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Introduction

Common Law, Democracy, History: a Modernist Tradition of Reading the Past

From the American Revolution until the very end of the nineteenth century, the common law was considered an integral mode of governance and public discourse in America. The vital presence of the common law might seem odd in a country that was premised in so many ways on breaking with its European past and on assuming political control of its own destiny. After all, the common law had originated in, and remained closely identified with, England. It was ideologically committed to upholding precedent and to repeating the past, claiming as it did so to embody the "immemorial" customs of the English, customs so old that their origin lay beyond "the memory of man." It consisted of judicial, rather than legislative, articulation of legal principles. For all these reasons, one might expect Americans, who were intensely proud of their republican experiment, to have rejected the common law.

Instead, until the very end of the nineteenth century, the common law was widely – although never universally – claimed and celebrated. In 1826, in the first volume of his celebrated *Commentaries on American Law*, the "American Blackstone," James Kent, delivered the following breathless paean to the common law that captures how many nineteenth-century American lawyers thought about it:

> [The common law] fills up every interstice, and occupies every wide space which the statute law cannot occupy.... [W]e live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake, and when we lie down to sleep, when we travel and when we stay at home; and

it is interwoven with the very idiom that we speak; and we cannot learn another system of laws, without learning, at the same time, another language.[1]

We might account for the longevity and resilience of the common law tradition in nineteenth-century America by advancing at least two reasons, both well known. First, the common law came with heavy ideological freight. Since the early seventeenth century, English common lawyers had resisted the encroachments of would-be absolute monarchs in the name of England's "ancient constitution," an agglomeration of immemorial, endlessly repeated, common law freedoms. Americans had thoroughly absorbed this learning. The American revolutionary struggle was fought to a large extent to vindicate what colonists considered their common law rights and freedoms. As a result, many prominent American legal thinkers from the late eighteenth century on considered the written U.S. Constitution to be informed by, and indeed to be incomprehensible without reference to, the common law.[2] Second, throughout the nineteenth century, the American state – whether at the federal, state, or local level – did not play nearly as significant a role in economy and society as it would in the twentieth century. The gap it left was filled by common lawyers, who played a correspondingly larger part in articulating law for America's vibrant and multiplying polities and economies. Even as they were accused of political bias, nineteenth-century American common lawyers took this role extremely seriously. More than a quarter-century ago, Morton Horwitz detailed the considerable creativity of American common law-

[1] James Kent, *Commentaries on American Law* (4 vols.) (New York: E. B. Clayton, 1840) (4th ed.; 1st ed., 1826), Vol. 1, p. 343. It is noteworthy that Kent makes an argument that many contemporary sociolegal thinkers would recognize, namely that law is utterly constitutive of our lives, down to their most mundane, routine, habitual aspects. For contemporary legal scholars, the authoritative work on the constitutive nature of law is Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

[2] The contemporary American legal scholar most clearly associated with identifying the common law sources of the revolutionary struggle is John Phillip Reid. See John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (DeKalb: Northern Illinois University Press, 2005). See also Reid's multivolume *Constitutional History of the American Revolution*. John Phillip Reid, *The Constitutional History of the American Revolution: The Authority of Rights* (Madison: University of Wisconsin Press, 1986); *The Constitutional History of the American Revolution: The Authority to Tax* (Madison: University of Wisconsin Press, 1987); *The Constitutional History of the American Revolution: The Authority of to Legislate* (Madison: University of Wisconsin Press, 1991); *The Constitutional History of the American Revolution: The Authority of Law* (Madison: University of Wisconsin Press, 1993).

yers as they reshaped English doctrines of tort, contract, and property to suit the needs of the nineteenth-century American economy.[3]

But there was more, and it is this that forms the subject of this book. Throughout the nineteenth century, the common law, history, and democracy were imagined to coexist in ways very different from the way we (or at least many of us) are now wont to imagine them. These nineteenth-century ways of imagining the relationships among the common law, history, and democracy go a long way toward explaining why the common law tradition survived for as long as it did as such a vital part of American governance and public discourse. They reveal different conceptions of how law, history, and democracy related to one another, different modes of historicizing law, and different ways of thinking about history itself.

For all their importance in their own time, however, these nineteenth-century ways of conceiving of the relationships among the common law, history, and democracy have been largely obscured from our view – or, alternatively, caricatured – by a powerful and still authoritative late-nineteenth- and early-twentieth-century modernist tradition of thinking about law, history, and democracy. In order to recover the ideational world of the nineteenth century and to rediscover the ways in which it might speak to us, it is therefore necessary to understand the modernist tradition that still largely occludes it. Accordingly, it is to this modernist lens through which we continue to read the past that I first turn. We need to understand how we have been reading the past, I submit, in order to see the past differently and to learn from it.

Less than a century after Kent penned his extravagant paean to the common law, it would become impossible for most serious American legal thinkers to express quite such an enthusiastic endorsement of the common law tradition. Around 1900, the common law tradition, so ardently claimed by American lawyers for so long, began to experience a loss of prestige. Furthermore, while it is emphatically not the case that the common law faded from the twentieth-century American legal landscape, its decline as a mode of governance and public discourse – relative to the twentieth-century regime of state-generated law, codes and regulations, bureaucratic experts, and administrative agencies – seems unquestionable. What happened?

The standard account runs as follows. By the end of the nineteenth century, massive transformations in American life – urbanization,

[3] Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).

industrialization, capital–labor conflict – seemed to necessitate ever greater democratic, collective, directive, and expert control over law. Calls for reform were everywhere. Common law notions of contract, property, and tort were entirely unable, it was maintained, to deal with the grave problems of America's industrial economy. Indeed, the common law, especially as it was joined to the U.S. Constitution and applied by the federal courts, was widely considered a bastion of past-oriented conservatism, threatening the viability of urgently needed social democratic legislation. The activities of the U.S. Supreme Court seemed to confirm such critiques. In the notorious case of *Lochner v. New York* (1905), the Court effectively read common law freedoms into the U.S. Constitution's Due Process Clause when it struck down as unconstitutional a New York maximum-hours law intended to regulate working conditions in bakeries on the ground that the law interfered with the right to contract.[4]

The *Lochner* decision, and others like it, incensed Progressive Era critics. The common law's conservative and individualistic orientation toward contract and property, to the extent that it was used to overturn or subvert reformist, redistributive, social democratic legislation, was read as profoundly antidemocratic. In order to restore to democratic majorities their rightful role in giving themselves their own laws, there began a long, complex, and contradictory assault on the common law extending all the way to the New Deal, which ended in the common law's retreat. *Lochner v. New York* rapidly became, and has remained, a symbol of judicial overreaching, a nadir in the history of the U.S. Supreme Court. Law in the twentieth century increasingly became a matter of state-generated law.

Beneath this factual account of how the forces of democracy defeated a reactionary common law lies the modernist account of the relationships among democracy, law, and history to which I have referred. This modernist account arose in the late nineteenth century. It provided the critical intellectual underpinnings for the Progressive Era assault on the common law tradition and remains extremely influential in our own understanding of the relations among democracy, law, and history.[5]

[4] *Lochner v. New York*, 198 U.S. 45 (1905).

[5] The standard and important work on legal modernism is David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994). Luban's own understanding of "modernism," while not at odds with anything I say, is too specific for my purposes. For a discussion of modernism that is closer to the one I advance here, see Dorothy Ross, "Modernism Reconsidered," in Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870–1930* (Baltimore: Johns Hopkins University Press, 1994).

In order for the forces of democracy to defeat the common law, law had to be convincingly represented as a species of politics, its foundations as law undermined. It was only when law could be successfully represented as a species of politics that common law judges could be represented as *illegitimately* usurping the realm of democratic politics. To be sure, as I will show, democratically oriented American critics of the common law had been attacking the common law as a species of politics from the American Revolution on. But the decline in the prestige of the common law in the early twentieth century and into our own time emerges in important part from this specific modernist tradition of thinking about democracy, law, and history. This modernist sensibility is discernible in the writings of America's most famous late-nineteenth-century critic of the common law tradition, Oliver Wendell Holmes, Jr. Although Holmes's role as a critic of the common law is well recognized – and widely celebrated – by American legal scholars and intellectual historians, it is not always sufficiently appreciated that his critique emerges out of a modernist historical sensibility.[6]

"Modernism," Peter Gay has argued, "is far easier to exemplify than to define." While it is beyond the scope of this book to come to terms with the various meanings of modernism as a cultural and intellectual phenomenon, it is significant that Gay identifies as the key attributes of modernism "the lure of heresy," on the one hand, and "a commitment to a principled self-scrutiny," on the other[7]; for it is precisely these two features of modernism, as Gay defines them, that were part of what I would characterize as a special kind of awakening to history revealed by Holmes's writings. (Later in this book, I will argue that much of Holmes's historical sensibility is shared with his late-nineteenth-century contemporaries.) For Holmes, in the spirit of heresy or iconoclasm, history would serve to tear down the suprahistorical foundations – logic, morality, and so on – of law. In sweeping away such foundations, history would invite critical self-reflection, new ways of imagining the future. The result would be an erosion of the boundary between law and politics.

[6] David Luban also takes Holmes to be the first major American legal modernist. As he puts it, "To see these modernist themes at work in legal theory close up, we need go no further than the writings of Oliver Wendell Holmes, whom I propose to take as a case study of the modernist predicament in law." Luban, *Legal Modernism*, p. 28. Luban, to be sure, recognizes the significance of what I would call historical thinking in his rendering of legal modernism.

[7] Peter Gay, *Modernism: The Lure of Heresy from Baudelaire to Beckett and Beyond* (New York: Norton, 2008), pp. 1, 3–4.

In a series of oracular texts, Holmes faulted the common law tradition for being insensitive to history. First, at the opening of his now little read classic, *The Common Law* (1881), Holmes makes an iconoclastic statement that has since become a mantra, if not a cliché, of modernist, pragmatist legal thought:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[8]

Holmes was arguing that legal thinkers had begun erroneously to believe that the common law could be understood as a matter of ahistorical logic, such that legal results would follow automatically from initial premises. But the common law, Holmes suggested, was ultimately irreducible to logic. Logic was not its foundation. Like all law, the common law had to be seen, instead, as the product of *nothing* but history, as something that had arisen and developed in time, as something without ahistorical foundations.[9]

Second, even as he insisted that the common law was not logic but instead the product of nothing but history, Holmes argued that the common law was excessively wedded to repeating the past for its own sake. In a celebrated essay entitled "The Path of the Law" (1897), Holmes famously declared that the mere passage of time, or antiquity, was an insufficient basis for endowing a rule with legal weight and significance. He put it thus:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[10]

[8] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 1.

[9] The phrase "nothing but history" comes from Benedetto Croce's *La storia come pensiero e come azione* (translated as *History as the Story of Liberty*). It has been popularized by David D. Roberts, *Nothing but History: Reconstruction and Extremity after Metaphysics* (Aurora, Colo.: Davies Group, 2006) (1995).

[10] Oliver Wendell Holmes, Jr., "The Path of the Law" (1897), in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Chicago: University of Chicago Press, 1995) (5 vols.) (Sheldon Novick, ed.) (hereafter "*Collected Works*"), Vol. 3, p. 399.

Antiquity, something that had long served as a ground of the common law's legitimacy, was thus as illegitimate a foundation for law as was logic. For law to be justified, it had to be justified in the present as a matter of critical self-reflection. A mere "blind imitation of the past," of the kind common lawyers allegedly engaged in, would not do. If we are to repeat the past, Holmes tells us, we must choose to do so now and with utter self-consciousness.

Holmes's twin critiques of the common law are superficially opposed. How could the common law simultaneously be accused of being excessively wedded to an ahistorical logic and excessively wedded to repeating the past for its own sake? Holmes was, in fact, pointing to different aspects of the common law tradition. The logic-oriented tradition was the product of a scientific orientation to the common law of relatively recent vintage. It had been developing around the Harvard Law School at the time Holmes came of age intellectually. The precedent-oriented tradition, in which the legitimacy of the common law rested upon repeating the past, went back centuries. It had been articulated authoritatively in the early seventeenth century and had been repeatedly reaffirmed.

What unifies Holmes's twin critiques of the common law is his modernist conception of history. For Holmes, history is the heretical or iconoclastic practice of revealing the merely temporal origins of phenomena in order to dismantle the foundations upon which such phenomena rest, whether those foundations be the logic allegedly underlying law or the accumulated weight of law's past that authorizes its own repetition. Once the temporal origins of phenomena have been identified and their foundations undermined, however, no underlying order, instantiated in an unfolding historical time, becomes visible. In other words, history possesses no necessary or coherent direction or meaning. It simply sweeps away foundations, clears ground, and invites self-reflection. Law's foundations may be dismantled in the name of history, but we are given no substitute foundations. We are told to think about what we might want law to be.

Holmes himself was no unambiguous partisan of popular democracy. Indeed, his modernist, antifoundational view of history could as readily be turned on the foundational philosophies of democratic majorities as they could on foundational theories of law. Nevertheless, Holmes's view of history as a ground-clearing gesture, when turned on law specifically, played an important role in breaking down the always tenuous distinction between law and politics. If law's foundations could be shown up as thoroughly temporal, as arising in historical time, contingent, and revisable,

how could one distinguish meaningfully between law and politics? Was not law just another way of doing politics? Where the law in question was not the direct result of the activity of democratic majorities, as was so clearly the case with the judicially articulated common law, did this then not render law an illegitimate way of doing politics? Although they have not always adequately underscored the modernist historical sensibility that is such an important part of Holmesian thought, American legal historians have frequently placed Holmes at the origin point of the "discovery" that law could be collapsed into politics. At the end of a brilliant and detailed discussion of Holmes, for example, Morton Horwitz puts it thus:

> [H]olmes pushed American legal thought into the twentieth century. It is the moment at which advanced legal thinkers renounced the belief in a conception of legal thought independent of politics and separate from social reality. From this moment on, the late nineteenth century ideal of an internally self-consistent and autonomous system of legal ideals, free from the corrupting influence of politics, was brought constantly under attack.[11]

The Holmesian breaking down of the wall between law and politics, itself part of a much wider modernist political, intellectual, and artistic "revolt against formalism" throughout the Western world, provided a critical intellectual underpinning for the early-twentieth-century Progressive assault on the common law.[12] Indeed, Holmes became the darling of democratically inclined, scientifically oriented Progressive Era critics of the common law precisely for having reduced law to politics. These critics actively claimed Holmes as an intellectual forebear, even though only a few subscribed in a philosophically rigorous way to all aspects of his particular brand of modernist, antifoundational, skeptical historical thought. Many of Holmes's insights were taken up, repeated, and deepened. Following in Holmes's footsteps, Progressive Era thinkers railed against the common law's late-nineteenth-century formalist orientation. For example, in his celebrated *Economic Interpretation of the Constitution of the United States* (1913), the historian Charles A. Beard deplored "[t]he devotion to deductions from 'principles'... which

[11] Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), p. 142.

[12] G. Morton White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949); James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (Oxford: Oxford University Press, 1986).

is such a distinguishing sign of American legal thinking."[13] Progressive Era thinkers also followed Holmes in attacking the common law's more traditional backward orientation, its commitment to repeating the past. Law was increasingly thought of as something that had to be made in the present, with full awareness of its contingency, provisionality, and revisability. This present-focused law had to rely, furthermore, on the latest expert knowledge of non-lawyers. As John Dewey put it in a little 1941 essay describing his philosophy of law, law required that "intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequence of legal rules and of proposed legal decisions and acts of legislation."[14] Various early-twentieth-century schools of legal thought – Sociological Jurisprudence, Legal Realism, and so on – flourished at least in important part on the basis of Holmesian insights. To be sure, not all twentieth-century legal thinkers subscribed to the Holmesian reduction of law to politics in the name of antifoundational history. Considerable intellectual labor would be expended in the twentieth century in the attempt to retrieve a conception of law from the rubble produced by this reduction. Even if legal thinkers ultimately rejected Holmes, however, they had first to confront the challenge he posed.

Within contemporary American legal history, what started more than a century ago as an erosion of the boundary between law and politics has become fully authoritative, indeed entirely traditional. Following patterns set in the Progressive Era, histories of American law that reveal its underlying politics abound (although contemporary American legal historians, far more sensitive to trends in the discipline of history, have been offering more richly contextualized histories than ever before). Over the years, we have learned how the nineteenth-century common law was Americanized and instrumentalized and formalized in the service of politics; how it was used to promote capitalism or to block redistributive legislation; and how it created or transformed relational identities (employer–employee, husband–wife, master–slave, etc.).[15] We are often left with the uneasy sense that something illegitimate transpired, that common law judges were engaged in

[13] Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: MacMillan, 1935) (1913), p. 9.

[14] John Dewey, in *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Law Book, 1941), p. 83.

[15] See William Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1975); Horwitz, *The Transformation of American Law, 1780–1860*; Horwitz, *The Transformation of American Law, 1870–1960*; William M. Wiecek, *The Lost World of*

overreaching, that they were doing something deeply political, that democracy was being subverted by law. At the close of *The Transformation of American Law, 1870–1960* (1992), Morton Horwitz captures perfectly this modernist tradition of looking at America's past. He exalts the modernist moment of law – one might legitimately label it a Holmesian moment – as a triumph for history *and* democracy, even as he recognizes that that triumph never became complete in twentieth-century America:

> Only pragmatism, with its dynamic understanding of the unfolding of principle over time and its experimental appreciation of the complex interrelationship between law and politics and theory and practice has stood against the static fundamentalism of traditional American conceptions of principled jurisprudence.
>
> Until we are able to transcend the American fixation with sharply separating law from politics, we will continue to fluctuate between the traditional polarities of American legal discourse, as each generation continues frantically to hide behind unhistorical and abstract universalisms in order to deny, even to itself, its own political and moral choices.[16]

If this still vital modernist account of the collapsing of the law–politics distinction in the name of antifoundational history is taken as an object of faith (as indeed it continues largely to be), we are left with a number of questions. Were American common law thinkers throughout the nineteenth century condemned to oscillate between a naive "blind repetition of the past" and a kind of surreptitious politics? Or did nineteenth-century American common law thinkers also conceive of law in history as they engaged in what we have long known to be a creative reshaping of common law doctrines? If nineteenth-century American common law thinkers did conceive of law in history, what did their historical sensibilities look like? Did they avoid collapsing law into history, and hence into politics, as we – living, teaching, and writing after Holmes – now do so automatically? What were the relationships among history, democracy, and law *before* the Holmesian modernist moment that has been so critical to twentieth-century understandings?

Classical Legal Thought: Law and Ideology in America, 1886–1937 (Oxford: Oxford University Press, 1998). On labor law, see Christopher Tomlins, *Law, Labor and Ideology in the Early American Republic* (Cambridge: Cambridge University Press, 1993); William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass.: Harvard University Press, 1991). On the law of marriage, see Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, Mass.: Harvard University Press, 2000). On the law of slavery, see Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996).

[16] Horwitz, *The Transformation of American Law, 1870–1960*, 271–272.

At stake in posing and answering such questions are our understandings of the historical relationships among American democracy, law, and history, which might serve as important explanations of the vitality of the common law tradition in nineteenth-century America. However, the answers might transcend the American context itself, speaking more generally to philosophical concerns about the status of foundational thinking after modernism. Philosophers of history have recognized that, since the late nineteenth century, we have been living in a world "after" metaphysics, where the world is nothing but history and seems "ever-provisional." Recognizing what Holmes recognized a century ago when he sought to tear down the foundations of law in the name of history, Benjamin Barber has written: "[P]olitics is what men do when metaphysics fails." Democracy, David Roberts writes, "is the form of interaction for people who cannot agree on moral absolutes."[17]

In seeking to re-create the ideational world of nineteenth-century common law, historical and democratic thought, I am seeking to reconstruct the world *before* this modernist intellectual crisis. At stake is not only an appreciation of the dynamism, sensitivity, and richness of nineteenth-century legal, historical, and democratic thought, something that has hitherto remained largely hidden from view because of the modernist lens through which we read the past, but a "provincializing" of the Holmesian, modernist tradition of thinking historically to which we are heirs.[18]

Nineteenth-Century Common Law Thought, the Historical Imagination, and American Democracy: a World before Modernism

In order to begin exploring the relationships among democracy, law, and history before modernism, one has to distance oneself from one of the critical assumptions of modernist historical thought, namely that an iconoclastic dismantling of the foundations of phenomena through the technique of revealing their temporal origins will clear ground, enable critical self-reflection, and open up the world for reimagining and remaking. To this day, I submit, this is an integral feature of our (now more "post-modern") historical method, obsessed as we are with demonstrating the

[17] Benjamin Barber, quoted in Roberts, *Nothing but History*, pp. xvii–xix.

[18] The standard text on "provincializing" Europe as a subject of history is Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, N.J.: Princeton University Press, 2000).

contingency of things, of emphasizing that nothing had to be the way it turned out, that things could have gone differently, that alternative choices and possibilities necessarily crowd the past, present, and future. Thinking this way implies that the subject – whether an individual, a democratic majority, or a society – can be rendered radically unconstrained and unencumbered, a blank slate from which thoroughgoing personal or democratic or societal reimagining might somehow begin. However, barring exceptions, this was not the ideational world of eighteenth- and nineteenth-century Americans.

Instead, the nineteenth century was a world in which the notion of *given* constraints was very real indeed. One undoubtedly valid explanation for the persistence of a sense of the givenness of constraints is that, even though Americans had long ceased to enact biblical strictures as law, this was a society that remained overwhelmingly religious.[19] However, the presence of religion in nineteenth-century American thought, if offered up as a definitive and all-encompassing explanation for the givenness of constraints, risks becoming monolithic and reductionist. It often fails to capture the changing, proliferating, and complex ways in which nineteenth-century Americans went about constructing their worlds and naming its limits and constraints. In what follows, I begin by offering a sense of how nineteenth-century Americans imagined the scope of political democracy, the formal sphere of the political. The formal sphere of the political, which would be called upon to do so much work in twentieth-century America, was often imagined as constrained. But it is the kinds of limits that were imagined, and the ways in which those limits were made to interact with each other, that are ultimately of interest.[20]

When it comes to nineteenth-century understandings of political democracy, it is important to keep in mind a cardinal fact. From the American Revolution into the twentieth century, throughout the Western

[19] For an article on the issue that adopts a comparative perspective and introduces the reader to much of the relevant literature, see Richard J. Ross, "Puritan Godly Discipline in Comparative Perspective: Legal Pluralism and the Sources of 'Intensity,'" *American Historical Review* 113 (October 2008): 975–1002. A good starting place is George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960).

[20] I am not talking about constraints on political democracy in the narrow sense of Lockean natural rights, but about a broader set of constraints that operated, at a philosophical level, as given. Indeed, my argument about the givenness of constraints supports, rather than contradicts, William Novak's discussion of nineteenth-century America as a "well-regulated society." See William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

world, political democracy, even as it was an aspiration for millions, was new and exceptional and not necessarily viewed as a prerequisite to national prosperity or prominence. The explosive eruptions and vicissitudinous careers of various revolutions – the late-eighteenth-century American, French, and Haitian Revolutions, the Latin American struggles, the revolutions of 1848, and the Paris Commune, to name just a few – underscored political democracy's instability, unpredictability, violence, and dangerousness.

It should not be surprising, then, that political democracy was the object of deep, ongoing suspicion. This suspicion was at the heart of the republican tradition that gave rise to the elaborate structure of checks and balances in the U.S. Constitution. But it continued into the nineteenth century long after the preoccupation with republicanism waned. Thinkers strove mightily to ponder political democracy's limits, to conjure up truths that the democratic subject, in his arrogant assertion that he could remake his world through self-conscious political activity, would be unable to tamper with. The midcentury Scottish romantic conservative historical thinker Thomas Carlyle offered the catchiest formulation, one that enjoyed considerable currency throughout the English-speaking world. Carlyle compared the nation to a ship that had to round Cape Horn. Was the establishment of political democracy among the crew of the ship sufficient to negotiate this confrontation with an inexorable and limiting nature? Carlyle's answer was unequivocal:

> Your ship cannot double Cape Horn by its excellent plans of voting. The ship may vote this and that, above decks and below, in the most harmonious exquisitely constitutional manner: the ship, to get round Cape Horn, will find a set of conditions already voted for, and fixed with adamantine rigour, by the ancient Elemental Powers, who are entirely careless how you vote.... *Ships accordingly do not use the ballot-box at all; ... one wishes much some other Entities, – since all entities lie under the same rigorous set of laws, – could be brought to show as much wisdom, and sense at least of self-preservation, the first command of Nature.... [Democracy is] a very extraordinary method of navigating, whether in the Straits of Magellan or the undiscovered Sea of Time* [emphasis added].[21]

"Nature" or "ancient Elemental Powers," in Carlyle's formulation, consisted of "a set of conditions already voted for, and fixed with adamantine rigour" that operated as an absolute limit on political democracy.

[21] Thomas Carlyle, "The Present Time," *Latter-Day Pamphlets* (New York: Scribner's, 1901) (1850), pp. 19–21.

But one should not imagine that the world of the nineteenth century was one in which limits to political democracy were necessarily self-consciously conjured up only by those ideologically opposed to it. What we might take to be a limiting or cabining of political democracy was in fact often merely taken to be an actually existing feature of political democracy, nothing other than the order of things itself. Throughout the nineteenth century, American political and legal thinkers were acutely aware of political democracy's manifest – and, to many, necessary or inevitable – incompleteness, even in those very few countries, such as the United States, that claimed to be democracies. They were fully aware, for example, that large segments of the native American population – a changing group that included women, minors, African Americans, Native Americans, property-less white males – were not full participants in the polity but were nevertheless subject to its laws. They were also aware that only a limited number of even those Americans entitled to vote actually voted in elections. They were conscious of how much of the rest of the world was non-self-governing. While some saw this as the basis for demanding an extension or deepening of political democracy, others did not think this incompletion made American political democracy less democratic, but instead that it underscored the fundamentally or essentially nondemocratic nature of law. This in turn fed the sense of constraints on political democracy, a Burkean inevitability of subjection to a governing order that one had not chosen. Did the fact that women were constrained to obey laws they had had no part in making not imply that *everyone* was, in some profound sense, similarly constrained?

This sense that the world was, in crucial ways, beyond the power of the democratic subject to remake, that it was subject to laws not of his making, imbues nineteenth-century American political and legal discourses. It allowed political democracy to coexist with various kinds of constraints or limits, most of which we would today reject. As a result, the politicolegal sphere was crowded with times ahistorical and historical, times with mysterious origins, times with a given logic and direction and meaning that democracy was declared unable to subvert. For our purposes, two different kinds of *given* times that enjoyed currency as limits to the sphere of political democracy are the nonhistorical premodern times of the common law, on the one hand, and the changing teleological and foundational times of nineteenth-century history, on the other. The creative and productive ways in which these times intersected, I argue, should lead us to provincialize our post-Holmesian thought and to render its reign less tyrannical and belittling as we look back on the nineteenth century.

Let me begin with the nonhistorical time of the common law. As I will set forth in much greater detail in Chapter 2, from the seventeenth century on, the common law tradition claimed for itself the self-consciously nonhistorical time of "immemoriality." The origins of the common law were said to reach back to a time "beyond the memory of man," a time self-consciously set beyond historical specification or determination. It was precisely this resistance to history that common lawyers relied upon to claim legitimacy for the common law. Freed from the strictures of a law that could be pinned down in chronological, historical time, common lawyers could claim a diffuse, imprecise, and mysterious antiquity on behalf of the common law. This special antiquity allowed them to claim superiority vis-à-vis lawgiving acts that could be located in chronological time, such as acts of monarchs or legislatures. Such temporally delimited acts of monarchs and legislatures, common lawyers argued, could never possess the wisdom of a law that embodied the wisdom of multiple generations going back into the mists of time.

But the "immemoriality" of the common law did not mean that the common law was immune to change. Even as they maintained that the common law was "immemorial," seventeenth-century common lawyers hailed the common law's ability to respond to changing circumstances through recourse to the time of "insensibility." The common law changed so "insensibly," it was argued, that it could never be seen to change. This was, in other words, also a time impervious to chronological or historical specification or determination. The precise moment of the common law's changing could never be located in chronological time; change could only be inferred from comparing origin and end points. And once again, common lawyers used this time as proof of the common law's superiority. Because it was "insensible," whatever change the common law brought about was less abrupt, less disruptive, and less violent, they argued, than the sudden and ill-conceived changes introduced by monarchs and legislatures.

It was precisely the indistinctness and imprecision of these times of "immemoriality" and "insensibility" – times that could easily crumble under the magnifying glass of modernist historical thought and its obsession with identifying the temporal origins of things – that American lawyers claimed, albeit in complicated ways, throughout the nineteenth century. It was precisely these times that gave the common law its authority. To nineteenth-century American common law thinkers, the Benthamite charge that common law judges made law as they pleased was an illegitimate aspersion. To them, the common law was an inherited body of

"immemorial" doctrine that commanded a measure of fidelity because of its antiquity and its association with Anglo-American freedoms. But this was never a blind fidelity. Above all, the common law was a method – indeed, the best, most scientific, and least despotic method – of "insensible," step-by-step lawmaking. The common law judge was uniquely privileged, far more so than any elected legislature, to "read" the community that presented itself to him in his courtroom. When the common law judge spoke, in other words, the common law corresponded perfectly to the actually existing state of the community. This was a view that had emerged in seventeenth-century England and that was held by prominent American common law thinkers throughout the nineteenth century, from Joseph Story to Thomas Cooley to the younger Oliver Wendell Holmes, Jr. Furthermore, the common law judge decided case by case, unwilling to turn his back on the past or to plunge headlong into the future. As such, the common law judge was committed to a careful calibration of the competing claims of the past, the present, and the future, of maintaining the identity of society over time even as he was committed to change. This was also a view repeated by nineteenth-century common law thinkers, from Francis Lieber in Jacksonian America to James Coolidge Carter at the end of the nineteenth century. When these features of the common law method were combined, it was democratically elected legislatures rather than common law judges that appeared "unscientific" in their lawmaking. Nineteenth-century American political democracy shared space, as it were, with a law that began but could not be seen to have begun, that changed but that could not be caught in the act of changing, that always embodied the current needs of the people even as it reflected the wisdom of an illimitable past.

The second kind of time that limited the scope of nineteenth-century American political democracy was the time – or rather times – of teleological and foundational history. Through much of the nineteenth century, history was not self-consciously antifoundational as it would become with Holmes and his modernist, pragmatist champions. When one contemplated the historical world, one did not see it, as many historians are now accustomed to seeing it, as a product of nothing but history, as one historically locatable phenomenon giving way to another. One saw it instead in terms of the logic of a number of "firsts" that underlay the passage of time and that gave it meaning: God, "spirit," "laws," "life," and so on. There has been a powerful tradition in American intellectual history that has charged American historical thought with inadequacy or insufficiency or weakness. Eighteenth- and nineteenth-century

Americans were too mired in a sense of their own exceptionalism, we have been told, to understand their historical world as genuinely historical, that is, as devoid of foreordained directionality.[22] This sense that eighteenth- and nineteenth-century Americans were committed to teleological and foundational conceptions of history is largely correct. But to say this does not capture the richness of nineteenth-century historical discourses. Regardless of the overwhelmingly foundational and teleological nature of nineteenth-century history, discussions about history, and about America's place in history, were vigorous. They were also decidedly not provincial: they employed vocabularies and structures that were in use in Europe as well. Furthermore, even though nineteenth-century Americans organized the historical world in terms of firsts and foundations, they did not necessarily agree with one another about what constituted the logic of history. There were many accounts of what history was about, of where it was headed. Finally, for all Americans, the actually existing world was unambiguously complex, crowded not only with different logics but also with what had to be recognized as exceptions to them.[23]

Teleological and foundational ideas of history were applied to American democracy from the American Revolution going forward. Even as many in the nineteenth century saw democracy as furnishing the logic of history, to the extent that history was imagined to possess an underlying logic and meaning and direction, it could equally serve as a check on democracy. If history was going somewhere, in other words, it was possible to judge the activities of a democratically elected legislature in terms of that logic. Thus judged, a legislature could be "wrong" in the sense that it was guilty of flouting the logic of history. Let us take the example of slavery. Proslavery thinkers in the mid-nineteenth century believed that slavery instantiated the natural "law" of subordination of blacks to whites. History proved this natural law. One could look at the subordination of blacks to whites across temporal and geographic contexts and conclude this. But it also implied that American democracy could *not* violate this natural law. Antislavery legislation was thus represented as an exception to this law, as something that went against the logic of history

[22] See J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, N.J.: Princeton University Press, 1975). The authoritative work for the nineteenth century is Dorothy Ross, *The Origins of American Social Science* (Cambridge: Cambridge University Press, 1991).

[23] For my attempt to discuss the intellectual aesthetic of "complexity," see Kunal M. Parker, "Context in Law and History: A Study of the Late Nineteenth Century American Jurisprudence of Custom," *Law and History Review* 24 (2006): 473–518.

itself. Antislavery thinkers employed the same logic, but to the opposite end. On both sides, the space of democracy was cabined or limited, in other words, by the logic imagined to imbue history.

Thus far, I have been arguing, political democracy in nineteenth-century America coexisted with two sets of constraining or limiting times, those of the common law and those of history. It is in the intersection of these times that we see how common lawyers made out the case for the centrality of the common law as an important mode of governance in America. We see that common lawyers were engaged neither in a "blind imitation of the past" that Holmes accused them of nor in a surreptitious or unthinking political reshaping of common law doctrine, but were openly, articulately, vigorously, and self-consciously trying to fit the common law to the imperatives of history as they and their contemporaries saw them, imperatives that were imagined to constrain American democracy itself. This common lawyerly turn to history was not just a defensive strategy against the common law's many critics (although it was also that), but a deeply felt position. Where legislatures seemed unable or unwilling to guide America along history's imagined path, or simply as lacking the expertise to do so, common lawyers would do the needful.[24]

I do not claim that the flourishing of the common law in the nineteenth century is due entirely to common lawyers' skillful mobilization of the times of history. That would be a crude idealist argument as easily rejected as a crude materialist one. The absence of an extensive state structure and a large number of organized voices calling for state intervention, which did not occur until the end of the nineteenth century, counts for much. At the same time, however, nineteenth-century lawyers' turn to history contributed powerfully to the vitality of the common law tradition as a mode of governance and public discourse in nineteenth-century America.

Nineteenth-century American common lawyers' turn to history reveals possible relationships between history and law that are occluded by the Holmesian, modernist antifoundational turn to history. In order to see

[24] Certain scholars have discussed nineteenth-century lawyers' turn to history. A major early work in this vein is Perry Miller, *The Life of the Mind in America: From the Revolution to the Civil War* (New York: Harcourt, Brace & World, 1965). More recent work, albeit with orientations different from mine, include David Rabban, "The Historiography of Late Nineteenth-Century American Legal History," *Theoretical Inquiries in Law* 4 (July 2003): 541–578; Stephen A. Siegel, "Historism in Late Nineteenth Century Constitutional Thought," *Wisconsin Law Review* (1990): 1431–1547; and Steven Wilf, "The Invention of Legal Primitivism," *Theoretical Inquiries in Law* 10 (2009): 485–509.

this, let us explore the mechanics of how nineteenth-century American lawyers combined common law and historical sensibilities.

Armed with the indistinct common law times of "immemoriality" and "insensibility," convinced of the superiority of the common law method over that of legislatively generated law, nineteenth-century American legal thinkers turned to the common law tradition to make sense of pressing issues ranging from labor to crime, commerce to slavery, marriage to local government, contract to tort. It is important to emphasize that the nineteenth-century common law was by no means the exclusive preserve of pro-commerce or laissez-faire legal conservatives (although such conservatives were overwhelmingly pro–common law). In the slavery debates, for example, common law ideas sustained both anti- and proslavery positions. During the years of the Civil War, when Americans had to rethink the very nature of their political system, the common law tradition could even provide a legal framework for the prosecution of the War. Indeed, we need to think of the common law tradition as a tradition of thought in and of itself, encompassing ideas about time, law, society, and government, to which American legal thinkers turned again and again.

Even as they turned to the common law tradition, however, nineteenth-century common lawyers turned to the varying times and logics of history. And it is here that the conjoining of common law and history reveals something interesting.

In the first instance, the bringing together of the times of the common law and the times of history served to subject the common law to history. From the eighteenth century on, English and Scottish political and legal thinkers were acutely aware that the old common law had developed in a land-based feudal society. Their challenge was to fit this law to the needs of eighteenth-century Britain's commercial society. History was thus imagined as a move from the feudal to the commercial. In the late eighteenth and early nineteenth centuries, American political and legal thinkers continued this trend of subjecting the common law to the imperatives of history imagined as a move from feudal to commercial. Political democracy played a complicated role in this regard. Scottish Enlightenment thinkers had posited foundational and teleological historical laws – such as the shift from feudal to commercial – in a world constrained by monarchs and aristocrats. Democracy was supposed to imply a lifting of the constraints of the feudal such that the laws of society and nature would have free reign. But as I will show, political democracy in the imaginations of late-eighteenth- and early-nineteenth-century

American political and legal thinkers remained constrained by the Scottish narrative of a historical shift from feudal to commercial, even as thinkers came up with shifting and contradictory ways of relating America's present to its British past. As the nineteenth century wore on, the imperatives of history changed. By the mid-nineteenth century, American political and legal thinkers were no longer preoccupied with plotting a relationship to a prerevolutionary, feudal past. The specter of British influence, so prominent in Jeffersonian and Jacksonian America, waned. At the same time, political democracy, once seen as at least potentially able to allow the laws of nature and society to flourish, came increasingly to be seen as itself a potentially serious obstacle to the flourishing of natural and social laws. First the slavery crisis, and then the centralizing impulses of federal and state regulation, brought about new, but equally constraining languages of history, whether Comtean languages of underlying invariable natural and social laws or Darwinian–Spencerian ones that plotted history as a slowly but constantly evolving "life." These new historical languages would also, as had been the case in earlier decades, be used to make sense of the common law. From the time of the American Revolution going forward, then, American common lawyers judged the common law rigorously in terms of various prevailing vocabularies and logics of history. Thus judged, parts of the common law were declared obsolete and excised, others systematized, yet others reformed or revived.

American common lawyers' critical use of these historical languages reveals something significant, I maintain, about the relationship between the foundational histories of the nineteenth century and the antifoundational modernist history that emerged with Holmes. From our post-Holmesian perspective, it is antifoundational modernist history that is invested with the ability to allow us to see bits of law as contingent and therefore as subject to reform. But nineteenth-century common law thinkers were equally able to render bits of law contingent and therefore subject to reform. The only difference is that they did it from the perspective of a history that was explicitly, even exuberantly, foundational, a history that had a meaning, logic, and direction. This suggests something that might be unnerving. Although the difference between foundational history ("their" history) and antifoundational history (supposedly "our" history) might appear enormous at first glance, upon reflection, it might be less significant. "Religious faith is so little at variance with skepticism," the philosopher Karl Löwith observed a half-century ago, "that both are rather united by their common opposition to the presumptions

of a settled knowledge."[25] If I understand this statement correctly, Löwith is arguing that religious faith (which might be a stand-in for the foundational and teleological histories of the nineteenth century) and skepticism (which might be a stand-in for modernist antifoundational history) are *both* opposed to a settled knowledge. *Both* are techniques for unsettling knowledge, for seeing things as contingent and therefore as changeable. In being brought to bear upon the common law, the foundational and teleological histories of the nineteenth century were no less effective than their early-twentieth-century modernist counterpart.

Even as they subjected the common law to history, however, nineteenth-century common law thinkers could argue that the common law, occasionally as doctrine but more often as method, itself realized and embodied the logic, meaning, and direction of history. It is important here to emphasize that, because nineteenth-century common law thinkers were not using history to pull down foundations generally in the manner of Holmes, the common law was never dissolved into history and reduced to politics. The times of the common law and the times of history brushed up against each other, informed each other, constituted each other, without destroying each other. History produced a perspective on the common law, but at the same time the common law produced a perspective on history. Nineteenth-century American common law thinkers reveal themselves, in other words, to have been able simultaneously to inhabit two different types of time, the nonmodern times of the common law and the varying times of nineteenth-century history. Of course, as I will demonstrate, holding on to two utterly different kinds of time, setting them in relationship to one another, required considerable intellectual labor. How might one maintain simultaneous affiliations to a legal tradition that had emerged in the seventeenth century and to the historical imperatives of the nineteenth century? Common lawyers' answers to this question form a large part of the subject of this book.

As already suggested, the common law tradition that common lawyers drew upon and defended so vigorously throughout the nineteenth century could not have survived in the way it did had it not been constantly updated, constantly reinvigorated, constantly re-presented in terms of the historical consciousness of the period. At the same time, and just as important, arguing that the common law itself embodied the logic, meaning, and direction of history secured a place for the common law in

[25] Karl Löwith, *Meaning in History: The Theological Implications of the Philosophy of History* (Chicago: University of Chicago Press, 1949), p. viii.

America. Political democracy was incomplete, crowded with given limits, constrained by history. The state was often inept. When the common law was joined to history, common lawyers were able to argue that they – rather than democratically elected legislatures or bureaucratic departments or commissions – were better able to take American society in the direction in which history was pointing, better able to embody history's meaning and logic. These arguments were made over and over throughout the nineteenth century. When history ceased to have a necessary direction, as was the case when a modernist, antifoundational history appeared to triumph around 1900, the common law could be made to look like "mere" politics by its influential opponents. Until then, common law thinkers could argue that they had a vital role to play in America's development.

This is not to suggest, as I will argue in conclusion, that the triumph of modernist antifoundational history around 1900 meant that foundational and teleological histories were forever banished from the American political and legal landscape. Holmes's own historical sensibilities – important as they were to the erosion of the boundary between law and politics – were not shared by many of those who claimed him as an intellectual forebear in the twentieth century. Indeed, they would use the breakdown of the law–politics distinction to advance different foundational histories, to instantiate different political perspectives as law, to create an administrative state, to undo America's legacy of institutional racism. Legal thinkers – including those very thinkers who had attacked the nineteenth-century common law tradition – would respond by returning to the common law tradition. The history of the relationship between history and the common law in the twentieth century remains to be written, but I have been struck by the impress of older common law ways of thinking in some of twentieth-century America's most prominent legal thinkers.

The Structure of the Book

The reader should be clear about what I am arguing. I do not deny the significance of the modernist turn in historical and legal thought that took place around 1900. Indeed, I take very seriously the reduction of law to politics that took place as a result of that turn, not just because of its enormous impact on the evolution of twentieth-century law, but also because of its impact on how historians have read the common law in the nineteenth century. However, at the same time, in seeking to reconstruct the ideational world of nineteenth-century lawyers, I seek not only to

put before my readers the sophistication and sensitivity of nineteenth-century legal, historical, and democratic thought, but also thereby to provincialize the modernist turn in history and law. I attempt to show that history was something eighteenth- and nineteenth-century common lawyers were doing all along, that history permitted them to render bits of common law contingent, that history informed their reformist efforts even as the fusion of the common law with history allowed them to argue that the common law was itself an agent of history. In other words, I am simultaneously attempting to illustrate the difference between nineteenth- and twentieth-century legal thought and to flatten that difference. This simultaneous emphasis on and erasure of differences tracks the way nineteenth-century common lawyers plotted the relationship between history and the common law, alternately distancing the one from the other and collapsing the one into the other.

A simultaneous emphasis on and erasure of differences is embodied as well in the structure of the book. The changing historical imaginations, vocabularies, and structures that American common lawyers inhabited from the American Revolution to about 1900 – and according to which the book is organized – were utterly different from one another, but nevertheless utterly equivalent in their ability to generate complex meaning for their adherents and to produce perspectives vis-à-vis the common law. In each case, even as the dominant historical imagination changed, what it did for its adherents remained similar. Common lawyers were able to use the relevant historical imagination to contextualize the common law, even as they were able to argue that the common law realized the logic of that same historical imagination.

Each chapter begins with a discussion of the dominant historical imagination of a particular period. After introducing the relevant features of this dominant historical imagination, each chapter explores how a range of legal thinkers used that historical imagination in different contexts, from labor prosecutions to vested rights to commerce to slavery to codification. In every chapter, there is also a discussion about the relationship between the U.S. Constitution and the common law. The reader should see each chapter as an illustration of the relationship between common law thought and a particular historical imagination: the range of contexts simply illustrates the pervasiveness of a particular historical vocabulary. It is important to keep in mind that this is emphatically not a book about doctrine (and as such does not attempt to make a contribution to the history of legal doctrine), but a book about the relationships among law, history, and democracy.

To be sure, identifying the "dominant" historical imagination for any given period is fraught with perils. Over the course of the nineteenth century, there were many ways of conceiving of the movement of history. Each of the periods I identify contains many different historical logics, some pointing backward to earlier periods, others anticipating future periods, yet others simply different from one another. Each period, in other words, is inevitably complex. One would expect no less. The point of identifying a period for me, then, is not to make an argument about periods, but to identify a historical imagination, unarguably influential at a particular time, and to show how it was shared, appropriated, and transformed by legal thinkers. My technique has been to work back from the principal legal texts, to rely upon the historical imagination of legal thinkers as a guide to reconstructing the historical imagination of any given period.