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Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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