Kunal M. Parker

Common Law, History, and Democracy in America, 1790–1900

Legal Thought before Modernism

Common Law, History, and Democracy in America, 1790–1900

Legal Thought before Modernism

KUNAL M. PARKER
University of Miami School of Law

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York NY 10013-2473, USA

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107614352

First published 2011
Reprinted 2012 (twice)
First paperback edition 2013

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication Data
Parker, Kunal Madhukar, 1968–
Common law, history, and democracy in America, 1790–1900 :
legal thought before modernism / Kunal M. Parker.
p. cm.
(Cambridge historical studies in American law and society)
Includes bibliographical references and index.
ISBN 978-0-521-51995-3 (hardback)
1. Common law – United States – History. 2. Justice, Administration of – History.
3. Progressivism (United States politics) – History. 4. United States – Politics and
government – 19th century. I. Title. II. Series.
KF395.P37 2011
340.5'70973–dc22 2010037104

ISBN 978-0-521-51995-3 Hardback
ISBN 978-1-107-61435-2 Paperback

Common Law, History, and Democracy in America, 1790–1900

This book argues for a change in our understanding of the relationships among law, politics, and history. Since the turn of the nineteenth century, a certain antifoundational conception of history has served to undermine law's foundations, such that we tend to think of law as nothing other than a species of politics. When law is thus viewed, the activity of unelected, common law judges appears to be an encroachment on the space of democracy. However, Kunal M. Parker shows that the world of the nineteenth century looked rather different. Democracy was itself constrained by a sense that history possessed a logic, meaning, and direction that democracy could not contravene. In such a world, far from seeing law in opposition to democracy, it was possible to argue that law – specifically, the common law – often did a better job than democracy of guiding America along history's path.

Kunal M. Parker is Professor and Dean's Distinguished Scholar at the University of Miami School of Law. He was previously the James A. Thomas Distinguished Professor of Law at Cleveland State University and has held fellowships at New York University Law School, Cornell Law School, Queens University in Belfast, and the American Bar Foundation. Professor Parker has served on the editorial boards of *PoLAR: Political and Legal Anthropology Review* and *Law and Social Inquiry*. His writing focuses on U.S. intellectual and legal history, the philosophy of history, the history and theory of immigration and citizenship law, and the history of law in colonial India.

Cambridge Historical Studies in American Law and Society

SERIES EDITOR

Christopher Tomlins, *University of California, Irvine*

PREVIOUSLY PUBLISHED IN THE SERIES

Andrew Wender Cohen, *The Racketeer's Progress: Chicago and the Struggle for the Modern American Economy, 1900–1990*

Davison Douglas, *Jim Crow Moves North: The Battle Over Northern School Segregation, 1865–1959*

Tony A. Freyer, *Antitrust and Global Capitalism, 1930–2004*

Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in the Antebellum South*

Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941*

David M. Rabban, *Free Speech in Its Forgotten Years*

James D. Schmidt, *Industrial Violence and the Legal Origins of Child Labor*

Robert J. Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth-Century America*

Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment*

Jenny Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery*

Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920*

Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America*

Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago*

Acknowledgments

I have many people and institutions to thank for this book. It is a sincere pleasure to acknowledge them all here.

This book began as a doctoral dissertation in the Department of History at Princeton University. While I was a graduate student at Princeton, each of my advisors – Hendrik Hartog, Anthony Grafton, and Daniel Rodgers – did individual reading courses with me, taking time out of their busy schedules every week to walk me through scholarly literatures and to respond to my concerns and queries. Dirk's, Tony's, and Dan's generosity speaks volumes not only about their extraordinary commitment to graduate students, but also about the very special culture of the Department of History at Princeton. This generosity continued while I was writing the dissertation and after. Dan Rodgers and Dirk Hartog both read the book manuscript at a late stage. Dirk, in particular, offered detailed and characteristically challenging comments. I know I am not the only one of Dirk's graduate students to feel overwhelmed by his generosity with his time. I cannot thank him enough.

A few more individuals deserve to be identified. Over the years, Christopher Tomlins has been a supporter and a friend. He encouraged me to go to graduate school in history and wrote me reference letters; he recognized the worth of this project when it was in its earliest stages; he shepherded it through to what it has now become; and he offered innumerable points of advice and suggestion. Annelise Riles, whom I met when we were both first-year students at the Harvard Law School, has taught me an immense amount over the years. Especially worthy of mention is that she arranged for me to spend a year at Cornell University in

2003–2004, which is where my dissertation began. Bill Nelson offered me the Samuel I. Golieb Fellowship at New York University Law School in 2006–2007, which allowed me to finish my dissertation. Barbara Quint gave me heavily subsidized housing during that crucial last year. Two individuals, with whose ideas this book engages, have been incredibly generous in their reading of my work: Bob Gordon and Dorothy Ross. I have learned much from their framing of issues. Clayton Koppes agreed to read the manuscript as it was close to completion and offered the valuable (and much desired) feedback of a non–legally trained historian. The editorial team at Cambridge University Press has been wonderful. I thank them all.

I have presented papers drawn from this book at the Benjamin N. Cardozo Law School, Case Western Reserve University Law School, the Cleveland-Marshall College of Law, Cornell Law School, Emory Law School, New York University Law School, Northwestern Law School, Queens University Belfast, the University of British Columbia, the University of California at Irvine, the School of Oriental and African Studies at the University of London, the University of Miami School of Law, the University of Oregon School of Law, the University of Southern California Law School, Villanova Law School, and at various annual meetings of the American Society for Legal History, the Law and Society Association, and the Association for the Study of Law, Culture and the Humanities. I thank audiences, commentators, and fellow panelists at all of these venues for their engagement.

I would also like to acknowledge the valuable research support of the Cleveland-Marshall College of Law and the University of Miami School of Law. The libraries of both institutions have been admirable in responding to my requests. Jessica Mathewson, Barbara Cuadras, and Sue Ann Campbell have gone above and beyond what one might reasonably expect of librarians. At both institutions, assiduous research assistants – Frank Wardega, Chris Valley, Justin Wales, and Eliot Williams – have helped make this book a better one. The William Nelson Cromwell Foundation offered me a welcome dissertation writing grant.

It is also a pleasure to name a number of friends and interlocutors who have helped in different ways to refine my thinking over the years: David Abraham, Anita Bernstein, Ritu Birla, Linda Bosniak, Christina Burnett, Marianne Constable, Charlton Copeland, Patti Falk, Zanita Fenton, Martha Fineman, Michael Froomkin, Rachel Godsil, Reg Graycar, Ariela Gross, Patrick Gudridge, Laura Hengehold, Gloria Howard, Dan Hulsebosch, Nancy Khalek, Amy Levine, Christine McBurney, Pat

McCoy, Michelle McKinley, Renisa Mawani, Hiro Miyazaki, Mae Ngai, Bill Novak, Mariana Ortega, Ishita Pande, Daria Roithmayr, Teemu Ruskola, Yumna Siddiqi, Frank Valdes, Mariana Valverde, and Barbara Welke.

Lastly, I want to acknowledge the support of my family, in both India and the United States. I want particularly to thank my mother, whose support has never faltered even as, over the years, my interests have changed.

Contents

1

Introduction

Common Law, Democracy, History: a Modernist Tradition of Reading the Past

From the American Revolution until the very end of the nineteenth century, the common law was considered an integral mode of governance and public discourse in America. The vital presence of the common law might seem odd in a country that was premised in so many ways on breaking with its European past and on assuming political control of its own destiny. After all, the common law had originated in, and remained closely identified with, England. It was ideologically committed to upholding precedent and to repeating the past, claiming as it did so to embody the "immemorial" customs of the English, customs so old that their origin lay beyond "the memory of man." It consisted of judicial, rather than legislative, articulation of legal principles. For all these reasons, one might expect Americans, who were intensely proud of their republican experiment, to have rejected the common law.

Instead, until the very end of the nineteenth century, the common law was widely – although never universally – claimed and celebrated. In 1826, in the first volume of his celebrated *Commentaries on American Law*, the "American Blackstone," James Kent, delivered the following breathless paean to the common law that captures how many nineteenth-century American lawyers thought about it:

> [The common law] fills up every interstice, and occupies every wide space which the statute law cannot occupy.... [W]e live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake, and when we lie down to sleep, when we travel and when we stay at home; and

it is interwoven with the very idiom that we speak; and we cannot learn another system of laws, without learning, at the same time, another language.[1]

We might account for the longevity and resilience of the common law tradition in nineteenth-century America by advancing at least two reasons, both well known. First, the common law came with heavy ideological freight. Since the early seventeenth century, English common lawyers had resisted the encroachments of would-be absolute monarchs in the name of England's "ancient constitution," an agglomeration of immemorial, endlessly repeated, common law freedoms. Americans had thoroughly absorbed this learning. The American revolutionary struggle was fought to a large extent to vindicate what colonists considered their common law rights and freedoms. As a result, many prominent American legal thinkers from the late eighteenth century on considered the written U.S. Constitution to be informed by, and indeed to be incomprehensible without reference to, the common law.[2] Second, throughout the nineteenth century, the American state – whether at the federal, state, or local level – did not play nearly as significant a role in economy and society as it would in the twentieth century. The gap it left was filled by common lawyers, who played a correspondingly larger part in articulating law for America's vibrant and multiplying polities and economies. Even as they were accused of political bias, nineteenth-century American common lawyers took this role extremely seriously. More than a quarter-century ago, Morton Horwitz detailed the considerable creativity of American common law-

[1] James Kent, *Commentaries on American Law* (4 vols.) (New York: E. B. Clayton, 1840) (4th ed.; 1st ed., 1826), Vol. 1, p. 343. It is noteworthy that Kent makes an argument that many contemporary sociolegal thinkers would recognize, namely that law is utterly constitutive of our lives, down to their most mundane, routine, habitual aspects. For contemporary legal scholars, the authoritative work on the constitutive nature of law is Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

[2] The contemporary American legal scholar most clearly associated with identifying the common law sources of the revolutionary struggle is John Phillip Reid. See John Phillip Reid, *The Ancient Constitution and the Origins of Anglo-American Liberty* (DeKalb: Northern Illinois University Press, 2005). See also Reid's multivolume *Constitutional History of the American Revolution*. John Phillip Reid, *The Constitutional History of the American Revolution: The Authority of Rights* (Madison: University of Wisconsin Press, 1986); *The Constitutional History of the American Revolution: The Authority to Tax* (Madison: University of Wisconsin Press, 1987); *The Constitutional History of the American Revolution: The Authority of to Legislate* (Madison: University of Wisconsin Press, 1991); *The Constitutional History of the American Revolution: The Authority of Law* (Madison: University of Wisconsin Press, 1993).

yers as they reshaped English doctrines of tort, contract, and property to suit the needs of the nineteenth-century American economy.[3]

But there was more, and it is this that forms the subject of this book. Throughout the nineteenth century, the common law, history, and democracy were imagined to coexist in ways very different from the way we (or at least many of us) are now wont to imagine them. These nineteenth-century ways of imagining the relationships among the common law, history, and democracy go a long way toward explaining why the common law tradition survived for as long as it did as such a vital part of American governance and public discourse. They reveal different conceptions of how law, history, and democracy related to one another, different modes of historicizing law, and different ways of thinking about history itself.

For all their importance in their own time, however, these nineteenth-century ways of conceiving of the relationships among the common law, history, and democracy have been largely obscured from our view – or, alternatively, caricatured – by a powerful and still authoritative late-nineteenth- and early-twentieth-century modernist tradition of thinking about law, history, and democracy. In order to recover the ideational world of the nineteenth century and to rediscover the ways in which it might speak to us, it is therefore necessary to understand the modernist tradition that still largely occludes it. Accordingly, it is to this modernist lens through which we continue to read the past that I first turn. We need to understand how we have been reading the past, I submit, in order to see the past differently and to learn from it.

Less than a century after Kent penned his extravagant paean to the common law, it would become impossible for most serious American legal thinkers to express quite such an enthusiastic endorsement of the common law tradition. Around 1900, the common law tradition, so ardently claimed by American lawyers for so long, began to experience a loss of prestige. Furthermore, while it is emphatically not the case that the common law faded from the twentieth-century American legal landscape, its decline as a mode of governance and public discourse – relative to the twentieth-century regime of state-generated law, codes and regulations, bureaucratic experts, and administrative agencies – seems unquestionable. What happened?

The standard account runs as follows. By the end of the nineteenth century, massive transformations in American life – urbanization,

[3] Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977).

industrialization, capital–labor conflict – seemed to necessitate ever greater democratic, collective, directive, and expert control over law. Calls for reform were everywhere. Common law notions of contract, property, and tort were entirely unable, it was maintained, to deal with the grave problems of America's industrial economy. Indeed, the common law, especially as it was joined to the U.S. Constitution and applied by the federal courts, was widely considered a bastion of past-oriented conservatism, threatening the viability of urgently needed social democratic legislation. The activities of the U.S. Supreme Court seemed to confirm such critiques. In the notorious case of *Lochner v. New York* (1905), the Court effectively read common law freedoms into the U.S. Constitution's Due Process Clause when it struck down as unconstitutional a New York maximum-hours law intended to regulate working conditions in bakeries on the ground that the law interfered with the right to contract.[4]

The *Lochner* decision, and others like it, incensed Progressive Era critics. The common law's conservative and individualistic orientation toward contract and property, to the extent that it was used to overturn or subvert reformist, redistributive, social democratic legislation, was read as profoundly antidemocratic. In order to restore to democratic majorities their rightful role in giving themselves their own laws, there began a long, complex, and contradictory assault on the common law extending all the way to the New Deal, which ended in the common law's retreat. *Lochner v. New York* rapidly became, and has remained, a symbol of judicial overreaching, a nadir in the history of the U.S. Supreme Court. Law in the twentieth century increasingly became a matter of state-generated law.

Beneath this factual account of how the forces of democracy defeated a reactionary common law lies the modernist account of the relationships among democracy, law, and history to which I have referred. This modernist account arose in the late nineteenth century. It provided the critical intellectual underpinnings for the Progressive Era assault on the common law tradition and remains extremely influential in our own understanding of the relations among democracy, law, and history.[5]

[4] *Lochner v. New York*, 198 U.S. 45 (1905).

[5] The standard and important work on legal modernism is David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994). Luban's own understanding of "modernism," while not at odds with anything I say, is too specific for my purposes. For a discussion of modernism that is closer to the one I advance here, see Dorothy Ross, "Modernism Reconsidered," in Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870–1930* (Baltimore: Johns Hopkins University Press, 1994).

In order for the forces of democracy to defeat the common law, law had to be convincingly represented as a species of politics, its foundations as law undermined. It was only when law could be successfully represented as a species of politics that common law judges could be represented as *illegitimately* usurping the realm of democratic politics. To be sure, as I will show, democratically oriented American critics of the common law had been attacking the common law as a species of politics from the American Revolution on. But the decline in the prestige of the common law in the early twentieth century and into our own time emerges in important part from this specific modernist tradition of thinking about democracy, law, and history. This modernist sensibility is discernible in the writings of America's most famous late-nineteenth-century critic of the common law tradition, Oliver Wendell Holmes, Jr. Although Holmes's role as a critic of the common law is well recognized – and widely celebrated – by American legal scholars and intellectual historians, it is not always sufficiently appreciated that his critique emerges out of a modernist historical sensibility.[6]

"Modernism," Peter Gay has argued, "is far easier to exemplify than to define." While it is beyond the scope of this book to come to terms with the various meanings of modernism as a cultural and intellectual phenomenon, it is significant that Gay identifies as the key attributes of modernism "the lure of heresy," on the one hand, and "a commitment to a principled self-scrutiny," on the other[7]; for it is precisely these two features of modernism, as Gay defines them, that were part of what I would characterize as a special kind of awakening to history revealed by Holmes's writings. (Later in this book, I will argue that much of Holmes's historical sensibility is shared with his late-nineteenth-century contemporaries.) For Holmes, in the spirit of heresy or iconoclasm, history would serve to tear down the suprahistorical foundations – logic, morality, and so on – of law. In sweeping away such foundations, history would invite critical self-reflection, new ways of imagining the future. The result would be an erosion of the boundary between law and politics.

[6] David Luban also takes Holmes to be the first major American legal modernist. As he puts it, "To see these modernist themes at work in legal theory close up, we need go no further than the writings of Oliver Wendell Holmes, whom I propose to take as a case study of the modernist predicament in law." Luban, *Legal Modernism*, p. 28. Luban, to be sure, recognizes the significance of what I would call historical thinking in his rendering of legal modernism.

[7] Peter Gay, *Modernism: The Lure of Heresy from Baudelaire to Beckett and Beyond* (New York: Norton, 2008), pp. 1, 3–4.

In a series of oracular texts, Holmes faulted the common law tradition for being insensitive to history. First, at the opening of his now little read classic, *The Common Law* (1881), Holmes makes an iconoclastic statement that has since become a mantra, if not a cliché, of modernist, pragmatist legal thought:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[8]

Holmes was arguing that legal thinkers had begun erroneously to believe that the common law could be understood as a matter of ahistorical logic, such that legal results would follow automatically from initial premises. But the common law, Holmes suggested, was ultimately irreducible to logic. Logic was not its foundation. Like all law, the common law had to be seen, instead, as the product of *nothing* but history, as something that had arisen and developed in time, as something without ahistorical foundations.[9]

Second, even as he insisted that the common law was not logic but instead the product of nothing but history, Holmes argued that the common law was excessively wedded to repeating the past for its own sake. In a celebrated essay entitled "The Path of the Law" (1897), Holmes famously declared that the mere passage of time, or antiquity, was an insufficient basis for endowing a rule with legal weight and significance. He put it thus:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[10]

[8] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 1.

[9] The phrase "nothing but history" comes from Benedetto Croce's *La storia come pensiero e come azione* (translated as *History as the Story of Liberty*). It has been popularized by David D. Roberts, *Nothing but History: Reconstruction and Extremity after Metaphysics* (Aurora, Colo.: Davies Group, 2006) (1995).

[10] Oliver Wendell Holmes, Jr., "The Path of the Law" (1897), in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Chicago: University of Chicago Press, 1995) (5 vols.) (Sheldon Novick, ed.) (hereafter "*Collected Works*"), Vol. 3, p. 399.

Antiquity, something that had long served as a ground of the common law's legitimacy, was thus as illegitimate a foundation for law as was logic. For law to be justified, it had to be justified in the present as a matter of critical self-reflection. A mere "blind imitation of the past," of the kind common lawyers allegedly engaged in, would not do. If we are to repeat the past, Holmes tells us, we must choose to do so now and with utter self-consciousness.

Holmes's twin critiques of the common law are superficially opposed. How could the common law simultaneously be accused of being excessively wedded to an ahistorical logic and excessively wedded to repeating the past for its own sake? Holmes was, in fact, pointing to different aspects of the common law tradition. The logic-oriented tradition was the product of a scientific orientation to the common law of relatively recent vintage. It had been developing around the Harvard Law School at the time Holmes came of age intellectually. The precedent-oriented tradition, in which the legitimacy of the common law rested upon repeating the past, went back centuries. It had been articulated authoritatively in the early seventeenth century and had been repeatedly reaffirmed.

What unifies Holmes's twin critiques of the common law is his modernist conception of history. For Holmes, history is the heretical or iconoclastic practice of revealing the merely temporal origins of phenomena in order to dismantle the foundations upon which such phenomena rest, whether those foundations be the logic allegedly underlying law or the accumulated weight of law's past that authorizes its own repetition. Once the temporal origins of phenomena have been identified and their foundations undermined, however, no underlying order, instantiated in an unfolding historical time, becomes visible. In other words, history possesses no necessary or coherent direction or meaning. It simply sweeps away foundations, clears ground, and invites self-reflection. Law's foundations may be dismantled in the name of history, but we are given no substitute foundations. We are told to think about what we might want law to be.

Holmes himself was no unambiguous partisan of popular democracy. Indeed, his modernist, antifoundational view of history could as readily be turned on the foundational philosophies of democratic majorities as they could on foundational theories of law. Nevertheless, Holmes's view of history as a ground-clearing gesture, when turned on law specifically, played an important role in breaking down the always tenuous distinction between law and politics. If law's foundations could be shown up as thoroughly temporal, as arising in historical time, contingent, and revisable,

how could one distinguish meaningfully between law and politics? Was not law just another way of doing politics? Where the law in question was not the direct result of the activity of democratic majorities, as was so clearly the case with the judicially articulated common law, did this then not render law an illegitimate way of doing politics? Although they have not always adequately underscored the modernist historical sensibility that is such an important part of Holmesian thought, American legal historians have frequently placed Holmes at the origin point of the "discovery" that law could be collapsed into politics. At the end of a brilliant and detailed discussion of Holmes, for example, Morton Horwitz puts it thus:

> [H]olmes pushed American legal thought into the twentieth century. It is the moment at which advanced legal thinkers renounced the belief in a conception of legal thought independent of politics and separate from social reality. From this moment on, the late nineteenth century ideal of an internally self-consistent and autonomous system of legal ideals, free from the corrupting influence of politics, was brought constantly under attack.[11]

The Holmesian breaking down of the wall between law and politics, itself part of a much wider modernist political, intellectual, and artistic "revolt against formalism" throughout the Western world, provided a critical intellectual underpinning for the early-twentieth-century Progressive assault on the common law.[12] Indeed, Holmes became the darling of democratically inclined, scientifically oriented Progressive Era critics of the common law precisely for having reduced law to politics. These critics actively claimed Holmes as an intellectual forebear, even though only a few subscribed in a philosophically rigorous way to all aspects of his particular brand of modernist, antifoundational, skeptical historical thought. Many of Holmes's insights were taken up, repeated, and deepened. Following in Holmes's footsteps, Progressive Era thinkers railed against the common law's late-nineteenth-century formalist orientation. For example, in his celebrated *Economic Interpretation of the Constitution of the United States* (1913), the historian Charles A. Beard deplored "[t]he devotion to deductions from 'principles'... which

[11] Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), p. 142.

[12] G. Morton White, *Social Thought in America: The Revolt Against Formalism* (New York: Viking Press, 1949); James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920* (Oxford: Oxford University Press, 1986).