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The Common Law Tradition in American Legal Historiography*

[*This essay first appeared in 10* Law & Society Review *9 (1975), as the first part of an introduction to a Festschrift for the Wisconsin social-legal historian James Willard Hurst. Its aim was to sketch the history of American legal historiography before Hurst came on the scene and to explain how Hurst broke with the tradition of largely "internal" legal history. (In this collection, the essay is split into two parts, with the second part on Hurst's contributions – "James Willard Hurst – Social Legal History's Pioneer" – in the section on "Legal Historians" that follows this one.) Since this was written several notable works have amplified and added much valuable detail to the account given here – most especially of legal history-writing in the nineteenth century: John Burrow*, A Liberal Descent: Victorian Historians and the English Past (1981); *Stephen Siegel, "Historism in Late Nineteenth Century Constitutional Thought," 1990* Wis. L. Rev. *1431; Kunal Parker*, Common Law, History and Democracy in America, 1790–1900: Legal Thought Before Modernism (2011); *and David M. Rabban*, Law's History: American Legal Thought and the Transatlantic Turn to History (2012).]

In 1963, the Italian historiographer Arnaldo Momigliano told an assembly of legal historians that they were gathered to celebrate "a historical event of some importance, the end of history of law as an autonomous branch of historical research." At least in the historiography of ancient law, he said, "the elimination of history of law as independent history now seems to me to be settled."

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Nor is it important to debate whether it was Max Weber or the French school of sociology or the teaching of Marx and Engels or, finally, the influence of Marc Bloch that precipitated this solution. It is inherent in the general recognition that law, as a systematization of social relations at a given level, cannot be understood without an analysis of the sexual orientations, the moral and religious beliefs, the economic production and the military forces that characterize a given society at a given moment, and are expressed in associations of individuals and in conflicts. It is conceivable today that history of literature, history of art, history of science, and history of religion can each retain some sort of autonomy, inasmuch as each is concerned with a specific activity of man. But what is no longer conceivable is that history of law should be autonomous; for by its very nature it is a formulation of human relations rooted in manifold human activities. And if, in some civilizations, there is a class of jurisconsults with special rules of conduct and of reasoning, this too is a social phenomenon to be interpreted.[1]

In the historiography of American law, the process Momigliano thus described as completed is only just beginning, for American legal historians have usually worked on the assumption that, at least for the purpose of dividing academic labor, it makes sense to identify a sphere of "legal" phenomena in society, and to write about how these have changed over time. It has never, of course, been possible to mark off the precise boundaries of such a field, but as a practical matter it almost inevitably turns out that they are drawn around the institutions, the occupations, the ideas and the procedures that have the appearance at any one time of being *distinctively legal*.[2] One might crudely represent this way of looking at law in society as follows:

input → Law → output

[1] A. D. Momigliano, "The Consequences of New Trends in the History of Ancient Law," in Momigliano, *Studies in Historiography* 239, 240–241 (1966).

[2] This would seem to imply that no one could write the legal history of a society that had no notion of "law" as a bundle of specialized activities distinct from, and to some extent autonomous of, other social phenomena – e.g., a society that did not distinguish between legal and religious norms. Legal historians usually solve this problem by treating of the aspects of such societies that appear to serve counterpart social functions to those of the relatively autonomous legal systems. For example, courts perform certain dispute settlement functions in modern Western societies which might, in other societies of the past, have been performed by councils of warriors or village elders. The warriors or elders will therefore be treated in the legal history of the other society. Yet though dispute settlement may be done by warriors or elders in modern Western societies also, that is not "law" and is therefore usually of no interest to legal historians. This somewhat curious manner of defining the field of specialization is partly responsible for the fact that focus abruptly shifts (and narrows) whenever a society exhibits traces of an autonomous legal order. On this point, see text at notes 29–31, 40–44, *infra*. On the emergence of "autonomous" legal orders in modern societies, see *Max Weber on Law and Economy in Society* (Rheinstein ed. 1954), especially chs. 7–9, 11; for a brilliant recent reinterpretation, Roberto Mangabeira Unger, *Law in Modern Society* (1976), especially at 52ff.

Inside the box is "the law," whatever appears autonomous about the legal order – courts, equitable maxims, motions for summary judgment; outside lies "society," the wide realm of the nonlegal, the political, economic, religious, social; the "inputs" are social influences upon the shape of the mass of things inside the law-box, the "outputs" the effects, or impact, of the mass upon society. Within the structure of this crude model there is, of course, a great range of possible theories of law, from a theory asserting that law derives its shape almost wholly from sources within the box (i.e., that it is really autonomous as well as seeming so), to one claiming that the box is really empty, the apparent distinctiveness of its contents illusory, since they are all the product of external social forces. Yet even those who incline to the latter view[3] take the contents of the box, epiphenomenal though they may be, as the main subject-matter of concern to the legal historian. Not that this is the only way of treating law historically, as Momigliano's words make clear;[4] but it probably is the only way for someone who defines himself as a "legal" historian; he has no choice.

Where he does have a choice, and an important one, is between writing internal and external legal history.[5] The internal legal historian stays as much as possible within the box of distinctive-appearing legal things; his sources are legal, and so are the basic matters he wants to describe or explain, such as changes in pleading rules, in the jurisdiction of a court, the texts assigned to beginning law students, or the doctrine of contributory negligence. The external

[3] Lawrence M. Friedman probably inclines as far as anyone. See e.g., his *History of American Law* (1973):

> This book treats American law … not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society … The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls … [T]he strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.

Id. at 10, 14. Professor Friedman acknowledges the existence of legal phenomena that are purely "internal" or "formal" – technical aspects of the system that can be altered or adjusted without affecting much (if at all) the outside society. See his "Law Reform in Historical Perspective," 13 *St. Louis U.L.J*. 351 (1969). He also recognizes that people living in some societies may perceive their legal order to be autonomous and to associate autonomy with legitimacy; he would classify such beliefs as part of a society's "legal culture" – "values and attitudes which … determine the place of the legal system in the culture of the society as a whole." See his "Legal Culture and Social Development," 4 *L. & Soc' y. Rev*. 29, 34 (1969).

[4] Some scholars would go further than Momigliano; see, e.g., Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," 8 *L. & Soc'y Rev*. 217, 221–224 (1973), for the views of a legal anthropologist who has given up on "law" altogether as a useful organizing concept in social research.

[5] These terms are borrowed from T. S. Kuhn's treatments of (remarkably similar!) problems in the historiography of science. See especially his "Relations between History and History of Science," 100 *Daedalus* 271, 279 (1971), "External history" seems to me a better label than "social" history because it is more inclusive; specifically, it includes intellectual and cultural history.

historian writes about the interaction between the boxful of legal things and the wider society of which they are a part, in particular to explore the social context of law and its social effects, and he is usually looking for conclusions about those effects.

Up until very recently, and with few exceptions, American legal history has been of the internal kind. From time to time the few proponents of external history would direct an exasperated complaint against this situation, without much altering it.[6] As it happens, I tend to sympathize with most of these complaints, but writing another one is not my present purpose, since others have already said trenchantly what needed to be said; and in any case the situation is rapidly improving and there is no need for one. At this point it is more interesting to ask how the tradition of internal historiography got itself established, how it managed to last so long, and what the consequences of its ascendancy were for historical writing about American law. With that kind of perspective it might be possible adequately to assess the achievement of James Willard Hurst, the legal historian who broke decisively with the main tradition over thirty years ago, and who has since become the leading exponent and practitioner of an external historiography.

With the purpose of attempting that assessment in mind, the brief essay that follows tries to sketch the broad outlines of the paths taken by American legal historians since the beginnings of their discipline in the 1880s.[7] As I see it, there was a Classical Period from about 1880 to 1900, followed by a long slump lasting until about 1930; a First Revival of interest and activity in legal-historical studies from the 1930s through the early 1960s; then a Second Revival starting around 1970 and still going strong.[8]

[6] The best of these are, I think, Daniel J. Boorstin, "Tradition and Method in Legal History," 54 *Harv. L. Rev.* 424 (1951); George L. Haskins, "Law and Colonial Society," 9 *Am. Q.* 354 (1957); Stanley N. Katz, "Looking Backward: The Early History of American Law," 33 *U. Chi. L. Rev.* 867 (1966); Lawrence M. Friedman, "Some Problems and Possibilities of American Legal History," in *The State of American History* 3 (Bass ed. 1970); Morton J. Horwitz, "The Conservative Tradition in the Writing of American Legal History," 17 *Am. J. Leg. Hist.* 275 (1973); Herbert Alan Johnson, "American Colonial Legal History: A Historiographical Interpretation," *in Perspectives on Early American History* 250 (Vaughan & Billias eds. 1973), hereinafter Johnson, "Colonial Legal History"; and the many historiographical contributions of Willard Hurst, of which the most comprehensive, as well as the most recent, is "Legal Elements in United States History," in *Law in American History* 3 (Fleming & Bailyn eds. 1971), hereinafter Hurst, "Legal Elements." Much acerbic and astute criticism of the state of the art has appeared over the years in the *Annual Survey of American Law's* "Legal History" sections written by John Phillip Reid (1962–66); Reid and William E. Nelson (1969–70); and Nelson (1967–69; 1973–present). I am very indebted to all the articles cited here. One of the many ironies connected with American legal history is that its shortcomings have called forth so useful a historiographical literature.

[7] See Calvin Woodard, "History, Legal History, and Legal Education," 53 *Va. L. Rev.* 89 (1967) for a similar sketch arriving at somewhat different conclusions.

[8] Some readers may find my idea of what constitutes "American legal history" idiosyncratic – both too inclusive and too exclusive. It includes studies in English legal history in the 1880s and 90s, but then drops these; and excludes constitutional, administrative, and other plausible candidates

Some hedges and qualifications are in order. I do not try here to provide a comprehensive bibliographical survey; there are several excellent ones available.[9] I shall have very little to say about the literature of the Second Revival, contemporary historiography, since I plan to write about that on another occasion. And I can't do here what really ought some day to be done: a full-blooded social history of legal historiography in this country, showing the relationship of attempts to reconstruct the legal past to changes in the situation of lawyers generally, not only in the schools but in practice and in politics; and to intellectual developments outside the law, especially in philosophy and the social sciences.[10] In other words, this story is properly a minor subtheme of a much larger one – which remains untold because its telling has had to wait upon the development of an external legal historiography.[11] In this piece there are hints and whispers about the important relationships, but nothing more.

for the category of American legal history throughout. Let me try to justify this. Hardly anything one could call American legal history was written in the 1880s and 90s, but one has to say something about the legal history that was written (English, mostly), because it exerted such a strong influence on what came later. After that I try to stick to the American side, including in the "legal history" field whatever contemporaries were likely to include, which until recently meant the history of "private law" subjects and not much else except perhaps constitutional history, which I do not feel competent to discuss, but which I gather has suffered from comparable if considerably less severe limitations. See the bibliographical note, and sources there cited, in Harold M. Hyman, *A More Perfect Union* (1973), pp. 557–560. Notions of what legal history is about are, of course, rapidly changing, thanks in large part to the work of Willard Hurst and his school. See text at notes 132–135, *infra*.

[9] See, e.g., Reid & Nelson, *Ann. Survey Am. L.*, *supra* note 6; Friedman, *History of American Law*, *supra* note 3, at 596–621; Friedman *supra* note 6; Johnson, "Colonial Legal History"; David H. Flaherty, "An Introduction to Early American Legal History," in *Essays in the History of Early American Law* (Flaherty ed. 1009); Wythe Holt, "Now and Then: The Uncertain State of Nineteenth Century American Legal History," 7 *Ind. L. Rev.* 615 (1974); and Harry N. Scheiber, "Federalism and the American Economic Order," 10 *L. & Soc'y Rev.* 57 (1975) (in this issue, *infra*).

[10] For an example of the exciting possibilities of a historiography relating law and lawyers to a wider culture, see William J. Bouwsma, "Lawyers and Early Modern Culture," 73 *Am. Hist. Rev.* 303 (1973) and the contributions already made to such a history cited in *id.* at 304 n.4.

[11] Friedman, *History, supra* note 3, at 567–595 sketches a provocative brief outline of twentieth-century American legal history. The best general secondary treatment of the history of the American bar remains, twenty-five years later, James Willard Hurst, *The Growth of American Law: The Lawmakers* [hereinafter Hurst, *Lawmakers*] 249–375 (1950), a circumstance that probably gives the author little satisfaction. The history of legal education has been well treated recently in Robert Stevens, "Two Cheers for 1870: The American Law School," in *Law in American History* 405, *supra* note 6; Jerold S. Auerbach, "Equity and Amity: Law Teachers and Practitioners, 1900–1922," *id.* at 551; and William Twining, *Karl Llewellyn and the Realist Movement* (1973). Two books are especially successful at relating legal to philosophical thought in the twentieth century: Morton White, *Social Thought in America: The Revolt Against Formalism* (2nd edn. 1957) and David A. Hollinger, *Morris R. Cohen and the Scientific Ideal* (1975). There are several studies of Realism: among them Wilfrid E. Rumble, Jr., *American Legal Realism: Skepticism, Reform, and the Judicial Process* (1968); Calvin Woodard, "The Limits of Legal Realism: An historical perspective," 54 *Va. L. Rev.* 689 (1968); Twining, *supra*, this note; Edward A. Purcell, Jr., *The Crisis of Democratic Theory* (1971); and G. Edward

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At the beginning of professional legal historiography in the United States which, for convenience, may be taken to be the publication by Henry Adams and his students of their *Essays in Anglo-Saxon Law* in 1876, nobody would have drawn a distinction between legal history and any other kind. For the first generation of professional historians in this country borrowed from Germany not only the name and method of "scientific" historiography, but also the idea of the proper subject-matter of that science: the development of political institutions from their remotest origins to the present. In the hands of the leading professionals in England like Freeman and Stubbs, and in America like Herbert Baxter Adams and John W. Burgess, this turned out to mean that virtually all history was to be legal and constitutional history: they were going to do for Anglo-American political forms what their German models had done for the Roman. Thus, there was nothing eccentric about the young Henry Adams's choice of Anglo-Saxon law as his Harvard seminar project in medieval history, or about the young O. W. Holmes's decision to study first Roman law and then the early forms of common law: the most exciting intellectual problems of the day were problems concerning origins of present political and legal forms, and the hottest debates over whether these origins were Roman or Teutonic.[12]

This preoccupation with origins resulted, of course, from the subscription of nineteenth-century historians to various kinds of evolutionary assumptions about the development of political institutions. These assumptions varied greatly in their particulars and patrimony from historian to historian: some learned an idealist historical jurisprudence from Savigny; others picked up Freeman's idea of history as the gradual unfolding of political liberty; still others borrowed metaphors from anthropology or comparative philology. At the common core of these theories were the assumptions that all societies undergo comparable processes of development from the simple to the complex, the primitive to the civilized; that these processes are continuous and progressive; and that the business of scientists was to discover, through the comparative study of developed and undeveloped peoples, the laws governing the growth

White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America," 58 *Va. L. Rev.* 999 (1972). This literature on Realism, though interesting and useful, still leaves one with the feeling that something important has been left out. Except for Twining, the authors tend to treat the Realists as (rather inept) legal philosophers, quoting from their more speculative work and from their debates on the nature of law with critics like Roscoe Pound and Morris Cohen. What gets slighted in the process is most of the stuff that the Realists themselves considered their most important work: their studies of subjects like procedure and commercial law. Research now being done by John Henry Schlegel should help to correct this. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976) appeared too late to be consulted for this essay.

[12] On the significance of Henry Adams' seminar, see Helen M. Cam, *Law Finders and Law-Makers* 176–182 (1962); on the influence of German writers on Holmes, Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years*, 1870–1882, ch. 5 (1963).

of civilizations.[13] The particular business of historians was to trace the development of customs and ideals of already developed civilizations back to their ancient beginnings. For the extremely influential historians H.B. Adams and Burgess, who were especially impressed by German conceptions of history as the science of the state, this program dictated studying the development of political institutions, in their legal and constitutional forms.[14] National and racial ethnocentrism then combined to make Anglo-American civilization the focus of study; and this in turn made of the historiography of North America simply the study of the most recent stages of a long, continuous process beginning in the ancient Teutonic forests.[15]

Institutional-evolutionary studies in legal history flourished in the law schools too in the 1880s and 90s, especially at Harvard; it was under the influence of this school (to varying degrees) that Holmes, Bigelow, Thayer and Ames made their contributions to the study of early English law.[16] The point of dwelling on the assumptions of the historical school is not to depreciate the achievement of these men, who were among the few people Maitland found it worthwhile to correspond with on professional subjects;[17] it is that these assumptions have continued to linger around the law schools to the present day, like radioactive matter with an abnormally long half-life. Professional historians – helped and sometimes led by the legal historians – soon repudiated the simpler tenets of this school, such as the theories of a unilinear evolutionary development and of the Teutonic origins of Anglo-Saxon civilization; and most of them went on to shake off its influence almost entirely. What we have to account for is the survival of nineteenth-century evolutionary theory not only in amateur legal writing – the brief "historical introductions" to textbook or article – but in various indirect ways in monographic legal history as well.[18]

The solution to the puzzle lies, I think, in the reasons that the new law schools were so hospitable to legal-historical studies in the first place: their

[13] J. W. Burrow, *Evolution and Society, A Study in Victorian Social Theory* (1966) emphasizes the variety of nineteenth-century evolutionary theories; Robert A. Nisbet, *Social Change and History* 166–188 (1968), their similarity.

[14] See especially Jurgen Herbst, *The German Historical School in American Scholarship* 112–116 (1965); and John Higham, *History: Professional Scholarship in America* 158–161 (1965). Out of fifteen history courses given at Harvard in 1890–91, "twelve were wholly or partly concerned with constitutional development." Cam, *supra* note 12, at 182.

[15] The titles of some of H. B. Adams's articles will convey the flavor of some of his scholarship: "The Germanic Origin of New England Towns," *Johns Hopkins Studies in History and Political Science* (ser. 1, no. 2, 1882); "Saxon Tithing-Men in America," *id.* (ser. 1, no. 4, 1882); "Norman constables in America," *id.* (ser. 1, no. 8, 1883).

[16] James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913); Melville M. Bigelow, *Placita Anglo-Normannica* (1879) and *History of Procedure in England from the Norman Conquest* (1880); Oliver Wendell Holmes, Jr., *The Common Law* (1881); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898).

[17] See C. H. S. Fifoot, *Frederick William Maitland: A Life*, at viii, 69–70, 75–76, 80 (1971).

[18] See text at notes 23–27, 32–44, *infra*.

faculties (at least initially) perceived no conflict between historical research and the strictly professional ambitions of the schools. To be sure, the founding generation of law teachers defined a role for themselves in the profession differing from the practitioner's. The legal scholar was not simply to train his students in the law as it was, but to ascertain the principles truly underlying the law through scientific research, to the end of reforming existing law by bringing it into conformity with those principles.[19] History was supposed to be the primary field of research. But ultimately the results of research were to be grist for the judicial mill. Ames, for example, thought of historiography simply as one of the useful lawyer's tasks that the professor, because of his freedom from the press of business, could attend to with the greater efficiency that comes from specialization off unction. What was wanted was:

> a high order of treatises on all the important branches of the law, exhibiting the historical development of the subject and containing sound conclusions based on scientific analysis… Too often the just expectations of men are thwarted by the action of the courts, a result largely due to taking a partial view of the subject, or to a failure to grasp the original development and true significance of the rule which is made the basis of the decision.

As an instance he cites the rule denying enforceability to creditors' agreements to release debtors on part payment of the debt: this "unfortunate rule," says Ames "is the result of misunderstanding a *dictum* of Coke. In truth Coke, in an overlooked case, declared in unmistakable terms the legal validity of the creditor's agreement."[20]

If only historians had earlier brought to light Coke's other case! Ames, plainly, felt none of Maitland's skepticism about the results of mixing legal dogma and legal history. Maitland said: "The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms."[21] Like most of his colleagues, Ames did not see the contradiction. He hoped to subordinate the development of dogma to historical science. In fact, things turned out exactly the opposite: legal history was subordinated to legal technique, the immediate needs of the profession to keep current dogma rationalized in line with past authority. The historical school's view of law as the continuous development of institutional forms lent itself beautifully to these needs, since that view made it easy to confuse the history of law with the "common law tradition" – the fictional continuity that each generation

[19] See Auerbach, "Equity and Amity," *supra* note 11 at 553–572.

[20] James Barr Ames, "The Vocation of the Law Professor," in Ames, *supra* note 16 at 366. [The reference is clearly to *Foakes* v. *Beer*, 9 App. Cas. 605 (1884), *citing* Pinnel's Case, 5 Co. Rep. 117a (1602).] Ames also saw a role for the law professor as an "expart counselor in legislation," by which he meant advisor on technical law reform. *id.* at 367–368.

[21] "Why the history of law is not written," *Collected Papers*, I, 480, 493 (1911).

of common lawyers imposes, in its own fashion and for its own ends, on the development of judicial doctrine.[22]

Institutional-evolutionary studies prospered in the law schools because they had something to offer the profession: documentation of the unbroken chain of connection between living lawyers and an ancient tradition. The successors in historiographical fashion to the historical school, however, could offer nothing of the kind. The second generation of American institutional historians, C. M. Andrews and H. L. Osgood in particular, rejected the idea of universal and necessary legal development; and picked up from the research of Maine, Brunner, Maitland, and Vinogradoff (among others) the program of studying the effects upon legal forms of specific and local variations in social environment.[23] Meanwhile the New, or Progressive historians led by Turner and Beard were carrying off much of the historical profession in their challenge to the primacy of the study of the development of political institutions, insisting that legal and constitutional forms were only secondary derivatives of economic and social forces. Beard was of course the most influential proponent of a revised notion of law as the expression, not of the evolving ethical ideals of the Anglo-Saxon race, but of economic interests pursued through factional politics.[24]

The law schools had small use for either of these modes of practicing history, even though Holmes and Pound, both law teachers, had been instrumental in promoting them. Very little American history of any distinction in

[22] Horwitz, *supra* note 6 at 282–283, calls attention to the "incredibly striking" parallels between lawyer's legal history and scientists' history of science, quoting T. S. Kuhn, *The Structure of Scientific Revolutions* 137–138 (2nd edn. 1970):

> Textbooks … begin by truncating the scientist's sense of his discipline's history and then proceed to supply a substitute for what they have eliminated. Characteristically, textbooks of science contain just a bit of history, either in an introductory chapter or, more often, in scattered references to the great heroes of an earlier age. From such references both students and professionals come to feel like participants in a long-standing historical tradition. Yet the textbook tradition in which scientists come to sense their participation is one that, in fact, never existed … [S]cience textbooks … refer only to that part of the work of past scientists that can easily be viewed as contributions to the statement and solution of the text's paradigm problems … No wonder that textbooks and the historical tradition they imply have to be rewritten after each scientific revolution. And no wonder that, as they are rewritten, science once again comes to seem largely cumulative.

[23] On the new institutional (or "imperial") historians, see Higham, *supra* note 14 at 162–166; Johnson, "Colonial Legal History." Maine is usually thought of as an evolutionist; but Kenneth E. Bock has persuasively argued that he was an opponent of the theory of a unilinear evolutionary development, and not interested in hunting for origins among primitive peoples, but instead was concerned to study law in relation to the entire surrounding culture, including its "relatively recent history." (I.e., Maine was disposed to explain ancient law by ancient history, but not modern law.) "Comparison of Histories: The Contribution of Henry Maine," 16 *Comp. Stud. in Soc' y & Hist.* 232, 247 (1974).

[24] On the Progressives, see Richard Hofstadter, *The Progressive Historians* (1968), especially 181–218; and Higham, *supra* note 14 at 171–182.

the institutional vein of Andrews and Osgood was written in the law schools between 1900 and the revival of legal-historical studies in the 1930s; this is probably because history, like liberal learning generally in that period, fell victim to the case method's exclusive claim on the undergraduate law curriculum. Moreover the institutional approach demanded long and patient study in primary materials, time taken away from, and not yielding any particularly valuable results in aid of, treatise and case-book writing.[25] As for Progressive history, it was simply anathema. When the Progressives took over American constitutional history they pretty well wiped out internal-doctrinal and intellectual-approaches among the historians, leaving these to be cultivated (with great distinction, as it turned out) by political scientists like Corwin and McIlwain.[26] They could obviously not have converted many lawyers to their method in the early part of this century, since in its extreme forms it denied the existence of any autonomous content to law, and hence any meaning to legal historiography as traditionally practiced. The Progressives did not themselves produce (at least, until Willard Hurst began to write) any significant body of work on private law; but their hostility helped effectively to split off legal history from the main action in American scholarship and to isolate it in the law schools.[27]

[25] The case method, in Langdell's original conception a way of getting across the basic principles of legal science, rapidly acquired its present-day justification as a pedagogic vehicle for the teaching of legal method. Thus justified, it became the device for teaching every undergraduate law course, tending to drive out subjects (such as legal philosophy and history) not suited to being so taught. See Stevens, *supra* note 11 at 435–449. In 1960, commenting bitterly on the anti-intellectualism accompanying the spread of the Harvard method in the late nineteenth and early twentieth centuries, Karl Llewellyn recounted that when

> [William A.] Keener was called to Columbia in 1890 to put that law school on a footing worthy of a great University, he brought with him two policies: (1) "The" case-system… (2) All that noise which is not "law" must go out; a "law" curriculum must cast out Ishmael. Columbia … had therefore to amputate from any official "law"-connection what became the Department of Political Science. Thus the Roman Law Perspective of a Munroe Smith, the scholarship and vision of a [Frank J.] Goodnow, the power and range of our greatest international lawyer, John Bassett Moore [who trained, among others, Julius Goebel, Jr.], flourished not within the law curriculum, nor for it, but across the barbarian border … In 1915, when, already our foremost jurisprude, [Roscoe Pound] became Dean at Harvard Law School, he deliberately took his own Jurisprudence course *out of the undergraduate curriculum*. He kept it out, lest his bulk of graduates be distracted – or contaminated.

Llewellyn, "The Study of Law as a Liberal Art," in *Jurisprudence* 375, 377–378 (1962). [Italics Llewellyn's; interpolations mine.]

[26] See generally, Herman Belz, "The Realist Critique of Constitutionalism in the Era of Reform," 15 *Am. J. Leg. Hist.* 288 (1971); Paul L. Murphy, "Time to Reclaim: The Current Challenge of American Constitutional History," 69 *Am. Hist. Rev.* 64 (1963).

[27] It is not always appreciated how wide the split was. One can get some sense of it from casual remarks made recently by non-lawyer historians who have become interested in law. For example: (a) Eugene Genovese: "[T]he fashionable relegation of law to the rank of a superstructural and derivative phenomenon obscures the degree of autonomy it creates for itself." *Ron, Jordan, Roll* 25 (1974). (b) Harry N. Scheiber, speaking of recent developments in economic history, refers to "*new* lines of inquiry that stress institutional and doctrinal development in American