



American Legal Thought in Transatlantic Context, 1870-1914

Résumé : La plupart des juristes américains ont décrit leurs prédécesseurs du XIX^e siècle comme ayant été des formalistes déductifs. Dans mon dernier livre, *Law's History: American Legal Thought and the Transatlantic Turn to History*, je montre que la première génération de juristes universitaires aux États-Unis, qui a écrit au cours des trois dernières décennies du XIX^e siècle, considérait le droit comme une science inductive historiquement fondée. C'est une école historique de la jurisprudence américaine qu'ils constituèrent et qui a été remplacée par le développement d'une vision sociologique du droit au début du XX^e siècle. Cet article se concentre sur le contexte transatlantique, les liens entre les universitaires européens et américains, par lesquels cette école historique du droit américaine a émergé, a prospéré voire décliné.

Mots-clés : École historique du droit américaine - sociological jurisprudence - Savigny, Maine, Brunner, Henry Adams, Bigelow, Holmes, Thayer, Ames, Maitland, Jhering, Pound

Abstract : Most American legal scholars have described their nineteenth-century predecessors as deductive formalists. In my recent book, *Law's History: American Legal Thought and the Transatlantic Turn to History*, I demonstrate instead that the first generation of professional legal scholars in the United States, who wrote during the last three decades of the nineteenth century, viewed law as a historically based inductive science. They constituted a distinctive historical school of American jurisprudence that was superseded by the development of sociological jurisprudence in the early twentieth century. This article focuses on the transatlantic context, involving connections between European and American scholars, in which the historical school of American jurisprudence emerged, flourished, and eventually declined.

Keywords : Nineteenth-century European historical thought, historical school of American jurisprudence, "Teutonic-germ theory," American scholarship on early English law, sociological jurisprudence, Savigny, Maine, Brunner, Henry Adams, Bigelow, Holmes, Thayer, Ames, Maitland, Jhering, Pound

1. Drawn from my recent book, *Law's History: American Legal Thought and the Transatlantic Turn to History*¹, this essay examines three crucial connections between American and European legal thought between 1870 and 1914. Against the general background of the emergence of historical scholarship in Germany and England, it traces the influence of German and English legal scholars on the historical school of American jurisprudence that developed during the last three decades of the nineteenth century. It then recounts more briefly the reciprocal appreciation in Europe of original American scholarship on the history of English law. It closes by pointing out that the American, Roscoe Pound, relied on the "teleological jurisprudence" of the German, Rudolph von Jhering, in developing his American version of "sociological jurisprudence" as an alternative to "historical jurisprudence." Pound created a misleading and disparaging image of his American predecessors that has largely persisted to the present and that this article attempts to correct.

¹ David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History*, Cambridge, Cambridge University Press, 2013.

I. The European background

2. The historical school of American jurisprudence, which dominated late nineteenth-century American legal scholarship, was part of a broader historical turn in many disciplines throughout the Western world. This historical turn rivaled the scientific revolution of the seventeenth century as a fundamental transformation of Western thought². Just as historical thinking pervaded philology, biblical studies, classics, philosophy, literature, and art; the new social sciences of anthropology, politics, and economics; and natural sciences such as geology, paleontology, and biology, it extended to legal scholarship. As Roscoe Pound recognized in the early twentieth century, “in law, as in everything else,” the nineteenth century was the “century of history”³.

3. European scholars, often led by lawyers, had been attentive to historical issues before the nineteenth century. French legal scholars in the sixteenth century studied Roman law on its own terms, recognizing the differentness of the past while examining the relationship between past and present law⁴. English scholars during the seventeenth century discovered that the laws and liberties of Anglo-Norman feudalism differed from those of previous Anglo-Saxon and subsequent post-feudal England⁵. Scottish legal thinkers in the eighteenth century developed a “conjectural” school of historical jurisprudence that posited stages of historical progress from barbarism to civilization and urged law reform to eliminate vestiges of feudal law that had become obsolete and harmful in their new, commercial age⁶.

4. Yet the historians of historical thought who have done most to illuminate it in earlier centuries themselves highlight the distinctiveness of the nineteenth-century historical turn. Prior work was often eclectic and unsystematic⁷, was not based on original sources⁸, and did not join historical insight with historical narrative⁹. J.G.A. Pocock wrote *The Ancient Constitution and the Feudal Law*, his pathbreaking 1957 “study of English historical thought in the seventeenth century,” in opposition to the prevalent view that serious historical thought began in nineteenth-century Germany. But he also emphasized that it was only in the nineteenth century that “history became a distinct and self-conscious way of looking at things”¹⁰, an accomplishment of “historians whom we may feel to be still our own contemporaries”¹¹. Historical scholarship displayed its “modern character,” extending to all aspects of the human condition, he more recently observed, when the reorganization of academic and intellectual life in the nineteenth century made history a profession. Even in the eighteenth century, history remained in a “pre-modern condition”¹². Dorothy Ross similarly traced the “modern understanding of history” to the early nineteenth century, when “history as a continuous procession of qualitative changes came fully into view”

2 John Higham, Preface, p. 8-9, in John Higham with Leonard Krieger and Felix Gilbert, *History*, Englewood Cliffs, N.J., Prentice-Hall, Inc., 1965, citing Herbert Butterfield, *Man on His Past*, Cambridge, Cambridge University Press, 1960, p. VII.

3 Roscoe Pound, *Book Review*, 35 *Harvard Law Review*, 1922, p. 774.

4 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, Cambridge, Cambridge University Press, 1957, p. 1-29; Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance*, New York, Columbia University Press, 1970.

5 J.G.A. Pocock, *op. cit.*, p. 208.

6 Peter Stein, *Legal Evolution: The Story of an Idea*, Cambridge, Cambridge University Press, 1980, p. 8-9, 23-50; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge, Cambridge University Press, 1989, p. 148-58, 172-5; J.G.A. Pocock, *Barbarism and Religion: Narratives of Civil Government*, vol. 2, Cambridge, Cambridge University Press, 1999, p. 310-29.

7 Donald R. Kelley, *op. cit.*, p. 307.

8 David Lieberman, *op. cit.*, p. 149.

9 J.G.A. Pocock, *Barbarism and Religion*, *op. cit.*, p. 224-6, 248.

10 J.G.A. Pocock, *The Ancient Constitution and Feudal Law*, *op. cit.*, p. 251.

11 J.G.A. Pocock, *op. cit.*, p. 228.

12 J.G.A. Pocock, *Barbarism and Religion*, *op. cit.*, p. 7.

and when “many European thinkers began to interpret the whole of reality, including what had earlier been conceived as absolute and unchanging, in contextual historical terms”¹³.

5. The turn to history as a mode of explanation in Western intellectual life began most intensely in Germany, largely in reaction against French influence. Initially a response to the universal rationalism of the eighteenth-century French Enlightenment, historical thought in Germany became more pronounced, and more associated with German nationalism, in the wake of the French Revolution and the subsequent French occupation of Germany during the Napoleonic wars. The major thinkers of the French Enlightenment were confident in the capacity of human reason progressively to discover a universal and timeless reality subject to general, often mechanistic laws. When they did think about the past, they typically characterized it as a more primitive period that the development of human reason was gradually overcoming in its search for universal truths¹⁴.

6. Contemporary Germans directly challenged these fundamental ideas of the French Enlightenment. Denying the possibility of universal laws governing human experience, they emphasized the individuality and diversity of different cultures. In contrast to philosophical speculation about the rational and the universal, they sought explanations in the organic growth of each distinctive culture, rooted in language and extending to all aspects of national life¹⁵. Attitudes toward medieval Europe well illustrated these differences. Whereas the French Enlightenment dismissed this period as a primitive, even barbaric, era that devalued rational thought, German thinkers embraced it as part of the continuous unity of their culture¹⁶. Germans perceived the French Revolution and the extension of French rule over Europe as the tragic political and military consequences of Enlightenment thought, attempts to impose universalism, as understood by the French, on the rest of the Continent¹⁷.

7. Johann Herder was the most influential eighteenth-century German opponent of Enlightenment thought and a significant spur to historical scholarship in Germany. From his study of language, Herder derived broad implications that subsequently stimulated historical studies across all disciplines. He challenged the Enlightenment search for a single universal and rational structure underlying all languages as well as its assumption that the contents of language express truths about the world¹⁸. Instead, Herder viewed language as an organism having a natural growth, to be studied genetically and comparatively, without the distraction of a futile search for a unifying rationality¹⁹. For Herder, the study of language was simultaneously the study of culture²⁰. He considered language the key to forming, and thus to understanding, a distinctive group culture, which he called a *volk*. Language linked the group together and expressed its collective experience not just in literature itself, but throughout all aspects of its culture, from art and religion to social and political life²¹. Languages and cultures not only differed from each other. Like other living organisms, they changed over time and thus must be studied historically. Rather

13 Dorothy Ross, *The Origins of American Social Science*, Cambridge, Cambridge University Press, 1991, p. 4.

14 Jurgen Herbst, *The German School in American Scholarship: A Study in the Transfer of Culture*, Ithaca, N.Y., Cornell University Press, 1965, p. 9, 55-56, 102; Maurice Mandelbaum, *History, Man, and Reason: A Study in Nineteenth-Century Thought*, Baltimore, Maryland, Johns Hopkins Press, 1971, p. 49, 55; Dorothy Ross, *op. cit.*, p. 9; Isaiah Berlin, *Herder and the Enlightenment*, in *The Proper Study of Mankind: An Anthology of Essays*, New York, Farrar, Straus & Giroux, 1998, Henry Hardy and Roger Hausheer, editors., p. 415, 431.

15 Maurice Mandelbaum, *op. cit.*, p. 47, 49, 56; Dorothy Ross, *op. cit.*, p. 9-10; Isaiah Berlin, *op. cit.*, p. 415.

16 Maurice Mandelbaum, *op. cit.*, p. 55-6.

17 Dorothy Ross, *op. cit.*, p. 21; Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession*, Cambridge, Cambridge University Press, 1988, p. 99; G.P. Gooch, *History and Historians in the Nineteenth Century*, London, Longmans, Green, and Company, 1913, p. 64-6.

18 Hans Aarsleff, *The Study of Language in England, 1780-1860*, Minneapolis, Minnesota, 1983, p. 143-7; Isaiah Berlin, *op. cit.*, p. 385, 415.

19 Hans Aarsleff, *op. cit.*, p. 151-53; Isaiah Berlin, *op. cit.*, p. 383.

20 Hans Aarsleff, *op. cit.*, p. 324.

21 Peter Stein, *op. cit.*, p. 58; Isaiah Berlin, *op. cit.*, p. 368, 380-81, 384.

than a sign of philosophical truth, language provided the historical record that revealed the distinctive national characteristics of a people²².

8. By emphasizing history rather than reason as the way to understand the complexities of human activity, Herder provided a major impetus for the German turn to historical scholarship in the nineteenth century. German scholars in different fields, often in contact with and inspired by each other, wrote the earliest works that examined their subjects historically²³. In biblical criticism, classics, law, and German literature, important original scholarship carried out the historical analysis previous advocated by Herder. Illustrating the many links among the historical interests of these German scholars, B.G. Niebuhr, who used poetry to investigate the early history of Roman institutions, inspired the great legal scholar, Savigny, to investigate the history of Roman law²⁴. Savigny, in turn, inspired Jacob Grimm, who was his law student and research assistant, to investigate the history of German literature and philology²⁵.

9. Savigny, considered by many as the founder of “historical jurisprudence” in Germany, had a huge impact on the first generation of professional legal scholars in the United States, who constituted the historical school of American jurisprudence at the end of the nineteenth century. Though some Americans, particularly those who did original work in legal history, read or at least consulted Savigny’s multi-volume works on the history of Roman law, his short work, *Of the Vocation of Our Age for Legislation and Jurisprudence*²⁶, was the major route through which American legal scholars became exposed to his fundamental ideas. Published in 1814 and translated into English, this book forcefully and influentially set forth his views on legal history and legal science in opposition to the Enlightenment law of reason and its attempted codification.

10. Near the beginning of *Vocation*, Savigny connected the abstract and unhistorical rationalism of the Enlightenment with arguments for codification. Since the middle of the eighteenth century, he observed, “a blind rage for improvement” leading toward “a picture of absolute perfection” prevailed throughout Europe. In law, this attitude expressed itself in the widespread longing for codes based “on the conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances, which we have only to discover to bring positive law to permanent perfection.” Such codes, expressed in the language of “pure abstraction,” would “be divested of all historical associations”²⁷. Throughout *Vocation*, Savigny reiterated his opposition to codification as a poor alternative to historical legal science. He took special pleasure in criticizing the French Code civil. He wrote that even the French recognized its many imperfections. The code posed a “more pernicious and ruinous” threat to Germany than to France itself, for Napoleon attempted to impose it “as a bond the more to fetter nations.” Fortunately, the defeat of Napoleon saved Germany from this threat²⁸. Though Savigny considered the French Code civil an especially “melancholy spectacle”²⁹, he also criticized the codes of Prussia and Austria³⁰. More generally, he maintained that codification, which attempts to anticipate correct results in all future cases, inevitably fails “because there are positively no limits to the varieties of actual combinations of circumstances” that may arise³¹.

22 Hans Aarselff, *op. cit.*, p. 146-7.

23 G.P. Gooch, *op. cit.*, p. 42, 54; Lord Acton, “German Schools of History”, *English Historical Review*, 1, 1886, p. 11.

24 Franz Wieacker, *A History of Private Law in Europe*, Oxford, Clarendon Press, 2003, Tony Weir, translator, p. 330.

25 G.P. Gooch, *op. cit.*, p. 55; Otto Jespersen, *Language: Its Nature, Development and Origin*, London, George Allen & Unwin Ltd., 1922, pp. 40-1.

26 Frederick Charles von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, North Stratford, New Hampshire, Ayer Publishing Company Publishers, Inc., 2000, reprint of 1831 English edition.

27 Frederick Charles von Savigny, *op. cit.*, p. 20-3.

28 Frederick Charles von Savigny, *op. cit.*, p. 73-4.

29 *Ibidem*, p. 83.

30 *Ibid.*, p. 99-133.

31 *Ibid.*, p. 38.

ii. In contrast to codification, Savigny emphasized the need for jurists to develop systematic analysis of law grounded in historical research. He stressed that law, like language, is tied to the history of a particular people. A main purpose of legal history, he felt, “is to trace every established system to its root, and thus discover an organic principle, whereby that which still has life, may be separated from that which is lifeless and only belongs to history”³². By revealing the distinctiveness of a national tradition, Savigny believed, historical research protects against the recurrent “self-delusion” of “holding that which is peculiar to ourselves to be common to human nature in general”³³. The failure to investigate the history of Roman law, he observed in a telling example, led many jurists to mistake it as natural law emanating from pure reason rather than as a distinctive product of the experience of a particular people³⁴.

12. With the publication of *Ancient Law*³⁵ in 1861, the Englishman, Henry Maine, became, after Savigny, the second major European influence on the development of the historical school of American jurisprudence. Maine’s reliance on the German scholarship was apparent both to his contemporaries and to his successors, although Maine himself did not address its influence on his work. Many concluded that *Ancient Law* introduced the German historical school to the English speaking world and was the first book by an English scholar to exhibit its central characteristics, including its emphases on the organic development of law, the continuity of national traditions, the parallels between language and law, and the defects of statutes³⁶. An English review of *Ancient Law* hailed Maine as the English Savigny and predicted that it would begin a new era of jurisprudence in England, just as Savigny founded historical jurisprudence in Germany³⁷.

13. Like many German legal scholars, Maine used the categories of Roman law to analyze all legal systems, and his extensive discussions of Roman law derived largely from the previous work of the Germans³⁸. Maine also embraced the distinctively English scientific tradition committed to induction from empirical evidence. History, he believed, provides the empirical data for an inductive science of law³⁹. He endorsed historical jurisprudence as a convincing scientific alternative to the prior jurisprudential schools of natural law and analytic jurisprudence, which were based on abstraction and speculation. Maine criticized analytic philosophy for treating all societies alike and, especially in focusing on law as a command of the lawgiver, for describing in universal terms characteristics that might be unique to the modern world⁴⁰. He was even more critical of the earlier school of natural law, which he considered the primary impediment to the historical method. Natural law assumed a “nonhistorical, nonverifiable condition of the race” in a presocial state⁴¹. Maine blamed Rousseau for extending the influence of natural law and for aligning it with the political and social views that led to what Maine called the “grosser disappointments” of the French Revolution. Under Rousseau’s influence, the school of natural law stimulated “disdain of positive law, impatience of experience, and the preference of a priori to all other reasoning.” During the French Revolution, it encouraged anarchy and was invoked more frequently as times grew worse⁴².

32 *Ibid.*, p. 137.

33 *Ibid.*, p. 134.

34 *Ibid.*, p. 134-5.

35 Sir Henry Maine, *Ancient Law*, Washington, D.C., Beard Books, 2000, reprint of 1861 edition.

36 Ernest Barker, *Political Thought in England 1848 to 1914*, London, Oxford University Press, 1928, 2nd edition, p. 142; J.W. Burrow, *Evolution and Society: A Study in Victorian Social Theory*, Cambridge, Cambridge University Press, 1966, p. 142-3; Peter Stein, *op. cit.*, p. 89; Paul Vinogradoff, *Introduction to Historical Jurisprudence*, London, Oxford University Press, 1920, p. 139; Paul Vinogradoff, “The Teaching of Sir Henry Maine”, *Law Quarterly Review*, 78, 1904, p. 119, 125; letter from Frederick Pollock to Oliver Wendell Holmes, Jr., February 16, 1923, in *Holmes-Pollock Letters*, Cambridge, Massachusetts, Harvard University Press, 1941, Mark DeWolfe Howe, editor, vol. 2, p. 112.

37 George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822-1888*, London, Longmans, Green and Company Ltd., 1969, p. 44.

38 Peter Stein, *op. cit.*, p. 90; Peter G. Stein, “Maine and Legal Education”, in *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, Cambridge, Cambridge University Press, 1991, Alan Diamond, editor, p. 195, 204-5, 208.

39 J.W. Burrow, *op. cit.*, p. 145-6, 156, 178; Paul Vinogradoff, *The Teaching of Sir Henry Maine, op. cit.*, p. 126.

40 Sir Henry Maine, *op. cit.*, p. 4-5, 182-3.

41 *Ibidem*, p. 68.

42 *Ibid.*, p. 53-4.

14. Maine became best known for his sweeping and memorably phrased generalizations based on historical data uncovered by others. *Ancient Law* contains what has become his most famous generalization: “The movement of progressive societies has hitherto been a movement from Status to Contract”⁴³. The movement from status to contract, he believed, was one example of the more fundamental transformation in the history of all progressive societies from collectivism to individualism, the central theme in his work⁴⁴. Among his other important generalizations, Maine asserted that primitive societies were uniformly patriarchal, that law in progressive societies becomes less formal and more specialized⁴⁵, that the practices of primitive societies in the present provide evidence of the forgotten past of civilized societies, and that social change requires corresponding changes in law. Although Maine was vitally interested in contemporary English law and society, *Ancient Law* did not explore English legal history, which had been much less studied than the history of Roman law. Yet Maine emphasized that his generalizations from the history of Roman law applied to England as well⁴⁶.

15. Among the subset of American law professors who wrote important original works in legal history – Henry Adams, Melville Bigelow, Oliver Wendell Holmes, Jr., James Thayer, and James Ames– the German scholars Rudolph Sohm and Heinrich Brunner were also extremely important. Sohm and Brunner were prolific authors who wrote on many topics of legal history. For the Americans, one book by each of them had particular significance: Sohm’s, *Der Proceß der Lex Salica*, published in 1867, and Brunner’s *Die Entstehung der Schwurgerichte*, published in 1872. As Henry Adams emphasized in his review of the French edition of Sohm’s book, the *Lex Salica*, the law of the Salian Franks in the fifth century, was the best preserved example of the archaic Teutonic law. Adams maintained, and other American legal historians agreed, that archaic Teutonic law influenced all territories settled by Germans, including England⁴⁷. Brunner’s book, which studied the history of the jury in what he called “sister” Teutonic societies, convinced Americans that the Franco-Norman inquisition developed into the English jury after the Norman Conquest. Several Americans exchanged lengthy correspondence with Brunner and at least one, Henry Adams, visited him in Germany⁴⁸.

II. The historical school of American jurisprudence

16. American legal scholars frequently expressed and elaborated in the context of legal analysis the key themes of the historical thought that pervaded Western intellectual life in the nineteenth century. They generally viewed history as an evolutionary process of development that organically connected the past with the present. They often referred to the “seeds” or “germs” of legal doctrine “ripening” into the more developed “fruit” or “offshoots” of current law⁴⁹, or to the “genealogy”⁵⁰ of law from its original “parents” to its “lineal descendents” among its living “children”⁵¹. They typically used evolution as a synonym for development rather than in its more specific Darwinian sense as a theory of natural selection extending over many generations. The late nineteenth-century American legal scholar Francis Wharton cited Burke

43 *Ibid.*, p. 100.

44 *Ibid.*, p. 99.

45 *Ibid.*, p. 186-7.

46 David M. Rabban, *op. cit.*, p. 116-7.

47 Henry Adams, Book Review, “Sohm’s Procedure de la Lex Salica”, *North American Review*, April 1874, p. 416-7.

48 David M. Rabban, *op. cit.*, p. 104-6.

49 John Norton Pomeroy, *An Introduction to Municipal Law*, San Francisco, A.L. Bancroft, 1883, original edition 1865, p. 19.

50 James Barr Ames, “Express Assumpsit”, in *Lectures on Legal History*, Cambridge, Massachusetts, Harvard University Press, 1913, p. 145.

51 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Boston, Little, Brown, and Company, 1898, p. 7, II, 47.

and Savigny to support his assertion that “the doctrine of juridical evolution was taught long before that of physical evolution came prominently before the public eye”⁵².

17. Understanding current law, these Americans believed, depends on tracing its evolution from its earliest origins. Occasionally, they explicitly differentiated meaningful history, which contributes to understanding the connections between past and present, from superficial history, which does not. Exhibiting what current historians deprecate as “presentism,” they made clear that they concentrated on meaningful history. They frequently dismissed history that does not help explain the present as irrelevant and merely “antiquarian.” Particularly interested in the history of their own legal system, the American legal scholars often endorsed the “Teutonic-germ theory” that was popular among English and American scholars in many fields. The works of original legal history by the Americans who studied the Germanic roots of English law in the Anglo-Saxon and Norman periods reflect this “Teutonic-germ theory”⁵³.

18. While applying evolutionary thought to legal analysis, Americans frequently emphasized that evolving custom is the source of law. In making this point, they sometimes rejected Blackstone’s famous assertion that the common law consists of “immemorial custom.” They conceded that positive law does not always reflect the prevailing customs in a society, but they stressed that in these circumstances the positive law will not be obeyed and cannot be effectively enforced. They devoted particular attention to the evolutionary phenomenon of new customs superseding the earlier customs on which current law is often based. When evolving custom advances beyond existing law, they maintained, the law must change. They were confident that their scholarship, by demonstrating whether legal survivals should be retained or abandoned, would be an aid to judges and legislators. Based on their historical research, they hoped to reconceptualize the legal system to make it more functional for their own time and place⁵⁴. For example, Holmes devoted much of *The Common Law* to uncovering dysfunctional survivals throughout the law⁵⁵, and Thayer treated the prohibition against hearsay evidence as a harmful remnant of the differentiation of witnesses from jurors centuries before⁵⁶.

19. Many American legal scholars self-consciously referred to themselves as legal scientists while stressing that they used the inductive method to extract meaning from evolving history. The scientific method of induction, they pointed out, derives and classifies principles from the observation of empirical data. They repeatedly stressed that history of law, particularly of case law, provides the empirical evidence for inductive legal science, just as natural and physical facts provide the empirical evidence for inductive sciences such as biology, chemistry, physics, and astronomy. Indeed, they maintained that by becoming an inductive science, law, like these other inductive disciplines, deserved inclusion in the emerging American research university. In developing their conception of law as an inductive historical science, they differentiated it both from the deductive science of mathematics and, like Maine, from prior speculative and unscientific theories of law, particularly natural law and analytic jurisprudence. They connected induction with evolution by frequently observing that the legal principles they induced from historical data had evolved over time. They assumed, and some explicitly stated, that legal principles would continue to evolve in the future, requiring new classifications⁵⁷.

20. American legal scholars often referred extensively and approvingly to Savigny and Maine. When James Coolidge Carter, a leader of the American bar, opposed the codification movement in New York, he relied heavily on Savigny’s historically based opposition to codification⁵⁸. Henry Adams, who initiated the historical study of law in the United States while teaching at Harvard in the early 1870s, wrote to Maine

52 Francis Wharton, *Commentaries on Law*, Philadelphia, Kay & Brother, 1884, p. 69.

53 David M. Rabban, *op. cit.*, p. 326-7.

54 *Ibidem*, p. 327.

55 *Ibid.*, p. 238-49.

56 *Ibid.*, p. 280-1.

57 *Ibid.*, p. 328, 377.

58 Mathias Reimann, “The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code”, *American Journal of Comparative Law*, 37, 1989, p. 103-6.

that he took *Ancient Law* as his starting point⁵⁹. And an important American legal scholar, William Gardiner Hammond, began his review of *Ancient Law* by referring to the broadly shared view “that the characteristic feature of the nineteenth century is the substitution of the historic method for the dogmatic, in all of the sciences which relate to human life or action.” After bemoaning the delayed “acceptance of the historical method in our jurisprudence,” Hammond praised Maine for “his very great service” in remedying that defect⁶⁰. Bigelow described himself as a follower of the historical school founded by Maine⁶¹. While treating the English law of evidence as “the child of the jury,” Thayer acknowledged that Maine had made this point thirty years before in the context of discussing how the English might adapt their system of evidence in governing India⁶². Thayer’s own emphasis on the importance of royal power in the development of the jury, he recognized, illustrated Maine’s generalization that in early periods the king was the great reformer of the law⁶³.

21. Oliver Wendell Holmes, Jr., probably the most famous American legal scholar of the late nineteenth century, both at home and abroad, resembled Savigny and Maine in ways many commentators have recognized, even though Holmes himself was famous for exaggerating his own originality and refusing to acknowledge intellectual debts. At the beginning of his scholarly career in the 1870s, Holmes read and re-read major works by Savigny⁶⁴, taking extensive notes⁶⁵. When Holmes turned 90, his friend, the English scholar Frederick Pollock, wrote that he could “sum up” Holmes’s career as a legal scholar in one sentence by saying that what Holmes has done for the Common Law... is much like what Savigny did for Roman law⁶⁶. After reading an article by Holmes in 1872, another English scholar, James Fitzjames Stephen, wrote Holmes that “I am amused to find you so deep in the historical method, which my friend and neighbor, Sir H. Maine, invented to a certain extent in this country”⁶⁷. And Holmes’s first great American biographer, Mark DeWolfe Howe, observed the thematic and organizational similarities between Maine’s *Ancient Law* and Holmes’s major book, *The Common Law*. Howe wrote that “Holmes borrowed from Maine the spectacles which the Englishman had used for observing the law of ancient Rome and looked through them at the common law of England⁶⁸.”

III. American challenges to European scholars

22. Although they self-consciously identified with the historical analysis of law that had originated in Germany and England, American scholars also asserted their intellectual independence from their European predecessors and contemporaries. Some Americans complained that European scholars tended to accept current law precisely because it emerged from the past. Just because current law can be explained historically, Hammond observed, does not mean that it should be treated uncritically. He maintained that people should reflect self-consciously about whether “we ought to continue the custom or the precedent”

59 Letter from Henry Adams to Henry Maine (February 10, 1875), in Harold Dean Carter, *Henry Adams and His Friends*, Boston, Houghton Mifflin Company, 1947, p. 63.

60 William Gardiner Hammond, “Ancient Law”, *Western Jurist*, 2 1868, p. 2 3, 8.

61 Melville M. Bigelow, “A Scientific School of Legal Thought”, *The Green Bag*, 17, 1905, p. 1.

62 James Bradley Thayer, *op. cit.*, p. 508.

63 *Ibidem*, p. 509.

64 Eleanor N. Little, “The Early Reading of Justice Oliver Wendell Holmes”, *Harvard Library Bulletin*, 8, 1954, p. 163, 181, 193, 194, 198.

65 Oliver Wendell Holmes, Black Book, Oliver Wendell Holmes, Jr., “Papers”, *Harvard Law School Library*, p. 18-20, 105-7.

66 Frederick Pollock, “Ad Multos Annos”, *Columbia Law Review*, 31, 1931, p. 349.

67 Letter from James Fitzjames Stephens to Oliver Wendell Holmes, Jr., November 17, 1872, microformed on reel 37, 0884, 0886, University Publications of America, Oliver Wendell Holmes Papers.

68 Mark DeWolfe Howe, “Introduction” to Oliver Wendell Holmes, Jr., *The Common Law*, Cambridge, Massachusetts, Harvard University Press, 1963, original edition, 1881, p. XIV.

derived from the past, a point many European writers “overlooked”⁶⁹. Criticizing Edmund Burke for his “undue reverence” for the past, the American scholar, Francis Wharton, maintained that “the recognition of the continuousness of the existence of a nation, composed, as is necessarily the case of elements constantly changing and developing, involves the corresponding and sympathetic change and development of the law” emanating from this national history. He used the transformation of views about slavery, defended by relatively recent moralists but “universally reprobated” in his own time, to illustrate how the evolution of “national culture” had terminated an institution that the nation had “outgrown.” At the same time that Wharton recognized the continuous existence of nations, he maintained that Savigny had exaggerated the similarity between a nation and “a continuous perpetual person.” He particularly objected to the German conception of a *Volksgeist*, which “too arbitrarily” ascribed to nations “constant and distinct tendencies such as those which separate individuals from individuals”⁷⁰. While elaborating his own historical approach, another American, Christopher Tiedeman, criticized Savigny’s account of history as a “quiet, smooth, uneventful development,” analogous to changes in language. Tiedeman instead relied on Jhering while maintaining that changes in the prevalent sense of right involve “vigorous contest between opposing forces”⁷¹. Holmes agreed with Tiedeman⁷² and also accused Savigny of improperly reading the moral and individualistic principles of German metaphysical thought into his interpretation of Roman law⁷³.

23. Similarly, while endorsing Maine’s historical approach in preference to prior jurisprudential schools of natural law and analytic jurisprudence, many Americans challenged his methods and conclusions. Americans frequently protested that Maine had not proved his many generalizations about legal evolution nor recognized the importance of Teutonic law as opposed to Roman law in the Anglo-American legal tradition. In his review of *Ancient Law*, for example, Hammond claimed that Maine had relied too heavily on second-hand accounts of the history of Roman law as the basis for generalizations about legal evolution⁷⁴.

24. The major American challenge to Maine came from Henry Adams. In a review of one of Maine’s books, Adams observed that his “brilliant hypotheses” remained “hazardous guesses”⁷⁵, and he wrote one of his students that it would require “a lifetime of work” to prove Maine’s generalizations⁷⁶. Based on his own study of Anglo-Saxon law, Adams challenged Maine’s assumption in *Ancient Law* that Roman law was typical of all ancient law. He claimed that Roman law often constituted “perversions” of earlier Germanic law and that English law derived primarily from Germanic rather than Roman sources. More specifically, whereas Maine asserted that the Roman patriarchal family existed in all archaic societies, Adams maintained that the Germanic family was not patriarchal⁷⁷. Adams claimed as well that the history of Germanic law contradicted Maine’s position that all societies organized by the family and the tribe before they developed the state⁷⁸.

25. Beyond his challenges to Maine, Adams criticized English scholars more generally for not relying on recent German works on the history of Germanic law. Particularly embarrassing for the English, Adams emphasized, German historical science has produced “a mass, one might even say a library, of German

69 William G. Hammond, “Supplementary Notes”, by the Editor, in Francis Lieber, *Legal and Political Hermeneutics*, St. Louis, F.H. Thomas and Company, 1880, William G. Hammond, editor, p. 313.

70 Francis Wharton, *op. cit.*, p. 93-4.

71 Christopher G. Tiedeman, *The Unwritten Constitution of the United States*, Buffalo, N.Y., William S. Hein & Company, Inc., reprint edition, 1974, original edition 1890, p. 11-2.

72 David M. Rabban, *op. cit.*, p. 107.

73 *Ibidem*, p. 254-6.

74 William Gardiner Hammond, *Ancient Law, op. cit.*, p. 8.

75 Henry Adams, Book Review, “Maine’s Early History of Institutions”, *North American Review*, April 1875, p. 433.

76 Letter from Henry Adams to Henry Cabot Lodge, June 11, 1873, in *Letters of Henry Adams (1858-1891)*, Boston, Houghton Mifflin Company, 1930, W.C. Ford, editor.

77 Henry Adams, Book Review, “Coulange’s Ancient City”, *North American Review*, April 1874, p. 391, 395-6.

78 Henry Adams, Book Review, “Maine’s Early History of Institutions”, *op. cit.*, p. 434.

books, all of which bear more or less directly on the history of England, and none or few of which have ever been utilized for the explanation of that history” by the English themselves, who had overlooked what had been lying under their eyes for six centuries. Indeed, little of this scholarship had ever been translated into English⁷⁹. Adams recognized that German historical scholarship was “undeniably hard reading, even for specialists.” Yet he warned that without mastering this scholarship any historian of early English law and society “will throw his labor away”⁸⁰. German scholars, Adams believed, had demonstrated what English scholars had generally resisted. The Germans had convincingly proved that the laws of archaic German society, rather than Roman law or “William the Conqueror’s brain,” were the source of the English common law and its constitutional system⁸¹.

26. While indicating their enormous respect for Brunner, some Americans who wrote on Anglo-Norman law challenged his important assertion that the Norman recognition, an important precursor of the English jury, was transformed from a matter of grace to a matter of right in Normandy, when the future King Henry II of England was still duke of Normandy. Claiming that Brunner’s position “cannot be sustained,” Bigelow attributed this major reform to Stephen Langton, the archbishop of Canterbury, more than sixty years after Henry II had become king of England⁸². When Thayer subsequently wrote an article identifying Henry II as a great law reformer, Bigelow criticized Thayer for letting himself “swallow Brunner too readily.” He claimed that “Brunner, with his pro-Norman anti-Anglican feeling, can see nothing English of any account”⁸³. Responding to the same article, Hammond similarly wrote Thayer that his own recent reading of Brunner “had not convinced me that the Norman share of the jury was so important as both B[runner] and you assume.” In fact, Hammond added, “his complete statement of the Norman case rather convinced me that it was not made out, especially in the important point of the legislation of Henry II as Norman or English”⁸⁴. In his extensive unpublished manuscript on the history of the common law, Hammond also frequently criticized Brunner for overemphasizing the Norman and underestimating the distinctively English contribution⁸⁵.

IV. European recognition of American scholarship on the history of English law

27. Transatlantic influences in late nineteenth-century legal thought traveled in both directions. Just as Europeans stimulated the turn to history in the United States, Americans produced original scholarship on the history of English law that impressed their colleagues on the other side of the Atlantic, particularly in England itself.

28. In 1876, Adams and three of his students, who received the first Ph.D.s awarded by the History Department at Harvard, published *Essays in Anglo-Saxon Law*. In a letter thanking Adams for sending him a copy, Maine praised the essays. He even acknowledged that he should have paid more attention to German law in *Ancient Law*, though he continued to maintain that the German family, like the Roman, was patriarchal⁸⁶. English reviewers of Bigelow’s major book, *The History of Procedure in England from the Norman Conquest* (1880), commented, sometimes with embarrassment, that an American had

79 Henry Adams, Book Review, “Sohm’s Procedure of the Lex Salica”, *op. cit.*, p. 416, 417.

80 *Ibidem*, p. 425.

81 Henry Adams, Book Review, “Maine’s Village Communities”, *North American Review*, January 1872, p. 198.

82 Melville M. Bigelow, *History of Procedure in England from the Norman Conquest: The Norman Period (1066-1204)*, Boston: Little, Brown, and Company, 1880, p. 186-90.

83 Letter from Melville M. Bigelow to James Bradley Thayer, February 5, 1892, James Bradley Thayer Papers, Harvard Law School Library.

84 Letter from William Gardiner Hammond to James Bradley Thayer, Feb. 26, 1892, James Bradley Thayer Papers, *op. cit.*

85 William Gardiner Hammond, “Notes of Lectures on History of the Common Law”, 1894, Harvard Law School Archives.

86 Letter from Henry Maine to Henry Adams, December 26, 1876, Henry Adams Papers, Lamont Library, Harvard University.

published more detailed scholarship on early English law than any Englishman had yet produced. “It deserves the fullest recognition, however mortifying to our national vanity,” one English reviewer wrote, “that America has challenged the title of German legal scholars to be the only thorough expositors in the present day of our more ancient law before anything of importance has been done in this direction in England itself.” The reviewer also observed that together with the *Essays on Anglo-Saxon Law*, Bigelow’s book afforded “a gratifying testimony to the zeal and learning of the school of legal history at Harvard”⁸⁷. In his review of Holmes’s book, *The Common Law* (1881), the famous English scholar, Frederick Pollock, observed that he had previously “called attention to the danger in which English lawyers stand of being outrun by their American brethren in the scientific and historical criticism of English institutions and ideas.” Holmes’s book, Pollock maintained, “adds considerably to the advantage gained on the American side in this friendly contest”⁸⁸. English reviewers similarly praised Thayer’s *Preliminary Treatise on Evidence at the Common Law* (1898), which emphasized that the modern law of evidence could only be understood in the context of the history of the jury. Pollock maintained that Thayer “goes to the root of the subject more thoroughly” than any previous publication⁸⁹, and another English review predicted that the book “may possibly exert as great an influence on English legal thinking as ‘Holmes on the Common Law’”⁹⁰.

29. Brunner also praised the American scholarship on the history of English law. Although he disagreed with Bigelow about the timing of the transformation of the recognition from a matter of grace to a matter of right, Brunner showed his respect for him by publishing a long review of his book in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, a leading German journal. Calling Bigelow’s work very useful, Brunner mitigated his criticisms by observing that German and Anglo-American scholars understandably had different perspectives in approaching the relationship between the prior law in Normandy and the Anglo-Norman law following the Norman Conquest. The Germans, Brunner believed, were interested in the connections between Anglo-Norman law and the prior Germanic law of the Continent, whereas English and American scholars were interested in the Anglo-Norman roots of the subsequent English common law. Brunner also agreed with Bigelow that it was dangerous to treat apparent similarities between the law of Normandy and Anglo-American law as necessarily reflecting continuities of legal ideas and institutions⁹¹. Intriguingly, Brunner described Bigelow’s chapter on the development of writs in Anglo-Norman England as the most valuable in the book, even though Bigelow stressed that the writs were not “imported into perfect form from Normandy” but mostly developed on English soil. Brunner claimed that Bigelow’s own evidence reinforced Brunner’s conclusion that they originated on the Continent⁹².

30. Brunner was much more fulsome in his praise of Thayer. In a letter to Thayer thanking him for sending a copy of his book, Brunner complimented “the scientific work which you have so excellently accomplished.” He informed Thayer that for more than twenty years he had thought of taking a long research trip to England. “I heartily rejoice,” Brunner could now report, “that the yawning gulf in the history of the jury has been filled by you better than I could have done”⁹³. A French review of Thayer’s book compared it to the great works of legal history written by Brunner in Germany and Maitland and Pollock in England⁹⁴.

31. Most impressively of all, Frederic Maitland, broadly admired as the greatest legal historian ever to have written in the English language, praised American scholarship on English legal history. Most current legal

87 E.J.G. Mackay, *The History of Legal Procedure in England*, 19 The Academy, March 26, 1881, p. 219.

88 *Saturday Review*, 51, 1881, p. 758, unsigned but ascribed to Pollock in G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self*, New York, Oxford University Press, 1993, p. 188.

89 Frederick Pollock, *Law Quarterly Review*, 15, 1899, in James Bradley Thayer Papers, *op. cit.*

90 *Law Journal*, 3, December 3, 1898, p. 589.

91 Heinrich Brunner, “Litteratur”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, 2, 1881, p. 202.

92 Heinrich Brunner, *op. cit.*, p. 211.

93 Letter from Heinrich Brunner to James Bradley Thayer, July 4, 1896, James Bradley Thayer Papers, *op. cit.*

94 *Revue Historique*, 137, p. 155, in James Bradley Thayer Papers, *op. cit.*

historians claim that Maitland founded the field of English legal history virtually alone. S.F.C. Milsom, Maitland's most important late twentieth-century critic, claims that Maitland "had nothing to stand on. There was no legal history worthy of the name"⁹⁵. J.H. Baker reiterated that Maitland "inaugurated the scholarly study of English legal history"⁹⁶. It does no damage to Maitland's well-deserved reputation to recognize, as he did himself with typical generosity, that he built upon others, especially Americans. Referring to American scholarship in English legal history in his inaugural lecture, "Why the History of English Law is Not Written," Maitland declared himself "cosmopolitan enough to regret an arrangement of the universe which has placed our records in one hemisphere and those who would make the best use of them in another"⁹⁷. In the introduction to his most important book, *The History of English Law before the Time of Edward I*, he listed eight scholars whose work he admired and did not intend to duplicate by what he called "vain repetition"⁹⁸. Four of these scholars were American: Holmes, Thayer, Ames, and Bigelow. Of the others, two were German, Brunner and Liebermann; one was a Russian who immigrated to England, Vinogradoff; and only one, Stephen, was English. While pointing out that substantial work on medieval English law "lies scattered in monographs and journals," the introduction referred specifically to only one journal, the Harvard Law Review in the United States⁹⁹.

32. The frequent citation of the four American scholars throughout the book's two volumes made clear that this prefatory praise was substantive and not merely polite. Most impressively, in the section of the book dealing with pleading and proof, Maitland described three of Thayer's articles in the *Harvard Law Review* as "so full and excellent" that his treatment would be very brief, dealing only with "the more vital or the more neglected parts of the story"¹⁰⁰. The section relied extensively on Thayer¹⁰¹ both for specific details and for more general themes, such as the lack of an equivalent to the modern trial¹⁰² and the "radically different" role of witnesses¹⁰³ in the twelfth century. The book cited Bigelow for evidence that Henry II had a significant role in the king's court¹⁰⁴, to support the assertion that the use of the seal in contract law originated with the Frankish kings rather than ancient folk law¹⁰⁵, as authority regarding both the substantive¹⁰⁶ and procedural¹⁰⁷ law of theft, and in discussing the allotment of proof between litigants¹⁰⁸. It invoked Holmes approvingly while observing that the relativity of ownership in late medieval land law persisted in current English law¹⁰⁹, while pointing out that ancient law assigned liability to inanimate objects¹¹⁰, and while maintaining that much of the law of specific relief originated in the thirteenth century and was not introduced by chancellors in the later Middle Ages¹¹¹. Maitland cited articles by Ames about the history of assumpsit in his chapters on contract and on crime and tort. Based on Ames's empirical research, Maitland accepted his conclusion that before the seventeenth century

95 S.F.C. Milsom, F.W. Maitland, *66 Proceedings of the British Academy*, Oxford University Press, 1982, p. 281.

96 J.H. Baker, "Why the History of English Law Has Not Been Finished", *Cambridge Law Journal*, 59, 2000, p. 64.

97 Frederic William Maitland, "Why the History of English Law is Not Written", in *The Collected Papers of Frederic William Maitland*, Cambridge, Cambridge University Press, 1911, H.A.L. Fisher, editor, vol. 1, p. 485.

98 Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, Cambridge, Cambridge University Press, 1899, 2d edition, p. XXXV.

99 *Ibidem*, p. XXXVII.

100 *Ibid.*, p. 604 n.1.

101 *Ibid.*, vol. II, at p. 598 n.1, 601 n.4, 606 n.1, 629 n.3, 632 n.5, 634 n.3, 637 n.3, 638 n.3, 650 n.4, 652 n.3, 654 n.1, 654 n. 4, 665 n. 1.

102 *Ibid.*, p. 592 n. 2.

103 *Ibid.*, p. 601 n. 4.

104 *Ibid.*, vol. I, p. 158 n. 2, 4, 159 n.2.

105 *Ibid.*, vol. II, p. 223 n.4.

106 *Ibid.*, p. 496 n.3.

107 *Ibid.*, p. 597 n.4.

108 *Ibid.*, p. 602 n.2, 3; 603 n.3.

109 *Ibid.*, p. 78 n.3.

110 *Ibid.*, p. 474 n.5.

111 *Ibid.*, p. 596 n.5.

plaintiffs could not use the action of covenant to recover a debt¹¹². In addition to the four American scholars he specifically praised in his introduction, Maitland occasionally referred to the *Essays in Anglo-Saxon Law* by Adams and his students¹¹³ and to other American legal scholars¹¹⁴. Even when he occasionally disagreed with the Americans, Maitland treated them with respect. Maitland's extensive substantive correspondence about English legal history with Thayer, Ames, and particularly Bigelow reinforces his published regard for their work¹¹⁵.

V. Jhering's influence on Pound's turn from historical to sociological jurisprudence

33. Just as the turn to history in American legal scholarship was part of a general transatlantic movement in the nineteenth century, legal scholars on both sides of the Atlantic joined scholars in other disciplines during the decades around the beginning of the twentieth century in a broad reorientation of social thought that largely abandoned historical explanation. In American legal scholarship, this reorientation is best represented by Roscoe Pound, who developed sociological jurisprudence as an alternative to the historical jurisprudence of the nineteenth century. Pound's formulation of sociological jurisprudence relied heavily on Jhering, as well as on new American work in philosophical pragmatism and the emerging social sciences, particularly sociology.

34. Pound followed Jhering both in attacking historical jurisprudence and in proposing an alternative based on the social needs of the present. According to Pound, Jhering introduced a "radical change in jurisprudence" as "epoch-making" as Savigny's development of historical jurisprudence. Shifting the emphasis of legal scholarship from "the nature of law to its purpose," Jhering replaced the "jurisprudence of conceptions" at the core of Savigny's historical jurisprudence with what Pound variously called a "jurisprudence of actualities"¹¹⁶, a "jurisprudence of realities"¹¹⁷, or a "jurisprudence of results"¹¹⁸. Whereas the jurisprudence of conceptions deduced a legal system based on fundamental conceptions derived from the historical development of Roman law, Jhering's teleological approach "began at the other end" by first asking, "How will a rule or decision operate in practice"¹¹⁹? By the end of the nineteenth-century, Pound asserted, the individualistic conceptions German historical jurists had extracted from Roman legal history were losing "touch with practical life" and had become purely "academic." Jhering reconnected law with practical life by examining the "human ends" law should promote and by treating law as a means to achieve those ends. Jhering, Pound observed, saw the legal implications of even the most trivial aspects of daily life. Rather than finding law from the evidence of legal history, Jhering believed in consciously shaping law in the social interest¹²⁰.

35. In his own discussion of Savigny, Pound maintained that he had unconsciously remained under the influence of the theories of natural law he had learned as a student but had expressly rejected while developing historical jurisprudence. Savigny substituted historical for philosophical foundations of law,

¹¹² *Ibid.*, p. 219 n.1.

¹¹³ *Ibid.*, p. 156 n.1, 159 n.2, 251 n.3, 252 n.2, 253 n.1, 364 n.1, 426 n.4.

¹¹⁴ *Ibid.*, p. 205 n. 1, 221 n. 1 (Langdell); 186 n. 2, 470 n. 1, 474 n. 5, 476 n. 1, 528 n. 6, 531 n. 3 (Wigmore).

¹¹⁵ Much of Maitland's correspondence with Ames and Bigelow has been published. H.D. Hazeltine, "Gossip about Legal History: Unpublished Letters of Maitland and Ames", *Cambridge Law Journal*, 2, 1924, p. 1; Warren O. Ault, "The Maitland-Bigelow Letters", *Boston University Law Review*, 37, 1957, p. 37285.

¹¹⁶ Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence", *Harvard Law Review*, II, 25, 1912, p. 140.

¹¹⁷ *Ibidem*, p. 142.

¹¹⁸ Roscoe Pound, *Mechanical Jurisprudence*, *Columbia Law Review*, 8, 1908, p. 610.

¹¹⁹ *Ibidem*, p. 610.

¹²⁰ Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence", *art. cit.*; II, *op. cit.*, p. 141-2.

but pursued the legal concepts he uncovered in his historical research, particularly those that supported individualism, with the same deductive logic used in natural law¹²¹. Pound added that Maine¹²² and the American historical school¹²³ adopted Savigny's approach. Though he devoted substantial attention to Savigny and Maine, Pound barely discussed his American predecessors, leaving the impression that the Americans who shared their views were derivative and inferior. In Germany, Pound observed, Jhering's theories had become part of the reform movement that "led to the downfall" of historical jurisprudence and its individualist theory¹²⁴. Clearly viewing Jhering as a model, Pound obviously hoped that his adaptation of Jhering's theories into his own formulation of sociological jurisprudence would have a similarly beneficial impact in the United States.

36. My own research has persuaded me that Pound was wrong about his American predecessors. They saw their historical approach to law as an inductive science that rejected the deductive formalism associated with the "jurisprudence of conceptions." They viewed legal concepts as evolving in response to social change, not as timeless principles. They believed, moreover, that history provided the route to social reform by uncovering dysfunctional survivals from the past that should be eliminated.

VI. Pound's successors

37. Scholars throughout the twentieth century perpetuated Pound's disparaging emphasis on the deductive formalism of late nineteenth-century American legal thought, usually without citing Pound himself. Yet the twentieth-century scholars did not generally follow Pound in linking deductive formalism with individualism and historical jurisprudence. The tension between traditional individualism and socially desirable collectivism, which underlay Pound's analysis of legal thought, was not a major theme for his successors. Nor did they follow his identification of historical jurisprudence as the dominant jurisprudential school in the United States after 1870. Even the few twentieth-century American legal historians who explored the history of their field did not share Pound's view about the centrality of history in late nineteenth-century American legal thought, though they occasionally elaborated criticisms similar to those Pound had levied against historical jurisprudence. They viewed the "Law and Society" school of legal history founded by J. Willard Hurst at the University of Wisconsin in the 1940s as the origin of professional legal history in the United States. They frequently indicated that prior work on the internal history of legal doctrine was worthy of contempt but not study, not even qualifying as real legal history, although they occasionally offered passing praise of Holmes, Ames, Thayer, and Bigelow¹²⁵.

38. Beginning with Duncan Kennedy's pioneering work in the 1970s on the structure of "classical legal thought"¹²⁶, some commentators have treated their late nineteenth-century predecessors more respectfully and in greater detail, even as they often reiterated many earlier criticisms of their work. Especially in articles by Stephen Siegel since 1990¹²⁷, legal historians have redirected attention to the importance of legal history

121 Roscoe Pound, *Interpretations of Legal History*, Cambridge, Cambridge University Press, 1923, p. 17-9, 28.

122 *Ibidem*, p. 55, 142, 145.

123 Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence", II, *op. cit.*, p. 148 and n.31.

124 *Ibidem*, *Harvard Law Review*, I, 24 1911, p. 143, 145.

125 Robert W. Gordon, "J. Willard Hurst and the Common Law Tradition in American Legal Historiography", *Law and Society Review*, 10, 1975, p. 9.

126 Duncan Kennedy, *The Rise and Fall of Classical Legal Thought*, Washington, D.C., Beard Books, 2006. Though not published until 2006, the original manuscript of this book was prepared in 1975 and was widely circulated through the late 1970s and 1980s, p. VII-VIII, XLI.

127 Stephen A. Siegel, "Historicism in Late Nineteenth-Century Constitutional Thought", *Wisconsin Law Review*, 1990, p. 1431; Stephen A. Siegel, "Joel Bishop's Orthodoxy", *Law & History Review*, 13, 1995, p. 215; Stephen A. Siegel, "Francis Wharton's Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought", *American Journal of Legal History*, 46, 2004, p. 422; Stephen A. Siegel, "John Chipman Gray and the Moral Basis of Classical Legal Thought", *Iowa Law*

in late nineteenth-century American legal thought while providing more extensive and nuanced explorations of its content. Building on this recent revisionism, I hope in this article, and much more fully in my recent book, I have helped recover the intellectual world and professional achievements of the late nineteenth-century American legal scholars, freed from the frequent misrepresentations and condescension of their successors. They were historically sophisticated thinkers in the mainstream of transatlantic intellectual life, and some of them were in the vanguard of original scholarship in legal history, respected by their contemporaries at home and abroad.

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