

11-20-2014

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Recommended Citation

Hovenkamp, Herbert J., "Interest Groups in the Teaching of Legal History" (2014). *Faculty Scholarship*. 1828.
http://scholarship.law.upenn.edu/faculty_scholarship/1828

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Interest Groups in the Teaching of Legal History

Herbert Hovenkamp*

One reason legal history is more interesting than it was several decades ago is the increased role of interest groups in our accounts of legal change. Diverse movements including law and society, critical legal theory, comparative law, and public choice theory have promoted this development, even among writers who are not predominantly historians. Individually, historians such as Charles Beard, J. Willard Hurst, Lawrence M. Friedman, Morton J. Horwitz, and William E. Nelson are among the many who have recast legal development under democracy as a consequence of disputes and compromises among diverse social and economic interests.

Clearly, legal historians must acknowledge the importance of interest group interaction in causing legal change. Nonetheless, in my own survey course in American legal I often push back. Taken too far, interest group theorizing becomes an easy shortcut for assessing legal movements and developments without fully understanding the ideas behind them. To be sure, intellectual history in the United States went into decline because its practitioners often wrote as if the history of ideas drove everything else, either disregarding or minimizing the role of interest groups. In the process intellectual history became branded as belligerently conservative because the dissemination of ideas in our past was controlled by a relatively small number of elites. These were mainly white, privileged, well educated, and male,. Great works of intellectual history, such as Richard Hofstadter's *Social Darwinism in American Thought* (1944), contain virtually no women, and Afro-Americans only as the objects of study rather than as participants. Social history became an essential corrective for including those that the history of ideas ignored.

Intellectual history was never *inherently* conservative in this fashion, however. People other than the white, male, upper classes have always contributed powerful ideas to political and legal dialogue. The dominant group of intellectual historians writing at the mid-twentieth century (Hofstadter, Henry Steele Commager, Morton White) either ignored them as serious contributors of

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influential ideas or else regarded their ideas as derivative. That was not true of everyone. For example Perry Miller was deeply conservative about history and believed strongly that political and legal outcomes are controlled by ideas. Nevertheless, he also wrote with admiration about such dissenters as Roger Williams and Anne Hutchinson, taking seriously both their ideas as well as those of their critics. Nevertheless, conservative bias left a stigma on intellectual history from which it has really never recovered.

On the other side, social and economic history have been driven by impulses originating from both the left (Marxism and its variants) and the right (public choice theory) that view policy as little more than the outcome of conflict among interest groups. Further, these preferences are generally "naked" in the sense that they reveal little more than the desires of each individual for wealth, stability, social status, or other recognition. Articulated ideas are little more than rationalizations, and the public processes that make legal rules are largely a zero sum game.

I try to instill in my students the idea that legal history is a much more complex process in which ideas and preferences interact. In differing areas and at different times one may dominate over the other, but almost never permanently. Further, ideas lead to preferences just as much as the other way around.

For example, when I get to the subject of business regulation I present my students with an issue such as this: in virtually every American state public utilities such as water, municipal gas and later electricity developed historically in a regulated "natural monopoly" regime in which the companies were publicly owned or price regulated to guarantee them a profitable rate of return. In the nineteenth century the price administration was often part of a firm's charter; later it came through bureaus and agencies. But it was nonetheless there. As a result, public utilities almost always made money and bankruptcies were rare. By contrast, groceries and lumber were sold in competitive markets, where prices were set by each firm acting in competition with other firms and business turnover was high, particularly in bad economic times. What accounts for these important differences in the legal structure of these industries? Is it because the utilities had more effective lobbyists or other interest group organizing than the grocers did? Almost certainly not. Over history small business and particularly

retailers have been quite successful at interest group politics. I don't believe the answer has much to do with interest groups at all. The dominant fact is that by the mid-nineteenth century economics had developed a very robust doctrine of natural monopoly, limited to public utilities and a few other markets, that recommended regulated monopoly in those cases but not others. The strength of that set of ideas served to consolidate political and legal opinion. To be sure, retailing in the United States has flirted with periods of regulation and protectionist legislation, but the views supporting these never claimed anything like the same level of consensus. The difference in the legal status of gas companies and grocers is much more robustly explained by a theory of political economy than by any story about interest group conflict.

We do our legal history students a disservice when we explain everything about legal regulation of the economy in interest group terms. In order to have a satisfactory answer one must also understand something about the technological, environmental, or engineering aspects of markets. For example, when long distance telephone communication required a physical line between speakers the United States phone was a monopoly controlled by AT&T. When wireless communication became commercially feasible, a competitive market structure emerged. Focusing on either the technological issues or the political issues to the exclusion of the other distorts the legal history of regulation, which expanded aggressively during the period 1900-1970, and the deregulation that occurred thereafter.

When theory is robust the relative weight of interest groups tends to be diminished. By contrast, when theory is chaotic, widely disputed, or has a poor fit with relevant facts, then interest groups play a much larger role. This explains, for example, why the role of interest groups has been much more significant in the development of an area such as intellectual property law (patents and copyright) than in other areas of economic regulation. Notwithstanding centuries of debate, there is little economic or technical consensus about fundamental questions such as the public value of the patent system or the optimal length or scope of a patent or copyright. Lacking decisive theory, Congress listens more closely to interest groups, and in this particular case the best organized interest groups are producers. The result is that small businesses and consumer groups have

traditionally paid (in both higher prices and reduced innovation) for overly protective intellectual property systems.

The treatment of social history, race relations, gender and other discrimination policy is more difficult, particularly in the twentieth century. Consensus was more elusive. I focus my own lectures on Darwin, the social sciences, and the nature-nurture controversy. The legal issues include social exclusion and residential and education segregation, interracial marriage, sterilization and eugenics. Darwin is particularly interesting, not only because of the way that it divided populations but also because so many legal ideas were attributed to it, including some that did not belong there. (For example, substantive due process was driven entirely by economics and had little to do with Social Darwinism). Darwinism itself produced strong right-leaning antigovernment views (Social Darwinism) and left-leaning views favoring a strong regulatory and welfare State (Reform Darwinism and Progressivism). For most of its history until 1930 or so both sides were vehemently racist, even though they had very different ideas about the role of government. Indeed, the State managed racism of the Progressives was undoubtedly more harmful to racial minorities than the more passive and private racism that preceded it.

Through all of this I try to instill in my students the idea that these people took their own scientific views just as seriously as we take ours today. They probably had about as much certainty that they were right, and no less reason for thinking so.

Interest group theory generally provides a more powerful explanation for legal change in twentieth century America than earlier. As intellectual consensus broke down interest groups acquired a relatively greater role. Nothing in the twentieth century dominated American policy thought as much as Protestant orthodoxy and classical political economy dominated the earlier period. Of course, this itself is an interest group driven phenomenon. The participation of women and racial minorities in the making of theology and political economy was small to nearly nonexistent. At the same time, however, the great Victorian ideas that shattered this world view, from Biblical criticism to Darwin to the marginalist revolution in economics were dominated by white males as well. Nevertheless, as

intellectual consensus became less prominent, a greater range of interest groups became relevant and eventually significant.

Teaching legal history in this fashion is more challenging to both the instructor and the students because it requires that ideas be taken more seriously. One cannot simply pass a hand over an entire area such as business policy and proclaim it to be the result of Social Darwinism, populism, labor and the surge in immigration, or some other interest group movement. I certainly do not expect my students to become experts in Calvinism, the social contract, classical political economy, genetic determinism, Freud, or the many other areas that wander into and out of my legal history course. But I do expect them to learn enough to take them seriously, and to understand that these intellectual ideas were as powerful to those who encountered them as the ideas that we hold today. Further the relative weight to be given to interest groups and political interests must be continuously re-examined.