The American School of Historical Legal Thought:
From the 1860s through Holmes and Pound

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. [See Pocock, Kelley] 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. Gordon divided
the subject into three periods, each characterized by a distinctive historiographical approach.
According to this division, the “internal” study of the history of legal doctrine prevailed in the
United States until roughly World War II. The pioneering scholarship of J. Willard Hurst at the
University of Wisconsin in the 1940s initiated 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. A third approach dates from the explosion of
scholarship in legal history that began around 1970. [Gordon-Hurst] The numerous young
scholars attracted to the field frequently found the exclusively internal or external approaches
overly simplistic. Often trained in graduate schools of history as well as in law schools, they applied 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. [see Gordon-Critical Legal Histories]

This division of scholarship in American legal history, which most American legal historians continue to accept, [cite examples] 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 among legal historians generally. 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. [cite examples such as Fisher, Tomlins, Grossberg, Hartog] Hurst’s “Law and Society” school of legal history also 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 have recognized his enormous contributions to the field. [See recent LHR issue following Hurst’s death and other essays] Internal legal history, by contrast, has not received similar attention or respect.
Several common themes emerged from the generally brief and often 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. [Boorstin-HLR, 429; Gordon-Hurst, 14-15, 20; Horwitz-Conservative, 276] By looking to the past for the purpose of discovering the origins of current legal categories, the critics added, internal legal historians often obscured the actual and often very different functions of earlier law in its own society and time. [Boorstin-HLR, 425, 428-33; Gordon-Hurst, 27] Rather than attempting to understand law in its historical context, internal legal historians frequently examined the accumulation of precedents to extract legal principles that purported to decide future cases with as much scientific rationality as the principles of biology or physics explained events in the natural world. [Horwitz-Conservative, 280, mis-ascribed to Pound, but see Horwitz-Transformation II]

Critics often complained that internal legal historians were fundamentally apologetic and, therefore, conservative. They studied the past to rationalize and justify current law, which they presented as autonomous scientific truth. Their approach cleansed law of any hint that social conflict and political struggle may have influenced its development. It also reduced the historian to the servant of the practicing lawyer and judge. [Boorstin-HLR, 426; Gordon-Hurst, 17; Horwitz-Conservative, 278, 281, 283; Horwitz-YLJ, 1058] As a result, and perhaps most sadly, it stifled the historical imagination, diverting attention from much more interesting issues. [Boorstin-HLR, 429, 436; Boorstin-YLJ, 973 and passim; Gordon-Hurst, 9-11, 54]
From very different angles of inquiry than concern about weaknesses in the internal approach, some recent work has discussed the historical research and assumptions of late nineteenth-century American legal thinkers, who lived during what 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. [Elliott, Herget, Hovenkamp] 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. [See especially three Reimann articles] Scholars have also contrasted American historical jurisprudence with competing analytical and natural law theories. [LaPiana, Grey on Holmes] Studies of major legal figures in the late nineteenth-century, such as Langdell and Holmes, have discussed their historical views. [See especially Grey articles; see also Reimann, Alschuler on Holmes] And scholars have examined the historical assumptions underlying constitutional interpretation during this period. [See especially Siegel]

My own exploration of the treatment of legal history in late nineteenth-century 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 World War I. [cite book] Historiographical issues I confronted during that project [see 9-21] 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, contained what I sought and what this article attempts to provide: a thorough account of how
American legal scholars before Hurst wrote about history and understood its meaning. With one outstanding exception, neither the critics of internal legal history nor the people who explored various aspects of late nineteenth-century legal thought examined in detail the actual historical views of particular scholars. And the focus of this exception, the historical jurisprudence underlying laissez-faire constitutionalism, [Siegel] covered only a small part of the subject that interested me. I, therefore, decided to read the late nineteenth-century scholars myself.

This article reports what I found about the period when serious work in legal history first flourished in the United States. It organizes the original scholarship around the historical topics that seemed most important to the authors themselves. Through detailed attention to their theories of history and to the historical examples in their own writing, it attempts to provide a comprehensive understanding of their historical thought. Based on this excavation and reconstruction of their work, the article reconsiders the claims about them made by recent scholars.

In brief, I found that many late nineteenth-century scholars endorsed evolutionary theories. Asserting parallels between law and language, they claimed that both evolved from the racial and national history of a people in a continuous process of development that revealed underlying principles. They 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 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 only occur 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.

Although many American legal scholars assumed continuous historical progress toward an inevitable result, others incorporated concepts of fluctuation, discontinuity, contingency, and decay into their evolutionary theories. Nor were evolutionary theorists uniformly satisfied about the state of current law. Belief in evolutionary theory often coexisted with the view that much existing law constituted dysfunctional survivals. These unfortunate survivals, scholars frequently observed, may have made sense in the past but had become illogical and repressive over time and stood in the way of legal and social progress.

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. Many stressed it as the basis for disagreeing with Blackstone’s famous assertion that the common law had existed “from time immemorial.”

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 deviated from its original intent, even in the absence of written amendments. [Makes Ackerman’s controversial view about unwritten constitutional amendment, with its various procedural requirements, seem tame and conservative by comparison] 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 viewed 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.

Based on their understanding that evolving custom is the source of law, many scholars explicitly endorsed the controversial practice of “judicial legislation” in both common law and constitutional adjudication. They maintained that judges are in the best position to conform law to changes in customs produced by new conditions. Decisions by judges, they maintained, permit the gradual and necessary evolution of law without serious social disruption. Blackstone’s assertion that judges must conform to precedent, like his identification of the common law as having existed “from time immemorial,” seemed to many of these scholars 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 contrasted their views both from theories of natural law and from analytic jurisprudence. Many associated themselves with the German historical school of jurisprudence, particularly its founder, Friedrich Karl von 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 “Volksgeist,” which unconvincingly treated nations as if they possessed 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. Their scholarship frequently combined historical reconstruction with conceptual analysis. Asserting that law is an inductive science, many of these scholars looked to history, and especially to the history of case law, as the raw material from which to induce legal principles.

Even this brief overview indicates that late nineteenth-century legal scholarship 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. For example, subsequent critics are correct in concluding that many American legal scholars in the late nineteenth century endorsed evolutionary theories of law. But the nineteenth-century scholars had much more complex and varied views about evolution than many critics have indicated. While some treated law as continuously evolving toward increasingly more progressive forms in an inevitable process governed by underlying principles, others viewed evolution as discontinuous and contingent.

Subsequent critics are also correct in concluding that the nineteenth-century scholars overwhelmingly studied history to understand the present, attempting to induce from past experience scientific principles that could govern future cases. But much of their work was not the apologetic rationalization of the status quo, as the critics frequently have claimed, but a
preliminary effort to reform the law in light of changed conditions. Many 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. Much of their work successfully uncovered dysfunctional
survivals of past law, maintained that these survivals posed obstacles to desirable legal and social
reform, and argued that they should no longer govern legal analysis. They saw themselves as the
leaders, not the servants, of practicing lawyers and judges, as scientists whose legal analysis
others should follow.

Given the widespread assumption that American legal historiography before 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 people who viewed law as the reflection of evolving custom, it was natural, even
tautological, to accept the importance of external influences. Few, 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. 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 much studied 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. Holmes 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 explored the history of legal doctrine as part of an effort to understand current law and to develop scientific principles for analyzing it. Also like them, he highlighted false analogies to the past and unfortunate historical survivals. But unlike his contemporaries, who often developed positive programs of conceptual legal reform designed to make law more effective in the present, Holmes was a Social Darwinist, skeptical that conscious legal reform could improve society and content to let people with competing interests fight over law, however foolishly, in the battlefield of democratic politics.

During the first two decades of the twentieth century, 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.” [ILH, 6] 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. Yet he maintained that the various historical methods of legal scholarship he analyzed 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” [ILH, 91] for “an engineering interpretation” of law. [ILH, 164] Pound translated this “engineering interpretation” into the “sociological jurisprudence” whose popularity among American legal scholars eclipsed the historical study of law.

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VII. THE ROLE OF LEGAL HISTORY IN UNDERSTANDING CURRENT LAW

Most late nineteenth-century scholars who were interested in legal history endorsed evolutionary theories of legal development rooted in nation and race. Many of them, however, seemed less interested in the theoretical implications of evolutionary theory than in the practical benefits of legal history for the analysis of current law. Unlike Wharton, who grandly tied the study of history to uncovering “the conscience and needs of the nation as a continuous political entity,” [78, see supra DMR, p. 6] many legal historians emphasized knowledge of history as a prerequisite for understanding existing legal doctrine. Based on a long career in law teaching, Hammond believed “no truth more firmly than” that “the surest, and, on the whole, the easiest method of learning the true nature and contents of any legal, political, or ethical doctrine, is to trace carefully the successive steps by which that doctrine has been formed in time.” [H-Lieber, iv] While stressing that students of American law should have a thorough grounding in English history, Cooley elevated the study of history over the seductions of theory. “An abstract consideration of rights,” he wrote, “may answer the purpose of the mere theorist, but it is not
In analyzing the sale of lands for the nonpayment of taxes, for example, he emphasized the historical underpinnings of the competing state and individual interests at stake. Professional excellence in current law, he made clear, depends on historical knowledge. Other historically inclined scholars also warned against what Pomeroy also called “mere theory,” or what Carter castigated as the “vanity” of theory. Ames often observed that history and theory reinforced each other. Both “precedent and general reasoning,” he maintained in a lecture entitled “The Inalienability of Choses in Action,” support the view that the dispossessed owner of a chattel has only an interest in a right of action. Ames emphasized that the legal history he discussed in reaching this conclusion was not simply “a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.”

Both Thayer and Bigelow reported that they became aware of the necessity of historical research while preparing works on substantive law. Thayer opened his Preliminary Treatise on Evidence at the Common Law by observing that he had initially intended to write a treatise on the law of evidence, but “found at once the need of going much deeper into the history of the subject, and into an exact analysis of many familiar terms, than I supposed would be necessary.” He quickly realized that he could not satisfy his own scholarly standards without historical treatment of various topics, such as the older law of trials, that were “crudely developed and half understood” but that “overlie and perplex” the law of evidence. His treatise was “preliminary” because it dealt with these “auxiliary” historical topics rather than with the full law of evidence itself. Bigelow described a similar experience growing out of his work on a torts casebook. In his preface to a collection of legal material dating from the period between the Norman Conquest and the reign of Richard I, Bigelow reported that while preparing his
casebook he realized the importance of the litigation and, even more, of the writs from Norman and earlier times. [Placita, iii]

An article by Thayer in the Harvard Law Review on “The Teaching of English Law at Universities” contained a particularly extensive justification of history as the basis for contemporary legal analysis. According to Thayer, “every man who proposes really to understand any topic, to put himself in a position to explain it to others, must search out that one topic through all its development.” [LE, 376] Thus, “the competent teacher of law must carefully and minutely explore the history and development of his subject,” in which “lies hidden the explanation of what is most troublesome in our law.” With effective historical research, the “dullest topics kindle,” and “the most recondite and technical fall into the order of common experience and rational thought.” For Thayer, Maine was the model legal historian. In contrast to the “disorderly mass of crabbed pedantry” of Coke and other earlier legal historians, Maine’s book, Ancient Law, “created an epoch” on the same order of importance as Darwin’s Origin of Species. [378-79, quotation on Coke unattributed] Thayer also praised Pollock and Maitland for The History of English Law, which dealt with the law of the later Middle Ages while asserting its continuity with and, therefore, its relevance for current legal practice. In fact, Pollock and Maitland convinced Thayer of the value of investigating the more remote legal past, and he praised Bigelow for doing so. [375] Thayer also joined Pollock and Maitland in urging a scholarly edition of the medieval English Year Books. [375-76] “Amidst their quaint and antiquated learning,” he wrote, “is found the key to many a modern anomaly” as well as evidence of the growth “of what we call the modern spirit.” [377]

Thayer conceded that all current law did not have roots in the distant past. Though some areas of the law, such as real property, criminal law, pleading, and the jury, did go back a long
way, others, such as perpetuities and the Statute of Frauds, did not. A few legal subjects, moreover, had very recent origins, such as American constitutional law and various aspects of tort law, including injuries to fellow servants. Yet Thayer insisted that a thorough understanding of any legal subject required immersion in all related cases over the course of its history. [376-77]

In examining legal history as an aid to understanding current law, legal scholars frequently searched for the origins of doctrines and used metaphors of family descent to connect the past with the present as part of a continuous history. Ames introduced his lectures on legal history by stating that he would treat “the origin and development of the ideas of crime, tort, contract, property, and equity in our law.” [34] “The Origin of Uses” and “The Origin of Trusts” were among the titles of his lectures, and throughout all of them he frequently referred to the origins of current law. [see, e.g., 158] Thayer entitled his most famous article, “The Origin and Scope of the American Doctrine of Constitutional Law,” began his important treatise by declaring that that the law of evidence exhibits “at every step the marks of its origin,” [Evidence, 3] and provided many examples of the origins of specific doctrines [see, e.g., 172, 173, 489] Just as Ames referred to the old “action of account” as the “father” of the current “count for money had and received,” [121] Bigelow described the writ for money loaned as “the parent of the modern writ of debt.” [Procedure, 165] Thayer called the Norman inquisition “the parent of the modern jury” [Evidence, 7] and the English law of evidence “the child of the jury.” [Evidence, 47] The oldest English common-law forms of action, Bigelow maintained, “are the direct lineal descendents” of Germanic forms from pre-Norman and Norman England, [Procedure, 147-48] and he agreed with Thayer that the modern jury is related “by direct lineage” to the Norman
inquisition. [Procedure, 334] Thayer similarly described the New England town meeting as “the literal descendent” of Germanic popular courts. [Evidence, 8]

Sometimes these historians asserted a connection between past and current law without explicitly demonstrating the links between them. In a typically frustrating example, Ames began a discussion of the recovery of stolen property by observing that since “certain rules in modern English law are directly traceable to the procedure of the Salic law it is worth while to describe it.” [39] He proceeded to describe the Salic law on the recovery of stolen property in substantial detail, but he never directly linked his historical treatment to the modern English law. In this example, as throughout much of his writing, Ames seemed to leave the reader with the responsibility of connecting the historical information he provided with current law. Pomeroy’s treatise on Municipal Law provides another illustration of an author who clearly intended his extensive historical discussion as background to understanding current law but who often did not himself make clear how the past influenced the present. These authors apparently thought that recounting a continuous history would itself reveal the connections between past and present. Their treatment of past law without explicit connections to the present might also indicate that, at least to some extent, they were interested in the past for its own intrinsic interest and not simply for the light it could shed on current law.

Other scholars, however, did explicitly connect the past with the present. Detailed discussion of several examples by various scholars, exploring vastly different legal topics, illustrates the extent and significance of this approach. I will review Thayer’s extremely influential work on the historical origins of the defects of modern evidence law and on the history of the distinctive American judicial power to declare legislation unconstitutional, Cooley’s analysis of how historical events shaped the legal meaning of free expression in federal
and state constitutions, and Bigelow’s account of the dispute between Becket and King Henry II in the middle of the twelfth century as an avoidable crisis whose results sadly reinforced selfish individualism at the expense of morality and the common good during subsequent centuries of English law. These examples of the use of history to analyze current law, though illustrative, could be multiplied many times by additional references to works of these and other late nineteenth-century legal thinkers.

A. Thayer on the Historical Origins of the Defects of Modern Evidence Law

Thayer’s preliminary treatise on evidence is a particularly good example of the use of history in contemporary legal analysis, perhaps because Thayer wanted to demonstrate the unfortunate influence of past law on current doctrine. According to Thayer, the English law of evidence is “an illogical, but by no means irrational, patchwork” that is intelligible only if understood historically, as the most important offshoot of the jury system. [Evidence, 180, 509] Thayer’s discussion of hearsay well illustrates this general point. In the early years of the jury, he maintained, the jurors were both witnesses and triers of fact. [519] As witnesses, they represented the community [102, 500] and were expected to rely on general knowledge as a member of the community as well as on any private knowledge they might have, including knowledge based on hearsay. In addition, jurors could gain knowledge from transaction witnesses, who were actual witnesses to deeds and who could testify only about what they personally had seen and heard. Transaction witnesses, therefore, could not rely on hearsay, whereas jurors could base their opinions on any knowledge available to them. [500, 519] For centuries, juries were presumed to have original knowledge of the facts [137] and rarely sought the testimony of transaction witnesses. [499-500] When they did, the transaction witnesses sometimes combined with the jury in deciding a case. [100, 102]
By the fifteenth century, however, it became a common practice for the parties to call transaction witnesses to testify in public before the jury, and the function of the jury narrowed. Rather than relying on their general or private knowledge, jurors lost their role as witnesses and became exclusively triers of fact who based their conclusions solely on the evidence provided by transaction witnesses. At the same time, the role of the judge expanded under the theory that the judge should know everything available to the jury. [139-40, 500] The emphasis on the prohibition against hearsay in the English common law of evidence, Thayer concluded, is “traceable in its origin and in its continuance to the fact that witnesses at common law testify mainly to juries, persons who were formerly themselves witnesses, and not merely to judges.” [501] If the jury, like the grand jury, had retained its old methods of hearing transaction witnesses privately and without any judicial involvement, Thayer observed, “it is easy to see that our law of evidence never would have taken shape.” [181] According to Thayer, rules that developed hundreds of years ago, when transaction witnesses went out with the jury, had “led to a steady and rigid adherence to the general doctrine of hearsay prohibition.” [519] At the same time, the “curse” of hearsay had become burdened with numerous exceptions designed to allow the admission of important evidence, resulting in “an instructive spectacle of confusion.” [523]

For Thayer, the hearsay rules were only one of many obvious defects in the law of evidence that had historical roots. His preliminary treatise was filled with other examples. Thayer repeatedly complained that courts had frequently introduced confusion into the law of evidence by deciding issues of substantive law or procedure as if they presented evidentiary questions. [4, 511] For example, the rules of evidence for proving attested documents “have come down out of practices and rules of medieval procedures by a slow process of change that has concealed their pedigree and their real nature and basis; and then rules of this sort have come
to be applied or refused application merely according to their letter, or according to some false imagination of reasons, with grotesque results, and in a manner fanciful and unintelligent.”

[512]

Thayer’s work on evidence convinced both Bigelow and Ames. Bigelow agreed with Thayer that the “devious course” of the law of evidence was “everywhere affected by the jury.” He relied on Thayer while concluding that the English law excluding hearsay evidence “has made it necessary, more and more down to the present day, to heap exception upon exception, until confusion is enough to baffle all but the persistent few who can follow the attenuating thread of history back to its obscure and distant beginnings.” As a result, Bigelow maintained, the administration of law had become an embarrassment. [Papers 170 and n.2] In a particularly devastating comment that ended with a citation to Thayer, Bigelow ridiculed “a process devoted to truth, which begins by turning away half the stream of evidence, and then sets to grinding out grist of rules for turning dribblings of the waste back to old, forgotten uses.” [184 and n.1] Ames, more moderately, praised Thayer soon after his death for recognizing that “our artificial rules of evidence were the natural outgrowth of trial by jury, and could only be explained by tracing carefully the development of that institution in England.” [464][See Langbein, 96 Columbia 1168, revising dating of rules of evidence that had historical roots]

B. Thayer on the Judicial Power to Declare Legislation Unconstitutional

In his influential article, “The Origin and Scope of the American Doctrine of Constitutional Law,” Thayer relied on history in a very different context to address an important contemporary issue in constitutional law. [For other examples of Thayer’s combination of historical reconstruction with analysis of current legal issues, see his essays on “Advisory Opinions” [42] and “Legal Tender” [60].] “How,” he began his article by asking, “did our
American doctrine, which allows to the judiciary the power to declare legislative Acts unconstitutional, and to treat them as null, come about, and what is the true scope of it?” [LE, 1; also 9 Harv. L. Rev. 23 (1895)] The origins of this doctrine, he answered, grew out of the political experience of the American colonies. The charters from the English crown that governed the colonies were essentially written constitutions. These charters contained restraints on colonial legislatures that were enforced by various means in England, including revocation of the charter, acts of Parliament, annulment of the legislation by the Crown, and judicial proceedings. Just as the English courts disregarded as null acts by colonial legislatures that violated the charters, colonial courts assumed this power for themselves. [3. Tiedeman agreed, 38-40]

The American Revolution, Thayer observed, replaced the external sovereign in Great Britain with the American people, who became their own sovereign. This transformation of sovereignty to the American people left unclear how to enforce the Constitution against violations by the agencies it established. Thayer stressed that nothing in the Constitution addressed this new problem. [4] In the decades immediately following the Constitution’s ratification, some state legislatures and courts assumed that independence simply substituted the American legislature for the British Parliament and thereby invested the legislature with the same supremacy that Parliament enjoyed in England. Several state courts assumed they could not invalidate legislation, and at the end of the first decade of the nineteenth century the Ohio legislature impeached judges for declaring some of its legislation void. [5-7] Yet most American jurisdictions followed the colonial practice of allowing courts to nullify legislation and, apparently by the second or third decade of the nineteenth century, the power of judges to declare legislation unconstitutional became accepted in all American jurisdictions. [4, 7-8]
Having established the origins of this doctrine, Thayer proceeded to investigate the history of its application. He claimed that an opinion in 1811 by Chief Justice Tilghman of Pennsylvania expressed a widely recognized “rule of administration.” The judicial power to declare legislation void, Tilghman declared while refusing to exercise it, should only be invoked if “the violation of the Constitution is so manifest as to leave no room for reasonable doubt.” [16-17] Thayer rephrased this “rule of administration” several times in his own words. After reviewing many cases, he summarized the judicial recognition that courts should overturn legislation only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one, -- so clear that it is not open to rational question.” [21] Under this approach, judges should not simply apply their own constitutional judgment, but should determine the extent of constitutional judgment allowed the legislature. Judges recognized that reasonable people could disagree about the constitutionality of legislation and that their ultimate power to declare legislation unconstitutional should only be exercised when a legislative determination was clearly unreasonable or irrational. Borrowing an example from Cooley, Thayer observed that a legislator who voted against a bill as being unconstitutional might subsequently become a judge and, without changing his mind, legitimately declare the enacted legislation constitutional. [22] As Thayer reiterated in italics, “the ultimate question is not what is the true meaning of the constitution, but whether the legislation is sustainable or not.” [30] Anticipating the criticism that he could be elevating the importance of what might have been only casual judicial observations, Thayer stressed “the early, constant, and emphatic” judicial statements on this subject. [22]

Thayer clearly agreed with the “rule of administration” he uncovered through his historical investigation. He even maintained that judges should emphasize it more forcefully.
But his reason for approving this rule may itself have derived from his understanding of history. Consistent with the transformation of sovereignty to the people that he ascribed to the American Revolution, Thayer concluded his article by stressing that the ultimate responsibility for government in the United States lies with the people. In contrast to Tiedeman, who approved substantial judicial review of the constitutionality of legislation as an important protection for the people, especially minorities, [see supra] Thayer believed that the people, not the courts, must guard against the abuse of legislative power by their representatives. Too much reliance on the courts to declare legislation unconstitutional, Thayer asserted, encourages legislative irresponsibility and popular quiescence. Legislators assume that they do not have to consider the constitutionality of legislation because the courts will subsequently do so, and the people do not monitor the activities of their representatives in the legislature because they leave that job to the courts. Yet Thayer claimed that under no system, including our own, “can the power of courts go far to save a people from ruin.” By stressing the limited judicial power to declare legislation unconstitutional as well as the danger of legislative “mischief,” Thayer hoped to bring responsibility “sharply home where it belongs,” to the people, who must be active in a political system based on popular sovereignty.  

D. Bigelow on the Defeat of Becket and the Role of Morality in Law

At a much more general level, a paper by Bigelow entitled “Becket and the Law” used history to address the relationship between law and morality, and the even broader tension between collectivism and individualism. Throughout his work, Bigelow invoked the “chastening page” of history to illustrate the dangers of “undisciplined individualism” to the common good. [See, e.g., Papers, 150-51] His paper on Becket associated desirable collectivism with law based
on morality [186] and invoked Becket as the personification of this position. The defeat of Becket by King Henry II in the middle of the twelfth century, Bigelow maintained, was a significant turning point that had devastating and continuing consequences for English law and society.

According to Bigelow, Becket was a collectivist who believed that morality, as expressed by Church canons, must be the basis of law. For Becket, any distinction between law and morals encouraged undisciplined and self-aggrandizing individualism that would divide society. [193-94, 200-01] He maintained that canon law, which expressed principles of equity, had priority over all inconsistent secular law. [212; on canon law as equivalent to equity see, e.g., 205, 213, 217] Becket’s commitment to this general position took a concrete form in his dispute with the King over the Constitutions of Clarendon in 1164, an attempt to resolve the respective roles of church and state. [199, 213] Bigelow stressed that the primary dispute between Becket and King Henry II concerned the division of jurisdiction between church and secular courts, not the substantive law to be applied in each court. The King knew and supported Becket’s commitments to equitable principles in all courts while helping him become chancellor and archbishop. In the actual controversy over the Constitutions of Clarendon, moreover, the King demonstrated his respect for canon law by sending them to the pope for ratification. As to matters of substantive law, the King wanted only to exclude from the equitable principles of canon law matters directly related to his ability to raise funds. [214-17] The King had no objection, by contrast, to the operation of equity in secular courts to private matters between men that did not involve the state. [238-39 n.1]

Becket’s dispute with the King over jurisdiction, Bigelow maintained, could have been avoided by compromises on each side. But once the jurisdictional dispute was engaged, he
indicated, issues of substantive law could not be avoided. [218] For Bigelow, the “pity” of the controversy over the Constitutions of Clarendon was that “the great moral idea of establishing the rule of equity in secular affairs was to be caught and broken on the wheel of an issue which did not involve the existence of Church authority and should never have arisen.” [218-19] Bigelow believed that England faced a choice between collectivism and individualism during the period immediately before the Constitutions of Clarendon. This emergency “put an end to England’s better hope,” collectivism, “upon an issue that was not vital,” the King’s power to finance his ambitions. [217-18] After Becket, Bigelow sadly observed, no other Englishman arose to champion his related causes of collectivism, morality, and equity. As an unfortunate result, England muddled along under the influence of selfish individualism “until muddling should come to be defended as the proper way.” [219]

Bigelow elaborated the disastrous effects of the decline of equity in secular courts following the controversy over the Constitutions of Clarendon. Though principles of equity had considerable influence in secular courts at the time of Becket and the potential for substantially more, [202, 206] they were eliminated from virtually every area of secular law after the Constitutions of Clarendon. In particular, the developing secular law ignored equity’s attention to subjective states of mind and focused instead on the objective effects of acts. [see 230] Criminal law looked to the body, rather than to the mind, as the criminal agent, and, therefore, allowed brutal bodily mutilation and barbarous forms of capital punishment. [221] Though the Church had come close to enforcing promises through principles of equity, the writ process that developed in the thirteenth century “drove equity out of the common law courts” [225] and postponed the development of contract and tort law. The courts became immersed in “technicalities concerning matters of mere form,” such as debt and covenant, and justice became
“hopelessly ensnared in “an interminable web of subtle and useless refinements and distinctions.” [223] The situation became so intolerable that, at the end of the fourteenth century, the Court of Chancery was established as a “stop-gap” court of equity, [226] which for centuries provoked “the marvel of judges of rival courts flinging jurisdictional fictions at each other with all the effect of reality.” In America, issues of justice were severed entirely from the law. [227]

If only Becket had prevailed! “All this long-drawn-out waste” [225] would have been avoided. Legal collectivism would have granted equitable powers to all courts, allowing them to take subjective as well as objective factors into account. [228] Bigelow conceded that even if Becket had won or avoided the controversy over the Constitutions of Clarendon, his legal collectivism might not have taken hold. But if it had become permanent, the legal history of England “would have changed for the better.” [220]

Bigelow ended his paper by bringing his story and lesson up to the present. He claimed that legal collectivism, and, more specifically, the equitable emphasis on states of mind, were “steadily gaining ground” in legal analysis. [229] Yet he warned that the utilitarian doctrines of Bentham and Mill were “a modern reaction against tendencies to consider states of the mind, or equity, in all courts, as the true test of conduct.” Thus, “the great struggle of legal history,” in which Becket, the leader of one camp, fell to a side issue of jurisdiction, continued for Bigelow and his readers. [230]

VIII. LEGAL HISTORY AS THE BASIS FOR FUNCTIONAL LAW REFORM

Some of these legal scholars used historical analysis not just to understand, and often to bemoan, the state of current law, but to argue for law reform in the public interest. In his article on “The Teaching of English Law at Universities,” Thayer stressed that studying the history of
law inevitably reveals “the necessity of restating the subject at hand.” Through historical exploration, “many a hitherto unobserved relationship of ideas comes to light, many an old one vanishes, [and] many a new explanation of current doctrines is suggested.” Confused topics are disentangled, ambiguities are cleared up, false theories are exposed, and “outworn and unintelligible phraseology” becomes understandable. History, in short, is the best “dissolver and rationalizer of technicality” and enables a “new order” to arise. [379]

Thayer maintained that the American law professor must assume the primary responsibility for this essential work of historical reconstruction as the basis for restating the law, and he emphasized that much work needed to be done. While acknowledging the existence of many useful, and even excellent, handbooks designed to assist practicing lawyers, Thayer complained that there were few law treatises in English of high academic quality. To a large extent, he maintained, “the writers and publishers of law books are abusing the confidence of the profession, and practicing upon its necessities.” He found it disgraceful that the best work on the history of the jury was written by Brunner, a professor of law at Berlin, and had not been translated into English. [Essays 380] Thayer also praised various English legal scholars, especially the legal historians Maine and Maitland. Without providing names, he mentioned important research by American legal scholars at seven universities across the country, [381] but he stressed the need for more.

Such scholarship, Thayer stressed, could only take place in a fully professional law school. It required the academic specialization of full-time professors [384] devoted to “the thorough and scientific teaching of law at the universities.” [380] Thayer believed that nothing is more useful than scholarship in legal history “to aid our courts in their great and difficult task.” [380] For roughly the two generations following his own, he asserted, law professors should
concentrate on the “formidable labor” necessary to explore “the history and chronological
development of our law in all its parts.” [384]

Writing six years later on “The Vocation of the Law Professor,” Ames made virtually
identical points. He lamented the generally poor quality of American law treatises, a condition
he ascribed to the “absence of a large professional class.” [365] Ames observed that while some
law schools were composed almost entirely of full-time faculty, most were not. Among all law
professors in the United States, three fourths were judges or active practitioners. [361] The job
of a law professor, he stressed, should be a vocation, not an avocation. [361-62] Citing Savigny,
Windscheid, Ihering, and Brunner, Ames stressed the excellence of legal scholarship in
Germany, where the vocation of the law professor had a long history. [364] While conceding
that in Germany the courts paid too much attention to the treatises of law professors and too little
to their own precedents, Ames maintained that the United States had much to learn from
Germany about the quality of legal literature. [364-65] He urged American legal scholars over
the next generation to follow “the modern spirit of historical research” [365] and produce
excellent treatises on every important branch of the law. These treatises should describe “the
historical development of the subject” and contain “sound conclusions based on scientific
analysis.” [366] The American law professor should pursue “legal doctrines to their source” and
derive “some original generalization” from them that would illuminate and simplify the law.
[368] Only then, Ames concluded, would Americans have “an adequate history of our law
supplementing the admirable beginning made by the monumental work of Pollock and
Maitland.” [366]

Like Thayer, Ames viewed assistance to judges as the primary value of scholarship in
legal history. Judges, he observed, generally lacked sufficient knowledge of “the original
development and true significance of the rule which is made the basis of the decision.” As a result, they too often reached incorrect results through poor reasoning. But Ames did not blame judges for this situation. He stressed that they did not have the training or the time to gain this knowledge themselves, and he complimented them for performing as well as they did under these unsatisfactory circumstances. Rather, judges should have the benefit of the research of professors, who should have the time for years of study and reflection and should write treatises “illuminated by the light of history, analysis, and the comparison of the laws of different countries.” Such treatises would “render invaluable service to the judge” and “exercise a great influence in the further development of our law.” American law professors, Ames added, should extend their role as expert advisor to legislation, “either by staying or guiding the hand of the legislator.” [366-67]

In their scholarly writings on specific legal subjects, Ames and Thayer followed through on the advice they gave their fellow professors, though Ames often treated history as the source of constructive legal rules that made analytic sense, whereas Thayer, at least in his great work on evidence, typically treated history as the basis for ridding the law of destructive rules and replacing them with better, more analytically logical ones. Much of Ames’s modest scholarly production consisted of legal history in the service of reforming current legal doctrine. [Though some more exclusively historical, such as disagreement with Holmes on “The Origin of Uses, pp. 233-42] In his essay urging return to an earlier theory of consideration, for example, Ames defended his legal analysis both as “a just deduction from the decided cases” [340] and as an efficient rule for business men. [353] Based on his analysis of cases over many centuries, Ames claimed in another article that the established English and American rule allowing an undisclosed principle to sue and be sued for contracts made by his agent was an anomaly that
should be revised according to “fundamental legal principles” derived from these cases. [453] Revising the law as he recommended, Ames maintained, would produce “just results” as well as conform with legal principle.” [463]

Dealing with a much grander theme, “law and morals,” Ames traced the history of English common law from its “formal and immoral” origins through six centuries of progress that brought the common law increasingly into harmony with morality. Ames observed, however, that this “great ethical advance . . . has not yet achieved its perfect work.” In the task of future improvement, he concluded, “there is an admirable field for the law professor.” [451]

Thayer’s preliminary treatise on evidence reveals the extent to which he tied historical reconstruction to law reform. “I hope,” he wrote in the introduction, “that those who attentively consider the long and strange story of the development of the English jury and the immense influence it has had in shaping our law, will find here a basis for conclusions as to the scope and direction of certain much-needed reforms in the whole law of evidence and procedure.” [Evidence-3] After elaborating throughout his treatise the historical basis for the illogic and irrationality that pervaded the law of evidence, Thayer concluded by urging “a treatment which, beginning with a full historical examination of the subject, and continuing with a criticism of the cases, shall end with a restatement of the existing law and with suggestions for the course of its future development.” [511] Any such treatment, Thayer maintained, should simplify the law in reference to general principles and make it more consistent. [509, 511, 529] The result, if accepted by judges, would need only slight assistance from the legislature to create a much more just law of evidence. [511, 531-32]

Thayer himself proposed two fundamental principles that would simplify the system of evidence by “aiming straight at the substance of justice.” [529] First, “nothing is to be received
which is not logically probative of some matter required to be proved.” Second, “everything which is thus probative should come in, unless a clear ground of policy or law excludes it.”

Thayer maintained that both principles derived from experience and are at the foundation of the current, but distorted, law of evidence. The process of simplification, he added, requires abandoning the constraints on these principles that developed historically from the machinery of the jury, though which our system of evidence is applied. The “great mass of substantive law that now lies disguised under the name of the law of evidence” as a result of the evolution of the jury, must be deleted from the law of evidence as “foreign matter.”

Applying these principles specifically to the law of hearsay, Thayer advocated restating the law so that the hearsay rule would become the exception and the admission of all relevant evidence, with some exceptions, would become the rule.

* * * * *

Holmes the Historian

Oliver Wendell Holmes, Jr., was a contemporary of the nine scholars whose work I have discussed. He was born in 1841, almost midway between the births of the oldest, Wharton in 1820, and the youngest, Tiedeman in 1857. Through various combinations of reading, correspondence, and friendship, he was familiar with many of them. He also read, met, and corresponded with leading British and German legal scholars of the period.

Holmes, of course, is a towering figure in the history of American law. He is much better known by a broader public than are any of his contemporaries. Despite fluctuations in his reputation, Holmes’s genius has been widely recognized both in his own lifetime and today. In 1982, Morton Horwitz opened his assessment of Holmes’s position in
American legal thought with the powerful statement: “There has been only one great American legal thinker and it was Holmes.” [31]

Yet most thinkers, even great ones, share many intellectual positions with their contemporaries. Indeed, it may be impossible to identify how individual thought is distinctive without first understanding these shared positions. Holmes largely obscured his relationship to the intellectual history of his age by repeatedly exaggerating his own originality while minimizing the contributions of others to his thought. [cite secondary sources] Reading Holmes against the background of the nine scholars I have discussed reveals the substantial extent to which he had similar views, particularly about the role of history in legal analysis. [This similarity observed by some other scholars, especially Alschuler, but not elaborated]

Like these other nine scholars, Holmes frequently considered history, rather than theories of natural law or analytic jurisprudence, the key to understanding law. Like them, he viewed legal history as an inductive science, endorsed evolutionary theories of legal development, emphasized that law derives from custom, and approved “judicial” legislation. And like many of them, his historical interpretation of law recognized but did not examine in detail external influences on legal doctrine, and rarely included the excavation and analysis of original sources. When Holmes did attempt to produce original legal history, the results often were less thorough, accurate, and convincing than the scholarship of Ames, Bigelow, and Thayer. On the other hand, Holmes was impressively reflective and articulate about the role of history in legal analysis. He often expressed directly and vividly historiographical assumptions that were more embedded and less developed in the work of his contemporaries. He also expressed distinctive historiographical views of his own, particularly in elaborating evolutionary theories of law.

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C. The Importance of History in The Common Law

The Common Law begins with three paragraphs that reveal the importance of history to Holmes and introduces many of his positions on its role in legal analysis. Written in clear and sometimes aphoristic language, much of which has since become famous, they merit quotation in full.

“The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” [Add in footnote the footnote a in Howe text, Holmes later annotation]

“In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for, by their manifest good sense, on the other, there are some which
can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.”

“I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further. In doing so there are two errors equally to be avoided both by writer and reader. One is that of supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times. The other mistake is the opposite one of asking too much of history. We start with man full grown. It may be assumed that the earliest barbarian whose practices are to be considered, had a good many of the same feelings and passions as ourselves.”

[CL 5-6]

Holmes signaled his interest in history near the beginning of his first paragraph in a sentence that has become one of his most quoted aphorisms: “The life of the law has not been logic: it has been experience.” History recounts the “experience” that has been the “life of the law.” In writing that “law embodies the story of a nation’s development through many centuries,” Holmes reflected the widespread view of late nineteenth-century legal scholars that history is a process of growth over time and that the nation is the basic unit of historical study. He also shared the interest of his contemporaries in studying legal history as a means to understand current law and even to project its future. “In order to know what it [law] is,” he observed, “we must know what it has been, and what it tends to become.” More specifically, he maintained that some legal rules “can only be understood by reference to” the early history of the German tribes or of ancient Rome. Although the substance of law mostly reflects contemporary notions of convenience, “its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” A proper understanding of history, moreover,
helps avoid the frequent mistake of treating the law of the present as natural and inevitable. By revealing the derivation of current law from issues that “had to be laboriously fought out or thought out in past times,” historical study guards against the anachronism of assuming that the past resembled the present and suggests the contingency of legal development. The fighting and thinking of the past could have turned out differently.

These three paragraphs illustrate the limits as well as the benefits of history for Holmes. The “general view of the Common Law” sought by Holmes requires “other tools” beyond logic alone, but history is only one of them. Various additional factors that influence law include “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.” Biology as well as history explains law. Even the “earliest barbarian” was a “man full grown,” who probably “had a good many of the same feelings and passions as ourselves.” And while logic does not fully explain the law, which is more than “the axioms and corollaries of a book of mathematics,” logic can “show that the consistency of a system requires a particular result.” Such a demonstration “is not all,” but it “is something.” Holmes emphasized that the “most difficult labor” for the scholar is to understand how “existing theories of legislation” combine with history “into new products at every stage” of legal development. And Holmes’s interest in history seemed confined to his basic goal of presenting “a general view of the Common Law.” He examined “the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further.”

D. Elaborations of Historical Themes

In an important address to the New York State Bar Association in 1899, “Law in Science and Science in Law,” Holmes placed the historical approach to law in a broader intellectual
context. He stressed that by the late nineteenth century historical science had replaced religion as the fundamental mode of explanation. “A hundred years ago,” he wrote, “men explained any part of the universe by showing its fitness for certain ends, and demonstrating what they conceived to be its final cause according to a providential scheme. In our less theological and more scientific day,” he added, “we explain an object by tracing the order and progress of its growth and development from a starting point assumed as given.” He called this process of explanation “historical.” By equating science with historical explanation, Holmes followed many of his contemporaries in numerous fields of inquiry. He reminded his listeners that in their own profession of law the historical method had achieved substantial recent success. [Law in Science 210-11]

Throughout The Common Law and in his later essays, Holmes elaborated the observations about legal history with which he introduced his book. He repeatedly justified his excursions into legal history by emphasizing its essential role in understanding current law. For example, Holmes traced “with some care” the derivation of the English common law of bailment from German law because the German doctrine “has had such important influence upon the law of the present day.” [CL 138-39] Knowing the history of the action of debt, Holmes similarly observed, is necessary “in order to understand the enlightened rules which make up the law of contract at the present time.” [CL 198] Because the reign of Edward III was “the time when the divisions and rules of procedure were established which have lasted until the present day,” Holmes thought it “worth while to repeat and sum up the condition of the law at that time.” [CL 208] More generally, Holmes believed that the “true principle” underlying a legal rule “can only be arrived at after a careful analysis of what has been thought hitherto.” [CL 72] Yet history can also disclose the sources of error in current law. [CL 232]
On the other hand, Holmes did not pursue history if it could not help explain current law. He did not discuss the duel because “it soon ceased to be used in debt” and, therefore, “has no bearing on” existing contract law. [201] Because warranty “so wholly disappeared” in the Norman period, Holmes concluded that “it can have no influence upon the law of consideration” and assumed that there was no point in discussing it. [205] And because “the heir of modern English law gets his characteristic features from the law as it stood after the Conquest” [274], there “no need to go back further than the early Norman period” and consider whether the English law identifying the heir with the ancestor was of German or Roman origin. [270]

While stressing the connections between past and current law, Holmes remained alert to the dangers of anachronism. He warned against transposing the categories of present law back into the past. The modern distinction between torts and breaches of contract, and especially between their different remedies, he pointed out, “is not found ready made.” The “region of what we should now call contract” might not have been so identified in the past. [CL 14; see also 289] Holmes also chastised the condescension of modern commentators toward the reasoning of their predecessors. “It is not justifiable,” he wrote, “to assume that a contemporary explanation of a new rule had nothing to do with its appearance.” To the suggestion that Bracton’s discussion of a legal issue “is only a piece of mediaeval scholasticism,” Holmes responded that Bracton was more likely to have a proper understanding of legal developments in his own time than the nineteenth-century scholars who might dismiss him as an obfuscating scholastic. [CL 293]

In multiple variations of his introductory contrast between logic and experience, Holmes characterized law as a process of development. “However much we may codify the law into a series of seemingly self-sufficient propositions,” Holmes concluded at the end of his first
chapter, “those propositions will be but a phase in a continuous growth.” [CL 32] Like many of his contemporaries, moreover, Holmes maintained that this growth of the law reflected the broader development of society. Introducing his discussion of the history of “liability for harm inflicted by another person or thing,” Holmes asserted that in addition to tracing the changes that explain current law, his “story will also afford an instructive example of the mode in which the law has grown, without a break, from barbarism to civilization” [CL 8], a phrase that recently prompted Mathias Reimann to suspect Holmes of plagiarizing Pomeroy [258 n.110; x-ref supra].

Holmes maintained that many societies moved from early theories of liability, based on moral standards associated with the “passion of revenge” against those at fault, to current theories of liability, based on external or objective standards in which fault played no role. [CL 8, 33] The early theories of liability, he stressed, “could not last when civilization had advanced to any considerable height.” [CL 16] Emphasizing the limits of logic, Holmes observed that the process of development from early to current theories of liability was “largely unconscious.” His historical explanation, Holmes confidently asserted, accounted for “the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the corpus from a priori postulates, or fall into the humbler error of supposing the science of the law to reside in the elegantia juris, or logical cohesion of part with part.” [CL 32] Elsewhere in The Common Law, Holmes attributed other transformations of legal doctrine to the development of society. In explaining changes in the law of property, he observed that absolute protection of titles, while “natural to a primitive community more occupied in production than in exchange, is hardly consistent with the requirements of modern business.” [CL 80] Rules of succession similarly changed with “the advance of civilization.” [CL 280]

E. Legal History as Evolution
Holmes shared with his contemporaries a proclivity to describe the process of legal
development in organic and evolutionary terms. Just as Savigny and Herbert Spencer had
endorsed evolutionary theories of legal development before Darwin published, Holmes read
Savigny and Spencer before finally reading Darwin in 1907. [White 149, 152; Reimann, 97-98;
Howe-Shaping 156; Howe-Proving 44-49; Burrow Evolution and Society 183, 186] Holmes
used organic metaphors throughout The Common Law. Summarizing the development of
theories of liability, he referred to the Roman and German “parents” whose “offspring” took root
“on English soil.” His history of liability revealed that “a single germ,” which he characterized as
“the desire of retaliation against the offending thing itself,” had been “multiplying and branching
into products as different from each other as the flower from the root.” [CL 30-31] In his
chapter on criminal law, he identified the presentment and the appeal as the “parents” of current
criminal procedure, which developed through a process of slow improvement. [CL 34-35] And
in his chapter on the history of contract law, he inferred that “the ‘good suit’ of the later reports
was the descendant of the Saxon transaction witnesses.” [CL 203]

Occasionally, moreover, Holmes joined his contemporaries in connecting legal to racial
development. In discussing developments in the law of bailment, for example, he stated that “in
this as in other respects, the English followed the traditions of their race.” [CL 138] The
difference between the English and Roman law of possession, he emphasized, “are due to the
sturdy persistence of the early traditions of our race.” [Kellogg 167] More generally, in “The
Path of the Law,” published in 1897, Holmes claimed that the “law is the witness and external
deposit of our moral life. Its history is the history of the moral development of the race.” [PL
170]

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38
1. Dysfunctional Survivals as the Justification for Legal Reform

For Holmes, as for other late nineteenth-century American legal scholars, uncovering the historical sources of confusion in current law justified legal reform. His historical approach, Holmes emphasized, “is necessary both for the knowledge and for the revision of the law.” [CL 32; on Holmes’s use of history to reform, see Reimann at 113, Grey at 807] Just as Thayer did not believe that the current law of evidence should be limited by the unfortunate legacy of the history of the jury [x-ref], Holmes did not believe that the common law generally should be limited by dysfunctional survivals from the past. If “in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from earlier times,” it makes sense to reconsider these “inventions” to determine whether the reasons given for them are convincing. Many of these subsequently invented reasons, he acknowledged, might be convincing. After all, “if old implements could not be adjusted to new uses, human progress would be slow.” But if current policy justifications do not survive this scrutiny, the law should be revised. [CL 33]

In “The Path of the Law” and “Law in Science and Science in Law,” two classic essays written in the late 1890s, Holmes reiterated and expanded the views he had expressed in The Common Law on the relationship between the historical understanding of legal survivals and law reform. Just as in The Common Law Holmes urged “a more conscious recognition of the legislative function of the courts” in finding new reasons based on public policy for the old forms of law [CL 32], in “The Path of the Law” he advocated “a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds.” [PL 185] Again comparing legal with biological evolution, Holmes wrote that the “development of our law has gone on for nearly a thousand
years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth.” [PL 185] But Holmes wanted a more rational and civilized body of law, in which “every rule it contains is referred articulately and definitely to an end which it subserves” and in which “the grounds for desiring that end are stated or are ready to be stated in words.” [PL 186]

History, Holmes continued to stress, is essential to the conscious reform of law to serve contemporary ends. It explains “why a rule of law has taken its particular shape.” [PL 186] In language closely analogous to his discussion of “the paradox of form and function” in The Common Law, Holmes maintained in “Law in Science” that “when a lawyer sees a rule of law in force he is very apt to invent, if he does not find, some ground of policy for its base.” He immediately added that “some rules are mere survivals. Many might as well be different, and history is the means by which we measure the power which the past has had to govern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end.” [LS 225] Echoing Tyler’s assertion that “the remains of the crude old order which have passed into harmful superstition” should be marked “out for destruction,” Holmes put the point somewhat more vividly in “The Path of the Law.” He observed that once “you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.” Yet getting “the dragon out of his cave,” Holmes stressed, “is only the first step. The next step is either to kill him, or to tame him and make him a useful animal.” [PL 187] In other words, once you get the “dragon” of a current legal rule out of the “cave” of historical obscurity, you can assess it and determine its force. If the legal rule cannot be made useful for contemporary purposes, it must be abandoned.
Holmes, therefore, called history “the first step toward an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of” legal rules that have survived from the past into the present. [PL 186-87] History is only a means, a tool whose “use is mainly negative and skeptical. It may help us know the true limit of a doctrine, but its chief good is to burst inflated explanations.” Just as Tyler described “history as the emancipation from the past” [see supra], Holmes maintained that it “sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.” [LS 225]

From this analysis, Holmes concluded that history, while valuable, should not assume too much importance. It is only a tool and should not be used to justify dysfunctional survivals and to override rational policy. [PL 191-92] After praising the great success of recent historical explanations of the law, Holmes cautioned that “continuity with the past is only a necessity and not a duty.” Historical continuity “simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.” But if people living in the present are able to use history as a tool to overcome these limits, they should feel free to change the law to make it better “without the slightest regard to continuity with the past.” [LS 211] If people can reconstruct history to “get the dragon out of his cave,” they should kill him if they cannot tame him.

In the late nineteenth-century, Holmes maintained, it no longer made sense to justify a law simply because “our fathers always have followed it.” [LS 225] He found it “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting,” he added, “if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” [PL 187] Though it cannot
be avoided, history can liberate as well as bind. By informing the present about the continuing influence of the past, it can open the way to reform in the future. Rational policy choices can replace dysfunctional survivals.

* * * *

3. Functional Survivals

Although Holmes devoted much of his scholarship to uncovering anomalous and dysfunctional survivals from the past that should prompt reconsideration and reform of current law, it is important to remember his fundamental belief that most survivals have become functional through the invention of new policies that replaced their original justifications. As he wrote in the first page of *The Common Law*: “The substance of the law at any given time pretty much corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much on its past.” [CL 5] And at the end of his opening chapter, while advocating the reconsideration of subsequently invented justifications for rules that are survivals from the primitive past, Holmes acknowledged that these justifications might turn out to be convincing. Much human progress, he observed, depends on the adjustment of “old implements” to “new uses.” [CL 33; see DMR supra pp. 14-15, 26]

Consistent with his belief in the adaptability of most survivals to current needs, Holmes referred throughout *The Common Law* to the “good sense” of surviving rules. He sometimes did so even in the midst of discussing anomalous survivals that produced conceptual confusion due to the lingering impact of old justifications. In discussing a rule of liability for the wages of sailors, Holmes remarked that the rule, though a survival, has “as usual” a “plausible explanation of policy.” [CL 28] A case exhibiting the “echo of primitive notions” also revealed “that the
working rules of the law had long been founded on good sense.” [CL 94] According to Holmes, “it does not matter” that “the historical origin of the rule was different” than its current justification. [CL 95] During his analysis of the fictional identifications that survived from the primitive law of inheritance, Holmes observed that “[c]ommon sense kept control over fiction here as elsewhere in the common law.” [CL 287] He complimented Bracton for extending a legal fiction with technical skill but also “with good sense, as fictions generally have been used in English law.” [CL 292] And Holmes maintained that a rule based on personifying metaphors “which proved nothing and justified no conclusion” nonetheless “was just as good as any other, or at least was unobjectionable.” [CL 299] Most importantly, Holmes underlined the adaptability of survivals while reiterating a central theme in The Common Law, the transformation of moral and subjective standards into external and objective ones. In virtually every area of the common law, he emphasized, surviving rules originally based on moral grounds, while often retaining the language of morality, currently enforced external standards justified by contemporary considerations of policy. [CL 33, 107-09, 128-29, 253-54]

Just as Holmes compared legal survivals that had lost their original functions to the clavicle in the cat [CL 31], he seemed to compare the entire common law to the body of the cat. Neither the common law nor the cat could have survived unless it had adapted to its changing environment. Some rules of the common law, like the clavicle in the cat, are survivals that served functions in the past but have no use in the present. But a cat, despite its useless clavicle, must have a functional physiology in order to remain alive. So, too, the common law as a whole must have “convenient” [CL 5] rules “expedient for the community concerned” [CL 32] to survive in the modern world.

H. The Instrumental Use of History in Legal Analysis
If most legal survivals are functional, why did Holmes focus so much of his historical
discussion on those he suspected are not? The answer lies in his view that the role of history in
legal analysis, like its role in anthropology for Tyler, is to emancipate the present and future from
the irrational constraints of the past. If the legal forms derived from outmoded justifications had
been adapted effectively to current needs, there was no need to engage in historical analysis.
“The doctrine of contract,” Holmes revealingly wrote at the beginning of his chapter on its
history, “has been so thoroughly remodelled to meet the needs of modern times, that there is less
necessity here than elsewhere for historical research.” [CL 195] In his discussion of tort law,
Holmes similarly explained that he would not explore “the possible historical connection” of
certain forms of liability with primitive theories “because, whether that origin is made out or not,
the policy of the rule has been accepted as sound.” [CL 124] But because Holmes believed that
the evolution of law, while mostly unconscious in the past, could be consciously directed in the
future, he wanted to uncover the historical origins of surviving rules that are confusing,
irrational, or dysfunctional in order to determine whether they could be revised through rational
analysis of competing policies. [x-ref DMR supra at 25-28]

By concentrating on the instrumental use of history to explain anomalies in current law,
Holmes explored only a narrow segment of the internal history of legal doctrine. As he wrote in
the opening paragraphs of *The Common Law*, “I shall use the history of our law so far as it is
necessary to explain a conception or interpret a rule, but no further. “ [CL 6] And if a current
legal rule is a survival from the past that had been effectively justified by a subsequently
invented policy, even if that policy bears no connection to the rule’s origins, Holmes saw no
need for historical research to explain or interpret it. If the survival is functional, Holmes
believed, its history is irrelevant. Only survivals that undermine the utility of current law require
THE AMERICAN SCHOOL OF HISTORICAL LEGAL THOUGHT: FROM THE 1860s THROUGH HOLMES AND POUND

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historical analysis, in order to “set us free” to determine whether or not they can be made useful or should be abandoned. [LS 225 and x-ref supra]
This book examines the central role of history in late nineteenth-century American legal thought. It argues that historical legal thought dominated American legal scholarship from the Civil War until superseded by the sociological jurisprudence promoted by Roscoe Pound in the decade before World War I. This argument reinterprets the intellectual history of American law while relating it to developments in other countries and in other disciplines. It is based on close readings of influential works by many of the most important nineteenth-century legal scholars, including Friedrich Carl von Savigny and Rudolf von Jhering in Germany and Henry Maine and Frederick Maitland in England. The book focuses on twelve Americans: James Barr Ames, Melville W. Bigelow, James Coolidge Carter, Thomas McIntyre Cooley, William Gardner Hammond, Oliver Wendell Holmes, Jr., Christopher Columbus Langdell, John Norton Pomeroy, Roscoe Pound, James Bradley Thayer, Christopher G. Tiedeman, and Francis Wharton.

Beginning with Pound, most scholars of American legal thought have criticized their nineteenth-century predecessors for invoking intellectually bankrupt formalism on behalf of laissez-faire capitalism in ways that undermined the social welfare. The few American legal historians who have addressed the history of their own field have bemoaned its poor quality in the nineteenth century. I try to demonstrate, by contrast, that a sophisticated historical understanding of law, often harnessed to arguments for legal and social reform, prevailed in late nineteenth-century American legal thought.
Attention to the work of major legal scholars in the United States and abroad reveals the general appeal of historical explanation and evolutionary social thought in many disciplines during the nineteenth century extended to law. Leading legal scholars in Germany, England, and the United States, often in direct contact with each other, shared historical understandings of law even as they disagreed in many particulars. Their commitment to the “scientific” study of law through history made many of them leaders in reforming legal education, particularly in developing academically oriented law schools within research universities. The American legal scholars on whom I focus addressed key themes in Anglo-American legal history, including the relative influence of Roman, Anglo-Saxon, and Norman traditions, the development of the substantive common law from earlier procedural writs, and the relationship of American law to the previous common law of England. Their historical understandings of law influenced their views on key legal issues that remain controversial today, such as the relative roles of the legislature and the judiciary and the legitimacy of changing interpretations of constitutional law. In law, as in social thought generally, scholars in all three countries increasingly stressed the weaknesses of traditional individualism and the necessity of recognizing collective interests. And just as legal scholars shared the prevalent historical orientation of nineteenth-century Western thought, in the early twentieth century they joined their colleagues in other fields in abandoning historical explanation, often searching for insights from the emerging social sciences.

My exploration of the role of history in legal thought grew out of my earlier work on the history of free speech in the United States. Especially while writing my book, Free Speech in Its Forgotten Years, I became interested in the relationship between the
specific topic of free speech and general issues that fall under the broad category of
historiography. Most of my historiographical concerns clustered around the difficulties
posed by attempts to study ideas over time, largely because I was studying a particular
idea, free speech, over a fifty-year period between 1870 and 1920. I read and reflected
about topics such as continuity and change in the history of ideas, the extent to which a
particular idea forms part of a broader ideology, and the complex interactions between
ideas and external social forces. While deciding that extensive discussion of
historiographical issues would distract attention from the book’s main focus on the
forgotten history of free speech in the United States, I did include an introductory section
that briefly used examples from this history to illustrate and address key historiographical
debates.

After completing Free Speech in Its Forgotten Years, I considered a separate
project that would concentrate on historiographical issues. As part of my survey of
existing literature, I searched for material about the history of American scholarship in
legal history. I was struck by how little had been written on this subject, especially
compared to historiographical scholarship by historians and philosophers and to the
dramatic growth of the general field of legal history since roughly 1970. I was also
struck that the relatively few American legal historians who wrote about the history of
their own field overwhelmingly concluded that sophisticated work began with the
pioneering scholarship of J. Willard Hurst at the University of Wisconsin in the 1940s.
They often portrayed previous American scholarship in legal history as dismal, rarely
even meeting the minimal standards of professional work in history, and best
remembered as an embarrassing reminder of the pitfalls legal historians should avoid.
They deprecatingly referred to it as doctrinal, internal, formalistic, conservative, apologetic, and perhaps worst of all, “whiggish,” committed to subsequently discredited views about the inevitable development of individual liberty in the Anglo-American world. Given the low esteem in which they held the earlier scholars, it is not surprising that they did not discuss their work in any detail.

In pursuing my own research on the history of American scholarship in legal history, I decided to proceed chronologically. I began with works written in the 1860s, when legal scholarship was first becoming a profession in the United States. The more I read nineteenth-century American scholarship in legal history, the more I disagreed with its disparagement by recent scholars, even as I recognized that much of it, like the work of the great contemporary European legal historians, dealt with the internal history of legal doctrine. I eventually concluded not only that legal history was a flourishing and sophisticated field, but that, more importantly, historical understandings of law dominated American legal scholarship from the 1860s through the first decade of the twentieth century. I realized that these conclusions challenged prevailing accounts of the intellectual and political history of American law, and placed it in broader interdisciplinary and international contexts. While retaining my original historiographical interests, I focused on the many exciting themes raised by the centrality of history in American legal thought during a crucial period of its development. This book is the result.

The criticism of legal history before Hurst is part of a broader critique of late nineteenth-century legal thought and its legacy. Throughout much of the twentieth century, legal scholars attacked late nineteenth-century legal thought as intellectually
formalistic, politically conservative, out of touch with other disciplines, and embarrassingly second rate. They viewed Oliver Wendell Holmes, Jr. as the great exception, a brilliant, highly original thinker who rejected the dominant formalism of his era. Holmes, they frequently asserted, laid the intellectual foundations for the sociological jurisprudence developed by Roscoe Pound in the early twentieth century, which finally made law modern by replacing formalism with a pragmatic approach to law that drew its inspiration from the emerging social sciences.

The historical legal scholarship that is the subject of this book reveals that this widely held consensus about developments before Pound is largely inaccurate and prompts suspicion that it derives more from the progressive intellectual and political agenda of twentieth-century scholars, beginning with Pound himself, than from a close reading of their nineteenth-century predecessors. Historical understandings of law, not unchanging deductive formalism, pervaded the legal thought of the late nineteenth century, including Holmes’s major work, The Common Law. Contemporary scholars both at home and abroad recognized Holmes as part of a distinctively American school of historical legal thought even as they indicated that his historical conclusions were both bolder and less accurate than those of others in this school. Legal scholars often invoked history to reform rather than to justify existing law and, as some recent revisionist work has observed, were more likely to be Jacksonian democrats or Mugwump reformers than conservative apologists for laissez-faire capitalism. Nor was late nineteenth-century legal thought as intellectually narrow and isolated as subsequent commentators maintained. Many American legal scholars were extremely well educated, well traveled, and multi-lingual, contributed to major literary and political journals of the period, and participated
actively in public affairs. In their scholarly work, they acknowledged their intellectual
debts to European scholars, particularly in Germany and England, even as they
occasionally criticized the conservatism of the Europeans. Correspondingly, eminent
European legal scholars, most impressively the great English legal historian, Frederick
Maitland, relied on the legal history written by Americans while praising its originality
and quality.

The emphasis on history as the key to understanding law was part of a general
movement toward historical explanation in many disciplines by Western intellectuals on
both sides of the Atlantic during the nineteenth century. This movement began most
prominently in Germany. German historical scholarship and the German research
university became models for ambitious scholars elsewhere, who often studied in
Germany to receive professional training as yet unavailable at home. The great German
legal scholar, Friedrich Carl von Savigny, played a key role at the beginning of the
nineteenth century in promoting historical scholarship, elevating the status of the
university professor, and developing the research university in his own country. Savigny
personified the ideal scholar for many abroad as well as in Germany itself.

The German model appealed to the American law professors who in the
generation after the Civil War transformed legal education from mostly practical training
to academic study in law schools affiliated with universities and staffed by full-time
teachers committed to scholarly research. Many of these Americans had studied in
Germany and hoped to establish in the United States the “scientific” approach to legal
scholarship that they associated with its historical study in Germany. Following their
German predecessors, they viewed the study of legal history as a necessary preliminary to
systematic analysis of current law. Yet the Americans, like English legal scholars also attracted to the German model, most influentially Henry Maine, typically developed different conceptions of historical legal science than the Germans. Unlike the Germans, who increasingly through the middle of the nineteenth century tried to use principles extracted from historical study to build timeless legal systems based on formal deductive logic, legal scholars in England and the United States typically emphasized that history provided the empirical data for an inductive science of law. They often asserted parallels between law and other sciences based on induction, particularly natural sciences such as geology, biology, chemistry, and physics, while contrasting law with deductive sciences such as mathematics.

Self-consciously viewing their historical approach to law as a distinctive jurisprudential school, American legal scholars in the late nineteenth century differentiated it approvingly from previous speculative and unscientific schools of natural law and analytic jurisprudence. Ridiculing the “vanity” of “mere theory,” they emphasized evolving custom as the source of law and insisted that current law could only be understood through study of its origins and historical development. Some fit the “whiggish” characterization of subsequent scholars, smugly praising the United States as the culmination of the progress of individual liberty from Anglo-Saxon “germs” while expressing racist views about other cultures. Yet most of them incorporated concepts of fluctuation, discontinuity, contingency, and decay into their evolutionary theories.

Belying subsequent claims that they were conservative defenders of the status quo, these Americans frequently asserted that conscious human activity, informed by historical understanding, could improve society through legal reform. Their historical
research often uncovered remnants of past law in the present. They observed that these
remnants typically made sense in the very different societies in which they arose and that
many continued to function effectively in the present even if their original rationales no
longer applied. But too often, they stressed, these remnants had become dysfunctional
survivals that produced needless obstacles and logical confusion in the current legal
system and, therefore, should be eliminated. Frequently engaged in political as well as
intellectual reform, many spoke out against the increasing materialism of American
society and denounced the excesses and inequalities produced by the growth of corporate
capitalism.

The dominance of historical explanation throughout the Western intellectual
world declined in the early twentieth century, in law, as in other disciplines. By
promoting “sociological jurisprudence” as an attractive alternative to “historical
jurisprudence” in his enormously influential early work during the decade before World
War I, Roscoe Pound contributed substantially to the demise of historical explanation in
American legal scholarship as well as to what became the prevailing, though importantly
inaccurate, view of its role in nineteenth-century legal thought. Like many intellectuals
in Europe and the United States, including the leading German and English legal
scholars, Rudolf von Jhering and Frederick Maitland, Pound believed that traditional
conceptions of individualism and individual rights impeded the attention to collective
interests required in the modern world. He linked his intellectual interest in the history of
legal thought with his strong conviction that American law promoted extreme
individualism at a time when the American public needed and demanded the legal
recognition of collective interests to solve the pressing social problems that excessive
individualism had largely produced. He identified various prior jurisprudential schools, including the historical school that he recognized as dominant in the United States since 1870, as contributing to the individualism that made American law a barrier to needed social reform, particularly in Supreme Court decisions that formalistically invoked individual constitutional rights such as “liberty of contract” to strike down progressive legislation enacted in the public interest.

Pound treated historical legal thought in America as largely derivative of the pioneering scholarship of Savigny in Germany and Maine in England, which he explored in substantially more detail than any work produced by Americans. He criticized both Savigny and Maine for their individualism and for justifying current law based on erroneous assumptions about its historical continuity, characterizations that applied much more fairly to Savigny and Maine than to the Americans Pound largely ignored. As an alternative to the outmoded jurisprudential schools of the past, Pound advocated what he called sociological jurisprudence. He described sociological jurisprudence as an amalgam of anti-formalist German legal thought, especially as formulated by Jhering, American philosophical pragmatism, and the emerging social sciences, which all recognized the importance of collective interests. He claimed that Holmes, in articles published in the 1890s and in his opinions as a judge, had anticipated its major themes. Ironically, Pound contributed to the decline of legal history largely through his own work as a legal historian. Using what seemed to be an evolutionary model of historical analysis to deny the continuing importance of history itself, he claimed that legal history at the turn of the twentieth century had value mainly as “preparatory work” for sociological jurisprudence.