

SIXTY-FIRST CLEVELAND-MARSHALL FUND LECTURE

THE STRUGGLE OVER THE PAST

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I. INTRODUCTION: THE NEW RIGHT AND THE REVIVAL OF HISTORICAL ARGUMENT

In the last twenty years there has been a remarkable revival of historical modes of argument and justification in the legal practices of the United States. In a country often accused of lacking any consciousness of its past, lawyers, judges and legal scholars have been engaged in a series of epic struggles to dominate the interpretation of history in order to make it serve their present agendas. In part, of course, these legal debates are echoes of general political controversies; primarily between, on the one hand, left- and center-liberals (Progressive Liberals, for short) who would like to preserve or even extend the policies of the 20th-century regulatory welfare state and Rights Revolution and, on the other hand, neo-liberals and cultural conservatives (the New Right, for short) who believe that precisely those policies have been the main cause of economic and cultural decline and must therefore be rescinded. One party believes it has been following a path of progress which, if continued, will lead to fulfillment of the nation's traditional ideals. The other party believes that the

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Progressive, New Deal, Great Society, and cultural trends of the 20th century represent a betrayal of those ideals, and that to be true to the traditions of its Founders the society must restore the principles it foolishly abandoned and return to an earlier and uncorrupted state.

The history of law has come to be vital contested ground in these controversies. The New Right parties who are in the political ascendancy, indeed now poised to transform the national state apparatus and its legal institutions, have developed an elaborate and quite sophisticated legal ideology. Much of this ideology relies upon relatively abstract reason: natural law libertarianism and utilitarian political economy. But history also plays a central role. History supplies an original Constitution, from which much 20th century political innovation, especially the expansion of the powers of government to regulate business property, the large-scale delegation of legislative power to administrative bureaucracies, and the new judge-made *limits* on the power of public authorities to control crime and deviance and to promote morality and religious observance, is seen as an unacceptable departure. History supplies a set of basic ground rules; the "traditional principles of the common law" of tort, property, contract, labor and unfair competition for the proper constitution of economic life, from which much modern law, both judge-made and statutory law, is seen as having improperly deviated. History supplies a set of "traditional values," traditionally protected by legislatures through the criminal sanction and morals legislation, and enforced by the delegation of discretion to various authorities to control the lives of children, juvenile delinquents, criminals, and the dependent poor. Both the values and the authority of those who would enforce them are seen as having been fatally undermined by the "Rights Revolution" pioneered by the Supreme Court and liberal welfare policies of the 1960s and 70s. History supplies a basic *Grundnorm* of liberal society, the norm of "color-blind equal opportunity," which requires for its implementation a legal system structured to preserve a competitive capitalism, with formally-equal rights for each and special privileges or special disabilities for none, which supposedly will operate so as to reward every individual precisely in proportion to his or her merit, which is seen as violated by many modern programs of special subsidies and exemptions, especially "affirmative action" systems of preferences for women and for blacks and other minorities.

As the New Right ideology spreads among elite decision-makers and intellectuals, it poses a serious challenge to the Progressive-liberal consensus about the legal meanings of history that had previously dominated American legal thought for a very long time, from approximately the 1940s through the 1970s. The historical claims of New Right ideology in particular have touched off a number of fierce debates among Old (Progressive) Liberal, New Right, and radical legal intellectuals.

## II. USES OF HISTORY IN LEGAL ARGUMENT—A BRIEF TAXONOMY

It will help to put the current debates in perspective if we can see them as variations on some of the standard modes in which lawyers make use of history. For simplicity, let's classify the basic modes as static, dynamic, and critical.

In the static modes, lawyers argue that a legal norm or rule or practice has a fixed meaning that has been established by past usage. This may be an

antihistorical argument for following a rule that is unchanging because it is timeless and universal, not dependent for its validity on time or place, as in the case of a natural law norm. It also may be simply an argument for following precedent, for maintaining continuity, for doing things the way they have been done before. The expanded version of this argument is the argument from tradition or long-established custom, or time immemorial. Perhaps most often, however, the argument refers to a definite historical location. It calls for adherence to the original understanding of a text or the original intentions of a founding legislator. Sometimes it privileges a particular time and place as having special authority because especially worthy of respect or imitation.

In the *dynamic* modes lawyers argue that the interpretation of legal texts and rules and principles does and must change over time to adapt to changing conditions.<sup>2</sup> The most ambitious dynamic modes are those in which the interpreter suggests (or tacitly assumes) that legal evolution follows some patterned historical tendency, an underlying *direction* of political, economic or social change.

Static and dynamic modes have in common that the lawyer appeals to history for *authority*; to the authority of an original text or tradition or founding moment, or to the authority of the course of history itself, that is to the changing circumstances or long-run evolutionary trends that dictate the need for a new rule or new interpretation. The past is *read* as if it were a legal text with binding force, even if what is being cited is not exactly a text, but a body of intentions or a collection of practices. The premise is that if we decipher the signs correctly, we can read out of them principles and precedents that ought to control current interpretations. The past can control the present because it is continuously connected with the present through narratives of stasis or tradition, or of progress or decline.

The *critical* modes by contrast are used to destroy, or anyway to question, the authority of the past. They assert discontinuous breaks between past and present. In ordinary legal argument perhaps the most familiar of these critical modes is the argument from obsolescence or changed circumstances; the argument that the original reasons or purposes of a rule have ceased to exist, or that the rule sprang from motives or a context that are no longer acceptable to modern eyes, are rooted in ugly, barbaric, primitive conceptions or practices. Another critical mode in this sense is ironic history, as in the "argument from perversity" which Albert Hirschman has identified as an enduring feature of conservative political rhetoric,<sup>3</sup> the argument that well-intentioned past

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<sup>2</sup>Strict textualism—the view that interpreters should look only to the words of the text and ignore the context—often poses as a static mode ["The words of the Constitution mean today what they have always meant"] but in actual practice this is a dynamic mode, since the reader of words who is allowed to ignore their context will necessarily read into them the conventional meanings of his own time and place. The words are left free to float and soak up later and changing meanings.

<sup>3</sup>ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

enactments have brought about the reverse of their intended results, and should therefore *not* serve as models for current practice.

### III. AMERICAN PRACTICE—A VERY SHORT HISTORY

In historical practice, American lawyers have generally combined static and dynamic modes with an occasional but definitely muted and minor theme of critical ones. Here's a short and simple version of the story:

The Revolutionaries of 1776 argued their cause against the English in a dominantly static mode: that they were asserting the common law rights of free-born Englishmen under the ancient "Gothic" Constitution of Anglo-Saxon England, which had subsequently been corrupted by the tyrannical practices of church and state under the "canon and the feudal law."<sup>4</sup> At the same time, the Revolutionaries shared with other Englishmen a dynamic view of political history, according to which those ancient liberties had been gradually recovered over centuries of struggle and finally confirmed in the constitutional settlement of the Glorious Revolution of 1689. Americans believed that the English Crown and Parliament had been illicitly reversing the course of history and once again conspiring against traditional liberty in their treatment of the colonies.<sup>5</sup> The colonists' basic argument, therefore, called for progress towards the restoration of the past.

By the 19th century, American lawyers had changed the mode of argument. The basic Anglo-Saxon liberties were now protected by written Constitutions and bills of rights, removing (for the most part) the need to consult the history of more ancient times. The issue was now the status of the common law inherited from England. There were several different common law traditions, living side by side but each obeying a different logic or tempo of time. The static tradition of the immemorial Gothic Constitution or ancient rights of Englishmen, as noted, was yoked to a dynamic story, the Whig history of the recovery of original Anglo-Saxon liberty through centuries of struggle against feudalism and tyranny towards the mixed Constitution. And that dynamic story was grafted on to a genuinely progressive history, the Scottish Enlightenment's four-stage theory of the development of modern society, in which law evolved in ways that were thought to be functionally suitable to each stage, hunters, shepherds, agrarian and commercial society, as they succeeded one another.<sup>6</sup> These dynamic themes, one specific to English history, the other a more general hypothesis of the progressive development of societies, were given a specifically national meaning, and destiny by the

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<sup>4</sup>John Adams, *A dissertation on the Canon and the Feudal Law*, 1 PAPERS OF JOHN ADAMS 127 (Robert J. Taylor, et al., eds. 1977).

<sup>5</sup>See generally BERNARD BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967), JOHN PHILLIP REID, *THE JURISPRUDENCE OF LIBERTY: THE ANCIENT CONSTITUTION IN THE LEGAL HISTORIOGRAPHY OF THE SEVENTEENTH AND EIGHTEENTH CENTURIES*, in *THE ROOTS OF LIBERTY* (Ellis Sandoz, ed., 1993).

<sup>6</sup>PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* (1980).

American republican experiment, which was supposed to preserve the static or timeless principles of English liberty, expressed in the common law, against any further corruptions; and also to carry the dynamic ones toward a more perfect realization than the world had ever seen. In this last theme we perceive, even in the inherent conservatism of legal discourse, traces of the American millennial dream, that in the New World the weight of history may be one day shed altogether, and men and women freed to natural liberty.<sup>7</sup>

Thus, the task of American lawyers was not only to *preserve* the common law's timeless principles and gradually-adapting slow-growing good customs, but also to *accelerate* its dynamic aspects to move it forward out of feudalism and the hierarchies of the corrupt old world.

Americans, of course, venerate their Federal Constitution and sacralize the moment of its making and its text is their polity's supreme law. The Founding period has the status of a Golden Age, and below the major themes of progress in American legal writing there has always been a strong minor subtheme of the jeremiad, lamenting declension from our origins. Yet the basic story told in American legal writing is dynamic and progressive, the story of the hand-in-hand progress of commerce and liberty, of 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 has effortlessly modulated in legal narrative into the generally-accepted paradigm of Western history as a movement "from status to contract" or simply of "modernization," and of *legal* history as the gradual evolution of forms functional to that modernizing process. The *ancien régime* and its incidents, 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 legalized segregation, gradually disappear under the modernizing pressures of commercial development. The master theme is the emancipation of the freely choosing self: 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. Progress was mainly defined in negative terms, as what we have been evolving away from—which was "feudalism."<sup>8</sup> (Later in the century "feudalism" was replaced with "socialism" as liberty's great opposite.)

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<sup>7</sup> See ERNEST TUVESON, *REDEEMER NATION: THE IDEA OF AMERICA'S MILLENNIAL ROLE* (1968); R.W.B. LEWIS, *THE AMERICAN ADAM* (1955).

<sup>8</sup> See, e.g., Thomas M. Cooley, *Limits to State Control of Private Business*, PRINCETON REVIEW (1878); JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* (1894).

The story, as I say, combined static with dynamic elements, but emphasized the dynamic. The Constitution and the common law had a core of "principle," of fundamental unchanging meanings. But principle had to be adapted to changing circumstances, and above all, to the modernizing dynamic of historical evolution. The static and dynamic modes were ultimately reconciled through teleology: The assertion that basic legal principles were "working themselves pure," were gradually evolving from primitive, obscure or cluttered forms to the highest and best realization of themselves. The "Classical" liberals who dominated legal thought at the end of the 19th century needed a dynamic view of history because they knew perfectly well that the economic and political liberalism they espoused had not existed in any pure form at the Nation's founding: when there had been extensive mercantilistic restrictions on trade, including wage and price controls and when there had been, above all, legal protection of slavery.

The "Progressive" liberals who followed and criticized them preserved the basic dynamism of the narrative. Some of the Progressive lawyers, to be sure, were aggressively modernist in outlook, treating the past as a disposable nuisance. The only use for history in this mode was to help shed the law of its cobwebs by showing it up as antique, irrelevant, rooted in barbaric or obsolete social contexts and outgrown conceptions.<sup>9</sup> In this critical and modernist mode of Progressive history, legislation represented the capacity of self-conscious collective efforts to overcome the force of custom and refashion the legal framework by the dictates of utilitarian reason. The end-point in the most optimistic versions was the escape from history and the promise of beginning anew with scientific social-welfare legislation. But most Progressive jurists did not seek to escape from history, but rather to conform the law to what they saw as the pace and tendencies of historical change; and pragmatically to remold it along the grain of those tendencies. Legislation in their view, was not against or out of custom, but *followed* custom and was now to be the primary method for adapting law to social evolution. The old common law framework had become dysfunctional, overtaken by events, and had evolved too slowly to cope with the rapidly changing conditions of industrial society. The "individualist" premises of Classical legal thought, which had originated in the natural-law thinking of the 17th and 18th centuries, had functioned well enough in an older America, an agrarian society on an open frontier with abundant land, a society of small independent producers, but was wholly unsuited to an industrial society of giant organizations.<sup>10</sup> The realization of individual freedom in such a society, as Chief Justice Hughes put in a famous New Deal case, required "increased use of the organization of society in order to protect the very bases of individual opportunity."<sup>11</sup> Thus they revised the

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<sup>9</sup> See, e.g., O. W. Holmes, Jr., *The Path of the Law*, in COLLECTED LEGAL PAPERS (1920); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>10</sup> See, e.g., ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921).

<sup>11</sup> *Home Insurance Co. v. Blaisdell*, 290 U.S. 398, 442 (1934).

story of stages of development to which legal change should be functional by inventing a new stage of industrial or collective society. Its implications for many Progressives were that the giant corporation should be legally naturalized, but so should the labor union, and there should be a new role recognized for the state in regulating both.<sup>12</sup>

Another line of Progressive critique was surprisingly traditional: that the Classics had improperly ignored or disregarded the long-standing regulatory doctrines contained in the common law itself; that the Classics' assertion of a generalized Constitutional "liberty" to do as one wills with one's property, and to contract on whatever terms one pleases, was an unwarranted radical innovation that had never been part of traditional "due process," of "the law of the land." The Progressives and New Dealers claimed that they, and not the Classical liberals, were the true heirs of the Founders' original purposes, i.e. that "energetic government" should engage in national planning in the public interest.<sup>13</sup>

The third great wave of liberal-legal ideologies, the "Rights Revolution" engineered by the civil rights movement and by the Supreme Court under the Chief Justiceship of Earl Warren and the federal executive under the leadership of Presidents Lyndon Johnson and (surprisingly!) Richard Nixon, was also faithful to the dynamic narrative of liberal progress. This phase tacked on a further stage in the evolution of liberal societies, one in which the state had to act affirmatively to bring groups who had been excluded or subordinated into full legal personhood: women, blacks and other minorities, underrepresented voters, aliens, the illegitimate, those accused of crimes, prisoners, mental inmates and welfare recipients. The courts also expanded the sphere of negative liberty, the right to be let alone, by finding new rights to expressive, sexual and reproductive freedoms. With less success, some advocates urged more radical claims to positive liberty as well, to the effective fulfillment of economic and social rights such as the right to a minimum standard of living.<sup>14</sup> But much of this rights-rhetoric was entirely tradition-based: the rights were not new, but simply required to fulfill America's original liberal promise, such as the libertarian right to the protection of "property" in an age where property increasingly took the form of grants of state privileges, licenses or benefits.<sup>15</sup>

#### IV. CHALLENGES TO LIBERAL PROGRESS

To summarize: American legal argument from the Founding onward consistently relied upon a core narrative of liberal progress, the story of liberal modernization, by which law both followed and facilitated the evolution of

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<sup>12</sup> See, e.g., Jeremiah Smith, *Crucial Issues in Labor Litigation*, 20 HARV. L. REV. 253, 345, 429 (1907); Walton Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932).

<sup>13</sup> See, e.g., HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909).

<sup>14</sup> See Samuel Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare*, 58 MINN. L. REV. 211 (1973).

<sup>15</sup> See Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

society away from feudalism, tyranny and superstition and towards increasing freedom. To reconcile this dynamic narrative with the need to assert continuity with fundamental principles, the story was often told in a teleological mode, as the gradual fulfillment of perfection of principles already immanent at the Founding. As Abraham Lincoln said of the Declaration of Independence, which had declared all men to be equal even as it established a polity that legalized slavery, the Declaration's authors

did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.<sup>16</sup>

The core narrative underwent important mutations in its phases as Classical-liberal, Progressive, and Rights-Revolution ideology. Each phase always had its critics; reactionaries claiming that a new mutation was a betrayal of foundational liberal principles, conservatives asserting that sweeping radical innovations would disturb the natural course of gradual and prudent evolution, left-liberals claiming that progress was not moving nearly fast or far enough.

By the late 1960s, some of the critiques took on a more radical form. At first such critiques came from the Left; from civil rights lawyers, organizers of poor communities and workers, feminists and anti-Vietnam War activists, who, embittered by growing conservative resistance and backlash to the insurgent social movements of the 1960s, began to lose faith in liberal progress; and to diagnose economic, racial, and gender inequality as stemming from relatively permanent structures of oppression ("capitalism," "racism" and "patriarchy") varying over time in particular details, but ceaselessly taking on new and virulent mutant forms.<sup>17</sup> Some of these activists kept alive utopian-socialist hopes of "Revolution." More often they were inclined to settle into a kind of grim historical pessimism or, as in the case of black radicals who adopted the rhetoric of Third World anti-colonialist nationalism, pursued a limited political strategy of separation from, rather than reform of, the wider society.<sup>18</sup>

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<sup>16</sup>Speech on the Dred Scott Decision (June 26, 1857), in ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1832-1858, 390, at 398.

<sup>17</sup>See, e.g. DERRICK BELL, RACE, RACISM AND AMERICAN LAW (1973)

<sup>18</sup>See Gary Peller, *Race-Consciousness*, 1990 DUKE L.J. 758 (1990).



In the meantime another set of challenges was brewing from the Right, one that was to be much more influential, since the Reagan victory in 1980 suddenly swept into positions of national power, the federal executive and judiciary, a cadre of legal intellectuals: libertarians and law-and-economics scholars from the University of Chicago and various conservative think-tanks. The lawyers of the Reagan Revolution came to power determined to do to the entrenched Progressive histories what the Progressives had done to the Classics: to substitute a new story, with different heroic agents and a different ending, into the standard narrative structure of the history of liberal society; and to some extent to challenge the story altogether. Their influence has been deep and pervasive and has posed the most serious challenge yet to the long reign of Progressive orthodoxy.

At first glance the most striking feature of conservative legal thought seems to be its historical pessimism; its apparent rejection of the dynamic narratives of legal change, especially as embodied in the notions of an "evolutionary" or "living" Constitution that the Classical and Progressive jurists had held in common. Conservative legal thought has a decidedly nostalgic impulse, to reproach modernist culture by reaching back into something before it. Its discourses on social life follow the form of the jeremiad; a lament over the declension of current generations from some exemplary golden age or set of founding principles. Yet this is usually followed, in the optimistic American vein, by an account of how, despite backsliding, with repentance and discipline, the principles may be restored in an even better form. So the designers of the imagery of the Reagan Revolution made it out that, with effort, we could be ceaselessly moved forward into our virtuous past of intact families, shared and rigorously enforced moral and religious convictions, and the unregulated pursuit of acquisition.<sup>19</sup>

Of course the historical view with which New Right *lawyers* are mostly identified is not a dynamic one at all, even a reactionary dynamism, but the static, mode of frozen time: the various "originalist" theories of Constitutional interpretation—in their extreme forms, the views that the contemporary intentions or understandings of the Framing generations of 1787 and 1868 should be the *exclusive* determinants of Constitutional meanings. Judging by the gross volume of paper produced, originalist exegesis is where President Reagan's lawyers invested most of the resources they had to spend on history.<sup>20</sup>

The originalist impulse never infected some of the most prominent jurists of the 1980s. Judge Richard Posner and Solicitor General Charles Fried, for example, remained immune. But, it had brilliant and influential promoters in Chief Justice William Rehnquist, Justice Antonin Scalia and almost-Justice

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<sup>19</sup>The account that best captures this element in President Reagan's appeal is GARRY WILLS, *REAGAN'S AMERICA: INNOCENTS AT HOME* (1987).

<sup>20</sup>Attorney General Edwin Meese declared this hermeneutics to be official government policy. See Edwin Meese, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION* (Jack N. Rakove ed., 1990).

Robert Bork. As James Wilson has noted,<sup>21</sup> the originalism of these jurists owes little to reverence towards the past or to the Founding Moments for their own sake. Though Bork likes to invoke the name of Edmund Burke,<sup>22</sup> and Scalia the binding force of "tradition,"<sup>23</sup> neither has any trace of the common-law mind, the respect for the tiny irreducible particulars of customs accreting over slow time, the reverence for what is simply because it has come gradually to be. The conservative jurists have much more in common with the philosophic radicals than with Burke or even Blackstone; they are positivists, who search the legal universe for authoritative commands, preferably those reducible to the form of code-like rules of general application. If the past cannot furnish us with definite rules of decision, look elsewhere.<sup>24</sup>

In their insistence that the "rule of law is a law of rules,"<sup>25</sup> the originalist-traditionalist jurists are, ironically, swimming against the main current of *traditional* American historical jurisprudence, that is common-law dynamic adaptationism, given content and direction by liberal modernization theory. Nineteenth century lawyers generally resisted codification, for example, because they supposed that its formulas would straitjacket legal development.<sup>26</sup> Progressive jurists' most telling objections to classical legal science were similar: that it had become too slow and inflexible to deal with changed conditions. Even codes are more flexible than the strict originalists' rules. For in a legal regime that instructs judges to look each time only at the code and not at the subsequent glosses, applications will change, even if unconsciously, as social contexts and linguistic usages change. Strict originalism seeks to freeze meanings against erosion by time; and this is rather hard to achieve. One can of course seek to state the original principle at a high enough level that it can be abstracted from context altogether, which leaves it free to float and soak up later experience; or, more imaginatively, to work toward a faithful "translation" of the principle, so that it will have similar or analagous effects in the new context to those aimed for in the old;<sup>27</sup> but in choosing either of these strategies one will leave strict originalism far behind. If one takes one's originalism as a serious project of historical reconstruction,

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<sup>21</sup>James G. Wilson, *Justice Diffused*, 40 U. MIAMI L. REV. 913 (1986)

<sup>22</sup>ROBERT BORK, *THE TEMPTING OF AMERICA* (1990). James Boyle however has suggested that Bork's views are genuinely Burkean in another way, that, like Burke, Bork wants to fabricate a historical myth of continuity between the present and an imagined past. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263 (1991).

<sup>23</sup>See *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).

<sup>24</sup>See Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV., 865 (1989).

<sup>25</sup>Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>26</sup>CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* (1981).

<sup>27</sup>See Mark V. Tushnet, *Following the Rules Laid Down*, HARV. L. REV. 781 (1983); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

if one goes back in time to dredge up all the concrete practices of reading and applying the rule that once defined its practical meaning, one will inevitably discover (along with quite unmanageable degrees of conflict and ambiguity) a lot of stuff that one does not want and cannot possibly convert to modern use.

Suppose we want to know what the Framing generation meant by federal non-establishment of religion. In the cargo of norms and practices that we salvaged from the sunken past, we would find some notables who thought that the federal government should remain aloof from any and all religious preferences and observances, though assuming as a matter of course that official establishments would continue at the state level, some who promoted religious observances on all public occasions to the great distress of other prominent figures, some who robustly embraced the Erastian view that the common and criminal law must enforce Christian prohibitions of sins like blasphemy in order to shore up basic social and moral order, while others (like the evangelical Baptists) just as passionately asserted that any government endorsement of religious faith must necessarily corrupt that faith. We would also find many who believed the non-establishment principle to be entirely consistent with legislating disabilities for Catholics and Jews and a policy of systematic eradication of native American Indians' and enslaved-Africans' religions.<sup>28</sup> This is just a short list. If we are really going to revive original understandings we will have to pick and choose our way among the relics, polish some of them up quite a bit, and leave others quietly to rest at the bottom of the sea. The dynamic readings of history have the advantage of giving us a method, however mythic and simple-minded that method may sometimes be, of connecting our present to our past in such a way as to argue that some story of progress or intervening experience has made pieces of the original understanding irrelevant, dead, anachronistic, obsolete.

But, in any case, the New Right jurists' commitments to originalist method turned out in to be only fitful. To take one example among many, in the *Lucas*<sup>29</sup> case of 1992, in which the Supreme Court held that government restriction of developmental uses of beach front property might be an unconstitutional taking, Justice Scalia suddenly pronounced all the historical evidence illuminating the understanding of eminent domain law around 1800 to be completely *irrelevant* and said that what would determine what counted as property and what was a taking would be a "historical compact" around flexible, *dynamic* state common law definitions of nuisance.

The *Lucas* opinion is revealing because it suggests that little of the conservative legal program is animated by a hankering after eighteenth-century values. It is primarily quite recent history, not the nation's whole history, that the New Right wants to undo. Originalism is less a method

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<sup>28</sup>See, e.g., Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Douglas Laycock, *Non-Coercive Support for Religion*, 26 VAL. U.L. REV. 37 (1991); MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965); JON BUTLER, *AWASH IN A SEA OF FAITH* (1990).

<sup>29</sup>*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

of giving content to basic legal norms than of rolling back the judicial Rights Revolution: the invention of new rights to liberty and property and privacy. The overall formula of judicial "restraint" has to some extent been able to satisfy the twin conservative agendas of deregulation in economic matters and the restoration of "traditional" authority in social ones. The courts have been more inclined to "defer" to executive agency decisions that soften or nullify regulatory legislation by interpretation or inaction,<sup>30</sup> to executive assertions of authority based on national security,<sup>31</sup> to legislative attempts to enforce moral standards through the criminal law,<sup>32</sup> and, above all, to the authority of public agencies at every level to direct (or neglect) the lives of subordinates and dependents like schoolchildren, asylum inmates, nursing home residents, public housing tenants, prisoners, schoolchildren, welfare recipients, public employees—all the old wards of the Warren Court.<sup>33</sup> Examined more closely, the New Right's historical arguments fit squarely into the conventional narratives of American legalism. Often they begin with the claim that society has declined, but end up promising redemption: the story of legal liberty has only been sidetracked, and with proper attention, can be rerouted back to the main line.

To be sure, the summons to restore "original intent" was obviously much more than a legal strategy: it was meant to underscore the theme of declension, to summon the past to reproach the present. In some respects, the Reagan-era conservatives did genuinely yearn to restore actual features, or what they took to be actual features, of late 18th-century society: particularly, I would venture to say, its practices of state support for Christian morality. (One does not know how they would respond to historical scholarship suggesting that that society was considerably less churchgoing, less respectful of religious belief, and more bawdy and disorderly than our own).<sup>34</sup> The slogan of original intent promises to return us to a time before the beginning of our modern discontents. But the actual historical location of that time is usually rather vague, and, most interesting, tends to shift according to the field of attention. The *Lucas* case is an example: the nuisance law that is invoked as a baseline is never exactly pinned down in historical time. All that is certain is that it belongs to an era of property-thinking in which the right to entrepreneurial development of land is essential to property in it; an epoch predating that of the emerging environmental consciousness, whose core notion is that sometimes the highest and best use of land might be its non-development.<sup>35</sup>

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<sup>30</sup> See, e.g. *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>31</sup> See, e.g. *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>32</sup> See, e.g. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>33</sup> See, e.g. *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189 (1989).

<sup>34</sup> Jon Butler, *supra* note 28.

<sup>35</sup> See Joseph L. Sax, *Property Rights and the Economy of Nature*, 45 STAN. L. REV. 1433 (1993).

Chiefly, it seems, the attempt is to revive the condition of late nineteenth century classical liberal society. Many New Right intellectuals admire that society for what they imagine to have been its devotion to laissez-faire capitalism and the minimal state.<sup>36</sup> Others admire the authoritarian social control of that period, by both state and civil society, of deviant behavior.<sup>37</sup> Some legal intellectuals of the New Right have sought faithfully to revive almost all the main features of the Classical-liberal legal regime. In private law this revival includes the negligence principle (or strict liability strongly laced with contributory-negligence and assumption-of-risk defenses) as the basis of tort liability, *de facto* regimes of minimal to zero liability for business-caused hazards, contract law restored to the principle of strict formal enforcement limited only by the most narrowly defined defenses of force and fraud, labor law restored to the unrestricted employment-at-will doctrine, the corporation conceived as nothing more than an aggregation of individual contracts. The public law revival includes a well-policed public-private boundary, strictly limiting the government's capacity to invade or regulate property without compensation, but removing all limits to the capacity of private owners to regulate those on their property. In criminal law the revival includes an increased unwillingness to regulate searches, arrests, detentions, interrogations, and conditions of confinement. In general, the belief is in the superior efficiency of common law to legislation as a mode of regulation. With these and many similar doctrines much of the classical edifice has been rebuilt brick by brick by legal intellectuals.<sup>38</sup> Similarly, in much of the legislation proposed by the current Congress and in decisions by the emerging New Right majority of the current Supreme Court, many of these ideas are once again becoming law.

What part has history played in re-naturalizing the classical system? The most uncanny of the revivals, the more so because it was a completely unconscious imitation of its 19th predecessors, the historical jurists, was the revival among legal economists of a customary-evolutionary theory of the common law.<sup>39</sup> Once naturalized, common law property, tort and contract rules could again function as the default legal constitution of the "private" market, any major legislative changes would appear as excrescences, superimpositions, "artificial" acts of "intervention." Starting from the premise announced in dozens of articles purporting to demonstrate the efficiency of

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<sup>36</sup> See, e.g. BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

<sup>37</sup> See, e.g. GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY* (1995).

<sup>38</sup> The pioneer and outstanding exemplar of classical reconstruction is of course Professor Richard Epstein of the University of Chicago. See, e.g., EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); *FORBIDDEN GROUNDS* (1995).

<sup>39</sup> See George L. Priest, *The Common Law and the Efficient Selection of Legal Rules*, 6 J. LEGAL STUDIES 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUDIES 51 (1977).

common-law rules, an evolutionary process was then hypothesized to explain how judges could have managed so consistently to arrive at efficient conclusions even though they hadn't any idea that that's what they might be doing. The naturalized baseline, however, was less frequently the *current* common law, as it had evolved through the twentieth century, but rather, through yet another act of homage to the past, that of the classical period itself.

While conservative lawyers were renaturalizing something like the classical common law, they were also devastating the statutory and administrative legacies left by its Progressive critics. In this they were aided by real history. Modern public-choice theory is bolstered by a series of historical case-studies showing that regulation has usually been sought by regulated interests for their own ends. Economic regulation was thinly disguised cartel enforcement. Spending programs were mostly pork-barrel for special business or middle-class beneficiaries. In its strong versions, the theory condemns almost all the output of Parliamentary democracies as a kind of legalized theft (assuming common law entitlements, once again, as the baseline establishing vested property rights), "rent-seeking" on behalf of special interests.<sup>40</sup>

To summarize, then: The new Right makes at least three kinds of historical claims. First, there is a set of basic norms and principles that should be treated as the constitutive ground rules of the American political, economic and social system, entitled to authority because they have been historically encoded in foundational legal forms (the original Constitutions, and common law and legislative "traditions"). Second, at some point in historical time—exactly *which* point shifts around quite a bit, but the preferred location is the mid-to-late 19th century—these basic ground rules were actually in force, with beneficial results for individual freedom, national prosperity, and social cohesion and morals. Third, in more recent periods—in economic regulation, the New Deal; in race relations, the period of affirmative action beginning in 1965; in social policy, the 1960s—the basic rules have been radically departed from, violated or distorted, with predictably horrible effects on freedom, prosperity and morals. In these narratives, to cite the most striking example, America's tragic and bloody history of racial oppression, from slavery through Jim Crow and segregation, is interpreted primarily as a misguided departure from *laissez-faire* principles; as having resulted from an excessive use of the state's police power to limit the free market competition that would in short order have eradicated racial caste distinctions or at least *unmerited* racial caste distinctions.<sup>41</sup>

Often these three claims are combined with a fourth: that there is a long-term historical *world-wide* tendency towards restoration of a reinvigorated classical liberalism. The story of how "the West" grew prosperous and rich and free through the adoption of a strict framework of legal arrangements protecting what's called "liberal capitalism," of which the most important component was

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<sup>40</sup>See DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

<sup>41</sup>RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992); CLINT BOLICK, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* (1988); DINESH D'SOUZA, *THE END OF RACISM* (1995).

a regime of "strict property rights," has become, through its enthusiastic sponsorship by the World Bank and Agency for International Development, one of the USA's major export commodities. It has been coupled recently with another story about the return to the market: How the world's societies, after failed experiments with socialism, central state planning, Keynesian redistribution, overregulation and overgenerous social spending are now, under the pressure of global competition, returning to the classical premises. The classical story, the escape from feudalism and mercantilism into *laissez-faire*, the qualification of *laissez-faire* with unsuccessful bureaucratic modification of the framework, the return to basics (what Mrs. Thatcher liked to call "Victorian values"), is becoming deeply entrenched.

#### V. NEO-PROGRESSIVE AND RADICAL RESPONSES: COUNTERHISTORIES

The New Right initiative to reclaim the interpretation of constitutional and legal history has touched off a minor cultural war, an American *Kulturkampf* for the soul of the American legal system. Having re-established original constitutional meanings as the prized territory of public law, the New Right originalists saw their ground invaded by hosts of alien interpreters with entirely different aims. The war opened up the Founding period and the Reconstruction Amendments to a fresh wave of revisionists, each trying to establish against competitors *the* authoritative reading of these constitutional moments.

Many of these revisers had as their ultimate aim to re-establish continuity with the Progressive story of liberal society; a story in which the modern state and its social policies could be vindicated and the New Right revolution put in its proper place as an unfortunate hiatus. To retake Constitutional ground from the conservatives, many liberal lawyers, rather unfortunately in my view, dropped the prevailing Progressive theory of the dynamically expanding Constitution and wandered back with the other time-travelers into the 18th century. Once there they made the happy discovery of the "republican" or civic humanist tradition of Atlantic political ideology rediscovered by J. G. A. Pocock and his school.<sup>42</sup> In that tradition, which clearly greatly influenced the American Founding generation, individual personality is only fully realized through the experience of self-government, through full participation in a *polis* or republic; and for its maintenance the republic requires independent citizens capable of the civic virtue that enables persons to identify their own interest with the common good. Scholars like Cass Sunstein and Frank Michelman have been inspired by the republican revival to a general conception of the constitutional design as something more than a framework for individual self-seeking through the market, a political system designed to promote, through a filter of high-minded disinterested representation, "deliberative"

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<sup>42</sup>J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975).

democracy for the common good.<sup>43</sup> The advantage of "republicanism" was that it offered a respectable, native-born, Founding-period-based communitarianism, a viewpoint from which to critique free-market libertarianism that was a native-grown viewpoint untainted by association with foreign socialisms or the Marxist tradition.<sup>44</sup>

Meanwhile, more left-of-center historians have been working up their own historically-based counter-Constitutional histories, using as their working materials the new history-from-the-bottom-up to recover the political/legal mentalites of outgroups. This is an age-old technique of immanent critique. It makes insurgent outgroups into the bearers of the utopian norms that, it hopes, will eventually triumph as the dominant norms of the system. If the outgroup does eventually triumph, its ideology becomes part of the official legal culture, and its despised radical precursors are retroactively sanctified as its visionary prophets. One of the most amazing features of the New Right's histories of race relations, for example, is the way they have sanctified Martin Luther King, Jr. as a prophet of their cause of "color-blindness." The new social-legal histories take this method a logical step further, recovering the Constitutional ideas of groups that never won out, or who were briefly successful and then crushed and lost to history—nineteenth century artisanal republicans, the Radical Republican programs and freedmen's movements of Reconstruction times, the agrarian cooperative movements of the 1880s and 90s, the industrial unions of the 1930s, the feminist movements of the 1850s, 1930s and 1970s, the civil rights and farmworkers' movements of the 1960s and 70s, as the exponents (and conceivably prophets?) of an alternative, very differently constituted social order, a "Constitution of aspiration."<sup>45</sup>

Every party (and not just the New Right) apparently hoped to find in historical Constitutionalism a new basis for forging consensus. What has happened instead, naturally, was that the historical controversies simply re-enact the modern ones. This Babel of contending originalisms has effectively precluded the hardening of a general consensus comparable to the Classical or Progressive narratives of progress in the Constitutional field, though each has achieved a kind of local hegemony by ignoring the existence of the others.

But if I am right about the long-run New Right challenge, it is not in the field of Constitutional law at all. Of considerably more importance, I have suggested, are their stealth campaigns in the areas of private law and statutory regulation. In these areas they have re-invigorated something resembling nineteenth century classical common law as the "natural" or "default" legal regime. The more successful that effort at naturalization is, the more those who

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<sup>43</sup>Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Frank Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

<sup>44</sup>The best account of the 'republican revival' in law is in LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

<sup>45</sup>See the essays contributed to a Symposium organized in 1989 by the Organization of American Historians, *THE CONSTITUTION AND AMERICAN LIFE* (David Thelen ed., 1988).



would justify departures from it are put on the defensive to explain those departures as "redistributions." So what I would guess to be the most important historical battles, though also the least visible ones are being fought so low to the ground that almost nobody notices what is going on. The focus down there on the forest floor is on what the classical common lawyers called custom, the routine doctrines and practices, common law and statutory, that have made up the stuff of ordinary social relations, that have helped to constitute power, community, and meaning.

## VI. CRITIQUES OF THE REVIVAL OF NINETEENTH-CENTURY LIBERALISM

It is to this debate about the optimal legal framework for liberal societies, which the New Right claims is validated by having been encoded in American legal traditions and by actual experience in practice, that, I believe, the insights and techniques developed by legal scholars and historians inclined to critical approaches to history have most of interest to contribute.

Since the New Right has been reassembling the classical-liberal system of legal thought of 1880-1920, a promising source of inspiration for critique should be the "New Liberals" (as they were called in England) or "Progressives" and Legal Realists (USA) who confronted and criticized that thought in its own time. (It's like a science-fiction movie. If your opponents bring to life a fabulous monster, your best response is to resurrect the fabulous hero who once slew that monster.) This strategy, which Morton Horwitz deploys in the second volume of his *Transformation of American Law*,<sup>46</sup> has paid handsome dividends. Critical scholars have found the Progressives most worthy of imitation for the techniques they used to de-naturalize the classical-legal constitution of the market or the private sphere; to expose its foundations as both as historically shifting and as theoretically incoherent.

One set of techniques, borrowed from the Progressive critics, is simply to document that the libertarian-*laissez-faire* rule-system never really existed at all. One can do this in part by detailing the myriad schemes of statutory and administrative regulation that are a constant throughout the 19th century. As older forms of public regulation (wage and price controls, statutory governance of the labor contract, governance of corporate enterprise through conditions and limitations on charters) faded out, new and even more extensive forms of state authority took their place. Even the USA, supposedly the most libertarian of nations, was always (especially at the state and local level) what the historian William Novak calls a "well-regulated society."<sup>47</sup> Another has been to locate the regulatory doctrines at the heart of the common law rules themselves: customary default rules governing contract, labor and tenancy relations, regulated commons in grazing or fishing grounds or riparian rights, doctrines

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<sup>46</sup>MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

<sup>47</sup>WILLIAM NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996).

of "public" rights limiting encroachments of private owners on public resources.

In yet another strain of critique, also in some part borrowed from Progressive and Legal Realist predecessors, in some part from classical social theory, critical historians try to challenge the claim that, in fact as well as in theory, the classical scheme is the optimal scheme for the maximizing of individual contractual liberty. One line of this critique emphasizes the authoritarian aspects of the classical scheme, all of the ways in which the legal system in fact authorized regimes of near-despotic social control, especially in labor relations, family relations, and in the regulation of deviants and dependents. The laborer might be "free" to enter or not enter into the wage bargain, and theoretically to negotiate the terms of his wages and hours. Once in the relationship, however, he was subjected to a dense legal web of master-servant regulations, duties of obedience and loyalty imported without embarrassment from ancient English statutes of labor control.<sup>48</sup> Indeed this supposedly optimally free society required an enormous amount of open, visible, public coercion to maintain it, especially against the instabilities promoted by an organized and politically mobilized agrarian movement and industrial labor force. The classical-liberal state threw away a lot of its legitimacy when, in order to protect its strict views of entrepreneurial property and liberty, it had so frequently to resort to rule by the labor injunction enforced by federal troops.<sup>49</sup> The most elementary liberal-capitalist social order, as we discovered in the heyday of industrial class conflict and in the terrorist violence of the Reconstruction South and are discovering all over again in the Hobbesian nightmare of post-Communist Russia, requires an enormous commitment of state force and capacity, the power and legitimacy to extract taxes to pay for security and justice, the bureaucratic capacity for monitoring and enforcement, to protect the basic institutions of property and exchange against force, fraud and corruption.

The opposite but complementary critical strategy is to point out that in its actual historical practice, the classical scheme had elements that in comparison to those of today's New Right seem positively radical. For one thing, the classical liberals took their individualism seriously, so much so that they believed the free individual was seriously endangered by increasing concentrations of private economic power. They thought a vigorous antitrust policy was essential to maintaining individual freedom as well as republican citizenship. The great figures of 19th century classical constitutionalism, men like Stephen J. Field and Thomas Cooley, regarded the kind of subsidies, exemptions and tolerance for combination and concentration that present-day state policies routinely extend to business as an abject selling-out of the cause of sturdy self-governing individual citizens and equality of individual right to the control of wealth, economic dependence and monopoly. They would have

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<sup>48</sup> See KAREN ORREN, *BELATED FEUDALISM* (1991); VICTORIA HATTAM, *LABOR VISIONS AND STATE POWER* (1993).

<sup>49</sup> See WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

been genuinely appalled by the reduction of the moral, political and distributive goals of antimonopoly policy to "efficiency" and "consumer welfare," as if such goods could compensate for the loss of republican independence and individual liberty (defined as the opportunity to rise to self-sufficient "free labor").<sup>50</sup> Such classical liberals also assumed (and here the contrast with today's libertarians is perhaps most stark) that the reason that the law need prescribe only minimal social duties was that strict moral and social codes would ensure that the better-off classes would act on the obligation to protect and care for their employees and communities; their libertarianism assumed a system of strongly enforced norms of social paternalism. It was when private paternalism visibly failed to alleviate the problems of poverty, unemployment, workplace abuse and family breakup, that classical reformers created the programs of protective regulation and benefits which are the recognizable ancestors of today's regulatory-welfare state. The origins of modern social policy, both in its better and its worse aspects, in its compassionate generosity and concern for social cohesion and well as in its repressive paternalism, lie not in the 1960s "counterculture," but in Victorian values themselves.<sup>51</sup>

In short, the institutions that the classical revival sees as ad hoc associations of individuals, making contracts that maximize their interests, the revisionists are likely to reanalyze as hierarchies or communities, both more authoritarian and more cooperative, and certainly more embedded and culture-laden: the quasi-feudal structure of master-servant relations, systems of racial, gender and ethnic caste subordination for organizing household, farm and even industrial labor, existing alongside strikingly egalitarian cooperative-producers associations, managed commons, ethnically-homogeneous fishing grounds, small and closely regulated public utilities, union-run factories.

All this has been meant to convey in a brief space some of the drama and intensity of lawyers' struggles over the history of their public and private law. Now we have to ask if any of this matters, whether it is not all wasted breath, the disputations of scholastics.

Is it worth doing just because lawyers so often, we think, "get it wrong," and should "get it right" instead? The answer cannot be, though it is the answer often given, that it profanes the past to get it wrong, as lawyers so often do, by the criteria of professional historical practice. After all, getting history "wrong," distorting the past, relying on false analogies, wrenching verbal formulae from their originating contexts and putting them to different uses, has been one of

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<sup>50</sup>See Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. OF AMERICAN HISTORY 970 (1975); ALAN JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY* (1987); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW AND HISTORY REV. 293 (1985).

<sup>51</sup>See DAVID ROBERTS, *VICTORIAN ORIGINS OF THE BRITISH WELFARE STATE* (1960); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992).

the great forces of creative innovation in the law. Holmes once argued in fact that "ignorance is the best of law reformers"—those who do not remember the past have the least work to do unlearning it.

Is the virtue of historical inquiry that it destroys myth-making—for example, that it makes it unthinkable to extract hard-and-fast doctrinal rules from the study of "original intentions" or that by exploding the fairytales of evolutionary progress it disabuses us of the notion that there is a simple linear progressive path of progress that we must adhere to? The hope of the Progressive modernizers was that history would rid the present of the dead weight of survivals, leaving us free to purposefully refashion our futures. It is hard to believe any more in the possibility of this kind of release from history; it is all too easy to historicize the modernists themselves, to see what a weight of unconscious inherited baggage they brought to the task of social-engineering, including their own set of mythic progressive narratives. Anyway, what historical experience suggests that people, including lawyers, disabused of myths of progress do any better than those under their spell? Of course those myths can induce a Panglossian complacency about the status quo as the most presumptively just and efficient set of arrangements on earth—or for that matter, a fanatic revolutionary fervor so confident that history is on its side that it will overlook any cruelties inflicted in the name of progress. Still, the narrative of liberal society as the gradual release of liberty from feudal restraints towards greater personal liberty and political inclusion has also been an immensely powerful force for emancipation. Ask the abolitionists of slavery, or the civil rights lawyers, who knew that the actual historical Constitution was a "covenant with death and pact with hell" in its protection of slavery, and later of segregation, but that nonetheless American liberal-legality might be read to hold immanent norms of freedom that could, that would with fighting human agents at their side, be gradually realized with unfolding time—that in the words of the Langston Hughes poem, "America, [which] never was America to me . . . will be."<sup>52</sup> The reformer's most effective ideological weapon has always been the metaphor of America's unfulfilled promise. Exploding this myth, one might well think, is not the most helpful advice the historian can bring to the Party of Humanity.

On the other hand, maybe it is—if the myth is that America has already fulfilled its promise, or can do so by pruning its legal system down to its minimalist classical core. Here the argument for complexifying our view of the past through history is an argument for showing how multiple and conflicting the traditions are, all the different kinds of narratives that can be told about the past, the kind of thing I've been doing in this lecture. We open up, one version of this argument goes, a space for freedom and innovation, not in the escape from history, but in choosing which traditions and trajectories to attach ourselves to. Of course the availability of all these options may seem to deprive history of any independent force in political argument: it's just another kind

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<sup>52</sup>Langston Hughes, *Let America be America Again*, in *COLLECTED POEMS* (Arnold Rampersad ed., 1995).

of rhetoric you resort to in order to get what you want. Having a different view of history in your arsenal is only good for convincing the incredibly rare power holder whose mind is really going to be changed by another take on what happened in 1793.

So I am not going to make any generalized argument for the uses of a more contextualized, complexified, multivalent, ironic, contradictory, historicized kind of history, which is after all just another way of telling a story. My argument is peculiar to the historical situation we find ourselves in—which is, I think, one in which a particular strong version, a revival of the classical version of the legal history of liberal societies is again coming into dominance in the Western world. The importance of history complicating narratives is chiefly in the way it reveals embedded alternatives in actual practices (not always admirable alternatives, to be sure, but suggestive of future possibilities) and these days perhaps especially in the way that it exposes the dream of achieving optimal freedom through a purified libertarian capitalism, protected by a purified neo-classical rule of law, as a utopian fantasy. It is a dream of reviving a state of society that never existed and brought many ugly consequences with it to the extent it did—a dream in its own way quite as fantastic, and in the present world potentially almost as dangerous, as the old dream of communism.