Introduction

This book examines the central role of history in late nineteenth-century American legal thought. It argues that historical legal thought dominated American legal scholarship from the 1870s until superseded by the sociological jurisprudence promoted by Roscoe Pound in the decade before World War I. This argument reinterprets the intellectual history of American law while relating it to developments in other countries and in other disciplines. The American scholars who are the primary focus of this book include Henry Adams, James Barr Ames, Melville M. Bigelow, James Coolidge Carter, Thomas McIntyre Cooley, William Gardiner Hammond, Oliver Wendell Holmes, Jr., John Norton Pomeroy, Roscoe Pound, James Bradley Thayer, Christopher G. Tiedeman, and Francis Wharton.

In analyzing these American legal scholars, I will try to convey how they understood their own work. Because they were interested in the evolution of legal doctrine, I will devote substantial attention to it. But this book is neither an attempt to write my own history of legal doctrine, nor an explanation of legal doctrine as ideology. Rather, it is primarily an intellectual history of the historical school of late nineteenth-century American legal scholarship in the context of transatlantic social thought. By trying to understand these scholars on their own terms, I hope to strip away a century of distortions and oversimplifications by twentieth-century commentators often more interested in their own political and intellectual agendas than in recovering what their predecessors actually thought and achieved. I hope to restore a deservedly prominent place in the history of American legal thought to its founding generation of professional legal scholars. More cosmopolitan, more learned, and more internationally respected than many of the people who have misrepresented or neglected them, they should be recognized and engaged as part of a rich intellectual tradition.

Combining transatlantic intellectual history, legal history, the history of legal thought, historiography, jurisprudence, constitutional theory, and the history of higher education, this book should appeal to readers interested in any of these subjects, and particularly to those interested in the connections among them.

Because I provide biographical information about important nineteenth-century legal scholars in Europe and the United States as well as summaries of their major works, the book should also appeal to readers who want to learn more about them. Addressing the backgrounds and political beliefs of these scholars, it portrays them as more diverse and complex than most subsequent commentators have assumed. For people who have never read classics such as *Ancient Law* by Henry Maine, *The Common Law* by Oliver Wendell Holmes, Jr., *The History of English Law* by Frederick Pollock and Frederic Maitland, or the pathbreaking articles by Roscoe Pound on "sociological jurisprudence," my extended discussion and analysis of these texts should provide a useful introduction. To a lesser but still substantial extent, I explore the work of the major German legal scholars who most influenced the Americans, such as Friedrich Carl von Savigny, Heinrich Brunner, and Rudolph von Jhering. My treatment of these scholars within a broad historical and international context, moreover, should enable fresh perspectives even for readers already familiar with much of their work. For example, by illustrating how many historical assumptions and interests all of these scholars shared, I challenge prevailing views about the distinctiveness of Holmes, Maitland, and Pound. Holmes and Pound continued to treat law historically even as they urged lawyers to apply the insights of the emerging social sciences, and Maitland, though justifiably perceived as broadening the focus of legal history to include social and economic history, remained primarily interested in the evolution of legal doctrine. Beyond examining major works of nineteenth-century legal scholarship, the book stresses the important, but lesser known contributions of other scholars, including Henry Adams, whose pioneering work introducing "scientific" legal history in the United States has understandably been overshadowed by his later, much better known histories and autobiography.

Beginning with Holmes and Pound in the decades around 1900 and continuing through most of the twentieth century, American legal scholars have defined their own understandings of law in opposition to the views of their late nineteenth-century predecessors, which they typically characterize, and often ridicule, as "legal formalism" or "classical legal thought." According to many of their successors, the late nineteenth-century scholars attempted to create a timeless structure of legal thought, often built on principles uncovered through the study of legal history, which would yield correct results deduced by formal logic. Many twentieth-century critics added that this timeless structure advanced conservative political goals by denying the possibility of conscious change and by treating the law as an autonomous system divorced from the forces and conflicts of the broader society. Jhering had made similar criticisms of German historical jurisprudence, which Pound often cited and quoted. Some twentieth-century scholars, more often in history and political science than in law itself, ascribed malevolent intent to the nineteenth-century scholars. They charged that intellectually bankrupt formalism was simply a pretext for justifying laissez-faire constitutionalism, a way to enforce individual economic rights to protect the wealthy while invalidating social legislation in the public interest.

Twentieth-century scholars often depicted Holmes as the great exception in the late nineteenth century, a brilliant, highly original thinker who laid the intellection foundations for the sociological jurisprudence developed by Pound in the early twentieth century. Sociological jurisprudence, they declared, finally made law modern by replacing formalism with a pragmatic approach that drew its inspiration from the emerging social sciences. They associated Holmes and Pound with what Morton White famously called the liberal "revolt against formalism" that pervaded American social thought from roughly 1890 to 1930.

The relatively few American legal historians who have addressed the history of their own field have reinforced the negative image of nineteenth-century American legal thought. Ever since J. Willard Hurst founded the "Law and Society" school of legal history at the University of Wisconsin in the 1940s, they have joined Hurst in criticizing the poor quality of prior American scholarship in legal history from its beginnings in the 1870s. They have portrayed Hurst himself as the first sophisticated legal historian in the United States, characterizing the work of his predecessors as dismal, rarely even meeting the minimal standards of professional scholarship in history, and best remembered as an embarrassing reminder of the pitfalls current legal historians should avoid. Ascribing to previous scholarship in legal history many of the faults associated with classical legal thought in general, they have deprecatingly referred to it as doctrinal, internal, formalistic, apologetic, and conservative. They have also criticized its "presentist" orientation, trying to explain current law by connecting it to past law and thereby failing to understand past law in its own, often very different context. Given the low esteem in which they held the earlier scholars, it is not surprising that they have not discussed their work in any detail.

This book reveals that the widely held consensus about late nineteenth-century American legal scholarship is largely inaccurate. It prompts suspicion that this consensus derives more from the progressive intellectual and political agenda of twentieth-century scholars than from a close reading of their nineteenth-century predecessors. Historical understandings of law, not unchanging deductive formalism, pervaded the legal thought of late nineteenth-century American legal scholars. Contemporary scholars both at home and abroad recognized Holmes as part of this distinctively historical school of legal thought even as they indicated that his historical conclusions were both bolder and less accurate than those of his historically minded colleagues. Legal scholars often invoked history to reform rather than to justify existing law and, as some recent revisionist work has observed, were more likely to be Mugwump reformers or Jacksonian democrats than conservative apologists for laissez-faire capitalism. They frequently spoke out against the increasing materialism of American society and denounced the excesses and inequalities produced by the growth of corporate capitalism. Many American legal scholars were extremely well educated, well traveled, and multi-lingual. Some contributed to major literary and political journals of the period and participated actively in public affairs, from opposition to slavery before the Civil War to postwar efforts combating municipal

and corporate corruption, promoting civil service reform, and urging better treatment of American Indians. In their scholarly work, they acknowledged their intellectual debts to European scholars, particularly in Germany and England, even as they occasionally criticized the conservatism of the Europeans. Correspondingly, eminent European legal scholars, most impressively the great English legal historian Frederic Maitland, relied on the legal history written by Americans while praising its originality and quality. Even when the late nineteenth-century scholars displayed key characteristics ascribed to them by their later detractors, they typically were much more intellectually sophisticated than the detractors acknowledged. For example, although they frequently focused on the internal development of legal doctrine in an effort to understand current law, they were sensitive to how the past differed from the present, warned against mistaking resemblance for continuity, stressed reversals and dysfunctional survivals as well as progress over time, and recognized the contingency of history while highlighting the influence of external factors on internal legal development.

The emphasis on history as the key to understanding law was part of a general movement toward historical explanation in many disciplines by Western intellectuals on both sides of the Atlantic during the nineteenth century, often in reaction against the metaphysical speculation of the eighteenth century that they associated with the excesses of the French Revolution. This movement began most prominently in Germany. German historical scholarship and the German research university became models for ambitious scholars elsewhere, who frequently studied in Germany to receive professional training as yet unavailable at home. Throughout the nineteenth century, historically oriented scholars in many fields, including law, influenced each other. Savigny, who largely initiated the historical school of law in the early nineteenth century, had been inspired by prior German scholarship on the history of Rome and in turn inspired his student, Jacob Grimm, to investigate medieval German poetry and folk tales. Grimm's philological work on the history of Teutonic languages stimulated English scholars to study Anglo-Saxon language and culture. Their investigations eventually extended to Anglo-Saxon law. Henry Maine's widely read book, *Ancient Law*, published in England in 1861, popularized Savigny's historical jurisprudence in England and the United States. Ultimately more influential in the emerging fields of anthropology and sociology than in law itself, *Ancient Law* made an important contribution to the evolutionary social thought that prevailed on both sides of the Atlantic, preceding and remaining largely independent of Darwin's evolutionary theories based on natural selection. American legal historians who studied the history of English law in the decades after 1870 provided an important though overlooked intellectual link between the two leading English legal scholars, Maine and Maitland, while relying on the research methods and findings of German legal historians who had investigated the history of Teutonic law. The emphasis by the American legal historians on the Teutonic origins of English law encouraged and reinforced the late nineteenth-century American historians and political

scientists who maintained that fundamental American institutions, such as the New England town meeting, derived from Teutonic roots. As the text of this book reveals, these illustrations of transatlantic and interdisciplinary connections can easily be multiplied.

The American scholars felt personally connected to the legal history they studied. They identified themselves as members of a unified Anglo-American race derived from Teutonic origins. Bigelow even combined genealogical research into his own family, which he traced to medieval England, with his broader research on the history of the English common law, just as Maitland subsequently picked the county of Gloucester, where he had family connections, as the site of his early original research about medieval English law. Focused primarily on the origins of the Anglo-American legal system, these late nineteenth-century American legal scholars devoted less attention to the history of distinctively American law. Occasionally, they did comment on the history of American common law and constitutional law, often in elaborating their evolutionary legal thought. They also referred to and occasionally wrote about the legal consequences of major current events, such as Reconstruction following the Civil War and industrialization. Yet in contrast to Savigny and other early nineteenth-century German scholars, whose very turn to historical analysis was largely a reaction against the background and aftermath of the French Revolution, American legal scholars did not shape their historical analysis in response to Reconstruction and industrialization. The Americans adapted the evolutionary social thought that originated in Germany and had become pervasive throughout Western intellectual life by the time they began their scholarly careers. This intellectual influence, rather than political or economic factors, best explains the dominance of historical analysis in late nineteenth-century American legal thought.

Overwhelmingly committed to evolutionary conceptions of legal change, the late nineteenth-century American legal scholars did not display the timeless deductive formalism ascribed to them by twentieth-century commentators. They repeatedly stressed that law evolves in response to changing social customs, an approach that recognized external influences on law. Many believed that evolution, at least in Western countries, had produced progress, and a few equated Western progress with the racial superiority of peoples evolved from Teutonic "roots." Yet they did not think that the evolutionary process had stopped, and most did not limit evolutionary progress to Teutonic societies. Often explicitly rejecting deductive theories of law, they emphasized that law is an empirical science based on induction from historical evidence. As part of their inductive approach, they wanted to organize and classify the legal data they observed. When their historical research revealed the survival of laws that made sense in the past but that no longer functioned effectively in the changed society of the present, they urged legal reforms that would eliminate these dysfunctional survivals. They recognized that their classifications were temporary, subject to further revision as part of the continuous process by which law responds to evolving custom. Just as functional laws in the past had become

dysfunctional in the present, functional laws in the present could become dysfunctional in the future.

Emphasizing the significance of their evolutionary analysis of law, the late nineteenth-century American legal scholars made clear that they considered it a distinctive jurisprudential school. They explicitly differentiated it from prior jurisprudential schools, particularly natural law and analytic jurisprudence. They especially contrasted the unscientific speculative approach of these prior schools, based on a priori "speculation" and "mere theory," with their own "scientific" reliance on induction from the empirical evidence of history. Their use of induction, they often maintained, was analogous to its use in the natural and physical sciences. Beyond identifying historical legal science as a different and better jurisprudential school than natural law or analytic jurisprudence, the late nineteenth-century legal scholars applied it to some of the most fundamental legal issues of their time. Because they believed that judges were typically in a better position than legislators to respond to evolving custom, they favored adjudication over legislation. Yet they approved legislation in exceptional circumstances, such as periods of rapid social transformation when immediate and substantial changes in the law are required. In response to the dramatic industrialization of the United States, for example, many of them urged legislation governing child labor, the operation of dangerous machines, and tenement housing, thereby challenging the claim by many subsequent scholars that their general opposition to legislation was based on conservative resistance to legislative reform. Their fundamental emphasis on law as a response to evolving custom also explains many of their views about constitutional interpretation. Rather than focusing on the text of the Constitution or the original intent of the framers and ratifiers, they believed that constitutional law, like law generally, evolves as circumstances change. While they generally acknowledged that the written text of the Constitution imposes some interpretive limits on judicial discretion, they urged judges to recognize transformations of popular understandings of the Constitution, such as the definition of citizenship during and after the Civil War, even as some of them cautioned that judges should often defer to legislative interpretations of constitutional meaning.

Among the many late nineteenth-century American legal scholars who made evolutionary legal thought the dominant jurisprudential school in the United States, a few published important original contributions to legal history. Drawing on the methods and findings of German scholars, they investigated the primary sources of English law while emphasizing its Teutonic origins. They mostly dismissed prior English scholarship on the history of English law as amateurish, insular, and unscientific, but they also criticized as pedantic and abstruse the Germans they generally admired. Henry Adams, who introduced the professional study of legal history into the United States when he joined the Harvard history department in 1870, studied the history of Anglo-Saxon law. Together with his students, he used the details of Anglo-Saxon law to test, and often to refute, the provocative generalizations about legal evolution

that Henry Maine in *Ancient Law* derived mostly from the history of Roman law. Bigelow, Holmes, Thayer, and Ames, who all lived in the Boston area and were in contact with each other, continued the American study of the history of English law in the last three decades of the nineteenth century. Bigelow and Thayer focused on the history of particular subjects, procedure for Bigelow and evidence for Thayer, whereas Holmes and Ames wrote about numerous issues in the history of the common law. While covering the history of various discrete topics, these scholars addressed broader themes in the history of English law. Within a consensus about the primarily Teutonic origins of English law, they disagreed among themselves as well as with leading German historians, particularly Heinrich Brunner, about the relative influence of Anglo-Saxon and Norman sources and about the extent to which the English mostly continued or independently developed Norman law after the Norman Conquest. Frederic Maitland, the great English legal historian, praised and built on the work of these Americans in his own scholarship on the history of English law. Maitland also developed close professional and personal relationships with Thayer, and particularly with Bigelow. Some American legal scholars, including some who focused on the early history of English law, wrote much less extensively about the history of both common law and constitutional law in the United States.

The historical orientation of the late nineteenth-century American legal scholars was closely tied to the emergence of the American research university in the decades after the Civil War. Many of these scholars emphasized that the historical research they urged could only be accomplished by full-time professional scholars whose teaching loads left them ample time for research. They criticized the prevalence of part-time instructors at American law schools, typically practicing lawyers and judges who had full-time jobs elsewhere. The position of a law professor, they asserted, should be a vocation, as in Germany, not an avocation of busy lawyers, as in England. While characterizing the historical study of law as an inductive science, they explicitly argued that law, like other inductive sciences such as biology and physics, deserved inclusion in the emerging American research university. Many of these American legal scholars devoted themselves to the reform of American legal education. They were among the founding faculties of new, university based law schools devoted to higher academic standards for both teachers and students. Several became deans of these law schools. Others were instrumental in the transformation of Harvard under President Charles W. Eliot from a teaching college to a research university. In 1870, the year after he became president, Eliot appointed Adams as a history professor and Christopher Columbus Langdell as the dean of the law school. Grateful for Eliot's strong support of his teaching and scholarship based on German methods of original research, Adams recognized that his hiring was part of Eliot's fundamental effort to reform education at Harvard. Like scholars throughout the emerging American research universities, many law professors had studied as postgraduates in Germany and wanted to introduce German standards of scholarship in the United States.

The dominance of historical explanation throughout the Western intellectual world declined in the early twentieth century, in law, as in other disciplines. Just as the turn to history in legal scholarship was part of a general transatlantic movement during the nineteenth century, legal scholars on both sides of the Atlantic joined scholars in other disciplines during the decades around the turn of the twentieth century in a broad reorientation of social thought, which protested the excesses of liberal individualism at the expense of the collective public welfare. By promoting "sociological jurisprudence" as an attractive alternative to "historical jurisprudence" in his enormously influential early work during the decade before World War I, Roscoe Pound contributed substantially to the demise of historical explanation in American legal scholarship as well as to what became the prevailing, though importantly inaccurate, view of its role in nineteenth-century legal thought. Like many intellectuals in Europe and the United States, including the leading German and English legal scholars, Rudolf von Jhering and Frederic Maitland, Pound believed that traditional conceptions of individualism and individual rights impeded the attention to collective interests required in the modern world. He linked his intellectual interest in the history of legal thought with his strong conviction that American law, through the "mechanical" reasoning of deductive formalism, promoted extreme individualism at a time when the American public needed and demanded the legal recognition of collective interests to solve the pressing social problems that excessive individualism had largely produced. Various prior jurisprudential schools, he claimed, including the historical school that he recognized as dominant in the United States since 1870, contributed to the formalism and individualism that made American law a barrier to desirable social reform. He particularly criticized Supreme Court decisions that formalistically invoked individual constitutional rights such as "liberty of contract" to strike down progressive legislation enacted in the public interest.

Pound treated historical legal thought in America as largely derivative of the pioneering scholarship of Savigny in Germany and Maine in England, which he explored in substantially more detail than any work produced by Americans. He criticized both Savigny and Maine for their individualism, a criticism that applied much more fairly to them than to the Americans Pound largely ignored and thereby diminished. While developing sociological jurisprudence as an alternative to the outmoded jurisprudential schools of the past, he described it as an amalgam of anti-formalist German legal thought, especially as formulated by Jhering, American philosophical pragmatism, and the emerging social sciences. All of these influences, he stressed, recognized the importance of collective interests. He claimed that Holmes, in articles published in the 1890s and in his opinions as a judge, had anticipated its major themes. Ironically, Pound contributed to the decline of legal history largely through his own work as a legal historian. Using what seemed to be an evolutionary model of historical analysis to deny the continuing importance of history itself, he claimed that legal history at the turn of the twentieth century had value mainly as "preparatory work" for sociological jurisprudence.

The following chapter begins with an analysis of a revealing address to the American Bar Association by James Bradley Thayer, a professor at Harvard Law School. Thayer's address highlights the importance of history in late nineteenth-century American legal thought. The chapter then provides brief biographical sketches of the eleven leading American legal scholars whose writings about legal history provide the focus of this book. The remainder of the book consists of three parts. Part I, "The European Background," summarizes the general turn to historical explanation in nineteenth-century Western thought and examines the major European legal scholars who most influenced the Americans, from Savigny to Jhering in Germany, and Sir Henry Maine in England. Part II, "The Historical Turn in American Legal Scholarship," is the core of the book. Devoting successive chapters to the scholarship of the major American legal historians of the late nineteenth century, it concludes with an analysis of the central themes of the distinctive "historical school of American jurisprudence" that dominated American legal thought during this period and included many scholars who did not themselves write original works of legal history. Part III consists of three long chapters. The first discusses the great English legal historian Frederic Maitland, who built on prior American scholarship on the history of English law while bringing the nineteenth-century study of English legal history to a culmination and, in many respects, to a close. The second portrays Pound's key role in transforming American legal scholarship from historical to sociological understandings of law while creating the portrait of his predecessors that dominated the leading twentieth-century interpretations of late nineteenth-century American legal thought. I review and assess these twentieth-century interpretations in the final chapter.

I

The Historical Study of Law in the United States

In August 1895, James Bradley Thayer, as chairman of the Section on Legal Education of the American Bar Association, read an address entitled "The Teaching of English Law at Universities." The address was published several months later in the *Harvard Law Review*. Nearing the end of a long and varied career, Thayer observed that he based his comments on eighteen years of busy legal practice followed by twenty-one years as a professor at Harvard Law School.[1] His address emphasized that legal scholarship, legal education, and practical law reform all depend on the study of legal history.

According to Thayer, "every man who proposes really to understand any topic, to put himself in a position to explain it to others, or to restate it with exactness, must search out that one topic through all its development."[2] In "thorough historical and chronological exploration," Thayer maintained, "lie hidden the explanation of what is most troublesome in our law." With effective historical research, the "dullest topics kindle" and "the most recondite and technical fall into the order of common experience and rational thought." Thayer stressed that studying the history of any part of the law inevitably reveals "the necessity of restating the subject in hand." Through historical investigation, "many a hitherto unobserved relationship of ideas comes to light, many an old one vanishes, [and] many a new explanation of current doctrines is suggested." Confused topics are disentangled, ambiguities are cleared up, false theories are exposed, and "outworn and unintelligible phraseology" becomes understandable. History, in short, is the best "dissolver and rationalizer of technicality" and enables a "new order" to arise.[3]

The essential work of historical reconstruction as the basis for restating the law, Thayer stressed, must be performed by full-time law professors in universities. To be effective, these professors must specialize in only a few related

[1] James Bradley Thayer, The Teaching of English Law at Universities, 9 Harv. L. Rev. 169, 182 (1895).
[2] Id. at 177.
[3] Id. at 178–9.