The Unrecognized Triumph of Historical Jurisprudence

LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY. By David M. Rabban. New York, New York: Cambridge University Press, 2013. 564 pages. $85.00.

Reviewed by Brian Z. Tamanaha*

Historical jurisprudence has been nearly erased from the annals of American jurisprudence. Legal theory revolves around rival schools of thought representing contesting positions. A common arrangement in jurisprudence texts is to begin with natural law and legal positivism, in that order, followed by legal realism, and then a host of contemporary schools of thought.[1] This ordering is chronological as well as thematic: natural law theory began in classical times;[2] legal positivism arose in the nineteenth century to challenge natural law;[3] legal realism arose in the 1920s and 1930s to debunk the dominant formalist views of law;[4] the Hart–Fuller debate of the late 1950s marked the reenergizing of legal positivism;[5] social scientific approaches to law (Law & Society Movement) began to develop in the 1960s;[6] in the 1970s, Dworkin mounted a challenge to Hart's dominance,[7] law and economics subjected law to examination from an economic perspective,[8] and Critical legal studies of the radical left burst onto the scene to challenge legal liberalism.[9] A hodgepodge of descendants of these various

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* Brian Z. Tamanaha is the William Gardiner Hammond Professor of Law, Washington University School of Law.

1. *See, e.g.*, ROBERT L. HAYMAN, JR. ET AL., JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM xi (2d ed. 2002) (organizing the examination of the philosophy of law roughly based on chronology); *see generally* JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE (rev. ed. 1990) (providing an introduction and structure to the study of the philosophy of law); FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY (1996) (discussing the evolution of the philosophy of law to provide a background for commentary on recent developments).

2. HAYMAN ET AL., *supra* note 1, at 2.

3. *Id.* at 75.

4. *Id.* at 158–60.

5. *See id.* at 78–79 (discussing Hart's role as a contemporary positivist and his famous exchange with natural law theorist Lon Fuller).

6. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV 1, 20–21 (1990).

7. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 42–46 (1967).

8. HAYMAN ET AL., *supra* note 1, at 299–300.

9. *Id.* at 402.

schools then followed. Historical jurisprudence is rarely mentioned. In an encyclopedic entry on "The Nature of Law," Andrei Marmor observes:

> In the course of the last few centuries, two main rival philosophical traditions have emerged, providing different answers to these questions [on the nature of law]. The older one, dating back to late mediaeval Christian scholarship, is called the natural law tradition. Since the early 19th century, Natural Law theories have been fiercely challenged by the legal positivism tradition promulgated by such scholars as Jeremy Bentham and John Austin.[10]

Contrast this narrative with a century ago, when Roscoe Pound wrote:

> Until recently, it has been possible to divide jurists into three principal groups, according to their views of the nature of law and of the standpoint from which the science of law should be approached. We may call these groups the Philosophical [natural law] School, the Historical School, and the Analytical School.[11]

Pound and others at the time asserted that in the late nineteenth century the historical school was dominant over the other two jurisprudence schools.[12] Natural law was in a state of decline. Renowned Oxford Professor James Bryce, writing in *Studies in History and Jurisprudence*, published in 1901, identified the same rival jurisprudential schools, but noted that "we now seldom hear the term Law of Nature. It seems to have vanished from the sphere of politics as well as from positive law."[13]

Not all contemporary jurisprudence scholars have forgotten historical jurisprudence. Robert Summers recognized that "legal theorists of the past two centuries have worked in one or more of the three . . . great jurisprudential traditions—continental natural law theory, British and Austrian analytical positivism, and historical jurisprudence."[14] But this is unusual.

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10. Andrei Marmor, *The Nature of Law*, STAN. ENCYCLOPEDIA PHIL. (Feb. 25, 2011), http://plato.stanford.edu/entries/lawphil-nature/.

11. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence I*, 24 HARV. L. REV. 591, 591 (1911).

12. Roscoe Pound, Book Reviews, 35 HARV. L. REV. 774, 774 (1921) (reviewing PAUL VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1920)); *see also* Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 1 (1905) (highlighting the prominence of the historical school).

13. 2 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 604 (1901). Although Bryce identifies four schools—metaphysical (natural law), analytical, historical, and comparative—he sees the latter two as interconnected. *Id.* at 607–37. Frederick Pollock also describes the latter two as intimately related, with both grounded in Montesquieu and Maine. *See* Frederick Pollock, *The History of Comparative Jurisprudence*, 5 J. SOC'Y COMP. LEGIS. 74, 75–84 (1903).

14. ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 11–12 (1982); *see also* Robert E. Rodes, Jr., *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165, 184 (2004) (arguing for a limited application of the historical school's doctrines).

That a once-prominent theory of law could be nearly expunged from current memory, at least in the United States,[15] is a puzzle that merits explanation. In *Law's History*, David Rabban aims to reawaken us to the former prominence of historical jurisprudence and to explain its apparent fall. He places much of the blame on Roscoe Pound.

> By promoting "sociological jurisprudence" as an attractive alternative to "historical jurisprudence" in his enormously influential early work during the decade before World War I, Roscoe Pound contributed substantially to the demise of historical explanation in American legal scholarship as well as to what became the prevailing, though importantly inaccurate, view of its role in nineteenth-century legal thought.[16]

Rabban also argues:

> Pound was both the last major figure who shared the historical understanding of law that dominated American legal scholarship in the decades after 1870 and the person who did most to bring that era to a close. Despite the spectacular revival of legal history in the United States since 1970, history has not regained the central role in legal scholarship it had in the late nineteenth century.[17]

Pound criticized historical jurisprudence for promoting an abstract, deductive view of law;[18] modern legal scholars, in Pound's wake, have characterized this period as the "formalist age."[19] Rabban argues that, contrary to Pound's characterization, historical jurisprudents did not hold a "deductive formalist" view of law.[20] This book is the latest addition to a growing list of revisionist works—including my *Beyond the Formalist Realist Divide*[21]—which argue that this period has been distorted by modern legal historians and theorists.

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15. English jurisprudence scholars show a greater awareness of historical jurisprudence, perhaps owing to Maine's continuing renown, but even in England the topic has been disappearing from jurisprudence courses. *See* Peter Stein, *The Tasks of Historical Jurisprudence*, *in* THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 293, 293–94 (Neil MacCormick & Peter Birks eds., 1986) (observing the decline of historical jurisprudence as a discipline taught in England).

16. DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 8 (2013).

17. *Id.* at 471; *see also id.* at 149 (analyzing the movement away from historical scholarship in both England and the United States).

18. Pound, *supra* note 11, at 600; *see also* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605–06 (1908) (advocating a scientific approach to justice and the law).

19. For an example of scholars describing the era as formalist, see GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

20. RABBAN, *supra* note 16, at 512.

21. Rabban recognized the affinity between my argument and his: "I have read an unpublished paper by Brian Tamanaha, aptly entitled 'The Realism of the "Formalist" Age,' claiming that late nineteenth-century judges did not subscribe to versions of deductive formalism attributed to them by Pound and the legal realists, and, in fact, themselves revealed plenty of realism in their decisions." David M. Rabban, *Reconsidering* Law's History*: A Response to the Symposium Comments*, 1 JERUSALEM REV. LEGAL STUD. 106, 116 (2010). The essay Rabban cites was taken

Rabban presents his book as serving two main goals: highlighting the "major American contributions to . . . English legal history" in this period, and "recovering the historical school of American jurisprudence."[22] He achieves the former goal, persuasively showing that influential original work in legal history was produced in this period. Legal historians will gain a much greater appreciation for their forebears from this book. Rabban is less successful, however, in explaining what historical jurisprudence was about and why the theory apparently faded.

This Review will focus on the fate of historical jurisprudence, advancing two arguments. First, Rabban's account of the reasons for its apparent demise is unpersuasive. Second, contrary to beliefs about its demise, the theory of law promoted by historical jurisprudence has proven remarkably successful, and the failure to recognize this constitutes a fundamental misunderstanding in contemporary jurisprudence.

I. Why Did Historical Jurisprudence Decline?

Rabban's failure to keep track of legal history and historical jurisprudence as separate fields renders his account deeply problematic. In the passages quoted above, for example, Rabban points to Pound's disparagement of historical jurisprudence and advocacy of sociological jurisprudence as major factors in the demise of legal "history" and "historical explanation."[23] This switches from Pound's stated target to a different casualty. Pound *was* critical of *historical jurisprudence* as a theory of law owing to *a priori* reasoning he attributed to the theory that he objected to, but he supported *legal history* as a scholarly endeavor.[24] "If modern jurisprudence were to lose the historical method," Pound wrote, "it would prove even more sterile than the much-abused historical jurisprudence of the last century."[25] Rabban quotes this passage without recognizing that it casts doubt on his own causal explanation.[26] Attacks on historical jurisprudence—a theory of the nature of law—would not in itself lead to a decline of legal history—a scholarly field.

The distinction between legal history and historical jurisprudence was well understood at the time. Voicing a thinly veiled critique of Henry Maine, Frederick Pollock and Frederic William Maitland wrote in the introduction of their famous *The History of English Law*:

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from my book, BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

22. RABBAN, *supra* note 16, at 536.

23. *Id.* at 149.

24. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence III*, 25 HARV. L. REV. 489, 514–15 (1912).

25. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence II*, 25 HARV. L. REV. 140, 155 (1912).

26. RABBAN, *supra* note 16, at 462.

> [I]t has been usual for writers commencing the exposition of any particular system of law to undertake, to a greater or less extent, philosophical discussion of the nature of laws in general, and definitions of the most general terms of jurisprudence. We purposefully refrain from any such undertaking. The philosophical analysis and definition of law belongs, in our judgment, neither to the historical nor the dogmatic science of law, but to the theoretical part of politics.[27]

Pound clarified that "[l]egal history, the discovery and exposition of the actual course of development of a particular legal system or of a particular doctrine in a particular system, is not historical jurisprudence."[28] Legal history details past events that occurred in specific legal systems, whereas historical jurisprudence operates at a higher level of generality, formulating broadly applicable claims about law.

Legal *history* is not historical *jurisprudence*. Rabban knows this but does not carefully attend to its implications for his analysis.[29] He asserts that both declined after the turn of the century in America and England.[30] This might have been for the same or for different reasons, but we cannot tell because he looks at legal history, not at jurisprudence. Historical jurisprudence might have faded because jurisprudence scholars rejected its soundness as a theory of law or because its theoretical framework was not clearly or fully elaborated.[31] Or perhaps institutional support (academic positions) for historical jurisprudence was lacking, or no great jurisprudential figure emerged to renew the theory. Or perhaps jurisprudence scholars, owing to the intellectual tastes of those drawn to theorizing, preferred the abstractions, universalism, and conceptual analyses of natural law theory and legal positivism to the more empirically grounded orientation of historical

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27. R.C.J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 143 (1988) (quoting FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1895)). Cocks observes that this was meant as a criticism of Maine. *Id.*

28. Pound, *supra* note 11, at 616.

29. Ironically, Rabban expresses a similar frustration with Pound:

> Unfortunately, Pound was not always consistent in his discussion of legal history. Using various terminology to convey the range of methodological approaches to the field, Pound typically equated 'historical jurisprudence' with 'the historical school' while contrasting both with 'legal history' and 'sociological legal history.' Yet at times he confusingly referred to 'sociological legal history' as a branch of historical jurisprudence or legal history.

RABBAN, *supra* note 16, at 429 (footnotes omitted). Rabban's problem is his failure to analyze these as separate fields.

30. *Id.* at 8.

31. Neil Duxbury suggests that historical jurisprudence, which he labels "comparative jurisprudence," did not carry on English jurisprudence because it lacked a distinctive jurisprudential agenda. "These men [Maine, Vinogradoff, Pollock] may well have been Oxford professors of jurisprudence, but their reflections on the subject were insufficiently well structured and focused to ensure that their own jurisprudential achievements would have lasting appeal." NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 91 (2004).

jurisprudence. Perhaps other factors contributed (I will propose several shortly)—none of which would necessarily be related to the contemporaneous dormancy of legal history.

Rabban asserts multiple times, from the introduction to the final page, that Pound bears substantial responsibility for the transatlantic decline of historical jurisprudence *cum* legal history.[32] This claim is dubious for several reasons—especially its failure to account for developments in England. Well before Pound wrote, prominent turn-of-the-century English jurists lamented the failure of the universities to attract lawyers with "an interest in legal history and juristic speculation,"[33] and historical jurisprudence in England was beginning to appear moribund.[34] Furthermore, Pound's idiosyncratic characterization of historical jurisprudence as highly abstract was based upon the German branch, which did not resonate with the English.[35] The ideas of Henry Maine, the English giant of historical jurisprudence, bore little resemblance to Pound's characterization.[36] Thus Pound's attack would not have had much impact on English views. Pollock, a leading English jurisprudence scholar, remarked, "[W]hen I am confronted with Professor Pound's unqualified assertion that a historical-metaphysical doctrine 'was dominant in the science of law throughout the [nineteenth] century,' I feel tempted to ask which of us is standing on his head."[37] Pound's portrayal also did not fit American historical jurisprudence, as Rabban argues,[38] so it is doubtful that his criticisms had much of an impact on contemporaries on this side of the Atlantic.

Furthermore, it is unclear why Pound's advocacy of sociological jurisprudence would itself debilitate historical jurisprudence or legal history; Rabban's suggestion appears to be that scholars inclined toward history were persuaded by Pound to drop this interest for sociological work on law, which assumes an enormous power of persuasion on his part. More to the point, there was no evident growth in "sociological jurisprudence" in America or England when historical jurisprudence faded around the turn of the century; the most outstanding sociological jurisprudence in this period was written by Austrian Eugen Ehrlich, independent of Pound.[39] Prominent legal

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32. RABBAN, *supra* note 16, at 8, 149, 211, 471, 536.

33. DUXBURY, *supra* note 31, at 63 (quoting JAMES BRYCE, Legal Studies in the University of Oxford (1893), *in* 2 STUDIES IN HISTORY AND JURISPRUDENCE 504, 518 (1901)). Pollock offered a similar lament in 1909, citing the neglect of these studies in England. *Id.*

34. *Id.* at 136. Duxbury argues that historical jurisprudence did not satisfy the late-nineteenth-century Victorian university demands for rigor, precision, technicality, and systematization. *Id.*

35. RABBAN, *supra* note 16, at 454.

36. COCKS, *supra* note 27, at 32–38 (describing how Maine's historical jurisprudence tried to incorporate empirical ideas from the social sciences).

37. Frederick Pollock, *A Plea for Historical Interpretation*, 39 LAW Q. REV. 163, 164 (1923).

38. RABBAN, *supra* note 16, at 432.

39. For the best early work on sociological jurisprudence, see EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Walter L. Moll trans., 1936). But this work was developed independently of Pound's call. The most sophisticated work in sociological

philosopher Morris Cohen remarked in 1937, in his survey of the preceding century of jurisprudence, that despite Pound's great learning and prominence, it is "amazing that . . . Pound has found so few disciples or direct followers."[40] Thus, there is no sign that Pound's advocacy had the causal effect Rabban implies.

When trying to understand the decline of American historical jurisprudence, one must also keep in mind that the German historicist tradition—the original intellectual inspiration for historical jurisprudence—also expired by the close of the nineteenth century,[41] as did "evolutionary social theory" in England.[42] These simultaneous declines in Germany and England of fields with intellectual connections to historical jurisprudence evidently had nothing to do with Pound's advocacy. Broader intellectual developments were at play.

Let me suggest four additional factors, beyond the possibilities briefly alluded to above, which might also have contributed. Evolutionary thinking was widespread in the late nineteenth century, as Rabban explains, and historical jurisprudence had prominent evolutionary strains.[43] Maine's assertion that law moves from status in primitive societies to contract in modern societies[44] is a classic example of evolutionary thinking. After the turn of the century, evolutionary theory, Herbert Spencer's Social Darwinism in particular,[45] fell into disfavor.[46] Franz Boas launched a sharp critique of comparative analyses of primitive societies—of the sort Maine pioneered—setting off "an anti-evolutionary tide that was to sweep over the whole field of anthropology for more than fifty years."[47] Evolutionary analysis was castigated as ethnocentric and racist, built on smug assumptions that the West was the high point by which all other civilizations were measured. The confidence in human progress that set in with the Enlightenment succumbed to a sense of pessimism after the turn of the twentieth century, particularly in

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jurisprudence in the United States developed after mid-century, following pioneering work by Julius Stone. *See, e.g.*, JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW (1946).

40. Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America*, *in* 2 LAW: A CENTURY OF PROGRESS, 1835-1935, at 266, 297–98 (A. Reppy ed., 1937).

41. *See* FREDERICK C. BEISER, THE GERMAN HISTORICIST TRADITION 23 (2011) (stating that the "golden years of German historicism" ended in the 1880s).

42. J.W. BURROW, EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY 260 (1966).

43. RABBAN, *supra* note 16, at 67–72.

44. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 163–65 (Beacon Press 1970) (1861).

45. Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEXAS L. REV. 645, 655 (1985).

46. Stein, *supra* note 15, at 293–94.

47. ROBERT L. CARNEIRO, EVOLUTIONISM IN CULTURAL ANTHROPOLOGY: A CRITICAL HISTORY 75 (2003).

the wake of the devastation wrought by the First World War.[48] These negative views toward evolutionary theory and progress did not favor historical jurisprudence (although legal history itself would not have suffered from them).

The second factor relates to the age. The turn of the century was a period of rapid and sweeping transformation, ushering in urban industrial capitalism and bringing big business, labor unions, and the expansion of government. It was a time of economic depression, social dislocation, and strife. Battles between competing interests were fought out in legal arenas. Progressives who urged reform, like Pound, favored legislation as the vehicle to implement change.[49] Given the rapidly dawning modern world and the volumes of new law being produced to meet the needs of the time,[50] a jurisprudential school with a backward gaze would appear to be a less fecund source of insight. The rise of legislation and the administrative state, furthermore, lent an antiquated feel to late-nineteenth-century historical jurisprudents who centered their theories of law on the common law.[51] The most outspoken historical jurisprudent, James C. Carter, who emphasized custom as *the* source of law[52] at a time when much law had little apparent connection with custom, would have come across as badly out of touch.

A third factor, one Rabban mentions,[53] was the optimism during this period that the newer social sciences, then becoming established in universities,[54] would deliver useful insights about the management and improvement of human affairs. Rather than credit Pound with hastening the demise of historical jurisprudence (*cum* legal history), it is more correct to say that Pound's advocacy was itself a reflection of a general belief among progressive intellectuals that social sciences promised solutions to pressing social and legal problems.[55] Others in law asserted the same,[56] including

48. Stein, *supra* note 15, at 124. For an exploration of evolutionary ideas and notions of progress and decay, see generally ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY: ASPECTS OF THE WESTERN THEORY OF DEVELOPMENT (1969).

49. *See* TAMANAHA, *supra* note 21, at 40–43 (explaining that judges' adherence to stare decisis made the common law a slow path to change).

50. Rabban alludes to this. RABBAN, *supra* note 16, at 523.

51. For a discussion of the rise of legislation relative to the common law, see BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 41–47 (2006).

52. *See* JAMES COOLIDGE CARTER, LAW: ITS ORIGIN, GROWTH, AND FUNCTION 120 (1907) ("[T]hat to which we give the name of Law always has been, still is, and will forever continue to be Custom.").

53. *See* RABBAN, *supra* note 16, at 432 (noting Pound's optimism "that the emerging social sciences could be used to identify social problems and solutions").

54. *See* DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 35–36 (1991) (discussing the rise of the social sciences in antebellum academia).

55. Rabban recognizes that the shift from history to the social sciences was a general one. RABBAN, *supra* note 16, at 520. Yet he claims that Pound's advocacy on its own had a major effect. *Id.* at 525–26.

Holmes a decade earlier.[57] Even Melville Bigelow, profiled by Rabban for his legal history work, urged a "scientific school of law" in which history was only one perspective among others which would identify the various social and psychological sources and influences on law.[58]

The fourth factor, related to the foregoing, is that historical jurisprudence was the victim of a misleading name. Cambridge professor Peter Stein, a rare contemporary scholar to situate his work within historical jurisprudence, emphasized this:

> Labelling is also important *within* the area of legal studies themselves, where the acceptance of a particular form of enquiry as respectable may depend on the attribution of an appropriate title. Labelling can work to the disadvantage of a subject, if it cannot free itself from the disfavour which a certain line of enquiry has attracted. Something of this kind has happened in the case of historical jurisprudence.[59]

The disfavor Stein alludes to is the widespread rejection of the notion that societies and law pass through evolutionary stages[60] (the first factor above).

My argument is different: the label "historical" jurisprudence is misleading because it gives the impression that *legal history* lies at the core of the theory. That is wrong. As Stein observes, "[n]ineteenth-century historical jurisprudence was founded on the connection between law and social and economic circumstances."[61] This was dubbed the "Historical School" because its most famous nineteenth-century theorists, Savigny and Maine, were Roman law scholars who drew on their historical knowledge to make their points.[62] Their theories of law assert that law is a product of the history of a society—but this postulate stands apart from legal history as an academic field. Maine's impact was much greater in anthropology and sociology than in legal history, and Maine himself promoted comparative jurisprudence;[63] his successor, Frederick Pollock, called it "comparative

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56. *See, e.g.*, William Draper Lewis, *The Social Sciences as the Basis of Legal Education*, 61 U. PA. L. REV. 531, 536–38 (1913) (advocating the integration of social science into legal education as a means to improve lawmaking and the judicial system generally).

57. *See generally* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899) (expressing enthusiasm for the interaction of science and law).

58. Melville M. Bigelow, *A Scientific School of Legal Thought*, 17 GREEN BAG 1, 14 (1905).

59. Stein, *supra* note 15, at 293.

60. *Id.* at 304.

61. *Id.*

62. *See* RABBAN, *supra* note 16, at 4 (identifying Savigny and Maine with the historical school).

63. *See* COCKS, *supra* note 27, at 141–95 (describing Maine's use of the "comparative method" in his work); PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA 99–121 (1980) (discussing Maine's contributions to anthropology and his comparative approach to the study of law); Alan D.J. Macfarlane, *Some Contributions of Maine to History and Anthropology*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL 117–18 (Alan Diamond ed.,

jurisprudence."[64] These are telling signs that legal history was not primary. By centering on legal history, Rabban's recounting of historical jurisprudence in *Law's History* perpetuates a misunderstanding.

II. The Society–Law Connection

Frederick von Savigny's *Of the Vocation of Our Age for Legislation and Jurisprudence*,[65] published in 1814 to challenge the enactment of a Civil Code for Germany, by all accounts is the founding document of historical jurisprudence. Savigny criticized the natural law "conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances,"[66] and he criticized the legal positivism proposition that "all law, in its concrete form, is founded upon express enactments of the supreme power."[67] Against these, he argued that law is the unplanned product of forces within society:

> In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view.[68]

The source, or "seat" of the law, he held, is the "common conviction of the people."[69] Law is "first developed by custom and popular faith" of the people,[70] then jurists work these social influences into the legal doctrine.

Owing to the multifarious inextricable connections between law and society, Savigny held, it is a delusion to believe that one could produce a new code that severs "all historical associations" and begins "an entirely new life."[71] This is impossible not only because existing law rests on and grows out of what came before but also because the thinking of jurists is permeated by preexisting ways. "For it is impossible to annihilate the impressions and modes of thought of the jurists now living—impossible to change completely the nature of existing legal relations; and on this twofold impossibility rests

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1991) (discussing "Maine's contribution to political anthropology"); Edwards Shils, *Henry Sumner Maine in the Tradition of the Analysis of Society*, *in* THE VICTORIAN ACHIEVEMENT OF SIR HENRY MAINE: A CENTENNIAL REAPPRAISAL, *supra*, at 143–44 (discussing "Maine's contribution to sociology").

64. Pollock, *supra* note 13, at 74.

65. FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., Littlewood & Co. 1831).

66. *Id.* at 23.

67. *Id.*

68. *Id.* at 24.

69. *Id.* at 28, 24.

70. *Id.* at 30.

71. *Id.* at 132.

the indissoluble organic connection of generations and ages; between which, development only, not absolute end and absolute beginning, is conceivable."[72]

Society is constantly moving, and law with it, he emphasized:

> But this organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency . . . . Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality.[73]

Although historical jurisprudence is frequently identified with evolutionism,[74] not all historical jurisprudents offered an evolutionary theory and not all legal evolutionists have been historical jurisprudents.[75] Savigny's account antedates Darwin's famous work by a half century; he emphasized that law *evolves* (develops) with the progress of civilization, but he did not proffer an evolutionary theory.

Knowledge of legal history has several important benefits noted by Savigny. Observing law over time makes apparent its gradual, organic development in connection with society;[76] it also shows that law often does not develop in isolation but is affected by external influences, like conquest, the importation of Roman law to Germany, or the spread of religion from one land to another.[77] Historical knowledge helps jurists (lawyers, judges, scholars) understand the meaning of existing legal rules.[78] And historical awareness helps inoculate scholars against succumbing to "a species of self-delusion," which he pinned on natural law theory, "namely, the holding that which is peculiar to ourselves to be common to human nature in general."[79]

I have detailed Savigny's views to show that the core propositions put forth by the progenitor of "historical jurisprudence" are not primarily about "legal history." Two planks stand at the center of the theory of law he articulated: law is the product of society and law is constantly evolving in connection with changes in society. It follows from these planks that law is a product of and tethered to the history of a society. While undoubtedly important to Savigny, legal history serves a *secondary* role, as an excellent source of information and insight about law. What made it a rival to natural

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72. *Id.*

73. *Id.* at 27.

74. *See generally, e.g.*, PAUL VINOGRADOFF, INTRODUCTION TO HISTORICAL JURISPRUDENCE 136–46 (1920) (providing examples of evolutionism's influence on jurisprudential studies).

75. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 45 (1985).

76. SAVIGNY, *supra* note 65, at 49.

77. *Id.* at 54.

78. *Id.* at 102–03.

79. *Id.* at 134.

law theory and legal positive theory of law was the social theory of law—legal history is not a part of the theory of law itself.

Awareness of the law–society connection did not originate with Savigny. Montesquieu's *The Spirit of the Laws*,[80] published to great acclaim in the mid-eighteenth century, was the first to proclaim it. He asserted that law matches surrounding circumstances, including climate, terrain, quality of soil, mode of cultivation and food acquisition, occupations, political system, "the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners."[81] "Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another."[82] Savigny credits Montesquieu with establishing that law is tied to the unique circumstances of the people, and, consequently, diversity of law among communities is to be expected.[83]

After the mid-nineteenth century, when evolutionary ideas were in full bloom,[84] Henry Maine presented a distinctively evolutionary theory of law, portraying legal development as a core element of social development.[85] He criticized both natural law and legal positivism for being too abstract and for lacking any historical basis in their speculations about law.[86] Although he does not acknowledge any debt to Savigny,[87] Maine does credit Montesquieu for describing law as a social institution shaped by its surroundings.[88] Knowledge of legal history was important to Maine as a source of insight on the connections between law and society, though he also advocated the comparative method as the key to perceiving broader patterns in the society–law relationship.

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80. MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

81. *Id.* at 9.

82. *Id.* at 8.

83. *See* SAVIGNY, *supra* note 65, at 57–58 (crediting Montesquieu for cautioning against the uniformity of laws).

84. Burrow argues that evolutionary thought was common and Maine developed his ideas independent of Darwin. BURROW, *supra* note 42, at 139–40.

85. *See generally* MAINE, *supra* note 44 (tracing the development of law and legal institutions alongside the development of other social institutions and practices).

86. *See id.* at 70, 111 (criticizing natural law for implying a state of nature that did not exist and criticizing legal positivism for falling back on "conjecture"); *see also* PAUL VINOGRADOFF, THE TEACHING OF SIR HENRY MAINE 4–6 (1904) (explaining the basis for Maine's criticisms of natural law and "analytical jurisprudence"); STEIN, *supra* note 63, at 89–90 (detailing Maine's use of history to criticize natural law and legal positivism).

87. Whether Savigny's ideas influenced Maine is disputed. COCKS, *supra* note 27, at 24–28. But there is no question that their core views of the tight relationship between law and society are similar. *See* Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 LAW Q. REV. 326, 333 (1937) (arguing that Maine could only be considered representative of Savigny's "historical school" because of Maine's sympathy with Jhering, the leader of the "younger" historical school); STEIN, *supra* note 63, at 89–90 (explaining the similarities between Maine's and Savigny's use of history).

88. MAINE, *supra* note 44, at 111–12.

Rudolph von Jhering, a German contemporary of Maine, cast aside Savigny's mystical notion of the "common consciousness" as the underlying source of law. Reflecting the times, Jhering described legal development instead as the product of battles between competing individuals and groups seeking legal support for their ends. "In the course of time," Jhering wrote:

> [T]he interests of thousands of individuals, and of whole classes, have become bound up with the existing principles of law in such a manner that these cannot be done away with, without doing the greatest injury to the former. . . . Hence every such attempt, in natural obedience to the law of self-presentation, calls forth the most violent opposition of the imperilled interests, and with it a struggle in which, as in every struggle, the issue is decided not by the weight of reason, but by the relative strength of opposing forces . . . .[89]

Oliver Wendell Holmes described the production of law in similar terms.[90] Notwithstanding his criticisms of Savingy, Jhering held the two central planks that law is the product of society and that the two evolve organically.[91] (James Carter stood out as a throwback among American historical jurisprudents because his emphasis on shared custom harkened back to Savigny at a time when Jhering's account had much greater resonance.)[92]

At the turn of the twentieth century, Eugen Ehrlich likewise promoted the view that society is the center of gravity of law and that both evolve in sync.[93] Identifying his position with Montesquieu's, Ehrlich asserted, "As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces."[94] Leading American jurisprudents responded enthusiastically. Both Holmes and Pound praised Ehrlich's work as the "best" of its kind.[95] Pound commended Ehrlich for

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89. RUDOLPH VON JHERING, THE STRUGGLE FOR LAW 10 (John J. Lalor trans., Callghan & Co. 5th ed. 1879).

90. *See* Holmes, *supra* note 57, at 448 (describing law's development out of a "clash between competing ideas"); *see also* Oliver Wendell Holmes, *Summary of Events: Great Britain: The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) (written anonymously) (describing law as the product of a struggle that usually reflects the "more powerful interests").

91. *See* STEIN, *supra* note 63, at 66–67 (explaining Jhering's theory that law evolves organically as lawyers attempt to solve the problems of "social life").

92. *See* CARTER, *supra* note 52, at 121 (contending that "*present existing* custom" serves as the basis of law).

93. *See* Brian Z. Tamanaha, *A Vision of Socio-Legal Change: Rescuing Ehrlich from "Living Law,"* 36 LAW & SOC. INQUIRY 297, 315 (2011) (explaining that Ehrlich believes that law "gets no repose" as society evolves).

94. Eugen Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582, 584 (1916).

95. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 29, 1919), *in* 2 HOLMES–POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 34 (Mark DeWolfe Howe ed., 2d ed. 1961); N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 110 (1997) (quoting Pound's letter to Gray with this praise).

showing "that it is not enough to be conscious that the law is living and growing, we must rather be conscious that it is a part of human life. It is not merely that it should look upon nothing human as foreign to it, in a sense everything human is a part of it."[96] Karl Llewellyn lamented that when he discovered Ehrlich's work, he was "somewhat crushed in spirit, because [Ehrlich] had seen so much."[97] Llewellyn identified Ehrlich as an early exemplar of realist jurisprudence.[98]

For our purposes, the essential point to recognize is that Ehrlich is considered a founding figure of *sociological jurisprudence*. The text setting out his social theory of law is *Fundamental Principles of the Sociology of Law*, published in 1913.[99] When articulating his own views, Ehrlich extensively discusses Savigny, writing, "In forming an estimate of the doctrines of Savigny and Puchta, one must bear in mind that it was they who first introduced the idea of development into the theory of the sources of law and clearly saw the relation between the development of law and the history of a people as a whole."[100] His criticisms of Savigny did not question that law is a social institution infused by social influences.[101] Ehrlich recognized that history and sociology are compatible perspectives from which to examine the social nature of law:

> [T]he chief function of the history of law, as the founders of the Historical School have pointed out in their day, must be to show that the legal propositions and the legal institutions are growing out of the life of the people, out of the social and economic constitution as a whole. For the sociology of law it is of value only in so far as it is successful in doing this.[102]

A crucial observation can now be made about the relationship between historical jurisprudence and sociological jurisprudence. Approaching from his parochial commitment to legal history, Rabban sets the two at odds, competing for primacy, suggesting that the rise of the latter came at the expense of the former. That is a misconception. They share intellectual parentage, a core theory of law as a social institution, the conviction that social–legal development is ongoing in connection with social forces, and a commitment to empirically informed theorizing about law. This shared complex of positions marks out a single coherent rival to natural law and legal positivist theories of law. The main difference is that—consistent with the tenor of their respective times—the older group tended to emphasize

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96. *Id.* at 108–09.

97. *Id.* at 291.

98. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 454 (1930).

99. EHRLICH, *supra* note 39.

100. *Id.* at 443.

101. *See id.* at 436–71 (criticizing Savigny's conception of the mechanisms through which social influences impact the law).

102. *Id.* at 475.

history and the newer the social sciences as their favored empirical source of knowledge. Like Savigny, Maine, and Jhering, Ehrlich was a scholar of Roman law, which he refers to extensively in his book. At the time he wrote, however, the developing field of sociology offered a broader framework to study the social nature of law, which he naturally adopted. It would make no sense for an empirically oriented social–legal theorist to artificially restrict himself to one field (history) when a broader range of informative perspectives had become available.

Historical jurisprudence was not vanquished by sociological jurisprudence—it morphed into it.[103] In his original article advocating sociological jurisprudence, Pound acknowledged that historical jurisprudence had expanded and taken an ethnological turn: "At first this wider historical jurisprudence was thought of as a comparative ethnological jurisprudence. But it was not long in assuming the name and something of the character of a sociological jurisprudence."[104] Paul Vinogradoff's *Introduction to Historical Jurisprudence*, published in 1920, ranges across history, psychology, sociology, economics, and political theory as they bear on social–legal development. Rabban, a legal historian, characterizes what occurred as the "demise" of historical jurisprudence (*cum* legal history), but in terms of the social theory of law, it is an advance, which in effect rendered the narrower *historical* jurisprudence label ill fitting and obsolete. The label fell into disuse, but the underlying theory of law carried on.

Historical and sociological jurisprudence are strains of a single jurisprudential school. Starting with Montesquieu, going through Savigny, Maine, Jhering, and Ehrlich, among many other theorists, including Oliver Wendell Holmes and other American historical jurisprudents, there is a manifest identity in their social theory of law. Later theorists criticized earlier ones, as well as contemporaries, while adding their own distinctive wrinkles, giving rise to significant internal diversity amongst them—just as there is great diversity within natural law and legal positivist theories. The social theory of law paints law as a social institution that is produced, molded, and buffeted by social influences, continually absorbing and responding to social forces and needs.

For lack of a recognized overarching label, it goes unrecognized that this constitutes a single jurisprudential school. This is an accident of naming. In its contest with natural law theory and legal positivism, had "historical jurisprudence" instead been dubbed "social historical jurisprudence" or

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103. Roy Kreitner and I take opposing positions on the fate of historical jurisprudence, although we both assert that it was successful. He contends that the abstract systematizing of the historical school came to dominate legal science in U.S. legal thought. Roy Kreitner, *Heroes, Anti-Heroes, and Villains*, 1 JERUSALEM REV. LEGAL STUD. 96, 101 (2010). I am skeptical of Kreitner's claim that German-type systemic thinking became popular in America. Rather than dominate legal science, I argue that it was subsumed within a broader range of social scientific perspectives on law.

104. Pound, *supra* note 11, at 614 (footnotes omitted). Although he is describing the German wing, Pound noted that a similar expansion had occurred in the English branch. *Id.* at 614 n.79.

"social–legal jurisprudence," identifying in its name what the *theory of law* was about, it would be perceived in completely different terms today—a story of success rather than failure.

III. The Forebear of Legal Realism and Modern Views

The social theory of law and the emphasis on social–legal change espoused by historical jurisprudents was taken over by the legal realists. Number one on Karl Llewellyn's list of realist tenets is "[t]he conception of law in flux, of moving law, and of the judicial creation of law."[105] Number three is "[t]he conception of society in flux, and in flux typically faster than the law."[106] Here is Llewellyn's account of how social change is manifested in law:

> It is society and not the courts which gives rise to, which shapes in the first instance the emerging institution; which kicks the courts into action. It is only from observation of society that the courts can pick their notions of what needs the new institution serves, what needs it baffles . . . . In any event, if the needs press and recur, sooner or later recognition of them will work into the law. Either they will induce the courts to break through and depart from earlier molds, or the bar will find some way to put new wine into old bottles and to induce in the bottles that elasticity and change of shape which, in the long run, marks all social institutions.[107]

Although these ideas are now associated with legal realism, it is classic historical jurisprudence.

Late-nineteenth-century historical jurisprudents repeatedly declared, as the legal realists would a generation later, that social influences made their way into law through the thinking of judges.[108] James Carter wrote, "Sympathizing with every advancing movement made by society, catching the spirit which animates its progress, it is [the judge's] aim [to] keep jurisprudence abreast with other social tendencies."[109] Christopher Tiedeman was more explicit in this 1896 passage:

> If the Court is to be considered as a body of individuals, standing far above the people, out of reach of their passions and opinions, in an atmosphere of cold reason, deciding every question that is brought before them according to the principles of eternal and never-varying Justice, then and then only may we consider the opinion of the Court

105. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

106. *Id.*

107. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 59–60 (1951).

108. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEXAS L. REV. 731, 748–55 (2009) (comparing pre-1900 statements of noted historical jurists with statements made by legal realists and noting that "the core insights credited to the Realists had been stated decades earlier").

109. James C. Carter, *The Ideal and the Actual in Law*, 24 AM. L. REV. 752, 773 (1890).

> as the ultimate source of the law. This, however, is not the real evolution of municipal law. *The bias and peculiar views of the individual judge do certainly exert a considerable influence over the development of the law*. . . . The opinion of the court, in which the reasons for its judgment are set forth, is a most valuable guide to a knowledge of law on a given proposition, but we cannot obtain a reliable conception of the effect of the decision by merely reading this opinion. This thorough knowledge is to be acquired only by studying the social and political environment of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue.[110]

To understand a legal ruling, Tiedeman advised, one "must look beneath the judicial opinion" and take into consideration "the pressure of public opinion and the influences of private interests" surrounding the case.[111]

Now we have arrived at another surprise. Modern legal historians have asserted that "[t]he [historical school] legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a 'formalistic' view of law and judging."[112] The legal realists are commonly thought to have debunked legal formalism, which has been attributed to the historical jurists. It turns out, however, that their respective views of law and judging have much in common.[113] The ideas the legal realists espoused about the social nature of law and judging were originally championed by, and trace directly back to, historical jurisprudents. The social theory of law generates these insights.

This does not stop with the legal realists—*we* see law in these terms as well. Over two decades ago, Donald Elliott noted that the idea that law evolves in connection with society is "deeply ingrained," though its provenance has been forgotten. "We speak of the law 'adapting' to its social, cultural, and technological environment without the slightest awareness of the jurisprudential tradition we are invoking."[114] Similarly, legal historian Robert Gordon recently remarked that evolutionary–functionalist "theory and its accompanying narrative [have] dominated Western thinking about the relation between law and social change for the last two centuries, although in strictly legal writing the theory is usually inexplicit: it lurks as a set of

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110. Christopher G. Tiedeman, *The Doctrine of Stare Decisis*, 3 U. L. REV. 11, 19–20 (1896) (emphasis added).

111. Christopher G. Tiedeman, *Dictum and Decision*, 6 COLUM. L. TIMES 35, 39 (1893).

112. William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 557 (1992).

113. I develop this argument more fully in *Beyond the Formalist–Realist Divide*. TAMANAHA, *supra* note 21, at 49–56, 79–89. Rabban describes Bigelow's views as "proto-realist," RABBAN, *supra* note 16, at 187–89, but does not go further to reconsider our conventional understanding of legal realism given the fact that many historical jurisprudents expressed similarly realistic views.

114. Elliott, *supra* note 75, at 38.

background assumptions rather than being explicitly set forth and argued for."[115]

Historical jurisprudence has triumphed[116]—at least in the general acceptance of its core theory of law. That is a remarkable conclusion to draw about a mostly forgotten jurisprudential school. It will once again take the field as a formidable rival to natural law and legal positivist theory, though under a broader name like social–legal jurisprudence, when a theorist combines the insights of historical and sociological jurisprudence with contemporary social–legal work to articulate a fully developed and convincing theory of the social nature of law.

115. Robert W. Gordon, *"Critical Legal Histories Revisited": A Response*, 37 LAW & SOC. INQUIRY 200, 202 (2012).

116. Frederic Beiser argues that, although it is thought to have expired, the German historicist tradition was successful in achieving the goal of having history recognized as a science. BEISER, *supra* note 41, at 25–26. My argument is that the success of historical jurisprudence lies in the general acceptance of the view of law it promoted.

Among schools of jurisprudence, the Historical School is like a poor and slightly eccentric relation. Everyone is polite to it, and no one explicitly disowns it, but no one really takes it seriously. Some writers mention its contribution to historical scholarship or its role in building up the intellectual life of nineteenth century German universities. Others have found it a fore-runner of sociological jurisprudence on the one hand and Nazism on the other. Sir Carleton Kemp Allen, in his classical Law in the Making, says of Friedrich Karl von Savigny (1779-1861), the founder of the school: If DIbbetson, â€˜What is Legal History a History ofâ€™ in A Lewis and M Lobban (ed), Law and History (Oxford University Press, 2004) 33-40. M Lobban, â€˜Sociology, History and the "Internal" Study of Lawâ€™ in R Nobles and D Schiff (eds) Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell (Ashgate, 2014) 39-60. R M Jarvis, P G Coleman and G L Richmond, â€˜Contextual Thinking: Why Law Students (and Lawyers) Need to Know Historyâ€™ (1995-1996) 42 Wayne Law Review 1603-1615. DIbbetson, â€˜The Challenges of Comparative Legal Historyâ€™ (2013) 1 (1) Comparative Legal History 1-11.Â Z Tamanaha, â€˜The Unrecognized Triumph of Historical Jurisprudenceâ€™ (2013) 91 Texas Law Review 615-632. Volume 2: Public Law. Historical jurisprudence : an introduction to the systematic study of the development of law. Item Preview. remove-circle.Â Historical jurisprudence : an introduction to the systematic study of the development of law. by. Lee, Guy Carleton, 1862-1936. contrary to Poundâ€™s characterization, historical jurisprudents did not hold a â€œdeductive formalistâ€ view of law.20 This book is the latest addition to a growing list of revisionist worksâ€”including my Beyond the Formalist Realist Divide21â€”which argue that this period has been distorted by modern legal historians and theorists.Â The most sophisticated work in sociological 2013] The Unrecognized Triumph of Historical Jurisprudence 621 philosopher Morris Cohen remarked in 1937, in his survey of the preceding century of jurisprudence, that despite Poundâ€™s great learning and prominence, it is â€œamazing that . . . Pound has found so few disciples or direct followers.â€40 Thus, there is no sign that Poundâ€™s advocacy had the causal effect Rabban implies.

Historical school of jurisprudence was against the notion that law is any regulations laid down. Hence it arose as a reaction against natural law and positive law theories. Law is to be found and not to be made. Law cannot be imposed; rather spirit of the people is to be followed.Â Every nation will have unique character due to its historical period, civilization and culture. The foundations are in the historical origins, evolutionary process and then the mode of transformation. It was a reaction against the rationalism, universalism and individualism, which was perceived in natural law philosophy. Edmund Burke laid down the foundation of this school, stated that habit and religion as the true guides to social action. This jurisprudence is divided into three periods: Founding to Civil War, Reconstruction to the New Deal, and post-New Deal to Griswold v. Connecticut.Â The reader is presumed to have already read the first of these two articles on the lost history of the Ninth Amendment. However, because the history presented in the first article plays an important role in understanding the jurisprudence that this Article recovers, a brief review is in order. The state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: One declaring the principle of enumerated federal power with all nondelegated power being reserved to the states, and the second declaring a rule of con-struction limiting the in... DIbbetson, â€˜What is Legal History a History ofâ€™ in A Lewis and M Lobban (ed), Law and History (Oxford University Press, 2004) 33-40. M Lobban, â€˜Sociology, History and the "Internal" Study of Lawâ€™ in R Nobles and D Schiff (eds) Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell (Ashgate, 2014) 39-60. R M Jarvis, P G Coleman and G L Richmond, â€˜Contextual Thinking: Why Law Students (and Lawyers) Need to Know Historyâ€™ (1995-1996) 42 Wayne Law Review 1603-1615. DIbbetson, â€˜The Challenges of Comparative Legal Historyâ€™ (2013) 1 (1) Comparative Legal History 1-11.Â Z Tamanaha, â€˜The Unrecognized Triumph of Historical Jurisprudenceâ€™ (2013) 91 Texas Law Review 615-632. Volume 2: Public Law. These lists of historical unrecognized or partially recognized states or governments give an overview of extinct geopolitical entities that wished to be recognized as sovereign states, but did not enjoy worldwide diplomatic recognition. The entries listed here had de facto control over their claimed territory and were self-governing with a desire for full independence; or if they lacked such control over their territory, they were recognized by at least one other recognized nation.