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JURISPRUDENCE OF HISTORY AND TRUTH

William P. LaPiana*

I. INTRODUCTION

For some years, scholarly inquiry into the nature of late nineteenth century American legal thought has been dominated by Duncan Kennedy's description of "classical" legal thought, so-named because it "amounted to a rationalistic ordering of the whole legal universe."¹ Kennedy places special emphasis on the integrated nature of classical thought. Certain key concepts, such as liberty of contract, are considered to supply answers to all sorts of legal questions.² This concept of integration, with its necessary implication that the process of legal judgment is a mechanistic application of unavoidable precepts, justifies the description of this sort of legal reasoning as "formalistic."³

The idea of classical formalism is also related to the instrumental interpretation of antebellum legal thought. That interpretation asserts that antebellum judges self-consciously manipulated common law doctrine to promote economic development at the expense of fairness and equity.⁴ In the final chapter of *The Transformation of American Law*, Morton Horwitz hypothesizes that once the changes favorable to capitalists made possible by instrumentalism were put into place, courts turned to a more formalistic approach to forestall any attempt to modify the results of instrumentalism in favor of greater distributive justice. In short, having accomplished their goal using a theory of law holding that judges could truly make legal rules, judges returned to the idea that they only applied

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1. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (Rita J. Simon & Steven Spitzer eds., 1980).

2. *Id.* at 19-21.

3. Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM. J. L. HIST. 221 (1980). See also, CHARLES C. GOETSCH, ESSAYS ON SIMEON E. BALDWIN 87-92 (1980).

4. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 1-30 (1977).

existing rules in order to prevent law from becoming a tool to vindicate those oppressed by the legal structure that instrumentalism created.⁵

Both classical formalism and instrumentalism are related to older views of the period. Roscoe Pound established his reputation, at least in part, by arguing against the "mechanical jurisprudence" of the late nineteenth century and advocating its replacement by sociological jurisprudence.⁶ After the Second World War, Morton White's *Revolt Against Formalism* found the originality of twentieth century thought in its attack on rigid, rule-oriented explanations of social phenomena in many different disciplines, including law.⁷ Other scholarly work contemporary with White's emphasized the extent to which legal ideas served dominant economic interests, thus perpetuating hostility against the claims of labor and providing the justification for striking down much-needed reform in the name of substantive due process and freedom of contract.⁸ Indeed, Duncan Kennedy's contribution to twentieth century interpretive theory is his drawing together of the two older approaches. In his analysis, the formalist structure is dictated by its attempt to promote and defend acquisitive bourgeois individualism.⁹

Herbert Hovenkamp has put forward yet another interpretation of the nature of late nineteenth century American jurisprudence. He explains the appeal of substantive due process by showing its relationship to the ideas of economics which were part of the general intellectual culture of educated Americans, including judges. These economic ideas shaped the unexpressed policy decisions behind various applications of substantive due process.¹⁰

These commentators on the state of American legal thought in the Gilded Age all agreed that what needs to be explained is the law's, or perhaps more accurately, the judges' approach to questions of wealth

5. *Id.* at 253-66 (Horwitz marks 1850 as the point in time where our legal system had transformed to favor capitalism).

6. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, (pt. 1, 2 & 3) 24 HARV. L. REV. 591 (1910), 25 HARV. L. REV. 140 (1911), 25 HARV. L. REV. 489 (1911).

7. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1957).

8. *See, e.g.*, CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 122-65 (1930); CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS* (1954); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1962).

9. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

10. *See*, HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1837-1937*, at 171-82 (1991).

distribution. While Kennedy and Horwitz attempt to link the desire to accomplish certain social ends with certain styles of legal thought, Hovenkamp and perhaps White are content to try to describe ideas which may have contributed to certain results. In any event, these discussions are primarily attempts to write intellectual history. They are attempts to elucidate the ideas that inform formal discourse which, in the case of the opinions of the courts, creates economic winners and losers.

This Article is another example of intellectual history which attempts to illuminate an aspect of legal thought in the Gilded Age. Part I is concerned with ideas about law itself, ideas which are similar enough to warrant grouping them together and setting them against other ideas about the nature of law. Those other ideas represent analytical jurisprudence. They are bound together by some degree of acceptance of positivistic views of law, i.e., of John Austin's assertions that law should be separated from morality at least for purposes of study and that all law is directly or indirectly the command of the sovereign.¹¹ The ideas examined here represent the opposition to analytical jurisprudence.

Part II describes the general state of legal theory in the public exchange among lawyers, professors, and jurists. This section shows the tension between historical jurisprudence, which asserts that law is best understood as an organic growth intimately related to the nature of a just society, and analytical jurisprudence, which asserts that the proper subject of legal study is legal principles in action without reference to the morality of those principles. According to analytical jurisprudence, law is accurately defined not as a system of principles drawing their authority from their conformity with the ultimate good, but rather as the commands of the sovereign which, at least in the common law world, are seen in the decisions of the courts. Part II also describes some of the historical circumstances which exacerbated this tension by linking it to important political questions. The thinkers discussed in Part II, however, carried on the debate in terms which reflected about the nature of law consistent with legal thought which dominated the pre-Civil War period's beliefs. They approached law as an inductive Baconian science, much as Joseph Story did, without becoming too explicit about the source of the principles.

Part III discusses another group of legal thinkers: William G. Hammond, Thomas McIntyre Cooley, Philemon Bliss, Christopher G. Tiedeman, Edward J. Phelps, John F. Dillon, and James C. Carter, who battled analytical jurisprudence in a different way. They attempted to establish a self-consciously scientific argument for viewing law as a system

11. See, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1954).

of broad general principles resting ultimately on custom, which most of them believed to be based on Henry Maine's contributions to legal thought. None of these thinkers took exactly the same route to the common goal, but there are sufficient similarities among them to identify them all with a single view of the nature of law, i.e., that a scientific understanding of the past leads ineluctably to a law of unchanging principles.

Part IV concludes that joining the belief that law is ultimately the product of great transcendent principles with an inductive view of legal science leads to a particular view of the judicial function. In this view, the province of judges is to apply the great principles to the cases before them. The best source of great principles is the common law, which has grown up with the people it governs and embodies legal truth far better than any positive law, even the Constitution. This belief has the practical effect of declaring illegitimate any legislative attempt to redistribute wealth and is the ultimate bulwark against the growth of socialism. Part IV suggests that an understanding of legal thought in the Gilded Age must be closely linked to the general intellectual history of that period. It questions the adequacy of any single theory to explain all aspects of the life of the law by showing that some of the writers modified their views over time. Finally, it hopes to recall the student to the need to examine biography. Even now, a century later, the legal community is still confronted with these issues. It must address the relationship between moral absolutes and law, the malleability of legal standards in the hands of legislatures, and the most fitting role for the judge in a democratic society.

II. HISTORY VS. ANALYSIS

History has long been a part of the common law. Any use of precedent implicates history to some degree, linking legal technique with a study of the past. In particular, English common law had a special relationship to the English past. The law was the great opponent of Stuart tyranny and embodied an entire history of liberty.¹² Jeremy Bentham questioned these easy assumptions loudly and relentlessly. As early as 1840, the Scottish lawyer James Reddie identified two distinct schools of jurisprudence, the analytical and the historical, identifying the former with Bentham and the latter with Hugo and Savigny.¹³ Henry Maine's *Ancient Law*, published in

12. J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1987); Gerald J. Postema, *BENTHAM AND THE COMMON LAW TRADITION* 3-80 (1986); John Phillip Reid, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986) (provides exhaustive illustration of the link between a history of liberty and the common law).

13. The result of the more correct views of law, as a science, which thus came to be

1861, is generally regarded as the first thorough discussion in English of the idea that current legal doctrine reflects long dead social arrangements. James Fitzjames Stephen reviewed Maine's work together with John Austin's recently republished introduction to analytical jurisprudence, *The Province of Jurisprudence Determined*, describing the former as a representative of historical school and the latter as representing the analytical. Stephen, a lawyer and sometime government official who published widely on what we would describe as political science, believed that both approaches were useful in attempting to understand the law.¹⁴

Similar views could occasionally be found in the United States. In 1890, John F. Dillon told the Ohio State Bar Association that there is truth in both "the Analytical and Historical schools of jurisprudence," and "that properly understood the two schools are not antagonistic but complementary, and that the true course is to combine the logical or analytical with the historical and experimental, the former mainly supplying the form, the latter mainly supplying the matter for a revised, improved and systematic Jurisprudence."¹⁵

However, bland acceptance of a multitude of approaches was not the usual response to what in the United States, at least, was a confrontation between analytical and historical jurisprudence. Some American commentators saw *Ancient Law* as an exemplary use of history to correct Austin's errors. For example, William G. Hammond, whose thought is examined in Part III, lamented that during Austin's sojourn in Germany, he fell completely "under the influence of the so-called philosophical school of jurists" and therefore had ignored the historical school, lead by Savigny.¹⁶ Had the situation been reversed, "the study of scientific jurisprudence in England might have reached, a generation earlier, the point to which it has later been brought under the guidance of jurists like Sir Henry Maine."¹⁷

entertained towards the close of the eighteenth century, in the different countries of Europe, has been the establishment of the two great modern schools or sects, into which the scientific students of law throughout Europe, appear to be divided, and which have been termed, by the continental jurists, the analytical school, of which Mr. Bentham may be called the founder, and the historical school, which is chiefly prevalent in Germany, and of which Professors Hugo and Savigny are the great leaders.

JAMES REDDIE, *INQUIRES ELEMENTARY AND HISTORICAL IN THE SCIENCE OF LAW* 50 (photo reprint, 1982) (1840). See WILLIAM L. MORISON, *JOHN AUSTIN* 148 (1982).

14. Stephen's review is summarized in MORISON, *supra* note 13, at 148-51.

15. John F. Dillon, *Bentham and his School of Jurisprudence*, 24 AM. L. REV. 746 (1890).

16. See William G. Hammond, *John Austin and His Wife*, 1 GREEN BAG 47 (1889).

17. *Id.* Modern scholarship indicates that Austin was not ignorant of the historical

What frightened some nineteenth century American lawyers about Austin's work is not hard to pin down. First, Austin contended that law could and should be separated from morality at least for purposes of study. Second, he argued that all law is directly or indirectly the command of the sovereign. As already mentioned, both of these were not original ideas of Austin. Jeremy Bentham advocated similar views of the common law. The notion that power is the ultimate source of law can be traced to Hobbes.¹⁸ However, American lawyers tended to ascribe these notions to Austin, finding their most important expression in his lectures. The posthumous volumes of Austin's lectures were both compact and complete. In contrast, Bentham's writings were scattered and when finally collected, quite bulky. Bentham was often regarded as a crank, or at least eccentric, with a reputation for taking an unconventional approach to the sanctities of home and family.¹⁹ Austin was a proper Victorian who held a formal academic appointment, even though he could not make a success of it.²⁰ The historical circumstances of the time greatly influenced the public perception of both Bentham's and Austin's views. The publication of Austin's lectures during the Civil War ensured them both of an American audience. Austin had much to say about sovereignty, and Americans had much to ask as they warred over the nature of the federal union. However complex its pedigree, the idea that "everything which the so-called supreme power of the State commands, whatever its character in point of right, is law, and nothing else is entitled to that designation," was associated by American lawyers with Austin.²¹

A. *Declaratory Theory*

Many of the lawyers who made that association were quite opposed to

school of jurisprudence during his stay at the University of Bonn in late 1827 and early 1828 and in fact studied with a *privatim docens* who was himself a disciple of the historical school. MORISON, *supra* note 13, at 17-20.

18. POSTEMA, *supra* note 12, at 46-60.

19. A typical judgment on Bentham is exemplified by James C. Carter. See James C. Carter, *The Ideal and the Actual in the Law*, 13 A.B.A. REP. 217 (1890). In this annual address before the ABA Carter labelled Bentham a "*crank* — a man who cherishes his pet theories in the solitude of his own contemplations, and disdains both the observation of the present and the study of the past." *Id.* at 244.

20. The importance of the propriety of Austin's life and of the sentimental aspects of his story can be seen in Hammond, *supra* note 16, at 47-53, which combines careful analysis of Austin's ideas with lavish praise for the selfless devotion of Sarah Austin whose efforts to see her husband's unpublished writings through the press are portrayed as the result of proper self-abnegation.

21. The formulation is that of JAMES C. CARTER, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 12 (1907).

Austin's ideas. They maintained that the common law was not merely a command of the sovereign, but rather was a body of principles beyond the vagaries of government and opinion, which, in conformity with classic common law theory, judges discovered rather than created.²² In one sense the strength of this idea in the post-Civil War era represents a continuation of the approach to law which dominated the antebellum period. The idea of Baconian legal science rested on the belief that cases were data from which the careful legal scientist could induce the true principles of law inherent in creation.²³ As strife over slavery increased, it became more difficult for jurists to find support for the moral unity of the law. In addition, procedural reforms abolishing the common law forms of action undermined the practical unity and coherence of the law that lawyers worked with every day.²⁴ Finally, Jacksonian notions of equality and governmental neutrality tended to make judicial expressions of ultimate truth less palatable. This tendency was reinforced by the replacement of an appointed judiciary with an elected one.²⁵

In any such event, talk of the moral coherence of the common law did not cease. In 1856 George van Santvoord, whose treatise on the New York Code of Civil Procedure demonstrated how important facts had become to the practice of law, told the graduating class at the University of Albany Law School that law was a Baconian science "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."²⁶ The goal of the legal scientist, according to van Santvoord, should be the creation of "a complete system of jurisprudence, founded upon broad, rational and universal principles of natural justice and truth."²⁷ He asserted, therefore, that precedents are only the evidence of

22. For an excellent summary of the traditional common law view of the judicial role, summed up in the maxim, traced to Coke, that *judex ist lex loquens* — the judge is the mouthpiece of the law, see POSTEMA, *supra* note 12, at 9-11.

23. See generally William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U.L. REV. 771 (1986).

24. William P. LaPiana, *Just the Facts: The Field Code and the Case Method*, 36 N.Y.L. SCH. L. REV. 287 (1991).

25. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW AND HIST. REV. 293 (1985).

26. GEORGE VAN SANTVOORD, *THE STUDY OF LAW AS A SCIENCE* 7 (1856).

27. *Id.* at 14.

law and if such precedents are wrong, they should be ignored, presumably in favor of those universal principles which are the law.²⁸

Theodore Dwight, a great advocate of the teaching of legal principles, separated these principles from the power of the state in his inaugural lecture at Columbia in 1858. He told his students that the judge does not originate law, rather "he can only *pronounce* it, and that after argument, and when the precise point is involved."²⁹ Thus the law is "*ascertained by judicial decisions*," not made by them, and a code should not originate law but rather aggregate, select and arrange the principles exemplified by the cases.³⁰

This belief in legal principles which transcended the vagaries of politics and adjudication survived the Civil War. An extreme expression of this view can be found in Henry Nicoll's graduation address to the Columbia class of 1869.³¹ He told the graduates that law is "absolute truth . . . the expression of those great principles of eternal justice which the Almighty has ordained — revealing them through the consciences of men — and which are unchangeable because they are the truth."³² Nicoll followed his definition of law with a remarkably catholic description of the sources of the principles. Whether we call them Divine law, or positive morality (Austin's phrase), "or whether they spring from the doctrine of 'the greatest utility' it matters not."³³ These principles are law higher than human enactment. The attempt to accommodate such divergent positions as God-given natural law and utilitarianism shows Nicoll's determination to maintain the separation of law from politics. He did not maintain, however, that law as it exists is always an accurate reflection of eternal justice.

Nicoll maintained that the actual state of the law cannot be understood without a knowledge of the times in which certain rules of law were framed. A study of history will reveal that "state policy," another name for politics, is the origin of that which "mars the harmony and symmetry of the

28. *Id.* at 35.

29. Theodore W. Dwight, *An Introductory Lecture Delivered before the Law Class of Columbia College, New York* 25 (1859).

30. *Id.* at 3, 43.

31. Nicoll was a prominent New York practitioner who played an important role in organizing the Association of the Bar of the City of New York. Nicoll resigned from the Bar in disgrace in January, 1875 after misappropriating funds. GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970*, at 128 (1970).

32. Henry Nicoll, *An Address delivered before the Graduating Class of the Law School of Columbia College* 5 (1869).

33. *Id.* at 5-6.

law.”³⁴ He uses the law of real estate as an example which he asserts is “not founded on the principles of right reason as now understood but on what those grim old barons of four or five centuries ago regarded as such when looked upon from their own selfish standpoint.”³⁵ Nicoll thus set up a dichotomy with law as the expression of eternal justice on one side, and law as debased by politics and “state policy” on the other.

The attempt to divide politics and law was an important aspect of the post-Civil War revival of the belief in unchanging principles of law. The works of Joel Bishop, a leading treatise writer and publicist, are an early example of the increasing importance of the separation of law and politics. In 1854 and 1855 Bishop published a series of seven brief essays on legal principles in the *American Law Register*.³⁶ His main theme expressed the danger of depending solely on authorities — decided cases — and neglecting the principles of law, a danger especially acute in the United States with its multiplication of common law jurisdictions.³⁷ According to Bishop, law was made up both of the rules of “natural justice” and of “technical rules” through which natural justice is administered.³⁸ The true task of the lawyer is to understand the principles of law. That understanding does not come solely, or even primarily, from the study of cases. The ultimate test of a legal principle is whether it comports with “that natural sense of right and justice which the Maker of us all has placed in the human mind.”³⁹ Judges do not by virtue of their office acquire any special skill in ascertaining legal principles. “We should remember,” Bishop wrote, “that a judge has no better opportunity to know what is a legal principle, than the humblest man in the ranks of the profession.”⁴⁰ The ability to know what a principle is “depends upon the person’s natural capabilities and his experience, study and reflection.”⁴¹ In addition, judges are preoccupied, and rightly so, with deciding the case before them. They are concerned with results first and with reasoning to those results second. Their statements of principles, therefore, are often incorrect.⁴² In sum, we arrive at the

34. *Id.* at 10.

35. *Id.* at 11-12.

36. Joel P. Bishop, *Law in the United States*, 3 AM. L. REG. 60 (1854); *Legal Principles. No. II*, 3 AM. L. REG. 185 (1855); *Legal Principles. No. III*, 3 AM. L. REG. 252 (1855); *Legal Principles. No. IV*, 3 AM. L. REG. 312 (1855); *Legal Principles. No. V*, 3 AM. L. REG. 381 (1855); *Legal Principles. No. VI*, 3 AM. L. REG. 505 (1855); *Legal Principles. No. VII*, 3 AM. L. REG. 633 (1855).

37. Joel P. Bishop, *Law in the United States*, 3 AM. L. REG. 60-61 (1854).

38. Joel P. Bishop, *Legal Principles. No. II*, 3 AM. L. REG. 185 (1855).

39. Joel P. Bishop, *Legal Principles. No. III*, 3 AM. L. REG. 252 (1855).

40. Joel P. Bishop, *Legal Principles. No. V*, 3 AM. L. REG. 383 (1855).

41. *Id.*

42. Joel P. Bishop, *Legal Principles. No. IV*, 3 AM. L. REG. 314 (1855).

knowledge of legal principles by reasoning to elementary truths. We test our reasoning by tracing out the consequences of the principle.

Are those consequences such as the adjudications of the courts show us to have an actual existence in the law? If we see, on the comparison, that our supposed principle, traced in every direction, leads to consequences precisely in accordance with the facts of the law as exemplified in the decisions of the Courts, we conclude that it is true and sound; in other words, that it is a legal principle. In so comparing our deductions with the decisions, we do not inquire, as being material, whether or not the judges, in arriving at the decisions, have recognized our principle. If they have, we may still find that it is erroneous; if they have not, we may yet find that it is correct.⁴³

For Bishop, the judges' job did not even include the systematic statement of the law, let alone the making of it. He stated that "the full force of their minds is directed to arriving at right *results*."⁴⁴ Principles were the province of thinkers like himself, who dedicated themselves to legal understanding and recording that understanding in treatises.⁴⁵

By the late 1860s, Bishop's emphasis on the existence of principles, not cases, had become even more pronounced, perhaps in reaction to the publication of Austin's lectures. In *The First Book of the Law*, Bishop set forth what he believed every student should know about the nature of law.⁴⁶ Compared to the 1850's, he more clearly emphasized the separation between cases and the principles of law. "[T]he law is a system of principles," he reiterated, "and the principles are the law itself, while the cases are only to be received in the nature of evidence, tending more or less strongly to prove the principles."⁴⁷ Moreover, the state could not change legal principles any more than it could order a stream to run uphill.⁴⁸

Twenty years later, Bishop still believed that judicial decisions were only evidence of the law, representing conclusions on particular facts.⁴⁹

43. Joel P. Bishop, *Legal Principles*. No. VII, 3 AM. L. REG. 634 (1855).

44. Joel P. Bishop, *Legal Principles*. No. IV, 3 AM. L. REG. 314 (1855).

45. *Id.*

46. JOEL P. BISHOP, *THE FIRST BOOK OF THE LAW: EXPLAINING THE NATURE, SOURCES, BOOKS, AND PRACTICAL APPLICATIONS OF LEGAL SCIENCE, AND METHODS OF STUDY AND PRACTICE* (1868).

47. *Id.* at 83-84.

48. *Id.* at 49-50.

49. Joel P. Bishop, *The Common Law as a System of Reasoning, — How and Why Essential to Good Government; What Its Perils, and How Averted*, 22 AM. L. REV. 1, 7 (1888) (the text of a speech Bishop gave before the South Carolina Bar Association in Columbia, South Carolina, on December 12, 1887, which was also published in a pamphlet entitled COMMON LAW AND CODIFICATION; OR THE COMMON-LAW AS A SYSTEM OF REASONING).

However, he emphasized even more strongly, the inability of legislation alone to alter the law. His definition of law placed it above the day-to-day fray. He told the South Carolina Bar Association, that “[t]hose visible things we call law and government spring naturally out of the invisible nature of man, under the influence of his surroundings.”⁵⁰ A court’s decision of a new question, “differing from what has gone before,” does not require the consultation of the books but rather of “the law engraved, not by man, but by God, on the nature of man.”⁵¹ Thus, law consists “of a beautiful and harmonious something not palpable to the physical sight, yet to the understanding obvious and plain, called principles.”⁵²

The investigation of this law is a special skill known as legal reasoning. The investigator must trace the established decisions to their principle “and thence pass downward to the new facts and inquire whether or not they are within the same principle. . . .”⁵³ When this process is correctly performed, the investigator “discovers, one by one, the laws which always existed, though, it may be, never before understood, pertaining to the government of men in communities.”⁵⁴ In fact, “[a]ll governmental affairs . . . travel in the path of precedent.”⁵⁵ Thus, Government, like law, is plagued by decisions made through mechanical application of rules without consideration of the reasons for those rules.⁵⁶ The survival of our government, therefore, depends on the cultivation of legal reasoning and the avoidance of legislation which substitutes fiat for an understanding of the law.

Bishop’s scorn of the legislature was typical of those who belittled Austin’s view of law as command, and instead found the source of law beyond the day-to-day workings of the world. For example, the wild machinations of the railroad wars in New York, as well as the instances of municipal corruption associated with the Tweed Ring, helped to inspire Nicoll’s lament that everyone was at the “mercy of the unscrupulous plunderers of the people” and “the surging tide of corruption which threatens to overwhelm us.”⁵⁷ Thomas Hoyne, a local Chicago lawyer, told

50. *Id.*

51. *Id.* at 5.

52. *Id.*

53. *Id.*

54. *Id.* at 6.

55. *Id.* at 27.

56. *Id.* at 27-29.

57. Nicoll, *supra* note 32, at 15. For a classic account of the railroad wars see CHARLES FRANCIS ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS (1886). For a modern discussion with reference to literature see MAURY KLEIN, THE LIFE AND LEGEND OF JAY GOULD 76-87 (1986). For a careful assessment of the Tweed scandals which goes far to rehabilitate the

graduates of the old University of Chicago that "the current conversation of society is the last job of the lobby or the 'ring,' which has *carried through* some legislature, under the forms of law, the appropriation to private uses of the public property or taxes to the amount of millions."⁵⁸ The excesses of Reconstruction legislatures provided the horrible examples for Edwards Pierrepont, Langdell's sometime law partner, who similarly cautioned an audience at Yale to deal carefully with the compilations of the Roman law because they were assembled "after the last embers of civil and political liberty were cold" and were designed to "expressly inculcate the foul doctrine of absolute power in the Sovereign and that every right and all the authority of the people were transferred to him."⁵⁹

Although these lamentations about the failings of legislatures are somewhat ritualistic, they do nevertheless evidence opposition to the idea that the ultimate source of law is the sovereign's command. Discussion of these topics heightened after the controversy over codification was revived by the passage of a civil code by the New York legislature. The New York Constitution of 1846 mandated codification of both the procedural and substantive law of the state.⁶⁰ The Code of Civil Procedure was written and adopted in short order, but the civil code remained unfinished for many years.⁶¹ In 1879, the New York legislature finally passed a version of the civil code only to have it vetoed by the governor.⁶² The code was revised, and in 1882, it was again passed by both houses of the New York legislature, only to be vetoed again by the governor.⁶³ These events, as well as the adoption by other states of the New York codes of procedural and substantive law, especially by new states in the west, sparked discussion

Tamanay leader's reputation see LEO HERSHKOWITZ, *TWEED'S NEW YORK: ANOTHER LOOK* (1977).

58. Thomas Hoyne, *Address to the Graduating Class of the Law School of the University of Chicago* 12-13 (June 30, 1869).

59. Edwards Pierrepont, *Oration on the Influence of Lawyers Upon Free Governments* 2 (1874).

60. Alison Reppy, *The Field Codification Concept*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS 17, 32 (Alison Reppy ed., 1949).

61. On the Code of Civil Procedure, usually called the Field Code after its principal author, David Dudley Field, see LaPiana, *supra* note 24, at 287, 302-27. On the stillbirth of the codes of substantive law, see DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 46-56 (1986). See also Reppy, *supra* note 60, at 36-42; MARTIN, *supra* note 31, at 146-50.

62. Philip J. Bergan, *David Dudley Field: A Lawyer's Life*, in THE FIELDS AND THE LAW: ESSAYS 48 (1986).

63. VAN EE, *supra* note 61, at 331-32.

emphasizing the transcendent nature of law and the imbecility of legislatures.⁶⁴

In 1879 the New York State Bar Association sponsored an essay competition that asked "is the common law a proper subject for codification?"⁶⁵ Not surprisingly, the first and second place essays both answered the question with a resounding no. Both writers argued in terms much like those Bishop used. William Ivins, the second place writer, declared that "the only universal and unchangeable elements of law are those principles fertile of consequences which do not descend into detail and which are not subject-matter of codification — the general maxims which are the only *legis legum* known to jurisprudence."⁶⁶ Shelton Viele, in the winning essay, defined the common law as "the great body of principles and precedent now existing and recognized in the law exclusive of purely statutory enactments and restrictions."⁶⁷ According to Viele, scientific codification required the discovery and statement of the fundamental principles of the law which are universally true.⁶⁸

These positions became official views of the organized New York bar as its fight against the civil code continued into the early 1880s. The Association of the Bar of the City of New York entered the fray with its own official observation that the proposed civil code's declaration of the sources of law was completely misguided.⁶⁹ According to the code, the "will of the sovereign" is expressed by the Constitution, statutes, and "the judgments of the tribunals enforcing those rules which, though not enacted, from what is known as customary or common law."⁷⁰ To the contrary, the common law claims its origins not from the will of the

64. The Civil Code was adopted in Georgia in 1863, California in 1866, Montana and North and South Dakota in 1872. MARTIN, *supra* note 31, at 154.

65. 3 N.Y. ST. B. ASS'N REP. 91 (1879).

66. William M. Ivins, *Is the Common Law a Proper Subject for Codification?*, N.Y. ST. B. ASS'N REP. 195 (1879). He clearly spoke the language of historical jurisprudence in a way which revealed the links between law and other aspects of social thought:

For law is not something superimposed upon society, but, like the language, morals, religion and politics of a people, it springs from their common consciousness. The formulations of positive law are to be sought in the national spirit, that *volkgeist*, as the Germans call it, which exists in all the members of a nation, and has its life in the national history, producing specific traits of nationality, as distinguished from the generic traits of humanity.

Id. at 195.

67. Shelton T. Viele, *Is the Common Law a Proper Subject for Codification?*, 3 N.Y. ST. B. ASS'N. REP. 171 (1879).

68. *Id.* at 172-73.

69. On the role of the Association see MARTIN, *supra* note 31, at 147-57.

70. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON THE AMENDMENT OF THE LAW UPON THE PROPOSED CIVIL CODE 7 (1881).

sovereign but "from the customs and habits of thought and action of a brave and free people."⁷¹ A committee of the Association, specially appointed to urge the rejection of the code, made the separation of the common law from politics explicit:

The common or unwritten law relates mainly to the principles and rules governing the conduct and affairs of men in their private relations and dealings. It is not made up of the arbitrary enactments of legislative bodies; but is a system or body of doctrine developed from the application of original principles to the actual experiences of life.⁷²

The committee asserted that legislative statement and enactment of these principles could be of use only in very special circumstances. As another unsympathetic critic of the proposed New York code observed:

Law in general, as civilized men recognize it, actually or potentially, exists in or results from the harmony of the universe and the natural relations and fitness of things. . . . It is not merely an arbitrary or positive rule of action, created by a mortal sovereign's will. Neither is it something invented by human intelligence. It may be discovered by us through Revelation, or evolved by human wisdom though the results of observation and experience. When thus found, as its development approximates to perfection, it may, to some extent, by slow degrees be safely formulated into written language.⁷³

Although the Governor vetoed the New York code in 1882, discussion of the topic of codification continued. Some of the commentary by lawyers questioned the competence of the legislature to enact a code. One writer asked whether better answers to legal questions could be expected from "an independent and learned judiciary" or from "an ever shifting elective body, wavering often between that devil, the lobbyist, and the deep sea of popular clamor."⁷⁴ Another lawyer made the same point while exhibiting some sympathy for the people's representatives. C.C. Bonney wrote:

If there be, as I readily confess there are, in some of the State legislatures, and in Congress, individual lawyers who are eminently qualified for the task [of codification], they are so burdened and vexed with multitudinous political and administrative duties, with committee service, and with the

71. *Id.*

72. Association of the Bar of the City of New York, *Report of the Special Committee to Urge the Rejection of the Proposed Civil Code, October 10, 1882*, at 21 (1882).

73. ALBERT MATTHEWS, *THOUGHTS ON CODIFICATION OF THE COMMON LAW* 9 (3rd ed. 1882).

74. Robert L. Weatherbe, *Codification*, 20 AM. L. REV. 324 (1886).

irritating applications of importunate constituents, that they can not, under such circumstances, perform the true work of codification.⁷⁵

The editors of the 1884 *American Law Review* commented:

Imagine such a body as the Legislature of Missouri (or even of New York), amending a code of the common law. Look in upon them; listen to their wrangles, and consider who they are. Why, half of them cannot write their names without running out their tongues. How helpless such a body of men is when it comes to dealing with such a subject as the codifying of the common law.⁷⁶

Belief in legal principles above and beyond the legislature's grasp was commonplace by the time the ABA's Committee on Legal Education questioned the reliance on the law found in cases. Some scholars, such as Arnold Paul, have traced the 1890's fear that the legislature was a potential instrument of socialism and anarchism to this criticism.⁷⁷ Bishop's treatment of government as a branch of legal reasoning is clearly related to such fears, especially when one considers his 1888 observation that anarchists seldom come from common law countries.⁷⁸ One of the few specific objections of Association of the Bar's special committee involved proposed section 998, which prohibited leasing one room to more than one family and enforced the prohibition by absolving tenants in such buildings from the obligation to pay rent. In objecting to the provision, the committee asserted that the legislature's abridgement of the freedom of contract also infringed on the rights of the poor:

What proper connection is there between the "horrors" of the tenement house and the despotic prohibition against an economy of rent, fuel, and other living expenses, practicable for two poor sewing women, with perhaps a child apiece, by hiring each a part of a single room? . . . [The section is an example] of the disposition to dictate to men what they may or may not do, and to trespass upon the most essentially valuable of all civil rights, the right to liberty of action.⁷⁹

Thus, the committee opposed such social legislation. These expressions of fear and frustration at the possibility of social legislation are not,

75. C.C. Bonney, *Codification*, 20 AM. L. REV. 26 (1886). Bonney was president of the Illinois State Bar Association in 1883, see his annual address *Law Reform and the Future of the Legal Profession* (1883).

76. *Codification of the Common Law*, 18 AM. L. REV. 99-100 (1884).

77. ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 61-81, 159-84 (1969).

78. Bishop, *supra* note 49, at 48.

79. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *REPORT OF THE SPECIAL COMMITTEE TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE 20* (1881).

however, the only motif found in the legal rhetoric of the period. The commentators also opposed the Austinian definition of law. George H. Smith, a California attorney and legal writer of the time, had no use for Austin or for any theory of law which placed its principles within the reach of the legislature.⁸⁰ According to Smith, ever since Blackstone's definition of law as the order of a political superior, "the still more foolish theory developed out [of the Blackstone definition] by Bentham and Austin, and the general reception of the Bentham/Austin theory . . . , English and American lawyers have, with few exceptions, lost all conception of what the law is."⁸¹ Smith argued that what Anglo-American lawyers have forgotten is that part of law which the Romans called the *jus gentium*. The *jus gentium* contains unchanging principles which are the basis of law. By contrast, the *jus civile*, which is the law of particular states, varies from nation to nation and is expressed, at least in England and America, in decided cases.⁸² The separation of the two can only be understood by a thorough study of the Roman jurists who first developed the distinction between the ephemeral and the permanent in law.⁸³ The permanent part of the law embodied in principles is the true subject of legal science. The rules of law established by the will of legislator are applicable only "to cases coming within their explicit terms." Principles of the law, however, "are principles in the true sense and are true not only in their explicit statement, but in all their implied logical consequences."⁸⁴ For Smith and Bishop, therefore, legal reasoning involved the application of principles to new situations through logical deduction. Smith's notion of legal science was not inductive. Smith believed that the notion that law is the cases and can be taught from cases is mistaken because law is reason and its source is reason. He asserted that the idea of legal science behind the case method of instruction promulgated by the Harvard faculty was therefore gravely flawed.

According to this notion, the law is supposed to be an inductive science, and the decisions of the courts to be the natural phenomena upon which it rests;

80. Smith has been almost totally ignored by scholars; the only exception is JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY* 46-49 (1990).

81. George H. Smith, *Of the Certainty of the Law and the Uncertainty of Judicial Decisions*, 23 AM. L. REV. 702 (1889).

82. Smith, *supra* note 81, at 708-14; George H. Smith, *The New Departure in English Jurisprudence*, 28 AM. L. REV. 872 (1894). John Chipman Gray characterized Smith's ideas as an "exploded superstition." JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 309 (2nd ed. 1921).

83. George H. Smith, *The True Method of Legal Education*, 24 AM. L. REV. 216-26 (1890).

84. Smith, *supra* note 81, at 708.

and hence the system is likened by Professor Gray to the method of learning chemistry by retort and crucible. But this is too novel an idea of *science* — which has been hitherto supposed to rest upon the truths of nature, — to be seriously entertained; and, until old notions are rectified it must appear even ludicrous, to conceive of a science based upon so unstable a foundation as the opinions of men, necessarily fluctuating, inconsistent, and self-contradictory.⁸⁵

In the end, the principles of the law were truths of nature and the idea that they were the product of the sovereign's commands simply impossible. Not surprisingly, the ultimate principle of justice as identified by Smith is perfectly compatible with a *laissez-faire* approach to government:

The principles of justice, of which the former [the *jus gentium* as opposed to *jus civile*] is composed, are in no way uncertain; for where all other principles fail, there is always the principle "*melior est conditio possidetis, et rei quam actoris*," — a principle founded upon that of personal liberty or self-ownership; which is the fundamental principle of jurisprudence. For it is obvious that no one has the right to interfere with another except by virtue of some clearly defined right; and the presumption being in favor of liberty, the burden of showing an alleged right must rest on him who asserts it; and hence where there is uncertainty the claim must fall to the ground. Hence in practice there is seldom, if ever, any difficulty in perceiving the justice of a case.⁸⁶

Smith provided perhaps the most complete exposition of the argument asserting the existence of unchanging principles of law. Such arguments supported a *laissez-faire* approach to matters of economic regulation and social legislation. Smith himself, however, was not a doctrinaire supporter of *laissez-faire*. In 1895, as the debt of the transcontinental railroads to the federal government was coming due, he advocated foreclosure and government operation of the roads as preferable to continued management by rapacious directors. In his view such a course was the only way to protect the "liberties and rights of individuals." Government management would no doubt be less efficient than private ownership, "but the obvious consideration presents itself, that whatever is saved on expenses by the superior efficiency of private management, goes to the benefit of the managers, and that the amount is insignificant compared with the other amounts that are wrested from the public by private greed."⁸⁷ In this

85. Smith, *supra* note 83, at 215.

86. Smith, *supra* note 81, at 709-10.

87. George H. Smith, *The Pacific Railroad Companies and the People of the Trans-Mississippi States*, 29 AM. L. REV. 206 (1895).

instance, at least, Smith believed unchanging rights belonged to individuals, not corporations.

Smith's attitude towards nationalization of the railroads is an example of the individualistic side of conservative legal thought, the descendant of Jacksonian opposition to privilege. His intellectual premises, along with those of the other writers who shared his belief in absolutes, are also descended from antebellum ancestors. Law for these thinkers was still the product of the mind of God, discoverable through investigation but not made by the facts, that is, the cases. The Austinian theory of law, separating law from morality and placing the source of law in political power, challenged the older notions and led to clearer and more strident assertion of the transcendent nature of law. It remained, however, assertion. Neither Bishop nor Smith nor any of the writers considered gave reasons for their belief, beyond the statement that Roman law embodied universal truths.

Other thinkers, such as Maine, however, argued that they could prove the transcendent nature of law in ways compatible with modern scientific inquiry. They devoted themselves to refuting Austin's analytical jurisprudence through historical jurisprudence. In spite of the scientific thrust of Maine's work, those American lawyers, discussed in the next part, who appealed to history in general and often to Maine in particular to disprove the Austinian theory of law proclaimed that history showed law to be transcendent, with a permanence that political institutions could not alter. To the naked assertions of the existence of transcendent, permanent law, these scholars added historical proof.

III. SCIENTIFIC LAW

Maine's *Ancient Law* was widely regarded as the epitome of historical jurisprudence and many American thinkers relied on this jurisprudence to disprove the analytical positivism they associated with Austin.⁸⁸ Their use of Maine may or may not have been true to the spirit of the work they so happily appropriated, but it is clear that they did accurately identify at least one major theme found in *Ancient Law*: the use of science to examine law — a science based principally on a comparative method. Maine examined non-English societies to elucidate laws of development which were true for Indo-European peoples.⁸⁹ For example, he believed that the proposition that a historical era of aristocracies succeeded a historical

88. Herget, *supra* note 80, at 25-29.

89. R.C.J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 34-38 (1988).

era of heroic kings may be considered as true, if not of all mankind, at all events of all branches of the Indo-European family of nations the important point for the jurist, [then, is that] these aristocracies were universally the depositaries and administrators of law.

This in turn gives rise to an era of customary law which all societies seemingly experience during the course of their history.⁹⁰

Maine's interest in tracing the development of societies led to perhaps the most frequently quoted passage from his work. Chapter V, Primitive Society and Ancient Law, traces the major aspects of the law of persons to the power of the father over the family. He dismisses all the speculation of the philosophers about the state of nature with the assertion that "the difficulty . . . is to know where to stop, to say of what races of men it is *not* allowable to lay down that the society in which they are united was originally organized on the patriarchal model."⁹¹ History then shows the "gradual dissolution of family dependency and the growth of individual obligation in its place."⁹² Thus it can be said "that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."⁹³ Whatever Maine meant by this famous assertion, some American thinkers seized on it as a justification for exalting custom above positive law and for claiming that custom supported the notions of *laissez-faire*.

The remainder of this section examines the thoughts of seven American legal writers: William G. Hammond,⁹⁴ Thomas McIntyre

90. HENRY SUMNER MAINE, *ANCIENT LAW* 11 (1963).

91. *Id.* at 119.

92. *Id.* at 163.

93. *Id.* at 165.

94. Hammond was head of the law department at the State University of Iowa from 1868 to 1881 at which time he became dean of the St. Louis Law School (Washington University). In addition to his editions of Francis Lieber's *Legal Hermeneutics* and Blackstone's *Commentaries*, discussed below, in cooperation with Dillon he prepared for several years digests of the Iowa decisions and from 1870-1873 served on the commission which prepared a new code for the state. A graduate of Amherst, he studied jurisprudence and civil law in Germany in the 1860's. Charles Claffin Allen, *The St. Louis Law School*, 1 GREEN BAG 289 (1889); *Recent Deaths*, 6 GREEN BAG 252 (1894).

Cooley,⁹⁵ Philemon Bliss,⁹⁶ Christopher G. Tiedeman,⁹⁷ Edward J. Phelps,⁹⁸ John F. Dillon,⁹⁹ and James C. Carter.¹⁰⁰

95. Second only to Story in combining the careers of judge, teacher, and author, Cooley occupied both a professorship at the law school of the University of Michigan and a seat on the Michigan Supreme Court for many years. He authored several important works including treatises on constitutional law, torts and taxation, and an edition of Blackstone. Toward the end of his life he served as the first chairman of the Interstate Commerce Commission. ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY* (1987).

96. Philemon Bliss was part of the New England diaspora, as was Cooley. Educated at Oneida Institute and Hamilton College, he read law and eventually practiced in Ohio where he served as a judge. He was elected to congress as a Republican in 1854 and 1856. He was appointed chief justice of the Dakota territory in 1861, but resigned from that position in 1863 and moved to Missouri in 1864. He was again elected to the lower court bench and then to the Missouri Supreme Court in 1868. After four years on the high court he retired and was appointed to a professorship in the State University. He founded Missouri's law school in 1873 and was its head until his death in 1889. In addition to his book on sovereignty examined here, he authored a standard treatise on code pleading. L.C. Krauthoff, *The Supreme Court of Missouri*, 3 GREEN BAG 183-84 (1891).

97. Christopher Tiedeman was Bliss's colleague at Missouri from 1881 to 1891. Like Hammond he had studied in Germany. He received his LL.B. from Columbia in 1878, and practiced for a time both in his native Charleston, South Carolina and in St. Louis before accepting his academic appointment. In 1891 he took a position in the law school of the University of the City of New York (the predecessor of New York University). In 1897, he resigned to devote full time to writing. He returned to academic life in 1902 as dean of the law school at the University of Buffalo and died the following year. His writings included several treatises which became standard works. JACOBS, *supra* note 8, at 59.

98. Edward J. Phelps was a native of Vermont and a successful lawyer there for most of his life. He took an early interest in politics, served in the Fillmore administration and ended his public career as minister to England, a post to which he was appointed by President Cleveland in 1885. He was one of the founders of the American Bar Association and one of its first presidents. In 1881 he accepted the Kent Professorship at Yale and he taught there, with the exception of his tenure in London, until his death in 1900. He remained in practice during his teaching career and was of counsel to a New York City firm. John W. Stewart, *Memoir of Honorable Edward J. Phelps*, in ORATIONS AND ESSAYS OF EDWARD JOHN PHELPS, DIPLOMAT AND STATESMAN vii-xv (J.G. McCullough ed. 1901) [hereinafter ORATIONS AND ESSAYS]. In his career he maintained a middle position between the full time teachers and the academically inclined practitioners.

99. John F. Dillon served with distinction as both a state and federal judge, but eventually left the bench for an equally successful career in private practice. In 1838 he moved from his ancestral home in upstate New York to Iowa. He trained as a medical doctor at the state university but left the practice of medicine due to his own frail health. He turned to law which he felt would make fewer physical demands. Rising quickly through the profession, he became a justice of the Supreme Court of Iowa in 1862. In 1869, President Grant appointed him to the Eighth Circuit where he sat for ten years. In 1879 he left the bench to teach at Columbia University while acting as solicitor for Union Pacific. Within three years he left Columbia to devote himself entirely to private practice. "For many years he argued more cases before the Supreme Court of the United States than any other attorney, and until his death in 1914 was regarded as the leading railroad lawyer in the country." The information in this paragraph is drawn from C. JACOBS, *supra* note 8, at 111-12. In the 1891-92 academic year he held the Storrs Professorship at Yale Law School,

It is useful to begin with Hammond's 1880 edition of Francis Lieber's *Legal and Political Hermeneutics* which was first published in 1839.¹⁰¹ Lieber's work contained several elements that would be developed further in the post-Civil War period. First, he wedded the typical antebellum belief in law appropriate for certain kinds of societies with a recognition of the relationship between social change and change in law. Lieber believed it was worthwhile to study the codes of nations "who acknowledge the same fundamental view of civilization as ourselves."¹⁰² The law exemplified by this comparative study is not unchanging. The supreme law is public welfare and "those states are doomed to decline, and fall to ruin, which endeavor to rule by ancient laws and forms only, and obstinately resist the progress and spirit of the age, as if the public mind could be encircled or checked by oral or written sentences."¹⁰³ Lieber defined nations by "the shared experiences of a group of people."¹⁰⁴

Hammond expanded upon these views in the lengthy collection of notes he appended to the third edition of the treatise. First he emphasized the historical uniqueness of each nation's character and the uselessness of forms based the obsolete experience of others. Hammond understood the progress and spirit of the age which Lieber saw as shaping a nation's law through the action of the public mind through history. Thus the extolling of the English constitution as a model for all states ignores "the difference made by historical circumstances."¹⁰⁵ This error "brings with it ethical injury to the indigenous constitution of the people which is the subject of

where he delivered the lectures published as *The Laws and Jurisprudence of England and America*. JOHN FORREST DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1894).

100. James Coolidge Carter was a graduate of Harvard Law School and a devoted and active alumnus. 14 *Dictionary of American Biography* 536 (D. Amlone, ed. 1934). Although his career began slowly, he eventually became an enormously successful practitioner of the new style of corporate practice. His interest in jurisprudence began with an appointment to the committee of the Association of the Bar of the City of New York, which opposed the proposed civil code for the State of New York. To refute the claims for the code so energetically made by its author, David Dudley Field, Carter delved "into inquiries concerning the distinctions between written and unwritten law." CARTER, *supra* note 21. He turned his researches into several important speeches and finally, toward the end of his life, he drew them all together into the lectures on the subject prepared for presentation at Harvard Law School but never delivered. The lectures were published posthumously as *Law: Its Origin, Growth and Function*.

101. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (1839).

102. *Id.* at 161. On Lieber, see generally FRANK FREIDEL, *FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL* (1947).

103. *Id.* at 183.

104. PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 71 (1975).

105. William G. Hammond, *Note D. On the Term 'Sovereignty,' in LIEBER, supra*

the mistake, interferes with the sound development of the native law, and prevents that law from being clearly understood by the people."¹⁰⁶ This native law is the legitimate law of a nation. An example in the Anglo-American world is the insistence that crimes be carefully defined by the positive law of the state. This belief "is the logical continuation of the same feeling which overthrew the Star-Chamber, and made its very name, as a court of criminal equity, synonymous with iniquity and oppression."¹⁰⁷ Out of historical experience comes the common law which is made not by legislative enactment, but by that very historical experience.¹⁰⁸ It is not surprising that Hammond maintained that the existence of an unwritten constitution "in England and America long before the first reduction of the constitution of any state to writing is too familiar a matter of history to be proved here."¹⁰⁹ In fact, the unwritten constitution controls the legislative power.

All the recent cases which state, as a ground for holding law unconstitutional, the fact that the legislature have assumed power not truly legislative in its character prove the same thing [the existence of the unwritten constitution]; for certainly it is to the unwritten constitution, not to the written one, that we must go to learn what power is legislative.¹¹⁰

In 1890 Hammond, then Dean of St. Louis Law School, further explained his views in his edition of Blackstone's *Commentaries*.¹¹¹ In notes throughout the text of this scholarly edition, Hammond collated all of the changes made in the eight editions of the *Commentaries* published during Blackstone's lifetime. He also appended "copious notes" to the text —

especially to discuss these changes as presented, not only in the rulings of our courts, but also in the works of a considerable number of acute thinkers who have commented largely, and by no means sparingly, upon Blackstone, and who, if they differ widely among themselves, at least consent in presenting a different theory of the law from any known in the eighteenth century.¹¹²

note 101, at 277-78. Hammond's notes follow Lieber's text and are numbered consecutively with it.

106. *Id.*

107. William G. Hammond, *Note J. On the Interpretation of Criminal Law*, in LIEBER, *supra* note 101, at 293-94.

108. Hammond, *supra* note 16, at 51.

109. William G. Hammond, *Note M. On Written and Unwritten Constitutions*, in LIEBER, *supra* note 101, at 309.

110. *Id.* at 309-10.

111. SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1890).

112. William G. Hammond, in BLACKSTONE, *supra* note 111, at xviii (preface).

Those thinkers who have promoted the "historical theory of law" have made a change which is "fundamental, and must be understood by any one who would know the common law as it is now administered in America, to say nothing of its past development." The "so-called school of analytic jurists," however, have been quite mistaken and have promulgated a view of law "farther away from the true sense of law, as we now understand it, than Blackstone's own view."¹¹³

According to Hammond, the proper view was one that saw law as order rather than command. Law does not tell a person what to do but rather allows one to regulate "one's own conduct through the power of foreseeing the results of one's actions." Thus, law is to be understood "not as commands to do or not to do, but as rules of established order."¹¹⁴ The source of the established order is custom, proven by the history of the development of law, which is more or less the same, at least "among the Aryan races." Initially, law and custom are identical. Gradually men realize that with the consent of others certain customs can be varied without invoking supernatural vengeance. Eventually the advantages of variance are understood, and the idea that rules can be made by consent gradually appears.¹¹⁵ Legislation, however, is forever based on the customs which originally were the only source of law. The changes made by legislation must never trespass on vested rights, and indeed, "the extent of such changes in an ordinary lifetime is very small. It has only been exaggerated by false theories which confound law with legislation."¹¹⁶

This correct understanding of the nature of law is clearly the product of the new historical way of studying law. In particular, the progression to the stage of legislation is closely related to Maine's description of the succession of methods of legal change. Hammond also made reference to the progression from status to contract in a way which clearly indicated his acceptance of its implied approval of laissez-faire economics.

Consider, for example, the immense addition to human powers produced by the general diffusion of the law of contracts, hardly known even in its rudiments to our early ancestors. It enables the merchant to extend his business over the whole navigable globe, and to reckon with confidence the result of transactions which may extend through years. It multiplies the power of the capitalist as many times as the number of persons whom he can induce by wages, or some other form of profitable contract, to labor in his interest and carry out his plans. These great results are not so much the

113. *Id.*

114. William G. Hammond, in BLACKSTONE, *supra* note 111, at 98-99 (note 10).

115. *Id.* at 103-104.

116. *Id.* at 102.

consequence of the rule of ethics, which bids every man keep his word, as of the rules of law, which give each contracting party power to enforce upon others the obligations they have assumed.¹¹⁷

However, Hammond did not share Maine's critical attitude towards comprehensive theories, like the idea of the social contract, which were based on speculation rather than historical evidence. Hammond believed in inviolable principles, such as the existence of vested rights which simply exist without reference to any explanation except that they inhere in the nature of things. In fact, the common law itself reflects the existence of "a Divine order in the moral as well as physical constitution of the world."¹¹⁸ It is not surprising, then, that Hammond should belittle legislation and the Austinian theory which makes it the source of all law.

As part of his argument, he even created a remarkable reconciliation of Blackstone's well-known statement of the supremacy of Parliament with the practice of judicial review in the United States. American courts, unlike English theorists of judicial control of Parliament, "have distinctly repudiated any right to pass upon the justice or reasonableness of such acts, or to declare them void as contrary to natural law."¹¹⁹ They proceed on the legitimate ground that they must "obey the letter of the constitution in preference to that of any merely legislative authority."¹²⁰ This belief in fact vindicates the rule of the people.

It is the distinct recognition of two grades of law, of which that enacted by the people in their constitution overrules that framed by the delegated power of the legislature, upon which the action of these courts rests and not upon any right of the courts themselves to overrule or in any manner revise the conclusions of another department of government.¹²¹

Cooley held similar views. His view of the American past led him to a perspective on American law much like Hammond's; Cooley highly regarded Lieber and his ideas of the organic nature of the state. The essence of Anglo-American history was the development of individual freedom and the limitation of legislative attempts to infringe it.¹²² Nurtured in the Jacksonian reaction to the influence of special interests on the state legislatures, especially concerning the financing of railroads, Cooley placed certain fundamental propositions above the legislative and

117. *Id.*

118. William G. Hammond, *On Precedent and the Doctrine of Authority in the Law*, in LIEBER, *supra* note 101, at 328 (note n).

119. William G. Hammond, in BLACKSTONE *supra* note 111, at 240-41 (note 35).

120. *Id.*

121. *Id.*

122. Jones, *supra* note 95, at 104-07.

political fray.¹²³ Law is basically customary and grows out of the lives of the American people. Law is truly popularly made and expresses the best of the people and is therefore just.¹²⁴ The legislature cannot derange it.

Law is something more than a collection of rules. Those who expect to find somewhere all the law in black and white, fail to grasp its divine significance. . . . Law is expressed in statutes and in decisions, but as the anatomy is not all of the man, so these are not all of the law; there is a vital force which is more than the words, and which, if the word were all blotted out, would still hold the units of society together and in order, while the words were being reproduced. And this vital force is inspired and invigorated by kinship to an Intelligence that is higher than the State, and above all human arrangements.¹²⁵

Cooley's historical conservatism does not appear to be related to ideas of Maine. If Cooley had a mentor in historical thought, it was Burke.¹²⁶ Cooley's thought was so completely grounded in historical experience that he explicitly agreed with Austin that all rights are the creatures of law and do not depend on reasoning from a state of nature and an original social contract.¹²⁷ Apparently, Cooley did not even attempt to appeal to the science of legal history promulgated by Maine. His thought related back to the traditional view of the common law as the embodiment of English liberty.¹²⁸ Cooley believed, without a doubt, that certain legal principles are both unchanging and rooted in something far greater than human opinion.

The link between the experience of the people and the expression of the divine is even more pronounced in Bliss's *Of Sovereignty*, published in 1885. Bliss attempted to elucidate the nature of the American state and to accurately describe the division of power and authority between the state and federal governments. Austin's definition of law as the sovereign's command was difficult to apply to a federal state where the existence of a single sovereign was problematic at best. Austin, himself, had difficulty applying his theory to the United States.¹²⁹ Bliss's contribution to the

123. *Id.* at 72-89, 131, 157-65.

124. Thomas M. Cooley, *The Uncertainty of the Law*, 22 AM. L. REV. 347, 365-366 (1888).

125. *Id.* at 367.

126. Jones, *supra* note 95, at 231-46.

127. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 4, at 7 n.8. (D. Avery Haggard ed., 4th ed. 1932).

128. Jones, *supra* note 95, at 235 n.79, 106-09.

129. AUSTIN, *supra* note 11, at 257-67. For a brief discussion of the difficulties in applying Austin's ideas to the United States, see Gray, *supra* note 82, at 74-79. A fuller

debate is both interesting and original. However, for present purposes, the important part of his work is the first sixty (approximately) pages which lay the groundwork for the analysis of sovereignty on an uncompromising attack on Austin's theory of law.¹³⁰

One sentence summarizes Bliss's theme: "The truth of legal history is . . . that the common law of every country, the great body of the law, if generally obeyed, is founded upon usage, upon the moral reason, upon common consent, and not upon command."¹³¹ Not surprisingly, Bliss believed that the United States had an unwritten constitution.

The great body of the constitution, the real force, — that which guards rights, tempers the exercise of powers, makes duties imperative and responsibilities real, interprets to officials the how and the what, after anarchy brings order out of chaos, — exists in the habits, the notions, the social vitality of a people. The written constitution is a help; but one whose letter is not supported by the unwritten is but chaff.¹³²

This assertion can be proven by investigating the "rudest societies" where there is recognition of "the primary precepts of the law of contracts" without the benefit of anyone's command.¹³³ Although the law is not fully developed in such rude societies, that does not mean that unenacted, natural law does not exist. The natural law is that law which is most developed. Therefore, in more advanced the societies, the precepts of natural law be more clearly evident.¹³⁴ As society develops, people will advance in understanding and perfection and, through "common consent," enforce an ever more perfect law.¹³⁵ Finally, Bliss did not hesitate to identify the law and the state with the Godhead:

Society itself springing from Nature, that is from God; the higher reason,

discussion of American attempts to deal with Austin's definition of sovereignty as applied to the United States can be found in PETER J. KING, *UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY* 337-484 (1986). For information concerning legal thinkers' responses to the Civil War, see generally PALUDAN, *supra* note 104.

130. Gray agreed with Bliss's discussion of American sovereignty but with little else in the book. "Unfortunately, the unsatisfactory character of the discussion on the nature of Law, with which the Essay [Bliss's work] opens, repels students from reading further." GRAY, *supra* note 82, at 78 n.1. Cooley also held a view of American sovereignty close to that of Bliss. See Philemon Bliss, *Sovereignty in the United States*, 1 MICH. L.J., 81-92 (1892).

131. PHILEMON BLISS, *OF SOVEREIGNTY* 52 (1884).

132. *Id.* at 163. In support of this statement Bliss cites Hammond's "Note M" in his edition of Lieber. *Id.* at n.1.

133. *Id.* at 26.

134. *Id.* at 37.

135. *Id.* at 37, 46-47, 52.

as well as the animal and social instincts, being also from God, — the rules which regulate our relations, as not only in harmony with every instinct, but as designed to prevent the abuse of the subordinate, as suggested by the higher in order to insure their subjection, all point to the great Source of good. Is there anything in jural society, when it answers its ends, that does not spring from the will of God? Who then are the legislators and magistrates but servants, minister of justice, bound to obey His will: And who but God is sovereign? The revolt against the superstitions which in all States and with all religions have sought to substitute the say-so of priests for that of God is no reason for rejecting the authority which is above all priesthoods, all States.¹³⁶

Bliss linked the idea that history reveals the operation of transcendent law with the notion that the enforcement of that law in society depends on the level of development of its people. Christopher G. Tiedeman further developed these two ideas while omitting Bliss's teleological views. In 1885, he reviewed Bliss's work for the *American Law Review*. According to Tiedeman, Bliss established

that law is not the product of the arbitrary will of the legislator, but the resultant of the natural forces that are, for the time being, at work in organized society, and that the mere *ipse dixit* of the supreme power so-called, cannot create a living law, except so far as its enactment is compelled by the resistless demands of society.¹³⁷

Tiedeman then noted out that European jurists, especially von Ihering, had reached a similar conclusion.¹³⁸ All law is the product of social forces; fundamental principles of law resulting from those forces are universal. Like Bliss, Tiedeman also concluded that there is no sovereign, but in the place of Bliss's invocation of the Deity, Tiedeman substituted "the control of social needs and necessities" which are beyond all mere human power.¹³⁹

The influence of society upon the law became the theme of Tiedeman's work. "No one can seriously question," he told the New York State Bar Association in 1896, "that law, in its totality, is an expression of the national will."¹⁴⁰ He went so far as to assert in *The Unwritten Constitution*

136. *Id.* at 63.

137. Christopher G. Tiedeman, *Book Review*, 19 AM. L. REV. 947-948 (1885) (reviewing PHILEMON BLISS, *OF SOVEREIGNTY* (1884)).

138. *Id.* at 948. Tiedeman had studied in Germany and had attended von Ihering's lectures at Goettingen.

139. *Id.* at 948.

140. Christopher G. Tiedeman, *The Doctrine of Stare Decisis and A Proposed Modification of Its Practical Application in the Evolution of the Law*, 19 N.Y. ST. B.A. REP. 113, 116 (1986). For similar expressions see Christopher G. Tiedeman, *Dictum and Decision*, 6 COLUM. L. TIMES 35 (1892); Christopher G. Tiedeman, *Methods of Legal*

of the United States that the original intent of the framers of the Constitution was meaningless.

Now the living power, whose will is given expression in the written word [of the Constitution], is not the men who framed or voted for the written word, but the present possessors of political power. The present popular will must indicate which shade of meaning must be given to the written word.¹⁴¹

Tiedeman carried his analysis to the extreme by asserting that there are no universally accepted natural rights which are relevant to jurisprudence. Rather, there are only "popular notions of rights" which "do become incorporated into, and exert an influence upon, the development of the actual law."¹⁴²

Given Tiedeman's emphasis on the importance of the actual needs and desires of society in the creation of law, one might expect that he was an early advocate of "sociological jurisprudence" like that developed by Roscoe Pound from his consideration of the same continental jurists studied by Tiedeman.¹⁴³ However, the year after his review of Bliss Tiedeman published his magnum opus, *A Treatise on the Limitations of Police Power in the United States*, in which he expounded the theory that the Constitution severely limited legislatures' abilities to regulate the use of property.¹⁴⁴ Although he does make a passing reference to natural rights which belong to man "in a state of nature,"¹⁴⁵ his principal point is that society makes law, and what is important is the kind of law society makes. Tiedeman states that "the unwritten law of this country is in the main against the exercise of police power, and the restrictions and burdens, imposed upon persons and private property by police regulations, are jealously watched and scrutinized."¹⁴⁶

Five years later, Tiedeman clarified this theory when he wrote, in *The Unwritten Constitution*, that the natural rights of the day, set by social forces, must be and can be protected through the mechanism of judicial review because natural rights are truly imbedded in the Constitution, and social forces define the meaning of what the Constitution. The natural

Education. III., 1 YALE L.J. 150, 153-54 (1892); CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 72 (1890), [hereinafter *THE UNWRITTEN CONSTITUTION*].

141. *THE UNWRITTEN CONSTITUTION*, *supra* note 140, at 144.

142. *Id.* at 72.

143. DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW*, 161-82 (1974).

144. CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (1886).

145. *Id.* at 1.

146. *Id.* at 10.

rights to be protected, however, are those of the doctrine of laissez-faire, the right to do whatever one wishes so long as no damage reaches another.¹⁴⁷ According to his writing in 1885, Tiedeman stated that these rights were under serious attack. "Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor and how many hours daily he shall labor."¹⁴⁸ In this passage, Tiedeman hints that the legislature is the source of the attack, a position he makes explicit a few pages later:

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.¹⁴⁹

For Tiedeman, the legislature was neither the source of law nor the representative of the social forces that made the law. Presumably, the course of our history shows what social forces really are, and Tiedeman, like the other scholarly authors, accepts the idea that the tenets of liberal economics pervade our history.¹⁵⁰

Phelps also believed in the primacy of principles which are an integral part of Anglo-American history. According to Phelps, the lawyer should not concern himself with cases but rather with "the foundation principles which underlie all propositions of law."¹⁵¹ These principles form part of what Phelps called the law of the land which is unalterable by the legislature. The principles are "inherent in the human conscience" and "derive their authority from the spontaneous and universal recognition of intelligent humanity as well as from divine revelation."¹⁵² The rights which are based on these principles — rights to life, liberty, and property — are

147. THE UNWRITTEN CONSTITUTION, *supra* note 140, at 78-82.

148. TIEDEMAN, *supra* note 144, at vi. Compare the similar passage in THE UNWRITTEN CONSTITUTION, *supra* note 141, at 80.

149. LIMITATIONS, *supra* note 144, at vii.

150. Tiedeman would eventually change his mind. See Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1350, 1350-84 (1990).

151. Edward J. Phelps, *Chief Justice Marshall and the Constitutional Law of His Time*, in ORATIONS AND ESSAYS, *supra* note 98, at 82 (1879).

152. Edward J. Phelps, *The Relation of Law to Justice*, in ORATIONS AND ESSAYS, *supra* note 98, at 95.

therefore "placed beyond the reach of any department of the government."¹⁵³

History confirms the primacy of these rights. In spite of the universal nature of these rights and the principles upon which they rest, they are also, in some way, the exclusive heritage of "the Anglo-Saxon race." These rights are embodied in a unique way in "the common law of England, which is likewise the common law of the English-speaking race everywhere."¹⁵⁴ Additionally, the common law includes certain "legal rights" which are the means of carrying out the enjoyment of the fundamental rights. These legal rights are the growing part of the law that changes as society changes.¹⁵⁵ These legal rights cannot be made by any authority. They are valid and enforceable only to the extent that they reflect the condition of society. Phelps, along with Tiedeman, believed that society, in some sense, made law. Phelps clearly set out the anti-positivistic implications of that belief:

And no man has ever yet obtained a clear idea of it [the foundation of law] who attempted to deduce its sanction from the maze of metaphysical speculation, or who failed to comprehend that law among a free people must have something else to stand upon besides positive authority, and must be inspired by a controlling and animating spirit, that has sway over the reason and the conscience of men. The days of arbitrary power in state, in church, or in rules have passed away, so far as we are concerned, to be seen no more.¹⁵⁶

Phelps found in this analysis of the transcendent nature of law the needed protection for the rights of property. While the rights to life and liberty are not seriously threatened in any way, "in various parts of the world at the present time, in many forms, under many theories, and upon widely differing propositions, the right of property has been brought into question, has given rise to violent discussion, and has become sometimes the subject of serious disturbance."¹⁵⁷ Even in the United States, people exist who do not propose to regulate property, which is perfectly permissible within constitutional limits, but instead propose to confiscate it — "to take from the rich for the benefit of the poor." Their favorite means to this perverted end "is to bring to bear upon those whom prosperity has rendered

153. Edward J. Phelps, *Law of the Land*, in ORATIONS AND ESSAYS, *supra* note 98, at 120.

154. *Id.* at 121-22.

155. *Id.* at 122-23.

156. Edward J. Phelps, *International Relations*, in ORATIONS AND ESSAYS, *supra* note 98, at 155.

157. *Id.* at 128.

obnoxious the power of excessive and unequal taxation.”¹⁵⁸ Phelps claimed that all such attempts to confiscate property are unconstitutional and must be struck down by the courts when the legislature errs in furthering them by statute. In sum, transcendent law, justified by its conformity to absolute morality and even revelation, operates as a bulwark against any attempt by a legislative majority to redistribute wealth.

Dillon’s arguments were more sophisticated. He claimed to find worth in both the analytical and historical schools of jurisprudence. He praised Austin for separating law from morality.¹⁵⁹ However, he had no use for the definition of law as command as there is much more to law than mere legislation.¹⁶⁰ Dillon believed that law was “derived, especially in modern times, still more largely from the general sense of justice and right as interpreted and ascertained by the judges than from ‘custom’ in the usual sense of the word.”¹⁶¹ This “general sense of justice and right” is based on a reading of the history of Anglo-American liberty.¹⁶²

Like the other thinkers, Dillon joined his historical outlook with the defense of property and by implication *laissez-faire*. He was explicit about the overt threat to property posed “by the advocates of the various heresies that go under the general name of socialism or communism, who seek to array the body of the community against individual right to exclusive property. . . .” Furthermore, he identified a covert threat

not by the socialist, but at the instance of a supposed popular demand; in which case the attack is directed against particular owners or particular forms of ownership, and generally takes the insidious, more specious, and dangerous shape of an attempt to deprive the owners — usually corporate owners — of their property by unjust or discriminating legislation in the exercise of the power of taxation, or of eminent domain, or of that elastic power known as the police power, — such legislation resulting, and intending to result, in “clipping” the property, or “regulating” the owner out of its full and equal enjoyment and use.¹⁶³

This danger of the tyranny by the majority was foreseen by the Founding Fathers, who “were neither visionaries nor socialists,” and who guarded against it through constitutional provisions.¹⁶⁴ The Fourteenth Amendment perfected this protection and set “the seal of national condemnation

158. *Id.* at 129.

159. DILLON, *supra* note 99, at 6.

160. *Id.* at 9.

161. *Id.*

162. *Id.* at 157-59, 216, 299.

163. *Id.* at 204.

164. *Id.* at 205.

upon Proudhon's famous maxim that 'property is theft.'"¹⁶⁵ In Dillon's view, it was the job of the courts to prevent any inroads into property rights by these horrid ideas.¹⁶⁶

For Dillon, the common law and the Constitution embody the essence of Anglo-American liberty, which has at its heart the protection of property. The fullest exposition of this approach to law, however, was produced by another practitioner, James C. Carter. The message of Carter's work is simple: all law is custom and courts declare but do not make the law. Custom is gradually established through sanctions. The first sanctions are informal ones which include self-help. Later, with the growth of "organized government," society enforces the decisions of acknowledged experts in what the customs are. The organized force of society is applied only "in the case of those breaches or alleged breaches of custom which endanger the peace of society." Eventually, "as civilisation advances, and population, industry, and wealth increase, the social organization expands and advances," and the job of ascertaining custom is lodged in "regular judicial tribunals, . . . armed with the whole power of the State to directly enforce their decisions." The proceedings of these courts are recorded in permanent form and are regarded "as authoritative declarations of binding custom." They become precedents and when litigation arises if "an apt precedent is found it is followed without further inquiry, and the precedents themselves are by the private work of jurists arranged in scientific form and go to make up the fabric of substantive law."¹⁶⁷

According to Carter, the State itself, occasionally enacts legislation but only in a limited field dealing with the organization and procedure of the courts — the mechanism of government and the classification as crimes of "mischievous acts which [had] not as yet been publicly punished." This legislation is not law because it is not designed to directly regulate the conduct of men in their dealings with each other." Rather, it is designed to simply carry out the business of the State which is, in reality, "a great corporation having many things to do." Even when the state legislates in relation to the conduct of its citizens, it affects conduct only indirectly, the "chief object being to create efficient instrumentalities for enforcing and aiding the fundamental law of custom."¹⁶⁸

For Carter, not only was the public law completely separate from private law, it was hopelessly inferior to it. Public law "is made by a single human person, or by a very few persons, and necessarily exhibits the

165. *Id.* at 213.

166. *Id.*

167. CARTER, *supra* note 21, at 169-71.

168. *Id.* at 171, 229-30.

imperfection and error which attaches to all such works.”¹⁶⁹ The private law, on the other hand, is unwritten and rooted in custom. He summarized his researches in exactly those terms:

The final conclusion of the inquiry, what rule or rules in point of fact governed human conduct, was that, so far as social conduct is concerned, *custom* is not simply *one* of the *sources* of law from which selections may be made and converted into law by the independent and arbitrary fiat of a legislature or a court, but that law, with the narrow exception of legislation, *is* custom, and, like custom, self-existing and irrevocable.¹⁷⁰

In fact, Carter notes that this customary law “may justly be called Divine; for, being identical with custom which is the form in which human nature necessarily develops conduct, it can have no other author than that of human nature itself.”¹⁷¹

Carter’s basis for this conclusion is mainly historical, based on a “survey of human life in all ages and in all stages of social progress.”

This survey has embraced primitive man, the savage member of a wandering horde; man when he first adopts a fixed place of abode; man when he first consciously organises a social state; man when he has first acquired the art of writing and when he first employs that art in the composition of laws; man as the subject of a conqueror imposing his dominion over realms not his own; man as the member of a conquered nation accepting submissively the rule of strangers; man in society where there is no power to protect him save his own right arm; man during the long period in which he seeks by the establishment of judicial tribunals to supplant the violence of self-help; man down to the period when judicial tribunals and legislatures have been established and perfected; man in the present enlightened age. . . .¹⁷²

Carter had no doubt that all nations and peoples have passed or will pass through these stages. His actual examples arose primarily from the history of England, especially the development of judicial tribunals — the history he knew best. Carter stated, “social progress elsewhere has not, as I suppose, in substance been different from that exhibited in England.”¹⁷³ Even the details of these various stages are uniform across societies.

Carter’s examination of the characteristics of the last stage of development was based on an examination of the courts of the United States and England “for the reason that we are best acquainted with them,

169. *Id.* at 230.

170. *Id.* at 173.

171. *Id.* at 231.

172. *Id.* at 119.

173. *Id.* at 55.

and because we may be sure that the condition of courts in other countries, however varying from that of these, is not fundamentally different."¹⁷⁴ The defect with theories of law which find their essence in command is that they ignore the truth "that society, like every other phenomenon in nature, was a condition resulting from the operation of causes reaching back into periods infinitely remote. . . ."¹⁷⁵

These various attempts to establish, on a historical basis, the primacy of custom in order to refute Austin's theory of the law, do differ in their use of historical argument. Cooley, Phelps, and Dillon place more emphasis on a peculiarly American or Anglo-American experience of history. Tiedeman generalizes this point of view and finds in the history of all nations the operation of social forces that create law. His appeal to continental learning, however, seems to indicate an belief in the uniformity of experience in the Western world. Hammond sees the history of the Anglo-American world as revealing a pattern of order which is the source of law, reflecting in turn the Divine moral order. Finally, Bliss explicitly sees the hand of the Divine in the development of the law of all societies, and Carter gives the most explicit exposition of that view. All these theorists, appeal to history in order to show that law is not a command, the product of will, but rather law is the expression of something greater than individuals — the collective experience of human life. This experience, especially in Carter's version of story, is to a great degree uniform and progressive — a development to an ordained end.

This approach to refuting Austin was also used by E.C. Clark, Regis Professor of Civil Law at Cambridge, whose own work criticizing Austin was favorably cited by Bliss.¹⁷⁶ Clark admired Austin's logical analysis of "the actually existing legal ideas and conceptions," which was a welcome corrective to "a previous *philosophical* school, whose members were represented as cutting themselves adrift from experience and preferring the evolution of a system out of principles dependent merely on their own consciousness."¹⁷⁷ Austin's definition of law as command, however, "dwells so prominently upon the circumstances of *legislation* (or *position*), as to throw entirely into the shade those historical beginnings of law, which have obviously existed in all nations, as rules of human conduct, anterior to

174. *Id.* at 66-67.

175. *Id.* at 268.

176. EDWIN CHARLES CLARK, PRACTICAL JURISPRUDENCE: A COMMENT ON AUSTIN (1883).

177. CLARK, *supra* note 176, at 3-4. For similar praise of Austin for his freedom from *a priori* speculation, see Edwin Charles Clark, *Jurisprudence: Its Use and Its Place in Legal Education*, 1 L.Q. REV. 201, 204-05 (1885).

anything that can be reasonably spoken of or thought of as legislation at all."¹⁷⁸

Clark maintained that an examination of the history of Greece, Rome, and the Teutonic tribes reveals a more or less "unconscious definition" of law. "The nearest approximation to a uniform or pervading idea is certainly not so much that of *enactment*, *position*, and *command*, as of *antiquity*, *general approval* and *usage*: where an original notion of *ordinance* does appear, it is not human but divine."¹⁷⁹ Although in modern times law is increasingly formulated by political authority, that is not the only way to make law. History shows us that law can and has existed apart from organized states, just as it shows us that there is a more or less uniform definition of law.¹⁸⁰

Clark does not go as far as Austin's American critics in placing law above the political fray. He agrees with Austin that judges do legislate, but he sees in the judicial process a method of making law that is better than legislation.

[T]he modifications effected by judiciary legislation are, at least, with us, very little suggested or affected by *political* feeling. With rare exceptions, they are based on purely scientific or utilitarian grounds, and are the result of independent and individual reasoning. Such a process is uncommon in political assemblies, where the most indifferent questions become matters of party spirit, and the decision of each person is generally determined beforehand by the side to which he belongs.¹⁸¹

As with the other theorists, Clark's opposition to Austin's ideas accompanies the denigration of the capacities of the legislature and a belief that law is better off separate from politics.

Clark also resembles the American thinkers in his appeal to history. He praises Maine for exhibiting the "true philosophical method" which brings to bear on legal questions lessons learned from the law of more than one period or nation. Such a method is as useful as Austin's in combatting useless *a priori* speculation because it promotes practical knowledge.¹⁸² Clark was careful, however, to distinguish between the general and reasonable belief in "certain principles notions and distinctions common to *all* systems of law, at least among nations which have attained any appreciable degree of refinement and civilisation" and the *a priori* speculation involved in the attempt "to make out that the common

178. CLARK, *supra* note 176, at 5.

179. *Id.* at 90.

180. *Id.* at 134, 144-49, 155.

181. *Id.* at 265.

182. *Id.* at 7-8.

principles obtained by the above method [of comparative jurisprudence] are in fact *necessary*, as resulting from the universal nature of man."¹⁸³ The American theorists seem to have paid much less attention to this distinction. For Carter especially, the message of history is uniform and inescapable. It is as if only that one famous phrase in Maine's *Ancient Law* was important: "We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."¹⁸⁴ As a speaker before the ABA stated in 1891 with specific reference to Maine's work: "In a modern industrial state, this freedom of individual contract, representing a long and toilsome progressive social development, becomes essential in any rational conception of individual liberty."¹⁸⁵

IV. CONCLUSION

The appeal to history was the proof of the existence of inescapable law. The course of history involved the liberation of the individual from the trammels of status, which American thinkers equated with the power of the state. American history provided support for such a belief. In addition, unchanging principles were long a feature of American legal science. The Jacksonian tradition of privilege for none identified state action with invidious discrimination and the appropriation of public funds for private purposes. The direct appeal to history, however, was something new, or at least thought to be something new. The contest between analytical and historical jurisprudence placed the entire enterprise on a new scientific basis. The majoritarian, and therefore ultimately socialistic, implications of positivism were disproved by Maine's historical approach.

Those who helped create the historical jurisprudence outlined above also maintained a belief in a declaratory theory of law and judging. Like antebellum legal scientists, advocates of historical jurisprudence spoke the language of induction.¹⁸⁶ Carter declared that "the province of science," including the science of law, is "rigidly confined to the observation and orderly arrangement of facts."¹⁸⁷ Hammond also argued that knowledge of the law is only obtained through induction based on the cases. Accordingly, the cases are the law because law could not be understood without them, but they do not make the law. "No one believes," he argued, "that the observation and experiments by which our knowledge of physical science is

183. CLARK, *supra* note 176, at 203.

184. HENRY SUMNER MAINE, *ANCIENT LAW* 165 (1963).

185. Frederick N. Judson, *Liberty of Contract Under the Police Power*, 14 A.B.A. REP. 231, 233 (1891).

186. *See supra* note 23.

187. CARTER, *supra* note 21, at 219.

constantly increasing, are so many additions to nature and its laws."¹⁸⁸ He was even more explicit in one of his notes to Lieber:

We can improve upon the fathers of the common law, not by rejecting their belief in the existence of such a law [above the decisions themselves and which they only reflect], but by recognizing the fact that it must be learned, like the laws of the physical world, inductively. The decided cases of the past are so many observations upon the practical working of these laws, from which the true theory is to be inferred, — precisely as the astronomer infers the true form of the planet's orbit from his observations of its position at many different times. The observed facts are authoritative: our inferences from them are theory; but it is the formation of that theory which enables us to carry our observations on farther and more intelligently, and thus to arrive gradually at the true understanding of the laws that govern the moral as well as those that govern the material universe.¹⁸⁹

Cooley also asserted that judges discover law, finding the proof for that assertion in the inductive nature of the legal process:

Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. The case is not the measure of the principle; it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle. . . . Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise.¹⁹⁰

Bliss cited these passages from Cooley and Hammond to support his assertion of the inductive nature of legal inquiry.¹⁹¹ Like the antebellum legal scientists, they found the true law by induction. For some of the writers this law expressed the mind of the creator, but for all of them its real power came from its connection with history.

Appealing to history to support the unchanging principles of law was useful, at least in part, because it appeared to link evolution to the science of the law. For all these thinkers, the expression of law in rules changes as times change. Carter blamed the seductive appeal of Bentham's foolishness on the ignorance of the pre-Darwinian world: "The law of Evolution so dominating in its influence upon recent thought, had not been stated."¹⁹²

188. BLACKSTONE, *supra* note 112, at 216 n.30.

189. LIBER, *supra* note 119, at 328-29 n.N.

190. COOLEY, *supra* note 128, at § 10.

191. BLISS, *supra* note 131.

192. CARTER, *supra* note 21, at 268.

Once it is understood that society evolves it becomes clear that legal rules are the product of factors which reach far back into time and cannot be changed by arbitrary legislation.¹⁹³ One harried supporter of analytical jurisprudence humorously described his dilemma in a world dominated by ideas of slow change:

But quite certainly, in spite of all that can be urged, the cultivators of analytical jurisprudence will still be reproached with wanting historical-mindedness, a graver charge in these days when evolution is in the very air, — it has been humorously said, — than heresy or even petty larceny.¹⁹⁴

Ironically, the arguments of these legal thinkers were not truly evolutionary. All of them accept a theory of historical change based on stages of development, much like the historical thought of the antebellum legal scientists.¹⁹⁵ Not every acknowledgement of change is evolutionary. Perhaps Tiedeman comes closest to the evolutionary idea with his emphasis on the law's adaptation to a changing social environment. Yet even he asserted the unquestioned superiority of the "highest" stage of development in which *laissez faire* reigns. The existence of unchanging principles, of course, also casts doubt on the evolutionary nature of this approach to law. In spite of their rhetoric, the goal of these writers seems to be the prevention of change, not accommodation to a changing world.

The science of law that these thinkers advocated had important implications for the deciding of cases. Once law is based on inescapable truths and the realm of public law is severely circumscribed, most legal questions become questions of private law, that is, of the common law. Additionally, the identification of the unchanging dictates of the law with the rights guaranteed, not only by the Constitution but by the "unwritten constitution," makes it both easy and proper to decide constitutional questions by analogy to common law concepts. As Phelps noted, once it was established that questions of constitutional law were to be entrusted to the judiciary and not to the political branches of government, "the simple, the ancient, the salutary, the perfectly intelligible and just principles of the common law became sufficient for all the purposes of constitutional construction."¹⁹⁶

This use of the common law to answer questions of constitutional law has been identified as a principal characteristic of the classical formalism

193. *Id.*

194. Charles Malcolm Platt, *The Character and Scope of Analytical Jurisprudence*, 24 AM. L. REV. 613 (1890).

195. See *supra* note 23.

196. Edward J. Phelps, *Chief Justice Marshall and the Constitutional Law of His Time*, in ORATIONS AND ESSAYS, *supra* note 98, at 42.

discussed at the outset of this article. Kennedy places special emphasis on the integrated nature of classical thought.¹⁹⁷ Certain key concepts, such as liberty of contract, were thought to supply answers to a host of legal questions.¹⁹⁸ This concept of integration, with its necessary implication that the process of legal judgment is a mechanistic application of unavoidable precepts, justifies the description of this type of legal reasoning as "formalistic."¹⁹⁹ The constitutionalization of the common law becomes the ultimate integration.

The legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a "formalistic" view of law and judging. As long as the ultimate repository of law is declared to be a body of principles beyond the reach of political processes, especially legislative processes, and once the guarantees of the Constitution are proclaimed to embody these unwritten principles, the decision of cases can become the mechanical application of transcendent rules. When the fear of socialism, so evident in all these thinkers, is joined to their view of the nature of law, it is plausible that the law they described, practiced, and taught was dedicated to preventing the redistribution of wealth.

On the other hand, this examination of the legal thought in the Gilded Age does raise questions for our understanding of the period. First, some American legal thinkers thought that law was deeply connected to history which, to a certain extent, dictated the principles that should be used to decide cases. They appealed not to a closed world of legal rules, not to economic ideas, but instead to a specific legal science based on a historical science reflecting the reality of human life.

This science, however, was not everyone's idea of science. A brief consideration of Maine's writing reveals a strong belief in the uniformity of human development based on the uniformity of human nature. Although Maine criticized the fantasies of those who speculated without reference to historical "reality," he and his American advocates apparently base their ideas not on empirical knowledge but on *a priori* assumptions. Of course, impatience with *a priori* reasoning in the social sciences began in the late nineteenth century. In a sense, the legal thinkers discussed here are representatives of a broad current of thought which is giving way to a new

197. "Kennedy characterizes classical legal consciousness as a rationalistic ordering of the entire legal system. . . . The lynchpin of classicism was the concept that individuals, governments, and the judiciary were the possessors of constitutionally delegated powers absolute within their spheres. . . . [N]umerous principles, categories, and methodologies radiated from it like spokes for the hub of a wheel." GOETSCH, *supra* note 3, at 90-91.

198. *Id.* at 19-21.

199. Goetsch, *supra* note 3, at 221-25; GOETSCH, *supra* note 3, at 87-92.

current which will help to mark the modern intellectual world.²⁰⁰ Perhaps the intellectual history of American law in the Gilded Age should be tied more closely to American intellectual history in general.²⁰¹

One consequence of taking a broader view should be a closer focus on the intellectual opponents of believers in transcendent law, the advocates of Austinian positivism who believed in the primacy of the case as the source of law. While this is not the place to begin such an inquiry, it is not unreasonable to suggest that those advocates may be found among those law teachers devoted to the case method. Maybe the usual picture of late nineteenth century formalism has obscured the novelty of what Langdell and his colleagues started.

Finally, the personal history of some of these writers should cause us to reflect on the adequacy of any one explanatory theory and any attempt to closely define a discipline called legal history. Louise Halper has thoroughly demolished the picture of Tiedeman as a consistent advocate of *laissez faire*.²⁰² Halper has shown that Tiedeman became, at the end of his life, an advocate of government ownership of what he termed public utilities, a classification which included the railroads, when faced with the apparent threat to small scale enterprise posed by large accumulations of capital. Tiedeman's advocacy is perfectly consistent with his legal theory. According to him, the meaning of constitutional provisions as well as rights is dependent on popular will. Regarding economic issues, the relevant popular will is the longing for equality, requiring the government to refrain from accentuating natural inequalities "by giving to the already stronger the complete control of the avenues of communication and locomotion which every one is obliged to employ."²⁰³ Indeed, any argument that private monopoly actually can provide services more cheaply than government monopoly is unavailing "against the sentiment that this economic advantage has been gained by a conspicuous sacrifice of the democratic principle of equality before the law."²⁰⁴ For Tiedeman, there was more at stake in the public controversies of his day than perfect consistency of thought — just as there must have been more at stake for George Smith

200. EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973). In this sense, Clark's comment on historical science quoted at note — above are "modern."

201. The latest discussion of these changes is DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 53-97 (1991).

202. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 *OHIO ST. L.J.* 1349 (1990).

203. PURCELL, *supra* note 200.

204. *See generally*, Halper, *supra* note 202.

who, in spite of his devotion to a law of rational principles, also decided that government control was the answer to the railroad problem.²⁰⁵

The jurisprudence of history and truth was but one aspect of American legal thought in the Gilded Age. In many ways it is pre-modern, yet it is not without some resonance for us. It was an appeal to absolutes, a way to answer the difficult questions of what standards the law should enforce. That is a question that still confronts us today.

205. Professor Hovenkamp has shown that economic thought about railroad regulation actually made a strong case for federal regulation of rates. See HOVENKAMP, *supra* note 10, at 149-68.

