3-13-2013

Rabban's Law's History

Herbert J. Hovenkamp
University of Pennsylvania Law School

David M. Rabban, Law's History: American Legal Thought and the Transatlantic Turn to History (New York and Cambridge: Cambridge Univ. Press 2013), 536 + xvi pp, index. ISBN: 978-0-521-76191-8.

This well written and expansive book is partly a history of legal histories. More than that, however, it is a history of how European, British, and American legal scholars used history, both when writing legal history and when they were writing substantively about legal policy. The focus is mainly but not exclusively American. Rabban begins with brief biographical overviews of several American legal scholars who wrote about legal history. Most of these were not primarily legal historians, but they did take distinctively historical approaches to legal policy. Then he describes the influence of historical scholarship in the nineteenth century generally, and next examines Continental legal historians, in particular Friedrich Karl von Savigny and Rudolph von Jhering from Germany. Next Rabban discusses English legal historian Sir Henry Maine, who together with Maitland dominated Anglo-American legal history for more than half a century. The final three-quarters of this book is concerned mainly with American scholars, including Henry Adams, Melville Bigelow, Holmes, Thayer, Pound, Constitutional law writers Thomas M Cooley and Christopher Tiedeman, plus others. The section on Pound also includes a lengthy discussion of the work of Frederic Maitland.

Rabban's principal thesis is that writing about Gilded Age and Progressive Era law has underestimated the role of history in both classical legal thought and the progressive thought that succeeded it. For the former, the law has too often been presented as formalistic, static and rule bound. For the latter it has often been presented as a-historical because it overvalues legislation and denigrates judges. Rabban identifies the Civil War as a turning point in American law writers' use of history. Increasingly American graduate students went to Europe or England to

study. Further, the Civil War threatened established American institutions in formidable ways. In addition, the mid-nineteenth century was a period of intense interest in evolutionary processes. Some of these were Darwinian but others were not and actually preceded Darwin. For example, Maine's *Ancient Law* (1861) is very much a book about evolutionary theory, even though Maine very likely had not read Darwin's *On the Origin of Species*, published two years earlier. This evolutionary theme is powerfully picked up in American writers such as Henry Adams and Holmes, and to a lesser extent James Coolidge Carter.

In the United States as in Great Britain, historicism showed up mainly in arguments favoring the common law, although Rabban argues that this statement underestimates the diversity of historical scholarship. The dominant view was that the common law was a product of long legal evolution, and that its development had natural, customary, social, economic, and even biological components that were often beyond the power of the sovereign to control By contrast, legislation was largely ahistorical. As a result, the greatest advocates of historical approaches in American legal scholarship tended to be conservatives who favored the common law and were suspicious of legislation. Among these were Francis Wharton, Cooley, Tiedeman, James Coolidge Carter, and Holmes.

Rabban's final section describes a transition that occurred in the early twentieth century from historical to "sociological" perspectives on law. His main point is that later historians writing about sociological law, particularly about Roscoe Pound, have underestimated the continuing influence of history in their work. Second, the sociological jurisprudence writers misrepresented the classical legal record that went before, characterizing it as formal and static, and denigrating its powerful historical components. In order to bring social science into law, reformers had to sever legal thought from history.

As Rabban illustrates so compellingly, the late nineteenth century was a golden age for what might be called "history in law" -- that is, legal writing that included not only explicit legal history, but also policy writing based on historicist defenses or critiques of the legal enterprise. This period came to and end when scholars began to think of legal analysis more as a product of social science and democratic preference, in which history played a greatly attenuated role.

Herbert Hovenkamp

Iowa City, IA