The Creation of American Common Law, 1850–1880

Technology, Politics, and the Construction of Citizenship

Howard Schweber

CAMBRIDGE

The Creation of American Common Law, 1850–1880

Technology, Politics, and the Construction of Citizenship

HOWARD SCHWEBER
University of Wisconsin–Madison

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014, Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2004

Printed in the United States of America

Typeface Sabon 10/12 pt. *System* LaTeX 2ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Schweber, Howard H.
The creation of American common law, 1850–1880 / Howard Schweber.
p. cm.
Includes bibliographical references and index.
ISBN 0-521-82462-1 (hardback)
1. Common law – United States – History – 19th century. I. Title.
KF394.S39 2001
340.5′7′0973–dc21 2003048467

ISBN 0 521 82462 1 hardback

Acknowledgments

This book is based on research that began at the University of Chicago and was continued at Cornell University and at the University of Wisconsin, supported by grants from the University of Chicago, the Mellon Foundation, and the University of Wisconsin. At all stages in the project, I benefited immensely from the guidance and critical insights of numerous scholars. In particular, I would like to thank (in alphabetical order) Greg Alexander, Richard Bensel, David Canon, Mark Graber, Isaac Kramnick, Theodore Lowi, and Steve Sheppard for their guidance, encouragement, and assistance. Portions of the research in this book appeared previously as an article in *Studies in American Political Development*; Karen Orren, Steven Skowronek, and several anonymous readers helped shape that portion of the discussion. Anonymous readers for Cambridge University Press provided thoughtful and illuminating critiques of earlier versions of the entire manuscript. Janet Donovan and Richard Parrish provided invaluable research assistance. In conducting research for this book, I was the beneficiary of the generous assistance of the reference staffs at Cornell's Olin Library, the Cornell Law School Library, the University of Chicago Law School Library, the University of Wisconsin Law School Library, the Illinois Historical Society Archives, the Virginia Supreme Court Library, the Library of Virginia, and the Virginia Historical Society. Reference librarians are the unsung heroes of the world of scholarship; certainly this book would have been impossible without them. In writing this book, I have benefited from the efforts of no fewer than three exceptionally fine editorial minds: Lewis Bateman, Andrew Saff, and Lynn Schweber. The last-mentioned of these has lived with this project since its inception, and has helped in its creation in innumerable ways, among which

her keen editorial eye is perhaps the least important. Elements of the argument of this book were presented as papers at annual meetings of the American Political Science Association, the Western Political Science Association, the American Society for Legal History, and the University of Wisconsin Workshop in American Political Development, and at job talks at the University of Wisconsin's Department of Political Science and Law School. Audience members present at each of those presentations made helpful, interesting, and often provocative comments. The errors that remain are my own.

Contents

Introduction

In the decade preceding the Civil War, judges in the highest courts of northern states created the system of American common law. The principles of tort, contract, and property liability that these judges developed were entirely different from the inherited system of English law that they replaced. The language and categories of pleading, the allocation and definition of burdens of proof, the standards for the description, and the adjudication of cases all were transformed. This was not merely a process of revision; it was a reconfiguration of the basic reasoning process that defined the logic of the law, its political significance, and its social function. These new, uniquely American common law principles, moreover, remain the basic elements of American legal thought and discourse to this day.

There was not a single, national pattern of legal development. Instead, there were two distinct regional patterns of development, each relatively uniform, in the North and the South. The principles of American common law were first worked out by judges in northern courts in the 1850s. Those principles were ultimately adopted by courts in the South in the 1870s, imported wholesale from the northern jurisdictions in which they had been created. But the antebellum, decade-long process in which American legal doctrines were developed and worked out was solely a northern one. The immediate questions, then, are why was there such a sharply bifurcated pattern in the historical development of American law, and what are the consequences of recognizing this differential pattern of development for our understanding of the relation between legal and political thought and American political development in the nineteenth century?

The American version of common law that was created and developed in northern state courts of the 1850s differed from the earlier version in a number of ways. First, where English common law had been divided into dozens of categories and subcategories, each with its own set of rules and its own approach for the analysis of cases, American common law was organized around the broad, unified categories of tort, contract, and property law that are familiar to modern lawyers. This was more than a matter of simplifying pleading practices. The new organization of legal categories meant the rationalization of the common law, such that a single set of principles would govern a vast range of different cases.

Second, the rights and duties of legal actors were similarly made uniform. In the English system, and the earlier American system, the legally enforceable obligations that one actor owed another would be determined on the basis of the status of each person and the precise relationship between the actors. In the new American system, conduct was evaluated against an objective standard rather than in terms of relational claims, and everyone was universally bound by the same duties. These duties, moreover, were not owed by one individual to another based on their relationship in a given interaction; they were owed by everybody to the world at large. That is, everyone was bound to behave in accordance with duties of care at all times because that was the obligation that the law placed on the members of American society. That obligation was not conceived in terms of the welfare of one's fellow citizens as individuals involved in transactions, but rather in terms of the collective welfare of the nation. That collective welfare, in turn, was phrased not in the traditional terms of preserving local order, but rather in terms of a vision of technology-driven progress.

Above all, the universal duty that was the hallmark of American common law in the antebellum North was the duty to avoid obstructing the wheels of progress. Technology-driven progress, exemplified by trains, defined a set of public goods that the common law would be called upon to serve. Paramount among these was the Need for Speed, the imperative demand of the emerging political economy for efficiency, regularity, and rapidity, achieved by the work of machines. The result was a universal set of duties, equally applicable to everyone regardless of his or her social position or role in a transaction, that completely reconfigured the rules for determining legal liability. Something of this idea is captured in what I will call the Duty to Get Out of the Way, an idea exemplified in new rules that made it the obligation of persons to avoid allowing themselves or their animals to be struck by trains, rather than the duty of trains to avoid hitting

persons or stock. The idea also appears in the form of duties of workers to avoid injury and to ensure the diligence and efficiency of other workers, the duties of shippers of goods to avoid exposing carriers to unexpected liabilities, and the duties of railroad passengers to avoid putting themselves in positions in which they might suffer injuries. All of these were novel conceptions, and all of them were grounded in the ideas that society required the benefits of technology-driven progress, and that citizens were required to learn to behave in ways that would aid that progress.

The duty to accommodate progress swept through all areas of the law, trumping all traditionally recognized property-based rights and entirely displacing a traditional model in which legal duties arose out of the relationship between parties and could not extend beyond the relationship that defined them. This new idea of a legally enforceable duty to be part of the national mission of technology-driven progress was the solvent that dissolved the old categories of common law adjudication and made room for the new doctrines of American law.

The terms of the specific legal doctrines involved in this shift of focus will be discussed in later chapters; at the outset, what is important to recognize is that in the 1850s northern courts changed the starting point for any legal adjudication. Where previously the process of adjudication began with an analysis of relative claims of individual rights, now the focus shifted to absolute claims of universal duties. And where the earlier inquiry began with the conduct of the defendant and the harms that conduct may have caused, the initial inquiry turned instead to the conduct of the plaintiff and the question of whether such a person's claims for damages deserved to be heard. A person who failed to meet the standards of conduct demanded by the collective interest in progress would have no claim on the courts' protection.

It was in this latter sense that the new, American system of common law that emerged in the northern states in the 1850s was constructed around a model of citizenship, one that replaced private rights with public duties as its lodestone. By "citizenship" I do not mean the technical legal categories of naturalization, or eligibility for participation in the formal political process, although studies of the development of that concept in the nineteenth century have shown patterns of exclusion and inclusion that are echoed in the developments that are described here (Smith, 1997; Neuman, 1996; Kettner, 1978). In the context of the common law, the term "citizenship" refers to the qualifications that entitle a person to claim the protection of public institutions. One of the fundamental elements of nineteenth century American citizenship, as it had been in the English

tradition, was the right to have one's claims heard in a court. In 1803, John Marshall stated the political proposition that made the rights of private litigants under the common law so central to English, and then American, republican thought. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." (*Marbury v. Madison*, 5 U.S. 137, 163, 1803). The "essence of civil liberty" might equally have been described as "the essence of citizenship." The right of an individual to call on the powers of the state to vindicate a private claim, and the concomitant duty of the state to hear that claim, had been the sine qua non of an Englishman's full membership in the political community. In the American experience, access to courts was if anything an even more important measure of equal entitlement to the prerogatives of citizenship.

When new legal doctrines defined the characteristics of persons entitled to present their claims in a court, they defined a new, legally delimited set of standards for citizenship. The characteristics of persons entitled to bring their private claims before a court for vindication described a model of "virtues," an ideal type that defined a citizen entitled to have his or her interests heard by the institutions of public life. Parties who failed to show that their conduct had demonstrated those legally required virtues could not recover damages; the state would not vindicate such persons' claims, regardless of the conduct of the defendant. By focusing on the satisfaction of universally applicable duties, this new legal model of American citizenship went beyond the political rhetoric of "responsible individualism" (Lowi, 1986; Gold, 1990), defining to whom or what that responsibility was owed in ways that were sharply at odds with earlier models of citizens as autonomous bearers of politically guaranteed legal rights. The legal construction of American citizenship began from a rejection, rather than an affirmation, of what Leonard Levy calls "the incorrigible individualism of the common law" (Levy, 1957: 316).

The model of citizenship reflected in the new common law doctrines of the antebellum North fit neatly with a strand in nineteenth century American political philosophy that scholars have dubbed "liberal republicanism," or a theory of "liberal virtues" (Kloppenberg, 1987; Sinopoli, 1992; Dagger, 1997). Like classical republican theory, liberal republicanism demanded that citizens display certain qualities for the common good rather than solely pursuing their own interests. In the nineteenth

century American version, however, these virtues were not the province solely of ruling elites, but rather belonged to everyone; concomitantly, the obligation to behave virtuously would be imposed on everyone, and the law would be the instrument for the enforcement of that obligation. In T. H. Marshall's classic formulation, citizenship implies "a kind of basic human equality associated with the concept of full membership in a community . . . which is not inconsistent with the inequalities which distinguish the various economic levels in the society" (Marshall, 1964: 70). "Full membership" in the American political community includes access to courts of law. The universal duties of American common law represented the legal construction of a model of citizenship that was liberal and inclusive in its universality and its legal equality, but simultaneously republican and exclusive in its connection of the prerogatives of citizenship to the display of requisite virtues.

The liberal inclusiveness that went along with the leveling tendency of northern legal development should not be overstated. Even in northern states that rejected slavery, equality did not always extend to free blacks, a situation exemplified in the adoption by Illinois, after fierce debate, of a constitutional provision barring their settlement in the state after 1850. The construction of legal duties was also emphatically "gendered," that is, built around expectations drawn from the experiences of adult males who were presumed to define the template of public life (King, 1995; Welke, 1994, 1995; Chamallas and Kerber, 1990).[1] Northern liberal republicanism was, as its name says, a species of republicanism, a theory that contained a construction of "citizenship" in terms of qualities and virtues and extended full membership only to those persons who were deemed to possess those virtues. What was radically liberal about the system of American common law that emerged in the northern states were the very broad terms in which the population of virtuous persons was defined, and the complete rejection of any formal differentiation among classes of citizens. The experiences of blacks and women received scant attention in the formation of either the political theory or the jurisprudence in which it was articulated, but the legal model that was thus derived applied equally – and was equally unforgiving – to everyone regardless of race, gender, place of origin, or social status.

[1] A married woman, for example, could not file lawsuits in her own name in most states until the late nineteenth century. Instead, she would have to seek compensation in a suit filed by her husband or "next friend." In New York, this rule was changed in 1860; in Illinois, the rule remained in force until 1874. By the early twentieth century, most states permitted married women to sue and be sued in their own names (Bishop, 1875, vol. 2).

During the same period, the southern regional pattern was similarly uniform, and similarly reflected underlying ideas about the virtues of citizenship, but the pattern was the opposite of that observed in the North. Through the antebellum years, southern states' highest courts steadfastly resisted pressures to "reform" the common law. The political philosophy of liberal republicanism described previously was a specifically northern ideology. In the antebellum South, republicanism reigned supreme in a form uncontaminated by the intrusion of liberal ideas. Instead, southern elites' republicanism became increasingly closely tied to the hierarchical social order of slavery. In this context, political doctrines hardened around themes of preserving social order, and common law doctrines became instruments for forestalling change. These differences in dominant political cultures reflected differences in the social and political economic organizations of northern and southern society. In each case, unsurprisingly, the ideology that was reflected among judicial elites was that which provided the legitimating claims for their societies. That being the case, it may be equally unsurprising that change came to northern American common law at the same time that change came to the northern American system of political economy. In both cases, moreover, change was carried by the same vehicle: the railroads.

The differences between northern and southern legal development paralleled the differences between northern and southern attitudes about railroad development. Railroads were embraced by the same northern states that embraced legal innovation as the engine of progress toward a glorious and novel future. By contrast, slaveowning elites resisted and feared railroads, and technology generally, as potential threats, just as southern courts resisted changes to the system of common law. But the connections between railroads and the creation of American common law are much more specific than that. The cases in which the new doctrines were worked out in northern courts were railroad cases. In state after state, new doctrines were announced, tested, and developed in the context of cases involving railroads. This is an important observation for this book. It is not simply the case that railroad cases tended to feature new doctrines, it is rather the case that railroad cases were the cases – and very nearly *all* the cases – in which new principles of law first appeared. The cases from northern courts that are discussed in the chapters that follow were chosen because they are all the cases in which these states' highest courts developed new legal principles in the 1850s, and with only a very few exceptions (noted in the text), these were cases that involved railroads. Conversely, in the 1850s the southern courts whose records are

examined here heard almost no railroad cases, and – sure enough – their legal doctrines underwent no revisions. And in the 1870s, when change finally came to the southern courts, it was carried, once again, by railroad cases. The cases from southern states that are discussed here are all of those in which those states' courts first announced their adoption of various principles of American common law, and once again, these were cases involving railroads.

It is not enough, however, merely to observe that modernization of the law accompanied modernization of the economy in the North, nor that resistance to legal innovation was accompanied by opposition to economic change in the South. There was nothing in the adoption of rail technology that necessarily implied radical reformation of the common law. Consider the case of England, the quintessentially modern nation of the late eighteenth and early nineteenth centuries (Alexander, 1997: 75; Hawke, 1970: 55–90). In England, railroads were treated as unwelcome intrusions by local parish elites, who responded by taxing rather than subsidizing their operations (Kostal, 1994: 364). Judicial elites resisted calls for legal reform, continuing a pattern of institutional conservatism that had been evident since the eighteenth century. The result was that the legal response to the challenges posed by the railroads was to fit them into the traditional common law system (discussed in the next chapter) (Kostal, 1994: 362–4; Hoeflich, 1989: 5). In response to injuries and damage, English lawyers created "a new field of specialized law practice" rather than attempting to unify the law into a single set of principles, while passengers and shipped goods retained the traditional protections of common carrier liability (Kostal, 1994: 365–6). Specific rules such as the fellow-servant rule were adopted, but there was nothing of the kind of complete reformulation and conceptual reorganization of legal doctrine that defined the creation of a specifically American system of common law. England, for example, did not adopt a general theory of negligence until 1932, and in other matters English common law was far from uniform, with individual counties' courts adopting rules in accordance with local preference (Donnelly, 1967: 742; Friedman, 1985: 25; see generally Kostal, 1994). As Peter Karsten has observed, this fact is a challenge to any deterministic account that presents legal change as epiphenomenal to economic development (Karsten, 1997: 299). The railroads were a powerful engine for change, but the response to the railroads depended on the political environment that preceded their arrival. To understand the innovation or the absence of innovation in antebellum American law, one must first understand the political environment that preceded the

railroads, and the consequent reactions to the transformations that they wrought.

One traditional explanation for a correlation between railroads and legal development in America is the "subsidy thesis" associated with Willard Hurst (Hurst, 1964; Friedman, 1985; Malone, 1986). This is an argument that legal doctrines were nothing more than thin justifications for courts to do whatever it would take to serve the interests of the emerging railroad industry, either because the owners of those companies were immensely powerful or because the success of those companies was viewed as a matter of immense importance, or some combination of these two arguments. Other scholars have amassed considerable evidence in favor of a similarly instrumentalist argument, but one that says that law, and especially tort law, was developed in order to *permit* recovery from new business enterprises (Rabin, 1981; Schwartz, 1981). Later arguments added a level of ideological analysis; support for political economic developments, by this analysis, fit within a dominant ideology of corporate capitalism, so that the use of law to subsidize development was merely an expression of a greater desire to favor a system of political economy and the legitimating ideology with which it was associated (Horwitz, 1992(a); Wiecek, 1998).

The subsidy thesis and its variants echo earlier more-or-less deterministic theories of modernization in which legal ideas follow the necessary courses created by economic and technological development. In Samuel Huntington's Durkheimian formulation, the development of advanced technologies inevitably resulted in a process of rationalization of authority, the development of specialized institutions to serve differentiated political functions, and broadening political participation (Huntington, 1968: 93–193). Theodore Lowi, similarly, describes differentiation and rationalization as the defining characteristics of the political economy of mid-nineteenth century America. The law, in this conception, adjusted to the demands of a changing economic order by accommodating the needs of new classes of economic actors. Where the demands of capitalism and the traditions of common law reasoning came into conflict, "capitalism won out in a straight fight" (Lowi, 1979: 5). Nothing in the chapters that follow will contradict this basic insight into what Joseph Schumpeter called the "creative destruction" of capitalism applied to law (Schumpeter, 1975: 82).

More recently, legal historians have extended the proposition that American law reflected American ideology still further, using the study of the law to address the nature of American political thought and the

relationship between state and society generally (Karsten, 1997; Tomlins, 1993; Wiecek, 1998; Gordon, 1996; Kennedy, 1980). These arguments point to the idea that something called "culture" acts as an independent variable, or at a minimum as a medium of communication between different positions on the political, economic, or social spectrum. Applying this mode of analysis to nineteenth century America, Stuart Bruchey (1990) described a culture of capitalist development underlying a whole series of attitudes toward questions of law and politics. Similarly, Irwin Unger (1964) explained nineteenth century American politics in terms of competition between different value systems that had associated modes of economic activity, rather than economic systems with internally generated principles of justification. By carefully developing the intellectual threads that provided the vocabulary for nineteenth century legal discourse, legal historians have illuminated the mediated connections between legal and political concepts to show continuities and points of change in the development of common law categories (Alexander, 1997; Novak, 1996). And a growing body of work in southern American legal history has begun to examine the distinctive patterns of sectional legal development in that region of the country (Huebner, 1999; Hunt, 1998; Hunt, 1988; Ely and Bodenhamer, 1986; Finkleman, 1985). Applying arguments drawn from theories of modernization and political culture to the situation in the antebellum South, we might expect to find that powerful elites shared a dominant ideology whose legitimating claims were threatened by some aspects of railroad development. And this, too, will emerge as the case in the chapters that follow.

This book, while drawing on these works and others like them, attempts to further our understanding of nineteenth century law and politics in several ways. First, by adding a systematic comparative dimension to the analysis, this book seeks to illuminate the contours of both northern and southern legal development. Second, by focusing extensively on the connections between legal and political discourse, I have attempted to connect the development of American common law to parallel patterns in the development of regional political cultures. Both legal development and railroad expansion depended on a vocabulary that connected the dominant political economic elites with a legitimating ideology. In places where the dominant political culture was sympathetic to railroad expansion and legal modernism, both flourished. In places where the dominant political culture was hostile to both developments, neither occurred. In each case, the approach to common law development reflected the commitment of the courts to further or preserve the virtues of their societies. The values of

the common law were not separate from the values of competing political cultures, they were their wellsprings. The comparative study of the development of political and legal principles can thus illuminate both, and in the process draw attention to the political commitments that are always built into any system of legal thought.

The selection of Illinois and Virginia as the key comparative cases for this study was driven by a recognition of the fact that these two states have striking similarities as well as sharp differences. Virginia, the oldest state in the Union, was from the eighteenth century through the Civil War the bastion of civic republicanism in America. Although politically Virginia was to be the leading state in the Confederacy, it was in some ways its least southern. At the outset of the Civil War, in fact, there was serious concern among southerners that Virginia might side with the Union. Virginia was also the southern state in which industrialization, and particularly railroads, had made the deepest inroads, and it was therefore the southern state in which the conflicts between traditional legal conceptions and the consequences of modernization are most clearly visible.

Illinois is in some ways the opposite case. Antebellum Illinois was an agrarian state of small towns and few cities (Howard, 1972: 146–56). Like Virginia, Illinois was politically and culturally a deeply divided state, with a southern portion whose population and outlook was predominantly southern, and a northern section settled by northerners and European immigrants. The northern part of the state, however, developed much later than the southern section. Although Illinois became a state in 1818, its entire northern section was not home to a significant number of people until the 1830s and did not become the locus of state political power until the late 1840s. Thus Illinois, and especially Chicago, represented a new state built by railroads rather than an ancient traditional society invaded by an alien force. In addition, railroads in Illinois did not develop gradually, they arrived roaring across the landscape with blinding speed. While there had been several mostly unsuccessful earlier attempts, the state's entire rail system was essentially constructed between 1850 and 1860. This meant that both the challenges and the opportunities created by new modes of transportation and communication were sharply drawn. The points of conflict between the imperatives of technological progress and the needs of traditional agrarianism were inescapable, and it was in response to those conflicts that Illinois demonstrated its political culture. As a result, in its legal development, Illinois presents an exceptionally clear case for study. Illinois' common law demonstrates the consistent pattern of legal development across the North from New England through the states

of the Old Northwest, and the equally consistent relationship between law and an emerging conception of citizenship.

Virginia and Illinois do not represent the northern and southern ideological extremes, but rather points of relative convergence between two sharply separated halves of America's national culture. Nonetheless, the two states' experiences were sharply different, reflecting dominant northern and southern patterns of development. The doctrines adopted by Illinois in the 1850s were the same as those adopted in Vermont, New York, and Ohio, despite significant differences in those states' economic circumstances, while Virginia's common law followed the same path as that of Georgia, North Carolina, and Kentucky, despite the same sorts of differences in the economic and physical circumstances of those states. As in the rest of the North, in the 1850s the Illinois Supreme Court's innovations in the law defined a model of citizenship based on technological exceptionalism, an expanded conception of the public good built around an ideal of industrial progress, and the standardization of legal rights and duties, while resistance to each of those ideas was at the heart of southern legal conservatism. Later, in the 1870s and 1880s, Virginia and the other southern states adopted the new American legal doctrines in ways that evaded the conceptual commitments that had been at the heart of their original formulations.

In the chapters that follow, I will present a closer study of the arcs of political and legal development that resulted in the creation of an American system of common law. In the first chapter, I will review the differences between the political economies and political ideologies of the antebellum North and South in more detail, and spell out the ways in which the American system of common law departed from the earlier system adapted from the common law of England. In Chapters 2, 3, and 4, I will present a close study of Illinois in the 1850s as an exemplar for northern development. In Chapter 5, I will trace the similarities and differences between developments in Illinois and those of three other northern states (Ohio, Vermont, and New York). Chapters 6, 7, and 8 consider Virginia with the same kind of detailed analysis that was previously given to Illinois, and in Chapter 9 the experiences of Virginia are compared with those of three other southern states (Georgia, North Carolina, and Kentucky). Finally, Chapter 10 presents some overall observations about the significance of this study for understanding the relationships among legal, political, and social development in nineteenth century America.

The organization of the discussions of Illinois and Virginia differs slightly. The discussion of Illinois' law focuses on the decade from 1850