The purpose of this essay is to describe and analyse the historiography of law and the economy in Europe in the late nineteenth and earlier twentieth centuries. Three major themes or approaches can be identified within this intellectual history. The first is a sociological interest in the nature and evolution of modernity in society. Here the contested concept of ‘modernity’ is used to mean the emergence of a society and culture where personal identities and social practices and norms are no longer determined primarily by communal tradition but are to some degree chosen. The second approach is political, and centres on the emergence of the state as a chief framework for national and communal life, replacing local, religious, and kinship institutions. The third approach is economistic, and searches for the legal, governmental, and institutional factors that revolutionized the productive capacity of the economy and led to European domination of the world by 1900.

These three approaches—the economic, the sociological, and the political—were hardly distinct. Disciplinary lines were not sharply drawn and scholars could be lawyers, anthropologists, political scientists, sociologists, and historians at the same time, with Sir Henry Maine (1822–1888) setting a polymathic example. Historiography and social sciences in all modes were deeply shaped by evolutionary theory, and there was a common ground of enquiry, being the history of European feudalism, corporatism, and state formation. Differences between the German, English, French, and Russian thinkers were significant, as each national society grappled with distinct experiences of modernity. But balancing the emergent national schools there was an easy internationalism and shared purpose amongst scholars.1

Today there are two narrowing tendencies at work in legal and economic historiography. One is the separation of national schools; and the other is the rise to domination of the economistic approach.\(^2\) The next two parts of this essay will examine the intellectual lineage of today’s dominant economistic model, and will criticize its usefulness for structuring enquiry into legal and economic history. The balance of the paper will investigate alternative historical models of legal and economic change, and the emergence of the national schools.

II

Lawyers and economists today are typically concerned with the evolution of rule certainty in social and political organization. In the lawyer’s view, certainty of rights and obligations allows individuals to plan their actions with legal security under the rule of law. For the economist, stable yet adaptive legal rules are a necessary institutional support for rational calculation in market or other economic activity. Rule certainty promotes the calculability of legal and economic risk which is taken to be a precondition for economic growth, comprising the division and specialization of labour, intensification of trade, capital accumulation and investment, and the application of technology to production. None of these economic processes, the rule certainty model posits, can occur without sophisticated law; moreover the causation works the other way, with economic development demanding and driving the elaboration of the legal system.\(^3\)

The rule certainty model implies a commitment to the public–private divide, whereby the state provides effective ground rules for individuals to exercise their wills or pursue their purposes. The normative dimension of the model is thus to maximize individual freedom and enhance utility returns to individual activity. Two leading theorists in the cultivation of the rule certainty model are Max Weber (1864–1920) and Ronald Coase (born 1910). Weber’s theoretical work dates from 1900, and much was left incomplete to be published after his death.\(^4\) Coase’s chief innovations were


done between the 1930s and 1960s. Both Weber and Coase argued that legal rules and institutions in mature economies first define entitlements, and then provide effective, impersonal procedures allowing trade and protection of those entitlements. Weber, the German sociologist of economics, religion, and law, and Coase, the Anglo-American micro-economist of transactions and institutions, thus offer a similar theory of the legal conditions for economic progress.

For all their resemblance, Weber's and Coase's theories of legal certainty each drew upon divergent models of law and society. Weber was a product of the German traditions of historical legal science and Kantian idealism, whilst Coase worked within the English utilitarian stream of political economy. The two theorists also pursued radically different intellectual styles. Weber as a general sociologist and economic historian offers grand theory of an ambition comparable to Marx; whilst Coase worked within the constrained utilitarian framework of analytical economics.

Weber's celebrated theory of authority underpins his sociology of law. Weber's schema distinguishes between traditional, charismatic, and rational power; power can be coercive domination or legitimate authority; traditional power can be patriarchal, patrimonial, or feudal; charisma tends to be short-lived and revolutionary, and tied to unique personalities; rational authority is legal or bureaucratic, and tends to be stable, perhaps too stable. These are not successive evolutionary stages in the manner of Marx or Maine, but rather ideal types that intersect and mix in real life. Weber's typologies of authority and governance drew from the trans-historical experience of European and non-European societies, but in intent they were not to be read as descriptions of discrete stages of history of any specific society. The ideal type was a sociological construct to improve conceptual clarity and suggest lines for research; it was not to be seen as an empirical average or even as an empirical observation, though it might draw on historical material in its formulation.

In studying the emergence of legalism in European cultures, Weber further distinguished between formal-rational, formal-irrational,


substantive-rational, and substantive-irrational law. Kronman has demonstrated that this series of four ideal types is better presented in terms of three dichotomies: those legal systems which have general rules rather than specific responses to facts; those systems that apply logical meaning and abstract norms to decisions rather than pragmatic or result-oriented tests; and those systems that separate law and morals as opposed to those that see law as a moralistic. These antinomies can be seen as Weber’s reworking of the ethos of the German school of classical Roman law (Pandectism) as exemplified in the work of Friedrich Puchta (1798–1846) and Bernhard Windscheid (1829–1907), for it was the dual German tradition of historical legal science and conceptual jurisprudence that provided the intellectual seedbed of Weber’s own legal theorizing. Weber’s legal theory can without exaggeration be described as a sociological paraphrase of German Pandectist literature.

Yet Weber went a good deal further in his theory-building, else he would not have had such strong influence on later scholarship. Weber also stressed the tendency of formal legal rationality and impersonal bureaucratic justice to develop into an ideology and serve to accrue dominating power to its own functionaries. Formal law will tend to favour the powerful and energetic classes of society who can exploit the formal equality of the law as they wield their substantive social power through property and contract. Weber further suggests that legal rational governance tends to entrap all participants in modern capitalistic society within narrowing and heartlessly functional roles. This critical and pessimistic side of Weber, drawing from Marx and Nietzsche, has had a profound impact on contemporary legal scholarship: ‘How does formal law favour the powerful and reinforce legitimation of their power?’ and ‘How does individualism inflict alienation?’ have become leitmotifs of legal realism and critical legal scholarship.


10 The most familiar of Weber’s phrases is his arresting metaphor of the ‘care for external goods’ becoming for modern man an ‘iron cage’ ('stahlhartes'): The Protestant Ethic and the Spirit of Capitalism (T. Parson (trans.), London, 1930, repr. 1985; 1st edn., 1904–5), at 181–2. This obscure phrase is perhaps overly quoted and paraphrased; more telling is the Goethe quotation set immediately afterwards (ibid., 182): ‘Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.’  

tration of justice?, and ‘How is coercion justified?’ are now staple problems of legal sociology and anthropology.

Coase's transaction-cost analysis operates within the narrower theoretical territory of economics, which seeks to model the utility-seeking behaviour of rational individual actors facing constraints in their actions and interactions. Coase urges that economic analysis take account of the pitfalls inherent in bargaining that inhibit efficient allocations of goods through market trades. Coase points to the invisible obstacle of unclear entitlements hampering market actors in their attempts to aggregate, coordinate, and execute their interests through self-interested transactions; the costs of bargaining, mechanical and strategic are just too pervasive. The proper role of the State is to define property rights clearly and if necessary to allocate them to those parties who can then trade them most effectively, or else to avoid interference where trade is possible. These insights, which adumbrate game theory and the strategic bargaining models of modern micro-economics, were applied by Coase variously to nuisance law, to regulation of public goods such as lighthouses and broadcasting airwaves, and also to corporate structure and industrial organization. His ideas have greatly extended the reach of micro-economics, fomenting the law and economics movement and also launching the new institutionalist economics, which can count many prominent economic historians within its circle.

Coase eventually criticized the use of micro-economic tools to analyse relationships and institutions outside formal markets, as practised by

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Chicago theorists such as Gary Becker and Richard Posner. Coase did not think that micro-economics could be built up into a new sociology presuming to analyze anything or everything from family structure to crime. As early as 1975 he wrote:

[It] by no means follows that an approach developed to explain behaviour in the economic system will be equally successful in the other social sciences. In these different fields, the purposes which men seek to achieve will not be the same and, in particular, the institutional framework (how, for example, the political and legal systems actually operate) will require specialized knowledge...[of] the important specific interrelationships of that system.16

Arguments against ‘economic imperialism’ as practised by Becker, Posner, and their followers can be normative, for example claiming that it is morally or aesthetically bad to view the entire social world through the lens of utility maximization. Or criticism can be positive, challenging the descriptive truth or accuracy or coherence or predictive power of the economic model of self-interested individuals maximizing utility through trades of entitlements.17 It may further be argued that social science can develop richer models than price theory which give a better account of the causal relationships within non-market institutions such as law and the family.18 But these criticisms, which Coase himself partly shares, have only been heeded at the margins. The basic Coasean model of implicit trading of entitlements in the shadow of transaction costs has now escaped from its creator’s control, and has generated large and active schools of scholarship in economics, economic history, sociology and political science, to say nothing of its pervasive influence in the American legal academy.

The dissemination and impact of both Weberian and Coasean ideas within modern law, economics, history, and other social sciences suggests that those ideas met a deep-seated need for useful models of social and economic ordering in Western societies. Weber and Coase’s theories each offered a programmatic methodology for research and created analytical languages which seemed to invest empirical materials with enormous significance.


There are dangers as well as strengths in harnessing Weberian and Coasean theory to guide enquiry into legal and economic history. First, Weberian legal sociology and Coasean law and economics are each relatively indifferent to the internal discourse of lawyers. Coase himself gave considerable attention to the details of law, but he handles legal materials rather in the economists’ manner, as stylized fact rather than historical evidence, and this can lead to vitiating errors. The same applies to Coase’s followers; for one leading example, the economic historian Douglass North (born 1920) makes many claims about law in his theories of the rise of the western economies but his research tends to rely on simplistic and outdated legal histories to provide empirical material for model-building. Only very recently have legal scholars in the Coasean tradition begun to study law carefully from the internal point of view.

By contrast, Weber’s engagement with legal discourse was more intensive. He wrote his doctorate in legal history concerning the forms and liabilities of south European medieval trading associations; his Habilitation was a study of Roman agrarian development and its impact on Roman public and private law; and his first work as a professor was an analysis of land tenures and labour in Prussia. His career as a major legal and economic historian may possibly have been diverted by the breakdown he endured in his thirties; but Weber maintained his abiding interest in Roman law, medieval commercial law and English common law in his later work. His sociology of law emphasizes the virtues of the formal rationality of Roman law, but acknowledges that merchants could reach


22 Interestingly Weber was supported by Brunner early in his career as having proved himself on both sides of the Romanist/Germanist divide in legal scholarship: ‘In his excellent work on Roman agrarian history, he has shown his talents as a Romanist and legal historian; his book on the conditions of rural workers in East Elbian Germany legitimizes his claim to be considered a capable Germanist as well’: letter to Althoff, 18 February 1893, quoted in M. John, Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code (Oxford, 1989), 121.
far better practical results with their local or customary law. For Weber ‘it was not . . . the greater appropriateness of the content of Roman law to the needs of emerging capitalism . . . all the specific legal institutions of modern capitalism are in fact alien to Roman Law and are of medieval origin’. He observed that the rational legal science of Pandectism drew its commercial sources from Germanic mercantile law and canon law as well as Roman law; examples were annuity bonds, bearer securities, bills of exchange, modern companies and shares, capital mortgages, trusts, and agency. Hence it was not the ideas of Roman law per se that were essential ingredients of modern capitalism, but rather the emergence of legal professionalism and the methodology of modern law. Weber’s theory of rational law was challenged by the ‘problem’ of England. He observed that English justice was formal in the royal courts but typically formless and discretionary in local courts, where the poor were governed by their rulers and denied full access to impersonal royal justice. Weber struggled with the irrationality of English legal learning and process but decided that despite the archaic qualities of English legal thought, the court procedures provided sufficient commercial certainty and in any case were attuned to the interests of the propertied and commercial classes. Even English equity could be regarded as formal justice:

‘aequum et bonum’ in Roman Law and the original sense of ‘equity’ in English law . . . both are products in part of a system of justice which is already highly rationalised and in part of the abstract concepts of Natural Law: the phrase ‘ex fida bona’ contains in any case an allusion to good commercial ‘morality’ and so has as little to do with genuinely irrational justice as does our own ‘free judicial opinion’.

Weber further argued that the requirement of the state to organize a standing military force explained much of the modern drive to bureaucratization and increased technical capacities of the state apparatus, processes which required a more elaborate and rationalized legal system which in the Continent took the form of Romanized law. England was peculiar in not needing a large standing army, instead developing a small but effective state apparatus capable of running its large overseas empire.

23 Weber, Economy and Society, n. 4 above, II, 1464–5 (Weber’s note), and see 694–752, 792–808.
Weber was a sensitive enough legal historian to concede when the evidence did not fit his ideal types or models. This ill-fit between model and material cut against Weber’s own methodological commitment to Verstehendesoziologie, or understanding social action in terms of the self-understanding of individual motivation and experience.26 Weber himself constantly referred to historical material to qualify his ideal types of legal governance; thus he acknowledged that so-called irrational ‘Kadi-justice ... as an actual historical phenomenon ... were bound up with sacred traditions and their often extremely formalistic interpretation’, with ‘rule-free evaluations of the individual case ... only where these sources of knowledge had failed’. He also noted the irrationality of jury decision-making, a factor challenging the formal rationality of Western law.27 It was only possible to rescue the theoretical project, namely the description of legal rationality as a component of economic modernity, from empirical ruin by creating supplementary models, lemmas to the general theory that protected the core axioms from negation.28 What is striking is how Weber’s legal sociology of ideal types and social actions could not capture the crucial historical issue of timing or sequential causation, or as social scientists now put it, of path dependence.29 Hence it was that the Reception of the learned laws shaped the fledging French and German secular national laws in the late middle ages, but could only partially infiltrate the English common law, already well-established by the late twelfth century.30 Weber’s sociological sampling and modelling of the data of legal history thus yielded an incomplete analysis and even posed the wrong questions so far as legal historians are concerned.31


28 Compare Thomas Kuhn’s celebrated ‘paradigm’ model of knowledge accretion, whereby ‘normal science’ absorbs evidential contradictions with supplementary theory until the scientific community no longer believes in the sense or utility of the paradigm—though Kuhn himself doubted the possibilities of paradigm modelling of normative social sciences and humanities: T. S. Kuhn, The Structure of Scientific Revolutions (3rd edn., Chicago, 1996); T. S. Kuhn, The Road Since Structure: Philosophical Essays, 1970–1993 (Chicago, 2000).


30 Heinrich Brunner argued that English (and to some degree French) law had escaped a full reception because twelfth-century jurists, notably Bracton, had admitted a degree of Institutionalism into the common law that served as a ‘prophylactic inoculation’: Grundzüge der deutschen Rechtsgeschichte (7th edn, Leipzig, 1919), 264, cited in P. G. Stein, Roman Law in European History (Cambridge, 1999), 118.

My second observation is that, looking at influence in the reverse direction, the theoretical ideas of Weber and Coase have only marginally informed or influenced mainstream legal history, especially in Britain. Legal historians are not obviously interested in seeking explanatory models drawn from social-scientific theory from outside the law. Their models tend to be informal, tacit, inductive, generated from positive legalistic materials, and striving above all to reconstruct the intellectual processes of past legal communities. Thus Brian Simpson described his doctrinal history of medieval and early modern contract law as ‘a special branch of the history of ideas, of their reception, evolution and interaction’ and added: ‘I have avoided explicit discussion of general theories of legal history, especially of the type favoured by legal sociologists; the omission is deliberate. Such theories are of scant value unless based on regular historical investigation and attention to evidence’.32 One of the reasons why Frederic William Maitland (1850–1906) is regarded, a century later, as the greatest of all English legal historians—as well as a leading intellectual historian and medievalist—is because of his skills of historical reconstruction through imaginative entry into the evidence.33 This informal hermeneutical approach, whether pursued self-consciously or not, may be an expression of English empiricism and scepticism, values which have been aggressively defended by scholars as different as Edward Thompson34 and Geoffrey Elton35—both general historians with a strong interest in the details of law. When historians of law seek explicit theory, Marxism and anti-Marxism have been far more potent spurs to scholarship than Weberian sociology or Coasean economics, especially in studies of property, crime, and criminal justice.36

A third reason why Weber and Coase are problematic sources of theory for legal history is that their models of law are static, in the sense that the

significant features of human behaviour that they isolate are ideal types that are not necessarily influenced by change over time. For example, Weber’s legal-rational calculation within a system of legitimation of rational authority can be observed to coexist and overlap in historical time with traditional and charismatic authority, but there is no explanatory mechanism to explain how different forms causally relate over time. This ahistorical quality was chosen by design in Weber’s methodology: if the abstract concepts of sociology were lacking in content as compared to the ‘concrete realities of history’, there were hoped-for gains in interpretation and meaning.37 The Coasean transaction cost model may give point to historical analysis of how particular institutions come into being that align or disalign individual and collective economic interests, but again there is no dimension of change over time in the model itself. Indeed the transaction costs theory as formulated by Coase’s followers (but not by Coase himself) may reduce to empty tautology, as any state of the world can be described as ‘optimal’ in light of given ‘transaction costs’. In other words the explanations are predicated upon some exogenous set of relationships or processes that typically are left out of the explanation. All of this is to say that the gains for historians in applying social science theory to legal and economic change are dependent on the quality of the model, and this is what is in issue.

To criticize specific theories need not imply that we can do better with no theories at all.39 One possible path is to revisit the powerful historical traditions integrating law, economics, and sociology, that flowered at the end of the nineteenth century and the early to mid-twentieth century. The prime concern of this broad movement was to study how social, economic, and legal organization has moved through causally-related stages. The formulations of the evolutionary process have been various, though all show a family resemblance; one source is the materialist stages theory forwarded by Scottish Enlightenment thinkers such as Lord Kames and Adam Smith.40 The most celebrated developmental models have come from the great figures of historical sociology: thus we have the move from status to contract (Maine),41 from feudalism to capitalism (Marx,
Engels); from community to society (Tönnies), from mechanical to organic solidarity (Durkheim), from gift relationships to bargain and contract (Mauss). We will see how it is possible to marry these broad models of social and economic structure and change in European society to leading themes of legal history concerning the development and inter-relationships of Roman law, Germanic law, and Anglo-Norman common law, and the path of state formation and economic development within the different national systems.

Evolutionary models of historical change may themselves be criticized as a highly abstracted description of modern European or Western societies. Explaining the special development and dominance of the West (including the special nature of Western law) had been a preoccupation of social thinkers from the Enlightenment onwards; and there was a tendency to describe certain products or features of European social organization (such as rule of law, property rights, limited governments and so on) as the key factors in human history. If historical progress, as led by the productive and legalistic West, was a common assumption at the end of the nineteenth century, then so was an interest in comparative social science, whereby the progress of different societies along the path of modernity could be measured against the progress of the West. This is a Whiggish theory of history blown to huge, even global scale.

If the superiority of Western law and organization and the telos of progress are leitmotifs of our period, this does not mean that there was a single orthodox model. Academic specialization leading to distinctions between law, anthropology, history, sociology, and economics may have been less strong at this time, but this is not to say that students of European institutions all practised a unified social science and shared the same preoccupations. We can discern sharp differences in the conceptualization of law by scholars in different national communities, with varying cultural and political preoccupations. To advance the argument that legal and

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social sciences were shaped by their historical and national context, it is appropriate to investigate the praxis of legal and economic history and sociology in terms of national schools dating from the middle to the end of the nineteenth century, and thus to contextualize such scholarship within the intellectual and political life of each nation. Two broad questions may be asked. First, how did jurists and other social theorists in different national communities—Germans, English, French, and Russians—conceive the evolution to modernity, as seen through the prism of the law? And secondly, did European scholars perceive England to be a special case as the pioneer modernizer? Attention will be directed largely to intellectuals outside the pantheon of Marx, Maine, Tönnies, and Durkheim, whose theories of legal evolution have been well-explored in recent years. German scholarship, and its English variant reaching its peak in the work of Maitland, merits special attention as the most developed legal and social science of its time and as the backdrop to Weber’s work.

IV

James Whitman argued in 1990 that German lawyers had passed through two broad stages in their thinking about the relations of law (that is, mainly private law) and society. In the first stage, in the late eighteenth century and the first half of the nineteenth century, lawyers, such as Friedrich von Savigny (1779–1861), Anton Friedrich Thibaut (1772–1840), and Puchta imagined a unified and modernized Germany resting on a blend of classical Roman law and the *usus modernus* as it had developed in Germany. Roman classical private law, built upon the free interactions of equal, independent property-owners and untouched by the feudalistic and ecclesiastical accretions of the Middle Ages, especially appealed to the German lawyers for its republican virtue, as well as its qualities of juristic elegance and orderly classification. The jurists’ classical legal project, argues Whitman, was joined to the Kantian idealism and romantic nationalism of the German intelligentsia, who were intent on redefining their nation and culture in the wake of the Napoleonic wars. Their problem was two-fold: to reconcile a modern capitalist economy and society with the ideal of the organic community; and to reconcile liberty with a unified state replacing the mosaic of principalities and kingdoms that still governed Germany.

According to Whitman, all of these romantic dreams were punctured by the political turmoil of the 1840s, the failure of liberalism in 1848, and the rise of authoritarian central power under Prussia. In the wake of Bismarck’s top-down revolution, legal liberalism transformed itself into a

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doctrines of private security and efficiency, of protection of individual interests through the power of the State. Rudolph von Jhering (1818–1892) is portrayed by Whitman as the intellectual leader of this movement; Jhering turns from the idealism and conceptualism in his work of the 1850s to a sceptical realism in the 1860s and on to a forthright utilitarianism in the 1870s and 1880s.48 Jhering’s utilitarian liberalism strongly influences the jurists and bureaucrats who formulate the Bürgerlichesgesetzbuch (BGB). This great civil code emerges as the constitution for an atomistic market, marked by a privileging of the free will in key areas such as property, inheritance, and contract; and a corresponding lack of engagement with the law of associations which increasingly dominate the economy in an age of industrial labour and capital.

Whitman’s ambitious thesis, which links the details of private law doctrine with vast debates on nation-building and social organization in Germany, may give an exaggerated picture of the explicit political and sociological content of lawyers’ debates.49 The political impulse to codification began with a desire to gather up a mass of existing laws in a fissured legal system and weld them into a coherent and unified institutional and procedural scheme, not necessarily to reform the content of the laws in the manner of Enlightenment legislators.50 The German Romanists’ objectives went a further step and involved deep rationalization of the norms of the law as well as its actions and procedures, through the relentless application of the Pandectist method. Yet their labours over the content of laws were structured more often than not by purely legal concerns rather than social concerns or political economy.51 For one example, the early nineteenth-century Pandectists were committed to ending feudal subordination through the conversion of peasant-holdings to free ownership on the pattern of Roman dominium, with lords’ rights converted to iure in

51 Wieacker, History of Private Law, n. 49 above, 341–86.
re aliena, or real claims attached to the peasant’s ownership; this was a key part of the jurists’ programme to establish a legal order recognizing freely-willing citizens of equal civil status under a unitary state. The elimination of feudalism was thus not designed as a social reform measure, but as a reform of status and jurisdictions. The lawyers engaged at some level with idealist philosophy, romantic political doctrine, and occasionally with utilitarian ethics, but these systems of thought did not drive their professional lives. The most important test case is the great controversy initiated by Savigny and Thibaut from 1814 over the value of codification. This debate was commonly taken to concern grand themes of statecraft. Savigny, with Goethe the most admired German intellectual of his age, asserted that law was the organic emanation of the German community or nation, but this romantic message was confused by his conflicting assertions that professional jurists were the true interpreters of that Volksgeist, and that the state as representative of the Volk was incapable of valuable legal reform through exercise of legislative will. Nonetheless Savigny’s romantic positions caught on like wildfire, driven by patriotic rejection of French codified law for the German states.\(^5^2\) In practice, however, the debate came to turn on whether juristic scholarship, newly renovated by Savigny through his reform of university law schools, should continue its slow process of building legal science, or whether lawyers should strive in the here-and-now to meet the national need for a reformed and coherent legal system. Ultimately, it was Savigny’s Pandectist heirs, including Puchta, Windscheid, and Planck,\(^5^3\) who developed the techniques to carry out the codification programme, harnessing historical legal science to pragmatic lawmaking. Savigny came to be invoked as an authority for the very reform that he deplored.\(^5^4\)

The ideology of late nineteenth-century German legalism excluded any notion of policy content in the law. Jhering’s interest jurisprudence of the 1870s was a heretical departure from the jurists’ conceptualism and arguably had little practical impact. Windscheid argued that the positive jurisprudence of the jurists was superior to direct legislative solutions because it was founded on a scientific knowledge of existing law and was not diverted by ethical, political, or economic considerations. He turned to Roman law above all because of the high technique of the classical jurists; thus Planck wrote of Windscheid’s foundational work on codification: ‘[I]t did not occur to him to wish to derive the contents of legal clauses

\(^5^2\) A brilliant assessment of Savigny’s incoherent positions and the social reasons for his commanding influence is given in H. U. Kantorowicz, ‘Savigny and the Historical School’ (1936) 53 Law Quarterly Review 326, especially at 332–41.

\(^5^3\) Gottlieb Planck (1824–1910), a practitioner and professor leading the first and second codification commissions across two decades, and who is described as the ‘true intellectual father of the BGB’ by Wieacker, History of Private Law, n. 49 above, 372.

exclusively or, even predominantly, from Roman law’. Yet Windscheid’s jurisprudence was also married to a highly Kantian conception of the legal privileges of the free willing individual, as he himself wrote:

The law creates for every will an area within which it is dominant and from which alien wills recoil. Law is, in the first place, not a restriction but a recognition of human freedom. The restrictive element is merely the other side of the freedom thus guaranteed.

One can summarize the ideology of the German Romanists in terms of four commitments: to historical and conceptual jurisprudence; to the abstract Kantian ideal of individual freedom and self-realization; to the building of a unified German state as a guarantor of freedom and legal rights; and finally a rejection of the utilitarianism that was a hallmark of English liberalism, and indeed an exclusion of any explicit political economy. Thus Ennerccerus in his study of Savigny of 1879 did not follow Savigny’s legal philosophy but gave priority to a positivist conception of law:

Constitutional change has ensured the influence of the people’s convictions about the law: but above all it is the new German Empire and its powerful central authority that is the guarantee of a code, which is truly common to the whole of Germany.

This belief in a national law cultivated by jurists and promulgated by a strong state was not just a professional ideology. Positivist legalism, in both its historical and conceptual guises, was one of the central components of a wider political liberalism throughout the nineteenth century. The liberals of the 1840s did not agree in their national, social, or economic views, but were united by the political and legal goals of eliminating feudal privileges and princely prerogative, though they did not go so far as to embrace republicanism. They wanted a Rechtsstaat incorporating separation of powers, and some degree of responsible parliamentary government, a liberal constitutional monarchy rather than a participatory democracy. The historian Blackbourn has detected in German liberalism

57 L. E. Ennerccerus, Savigny (Marburg, 1879), at 45, quoted in John, Politics and the Law, n. 22 above, 50.

The combination of Romanism and Kantianism of the jurists and their adoption of a strong liberal constitutional ideology formed a new common sense that attracted criticism from both left and right. Leftists had good reason to be disappointed. The jurists’ assault on the institutions of feudalism using the weapons of jurisprudence was inconclusive, and it was legislation after 1848 that produced significant reforms to landholding. Social democrats chafed at the technocracy, bureaucracy, and authoritarianism of the emergent national state. The social democrats went along with the codification project, but when the code was finalized the drafters omitted employment law and the law of associations, surrendering these key areas to the states. This opt-out had stark political results: the general theory of free contracting enshrined in the \textit{BGB} melded with the states’ restrictions on collective industrial action to throw the weight of national and state law against the worker, the union, and the political association. By default a seemingly depoliticized private law, which consciously sought to exclude the policy dimensions of public law, was seen to take a strong ideological position against recognition of the legality of collective sectoral interests and against positive state regulation of the economy. Critics accused the codifiers of myopia—that their fixation on the creation of optimal ground rules for the free play of individual wills was unhappily divorced from social and economic reality.

Perhaps more significant was the opposition to the liberal code from the conservative right, and here lay an intellectual shift somewhat at odds with the values of the nineteenth-century jurists. As the nineteenth century progressed the German middle-class, including especially the professoriate,
became steadily more nationalistic and statist. Historiography, economics, political science, and sociology in Bismarckian and Wilhelmine Germany became imbued with patriotism and the desire for a strong state to heal the political and economic turmoils buffeting Germany from the 1870s, as population growth, industrialization, and class conflict accelerated. One effect of this mood was increasing hostility to liberal political culture, whether the utilitarianism associated with England or the German idealist tradition; and this illiberalism infiltrated attitudes to economics and law.62 In this period there emerged the ‘Kathedersozialisten’, the ‘socialists of the chair’, led by Gustav von Schmöller (1838–1917) and Werner Sombart (1863–1941).63 It is worth examining the values of the Ketthedersozialisten in order to understand the turbulent intellectual climate within which the BGB was developed.

V

Schmöller dominated academic economics and economic history in Imperial Germany, and was reputed to decide the bulk of academic appointments within the state-controlled professoriate.64 He routinely excluded thinkers whose methods or politics were too liberal or socialist for his taste, such as ‘Marxists and members of the Manchester School’.65 In his dense works of institutional description, he studied the roots of contemporary problems in German society and state: his topics included class struggle, mercantilism, and guild and town jurisdictions. His overall themes were that the political institutions of a community were the prime determinants of its economic life; and that social science should be problem-based, and should aim to investigate and solve social problems through policy advice to rulers. According to his precept and example, professors were bureaucratic counsellors owing loyalty to the state that employed them.

Schmöller accepted the validity of evolutionary stage theories inherited from eighteenth-century social science; his variant models included shifts in the mode of production from pastoralism to agriculture to industry and trade; or systems of exchange moving from barter to monetized trade to credit; or demographic or technological stages of development. But all these stages were simply facets of the ‘dependence of the main economic

62 Blackbourn, History of Germany 1780–1918, n. 60 above, 265–347.
63 W. J. Ashley, ‘Socialists of the Chair’ (1896), in J. Eatwell, M. Milgate, and P. Newman (eds.), The New Palgrave: A Dictionary of Economics, 4 Vols. (NPDE) (London, 1987), IV, 412. Also important in this tradition was Adolph Wagner, whose economics of money and finance was more deductive and less historical than that of his peers: H. Reich, ‘Adolph Wagner’, NPDE, IV, 846.
institutions of any period upon the nature of the political…bodies most important at the time’. Schmöller had no belief in the methodological individualism or utilitarianism of English economics:

The idea that economic life has ever been a process mainly dependent on individual action,—an idea based on the impression that it is concerned merely with methods of satisfying individual needs,—is mistaken with regard to all stages of human civilisation.

In a rancorous controversy with Carl Menger (1840–1921), the Austrian marginal utility theorist, beginning in 1883–84, Schmöller completely denied the validity of deductive economics, and he was to preach that the purpose of German political economy was ‘to rid the science of English and French liberal-utilitarianism’. Schmöller also opposed the Kantian idealism of the German humanities, and was more sympathetic to Darwinian, Hegelian, and Marxist approaches to the social sciences. The policy element of Schmöller’s analysis was unstinted praise of central state intervention in the economy by a strong national ruler and skilled bureaucracy standing above sectional interests; and along with this stance went a rejection of deductive systems of economic analysis whether liberal or Marxist, in favour of problem-based, inductive, policy-oriented enquiry. Much of his work investigates


67 Mercantile System, n. 66 above, 3–4. By age 22 Schmöller had clearly formulated his methodological stance: ‘If man were compelled only by necessity, we could rightfully call our science [of economics] a mathematical one, and we should only need to seek for the natural laws involved; then we should have an eternally valid theory. But since this is not so, we must place economics among the social sciences, which cannot be separated from space, time and nationality, and whose foundations we must seek, not alone, but primarily in history’: (1860) 16 Zeitschrift fur die gesamte Staatswissenschaft 461, quoted in P. R. Anderson, ‘Gustav von Schmöller’, in S. W. Halperin (ed.), Essays in Modern European Historiography (Chicago, 1970), 289, 293.


69 T. Veblen, ‘Gustav Schmöller’s Economics’, (1902) 16 Quarterly Journal of Economics, 39; cf. N. Balabkins, Not by Theory alone… The Economics of Gustav von Schmöller and Its Legacy to America (Berlin, 1988), which advances the exaggerated claim that Schmöller’s research and teaching laid a foundation for both American institutionalist economics and English institutionalist economic history. It is tolerably clear that Schmöller’s influence helped to prevent the emergence of analytical economics in Germany until the time of the Weimar republic: Scheffold, ‘Gustav von Schmöller’, n. 64 above, 257. At the same time the German Historical School of economics struck a deep chord in Japan: Y. Shionoya (ed.), The German Historical School: The historical and ethical approach to economics (London, 2001).

the web of laws and political controls that promoted and regulated markets and production in local economies. In his view, territorial organization of economies eventually had to give way to unified state organization that repressed and integrated partial local interests. His studies encompassed everything from early village organization, to medieval municipalities, corporations, guilds, and provinces, through to the crown and estates of the German principalities and empire. At all times, the important channel or catalyst of social and economic evolution was through developing stages of government. Schmöller summed up his theory of state integration of economic life in his analysis of mercantilism:

What was at stake was the creation of real political economies as unified organisms, the centre of which should be, not merely a state policy reaching out in all directions, but rather the loving heart-beat of a unified sentiment.

Only he who thus conceives of mercantilism will understand it; in its innermost kernel it is nothing but...state making and national-economy making at the same time ..., which creates out of the political community an economic community, and so gives it a heightened meaning. The essence of the system lies not in some doctrine of money, or of the balance of trade; not in tariff barriers, protective duties, or navigation laws; but in something far greater:-namely, in the total transformation of society and its organisation, as well as of the state and its institutions, in the replacing of a local and territorial economic policy by that of the national state.

The resonance of Schmöller’s theory of economic evolution through state formation with the romantic nationalist impulses behind legal unification is not hard to identify. His work also fed those impulses; his 1883 essay on mercantilism helped lay the intellectual foundations for the Bismarckian tariff policy and the later forward naval policy. Certainly the essay on mercantilism ends with a fulmination against the ‘egoism’ and ‘violence’ of English naval and mercantile policy that had denied to Germany its rightful overseas trade and colonies. Schmöller urged the state in its domestic policy to ameliorate poverty, regulate industry, and thus forestall the lure of class war and social democracy with national welfare schemes; and these writings also swayed Bismarck’s administra-
Interestingly on the eve of the Great War, Weber attacked Schmöller’s policy-oriented approach to social enquiry as tendentious and lacking curiosity in causality and interpretation, and called for German social science to be more detached and less nationalistic.

In the next generation the most important economic thinker, apart from Weber himself, was Werner Sombart. He trained as a lawyer as well as an economist, and wrote historical sociology investigating the birth of capitalism from medieval roots and its modern industrial and urban development. Sombart highlighted entrepreneurship as the key sociological element in modern economies, being a state of mind involving quantified rationality, forward thinking well capable of delayed or deferred gratification, love of risk, and a powerful desire for unlimited riches beyond the needs of present consumption. His methodological goal was to introject intentionality into the Marxian sociology of economics—not far distant from Weber’s theoretical project. In Sombart’s account the classical Smithian model of division of labour and impersonal price competition did not give a sufficient explanation for the rise of capitalism. Like Weber, Sombart gave primacy to cultural and psychological rather than technological or organizational factors in analysing the rise of capitalism. The machine-driven industrial revolution in England, or technological innovation generally, was not the core issue, as technology was only a by-product of culture. Sombart made a special study of the economic prowess of Europe’s and Germany’s Jews, whom he located as the ‘catalytic’ force in capitalist growth in Europe through their provision of commercial services. Again, Sombart’s work on entrepreneurial spirit parallels Weber’s investigation of both pariah religions and the Protestant ethic as strands in the development of the capitalist mind. Sombart also analysed the cultural and intellectual roots of socialism, the economic effects of

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79 F. H. Knight, On the History and Method of Economics (Chicago, 1928), 89–103.


war,\textsuperscript{82} and of luxury consumption as stimulants of demand,\textsuperscript{83} themes of still greater resonance in the later twentieth century.

Sombart was a brilliant stylist filling his work with barbed aperçus and terse paradox, but it was also rife with intellectual incoherencies and contradictions.\textsuperscript{84} Thus his historical study of capitalist rationality sits side by side with a radical dislike of capitalist culture as resting on usury, bargaining, monopolistic property, and commodified labour relations. His early socialist and Marxist adulation of the proletariat and his admiration for the Jewish commercial genius gives way to derision of urban and industrial culture and rank anti-working class and anti-semitic prejudice. His famous pamphlet ‘Why is There No Socialism in the United States?’ (1906) answered the posed question in terms of the utilitarian and individualistic mentality of the American worker, in an impersonal urban culture denuded of fellow-feeling. Sombart went on to write diatribes against the English in 1915 as almost the whole German intelligentsia was swept into a strident patriotism during the Great War.\textsuperscript{85} Sombart derided the English as a self-centred nation of ‘traders’ who must submit to the generous-hearted German nation of ‘heroes’. There were distant echoes of these sentiments in Weber, who distinguished ‘booty’ capitalism run by charismatics, ‘pariah’ capitalism run by Jews and other religious outsiders, and ‘bureaucratic’ capitalism run by everyday professionals. Like themes are also

Sombart rewrote this book many times as his politics veered rightwards, changing its title in 1903 to \textit{Die Deutsche Volkswirtschaft in Neunzehnten Jahrhundert}, and by its resissue in 1935 it had turned into a Nazi tract.

\textsuperscript{82} W Sombart, \textit{Krieg und Kapitalismus} (Munich, 1913, repr. New York, 1975).
\textsuperscript{84} For a compressed statement of his positions see W. Sombart, ‘Economic Theory and Economic History’ (1929) 2 \textit{Economic History Review} (1st ser.) 1.
\textsuperscript{85} Liberals such as Brentano and Weber strongly supported the war, as did the bulk of the German Left. Patrick Wormald, in ‘Early English Law and the Historians’, in \textit{The Making of English Law: King Alfred to the Twelfth Century} (Oxford, 1999), at 20–1, notes the irony that Felix Liebermann, the archetypal otherworldly Berlin Jewish professor, whose career was always marked by Anglophilia, ended up writing diatribes in 1916 against liberal and imperial England, in the midst of the slaughters of the Great War: thus Liebermann ‘[g]ratefully dedicated’ the third volume of his critical edition of Anglo-Saxon legal texts ‘to the Memory of Heinrich Brunner and Frederic William Maitland, the age’s greatest researchers into the legal history of medieval England’, and haplessly offered the work as:

a token in melancholy memory of the peace-blessed time when this work began, when the German immersed himself admiringly in the political life and literature of Britain, and the Briton ungrudgingly opened the way to German research, including this contribution to the earliest history of his nation; also as a heartfelt expression of the confident hope that the storm of hate and the sea of blood which engulf the time of completion of these pages will soon be understandable as essentially caused by the historical necessity of conflict between the heedless claims of a World-empire, familiar with power, to continue to dominate navigation and world trade, and the justified determination of the unified German people to contend peacefully and circumspectly but with freedom and strength for the goods of the earth, and to expand itself to the measure of its inborn life.
found in Tönnies with his distinction between the warm connection of pre-capitalist community and the cold impersonality of modern commercial society. However, Weber and Tönnies do not turn these ideas into a crude nationalist message. Sombart ended his career as an active supporter of the Nazis; he has been well described as a ‘reactionary modernist’ akin to the National Socialist ideologues Schmitt and Heidegger.

One common feature of the ‘socialists of the chair’ was their attraction to autocratic and centralizing state rule, and perhaps this helps explain their instrumental attitude to law and legal history. Max Weber is distinguished in that he never departed from a tolerant liberalism, was less extreme in his patriotism and nationalism, though he shared in his contemporaries’ cultural pessimism and dislike of the modern age. At any rate Weber never succumbed to Anglophobia like his colleagues during the War. He was fascinated and attracted by the liberal English state and society, even though its lack of coordination and direction puzzled him and challenged his models of law and economy. Another important liberal economic theorist with a training in law was Lujo Brentano (1844–1931), who from the 1870s studied the legal and economic history of guilds and trade unions and later summed up his findings in a massive treatise of English social and economic history. Brentano favoured trade union rights, industry regulation, and broad-based welfare policies, and rejected the illiberalism and chauvinism of the statist Kathedersozialisten, opposing state protection of landed and agrarian interests. He also kept his distance from socialism, remaining a left-leaning liberal democrat. His

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87 F. Lenger, Werner Sombart, 1863–1941 (Munich, 1994) gives an unconvincing apology for Sombart’s racism and extreme nationalism. Händler und Helden (‘ Merchants and Heroes’, Munich, 1915) exemplifies Sombart’s jingoistic anti-English and illiberal stage. Sombart’s work was used for anti-Semitic propaganda, and not just in Germany: see e.g. [John Henry Clarke], England Under the Heel of the Jew (London, 1918) which weaves together passages from Sombart’s The Jews and Modern Capitalism with Christian and racialist anti-Semitism. See further N. Stehr and R. Grundmann, Economic Life in the Modern Age: Werner Sombart (New Brunswick, 2001), ix–lxii.

88 On Weber’s ‘England problem’ see references in n. 24 above.

89 L. Brentano, Die christlich-soziale bewegung in England (Leipzig, 1883); L. Brentano, On the History and Development of Gilds, and the Origin of Trade-Unions (London, 1917); Eine Geschichte der wirtschaftlichen Entwicklung England, 3 vols. (Jena, 1927–9); L. Toulmin Smith, J. Toulmin and L. Brentano (ed.), English Gilds: The original ordinances of more than one hundred early English guilds, together with the olde usages of the Cite of Wynchestre; the ordinances of Worcester; the office of the Mayor of Bristol; and, the costomary of the Manor of Tettenhall, with a preliminary essay ‘On the history and development of gilds’ by Lujo Brentano (London, 1892).

own theorizing of the rise of capitalism was sharply critical of the theological-religious and racialist-religious theories of both Weber and Sombart, and instead emphasized the role of long-distance trade promoted by armed power in the earliest periods, and of impersonal calculative ethos emerging as the communitarian bonds of family, tribe, guild, and locale break down in modern times. Brentano, together with contemporaries such as the distinguished jurist and historian of medieval law Hermann Kantorowicz (1877–1940), maintained a liberal spirit in German law, history, and social science in the troubled years between the Great War and the Nazi dictatorship, with Kantorowicz, in particular, bravely championing liberal values and internationalism in the Weimar years.

VI

Did the intellectual environment of the Kathedersozialisten, with its fervid patriotism and its rejection of deductive and rationalizing social science, leave its traces within German legal science and history? It is possible to give both a negative and positive answer. It should be acknowledged that the great German Romanist jurists and legal historians from before the Great War inhabited a technocratic intellectual world from which illiberalism—and indeed any overt political ideology beyond abstract Kantianism—was tacitly excluded. From Puchta and Savigny through (early) Jhering and Windscheid, the Pandectist project involved the construction of a coherent and gapless system of civil law through scientific scrutiny and abstraction of legal-historical (that is, largely Roman) sources. This technique perforce required a degree of rationalism, comparativism, and conceptualism, balancing any tendency to romantic or ethnic national-

ism. At any rate the Pandectist lawyers of the later nineteenth century, with their strong objective of codification, united to fend off attacks from romantic Germanists such as the folklorist Jacob Grimm (1785–1863), the jurist Georg Beseler (1809–1888), and the legal historians Georg Waitz (1813–86) and Otto Gierke (1841–1921). The Germanists called for a more nativist law sensitive to the social needs of Germany. Their critique of the Pandectists reached its peak in Gierke’s attack on the draft Code in 1889.

Gierke’s interventions into the politics of codification hovered somewhere between conservative and socialist critiques of free market liberalism. He advocated curbs on land markets and restriction on freedom of testation, favouring Junker and peasant interests. He also wanted restrictions on freedom of contract so that debt and mortgage creditors and landlords could not push their bargaining power to its fullest extent against farmers, tenants, and builders. In his elaborate theory of associational law, he wanted more recognition of the place of collective action by unions and corporations as an intermediate level of economic activity between the state and the market, freed of the unwieldy concessionary system of state control of incorporation. Gierke believed that by tracing the history of German law controlling associations and guilds he could supply the necessary building materials for a well-regulated economy and society, with strong state interventions able to tame the corrosive effect of liberal markets. His work came to epitomize the historical scholarship and juristic creativity of the Germanists in the practical areas of commercial law, company law, agency, land law, inheritance, joint property, and trust.

Gierke was only the most prominent figure within a wider Germanist movement in legal historical scholarship of the time. These scholars sought to highlight a great German tradition of feudal law and culture underpinning European, especially Northern European state formation. It would be inaccurate, however, to portray their work as part of the rising tide of romantic nationalism and illiberalism in German legal scholarship of the


94 O. Gierke, Community in Historical Perspective (selections from Das deutsche Genossenschaftsrecht, 4 vols., Berlin, 1868–1913; M. Fischer (trans.), A. Black (ed.), Cambridge, 1990); O. Gierke, Political Theories of the Middle Ages (selections from Das deutsche Genossenschaftsrecht; F. W. Maitland (trans. and ed.), Cambridge, 1900); D. Runciman, Pluralism and the Personality of the State (Cambridge, 1997), 34–85.

pre-war period. Heinrich Brunner (1840–1915), for example, wrote of Frankish law spreading through Normandy to England, establishing a strong state under the Crown with the jury as a royal innovation, not an insignia of local liberty.96 Liebermann’s work on the Anglo-Saxon legal sources,97 Maurer on Teutonic law and the village commune,98 and Heusler on the law of the Icelandic sagas99 may have been driven by a similar desire to portray the genetic unity of the North European world of ‘Germanic’ law. These scholars ‘treated as German legal history anything supposedly Germanic anywhere in Romanic Europe . . . stimulated by the spirit of Germanism in Germany, [the view] was that all the non-Roman elements in such legal orders . . . were necessarily German and directly attributable to the historical and social influence of the Germanic tribes’.100

Germanist sentiments could have a cosmopolitan as well as nationalistic valence. For example Rudolph Gneist (1816–95), who studied early English constitutional development, gave his work an Anglophile twist: he wrote of decentralized English law and administration as a model that German administrators might well emulate. He saw the key to English constitutionalism in self-government, being the ‘balanced constitution’ of Crown and Parliament originating in the early fourteenth century, with the English Crown later successfully harnessing the gentry’s energies for the voluntaristic provision of government services, reaching a peak of cooperation in the eighteenth century.101 Although his historical work tended to give


support to decentralization of public law powers in the emerging German state, Gneist added his voice to the call for codification of private law, a common law for Germany as a measure for national unity.  

Brunner too supported the code though he agreed with Gierke that the 1888 draft was lacking in social conscience.  

The Germanists participated fully in the liberal codification project. They were represented on the second drafting commission by the distinguished legal historian Rudolf Sohm (1841–1917). But it is striking how the drafters of the BGB collectively resisted the special interests of Junker, peasant, and artisan groups, who campaigned with little success to include laws protecting unified landholdings and traditional trades from the disintegrating pressures of commerce, speculation, and creditor power. Sohm helped introduce some rather limited social law into the code, but went along with the mainly liberal lines of the Pandectist project; his and the Germanists’ reasoning was that the code had to stand above sectional politics or it would fail as a national institution. The Pandectist response to critics such as Gierke, who called for curbs on the implicit market liberalism of their Romanized private law, was to concede the need for interest-based legislation on a piecemeal basis, at national or state level, but to reject the idea that social policies should be allowed to disturb the science of private law. The professionalism of the jurists as both legal scientists and as servants of the state meant that even in the conservative and nationalistic of Wilhelmine Germany, practical law-making could appear to be relatively immunized from ideology and interest-group politics.  

To summarize: legal and economic ideology in Wilhelmine Germany was deeply historicist and nationalistic, but also informed by a spectrum of political colours, liberal, conservative, and socialist; and scholars could combine more than one of these colours in their work. This pluralism is reflected in the making of the BGB in the 1880s and 1890s. The BGB can be seen as both strikingly modern in content and technique, and yet at the same time anachronistic at its birth. It reproduced the conservative family law and liberal economics of the late nineteenth century; it restated the

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103 Ibid., 42–6, 108.  
104 Sohm wrote distinguished works on Roman law (e.g. Institutionen des Römischen Rechts, Leipzig, 1884), German law (e.g. Die Altdutsche Reichs-und Gerichtsverfassung, Weimar, 1871), and above all on ecclesiastical law (Kirchenrecht, Leipzig, 1892). He wrote other synthetic historical works demonstrating the interactions between these systems of law in the making of German legal tradition, and can thus be characterized as a pluralist straddling the German and Roman wings of the historical school. Part of his church history is summarized and translated in W. Lowrie, The Church and its Organization in Primitive and Catholic Times (London, 1904). Sohm supported codification as early as 1874, neutralizing the use of Savigny as an anti-code authority: John, Politics and the Law, n. 22 above, 47–8.  
dogmas of freedom of contract and absolutism of ownership in uncompromising terms under the shield of a selective reading of Roman sources. There was little sense of the rise of associational form that was already transforming relations amongst commerce, capital, and labour, that area of law where the Germanists made their greatest contribution. The confrontation between liberal legal technocracy and collectivist social and political ideologies in the making of the BGB suggests that the fin-de-siècle German legal world was far from monistic, with rival intellectual traditions sharing the stage. It is this intellectual and political sophistication that helps account for the prestige and influence of German law, history, and other human sciences in France, England, Italy, and America before the Great War. 106

VII

Academic law was late to develop in England, and lawyers as a group trained within their own professional schools were distanced from other intelligentsias. There were a handful of great figures of the early and middle years of the nineteenth century such as Bentham, Austin, and Stephen, who pursued a systematic and conceptual analysis of law and its relation to society. 107 However the cultivation of an independent juristic science is most strongly evident in the two decades after 1880. 108 The legal historian Maitland stands out amongst the crowded talents of end-of-century academic law. 109 Maitland read philosophy and political science under Sidgwick at Cambridge, but turned to history after a fruitless seven-year stint in chambers at Lincoln's Inn. He was self-taught as an historian, and as an historian soon came to reject overtly Sidgwick's concept of political science as a search for the laws of society. 110 He was openly inspired by German examples, writing of his mixed feelings of gratitude and shame at having scholars of the calibre of Brunner, Liebermann,
Gneist, and Riess\textsuperscript{111} so completely dominate the positive historiography of early English law.\textsuperscript{112}

Maitland’s developed historical sense also led him to criticize Maine’s schematic anthropology of law, both in details and in its architecture. Maitland argued that social, economic, and institutional history revealed no general laws, falsifying Enlightenment ‘stages’ theories. For example there was no universal progress of family law and kinship structure:

To construct some fated scheme of successive stages which shall comprise every arrangement that may yet be discovered among backward peoples, this is a hopeless task. A not unnatural inference from their backwardness would be that somehow or another they have wandered away from the road along which the more successful races have made their journey.\textsuperscript{113}

The better model was one of a series of long continuities punctured by breaks precipitating change, with selective imitation between systems hastening variant mutations. Hence it was false for anthropologists to postulate immutable stages of development as a social form of Darwinian evolution, as Maitland expounded:

Even had our anthropologists at their command materials that would justify them in prescribing a normal programme for the human race and in decreeing that every independent portion of mankind must, if it is to move at all, move through one fated series of stages which may be designated as Stage A, Stage B, Stage C and so forth, we still should have to face the fact that the rapidly progressive groups have been just those which have not been independent, which have not worked out their own salvation, but have appropriated alien ideas and have thus been enabled, for anything that we can tell, to leap from Stage A to Stage X without passing through any intermediate stages. Our Anglo-Saxon ancestors did not arrive at the alphabet, or at the Nicene Creed, by traversing a long series of ‘stages’; they leapt to the one and to the other.

\textsuperscript{111} L. Riess, \textit{Geschichte des Wahlrechts zum englischen Parlament im Mittelalter} (Leipzig, 1885), a study adumbrating Maitland’s view of the early parliament as a conciliar and curial process rather than an institutionalized representative legislature. See further below, text accompanying n. 129–32.


But in truth we are learning that the attempt to construct a normal programme for all portions of mankind is idle and unscientific. For one thing, the number of portions that we can with any plausibility treat as independent is very small. For another, such is the complexity of human affairs and such their interdependence that we can not hope for scientific laws which will formulate a sequence of stages in any one province of man’s activity. We can not, for instance, find a law which deals only with political and neglects proprietary arrangements, or a law which deals only with property and neglects religion. So soon as we penetrate below the surface, each of the cases whence we would induce our law begins to look extremely unique, and we shall hesitate long before we fill up the blanks that occur in the history of one nation by institutions and processes that have been observed in some other quarter. If we are in haste to drive the men of every race past all the known ‘stages’, if we force our reluctant forefathers through agnatic gentes and house-communities and the rest of it, our normal programme for the human race is like to become a grotesque assortment of odds and ends.¹¹⁴

Maitland’s historical inductivism further explains why there is little economic observation in his work despite the intensity of economic learning in his immediate environment.¹¹⁵ His legal values were rooted in the aesthetic liberal philosophies of Sidgwick and the Cambridge of the Apostles; and such liberalism tended to be pragmatic, undoctinaire, and wary of system-building social science.¹¹⁶ This meant that Maitland was not a romantic committed to the historical past for its own sake. His pragmatic and reformist urges can be seen most strongly in his impatience with the messiness of the modern common law; he resented the dead weight of historical doctrine, especially in the land law¹¹⁷ and in equity,¹¹⁸ and...
expressed envious admiration for the rationalizing achievements of the
BGB.\textsuperscript{119}

Maitland’s complex and allusive scholarship has suggested to many admiring that he was driven by a simple desire for truthful historical knowledge of England’s medieval past through close study of legal records; and this is one explanation for his reverence for the German masters’ loving recreation of the legal past as they strove to build the future.\textsuperscript{120} But Maitland also responded to the substantive political arguments embedded in the Germans’ romantic scholarship, both its liberal and its nationalist and communitarian strains. Here must be distinguished two overlapping parts of Germanic legal-historical theory, the first being the idea of the original Teutonic village commune, deriving from patrilineal kinship groups and holding land in common, as evoked by Maurer and adopted by Maine, and the second being the concept of free associations permeating every level of social organization between the individual and the state, as promoted by Gierke. Maitland adopted the Gierkean concept of associational law as a deeply attractive political model of legal development, and at the same time vehemently rejected the ‘village community’ thesis, whereby early Germanic collectivism gives way to Romanic individualism in the history of land settlement. Maitland showed that cognatic kinship groups in Anglo-Saxon period with recognition of matrilineal descent and relatively free alienation of property led to cross-cutting loyalties that fostered an early individualism in family life and land-holding, rather than the exclusivity of patriarchal and patrilineal clans. Indeed he went on to reject the very terms of the ‘village commune’ debate:

[Is it not very possible that the formula of development should be neither ‘from communalism to individualism,’ nor yet ‘from individualism to communalism,’ but ‘from the vague to the definite’?\textsuperscript{121}

He later sharpened his jurisprudential objections to the thesis of group ownership by the early village commune:


It apparently attributes ownership of land to communities. It contrasts communities with individuals. In doing so it seems to hint, and yet be afraid of saying, that land was owned by corporations before it was owned by men....But if we abandon ownership by corporations and place in its stead co-ownership, then we seem to be making an unfortunate use of words if we say that land belonged to communities before it belonged to individuals. Co-ownership is ownership by individuals.122

Maitland's commitments in the ideologically-charged debate over ancient communitarianism was far from straightforward, as he revealed in a letter of 20 February 1889 to Vinogradoff discussing the manuscript of his *Villageainage in England*. Maitland wrote:

[It will seem strange to English readers, this attempt to connect the development of historical study with the course of politics; and it leads you into what will be thought paradoxes—e.g. it so happens that our leading ‘village communists’, Stubs and Maine, are men of the most conservative type, while Seebohm, who is to mark conservative reaction, is a thorough liberal...[T]he English believer in ‘free village communities’ would very probably be a conservative...On the other hand with us the man who has the most splendid hopes for the masses is very likely to see in the past nothing but the domination of the classes. Of course this is no universal truth—but it comes in as a disturbing element.123

Maitland’s own developed position was neither apolitical (as he implied to Vinogradoff) nor individualistic,124 but was a subtle form of corporatism. Here Gierke’s views on the reality of group personality, the need for a free associative law, and the crucial role of corporations as bodies intermediate between the State and the individual, influenced Maitland’s vision of politics and law at the deepest level.125 His work from the late 1890s highlighted the emergence of groups and associations, some legally defined and

122 Maitland, *Domesday Book and Beyond*, n. 114 above, 341–56, on the importance of several co-ownership and joint and several possession in early English land law and the distinction between feudal or corporate jurisdiction and tenure or ownership. In this sphere Maitland followed German legal history and anthropology closely, including L. Dargun, *Mutterrecht und raubehe und ihre reste im germanischen recht und leben* (Breslau, 1883); F. E. A. Meitzen, Wanderungen, Anbau und Agrarrecht der Völker Europas nördlich der Alpen. Siedelung und Agrarwesen der Westgermanen und Ostgermanen, 3 vols. (Berlin, 1895); R. Hildebrand, *Recht und Sitte auf den primitiv mehrere wirtschaftlichen Kulturstufen* (Jena, 1896, 2nd edn., 1907). The individualist message is still more strongly stated in Pollock and Maitland, *History of English Law*, n. 113 above, I, 617–34: ‘The student of the middle ages will at first sight see communalism everywhere. It seems to be an all pervading principle. Communities rather than individual men appear as the chief units in the governmental system. A little experience will make him distrust this communalism; he will begin to regard it as thin cloak of a rough and rude individualism...communal liability...is merely a joint and several liability...A right of common...may be an individual’s several right...[R]ights given by the manorial custom...are several rights given to individuals.’

123 *Letters of Maitland*, n. 118 above, 57–8; cf. 59–60.


others informal, which formed a web of relations stretching from the Crown, itself a corporation sole, through royal franchises and feudal tenures to the plethora of local jurisdictions and associations, including townships and boroughs as well as manors and fees.\textsuperscript{126} He made the point that in the era before social contract theory, the lines between land law and government, between corporate law and constitutionalism, and indeed between jurisprudence and political theory, were hazy at best, and he saw here messages for the modern age of the mixed economy with its corporate capitalism and powerful bureaucratic states.\textsuperscript{127} In his Ford Lectures of 1897 he summed up his vision with an aphorism at Maine’s expense:

If we look at the doings of our law courts, we may feel inclined to reverse a famous judgment and to say that while the individual is the unit of ancient, the corporation is the unit of modern law.\textsuperscript{128}

Maitland thus can be portrayed as a pluralist, a mildly communitarian liberal, not easily compared to his German role-models who were largely legal nationalists or \textit{Kathedersozialisten}, adulating the State as representative of the \textit{Volk}. In his work on the history of the early English state, he offered a profound reappraisal of the positive authority of the Crown, that mystical entity that stands substitute for a state in England.\textsuperscript{129} His ideological complexity in regard to the theory of the state can partly be seen as a distillation of the times. With the strains and disappointments of liberal democracy at the \textit{fin-de-siècle}, many historians were no longer enamoured

\begin{itemize}
  \item \textsuperscript{127} Maitland, ‘Introduction’ to Gierke, \textit{Political Theories of the Middle Ages}, n. 94 above, xvii–xliii.
  \item \textsuperscript{129} Maitland, ‘The Corporation Sole’, in \textit{Collected Papers}, n. 110 above, III, 210; ‘The Crown as Corporation’, ibid., 244. Ideas of corporatism (or syndicalism) as a bridge between
\end{itemize}
of the Whig constitutional narrative of the eighteenth and nineteenth centuries. The Whig historiography, entrenched by William Stubbs in the 1870s, celebrated the English nation’s evolution of liberty from Saxon origins, to be enshrined from the high middle ages in parliamentary government, the common law as popular custom, and a balanced constitution of estates. The ancient constitution, in this narrative, survives the centralizing corruption of the luxurious Stuarts and prospers into sober Victorian government.  

Maitland in his work on the earliest parliaments put in place of the Whig orthodoxy a more complicated story, with the king’s government of the thirteenth century appearing as heavily judicialized in its various guises of councils, courts, and parliament, and more committed to rule through administration and adjudication on the feudal model than any basis in representative government.

Maitland was patriotic about the achievements of English constitutionalism, observing how the English common law had come to provide a system of land holdings, legal actions, and constitutional principles in countries spreading from Australia to America. But this imperialism is the victory of legalism, not of Anglo-Saxon liberty writ large.

For work which further teased out the social and economic implications of manorial or feudal law, we can turn to Maitland’s contemporaries Frederic Seebohm (1833–1912) and Paul Vinogradoff (1854–1925). Vinogradoff studied the operation of jurisdiction and status in the relationships of serfs and lords, and used his historical materials to show that English villeinage was highly regulated by law and custom, blurring the line be-
tween free and unfree tenants. Vinogradoff's historical project was overtly designed to contrast freedom-making Western feudalism with the degraded and permanent servility of serfs in the Slavonic lands, where lordship had never been legitimated by restraining law. Seebohm studied the earliest origins of manorialism, which comprised a mixture of demesne, dependent holdings, and common property. He vehemently opposing the Germanist ‘village commune’ thesis as romantic error; primitive communism was not the basis of feudal collectivism. He traced manorial organization back to the Roman villa, which provided the template for Anglo-Saxon, and indeed most European feudalism, including Frankish and German; non-feudal Celtic ‘tribalism’ was the exception proving the Roman rule. According to Seebohm, the common property of the manor was in descent from Roman forms of serfdom; it was an equality of dependents, a stage in social evolution to be escaped as freedom brought the individual personal liberty and private rights in land, insulating him and his family from the governmental power of landed superiors. Maitland doubted the thesis that Roman agrarian structure was the source of manorialism, but in engaging with Seebohm he accepted some of his themes: ‘May it not again be that such communalism as we find in the ordinary village of later times is in large measure the result of seignorial pressure?’ Seebohm also related the efficiency of the agrarian system to late medieval, Tudor, and Georgian enclosures which destroyed the dependent English yeomanry and peasantry, and laid the foundations for a free land market.

Maitland, Vinogradoff, and Seebohm were each exceptional in their versatile ability to straddle early legal and economic history. It was more conventional for economic historians in England to focus on modern enclosure and industrialization, rather than the earlier periods favoured by legal historians.

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The professional discipline of economic history in England can be said to have begun in the nineteenth century with J. E. Thorold Rogers’ five-volume history of agriculture and prices from 1866, which provided essential data to ground the new subject. Arnold Toynbee (1852–1883) in his Oxford lectures of 1881–2 on the industrial revolution provided an interpretative framework, emphasizing not only the productive potential but also the social harms caused by enclosure and the early factory system. Much of this celebrated work comprised an attack on Ricardo and the classical economists’ deterministic theories of rent and wages that seemed to justify the impoverishment of the common people in industrial society. Toynbee’s blend of historical illustration and impassioned radicalism, which itself drew on deep religious commitment, gave his work an extensive influence, and helped redefine economic history as a rival to economic science, rather than as a partner of legal and constitutional history.

The economic historians who followed in Toynbee’s wake shared his wish to combat the verities of economic science. Their fire was trained against the heritage of David Ricardo, whose deductive methodology they further ascribed to the leading contemporary economist Alfred Marshall (1842–1924). This brand of economic science was a softer target than the moralistic political economy of Adam Smith or John Stuart Mill. One response by the economic historians to Ricardian and Marshallian logic was to raise large sets of quantitative and qualitative data for inductive analysis, claiming *a la* Maine that England had to be studied as a society passing through certain stages of development, and that clearing markets did not necessarily provide the key to understanding all periods but that local, time-bound custom had its own rationality. Maine, Stubbs, and later Vinogradoff were invoked as inspirations for the historical method in economics; or as one of the pioneers, Cliffe Leslie, put it, jurisprudence taught history to economics. Another pioneer of the historical approach to economics was William J. Ashley (1860–1927) at Oxford, who dedicated his life to


his *English Economic History and Theory* of 1885 to Toynbee.\(^{141}\) He studied feudal tenures, guild structure, and the law merchant, acknowledging Schmöller as an influence, whom he translated. He later made his career at Toronto and Harvard, teaching constitutional law and history as well as economic history. In a slightly different vein was William Cunningham (1849–1919), a Christian socialist and romantic anticapitalist working at Cambridge who wrote on medieval industry, commerce, and guild regulation, and who vehemently rejected Marshall’s presumptions that economics was a deductive science holding good for all times and places.\(^{142}\) After a long polemical battle with Cunningham, Marshall himself introduced historical sections into his treatise and also philosophical reflections on the importance of coordination, cooperation, and law, supplementing the emphasis on price competition as the basis for understanding economic life.\(^{143}\) The intense methodology debates of this period connected to burning contemporary issues of imperial tariffs, protection of industry, and legal recognition of trade unionism; inductivists tended to favour étatism and collectivism; deductivists tilted to free markets and individualism. Both Ashley and Cunningham strongly supported Imperial tariff preference. Indeed Cunningham spelt out a full-blooded mercantilist position in 1890, in words that could have been written by Schmöller:

> Our national polity is not the direct outcome of our economic conditions; whereas time after time, our industrial life has been directly and permanently affected by political affairs, and politics are more important than economics in English history.\(^{144}\)

In methodology and political outlook these founding fathers of historical economics can fitly be described as English ‘socialists of the chair’.

The debates over the veracities of deductive economics and policy implications for regulation continued when Cunningham left Cambridge in 1895 to join like-minded scholars at the new London School of Economics, including E. Cannan (1861–1935), W. S. Hewins (1865–1931), R. H. Tawney (1880–1962), and Sydney Webb (1859–1947) and Beatrice Webb (1858–1943).\(^{145}\) The LSE school tended to argue for an enlarged state role


in economic regulation and also railed against Marshallian static equilibrium economics for its lack of interest in institutions and history. The Webbs in their magisterial histories of unionism and local government paid considerable attention to the network of law and jurisdictions governing the lives of the common people through collective and public actions, and their works are still valued for their close research as well as their role in laying the intellectual foundations of the British labour movement. \[146\] Hewins, the first director of the LSE, published on seventeenth-century trade and finance in 1892, again emphasizing the beneficial role of the state.\[147\] Tawney’s work was perhaps the most brilliant and innovative. His work on Tudor agrarian history and enclosure examined the waning years of the manorial economy, and included a degree of analysis of shifting legal forms of tenure and regulation of trade and guilds.\[148\] Tawney’s celebrated essay ‘The Rise of the Gentry’ argued that shifts of wealth from the aristocracy and church to the gentry had altered the composition of the ruling class and thus disturbed the balance of economic and political power in Tudor and Stuart England, and that this imbalance had been a prime cause of the English Revolution.\[149\] In the background to this enquiry was the problem of the relationship of religion and ideology on one hand and economics on the other. These concerns were addressed more squarely in Tawney’s famous lectures ‘Religion and the Rise of Capitalism’, which examined the shifting economic ideology of theologians and the church; his theme was to show how capitalistic ideas seeped into Christian thought, which had conventionally been opposed to the personal accumulation of wealth.\[150\] Though Tawney’s theme would seem to be highly


\[147\] W. S. Hewins _English Trade and Finance: Chiefly in the Seventeenth Century_ (London, 1892). Hewins work was followed by that of Lilian C. A. Knowles (1870–1926), e.g. _The Industrial and Commercial Revolutions in Great Britain During the Nineteenth Century_ (London, 1921); _The Economic Development of the British Overseas Empire_ (London, 1924); _Economic Development in the Nineteenth Century: France, Germany, Russia and the United States_ (London, 1932).


Weberian, his preparatory notes suggest that he was uninfluenced by Weber’s famous 1905 essay on Puritanism and the capitalist ethos, and that his analysis of the links between religion and economics was independently conceived.151 Tawney’s ideas dominated the social and economic historiography of Tudor and Stuart England (‘Tawney’s Century’), giving rise to raging argument over the nature of the landholding class and the economic implications of Protestant religion and dissent in early modern England, debates that ran for two generations and touched deeply on English political identities.152 Tawney’s work methods were influential too, blending detailed intellectual, institutional, and quantitative history with guiding hypotheses. In his documentary publications he made extensive use of writs, lease documents, indentures, and other deeds as well as case law and statute to explore England’s earlier economic history. Later he researched into canon law and the law of tenures, but there was no particular place in his work given to legal or constitutional factors in explaining long-term historical change.

Tawney, together with the charismatic medievalist Eileen Power (1889–1940), founded the Economic History Society in 1926, with its own conferences and prestigious review journal, in conscious opposition to the liberal economic science of Marshall and then of Keynes at Cambridge. It is notable that despite the conscious embrace of institutionalist methodology, it is the case that very few of the articles in the first series of the Economic History Review, from 1927 to 1948, showed any interest in law or legal history.153 The legal historian W. S. Holdsworth (1871–1944), in the first issue of the Review of 1927, called on economic historians to take legal ideas and doctrines seriously, calling for collaborative research in areas such as labour regulation, monopolies, and land tenures.154 His plea

151 D. M. Joslin and J. M. Winter (ed.), R. H. Tawney’s Commonplace Book (Cambridge, 1972). Tawney expressed his doubts of the Weberian thesis in Religion and the Rise of Capitalism at 319–21, and criticized the generalizations propounded by Weber and the German sociology of religion in the preface to the 1936 edition, and also in his preface to Talcott Parsons’ translation of Weber’s The Protestant Ethic and the Spirit of Capitalism (New York, 1930). Yet Weber and Tawney’s positions were not dissimilar, claiming not that a certain theology gave rise to capitalism, but that Protestant ethics in northwestern Europe shielded or reinforced the emergent capitalist ethos more than other creeds.


met with a meagre response. Medievalists could not help but use legal records extensively in exploring manorialism, but of later periods there were some five articles on companies and one on combination in the entire first series of the Review. Of this handful, only D. O. Wagner's work on Edward Coke's economic ideology really engaged with the details of law. Perhaps Tawney's success and influence as a role model for economic and social historians helped establish the rift between legal and economic history that opened still wider later in the century. For one example, Eileen Power's brilliant comparative study of European manorialism published in 1932 harnessed the Germanist theories of legal association in her investigation of the everyday life of the peasantry, but she also decried the tendency of legal historians to focus on the manorial relations of lord and peasant and attempt to generalize about the institutions and jurisprudence of feudalism; this was to ignore the relationships of the common people within their specific village communities.

At Oxford in the pre-war years, important work on economic and legal history was carried out in the Law Faculty. Aside from Vinogradoff we can name here the constitutional jurist Albert Venn Dicey (1835–1922). His masterpiece Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century, published in 1905 and expanded in 1914, can be seen as a key work of legal and economic history, joining laissez faire ideology and criticism of collectivism with history of legislation and government, with some attention given to courts and juristic writing as well. If Dicey upheld the power of a unified state with sovereign legislative power, he also used the values of the Rechtsstaat

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to counsel against the use of state power to regulate society and economy; in his hands the Rule-of-law state becomes the Nightwatchman state.159

At Cambridge in the period before the Great War, John Clapham (1873–1946) built up his dominance of economic history teaching and research, and after writing histories of the English woollen industry and a comparative economic history of modern France and Germany, was appointed to a chair in 1928.160 Like Ashley, he was by no means hostile to Marshallian neoclassical assumptions about the working of the economy, and the first volume of his great multi-volume work *The Economic History of Modern Britain* of 1926 was dedicated to both Marshall and Cunningham. Clapham did, however, harbour a dislike of pure economic theory, and in 1922 he published a stinging attack on the ‘empty economic boxes’ or theoretical constructs of orthodox price theory.161 His work was densely descriptive and did not use models of deductive methods, but he did accept much of the normative framework of orthodox economics with its emphases on entrepreneurs increasing productivity and setting market prices for goods in a *laissez faire* regulatory framework. Clapham’s work describes legislative policies closely and made good use of parliamentary legal enquiries and of published legal treatises; but he was otherwise little interested in legal institutions.162

The historical assault on political economy had waned by the inter-war period; economists and economic historians practised their arts in relatively happy intellectual seclusion from each other. In the 1920s and 1930s Keynes was occasionally interested in the history of regulation, prices, and industrial organization;163 but his great work on macro-stabilization pulled Cambridge economics back towards deductive science; and a similar story could be told of John Hicks’ Oxford in the 1930s and 1940s.164 There were some counter-streams to neo-classical method at this time, such as Maurice Dobb (1900–1976) and the nascent school of English

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164 J. R. Hicks, *Value and Capital* (Oxford, 1939) is the key text. Hicks’ late book *A Theory of Economic History* (Oxford, 1969) was marginal to the deductive thrust of his work.
Marxist economic historians. These scholars were occasionally interested in the doctrinal content and operation of law, as Rodney Hilton (1916–2002) sought to analyse the basis for lordly jurisdiction and power over tenants; and Christopher Hill (1924–1993) examined seventeenth and eighteenth century legal ideology and linked this to the rise of agrarian and industrial capitalism. But these are marginal cases; the striking overall impression is how seldom economic historians and legal historians cooperated in England from the turn of the century to the Second World War, and even less thereafter. It may be that German-style historical jurisprudence with its interest in community and nation, including its English variants in the work of Maine, Maitland, and Vinogradoff, was fundamentally tainted by association with German totalitarianism in the 1930s and 1940s; Savigny and Jhering were now seen as illiberal precursors of Carl Schmitt. At any rate, when Patrick Atiyah formulated his grand synthesis of legal, intellectual, and economic history in 1979, he truly had no recent English models to build upon, and the result was an extremely valuable but highly eclectic study of inductively related themes. It is interesting to speculate how Atiyah might have written *Rise and Fall of Freedom of Contract* today; perhaps with efficiency models drawn from Coase and modern law and economics?

VIII

The heroic age of French law was the eighteenth century, when the Commentator tradition was completed so as to lay the foundations for the great Napoleonic Code. In the nineteenth century, jurists were less sure of their vocation beyond professional application of the Code, and tended to copy the German historical masters, claiming Savigny as a distant Frenchman. The heyday of deductive social science in France also lies in

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this period, in the era of the Enlightenment, with many foundations of economic theory being laid down by French thinkers including Borda, Condillac, Condorcet, Laplace, Quesnay, Du Pont de Nemours, Say, and Turgot. It is fair to say that the brilliant Enlightenment tradition of economic sciences did not prosper in France, but migrated across the Channel and the Atlantic to help lay the foundations for English and American political economy. By 1900, French economics, such as it was, nestled within the law faculties, and although there were some competent synthesisers and teachers such as Dunoyer and Pirou, the latter an erudite lawyer-economist, the discipline was not at a peak.

By contrast with law and economics, the disciplines of history, sociology, anthropology, and geography boasted a host of brilliant figures, many of whom closely studied issues of economic development. Some of this originality may have derived from the eccentric nature of this sub-intelligentsia, many of them distanced from Parisian academic life and its orthodoxies (Belgians, Alsatians, and Jews are notable here). The legal sociology of Emile Durkheim (1858–1917) drew from his exposure to Roman and civil law. In his well-known theory, law is seen as a strong indicator of the underlying structure of society, culture, and economy. It followed that a heightened division of labour and increasingly atomistic social structure and anomic values under advanced capitalism causes shifts in legal form from ‘retributive’ norm enforcement to ‘restitutory’ sanctions. Even under anomic or amoral modern capitalism, according to Durkheim, legally-supported contractual exchange represents a cooperation based on shared beliefs and goals rather than a competitive struggle between individuals for gain. Durkheim’s brilliant sociological successors after the Great War were Maurice Halbwachs (1877–1945), and above all his nephew Marcel Mauss (1872–1950), the progenitor of cultural anthropology based on the analysis of gifting or discretionary exchange as a bonding force of society. Although the Durkheimian schools of legal sociology and anthropology made brilliant surmises about the functions of law in society, they were not very specific about the interactions and evolution of law and

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economy over time; and the empirical basis of Durkheim’s premises were challengeable. It could be said that industrial society has a more retributive criminal law than primitive society; that the division of labour is as much coercive and alienating as cooperative and integrating; that law is a professional praxis, not a mirror of social structure.\footnote{Macfarlane, \textit{Making of the Modern World}, n. 116 above, 108–20.}

As in England, perhaps the greatest work done in legal and economic history emanated from the medievalists, and here we can observe the pervasive influences of Fustel de Coulanges (1830–1889) and Henri Pirenne (1862–1935) as brilliant teachers, writers, and mentors. Fustel de Coulanges wrote on religious, legal, and civic bases of the ancient city cultures, which he saw as the seed of modern European societies. Towards the end of his life he made explicit his criticisms of the romantic Germanist attempts to portray a primitive agrarian communism in land preceding feudal and private tenures.\footnote{N. D. Fustel de Coulanges, \textit{The Ancient City: A Study on the Religion, Laws and Institutions of Greece and Rome} (W. Small (trans.), Boston, 1874, London, 1916; 1st edn., \textit{La Cité Anticue}, Paris, 1864); \textit{Histoire des Institutions Politiques de l'Ancienne France} (Paris, 1875, 2nd edn., 1888–92); \textit{The Origin of Property in Land} (1889; M. Ashley (trans.), W. J. Ashley (intro.), London, 1891). Fustel's Romanist thesis may be conjoined to Seebohm's work in \textit{The English Village Community}, n. 134 above.} Pirenne analysed the nature of medieval European trade, and its role in fomenting the urban culture in Northern Europe. He also studied the collapse of the culture of late antiquity, and the impact of Islamic military incursions in promoting the rise of feudalism involving the subordination of farmers to military lords.\footnote{F. L. Ganshof, 'Henri Pirenne and Economic History' (1935–6) \textit{6 Economic History Review} (1st ser.), 179; R. C. van Caenegem, 'Henri Pirenne: Medievalist and Historian of Belgium', in van Caenegem \textit{Law, History, the Low Countries and Europe} (London, 1994), 161.} If the grand theses of these scholars are no longer followed, the expansive comparative methodology proved to be inspirational. They directly influenced Marc Bloch (1886–1944) and the early \textit{Annales} school of history led by Bloch together with Lucien Febvre. Bloch’s work encompassed a wide field including the nature of kingship in medieval French and English culture; the law of lordship and of manorial organization, the legal and social status of the free and unfree, medieval household composition, and the use of law and custom to coordinate rural production and to coerce labour. Bloch was also a wide-ranging comparativist, and his work of the 1930s can be seen as a liberal-minded protest against the darkening world of aggressive nationalisms that finally claimed his life. Bloch rejected sociological determinism and grand theory, but rather sought out patterns of social and economic organization over very long periods, examining the interrelations between law, politics, literature, agrarian practice, military organization, religion, kinship, demography, technology, trade, prices, currency stability, and more. Bloch’s masterpiece \textit{Feudal Society} shows the author’s
ability to integrate sophisticated legal history with his over-riding concern to analyse the entirety of material and economic life. His chapters on the foundations of law in medieval Europe investigates the interplay of custom, canon law, royal law, and Roman law; and he returns constantly to the long-term social results of the differing shades of servitude and freedom and the nature of lordship and vassalage in the various national jurisdictions. The originality of England, in Bloch’s view, was to evolve a centralized royal system of justice sharply distinguished from local jurisdictions, that could regulate the manorial economy without (like the French crown) dictating to society at all levels; ‘In this way English feudalism has something of the value of an object-lesson in social organization.’

Annales historians following Bloch perhaps lacked his striking capacity to weave together so many perspectives convincingly; and the late Annales school presided over by Braudel became more narrowly Francocentric and methodologically static. Bloch by contrast ranged confidently across European history, and he attended closely to English history and affairs. He was professionally close to his English peers, visiting London and Oxbridge on many occasions, and was a distinguished contributor to the Cambridge Economic History. His continuing influence on modern historical thought is comparable to Maitland’s, showing how rigorous historical


enquiry can be made across a broad canvas of legal, social, and economic history.

Apart from Bloch’s oeuvre, and outside the new school of economic history he invented, there were fine French students of English economic history such as Paul Mantoux (1877–1956) who gave a classic account of the industrial revolution in 1906. Mantoux used a conventional descriptive methodology, and was interested in law chiefly in terms of ad hoc legislation interventions concerning enclosures, poor relief, trade union rights, the apprenticeship system, child labour, monopoly, patent, trade, and price controls. Élie Halévy (1870–1937) at the same time wrote about the English ‘philosophical radicals’, in which class he included liberals, utilitarians, and classical economists, as well as producing a six-volume general history of Victorian England. This work again demonstrates interest in English history as an important reference point for European scholars grappling with the experience of modernity in their own societies.

IX

We have seen how it was in the close study of feudal society that legal and economic history were likeliest to meet, and here Russian scholars were deeply influential. The work of Vinogradoff on the legal and economic framework of villeinage has been discussed; he inspired other Russian scholars before the Great War and the Revolution, including M. Kovalesky, D. Petrushevsky, and A. Savine. This school was concerned to study the nature of the English village community and compare it to the Russian мир, and thus explore the evolutionary path of agrarian institutions. The great classicist M. I. Rostovstev (1870–1952) looked to more distant history; his seminal work on the Mediterranean economy and society of antiquity drew from every source including legal materials.

187 See text accompanying n 133 above.
188 See e.g. M. Kovalesky, ‘Early English Land Tenures: Mr. Vinogradoff’s Work’, (1888) 4 Law Quarterly Review 266; references in n. 186 above.
A key figure of the next generation was M. M. Postan (1899–1981), who trained in law and economics at Odessa and Kiev after studying science and sociology at St Petersburg. This protean intellectual dazzled students and colleagues and succeeded Clapham as the dominant figure of the discipline of economic history. After working at the LSE, he moved to Cambridge in the 1930s. There he pushed medieval economic history into new directions, shattering the Pirenne thesis that expanding urban-based trade across Northern Europe had brought capitalist relations to the rural countryside and had hastened the dissolution of feudal ties and the shift to urban industrialism. Postan was adept with every type of source, and used legal documents skilfully with a deep knowledge of European legal concepts. He showed that access to profitable trades in agricultural produce could lead lords to intensify feudal subordination of the peasantry, in order to expand demesne production for the market. This insight appealed to Marxists and other anti-capitalists, who could show the rise of market relations to be coercive rather than liberating for labour. But Postan’s thesis was rather demographic in nature—he argued that it was population shifts, induced by long historical rhythms of over-population, famine, and plague, that determined the relative power of lords and peasants. His studies of the legal status of the medieval labourer fed his wider demographic theories and showed how fruitfully medieval legal records could be used in economic history. The rival Marxist interpretation of medieval economic history, given in outline by Maurice Dobb, was given empirical grounding by the Russian scholar E. A. Kosinsky (Berkeley, 1967–93), an all-encompassing reconstruction of the Mediterranean trade economy and culture of the high middle ages with much attention to law (e.g. I, 65 ff); cf. P. Hordern and N. Purcell, The Corrupting Sea: A Study of Mediterranean History (Oxford, 2000), 31–5.

194 Dobb, Studies in the Development of Capitalism, n. 165 above.
(1886–1959), who made extensive use of manorial and legal records in his calculations of rent incomes for lords, extracted from peasants constrained by unfree status or tenure. Kosminsky argued that the rise of the common law in the twelfth and thirteenth centuries undermined the legal protections of unfree tenants, a thesis elaborated in the work of Rodney Hilton.

It is perhaps no accident that the next great revolution in economic history was in large part inspired by another Russian intellectual, namely Alexander Gerschenkron (1904–1978), Austrian-trained but making his career at Harvard. This was the cliometric revolution, whereby economic models and the techniques of econometrics were applied to historical data. But aside from quantification, Gerschenkron’s most striking theoretical contribution was his notion of ‘economic backwardness’, whereby latecomers to industrial development could not simply accumulate capital and expand market production and trade, as England the first mover had done, but rather had to resort to specific state interventions to overcome barriers to entry in a competitive and technological world. This thesis, first enunciated in 1952, used history to depose the English model of historical political economy from its perch as the prime model of modernization. Gerschenkron’s work implied that the English experience of the rule-of-law state, with a strong central law-making authority, an effective fisc and military, and laissez-faire industrial and social policies, was only one path to economic maturation and prowess, and indeed an historically peculiar path that could not be emulated by latecomers. In this light the conventional rule-certainty model turned out to be a tendentious Whig interpretation of economic history.

We began by questioning the privileged position of rule certainty within the discipline of legal history. Today, with Britain established as a middle-range power within the European and international economies, we might finally permit ourselves to cease worrying at Weber’s problem of the role of irrational English law in causing or retarding economic modernization;

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198 Though still a popular model, as in the works of North and his followers, n. 3 above; for a sophisticated recent restatement of the conventional model see N. Ferguson, The Cash Nexus: Money and Power in the Modern World, 1700–2000 (London, 2001).
and even relax the Coasean insistence on crystalline, tradeable property rights as the essential economic and legal virtue. Beyond Weber and Coase there are further problems to solve, such as how the variant modernizations of European societies were shaped by the linked developments of Germanic law, Roman law, and Anglo-Norman common law; and how legal traditions swayed the path of state formation within national systems, including non-European states that adopted and adapted European legal codes. It is important to study the evolution of legal rule-making and economic calculation; but the terrain of legal and economic history extends far beyond that.199

199 The author thanks Martin Daunton, Assaf Likhovski, Michael Lobban, Raphael Schapiro and Lucia Zedner for their insightful comments. No liability attaches for remaining errors.