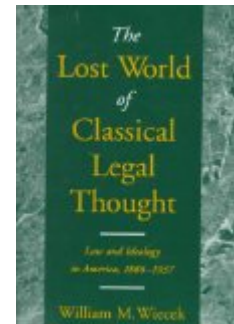




William M. Wiecek. *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937*. New York and Oxford: Oxford University Press, 1998. vii + 277. \$65.00 (cloth), ISBN 978-0-19-511854-4.

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Classical Legal Thought: Revising the Revisionists and the Search for a Middle Ground

In the last decade, a number of books have examined Classical Legal Thought, also known as formalism or orthodox legal thought, through the lens of intellectual history. These books grapple not only with legal doctrine, but also with the question why at certain historical moments particular ideas are considered important, why such ideas are challenged by other ideas, and how such ideas must be understood against a larger social and political background. William M. Wiecek joins this tradition and has succeeded in the difficult task of writing an intellectual and legal history that should be readily accessible to a wide audience of students, lawyers, and historians, while sensitively situating Classical Legal Thought within the social, economic and political conditions that gave rise to it.

The Lost World of Classical Legal Thought is more ambitious than its title indicates. Wiecek, Congdon Professor of Public Law at Syracuse University Law School, traces at least some of the dominant strands of American jurisprudence from the American Revolution through the New Deal. The book also provides a background for Wiecek's forthcoming study of the Supreme Court from 1941 through 1953 that will appear in the Oliver Wendell Holmes Devise Series. Synthesizing a vast amount of historical and legal scholarship, Wiecek posits that the roots of late nineteenth-century classical legal theory lie deep within American jurisprudence and political theory, and that classicism arose "from eighteenth-century constitutional foundations and derived its legitimating power from them." (p. 19).

Implicitly rejecting the arguments of such scholars such as John Henry Sclegel [1], who question whether formalism can accurately be described, Wiecek argues that Classicism was a coherent jurisprudence, and that much of the received understandings of Classicism have not "fully appreciated how comprehensive and powerful orthodoxy was as an explanation of what law is, and as a justification for the role of courts in expounding it." (p.viii). With this understanding, Wiecek seeks to explain how Classicism developed in the post-Civil War period, why it reigned, and what caused its demise in the 1930s. Although critical of Classicism, especially the anti-labor jurisprudence of American courts in the Gilded Age, Wiecek argues that classical jurisprudence had a certain cohesiveness of thought that modern jurisprudence lacks and for which it continues to search.

Wiecek divides Classicism into five overlapping time periods, each treated in its own chapter: "The Foundations of Classical Legal Thought 1760-1860," "The Emergence of Legal Classicism 1860-1890," "Classicism Ascendant 1880-1930," "Classicism Contested 1893-1932," and "The Collapse of Legal Classicism 1930-1942." These divisions make for an immensely readable book, but provide a linear chronology that may neglect some of the complexities and inconsistencies in American law. As Wiecek recognizes, Classicism did not develop in a linear progression; and as scholars such as Paul Kens and Melvin I. Urofsky [2] have shown, for every case that displayed the elements and attributes of Classicism another case exists demonstrating the opposite. That said,

Wiecek weaves an extraordinarily coherent narrative that demonstrates a great range of knowledge of primary and secondary sources, and that aims to create an intellectual history firmly grounded within a social context.

Wiecek views classicism as arising from legal concepts developed in the early Republic by the judiciary, early legal academics, and the antebellum bar; at least in some part, he maintains, classicism sprang from Revolutionary ideology that cherished individual rights and the supremacy of law over arbitrary power. Looking at early Supreme Court decisions, he interprets *Marbury v. Madison* (1803)[3] as a key case in which the Court adopted a Hamiltonian concept of will and power as solely within the province of the legislature and distinguishable from reason located in the judicial realm. This distinction between law and politics would become one of the dominant leitmotifs of Classical Legal Thought. Likewise, Wiecek views cases such as *Fletcher v. Peck* (1810) [4] as firmly establishing the importance of the contracts clause in a way never anticipated by the Framers.

Wiecek writes, “In the 1820s, the development of classicism’s foundation shifted out of the Supreme Court and into different intellectual venues” (p. 37). As the Taney Court pursued an instrumentalist approach to the law, treatise writers and legal academics engaged in a “systematic exposition of the law” that provided the jurisprudential underpinnings to Marshall’s decisions. Reason became equated with law as an objective, neutral, and apolitical science resting on a few fundamental and universal principles. Legal cases might be evidence of the law but, according to the intellectual current of the day, law existed as an a priori system. For example, Rufus Choate, the Massachusetts attorney-statesman, expounded what was to become a well-worn notion of Classicism – that the judge does not make the law, but merely finds it. Thus, by the Civil War, at least some elite judges, lawyers and academics had created a strong foundation for Classical Legal Thought.

A problem with Wiecek’s discussion of the antebellum bar is that he ascribes a coherent position regarding the nature of law to a body of people who did not necessarily speak with one voice – when they spoke at all. As William LaPiana has written, the practicing lawyer in antebellum America may have been a great deal more concerned with the practice of pleading than with Justice Story’s notion of universal legal principles.[5] Another question worth pausing over when discussing the antebellum bar is the existence of actual or potential regional differences and the extent to which our understanding of

the antebellum bar derives from a small coterie of primarily northern intellectuals. I cannot help but think of Drew Gilpin Faust’s biography of James Henry Hammond and the description of his law practice in Columbia, South Carolina.[6] Although Hammond could be considered part of a group of elite lawyers in South Carolina, it would be surprising if he spent a great deal of time thinking about the jurisprudential underpinnings of the law. This is not to say that Wiecek’s understanding of the bar is incorrect or that his project is in any way invalid – only that, by looking more deeply into the ways that lawyers viewed the law, and the ways in which the law was actually practiced, the historian might reveal a much greater diversity of opinion than Wiecek acknowledges.

Wiecek views Reconstruction and its aftermath as a period of legal cultural lag during which the judiciary struggled to apply legal paradigms constructed for a primarily agricultural and proprietary capitalist society to a new and emerging industrial and national economy. Using William Novak’s notion of the well-regulated society (which Novak argues existed before 1877) [7], Wiecek writes, “Before 1870, Americans resorted to law to promote public safety, stimulate economic development, police public spaces, control morals.... They did not waste a moment’s concern about overriding individual interests in doing so.” (p.68). Against this background, Wiecek sees the rise of Classicism, with its embedded notion of laissez-faire, as revolutionary. Yet, Wiecek has so convincingly demonstrated that the tenets of Classicism have deep roots within American law that the quoted statement at least seems too sweeping.

Agreeing with Morton Horwitz’s understanding of one of the impetuses for Classicism [8], Wiecek argues that Classicism represented a “search for order” against a background of tumultuous social change resulting from the Civil War, Reconstruction, labor agitation, immigration and the rise of an industrial economy. Wiecek writes, “Anxiety drove lawyers to articulate a comprehensive vision of law.” (p.79). A fascinating point that Wiecek makes is that the emancipation of the slaves was the largest expropriation of “property” that had occurred to date. Emancipation may have fueled legal anxiety over the law’s conception of property and worked to enshrine the somewhat absolutist concept of property into Classicism. Likewise, slave law was inherently inconsistent in viewing slaves as property but at times recognizing a slave’s personhood. Above all, Classicism sought certainty in law as an objective, scientific, and logical system where an emphasis on fundamental principles and abstractions allowed law to stand above what Novak calls

the “ambiguous mess of substantive human and historical values.”[9]

Thus from one prospective, Classicism formed an intellectual bridge mediating between early nineteenth-century ideas of individualism and local control, as so vividly illustrated in the work of James Willard Hurst[10], and the post-Civil War development of a vigorous national government. As Wiecek writes, “Legal classicism grew out of the tension between two poles of republican aspiration: the power of government to regulate, on one hand, and the liberty of individuals, on the other.” (p.112). Yet at the same time, Wiecek ascribes a certain pessimism and moroseness to late nineteenth-century law, which feared that “the growing proletariat, maddened by diverging extremes of wealth and poverty, would lash out in an expropriating frenzy to seize the accumulations of the rich.” (p.84). Thus, Classicism’s fear of legislative redistribution was in part a reaction by elites to growing labor unrest most powerfully demonstrated abroad by the Paris Commune (1871) and at home by the Pullman strike (1877).

Following a general description of the rise of Classicism, Wiecek turn his attention to the twin pillars of Classicism – property and contract. It is here that he addresses what he calls revisionist historians’ understanding of Classicism. Some revisionist historians, among whom Wiecek singles out Howard Gillman[11], argue that Classicism was primarily concerned with preventing class legislation. Class legislation was a shorthand term for laws that primarily benefited only one group in society and primarily burdened another group. According to the revisionist interpretation, class legislation was especially repugnant since it violated the central constitutional tenet of equality and the resulting principle that, between groups with conflicting interests, the state should remain neutral. Wiecek argues that hostility to class legislation certainly formed one part of Classicism’s ideology but that it fails to explain the whole. Likewise, Wiecek rejects the idea of some legal theorists that legal decisions can be explained only as political and result-oriented. Wiecek seeks to build a bridge between various scholars’ interpretations of Classicism. Thus, at once, Wiecek demands that Classicism be taken seriously as a coherent jurisprudence, while at the same time disagreeing with the scholarship that refuses to recognize the inherently conservative ideology of Classicism.

Wiecek divides Classicist constitutional adjudication into three chronological stages. The first (1886 to 1905) marked the ascendancy of substantive due process and

liberty of contract. The next period (lasting until the First World War) saw Classicism as intermittently challenged, and the final period (from the First World War to the 1930s) saw the Supreme Court regressing to the dogma of Classicism but continually challenged, both internally and externally, as it did so. Wiecek makes a strong case that as a complex, industrial economy continued to develop, Classicism remained mired in an earlier world – a jurisprudential anachronism that left law unconnected to the realities of twentieth-century life. Equally fatal was the law’s growing incoherence. The stream of Supreme Court precedents no longer could be reconciled with one another and Justices Holmes and Brandeis laid the foundations for a different legal order. From the academic corner, legal progressives and later the Legal Realists provided potent and consistent criticisms of Classicism.

Wiecek views the death of Classicism as occurring in 1937-1938, and posits that these years were experienced as, if not actually representative of, a sudden and dramatic constitutional revolution. Wiecek carefully maneuvers between the traditional understanding of the change in Supreme Court jurisprudence as occurring in 1937, as a response to Roosevelt’s Court-packing plan, and newer scholarly interpretations best exemplified by Barry Cushman’s works[12]. Cushman questions whether there was a jurisprudential change in 1937, as well as what effect, if any, the Court-packing plan had on the Court’s decisions. Cushman thus argues that the Court’s jurisprudence slowly unraveled and that, if there was any switch, it occurred with *Nebbia*. *New York* (1934)[13], not in later cases. Wiecek seems to search for an eminently reasonable middle ground, finding that Classicism had began its decay, and that the Court had began to dismantle classical jurisprudence, before 1937, but he concludes that 1937 constituted the final phase of the revolution in the Court’s jurisprudence, with contemporaries viewing it as such. Yet as other scholars have shown, Classicism did not necessarily meet its demise in the late New Deal. Rather, Classicism may have metamorphosed into other forms. We will have to wait until Wiecek’s next book to discover whether in his opinion Classicism has a radioactive half life.

Wiecek’s discussion of the rise and fall of Classicism may be more illuminating as a history of the Supreme Court than as a description of late-nineteenth and early-twentieth century law or legal thought in general. For instance, in a section of the book discussing state court decisions (pp. 126-133), Wiecek argues that state courts expounded the night watchman state and a jurisprudence of laissez-faire. Wiecek writes, “[I]n the closing decades

of the nineteenth century, state courts resisted legislative policy initiatives. State judges, in one scholar's opinion, 'competed with one another for the starkest application of freedom of contract and the truest belief in laissez-faire ideology.' (p.127)[14]. The New York Court of Appeals is cited as a perfect example. In 1885, in *In re Jacobs*[15], that court struck down legislation prohibiting the manufacture of cigars in tenement houses. The Court handed down a decision that embodied every element of Classicism. Yet, the facts that gave rise to *Jacobs* are complicated and one may not be able to generalize about the ideology of the New York Court of Appeals from *Jacobs* alone, in light of a large number of decisions inconsistent with its reasoning and result. Indeed, in the twenty years following *Jacobs*, the New York Court of Appeals handed down many decisions that not only upheld reform-minded legislation in the area of housing, food purity, and child labor, but did so using reasoning that was anything but formalist. It must be remembered that the notorious case of *Lochner v. New York* (1905) [16], which galvanized critics of Classicism, went to the United States Supreme Court after the New York Court of Appeals had upheld the maximum hours law for bakers at issue in that case. Neither *Jacobs* nor *Lochner* was an anomaly for the New York Court of Appeals. In the same way that that court cannot be labeled as classicist, it can not be labeled as progressive – indeed, the labels may tell us little, but rather may erase the complexity of the historical and jurisprudential record. The very nature of litigation, brings into contact two opposing legal positions, as well as a myriad of facts, and each appeal to a higher court means that the law was contested enough that one party was willing to test it. In law, there is dialogue everywhere – between courts and attorneys, between attorneys, between attorneys and the press, between courts and the public, between courts and the legislature, and between lower and higher courts. Thus, the very site of law is contested. This is not meant as a criticism of *The Lost World of Classical Legal Thought*, only as a suggestion that Classicism may be more deeply textured, less monolithic and dominant when moving one's attention away from the Supreme Court.

For some time, legal scholars have identified Legal Realism as something less than a coherent intellectual movement and more akin to a mood. Early in this book, Wiecek tells us that formalism was an ideology, a structure of thought, a legal consciousness, a mentalite, and a coherent body of thought. Could the story of Classicism be told differently if one began to think of it as a loose movement, more like Realism, than as a coherent

body of thought? One might even reach the point where Classicism could only be understood by what came before and after it. Perhaps, it is possible to understand jurisprudential movements as in dialogue with one another, informing and reflecting each other.

The Lost World of Classical Legal Thought is deftly written, thoroughly enjoyable, and a book well worth reading. It will undoubtedly become an important resource for both students and scholars, and will serve as an excellent book for the law-school classroom. Wiecek's appendix (pp. 253-277), a detailed historiography of Classicism, is an absolute must for those working in the field. Wiecek, however, faces a difficult dilemma –he wants to tell a cohesive and chronological story about the development of American law and the role that Classicism played. Yet as Wiecek recognizes, the movement of law is uneven. The development of Classicism, what it meant, how it worked in the multitude of courts (local, state, and federal), and why it arose at a specific historical moment, may be so complex, so inconsistent and present such a vast multiplicity of discourses that it defies general description.

NOTES

[1]. See John Henry Schlegel, "Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing About Jurisprudence, High Culture and the History of Intellectuals," *Buffalo Law Review* 45 (1997): 277.

[2]. Paul Kens, "The Source of Myth: Police Powers in the States and Laissez-Faire Constitutionalism 1900-1977," *American Journal of Legal History* 35 (1991): 70; Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History* 72 (1985): 63.

[3]. 1 Cranch 137 (1803).

[4]. 6 Cranch 87 (1810).

[5]. William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994).

[6]. Drew Gilpin Faust, *James Henry Hammond and the Old South: A Design for Mastery* (Baton Rouge: Louisiana State University Press, 1982).

[7]. William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

- [8]. Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992).
- [9]. Novak, *People's Welfare*, 247.
- [10]. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).
- [11]. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (Durham: Duke University Press, 1993).
- [12]. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).
- [13]. *Nebbia v. New York*, 291 U.S. 502 (1934).
- [14]. quoting, Aviam Soifer, "The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1881-1921," *Law and History Review* 5 (1987): 254.
- [15]. *In re Jacobs*, 98 N.Y. 98 (1885).
- [16]. *Lochner v. New York*, 198 U.S. 45 (1905).
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