

**"The Past as Authority and as
Social Critic: Stabilizing and
Destabilizing Functions of History
in Legal Argument"**

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THE PAST AS AUTHORITY AND AS SOCIAL CRITIC: STABILIZING AND
DESTABILIZING FUNCTIONS OF HISTORY IN LEGAL ARGUMENT

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In the last twenty years there has been a remarkable revival of interest in history among lawyers and legal scholars, dramatically so in the United States, the country that Europeans like to accuse of lacking any consciousness of its past. Here legal and constitutional history are unquestionably living subjects, the indispensable resources of the characteristically legalized forms of our political argumentation. There is nothing at all new, of course, in the fact of lawyers resorting to history for their argumentative materials. Lawyers and history have always cohabited in a relationship of intimate antagonism. Lawyers have always needed history, just as they have always abused it. They have been among the chief founders of modern historiographical practice, as well as the persistent enemies of a genuinely historical outlook. The revival that is now taking place relies mostly on ways of making history relevant to legal argument that have been around for some time, some of them from early modern Europe, others of more recent eighteenth and nineteenth century invention.¹ Much of this paper will be given to sketching some of these recurrent modes of lawyers' resort to history, along with some modern examples. But I shall also want eventually to suggest, though very tentatively, that there may be something new in the current revival after all, some ways of using history that do not quite repeat familiar patterns, and that point towards what may be less abusive forms of coexistence, on the model, say, of Soviet-American relations after the Cold War.

First to explain the apparent paradox: why lawyers keep going back to history and keep abusing it. The need to resort to history is obvious: law derives its authority from things that

¹The general treatments I've found most helpful include: Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (1990) and *Foundations of Modern Historical Scholarship* (1970); Julian Franklin, *Jean Bodin and the Sixteenth Century Revolution in the Methodology of Law and History* (1963); J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (1957); Mack Walker, *Johann Jakob Moser and the Holy Roman Empire of the German Nation* (1981); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* (2d ed. 1967); Paolo Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century* (1977; tr. 1981); J.W. Burrow, *A Liberal Descent: Victorian Historians and their Past* (1981); Peter Stein, *Legal Evolution: The Story of an Idea* (1980); John P. Dawson, *Oracles of the Law* (1968); James Whitman, *The Legacy of Roman Law in the German Romantic Era* (1990); David Lieberman, *The Province of Legislation Determined* (1990).

happened in the past, sometimes the quite distant past: from ancient documents or enactments, precedents, customs or traditions. The Anglo-American legal tradition has moreover been comparatively empirical and historically-minded, rather than conceptualistic and systematic; thus inescapably to some extent backward-looking in both common-law and Constitutional adjudication. Yet law and lawyers tend to be conservative rather than reactionary influences, committed to stabilizing present advantages and expectations -- or at most to encouraging gradualist reformism -- rather than to restoration of the past. The past is therefore chiefly serviceable so far as it can be seen as of a homogeneous piece with the present, so that its authority will legitimate the often considerable social dislocations that have been taking place. Legal elites of the industrializing societies of the nineteenth century, in their roles as guardians of the "traditional rights of property", helped rationalize the process of wholesale destruction of existing property rights and their transfer and consolidation into the hands of entrepreneurial users.

A. Lawyers' History -- Some Standard Modes

A look at some of the conventional modes of lawyer's history will quickly reveal why it is -- indeed, usually must be -- tortured history.

1. The most basic and unavoidable lawyer's resort to historical materials is to texts that are themselves the operative law: that is, whose authoritative reading will actually resolve (or at least bear on) a legal dispute -- a constitution, statute, charter, grant, contract or testamentary instrument, and the like. The lawyer-historian's contribution may be actually to discover the text; or simply to help interpret it, possibly with the aid of whatever contemporaneous records that may be helpful to the task. Sometimes the question posed to the text is authentically antiquarian ("Did James I intend in his grant to the Pennsylvania proprietors to include rights to exploit the sea-bed?"). But much more often it is aggressively anachronistic ("Did the Framers of Article I of the Constitution confer upon the federal government the power to construct an interstate highway system?" "Would the Framers of the Fourteenth Amendment have wanted racial integration of the schools?"), a question that a conscientious historian cannot really help to answer -- or, to put this more cautiously, can help only very indirectly -- since the present dispute is likely to be one that the text's authors could not have imagined, or, even if they could have imagined it, would have been unable to approach with anything like a modern's experience and tacit knowledge.

The lawyer's easiest course, naturally, is simply to read the document as if it had been uttered in her own time, wrenching it out of history altogether and relocating it in modern context. The main alternative usually proposed, reconstruction in detail of the contemporaneous understandings of its original authors or

audience, is attended with famous practical difficulties² -- their intentions may be undiscoverable, they may have disagreed about what they intended or left intentions vague or ambiguous, etc. If the lawyer bypasses these difficulties and partially succeeds in reconstructing intentions with some precision, she is likely to find herself in an alien and unrecapturable social and conceptual world, whose concerns seem both parochial and quite remote from those they have been resurrected to address. No wonder that when such detailed reconstructions are accomplished by legal historians, they are usually ignored in the profession and courts.

2. One middle way between anachronism and antiquarianism is to reconstruct the consciousness of the text's historical authors at a level of generality that will comfortably straddle both past and present, so as to be able to claim with perfect truth that legal principles don't change, though their applications must vary with changing circumstances. The level of generality may sometimes rise very high to make the straddle ("The Founders were suspicious of concentrated power"), so much so indeed as to soar above the specific intentions of historical legislators to the general mode of thinking of their age, or even to the "spirit" or "genius" of "our Constitution and institutions" (e.g. "Teutonic democracy", "Anglo-Saxon norms of fair procedure".)

Within this middle way there have been two major variations, one stressing the timelessness of the basic principles, the other their adaptation over time to changing circumstances. The choice of one path or the other can lead, as Pocock for example has shown in his contrast of seventeenth-century English conceptions of "immemorial" common-law custom, one (Coke's) insisting on its foundation in the ancient Gothic constitution, the other (Hale's) emphasizing its ceaseless adaptability, to radically divergent views of law.³

(a) The first method usually privileges a particular historical moment or age -- Rome in the period of classical legal science, pre-Conquest Anglo-Saxon England, the Founding American generation of 1787 -- as having exemplified the principles in an exceptionally pure form; everything since, if not decline, must be a struggle to recapture that purity. Again, this sort of lapsarian history is not necessarily or even usually a reactionary method, in the hands of a jurist willing to believe, let's say, that the Ur-principles of common-law or Roman-law legal science are devoted to the promotion of individual free will through protection of the owner's security and powers to

²Elegantly summarized in Paul Brest, *The Misconceived Quest for the Original Understanding*, B.U.L. Rev. (197).

³J.G.A. Pocock, *The Ancient Constitution and the Federal Law*

dispose of private property; thus interpreted, the principles have been recruited to the same service as any ahistorical and a priori positivism or natural-law theory. But it is obviously an anti-historical method, for all its privileging of past authority (and despite the fact that much valuable historical research was done, as it were on the side, by those who believed in it.) As a method, it casually links together records from completely different periods and contexts as evidence of the same timeless principles. Its only notion of historical change is of lapses from and restorations of the true constitution.

(b) The second method, given somewhat variant forms in Hale, Burke, and Savigny's Historical School, seems at first much friendlier to history; and of course Hale and Savigny and Savigny's disciples did distinguished historical work. But the story of legal change as one in which law (mostly) unconsciously records the spontaneous underground modifications of thousands of particular customs to adapt to changing circumstances, can be extremely resistant to historical analysis. Hale's view in fact seemed to be that the history of the common law was unknowable, since it has been fed by so many springs and sources over so long a time; one can never say therefore whether a given application is of fresh or ancient origin, and what contextual influences or causes may have shaped it. Moreover on this view the authority of law lies in its unbroken continuity, which repels any type of historical account of discontinuous change. The German school had no doubt that legal history was accessible to science; but ultimately for many members of that school the aim of studying multiple manifestations of legal forms over time was once again to distill their essential core of principle, to weed out the inessential (the arbitrary, anomalous, purely contingent debris of history) from the essential; and, once this was done, to abandon historical inquiry altogether for the more urgent task of weaving the historically-derived principles together into a System.

Much conventional legal argument of the last two centuries has relied on a lazy synthesis of these two competing views, seeing law as both unchanging in root principles and adaptive in particulars; and has combined the two views with a vulgar-Whiggish notion of law as progress, so that, by means of gradual adaptation, the ancient and essential principles of legal order are ever more efficiently realized (with some allowances for lapses and setbacks) in practice. In this synthesis, legal history is written as the story of the genetic ancestors or "origins" of the legal forms of the present, and of the gradual developing of these embryos into their mature modern condition.

3. There did, nonetheless, develop a mode of legal-historical writing that for some considerable time bridged the gulf between the dogmatic-authority-stabilizing purposes of the lawyers and the integrity of a dominant historical method. This

was the historiography of the "comparative method" of study, by means of comparative legal history as well as anthropology and linguistics, of societies from the relatively "primitive" to the most "advanced", with the purpose of discovering the laws governing the evolution of "progressive" societies.⁴ (In fact some of the great contributors to comparative evolutionary theory were lawyers like Adam Smith and Henry Sumner Maine.) This symbiosis held enormous advantages for both history and law. Lawyers could at last both write history without falling into anachronism, and use it without threatening the conservatizing functions of their vocation. By the mid-nineteenth-century, it was no longer necessary to insist that private property had been the basis of ancient societies in order to legitimate it as the basis of modern societies: communal property simply belonged to an earlier "stage", and was functional to society in that stage as absolute-individual property was functional to civilization in its present and more advanced condition.⁵

Such studies, if their subtleties were pruned away, were also congenial to vulgar-Whiggish views of legal evolution as a central component of the simultaneous progress of commerce, liberty, and science. So useful in fact has this mode of history -- progressive societies evolve in stages, and in each stage develop legal forms that are functional to their social needs -- been to lawyers that it has remained the dominant mode in legal argument and scholarship in this country ever since, even after many of the universalistic and deterministic premises on which it is based have been blasted away by scholars in other fields. But the lawyers often adopted the mode of thinking behind evolutionary functionalism without making any commitment to continuing the type of research on which that thinking was based; thus for the most part the promise of Smith's and Maine's efforts, that lawyers might develop a tradition of comparative historical sociology, was never fulfilled. The work of scholars like Mommsen and Weber and Vinogradoff, for example, was almost completely ignored by legal scholars in their own time, and no attempt was made to integrate it into conventional legal argument. (Gierke's work on mediaeval associations as "group-persons" is a remarkable exception to this tale of neglect; it supplied the materials for reconceptualizing corporate personality in the era of giant concerns.) So instead of continuing to investigate the relations between changes in legal and in social forms, most legal writers were content simply to

⁴See especially Stein, Legal Evolution.

⁵This is not to say that at the time these historical conclusions were not violently controversial. On the nineteenth-century debates among historians and lawyers on the history of property and its legal forms, see especially Grossi, Alternative to Private Property; and J.W. Burrow, "The Village Community", in...

assume that such relations existed, and that they were (save for some instances in which legal change "lagged" behind social and economic change) functional. (A common reason for ignoring context -- social history -- in the writing of legal history was simply to posit that courts or jurists have been the authoritative recorders of customary practices, the best and truest representatives of the Volk, so there was no need to go behind their writings. One could even take this view if one believed -- as Holmes for example did -- that legal change was conflictual and Darwinian, rather than harmonious and consensual; the courts and jurists simply registered the outcome of the struggle, the practices of the winners.) The social change that supposedly drives legal change through its functional requirements thus tends to appear in legal writing only as vaguely specified background processes or "forces" -- "the decline of feudalism", "modernization", "the rise of industrial capitalism", "the growth of the regulatory welfare state," and so forth -- rather than as richly described environmental influences.

But it would be very misleading to leave the impression that lawyers' uses of history have invariably and necessarily been apologetic, designed to stabilize current structures and advantages with the authority of the past. Many legal-historical modes, including some of the modes just discussed, have served critical and destabilizing functions. In promoting a customary common law, Coke and his fellows were opposing to centralized royal power what could be taken, and later was often turned into, a ideology of popular pre-Norman liberties against central royal power. Smith was of course challenging the entire system of mercantilist regulation. Even Savigny, though an aristocratic conservative politically, was (as my colleague James Whitman has shown⁶) concerned to develop a view of Roman property principles as gradually ripening possession into ownership, in order to emancipate the German peasantry from serfdom without the need for legislation or revolution. Modern "conservatives" like Bork appeal to the authority of the "original understanding" in the hope of undoing a generation of settled constitutional precedent. Maitland and Holmes, among others, saw the main point of legal history as that of liberating the present from the past, by revealing how much current law was merely "survivals" of ancient forms that had lost their functions, or else by showing up authority as having been rooted in a context of ugly or barbaric or obsolete social practices. They also shook up the hardening complacency of evolutionary views of history by using their research into the history of legal forms to invert the conventional patterns of "progressive" social development: Maitland for example concluded that English law had evolved away from the "individualism" of mediaeval village societies towards

⁶Whitman, *Legacy of Roman Law*, Ch. 5.

more cooperative and communal forms in modern associational life, Holmes that the common law had in the same period left behind its concern for individual moral culpability to treating persons as standardized units in the service of collective social welfare. The fact that lawyers may be recruited to serve different power centers and opposing economic and social interests, has meant that these critical uses of history have also found their outlets in legal argument.

Even when lawyers adopted historical models such as evolutionary functionalism for primarily apologetic principles, the resulting engagement with history could not help but bring with it destabilizing consequences. For example, when nineteenth-century historiography began to identify the Germanic collectivistic Mark rather than the Roman dominium as the "basic" or "original" form of European landholding, it removed one of the primary authoritative props to the order of absolute-individual ownership -- even though the same historians, like Maine, had the ready response that modern needs required new forms of ownership. As Paolo Grossi has pointed out in his great study, collective forms of property through these researches acquired an entirely different status -- it was no longer just a utopian fantasy or dangerous socialist projection, but represented the actual lived experience of ancestors -- and, as it turned out, of quite a lot of forgotten or marginalized contemporary European communes as well. The same could be said, to cite more recent examples, of the lawyers and historians who revived the extensive history of pre-Civil War state planning to demonstrate that the New Deal violated no sanctified American tradition of laissez-faire or for that matter, of legal scholars who have been raiding the historical revival of the "republican" tradition of civic virtue in the hope of finding counterweights to the politically regnant modes of unbridled "liberal" self-serving individualism. Moreover once the lawyers had embraced history, they could not ever get rid of it, even when its company became uncomfortable. The historicizing of the legal-dogmatic categories of property relations, the acceptance of non-legal evidence regarding them, moved them into the domain of historical, sociological and political-economic analysis, where they became vulnerable to intellectual revisionists who might share none of the lawyers' stabilizing agenda.

B. Examples from Recent American Histories of Law

The discussion so far has been perhaps excessively abstract and taxonomic. In this section I'd simply like to match up some of the recent work in American legal history to some of the modes just described and to say something about where this work falls on the authority-reinforcing/subverting: stabilizing/destabilizing divides. Here's a very rough, very summary breakdown.

1. There has been a remarkable resurgence -- remarkable in view of its general discredit among historians and historically-minded lawyers -- of literalist "originalism", the urge to fix the current meaning of legal texts, especially Constitutional texts, by reference to the specific intentions of the 1787 convention (or, in some version, to the conventional understandings of its eighteenth-century ratifiers). Undoubtedly the spurs to this work have been the endless bicentennials and the band of originalist lawyers in President Reagan's Justice Department. As has usually been true of the originalist project, it is politically most serviceable when kept as a vague aspiration; when actually executed, the project of detailed reconstruction continues to yield largely alien or repellent products. It seems unlikely that most modern conservatives would be happy with a modern Constitution in which seditious libel might still be made a criminal offense; or in which Congress would share with the President primary authority over the design of foreign policy; or the military-industrial complex denounced as a corrupt patronage-bureaucracy-standing-army. It is thus perhaps not surprising that Judge Robert Bork, in his recent book the latest among many to insist on literal fidelity to the historical "original understanding" as the exclusively valid sure guide to constitutional interpretation, should fail to cite a single historian's work.⁷

The more fruitful and interesting disputes, as usual, have been over how best to recover the general principles or "spirit" of the ancient constitution -- partly to shore up aspects of the present dispensation, but much more to reproach and reclaim a decadent present with the Founders' wisdom. The more sophisticated conservatives reconstruct eighteenth-century systems less so that we can slavishly imitate the details than that we may appreciate the principles and attitudes of mind informing them: the conception of liberty as customary law restraining governmental power⁸; the separation of law from politics in John Marshall's jurisprudence⁹; or the Federalists' marvelous balance of temperament that could combine realism about self-interest with faith in civic virtue, respect for theory with distrust of over-abstract systems, suspicion of political power with confidence that complex institutional mechanisms could both contain ambition and channel it productively, disdain for the masses with optimistic projects for educating them to responsible

⁷Robert Bork, *The Tempting of America* (1989).

⁸John Phillip Reid, *Liberty and the Original Understanding*, in *Essays in the History of Liberty* 1 (1988).

⁹George Lee Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-1815* (1981).

citizenship.¹⁰ Left-liberal lawyers have their own ancient constitution, deploying tradition against modern neo-classical economics and public-choice theory to recover the general-public-interest-regarding "republican" strain in the Federalist persuasion¹¹ -- and sometimes in the anti-Federalist persuasion as well, in one of those interesting lawyers' resurrections of an opposition counter-tradition to history's winners.¹² Perhaps the most ambitious, as well as the most resolutely anti-historical while purportedly based on history, attempt to synthesize an unchanging ancient constitution for modern use is Richard Epstein's assertion of a absolute libertarian right to property secure from all private and public encroachments, claimed to take the same basic form in Roman law, the liberal philosophies of Hobbes and Locke, the thought of the Constitutional Framers, and the (mostly late nineteenth-century) "common law"!¹³ Epstein's vision, though often cited as ideological authority by powerful people -- libertarian policymakers and lawyers -- is of course in most respects in the modern world a highly critical one, indeed radical, since its realization would entail the demolition of all the taxing, spending and regulatory activities of the welfare state.

3. There are also some modern representatives of the adaptationist school of customary law. Some conservative legal historians stress the Burkean qualities of the legal system. They celebrate the common law as encoding the gradually evolving "spontaneous order" of society¹⁴. They echo the early Federalist (and Tocqueville's) thèse nobiliaire: that in America, lawyers and judges are an aristocracy with a social-stabilizing function; they restrain popular enthusiasms and levelling legislatures; they maintain, by means of transmitted professional habits and adherence to precedent, traditional principles and continuity with the past against radical revisions, sharp discontinuities, and excessively "abstract" principles; they are

¹⁰Ralph Lerner, Prologue: Recovering the Revolution, in *The Thinking Revolutionary: Principle and Practice in the New Republic* (1979).

¹¹See especially the work of Cass Sunstein: e.g. *Beyond the Republican Revival*, 97 *Yale L. J.* 1539 (1988).

¹²See the recent Symposium on Anti-Federalism in the *Northwestern Law Review*.

¹³Richard Epstein, *Takings* (1985).

¹⁴Friedrich Hayek's phrase, frequently echoed in Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law* (1977).

agents of social integration, promoting cultural and national unity and customary morality through the shared values of legalism and the Constitutional norms of liberty, property, and due process.¹⁵ Among some Chicago lawyer-economists, customary adaptationism was for a period formalized as the "efficiency of the common law hypothesis", the hypothesis being that common-law decision-making had an inherent tendency to reach increasingly wealth-maximizing or transaction-cost-reducing results over time; and considerable ingenuity went into describing the mechanisms that might explain how the common law could have relentlessly pursued economic efficiency even though its judges obviously hadn't a clue that that's what they were doing.¹⁶ Again, however, none of the right-wing schools is concerned to sanctify the present dispensation. They defend nineteenth-century corrective justice against twentieth-century redistributive justice, nineteenth century common law rules against social-welfare legislation, morals legislation against Constitutional invalidation. The closest thing to a truly Burkean state of mind, in fact, belongs to the left-liberal defenders of the legacy of the Warren Court and its reformist, "evolving" Constitution.

3. Not surprisingly however, in a culture that prefers to extol than to deplore progress, to see the present as -- at least potentially -- a fulfillment rather than a betrayal of the past,

¹⁵For some early nineteenth century versions, see, e.g. Inaugural Discourse [The Value and Importance of Legal Studies], in Joseph Story, *Miscellaneous Writings* 440 (1835); Rufus Choate, *The Positions and Functions of the American Bar, as an Element of Conservatism in the State*, in 1 Samuel Gilman Brown, *The Works of Rufus Choate* 414 (1862); Alexis de Tocqueville, *Democracy in America* (J.P. Mayer ed., George Lawrence trans. 1969); Sandra van Burkleo, "Honour, Justice and Interest": John Jay's Republican Politics and Statesmanship on the Federal Bench, 4 *J. Early Republic* 239 (1984); G. Edward White, *The Marshall Court and Cultural Change* (1988); Daniel Walker Howe, *The Political Culture of the American Whigs*. For modern legal writers who themselves adopt some form of the Burkean approach, see Alexander Bickel in his later moods, as in *The Morality of Consent* (1975); James McClellan, *Joseph Story and the American Constitution* (1971); Stephen Presser and Becky Bair Hurley, *Saving God's Republic: The Jurisprudence of Samuel Chase*; Bridwell and Whitten, *Constitution and Common Law*. The Conservative tradition of legal-historical writing in general, and Professor McClellan's biography of Story in particular, inspired Morton Horwitz to a notable polemic, *The Conservative Tradition in the Writing of American Legal History*, 17 *Am. J. Leg. Hist.* 275 (1973).

¹⁶See Priest, *The Common Law and the Efficient Selection of Legal Rules*, *J. Legal Studies* ; Rubin, *J. Legal Studies*....

the legal history that has always been dominant in America has been liberal rather than reactionary history (though always somewhat qualified by the felt need to protect the status of the Founding period as our Golden Age). The basic Liberal story is the story told by the Scottish Enlightenment political thinkers of the hand-in-hand progress of commerce and liberty, the gradual emancipation of individual freedom and reason from the shackles of feudal and mercantilist restraints on land, labor and capital, and from the tyranny and superstition of the rule of despots, nobles and established churches. This story in turn merges effortlessly into the generally-accepted paradigm of Western history as a movement "from status to contract" or simply "modernization," and legal history as the gradual evolution of forms functional to that modernizing process. The middle classes rise, and after long struggle with the ancien régime, finally triumph. (In America, of course, the ancien régime was pretty weak and vestigial to start with.) The remnants of the regime -- primogeniture, established churches, seditious libel, imprisonment for debt and hostility to bankruptcy, customary monopolies, labor-conspiracy prosecutions, married women's disabilities, indentured servitude, eventually even slavery itself, and after slavery Jim Crow -- gradually disappear under the modernizing pressures of commercial development. The basic theme is liberalization: the release of individual energy, the opening of opportunity, the removal of restrictions on choice, gradual progress to the point where virtually all social relations in which people may find themselves may be seen as instituted by their voluntary consent. More and more groups shed special incidents of status and become eligible to participate as legal equals in the polity and economy. In these histories the merit badges for lawyers go to those who help transform economic and political institutions in the direction of liberal development. Lawyers like Hamilton, Marshall, Story, Shaw and Kent, praised as conservatives in the Burkean histories, are recast as Liberal pioneers, statesmanlike architects of the frameworks for a liberal-pluralist market society.¹⁷

Needless to say there are deep political splits even within Liberalism. The biggest divide is between Classics and Progressives. For the Classics the high-water-mark of liberal development is around the end of the nineteenth century, by which time legal science had produced a system of common-law and Constitutional principles nearly perfecting the framework for a

¹⁷See, e.g., James Willard Hurst, *Alexander Hamilton, Law Maker*, 78 Colum. L. Rev. 483 (1978); Kent Newmyer, *Supreme Court Justice Joseph Story* (1985); Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw* (1957).

libertarian polity¹⁸; most legal change since then has been a slide into the "serfdom" and inefficiency of the regulatory welfare state.¹⁹

For the Progressives (so far a much more numerous and influential group among legal historians), the Classics' high point -- symbolized by Lochner v. New York, the case that in modern liberal-legal mythology is equivalent to the worst excesses of Stuart despotism -- is our legal system's all-time historical low, a terrible deviation from the general advance. Some versions have it that there was a massive failure of policy and imagination, during a "lag" period in which law failed to come to grips with the realities of large-scale capitalism and its effects of urban squalor, unassimilated immigrant populations, destruction of the natural resource base, industrial accidents, labor strife, monopoly power, periodic depression and mass unemployment, skewed wealth-and-income distribution; other versions that well-organized corporate interests captured the legal system and made it do their bidding until underdog groups could counter-organize. The course of liberalization could only resume once the managers of the legal system accepted that state and federal governments would have to supply specialized regulatory mechanisms coordinating economic activity and controlling its worst side-effects. After the New Deal the Progressive legal historians returned to the ante-bellum period to find a rich variety of state interventions into economic life, so that the New Deal could be seen not as drastic innovation on a landscape of laissez-faire tradition, but as one more stage in a long tradition of pragmatic state policies towards the economy.²⁰

¹⁸The great progenitor of such work is Friedrich Hayek. See The Constitution of Liberty (1960). More recently the mission of bolstering a libertarian legal theory with historical models has fallen to Richard Epstein. See, e.g., Richard Epstein, Takings (1985); In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947 (1984); A Common Law for Labor Relations, 92 Yale L. 1357 (1983).

¹⁹With the significant exception of work by Chicago-school economists on the history of regulation, surprisingly little legal history has been written from a Classical-Liberal perspective. As the ranks of right-libertarian academics increase, we may expect this to be one of the growth areas of legal historiography in the near future.

²⁰See, e.g. Oscar & Mary Handlin, Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861 (1st ed. 1947); Louis Hartz, Economic Policy and Democratic Thought, Pennsylvania, 1776-1860 (1948). See Harry Scheiber, Government and the Economy: Studies of the Commonwealth Policy in Nineteenth Century America, 3 J. Interdisc. Hist. 135 (1972) for an

The masters of modern American legal history have been on the whole Progressives²¹, but rather somber and disenchanted ones, as befits a generation that has lived through the Cold War, Vietnam, and many failures or shortfalls of Progressive-minded policies: the failed war on poverty; the collapsed collective-bargaining regime (now shrunk to cover only 13% of the workforce); disappointed aspirations to racial integration, affordable housing, a universal social wage, redistribution through progressive taxation, effective public education, and taming the political power of big business through anti-trust policy; and waning confidence in regulatory bureaucracy as the instrument of such policies. It's not surprising that from the 1950s onwards some Progressive historians would be stressing maturation as an important element of progress, meaning coming to terms with the tragic limits on human capacities and rational planning, and the imperfections of legal and administrative institutions as instruments of policy.²²

Soon after the Progressives began to sense the limitations of their political vision, the vision itself came under bruising assaults from both right and left-wing critics, who offered remarkably convergent reasons to question the beneficence of Progressive state policies in "the public interest." The state, critics on both sides contended, had simply been captured by special interests for their own ends: economic regulation was thinly disguised cartel enforcement; spending programs were mostly subsidies for corporate or middle-class beneficiaries; taxing policies riddled with special deals neither promoted economic growth nor genuinely redistributed income.²³ The

excellent critical synthesis of this body of work.

²¹I am thinking here primarily of Willard Hurst, Lawrence Friedman, Oscar and Mary Handlin, Louis Hartz, Harry Scheiber, Morton Keller and even for some purposes (though his Progressive-Liberal persona alternates with a Radical one) Morton Horwitz.

²²See, e.g., Willard Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 *Am. J. Legal. Hist.* 1, 18 (1979).

²³For representative historical critiques of Progressive regulation from the right, see Albro Martin, *Enterprise Denied* (1971); from the left, Gabriel Kolko, *The Triumph of Conservatism* (1963); from the modern neo-liberal center, Thomas McCraw, *Prophets of Regulation* (1984). Disillusioned Liberal historians themselves played a leading part in this revision: for a classic treatment of law as the product of interest-group politics, see Lawrence Friedman and Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 *Colum. L. Rev.* 50 (1967). But the pendulum of historical revision always swings back (and the critiques were

critiques paved the way for both Radical and Classical-Liberal reinterpretations of the Progressive-Liberal histories.

4. In the last ten years it has been the radical reinterpretations that have been the most consequential for legal-historical writing -- not, to be sure, so consequential as to displace the entrenched Progressive-Liberal and the newly influential Conservative paradigms in the ideology of practicing professionals, but nonetheless quite influential in the reimagination of the past in legal-academic writing. Many of the generation who came of intellectual age in the late 1960s trained as historians under the stars of Christopher Hill, E.P. Thompson, Eric Hobsbawm, Eugene Genovese, Herbert Gutman and David Montgomery; and, seeing there were no jobs in history, went to law school and ended up as legal scholars. These were scholars who explicitly sympathized with the subordinated groups of history, and sought to recreate not only their distinctive patterns of life, but their struggles with their overlords and their political, economic and moral ideals.

Most Conservative and some Liberal historians²⁴ tend somewhat to identify with the lawyers and judges and jurists they write about, or at least with their situation. For such historians, clearly, legal and Constitutional history is in part professional training in statecraft²⁵: we look to past masters

rather overbroad anyway). In recent years historians have begun to rehabilitate the Progressive vision. Some have re-emphasized the idealistic aims of Progressive reforms, as opposed to their self-interest-promoting and social-control aims, and presented them as though flawed still basically admirable: see, e.g. Robert Crunden, *Ministers of Reform* (1982); James Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (1986). Others, notably including some legal writers, have re-examined specific policies and programs of the Progressive and New Deal eras, finding in them both evidence of motives to pursue the public interest (see, e.g., Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *Yale L. J.* 1017 (1988)) and continuing relevance for the remedy of current policy failures: see, e.g., William Simon, *The Invention and Reinvention of Welfare Rights*, 44 *Md. L. Rev.* 1 (on the New Deal Social workers.)

²⁴There is a clear generational difference here. Hurst clearly sees legal history as the handmaiden to current policymakers. In his *History of American Law* (2d ed. 1987) Friedman is considerably less engag e, more ironic and detached.

²⁵For Hurst, to be sure, it is democratic statecraft, decisionmaking at the humdrum administrative and state-legislative levels, not just the commanding heights.

to see what to emulate, what mistakes they made and what to avoid, to learn maxims of prudential wisdom. Lawmaking has often been misguided; but well-made law, sound doctrine and sensible policy, is basically benign.

Radical-populist²⁶ history, by contrast, sees law from the bottom up, from the perspectives of oppressed or disempowered groups; and thus sees it as ruling-class measures to repress or coopt such groups, or as concessions such groups have managed to extract by struggle. Legal history in this mode is a dialectical story of progressively self-conscious, but repeatedly thwarted, subordinated-group insurgency. The early workingmen's associations, for example, meet with indictments for criminal conspiracy. They overcome these only to enter a fearful new regime of regulation by injunction; mobilize to win state legislative protections for labor picketing and organization, and then see these statutes nullified by hostile courts. Finally they achieve national defeat of injunctions and the legal rights to organization and recognition in the New Deal; but the New Deal protections are rolled back by Taft-Hartley, by a series of adverse court rulings and, since 1970, by renewed employer militance and a Labor Board ranging from ineffective to positively hostile.²⁷ Victims of industrial accidents run up

²⁶I say "populist" rather than "Marxist" because very little work by American legal historians is strongly or distinctively Marxist in approach, if one means by that history that seeks to explain most legal forms and outcomes as epiphenomena of the class struggle incident to the "relations of production" that are in turn determined by material-technological "forces of production". These days, ironically, it is likely to be right-wing Chicago economists who suggest that law is best explained as instrumentally fashioned by groups pursuing their material interests, or functional adaptations to master processes of economic change. The radical historians, by contrast, usually treat law as expressing ideologies and ideals that are partly "autonomous" from economic interests and "forces". I bring this up because the term "Marxist" is carelessly applied, often as a smear label, to almost any writer who shows sympathy with the underdogs of history, or indignation at the ways in which political and economic elites used the legal system against them.

²⁷See, e.g., Christopher Tomlins, *The State and the Unions* (1985); Wythe Holt, *Labor Conspiracy Cases in the United States, 1805-1842*, 22 *Osgoode Hall L. J.* 591 (1984); Dianne Avery, *Images of Violence in Labor Jurisprudence*, 37 *Buff. L. Rev.* 1 (1989); William Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1111 (1989); Karl Klare, *Judicial Deradicalization of the Wagner Act*, 62 *Minn. L. Rev.* 265 (1978); Katherine Stone, *The Postwar Paradigm in American Labor Law*, 90 *Yale L. J.* 1509 (1981), Joel Rogers, *Divide and Conquer: The Structure of Post-War Labor*

against fellow-servant and assumption-of-risk defenses to tort suits in the mid-nineteenth century; only just begin to erode the defenses when the system is sidetracked onto low-payout Workers' Compensation; and ultimately win a generic right to safe workplaces in the Occupational Safety and Health Act of 1970 only to find it unenforced.²⁸ Organizers for Black rights see the ambitious hopes of Radical Reconstruction go down the drain with the Supreme Court's encouragement; the Southern legal system rebuilt around Jim Crow segregation maintained by corrupt officials and juries and tolerated unofficial violence; and the Southern economy organized around the legal forms of sharecropping and tenant farming that trap Blacks at the bottom of the occupational ladder. The Brown decision integrating the schools, painfully extracted from the courts after thirty years of patient NAACP litigation, runs into "Massive Resistance" from Southern political leadership, is left unenforced until a Black civil rights movement organizes to challenge segregation, and remains unenforced to this day to the extent that integration and affirmative-action may substantially threaten interests of middle-class whites.²⁹ These are just a few examples: obviously one could add similar stories for women, paupers and welfare recipients, immigrant groups, or radical dissenters.

In the radical legal histories law appears in (at least) two

Relations, 1990 Wisc. L. Rev. (forthcoming).

²⁸See, e.g., James Weinstein, *The Corporate Ideal in the Liberal State* (1968); Richard L. Abel, Book Review, 83 Mich. L. Rev. 772 (1983), and Book Review, 85 Mich. L. Rev. 800 (1985); Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* (1986).

²⁹The historical literature on black civil rights is of course vast though it has tended to cluster around the twin peaks of Constitutional litigation, the Supreme Court's decisions on legislation implementing the Reconstruction Amendments and then in the "Second Reconstruction" after the decision in Brown. For a small sampling of the best of this literature, see: Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988); Leon Litwack, *Been in the Storm So Long* (1979); Harold Hyman and William M. Wiecek, *Equal Justice Under Law* (1982); Charles Lofgren, *The Plessy Case* (1988); Richard Kluger, *Simple Justice* (1976); Mark Tushnet, *The NAACP Campaign against Segregated Education, 1925-1950* (1987); David Garrow, *Bearing the Cross* (1986). For clear statements of Radical perspectives on this history, see Derrick Bell, *Race, Racism and American Law* (2d ed. 1980); Alan Freeman, *Antidiscrimination Law: A Critical Review*, in *The Politics of Law* 96 (David Kairys, ed. 1982).

somewhat different and conflicting guises:³⁰ (a) It appears as broken promises. Law embodies universally good norms of equal rights, of fair procedures, protection against arbitrary and tyrannical rule, and protection of the conditions of self-realization -- individual autonomy, solidarity in association with others, participation in self-government. The problem is that these norms have been twisted and manipulated by dominant groups to their own advantage. Lawyers, who ought to have been the standard-bearers of the norms embodied in law, have instead repeatedly perverted them on behalf of powerful clients.³¹ Nonetheless subordinated groups can make use of the utopian and unfulfilled norms of justice as resources: they can refashion, out of the same norms they nominally share with their oppressors, constitutions and rights that effectively articulate their grievances and ideals -- property rights in employment, or in squatters' tenure, or as traditional use-rights in grazing or fishing-grounds; or freedom of contract defined as legal equalization of bargaining advantages. (b) Law also appears less advantageously as a bunch of snares and delusions, albeit with some exploitable loopholes. In this view the utopian promises of the legal system are just ideological window-dressing, masks for power. Yet the needs of the powerful to make them seem benign, to frame them in formal terms of general rights and obligations, delivers some resources to employ the norms and procedures of the system against itself. The danger of such tactics, however, is that they may only serve to reinforce the ideological legitimacy of the system as a whole.

This ambivalent attitude toward the legal system, like the history it generated of legal change as periodically resurgent and repeatedly thwarted subordinated-group mobilization, perfectly expressed the professional and political situation of legal activists for social movements -- activists who had witnessed a remarkable blossoming of opportunities for law-driven (indeed court-driven) social change in the 1950s and 60s, only to see them wither away or come to disaster in the 70s and 80s.

That same experience of disillusionment also delivered some real benefits to the Radicals' legal-historical writing. It freed

³⁰The famous passage in E.P. Thompson, Whigs and Hunters (1975) at 258-69, characterizing the law as both a medium of ruling-class oppression and as a practically effective expression of the ideal of limits on such oppression, nicely reveals this Radical ambivalence.

³¹The theme of lawyers as betrayers of legal ideals is prominent in Morton Horwitz, The Transformation of American Law (1977), Ch. 5; Alfred S. Konefsky, Preface to The Papers of Daniel Webster: 1 Legal Papers xvii (Alfred S. Konefsky and Andrew King, eds. 1982); and especially Jerold Auerbach, Unequal Justice (1976).

them from one of the besetting diseases of legal history, its filiopietism towards tradition and the heroic lawyers and judges of the past. It also markedly changed the portrayal of background "social forces." Appropriating the work of left social historians, the Radicals emphasized the suffering and violence underlying what had often been told as a story of gradual and impersonal social changes -- "evolution", "modernization", "development".³² "The re-organization of industry around mass-production techniques," to take one example of a phrase describing a disembodied process, was in reality a prolonged and bloody business: ragged armies of strikers, often by the tens of thousands, confronting troops and armed guards for months at a time in violent standoffs.³³ Legal elites, who in the most complacent orthodox accounts figure as the statesmanlike vanguard of progressive policies, ceaselessly adapting law to the evolving needs of society, in fact often actively participated in and apologized for the worst injustices, or tried not to see them. Progress towards equal and decent treatment of minorities and a more inclusive democracy usually came, when it came at all, from disruptive movements from below; aided in their early phases by few lawyers, and those few as often as not considered outcasts and pariahs.³⁴ Moreover there is never any assurance that

³²This exaggerates, as the 1960s critical generation was prone to doing, the complacency of the previous accounts. In legal as in general historiography, the principal charge was that the 1950s historians had emphasized ideological "consensus" at the expense of "conflict" in the American past, and had uncritically celebrated that consensus. The charge might have been valid enough against certain works of the period--let's say, for instance, Daniel Boorstin, *The Genius of American Politics* (1953)--but vastly overdrawn with respect to its best work. Willard Hurst, for example -- like Richard Hofstadter and Louis Hartz -- was acutely aware of the defects of the liberal consensus. Hurst characterized the dominant nineteenth-century consensus as "bastard pragmatism", fixated on market calculation, incapable of any but the most short-term assessment of the consequences of action, basically irresponsible in ways that imposed heavy social costs. *Law and Economic Growth, passim* (1964). Later histories in tune with the Liberal-Progressive sensibility, like Lawrence Friedman's *History of American Law* (2d ed. 1985), fully incorporate the "bottom-up" perspectives of the New History.

³³See, e.g., David Montgomery, *The Fall of the House of Labor* (1987); Richard Edwards, *Contested Terrain* (1979); William Forbath, *The Shaping of the American Labor Movement*, 102 *Harv. L. Rev.* 1111 (1989).

³⁴The Boston legal establishment of the ante-bellum years, with a few notable exceptions, supported the segregation of the city's school system, setting a precedent to be fatally drawn upon

ground thus gained will not be lost again, and the gainers again dispossessed of power. There is no reliable trend towards ever-increasing pluralism, incorporation of new groups into the economy and polity as equal players: rather there are periods of struggle for incorporation, often followed by periods of intense reaction, sometimes xenophobic and hysterical, sometimes quite nicely calculated by established powers.³⁵

Most of my own sympathies as someone trying to put history to use in training lawyers lean towards the Radical approaches to legal history, particularly to those accounts, lately increasing in number and quality³⁶ that show how subordinated groups appropriate the symbols and norms and procedures of legality from the dominant culture and refashion them to suit their own

in the construction of post-bellum Jim Crow institutions. See J. Morgan Kousser, "The Supremacy of Equal Rights": The Struggle against Racial Discrimination in Ante-Bellum Massachusetts and the Foundations of the Fourteenth Amendment, 82 Nw. L. Rev. 941 (1988). After the Civil War most of the leaders of the Northeastern city bar cheered on the judicial evisceration of the Reconstruction Amendments. Daun van Ee, David Dudley Field and the Reconstruction of the Law 171-2 (1986). In the post-Brown South, despite the stirring example of courage and firmness set by the Eisenhower-appointed judges of the Fifth Circuit in dismantling racial segregation, it was almost impossible to find a white lawyers willing to take on a civil rights case. Jack Bass, *Unlikely Heroes* (1981).

³⁵One obvious example is the turn, after rapid progress had been made in the courts towards a libertarian view of the First Amendment in the 1930s and 40s, to prosecutions of, and legislative and administrative sanctions against, dissidents and supposed "subversives" in the loyalty-security investigations and purges of the 1950s -- many of which, though fortunately not all, survived judicial review. See Michael Belknap, *Cold War Political Justice* (1977), Stanley I. Kutler, *The American Inquisition* (1982), David Caute, *The Great Fear* (1978).

³⁶See, for a few examples of such work: Forbath, *Shaping of American Labor*; Hendrik Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899 and Mrs. Packard on Dependency, 1 Yale J. of Law and the Humanities 79 (1988); Martha Minow, "Forming Underneath Everything that Grows": Toward a History of Family Law, 1985 Wis. L. Rev. 819; Carol Weisbrod, *Images of the Woman Juror*, 9 Harv. Women's L. J. 59 (1986); William Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (1977); Linda Kerber, *Women of the Republic* (1986); Suzanne Lebsock, *The Free Women of Petersburg* (1984); William Sewall, *Work and Revolution in France* (1980); Stephen Hahn, *The Roots of Southern Populism* (1983); Norman Pollack, *The Just Polity* (1987).

purposes, how they develop counter-constitutions in the shadow of mainstream ideas of law and order. Some of those counter-constitutions eventually achieve dominance themselves; some are crushed or coopted and lost to history. This is history that, as the best Liberal history also does, incorporates the Legal Realists' and legal sociologists' insights that the law of any period isn't a fixed constellation of rules, articulated from the top, but a plastic medium whose actual content is fought over and practically shaped by thousands of interpreters, at all levels of society.

Yet the Radical's picture of legal history as the struggle, often unsuccessful, of the subordinated for a place in the sun has not proved an entirely satisfying solution to the perpetually vexing problem of making history politically and professionally useful without betraying its complexity and historicity. Some of the problems:

(a) The perspective of identification with the subordinated sometimes unacceptably reifies, demonizes, or treats as a monolith the dominant groups and their order. A legal system, like an economy, is much more than an elaborate mechanism for exploiting the downtrodden. Dominant groups aren't just monsters using every trick they can find to hold on to wealth and privilege. They would not usually have remained dominant without the ability to develop formidably plausible ideologies and social practices justifying the continuation of the systems that maintain them. Their actions too are constrained, by economic structures, market conditions, political coalitions, legal options, and the imaginative range of their culture. They are often confused and divided among themselves. One needs to achieve at least enough sympathy, however provisional, with dominant legal cultures in order to understand both their plausibility, their power to organize perceptions of reality for those who held them, and also their constraining force, the ways in which they helped to define and limit self-interest.

Fortunately in recent years legal historians have done really excellent work reconstructing dominant as well as subordinate legal ideologies, especially the law of the Classical period. In fact one of the interesting by-products of the Liberals' (partial) disenchantment with the Progressive legacy of regulatory policy and institutions was that it opened up the Classical period of 1870-1920 to re-evaluation.³⁷ The

³⁷See Lawrence Friedman, *A History of American Law* 358-63 (2d ed. 1985); Arnold Paul, *Conservative Crisis and the Rule of Law* (1960); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *Research on Law & Society* 3 (1980); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning*

revisionists found that the Classical lawyers and judges had been unduly demonized as partisan ideologues of big capital. Classical common and Constitutional law, they argued, was the stepchild of Jacksonian, Free-Soil and abolitionist "equal rights" ideology, not of the "trusts". It distrusted all forms of legal privilege and legal disability; it aimed at classless formal-general neutrality, such as perfectly symmetrical treatment of capital and labor combinations.³⁸ Some of the Classical lawyers and judges were hostile towards or at least troubled by the rise of large business enterprises, believing them threatening to individual autonomy and political independence; corporations as parties often lost in the courts; while most Progressive social legislation survived judicial review under the quite expansive scope that Classical judges gave to the state police power to regulate health, safety and morals.

(b) Another problem with Radical history, or with some of it anyway, is a problem it shares with much Liberal as well as Marxist history. Even historians who are good at recreating the counter-constitutions with which subordinated groups have challenged the legal arrangements that evolved in our society, sometimes continue to subscribe to the determinism of the orthodox evolutionary-functional accounts. They assume that

and Origins of Laissez-Faire Constitutionalism, 3 Law & Hist. Rev. 293 (1985); Morton Keller, Affairs of State 362-70 (1977); Alan Jones, Thomas M. Cooley and "Laissez-Faire Constitutionalism", 53 J. Am. Hist. 751 (1967); Charles McCurdy, Justice Field and the Jurisprudence of Government-Business Relations, 61 J. Am. Hist. 970 (1975); Stephen Siegel, Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation, 70 Va. L. Rev. 187 (1984); Melvin Urofsky, State Courts and Protective Legislation during the Progressive Era, 72 J. Am. Hist. 63 (1985); James May, Antitrust in the Formative Era, 50 Ohio State L. J. 257 (1989); Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379 (1988) and Labor Conspiracies in American Law, 1880-1930, 66 Tex. L. Rev. 919 (1988); Aviam Soifer, The Paradoxes of Paternalism and Laissez-Faire Constitutionalism, 5 Law & Hist. Rev. 249 (1987).

Interestingly enough neither Conservatives nor Classical-Liberals have as yet played much of a role in this historical rehabilitation of Classical jurisprudence. In political allegiance most of the revisionists are left-Liberals or Radicals.

³⁸That this was both the overt and intended aim of the system does not, of course, mean that it was successful. A generation of Legal Realist critics led by Holmes pointed out that the Classical system's apparent neutrality was illusory, that it inevitably papered over a mass of unacknowledged biases and implicit policy judgments.

the main economic changes that took place were somehow inevitable. In other words, whether they are complacent or critical about the development of economic institutions, they tend to portray the evolution of the institutions of modern capitalism to have been a process that was, in its essentials, fixed and determined.³⁹ Legal change is still just a series of responses -- adaptive or resistant as the case may be -- to this master story of "modernization" or "capitalist development".

Here is the place where I think the legal historians associated with the Critical Legal Studies (CLS) movement have added most value to the Radical account. They have stressed that a capitalist economy and its workings are in part constituted through legal rules and processes. The law defines what "private property" is, and which "harms" to property may be compensated and enjoined and which must be suffered in silence; it sets the ground-rules of economic conflict, marking the limits on how competitors and employers and workers may combine to do each other damage; and it supplies processes for resolving such issues (juries, administrative boards, adversary litigation, etc.) that also distribute advantages to those best able to manipulate them. The CLS historians' main point about these legal arrangements is that the basic principles behind them are so indeterminate, and their historical interpretations so variable and multiform, that one cannot plausibly speak of a single "capitalist" order at all. A commitment to "private property rights" in the abstract can tell you nothing about whether homeowners can stop a coal company from polluting their groundwater, downstream riparian owners can sue upstreamers for diversion, or workers or creditors or suppliers or customers have a right to participate in corporate decisions affecting their interests. The legal system has to decide how to define the property rights in question, and to whom it will assign them; it has to decide whether the rights will be lumped together in one "owner" or spread among many, whether they will be protectible by injunction or only by damages, or not at all. In its actual history, our legal system has resolved these questions and thousands more like them in strikingly different ways, reaching contradictory answers at different times and even in the same periods; it has moved property rights around to different categories of owners, and continually abolished old rights and invented new ones. Thus in the U.S. as elsewhere in the capitalist world, there have been many actual historical capitalisms -- one might add, many forms of patriarchy, many variations on the theme of white racial supremacy -- and there

³⁹Considering how often "capitalism" is invoked as an explanatory concept by people from all segments of the political spectrum, it is remarkable how few coherent accounts there are of what it is supposed to be.

might have been many more.⁴⁰ Such legal histories usefully supplement work in comparative political economy that sharply challenges determinist accounts⁴¹ of the emergence of such institutional forms as eventually achieved predominance in the American economy, like "Fordist" methods of workplace organization or the giant multi-divisional enterprise; that argues instead that there was nothing in the least inevitable about the appearance of these particular forms, that there have been plenty of variations on them within "capitalist" societies, and that the emergence of particular forms has been tied to quite contingent variations in politics, ideology, culture and -- not least -- legal ideas and institutions.⁴² The point is that our current economic and legal institutions got to be the way they are, not through some logic of linear development, but through a process rather more nearly resembling that of biological evolution. Multiple forms are continually being produced; some disappear, killed off by predators or random external shocks; some survive for contingent reasons; some are selected for certain functional purposes, then sidetracked and coopted for other purposes entirely. The political lesson of such demonstrations, clearly, is to illustrate what might be called

⁴⁰See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 209 (1979); Gerald Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1059 (1980); John Nockleby, *Tortious Interference with Contractual Relations in the Nineteenth Century*, 93 *Harv. L. Rev.* 1510 (1983); Elizabeth Mensch, *The Colonial Origins of Liberal Property Rights*, 31 *Buff. L. Rev.* 635 (1983); Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 *Stan. L. Rev.* 1189 (1985); Robert Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 *So. Calif. L. Rev.* 1101 (1986); Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 *Wis. L. Rev.* 975; James Kainen, *Nineteenth Century Interpretations of the Contract Clause*, 31 *Buff. L. Rev.* 381 (1982); Robert Weisberg, *Commercial Morality, The Merchant Character, and the History of the Voidable Preference*, 39 *Stan. L. Rev.* 3 (1986).

⁴¹Such accounts take many forms, from Liberal efficiency-based accounts such as Alfred Chandler, *The Visible Hand* (1977); or Marxist accounts of the logic-of-monopoly-capitalism, such as Harry Braverman, *Labor and Monopoly Capital* (1974).

⁴²See, e.g., Michael Piore & Charles Sabel, *The Second Industrial Divide* (1984); Richard Kuisel, *Capitalism and the State in France* (1981); William Reddy, *The Rise of Market Culture* (1984); Gavin Wright, *Old South, New South* (1986); Charles Maier, *In Search of Stability* (1987); John Goldthorpe (ed.), *Order and Conflict in Contemporary Capitalism* (1984); Joel Rogers, *Divide and Conquer*.

the radical potential of conservative arrangements: to show that there exist, already immanent in such familiar ideals and institutions as private property and free contract, possibilities for transforming the society and economy in more democratic and egalitarian (as well as, to be sure, more autocratic and unequal) directions.⁴³

(c) Finally, identification with the subordinated runs some risk of unduly romanticizing them, as well as demonizing their opponents (though on the whole I'm in total agreement with Barrington Moore's general prescription for historical attitude: sympathy for the victims of history, skepticism toward the claims of those who did them in⁴⁴). Unhappily there's no guarantee that any group's experience of suffering and oppression will valorize its political and moral aims. Struggling groups are sometimes forces of reaction, sometimes out to protect their own privileges at the expense of others worse off, often in conflict with one another, often defending hopelessly non-viable futures. (One of the great merits it seems to me of some of the 1980s social histories is a new and welcome clarity, miraculously achieved without loss of empathy, about these darker aspects of subordinated-group movements.⁴⁵)

(d) Finally, the somewhat Manichaeian worldview of Radicalism has not always been alert to the causal complexities and ironies of history, of the pervasiveness of intentions gone wrong, unintended consequences, perverse twists.⁴⁶ The strength and

⁴³See e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 Md. L. Rev. 563 (1982) revealing tradition of paternalist and redistributive motives in ordinary contract and tort doctrine); Joseph Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611 (1968) (showing how traditional contract and property doctrine justify giving workers and communities affected by plant closings a property interest in the plant). The legal scholar most insistent on the plasticity of economic institutions and the most conscientiously detailed in proposals for reconstruction is of course Roberto Mangabeira Unger. See especially his *Politics: Part I, False Necessity* (1987).

⁴⁴Barrington Moore, *Social Origins of Dictatorship and Democracy* 523 (1966).

⁴⁵For exemplary recent works in this as in other respects, see Eric Foner, *Reconstruction*; David Montgomery, *House of Labor*.

⁴⁶Again I think the more recent Radical work, such as that on alternative constitutions cited at note 35, supra, has avoided this problem. In fact the whole message of this work is one of how underdog groups fashioned materials for their own emancipation out of the very systems meant to subdue them. The classic Radical work

solidarity of a craft trade-union movement can lead it to such early organizational and political triumphs as to lock it for the long term into a rigid conservatism, resistant to all innovation and internal democracy, hostile to unskilled, immigrant, Black and women laborers; and ultimately doom it to extinction. Legal strategies designed to "protect" working women may end up rigidifying their occupational segregation; while on the other hand, the strategy of an employer to divide labor and lower wages by degrading work may open up new demands for women workers that ultimately has corrosive effects on patriarchy.

* * * *

I promised at the start that I would try to suggest some ways in which some of these recent approaches to legal history may be seen as something new, as well as a repetition of long-established modes. I'm not sure at this point that I can make good on the promise. Most of the basic strategies of the new histories are quite familiar. Lawyers always first turn to history in search of authority; but the search, if conscientiously pursued, has usually been disappointing and ultimately subversive of the original project. The past recovered is demythologized -- Magna Carta appears as a baffling technical quarrel over feudal privileges, the Founding Fathers (or even the great counter-authorities, constitution-revising social movements led from below) as a bunch of squabbling factions -- and the present relativized as just another among many possible variations in the legal regulation of social life. Reform-minded lawyers have long searched the past to brand the present a corrupt deviation from its true principles, or to recover buried counter-traditions or counter-constitutions to oppose to present orthodoxy, or to suggest that evolutionary long-wave trend-lines point toward the triumph of reformist society, or finally just to suggest that the future is not determined by the past at all but within the control of present generations. The main difference that I think I perceive about much modern work, particularly the radical or critical work, is a much sharper awareness, in the form of a kind of post-modern skepticism, about the contingency, fragility, and revisability of all models of the past, their own as well as the established ones they are trying to displace. One rarely has the sense now of dogma being swept aside so that a new dogmatics may take its place, counter-authority set on the throne of authority. The point seems rather to simply to soften up existing structures by becoming aware of the conflicts and ambiguities in the very foundations of the way they were constructed; to recover suppressed alternatives less to establish them as a new orthodoxy than to suggest the perpetual

in this vein is Eugene Genovese, Roll, Jordan, Roll (1974) (showing how slaves appropriated the Christianity of the slaveholders to fashion images of benevolent protective masters and their own release from bondage to the Promised Land).

malleability and revisability of structures. But with this loss of dogmatism, this newly playful awareness of contingency, has also come some sense of loss of direction; and the potential contributions of history to constructing programs, as opposed to combatting the fatalistic sense that no change is possible, is still not so clear.

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