The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937

William M. Wiecek

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To Judy, again
with all my love
L'Chaim

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Preface

A comment about the origins of this study may help the reader place it in a larger interpretive framework. This book is the first installment of a work-in-progress on the history of the United States Supreme Court from 1941 to 1953. It is what historians call a prolegomenon, or an introduction, to that parent study.

In late 1994, the Permanent Committee for the Oliver Wendell Holmes Devise and Stanley N. Katz, the general editor of the *History of the Supreme Court of the United States* series, offered me the magnificent opportunity of preparing the Holmes Devise volume covering the years 1941–1953. I projected two introductory chapters for the Holmes Devise book, one situating the Court in the context of American society on the eve of Pearl Harbor, and the other summarizing the state of constitutional doctrinal development at that time. I hoped thereby to re-create for the reader the world as it might have appeared to a Justice of the United States Supreme Court at the start of October Term 1941.

Approaching the book that way, it became apparent to me that one of the Stone Court's most important responsibilities was its search for a jurisprudential paradigm that would replace the recently abandoned ideology that I refer to in this book as "legal classicism." One of the defining characteristics of the Roosevelt Court was the fact that a hitherto dominant way of thinking about law and the role of courts in American society had been discarded in 1937–1938. By 1941, nothing had emerged to take its place. There seemed to be a modern scholarly consensus about the origins, content, vogue, and weaknesses of the abandoned ideology. So I thought it would be a simple matter to summarize that consensus, note the challenges to it posed by recent revisionist writings, and present that doctrinal-historical sketch as the entrée to the story of the Roosevelt and Truman Courts.

But then that introductory doctrinal chapter took on a life of its own. I found myself in the position of an author of fiction who sits at the word processor observing his characters as they come to life. They tell their own story, and the author merely records it as their amanuensis. So it was with my introduction to legal classicism. As soon as I began writing, interpretive questions presented themselves in ways that I could not ignore. Many questions remained unanswered or even unasked about this

body of thought. Conventional and revisionist accounts alike assume important issues that seemed to me to require further exploration. Little has been written about the roots and origins of orthodox thought, or about how that body of lawyers' thinking related to the larger intellectual and social background against which it appeared. Most important, neither critic nor admirer seemed to have fully appreciated how comprehensive and powerful orthodoxy was as an explanation of what law is, and as a justification for the role of courts in expounding it.

So what was to have been a brief introductory summary evolved into a long chapter, then cloned itself into two chapters, then continued a dismaying process of mitotic division, until a fortuitous opportunity intervened. The speaker who had been invited to deliver the annual lecture of the American Society for Legal History at its 1995 meeting was unable to fulfill his engagement. The chair of the program committee, Professor Don Nieman, asked me if I would substitute at the last minute. I took the opportunity to integrate my thinking up to that point, and to present a synopsis of what I was writing.[1] Comments from members of the society enabled me to see, at last, the real scope and significance of the book that I had inadvertently written. You now hold that book in your hands.

Though writing is a solitary experience, many persons helped bring this book into print. Stanley N. Katz has for thirty years been a friend and mentor. His counsel did much to shape this book and the one that is to follow. Friends and colleagues, Richard D. Friedman foremost among them, have read parts of the manuscript or all of it, and offered insights and comment. Historian friends who have patiently listened to my ideas and offered advice or criticism include Harold M. Hyman and Sandra Van Burkleo. Syracuse University and the community of its College of Law have been unstintingly supportive. I thank particularly Vice Chancellor for Academic Affairs Gershon Vincow, Deans Daan Braveman and Sarah Ramsey, and my colleagues on the law and history faculties, especially Chris Day, Brian Bromberger, and David Bennett. Louise Lantzy and members of the Law Library staff, in particular Wendy Scott, Elmer Masters, Mike Poitras, and Ted Holynski, have provided essential support. Karen Bruner assisted with research in exemplary ways. Morton Horwitz and Duncan Kennedy of the Harvard Law School have been generous in their encouragement. The hospitality of John P. and Martha Chandler in New Hampshire, and of Marvin Gettleman and Ellen Schrecker in the Catskills, provided an emotional environment that later buoyed this work in a difficult time. Linda Zimack's interest and support during that period was crucial. The flaws of this book remain my sole responsibility, but whatever virtues it may have are owing in some measure to the help of friends.

Note

1. That presentation was derived from a précis of this book that will appear as "The Lost World of Classical Legal Thought: Prolegomenon to the Modern Constitution," in Sandra Van Burkleo, ed., *Time to Reclaim: American Constitutional History at the Millennium* (forthcoming).

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Prologue

The Challenge of Classical Legal Thought

During the half-century between 1886 and 1937, a distinctive outlook dominated the thinking of American lawyers and judges. It was an ideology as defined by the historian Eric Foner: a "system of beliefs, values, fears, prejudices, reflexes, and commitments — in sum, the social consciousness — of a social group."[1] Scholars have designated this ideology by various phrases: "legal orthodoxy," "classical legal thought," "legal formalism," "the orthodox ideology." I call it "legal classicism" because I seek a label that is as neutral as possible yet that retains some descriptive and suggestive content. "Formalism" is excessively narrow and potentially misleading, while "orthodoxy" carries pejorative connotations for some readers.

Classicism was both an ideology and a structure of thought created by an intellectual community,[2] the elite American bar and bench. Robert Gordon refers to this elite as a "community of intellectual discourse," which is a useful way of thinking about the men who shaped — and were shaped by — classicism.[3] This coterie included half the Justices of the United States Supreme Court in those years, and most of the Chief Justices.

As a phenomenon of legal consciousness or *mentalité*, classicism comprised a coherent set of beliefs, values, and assumptions about law and the role of courts in construing law. It was not a jurisprudential school and was something both more and less than a jurisprudential theory. Classicism rested on a deeper underlying ideological structure, which consisted of beliefs shared by most middle-class contemporaries about liberty, power, human nature, rights, and republican government. It identified the values that define Americans as a people and their government as a republic.

The classical outlook provided an explanation of the nature and sources of law; it justified judicial review and the place of courts in American democracy; it offered a plausible account of the way that judges and lawyers think; most important, it legitimated the Supreme Court's power to construe the Constitution. Though classical thought was profoundly and irremediably flawed, we lost something valuable in our

constitutional discourse when we discarded it in 1937, and we have not yet found a replacement.

In this prologue, I summarily sketch the substance of classical legal thought, by way of identifying and defining the subject of the book in a generalized description. Ensuing chapters elaborate those generalizations, trace their historical evolution, and explore the causes of classicism's demise.

Classical Legal Thought Briefly Described

Most recent writers on American law take the existence of classicism as a given, either as formalist method or as laissez-faire policy preference. But some scholars have begun to investigate it more systematically.[4] The account of classicism in this study begins with their conclusions and extends their inquiry. Going backward in time, it seeks classicism's origins in the public law of the early republic; moving "horizontally" in the era of classicism's dominance, it identifies classicism's linkages to contemporary thought about society and the economy; carrying the story forward in time, it traces classicism's overthrow.

Legal classicism constituted a coherent body of thought that provided answers to some of the most enduring questions of jurisprudence: What are the sources of law? How does law promote the goals of society — and which goals? What legitimates the authority of legal institutions? Why is legal obligation binding? What is law's relationship to politics? Classicism offered a justification of law and judicial power that was persuasive, even compelling, in its time. So powerful was its explanatory and legitimating power that it continues to echo today in our legal discourse, a half-century after it was consigned to a dishonored burial. To paraphrase Maitland on the forms of action: classicism may be dead, but it rules us from the grave. Like the tolling of the drowned bells in Debussy's "Sunken Cathedral," legal classicism's muffled, ghostly peal rings throughout modern law.

Classical legal thought may be presented in terms of (1) patterns of reasoning, (2) social values, and (3) sources of law.

Patterns of Reasoning

Legal classicism was, first, a way of thinking about law and, behind that, a way of thinking, period. It was abstract, formal, conceptualistic, categorical, and (sometimes) deductive. One reason for classicism's bad repute in our time is that this way of thinking overstayed its welcome. It lingered on in law long after it had been abandoned in other fields. It was discredited among other intellectuals, dysfunctional in light of law's goals, and ever more distanced from social and economic reality. In the end, classical legal thought hung on only as empty dogma, and its critics could condemn it as nothing more than a rationalization for illicit power.

The innovations in legal education instituted by Dean Christopher C. Langdell at the Harvard Law School after 1870 inculcated the claim that the Langdellian law school teaches students "to think like a lawyer." Preposterous though that idea is, it

does contain an element of truth. Classical jurists did organize their thought in ways that were distinctive and that we may ascribe to them as characteristic. Their processes of reasoning furnished the methodological foundation of classicism.

Classical thought aimed at a high level of abstraction and generality. Parties appeared in opinions and treatises as "A" and "B," "purchaser" and "seller," "the contracting parties," "a reasonable man." When such bloodless impersonality was not possible, judges seldom took more notice of the parties than to refer to them in status terms as "appellant's intestate," or "one Jones, a brakeman." Abstraction promoted neutrality, purportedly diverting the judge from being swayed by personal sympathy or aversion. This self-reassuring posture of impartiality enabled judges to ratify their assumptions and biases, or — what amounts to the same thing — to assume that those views were universally valid. Generalization served the same end by enabling law's universality. The justice at which classicism aimed was not a fair, equitable result in the particular case, but rather a uniform, undeviating, impartial application of supposedly neutral rules in all cases. Law must apply in the same way to all similarly situated. The more general and unqualified the statement of the rule, the more likely that it would approach such universal scope.

Professional Americans a century ago enjoyed a luxury no longer within our reach today: they were confident that they could attain objective truth. Such premodern confidence in objectivity, grounded in beliefs about the moral and the material universe — both being governed by universal laws — enabled them to believe that concepts like property or race had objective validity. They thought that such legal categories were innate in nature, not socially constructed. Absolute standards and truth were attainable by complying with unquestioned norms. The moral and legal order could be identified with certitude and should be imposed because it was objectively just. For the pious, this moral/legal order was divinely ordained; for others, whatever its origins, it was as patent and as binding as the law of gravity. Fortified by such epistemological confidence, classical jurists derived notions of fact, causation, and proof that were certain and objectively verifiable. It would have struck them as perverse and socialistic, for example, if someone had suggested that property relationships were legally and socially constructed (and thus subject to legislative control), rather than being the objective, determinate relationship between a man and a thing that he owned.

Generalization, abstraction, and certitude were components of a larger classical enterprise, the creation of a legal science. The very notion of law being a "science" challenges us moderns. So fatuous does the idea seem, in the light of modern understandings both of science and of law, that no one has yet been able to compose a satisfactory account of what legal science meant to the classical jurists in the United States. To grasp their aspiration to legal science, the modern reader must leap by imagination back into a world before Rutherford and Einstein and Planck and Heisenberg, before Freud, before Marx and Durkheim and Weber, sometimes, it almost seems, before Galileo and Copernicus. Legal science encouraged lawyers to think that they were expounding principles of universal validity, applicable to all legal categories they fit, beyond human power to manipulate or modify. The right principles would solve the problem of precedential anomalies, which were often caused

by the pesky impulse to achieve justice in a particular case. In the "Formal Style" discerned by Karl Llewellyn, "'principle' is a generalization producing order which can and should be used to prune away those 'anomalous' cases or rules which do not fit." The "rules of law are to decide the cases; policy is for the legislature, not for the courts."[5]

A ready technique for assigning things to their appropriate categories was to construct simple dichotomies: "direct" versus "indirect," "fact" versus "law," "manufacturing" versus "commerce." Categories usually identified the appropriate principles to be applied. Legal relations turned on whether, for an example drawn from the law of agency, someone acting on behalf of another was an agent, a servant, or an independent contractor. Such patterns of thought were reductionist, hurrying classicism on in its flight from fact-specificity toward abstraction, resolving reality's complexity into simplified binary patterns.

Classical lawyers reveled in systematization. Though its underlying patterns varied over time, classicism sought to identify a hierarchy of principles, doctrines, and norms. This structure generated results, which accreted into precedents. In going from precedents to principles and back down again, classical lawyers functioned both inductively and deductively. Generally the deductive method was better suited to appellate adjudication, while the inductive mode of reasoning was more at home in the academy, especially in two lasting Langdellian innovations, the casebook and the Socratic method.

Some scholars have called this way of thinking systematically "formalism," or "formalistic."[6] That designation usually connotes a mode of thought and sometimes of literary expression as well, but it has jurisprudential implications that render it potentially misleading. We encounter a substantive difficulty in dismissing classical thought simply as formalistic. "Formalism" might properly imply rule-boundedness, the idea that judges are constrained by extant norms and achieve justice by applying those norms.[7] Taken in this sense, the label is not adequate for an understanding of classicism. It evokes the dilemma forcefully expressed by the German savant Rudolf von Jhering, who wrote of the philosopher's confrontation with formalist reasoning in law: "[W]ho can see in formalism nothing but a superficial way of seeing things, a purely external impulse of looking at things, a positive disruption of the relation between form and substance. . . . This overemphasis of the dry, bare form, this angst-ridden, pedantic worship of a symbol that is totally worthless and meaningless in itself, the poverty and meanness of spirit that animates and dominates formalism." Yet, Jhering went on, formalism, "because it is grounded in the innermost essence of law, repeats itself in the law of all peoples, and always will."[8]

Like Jhering, we are repelled by formalism's exaltation of form over substance, rule over justice, yet bound by the need ever to return to the command of rules and their disciplined application. Charles Fried has identified this characteristic of formalism as its "constitutive rationality," necessary to law anywhere.[9] In any event, the classical enterprise cannot be written off simply because it was formalist either in logic or in application of rules.[10] Its ultimate failure was determined by other characteristics.

Given classicism's premises about how lawyers ought to think, the role of the courts followed logically. Drawing on pre–Civil War suppositions, legal classicism

held that judges did not "make" law; they "found" it. This is sometimes called a declaratory theory of judging, from the commonplace or legal maxim that stated that the judicial function was "ius dicere et non ius dare": to declare the law and not to make it. The judge supposedly had no more discretion to invent a legal rule on instrumentalist grounds or policy preferences than a chemist had to dictate the outcome of an experiment. In both cases, scientists discovered results; they were not supposed to control or manipulate them.

This view of the judge's role led lawyers of the classical period to ascribe to him an almost automaton-like quality, a superhuman achievement of impartiality that assumed James I's claim to be *lex loquens*. William Blackstone provided the canonical justification for this view: "[T]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact. . . . Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on settled and invariable principles of justice."[11]

Social Values

The foregoing patterns guided lawyers in *how* they thought about law and society. Equally important was the substance of their beliefs, or *what* they thought about society, about the economy, about law, about courts, about themselves.

Traditional liberal accounts of classicism ascribe ideologies of laissez-faire and social Darwinism to the legal elite. The most influential imputation of this idea was Justice Oliver Wendell Holmes's *Lochner* dissent: "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[12] Holmes's assertion was not wrong, but some qualifications are in order.

Lawrence Friedman overstated the case when he claimed that "neither the United States Supreme Court nor the state supreme courts as a whole ever judged social legislation on the basis of any consistent pattern of ideas which can properly bear the name of an economic theory. . . . No consistent ideological pattern emerges from the case law."[13] Ideology there was, in abundance, but not consistency. Classical jurists proclaimed a set of beliefs; they did not maintain them with the ideological rigidity of a Richard Epstein, but they were guided by those beliefs in their thinking and their judging.

Laissez-faire — which Max Lerner called "the philosophical anarchism of the rich and successful"[14] — did find a more enthusiastic reception in the United States than it did in England, the home of Herbert Spencer, its foremost exponent. But few American lawyers had ever actually read Spencer or his American disciple, William Graham Sumner. They were no better acquainted with the writings of the French physiocrats, Adam Smith, Jeremy Bentham (whose contempt for the common law would have closed their minds to his thought in any event), John Stuart Mill, or the leading exponents of the Manchester school, Richard Cobden and John Bright. For that matter, even their acquaintance with John Locke was, at best, third-hand. By the time laissez-faire thought reached these shores, experience had long overtaken theory

in England: repeal of the Corn Laws was a distant memory.[15] The social order over which Gladstone and Disraeli presided was no more consecrated to laissez-faire dogma than was contemporary Wilhelmine Germany.

Laissez-faire called for limited governmental intervention in the economy — constrained, but by no means weakened. Yet American legal conservatives were almost unanimously supporters of tariffs and the gold standard. The English visitor James Bryce noted in 1888 that "one half of the capitalists are occupied in preaching laissez faire as regards railroads, the other half in resisting it . . . in tariff matters."[16] But the men who enacted the Payne-Aldrich and Hawley-Smoot tariffs would have proclaimed themselves believers in laissez-faire and disciples of Spencer (if they had known who he was).

Laissez-faire also implied dedication to a free market economy, yet here too consistency and doctrinal purity evaporated in the heat of self-interest. The night-watchman state was a figment of classical-liberal rhetoric. An unregulated market society might be a suitable means of allowing the price of labor to sink to levels set by penury, but it certainly would not do when private enterprise called for subsidies or protection from competition.

Classical lawyers have been portrayed as social Darwinians. That, too, is true, but only with qualifications. Belief in a free market, however much it may be compromised by self-interest, is not the same thing as a vulgarized social Darwinian outlook. Jurists of the classical era believed in competition, for labor at least, and they thought that the struggle for survival should provide an effective incentive to workers. So a theoretical social Darwinism was a natural complement to their let-alone outlook. Yet here again consistency gave way to opportunistic pursuit of the main chance, especially among large economic competitors. Struggle, competition, and survival were scarcely desirable among corporate giants, or among suitors for scarce or unique natural resources. Indeed, one of the most powerful impetuses for national economic regulation came from industrialists trying to escape from competition among themselves.

Thus, to label legal classicism the judicial expression of free market economics or survival-of-the-fittest social outlook is only an approximation to reality. Those dogmas or social philosophies were weapons in an ideological armory: available but not constantly in use. The Justices of the Supreme Court drew on them opportunistically, some more frequently than others. Rufus Peckham and David J. Brewer endorsed laissez-faire dogma confidently, but most of their brethren refrained from avowing such ideological commitments. The labels of laissez-faire and social Darwinism are catchalls rather than precise analytical tools.

Our search for more comprehensive and accurate ways of describing the classical outlook would be better directed toward morally based values. Like most other Americans in the late nineteenth century, classical lawyers were captives of an individualist outlook. In nineteenth-century law, as in other areas of Victorian culture, the individual was the exclusive focus of concern in legal, moral, and political reasoning. Lawyers of the time did not think of society as a congeries of groups, which is the assumption of interest-group pluralism that dominates twentieth-century political analysis. Instead, they placed great store on the autonomy of the individual will. Applauding Henry Maine's celebrated observation that "the movement of the

progressive societies has hitherto been a movement from Status to Contract,"[17] they regarded the centrality of individual will as the supreme achievement of modern legal systems. It represented progress beyond feudal societies where individuals were constrained by status, rank, or class, locked permanently into the station in which they had been born. Progress toward nineteenth-century liberalism carried society away from tyranny, superstition, and constraint, to a legal order characterized by freedom, rationality, and individual mobility. All modern law seemed to be a realization of that progress: slavery, the most total of status constraints, had been abolished; first married women, then their spinster sisters, had been emancipated into full legal capacity; political status based on religion or property ownership had given way to universal suffrage (to classical judges, a mixed blessing, though).

Both private and public law exalted the primacy of individual will. The law of contracts contrived doctrines of offer and acceptance to give it effect. The public law doctrine of liberty of contract endued contractual capacity with constitutional status. In property law, common law courts sloughed off restraints on alienation to encourage the free transferability of both realty and personalty. Commercial law promoted negotiability to create a commercial society composed of innumerable individual economic actors. In all these ways, the law celebrated its progressive tendencies, freeing human creative capabilities to enhance both personal growth and the common welfare.

Certain consequences followed from the centrality of individual will. One was its correlate, individual responsibility. Classical law proclaimed hostility toward state paternalism. "The paternal theory of government is to me odious," trumpeted Justice David J. Brewer in 1892.[18] Classical judges stressed the necessity for all people to be responsible for their own destiny, and condemned intervention by the state meant to protect individuals from misfortune and their own folly or inadequacy.

Because the law exalted will, it had to regard all individuals as juristic equals. This had pervasive consequences. In contractual relationships, the law could not take account of disparities in bargaining power, for to do so would be to invite the sort of state intervention that the antipaternalist ethos condemned. Collectivities were suspect, at least those formed by working people, because they threatened to interpose an external entity like a union into binary economic relationships that presumed one person freely contracting with another. (It should go without saying that classical law often overlooked legal arrangements inconsistent with this presumed individualism. Thus, for example, classical lawyers saw nothing regrettable about the elaborate structure that conservative white regimes erected in the post-Reconstruction South to constrain and repress black labor. Nor were classical lawyers much troubled by pooling, trusts, or manufacturers' associations unless they ran afoul of specific antitrust restraints.)

The primacy of individual will had an important grounding in political theory. A free state must not be coercive. In theory, and as much as possible in practice, the state must rest on the consent of the governed. Consent was presumed from continuing presence in the jurisdiction, and had been ever since the Laws and Liberties of Massachusetts had made the point explicit in 1648. That is not to say that the state could not act coercively, of course. On the contrary: classical lawyers became rapturous about the coercive might of the state when it was deployed to crush labor

unions or other impediments to the pure theoretical one-to-one contractual employment relationship.

The basic condition for the exercise of individual will was liberty, which classical lawyers understood in the sense that Isaiah Berlin has described as "negative liberty."[19] Liberty in this sense required restraints on the state's power to assure that the individual would not be oppressed by its authority. Positive liberty, providing an active role to a person as a member of society exercising civic responsibility together with others, was alien to the classical mind. The sort of active involvement in civic affairs that classical republicanism demanded was scarcely appropriate for the working classes and other lower orders, whose proper role was limited to contributing labor to society's productive capacities. The Jeffersonian yeoman farmer was a figure from a landscape long gone. The bucolic idyll had no place in the industrial United States of the late nineteenth century, except in Currier and Ives nostalgia. Governance, as Alexander Hamilton had insisted, was the prerogative of those fitted for it by education, wealth, command, and status. But all men equally enjoyed negative liberty, the freedom from unwarranted state coercion. (There was no appropriate direct role for women in governance, any more than there would be for children or lunatics. Theirs was the domestic sphere.)

Classical lawyers had only a partial conception of equality, and that was limited to the narrow scope of jural equality: all persons were presumed equals in bargaining relationships. The state could not properly endow any individual with formal advantages not based on services rendered or other indicia of merit, nor could it impose disabilities unrelated to the public welfare. Beyond that, however, state-enforced equality would conflict with the ideal of liberty. Equality of opportunity, if not pressed too vigorously on behalf of the poor, was a harmless social ideal, possibly even a useful one if it propagated a Horatio Alger myth of vertical social mobility. But equality of results or equality of condition was abhorrent, for several reasons. It could be achieved only by redistribution of extant wealth. It would derange the presumptively neutral and just results of industry and would be bad policy to boot, rewarding the indolent or the unfit at the expense of the productive members of society. Inequality of status or fortune was inevitable in all free societies, and attempts to rectify such inequality could only infringe individual liberty in one way or another.

Classical legal thought cherished an understanding of rights derived from the tradition of natural or higher law. In the nineteenth century, lawyers thought of rights primarily in terms of contract and property. Rights were anterior to the state, recognized and protected by the Constitution but not created by it.[20] In this Lockean sense, the state existed to protect rights; that was indeed the whole point of the social compact, embodied in the federal and state constitutions. State interference with rights, as by, for example, intruding into bilateral individual contractual arrangements, would pervert the social contract and its implementation in law.

This understanding weakened around 1900 with the rise of the positive state. Rights are now seen as claims that are created by law on the state or against other individuals and entities. To understand classical thought, it is necessary for moderns to go behind that twentieth-century understanding of rights.

The liberty ideal also alerted American elites to the possibility that public law

(constitutional, administrative, and criminal law) had a threateningly redistributive potential. Anticipating that, the Framers had carefully hedged public law about with constraints that protected property rights and contractual results: the contracts, due process, and just compensation clauses, for example. Most bodies of private law were nonredistributive; contract law, above all, assumed that negotiations resulted in wholly voluntary economic arrangements by bargaining equals based on their estimates of their own self-interest. Under a regime of freedom of contract, the state redistributed nothing; at most, it enforced the consequences of the parties' willed transactions.

Constitutional and administrative law, on the other hand, threatened to rearrange the status quo of power and material wealth, the most threatening form of state coercion. Taxation posed an obvious danger, but regulation of commercial enterprise was no less serious a threat, especially because it might often be more plausible and politically justifiable. For all these reasons, the distinction between public and private law had to be strictly policed. Private law had to evolve toward ever more effective realization of individuals' wills, while public law had to inhibit state authority. (In recent times, this older emphasis has been revived in "public choice" theory. Fearing redistribution, or what they term "wealth transfers," public choice theorists call for an activist judiciary to police legislative policies to root out the influences of interest group "rent-seeking.")[21]

The classical lawyers' fear of redistribution lent a distinctly antidemocratic cast to their thought. Continuing to work within a structure of assumptions and beliefs established a century earlier during the American Revolution, they worried that numerical majorities in a state might combine politically to despoil the virtuous and wellborn of their accumulated wealth, the fitting reward of industry. They shared James Madison's anxieties about majority power, without his offsetting confidence that structural limitations on majority rule could constrain the masses. The steady progress of democracy since Madison's day was scarcely encouraging. Democratic majorities in state and municipal government had indulged themselves in such appalling adventures as debt repudiation and modification of corporate charters. Democracy threatened to become the handmaiden of plunder. Woe betide the state when the hordes of new immigrants, improvidently enfranchised by the Democratic Party prostituting itself for their votes as it had earlier done for the Irish vote, augmented the forces of radical farmers, silverite monetary inflationists, labor unions, and agrarian radicals rallying to the Farmers Alliances!

Classical jurists placed the highest value on certainty, stability, and predictability, both in society and in law. They feared the disruption of either. "Anarchy" was for them a code word expressing their inmost anxieties, a fear of loss of control and of descent into a Hobbesian war of all against all. The social turmoil that marked the last quarter of the nineteenth century frightened them. Labor unrest and the turbulence of the cities seemed to realize their fears, with the promise of worse to come. Legal elites turned to law to do what they could to suppress disorder. This response has led unsympathetic observers to write them off as conservative, if not reactionary. They were that, to be sure, but our understanding of their outlook is incomplete if we conclude our inquiry at that point.

The Nature and Sources of Law

Classical lawyers understood law in ways significantly different from the way that we do a century later. We risk misunderstanding their thought, and parodying their achievements, if we fail to take those differences into account.[22]

Given classicists' yearning for order and stability, it was ironic that one of the traditional foundations of those values in the legal order was no longer accessible. Natural law, "the Laws of Nature and Nature's God" to which Jefferson appealed in the Declaration of Independence, had long been retired as a plausible basis for the legal order. Living in what had become for American elites a secular age, classical lawyers (themselves seldom pious or traditional Christians)[23] faced the challenge of identifying a credible secular alternative, but one of equally compelling authority.

Nevertheless, they believed that law was derived from universal principles of justice and moral order. These were as prevalent, unchanging, and authoritative as the law of gravity, to which classical lawyers sometimes compared them. Because these principles were rooted in absolute justice, their faithful application would produce just and correct results. For those who took comfort in such things, the principles that underlay law were harmonious with the commands of the Decalogue and with Christian morality generally.

Viewed as a system, the body of law was comprehensive and complete unto itself. At the tier of principle, the system was closed: no one expected to discover new transcendent principles of justice. New norms might evolve to accommodate social or economic change, and the application of norms certainly would evolve. But doctrinally integrated principles were fixed. Judges had an obligation to maintain the internal coherence and consistency of the system. They did this by incorporating valid decisions into the structure and sloughing off flawed precedent.

In the next tier of law's hierarchy came doctrine, a lawyers' systematization of the rules that principles generated. Doctrine may be essential to coherent development of the law, as Charles Fried has argued,[24] but it remains something imposed on the otherwise spontaneous evolution of the common law. In a common law system, doctrine is academic in origin, identified when lawyer-scholars stepped outside the day-to-day concerns of practice to reflect and write about law's development. Two innovations, debuting a half-century apart, made it possible for lawyers to expound doctrine: the legal treatise, which appeared in the 1820s, and the modern law school, begun in the innovations of Langdell at Harvard and Theodore W. Dwight at Columbia in the 1870s. Together, they provided first the medium, then the environment, in which academic lawyers could systematize legal rules into coherent doctrinal structures.

Doctrinal exposition in treatises provided the interface between supralegal principles and the actual rules of law generated by common law adjudication. These rules were the product of a mode of litigation having certain specific characteristics.[25] Classical litigation was bipolar, between two private parties; retrospective, attempting to restore a status quo disturbed by a tortious act or a contractual dispute; confined in its impact, limited in its immediate consequences to the actual parties, and, at law, resolved by the payment (or not) of money damages; and fertile, generating a legal rule in a regime of stare decisis capable of resolving the next dispute presenting similar facts.

The forms of classical adjudication contributed to attaining classicism's highest goal, the rule of law. Judgment was to depend on impartial administration of fixed rules, not on uncontrolled judicial discretion, empathy, or whim. Only such neutral impartiality could guarantee that the application of law would be predictable, and its substantive rules not dictated by those who stood to benefit from them.

Central to the classical constitutional vision was the imputed differentiation, if not antagonism, between state and society. Society, defined by the primacy of the individual and the role of institutions like family and church, was prior to the state (that is, government), in both time and precedence. According to orthodox Lockean theory, the state existed to protect society and its constituent institutions, but it had the sinister tendency of itself threatening them. Control of state power, therefore, became one of the most pressing needs of free societies.

In the nineteenth century, the rule of law was the principal means of assuring society's dominance over the state. The idea of a rule of law was not new in industrial America; John Adams was responsible for one of its ancestral formulations in the Massachusetts Constitution of 1780, whose Declaration of Rights mandated the separation of powers, "to the end it may be a government of laws and not of men."[26] Nor was it unique to the United States; it was the American cousin of the contemporary German ideal of the *Rechtsstaat*. But the concept took on new connotations in the heated social atmosphere of the late nineteenth century. In Adams's time, the rule of law assumed the neutral state, governmental power impartial among conflicting interests, lending its force to none except by the operation of majoritarian republican politics, constrained by constitutional norms established by the sovereign people themselves through ratification of the Constitution. But in the industrial America of a century later, the rule-of-law ideal had come to be, for many, a fiction justifying use of the state's power to sustain the privilege and position of wealthy elites.

This threat to the rule of law had a dangerously destabilizing potential, threatening the legitimacy of the law itself. Across the ideological continuum, both contemporary and modern, the rule of law is considered essential to law's place in a democratic society. Even in a Marxian view, where law is seen as a form of ideology that legitimates class power through its hegemonic operation, the rule of law operates to require inclusion of equitable principles valued by nonhegemonic groups like workers.[27] From more centrist perspectives, the modern Court has reaffirmed the necessity and the supremacy of the rule of law in solemn language suited only to the gravest occasions.[28] Such near universal[29] allegiance to the rule of law, at least as aspirational ideal, confirms its centrality in the American legal regime.

Lawyers considered American legal culture in the classical era to be autonomous. They regarded their system as self-contained and characterized by a quality that today is known in cardiac physiology as "automaticity": capable of generating its own animating impulses, keeping itself going along by an endogenous capability of activating itself.[30] This automaticity assured law's independence from political controversy and legislative struggle. To extend the cardiac metaphor, if disturbance or trauma affected other organs (legislative or executive, church or private association) the heart of law, the common law system, would continue to beat, pumping life-sustaining order throughout the body politic.

Law's autonomy led classical jurists to regard social science data with Olympian

indifference (until the Supreme Court permitted itself to be influenced by the Brandeis Brief in 1908). What did it matter that legal doctrine or norm might or might not be compatible with a reality disclosed by the emergent social sciences like economics or sociology? The imperial sway of a general principle like *pacta sunt servanda* was not to be deflected by discordant social conditions (such as the relative bargaining power of the parties) any more than it was to be diverted by a party's unilateral preference.

Classical lawyers disdained resort to the emergent social sciences because their legal system was sufficient in itself, endogenously generating whatever impetus to its own development might be required. In this attitude, they followed in a tradition established by Edward Coke in the seventeenth century, reaffirmed by John Austin in the nineteenth, and most recently restated in an extreme form amounting to intellectual autarky by Alan Watson,[31] that insists on law's autonomy from the rest of society.[32]

In a similar sense, law was amoral (though expressing the thought that way might have troubled classical lawyers). Its legitimacy rested not on an individual judge's own ethical compass, nor on the customary or popular moral values of contemporary society, nor even on the Christian moral order. Classical lawyers boasted of law's independence from popular morality. Nathan Dane, acclaimed as "the American Blackstone," explained that "the law of the land and morality are the same [only in] some special cases." The become divorced "when policy, or arbitrary rules must also be regarded. Virtue alone is the object of morality, but law has also often, for its object, the peace of society, and what is practicable."[33] Joseph H. Beale, one of the last classicist academics, wrote in 1916 that "law as the lawyer knows it is absolutely distinct from any rule of conduct based on a moral ground however strong."[34]

Some classical lawyers, such as James C. Carter, believed the common law method was "historicist" in the continental sense, emanating out of the customs and experience of the people. This assured law's authenticity and confirmed the legitimacy of its results. Their common law bias imbued judges with a suspicion of legislative intrusion into the economy or into social relationships. Since the natural evolution of common law kept it harmonious with society, legislative intervention could only disturb that harmony. Thus classical lawyers often repeated the old precept that statutes in derogation of the common law are to be strictly construed. The public law counterpart was vigilant judicial oversight of legislation to insure its conformity with constitutional limitations.

The Structure of This Book

Legal classicism held sway for half a century because its roots reached down into the origins of the American constitutional order and intertwined with some of our most fundamental normative republican commitments. Its legitimating function traced back to the republic's beginnings, and was derived from republican "foundational principles" concerning the nature of government and the social order.[35] Thus lawyers could invoke it as "normative history"[36] to sanction policy positions that

were implicit in legal doctrines. Chapter 1 surveys the first century of legal growth in America, outlining the foundations of classical thought.

Classical ideology rose to ascendancy in the generation after the Civil War. It grew out of the social and economic conditions of the time, and constituted the elite bar's response to them. The second chapter explores American society in the Gilded Age and the anxieties it induced among American lawyers and judges, and summarizes the ideological content of classical thought.

Once formulated into a coherent whole, the classical outlook quickly dominated the work of the United States Supreme Court in constitutional law. Although its reign was not exclusive — rival lines of precedent contemporaneously developed that undermined its authority — legal classicism constituted *a* dominant way of expounding the law of the constitution, but not the only way. Chapter 3 evaluates classical constitutional law in the era of classicism's reign, 1886 through 1937.

American law has developed through continual discourse over centuries of time, which has led constitutional theorists to see it as the product of a community of discourse.[37] One way of interpreting our constitutional history is to consider the Court engaged in a dialogue with the American people over the direction of republican values. This discourse has not always been harmonious. The impact of classical adjudication on American society, government, and the economy provoked hostile political and intellectual reactions. Legal classicism tried to control the attitudes of laypeople toward law and courts, but it never commanded universal respect. On the contrary, the history of American public law has been marked by recurrent political efforts to overthrow classical beliefs.

In the political arena, different interest groups threatened by the consequences of classical adjudication sought to curtail the power of courts or to overturn specific decisions. Some judges and scholars not in the thrall of classical ideology produced a critique of the ways that its assumptions determined results in both private and public law. Meanwhile, by the First World War (if not earlier), the intellectual vitality of legal classicism had drained away. It ceased to be intellectually fecund just as its legitimating authority was beginning to wane. Chapter 4 explores this political and intellectual decline.

One of the greatest challenges confronting the student of classicism is to explain why an explanatory paradigm of such power, scope, and legitimating authority collapsed so suddenly and completely in 1937–1938. Chapter 5 and the epilogue offer some explanations.

Classicism succumbed in a surprisingly brief period and was defunct as a legitimating ideology by 1938. When it disintegrated, a new paradigm, announced offhandedly by Justice Harlan Fiske Stone in a footnote in *United States v. Carolene Products* (1938), partially supplied its place. It anticipated the next half-century of constitutional development, announcing a shift in the Court's concern from economic to noneconomic issues. After Stone became Chief Justice in 1941, the Court began implementing the new legal order.

But the *Carolene Products* paradigm, prescient though it proved to be, did not supply a comprehensive legitimating authority for the system that it had displaced. As an innovation, it did not enjoy the aura of legitimacy that had validated classicism. In the half-century since Stone announced the new paradigm, the legal sys-

tem has not yet produced a comprehensive structure of thought comparable to classicism, and therefore much of the Court's work today remains vulnerable to challenges to its legitimacy.

Finally, a historiographic appendix surveys the ways that historians have presented legal classicism. Lawyers and others who are not historians sometimes do not appreciate the extent to which our understanding of the past is nothing more than a digest of what historians have written about it. Lay readers sometimes attribute greater authority to our interpretations than is warranted. The writing of history is as contingent, as culturally bound, and as ideological as the writing of judicial opinions. A survey of how historical interpretations of classicism have evolved might prove useful or interesting to some readers, and it appears in the appendix.

Notes

1. Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (1970), 4.

2. I borrow the phrase from G. Edward White, "Transforming History in the Modern Era," 91 *Mich. L. Rev*. 1315, 1323–1324 (1993) (reviewing Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* [1992]; I will hereafter refer to this book as Horwitz, *Transformation II*).

3. Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920," in Gerald L. Geison, ed., *Professions and Professional Ideologies in America* (1983), 72.

4. Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940," *Research in Law and Sociology* 3 (1980), 3; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (1977), 253–68 (hereafter: Horwitz, *Transformation I*); Horwitz, *Transformation II*, 3–63; Elizabeth Mensch, "The History of Mainstream Legal Thought," in David Kairys, ed., *The Politics of Law: A Progressive Critique*, 2nd ed. (1990), 13–37; Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise," 70–110; Thomas C. Grey, "Langdell's Orthdoxy," 45 *U. Pitt. L. Rev*. 1 (1983); Stephen A. Siegel, "Lochner Era Jurisprudence and the American Constitutional Tradition," 70 *N.C. L. Rev*. 1 (1991); Neil Duxbury, *Patterns of American Jurisprudence* (1995), 9–64; Donald J. Gjerdingen, "The Future of Our Past: The Legal Mind and the Legacy of Classical Legal Thought," 68 *Ind. L.J.* 743 (1993); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993).

5. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals*, (1960), 38.

6. E.g.: William E. Nelson, "The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America," 87 *Harv. L. Rev*. 513 (1974); William M. Wiecek, *Liberty under Law: The Supreme Court in American Life* (1988), ch. 5, "The Formalist Era, 1873–1937."

7. Frederick Schauer, "Formalism," 97 *Yale L.J.* 509 (1988).

8. Rudolf von Jhering, *Der Geist des Römischen Rechts*, vol. 2, part 2, 478–79 (1858). I thank my colleague Peter Herzog for guiding my translation of this passage. Duncan Kennedy quotes a different translation in "Legal Formality," 2 *J. Legal Studies* 351 (1973).

9. Charles Fried, "Constitutional Doctrine", 107 *Harv. L. Rev*. 1140, 1145 (1994).

10. Edward A. Purcell Jr. denies that legal thought in the 1870–1930 period can usefully be described as formalist. He maintains that judges' decisions were informed by substantive value choices and thus were instrumentalist: *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958* (1992), 253–254.

11. William Blackstone, *Commentaries on the Laws of England* (1765–68), vol. 3, 396.

12. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). A minor economy of wordage: since I do not refer to Holmes *père* anywhere in this study, I omit the Jr. in the name of Holmes *fils*.

13. Lawrence M. Friedman, "Freedom of Contract and Occupational Licensing 1890–1910: A Legal and Social Study," 53 *Cal. L. Rev*. 487, 525–26 (1965).

14. Max Lerner, "The Triumph of Laissez-Faire," in Arthur M. Schlesinger Jr. and Morton White, eds., *Paths of American Thought* (1963), 148.

15. Arthur J. Taylor, *Laissez-Faire and State Intervention in Nineteenth-Century Britain* (1972).

16. James Bryce, *The American Commonwealth*, 2nd ed. rev. (1891), vol. 2, 292.

17. Henry Maine, *Ancient Law* (1861; rpt. 1917), 100.

18. Budd v. New York, 143 U.S. 517, 551 (1892) (Brewer, J., dissenting).

19. Isaiah Berlin, *Four Essays on Liberty* (1970), ch. 2, "Two Concepts of Liberty."

20. Cf. a modern echo of this belief: "[W]e deal with a right of privacy older than the Bill of Rights . . . .": Douglas, J., for the majority in Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

21. Jonathan R. Macey, "Public Choice: The Theory of the Firm and the Theory of Market Exchange," 74 *Cornell L. Rev*. 43 (1988); Macey, "Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory," 74 *Va. L. Rev*. 471 (1988).

22. Although the subhead to this section is almost identical to the title of John Chipman Gray's classic, *The Nature and Sources of the Law* (1909), the following paragraphs do not reflect the theses or contents of that magisterial book.

23. For a pious exception, see Stephen A. Siegel, "Joel Bishop's Orthodoxy," 13 *Law and Hist. Rev*. 215 (1995). Thomas M. Cooley was another.

24. Charles Fried, "Constitutional Doctrine," 107 *Harv. L. Rev*. 1140 (1994).

25. Abram Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harv. L. Rev*. 1281 (1976); Louis L. Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff," 116 *U. Pa. L. Rev*. 1033 (1968); Owen M. Fiss, "The Social and Political Foundations of Adjudication," 6 *Law & Hum. Behavior* 121 (1982); Fiss, "Foreword: The Forms of Justice," 93 *Harv. L. Rev*. 1 (1979).

26. William F. Swindler, *Sources and Documents of United States Constitutions* (1973–1979), vol. 5, 96.

27. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975), 258–269.

28. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) (joint opinion of O'Connor, Kennedy, Souter, JJ.; dissenting opinion of Rehnquist, C.J.).

29. Morton Horwitz is, or was, an exception: "The Rule of Law: An Unqualified Human Good?," 86 *Yale L.J*. 561 (1977).

30. The human heart generates its own electrical impulses in the sinoatrial and atrioventricular nodes, which cause depolarization and repolarization of cardiac muscle fibers, producing contractions and relaxations of the atria and the ventricles.

31. Alan Watson, *Slave Law in the Americas* (1989), 64, 76, 130–133.

32. Charles Fried makes a more moderate claim for law's autonomy in "Jurisprudential Responses to Legal Realism," 73 *Cornell L.J*. 331 (1988); see also Richard Posner, "The Decline of Law as an Autonomous Discipline," 100 *Harv. L. Rev*. 761 (1987) (noting shrinkage of law's autonomy since 1960).

33. Nathan Dane, *A General Abridgement and Digest of American Law* (1823–29), vol. 1, 100.

34. Joseph H. Beale, *A Treatise on the Conflict of Laws*, 1st ed. (1916), vol. 1, 153.

35. On foundational principles in constitutional adjudication, see Kennedy, J., concurring in United States v. Lopez, 115 S. Ct. 1624, 1634 (1995).

36. Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (1993), 180.

37. Robert Cover, "Foreword: Nomos and Narrative," 97 *Harv. L. Rev.* 4 (1983); Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," 93 *Yale L.J.* 1013 (1984); Frank Michelman, "Foreword: Traces of Self-Government," 100 *Harvard L. Rev.* 4 (1986); Kahn, *Legitimacy and History*, 171–189; Gillman, *The Constitution Besieged*, 200 (who refers to a "legal" ideology as understood by "interpretive communities in particular historical contexts"). These authorities differ among themselves, however, about just who constituted the discursive community: the American people, the Court itself, the Court plus the professional elite, Congress, etc.

Chapter One

The Foundations of Classical Legal Thought, 1760–1860

Classical legal thought did not appear suddenly and without precedent in 1890, nor was it an innovation. It grew instead out of the previous century of constitutional growth, evolving in an organic development of antebellum legal culture. Its origins go back to the creation of the American republics. Classicism arose from the original eighteenth-century constitutional foundations and derived its legitimating power from them.

In the ideology of the American revolution, in the early state constitutions, in the national constitution of 1787, and in early precedents of the state and federal courts, Americans created a constitutional system that privileged certain substantive values, particularly those relating to contracts, property, and security for personal liberty. The Framers of the state and federal constitutions assigned the courts' place in the constitutional order and legitimated the use of judicial power.

The American Revolution

From the American Revolution, classical legal thought derived some defining elements of American constitutionalism:

the sense of a higher law controlling ordinary legislation
a fear of governmental power as a threat to individual liberty
the dominance of legal culture in American public life
commitment to a stable legal order
the tendency to convert political and ideological divisions into legal argument
the centrality of the common law in the American legal order
a dedication to limited government and regularized procedure