
David Rabban’s important book has its origins in an irony: American legal history has rarely addressed its own past. With a remarkable absence of historical consciousness, United States legal historians often trace their own beginnings back to J. Willard Hurst, Horwitz, and (to be alliterative) H-Law, as if the field had its origins in an epiphany on the road to a lumber logging camp in the middle of the twentieth century. Rabban examines the rise of historicism as a dominant legal discourse in the nineteenth century. Examining eleven American legal thinkers—including Henry Adams (who might well be the founder of legal historical studies in this country), Thomas M. Cooley, and James Barr Ames—Rabban identifies a golden age of legal history from the 1870s until the emergence of sociological realism under the aegis of Roscoe Pound.

Pound is Rabban’s antagonist who sets in place a common attitude “ascribing to previous scholarship in legal history many of the faults associated with classical legal thought in general, they have deprecatingly referred to it as doctrinal, internal, formalistic, apologetic, and conservative” (3). Pound’s antipathy to this earlier scholarship was shared by Hurst, and entered into the habits of mind of subsequent United States legal historians. Rabban, however, demonstrates convincingly the sophistication and relevance of nineteenth-century historical scholarship. These scholars were neither proponents of an internalist understanding of law nor did they embrace deductive formalism. Debates over the origins of juries, procedures concerning the ownership of chattel, and the sources for America’s unusual institution of judicial review demonstrated the influence of external forces on the making of legal doctrine.

The importance of Rabban’s recovery of an entire historical legal scholarship should not be underestimated. But his choice to do so through the medium of biography—a kind of Pantheon of American historicists—creates the impression of thinkers who respond primarily to each other. German debates over the reception of Roman law between the adherents of Friedrich Carl von Savigny and Rudolph von Jhering, which emerged in the shadow of the post-Napoleonic settlement, are the starting point for this scholarly constellation, but other approaches might be taken. In a recent book, Kunal Parker suggests that common law—as a precedent grounded legal framework—leads to historicism, and historicism, at least what Parker calls a “modernist historical sensibility,” leads to the iconoclastic tearing down of law’s foundational claims to grand concepts such as morality or logic. It is true that scientific legal historicism seems to follow Rabban’s trajectory, but there is still room for identifying the complex web of thinking—outside the traditional
scope of intellectual biography—grounding nineteenth-century legal historicism.

As with any first-rate work of scholarship, Rabban leaves us with questions: what is the relationship of historicism—the use of history in its normative context—and scientific historical research? How did the rhetorical use of nineteenth-century historical evidence influence the architecture of American law? Was there an anti-historicist movement that might be traced from Austin to Pound’s Boston in a similarly genealogical fashion? And is historicism always a counterpoint to formalism—as historical arguments could be raised to promote legal change or to venerate custom, to identify the contingency of legal doctrine or to embody narrow notions of our Anglo-Saxon origins? Perhaps historical thinking is more malleable an instrument than Rabban suggests.

Rabban at times treats history as if it were a late nineteenth-century invention, but the turn toward history and evolutionary models has a longer trajectory. For example, Peter Stein traced evolutionary legal thinking across an extensive span of time, and historicism was a signal feature of the Scottish enlightenment. Rabban occasionally risks approaching the eighteenth-century past with similar disregard to that he identifies with Pound.

Perhaps Rabban’s greatest contribution is not the comeuppance historical jurisprudence gives to sociological realism, but the transatlantic turn. Rabban deftly treats late nineteenth-century legal history as a kind of triangle trade between Germany, the United States, and Britain. This is a legal transplant narrative. In Germany, the turn toward history began with the resurfacing of Roman and Teutonic traditions as a reaction to French Enlightenment notions of universal legalism. Combining German historicism with English empiricism, Americans turned toward examining early English sources. Remarkably, British scholars were prompted to emulate the scientific historical approach of Americans in dealing with their own legal origins. Rabban broadens the territory encompassed by American legal historians. Colonial American legal historians have long operated in a world encompassing Europe, Britain’s Celtic fringe, the Caribbean, and, more recently, North America’s other new world imperial outposts. But somehow—and this might well be another Hurstian legacy—most American legal historians turned inward as they traced the development of nineteenth-century United States law. Rabban’s landmark book makes an essential contribution by providing us with a new geography as well as excavating legal history’s neglected past.

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