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History in the American Juridical Field: Narrative, Justification, and Explanation

Christopher Tomlins*

I. INTRODUCTION

Law in the contemporary United States has achieved unchallenged ascendancy as the principal arena and discourse for decisionmaking in social and political affairs. Law's capacity to dominate in such decisionmaking is largely dependent on popular confidence in the legitimacy and efficacy of the rules it produces. Legitimacy is in turn grounded upon the repeated invocation over time of foundational values associated with the juridical form: law's objectivity in application (no one is above the law), universality in implementation (one law for all), and neutrality in outcome (the law does not take sides). Together, these values compose what I shall call law's meta-character—the normative idealization of the workings of law in society that emanates from "the world of the law."

As resort to law proliferates, however, actual "legalities"—the legal conditions of social life—are produced not through the elaboration of holistic jurisdictional narratives, but from competitive struggles, adversarial or bureaucratic, to achieve specific, instrumental outcomes. Individuals, agencies, interest groups and social movements (including legal professionals themselves) make particular, self-serving investments in law. The availability of law for widespread use furnishes a practical quotidian basis for law's social efficacy, but use itself is indifferent to, and

* Senior Research Fellow, The American Bar Foundation. This essay began as a paper written for a Colloquium, *Sur la Portée Sociale du Droit: Usages et Légitimité du Registre Juridique*, convened November 2002 at the University of Picardy-Jules Verne, in Amiens. I wish to thank Liora Israeli, Guillaume Sacriste, Antoine Vauchez and Laurent Willemez for their invitation to participate. I am grateful for comments on earlier drafts of this essay from Bryant Garth, Ajay Mehrotra, Kunal Parker, David Rabban, and the participants in legal history workshops held at the faculty of law, Tel Aviv University (November 2002) and at Columbia Law School (March 2003).
may even contradict, law's meta-character.

How is law's legitimacy—and thus its overall social authority—maintained when actual legality is produced in self-serving competition? This Article holds that maintaining law's social authority is the principal concern of the complex of institutions, actors and ideologies that comprise the world of the law. In particular, it ascribes to the juridical professions (of bench, bar and academy) a major interest in sustaining law's claim to legitimacy in rulemaking in the face of the particularism and fragmentation that the professions' pursuit of their own self-interest simultaneously encourages. That is, even as their members use law instrumentally in the service of particular clients, outcomes, or ideas, the juridical professions perform a crucial managerial role in the state formation composed by law's ascendancy by maintaining a representation of law that validates its proclamations of objectivity, neutrality, universality—and therefore autonomy.

How, specifically, has this task been performed? What resources have been used? Here my overall purpose is to explore the use made of a particular intellectual resource—history—to sustain law's claims. Construing history both as a narrative that frames human activity by situating that activity in time and context, and also as an analytic discourse that unravels the assumptions about causation and consciousness implicit in all narratives, I examine how history has advanced, or criticized, the construction of law's meta-character. I begin in Part II with history as narrative by tracing the formation of the world of the law in America. There I concentrate on the social, intellectual and institutional conditions that prompted the crystallization of that world in its contemporary configuration in the late nineteenth century, on the reasons for its formation, and on the modernist aesthetic that crystallized along with it. Then in Part III, I investigate the significance of historical discourse both in that initial labor of formation and in the maintenance of the world of the law so formed. How has history been mobilized as a strategy and a resource in the managerial practices that have sustained law's identity and effectivity? Can the history of law have a meaningful existence outside the world of the law? If so, what purpose could it serve there? What form might it take?

Following the late Pierre Bourdieu, I use the term "juridical field" to encapsulate what I have to this point called "the world of the law." I do so because talk of "law," or "the law," or "the rule of law" or "the world of the law" tends to be vague. What do these terms encompass? "Juridical field" answers that question by concentrating our attention on the

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intersection of discourse, behavior and institutions. By “field” I mean an area of “structured, socially patterned activity or ‘practice’” that in the juridical case is defined “disciplinarily and professionally.” Organizationally and conceptually, a field is centered on “a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values” that unite materiality with ideation, institutions with purpose, ceremony with outcome, action with ideology. In law’s case, the juridical field produces both law and law’s self-effecting capacities.

As we shall see, until quite recently (the early 1970s), histories of American law were generated almost entirely within the juridical field. By and large those histories narrated the field’s success, in serial iterations, in performing and reconciling both its social (instrumental) and its legitimating (universal) roles. In the juridical field, then, history primarily normalized and justified the current state of law’s affairs. Resort within the field to history as a discourse of critique was by no means unknown, particularly in the second half of the twentieth century. But even critique was largely functional, dictated by a reformist politics of improvement pursued on terms set by the fundamental structure and practices of the field itself. The question we confront now, and on which this Article concludes, is whether this state of affairs will persist.

Historical investigation of the American juridical field, and of the uses made of history within the juridical field, refines our understanding of the ways in which the field composes and maintains law, and in the process ensures that its activities are perceived as effective and legitimate. This underlines history’s potential in the enterprise currently identified by Yves Dezalay and Bryant Garth as “explain[ing] the ‘rules for the production of the rules.’” According to Dezalay and Garth, “the content and scope of rules produced to govern the state and economy cannot be separated from the circumstances of their creation and production.” In America, rules of governance emerge in the course of competition among discourses, disciplines and professions—principally law and the social sciences. In that competition, law, besides being the leading participant, also sets “the key terms of legitimacy.” All those who seek to influence “the production of the rules” (the process of formation and reformation of the rules that govern state and social action) assume law’s foundational character as a precondition. “There is very little effort to explain ‘the rules for the

2. Richard Terdiman, Introduction to id. at 805, 805.
3. Id. at 806.
5. Id. at 307.
6. Id.
production of the rules.' Instead [participants]... tend to proceed in a quasi-legalistic mode, describing what the rules should be." Their concerns are essentially prescriptive. They do not discuss "what makes the credibility of law" or "how the law is made." 8

Those discussions, however, must take place if we are to understand the rules that are produced. They are even more essential if we are to understand how they are produced—"the production and legitimation of law itself." 9 For as Dezalay and Garth's formulation reminds us, the production of rules is necessarily a process with formative rules of its own. "The circumstances of production shape the range of possibilities that are likely to be contemplated and implemented—or ignored." 10

To understand the rules produced, Dezalay and Garth argue, one must "examine their genesis—where they come from, what material was used to create them, and what conflicts were present at the time." 11 As they acknowledge, this means writing history. Inquiry into the rules for the production of the rules is nothing less than "inquir[y] into the structural history of the creation and production of national legal practices." 12 The objects of that inquiry are "national histories and disciplinary evolutions"—the specific institutional and discursive structures within which the production of rules occurs, and the methods of research and theories of formation embraced by those who are engaged in rule production. 13 Thus Part II of this Article opens to historical examination the formation of the modern juridical field in the American case, while Part III examines the historical narratives of the law and its world that have been produced over time.

As I have said, the history of law has been a practice largely contained within the boundaries of the juridical field. Hence writing the history of the field must include writing the history of the field’s own legal-historical practices. But history, just like law and the social sciences, is also a method of research and a theory of formation. While it is rarely capable of producing specific rules of governance itself, history certainly produces discourses of causation that powerfully contextualize the production of rules by others, and thus helps to define the terrain of rule production. Indeed, prior to the twentieth century, and particularly in Europe, history was a dominant presence in juridical discourse, heavily implicating the process of formation of national legal practices. It is not impossible that

7. Id. at 311.
8. Id.; see also Edward L. Rubin, Law and the Methodology of Law, 1997 Wis. L. REV. 521.
9. Dezalay & Garth, supra note 4, at 312.
10. Id. at 307.
11. Id.
12. Id. at 311.
13. Id.
history could come to enjoy the same influence again. In considering the
construction of the rules for the production of the rules, then, it is crucial
to pay attention to past uses made of history—legal and general—both as
a modality of inquiry into law, and as a resource to which participants in
the juridical field have turned, time and again, to sustain the security and
authority—that is, to maintain the meta-character—of the juridical field
itself.

II. THE EMERGENCE OF THE AMERICAN JURIDICAL FIELD: A HISTORY

Whether considered behaviorally or ideologically, the United States of
America is the most “juridified” of societies, polities, and states in the
contemporary world. It has been so since its inception in the late
eighteenth century, a fact grounded in the Republic’s prehistory. Both as a
discourse of justification and as a technology of implementation, law was
embedded in the processes of Anglo-American colonization from the
earliest moments of English intrusion upon the North Atlantic seaboard.
By the early eighteenth century, legal discourse was a commonplace of
quotidian social practice and colonial political culture. The constitutional
politics of the Anglo-American imperial crisis and revolution greatly
amplified “Americans’ pervasive sense that their society [was] uniquely
lawbound,” such that, by the beginning of the nineteenth century, law had
become the Republic’s recognized language of authority. As Thomas
Paine famously wrote in Common Sense, “in America THE LAW IS KING.”
So also Alexis de Tocqueville, who as famously observed, “There is
almost no political question in the United States that is not resolved sooner
or later into a judicial question.” Profound long-term resonance exists in

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14. In American constitutional law, for example, originalism is already fully established,
controversially, as a historical practice in the legal academy. See Laura Kalman, Border Patrol:
Reflections on the Turn to History in Legal Scholarship, 66 FORDHAM L. REV. 87 (1997).
AMERICAN IDENTITY 105-113 (1998); PATRICIA SEED, AMERICAN PENTIMENTO: THE INVENTION
OF INDIANS AND THE PURSUIT OF RICHES (2001); RICHARD TUCK, THE RIGHTS OF WAR AND PEACE:
POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIIUS TO KANT (1999); Christopher
Tomlins, The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English
Intrusions on the American Mainland in the Seventeenth Century, 26 LAW & SOC. INQUIRY 315
16. See generally THE MANY LEGALITIES OF EARLY AMERICA (Christopher Tomlins & Bruce
Mann eds., 2001); PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA (1992).
17. Stanley N. Katz, The Problem of a Colonial Legal History, in COLONIAL BRITISH AMERICA:
eds., 1984); see also ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11-33
(1984); CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC
18. THOMAS PAINE, Common Sense (1776), in COMMON SENSE AND OTHER WRITINGS 3, 31
19. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey Mansfield & Debra
Dezalay and Garth’s observation that “law in the United States historically has been able—indeed expected and desired—to gain the position of setting the key terms of legitimacy.”

To acknowledge law’s supervening authority as the Republic’s modality of rule is immediately to prompt more important questions. Where was law located in the Republic—in the federal constitution, in the states, in the people? In legislatures, in courts? In the profession? In the taught tradition of an Anglocentric common law? In crowning law king, Paine simultaneously embraced a decidedly antinomian, decidedly democratic constitutionalism as law’s proper locale: “[L]et the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.”

In 1786, ten years after Common Sense, Benjamin Austin, an active New England Antifederalist, echoed Paine’s antinomianism. He attacked the “multiplicity of evils” inflicted by the profession of lawyers whose “pernicious” practices “perplex and embarrass every judicial proceeding.” He attacked judiciary practices that daily humiliated citizens with “flagrant impositions . . . under sanction of law.” And he attacked the undisturbed ascendancy, Revolution notwithstanding, of the “whole body of English laws” upon which the “wonderful misery of law craft” fed. Austin demanded “a system of laws of our own, dictated by the genuine principles of Republicanism, and made easy to be understood by every individual in the community,” administered through institutions of “fixed and determined” powers upon which “the Judicial Authority” might not “trample . . . with impunity.”

So too did William Manning, ten years after Austin, for whom the “mule order” of lawyers acted in symbiosis with the judicial and executive officers of government by “explaining and constructing away the true sense and meaning of the constitutions and laws.” By keeping the laws “numerous, intricate and hard to be understood,” lawyers and officers collectively served the interests of “the Few” in dominating “the Many.”

Periodically throughout the first half century of the Republic, antinomian

20. Dezalay and Garth, supra note 4, at 307.
21. PAINE, supra note 18, at 31-32.
23. Id. at 10, reprinted in 13 AM. J. LEGAL HIST. 244, 252.
24. Id. at 15-16, reprinted in 13 AM. J. LEGAL HIST. 244, 257-58.
25. Id. at 16, reprinted in 13 AM. J. LEGAL HIST. 244, 258.
27. Id.
democracy rebelled against the juridical professions' elite common-law constitutionalism, agitating for "laws of [their] own, dictated by the genuine principles of Republicanism, [and] . . . easy to be understood." When Tocqueville wrote in the 1830s of America's remarkable capacity to transmute political into judicial questions, he was describing (and applauding) the success of juridical elites in sustaining common-law constitutionalism as an aristocratic counterbalance to the democracy.

These early conflicts illustrate the tension between law's usage and its meta-character outlined in the foreword to this Article, but reverse that tension's polarity. Everyday resort to law did not validate it as a vital medium of social practice, but rather exposed the ease with which it could be used by the unscrupulous to manipulate ordinary citizens. Law's metaphysical legitimacy, in contrast, was far more than an abstract discourse of justification ritually invoked. It was an active civic belief system, "sacred" in Austin's words. The reason for the reversal is simple: quotidian use implicated the deeply distrusted juridical professions. Their interventions were what kept law numerous, intricate and inexplicit—the better to justify their claims to exclusive interpretive authority. Austin's response had been classic antinomianism: mediation by the republican citizenry. Juries of the people, not the professions, should exercise authority over the law. To Manning, similarly, zealous support would always exist for the rule of law as long as it was left to "the free consent of a majority of the whole people" represented in legislatures and on juries to determine what was justice—"what is right and what is wrong." Law was self-evident, common sense, natural, hence unchanging. Legal processes required no law craft. They would be managed by the people.

By the end of the nineteenth century, law craft had escaped quite decisively from the cage to which antinomian discourse had attempted to

28. HONESTUS, supra note 22, at 16, reprinted in 13 AM. J. LEGAL HIST. 244, 258. See generally FREDERICK ROBINSON, AN ORATION DELIVERED BEFORE THE TRADES' UNION OF BOSTON AND VICINITY, ON FORT HILL, BOSTON, ON THE FIFTY-EIGHTH ANNIVERSARY OF AMERICAN INDEPENDENCE (Boston, Charles Douglas 1834); TOMLINS, supra note 17, at 60-94.
29. HONESTUS, supra note 22, at 249-50, 251, 255-56.
30. MANNING, supra note 26, at 132, 138, 143.
31. See generally TOMLINS, supra note 17, at 1-8. Manning's distrust of juridical elites was clear. To the proposition that lawyers were an order necessary in free governments to curb the arbitrary will of judges, he replied, "that would be like setting the Cat to watch the Cream Pot." MANNING, supra note 26, at 141. On the powers of juries, and the ascendancy of judges over juries in the determination of matters of law emerging in the late eighteenth century, see KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 107-08 (1989); and SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 34-66 (1990). The process (relative loss of authority by the jury to juridical professionals) that Hall describes had in fact already been underway during the eighteenth century and would continue in the nineteenth. On the Antifederalists' critique of the power of juridical professionals, and their defense of juries, see TOMLINS, supra note 17, at 68-70. On continued popular distrust of juridical elites and affinity for legal processes within popular control, see ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880 (1989).
confine it at the beginning, gaining for itself an unchallenged capacity to set "the key terms of legitimacy." That is, over the course of the century the tension between usage and meta-character took on its modern form, and the juridical field appeared in its modern incarnation—a proliferation of discrete instrumental usages, an aesthetic of universals, and professions to control, or at least reconcile, the friction between them. How did the escape come about? What were its consequences?

A. The Antebellum Period

Law slipped the antinomian constraint along two related paths: one the high path of constitutional ideology, the other the low path of usage and representation in daily life. Together these paths constructed the modern juridical field.

The high path was that of common-law constitutionalism. In the aftermath of the American Revolution, an Anglocentric legal culture confronted the serious problem of how to reconcile its intellectual dependence on a customary common law accreted in historical time with republican polities newly created on a foundation of Enlightenment reasoning and popular consent, and sustained by a lasting spasm of millennial faith that escaped history, turning "the past into prologue and the future into fulfillment of America's republican destiny." 32 Jurists fought to sustain the legitimacy of their common-law jurisdiction against the people gathered in legislatures. Initially, their impulse was not to confront republican circumstance, but to conform their own authority to it by arguing that, as "custom," the common law, no less than republican legislation, comprised a body of prevailing legal principles to which the people had consented. 33 Some, more ambitiously, cast the common law as the original expression of the sovereign people's will in the revolutionary polity, and dubbed the judiciary "agents" of the people in interpreting that will. 34 From here jurists proceeded to claim a coordinate authority for the

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33. As, for example, in James Wilson's 1790-91 law lectures. See 1 James Wilson, Lectures on Law Delivered in the College of Philadelphia in the Years One Thousand Seven Hundred and Ninety, and One Thousand Seven Hundred and Ninety One, in The Works of James Wilson 67, 122 (Robert Green McCloskey ed., 1967).

34. Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 20 (1977). See generally id. at 18-30. Note the argument of the jurist Peter S. Du Ponceau, writing in 1824, that "at the very moment when independence was declared, the common law was claimed by an unanimous voice as the birth right of American citizens." Peter S. Du Ponceau, Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States, at ix
courts' common-law jurisdiction, arguing that as embodiments of the sovereign will courts enjoyed an authority to expound that will no less than legislatures. Judges argued that in important procedural respects—flexibility in molding decision to circumstance, continuity of tenure and thus of policy perspective—their capacity to expound the sovereign will was far superior to that of legislatures, constituting a distinct modality of rule itself. Some jurists claimed, more bluntly, that the common law did not just enjoy coordinate authority within the new polity, but was actually foundational—"the basis of all our systems, from the great confederacy of independent states, down to the smallest corporation." By the 1830s, Tocqueville could confirm both the strategic success of the jurists' campaign, and the immense social authority that they had secured as a result.

[French] written laws are often difficult to understand, but each man can read them; there is nothing, on the contrary, more obscure for the vulgar and less within his reach than legislation founded on precedents... The French lawyer is only a learned man; but the English or American man of law resembles in a way the priests of Egypt; like them, he is the lone interpreter of an occult science.

The "low" path of escape lay in systematic reorganization of the use and expression of law in social life—the emergence and consolidation of the

(Philadelphia, Abraham Small 1824) (emphasis omitted). Du Ponceau conceded that the Revolution had led to the promulgation of written compacts that had replaced the common law as the source of the powers of American political institutions. But he then promptly reestablished the common law as "source" by insisting that these compacts were themselves but expressions of America's more basic common law heritage. "We need but open the Constitution of the United States and the laws which have been made in pursuance of it, and we shall find the common law almost in every line"; hence, "the common law of England" was established as the law of the United States "for all national purposes and for all cases in which the local law is not the exclusive rule." Id. at 91-92.

35. "The formation of the United States government gave rise to a system of laws peculiar in itself, and which neither confirms, contradicts, nor in any way changes the common law, but occupies or constitutes a new and independent department of jurisprudence." FRANCIS HILLIARD, THE ELEMENTS OF LAW: BEING A COMPREHENSIVE SUMMARY OF AMERICAN CIVIL JURISPRUDENCE 5 (Boston, Hilliard, Gray & Co. 1835).

36. A jury charge from this period stated:
The Acts of the legislature form but a small part of that code from which the citizen is to learn his duties, or the magistrate his power and rule of action. These temporary emanations of a body, the component members of which are subject to perpetual change, apply principally to the political exigencies of the day. It is in the volumes of the common law that we are to seek for information in the far greater number, as well as the most important causes that come before our tribunals. . . . Its rules are the result of the wisdom of ages.


37. WARREN DUTTON, AN ADDRESS DELIVERED TO THE MEMBERS OF THE BAR OF SUFFOLK AT THEIR ANNUAL MEETING, IN SEPTEMBER 1819, at 18 (Boston, S. Phelps 1819); see also NATHaniel CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS 253-54 (Burlington, E. Smith 1833); DU PONCEAU, supra note 34; STIMSON, supra note 31, at 144.

38. TOCQUEVILLE, supra note 19, at 255.
law as a fully professionalized practice, a discrete field of inquiry and an autonomous academic discipline. These were developments whose effects became clear primarily in the later decades of the century.

American jurists’ struggle to secure an authoritative jurisdictional voice in the antebellum Republic was primarily a struggle for power and position within the revolutionary polity. Though highly charged at particular moments,\(^\text{39}\) it never turned into a wholesale confrontation with that polity. Nor had the antebellum world of the law achieved that degree of definition and control of its own discursive space, which, later in the century, would lead to permanent and self-conscious organizational separatism. Instead, the law in the early republic mingled, largely harmoniously and largely in the same social spaces, with other realms of human thought and activity. Harmony was rooted in “the American exceptionalist vision” from which law had made no real attempt to depart—the millennial protestant belief that “the successful establishment of republican institutions” had confirmed America’s place was outside history, attached to God’s eternal plan.\(^\text{40}\) “The country’s progress would be the unfolding of the millennial seed, rather than a process of historical change.”\(^\text{41}\)

In this Christian conception of time, progress meant ongoing revelation of the “fixed laws of history and nature” through scientific inquiry.\(^\text{42}\) One discourse, “Protestant Baconianism,” furnished the conception of science that infused the antebellum period’s learned and professional epistemology.\(^\text{43}\) Protestant Baconianism was characterized by four essential commitments: to natural theology (that the truths of religion would be revealed through the study of nature); to inductive inquiry and taxonomy; to systematic analogical reasoning, binding all forms of knowledge together in one grand synthetic discourse; and to a social understanding of science as a distinctively public undertaking, the purpose of which was to bring moral and political uplift in the civic sphere.\(^\text{44}\) In the antebellum period, scientific inquiry was an affirmative exercise dedicated to revealing the operation of a priori truths on the basis of empirical observation of discrete instances. “Rational reflection upon the truths of experience... validated both the common physical world and the

\(^{39}\) For example, in the 1800s, and again in the 1830s. See TOMLINS, supra note 17, at 131-44, 152-219.


\(^{41}\) Ross, supra note 32, at 912. The remainder of this section closely follows arguments and research that first appeared in Christopher Tomlins, Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative, 34 LAW & SOC. REV. 911, 914-32 (2000).

\(^{42}\) Ross, supra note 40, at xv.


\(^{44}\) Id. at 423-24.
fundamental truths of morality and divinity embodied in Christianity.\textsuperscript{45}

Naïve revelatory empiricism offered an intellectual basis upon which specifically legal inquiry could engage in common with other realms of antebellum scientific discourse. Antebellum legal science meant the application of "Protestant Baconian" principles and method to law in order to reveal the "ordered principles" that gave organization, structure, and guidance to the law, and hence to human society.\textsuperscript{46} The results were expressed in an antebellum treatise tradition of increasing sophistication and ambition. Works consisting largely of agglomerations of individual cases, such as Nathan Dane's encyclopedic \textit{General Abridgment and Digest of American Law},\textsuperscript{47} were superseded by the increasingly self-confident, rationalizing, and systematizing work of Kent, Sedgwick, Greenleaf, and above all Story.\textsuperscript{48} Individual cases were but "data to be

\begin{itemize}
  \item \textsuperscript{45} Ross, \textit{supra} note 40, at 37. Baconian scientists, in all fields, "believed that... the principles they adumbrated were real and true because, in the end, they were expressions of the Creator. The result of Baconian science, properly done, was a better understanding of God." WILLIAM P. LAPIANA, \textit{LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION} 32 (1994).
  \item \textsuperscript{46} As a Baconian science, law "laid broad and deep upon those universal principles of natural justice which the cultivated reason of all ages has sought to apply to human affairs in the almost infinitely diversified relations of man to his fellow man, to society, and to civil government." GEORGE VAN SANTVOORD, \textit{THE STUDY OF LAW AS A SCIENCE} 7, 14 (1856), \textit{quoted in} William P. LaPiana, \textit{Jurisprudence of History and Truth}, 23 RUTGERS L.J. 519, 525 (1992). Legal science meant "a complete system of jurisprudence, founded upon broad, rational and universal principles of natural justice and truth." VAN SANTVOORD, \textit{supra}, at 18, \textit{quoted in} William P. LaPiana, \textit{Jurisprudence of History and Truth}, 23 RUTGERS L.J. 519, 525 (1992).
  \item \textsuperscript{47} NATHAN DANE, \textit{GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW} (Boston, Cummings, Hilliard & Co. 1823-29).
\end{itemize}

All this work was, in Ross's terms, "prehistoricist." Thus, writing of Joseph Story, Ross notes that although clearly influenced by the contemporary German historical school of law (see \textit{infra} Part II of this Article), Story believed that legal interpretation had to reflect "the unchanging foundations of natural law." Ross, \textit{supra} note 32, at 920. For Story, as for the great American historian George Bancroft, "the aggressive Protestant religiosity of American culture sustained an early modern conception of the universal principles of God and nature and narrowed the sphere in which historical
observed,” whence came “legal principles, the ordering of which should lead to rational understandings of the legal universe”—which was, of course, God’s universe. 49

Initially, law’s scientists laid no overt claim to the preeminence of the juridical in scientific inquiry. 50 Made confident of law’s ascendancy in the community of antebellum scientific discourse by the treatise writers’ systematizing achievements, however, proponents of legal science were ready by mid-century to proclaim explicitly law’s autonomy from politics and its preeminence at the discursive intersection of all the sciences. To David Dudley Field, speaking at the inauguration of the first University of Chicago Law School in September 1859, legal science was, of all the sciences, “the most comprehensive in its compass, the most varied and minute in its details, the most severe in its discipline, and the most important to the order, peace, and civilization of mankind.” 51 Its preeminence in scientific and political discourse lay precisely in its mastery of the infinite complexities of human behavior:

Compare this science with any of the other sciences; with those which are esteemed the greatest in extent, and the most exalted in subject. Take even astronomy, that noble science . . . . Sublime as this science is, it is but the science of inanimate matter, and a few natural laws; while the science which is the subject of our discourse governs the actions of human beings, intelligent and immortal, penetrates into the secrets of their souls, subdues their wills, and adapts itself to the endless variety of their wants, motives and conditions.

. . . The law, it will be remembered, is the rule of all property and all conduct. 52

How was law’s transcendent authority to be realized and sustained? Unilateral judicial pronouncement was one answer. Chief Justice Taney had recently attempted as much, from the highest bench, in Dred Scott. 53

change could be accepted.” See id. at 916-17, 920; see also LAPIANA, supra note 45, at 34-44. Ferguson describes how Abraham Lincoln’s antebellum legal aesthetic reproduced that of the early nineteenth century: “As with earlier lawyer-writers, the law provides an ordering device and source of definition, and it proves that divine and human law connect in the American experiment.” FERGUSON, supra note 17, at 306.

49. LAPIANA, supra note 45, at 30.
50. “How much mistaken is the idea entertained by many in this country,” wrote David Hoffman in 1836, “that the lawyer (whose province is reasoning) can attain to eminence, though he restricts his inquiries within the visible boundaries of his peculiar science.” 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 104 (Baltimore, J. Neal 1836).
52. 1 id. at 528.
The locale of Field's address suggests another—systematic education, efficient and complete. Dismissing what had been to that point the mainstream of American legal education—"private study" and apprenticeship to practitioners "amid the bustle and interruptions of practice, 54—Field spoke out for professional training imparted by university law schools on the German model. "This science, so vast, so comprehensive, so complicated and various in its details, needs to be studied with all the aids which universities, professors and libraries can furnish." 55

Field was prescient but somewhat premature. In 1859, systematic university-based education in legal science had little significance for American law. "The vast majority [of American lawyers] studied law only through apprenticeship and were never exposed to systematic instruction in the science of principles." 56 The law office and the court house were the spaces where law was learned, and there the emphasis lay on the practical—pleading and procedure, the functional needs of clients. "In spite of all the praise and glorification heaped on the science of principles, a thorough knowledge of its precepts would not get a client’s case before the court." 57 Nor did the antebellum professional bear much resemblance to what would become the norm of the twentieth century. "Early American professionals were essentially community-oriented. Entry to the professions was usually through local elite sponsorship, and professionals won public trust within this established social context rather than through certification." 58 A profession was more civic role and resource than discrete learned discipline; it was "an emphasis within a shared and relatively accessible public culture." 59

In the antebellum period, the juridical field remained porous, largely
unformed. Jurists had fought antinomian democracy to a draw while simultaneously absorbing the millennial epistemology that antinomianism embraced. The world of the law had not yet claimed decisive distinctiveness for itself. Its discourse of means and ends remained largely at one with the greater public culture. Law produced rules, but as Chief Justice Taney discovered, it did not yet command enough resources, either discursive or institutional, to control the terrain of rule-production.

B. After the War

All this began to change after mid-century. If the antebellum era had been characterized by an overarching commonality in the methods, media, and locales of learned discourse, the post-Civil War decades saw fragmentation. If the antebellum experience of American lawyers was one of apprenticeship, not education; of sharing community with others, not gathering in self-interested associations; of a profession but not of professionalism; the post-war decades saw a total reconfiguration of law's institutional environment. While the antebellum era of common-law constitutionalism, defined by a defensive apprehension of antinomian democracy, was one of essentially rhetorical claims to the juridical field's ascendancy in setting "the key terms of legitimacy," the post-war years saw something very different: the development of new, institutionally grounded practices that demonstrated systematically how an active "logic and precision of legal form, category and rule" might realize larger "societal goals." 60

The Civil War itself provided an essential and fundamental stimulus to the transformation of law's world. Offered on the war's eve, a moment of profound crisis that drove home to contemporaries the irremediable failure of American politics, David Dudley Field's grandiloquent elevation of law "equal in duration with history, in extent with all the affairs of men," without which "there could be no civilization and no order," grabbed for transcendent intellectual authority situated in law as such. 61 As an event, the war itself jerked the Republic "from Providential toward historicist views of time," 62 undercut the celebrated immutability of its institutional forms, and weakened the naïve revelatory empiricism of its epistemology in favor of a more measured, historical scientism. "Christian minds still saw the upheaval as an apocalyptic event, but to the new scientific secularists it showed that the American republic had not been perfectly

   61. 1 FIELD, supra note 51, at 519, 529.
   62. Ross, supra note 32, at 925.
formed at the moment of its inception." 63

In the post-war decades, developments along three axes created a new space for the juridical in the topography of power. First, institutionally: between 1859 and 1876, Civil War and Reconstruction brought forth a new American state form, national and centralized rather than local and disaggregated. Simultaneously, the process of Reconstruction, the machinations of the Republican Party-state, and "the surging tide of corruption" that accompanied northern and western economic growth progressively discredited legislative and executive government within the new state formation, creating an opportunity that juridical elites seized, particularly after 1877. 64 Second, culturally: "Americans experienced massive historical changes that directly challenged their historical self-perception." 65 Rapid industrialization and its attendant economic, social, and cultural changes—immigration and urbanization, demographic dislocation and cultural diversification, class formation and conflict—obliterated the common social spaces of antebellum America and the millennial world-view they had sustained. 66 Finally, organizationally: the forms of inquiry by which knowledge and information had been defined and pursued in the antebellum era were overthrown. Modernity increasingly relocated signification beyond the local, the familiar, the proximate. It drained the "island communities, individuals and personal milieus" of the antebellum era of their descriptive and prescriptive significance, their explanatory capacity, their causal sufficiency. 67 The antebellum model of inquiry—literate genteel professionals, associated socially in civic cultural institutions, parsing each other’s intellectual activities—was utterly transformed. By the 1880s, disciplines—modes of specialized academic inquiry and professional self-identification defined in universities and professional associations—drove the organization of the intellect and the production of knowledge.

The modern American juridical field was formed in this moment of social, cultural, and organization transformation. The seed crystal was Harvard Law School, where legal education’s leading post-Civil War innovator, Christopher Columbus Langdell, sought to reconstitute law as an expertise—a specific knowledge, consisting in the rigorous elaboration of

64. See RICHARD BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY IN AMERICA, 1859-1877 (1990); LaPiana, supra note 46, at 529-30. Roscoe Pound speaks of the period from the Civil War to the end of the century as one of "the hegemony of the judiciary in our polity." ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 49 (1938).
65. Ross, supra note 32, at 925.
66. Id.
of explicit rules, developed through the adoption of disciplined and clearly defined methods of inquiry, and defended by exacting institutional standards.

Langdell was recruited to the newly created deanship of Harvard Law School in 1870 by Charles W. Eliot, who had become the University’s President the year before. Eliot, a chemist, had already identified himself with the post-war reordering of intellectual and professional life—its withdrawal from the public culture of the community and its reconstitution in the university. His ambition was to recreate scientific discourse in general as an exclusively academic expertise. In professional education this meant a move toward theory and research, and away from the inculcation of craft mysteries and skills. In the particular case of law, it meant reinvention of the law school. 68

Langdell’s appointment was the key to the institutional reinvention of Harvard Law School. Under his direction, the law school first established a sequenced two-year curriculum for the LL.B., then a three-year curriculum, and then made law a graduate degree. The substance of the curriculum was confined to “pure law” subjects. Admission requirements were substantially elevated, examinations regularized, and a full-time academic faculty was recruited to replace adjunct practitioners. 69

Langdell also pressed for the reorganization of Harvard’s teaching around a particular pedagogical style, the case method. The case method implied a fundamental departure in legal analysis that recognized and acknowledged judicial decision making as the original and essential act of legal invention. Rather than read about law secondhand in treatises devoted to the exposition of grand principles, Langdell required his classes to learn law from discussion of its primary sources. Case method would show that the way to “real” law, and hence “real” lawyering, lay in intensive study of techniques of adjudication in “real” cases. 70

68. According to Eliot, genteel intellectualism had encouraged “loose and inaccurate statements” that undermined “single-minded” scientific inquiry in all fields. See BENDER, supra note 58, at 35-36; see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 51-55 (1983). In 1862, Louis Agassiz wrote of Harvard that the undergraduate college had “more the character of a high school than of a university,” and its adjunct professional schools (law, divinity, medicine, and science) had “in no instance yet reached the true character of University faculties” but were rather “accessories or excrescences” of the college. Letter from Louis Agassiz to John A. Andrew (Dec. 16, 1862) (on file with the Massachusetts Historical Society), quoted in HASKELL, supra note 67, at 123-24.

69. LaPiana describes in detail Langdell’s innovations and responses to them. See LAPIANA, supra note 45, at 7-28.

70. Id at 58. “At the heart of Langdell’s scholarship is a reverence for the decided case, the judicial opinion, as the root of all Anglo-American law and the source of principles rather than as a[n] . . . illustration of them.” Id. at 70; see also JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING 9-21 (1914); Bruce Kimball, “Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law”: The Inception of Case Method Teaching in
Langdell’s emphasis on the derivation of legal principles from exacting empirical study of cases offered American law a new identity as a technically sophisticated, professionalized discourse of decisionmaking within the control of judicial elites, but one that was also increasingly subject to instruction, interpretation, confirmation, and correction by scholars in law schools.\textsuperscript{71} Simultaneously, his institutional reforms identified Harvard Law School as the model for the modern legal education that would create and sustain that identity—the “market leader and professional exemplar.”\textsuperscript{72} The national influence of Langdell’s model was immense. In the half-century after 1870, Harvard Law School became “intellectually, structurally, professionally, financially, socially and numerically” dominant in American legal education.\textsuperscript{73} “[T]here was a basis for professional unification; someone had finally defined ‘the law’ by creating an orthodox educational system and a structure and curriculum for it. . . . [T]he law school could be recognized as the cradle of technique and produce the technocrats necessary to man the new system.”\textsuperscript{74}

Langdell’s foundation of law’s claim to ascendancy on its capacity to reinvent itself as an internally coherent, technocratic expertise came about both amid and in response to important challenges from outside and from within the juridical field.

Outside, the same organizational and epistemological transformation that began recasting law in the 1870s also bred major departures in social science that challenged traditional legal discourse with new “social vocabularies.”\textsuperscript{75} The emerging social science disciplines “understood theory as provisional, relative to the current economic and technological

\textsuperscript{71} In 1905 Joseph H. Beale observed, “The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law.” Joseph H. Beale, Jr., The Development of Jurisprudence During the Past Century, 18 HARV. L. REV. 271, 283 (1905) (emphasis added). James Barr Ames, like Beale, described Langdell’s method as “inductive.” JAMES BARR AMES, The Vocation of the Law Professor, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354, 362 (1913); see also id. at 364, 366-68. Redlich, however, questioned the description’s accuracy. Induction was a means to determine the existence of unobservable but fundamental, naturally-occurring, principles through the observation of historical and statistical facts. Redlich argued that Langdell was actually engaged in a distinct exercise—“the logical and systematic development of all fundamental norms of the common law out of the original sources of this law.” REDLICH, supra note 70, at 55. This was “not induction, but empiricism.” Id. at 57.

\textsuperscript{72} STEVENS, supra note 68, at 38.

\textsuperscript{73} Id. at 41.

\textsuperscript{74} Id. at 41-42. Thomas Grey describes Langdell’s doctrinal model as “a vast discursive structure that came to dominate legal education and to greatly influence the practical work of lawyers and judges.” Thomas Grey, Langdell’s Orthodoxy, 45 U. PITT. L. REV. 1, 5 (1983); see also id. at 1-6.

This perspective on social development clearly indicated "that social conventions were too variable historically to be captured in political, legal, and economic doctrines held to be timeless and invariant, applicable without regard to ever-changing circumstances." Thus, as long as the reproduction of legal knowledge remained centered on the rote repetition of essentialist tropes—the antebellum era's "fixed laws of history and nature"—law rendered itself dismissible as merely "a rather haphazard craft tradition," its educational centers (whether the law office or the old model schools) a site of inculcation in a mystery rather than of disciplined inquiry.

Lester Frank Ward elaborated the critique in his *Dynamic Sociology, or Applied Social Science*. He scorned the three traditional "learned professions," law, theology, and medicine, for their unscientific thought, unawakened intellect, derivative reasoning, and ignorance of social realities: "How utterly incompetent . . . are the men who have always held and still hold the reins of power in society!" Ward proposed "a new system of governance" to replace them, expressed in regulatory conventions premised on "reliable ways of publicly monitoring the actual effects of incentives in achieving social purposes"—that is, applied social science. Ward argued that law should henceforth be produced in legislatures re-imagined as sites for the inculcation and application of the new social knowledges. Every legislature must become "a polytechnic school, a laboratory of philosophical research into the laws of society and human nature;" every legislator "must be a sociologist."

As social scientists attempted to remove the state to their own turf by re-theorizing law as consequential upon their new positivist methodologies, law was simultaneously reinventing itself as an autonomous area of expertise with a distinct professional identity. A trained profession newly dedicated to Langdellian legal science as a disciplined restatement of law was the newly formed juridical field's retort to the social-scientific critique of the craft tradition.
Inside the world of the law, the production of the new disciplinary order was a fiercely contested process. Opposition came in several forms. First, traditional craft elites disdained the new conception of law conveyed in Langdell’s pedagogy. The case method’s concentration on judicial decisionmaking departed radically from the paradigmatic antebellum representation of law as a revelatory “science of principles.” Pre-war lawyers had stressed the immanence and immutability of principles precisely to deny that judges made law rather than “discovered” it.\(^{85}\) The antebellum paradigm remained highly influential throughout the second half of the century.\(^{86}\) Law, Joel Bishop held in 1888, had been engraved by God on the nature of man—“a beautiful and harmonious something not palpable to the physical sight, yet to the understanding obvious and plain, called principles.”\(^{87}\) In 1891, the American Bar Association’s Standing Committee on Legal Education launched a strongly worded critique of case method in the name of principles: “We deprecate the use of cases alone without reference to the fundamental principles of the law of which we believe them to be in all cases the application.”\(^{88}\) Case method was erroneous, because “the cases are not the original sources of law.”\(^{89}\) In 1900, one of the ABA’s founders, Yale Law School’s Simeon Baldwin, took to the Harvard Law Review to denounce once more the use of case method in legal education: “No science can be learned purely from particulars. The universals must be studied to discover what the particulars mean and whence they sprang.”\(^{90}\) Tracing doctrinal development through...
cases was neither interesting nor profitable; students could better learn the rules from textbooks. Reported cases were merely theatrical performances, and their endless multiplication rendered them useless as a guide to law. "The tendency of the bench, in all appellate courts, is more and more to recur to fundamental principles." Principles—coherent, structured, fundamental—underpinned law's architecture. "They must stand in order in the chambers of [the student's] mind, ready to come at call."

Baldwin's campaign against the case method proved unavailing. Nevertheless, as the new pedagogy spread beyond Harvard, the larger conception of law implicit in Langdell's method was questioned within the expanding law schools. Langdell was not vitally at odds with his scholarly peers in his general approach to law study. Investigation of cases yielded data from which students could derive generalizations about law's structural composition. Repeated observation permitted generalizations to harden into rules that would guide the outcome of future legal events. Langdell, however, was insistent on fashioning an epistemological separation between law and jurisprudence—to separate rigor from speculation, rule from motive, empirical from normative conclusion. The study of jurisprudence did not "specially concern lawyers or those intending to become lawyers, but other portions of the community... those aiming at public life or a high order of journalism."

The chief business of a lawyer "is and must be to learn and administer the law as it is; while I suppose the great object in studying jurisprudence should be to ascertain what the law ought to be." Although the two pursuits might seem "of a very kindred nature, I think experience shows that devotion to one is apt to give more or less distaste for the other."

Contemporaries were much less willing to engage in the same epistemological break with the nineteenth century, to relocate law's meaning and justification in the sheer rigor with which its capacities were taught and practiced rather than in the normative universals it had customarily invoked. They found law's aesthetic by yoking it to something other than itself—to a religious metaphysic that proclaimed legal order a manifestation of a higher divine order; to a secular morality that grounded law in social mores; to evolving custom; to historical inevitability; to "principles of 'ethnic spirit'... revealed through the

91. Id. at 261.
92. Id.
93. Letter from C.C. Langdell to T.D. Woolsey (Feb. 6, 1871) (in the Woolsey Family Papers, Series I, Box 23, folder 433, Yale University Library, Manuscript Division), quoted in LAPIANA, supra note 45, at 77.
94. Id., quoted in LAPIANA, supra note 45, at 77.
95. Id., quoted in LAPIANA, supra note 45, at 77. See generally Grey, supra note 74.
historical study of the nation and its dominant racial group”;

![Image](https://via.placeholder.com/150)

96 even to “the universe . . . the infinite” and “its unfathomable process.”

97 This impulse to seek ultimate legitimacy in normative discourse clashed with the Langdellian move to give the field command of its own legitimacy by founding law’s meta-character on the quality of its internal practices—rigorous consistency in the articulation and application of an expertise.

Quarrels over law’s aesthetics extended beyond intellectual disputes over how the juridical field’s authority might be justified and defended. These were vital struggles over the distribution of authority within the field itself. As Beale recognized in 1905, Langdellian pedagogy had reinvented the law school not just as the only appropriate locale for education and training in law, but as the default locale for authority in legal interpretation itself.98 In particular, the case method’s systematic and critical analysis of legal materials implied a relative displacement of the practitioners—jurists and bar elites—who had dominated the channels of authoritative pronouncement for most of the nineteenth century, in favor of a new professionalized professoriat. Some of Langdell’s peers were unwilling to go along. Langdell’s Harvard colleague John Chipman Gray thought Langdell’s indifference to traditional authorities astonishingly arrogant. His conception of law and legal education showed “contempt” for juridical elites and “flouted the opinion of the profession at large.”

Cases were decided on the reported facts. Analysis of cases should not substitute the pedagogue’s critique for the facts, or the pedagogue for the juridical actor, in determining the law “which actually obtains.”100 It was “the opinions of judges and lawyers as to what the law is” that qualified as “the law.”101 A faculty of professional academics without experience of practice would mislead their students by substituting “intellectual gymnastics” for the law.102


97. Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 478 (1897).

98. Beale, supra note 71.


100. Id.

101. Id.

102. Id.; see also Siegel, John Chipman Gray, supra note 96, at 1532-35. Ames thought Gray was right about what had been, but wrong about what would be. Professional legal academics would create law in the future just as judges and lawyers had in the past. “The field of the law-professor’s activity is not limited to his relations with his students, either in or out of the classroom. His position gives him an exceptional opportunity to exert a wholesome influence upon the development of the law by his writings.” See AMES, supra note 71, at 364. Judges were not specialists; professors were. Professors'
The same *cri de coeur* came from Oliver Wendell Holmes, expressed most famously in his aphorism, "the life of the law has not been logic: it has been experience." For Holmes, law was "what the courts ... do in fact." The task of legal scholarship and legal education was hence to equip future lawyers with the means to predict what judges would do. "[L]awyers[... ] ... only concern is with such rules as the courts enforce." Only that which was "enforced by the procedure of the courts" was law; hence, only that was "of practical importance to lawyers." A pedagogy that subjected the opinions of judges and lawyers to the law school's autonomous and critical appraisals of legal materials taught not law but hermeneutics. To study law was to be groomed for a profession whose business was "to appear before judges" when necessary, and otherwise to advise clients how best to order their affairs so as to avoid appearing before judges. The key to professional effectiveness, whether in appearance or in successful avoidance, was "prediction of the incidence of the public force through the instrumentality of the courts." Even more emphatically than Gray, then, Holmes placed the judge at the determining center of the juridical field, stressed that the first necessity for legal professionals was to understand the judge, turned education into an exercise in predicting what the judge would do, and sniped at Langdell's conceit in thinking otherwise.

Holmes the pragmatist, the proto-realist judge, has provided generations of liberal legal scholars inclined to despise Langdell's pedagogy with a hero-alternative—a "representative man, an iconic figure" who measures up to their preferred conception of "the legal profession ... the judicial function, and the role of the public intellectual." But the core conclusions might not be accepted, but Ames was confident that professorial treatises were destined "to render invaluable service to the judge and ... to exercise a great influence in the further development of our law." Id. at 367. Law professors should exercise no less influence, Ames added, over the work of legislatures. Id. at 368.

104. Holmes, supra note 97, at 461.
107. Holmes, supra note 97, at 457.
109. Given Holmes's career choices, it would have been odd had he thought any differently. As Grey notes, it was "the professional perspective" that led Holmes "to think in terms of prediction." Grey, supra note 108, at 830. After fighting in the Civil War, Holmes had earned a degree from the (pre-Langdell) Harvard Law School and then practiced in Boston. After publication of *The Common Law*, Holmes accepted an appointment to the Harvard faculty, but resigned after only a year to begin a fifty-year judicial career, the first twenty years on the Massachusetts Supreme Judicial Court, becoming Chief Justice in 1889, and the next thirty on the U.S. Supreme Court. In a sixty-one year professional career, Holmes thus spent sixty years as a practitioner or judge, and one as an academic.
developments that created the modern juridical field in the late nineteenth century were not addressed to any such romantic clash. Rather, the late nineteenth-century revolution in the field was an institutional project to reorganize the field’s capacities so as to take command of the processes of rule production and to set the terms on which those processes operated.

Langdellian pedagogy transformed law craft by creating an integrated and internalized relationship between the use of law, the professionalization of law, and the character of law. Langdell’s timing was crucial. The social and economic changes accompanying rapid industrial growth generated exponential increases in resort to law and in “market demand for lawyers,” which the late nineteenth-century law school answered with “a kind of mass production of lawyers that the former and time-honored method of [office] training could not begin to approach.” The move from law office apprenticeship to the law school (from the tutelage of the practitioner to the tutelage of the professional scholar) as the strategic point of skills training industrialized law and legal education. This trend was part of a more general move in America away from apprenticeship as a way to inculcate skill and toward widespread experimentation with vocational education. This project in turn provided the opportunity for the larger reinvention of law as an authoritative, technocratic, professional discourse and enterprise. Langdellian pedagogy reconstituted both the production of lawyers and the production of law—rules—as scientifically managed processes; it reinvented the institutional and conceptual apparatus of the juridical field by creating new protocols of investigation and new institutions—law schools—at its center. At the heart of these innovations was “an attitude of

(Shaw W. Gordon ed., 1992); see also KAHN, supra note 55, at 101 (Holmes is “the paradigmatic image of the American judge”). For a careful exploration of Holmes as the symbolic exemplar of juridical authority as constructed in the American field, see Robert A. Ferguson, Holmes and the Judicial Figure, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., supra, at 155.

111. Holmes did not criticize Langdell because they were fundamentally at odds. Their analyses of law were in fact quite similar. See Grey, supra note 108, at 816-17. Rather, Holmes and Langdell were engaged in a professional war to control the turf of authority in the juridical field from, respectively, the bench and the academy. Holmes’s imagery made it clear that among other things, masculinity was at stake. He wrote with reverence for action, and with contempt for academics: “the place for a man who is complete in all his powers is in the fight”; professors and men of letters were effeminate, emasculated, and they “give up one-half of life that [their] protected talent may grow and flower in peace.” Id. at 839 (quoting OLIVER WENDELL HOLMES, Law in Science and Science in Law, in COLLECTED LEGAL PAPERS 210, 224 (1920)); see also Christopher L. Tomlins, A Mirror Crack’d? The Rule of Law in American History, 32 WM. & MARY L. REV. 353, at 394-96 (1991) (book review). On the identification of protection with “feminization” in the legal culture of the turn of the century, see BARBARA Y. WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920 (2001).


questioning, of research, of careful investigation... of seeking for exact knowledge and then shaping action on discovered facts," and systematic "case" study, gaining purchase on core subjects through the use of discrete instances to pick apart and examine accepted practices, strip them to their constituent details, and reconstitute them in new ways. The goal was to employ education and training as deliberately conceived and deliberately managed processes that could guarantee a monopoly of appropriate and useful "skills" responsive to contemporary society's transforming demands to a discrete professional group. The extraordinary and sustained diffusion of this model suggests its power. Robert Gordon suggests that Langdell's innovations were so profoundly influential because they established a translocal template that produced interchangeable law and interchangeable lawyers. What they also established, of course, was the ascendancy of the academy in the production of law, a development at which John Chipman Gray sniffed archly: "I can quite believe that in an industrial school a man of small experience may often be a better teacher than one of much larger practice... But in law the opinions of judges and lawyers as to what the law is are the law."

In the late nineteenth and early twentieth centuries, when the Langdellian law school was establishing the terms of its own, and law's, professional and methodological differentiation from other subject areas and modes of inquiry, it was doing little that was different from other sectors of the university, or of society at large. Langdell's law was no more obsessively differentiated or technically formalistic than other modes of contemporary thought. As we have seen, inquiry in general

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114. SUB-COMM. ON ADMIN., AM. SOC'Y OF MEC'CH. ENG'RS, THE PRESENT STATE OF THE ART OF INDUSTRIAL MANAGEMENT (1912), quoted in DANIEL NELSON, FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT 198 (1980). Taylor called his discrete case studies "object lessons," his foremen "teachers," and himself "an industrial educator." See KORVER, supra note 113, at 59. Langdell himself is famous for his references to the law library and its case texts as the "workshop" of professor and student alike. See Schweber, supra note 43, at 458-59. The metaphor is also consonant with Lester Frank Ward's contemporary invocation of the legislature as a "polytechnic school" and a "laboratory," and of legislation as invention. See 1 WARD, supra note 80, at 37, 38. More generally, Paul Carrington has emphasized the centrality of technocratic training to the emerging late-century definition of professionalism, and the transformative effect of the demand for technocratic training on American universities: "They became in important part what we now recognize as the factories of human capital run by educational entrepreneurs." PAUL CARRINGTON, HAIL! LANGDELL!, 20 LAW & SOC. INQUIRY 691, 704 (1995). In 1870 "higher education was about to become a major national industry." Id.


117. REDLICH, supra note 70, at 17; see also Schlegel, supra note 84, at 313-14, 319-20. Dorothy Ross observes: "The mainstream social science that took shape in the United States from the 1890s to the 1920s was ahistorical and technocratic, anxious to recreate the historical world in accord with the demands of scientific prediction and control." Dorothy Ross, Modernist Social Science in the Land of the New/Old, in MODERNIST IMPULSES IN THE HUMAN SCIENCES, 1870-1930, at 171, 171 (Dorothy

https://digitalcommons.law.yale.edu/yjlh/vol16/iss2/2
had fragmented under the impact of academic reorganization; the disciplinary differentiation then established would continue throughout the following century. In legal scholarship, this differentiation would continue to be evident, even to the present, and even in the work of those who regarded themselves as critics of the system that Langdell had founded. Law's difference, like that of other disciplines, established the point of departure for acolyte and antagonist alike.\textsuperscript{118}

The late nineteenth-century revolution in American law, then, is a very clear instance of a systematic endeavor to establish new "rules for the production of the rules." The new rules were internalized within the juridical field, locating law's legitimacy as a source of rules in its own rigorous professionalized practices. As Thomas Grey has put it, here was "a set of ideas to be put to work from inside by those who operate legal institutions... contain[ing] an accurate account of legal institutions, a method for operating them, a creed for legal professionals, and a justification of the institutions for outsiders."\textsuperscript{119} The revolution modernized the U.S. juridical field, and for the first time established a fully articulated relationship among its components: (1) specialized schools controlling their own admissions and credentials and training participants in the uses of an autonomous technical discourse; (2) a profession wielding an expertise, overseeing its members' qualifications and generally mediating access to juridical institutions; (3) a judiciary whose product was the prime, indeed virtually exclusive, object of attention—the raw material from which legal expertise was constructed; and (4) an academic elite that defined its membership by the autonomous knowledge it had invented and that claimed for that knowledge interpretive authority over the juridical field's production of legal rules. The revolution was astonishingly successful. It was the signal event in "the structural history of the creation and production of national legal practices" in America.\textsuperscript{120} Its imprint defines the U.S. juridical field to this day.

\textsuperscript{118} Carl Landauer writes: "Despite the interventions of Legal Realism and Critical Legal Studies, the case-law centeredness of legal scholarship has persisted." Carl Landauer, Social Science on a Lawyer's Bookshelf: Willard Hurst's Law and the Conditions of Freedom in the Nineteenth-Century United States, 18 LAW & HIST. REV. 59, 60 (2000). John Henry Schiegel writes of the first of those interventions that "Realism... was an antiformalism that preached, and occasionally delivered evidence of, the importance of an empirical understanding of the workings of the legal system... yet somehow Realism always returned to case law analysis." JOHN HENRY SCHIEGEL, AMERICAN LEGAL REALISM AND EMPirical SOCIAL SCIENCE 25 (1995). For a more severe assessment, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10, 65-159 (1995). On Critical Legal Studies, see infra text accompanying notes 307-309.

\textsuperscript{119} Grey, supra note 74, at 6; Gordon, supra note 115, at 70-82, 100-10.

\textsuperscript{120} Dezalay & Garth, supra note 4, at 311.
III. HISTORY AS EXPLANATION, AND AS JUSTIFICATION

Considered as an intellectual resource applicable to the explanation of human activity, history generally comes to us in two forms: history that is generated within a field of practice as a form of self-analysis and self-understanding; and history generated from outside, taking both the field of practice and its self-generated history as the object of analysis. In the juridical field, history in the first mode (historical jurisprudence, historical legal science, "historism"¹²¹) was a noticeable presence in the legal-intellectual environment of later nineteenth-century America. Indeed, throughout the nineteenth century (in England and particularly in Germany, but in America not on any significant scale until after the Civil War) history was of major importance as a resource applied in juridical inquiry into the nature of law and, more generally, into the proper course of development for the juridical field as a whole. History in the second mode, systematic inquiry into the phenomena of the juridical field, is a rather more recent development. In the United States, the history of law did not begin to take on the methodological appurtenances appropriate to a subject in itself in any deliberate way until after World War II. And only since the mid-1970s has it begun to become a subject for itself—a mode of investigation and critical analysis undertaken from a disciplinary standpoint that makes the juridical field and its self-understanding the object of inquiry.

In this Part, I consider in turn these two positions for history: as a conceptual participant in the development of nineteenth and twentieth-century professional jurispractices;¹²² and as a critical commentary on those practices. How did history in the first form figure in the processes described in Part II? What is the relationship between historical jurisprudence and legal history? What has American legal history told us about modernity's juridical field that is distinct from what that field tells us about itself? These questions lead on to the larger query: how has history contributed to the production of the rules? How has history figured in the processes by which the juridical field has attempted, largely successfully, to control the terms of rule production and thus of its own legitimacy?


¹²² The term "jurispractice" is taken from Katherine Hermes, "Justice Will Be Done Us": Algonquian Demands for Reciprocity in the Courts of European Settlers, in THE MANY LEGALITIES OF EARLY AMERICA, supra note 16, at 123, 127. Hermes uses "jurispractice" to convey a sense of legal mentalité—the mingled thought and action by which ordinary people construct law. Here I am using the term to refer to the professional legal mentalités constructed in the juridical field.
A. Historical Jurisprudence

Conceptually, history was an important participant in Langdell’s revolution. Langdell himself referred to case method as a means to understand that law was “a growth extending . . . through centuries” to be traced and mastered “by studying the cases in which it is embodied.”123 His colleague, James Barr Ames, credited Langdell with “great powers of historic insight,” and placed knowledge of legal history and of the law’s historical development at the center of Langdell’s intellectual achievements.124 Ames himself, Joseph Henry Beale, James Bradley Thayer and other key members of the new Harvard faculty wrote histories and thought of themselves as legal historians. Their work refracted law through the lens of inductive method and the investigation of development over time. Their “institutional-evolutionary studies in legal history flourished . . . in the 1880s and ’90s.”125

History in this evolutionary mode complemented technical and doctrinal exegesis in the new law schools. As case method strengthened its hold, legal scholarship’s historical aspect came increasingly to be dominated by empirical demonstration of the processes of common law evolution (the attenuation of “archaisms and anomalies,” the growth of “generality and internal consistency”126), whereby the common law became ever more amenable to categorization in a structure of general principles derived from leading cases.127 As such, history played the essential but auxiliary role of outlining the path to the present—“a subcontractor whose job was finished once it had laid the foundation of principles.”128 Neither as a critical philosophy nor as a discipline did history as such establish sufficient presence in the juridical field to have any sustained intellectual impact in determining the course of the field’s pedagogical path.129

In this elision of effective historical analysis one may perceive strategic

123. CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at viii (Boston, Little, Brown & Company 1871).
124. JAMES BARR AMES, Christopher Columbus Langdell, in AMES, supra note 71, at 467, 476
127. See Gordon, supra note 125, at 15-17.
128. Gordon, supra note 126, at 1026.
129. On history’s evolutionary role and auxiliary status in progressive social science, see ROSS, supra, note 40, at 149-71; and Ross, supra note 117, at 171. David Rabban has recently argued that legal history was flourishing in late nineteenth-century legal scholarship and that it offered a richer and more sophisticated intellectual analysis of law than previous scholars have allowed. But his analysis of the era’s historiography—that it was internal, evolutionary, organic and harnessed, in the hands of figures like James Bradley Thayer and Oliver Wendell Holmes, to the task of improving the law by exposing the roots of “anomalies and confusion”—departs in no substantive aspect from that offered by previous writers. See David M. Rabban, The Historiography of The Common Law, 28 LAW & SOC. INQUIRY 1161, 1163-66 (2003).
advantage: the juridical field’s internalization of controls over law’s epistemology. Turning history into a prolegomenon to the present rather than deeply implicated by all possible explanations of the present also elided the problem of adopting a historical standpoint in an America where the “prehistoricist cast of mind” grounded in the antebellum era’s revelatory parsing of “enduring truths of religion and reason” still held considerable sway, not least in legal scholarship. The American Revolution had jerked America clean out of historical time to which, even a century later, it was only slowly returning.

In Europe, in contrast, “awareness of the individuality of different cultures and histories” was far more pronounced. That awareness was reflected in a more active resort to history as a mode of explanation of law. History on a mythological scale supplied law with meta-character. But history was also a source for theories of legal formation. As a result, within the juridical field history became an important participant in the field’s strategies for accommodating change.

The European historical jurisprudence most compatible with American tendencies to prehistoricism was that of Sir Henry Maine. Although “widely regarded as the epitome of historical jurisprudence,” Maine’s Ancient Law was really no more than an English mid-century sideshow to the main continental event. It was nevertheless highly influential. Maine wrote Ancient Law to counter “unfruitful” Benthamite and Austinian positivism by demonstrating law’s transcendent and autonomous developmental impulse. Ancient Law airily traced the “movement of progressive societies” through a series of stages that represented social development as “the gradual dissolution of family dependency and the growth of individual obligation,” realized, in law, by the substitution of the individual for the family “as the unit of which civil laws take account.”

130. Ross, supra note 32, at 911, 921. For evidence of the continuing influence of those enduring truths, see Siegel, John Chipman Gray, supra note 96; and Siegel, Orthodoxy, supra note 96.

131. See Ross, supra note 32, at 911-16.

132. Id. at 911.


134. See Ross, supra note 32, at 919. Ross traces the vast difference between American and European historical consciousness to the impact of an enlightenment revolution that succeeded (the American) against that of one (the French) that failed. Id. at 911-14; see also PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 51-98 (1980).

135. LaPiana, supra note 46, at 536.

and the consequent replacement “of reciprocity in rights and duties which have their origin in the Family” with “tie[s] between man and man” founded on contract. 137 “We seem to have steadily moved toward a phase of social order in which all these relations arise from the free agreement of Individuals,” Maine wrote, and proceeded thence to his best known aphorism: “the movement of progressive societies has hither to been a movement from Status to Contract.” 138 Roscoe Pound later pointed out the fallacy in Maine’s seductive aperçu: “[I]n truth the dogma of Sir Henry Maine is a generalization from Roman legal history only.... It has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it, unless, indeed, we are progressing backward.” 139 Nevertheless, Pound conceded, Maine’s theory “was so thoroughly adapted to the individualism which characterized the traditional element of our law for other reasons... that it soon got complete possession of the field.” 140

*Ancient Law* was a convenient history, for it did not actually require anyone to think historically. It was a metaphysical history “formulated... as axiomatic propositions, which had only to be stated to be immediately accepted,” 141 that collapsed “the whole past... into a single stage which progress was leaving behind.” 142 As such *Ancient Law* was highly compatible with the general indifference to historical time that, at mid-century, reigned in America. In its antagonism to Benthamite positivism it was also highly compatible with the defense of common-law jurisdiction against legislation that, we have seen, was so crucial to the shape of the modern American juridical field. 143 Americans seized on *Ancient Law* both idealistically, as the prolegomenon to *their* present, and instrumentally, “as a justification for exalting custom above positive law and for claiming that custom supported laissez-faire.” 144

The true home of European historical jurisprudence was, however, not imperial England but fragmented Germany. German historical jurisprudence had emerged substantially earlier than the Anglophone variety and in altogether different circumstances—out of political necessity to start thinking about specifically German history, rather than out of a breezy whiggish design to restate all history in terms of concepts,

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137. *Id.* at 168-69.
138. *Id.* at 169, 170.
140. *Id.* at 155; see also STEIN, supra note 134, at 96-97.
141. STEIN, supra note 134, at 97.
142. ROSS, supra note 40, at 16.
143. For comments symptomatic of American common lawyers’ loathing for Bentham, see Beale, *supra* note 71, at 277, 282-83. Beale thought Bentham “insane.” *Id.* at 277.
144. LaPiana, *supra* note 46, at 536.
values or norms most convenient to one's own national, continental, or imperial desires.¹⁴⁵ Little noticed in the United States until after the Civil War, German historical jurisprudence then became an important influence in the debates that constructed the modern American juridical field. It would be less important, however, to the field's animating ideology.¹⁴⁶

B. The German Historical School

The scholarly origins of the German Historical School are found in the Roman law studies of Friedrich Carl von Savigny (1779-1861). Following in the wake of Kant's critique of eighteenth-century natural law reasoning, Savigny defined law not as an expression of immutable substantive principles of justice located in nature or divine will and thus "right beyond question," but instead as a formal rule system, the purpose of which was to resolve conflicts among different realms of individual autonomy. Savigny idealized Roman law as the most complete expression of that formal rule system.¹⁴⁷ To this, however, Savigny brought a consciousness of history, not as a mere "collection of examples" but as "the living connection, which links the present to the past," that located law's ultimate social significance—and hence ultimate legitimacy—beyond the operation of formal rule systems, in national character or Volksgeist, where it was "inseparably interwoven with the total historical development of a people."¹⁴⁸

Savigny thus conceived of law "not as a consciously created, legislative product"—abstractable, codifiable, improvable, reformable—but "as the result of a people's historical and cultural experience, as a

¹⁴⁵. As Georg Iggers puts it, there is missing in the German tradition the conscious attempt so frequent in nineteenth-century nationalism in Italy, France, America, and Britain, which identifies national aspirations with universal human values. . . . Every state is unique, embodying a particular and inimitable spirit and ethics. German nationalism is thus much more historically oriented, far more devoid of an idea that transcends the political or ethnic nation.

Iggers, supra note 121, at 9; see also id. at 8, 11.

¹⁴⁶. See Pound, supra note 139, at 154-55; Beale, supra note 71, at 283; Mathias Reimann, The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, 37 AM. J. COMP. L. 95 (1989) [hereinafter Reimann, Historical School]; Mathias Reimann, Nineteenth-Century German Legal Science, 31 B.C. L. REV. 837, 837-39 (1990) [hereinafter Reimann, German Legal Science]; Stefan Riesenfeld, The Influence of German Legal Theory on American Law: The Heritage of Savigny and his Disciples, 37 AM. J. COMP. L. 1 (1989). Luther Cushing lectured on German historical jurisprudence at Harvard in 1849, and Michael Hoeflich has traced other antebellum links between German jurisprudence and American jurists. But with rare exceptions these appear to have been limited to purely personal contacts. As Hoeflich says of Story, there is evidence of awareness and admiration of German jurisprudence, but not of any close acquaintance or influence.


¹⁴⁷. Matthias W. Reimann, Holmes's Common Law and German Legal Science, in The Legacy of Oliver Wendell Holmes, Jr., supra note 110, 72, 81-83.

¹⁴⁸. Iggers, supra note 121, at 66.
silently growing body, expressing itself in the community’s convictions." Savigny’s conception of national legal structure grounded on Volksgeist forestalled tendencies to resort to law reform through codification or legislation. In place of legislation Savigny exalted the capacity of jurists, who were responsible for “the more technical parts of law,” and whose life’s work was to render explicit the rules immanent in the customs and practices of the Volk. Tracing their ideas historically traced the organic development of law.

Simply to characterize the Historical School according to its theory, however, neglects the school’s most important formative context, German history itself. Lashed throughout the eighteenth century by waves of universalist reform—of princely Absolutism and the enlightened thought that entered its service and codified its law; of the French Revolution; of Napoleonic occupation and the introduction of the Code Napoléon or Code Civil in the Rheinland—German intellectuals in the post-Napoleonic period sought sanctuary from these failures of the Enlightenment in a return to the particularities of their own history. Some looked only as far as solidification of the Hohenzollem Obrigkeitstaat (state of authority) of the Prussian Reform Era. Some, however, looked further—to “still-surviving old corporate traditions and institutions of the Middle Ages and the Reformation . . . revered in the romantic German society that emerged after the French occupation.”

The Historical School was born in the debates of the Romantic era that began with the War of Liberation. Its earliest manifestation was Savigny’s critique of codification, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (On the Vocation of our Time for Legislation and Legal Science) published in 1814 in response to Anton Thibaut’s pamphlet Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland (On the Necessity for a Common Civil Law for Germany), which had appeared a few months earlier. Thibaut’s

149. Reimann, supra note 147, at 83.
150. STEIN, supra note 134, at 60.
151. Id. at 60-63; Reimann, German Legal Science, supra note 146, at 853-58.
152. Throughout the nineteenth century, historians in the German tradition “stress[ed] the intransferability of political institutions,” arguing that every state was “unique, embodying a particular and inimitable spirit and ethics.” HEGERS, supra note 121, at 9. See generally id. at 7-16, 26-43.
pamphlet had called for a comprehensive revival of early modern German legal culture and its embodiment in a new and exhaustive civil code as a means to unite the fragmented German-speaking lands in one ordered nation (as Napoleon had temporarily united the princely states of the occupied Rheinland in the Rheinbund under the Code Civil). Though a Romanist, Thibaut saw no place for Roman law in his code. The Corpus Iuris had been “the work of an alien nation.”\textsuperscript{157} The privilege accorded the pronouncements of the scholar-jurist in the early modern European Roman law tradition had interposed further levels of alienation between the Volk and the law. Thibaut “wished to see the rule of lawyers learned in the Roman-Canon tradition at an end . . . . [He] denounced Roman law precisely because its rule entrusted the well-being of the German people to scholars.”\textsuperscript{158} A code for Germans had to embody the Volks-Ideen of Germans.

Savigny’s response was both a defense of the legitimacy of the German Roman law tradition and of its scholarly institutions, and a critique of codification. Since the introduction of Roman law in the Middle Ages, Roman law and German legal culture had become indistinguishable. “German jurists had expended their scholarly energies upon [Roman law] for centuries; accordingly, it had become effectively German.”\textsuperscript{159} Hence Thibaut’s distinction between Roman law and true German law had become essentially meaningless. In any case, historical knowledge of German custom had not advanced far enough to allow the formulation of a distinct German code that could possibly “fit” the nation better than Roman law. The complexity and variety of local practices and regional jurisdictions among the different states, territories and Ländc, and the lack of real knowledge about them, rendered the idea of exhaustive codification an absurdity. Enlightened codification abstracted human difference. It had been a “great human overreaching,” its products “poorly suited to the societies in which they had been introduced.”\textsuperscript{160} Savigny did not dispute the existence of opportunities to create German unity through law, but thought legal unity dependent upon a gradual process of investigation and recovery of custom in all its diversity, and refinement of its Roman law embodiments. This process was in turn dependent not upon abandonment

\textsuperscript{156} Whitman, supra note 153, at 102-04; Gale, supra note 153, at 128-29, 130-31. Savigny’s Vom Beruf was in fact a fragment of a major work on Roman law that had been in preparation for some years.

\textsuperscript{157} Thibaut, supra note 155, at 69, quoted in Whitman, supra note 153, at 105.

\textsuperscript{158} Whitman, supra note 153, at 104-05. Thibaut’s was an “enlightened” romanticism, however: first in the advocacy of codification itself; and second in allowing that the actual composition of his code would be the responsibility of scholar-experts learned in German custom and tradition. Gale, supra note 153, at 129.

\textsuperscript{159} Whitman, supra note 153, at 109.

\textsuperscript{160} Id. at 108.
but restoration and cultivation of the autonomous scholarly tradition of the pre-absolutist Empire situated in the only true institutional expressions of pan-German culture, the universities.\textsuperscript{161}

The Historical School that emerged from Savigny’s response to Thibaut and from his later writings thus placed Roman law—and particularly Roman law scholarship—at the center of German legal culture and made the scholarly profession of university-based jurists the key actor in the production of rules for the German juridical field. This emphasis on expertise was not counterposed to \textit{Volksgeist} as a point of legitimating origin. Rather it was a development from custom. “Roman law existed alongside custom. The main sources of prevailing custom were two: testimony of local witnesses and writings of university professors. As the romantics of the Historical School interpreted this state of affairs, \textit{Professoren} and \textit{Volk} together made law.”\textsuperscript{162} Savigny, however, gave little support to the revival of those pre-Absolutist institutions that had expressed most clearly the ideal of interactive lawmaking: the \textit{Aktenversendung} and the \textit{Spruchkollegium}.\textsuperscript{163} His universe was one much more of disciplined expertise developing law through a learned treatise tradition. “The \textit{Volk}, the original source of custom, had ceased to be the principal maker of law as culture evolved; jurists had accordingly stepped in and carried on the task of developing customary law.”\textsuperscript{164} Historical study of the Pandects and Roman history, and systematization of concepts and propositions—\textit{Pandektenwissenschaft}—became the means to refine the forms that gave expression to the \textit{Volksgeist} in legal activity.\textsuperscript{165}

The most forthright statement of the Historical School’s scholar-centered juridical field, or \textit{Juristenrecht}, came from G.F. Puchta. The greatest of \textit{Pandektenwissenschaft}’s exponents, Puchta was also the most uncompromising advocate of professorial lawmaking. “Puchta developed Savigny’s postulate of the role of jurists as the organs of the \textit{Volksgeist} into an account of the existing order and a philosophy for the future.”\textsuperscript{166} For Puchta, the common conviction of the profession, expressed in the

\begin{itemize}
\item \textsuperscript{161} \textit{Id.} at 108-09.
\item \textsuperscript{162} \textit{Id.} at 119.
\item \textsuperscript{163} \textit{Aktenversendung} describes the practice of sending a case to a law faculty for decision. The \textit{Spruchkollegium} was the body of the faculty that would make the decision. These institutions integrated law faculties into the structure of early-modern legal decision-making by giving them the function of providing final learned justice—Roman law impartiality—in disputes that local (customary) law could not resolve. Both revived to some degree in the nineteenth century. \textit{Id.} at 8-9, 34-36. Savigny gave little attention to these “practical” forms of scholarly lawmaking, and actively opposed the claims of judges that their decisions could constitute authoritative sources of law. “It was very important for Savigny . . . that the principal source of law not be prior court [or court-like] decisions but rather learned essays and treatises.” \textit{Id.} at 129.
\item \textsuperscript{164} \textit{Id.} at 120.
\item \textsuperscript{165} \textit{Id.} at 120-24; see also Reimann, supra note 147, at 83-84.
\item \textsuperscript{166} Whitman, supra note 153, at 122.
\end{itemize}
expertise of the scholarly jurist, was just as legitimate a basis for law as the common conviction of the Volk expressed in custom. Scholars "had a special responsibility to elaborate their gemeinsame Überzeugung [common conviction] into a national law. Indeed, they could serve the nation's lawmaking needs better than any other force, for through scholarly systematization and elaboration, they were able to transcend the merely 'receptive' and become 'productive.'”\(^{167}\) This severed the formal connection Savigny had postulated between juristic expertise and Volksgeist. Custom became practically irrelevant, expertise became the active means to every end, and the German Roman law tradition headed toward the deep abstraction of Begriffsjurisprudenz (the jurisprudence of concepts)—law in "true and pure form . . . a gapless system of abstract and thus timeless truth with no areas of uncertainty," driven by logic, unconnected to history or society, neutral and self-sufficient.\(^{168}\) This split the Historical School in two, as adherents of the Volksgeist abandoned Roman law for a specifically Germanic and Teutonic past that decried the historic adoption of Roman law as a "national disaster" that had "estranged the people from the law."\(^{169}\)

C. The German Historical School and the American Juridical Field

The Historical School established a method for the production of rules (the development of a science of positive law through historical inquiry into legal texts) and a structure of authority to control and implement those rules (Juristenrecht). Both, as we have seen, were key to the formation of the modern American juridical field. As a representation of academic professionalism, German academic law enjoyed enormous influence in the later nineteenth-century United States. Far more than England, Germany provided the American professoriat with the model of accumulated social capital it most desired to emulate—disciplinary organization, institutional prestige, social and intellectual status, recognized expertise. Juristenrecht, in particular, offered Americans a glimpse of the ultimate in scholarly authority. German legal science also provided the model of legal order systematized through learned analysis that the "practical sense" of the Anglophone common lawyer could not. As legal materials proliferated exponentially following the Civil War, control of their meaning through recognized and acknowledged expertise became urgent. In seeking to elevate both their position and their authority

\(^{167}\) Id. at 124.

\(^{168}\) Reimann, supra note 147, at 84. See generally id. at 83-84.

\(^{169}\) Id. at 84. See generally STEIN, supra note 134, at 63-64; Gale, supra note 153, at 140-42; Reimann, German Legal Science, supra note 146, at 868-70. On Savigny's balancing of German and Roman law, see Munroe Smith, Four German Jurists (pt. 1), 10 POL. SCI. Q. 664, 674-75 (1895).
within the American juridical field, therefore, American academic lawyers eagerly drew on the German law professor as their model.\textsuperscript{170}

Along with the general influence of German legal science and professional academic organization, historical jurisprudence clearly registered its presence on American jurists as a matter of substance. In a general way, Savigny's \textit{geschichtliche Rechtswissenschaft} (historical legal science)\textsuperscript{171} offered means to render as explicit hypotheses assumptions already implicit in common-law jurisdictions. As founded by Savigny and developed by Puchta, historical legal science complemented the claims about common-law adjudication that Langdell and others made: that it was historical, reflective of custom, but disciplined over time by rules of precedent and, increasingly, by authoritative expert pronouncement, and hence suited to scientific inquiry designed to detect tendencies toward uniformity that could be restated as principles, while uprooting anomalies.\textsuperscript{172} To that extent, German historical jurisprudence had a general influence over the American juridical field that extended even to the details of the case method.\textsuperscript{173}

But German historical jurisprudence was also (in both its Romanist and its Germanist incarnations) an account of causation—how the specific historical experience of a nation decisively influenced the law.\textsuperscript{174} In this aspect, as a fount of theory, its influence on American juridical discourse was more confined. Antebellum American jurisprudence had been wedded to a universalist philosophical location outside time, without any specific historical consciousness of its own. The scholars who after the Civil War turned to a more evolutionary jurisprudence still failed to establish a real place for historicist specificities in their accounts of origins: too many of them "viewed historical evolution as an inevitable process, driven by underlying principles that human beings could discover but not control."\textsuperscript{175} Here was no fundamental rupture with the antebellum era’s

\textsuperscript{170} Gordon, \textit{supra} note 125, at 14; Mathias Reimann, \textit{A Career in Itself: The German Professoriate as a Model for American Legal Academica, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920, at 165, 179} (Mathias Reimann ed. 1993).

\textsuperscript{171} Reimann, \textit{German Legal Science, supra} note 146, at 854.

\textsuperscript{172} And hence the phenomenon of evolutionary-institutional history at Harvard, already noted. \textit{See} Gordon, \textit{supra} note 126, at 1028.

\textsuperscript{173} This was certainly a connection and parallel that Joseph Redlich drew. \textit{See} REDLICH, \textit{supra} note 70, at 54-59.

\textsuperscript{174} As Munroe Smith wrote in 1895, Against the conception of "natural" law, universal in its dominion, eternal and unchangeable in its essence, progressive only in the sense that a fuller recognition and more perfect comprehension of its principles may be progressively attained, Savigny set up the conception of law as an historical product of the life of each people or nation, varying according to the national genius, developing in each nation with that nation's entire social development. Smith, \textit{supra} note 169, at 666.

\textsuperscript{175} Rabban, \textit{supra} note 129, at 1165. I should note that James Kloppenberg has pointed to the period from 1880 to 1910 as the beginning of a search for alternatives to "idealist and naturalist
inductive unpacking of "fixed laws of history and nature."¹⁷⁶

Historical jurisprudence’s preeminent late nineteenth-century American exponent was James Coolidge Carter, an elite practitioner and bar leader—in his day “possibly the most famous lawyer in the country.”¹⁷⁷ Carter had become acquainted with the German Historical School when a student at Harvard a decade before the Civil War, long before the Langdellian revolution. His later writings and speeches showed the influence. Carter, like Savigny hostile to codification and suspicious of legislation, grounded the law on the slow evolution of deep-rooted, uniform customs that disciplined conflicting interests without the need for grand rationalizing narratives. Law’s ultimate support, he argued, was public opinion, which set the national standard of justice. But Carter’s restatement of Volksgeist as “public opinion” did not reflect a democratic impulse. Public opinion stood in conceptual counterpoint to the active expertise of the professional scholar, but it was not determinative. The standard of justice,

though resting upon public opinion, does not rest upon the opinion of the present moment, or that of a few, or a class, or even the whole, when heated by passion or swayed by interest. It is that settled opinion which belongs to the state of moral and intellectual progress which the nation has reached, from which men may be occasionally diverted for a moment, but to which they will ever return.¹⁷⁸

The standard of justice was the standard of moral and intellectual

philosophies” in America, a rejection of the identification of truth with “eternity and necessity,” a move instead toward “a profoundly historical sensibility, imbued with the belief that meaning is woven into the fiber of experience, that becoming rather than being is the mode of human life, and that people make rather than find their values.” See JAMES T. KLOPPEMBERG, UNCERTAIN VICTORY, SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870-1920, at 3-4, 107-14 (1986). In American jurisprudence, the influence of this “radical theory of knowledge” can be detected among proto-realists such as Holmes and Pound. See DUXBURY, supra note 118, at 32-47, 54-63. Still, Duxbury detects in them no more than a partial shift from formalism. Id. at 10; see also infra text accompanying notes 194-209.

¹⁷⁶ ROSS, supra note 40, at xv.
¹⁷⁷ Grossman, supra note 96, at 578.
¹⁷⁸ JAMES COOLIDGE CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW 12 (New York, Banks & Bros. 1889) (emphasis added), quoted in Grossman, supra note 96, at 606. See generally Gordon, supra note 125, at 20; Grossman, supra note 96, at 604-26; Reimann, Historical School, supra note 146, at 103-05. As Reimann points out, id. at 105-18, Carter restated Savigny in a form more dogmatic, more extreme and more elitist than Savigny ever adopted. Law’s organicism was an absolute truth, hence no codification was ever legitimate; Juristenrecht was an absolute principle, hence the rule of legal expertise was not to be challenged from any source. As Carter put it,

[1]In the realm of the law the people at large are wholly incompetent to the task. The members of the legal profession alone are able to contrive the methods by which the administration of justice can best be secured. Sciences can be advanced only by the labor of experts, and we are the experts in the science of law.

CARTER, supra, at 60, quoted in Reimann, Historical School, supra note 146, at 111. Note, of course, that here Carter substitutes the legal profession for the legal academy as the key possessor of expertise in the juridical field.

https://digitalcommons.law.yale.edu/yjlh/vol16/iss2/2
progress, refined from the selfish passions and interests of the moment and represented best in the thoughts and actions of disinterested men of influence—men like Carter himself.

Others, practitioners and scholars both, also took up the tenets of the Historical School, although with varying degrees of consistency. William G. Hammond thought the historical theory of law "fundamental." Law emerged from historical experience where it was grounded in custom. But he persisted in seeing law also as reflective of "inviolable principles" that inhered "in the nature of things."179 John Norton Pomeroy, Thomas McIntyre Cooley, and Christopher Gustavus Tiedeman all embraced the idea of law "as an evolving product of the mutual interaction of race, culture, reason and events" and of historical study as a means to reveal law's social norms and objective principles.180 As individuals, the degree of their emphasis on this or that component of the historist complex varied. Cooley, for example, like Carter, presented law as "stable, yet imperceptibly evolutionary and adaptive," founded upon "a people . . . formed by race and habit into a holistic group" and reflective of "traditional and ancient wisdom more than novelty and current speculation."181 Tiedeman was more inclined to see law as influenced by social struggles than organic solidarities.182 Collectively, their jurisprudence, grounded in historicism, was highly resistant to interventionist state activity.183

Musing, in the early 1920s, on historical jurisprudence's significance, Roscoe Pound characterized its adherents as participants in a general attempt to resolve a central problem of nineteenth-century legal thought that one might characterize as the problem of reconciling the universalist impulse of the Enlightenment with human circumstance:

[T]he social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security.184

Nineteenth-century historical jurisprudence had attempted to join stability with adjustment in an evolutionary and organic theory of origins and

179. LaPiana, supra note 46, at 542.
180. Siegel, Historism, supra note 96, at 1435.
181. Id. at 1500, 1501.
182. Id. at 1521.
183. See LaPiana, supra note 46, at 537-44. The subtler of these advocates—notably Tiedeman—had studied in Germany.
184. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY I (1923).
adaptation that afforded little room for self-conscious rationalizing interventions.

It did not think of a law which had always been the same but of a law which had grown. It sought stability through establishment of principles of growth, finding the lines along which growth had proceeded and would continue to proceed... Law was not declaratory of morals or of the nature of man as a moral entity or reasoning creature. It was declaratory of principles of progress discovered by human experience of administering justice and of human experience of intercourse in civilized society; and these principles were not principles of natural law revealed by reason, they were realizings of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history.\(^\text{185}\)

Pound accepted that historical jurisprudence had been an advance on natural law reasoning in its attempts to accommodate social change. But to him, it was itself deeply vulnerable to change. Historical jurisprudence lodged legitimacy in custom and recognized that custom could change over time, but controlled change by privileging the organic continuity of the Volk, the homogenous people, over the “current speculation” that motivated codifiers and legislatures. For Carter, customs were uniform, “common modes of action,” superior to any other expression of legal intent.\(^\text{186}\) They were “the unerring evidence of common thought and belief... the joint products of the thought of all.”\(^\text{187}\) The authority of organic custom accreting over time, moderated by men of influence, would resolve conflicts among antagonistic interests. Law’s metaccharacter was simultaneously secured in law’s everyday usage. “In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each.”\(^\text{188}\)

Too much change, however, and historical jurisprudence would lose its explanatory capacities; the flood of heterogeneity would render the credibility of shared custom scant. And in fact, the influence of historical jurisprudence waned decisively in the early twentieth century, as massive social changes and the new social knowledges that accompanied them confronted the ideology of customs-in-common. Theories of gradual adaptation, of “progress” along lines laid down by organic custom, were quite irrelevant to this historical context. As John R. Commons put it,

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185. Id. at 9 (emphasis added).
186. JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION 143 (1907).
187. Id.
188. Id.
directly addressing Carter, “customs differ, customs change, customs are good and bad, and customs conflict. They are uncertain, complex, contradictory, and confusing. A choice must be made. Somebody must choose which customs to authorize and which to condemn or let alone.”

Out of this came the emergence of scholarly expertises and the wars among their elites, for whoever gained the authority to do the choosing—lawyers or social scientists; and, among lawyers, men “in the fight” or emasculated scholars—became the lawgivers, exercising “official discretion.”

Commons’s emphasis on authoritative human choice as the mediator of conflicting customs reflected a general contemporary turn from history to the demands of the present, to the embrace of “philosophies of action and creation” over reliance on past pattern. In America historical jurisprudence was too conservative, too dogmatic, impervious to anything other than slow organic change. Pound found it doubly wanting: “It assumed progress as something for which a basis could be found within itself . . . . It assumed that a single causal factor was at work in legal history and that some one idea would suffice to give a complete account of all legal phenomena.”

Pound’s critique of the Historical School was not original to Pound. Its seminal author was Rudolf von Jhering, a major influence upon Pound, who had also taught Tiedeman at Göttingen. Originally a Roman lawyer of the Historical School and “a devotee of Puchta,” Jhering became increasingly critical both of the Historical School’s founding assumptions about legal development, and of the Begriffsjurisprudenz that Puchta had extrapolated from those assumptions. Jhering rejected the Historical School’s emphasis on law’s national spirit and unconscious growth for a “practical jurisprudence” that sought to locate law much more explicitly in time and social experience and above all in conscious action and agency. Law’s development was not mere unconscious growth reducible to a system of concepts designed and manipulated by scholar experts. Rather, law was implicated in social life where it was begotten by

189. John R. Commons, Legal Foundations of Capitalism 300 (1924).
190. See note 111 supra.
191. Commons, supra note 189, at 300.
192. Pound, supra note 184, at 11.
193. Id. at 19 (emphasis added).
194. As Pound acknowledged in The Spirit of the Common Law, supra note 139, at 203-06. See also James E. Herget, The Influence of German Thought on American Jurisprudence, 1880-1918, in The Reception of Continental Ideas in the Common Law World, supra note 170, at 203, 208-09.
196. Whitman, supra note 153, at 214.
197. Smith, supra note 169, at 682.
social necessity in the struggles “between conflicting individuals and groups” to realize their ends. Struggles themselves advanced social interests. “These social interests can be viewed subjectively as the aims or desires of the group or the individuals in it, or objectively in terms of their social usefulness.” Egoistic action to secure a selfish interest performed a social purpose by advancing a claim that required adjustment and reconciliation with competing selfish interests. Through incessant interventions and adjustments, law and legal institutions created an optimal—if perpetually contingent—compromise among articulated social interests, expressed in state authority. At any given moment, then, law was “the totality of the conditions of existence of society that are assured by means of external coercion through the power of the state.”

In American jurisprudence, the closest equivalent to Jhering’s “practical jurisprudence” was pragmatism. American legal pragmatists did not dispense with history any more than Jhering did. Like him, however, they united it with a theory of social action. Law was “constituted of practices—contextual, situated, rooted in custom and shared expectations,” hence historical. But law was also instrumental, “a means for achieving socially desired ends.” The two themes show up together in Holmes’s The Common Law, although uneasily and unsatisfactorily, for The Common Law was “a mishmash” of current and recent ideas, not a synthesis; it described “the law’s historical growth, its legislative nature, expression of Darwinist struggle, Teutonic origin, positivist character, utilitarian goal to serve society’s needs and basic human drives, and so

198. Herget, supra note 194, at 206.
199. Id.
200. Munroe Smith, Four German Jurists (pt. 2), 11 POL. SCI. Q. 278, 292 (1896) [hereinafter Smith, Jurists (pt. 2)]; see also Reimann, supra note 147, at 101-03; Munroe Smith, Four German Jurists (pt. 3), 12 POL. SCI. Q. 21, 21-41 (1897) [hereinafter Smith, Jurists (pt. 3)]. See generally id. at 292-94, 278-309; Smith, supra note 169, at 685-92. All of these themes come together in the first pages of Rudolf von Jhering, The Struggle for Law (John J. Lalor trans., 1915), first published as Der Kampf Um’s Recht (Wien, Manz 1872), where Jhering writes that

The life of the law is a struggle,—a struggle of nations, of the state power, of classes, of individuals. All the law in the world has been obtained by strife.... The entire life of the law, embraced in one glance, presents us with the same spectacle of restless striving and working of a whole nation, afforded by its activity in the domain of economic and intellectual production. He contrasts this conception with “the Savigny-Puchta theory of the origin of the law” according to which “the formation of the body of principles of jurisprudence is effected by a process as unnoticed and as painless as is the formation or growth of language.” Id. at 1-2, 7, 14-15. It is worth noting that Der Kampf Um’s Recht appeared the year prior to Nietzsche’s essay On the Uses and Disadvantages of History for Life and implies in its account of law something of the same impatience and disquiet that Nietzsche felt at the “oversaturation of an age with history.” See Nietzsche, supra note 133, at 83.

201. For Jhering’s conversion from Begriffsjurisprudenz to “practical jurisprudence” after 1860 and its effects, see Smith, supra note 169, at 686-92; Smith, Jurists (pt. 2), supra note 200, at 278-309; and Smith, Jurists (pt. 3), supra note 200, at 29.
203. Id.
on." But Holmes exhibited the beginnings of the tendency already clear in Jhering to break with evolutionary history for a "more conflictful and nonteleological historicism" grounded, in Holmes's case, in an apprehension of social life as "fierce, Darwinian struggle."\footnote{204}

Here, however, the resemblance ended. Jhering's theory of struggle was not Darwinian. Struggle for law was an unending human obligation "provoked by the violation or the withholding of legal rights . . . repeated in every sphere of the law."\footnote{205} And legal history was much more than a descriptive account of the foundations of legal action.

It should not content itself with telling what happened, what changes occurred; it should discover the reason, the 'why,' of the facts described, and the forces that underlie and determine the changes. Nor should legal history content itself with this alone: it should show the causal relationship between antecedent and subsequent facts, how changes begot other changes . . . As such, legal history has a right to exist for itself, as an independent science. It should emancipate itself from the idea of practical utility to the lawyer.\footnote{206}

For Holmes, however, the role of the jurist as an active maker of choices, an author of socially utilitarian outcomes in contests between conflicting social tendencies, was uppermost. Historical inquiry could reveal some of the terms of choice. In *The Common Law* the environment of juridical choice was still to a degree determined historically: law's "form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."\footnote{207} But "the substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient."\footnote{208}

Holmes was clearly aware of the limitations of a theory of change that presupposed the existence of a homogeneous community with shared values and interests, but that led him to marginalize history of law rather than (like Jhering) to seek its re-creation as independent critical inquiry. "Experience"—history and custom—could be mobilized to understand why law was as it was, but not to justify it. "Logic"—purposive intraprofessional analysis of the orientation of common law doctrines and

\footnote{204. Reimann, supra note 147, at 105.}
\footnote{206. JHERING, supra note 200, at 21.}
\footnote{207. Jhering's reflections on legal history were contained in one of his last works, a fragment on legal historiography published two years after his death as an essay in a collection entitled *ENTWICKLUNGSGESCHICHTE DES RÖMISCHEN RECHTS* [HISTORY OF THE EVOLUTION OF THE ROMAN LAW] (Leipzig, Breitkopf & Härtel 1894), and recounted by Smith, *Jurists* (pt. 3), supra note 200, at 32.}
\footnote{208. HOLMES, supra note 103, at 2.}
\footnote{209. Id. at 1-2 (emphasis added).}
standards—was no less a means of reorienting law to serve the social purposes identified by judge or scholar. By the 1880s, we have seen, predicting what judges and courts would do in the future had become Holmes's uppermost criterion and concern. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."210 In this exercise, history retained value "to explain a conception or to interpret a rule, but no further"—certainly not as any kind of influence upon what judges might do with the conception or rule.211 Jhering notwithstanding, history would remain an unemancipated auxiliary within the juridical field, its value measured by its "practical utility to the lawyer."212 For pragmatists it served to expose the pointlessness of old rules while leaving judges free to make pragmatic—socially useful—choices.

This was effectively the last gasp of historical jurisprudence—at least in its nineteenth-century form—in the United States. For the first quarter of the new century, legal-historical study more or less disappeared from the law schools. Some of its exponents "went over to positivism. Others turned to the economic interpretation of legal history, or to historical materialism. Others asserted that a distinction must be made 'between history and the historical school,' gave up historical jurisprudence and confined themselves to a purely descriptive legal history."213 Pragmatists turned from historicism to Pound's "engineering" conception of law, which Pound himself described, in Jhering-like terms (but omitting Jhering's theory of history), as "the activity of adjusting relations or harmonizing and reconciling claims and demands," rather than as "the adjustment itself... in which the facts of life mechanically arrange themselves of logical necessity."214

One may perceive the nineteenth century's Historical School as an attempt to hold "the people," their usages of law, and law's meta-character

210. Holmes, supra note 97, at 461.
211. HOLMES, supra note 103, at 2; see also Ernst, supra note 205, at 1056; Gordon, supra note 125, at 30. We tend to forget that Holmes never actually wrote on the first page of The Common Law that experience should be favored over logic. Each had its place. In order to fulfill his purpose "to present a general view of the Common Law... other tools are needed besides logic." HOLMES, supra note 103, at 1 (emphasis added); see also Rabban, supra note 129, 1171-72, 1184.
212. JHERING, supra note 200.
213. POUND, supra note 184, at 10.
214. Id. at 152-53 (emphasis supplied). For Pound, engineering was a jurisprudence appropriate to the idea of the juridical field (or "legal order" as he described it).

We are beginning, in contrast with the last century, to think of jurist and judge and law-maker in the same way. We are coming to study the legal order instead of debating as to the nature of law. We are thinking of interests, claims, demands, not of rights; of what we have to secure or satisfy, not exclusively of the institutions by which we have sought to secure or satisfy them, as if those institutions were ultimate things existing for themselves... Such a change of attitude is manifest among all types of jurists in the present century.

Id. at 152-53 (citations omitted).
all together in one relationship by the power of "some one idea" (the force of history as group experience) unmediated save by the historical phenomena—custom, shared norms—themselves. Those phenomena imparted a logic of development to law that could be observed, but not altered. Langdellian legal science represented one important reaction to the obvious inability of historical jurisprudence to perform such an ordering, explanatory role in an era of social fragmentation. Langdell used the historical study of cases to dislodge the metaphysics of principles from its central spot in the American case, but then lodged command of law's meta-character—consistency, universality, coherence—securely within the ambit of the juridical field's own professionalized processes and institutions. He ensured that the act of authoritative mediation between usage and meta-character became the province of a technocratic academic elite. In his own fashion, Holmes did something similar, discarding history along the way between The Common Law and The Path of the Law, to express law in a set of practices of his own that differed from Langdell's mainly in elevating men of action—the judge, the practitioner—over the scholar. Pound, finally, broke altogether with history to write the first pragmatic and "sociological" analyses of the modern American juridical field that in epistemological terms nevertheless differed only marginally from formalism. But whichever the preferred track—conceptualist/formalist, or sociological—history as practice played at best a supporting role. Even Jhering's admirers, then, ignored or distorted his desire that the Historical School's deficiencies become a platform for a decisively new legal history, a legal history "for itself," entirely independent of juridical practice.

D. Legal History and Historical Practice (I): An Internal Historiography

If not in the world of the law, where might such a history have been written? One obvious locale is the discipline of history. Investigation, however, disappoints, except at the margins.

History emerged in America as a disciplinary expertise—a
professionalizing scholarly practice—at much the same time as the juridical field and the social sciences, in the last quarter of the nineteenth century. Like the new generation of academic lawyers and social scientists, indeed more so, historians in America were profoundly influenced by German models of academic organization, which increasing numbers of them had experienced first-hand through study for advanced degrees at German universities. Eager to replicate the German experience of disciplinary development in which historical knowledge made professionalized expertise, historians in America also followed German example in determining the proper substance for study: "the development of political institutions from their remotest origins to the present.” As Robert Gordon has observed, this bias toward inquiry into politically constitutive institutions meant that history-as-discipline would give great attention to legal and constitutional history. American historians "[would] do for Anglo-American political forms what their German models had done for Roman.”

For Americans, German model history was exemplified in the work of Leopold von Ranke. Ranke was not a Romanist; he wrote widely on early-modern and modern German, European, and eventually world history. His influence was felt through his contributions to historical method, particularly the application to modern history of the "documentary and philological methods which had been developed for the study of antiquity,” and which Savigny (a friend and, philosophically, a colleague) had already made central to his Romanist geschichtliche Rechtswissenschaft. Ranke’s method emphasized "the extraction of the pure facts,” and austere objectivity in presenting them. "Strict presentation of the facts, conditional and unattractive though they may be, is unquestionably the supreme law, for historical research is oriented by its very nature to the particular.” Objectivity was no less a political than a professional ideal, expressing Ranke’s aversion to the “committed” historical writing that accompanied the rise of Germanist history in the first half of the nineteenth century. Ranke’s devotion to historical


218. Id.. On the influence of German models on American historians, see generally JOHN HIGHAM, HISTORY: PROFESSIONAL SCHOLARSHIP IN AMERICA 11 (1973); IGGERS, supra note 121, at 63-65; PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 21-46 (1988); and Ross, supra note 32, at 921-24. On the general influence of German models on the social sciences in America, see Ross, supra note 40, at 53-140.

219. NOVICK, supra note 218, at 26-27.


222. NOVICK, supra note 218, at 30. Ranke’s method was also relativist. The task was not to judge the past, but simply to show what had happened. See IGGERS, supra note 121, at 67.
particularity, meanwhile, underlined that his methods, like Savigny's, were formulated in reaction to Enlightenment universalism.

Yet facts alone were not what sustained Ranke's history. The facts, like the law, had a spiritual (geistliche) essence for which it was the historian's fundamental duty to find expression.

The external appearance is not the final thing which we have to discover; there is still something that occurs within. . . . It is our task to recognize what really happened [wie es eigentlich gewesen] in the series of facts which German history comprises: their sum. After the labor of criticism, intuition is required. 223

Jhering could never be mistaken for Ranke, but Jhering's turn-of-the-century reflection on what legal history should be—not merely descriptive, but required, instead, to explain the causality that underlay the facts—has some philosophical resonance with Ranke's views. 224 unfortunately, Ranke's American disciples were insensible to the limitations that Ranke saw in empiricism. Rather, they idolized him as pure empiricism's evangelist, an assembler of facts free of causal philosophizing:

This, then, was the model of scientific method which, in principle, the historians embraced. Science must be rigidly factual and empirical, shunning hypothesis; the scientific venture was scrupulously neutral on larger questions of end and meaning; and, if systematically pursued, it might ultimately produce a comprehensive, "definitive" history. It was in the light of this conception of wissenschafliche Objektivität that they regarded themselves as loyal followers of Ranke. 225

German historical science gained a particular foothold at Columbia and Johns Hopkins. At Columbia, graduate work in history and political science began in 1876 with the appointment of John W. Burgess as professor of political science and constitutional law. Burgess had studied history, public law and political science at Göttingen, Leipzig and Berlin

223. LEOPOLD VON RANKE, supra note 220, at 21, quoted in NOVICK, supra note 218, at 28 (emphasis added). See generally NOVICK, supra note 218, at 28-30. As this indicates, "wie es eigentlich gewesen" links a plethora of meanings, from a statement of particularity, to an assertion of "essence." As Iggers puts it, "Ranke was no empiricist. His position was much closer to philosophical realism. Just as he saw a deeper reality behind historical phenomena, so he saw in phenomena merely the concrete expressions of metaphysical forces." IGGERS, supra note 121, at 76. See generally id. at 76-80.

224. See supra text accompanying note 207. Jhering would not have accepted Ranke's belief that behind historical events lay a spiritual totality, yet his stress on "the feeling of legal right" (Rechtsgefühl) and the individual's ethical duty to participate in struggle for it as the only means to law has some philosophical resonance.

225. NOVICK, supra note 218, at 37; see also HIGHAM, supra note 218, at 108; IGGSERS, supra note 121, at 63-64.
before joining Columbia, where he "hoped to produce statesmen and public officials as well as scholars." At Johns Hopkins, founded as North America’s first professional graduate school the same year, Herbert Baxter Adams directed historical studies along a path of research directly influenced by the “germ” theory of Teutonic origins that had become a major strand of Germanist history in the post-Savigny era. Trained by Johann Bluntschli at the University of Heidelberg, Adams was “not a noteworthy scholar,” but he was “an indefatigable promoter of professional history” who “probably did more than anyone else to Germanize American historical scholarship.” Adams’ credo was gradual evolution governed by eternal moral laws—a blend of pseudo-Rankean historical thinking with antebellum American prehistoricism. “In the improvement of the existing social order, what the world needs is historical enlightenment and political and social progress along existing institutional lines.”

The professional history promoted by Adams encountered the same problem as evolutionary-historical jurisprudence. Massive social change in America near the end of the century shredded the credibility of gradual evolution as an account of historical change. “There is evidence in the 1880s for the first time of a conscious sense that history is a process of continuous qualitative change.” Most of the second generation of professional historians turned away from the evolutionary assumptions of their forerunners, rejecting “the idea of universal and necessary development” for “the effects... of specific and local variations in social environment.” In doing so, they also turned away from the first generation’s legal-institutional investigations, seeing in the law but a subsidiary influence on social and political developments that were better explained by economic and social forces.

As elsewhere in late nineteenth-century intellectual life, the very process of professionalization and expertise-creation reconstituted law and history as distinct domains. Pound’s pronouncement of the death of historical jurisprudence was in part simply an acknowledgment that the professional and disciplinary reorganization of knowledge made it nearly impossible to share common ground. In law’s case, rule production after

226. HIGHAM, supra note 218, at 11.
227. Id.
228. Herbert Baxter Adams, Is History Past Politics?, 13 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 67, 81 (1895), quoted in Ross, supra note 32, at 923. Adams’s was the kind of thinking, of course, that drove Nietzsche to despair. “It almost seems that the task is to stand guard over history to see that nothing comes out of it except more history, and certainly no real events!” NIETZSCHE, supra note 133, at 84.
229. Ross, supra note 32, at 924.
the turn of the century became entirely internal to the modern juridical field and predominantly formalist in epistemology, whether it was the formalism of "mechanical" conceptualist jurisprudence or of Holmesian prediction. Formalism's only competitor was Pound's ill-defined "engineering" style, which (as we have seen) also proposed itself as the activist successor to passive evolutionary history. 231 In history's case, professionalization had created another self-referential and internalized disciplinary discourse, in which value-neutral objectivity and factualism assured the interchangeability of all the parts that the discipline's purely empiricist division of labor would manufacture. "I struggle on," James Franklin Jameson wrote in 1910, "making bricks without much idea of how the architects will use them, but believing that the best architect that ever was cannot get along without bricks." 232

The division of territory and the nature of its epistemology meant that history no more than law could accommodate Jhering's vision of an explanatory legal history. Insofar as Jhering's purpose had even a faint American echo it was to be found in political science, among renegade historians like Burgess and Beard, or among institutional economists like Commons. 233 Indeed, it was at those margins—the nexus of history with political science and institutional economics—that the most suggestive American analysis of legal institutions was actually pursued. 234 Legal-historical scholarship did not disappear entirely from the law school or history department, although the substance of scholarship changed. German influence on professional scholarship in America, already weakening after the turn of the century, collapsed altogether during and after World War One. American history shook itself free of Teutonic germs to recover the authoritative Anglo-American common-law

231. See POUND, supra note 184, at 10; POUND, supra note 139, at 195-96. On the lack of intellectual definition in Pound's jurisprudence, see JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 166 (1990); and Tomlins, supra note 41, at 934-35.

232. JAMES FRANKLIN JAMESON, AN HISTORIAN'S WORLD: SELECTIONS FROM THE CORRESPONDENCE OF JOHN FRANKLIN JAMESON 136 (1956), quoted in NOVICK, supra note 218, at 56. See generally NOVICK, supra note 218, at 47-60. As Novick observes, "This conception of the historian's task—the patient manufacture of four-square factualist bricks to be fitted together in the ultimate objective history... offered an almost tangible image of steady, cumulative progress. Although creating a grand synthesis might require an architectonic vision, almost anyone, properly trained, could mold a brick." Id. at 56.

233. Id. at 69. On Commons, see HIGHAM, supra note 218, at 178; and Katz, supra note 17, at 461-62.

234. See, for example, the monographs in the famous Columbia research monograph series, Columbia University Studies in History, Economics and Public Law, founded in 1892. Johns Hopkins had created its own series—The Johns Hopkins Studies in History and Political Science—a decade earlier, in 1883. As John Higham has indicated, supra note 218, at 107-08, the early twentieth century's disciplinary frontiers between history, institutional economics and political science were porous, but the professionalizing project in history sought distinctions rather than continued interaction, and warred with the social sciences over the dangers that their demands for explicit "general principles" and "systematic interpretation" posed to historians' embrace of factualism.
tradition from British medieval and early-modern history. In the law schools this Anglophilic task was quite easily reconciled to the pedagogy dominant since before the turn of the century and bred periodic revivals of interest in legal-historical scholarship, though without much depth of support or breadth of vision. "As long as the common-law tradition was a source of normative authority, the doing of legal history was conceived to be a professional task; as long as it was a professional task it was bound to be internal." 235 History's most distinctive practitioner (and at that time its sole entrepreneur) within the juridical field, Julius Goebel of Columbia Law School, alternately lambasted and defended this orientation, embodying the schizophrenia that the combination of law's professional demands with historical consciousness could impart. 236 In history departments, where taught at all, legal history was almost invariably subsumed within American colonial period history before the Revolution, and the history of the Federal Constitution thereafter. In general, historical scholarship on law was largely descriptive and narrowly focused on doctrinal categories and the processes of juridical institutions. "Research that adopted a different perspective was not likely to be considered 'legal' history at all." 237

But legal history was a sideshow in both fields. 238 In history the main


236. See id. at 25; Katz, supra note 17, at 458-59, 461. Julius Goebel was the Director of the Foundation for Research in Legal History established in 1930 at Columbia Law School. Gordon catches Goebel in two very distinct mentalities—the one as a young man ridiculing law school doctrinal history as obeisance "to the intellectual tyranny which the judicial opinion exerts... elevated to a status of preposterous importance as a source," JULIUS GOEBEL, JR., FELONY AND MISDEMEANOR, at xvii-xviii, quoted in Gordon, supra note 125, at 21 n.30, and the other, twenty-five years later, eulogizing the judicial opinion of old "that rests upon impeccable authority and that carries conviction by reason of this and of its inner logic.... Fortunate it is that there are so many written." Julius Goebel, Jr., Learning and Style in the Law—An Historian's Lament, 61 COLUM. L. REV. 1393, 1398, quoted in Gordon, supra note 125, at 37 n.83.

237. Gordon, supra note 125, at 27. Such was the fate of the young Richard B. Morris, whose energetic and experimental STUDIES IN THE HISTORY OF AMERICAN LAW: WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES (1930), was greeted with revulsion by the law professoriat, notably Karl Llewellyn, who wrote a singularly pompous review of Morris's book. Karl Llewellyn, Book Review, 31 COLUM. L. REV. 729 (1931). Llewellyn rubbed the book as "depressing and grotesque," id. at 729, and its author as a botch, for "gallop[ing] beyond facts," id. at 730. Morris had attempted to work at the intersection of Columbia's history department and its law school, and had written papers, later incorporated in his book, for Julius Goebel, Hessel Yntema and Llewellyn himself. Speaking, as it were, as the voice of the law school, Llewellyn repudiated the attempt on behalf of all three. For assessments of Morris's legal history and accounts of the reception of his work, see Stephen Botein, Scientific Mind and Legal Matter: The Long Shadow of Richard B. Morris's Studies in the History of American Law, 13 REV. AM. HIST. 303 (1985); and Christopher Tomlins, Why Wait for Industrialism? Work, Legal Culture, and the Example of Early America—An Historiographical Argument, 40 LAB. HIST. 5, 14-23 (1999).

238. Llewellyn's review of Morris dwell on the paucity of American legal-historical scholarship. The field was "fascinating" but "little-known"; it was "fertile" but near empty. Llewellyn, supra note 237, at 729, 730, 732. Peter Novick's account of the American historical profession prior to the 1970s is notable for the complete absence of legal history. NOVICK, supra note 218. In 1994, Willard Hurst recalled that as of the mid-1930s, "it is literally true that... there were probably only three or four
event was the overthrow of the first generation’s emphasis on political and constitutional history, and repudiation of the evolutionism and factualism that went with it, by proponents of the New History—social and economic—and the latter’s consolidation as the new orthodoxy. In law, it was Pound’s “engineering approach” and its consolidation as an important aspect of Legal Realism.

The engineering approach developed under the banner of “sociological jurisprudence.” Pound (like the New Historians) insisted on the importance of studying institutional processes in social context. In law, this meant studying the trial courts where law took place, the rules they applied, the decisions they reached, and the social consequences of those decisions in practice. Scholars should de-emphasize abstract doctrinal principles: “the main province... should be the actual effects—the factual consequences” of juridical activity; the main question, law’s capacity to achieve the “concrete securing or realizing of human interests.” All this shows the influence of Pound’s functionalist reading of Jhering—law as a means to social ends, the product of selfish struggles among groups and interests mediated by juridical interventions. But in his challenge to the older mechanical approach, Pound also seemed for a moment to see what Jhering had seen: the potential for history to furnish an independent theoretical position from which law could be explained:

In the past century we studied law from within. The jurists of today are studying it from without... Where the last century made of legal history merely a study of how doctrines have evolved and developed considered solely as jural materials, [today’s jurists] call for a sociological legal history, a study of the social effects which the doctrines of the law have produced in the past and of how they have produced them. They call for a legal history which shall not deal with rules and doctrines apart from the economic and social history of their time, as if the causes of change in the law were always to be found in the legal phenomena of the past; a legal history that shall not try to show that the law of the past can give us an answer to every question by systematic deduction as if it were a system without hiatus and without antinomies. They call for a legal history which is to show

practicing legal historians in the United States.” See Hendrik Hartog, Snakes in Ireland: A Conversation with Willard Hurst, 12 LAW & HIST. REV. 370, 385 (1994). In 1984, Stanley Katz stressed that, considered as a field—Katz’s definition was “an area of study with the sense of its own intellectual integrity and with an organized institutional structure to promote it”—American legal history was only about ten years old. Katz, supra note 17, at 466.

239. Higham, supra note 218, at 104-31; Novick, supra note 218, at 86-167, 206-78.

240. Herget, supra note 231, at 166.

us how the law of the past grew out of social, economic and psychological conditions, how it accommodated itself to them, and how far we may proceed upon that law as a basis, or in disregard of it, with well-grounded expectations of producing the results desired.  

Pound's peroration was inspiring, but it exaggerated the demand—there was no obvious constituency of jurists clamoring for a new legal history. In any case Pound's words far outran his deeds. Fearing that law's control of the juridical field would be weakened by opening it to other influences, Pound was always ambivalent in his pursuit of sociological jurisprudence. Here he began the analysis that would culminate in a gush of sympathy for Jhering's history by first carefully undermining it. "The fashion of the time calls for a sociological legal history... I should be the last to deny the great importance of this feature of the program of the sociological jurist. But it is possible to overrate the value of this type of history for juristic purposes." And when, some years later, Pound returned to history to expound at length upon the course of American law in his lectures on The Formative Era in American Law, he completely repudiated the cautious encouragement he had given an extemalist historiography in his earlier work.  

Pound remained critical of nineteenth-century historical jurisprudence and its metaphysical reliance on Volksgeist, but now stressed that American law possessed its own, superior, internalized fountain of historical continuity, immune from generalized social influence, encapsulated in a hermetically sealed "taught legal tradition." Received from England, transmitted through successive generations of lawyers and judges tempered by training and practice, the taught tradition was so powerful that it could overbear and channel the influence of social and economic conditions rather than surrender to them;


243. POUND, supra note 139, at 10 (emphasis added). Jhering had stated his indifference to juristic purposes, to the idea that legal history should be "of practical utility to the lawyer." Pound, however, wanted law on top: "an infusion of social ideas into the traditional element of our law" but no "inкер[ing] with our courts and with our judicial organization" to achieve it. Legal intellectuals should "provide a new set of premises, a new order of ideas in such form that the courts may use them and develop them into a modern system by judicial experience of actual causes." Id. at 190. Pound's own practice as a legal intellectual is highly instructive. Although formulating "sociological jurisprudence" as a challenge to Langdellian legal thought, Pound never taught it at Harvard Law School (where he was dean for twenty years, 1916-1936) but only in Harvard College. See Robert W. Gordon, The Case for (and Against) Harvard, 93 MICH. L. REV. 1231, 1246 (1995); see also Daniel R. Ernst, Law and American Political Development, 1877-1938, 26 REV. AM. HIST. 205, 207 (1998); Tomlins, supra note 41, at 937.

244. By the 1930s, Pound had abandoned most of his earlier positions. Willard Hurst remembers the Pound of that period as "isolated... arrogant... and very dogmatic." Hartog, supra note 238, at 374.

245. POUND, supra note 64, at 82.
it could forestall dramatic conflictual change in favor of adaptive alteration wisely directed by experienced jurists.

Tenacity of a taught legal tradition is much more significant in our legal history than the economic conditions of time and place. These conditions have by no means been uniform, while the course of decision has been characteristically steady and uniform, hewing to common-law lines through five generations of rapid political, economic and social change, and bringing about a communis opinio over the country as a whole on the overwhelming majority of legal questions, despite the most divergent geographical, political, economic, social and even racial conditions.  

Pound's taught legal tradition described and celebrated rule production as a function of a particular expertise wielding a closed discourse. This was particularly noticeable in his account of the late nineteenth-century revolution in law, when “national law schools, teaching law not laws, and teaching law in the ‘spirit of the common legal heritage of English-speaking peoples,’” had been established and subsequently become key to the successful preservation of a common law cultural uniformity “against many forces of disintegration.” Vitality, reason corrected by juridical experience and trained technique, and adaptation by courts and judges of existing authority through disciplined resort to new information were all modes of common-law change perfectly comprehensible within the taught common-law tradition. Here was a powerful new expression of law as custom, the custom not of the Volk but of juridical elites, explicitly reproduced through their taught tradition. In a world fragmented by social conflict and selfish interest, homogeneity of norm, value, and intent could still exist in the community of the self-renewing profession. Their communis opinio was the rock on which the waves of exterior force, whether economic determinism or demagogic irrationality, would break.  

Pound had of course once bemoaned the loss of juristic vitality that he saw inherent in the “mechanical” jurisprudence of the late nineteenth century—“rigorous logical deduction from predetermined conceptions in

246. Id. at 82-83.
247. Id. at 83.
248. See id. at 83-101. Pound's faith in juridical elites in The Formative Era of American Law took him close enough to Savigny and Puchta as to oblige him to contrive a distinction. The taught tradition was uniquely effective in America because its exponents were “strong lawyers and enlightened statesmen... [men] of action” (a clear echo of Holmes), in contrast to the scholars who dominated continental legal science, who had mistakenly concluded that “nothing could be achieved by conscious, intelligent, juristic effort.” Id. at 5. Pound went on to attack the effete “academic teachers of the historical school, Savigny, Maine, and in this country Ames and Thayer and Bigelow... [who] believed law could only be found by historical study, distrusted legislation, and were averse to action.” Id. at 6.
disregard of and often in the teeth of the actual facts." He had once bemoaned the abundant "freaks of judicial law-making," and had allowed himself to recognize legislation, briefly, as "the more truly democratic form of law-making." But in the mid-1930s, Pound had little inclination to trust in legislation and the detested administrative state that it was creating, and far more to credit "the creative power of judicial decision." His admiration of the judiciary grew ever more uncritical, his loss of interest in determinative conditions ever more pronounced.

Robert Gordon has written, rightly, that failure "to develop an extensive external historiography of law" during the first half of the twentieth century "does not stem from pragmatic thinking, but... from loss of nerve in the face of the implications of that thinking; not from reckless disregard of the common law tradition, but from an anxious solicitude to preserve it." In the case of America, neither professional history nor the juridical field explored alternatives to the common-law tradition. In fact they diverged. In history, the second generation's rebellion against pseudo-Rankean brickmaking pursued a historiography of social and economic causation, but largely abandoned the legal-constitutional sphere that might have benefited. In the juridical field, Pound's taught tradition offered an historical narrative of legal development, but only to reveal that law's meta-character—its uniformity, stability, consistency, adaptability—was securely within its own control, the most divergent geographical, political, economic, social and racial conditions notwithstanding. In short,

251. POUND, supra note 64, at 110-11.
252. Pound actually almost never saw merit in legislation, arguing instead for intelligent incremental action by legal elites—judges, lawyers and legal intellectuals. "[T]he new period of legal development which is at hand... will be a period of scientific law made, if not by judges, then by lawyers trained in the universities: not one of arbitrary law based on the fiat of the sovereign, however hydra-headed." POUND, supra note 139, at 83-84. By 1938, legal intellectuals had won Pound's antipathy too. Compare Pound's conclusion in INTERPRETATIONS OF LEGAL HISTORY (1923), supra note 184, with his position in THE FORMATIVE ERA OF AMERICAN LAW (1938), supra note 64. In the former he states:

Judges work under conditions that make it less and less possible for them to be the living oracles of the law except as they give authority to what has been formulated by writers and teachers. An interpretation that will stimulate juristic activity in common-law countries, that will bring our writers and teachers to lead courts and legislatures... will have done its work well.

POUND, supra note 184, at 164-65. In the latter the conclusion is very different:

On the whole the judges have done their part better than the jurists and the teachers. They have pushed forward cautiously but with reasonable speed along paths worked out by judicial empiricism, while those who should have put the forward movement in the order of reason and should have furnished ideal plans of the forward path, have urged pseudo-scientific reasons why the judges should stand fast and have preached that progress would spontaneously achieve itself.

POUND, supra note 64, at 126-27.

history produced no competing account of law, while Pound's history of law dismissed the causality of exterior circumstance. Acting in a crisis, the taught tradition reconfirmed that rule production was located in a safe preserve—under the control of an expertise whose construction and transmission was organized from within the juridical field itself.254

E. Legal History and Historical Practice (2): An External Historiography

Before the 1950s, American legal history had demonstrated little of the critical interpretive capacity that Jhering had advocated some sixty years earlier. Legal history had virtually no presence outside the juridical field. Within, it had no independence, becoming, particularly under Pound's tutelage, a means to affirm the legitimacy of the common-law tradition and celebrate its achievements. The first scholar to move away from this orientation, hence his abiding influence in determining American legal history's mature configuration, was Willard Hurst.

Hurst, one might argue, set out to do what Pound, long before, had talked of but never accomplished: to construct a synthetic contextualized sociology of juridical action and institutions. According to William Novak, Hurst "consciously strove to underwrite his work with a systematic and elaborate conceptual framework designed to link his close empirical investigations of nineteenth-century American law to perennial questions about 'the general course of social experience.'"255 Hurst's agenda suggests as much, stressing the "living interplay of law and social growth" and "law's operational ties to other components of social order."256 His work, like Pound's, shows Jhering's influence, notably Jhering's conception of law's appearance in the relationship between agency and social structure, between human action and the conditions of its freedom. But Hurst far surpassed Pound in the extent to which his instrumentalist understanding of nineteenth-century legal action accommodated Jhering's theory of legal order as an expression of social purpose arising out of the struggle among interests.257 Further, Hurst's empirical research underpinned a causality that completely reversed

254. I have argued elsewhere that maintaining authority over rule production within the juridical field in the face of crises pressing on it from outside, is also true of Legal Realism, and is indeed a repetitive theme (always with substantive variation) of the juridical field in the United States. See Tomlins, supra note 41.


256. Id. at 99. As Bryant Garth has shown, Hurst had a very deliberate strategy for realizing his agenda. Bryant Garth, James Willard Hurst as Entrepreneur for the Field of Law and Social Science, 18 LAW & HIST. REV. 37 (2000). See also Hartog, supra note 238, at 377-84.

257. Herget & Wallace, supra note 242, at 407-08. Jhering, it should be emphasized, was not an instrumentalist, and thought about law as a social process in terms less of the facilitation of transactions among individuals than of the cumulative, conscious and collective exertion of a will to struggle for law on the part of a nation.
Pound's post-progressive taught tradition. "In the interaction of law and American life the law was passive, acted upon by other social forces, more often than acting upon them."\textsuperscript{258} This was the first resolutely externalist conceptualization of causality in the U.S. field.\textsuperscript{259}

The use of law to further self-interest is, of course, the opening motif of \textit{Law and the Conditions of Freedom}\textsuperscript{260}—use that was immanent in the actions of mythologically ordinary citizens who contrived institutions to lend legality to the "facts" they had created "on the ground." These ordinary Americans were makers of law, but in a "narrowly practical" way.\textsuperscript{261} Hurst would explain at length:

> for most of the nineteenth century we put little of our creative talent into making the basic framework of law except in areas which we saw most directly contributing to the release of private energy and the increase of private options. Politics in the grand sense had been the focus of our creative energy from 1765 to 1800.... With these matters apparently settled, and confronting the challenge of the continent, the nineteenth century was prepared to treat law more casually, as an instrument to be used whenever it looked as if it would be useful.\textsuperscript{262}

Americans were "concerned with law more as an instrument for desired immediate results than as a statement of carefully legitimated long-range values . . . . [T]he values that people wrote into law and more or less implemented through law did not add up to a neatly balanced, conceptually complete pattern of human interest."\textsuperscript{263} Here, it seemed, was no \textit{volkisch} ur-custom sedimented into law, no science of principles, no taught tradition. Here was unapologetic self-seeking.

Instrumentalism, however, was but a surface phenomenon. Multiple egoistic struggles to realize self-interest generated functional socio-legal structures. But as producers of outcomes, these structures reached no further than the short-term calculus that Hurst called "bastard pragmatism"—hardly a viable meta-character for law. Below instrumentalism lay something altogether different, not far removed (although employing a different conceptual vocabulary) from Savigny's \textit{Volksgeist}. In the language of 1950s history its name was "consensus," a description

\textsuperscript{258.} \textsc{James Willard Hurst, The Growth of American Law: The Lawmakers} 4 (1950). The second sentence of the book reads "Men wanted national independence largely for economic reasons, but they said they wanted it because their legal rights were invaded." \textit{Id.} at 3.

\textsuperscript{259.} See Gordon, supra note 125, at 12, 51-53.

\textsuperscript{260.} \textsc{James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States} (1956).

\textsuperscript{261.} \textsc{James Willard Hurst, Law and Social Order in the United States} 24 (1977).

\textsuperscript{262.} Hurst, supra note 260, at 10.

\textsuperscript{263.} Hurst, \textit{ supra} note 261, at 23-24 (1977).
encouraged by Hurst’s incessant invocation of a homogenous national consciousness—“we.” Consensus, considered as shared values produced in a collective exertion of conscious reflection, was an essential condition of Hurst’s schema. Without shared values, instrumentalism’s multiple selfish usages of law could not form a stable equilibrium. But Hurst was just as interested in other expressions and conditions of consensus—consensus as an aspect of social structure resulting not from conscious reflection but from unreflective habit, “experience transmuted into social action without the intervention of reflective intelligence.”^264 Law was not a distinct order of reality, “timeless, placeless, essential.”^265 It was “man-made,” the product of human deliberation.^266 But it was also, and overwhelmingly, consequential upon human society’s capacity for unconscious drift and inertia. “Hurst’s point was that the whole realm of intentional wills or interests (whether in conflict or not) was but a small fraction of the overwhelming social pressure ... impinging upon law below the level of conscious intent or interest on the part of the historical actors.”^267

To a degree, the components of Hurst’s scheme—self-interested instrumentalism and pragmatic working principles on the surface, drift and inertia as causal forces operating below the level of consciousness—recall Holmes’s description of law as “a reaction between tradition on the one side and the changing desires and needs of a community on the other.”^268

But the extent of the causality of “drift” and “default” and “inertia” takes us to a deeper level, for it returns us to custom and thus to German historical jurisprudence. The deep underlying structure of consensus was the context for Hurst’s jurisprudence of interest-pursuit, for in the Hurstian scheme, consensus both reflective and unreflective was the foundation for law’s meta-character. Within that meta-character, interests could fight for relative advantage without risking systemic rupture. Consensus mediated the fight.^269

^264. Gordon, supra note 125, at 46.
^265. JAMES WILLARD HURST, JUSTICE HOLMES ON LEGAL HISTORY 4 (1964).
^266. Id.
^267. Novak, supra note 255, at 109; see also Hartog, supra note 238, at 385-86; Harry N. Scheiber, At the Borderland of Law and Economic History: The Contributions of Willard Hurst, 75 AM. HIST. REV. 744, 746 (1970). Novak estimates that as far as Hurst was concerned causation was eighty percent inertial and only twenty percent consequential upon conscious reflection.
^269. Holmes gave tradition (custom) causal capacity, but his insistence on law’s functional and instrumental imperatives “to meet present and future human needs” always placed tradition and “the felt necessities of the time” in tension. Hurst, in contrast, saw consensus (custom) as a condition on law production.

The most creative, driving and powerful pressures upon our law emerged from the social setting. Social environment has two aspects. First, it is what men think: how they size up the
The protocols and relationships of the juridical field provided the instruments for both fighting and mediation, and the field itself provided the site on which these activities took place. The determinants of long-term outcomes for human freedom, however, lay outside the juridical domain, at the intersection of material conditions with human values. The key determinant in America was the market—the focus for and producer of behavioral consensus. "We favored large scope for private invention and elaboration of organizational techniques for increasing control over material or social environment. Thus we assigned the market a role substantially equal to that of political process in shaping social order, and provided facilities and great freedom to men to experiment. . . ."

Law did not create the market but acted instrumentally within its shadow—enabling, supplementing, and servicing market activity. In enabling market freedom, however, law stood precisely at the intersection of market as action and market as value. Thus, as Novak has written, "law as values in American society frequently revolved around the competing demands for individual liberty versus democratic freedom, or as Hurst understood it, the release of energy versus the balance of power," ultimately embodied in the emergence of a twentieth-century polity "of administrative regulation." Yet even at this point, competition occurred within the bounds of an ideological and cultural consensus that enveloped and steered legal action: "Our prime inheritance was of middle-class ways of thinking." The "release of energy" was a release of middle-class energy.

In the prolegomenon to his entire scholarly project, written in 1950, Hurst underscored law's balancing role as a basic function, foundational to universe and their place in it; what things they value, and how much; what they believe to be the relations between cause and effect, and the way these ideas affect their notions of how to go about getting the things that they value. Second, it is what men do: their habits, their institutions.

Hurst, supra note 258, at 11. See generally id. at 11-12.

Carl Landauer, supra note 118, at 80, notes that Hurst portrays the nineteenth century as "a fully articulated cultural structure." Law and the Conditions of Freedom creates "a carefully structured intellectual system in which the parts work perfectly together." Id. Fundamentally, he concludes, "Hurst was describing the working of a value system. 'The tone of this society,' he stated about early nineteenth-century America, 'was set by men for whom life's meaning lay in striving, creation, change, and mobility.'" Id. at 81 (quoting Hurst, supra note 260, at 36). All had "the same 'life goals and values.'" Id. (quoting Abram Kardiner et al., The Psychological Frontiers of Society 414 (1945)).

270. Hurst, supra note 265, at 42. No more in economic activity than other realms of action did Americans display variation in motivation or purpose: the community's dominant temper was "getting ahead." Getting ahead "meant just one thing"—it was a commitment on which all men's plans, values, purposes and emotions centered. Hurst, supra note 258, at 441.


272. Hurst, supra note 260, at 7.

the social order. Political argument over the meaning of gain, or its distribution, was no more than a "vent for emotion." The real work was done in the juridical field, whose agencies—legislatures, courts, executive and administrative bodies, lawyers—were handed the "ideal function" of "order[ing] social relations . . . protect[ing] the individual on the one hand and the community on the other." This was a matter not just of reconciling individual claims with the claims of the whole, but also of reconciling both with still other claims thrown up by intermediate groups, "brought together by some close, sharply felt interest, more powerful than individuals, less representative than the community." Group interest, in fact, "was the most dynamic force that played on our law," one that impinged decisively on the individual's "right to his full development" and the community's "solidarity." Organized pressure groups pushing particular programs in their own interests "made a picture of a society which seemed less like a structure of interlocking, mutually supporting parts, than like billiard balls on a table, knocking against each other and rolling apart from the impact, to hit and rebound from others." Power had to be brought into balance "sufficiently so that particular blocs could not run roughshod over other interests in society."

The job for the juridical field was to be both functional and objective—to find facts, make policy and see to its execution "with substantial neutrality toward special interests." But the field's capacities for neutrality were hampered by Americans' preoccupation "with the economy as a field for private adventure," which bred indifference to the creation of efficient public institutions and left law open to the influence of special interests. The supposedly hermetic juridical field of earlier legal historiography was in fact only too vulnerable to externalities:

Main currents in the history of all the principal agencies of lawmaking showed this in one fashion or another. The late nineteenth-century courts yielded uncritically . . . The bar fell so far into the governing temper of the time as to be content with the role either of technician or partisan, and forfeited much of its public standing as spokesman of the general interest.

The legislature showed no more capacity to identify and defend a public
interest. Only the executive showed any potential. This argument was devastating to Pound's celebratory Formative Era. Hurst could agree that law should perform "as mediator of the general interest" but not that it had succeeded in doing so over time.\textsuperscript{283} History's job was not to participate in mythmaking but to engage in critical assessment of law's performance, "[t]o trace the manner in which legal institutions had dealt with the resulting tensions in one field of public policy after another."\textsuperscript{284}

Hurst's declaration of independence from the common-law tradition of history writing, and from its adherence to case law and doctrinal exegesis created a sophisticated framework for historical study of the American juridical field. Social and economic conditions, the sheer density of law and legal process in American life, instrumentalism, pragmatic popular norms—these themes and their interaction would dominate a generation of scholarship that collectively established an independent historical standpoint on study of the juridical field, one that has remained a default presumption, or at least a point of departure, for many participants through the present.

One must ask why. In the light of the history of legal history, why did \textit{this} history begin to come about at this time? Why was Hurst successful in influencing legal-historical inquiry to move away from complaisant descriptions of "the production of rules" in the juridical field to probing the circumstances of rule production—the "rules for the production of rules"? And how deeply, in fact, did Hurst's new history probe?

The first question is answered by intellectual biography and temporal circumstance. Hurst derived his emphasis on the economy and his insistence on exploring law's social context from an historical imagination honed on second-generation history, particularly from intensive study of Charles and Mary Beard's \textit{Rise of American Civilization}, the hugely influential synthesis of the Beards' economic interpretation of history. The Beards' emphasis on the overweening role of economic action and on struggles between the community and organized "interests" provided a basic foundation for Hurst's agenda, supplemented by wide reading in 1940s and 1950s social science. From the privations of the 1930s came further practical instruction in the centrality of the economy in social life, while from the New Deal came the example of positive state action led by a strong executive: the administrative regulation—the balancing—of conflicting interests and social needs. From Hurst's legal education at Harvard came negative referents: the unreality of a self-referential expertise; distaste for Pound. From \textit{these}, in turn, came an opening to the Legal Realism that Pound had toyed with, but discarded, and the

\textsuperscript{283} \textit{Id.} at 446.
\textsuperscript{284} \textit{Id.} at 446.
possibility of imagining a functional relationship between law and its social and economic environment. From his work for Louis Brandeis and Felix Frankfurter came opportunities to think seriously about the practical capacities of law and legal process. From his collaboration with Lloyd K. Garrison on their co-taught University of Wisconsin Law School course "Law in Society" came the opportunity to begin the assemblage and synthesis of materials that would ultimately contribute to Hurst's first major work, The Growth of American Law. From nineteenth-century legal history, finally, came the heritage of Savigny and Jhering—custom and inertia, the jurisprudence of interests, law as an object and outcome of struggle, and as an expression of social purpose. 285

It is easier, though, to piece together some of the elements that help explain why Hurst the lone scholar developed his particular genre of legal history than to explain why it became paradigmatic. In broad terms the answer to this question is organizational rather than intellectual, for Hurst's genre did not become paradigmatic until more than twenty years after Hurst began writing, and ten years after those whom he had influenced and supported began to produce their own "externalist" historical scholarship. 286 Paradigm status came about through academic entrepreneurship and through calculated professional choice and strategy, rather than through some spontaneous shift in historical imagination. Hurst's externalist historiography, moreover, was but one manifestation (and not the most important) of a more general externalism that served far


286. Mark Tushnet noted in 1972 that, at the time of its publication in 1964, Hurst's most ambitious empirical study (on which he had worked some seventeen years), JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964), "received little attention" and, until the early 1970s, had been "largely ignored." See Mark Tushnet, Lumber and the Legal Process, 1972 Wis. L. REV. 114, 114. Robert Gordon also traces the rise of the Hurstian perspective to the early 1970s. Gordon, supra note 125, at 55. For examples of work directly or indirectly inspired by Hurst prior to the diffusion of the Hurstian perspective, see LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY (1965); ROBERT S. HUNT, LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY (1958); SPENCER KIMBALL, INSURANCE AND PUBLIC POLICY: A STUDY IN THE LEGAL IMPLEMENTATION OF SOCIAL AND ECONOMIC PUBLIC POLICY, BASED ON WISCONSIN RECORDS, 1835-1959 (1960); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971); JAMES A. LAKE, LAW AND MINERAL WEALTH: THE LEGAL PROFILE OF THE WISCONSIN MINING INDUSTRY (1962); FRANCIS W. LAURENT, THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES: A CENSUS OF THE ACTIONS AND SPECIAL PROCEEDINGS IN THE CIRCUIT COURT FOR CHippewa COUNTY, WISCONSIN, 1855-1954 (1959); and EARL FINBAR MURPHY, WATER PURITY, A STUDY IN LEGAL CONTROL OF NATURAL RESOURCES (1961). Lawrence M. Friedman is probably the most important disseminator and exemplar of Hurstian legal history. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973). Harry Scheiber's 1970 review article, At the Borderland of Law and Economic History, was instrumental in introducing historians at large to Hurst's work. See Scheiber, supra note 267.
more than scholarly-analytic purposes. History was Hurst's métier and to a
degree his vehicle, but the fundamental purpose of Hurst's activities lay
outside any scholarly ambition for history in law per se. Hurst's
professional goal was, as Langdell's had been, to oversee the process of
writing new rules for the production of rules within the juridical field.

Three aspects of Hurst's effort must be underlined. First, its location.
Professionally, Hurst was firmly situated within the juridical field, and he
wrote for its attention. His credentials—his capital—were uniquely
attuned to that field's criteria for success: an elite undergraduate
education; a Harvard law degree; a Supreme Court clerkship; the
patronage of two of the field's peak actors, Frankfurter and Brandeis; and
the connections that took him to his first law faculty position. As a career
actor within the juridical field, Hurst defined his agenda by his location
within that field. Thus, while Hurst himself wrote historically by
inclination and intellectual commitment, the professional world in which
he was situated was not that of history, nor would it ever be. Had history
been Hurst's locale, it is unlikely that his work would have received either
attention or sponsorship in the juridical field.

Second, we should note how carefully Hurst defined his position within
the juridical field. His was a critique of the traditional centers of influence
in the field—the centers that had up to that point produced the field's most
influential accounts of itself—but not of the field itself. And the strategic
standpoint he espoused was not that of history per se but, much more
broadly, of "social science"—always, in the twentieth century, the
disciplinary genre most clearly associated, as history was not, with
innovation within the juridical field. Consistently throughout the 1950s
and 1960s, Hurst's formidable entrepreneurial talents were devoted to
attracting sponsorship not only for his own scholarship, but also for
programs that would recruit young scholars already in the law field to the
general "law and society" perspective that Hurst championed. His goal
was to weaken the grip that traditional elites in the legal establishment had
on the juridical field, and to build a counter-elite.

There is little evidence in Hurst's entrepreneurial activities (ranging
from his interactions with the Rockefeller Foundation in the late 1940s
and 1950s, to his later promotion of law and society at Madison and in the

287. Robert Gordon writes that Hurst "wrote his books as background briefs for present-day
lawmakers." Robert W. Gordon, Hurst Recaptured, 18 LAW & HIST. REV. 167, 172 (2000); see also
Gordon, supra note 125, at 48-49; Katz, supra note 17, at 466.
288. See Ernst, supra note 285; Garth, supra note 256; Hartog, supra note 238, at 377-78;
Landauer, supra note 118.
289. See Garth, supra note 256; Tomlins, supra note 41, at 951-53, 956-57; see also Bryant Garth
& Joyce Sterling, From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the
Law and Society Association in the 1960s) that history itself held any pivotal significance for him as the discipline strategic to advancement. In 1951, in formulating his first major proposal to the Rockefeller Foundation to underwrite a program “to equip a small nucleus of promising young men with the cross-disciplinary techniques which should enable them to produce more effective work,” Hurst recommended establishing a planning committee bringing together four lawyers and eight scholars from non-law disciplines.\textsuperscript{290} None was a historian. Hurst spoke to law from the perspective of history in his own work, and encouraged other “lawmen” to write history, but engaged in no sustained program of cross-fertilization with historians.\textsuperscript{291} His interest lay in promoting innovation within the juridical field.

The need for innovation arose from a combination of circumstances: the failings of Legal Realism, a perception of post-war crisis and complacency in the legal profession stemming from the continued narrowness of the training offered by traditional centers of influence, and from the profession’s resultant incapacity to assume its responsibilities “to provide political leadership.”\textsuperscript{292} Added to professional crisis was a perception that the social science disciplines were once more forging ahead (as they had in the 1880s and again in the 1920s) in the contest to provide the key epistemological site for authoritative state decision-making. Hurst’s call “for empirical research and social science” was his answer to both crisis and challenge.\textsuperscript{293} It was intended as a broadening of the juridical field’s capacities through reform controlled from within. His objective was to show legal elites how to “retool to maintain a dominance over social scientists.”\textsuperscript{294} The strategy was to appropriate expertise from outside the legal-academic establishment by “building bridges to the social sciences that were gaining prestige at the expense of legal traditionalism,” not to undercut the juridical field itself.\textsuperscript{295} The law schools, he insisted, had to remain “one of the truly strategic points for moving social science knowledge and philosophy about society into the currents of decision in the community.”\textsuperscript{296}

\textsuperscript{290} Garth, supra note 256, at 48.
\textsuperscript{291} Id.
\textsuperscript{292} Id. at 38.
\textsuperscript{293} Id. at 47.
\textsuperscript{294} Id. at 48.
\textsuperscript{295} Id.
\textsuperscript{296} Id. at 54 (internal quotation marks omitted). See generally id. at 37-39, 56-58; Tomlins, supra note 41, at 946-60. Ernst, supra note 285, at 14, reports that “[Hurst] agreed with [Felix] Frankfurter that ‘the expert should be on tap, but not on top’—unless that expert was a lawyer.”
F. Legal History and Historical Practice: (3) Critical Legal History

Hurst’s campaign was successful in both its major aspects: promoting innovation in, while retaining initiative for, the juridical field. The narrative of rule formation represented in Roscoe Pound’s taught tradition was rendered nugatory. New rules were produced; new rules for the production of rules within the field were written. No less an observer than Supreme Court Justice Byron White acknowledged the impact in 1971, praising the turn in legal research from “narrow study of judicial doctrine” to “deal[ing] with the ties between law and society.”

White’s comments mark the early 1970s as a pivotal moment for “law and society” within the juridical field, but also for Hurstian legal history outside it. As an entrepreneur for the law and society approach within the field, Hurst, we have seen, had been careful not to fly the flag of history as such. He had recommended a general externalism, and since the early 1960s it had been coming on line. But it is indisputable that by the early 1970s Hurst’s legal history had also gained recognition in the history field. Symbolic of this confluence, Hurst was invited to write the keynote essay for the volume Law in American History, published in 1971 by Harvard’s impeccably establishment Charles Warren Center for Studies in American History. It is in that volume’s introduction that Justice White can be found endorsing Hurst’s “law and society” perspective over “doctrine.”

It is noteworthy, then, that it was precisely at this ceremonial moment of externalism’s admission to the juridical field, and of Hurstian legal history’s admission to the canon of “American History,” that a young Assistant Professor at Harvard Law School named Morton Horwitz chose to start a new fight with Roscoe Pound, and named doctrine—the real (historical) meaning of rules—not society, as the essential terrain.

American legal history, Horwitz accurately observed, had “almost exclusively been written by lawyers.” Perhaps ingenuously, Horwitz speculated that professional historians had absented themselves because participation in the field “inevitably involves mastery of technical legal doctrine,” a requirement that always left historians “paralyzed with

297. Byron R. White, Introduction to LAW IN AMERICAN HISTORY, at v, vi (Donald Fleming & Bernard Bailyn eds., 1971)
298. Gordon, supra note 125, at 55.
300. Gordon, supra note 125, at 55.
302. Id. at 275.
fear.\textsuperscript{303} But what kept historians from writing legal history was not Horwitz’s concern. Like all the lawyer legal historians before him Horwitz wrote to gain attention within the juridical field. His particular objective was to criticize what his predecessors had used their monopoly to create: a history of continuities and intact traditions, of antiquarian searches for doctrinal origins, all of which “perverted the real function of history by reducing it to the pathetic role of justifying the world as it is.”\textsuperscript{304}

Horwitz’s target here was Pound’s celebration of law’s internalized constancy under the tutelage of heroic judges and sympathetic legal intellectuals. He spoke out for “the real function of history”—critique—against Pound’s “dominant form of legal history.” Pound’s form, of course, was not dominant. Hurst and his acolytes had been undermining it for well over two decades. Hurst’s entire oeuvre since The Growth of American Law is appropriately understood as a devastating retort to Pound.\textsuperscript{305} But Horwitz had nothing to say of Hurst. In part, his was a fight internal to Harvard Law School, an insurgent assistant professor lambasting the school’s most famous (and recently deceased) twentieth-century scholar. Hurst of Wisconsin was irrelevant to that fight. But that was not the most important reason. Horwitz’s assault on lawyers’ perversions of history was the first in a line of more elaborated analyses that would coalesce at the end of the 1970s as “Critical Legal History.” Written largely from within the elite eastern establishment that Hurst had targeted, the defining characteristic of the genre was its rejection of Hurst’s externalism, its preoccupation with doctrine in particular and the law’s internalities in general.\textsuperscript{306}

Ironically, Hurst was in some ways the author of his own absence. Hurst’s project had been to protect the strategic position of law. The very rise of Critical Legal History, and of its parent movement, Critical Legal Studies (CLS), attests to his success.\textsuperscript{307} Although spawned in the Law and

\textsuperscript{303} Id.

\textsuperscript{304} Id. at 281. Horwitz’s project was mildly schizophrenic (the field required mastery of doctrine; the masters of doctrine—like Pound—had perverted the field), and would give others dyspepsia when it came to absorbing his first major attempt to set matters aright, HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, supra note 34. On Transformation and its reception—and its anxieties about doctrine and its debts to Hurst—see Laura Kalman, Transformations, 28 LAW & SOC. INQUIRY 1149 (2003); and Christopher L. Tomlins, American Legal History in Retrospect and Prospect: Reflections on the Twenty-Fifth Anniversary of Morton Horwitz’s Transformation of American Law, 28 LAW & SOC. INQUIRY 1135 (2003).

\textsuperscript{305} It is worth noting, however, that neither Hurst nor Horwitz disputed Pound’s identification of the first half of the nineteenth century as American law’s “formative” era.

\textsuperscript{306} See Gordon, supra note 126; Gordon, supra note 125. The trend was given definition, and meaning, and a name, in Gordon’s famous 1984 article, Robert W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57 (1984). On the development of legal history at Harvard Law School during the period of Hurst’s ascendency in the field, see Katz, supra note 17, at 466-67.

\textsuperscript{307} The thoughts in this and following paragraphs on CLS depend heavily on Tomlins, supra note 41, at 959-63.
Society movement, CLS developed as a critical, law-based reaction to Law and Society’s ascendant metaphor, law as a dependent variable, and to its ascendant research practice, the ascription of objective meaning through positivist social scientific inquiry. In the CLS project, internal, not external, critique was the chosen strategy; social theory rather than social science was the interrogatory vehicle; and law’s virtual autonomy as institutional formation, profession, discipline, and discourse, rather than law as dependent variable, was the point of departure. CLS, though politically left-wing, was, far more than Law and Society, a creation of the juridical field. It was founded in the legal academy and led by scholars trained and in many cases based at elite law schools. Objectively, then, the rise of CLS confirmed the resurgence of the law schools that Hurst had sought, and also (less happily) that the center of gravity in the juridical field was shifting back toward the institutions from whose network Law and Society at its inception had been a departure. At least in institutional terms, by the late 1970s law had gained decisive ascendancy in the field of encounter between law and other disciplines that had been initiated in the 1960s Law and Society movement.

Critical Legal History had some roots in Hurst’s externalist paradigm (in the same way that Legal Realism had some roots in Pound’s engineering approach). Initially its historiographers identified critical legal history as a social/legal genre. Hurst, we have seen, had lent the stimulus of example to the growing interest of professional historians in writing socio-legal history after the manner of the “law in action” approach of the Law and Society movement that he had done so much to sponsor, and in its earliest days Critical Legal History did much the same, with a “new left” bite. Critical Legal History offered some promise of cross-disciplinary conjunction with professional historians: much as Hurst had drawn on the Beards and Parrington, so Critical Legal History embraced historians such as E.P. Thompson and Douglas Hay. Professional historians in turn embraced Critical Legal History by awarding Horwitz the 1978 Bancroft Prize for his Transformation of


310. Gordon applied the “social/legal” tag at the beginning of his article. Gordon, supra note 306, at 58. By the end of the article he had rather clearly rejected it in favor of the history of doctrine. Id. at 117-25.
American Law. But before the end of the decade Critical Legal History was shaking Hurst’s dust off its shoes, to become the latest of the juridical field’s internalized legal histories—a history addressed to the juridical field from within itself. Critical Legal History tolerated the Hurstian social historical paradigm, or dismissed it—sometimes affectionately, sometimes not. Beyond some isolated examples, it never showed much inclination to develop a “critical empiricism” of its own. The result was a pronounced conceptual tension within the developing U.S. legal-historical field, one, fortunately, that did not dilute the extraordinary energy that would characterize legal history both within and outside the legal academy from the 1970s on, but a tension nonetheless.

The socio-legal perspective promoted by Hurst and uppermost in modern professional historical research on the law meant a burgeoning of contextualizing, historicizing empirical inquiry into legal phenomena. The impact on the legal history field, as historians saw it, was profound, generating multiple interpretive perspectives. At first content to follow the “dependent variable” approach of Law and Society, historians began subsequently to identify law as enormously powerful—constitutive of social, economic and political relations—while at the same time stripping it of the linguistic and technical appurtenances that inscribed a virtual autonomy on its constitutive practices. Current inquiry into legal culture promises further to erode the line between the social and the legal, both empirically and methodologically. Understood as an attempt to develop a standpoint on law situated outside the juridical field, the point of historical work has been to challenge the juridical field’s freedom to engage in self-defined rulemaking.

The impact of historians’ entry upon the terrain of legal history as legal scholars see it, on the other hand, has been on the whole marginal. To an important extent, this opinion reflects the actual state of preferences in the legal academy. After Robert Gordon proclaimed the beginnings of the

311. HORWITZ, supra note 34.
313. For a brief guide, see Barbara Y. Welke, Willard Hurst and the Archipelago of American Legal Historiography, 18 LAW & HIST. REV. 197 (2000).
314. TOMLINS, supra note 17, at xi-xvi. For examples of recent work in legal history along the lines discussed in this paragraph, see the essays collected in THE MANY LEGALITIES OF EARLY AMERICA, supra note 16; and see also RONEN SHAMIR, THE COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE (2000). For commentary on the “cultural turn” see generally KAHN, supra note 55.
315. Robert A. Ferguson of Columbia Law School, for example, has taken issue with history’s invasion of the juridical field. The best legal history, he concludes, is that which pays proper attention
current revival of historical study in the mid-1970s, the pace for legal history within the legal academy was set by the Critical genre, and the focus of that genre was a return to pre-Hurstian internalism. Certainly the results were very different from those offered by the taught tradition. Nonetheless, Gordon’s post-Hurst historiography championed the intellectual history of legal doctrine—“legal historiography as the intellectual history of the rise and fall of paradigm structures of thought”—as the core purpose and achievement of Critical Legal History. From this perspective the most exciting work was that which “take[s] dominant legal ideologies at their own estimation and tr[ies] to see how their components are assembled.” Why is this? Gordon’s own answer is important:

The point seems to be rather simply (1) to soften up existing structures by becoming aware of the conflicts and ambiguities in the very foundations of the way they were constructed, (2) to recover suppressed alternatives less to establish them as a new orthodoxy than to suggest the perpetual malleability of structures and the possibly experimental directions for their revisions, (3) to stress the multiplicity of legal traditions and the perpetually contested and contradictory nature of basic legal ideals, (4) to reveal the backstage mechanics of how ideals are constructed in order to dissipate myths that they are natural or determined by the course of history, and (5) to spin out alternative narratives to break the spell of dominant master narratives.

To whom were these interventions addressed but to Gordon’s co-actors within the juridical field? As Horwitz’s reversion to doctrine at the very

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317. Robert W. Gordon, The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument, in THE HISTORIC TURN IN THE HUMAN SCIENCES 339, 360 (Terrence J. McDonald ed., 1996). For a useful short account of the origins of this mode of critical doctrinal/legal-intellectual history, see Ernst, supra note 205, at 1030-34. For a longer account, which is also an important critique of the genre, see Joan C. Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. REV. 429, 471-85 (1987). In 1984, Gordon’s enthusiasm for this approach was tempered slightly by concern that the critical doctrinal history that had been written to that point suffered from a deep tendency to abstraction and refusal to engage in meaningful empirical research outside the realm of traditional scholarly law sources—“case law and treatise literature produced by the high mandarins of the legal system.” Gordon, supra note 306, at 120. He conceded “if the Critics want to make [their] point convincingly, they will have to start slicing their narratives out of field-level uses of law.” Id. at 124-25. Twenty years on, they have yet to do so.
outset of the CLS era suggested, Critical Legal History's significance lay in the realm of struggles within the juridical field over the meaning of the rules that the field produced.\footnote{319} Nothing prevented the employment of other genres of history in that fight.\footnote{320} But inevitably, in such a project, the primary attention and methods of critical legal historians, who overwhelmingly were participants in the juridical field, were dominated by the concerns that arise in that field.\footnote{321}

Critical Legal History's basic project was to prevent lawyers obtaining legitimation for current orthodoxies from Pound's taught legal tradition by using historicist scholarship to destroy the basis of that tradition. This would clear the way for battle with the conventional ideologies of rule produced within the juridical field. Hurst's methodologically very different project can also be understood as an embrace of the same basic goal. In Hurst's case, the prescriptive recommendation of his historico-legal scholarship was squarely in the progressive tradition—the application of organized social intelligence to "deliberate and self-conscious policy-making" through the medium of an administrative state.\footnote{322} It was to be accomplished by empirical research—marshaling facts and applying social science theories to them—but firmly under the guidance of lawyers.\footnote{323} Yet a complex analysis of the actual configuration of the juridical field—the rules for the production of rules—underlay Hurst's methodological recommendation, built on an inquiry into the history of national legal practices that stood independently of the recommendation itself.\footnote{324} Historians outside the juridical field picked up

\bibitem{319} CLS scholar Gary Minda has made this abundantly clear: It is a critical time for jurisprudential studies in America. It is a time for self-reflection and reevaluation of methodological and theoretical legacies in the law. At stake is not only the status of modern jurisprudence, but also the validity of the Rule of Law itself. In the current era of academic diversity and disagreement, the time has come to seriously consider the transformative changes now unfolding in American legal thought. The challenge for the next century will certainly involve new ways of understanding how the legal system can preserve the authority of the Rule of Law while responding to the different perspectives and interests of multicultural communities.


\bibitem{320} As the rising incidence of joint graduate degrees in history and law, the appointment of joint degree holders to law faculties, and so forth attest.

\bibitem{321} Tomlins, \textit{supra} note 41, at 961-63.

\bibitem{322} Hurst, \textit{supra} note 260, at 108.


\bibitem{324} As a field of inquiry, Hurst wrote, legal history addressed "the presence of law in society as a particular institution, possessing its own forms of organized power and its own ways of operating." See \textit{Hurst, supra} note 261, at 5. To plumb the multiplicity of forms of power and ways of operating, Hurst offered five categories for inquiry into the history of US national legal practices: institutions, ideas, inertia, the pursuit of justice, and the balancing of consensus and conflict. None of these inherently led to a particular prescriptive outcome. \textit{Id. at 274}. See generally \textit{id. at 270-74}.
on Hurst principally in the latter aspect. They had little reason to be interested in his prescriptive recommendations per se.

For Critical Legal History, the pursuit of the prescriptive turned out to be far more complex. One route was to follow a critical variation on an orthodox technique—to marshal expertise to underpin alternative interpretations of traditional legal sources so as to contest the meaning of those sources and of the rules they embodied and generated. A second and different route flowed from Critical Legal History’s most influential proposition—that historicist deconstruction of doctrine exposed underdetermination in the relationship between law and society, teaching that there are no “necessary consequences of the adoption of [any] given regime of rules.”325 Ideally, following this route would open existing rules to suppressed alternatives that Critical Historians could offer once more to the present both as prescriptive bases for revision and as a conceptual point of entry to debates over the mode of rule production itself. “The premise is that if we can show how past forms were made and unmade, and how present forms in their turn came to be put together, we can make the present seem . . . more amenable to reimagination and change.”326 Gordon declared this route a purge of “dogmatism”—a departure from the “Spy versus Spy” contest that merely replaced authority with counter-authority. An innovative politics of legal change would take its place, one that used history to demonstrate the plasticity of all modes of action. But Gordon also noted, less happily, that Critical Legal History’s corrosive capacities had no necessary connection to a progressive politics:

The notion that every form of legality is a constructed artifact rather than a natural or determined fact is useful for understanding the genealogy of current conditions, but at the same time tends . . . to deprive people of any strong basis for confidence in transcendent standpoints for critique of the present order.327

Or indeed of any other order. After more than two decades of activity, it remained unclear to Critical Legal History’s most intelligent exponent whether the work of Critical Legal Historians could guide their project of social renewal through law. Following in the wake of earlier prescriptive

326. Gordon, supra note 306, at 125. As an example, one might include in this category the extensive historico-legal scholarship on the Langdellian revolution, the goal of which has been to demonstrate the diversity of opinion, method and approach that existed at the moment of foundation of the modern juridical field, thus emphasizing—through recovery of lost alternatives—that apparently paradigmatic rule structures in the juridical field are always open to reimagination. Much of the scholarship appears to be motivated by searches for new legitimating universals for law that possess historical pedigree. See also Stephen A. Siegel, The Revision Thickens, 20 LAW & HIST. REV. 631, 635–37 (2002). See generally Grossman, supra note 96; Siegel, Historism, supra note 96; Siegel, Orthodoxy, supra note 96; Siegel, John Chipman Gray, supra note 96.
enthusiasms, Critical Legal History in its maturity had moved to examine the rules for the production of rules, only to conclude (quite erroneously, in the light of history, social experience, and its exponents' own positions of privilege) that there were none.

G. Legal History and Historical Practice (4): Critical Historicism

In 1997, an apparently relieved Robert Gordon hailed "the arrival of critical historicism," perhaps "the most exciting work currently being done on law." 328 The latest iteration of Critical Legal History, critical historicism appeared to promise a way out of the genre's dead end. Gordon underlined the sense of new beginnings by resort to an exotic metaphor of pageant and diplomacy—the presentation of credentials by "an accredited envoy from Other Genres to the City of Law," and the recognition of the envoy "as a category of intellectual practice relevant to law." 329

Imaginative metaphors notwithstanding, Gordon's announcement failed to establish that critical historicism on its face actually represented any sort of liberating break in the relationship between Critical Legal History and the "legally-constructed domain" from which it had sprung. Critical historicism's arrival was announced in one of law's elite spaces (the pages of the Stanford Law Review). Its desire for admission—recognition of its "relevance"—was palpable; the terms were hardly a challenge. The encounter itself occurred entirely on law's turf, within a virtually closed system—hermetic, circular. By whom was the envoy received? One part of the juridical field. By whom accredited? Another part. For the envoy was actually a delegation of five law professors (if we include Gordon) and a single constitutional historian—to lawyers, always the most tolerable breed of historian. 330 These best and brightest critical historicists had journeyed not from "Other Genres" but from law's suburbs to City central to have their craft citizenship recognized as "a category of intellectual practice." Solemnly, the City had granted its endorsement. They were now freemen.

Critical historicism's arrival as savior of Critical Legal History was a subtext to Gordon's main claim, maintained consistently throughout his career as Critical Legal History's leading historiographer, that Critical Legal History has always been subversive because it disrupted the mainstream modes of relationship between law and history that serve to reassure us "that what we do now flows continuously out of our past, out

329. Id. at 1023.
330. See, e.g., Horwitz, supra note 301, at 275.
of precedents, traditions, fidelity to statutory and constitutional texts and meanings. But the subtext of escape from Critical Legal History’s dead end pops up quickly nonetheless. The dead end was the deviant doctrinalism preached during Critical Legal History’s fashionable and playful heyday. The new critical historicism that the Stanford Law Review symposium celebrated was in contrast

*any* approach to the past that produces disturbances in the field—that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such as that of the losers rather than the winners) ... or that posits alternative trajectories that might have produced a very different present—in short *any* approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.

One reading of the “arrival” of critical historicism powerfully suggests that the history of law practiced and recognized within the juridical field remains a closed loop. Lawyers write history for their own purposes, whether critical or conventional. The most obvious of those purposes is to use history as a means to commend, defend, reform, replace, and argue about the rules. Within the juridical field, that is, history always ends up as a modality of jurisprudential debate. And jurisprudence, we have seen, is prescriptive. “When it is not pursuing the analytic question of the conditions of legal validity, contemporary jurisprudence is telling us how judges should rule or how regulatory regimes should work.”

Another reading allows a more generous conclusion. Legitimizing “*any* approach to the past” as long as it unsettles routines, Gordon argues, brings “virtually all history as practiced by modern historians” to bear critically on law. As such, critical historicism can be seen as a break in the trajectory of critical legal-historical scholarship. It opens the juridical field to the whole range of disciplinary practices developed by professional historians, practices noted but as quickly forgotten in Critical Legal History’s rapid slide from the social to the doctrinal and the prescriptive.

But how does “virtually all history” suddenly become critical history? Gordon’s claim for historical practice’s immanent criticality in the domain of law is founded on the proposition that professional historians’ purposes and working assumptions are fundamentally different from those of lawyers. Lawyers and historians are distinct breeds of trained intellect.

332. *Id.* at 1024 (emphasis added).
“Lawyers are monists, historians are pluralists . . .”335 That is, “lawyers want to recover a single authoritative meaning from a past act or practice while historians look for plural, contested, or ambiguous meanings.”336 Second, “[l]awyers are overtly presentist: They want to bring past practices into the present to serve present purposes.” Historians are not interested in presentism, but difference—the dead past, the pastness of the past, the disparity between past and present, the breaks and “great epistemic shifts” that render past and present irreducibly discontinuous.337

Both propositions are open to dispute. It is not difficult to think of monist histories, nor are they necessarily bad history, nor necessarily “uncritical” because of it. Can one think of a more monist history than Charles Beard’s decidedly critical Economic Interpretation of the Constitution of the United States?338 Nor is the identification of “history” with a “past” separated from the “present” and their “difference” all that helpful. First, the very idea of a distinct accessible “past” is problematic. As Keith Jenkins has observed, following Hayden White, the past as such has no accessible reality, no rhyme nor rhythm of its own. It is sublime: incomprehensible, uncontrollable, uncontrolled, disordered. The past leaves only fragments or remnants that are already historicized in the very act of their preservation: they exist only as archaeological, or documentary, or visual “sources” from which “data” can be extracted and then organized into other texts—chronicles, chronologies and narratives—that impose order and sequence on events and ideas by using theories, hypotheses, literary forms, or simply common sense. From this perspective the past furnishes not history but only material “waiting to be appropriated with reference to the social formation wherein the appropriations are being variously legitimated.”339 Second, a sizeable proportion of modern history has been composed in the course of presentist searches for just such “usable pasts.”340 Indeed, the creation of

335. Id.
336. Id. at 1025.
337. Id.
338. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).
histories that purport to explain a current present is, one can surely assume, a prime motivation for critical historians. Finally, history's temporality cannot be confined to what's done with, as if "the past" could be neatly boxed. "The past can be seized only as an image which flashes up at the instant it can be recognized and is never seen again." Thus, "[t]o articulate the past historically . . . means to seize hold of a memory as it flashes up at a moment of danger." As Francis Barker put it, history is the seizure of "that disturbing, critical irruption into the present."

So the idea that "virtually all history as practiced by modern historians" is critical when mixed with law seems based on a dubious assumption of essentialist—as opposed to political, or strategic or disciplinary (or all three)—distinctions between lawyers and historians. More to the point, how in fact does contemporary pluralist history, sensible of the past's ambiguity, contingency, and pastness actually enliven the project of Critical Legal History? Gordon argues that the contribution is precisely plurality itself. "What is common to many of these approaches is that they treat law—meaning not just legal texts but legal instruments, processes, rituals, interactions, discourses—as cultural artifacts, imaginative constructs, historically contingent and perpetually contested and renegotiated." But perpetual contingency is really of interest only to the intellectual, the "host of pure thinkers who only look on at life, of knowledge-thirsty individuals whom knowledge alone will satisfy and to whom the accumulation of knowledge is itself the goal." What the infinite plurality of much contemporary historical practice conveys is nothing so much as a new form of burial in the past. Once more "all that has ever been rushes upon mankind," this time not as "a science of universal becoming" but as a blizzard of piecemeal narratives that, collectively, add up to little more than a smorgasbord of equal-opportunity possibilities.

Such an outcome may be attractive to Gordon precisely insofar as it reproduces and spreads wide the totalized contingency prized by the mandarin mode of critical doctrinal history. But history that is infinitely interpretable, that grants each of us our own niche in time, can have little


342. Id.


344. NIETZSCHE, supra note 133, at 77.

345. Id.
to say about the collective struggles of humanity for transcendence, the project that CLS once embraced as the appropriate subject for inquiry. This is not critical history but history dispersed, atomized, neutralized. After all the possibilities have been uncovered, lost voices given speech, and contingencies explored, things still come out a certain way. We are obliged to attempt to explain why. "In ultimate epistemological senses it may [be necessary] to exercise some skepticism about [one's] own groundedness, but this is quite different from beginning in a programmatic way from that lack of foundation." 346 We should not fear "general statements about the structure and transformation of history which are not rooted for their 'truth' . . . in a single and particular historical moment." 347 The point of historical metanarrative is precisely to avoid the slide from particularity into antiquarianism, to shed ourselves of "that dead weight of the apparent past in order that [we] may remember." 348 The critical historian's task is remembrance, recognition and explanation.

IV. CONCLUSION

My narrative of the formation of the modern juridical field in the later nineteenth-century United States has described how it emerged in a crisis of control arising from exponential growth in resort to law, coupled with a fragmentation of the institutions controlling the production of knowledge that shattered the unity implicit in the nineteenth century's epistemological assumptions. My account of resort to history as explanation of those and succeeding processes of crisis and reformation in the juridical field has emphasized how—with rare exceptions—history has been appropriated to serve the field's agenda. Elsewhere I have emphasized similar processes of appropriation in law's relationship with other forms of social knowledge that were professionalized in the late nineteenth century. 349 Reacting to successive crises of usage and legitimacy, participants in the juridical field have successfully invested in different forms of knowledge and power from outside the field. In so doing, they have reconstituted the field's substance while preserving its sealed essence: the field retains the capacity to reconcile the uses to which law is put with the meta-character it proclaims for itself.

History within the juridical field is history within a field of power—power to set "the key terms of legitimacy." In Hurst's day, legal history looked outward for interpretive assistance. Indeed, Robert Gordon used

346. BARKER, supra note 343, at 107.
347. Id.
348. Id.
349. See Tomlins, supra note 41.
his castellate metaphor for the first time at the Hurstian peak, reporting that Hurst had lowered the drawbridge and "throw[n] open the gates" of the City to general historiography. But Hurst had always thought the tourists needed an official guide, lest, once inside, they waste their time in aimless wanderings. Non-lawyers, Hurst said, would be

hampered chiefly by their ignorance, first, of the law's jargon, and, secondly, of the techniques of reading between the lines so that one does not take more seriously than he should what the law declares. The non-lawyers have pretty well stayed clear of legal territory, and when they venture into it, it is a rare case in which they do not—from a lawyer's standpoint—either belabor the obvious, or fall into errors of treating words as if they were substances.

In 1931, Karl Llewellyn had belittled Richard Morris in precisely that fashion. Only a lawyer knew what law was. Morris should have had "a careful professional go over his manuscript" to eliminate his "curious errors." And though it did not shut down access, Critical Legal History's hierarchy of excitement was in its own way as discriminating.

To be sure, history within the juridical field has not been merely dutiful in its performances. Important variations have existed within the overall trajectory I have outlined—compare, for example, the different perspectives on historical jurisprudence embraced at the turn of the twentieth century by Oliver Wendell Holmes and James Coolidge Carter. Overall, however, even the modes of scholarship that have mobilized history for purposes of critique within the juridical field—Hurst's external paradigm, Critical Legal History—have tended to channel its forms to ensure that they serve the purpose thought appropriate.

Conceivably, critical historicism represents the beginnings of a different resort to history. Critical historicism claims not to pick and choose but simply to embrace history as method—an ineluctably plural method that resists deployment for present purposes, that provides "a rich cornucopia... of novel approaches to law," and that travels unaccompanied. I have already commented on the sophisticated antiquarianism immanent in an uncritical historicist fetishization of plurality. Assuming that problem can be surmounted, it still remains to be

350. Gordon, supra note 125, at 54-55.
351. Memorandum, James Willard Hurst, Law and Values (May 9, 1951) (on file with the Rockefeller Archive Center), quoted in Garth, supra note 256, at 48.
353. See Gordon, supra note 317, at 359-60.
354. Gordon, supra note 328, at 1029.

https://digitalcommons.law.yale.edu/yjlh/vol16/iss2/2
seen whether this most recent resort to history can survive an encounter with so purposeful a field as the juridical, or whether it is simply part of a general drift to methodological pluralism that is the juridical field's latest response to a crisis of usage arising to challenge meta-character. If I am correct that, hitherto, histories of law generated within the juridical field have constantly concerned themselves with justifying successive structures of rule production, one has reason to be cautious.

Yet whether or not critical historicism per se is the wave of the future, there is general reason for some degree of optimism where historical research is concerned. Dezalay and Garth note that another upsurge of interest in the juridical field is occurring in the social science disciplines. With it has come the disciplines' tendency to produce "prescriptive discourse," normative proto-legal accounts of what the rules should be. The upsurge of interest, in other words, bespeaks a participatory rather than a critical ambition. "Unfortunately... very few scholars actually inquire into the structural history of the creation and production of national legal practices."

On the evidence of recent years, by contrast, history outside the juridical field has become attuned to critique rather than prescription, to the dismantling of processes of rule production so as to reveal "the rules for the production of the rules." One can argue that this has occurred solely by default. Historians are only rarely members of the community of rule recommenders, although they can of course be found in the ranks of public intellectuals agitating for particular outcomes. The late nineteenth-century reorganization of inquiry did not constitute history as an instrumental social knowledge as it did the social sciences, and little has occurred since to alter that state of affairs. Dezalay and Garth note, following Wallerstein, that "the division of the roles of the disciplines is the product mainly of the nineteenth-century state. Political science thus focuses on national government... [while] anthropology focuses on colonial relationships." History enjoys no similarly demarcated role. History,


356. Dezalay & Garth, supra note 4, at 311.

357. Id.
certainly, can be a powerful resource in the hands of the state. It allows the state to create broad narratives of necessity and progress to explain its purposes, a context within which more instrumentalist discourses can safely nest their recommendations. But history has little detailed prescriptive capacity of its own. Indeed, it was the disintegration of history in its broadly Hegelian, nineteenth-century sense—the unfolding of Spirit in time—that helped to constitute more instrumentalist discourses. History's capacity to explain by invoking the sheer weight of the past was no longer convincing. Americans attempted to reconstitute history as a scientific discipline, a mode of inquiry that would produce factualist bricks, for the new late nineteenth-century division of intellectual labor. But they eschewed explicit purposiveness as "philosophy." The new social sciences, notably sociology, claimed the decisive architectonic role.

Unable, despite its best efforts, to develop a systematic positivism of its own, history has been left with choices among myth-making, sheer description, and interpretation. Having tried both myth-making and description, it is perhaps not surprising that, even if only by default, attempts to understand "why law is what it is," discussion of "what makes the credibility of law," and scrutiny of "the black box that produces the law and more generally the rules of the game for governance" have finally crept onto its agenda.

In pursuing that agenda, history can provide justification, or it can provide explanation. Much of history's historical role, we have seen, has been devoted to justification. As history (in all of its genres, not just the cultural and intellectual currently in favor) becomes more critical in its relationship to the law, and to the present, it may have more explaining to do.

358. As Thomas Bender observes, history offers the nation-state the capacity "to define the framework of its self-understanding." Thomas Bender, Historians, the Nation and the Plenitude of Narratives, in RETHINKING AMERICAN HISTORY IN A GLOBAL AGE 1, 6 (Thomas Bender ed., 2002).

359. These three genres of history accord roughly with what Nietzsche called the "monumental," the "antiquarian," and the "critical." NIETZSCHE, supra note 133, at 67-77.

360. Dezalay & Garth, supra note 4, at 312, 313.