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I. INTRODUCTION

Ten years ago, legal history was not taken particularly seriously, and there was still much truth in Daniel Boorstin's 1965 lament that "while lawyers, judges, and law professors repeat platitudes about their glorious professional past, they find no respectable place for legal history in their extensive curricula."[1] With the publication in 1973 of Lawrence Friedman's *A History of American Law*,[2] however, American law professors could quickly gain an overview of their own disciplines and bring law school legal history courses out of thirteenth century England.[3] Five years later, Morton J. Horwitz' book on American legal history[4] won the Bancroft Prize, which is Columbia University's award for outstand-

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1. D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 444 (1965).

2. L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

3. The materials always had been available for the few people who had the substantial fortitude to assemble them. The pioneers were Mark De Wolfe Howe, J. Willard Hurst, George Haskins, and Julius Goebel, Jr. *See, e.g.*, C. AUERBACH, L. GARRISON, J. W. HURST & S. MERMIN, THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES (1961); J. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS (1931); G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN (1960); M. HOWE, READINGS IN AMERICAN LEGAL HISTORY (1949).

Friedman synthesized and built upon the work of Hurst and his school. The availability of Friedman's work made it more likely that American law schools would be able to offer legal history courses that met Calvin Woodard's prescription for "relevance" by concentrating on nineteenth-century America—a period that law students might find more pertinent than the traditional focus of late medieval England. *See* Woodard, *History, Legal History, and Legal Education*, 53 VA. L. REV. 89, 113-21 (1967).

4. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977).

ing historical scholarship and probably the history discipline's highest professional honor. This selection marked the first time that a work in American legal history had won the award, and it conferred a new mantle of legitimacy on legal historians in general. These two books, plus a few significant others,[5] generated dozens of reviews in legal publications,[6] and those periodicals began to publish pieces concerning the history of American law on a far more regular basis.[7] By 1979 two major lawbook publishers apparently had become convinced that a new potential market existed for American legal history textbooks,[8] and almost all law schools now offer either a course or a seminar in American legal history.

Two other factors besides the recent effusion of scholarship have contributed to the growing respectability of American legal history in the legal curricula. One is the newly perceived, post-Watergate need for ethics in the law. Legal history, as it is practiced currently, concerns the discovery, articulation, and evaluation of the norms that have guided American courts, legislatures, and lawyers in the past; this information supposedly sharpens one's judgment about the appropriate values to implement in the future. Second, many undergraduates contemplating law school now are pursuing increasingly specialized curricula. Until recently, many schools simply did not encourage a generalized course of study, and educational specialization seemed to offer a surer and safer chance to achieve the high grade point averages now needed for admission to law school. As a result, some students believe that law school offers the last chance to obtain a dose of humanistic learning. These students often conclude that although philosophical insights might not readily be gained in most law school courses, the perspective acquired in courses such as American legal history can contribute both a missing sense of community of endeavor and an antidote to the cynical instrumentalism that so often prevails in law schools.[9]

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5. *See, e.g.*, M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876 (1976); W. NELSON, AMERICANIZATION OF THE COMMON LAW (1975); G. WHITE, THE AMERICAN JUDICIAL TRADITION (1976).

6. For a collection of many of some reviews, see LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW: A COLLECTION OF REVIEW ESSAYS ON AMERICAN LEGAL HISTORY (H. Hartog ed. 1981) [hereinafter cited as LAW IN THE AMERICAN REVOLUTION].

7. *See, e.g.*, ESSAYS IN NINETEENTH CENTURY AMERICAN LEGAL HISTORY (W. Holt ed. 1976) (collecting many law review articles on legal history).

8. *See, e.g.*, S. PRESSER & J. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS (1980); READINGS ON THE AMERICAN LEGAL PROFESSION (D. Nolan ed. 1980).

9. *Cf.* Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955

The increasing opportunities to teach legal history in law schools and the lamentable decline of positions available to historians in undergraduate institutions have resulted in more historians either teaching in law schools or combining graduate training in history with graduate training in law. As a result, several methodologies or approaches to legal history have emerged. Although legal history has generated a great deal of comment,[10] few have written about how this spate of scholarship and criticism might affect law school teaching. This Article attempts to categorize and to review, therefore, the kinds of insights that American legal history currently offers both to law students and to law professors. Parts II and III of the Article sketch the parameters of the legal history discipline and describe the variant historiographical approaches that scholars recently have adopted. Part IV then offers some suggestions for integrating legal history into selected law school courses.

II. The Core Values of American Legal History

As a "perspective course," legal history seeks to raise law students to a new level of insight; to permit them, in Holmes' memorable phrase, to hear some of "the echoes of the infinite";[11] and to make them appreciate that the nature of what has gone before facilitates and circumscribes what happens in the law today. Because legal history necessarily deals with longer time periods than do other law school courses, legal history professors more easily can discern and elaborate on the nature of the past and the process of change in the law. Like other law professors, those who teach legal history seek ultimately to prepare lawyers to condition their legal actions not only to the immediate needs of their clients, but also to the continuing needs of the constitutional order. The advantage of an extra degree of removal from the more immediate doctrinal and procedural requirements of practice, however, puts legal historians in a unique position to underscore these duties and obligations of prospective lawyers.

This broader aspect of American legal history teaching potentially offers the greatest reward for both teacher and student. Since one can assume that many law students could have pursued alter-

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(1981) (discussing law professors' obligations to use their scholarship and teaching to promote a reverence for truth and to fight cynicism in their students).

10. *See, e.g.*, Law in the American Revolution, *supra* note 6.

11. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 478 (1897).

native graduate business courses that could have provided quicker and more substantial financial reward than could the practice of law, one can also assume that law students are after more than money. At some level, then, although one must probe very deeply in some stubborn cases, a law professor may draw on a shared commitment to altruistic enterprise, a shared desire to implement ideals of justice, and a shared realization that the law—whatever its current or past limitations—has been a principal instrument in the physical betterment of mankind's condition. Actually showing law students that they are engaged in a worthy struggle of this sort provides an experience that confirms the value of instruction for both teacher and student and can lead to some of the solutions modern society so desperately needs in its search for meaning in human existence.

One can also describe this value of legal history teaching in Edmund Burke's metaphorical terms by characterizing the job of law professors in general, and legal historians in particular, as an attempt to convince students that they must view the law as Burke viewed the social contract. Burke argued that this contract does not constitute an agreement which is easily dissolvable by one of its parties, but is instead an ongoing partnership among members of society in all science, art, and virtue.[12] Since the ends of such a partnership cannot be obtained without the effort of many generations, Burke suggested, "it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."[13] Similarly, the law professor's task is to suggest to students the dangers of pursuing legal quests for instantaneous transformations, utopian solutions, or even short-term manipulations that eventually might undermine the long-term goals of American law. To make all these glittering generalities meaningful, as well as to set some manageable and intelligible limits on the multi-generational partnership, one necessarily must specify what the goals of American law have been. Fortunately, this task has preoccupied the teaching and scholarship of most recent legal historians.[14]

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12. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 194-95 (O'Brien ed. 1969).

13. *Id.*

14. Another way to state these ultimate goals of law teaching is to suggest that professors should communicate to students that they are involved in an important international human dialogue which seeks to determine the appropriate modern jurisprudential principles for the promotion of justice. This dialogue—or search—attempts to uncover American equivalents for the civil-law concepts of "Recht" or "Droit," which are used to formulate

As suggested below,[15] however, no general agreement exists among legal historians about the prominence of any single, overarching theme in American legal history. Consequently, perhaps the best approach to the study of legal history is to stress the variety and the richness of the goals of the various legal doctrines as they have evolved and to emphasize that much of American law has concerned the reconciliation of conflicting aims and values in our legal culture.[16] Since at least the early nineteenth century, several prominent ideals, which properly can be characterized as "core values," have been evident in American law. Although lawyers and laymen generally agree that these several ideals are desirable, the problem of their order of priority has been a source of great conflict, since the ideals, when pushed to their limits, exclude or diminish one another. This part of the Article describes these core values and then uses them as a means of thematic discrimination to explain some of the current variant approaches to American legal history.

The most basic core value of American law[17]—and, indeed, of virtually any human society—is the ideal enshrined in the concept of the "rule of law" itself: any compulsion in the society must not take place arbitrarily, but must be subject to some restraints. These restraints might develop from a variety of diverse sources, including the law of nature, God, the social contract, or clearly announced and procedurally valid acts of the temporal sovereign.

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standards for evaluating the specific positive rules of law. *See* Fletcher, *Two Modes of Legal Thought*, 90 YALE L. J. 970, 980-84 (1981).

15. *See infra* notes 34-96 and accompanying text.

16. The effort to stress competing values is emerging as a useful corrective for both "legal nominalism"—the notion that no legal rules are inherently better than any others—and the "efficiency" or "wealth maximization" school of economic analysis of law, which holds out greater material prosperity as the aim of the law. Fletcher, *supra* note 14, at 995-96. Fletcher emphasizes two recent efforts to study the variated nature of legal values. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (differing approaches to compensation for governmental appropriation of private property); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (relative influences of altruism and idealism in the history of contract law).

17. The four core values that are described below might well be criticized as "cartesianism, the construction of drastically simplified models of social reality," and thus as an unacceptable reduction of the real complexities of the historical context. *See* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1025-28 (1981). Nevertheless, the approach *has* proved heuristic, and—at least as far as beginning legal history students are concerned—the process of illuminating the richness of the historical context must start somewhere. Some cartesianism, therefore, may be necessary to perform a current "critical academic task, . . . to clarify the competing ideals currently struggling for ascendency . . . by placing them in historical . . . context." Ackerman, *The Marketplace of Ideas*, 90 YALE L.J. 1131, 1140 (1981).

This most basic principle represents the idea that the legal system must provide *restraints on arbitrary power.*[18] Because of the primacy of this core value, it can be discerned earliest in what might be characterized as the beginning of the American legal culture—the time during our colonial period in which we mirrored the struggles of the English in their civil wars and their Glorious Revolution through American events such as the Zenger Trial,[19] the Writs of Assistance Case,[20] and the writing of the Declaration of Independence.

The second core value of the American legal culture is the ideal of *popular sovereignty.* Following its rebirth in Europe,[21] this notion emerged in America as people began to accept the idea that the best way to prevent the exercise of arbitrary power is to disperse political power as widely as possible and to lodge ultimate sovereignty in the citizenry. The second core value was born soon after the first[22] and was certainly of paramount importance in the theoretical framework both of the Declaration of Independence and of the federal constitution of 1787. This legal ideal, however, is perhaps the most problematic—if not the most hypocritical—of all the four values: women and racial and ethnic minorities effectively have been excluded from the definition of "people" throughout much of American history, and the people themselves can never effectively exercise sovereignty because some representative must exercise it on their behalf. For these reasons, the founding fathers proclaimed the United States to be a republic and not a democracy. Nevertheless, as American history has unfolded, many people often have equated the principle of popular sovereignty with the

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18. Many of the assertions that are made in this part of the Article are developed in their historical context in the Teacher's Manual to S. PRESSER & J. ZAINALDIN, *supra* note 8. For one of the most influential statements of freedom as the absence of subjection to arbitrary power, see J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. IV, ¶ 22 (1690).

19. *See* J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 1 (1972). Peter Zenger was tried in New York in 1735 for seditious libel, and a jury acquitted him after an historic argument by his lawyer, Andrew Hamilton. The case marked an early statement in colonial America that the sovereign was not immune from criticism. *Id.* at 34-35.

20. For the primary sources on this case—also known as "Paxton's Case"—in which American Whigs argued that unlimited search warrants were unconstitutional instruments of tyranny, see S. PRESSER & J. ZAINALDIN, *supra* note 8, at 61-89.

21. *See, e.g.*, J. LOCKE, *supra* note 18.

22. An example of its operation in colonial America is Andrew Hamilton's rhetoric in the Zenger trial. *See* J. ALEXANDER, *supra* note 19. The controversy over proprietary quitrents in New Jersey in the 1740's provides another example of this second core value. *See* Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 RUT.-CAM. L.J. 262 (1976).

idea of democracy, and they have never made it universally clear whether our legal system exists to implement the wishes of the people, or whether it exists merely to effect what the representatives think best benefits the people.

The tensions brought about by the impossibility of the complete implementation of popular sovereignty and, in particular, the risk of divergent interests among the people and their rulers, fairly quickly generated a third core value of American law, which can be characterized as the *maintenance of maximum economic opportunity and social mobility*. Pursuant to this ideal, Americans rejected the institution of privileged orders and social deference—because it led to the exercise of arbitrary powers—and fairly early focused on the idea that oppression would be minimized and something akin to democracy would be best assured by allowing capable individuals to accumulate wealth and rise in social standing and commercial power. This principle of American law was in full operation by the time of the Jacksonian entrepreneurs[23] and may have reached its fullest expression in Chief Justice Taney's opinion in *Charles River Bridge v. Warren Bridge*.[24] This third core value, however, was influential from the beginning of American history and manifested itself in a hatred both of the English aristocratic feudal order and of any remnants of that order in the English common law. One of the clearest early displays of this antipathy occurred in the late 1780's, when the Boston Merchant Honestus questioned the need for lawyers, a group which he believed to be an unnecessary and odiously privileged class in a republic.[25] Nevertheless, the principle did not receive what was probably its most coherent form until well into the nineteenth century, when its most profound legal impact was to end the hegemony of the *rentier* interest in American law and to substitute the ascendence of fluid, entrepreneurial, commercial, and manufacturing

23. For studies of how the egalitarian philosophy of the Jacksonian years included a component that stressed the duty of each man enterpreneurially to accumulate as much wealth as possible, see S. BRUCHEY, THE ROOTS OF AMERICAN ECONOMIC GROWTH 1607-1861, at 193-207 (1968); S. PRESSER & J. ZAINALDIN, *supra* note 8, at 260-63; P. TEMIN, THE JACKSONIAN ECONOMY (1965).

24. 36 U.S. (11 Pet.) 420 (1837). *See also* K. NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 95-98 (1968). In the *Charles River Bridge* case Chief Justice Taney held that a new bridge company's charter was constitutional, even though it arguably contravened a conferral of an implied monopoly in an old bridge company's charter. *See infra* notes 154-61 and accompanying text.

25. B. Austin, *Observations on the Pernicious Practice of the Law, As Published Occasionally in the Independent Chronicle in the Year 1786*, at 7-10 (1819), *reprinted in part in* S. PRESSER & J. ZAINALDIN, *supra* note 8, at 264-66.

wealth.[26]

A final core value of American law began to evolve at the turn of the nineteenth century, when it became increasingly evident that democracy, social mobility, and the ideal of restraints on arbitrary power might best be realized if the legal system allowed the primary economic and industrial development decisions to be directed by Adam Smith's "invisible hand."[27] By according primacy to doctrines such as freedom of contract,[28] American law increasingly recognized that the national interest would best be served by carving out a large sphere of private initiatives and interests—immune from governmental intervention or regulation—where the free market, rather than the state, might maximize development.[29] In the late nineteenth and early twentieth centuries, this free enterprise ideal of the *maximum protection and promotion of private interests and initiatives* became perhaps the dominant value of American public and private law,[30] although it has lost considerable ground since the New Deal years. The ideal of protected spheres of private interests was evident in crude form in the early years following the American revolution—both in the state declarations of rights[31] and in the Federal Bill of Rights of 1791[32]—although in those early years the primary protected private interests probably were more spiritual and political than economic in nature. Nevertheless, explicit reference in American law to Smith's market-oriented views can be found as early as the Philadelphia Cordwainers trial in 1806.[33]

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26. The manner in which the *rentier* interest—that is, the power, wealth, and influence of great landowners—lost out to entrepreneurial sectors in the battle over who ought to benefit most from legal doctrines is the subject of M. HORWITZ, *supra* note 4.

27. The "invisible hand" notion suggests that the accumulation and conflict of individual private interests will lead to the most efficient allocation of resources and production. For an accessible introductory treatment of Smith's "invisible hand" idea, see R. HEILBRONER, THE WORLDLY PHILOSOPHERS 38-44 (rev. ed. 1967).

28. For descriptions of how freedom of contract became a dominant concept in antebellum law, see M. HORWITZ, *supra* note 4; W. NELSON, *supra* note 5.

29. *Cf.* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 272-73 (1962) (discussing how Hobbes' and Locke's work has been interpreted in modern democracies to support capitalist enterprise and individual effort).

30. *See, e.g.*, S. PRESSER & J. ZAINALDIN, *supra* note 8, at 674-705 and sources cited therein.

31. *See, e.g.*, PA. CONST. of 1776, ch. I, art. I ("inherent and unalienable rights" include "acquiring possessing and protecting property"), *reprinted in* S. PRESSER & J. ZAINALDIN, *supra* note 8, at 114.

32. *See, e.g.*, U.S. CONST. amends. I, IV, and V (protection for religion, speech, privacy in dwellings, and property).

33. Commonwealth v. Pullis, Mayor's Ct. of Philadelphia (1806).

With these four core values of American legal history delineated, we now can articulate and evaluate the divergent approaches that scholars have taken to the study of American legal history. In elahorating upon these current schools of legal history, the next part of the Article also suggests some of the outstanding writings in the area that profitably might be consulted by beginners.

III. Current "Schools" of American Legal History

Four schools of legal history are discernible from the current literature in the area. This literature includes major works that are representative of each school, as well as critical book reviews that often are as important as the works themselves, in part because they provide a format for the intellectual sniping that recently has enlivened legal historical scholarship. As should be evident from the discussion below, legal history, along with the subject of law and economics,[34] is today generating some of the most sharply divided scholarship in legal literature.

The first school of legal history that seems to be discernible adopts the notion that law has followed an orderly evolution according to fixed intellectual principles and, thus, may be labelled the "conservative school." These legal historians come closest to replicating the thinking of the great English and American Whig historians like Lord Macaulay or George Bancroft.[35] To begin with the first of several sweeping generalizations, the practitioners of this school believe that the enterprise of legal decisionmaking predominantly has proceeded according to certain neutral principles. They posit that although the substantive law might have varied over time and might have been created to meet particular social or economic needs, the basic principles of the law have not changed. By focusing on the maintenance of particular principles, the practitioners of this first school emphasize the first core value of American law that was discussed above[36]—namely, the restraint of arbitrary power, the "rule of law" itself, or, simply, the notion of adherence to precedent.

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34. For the latest examinations of law and economics, see *Symposium on Efficiency as a Legal Concern*, 8 Hofstra L. Rev. 485 (1980); *A Response to the Efficiency Symposium*, 8 Hofstra L. Rev. 811 (1980).

35. *See, e.g.*, G. Bancroft, History of the United States of America, From the Discovery of the Continent (1883); H. Butterfield, The Whig Interpretation of History (1931); T. Macaulay, The History of England, From the Accession of James the Second (1866).

36. *See supra* notes 17-20 and accompanying text.

Oliver Wendell Holmes, Jr., for example, explained much of American tort law by pointing to the courts' efforts to maintain the principle of no liability without fault, and he explained much of American and English contract law using the principle of consideration.[37] Similarly, Roscoe Pound characterized legal developments as the orderly evolution of legal doctrines brought about by judges' searching for principles in previous cases and applying them to new situations, a process which he described as a "taught legal tradition."[38] G. Edward White, the latest proponent of this school, pushes the analysis to a slightly different level,[39] but he nevertheless contends that certain legal principles—mostly procedural ones—circumscribe the role of judges and ensure that they adhere to a coherent "American judicial tradition."[40] The common thread that ties together the work of all these scholars, then, is a primary emphasis on intellectual judging paradigms and a relegation of economic, political, and social influences to a secondary level.

The practitioners of the second group of legal historians, the "Wisconsin school,"[41] view economic needs as the primary determinants of law. Although any generalization slights the subtlety of the school's best analysis, its adherents widely perceive law as a tool to be used by the most productive sectors of American society in "releasing their energy."[42] This group as a rule focuses primarily on the third core value discussed above of maintaining maximum economic progress and social mobility.[43] Adherents of the Wisconsin school apparently are more prepared than their conservative school counterparts to conclude that judges, legislators, lawyers, and other actors in the legal system often have been willing to abolish even the most fundamental principles or tenets of legal doctrines in the promotion of economic progress, and that the law can be almost totally malleable in the hands of those bent on

37. *See* O.W. HOLMES, THE COMMON LAW (1881).

38. *See* R. POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).

39. Although White appears to recognize to a greater degree than Pound or Holmes that judges self-consciously may be molding doctrines that are influenced by current political issues, he still finds dominant elements that continue from John Marshall to Earl Warren. G. WHITE, *supra* note 5.

40. *Id.*

41. This group is so named because its most distinguished practitioners taught or studied at the University of Wisconsin Law School. *See* White, Book Review, 59 VA. L. REV. 1130, 1132 (1973).

42. *See* J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 3-32 (1956).

43. *See supra* notes 23-26 and accompanying text.

achieving their economic or political ends.[44] Practitioners of the two schools seem to agree, however, that legal change reflects a fundamental societal consensus on the appropriate values and principles of the legal system. The Wisconsin school thus explains much of nineteenth-century legal development as the result of many—if not all—Americans concluding after the rise of the Jacksonian entrepreneurs[45] that democracy could best be achieved by promoting economic progress and social mobility.[46] If de Tocqueville's findings are still considered valid, the evidence supporting this conclusion certainly seems strong.[47]

The work of the third school of legal history, of which Morton J. Horwitz is perhaps the chief proponent,[48] shares with the Wisconsin school a focus on both the economic implications of legal doctrines and the economic influences that create those doctrines.[49] The practitioners of this "radical transformation school," however, reject some of the relatively benign implications of the Wisconsin school's historiography.[50] Instead of accepting that changes in American law have transpired because of a consensus on appropriate legal values, for example, Horwitz suggests that a minority comprised of merchants, industrial entrepreneurs, and lawyers—foisted a new legal order on an unwilling—or at least a hoodwinked—general populace.[51] According to this view, late eighteenth-century contract law focused primarily on principles of substantive equity, including such formidable doctrines as the sound price rule,[52] and the law in general was administered principally through the equitable discretion of juries. Horwitz, however,

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44. *See, e.g.*, L. FRIEDMAN, *supra* note 2, at 14 ("The basic premise of this book is that despite a strong dash of history and idiosyncrasy, the strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.").

45. *See supra* note 23.

46. *See, e.g.*, J. HURST, *supra* note 42 (nineteenth-century law promoted a "release of energy" to secure the widest benefits of the American Revolution's political gains).

47. *See* I & II A. DE TOQUEVILLE, DEMOCRACY IN AMERICA (P. Bradley ed. 1945).

48. *See* M. HORWITZ, *supra* note 4.

49. *Id.* at xvi ("American legal system after the Revolution was transformed successfully to promote developmental goals.").

50. *See* Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81.

51. For an explanation and critique of his analysis, see Presser, *Revising the Conservative Tradition: Towards a New American Legal History*, 52 N.Y.U. L. REV. 700 (1977), *reprinted in* LAW IN THE AMERICAN REVOLUTION, *supra* note 6, at 113.

52. The payment of a "sound price" creates an enforceable, implied obligation that the goods purchased be "sound"—that is, fit for the purpose for which they were purchased. *See* M. HORWITZ, *supra* note 4, at 161-73, 180.

argues that in the nineteenth century the rule of *caveat emptor* replaced the sound price rule, the rules of contract generally were rigidified, and juries were forced more often to accept and act on the law as the judges delivered it to them.[53] According to Horwitz, certainty replaced equity as the central value of contract law, and the market mentality of industrial capitalism replaced the communitarian mentality of preindustrial America.[54] Putting the work of this school into the scheme of values that this Article has delineated then, Horwitz and others of his school are most interested in pursuing the conflict between the value of popular sovereignty[55]—to the extent that this value might be interpreted to dictate adherence to widely shared community standards of fairness and equity—and the value of maintaining maximum economic opportunity and social mobility.[56]

At least one commentator has called Horwitz' work marxist,[57] and, indeed, some of his views on the evolution of contract law do sound similar to Marx' notorious assertion in *The Poverty of Philosophy* that "[t]he Handmill gives you society with the feudal lord; the steam mill, society with the industrial capitalist."[58] According to Horwitz, the merchant and entrepreneurial class, once it gained ascendence in American society, proceeded to refashion the law to prevent further fundamental change and to ensure its continued dominance.[59] Horwitz argues that this development led to a period of "formalism" in the law which began in the middle of the nineteenth century[60] and to an era of outrageous and inequitable

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53. *Id.* at 180, 197-201.

54. *See id.*; Presser, *supra* note 51.

55. *See supra* notes 21-22 and accompanying text.

56. *See supra* notes 23-26 and accompanying text. In his recent excellent work on the law of slavery, Mark Tushnet, the most prolific writer of the radical transformation school, described a similar conflict in Southern slavery law as "the competing pressures of humanity and interest." M. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 5-6 (1981).

57. *See, e.g.*, Nelson, *Legal and Constitutional History*, 1978 ANN. SURV. AM. LAW 395, 397. Some of the other scholars in this school—for example, Tushnet and Feinman—use the theories of Marxism much more explicitly than Horwitz. *See, e.g.*, Feinman, *The Role of Ideas in Legal History*, 78 MICH. L. REV. 722 (1980); Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPS. 96 (1979).

58. K. MARX, THE POVERTY OF PHILOSOPHY 202 (n.d.), *quoted in* P. SINGER, MARX 36 (1980).

59. M. HORWITZ, *supra* note 4, at 266.

60. *Id.* at 253-66. The idea of formalism as an exclusive, dominant, and deceptive strategy of jurisprudence apparently is no longer tenable. *See, e.g.*, Presser, *Judicial Ajax: John Thompson Nixon and the Federal Courts of New Jersey in the Late Nineteenth Century*, 76 NW. U.L. REV. 423, 426 (1981), and sources cited therein. A distinctive, bom-

maldistribution of American society's material assets.[61] Unlike Marx, however, Horwitz does not necessarily view the development of the means of production as the primary force in history, nor does he appear to share the classic Marxist idea that the inevitability of certain dialectical transformations in society ultimately will lead to a proletarian revolution and a withering away of the state. Nevertheless, one can find a strain of utopian socialism in Horwitz' work, which manifests itself in his belief that if America can free itself from the constraints of nineteenth-century legal concepts, it might be able to fashion a truly equitable legal system.[62] Horwitz presumably believes society then could return to some of the organizing principles of an earlier, uncorrupted America.

When Horwitz won Columbia's Bancroft Price in 1977, he naturally became a prominent target for criticism. Some commentators have suggested that these critical attacks have devastated his scholarship,[63] but this proposition goes too far. The criticisms usually have focused on Horwitz' use of relatively few cases to support his assertions, on other cases or legal sources that contradict his readings of doctrinal development, or on his reliance upon authority from only a particular area of the country.[64] These criticisms

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bastic judicial style clearly existed in the late nineteenth century, but it may have reflected the resurgence of individualistic religious and moral fervor following the chaos of the American Civil War as much as it did a particular class attempt to impose its hegemony through the law. *Id.* at 427-28. Horwitz, of course, does not argue in *The Transformation of American Law* that late nineteenth-century formalism represented some sort of self-conscious conspiracy on the part of judges and other legal figures. *See* Presser, *Book Review*, 22 AM. J. LEG. HIST. 359 (1978). Nevertheless, considering the prevalence and inevitability of "bourgeois individualism" in nineteenth-century American political life, one must question Horwitz' frequent use of the "deception" or "concealment" metaphor for what transpired in American legal history. *Cf.* C. MACPHERSON, *supra* note 29, at 262-77 (underlying unit of English political thought from the seventeenth to the nineteenth centuries was based on the concept of "possessive individualism" from sixteenth-century political courts).

61. M. HORWITZ, *supra* noto 4, at 253-66.

62. *See, e.g.*, Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J. L. & ECON. 621 (1976) [hereinafter cited as *Legacy*]; Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 66 YALE L.J. 561 (1977) [hereinafter cited as Book Review]. Horwitz' concentration on the limiting effects of dominant legal paradigms reflects the influence of Thomas Kuhn's book, THE STRUCTURE OF SCIENTIFIC REVOLUTION (2d ed. 1971). *See* Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEG. HIST. 275, 282-83 (1973) [hereinafter cited as *The Conservative Tradition*]. Horwitz' work thus appears to bear a strong resemblance to the work of the European "structuralist Marxists," who explored the limiting characteristics of intellectual paradigms—*i.e.*, the "structures" of human thought and action. *See* D. MCCLELLAN, MARXISM AFTER MARX, 298-306 (1979) and sources cited therein.

63. *See, e.g.*, Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159, 1168 n.45, and sources cited therein.

64. *Id.; see generally*, Bridwell, *Theme v. Reality in American Legal History*, 53 IND.

for the most part are well reasoned, but their total impact may be less than the sum of their parts. Horwitz, as well as other members of the radical transformation school, still have much to contribute to our understanding both of the nature of change in the legal order and of how the work of particular actors influences others. Critics of this school often appear not to realize that one essential premise in the radical transformation theorists' work is that while the way society thinks about the law may change dramatically, at any given point in time only certain elements of the changes are perceptible.[65] Furthermore, Horwitz and his colleagues appear to assert that some doctrines of the law, or some legal actors, may at any given time be much more influential than others.[66] Thus, even if only five out of fifty cases decided at a particular time support their view, they might argue that those five decisions sigual a dominant attitudinal change and thus should be entitled to the most weight in any analysis. Horwitz, therefore, generates criticism simply because he must deal with any historian's most perplexing problem—namely, assigning weight and order to a virtually infinite and contradictory body of fact. Since Horwitz' strong polemical statements often obscure this methodological problem, however, his critics have had an easy time pointing out evidence that contradicts his thesis.

On a final—and paradoxical[67]—note before considering the last group of legal historians, the work of the radical transformation and conservative schools of legal history share a common problem: both schools—and, to a more limited extent, the Wisconsin school—base their historical interpretations on elusive premises concerning both the subjective nature of the nineteenth-century legal mind and how various patterns of thought influenced the law and each other. Since patterns of thought do not lend themselves to exact empirical verification, their theses are impossible nltimately to prove or disprove. To the extent that the radical transformation school explores the availability of *competing* intellectual paradigms—indeed, this type of inquiry lies at the heart of

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L.J. 449 (1978).

65. *See, e.g.*, M. HORWITZ, *supra* note 4, at 1-30 (discussing the emergence of an "instrumental conception" of law).

66. For instance, Horwitz' analysis suggests that Joseph Story is perhaps the best example of a jurist who was much more influential than others. *Id.* at 38-39, 55-56, 112, 118, 196-97, 205, 248-52, 258.

67. The radical transformationists level their most rigorous criticisms at the work of the conservatives. *See, e.g.*, Feinman, *supra* note 57; *The Conservative Tradition, supra* note 62.

the radical transformation thesis[68]—its analysis is inherently more satisfying than that of either the conservative school or the Wisconsin school, since the availability of competing intellectual paradigms appears to be an inevitable result of the competing values that are inherent in our legal culture.[69]

Viewed in this light, the radical transformation approach to legal history resembles the final discernible school of thought, which can be likened to Elizabethan tragedy or Greek mythology because it focuses on great men of the law. Like Horwitz, the proponents of the "heroic school" of legal history believe that exploring all the empirical minutiae of the law may prove misleading or counter-productive. Unlike the radical transformation theorists, however, heroic school historians believe that psychological and philosophical problems of the human condition determine their subjects' legal behavior more than do the means of production or economic development. In particular, heroic school historians study the ways in which their subjects constructed legal systems that initially were intended to resolve personal internal conflicts, but which were later applied in an effort to heal general societal conflicts. Heroic school scholars, therefore, are most comfortable in the mode of biography, and Leonard Levy's and Robert Cover's works on Chief Justice Shaw[70] are indicative of this preference. Levy and Cover do not view Shaw and his legal decisions either as the products of the economics of his time or as the results of a particular legal tradition, but rather as the results of the sheer force of his own personality. These authors believe that Shaw used his dynamic personality to implement a passionate commitment to particular and conflicting social, ethical, and political values that were not necessarily accepted in the legal system which existed at the time. Levy and Cover, for example, identify a central problem in Shaw's deep commitments both to abolish slavery and to preserve the federal union—namely, that the commitments place in conflict the legal values of democracy, private ordering, and adherence to the existing legal order.[71] Thus, the authors present Shaw's slavery decisions as an effort to resolve his inner conflict through the law. In following Shaw's attempts to determine the

68. *See supra* notes 55-56 and accompanying text.

69. *See supra* notes 11-33 and accompanying text.

70. *See* R. COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS (1975); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957).

71. *See* R. COVER, *supra* note 70, at 227-58, 249-56; L. LEVY, *supra* note 70, at 315-21, 323-30, 332-36.

proper obeisance to be accorded particular personal values or their legal analogues—in other words, in studying the allocative process of the heroic judge—the writer and the reader leave the realm of law and enter the realm of justice.

The heroic writers' perspective, therefore, is neither provincial nor particularly legal; on the contrary, it is universal. These writers transcend the four legal values delineated above because their work usually goes beyond the doctrines to study personalities. Nevertheless, one might characterize their work as the study of human attempts to reconcile the irreconcilable aspects of various legal and personal values. As Peter Teachout recently declared, the writers in this school are not really generating historical scholarship; they are producing literature.[72] These writers—among whom the author immodestly includes himself[73]—do not prove assertions by exhaustively marshalling and analyzing vast amounts of data. They probably perceive that an empirical analysis of law cannot be performed comfortably in a human lifetime and inevitably would lead to contradictory interpretations.[74] Instead, therefore, they have written relatively short essays that are essentially more literary than historical.[75]

As Teachout has suggested, Gilmore remains the most visible practitioner of this methodology,[76] and his writing indeed may be works of allegory rather than history.[77] He rejects the conceptualists such as Holmes, Langdell, and Williston who would impose a rigid authoritarian order of "classical contract doctrines," perhaps because of weaknesses within themselves.[78] Gilmore's heroes are the Corbins, the Llewellyns, and, indeed, the Gilmores—great-spirited men who would infuse the law with pluralism, humanity,

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72. Teachout, *Gilmore's New Book: Turning and Turning in the Widening Gyre* (Book Review), 2 VT. L. REV. 229 (1977).

73. *See, e.g.*, Presser, *supra* note 60; Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U.L. REV. 26 (1978).

74. *See* Gordon, *Book Review*, 1974 WIS. L. REV. 1216, 1238-39.

75. Some radical transformation work also lends itself to this "literary" characterization. Horwitz' book, for example, might be described as "Dark and Dostoyevskyan." *See* Presser, *supra* note 51, at 700.

76. *See generally* Teachout, *supra* note 72.

77. *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW (1977); G. GILMORE, THE DEATH OF CONTRACT (1974).

78. For Gilmore's explanation of the influence of Langdell, Holmes, and Willisten on the rise of the "classical" theory of contract, see G. GILMORE, THE DEATH OF CONTRACT, *supra* note 77.

and flexibility.[79] Gilmore uses his allegory of these legal figures to show us both how bad the law might be or might become and how one might seek good and avoid evil.[80] He fears the new conceptualists like Posner—and, perhaps Horwitz—and warns of the injustices of magnificient Langdellian Gothic legal cathedrals.[81] Although Richard Speidel has argued that Gilmore's description of these legal giants' work is based more on myth or fantasy than reality,[82] his criticism may be off the mark. Gilmore, like the Greeks,[83] perceives that myth is often greater than reality.[84]

While each legal history school culls reality to organize their interpretations and create myths about the law, the heroic school—more than the others—constructs myths that underscore the uncertainty and paradoxes of life. In this way the heroic school's myths more closely resemble those of the great Greek writers of tragedy and epic poetry. Another distinctive characteristic of the heroic school is a nuance that Teachout appears to devine from Gilmore[85]—the recognition of the Elizabethan[86] character of legal man in general and of Oliver Wendell Holmes, Jr., in particular. According to Teachout, Gilmore, by reminding us both of Holmes' colossal creativity and of his massive insensitivity, "pulls into sharp focus the powerful contradictions in his character and thought, and explores searchingly the paradoxical connections be-

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79. Gilmore's general tendency is to lavish praise on Corbin and censure on Langdell, Holmes, and Williston. *Id.* Corbin best captures what Gilmore lauds in the one-volume student edition of his famous treatise, *Contracts*. A CORBIN, CONTRACTS (1952). Llewellyn also demonstrates the humanistic sympathies that Gilmore seems to praise. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1954).

80. *See* Teachout, *supra* note 72.

81. *Id.* at 235-37, 268.

82. *See* Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975).

83. The suggestion that myth is greater than reality, for example, may be interpreted as a central theme of Plato's *Republic*. One can discern this theme both in his theory of the ideal forms (Books V and VII) and in his comments that his guardians must not be taught the works of some of the great Greek poets lest the poets' critical views of the gods corrupt them (Books II and III).

84. This cryptic statement simply means that since myth need not be circumscribed by what actually occurs, its range is great: since it need not take account of the complexities of reality, its power of expression is more perfect. Because myth, if believed, is as influential as reality, its power to influence may thus be greater.

85. Teachout, *supra* note 72 at 254-55 n.90.

86. Teachout's source for the description of Elizabethan character is D. BUSH, PREFACES TO RENAISSANCE LITERATURE 89 (1966), *cited in* Teachout, *supra* note 72, at 255 n. 90. Perhaps one of Shakespeare's best demonstrations of the duality of man's nature is the tragedy of Leontes, which is found in the first half of *The Winter's Tale*.

tween Holmes's darker and nobler natures."[87] This paradox might be referred to as Elizabethan because late Renaissance thought in England was characterized by its recognition of the "troubled, even despairing, sense of man's inescapable duality, of his being pulled at once toward the bestial and the angelic."[88] This view enables Gilmore and the other proponents of the heroic school to embrace at once, as did the Greeks and the Elizabethans, "lower depths and loftier heights and richer tensions"[89] than are included in the views that practitioners of the other schools espouse. This quasi-literary view of man as inherently complex and contradictory better enables heroic school historians to describe legal development; it at least enables them to communicate their insights more immediately to the reader. The practitioners of the fourth school thus are better equipped to account simultaneously for all the inconsistent core values in American law than are the writers who adhere to the other schools.

Like the conservative school scholars, then, the heroic school legal historians are interested primarily in the intellectual paradigms that their subjects utilized. The writings of the heroic school, however, posit the existence of conflicting and competing elements within the thought and philosophy of their subjects to a greater extent than does the work of the conservatives. Like the writers of other forms of literature, the writers of the fourth school assume that man is after more than mere economic survival, and they study legal man as he searches for spiritual as well as temporal salvation. Many of these characteristic elements of heroic school writings appear in the work of other schools. In particular, adherents of the radical transformation school[90]—particularly Horwitz—exhibit messianic or millenarian elements in their work and are preoccupied with questions of justice and of human salvation.[91] Nevertheless, while the radical transformationists ultimately seem to believe that justice will best be secured—and a high quality of life best assured—through a fundamental redistribution of material wealth and a new communitarian attitude in the law, the work of the fourth school suggests no such prescription for utopia. He-

87. Teachout, *supra* note 72, at 255.

88. *Id.; see supra* note 86.

89. D. BUSH, *supra* note 86, at 89, *quoted in* Teachout, *supra* note 72, at 255 n.90.

90. *See supra* notes 48-69 and accompanying text.

91. For statements of Horwitz' belief that society might be improved if we could shed the odious aspects of our "rule of law" see *Legacy, supra* note 62; *Book Review*, supra note 62.

roic school scholars simply imply that to the extent salvation and a high quality of life are attainable, they will come only through individual striving and concentration on the unique characteristics and potential of particular individuals, rather than through concerted action based on the needs of the entire community. The fourth school's "heroic" concern, therefore, is more often with how the law enables heroic individuals to flourish, than with how some group might have misused the law to oppress the masses, or with how the law might be reformed to terminate the inherent alienation among the people and their rulers in an atomistic market society.

In sum, the four schools of legal history outlined above probably can be classified and distinguished according to their preoccupations with particular aspects of American law's four leading values. Thus, conservative school writers emphasize the first or paramount core value of the restraint of arbitrary power and the adherence to the rule of law concept.[92] Wisconsin school scholars, on the other hand, draw insights from the third value of American law—the maintenance of maximum economic opportunity and social mobility.[93] Members of the radical transformation school are preoccupied with questions of how the notion of popular sovereignty or democracy can be preserved and shielded from the arbitrary power that the law's promotion of economic progress creates.[94] Finally, heroic school writers concentrate on the contributions to the American legal culture of strong individuals, and, in so doing, they often consider the fourth value of American law—the maintenance of maximum freedom for private initiative.[95] This fourth value, more than any other, recognizes the need for competing conceptions of what is good for society and suggests that conflicts between and among the other legal values create a need for individuals to reach creative, unique, and different resolutions of the ordering of priorities in implementing the values of American law.

With the four values and the four schools of American legal history thus examined, this Article next suggests several ways in which the insights gained from current studies in legal history—particularly from the characterization of American legal history as a series of conflicts over competing values—might be inte-

92. *See supra* notes 17-20 & 35-40 and accompanying text.
93. *See supra* notes 23-26 & 41-47 and accompanying text.
94. *See supra* notes 21-26 & 48-69 and accompanying text.
95. *See supra* notes 27-33 & 70-91 and accompanying text.

grated into classroom teaching. Under the rubric of each school of legal history, the Article examines several approaches that law professors might adopt to use the history of law to illuminate current issues in their courses. Many of these approaches will be familiar to most professors; several are traditional "old chestnuts" of law teaching. The aim, however, is to suggest how the "old chestnuts," together with some new developments in legal historiography, might be employed to provide law students with a deeper understanding of American law. Ultimately, the digestion of these insights with the other classroom materials might lead to the satisfaction of law students' hunger for spiritual as well as instrumental instruction. This possibility is particularly likely in first-year courses, both because the first year is the most shattering, penetrating, and powerful experience for law students and because the need for unifying philosophical explanations is strongest during that time.[96]

IV. Selected Approaches to Integrating American Legal History into Legal Education

A. *The Conservative School and the Containment of Arbitrary Power by the Rule of Law*

1. Contracts

The dispute between Sir Edward Coke and James I over the extent of the royal prerogative and its possible circumscription by the English common law[97] provides perhaps the greatest vehicle for the use of historical episodes in contracts courses to explain the emergence of the rule of law as a restraint on arbitrary power. Although almost all contracts teachers probably make at least some reference to the conflict between the common-law and equity courts in the early seventeenth century, focusing on the several face-to-face confrontations between Coke—as the common law's representative—and assorted royal officials is perhaps the best way to illuminate this historical controversy. Professors should comment on Coke's disputes over the question whether the King should be subject to the constraints of the common law with Chancellors Ellesmere and Bacon, as the representatives of the preroga-

96. Most of the approaches suggested below are drawn from materials in first-year courses—particularly contracts—because these are the courses with which most legal historians teaching in law schools are familiar.

97. For an excellent treatment of this conflict, see C. Bowen, The Lion and the Throne 291-306 (1956).

tive courts of equity, with Archbishop Bancroft, as the representative of the Ecclesiastical Court of High Commission, and, finally, with James I himself. Although the conflict began as a personal struggle between Coke and the King and his ministers, it concluded with the assertion of parliamentary sovereignty and the execution of James' successor, Charles I, during the English Civil Wars. This struggle, therefore, is fascinating both for what it reveals about the emergence of the rule of law as a restraint on arbitrary power and for what it eventually signified in the American and English revolutions—namely, the idea that the English common law and the "fundamental rights of Englishmen" embody the essence of popular sovereignty.[98]

While this episode provides the traditional historical tool for underscoring the difficulties of concentrating discretion in equity judges, a great many other developments in early American history are instructive when addressing the core value of restraining arbitrary power. Perhaps the most helpful of these historical developments is the hostility with which Americans came to view the colonial Vice-Admiralty courts, which operated without juries. Examining that hostility naturally leads to the question of how the arbitrary power of jury discretion might itself frustrate contracts, and one ultimately might suggest that colonial reliance on juries —because of the colonists' belief in popular sovereignty —resulted in a conflict between the American legal values of popular sovereignty and the restraint of arbitrary power. Horwitz,[99] William Nelson,[100] and John Reid[101] have shown that colonial juries often used their equitable discretion to enforce popular prejudices, and this practice occasionally extended to voiding contracts that the English common law might have enforced.[102] In short, reference to English and American colonial history enables a contracts professor to explore one dimension of a traditional conflict in contracts courses—the conflict between certainty and equity.

When exploring the arbitrary operation of equity, one should always consider the methodological comments of perhaps our most famous Chancellor, James Kent, who said,

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98. *See, e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

99. M. HORWITZ, *supra* note 4.

100. W. NELSON, *supra* note 5.

101. J. REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION 27-28 (1977).

102. *Id.*

> In 1814 I was appointed Chancellor. The office I took with considerable reluctance. . . . The person who left it was stupid, and it is a curious fact that for the nine years I was in that office there was not a single decision, opinion, or dictum of either of my two predecessors . . . , from 1777 to 1814, cited to me or even suggested. I took the court as if it has been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable under our Constitution. This gave me grand scope . . . .
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> . . . .
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> My practice was, first, to make myself perfectly and accurately . . . master of the facts. . . . I saw where justice lay, and the moral sense decided the [cause] half the time; and I then sat down to search the authorities until I had [exhausted] my books. I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case . . . .[103]

2. Constitutional Law

One advantage of an historical approach to American law that emphasizes the overarching values of American legal culture is that it illuminates the correspondence between American public and private law.[104] Accordingly, the same difficulties with arbitrary power that are evident in contracts doctrines can be observed in the principles of American constitutional law. One prominent example illustrates the underpinnings of the fourth amendment's prohibition against unreasonable searches and seizures.[105] In the "Writs of Assistance"[106] case of 1761 the court considered whether colonial customs officials forcibly could search homes for contraband without first obtaining a special search warrant from a responsible magistrate that clearly identified the premises to be searched and the goods sought. English statutes authorized warrantless searches pursuant to "Writs of Assistance," which the Court of Exchequer routinely issued to customs officials when they assumed office.[107] The practice appears to have been followed in

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103. W. KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 157-59 (1898).

104. *Cf.* Hall, Book Review 77 NW. U.L. REV. 112 (1982) (reflecting on the need to integrate the fields of constitutional and legal history).

105. U.S. CONST. amend. IV. The fourth amendment states that

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things te be seized.

Id.

106. Paxton's Case of the Writ of Assistance, Quincy's Mass. Reports 51 (Sup. Ct. of the Province of Mass. 1761); *see* S. PRESSER & J. ZAINALDIN, *supra* note 8, at 61-89; M. SMITH, THE WRITS OF ASSISTANCE CASE (1978).

107. *See* 2 LEGAL PAPERS OF JOHN ADAMS 106-23 (L. Wroth & H. Zobel eds. 1965).

Massachusetts from 1755 until 1761, when, for various personal and political reasons, James Otis, Jr., a brilliant and fiery lawyer who was soon to emerge as a leader of the Whig opposition to England, appeared in Massachusetts court to challenge the legality of the writs.[108] Although Otis might have used several sophisticated and technical arguments to suggest that the English statutes authorizing the issuance of the general writs of assistance were inapplicable in America,[109] he instead grounded his argument on the assertion that employment of the writs constituted an absolutist exercise reminiscent of King John's and the Stuarts' abuses of the prerogative and, therefore, was "constitutionally" impermissible. Otis accused the writs of being "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book."[110] Otis reminded his listeners that such exercises of arbitrary power had "cost one King of England his head [Charles I] and another [James II] his Throne."[111] Pointing to the "fundamental principle" of the English Constitution that would justify invalidating the writs, Otis announced that "one of the most essential branches of English liberty . . . is the freedom of one's house. A man's house is his castle; . . . and while he is quiet, he is as well guarded as a prince in his castle. This writ . . . would totally annihilate this privilege."[112]

Attempting to bolster his arguments with a dubious misreading of Coke's opinion in *Dr. Bonham's Case*,[113] Otis demanded that the Massachusetts court throw out the writs because "AN ACT AGAINST THE CONSTITUTION IS VOID."[114] Although Otis eventually lost this particular battle, his ardent rhetoric had two

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108. M. SMITH, *supra* note 106, at 216-17.

109. Otis, for example, could have argued that English statutes ought to be construed as not condoning "general" warrants. He also could have argued that the practices of the Exchequer court could not be duplicated in America. *See* 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 107, at 106-23.

110. S. PRESSER & J. ZAINALDIN, *supra* note 8, at 69 (quoting Massachusetts Spy, April 29, 1773, at 3, cols. 1-3).

111. *Id.*

112. *Id.* at 70.

113. Dr. Bonham's Case, 77 Eng. Rep. 638 (K. B. 1610) (according to the principles of the English common law, a statute could not be construed to make the Royal College of Physicians both a party and a judge in the same case). For the most lucid discussions of this "misreading" of Coke to find a general principle of the common law that permitted courts to invalidate parliamentary legislation as "unconstitutional," see 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 411-13 (B. Bailyn ed. 1965), and sources cited therein.

114. S. PRESSER & J. ZAINALDIN, *supra* note 8, at 71 (quoting Massachusetts Spy, *supra* note 110).

profound effects on American law. First, constitutional protection from unreasonable searches and seizures became enshrined in the Bill of Rights,[115] and, second, the notion of judicial review of legislation based on the principles and provisions of a constitution became the most original and enduring institution of American government.[116] The federal constitution's permanent establishment of judicial review resulted from myriad causes, but the principal one appears to have been the commercial uncertainty that the excessively democratic and prodebtor state legislation created during the period in which the Articles of Confederation were in force.[117] Although the arguments for the institution of judicial review may have been couched in terms of popular sovereignty,[118] the fear of arbitrary power permeates the philosophy of judicial review, which in its early American manifestations was shaped by the historical abuses of the English royal prerogative.

3. Antitrust Law

By the late nineteenth century, the legal and cultural value of restraining arbitrary power in America had become divorced from its foundations in resistance to Stuart absolutism. Fears that society once had directed against human beings began to be focused on supposedly impersonal, artificial creations—the American corporations. Instructors can pursue this aspect of the historical theme in many contexts, but it is perhaps best considered in the framework of the evolution of federal antitrust law in America. The passage of the Sherman Antitrust Act of 1890[119] may have constituted no more than a cosmetic gesture by a business-dominated Congress that was intent on quieting a massive public uproar by producing "some bill headed: 'A Bill to Punish Trusts' with which to go to the country."[120] Whatever the intention of the Act's drafters, however, the judicial perception that corporations were odious instruments of arbitrary power led the courts to attempt to restrain that

115. U.S. CONST. amend. IV.

116. For the classic theoretical statement of this notion, see THE FEDERALIST No. 78 (A. Hamilton). *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). A bolder articulation of the doctrine by a Federalist judge can be found in Chase's opinion in United States v. Callender, 25 F. Cas. 239, 254-58 (C.C.D. Va. 1800) (No. 14,709).

117. *See* G. WOOD, *supra* note 98, at 403-25.

118. *Id.* at 453-63, *see* THE FEDERALIST No. 78, *supra* note 116.

119. Ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)).

120. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 221 n.4 (1956) (quoting L. COOLIDGE, AN OLD-FASHIONED SENATOR: ORVILLE H. PLATT 444 (1919)).

perceived arbitrary power through the antitrust laws. This development illustrates the importance of American cultural values both as social forces acting on—but ultimately independent of—legislators and as ideas capable of turning a legal placebo into a potent instrument of regulation or reform.

Prior to the Sherman Act state courts first articulated a "devil theory" of corporations. Some members of Congress had alluded to this notion in their rhetoric during the debates over the 1890 Act,[121] and the courts that subsequently interpreted the statute seemed to adopt the view rather consistently. In *Central Ohio Salt Co. v. Guthrie*,[122] for example, the state court declared that the "inevitable tendency" of manufacturers to allocate territories between themselves was "injurious to the public," and that even if such agreements were deemed not to have resulted either in the destruction of competition or in an unreasonable increase in price, courts would not enforce them because agreements among competitors eventually would damage the public.[123] Similarly, the Michigan Supreme Court remarked in *Richardson v. Buhl*[124] that this damage naturally resulted because "[t]he sole object of [such a] corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure."[125] The *Richardson* court stated that these corporations were nefarious, "artificial person[s], governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 people."[126] Reflecting the deep-seated American fear of arbitrary power, the court concluded that the tendency of any monopoly was "destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal constitution . . . ."[127] In sum, these courts were engaging in an elaborate exercise of reifying corporations[128]—imagining these "artificial beings" as blood-

121. *See, e.g.*, 21 CONG. REC. 2457 (1890) (Senator Sherman's statement that combinations in restraint of trade smacked of "kingly prerogative"); S. PRESSER & J. ZAINALDIN, *supra* note 8, at 584 (quoting 21 CONG. REC. 2726 (1890) (Senator Edmunds stated that "all human experience and all human philosophy have proved that [monopolies] are destructive of the public welfare and come to be tyrannies, grinding tyrannies.")). *See generally infra* notes 129-32 and accompanying text.

122. 35 Ohio St. 666 (1880).

123. *Id.* at 672.

124. 77 Mich. 632, 43 N.W. 1102 (1889).

125. *Id.* at 657, 43 N.W. at 1110.

126. *Id.*

127. *Id.* at 658, 43 N.W. at 1110.

128. For a discussion of the "reification" of the corporation, see R. WINTER, GOVERN-

less monsters that were unmoved by any human feelings and bent simply on monetary gain at public expense.

Senate proponents of the Sherman Antitrust Act also focused on this theme. John Sherman himself declared that trusts were governed only by "[t]he law of selfishness, uncontrolled by competition, [which] compels [them] to disregard the interest of the consumer."[129] Sherman expressly linked the bill to the fear of Stuart absolutism by concluding that a trust controlled by a single man "is a kingly prerogative, inconsistent with our form of government . . . ."[130] Senator Edmunds joined Sherman and declared that the bill was necessary to "repress and break up and destroy forever" monopolies such as the sugar and oil trusts "because in the long run, however seductive they may appear in lowering prices to the consumer, for the time being, all human experience and all human philosophy has proved that they are destructive of the public welfare and come to be tyrannies, grinding tyrannies."[131] Unfortunately, the Senator never explained what he meant by the phrase "all human experience and all human philosophy." Indeed, the drafters of the Sherman Act clearly did not intend to proscribe *all* monopolies, but only those that the common law would have deemed impermissible.[132]

Even though the common law may have supported the condemnation of only those monopolies that operated "unreasonably" to restrain trade, some of the earliest constructions of the Sherman Act suggested that the statutory language prohibited *all* agreements in restraint of trade.[133] In the first Supreme Court opinion to adopt this position, Justice Peckham apparently rejected a "rule of reason" analysis because of his personal ideology, which emphasized the legal restraint of big business' arbitrary power. Peckham, for example, repeated the state court litany that trusts or

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MENT AND THE CORPORATION (1978).

129. S. PRESSER & J. ZAINALDIN, *supra* note 8, at 581 (quoting 21 CONG. REC. 2457 (1890)). For the entire debate, see 21 CONG. REC. 2456-68 (1890).

130. S. PRESSER & J. ZAINALDIN, *supra* note 8, at 581 (quoting 21 CONG. REC. 2457 (1890)).

131. *Id.* at 584.

132. *See, e.g.*, 21 CONG. REC. 2457-68 (1890). *See generally*, Letwin, *supra* note 120, 221-43 (1956). For the English common law authorities, see Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954) (although English common law condemned prerogative grants of monopoly, engrossing and charging extortionate prices for necessities, unreasonable agreements not to compete between employers and employees, and certain conspiracies to raise or lower wages, its proscriptions were not as broad as the provisions of the Sherman Act).

133. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

combinations

> all have an essential similarity, and have been induced by motives of individual or corporate aggrandizement as against the public interest. In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose.[134]

Peckham also observed that although these combinations might provide some cost savings for consumers, their ultimate result would be to drive "out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity . . . might be dearly paid for by the ruin of such a class . . . . "[135] While acknowledging that this dislocation inevitably might result from the normal course of changes in business methods, Peckham suggested that no such inevitability ought to attach in law to business ruinations that result from "combinations of capital."[136] Even though the combinations initially might lower an article's price, "[i]t is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers . . . . "[137]

Thus, Peckham's concern for the small businessman in America, coupled with his conclusion that "combinations of capital" inevitably harmed the public interest, led him to construe the antitrust laws in a way that would avoid the ruination of the class of "small but independent dealers."[138] Peckham's romantic, antebellum notions[139] of what sparked "real prosperity" caused him to

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134. *Id.* at 322-23.

135. *Id.* at 323.

136. *Id.*

137. *Id.* at 324.

138. According to Peckham,

> Whether [such independent businessmen] be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

Id. at 324.

139. *See supra* note 138. For a discussion of Peckham's romantic wish to return to simpler antehellum times and its influence on his jurisprudence, see Skolnik, *Rufus Peckham*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 1685 (L. Friedman & F. Israel eds. 1969).

utilize the Sherman Act as a vehicle for preserving a "big is bad, small is beautiful," ideology of independent business. Remarkably, Peckham failed to make the distinction that the instant case concerned railroads, which were characterized by their attendant public regulation and their demonstrated need for economies of scale. He argued that at the time of the Sherman Act's passage,

> [t]here were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging . . . and it was alleged that the prices . . . were unduly and improperly enhanced by combinations among the different roads. . . . [T]he evil to be remedied is similar in both [manufacturing and railroad] corporations, . . . we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both.[140]

By reading the general language of the Sherman Antitrust Act to cover railroads, Peckham undermined the new regulatory efforts of the Interstate Commerce Commission[141] and appeared to take a firm stand in favor of a transcontinental transportation system that was dominated by individually operated, small business enterprises. Of course, the Supreme Court eventually accepted the rule of reason analysis that Peckham rejected and recognized the intent of the Act's framers to implement only the rule of the common law at the federal level.[142] Nevertheless, one who considers Peckham's ideology as it related to the influence on the Act of the desire to restrain arbitrary power—in the form of large business enterprises—is better equipped to explain current debates on that issue. The idea of "per se" antitrust law rules, for example, owes much to ideologies like Peckham's.[143] Furthermore, the resistance to argu-

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140. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 319-20, 324-25 (1897).

141. Peckham strongly suggested that the Interstate Commerce Commission (ICC) condoned the railroad's practices of entering into "rate agreements" to ensure the continuation of railroad service at reasonable rates and free from ruinous competition. *Id.* at 314-15, 321. Although the ICC apparently had been directed to enforce the law against "pooling agreements"—agreements to parcel out freight and territories between competitors that were forbidden by the Interstate Commerce Act, ch. 104, § 1, 24 Stat. 379 (1887) (current version at 49 U.S.C. § 10101 (Supp. III 1979)) — it did not interpret "pooling agreements" to include rate agreements. J. GARRATY, THE NEW COMMONWEALTH 1877-1890, at 112-19 (1968).

142. Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1910); *see supra* note 132 and accompanying text.

143. Several practices in restraint of trade have been regarded as so obviously odious that no "rule of reason" is applied, and a violation of the antitrust laws is made out once evidence of the particular practice is established. Some examples of these practices are price fixing, collective boycotts, and market sharing. *See* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 27-28 (2d students' ed. 1970).

ments that these and other "inefficient" antitrust law rules should be abandoned in the interest of wealth maximization[144] perhaps is attributable to the continued viability of Peckham's free enterprise notions about the nature of real prosperity. This continued viability in turn supports the conservative school's contention that the law progresses according to fixed intellectual principles that judges apply to new situations.[145]

Advocates of a market-oriented, wealth-maximizing system appear to have the upper hand in the current federal administration. In a statement that directly contravened Peckham's perspective, Attorney General William French Smith recently announced that the Justice Department's Antitrust Division was reexamining "inefficient" prior official positions on antitrust law interpretation pursuant to the insight that "bigness is not necessarily bad."[146] This new policy illustrates how perceived popular demand for economic progress—in this case, for an end to perceived unnecessary restraints on productive capital and economies of scale—may result in the change or abandonment of statutory or common-law legal rules. The next section considers other opportunities for exploring this phenomenon by suggesting insights of the Wisconsin school of legal historians, who concentrate on legal change resulting from the pressures of a societal consensus on the desirability of economic progress.

B. The Wisconsin School and the Alteration of Rules of Law in Service of Economic Progress and Social Wealth

1. *Groves v. John Wunder Co.*

One can conjure up many historical examples to support the Wisconsin school's contention that American law has changed to accommodate the needs of industrial capitalists in a market economy. Perhaps the best starting point for this analysis, however, is the traditional contracts case of *Groves v. John Wunder Co.*[147] Defendant in *Groves* had agreed to leave plaintiff's property at a uniform grade after removing sand and gravel from the land. Since the cost of levelling the land would be $60,000 and the resulting

144. For arguments regarding the supposed inefficiencies that are inherent in much of current antitrust law, see R. POSNER, ECONOMIC ANALYSIS OF LAW, 210-552 (2d ed. 1977) and sources cited therein.

145. *See supra* notes 35-40 and accompanying text.

146. Wall St. J., June 25, 1981, at 6, col. 2.

147. 205 Minn. 163, 286 N.W. 235 (1939).

value of the property would be only about $12,000, defendant deliberately breached the contract and refused to level the land. Defendant argued that damages to plaintiff should be the difference in the value of the property before and after it was graded. Plaintiff, on the other hand, contended that damages should be calculated as the cost of performance.

The *Groves* majority held for plaintiff and awarded damages based on the cost of levelling plaintiff's land. The court in essence reasoned that land is unique, stating that "[t]he owner's right to improve his property is not trammelled by its small value."[148] A strong dissent, however, argued that damages should be calculated based on the diminished value rule—as long as no evidence existed to support the contention that plaintiff wanted the land levelled to satisfy his personal tastes—and rejected the proposition that the measure of damages should be increased because the breach was willful.[149]

To put the *Groves* majority's decision into context, one must understand the special treatment that the English and American common law has accorded land. Although the availability of specific performance in disputes over land illustrates this treatment most clearly, the same considerations apparently influenced the majority's decision to award Groves the cost of contract completion rather than the decrease in the land's value caused by the breach. The majority's thesis in effect was that one simply cannot put an objective market value on land; the *Groves* dissent, on the other hand, would reject this thesis when the purpose of a specific transaction is clearly and measurably economic. To gain more than a mere intuitive grasp of the majority's uniqueness-of-land concept, one must consider centuries of English and American colonial cultural and legal history, in which all life centered around land, and people's status, social duties, and responsibilities arose from their relationships to that land.[150]

One fairly can speculate that the *Groves* majority missed the essential economic purpose of the transaction in question because it accepted the Jeffersonian vision that Americans should continue to attach primacy to land. In his *Notes on Virginia*, Jefferson posited that Americans should make their livelihood on small plots of

148. *Id.* at 168, 286 N.W. at 237.

149. *Id.* at 171-85, 268 N.W. at 239-45; *see* Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1963).

150. *See, e.g.*, F. GANSHOF, FEUDALISM (3d ed. 1964); P. LASLETT, THE WORLD WE HAVE LOST (1965); L. WRIGHT, THE CULTURAL LIFE OF THE AMERICAN COLONIES 1607-1763 (1957).

land by continuing as brave yeomen farmers who would shun commerce, industrial expansion, and luxury.[151] What Groves did with his land and money is not what Jefferson suggested, of course, but that is not the point—the point is that the law of contracts sometimes allows judges to ignore the economic valuation of the market and to impose remedies based on the supposedly unique value of a particular piece of land. The *Groves* case thus demonstrates the law's accounting for personal idiosyncrasy, a characteristic that also supports the position of those who stress the legal value of the operation of private wishes in public regulation.[152]

The relevance of the *Groves* case in this context is that it presents the tension between a traditional rule—supporting individuality by recognizing the uniqueness of land when measuring value—and a more modern approach—calculating damages based solely on economic loss. According to the Wisconsin school's thesis, both these rules arose because of the economic needs of society. As these needs have changed over time, the holding in *Groves* has become almost an exception to a general rule; the *Groves* dissent appears more in keeping with the trend of American law to weigh market considerations most heavily in reaching economic results that diminish the importance of individual idiosyncrasy, reduce uncertainty, and presumably minimize inefficiency while maximizing production.[153] Thus, by approaching the *Groves* case from the Wisconsin school's perspective, one can better examine the role of market forces in judicial decisionmaking.

2. *Charles River Bridge v. Warren Bridge*

The first great constitutional law case that most fully embraces the core value of American law of maximizing economic progress at the expense of other property interests is the Supreme Court's decision in *Charles River Bridge v. Warren Bridge*.[154]

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151. The most famous section in which this point is made in the *Notes* is Jefferson's response to query XIX. T. JEFFERSON, *Notes on the State of Virginia* (1781-82), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 279-81 (A. Koch & W. Peden eds. 1944); *see* Letters from Thomas Jefferson to Charles Van Ogendorp (Oct. 13, 1785), J. Bannister, Jr. (Oct. 15, 1785), and A. Stuart (January 25, 1786), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* at 384-85, 385-88, 390-91.

152. *See supra* notes 27-33 and accompanying text; J. DAWSON & W. B. HARVEY, CASES AND COMMENT ON CONTRACTS 12-13 (3d ed. 1977) (quoting RESTATEMENT OF CONTRACTS § 346, illustration 4).

153. *See, e.g.*, M. HORWITZ, *supra* note 4, at 196-201 (the "objective" theory of contract helps ensure certainty and predictability in mature markets).

154. 36 U.S. (11 Pet.) 419 (1837). *See supra* notes 23-29 and accompanying text. For

Eighteen years before the *Charles River Bridge* case, the Court in *Dartmouth College v. Woodward*[155] held that the grant of a corporate charter to Dartmouth College was a contract that the contract clause of the Constitution[156] protected from state interference in the absence of a reserved power of amendment. The *Charles River Bridge* case presented the question of how narrowly the state contractual obligations incurred in the granting of charters should be construed. In 1785 the State of Massachusetts chartered the Charles River Bridge Company to build a toll bridge across the Charles River and granted the company a franchise to collect tolls for an extended number of years. In 1828, when the Charles River Bridge franchise still had a substantial time to run, the State chartered a competing bridge company to operate a toll-free bridge. The effect of the second charter, of course, was to render the Charles River Bridge Company's franchise worthless. The Charles River Bridge charter contained no language dealing with the state's authority to grant competing charters; the new bridge company, therefore, argued that the strictly construed language of the document and the State's obligation to act in the public interest justified new bridge charters whenever the interests of commerce or public transportation made them necessary. The Charles River Bridge Company, on the other hand, argued that since an undertaking not to breach can be implied in every contract, the original charter should be construed to contain an implicit assurance that the State would do nothing to render the charter worthless. Both the new and the old bridge proprietors based their arguments on the country's need for economic development: the Charles River Bridge Company argued that this development would be stymied if initial investments were not assured full contractual protection, and the Warren Bridge Company argued that the same development would be frustrated if newer forms of transportation were not allowed easily and freely to compete with old ones.[157] As Justice Taney explained in his majority opinion holding for the Warren Bridge Company, the real issue in the case might have been whether the newly burgeoning railroad industry would be checked by lawsuits from the moribund turnpike companies,

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an excellent Wisconsin school analysis of this case, see S. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

155. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

156. U.S. CONST. art. I, § 10 ("No state shall . . . pass any . . . law impairing the obligation of contracts . . . . ").

157. S. KUTLER, *supra* note 154, at 43-44.

whose business the railroads were then seizing.

The *Charles River Bridge* case dramatically illustrates how public pressures for economic progress can change either the applications of constitutional rules or the conceptions of property or contract. Indeed, the depth of the chagrin that Justice Story and Chancellor Kent felt after the rendering of the decision is indicative of the extreme nature of legal change during the mid-nineteenth century. Thus, Kent "thought Taney's opinion . . . was miserable and [Story's] gigantic," and reportedly could read Taney's opinion only with "shuddering disgust" and "increased repugnance."[158] Story himself, who dissented in the case, wrote in 1837 that "I am sick at heart, . . . and now go to the discharge of my judicial duties . . . with a firm belief that the future cannot be as the past."[159]

Although Wisconsin school historians would attribute the legal change signaled by the *Charles River Bridge* case to a difference over the best method of achieving the concensus goal of economic development, members of the radical transformation school[160] examining the same case would probably be more struck by the perceptions of extreme change on the part of Story and Kent revealed both by the application to constitutional law of the "instrumental conception"[161] of law and the malleability of legal doctrines, which jurists such as Story and Kent themselves had poineered in the private law area. This Article, therefore, next considers some radical transformation school concepts that can be used to develop understanding of American private law.

C. *Conflict Between Core Values and Radical Transformation in Private Law*

One of the primary premises of the radical transformation school is that the power centers of American society in the nineteenth century used the law as a vehicle for promoting fluid, entrepreneurial uses of capital at the expense of *rentier* interests.[162] The seminal work of this school, Horwitz' *The Transformation of*

158. G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 365-66 (1970).

159. Letter from Joseph Story to James Kent (June 26, 1837), *quoted in* 5 C. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, at 93 (1974).

160. *See supra* notes 48-69 and accompanying text.

161. *Id.*; *see* M. HORWITZ, *supra* note 4, at 1-30.

162. *See supra* notes 48-69 and accompanying text.

American Law,[163] provides many examples in tort, property, and contract law to support this proposition. Horwitz' book, for example, discusses Justice Story's intent in cases such as *Van Ness v. Pacard*[164] and argues that Story altered American property rules to enable American tenants to invest in productive capital without risking their landlords' appropriating their investments by applying the English "waste" doctrine.[165] Horwitz' work also facilitates a study of Chancellor Kent's efforts to mold American common law in a manner consistent with his ideals of economic progress.[166] Furthermore, Horwitz' analysis is particularly useful when studying how the nineteenth century case of *Seymour v. Delancey*[167] altered the rules regarding adequacy of consideration; Horwitz claims that the court in *Delancey* effected this change because it deemed objective market principles to be more important than popular equitable considerations.[168]

Another leading work of this school, Richard Danzig's brilliant article[169] on *Hadley v. Baxendale*[170] provides a further radical transformation study of the competition between popular equitable notions and particularized demands of industrial organizations. Danzig thoroughly examined the facts of the case and offered the thesis that the needs of an increasingly organized English national market prompted the court to adopt the *Hadley* forseeability rule as a means of minimizing the unpredictable exercise of jury discretion in the local courts. Extending Danzig's analysis, one might also conclude that the quick acceptance of the forseeability principle in America followed from similar needs.

Studies like Horwitz' and Danzig's suggest that in the process of transforming legal doctrines to accommodate emerging national markets, older equitable concepts, and their democratic manifestations—for example, jury discretion in setting breach of contract damage awards—impersonally were dismissed from the law. These scholars' perspectives can provide valuable insights into the cur-

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163. *See supra* notes 4 & 48-69 and accompanying text.

164. 27 U.S. (2 Pet.) 137 (1829).

165. M. HORWITZ, *supra* note 4, at 55-56. According to the English "waste" doctrine, any fixtures removed by the tenant—unless they were "trade fixtures" used in some nonagricultural trade would create tenant liability for the value of the fixtures removed. *Id.*

166. *Id.* at 117-18, 124-26, 138-39, 165, 190.

167. 6 Johns. Ch. 222 (N.Y. Ch. Ct. 1822), *rev'd*, 3 Cow. 445 (N.Y. Sup. Ct. 1824).

168. M. HORWITZ, *supra* note 4, at 179-80.

169. Danzig, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

170. 156 Eng. Rep. 145 (1854).

rent state of the law and how it progressed to this point. Nevertheless, as the discussion above of Peckham's opinion and the *Groves* decision suggests, American legal history seems never really to bury old equitable or social concepts completely. Our legal system, therefore, is perhaps best described as a system for reconciling new and old values, mores, and perspectives. The next section of this Article thus examines the conflict between, and the occasional reconciliation of, these conflicting legal pressures.

D. Reconciling Diverse Demands: The Heroic Mode in Legal History

The works of the radical transformation theorists provide a fruitful source for examining the simultaneous existence of competing perspectives, since the methodological care of those theorists usually leads them to present enough data that one can derive interpretations which are quite different from their own occasionally polemic conclusions.[171] The pressures of competing ideological imperatives, however, usually emerge with more clarity in the work of the heroic school writers. As discussed above,[172] the heroic mode of doing legal history takes as its foundation the premise that changes in the law are the result of individual strivings and personalities. Consequently, the historiography of this school often focuses on the internal forces at work on a particular jurist's decisionmaking. These forces are perhaps best examined by reference to literary parables that illuminate the character of the decisionmaker in question. What follows, therefore, are two examples of how the legal careers of great lawyers or jurists might be examined allegorically to divine a humanistic understanding of legal development.

1. Lemuel Shaw

Lemuel Shaw, who was the Chief Justice of the Supreme Judicial Court of Massachusetts, is perhaps best known for his labor law work[173] and, in particular, for his opinions in *Farwell v. Boston & Worcester Rail Road*[174] and *Commonwealth v. Hunt*.[175] This body of Shaw's work provides an excellent example for applying

171. *See* Presser, *supra* note 51, at 716-24.
172. *See supra* notes 70-91 and accompanying text.
173. *See* L. LEVY, *supra* note 70.
174. 45 Mass. (4 Met.) 49 (1842).
175. 45 Mass. (4 Met.) 111 (1842).

the historiographic technique outlined above, which in essence results in a confluence of law, history, and literature. In *Farwell* Shaw held that the English "fellow-servant" doctrine applied in America and, therefore, that a railroad laborer could not recover from his employer for an injury that the negligence of a fellow worker caused. In *Hunt*, however, Shaw determined that labor unions did not constitute conspiracies, a conclusion that contravened the English and American law which existed at the time.[176] The surface inconsistencies between the two opinions generated a fascinating historical debate,[177] which no one has resolved definitively. In keeping with the "literary" emphasis of heroic school analysis, one might wish to resolve this inconsistency by considering the work of Herman Melville.

Melville dedicated his first book, *Typee*, to Shaw, who was his father-in-law. Shaw, in turn, was in love with Melville's aunt and always carried two love letters from her in his wallet. Since their families appear to have been exceptionally intimate,[178] considering Melville's Captain Vere in *Billy Budd* as a character based at least in part on Shaw is certainly a fair assumption. In allegorical terms, then, the character of Billy Budd could represent the American workingman—a simple laborer such as Farwell—and Vere's judgment that Billy Budd must hang could represent Shaw's treatment of workers in the *Farwell* case. In the novel, Vere incorrectly asserts that Billy acted of his own free will when he killed Claggart, and in *Farwell*, Shaw asserts the social fiction that workers are free to contract as they wish. Vere, like Shaw, professes to be a just, if stern, man, but just as the readers of *Billy Budd* are not persuaded initially by this attitude, so the contemporary reader of *Farwell* is not persuaded that Shaw rendered "justice" to those who suffered from the ravages of the "fellow-servant" rule.

On the other hand, one can probe deeper into the themes of the novelist and the judge and reach a different conclusion. For example, one might present Billy as negligent, even evil, and thereby raise the possibility that Vere is in fact good and just. In the novel, Billy Budd fails to report plans of a mutiny because his

176. For the contemporary English law, see Rex v. Journeymen Taylors, 8 Mod. Rep. 10 (K.B. 1721). For the American law, see People v. Fisher, 14 Wend. 10 (N.Y. Sup. Ct. 1835).

177. *Compare* Nelles, Commonwealth v. Hunt, 32 COLUM. L. REV. 1128 (1932) *with* R. POUND, *supra* note 38, at 86-88 (1938).

178. For the link between Shaw and Melville, see R. COVER, *supra* note 70, at 4-6 (1975).

personal honor prevents him from informing on his peers. He then proceeds to kill Claggart because of his frustration at Claggart's false accusations. Billy's behavior threatens shipboard discipline, and, since a state of war then existed, any breach in discipline threatened the survival of the entire crew. Vere's treatment of Billy, therefore, becomes necessary and inevitable. Similarly, the labor unrest in New York City at the time of *Farwell*[179] perhaps suggested to Shaw the necessity for some demonstration to secure discipline among workers.

In any event, both Vere and Shaw clearly transcended personal morality when they attempted to act according to a "higher morality," a reaction which they believed the needs of the commonwealth required. Sailors engaged in a war cannot be permitted to behave like savages, and workers must be treated as free agents who contract for their own independence and are paid higher wages for any higher risks that they assume. The interests of the nineteenth-century economy in *Farwell*, like the interests of the war effort in *Billy Budd*, are better protected under such a scheme; private interests must be subordinated, at least in part, to the collective interest. Melville's ambiguous *Billy Budd*, however, offers no simple answer to the question whether Vere's behavior was correct or praiseworthy. Shaw's treatment of laborers in *Hunt*, on the other hand, does display a higher regard for the common good, since he condones the organization of labor to preserve the contractual bargaining power of workers. *Hunt* thus is consistent with the free market model that Shaw employed in *Farwell*, and this model in turn becomes a higher morality with which to reconcile the surface inconsistency between the *Hunt* and *Farwell* opinions. The diverse themes in Melville's *Billy Budd*, therefore, help magnify the diverse themes in Shaw's jurisprudence.[180]

2. Benjamin Cardozo

One other example, which is drawn from comparing Justice Cardozo to Greek literature, helps underscore the flexibility, diversity, and reach of the heroic school approach. Thus, perhaps the best way to explain the multiple considerations at issue in Cardozo's opinion in *Allegheny College v. National Chautauqua*

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179. The unrest referred to in the text concerned a mass meeting of 27,000 people, which was described as "the greatest meeting of working men ever held in the United States" until that time. L. LEVY, *supra* note 70, at 193.

180. *See* S. PRESSER & J. ZAINALDIN, TEACHER'S MANUAL FOR LAW AND AMERICAN HISTORY: CASES AND MATERIALS 63-64 (1980).

Bank[181] is to approach the case after examining the problem in Aeschylus' *Oresteia*. In *Oresteia*, Agamemnon, the Greek leader in the battle against Troy, is brutally murdered by his wife, Clytemnestra, and her lover. Orestes, Agamemnon's son, then punishes his mother for this foul deed by slaying her. In her last moments, Clytemnestra summons the Furies to hound and torment Orestes for murdering her. The play, then, concerns the resolution of the conflict between an old morality—requiring one always to respect blood ties—and a new morality, which suggests that, under certain circumstances, matricide is justifiable. The play represents the movement from the primitive, authoritarian, and aristocratic morality and social order to the more subtle and conditional democratic society and morality that was then emerging in fifth-century Athens.[182]

In *Allegheny College* Cardozo recognized the doctrine of promissory estoppel and enforced a promise of a decedent to have her executor grant a sum of money to a college. Judge Kellogg in dissent, however, focused on the lack of contractual formalities in the transaction and appeared to emphasize the need for bright-line rules in contract law. Drawing upon the *Oresteia* analogy, one can suggest that Kellogg's dissent represents an old morality and that Cardozo's opinion casts him as a proponent of a new morality represented by the doctrine of promissory estoppel.[183]

This new morality, like that in the Golden Age of Athens, is far more subtle than the old. Cardozo did not care what the parties called their arrangement, or what they thought they were doing; he was prepared to "weav[e] gossamer spider webs of consideration"[184] to advance the greater good of higher education over personal greed. Cardozo's new morality, therefore, subordinated the wishes of the individual to the interests of the collectivity, which is precisely what *Oresteia* and much of Greek tragedy took as its

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181. 246 N.Y. 369, 159 N.E. 173 (1927).

182. *See* Lattimore, *Introduction* to AESCHYLUS, ORESTEIA 5-31 (R. Lattimore trans. 1953). *See generally*, AESCHYLUS, EUMENIDES (H. Lloyd-Jones trans. 1970); E. DODDS, THE ANCIENT CONCEPT OF PROGRESS AND OTHER ESSAYS ON GREEK LITERATURE AND BELIEF (1973); K. DOVER, THE GREEKS (1981). Aeschylus was working through the use of several dichotomies, which now might simply be thought of as the distinction between the public and the private interests—the fourth significant core value of American legal history discussed above. *See supra* notes 27-33 and accompanying text.

I am indebted to my colleague in the department of classics at Northwestern, Brook Manville, both for his suggestion of these sources and for his willingness to share his deep understanding of Aeschylus with me.

183. *See* U.C.C. § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

184. G. GILMORE, *supra* note 77, at 62 (1974).

foundation.[185] Thus, comparing Cardozo's jurisprudence to the thematic strains in Greek literature can provide expanded insights into the process of legal change that Cardozo so significantly affected.

V. CONCLUSION

That historians in law schools practice something called "legal" history seems to require some sort of explanation. "Legal" history seems to imply the existence of its opposite, and it is difficult to imagine an "illegal" history without envisioning a group of masked and surreptitious scholars hent on some nefarious purpose. Perhaps this is why so many books that might have been entitled "legal history" have been labelled histories "of," "and" or "in" law.[186] In another sense, however, the endeavor might be labelled "legal history," rather than "the history of law." In teaching the law's past, previous events illuminate the present and mark out desirable choices for future conduct. In this sense, then, the teaching of history serves the same societal pattern-maintenance function as legal rules.

This pedagogical technique increases our understanding not only of the nature of the American legal culture, but also, pursuant to the particular possibilities that heroic school scholars have created, of the nature of mankind.[187] These scholars teach us that a great danger exists in preoccupation—at the individual or cultural level—with a single value to the exclusion of others. As a result, these scholars stress the need to remain simultaneously committed to a variety of values. The implementation of this lesson requires an openness of spirit and a maturity that is not always forthcoming in either societies or individuals; it also requires a willingness to attempt the impossible and to run the risk of being labelled a hypocrite.

In those eras of history when some Americans and their laws were overly preoccupied with one of the four values described

185. As discussed above, *see supra* notes 173-80 and accompanying text, this theme also concerned Shaw.

186. *See, e.g.*, L. FRIEDMAN, *supra* note 2; LAW IN AMERICAN HISTORY (B. Bailyn & D. Fleming eds. 1971); S. PRESSER & J. ZAINALDIN, *supra* note 8.

187. The mythological insights that this school offers may be a sign that legal thinkers have begun to explore the same territory as European structuralists such as Claude Lévi-Strauss. *See, e.g.*, C. LÉVI-STRAUSS, MYTHOLOGIQUES (1967-1971); C. LÉVI-STRAUSS, 2 STRUCTURAL ANTHROPOLOGY (1967); *cf.* Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1400 (suggesting the need for American legal scholars to focus on the implications of the work of Lévi-Strauss, Habermas, Lacan, Barthes, and Althusser).

above,[188] tensions resulted that severely strained the fabric of American society. In the early years of the Republic, rampant popular sovereignty resulted in arbitrary mob actions that made government all but impossible.[189] In the mid-nineteenth century, Southern orators' and lawyers' excessive emphasis on the private sphere of protected property rights in slaves led to a gag rule in Congress, to exaggerated fears of a Southern conspiracy among the abolitionists, and ultimately to an orgy of Northern democratic sentiment that resulted in the Civil War.[190] In the years preceding the New Deal, preoccupation with private property rights to contract led to a constitutional revolution that fundamentally reordered the nature of American government and led to an unhealthy emphasis on restraining arbitrary private power through governmental intervention.[191] If the recent efforts of federal and state courts represent a trend,[192] American society now is apparently attempting to regain some sense of balance and to retreat from the

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188. *See supra* notes 11-33 and accompanying text.

189. Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. 3, 34-35 (3d Ser. 1970) (describing how post revolutionary Whig leaders believed that continued mob activity after the American revolution, although arguably based on notions of popular sovereignty, constituted "insults to government that were likely to discredit American republicanism in the eyes of European observers").

190. For an excellent treatment of all these historical developments, see D. POTTER, THE IMPENDING CRISIS 1848-1861 (1976).

191. *See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

192. Such a "trend" may be observed in a number of different substantive legal categories. In contracts, for example, certain signs suggest that state courts may be seeking to reinforce private bargaining behavior rather than constantly reanalyzing the fairness of individual transactions. *See, e.g.*, Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. 1971); Weisz v. Parke-Bernet Galleries, Inc., 77 Misc. 2d 86, 351 N.Y.S.2d 911 (App. Term 1974).

One theorist remarked in 1976 that it is inappropriate both to use judicial activism to advance social objectives through private tort cases and to fashion negligence rules on a case by case basis. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976). At least some recent negligence and products liability decisions seem to share this concern that there must be some limits on the expansive construction of the doctrines. *See In re* Kinsman Transit Co., 388 F.2d 821 (1968); Tibbetts v. Ford Motor Co., 358 N.E.2d 460 (Mass. App. Ct. 1976). Finally, strong signs are appearing that the United States Supreme Court wants to diminish the reach of the federal securities laws. Federal authorities probably went far beyond the congressional intent when, in the late 1960's and early 1970's, they used these laws to punish almost any conceivable fraudulent behavior in connection with the issuance of securities. *See* The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 & Supp. IV 1980). *Compare* Superintendent of Ins. of New York v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) *and* S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (apogee of liability for fraud under securities laws) *with* Aaron v. S.E.C., 446 U.S. 680 (1980) *and* Chiarella v. United States, 445 U.S. 222 (1980) (apparently constricting the reach of the federal securities laws).

rampant judicial activism of the past. The maintenance of this balance, however, never will be easy because no single core value ever can be realized fully without endangering the others. Indeed, our institutions always can be condemned for failing to honor the promises that they were designed to fulfill.

Because we can never have true democracy, the efforts of our legislatures often appear hypocritical. We can never have a totally free market, or a maximum of economic progress and social mobility, without running the risk that monopolies will exercise intolerable arbitrary power. The most desirable course for society eventually may be to arrive at a communitarian existence, in which these and other antinomies of the liberal perspective would be dissolved, and society somehow would become free to discard the contradictory imperatives of the old individualistic values. The most brilliant recent attempt to lay the groundwork for such an existence, however, apparently confesses frankly that reaching this utopian state would be impossible without clearly articulated divine direction, which generally has not been available for two millenia.[193]

Perhaps the best available alternative to such a goal is to consider why relative peace and prosperity have existed during much of our legal past, and whether this tranquility has affected American law's commitment continually to reconcile the irreconcilable in diverse values. As suggested earlier, then, because of the manner in which selected parts of the history of law can suggest the proper course to follow in the future, labelling this activity "legal history" is perhaps correct. In teaching lawyers, at least, it seems appropriate to adopt this shamelessly presentist mode of history.[194] "Legal history," then, is really *applied* history, and it is probably theoretically distinguishable from "pure history"—the search for the objective truth of the past—in the same sense that applied mathematics differs from pure mathematics. Nevertheless, since the totality of past experience can never be recovered in full detail, even the most scrupulous scholars must employ some principles of selection, and each historian of the law, therefore, must make methodological assumptions that are consistent with the values which he or she holds.

At some point, then, all history of law may be "legal" history,

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193. *See* R. UNGER, KNOWLEDGE AND POLITICS 295 (1975).

194. In this sense, Hendrik Hartog's characterization of several legal historians appears accurate. Hartog, *Distancing Oneself from the Eighteenth Century: A Commentary on Changing Pictures of American Legal History*, in LAW IN THE AMERICAN REVOLUTION, *supra* note 6, at 230.

even though some forms may be more "pure" than others. Indeed, a complex dialectical interplay probably exists between the values one expects to discover during the study of "pure" history of law and the values one seeks to transmit when teaching. For now, however, law teachers should be concerned with "legal history" and not, alas, the history of law. Some legal scholars, impatient with Laskian or Bickelian pluralism,[195] once again are searching for the single key to achieving a perfectly functioning legal system.[196] Some of them profess to find the solution in the "new conceptualism" of the Posnerian wealth maximization or efficiency analysis of law and economics,[197] while others seek it in the "unholy trinity" of Marxism, semiology, and phenomenology.[198] Nevertheless, formulating the law along the lines of the first philosophy would generate the same arbitrary power problem encountered in the late-nineteenth century, and subscribing to the second ultimately would lead to a socialism that—if much of recent world history is a guide—inevitably would result in the suppression of valuable private diversity and initiative. One could do much worse than to settle for an enlightened Burkianism[199] that is content to revel in inconsistency, to eschew simple or complex, one-track modes of analysis, and to accept Holmes' view that repose is not the destiny of man.[200] Short of divine revelation, then, we are not likely to find a means to unlock the ultimate mysteries of our destiny, but legal history still can be used to understand how best to fumble for the keys.

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195. *Cf.* S. PRESSER & J. ZAINALDIN, *supra* note 8, at 734-65 (noting that unhappiness with Harold Laski's and Alexander Bickel's ethical position that society ought to maximize competition between different values simply by maintaining access to the political process led both Circuit Judge J. Skelly Wright and the Warren Court to seek to implement their own vision of a jurisprudence of "goodness").

196. For evidence of this trend, see Tushnet, *supra* note 187; *Legal Scholarship: Its Nature and Purposes*, 90 Yale L.J. 955-1296 (1981).

197. For these professions, see *Symposium on Efficiency as a Legal Concern*, *supra* note 34.

198. Tushnet, *supra* note 187, at 1399.

199. "Enlightened Burkianism" denotes adherence to Edmund Burke's "chief articles" of a "universal constitution for civilized peoples." R. KIRK, THE CONSERVATIVE MIND FROM BURKE TO SANTAYANA 15 (1953). Kirk derived these articles from Burke's speeches and writings as "reverence for the divine origin of social disposition; reliance upon tradition . . . for public and private guidance; conviction that men are equal in the sight of God, but equal only so; devotion to personal freedom and private property; opposition to doctrinaire alteration." *Id.* Since Burke limned an implicit philosophy that culled superior from inferior principles of the past, limiting an interpretation of Burke to the notion that what has gone before ought to be repeated would be incomplete. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1039 (1980).

200. Holmes, *supra* note 11, at 466.