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FORUM:
ONCE MORE UNTO THE BREACH: LATE NINETEENTH-
CENTURY JURISPRUDENCE REVISITED

James Coolidge Carter and Mugwump Jurisprudence

LEWIS A. GROSSMAN

When James Coolidge Carter died at age seventy-seven in 1905, a front page article in the *New York Times* declared, "It was admitted everywhere that he possessed one of the most thoroughly equipped legal minds which this country ever produced." His friend Congressman William Bourke Cockran eulogized him on the floor of the United States House of Representatives as "a man recognized all over the world as the leader of the American bar." Lawyer and diplomat Joseph H. Choate, another longtime friend, remarked in his memorial address at the Association of the Bar of the City of New York that Carter "had become at the time of his death one of [this nation's] best known and most valued citizens."¹

These encomiums cannot simply be dismissed as sentimental praise of the recently departed. Carter was, in fact, an extremely distinguished and

1. "James C. Carter Dies After Brief Illness," *New York Times*, 15 Feb. 1905; "Tribute to J. C. Carter by Cockran in House," *New York Times*, 16 Feb. 1905; Joseph H. Choate, "Memorial of James C. Carter," in *Association of the Bar of the City of New York: Annual Reports* (1906), 120.

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influential figure in the final decades of the nineteenth century, possibly the most famous lawyer in the country. President Grover Cleveland likely would have appointed him Chief Justice of the United States if not for concerns about his health.² He was a national leader in the areas of legal practice, jurisprudence, and legal and political reform, and he built important intellectual and personal bridges between these fields.

Carter was perhaps the most respected appellate advocate in the nation. He argued approximately three dozen matters before the Supreme Court, including some of the most important cases of the Gilded Age.³ He also achieved distinction among practicing lawyers for his leadership in professional associations and debates over law reform. He served as president of the American Bar Association, the New York State Bar Association, and the Association of the Bar of the City of New York. From within the last of these organizations, he led the successful fight against the efforts of his nemesis, David Dudley Field, to replace New York State's decisional private law with a civil code. Codification was one of the most widely discussed legal reform issues during the 1880s, and Carter's name became almost synonymous with the anticodification position.

As a jurisprudential writer, Carter was the preeminent American champion of historical jurisprudence, an important strain of Gilded Age legal thought that has recently gained the attention of a few scholars after being neglected for many years.⁴ To advance his struggle against codification, Carter set forth ideas similar to those of Friedrich Karl von Savigny, the

2. On Carter's fame and reputation, see George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York* (Boston: Houghton Mifflin Company, 1970), 173; James Grafton Rogers, *American Bar Leaders: Biographies of the Presidents of the American Bar Association, 1878-1928* (Chicago: The Lord Baltimore Press, 1932), 81. On Carter's consideration for the Supreme Court, see Theron G. Strong, *Landmarks of a Lawyer's Lifetime* (New York: Dodd, Mead and Company, 1914), 281; Martin, *Causes and Conflicts*, 173; "James Coolidge Carter" (unattributed speech in the Irving Club Collection, Special Collections, Hoskins Library, University of Tennessee, Knoxville), 9. See also "The Man for Chief Justice," *New York Times*, 10 Apr. 1888.

3. Among the cases Carter argued were *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290 (1896), and *U.S. v. Joint Traffic Association*, 171 U.S. 505 (1897), two important early interpretations of the Sherman Antitrust Act; *Smyth v. Ames*, 169 U.S. 466 (1898), which established substantive due process limits on the legislative power to set railroad and utility rates; and *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895), which declared the personal income tax unconstitutional. In *Pollock*, Carter actually argued on behalf of the Continental Trust Company, the appellee in *Hyde v. Continental Trust Co.*, 157 U.S. 654 (1895). The Supreme Court heard *Hyde* simultaneously with *Pollock* and decided them on identical grounds, but it reported them separately. The cases were formally consolidated on rehearing and reported as *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. 601 (1895).

4. Roscoe Pound wrote extensively about the historical school, which in his eyes "rul[ed] almost uncontested during the latter half of [the nineteenth century]." Roscoe Pound, *Interpretations of Legal History* (New York: The Macmillan Company, 1923), 10. Subsequent

renowned German historical jurist. Like Savigny, Carter equated the unwritten law with the evolving customs of the people. He argued that common law judges, instead of making law, found the basis for their decisions in "the social standard of justice, or from the habits and customs from which that standard itself has been derived."⁵ Statutory enactments, by contrast, often conflicted with custom, or came to do so as custom changed while the written law remained static. In Carter's view, legislation contrary to custom was not only futile, but promoted grave mischief as the people strove to evade its enforcement. Therefore, he contended that the regulation of private affairs should remain primarily the province of unwritten law. Although he never taught at a law school, Carter was, at the time of his death, scheduled to present these jurisprudential theories in a major series of lectures at Harvard Law School, where he was an influential and active alumnus.⁶

Finally, Carter was also one of the nation's leading municipal reformers. He was a member of the legal team that, in 1876, brought down New

scholars of American Gilded Age jurisprudence have tended to focus on the "classical" structure of the era's legal thought, rather than historical jurisprudence. See, e.g., William M. Wiecek, *The Lost World of Classical Legal Thought* (New York: Oxford University Press, 1998); Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940," *Research in Law and Sociology* 3 (1980): 3–24; Elizabeth Mensch, "The History of Mainstream Legal Thought," in *The Politics of Law: A Progressive Critique*, ed., David Kairys, 2d ed. (New York: Random House, Pantheon Books, 1990), 18–21; Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 9–31 (hereafter cited as *Transformation II*); Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983): 1–53. Recently, however, some studies have returned to the importance of historical modes of jurisprudence in the late nineteenth century. See, e.g., Stephen A. Siegel, "Historism in Late Nineteenth-Century Constitutional Thought," *Wisconsin Law Review* 1990: 1431–1547; William P. LaPiana, "Jurisprudence of History and Truth," *Rutgers Law Review* 23 (1992): 519–59. Cf. Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review* 41 (1989): 805–15.

5. James Coolidge Carter, "The Ideal and the Actual in the Law," in *Report of the Thirteenth Annual Meeting of the American Bar Association* (1890), 225.

6. The lectures were published posthumously in 1907 as a book, *Law: Its Origin, Growth, and Function* (New York: G. P. Putnam's Sons, 1907). Carter also presented his jurisprudential theories in *The Proposed Codification of Our Common Law* (New York: Evening Post Job Printing Office, 1884), no. 1183 of *Nineteenth-Century Legal Treatises* (Woodbridge, Conn.: Research Publications, 1984, micro-fiche); *The Provinces of the Written and the Unwritten Law* (New York: Banks and Brothers, Law Publishers, 1889), no. 2423 of *Nineteenth-Century Legal Treatises*; and "The Ideal and the Actual in the Law." On the similarities between Carter and Savigny, see Mathias Reimann, "The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code," *American Journal of Comparative Law* 37 (1989): 95–119. Carter's activities as a Harvard Law School alumnus are discussed in William P. LaPiana, *Logic and Experience* (New York: Oxford University Press, 1994), 12–13.

York City's notorious political boss William Tweed by successfully prosecuting a civil suit by the state against him for corruption and graft. Later, Carter was president of the City Club, an important reformist association dedicated to extirpating party-based corruption from New York City's government. He was also a founder and president of the National Municipal League, which pursued a similar agenda on the national level. As an organizer of the nonpartisan Citizens' Union, he was one of the principal supporters of reformist candidates for the New York City mayoralty, and he was himself prominently mentioned as a potential candidate for that office.⁷

Carter deserves much more attention than he has received from scholars, not only because of his considerable influence as an individual, but also because he exemplified a patrician political culture to which many Gilded Age legal figures belonged, a political culture I will designate with the label *Mugwump*.⁸ A large number of elite urban lawyers were Mugwumps, as were many elite law professors. Although Carter's avid jurisprudential interests distinguished him from most of his colleagues in the bar, and his ongoing practice experience and reform activism differentiated him from the Harvard Law School faculty, perhaps no person better illustrates the interwoven theoretical, political, and practical concerns of legal Mugwumpery.⁹

The Mugwumps were transitional figures, struggling to accommodate traditional modes of thought to the challenges of modernity. Not surprisingly, therefore, Carter's legal and political theories were characterized by a precarious synthesis of apparently inconsistent elements. He spun out extended arguments for limiting the role of legislation even as he acknowl-

7. See, for example, "For Mayor Against Tammany," *New York Times*, 26 Apr. 1894.

8. Only two article-length scholarly treatments of Carter's thought exist: M. J. Aronson, "The Juridical Evolutionism of James Coolidge Carter," *University of Toronto Law Journal* 10 (1953): 1-53, and Reimann, "The Historical School Against Codification." Other treatments of Carter have been sporadic and usually summary. See, e.g., Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York: Simon and Schuster, 1985), 403-5; LaPiana, *Logic and Experience*, 139-42; Bernard Schwartz, *Main Currents in American Legal Thought* (Durham, N.C.: Carolina Academic Press, 1993), 337-46, 353-63; James E. Herget, *American Jurisprudence, 1870-1970* (Houston: Rice University Press, 1990), 120-30; Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910," in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, Conn.: Greenwood Press, 1984), 51-52.

9. On the large Mugwump presence in the elite bar associations, see Gerald W. McFarland, *Mugwumps, Morals, and Politics, 1884-1920* (Amherst: University of Massachusetts Press, 1975), 40-42. On the Mugwumpery of law professors, see Grey, "Langdell's Orthodoxy," 35; G. Edward White, "Revisiting James Bradley Thayer," *Northwestern University Law Review* 88 (1993): 48-83. On the predominance of Mugwumps on the Harvard University faculty, see Robert Kelley, *The Transatlantic Persuasion* (New York: Alfred A. Knopf, 1969), 301. On Harvard's development as a school of full-time teachers and scholars, some with little practice experience, see William P. LaPiana, *Logic and Experience*, 14-22.

edged the increasing need for it in contemporary society. He incongruously seemed to embrace both a belief in natural law and a relativistic evolutionism. He layered views characteristic of the antebellum Jacksonian Democrats over a base of attitudes he inherited from their bitter rivals, the Whigs. For a long while, Carter was able to gather this melange of ideas and influences into a coherent, though complex, system of beliefs. Ultimately, however, the foundation of his jurisprudence, like that of Mugwumpery itself, began to crack under the weight of a rapidly changing and diversifying nation.

I. Mugwump Political Culture

Background

Defined narrowly, the Mugwumps were northeastern urban gentleman reformers who, in the 1884 presidential election, bolted the Republican Party to vote for Democrat Grover Cleveland because they considered James Blaine, his Republican opponent, to be a corrupt spoilsman. The *New York Sun* ridiculed these genteel rebels by calling them “Mugwumps,” a term derived from an Algonquin word meaning “great man” or “chieftain.” The nickname became popular among the bolters’ critics, and the bolters themselves ultimately embraced the label as one signifying their noble adherence to principle rather than party.¹⁰

The Mugwumps were overwhelmingly Anglo-Saxon Protestants, and many were descendants of old-stock New England families. Most had attended college, typically at elite schools such as Harvard and Yale, and this high educational status set them apart from the mass of Americans. The vast majority were professionals or entrepreneurs, and approximately one-quarter were lawyers. Although there were substantial variations of wealth among the Mugwumps, almost all were men in comfortable circumstances. In short, the Mugwumps existed in a privileged, exclusive subculture, and the word Mugwump almost inevitably assumed a cultural, as well as political, meaning. Today historians often use it to describe members of the Gilded Age urban gentry class without regard to their electoral behavior.¹¹

10. McFarland, *Mugwumps, Morals, and Politics*, 11; John G. Sproat, “The Best Men”: *Liberal Reformers in the Gilded Age* (New York: Oxford University Press, 1968), 126; John M. Dobson, *Politics in the Gilded Age: A New Perspective on Reform* (New York: Praeger Publishers, 1972), 111.

11. On religion, see McFarland, *Mugwumps, Morals, and Politics*, 183–84. On New England roots, see Richard Hofstadter, *The Age of Reform: From Bryan to F. D. R.* (New York: Knopf, 1955), 140. On education, see McFarland, *Mugwumps, Morals, and Politics*, 26; James McLachlan, “American Colleges and the Transmission of Culture: The Case of the

Representatives of the Mugwump type pursued an agenda of civil service reform, tariff reform, and sound money, an agenda often deemed by scholars to reflect a broader commitment to laissez-faire.¹² Their reformist program was based largely on their moralistic opposition to the capture of the political process by unscrupulous party bosses and nouveau-riche corporate plutocrats. In his great work, *The Age of Reform*, historian Richard Hofstadter suggested that the Mugwumps were motivated primarily by a selfish desire to regain the political influence and cultural authority they had lost to these rising figures, whom they viewed as crude upstarts. Subsequent scholars have variously embraced this "status resentment" thesis or rejected it for failing to recognize the Mugwumps' sincere dedication to the public welfare. But whether the Mugwumps focused primarily on advancing their own interests or those of the public, they viewed corrupt politicians and new men of wealth as their main obstacles.¹³

Carter's Mugwumpery

Like many members of the elite New York City bar, Carter was a Mugwump. He had been a loyal Republican until 1884, but that year, attracted to Cleveland's personal integrity and commitment to political reform, he joined the great bolt. Indeed, he led the Association of the Bar of the City of New York's campaign against Blaine. Thereafter, he maintained a steadfast nonpartisan stance, supporting candidates of any affiliation who were dedicated to resisting the power of entrenched parties and special interests. As noted by his colleague William Hornblower, "He never . . . became a

Mugwumps," in *The Hofstadter Aegis*, ed. Stanley Elkins and Eric McKittrick (New York: Knopf, 1974), 184, 190–93; McFarland, *Mugwumps, Morals, and Politics*, 204. On professions, see Gerald W. McFarland, "The New York Mugwumps of 1884: A Profile," *Political Science Quarterly* 78 (1963): 44; McFarland, *Mugwumps, Morals, and Politics*, 182–83. On wealth, see McFarland, "The New York Mugwumps," 48–49; McFarland, *Mugwumps, Morals, and Politics*, 25–26. On the cultural meaning of the label *Mugwump*, see McFarland, *Mugwumps, Morals, and Politics*, 1.

12. On civil service reform, see Dobson, *Politics in the Gilded Age*, 153–71; Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865–1883* (Urbana: University of Illinois Press, 1961). On free trade, see David M. Tucker, *Mugwumps: Public Moralists of the Gilded Age* (Columbia: University of Missouri Press, 1998), 26–37, 83, 92; Dobson, *Politics in the Gilded Age*, 149–50; Sproat, *The Best Men*, 172–82. On currency policy, see Tucker, *Mugwumps*, 59–72, 95–106; Sproat, *The Best Men*, 184–91. On Mugwumps and laissez-faire, see Sproat, *The Best Men*, 142–68, 206–8; Hofstadter, *Age of Reform*, 142; Tucker, *Mugwumps*, 59, 62, 83–84.

13. Hofstadter, *Age of Reform*, 137–43. An example of a work embracing the status resentment thesis is Hoogenboom, *Outlawing the Spoils*. Works rejecting the thesis include Tucker, *Mugwumps*, and McFarland, "New York Mugwumps." For a fine historiographical essay on the Mugwumps, see Geoffrey Blodgett, "The Mugwump Reputation, 1870 to the Present," *Journal of American History* 66 (1980): 867–87.

party man, but held himself at all times free to act as his sense of duty required in each successive political contest between the parties."¹⁴

Carter was almost the epitome of the Mugwump type. He was an old-stock Protestant whose family had settled in Massachusetts in the early seventeenth century. He was raised in New England (Lancaster, Massachusetts) and attended an elite northeastern university (Harvard College and Harvard Law School). Perhaps the only aspect of Carter's early life that deviated from the Mugwump paradigm was his economic background. He came from a large family of modest means, and it was a financial struggle for him to attend Harvard. Joseph Choate remarked that Carter "[came] into life with no advantages but his own natural gifts stimulated by poverty and the spur of necessity." Although other Mugwumps had faced such hardships, they were a small minority. Carter's family had long been socially prominent in his hometown of Lancaster, however, and this heritage of community leadership was typical of the Mugwump type.¹⁵

After law school, Carter spent the remainder of his productive life practicing law in New York City, a center of Mugwumpery. Like many other Mugwump lawyers, Carter resisted narrow disciplinary specialization and associated closely with professionals and intellectuals in a wide variety of fields. He maintained extensive social and professional contacts not only with gentry society in New York City, but also, through his Harvard connections and activities, with like-minded individuals in Cambridge-Boston, the Mugwumps' other main home. Among Carter's friends and correspondents were some of the leading lights of Mugwump culture, including E. L. Godkin, the editor of the *Nation* and the *New York Evening Post*; Charles Eliot, the president of Harvard University; Charles Eliot Norton, the distinguished scholar and editor of the *North American Review*; and Seth Low, the president of Columbia and independent mayor of New York City. Carter was a lifelong bachelor, and his social life apparently revolved almost entirely around the exclusive men's clubs to which many Mugwumps belonged.¹⁶

14. William B. Hornblower, "James C. Carter," *The Green Bag* 17 (1905): 684. For insight into Carter's affectionate support for Cleveland, see James Coolidge Carter to Grover Cleveland, 11 Nov. 1888, Cleveland Papers, Library of Congress.

15. Choate, "Memorial," 120. On the wealth and family backgrounds of the Mugwumps, see McFarland, *Mugwumps, Morals, and Politics*, 25–26, 35–36.

16. On Mugwump lawyers' interactions with intellectuals from other fields, see White, "Revisiting James Bradley Thayer," 62–63. On the geographic centers of Mugwumpery, see McFarland, *Mugwumps, Morals, and Politics*, 18–21; Hofstadter, *Age of Reform*, 139. Carter's biographical details are drawn primarily from "James Coolidge Carter," unattributed speech, 5; George Alfred Miller, "James Coolidge Carter," *Great American Lawyers* 8 (1909): 3–41; Rogers, *American Bar Leaders*, 80–85; Edwin DeTurck Bechtel, "James C. Carter" (notes for a lecture), 9 Mar. 1950, Harvard Law School Manuscripts Collection; Choate, "Memorial" 120–35; "James C. Carter Dies After Brief Illness," *New York Times*, 15 Feb. 1905; Obituary clippings, James Coolidge Carter file, Harvard University Archives.

Carter embraced all the core issues of genteel liberal reform, including civil service reform, free trade, and sound currency. His choice of foes was as typically Mugwump as his selection of friends. He directed his rancor primarily at party bosses, corrupt politicians, and self-aggrandizing tycoons. His disdain for the very rich merits special attention, for despite his modest origins, Carter himself became an extremely wealthy man by representing large corporations. At the time of his death in 1905, he was worth a million and a half dollars, an impressive fortune even on the scale of the generally affluent Mugwumps.¹⁷ The malice Carter frequently expressed for the wealthiest Americans may have been rooted in a version of the "status resentment" that, according to Richard Hofstadter, characterized the Mugwumps. The tone of his speeches and private correspondence suggests that he perceived the new breed of magnificently rich men to be not only more powerful than he, but also, in Hofstadter's words, "uneducated and uncultivated, irresponsible, rootless, and corrupt, devoid of refinement or any sense of noblesse."¹⁸

II. The Jacksonian Model and Its Limitations

Special Legislation and Plutocratic Tyranny

Most scholars who have studied Carter have made the error of asserting that he was motivated by a desire to thwart social welfare regulation and advance the interests of big business. Roscoe Pound, who clearly scorned Carter, began this trend by linking his ideas to judicial attacks on "modern social legislation." Later scholars followed suit. Benjamin Twiss remarked that Carter "furnishes a provocative example of the influence of [probusiness] bias on a really deep thinker." More recently, Matthias Reimann has opined that "Carter's protest against legislation was protest against infringement on the economic freedom of his wealthy clients." According to Morton Horwitz, "At bottom [of Carter's jurisprudence] was a long-standing fear of legislative intrusion into the distribution of wealth and privilege."¹⁹

Horwitz's assertion is correct, but not in the way he intended. Although

17. "Mr. Carter's Will," *New York Times*, 12 Mar. 1912. No more than about five percent of the Mugwumps were millionaires like Carter. McFarland, *Mugwumps, Morals, and Politics*, 25.

18. Hofstadter, *Age of Reform*, 141.

19. Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911): 601; Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942; New York: Russell and Russell, 1962), 179; Reimann, "The Historical School Against Codification," 116; Horwitz, *Transformation II*, 119. For similar comments on Carter, see also Roscoe Pound, "Common Law and Legislation," *Har-*

Carter strongly opposed redistribution of wealth by the legislature, he found the upward variety of redistribution to be more prevalent and objectionable than the downward sort. He frequently condemned the excessive wealth of the very rich, their corrupt control of the government, and their use of this control to exploit the working class and poor. In a letter to Harvard president Charles Eliot, for example, Carter condemned the fact that "the great mass of our wealthy people have by degrees become combined to acquire and use the political powers of the nation for the purpose of making money for themselves."²⁰

Scholars who have wrongly characterized Carter as having a probusiness bias belong to a long tradition of interpreters of Gilded Age legal thought. For much of the twentieth century, the prevailing portrait of late nineteenth-century jurists was painted by progressive historians. They depicted proponents of laissez-faire constitutionalism as servants to a corporate plutocracy, grafting their favored economic principles onto American law in order to suppress popular demands for just social legislation.²¹

Today, however, few legal historians completely embrace the progressive interpretation of Gilded Age jurisprudence. Since the 1960s, with Alan Jones's seminal articles on Thomas Cooley, legal scholarship about the period has come to be dominated by revisionists such as Jones, Charles McCurdy, Michael Les Benedict, and Howard Gillman, who perceptively link the laissez-faire thought of the late nineteenth century to antebellum Jacksonian ideals of government neutrality and equality under the law. These historians argue that Gilded Age jurists, like their Jacksonian predecessors, did not oppose regulation per se, but rather "special legislation" or "class legislation" that promoted the interests of particular individuals or groups, rather than the common good. According to this thesis, legislation favoring the wealthy was as objectionable to Gilded Age jurists as legislation favoring the working class.²²

vard Law Review 11 (1898): 382 n. 3, 388 n. 1, 396 n. 2, 404 n. 6; Roscoe Pound, review of *Law: Its Origin, Growth, and Function*, by James C. Carter, *Political Science Quarterly* 2 (1909): 318–19; Sidney Fine, *Laissez Faire and the General-Welfare State* (Ann Arbor: University of Michigan Press, 1969), 164. Perhaps the only scholar to recognize that Carter should not be neatly pigeonholed as a probusiness conservative is Robert Gordon, who has written, "A leading Mugwump in the '80s, Carter turned into a leading, though relatively conservative, Progressive in the '90s." Gordon, "Fantasies and Practices," 51–52.

20. James Coolidge Carter to Charles Eliot, 1 June 1903, Eliot Papers, Harvard University Archives (hereinafter cited as Eliot Papers).

21. See, e.g., Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), 115–35; Arnold Paul, *Conservative Crisis and the Rule of Law* (Gloucester, Mass.: Peter Smith, 1960); Max Lerner, "The Supreme Court and American Capitalism," *Yale Law Journal* 42 (1933): 669.

22. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, N.C.: Duke University Press, 1993); Michael Les

Although the problem of special legislation was central to late nineteenth-century legal thought, the revisionists' use of the term *Jacksonian* to describe jurists of that era is not always apt. The antebellum Jacksonians believed that the main threat to liberty was the capture of the government by a financial aristocracy. By contrast, many of the Gilded Age individuals discussed by the revisionists primarily feared popular forces. Carter and many other Mugwumps, however, really did echo the Jacksonians by focusing their wrath on special legislation benefiting moneyed interests. As Carter remarked, "Many complain—none more than I—of schemes, such as protective tariffs, bounties, and subsidies, by which a government confers favours upon classes of persons which it cannot confer upon all alike and by which the greater part of the burdens of taxation are shifted to the shoulders less able to bear them."²³ As discussed below, Carter was much less likely to oppose government measures designed to ease the plight of the working class.

Carter's statements in support of free trade, a cause he shared with the Jacksonians, dramatically illustrate his own almost obsessive concern about the machinations of industrial magnates and their political hirelings. He believed that the Republican and Democratic parties were both "controlled by an enormous aggregation of interests which think themselves dependent upon a protective tariff." Addressing the duty on coal and iron, Carter asked, "What was the object of that duty? . . . The reason of it was to make those who happened to have coal and iron, a little wealthier than they were before. The reason was to make those men who were worth \$100,000 in coal and iron worth \$200,000 at one stroke of the pen."²⁴

Carter was outraged by the way the protective tariff effectively shifted wealth from the general public to an affluent few. "To tell an individual that he shall not buy this or that kind of goods in England, France, or Germany, and to compel him to buy these goods at a greatly increased price from particular persons in this country, is to give to such persons an enormous monopoly, and to lay the rest of the country under the heaviest taxation for

Benedict, "Laissez-Faire and Liberty: A Reevaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985): 293–331; Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897," *Journal of American History* 61 (1975): 970–1005; Alan Jones, "Thomas M. Cooley and the Michigan Supreme Court," *American Journal of Legal History* 10 (1966): 97–121; Alan Jones, "Thomas M. Cooley and Laissez-Faire Constitutionalism: A Reconsideration," *Journal of American History* 53 (1967): 751–71.

23. Carter, *Origin, Growth, and Function*, 342.

24. "James C. Carter on Excise Question," *New York Times*, 7 Mar. 1904; "Let Congress Act Speedily," *New York Times*, 4 March 1894.

their benefit." In attacking the tariff and other examples of "private enrichment by public bounty," Carter asked, "How is it possible for the masses of the people and the ranks of labor to behold the sudden acquisition of great fortunes in ways widely removed from honest industry without suspecting that by some method the fruits of their labor have been diverted from them, and without becoming dissatisfied, restless, and uneasy at what they regard as an unequal distribution of the fruits of the Nation's industry[?]"²⁵

Carter employed similar language in his impassioned oral argument before the United States Supreme Court in favor of the federal income tax. He denounced "the growing concentration of large masses of wealth in an ever diminishing number of persons." He decried how the "wealthy and powerful classes" used their power over the legislative and judicial processes to ensure that "the principal burdens of taxation [were] borne by the poor." These provocative statements were not simply rhetorical flourishes on behalf of a client; Carter genuinely supported the income tax.²⁶

The Mugwump Battle against the Code

In light of Carter's and other Mugwumps' concerns about special legislation favoring wealthy interests, it is interesting to examine the rhetoric of the successful campaign against the New York Civil Code that the Association of the Bar of the City of New York waged under Carter's direction.

David Dudley Field, one of three code commissioners appointed by the New York legislature in 1857, drafted the bulk of the civil code. After the commission presented the civil code to the legislature in 1865, Field spent many years fruitlessly lobbying for its adoption. Both the assembly and the senate voted to enact the code in 1879 and 1882, but each time the governor vetoed it. Undaunted, Field lobbied for the passage of the civil code annually throughout the 1880s.²⁷

During this decade, Carter served as the coordinator and main spokesperson for the forces opposing codification. The nerve center of the anti-codification campaign was the Association of the Bar of the City of New York. The Mugwumps figured prominently in the 1870 founding of this

25. "James C. Carter on Excise Question," *New York Times*, 7 Mar. 1904; "J. C. Carter Says Halt Republican Degeneracy," *New York Times*, 18 Aug. 1904.

26. "Hyde v. Continental Trust Co.," *Argument of Mr. James C. Carter for the Appellees*, (New York: Albert B. King, Printer, 1875), 12–13, 14 (hereafter cited as Hyde Argument), no. 51,849 of Nineteenth-Century Legal Treatises. On Carter's support of the tax, see James C. Carter to Richard Olney, 29 April 1895, Olney Papers, Library of Congress.

27. Alison Reppy, "The Field-Codification Concept," in *David Dudley Field: Centenary Essays Celebrating One Hundred Years of Legal Reform*, ed. Alison Reppy (New York: New York University School of Law, 1949), 36–42; Daun van Ee, "David Dudley Field and the Reconstruction of the Law" (Ph.D. diss., The Johns Hopkins University, 1974), 331–32.

organization, and by 1884 at least fifty-three of the most politically active Mugwumps belonged to it, five were on its executive committee, and Carter was its president. There almost certainly were numerous additional, less prominent, bolters in the association, and many members who were Democratic or Republican party loyalists had patrician reform sympathies. The leading Mugwump newspaper in New York City, the *Evening Post*, published by Carter's friend E. L. Godkin, repeatedly editorialized against the civil code. The leading Mugwump magazine, Godkin's *Nation*, printed a lengthy anticodification essay by Carter.²⁸

Morton Horwitz suggests that the opponents of the code may have feared its progressive aspects. In fact, the anticodification pamphlets produced by the city bar association hinted that the code was a plot by plutocratic interests to shape the law in their favor. For example, George H. Adams charged that "the Code in no wise limits in any respect the persons or corporations who may create a trust, or who may become trustees of a trust[.]" J. Bleecker Miller attacked the code for allowing "the formation of corporations for any purpose with such undefined powers and duties on the part of its officers toward the public and towards the stockholders." He continued, "[I]f we adopt this Civil Code, we will . . . certainly have, first, a great increase of the power of rich and unscrupulous men, acting especially through corporations, and then a socialistic reaction."²⁹

The charge that drew the most attention was George L. Rives's assertion that the code's provisions favored elevated railways, most notably by making them immune to suit for depriving property owners of light and air. Rives was a model of the Mugwump type—a New York City lawyer educated at Columbia and Cambridge who was extremely active in reform politics, served in the administration of President Grover Cleveland, and

28. On Mugwumps in the bar association, see McFarland, *Mugwumps, Morals, and Politics*, 40–41. The list of Mugwumps from which McFarland draws his statistics is by no means complete. It is comprised primarily of men active enough in Mugwump political activities to be named in newspapers. *Ibid.*, 179–81. On reformist sympathies of non-Mugwumps in the bar association, see "The Judicial Nominations," *New York Times*, 22 Oct. 1898. See generally Martin, *Causes and Conflicts*. One of the many anticodification editorials in the *Evening Post* was "The Field Code," *New York Evening Post*, 4 Apr. 1885. Carter's contribution to the *Nation* was "The Proposed Codification of Our Common Law," *Nation*, 14 Feb. 1884, 147–48.

29. Horwitz, *Transformation II*, 118–19; George H. Adams, *The "Trusts" and the Civil Code: An Examination of the Provisions of the Proposed Civil Code as Affecting "Trusts," or Trust Combinations in Business* (New York: The Association of the Bar of the City of New York, 1888), 5, no. 791 of Nineteenth-Century Legal Treatises; J. Bleecker Miller, "Corporations Under the Proposed Civil Code," in *Association of the Bar of the City of New York, Fourth Annual Report of the Committee to "Urge the Rejection of the Proposed Civil Code"* (New York: Evening Post Job Printing Office, 1884), 90, 91, no. 785–86 of Nineteenth-Century Legal Treatises.

belonged to a variety of gentlemen's clubs. In his pamphlet *Torts Under the Code*, Rives focused on the ways in which the code appeared to relieve "the great railroad corporations" from liability to adjoining property owners, as well as to injured passengers, employees, and bystanders.³⁰

To fully understand the animus with which Carter and his allies from the Association of the Bar of the City of New York attacked the civil code, it is necessary to understand their feelings about David Dudley Field, the primary author. One of the most illuminating facts about Carter and Field's rivalry, rarely noted by legal historians, is that their fight over codification was only one battle in a broader war between the two men.³¹

The rift between Carter and Field probably developed in the late 1860s because of Field's representation of financiers Jim Fisk and Jay Gould in their fight with Cornelius Vanderbilt over control of the Erie Railroad. During this sordid confrontation, Fisk and Gould employed such tactics as bribing state legislators and placing Tammany Hall boss William Tweed on the Erie board of directors to ensure friendly treatment by Tammany judges. These judges repeatedly granted Field's requests for injunctions and for the appointment of Tweed loyalists, including William Tweed, Jr., as receivers. Boston Mugwump Charles Francis Adams condemned this spectacle as an "extraordinary perversion of the process of law." He, his brother Henry, E. L. Godkin, and other Mugwump commentators publicly savaged Field for his role in the Erie wars. The Erie episode impelled Carter and other reform-minded lawyers in 1869 to begin organizing the Association of the Bar of the City of New York in hopes of improving the moral character of lawyers and judges.³²

The first direct public confrontation between Carter and Field occurred in 1875, when Carter, along with Wheeler Peckham and Charles O'Connor,

30. George L. Rives, *Torts Under the Code: An Examination into the Provisions of the Proposed Civil Code Relating to the Laws of Torts, With an Enquiry Into the Effect of the Code Upon Litigation Against The Elevated Railways* (New York: Evening Post Job Printing Office, 1885), 19–24, no. 787 of Nineteenth-Century Legal Treatises. This charge was raised and debated extensively in popular newspapers. See, e.g., "A Code With a Purpose: More Help for the Elevated Railroads," *New York Times*, 20 June 1882; Editorial, *New York Evening Post*, 6 May 1884. Information on Rives is drawn from "Mr. Gilroy's Objection," *New York Times*, 20 Nov. 1896; "George L. Rives, Noted Lawyer, Dies," *New York Times*, 19 Aug. 1917.

31. Perhaps the only recent scholar to even mention the prior interactions between Carter and Field is Mathias Reimann. See Reimann, "The Historical School Against Codification," 113–14.

32. Charles Francis Adams, "The Erie Railroad Row Considered as an Episode in Court," *American Law Review* 3 (1868): 41. See also van Ee, "David Dudley Field," 221–52; Martin, *Causes and Conflicts*, 3–15, 33–34, 253–63; Maury Klein, *The Life and Legend of Jay Gould* (Baltimore: The Johns Hopkins University Press, 1986), 76–98; Leo Hershkowitz, *Tweed's New York: Another Look* (Garden City, N.Y.: Doubleday, Anchor Press, 1977), 231–32.

represented the state of New York in the highly publicized and successful civil suit it brought against Tweed to recover \$6 million in stolen public funds. Field represented Tweed. There was clearly no love lost between the two lawyers. In his summation, Carter criticized Field's use of "every device of technicality for the purpose of obstructing the progress of justice and leading to an erroneous result." He taunted his counterpart for being known around the world not for his legal reforms, but "in connection with the great frauds which have disgraced the civilization of our time, and in connection with the person mainly and chiefly responsible for them [Tweed]."³³

To Carter and like-minded attorneys and journalists, Field thus embodied two grasping and dissolute forces that were conspiring to capture the government and legal system: corporate plutocrats and city bosses. Indeed, Field was perceived to be an important link between the two. Rives's allegation that Field drafted the code to favor elevated railroads therefore had a certain plausibility, even if it was in fact nonsense. The anticodifiers' suspicions were heightened by the fact that Field's client Jay Gould had, in 1881, gained control of the Manhattan Elevated Railroad through a series of morally questionable maneuvers. Even worse, Cyrus Field, David's brother, controlled another line, the New York Elevated. The *New York Times* opined, "As the proposed Civil Code was designed to include the laws affecting corporations, the use of the work of a man like Field . . . would have been somewhat analogous to the hiring of a Tombs 'shyster'—interested in procuring the freedom of imprisoned scamps of various degrees of criminality—to codify the criminal laws of the State."³⁴

Carter's Incomplete Embrace of Jacksonianism

It is clear that, like the Jacksonians before the Civil War, Carter and other Mugwumps feared the capture of the political process by wealthy interests. Nonetheless, Gilded Age gentry political culture should not be subsumed under the rubric of Jacksonianism, for there were critical differences between the Mugwumps and the antebellum Democrats.³⁵ Although they shared a desire to create a political and legal system insulated from ma-

33. "The Suit Against Tweed," *New York Times*, 8 Mar. 1876.

34. "A Code With a Purpose: More Help for the Elevated Railroads," *New York Times*, 20 June 1882. On control of the elevated railroads, see Klein, *Jay Gould*, 284–91.

35. G. Edward White stresses this point in "Revisiting James Bradley Thayer," 55–60. White uses the term "Brahmin gentry" rather than "Mugwump" to refer to Thayer's political culture. For the purpose of defining a political community with shared foundationalist assumptions, these labels are roughly synonymous, although the former refers to a New England elite centered around Boston, whereas the latter also encompasses comparable subcultures in other cities, such as New York and Philadelphia. *Ibid.*, 58 n. 40.

nipulation by the money power, they reached very different conclusions about how to structure that system. Consequently, the indiscriminate use of the label *Jacksonian* may muddle rather than clarify one's understanding of the elite legal thought of the late nineteenth century.

Consider, for example, the two political cultures' sharply contrasting attitudes toward working class political power. Jacksonianism was, above all, a people's movement. One of the Jacksonians' core principles was rule by the majority of free white men, regardless of wealth or education. As articulated by historian Harry L. Watson, they believed that "public questions should be decided by the public voice." They also insisted that a large portion of the citizenry was qualified to hold public office and should be given the opportunity to do so.³⁶

The Mugwumps, by contrast, displayed an unapologetic elitism. They viewed society as a hierarchy topped by a natural aristocracy of educated, public-spirited gentlemen like themselves. To preserve their traditional role as political, cultural, and moral leaders, the "best men" had to resist the influence, not only of self-seeking magnates, but also, in Carter's words, of "the unthinking and the vicious multitudes who crowd our cities."³⁷

Although Carter expressed concern about the plight of the urban masses, he also exhibited callous disdain for them. For example, he confessed that despite his opposition to the plutocrats' schemes to procure government favors at the expense of the working class, he expected laborers would "waste" and "mispend" any additional income they were permitted to keep. "When the workman has learned to exercise that self-restraint which will enable him to make good use of the entire product of his labour, he will have acquired at the same time the intelligence and the courage which will enable him to win it."³⁸

In light of his contempt for the capacities and character of the working class, it is not surprising that Carter strove to diminish its involvement in political affairs. In 1876, as a member of a commission on city government established by Governor Samuel Tilden, Carter authored a report recom-

36. Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: Farrar, Straus and Giroux, Noonday Press, 1990), 241. See also *ibid.*, 11, 103; Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief*, 1960 ed. (Stanford: Stanford University Press, 1957), 237-53; Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown and Company, 1945; paperback ed. 1953), 343-44.

37. James C. Carter, "President's Annual Address," *Proceedings of the Second National Conference for Good City Government and of the First Annual Meeting of the National Municipal League and of the Third National Conference for Good City Government* (Philadelphia: National Municipal League, 1895), 275. On Mugwump elitism and resistance to working class political power, see Hoogenboom, *Outlawing the Spoils*, 197; Sproat, *The Best Men*, 250-57.

38. Carter, *Origin, Growth, and Function*, 342.

mending that the expenditures of each municipality in New York be controlled by a board of finance elected only by those voters who paid more than a specified amount in property taxes or rent.³⁹ Later in life, Carter opined, "Jefferson's democratic principles assume the possession of a certain measure of intelligence, independence, and virtue in the people. This assumption was generally good in his time, and perhaps is generally good now, except in the cases of crowded and ill-conditioned populations. These are really not capable of self government."⁴⁰

The disconnection between the Mugwumps and the Jacksonians is also starkly illustrated by their differing positions on the issue of codification. The antebellum Democrats generally supported codification, and David Dudley Field himself was a leading Barnburner Democrat before he joined the Republican Party in the 1850s. Despite their concerns about the corruption of the political process by wealthy interests, the Jacksonians placed more trust in the political branches of government than in judges, especially unelected judges. They decried common law decisions as undemocratic usurpations of legislative power by an unelected aristocracy, and they condemned the common law itself as an incomprehensibly voluminous, mystifyingly intricate, and dangerously ambiguous feudal remnant.⁴¹

Conversely, Carter made defeat of the civil code his greatest cause. He was deeply distrustful of the men who enacted and enforced legislation and was a tireless advocate for the common law and for the indispensable role of judges. His position on codification actually echoed that of the antebellum Democrats' antagonists, the Whigs. They, like Carter, were strong supporters of the common law, urged the preservation of a powerful and independent judiciary, and, with some exceptions, fervently opposed codification.⁴² Thus, Carter's resistance to codification is a compelling example of his affinity to Whig, rather than Jacksonian, ideals.

39. *Report of the Commission Appointed by the Governor to Devise a Plan for the Government of the Cities* (24 Feb. 1877), reprinted in *New York Times*, 7 Mar. 1877 (hereafter cited as *Tilden Commission Report*). On Carter's authorship of this report, see Miller, "James Coolidge Carter," 13.

40. James Coolidge Carter to William Bourne Cockran, 12 Oct. 1898, Cockran Papers, New York Public Library (hereinafter cited as Cockran Papers).

41. On Jacksonian resistance to codification, see Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, Conn.: Greenwood Press, 1981), 158–63; Perry Miller, *The Life of the Mind in America* (New York: Harcourt, Brace and World, 1965), 108–9. On Field's Jacksonianism, see Schlesinger, *Age of Jackson*, 438, 463, 464; van Ee, "David Dudley Field," 114.

42. See Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979), 229–30; Cook, *The American Codification Movement*, 103–4, 180; Miller, *Life of the Mind*, 257.

III. Mugwump Whiggery

Unlike David Dudley Field, Carter probably did not have Democratic roots. He almost certainly migrated to the Republican Party from a starting point of Whiggery, as did most Mugwumps, especially those who were Yankee Protestant New Englanders with college degrees. Joseph Choate, who attended Harvard College with Carter in late 1840s, recalled, "Like all the young men of that day, he was a devoted admirer of [Whig leader Daniel] Webster." It is thus not surprising that certain aspects of Carter's world view, and that of other Mugwumps, appear to have derived from Whig traditions.⁴³

Consider, for example, the very similar elitist attitudes displayed by the Mugwumps and the Whigs. In contrast to the Jacksonians, with their leveling instincts, the Whigs generally resisted giving the working class a greater voice in government, either as voters or as public servants. In the words of historian Daniel Howe, the Whigs were heirs to a colonial "politics of deference," and they "made use of an old-fashioned elitist view of politics and society." They considered highly educated and well-off citizens to be the natural leaders of the republic. The Mugwumps clearly inherited this hierarchical outlook.⁴⁴

Another commonality between the Whigs and the Mugwumps was their antipartyism. The Jacksonians, who are often credited with inventing the modern political party, believed parties were not only inevitable in a free country, but also essential, because they permitted the popular majority to combine and defeat aristocratic forces. The Whigs, by contrast, often decried parties as "factions" pursuing their self-interest to the detriment of the common good. They considered parties to be inherently corrupt, especially when organized around mere loyalty rather than issues and values. The Mugwumps, as discussed below, echoed these antiparty sentiments almost exactly.⁴⁵

43. Choate, "Memorial," 121. On the Whig backgrounds of most Mugwumps, see Richard J. Ellis, *American Political Cultures* (New York: Oxford University Press, 1993), 110; Hoogenboom, *Outlawing the Spoils*, 193; McFarland, *Mugwumps, Morals, and Politics*, 39. For an analysis of the relationship between the New England Mugwump and Whig political cultures, see White, "Revisiting James Bradley Thayer," 55–60. On Whig predominance among Yankee Protestants, see Howe, *American Whigs*, 17. On Whig domination of the colleges, see Dorothy Ross, *The Origins of American Social Science* (New York: Cambridge University Press, 1991), 36. Massachusetts, Carter's home state, supported the Whig candidate in every presidential election from 1836 to 1852 and the candidate of the Whig predecessors, the National Republicans, in 1828 and 1832.

44. Howe, *American Whigs*, 31. On Whig elitism and resistance to political democracy, see also Watson, *Liberty and Power*, 219–20, 241, 245. Cf. Meyers, *Jacksonian Persuasion*, 7–8.

45. On the Jacksonians' embrace of party politics, see Watson, *Liberty and Power*, 5–6, 11–12, 173, 201. On Whig antipartyism, see Howe, *American Whigs*, 51–54. While hurling

These Whiggish features of the Mugwump outlook clearly helped shape Carter's legal and political theories. Another critical facet of the Whigs' ideology, their faith in government as an instrument to promote the public good, had a less obvious legacy among Carter and the Mugwumps. Nonetheless, as my conclusion shows, even this attitude colored Carter's thought in important ways.

Probably the most significant feature of American Whiggery embraced by the Mugwumps, however, was its moralism. John Gerring has pointed to the "moral order of Yankee Protestantism" as one of the key features of the Whigs' system of beliefs. Influenced by the Second Great Awakening and by Christian moral philosophers such as Brown University's Francis Wayland, the Whigs accepted immutable standards of ethical conduct based on the principle of avoiding, in Gerring's words, "selfishness, greed, and licentious behavior." Jacksonian political culture, by contrast, was relatively secular, uninfluenced by moral philosophy, and tolerant of the mores of the Irish and German immigrant communities, including their use of alcohol.⁴⁶

The Mugwumps shared the Whigs' focus on moral issues, as well as the substance of their ethics. They were, as college students, educated by the same moral philosophers from whom the Whigs drew inspiration. Although the Mugwumps' outlook became increasingly secular during their maturity in the age of Darwin, their ethical code survived the erosion of the religious foundation on which it originally rested. Like Whig morality, Mugwump morality was predicated on "repressing the base interests of self and promoting the welfare of others, the general welfare, and the republic."⁴⁷

It is impossible to understand Mugwump jurisprudence without grasping the importance of this ethical system to their world view. David M. Tucker, in his recent book, *Mugwumps: Public Moralists of the Gilded Age*, argues that the gentry reformers' chief distinguishing trait was their devotion to promoting the virtue essential to free government and a properly operating market economy. Many other scholars have recognized the cen-

antiparty invective at the Democrats, early Whigs sometimes claimed that they themselves did not comprise a party at all, but merely an association of concerned citizens. Even after they reconciled themselves to the concept of parties, most Whigs continued to oppose the notion of a party as a self-perpetuating power center based on the spoils system. *Ibid.*, 53–54. Howe specifically identifies the Mugwumps as the successors to the Whigs because of their similar antipathy to modern party organizations. *Ibid.*, 303.

46. Richard Gerring, "Party Ideology in America: The National Republican Chapter, 1828–1924," *Studies in American Political Development* 11 (Spring 1997): 87, 88. See generally *ibid.*, 87–96; Howe, *American Whigs*, 28; Watson, *Liberty and Power*, 194.

47. Tucker, *Mugwumps*, viii. On the influence of the antebellum moral philosophers on the Mugwumps, see Tucker, *Mugwumps*, 1–14.

trality of this moralism to Mugwumpery, although more than a few have, unlike Tucker, disparaged it as overfastidious self-righteousness.⁴⁸

Self-righteous or not, Carter never stopped voicing his own concerns about the moral condition of American society. Like other Mugwumps, his morality was built on a single core principle, namely avoiding self-interest. He deemed "human selfishness" to be the most ignoble of personal characteristics and the source of most unethical behavior in both the public and private spheres. Carter's disdain for self-regarding conduct and his desire to promote "public virtue and private morality" shaped almost every aspect of his jurisprudence.⁴⁹

IV. Legislators, Judges, and Public Virtue

The Problem with Politicians

The best-known aspect of the Mugwumps' ethical agenda was their crusade to cultivate selfless dedication to the common weal among public servants. Carter's conviction that judges were more likely than legislators to exhibit this characteristic was an important factor in his opposition to codification. Considering his view of legislators' morality, it is hardly surprising that he did not want the great body of private law turned over to them.

The members of the Legislatures of our own States are likely to be not the wisest, but the smartest only. Instead of having the public good at heart they often have only their own personal interests or ambitions, or they have been elected through the patronage and money of some powerful pecuniary interest and are faithful alone to that influence. Moreover, the pecuniary value which may lie in some special legislation is often so great that powerful private interests are found willing to pay prodigious sums to secure it, and corruption and bribery are practised to a frightful extent; the forces of corruption become organised by some skilful leader, expressively called a *boss*, who acquires a control of legislation greater than that enjoyed by many sovereigns.⁵⁰

Despite the surface similarity to antebellum Democratic rhetoric in this condemnation of special legislation, Carter's assertion that political party bosses orchestrated political corruption was completely foreign to Jacksonianism. The Mugwumps viewed the seemingly ineradicable party mechanisms established during the Jacksonian era as the main source of moral decadence in government. They bolted the Republican Party in 1884 be-

48. See generally Blodgett, "The Mugwump Reputation."

49. James C. Carter to Charles Eliot, 24 Dec. 1903, Eliot Papers; "The Suit Against Tweed," *New York Times*, 8 Mar. 1876.

50. Carter, *Origin, Growth, and Function*, 236–37.

cause they perceived James Blaine to be the embodiment of corrupt machine politics. Although many Mugwumps afterward maintained a nominal identification with one or the other party, independence was their keyword. As one historian explains, "Above all, they did not consider party loyalty the primary ideal to which a man should aspire. The dictates of their consciences mattered more to them than all the persuasions and seductions the party organization might offer." Carter himself repeatedly expressed great disdain for "the ordinary politicians . . . who surrender every principle at the call of party . . . interest."⁵¹

While reluctantly acknowledging that the "formation of general parties . . . is useful, or, at all events, inevitable" at the state and national levels, Carter denied that there was any acceptable place at all for political parties in municipal governance. His long experience with party-based urban corruption was perhaps the most important reason for his limited faith in the activist state. Like many Mugwumps, especially those in Tammany-dominated New York City, Carter was almost fanatical about ridding city government of the parties' pernicious influence. "What have [the parties] to do with municipal affairs?" he asked. "They have nothing properly to do with that; nothing whatever."⁵²

Carter and other Mugwumps had great disdain for the "spoils system," by which local party bosses distributed public offices and jobs to men who would pledge their electoral support to the party. The Mugwumps' relentless campaign to reform city government, through merit hiring and other means, was an effort to promote administrative expertise and efficiency, but it was also, as Carter emphasized, a "moral enterprise." He told one audience, "What is needed is the creation of a public sentiment that the delivery of Municipal Government into the hands of a band of politicians is all wrong. Then the advance of pure government will be resistless, for with corruption on one side and purity on the other, there can be but one outcome. . . ."⁵³

The Mugwumps' moralism, antipartyism, and elitism reinforced each other. Genteel reformers disdained the unqualified and self-serving men who, under the party patronage system, assumed offices that should have been filled by educated and virtuous individuals like themselves. The

51. Dobson, *Politics in the Gilded Age*, 109; James C. Carter to Charles Eliot, 19 May 1903, Eliot Papers.

52. Tilden Commission Report; *How Far Can Municipal Government be Divorced From National Party Lines: Report of Discussion Before the Nineteenth Century Club* (New York: Nineteenth Century Club, 1896), 6.

53. "James C. Carter's Idea of It," *New York Times*, 10 Feb. 1895; "Women Against the Tiger," *New York Times*, 3 Nov. 1894. On the moral aspects of municipal reform, see Frank Mann Stewart, *A Half Century of Municipal Reform: The History of the National Municipal League* (Berkeley: University of California Press, 1950), 156–57.

Mugwumps also condemned the urban masses who, instead of exercising their suffrage according to principle, sold their votes to party operatives in exchange for public jobs. Carter observed:

[T]here is the floating and unattached vote, which cares nothing about politics of any kind, cares nothing, indeed, about any interest in society, is destitute, in one sense, of public spirit. Your tramps, or floaters, of whom there are thousands in the city of New York; the lowest classes, the most ignorant classes of laborers, the foreigners who have just arrived here by thousands. . . . [Their] votes . . . are all in a certain sense *purchasable*.⁵⁴

Carter warned that as this web of corrupt bargains gave party politicians and their corporate sponsors control over urban votes and revenues, the ethical basis of the state and national governments would be undermined along with that of the municipal governments. "[I]t is absolutely impossible, if our cities should continue to be given over to corrupt plunder in the way they now are, for the Republic itself to maintain the institutions under which it has so long lived." The New York legislature maintained extensive control over the state's cities, and Carter observed that this centralization of authority simply "ma[d]e the fortunes of our principal cities the traffic of the lobbies" and enhanced the power of "corrupt cliques and rings . . . quick to perceive that in the business of procuring special laws concerning local affairs they could easily outmatch the fitful and clumsy efforts of disinterested citizens."⁵⁵

Thus, the state legislature, the very body that would have stewardship over Field's proposed code, was implicated in the corruption stemming from party domination of municipal affairs. Carter bemoaned how party control of legislators enabled corrupt interests to shape lawmaking. "I have little faith in the legislature. To freemen you can talk, but to slaves, what can you say[?] When the power is held by a boss, it is the boss you must move." National politicians were also embroiled in "this wretched spectacle of moral cowardice. . . . [The wealthy] absolutely control the organizations of the dominant party and the great mass of Senators and representatives are, first of all, the supporters of some particular pecuniary interest."⁵⁶

Carter asked, "How shall we get good government? . . . It comes to this: Have the right men in office. I mean those men who have sufficient ability to understand their duties and honesty enough to execute them properly."

54. *Report of Discussion Before the Nineteenth Century Club*, 8–9.

55. *Ibid.*, 19; *Tilden Commission Report*. For a discussion of similar contemporary assessments of the urban crisis, see Melvin Holli, "Urban Reform in the Progressive Era," in *The Progressive Era*, ed. Lewis L. Gould (Syracuse: Syracuse University Press, 1974), 133–35.

56. "Seth Low on Consolidation," *New York Times*, 26 Feb. 1896; James C. Carter to Charles Eliot, 1 June 1903, Eliot Papers.

He was appalled at the poor qualifications of the assemblymen and senators who drafted the states' laws. "When we consider the amount of the talent, skill and training which is called into requisition to satisfy those needs which are most immediately felt by individuals, as in business affairs[,] and those with which the learned professions are concerned, and compare it with that to which the all important task of framing our laws is entrusted, the spectacle seems almost ludicrous." He was even more outraged, however, by the legislators' immorality, their "engross[ment] with party and personal schemes" rather than with the public interest.⁵⁷

Therefore, it is little wonder that Carter told Godkin, "I can render no greater service in my day and generation than by defeating the various schemes of codification and other forms of over-legislation." Lawrence Friedman has correctly pointed out that Field's Civil Code was the product of an expert commission made up of legal elites, not of the legislature itself. Nonetheless, Carter worried that even if the code were acceptable as enacted (a doubtful outcome, in light of Field's questionable ethics), the legislature would inevitably amend it and make "[u]nnecessary and unwise changes . . . sought from personal and unworthy motives."⁵⁸

The Problem with Judges

Carter believed his efforts to defeat codification and generally discourage legislation would, if successful, reduce legislators' opportunities for mischief, but he almost certainly understood that victory in this struggle would not solve the problem of corruption. The judiciary would remain the primary expositor of New York's law, and Carter had ample reason to doubt the fitness of judges to play this role. In 1846, as part of the national Jacksonian-era movement to make the courts accountable to the people, New York State had revised its constitution to provide for the direct election of judges for eight-year terms. Consequently, the judges whom Carter want-

57. "Good Men Should be Elected," *New York Times*, 21 Dec. 1894; James Coolidge Carter, "Address of the President," in *Reports of the American Bar Association*, vol. 18 (Philadelphia: Dando Printing and Publishing Co., 1895), 226; *ibid.*, 229 (hereinafter cited as "1895 ABA Presidential Address").

58. James C. Carter to E. L. Godkin, 15 Nov. 1889, Godkin Papers, Houghton Library, Harvard University (hereinafter cited as Godkin Papers); Friedman, *A History of American Law*, 404-5; Carter, *Provinces*, 50. During the war over the proposed adoption of the New York Civil Code, Carter and his colleagues did not emphasize the shortcomings of legislators. This is hardly surprising, for they were trying to win over the New York legislature itself. Instead, the anti-codifiers generally focused on flaws in Field's draft and on the positive qualities of the common law and the courts. Later, when the struggle against codification appeared to have been won, Carter more openly questioned legislators' morality and qualifications.

ed to entrust with the development of the law were selected in the same manner as assemblymen and mayors.⁵⁹

Much of the bar believed that the direct election system gave party bosses excessive power over the courts. At the 1867 state constitutional convention, there was widespread sentiment, fanned by attorney delegates, to enhance the independence of judges by revoking the elective system, increasing the length of their terms, or both. The people of New York State ultimately approved an amendment to extend the terms of higher court judges from eight to fourteen years but rejected a proposal to give the governor the power to appoint judges with the advice and consent of the senate.⁶⁰

During the late 1860s and early 1870s, leading reformist lawyers frequently attacked judicial corruption, most prominently in connection with the aforementioned legal battle over control of the Erie Railroad. In 1871, a year after Carter helped found the Association of the Bar of the City of New York, the organization began working to promote the integrity and independence of the judiciary. First, it participated in a successful effort to defeat one of Boss Tweed's candidates for the state supreme court. Soon afterward, the association commenced an energetic campaign to remove dishonest judges already on the bench. It prepared a lengthy memorial to the state legislature condemning the "influence of corruption upon [the] official conduct and decisions" of many judges. This memorial triggered legislative proceedings leading to the impeachment and removal of two prominent Tammany Hall judges, George G. Barnard and John H. McCunn, and the resignation of a third, Albert Cardozo.⁶¹

Carter was a leading figure in two subsequent attempts by the city bar association to insulate the bench from corrupt party politics. In 1893, it organized a successful statewide campaign against the election of Judge Isaac H. Maynard to the court of appeals. Maynard, a Democrat, had allegedly tampered with the results of a state senatorial election when he was the deputy attorney general of New York. The association hosted a giant public meeting at Cooper Union, during which Carter implored the audi-

59. On judicial selection and tenure in New York, see J. Hampden Dougherty, *Constitutional History of New York State From the Colonial Period to the Present Time*, vol. 2 of *Legal and Judicial History of New York*, ed. Alden Chester (New York: National Americana Society, 1911), 167–91; Martin, *Causes and Conflicts*, 32, 85, app. A. During the first part of New York's history, state judges were appointed by a council of appointment, and all but inferior magistrates served during good behavior until mandatory retirement at age sixty.

60. Martin, *Causes and Conflicts*, 85–86, 107–9; Dougherty, *Constitutional History*, 178–89.

61. Martin, *Causes and Conflicts*, 83. See generally *ibid.*, 68–86; Hershkowitz, *Tweed's New York*, 225–32. Albert Cardozo was the father of future United States Supreme Court Justice Benjamin Cardozo.

ence to defeat Maynard at the polls. "Do this, and hereafter to the band of spoliation and of rings and bosses of the State you will create a monument and warning which they will hereafter in all time to come take notice of." Maynard was soundly defeated.⁶²

Five years later, Tammany boss Richard Croker declined to renominate Judge Joseph F. Daly for the supreme court because the judge had refused to make certain court appointments demanded by Croker. The bar association vigorously supported Daly's reelection on an independent ticket. Carter delivered speeches at two huge rallies. In a Carnegie Hall meeting, over which he presided, he warned:

There is a danger at all times that the political boss will nominate, even for a Judge, some man who will do his bidding or the bidding of his party, and when such a man is put upon the bench, he will carry out the unholy compact he has tacitly entered into, and the bench is degraded and justice imperiled. . . . Are the Judges of our courts to understand that their continuance in office depends upon their acquiescence in the personal or political demands of party machine leaders?⁶³

This time, the reformers' efforts failed; Croker's candidate won the election.⁶⁴

In light of Carter's decades-long fight against judicial corruption, and the uneven success of those efforts, it is worth considering whether he considered judicial, rather than legislative, control over the development of the law to be a positive good or simply the lesser of two evils. At times, Carter suggested it was the latter. He bemoaned "the occasional incompetency, and, alas! sometimes, but not often, the worse than incompetency, of our judges . . . the flagitious instances in which the mere creatures, or tools, of political factions or private interests have found places in the sacred seat of judgment." In a letter to William Bourke Cockran, he opined, "You and I know the imperfections which attach to this instrumentality [the judiciary], but it is the best we have, or can have."⁶⁵

Interestingly, however, Carter concluded on other occasions that there were many judges of high caliber, despite the bosses' control of the judicial selection process and the infamous episodes of corruption. Even in the midst of the Daly controversy, Carter acknowledged that many occupants of the New York bench were "[j]udges of the highest learning and ability and of perfect fidelity." In a letter to Governor Levi Morton concerning trial judges

62. "Thousands Against Maynard," *New York Times*, 27 Oct. 1893. On the campaign against Maynard, see Martin, *Causes and Conflicts*, 158–59.

63. "The Judicial Nominations," *New York Times*, 22 Oct. 1898.

64. On the campaign against Croker, see Martin, *Causes and Conflicts*, 167–68.

65. Carter, *Proposed Codification*, 115; James C. Carter to William Bourke Cockran, 2 Feb. 1892, Cockran Papers.

who might be promoted to the appellate bench, Carter reviewed the seven judges in the department encompassing New York City and observed, "I suppose all of them owe their positions pretty much to Tammany Hall, and I have been surprised at two things: first, that that organization should have selected such good men, and, second, that they should have exhibited so little subserviency to the power to which they are indebted for their places."⁶⁶

In this letter to Morton, Carter listed the preferred traits of an appellate judge as "first, what may be called professional qualifications; that is to say, the union of intellectual ability and discipline; and, second, personal character." While this is hardly an original statement regarding judicial qualifications, it is notable because these were the very characteristics the Mugwumps believed distinguished their own kind from other segments of society. Carter's implicit assumption that the best judges were men of the Mugwump type is revealed by his definition of "personal character." In his view, a judge graced with this quality not only based his decisions on principle rather than on "personal or political" motives, but also manifested a sort of patrician refinement. Carter faulted one judge for being "rough, imperious, and often inconsiderate . . . not a natural gentleman."⁶⁷

Carter had witnessed too much corruption, party loyalty, and ungentlemanly behavior on the bench to think that the New York judiciary fulfilled the Mugwump ideal. The federal and Massachusetts courts, with their appointive systems and life tenure, perhaps approached it more closely. A Boston Mugwump like James Bradley Thayer may well have been confident, as G. Edward White asserts he was, that the typical judge was a rational Brahmin gentleman.⁶⁸ It was more difficult to reach this conclusion in New York, however, where judges were the products of the rough-and-tumble politics of the party system. Even in New York, however, judges came nearer to the paradigm than did legislators, in Carter's opinion. Moreover, the city bar association's occasional victories in the sphere of judicial reform may have persuaded Carter that reform-minded lawyers, if properly organized, could exert substantial influence over the composition of the judiciary. Perhaps that is why he deemed the problems of incompetence and corruption on the bench to be "*curable* mischiefs." Carter believed that if attorneys embraced their duty of promoting improvement in the law, "[o]ur advice would be taken in the selection of judges, and we should select the best."⁶⁹

66. "The Judicial Nominations," *New York Times*, 22 Oct. 1898; James C. Carter to Governor Levi P. Morton, 19 Feb. 1895, Levi P. Morton Papers, Syracuse University.

67. James C. Carter to Governor Levi P. Morton, 19 Feb. 1895, Levi P. Morton Papers, Syracuse University.

68. White, "Revisiting James Bradley Thayer," 82.

69. Carter, *Proposed Codification*, 115; Carter, *Provinces*, 61.

V. The Common Law, Custom, and Mugwump Morality

Carter's greater affinity for the men who populated the bench than for those who served as legislators was an important reason why he struggled to keep private law within the province of the courts. It was not, however, the only reason. The common law had a particular appeal to him. He developed a theory about its source and evolution that made it a perfect vehicle for his Mugwump values.

Mugwump Ethics and the Private Sphere

That the Mugwumps are most often remembered for attempting to purify government should not obscure their deep commitment to advancing private morality as well. According to the Mugwump moral code, the keys to ethical behavior in the private realm were, as in the public context, the avoidance of self-interest and the pursuit of the public good. From the antebellum moral philosophers, and from more secular theorists such as John Stuart Mill, the Mugwumps adopted an ethical system based on benevolence, altruism, and the subordination of selfish desires. Carter, for example, asserted that "[a]ll the advances in civilisation and morality which society has thus far made are due to the cultivation and development of those moral sympathies which find their activity in co-operation and mutual aid."⁷⁰

Robert Kelley has observed that Mugwump moralism "was fundamentally concerned with society, not with personal conduct—temperance, dancing, Sunday laws, and the like." It is true that the Mugwumps generally opposed state regulation of personal vices, for reasons explored below. Their strong views concerning the limits of government action should not, however, be confused with tolerance for debauchery among the citizenry. For instance, Carter condemned working class saloons, "where men are tempted to ruin themselves and their families by indulgence in drink and are led into the commission of the worst of crimes."⁷¹

Nonetheless, the Mugwumps' efforts to promote private morality focused chiefly on economic issues. For the gentry reformers, political economy and moral philosophy were inextricably intertwined. They rejected the ethos of rapacious and selfish individualism that they thought characterized the new breed of industrialists and financiers. Instead, they advanced a competing vision of market behavior based on self-restraint, mutual dependence, and fair dealing. As Tucker observes, the Mugwumps "knew the

70. Carter, *Origin, Growth, and Function*, 251. See generally Tucker, *Mugwumps*, 4–13.

71. Kelley, *Transatlantic Persuasion*, 294 n. 3.; Carter, *Origin, Growth, and Function*, 250.

normal marketplace not as a Hobbesian war of all against all, but, instead, as a moral endeavor governed by restraint and the golden rule."⁷²

Clearly, the ethical mandate to avoid self-regarding behavior was not nearly so absolute in the private realm as in the public, for many Mugwumps benefited greatly from the commercial development and economic growth of the Gilded Age. About half of them were entrepreneurs and financiers, and Mugwump lawyers such as Carter earned large fortunes representing individuals and enterprises dedicated to making money. Nonetheless, Mugwumps generally deplored material values and condemned the accumulation of riches as an end in itself. As early as his graduation from Harvard College, Carter urged his fellow students "to teach men that even in this world there is something worth living for beside their bodies and something more valuable than heaps of gold, or palaces of marble."⁷³

Wealth was legitimate in the Mugwumps' eyes only if it was earned (or inherited) honestly and counterbalanced by a sense of public responsibility and a sincere concern for the welfare of others. They saw themselves as the heirs to long family traditions of gentlemanly business practices and high-minded community leadership. By contrast, the new rich, lacking any sense of noblesse oblige, were oblivious to both commercial ethics and their duties to society. Mugwump editor Charles Eliot Norton's disgust at the new capitalists' conduct led him to question "systems of individualism & competition. We have erected selfishness into a rule of conduct, & we applaud the man who 'gets on' no matter at what cost to other men."⁷⁴

Carter himself decried "hoarded prosperity." Despite his own substantial wealth, he was not nearly so rich as magnates like Fisk or Gould, nor, in his eyes, nearly so selfish and corrupt. Carter viewed such men's unrestrained pursuit of mammon as contrary to the nation's moral traditions. He observed, "The recent prodigious increase of wealth, the vast accumulations by single individuals, often gained by dishonest or questionable practices, the pursuit of frivolous pleasures, the display of luxury, the indifference of many men of wealth to the public welfare . . . are spectacles which suggest moral degeneration." Carter went so far as to welcome a looming financial crash. "If it comes great fortunes and great reputations will come to bitter grief, but the lesson will be valuable and instructive."⁷⁵

72. Tucker, *Mugwumps*, 24. On Mugwump market ethics, see Tucker, *Mugwumps*, 4; Ellis, *American Political Cultures*, 111; Hoogenboom, *Outlawing the Spoils*, 99.

73. James Coolidge Carter, "Harvard College Class Day Oration, June 21, 1850," 33, Harvard University Archives. For statistics on Mugwump professions, see McFarland, *Mugwumps, Morals, and Politics*, 182–83. On Mugwump antimaterialism, see Kelley, *Transatlantic Persuasion*, 300; Hofstadter, *Age of Reform*, 140.

74. Hoogenboom, *Outlawing the Spoils*, 99.

75. James C. Carter to William Bourke Cockran, 27 Sept. 1903, Cockran Papers; "1895 Municipal League Address," 268; James C. Carter to William Bourke Cockran, 27 Sept. 1903, Cockran Papers.

Carter's concern for fair dealing extended beyond his opposition to the exploitative schemes of robber barons. The main theme of his jurisprudential writings was the interaction between customary morality, higher morality, and the law, and the majority of his examples concerned the law's treatment of commercial practices that contradicted his vision of the market as a co-operative and ethical realm. He focused on conduct such as the watering of milk by milkmen, the concealment of risk by marine insurance policy holders, and the failure of merchants of goods to disclose defects to customers.⁷⁶ As discussed below, he concluded in each instance that the common law, though based on societal custom, embodied ideal ethical norms.

The Social Standard of Justice

Carter believed that the moral foundation of the common law, which he termed "unwritten law," made it superior to the written law as a way to regulate private relations. He explained that the method of common law decision making, unlike the process of applying statutes, permitted judges to decide each matter on a moral basis, according to the requirements of "justice." Although written law sometimes offered more certainty than unwritten law, this certainty came at the expense of justice, because rules established by statute "are rigid and absolute, and cannot be modified and shaped to suit the varying aspects which different cases may exhibit." A court applying the common law, by contrast, did not establish rules "absolutely," but rather did so "provisionally," based on the particular facts before it, "and whenever a case arises presenting different aspects, the rule is subject to modification and adaptation as justice or expediency may dictate."⁷⁷

This view of the common law differed from the "classical orthodoxy" of Carter's contemporary, Christopher Columbus Langdell, who emphasized *stare decisis* and logical deduction from broad principles. In contrast to practitioners like Carter, academics such as Langdell, the dean of Harvard Law School, felt the need to forge a logically coherent "legal science" that would vindicate their role in the university. Although Langdell believed that considerations of justice were relevant to the establishment of general foundational principles, his desire to impose formal conceptual order on the legal system as a whole led him to resist appeals to justice in the resolution of particular cases.⁷⁸ Conversely, Carter and other anticodifiers painted a portrait of the common law that highlighted its flexibility and case-specific justice.

76. Carter, "The Ideal and the Actual," 229–30, 234; Carter, *Origin, Growth, and Function*, 80–81, 70–74, 327–28.

77. Carter, *Proposed Codification*, 25–26. See generally *ibid.*, 1–44.

78. This description of Langdell's jurisprudence is drawn from Grey, "Langdell's Orthodoxy."

It is important to recognize, however, that by *justice*, Carter did not mean natural or divine law. Indeed, he explicitly rejected the theory that law derives directly from Nature or God.⁷⁹ Instead, he referred to the “popular standard of justice,” “social standard of justice,” or “national standard of justice.” In his later writings he largely replaced these phrases with alternatives such as “the opinions, customs, and habits of the people,” or simply “custom.” Carter asserted an absolute identity between the common law and custom. “[C]ustom is not simply *one* of the *sources* of law from which selections may be made and converted into law by the independent and arbitrary *fiat* of a legislature or a court, but . . . law, with the narrow exception of legislation, *is* custom.”⁸⁰

Carter’s customary theory of law represented a rejection not only of natural law jurisprudence, but also of the theory, popularized by Jeremy Bentham and John Austin, that law is a command proceeding from the state’s sovereign power and enforced by a sanction. In challenging the application of this definition to the common law, Carter pointed out that judges were not themselves sovereign, and he dismissed Austin’s assertion that the sovereign legislature tacitly delegated to courts the authority to make law. More important, Carter argued that judges did not “make” law at all, but rather “declared” already existing law, which they “found” among the “habits, customs, business and manners of the people, and those previously declared rules which have sprung out of previous similar inquiries into habits, customs, business and manners.”⁸¹ He often asserted that judges were society’s “experts” at ascertaining these customs, although he never offered any real support for this assertion.⁸²

By equating the common law with custom, Carter acknowledged that the law would change as the habits and manners of society changed. He criticized jurisprudential writers who “have a way of pointing us to crude states of society, village communities, etc. in order to show the origin and nature of law. To my mind the thing is going on right before our eyes every day and we have only to thoroughly scrutinize the process to learn just what it is.” Despite the fluidity Carter ascribed to law by linking it to custom, however, when he spoke of custom and the social standards that grew out of it, he was referring to deep-rooted phenomena.

79. Carter, *Origin, Growth, and Function*, 9–12, 13, 174–79.

80. *Ibid.*, 173.

81. Carter, “The Ideal and the Actual,” 224. For Carter’s rejection of Austin and his embrace of a declaratory theory of law, see Carter, *Origin, Growth, and Function*, 179–90; Carter, “The Ideal and the Actual,” 222–27.

82. See, e.g., Carter, *Proposed Codification*, 1; Carter, *Provinces*, 11; Carter, *Origin, Growth, and Function*, 327.

The social standard of justice, though resting upon public opinion, does not rest upon the opinion of the present moment, or that of a few, or a class, or even the whole, when heated by passion or swayed by interest. It is that settled opinion which belongs to the state of moral and intellectual progress which the nation has reached, from which men may be occasionally diverted for a moment, but to which they will ever return.

The slow evolution of custom ensured that so long as the legal system remained court-centered, the law would change only by degrees.⁸³

Carter's preference for gradual and ordered change rooted in custom was reminiscent of the antebellum Whigs, who had an organic vision of history that stressed each generation's responsibility to previous and future ones. Enthusiastic adherents of the theories of Edmund Burke, they believed contemporary institutions embodied the moral sense of the race and should not be suddenly overthrown. Carter showed his Whig roots when he described custom as "the imperishable record of the wisdom of the illimitable past reaching back to the infancy of the race, revised, corrected, enlarged, open to all alike, and read and understood by all."⁸⁴

Carter's Value-Laden Historicism

Because customs were constantly evolving and varied from society to society, Carter's central reliance on custom sometimes appeared to take him to the brink of ethical relativism. For example, he declared, "In the case . . . of a custom admitted to be universal in any human society, no doubt could be started concerning its legality in the courts, nor concerning its propriety in the forum of morals. Neither law nor practical morality can ever transcend a universal custom. Polygamy may be wrong in New York, but it is right among the Turks." In another instance, Carter contended simply, "Justice is . . . not an absolute, but a relative virtue." E. L. Godkin's *Nation*, one of the leading Mugwump periodicals, agreed. An unsigned review of one of Carter's articles, almost certainly written by Godkin himself, stated, "[Justice] is the rule of action prescribed by social morality. . . . [I]t is what the bulk of men comprising the community would think fair and right."⁸⁵

By basing justice on evolving national customs, Carter seems at first glance to have abandoned the lessons of the antebellum moral philosophers, who considered ethical norms to be objective, absolute, and immutable

83. James C. Carter to E. L. Godkin, 15 Nov. 1889, Godkin Papers; Carter, *Provinces*, 12.

84. Carter, *Origin, Growth, and Function*, 127. On Whig organicism and embrace of Burke, see Howe, *American Whigs*, 70–75, 235–36.

85. Carter, "The Ideal and the Actual," 234–35; Carter, *Origin, Growth, and Function*, 162; "Carter on Codification," *The Nation*, 28 Nov. 1889, 437.

principles. Thus, it is interesting that more of Carter's contemporary critics attacked him for perpetuating natural law notions than for promoting ethical relativism. Roscoe Pound, for example, complained, "While he claims to be an historical jurist, his philosophical position is that of natural law." David Dudley Field condemned Carter for the "religious aspect to his theory" and for groundlessly assuming that judges "know what is divine and what human better than other men." Even the laudatory *Nation* review quoted above quibbled, "Mr. Carter, unfortunately, . . . gives some countenance to the notion that there is something called 'abstract and absolute justice . . .,' a 'hidden reality,' but still a 'reality.'"⁸⁶

These criticisms reveal that Carter clung to a form of moral objectivism even while recognizing social flux. He maintained that "the conceptions of *ought* and *must* in the breast of the individual . . . proceed from a higher source. . . . Otherwise neither the conception of a higher condition, nor the aspiration to reach it would be explicable." In short, Carter declared that "[the ideal] has an existence as truly as the actual."⁸⁷

Despite the reality of man's ideal conceptions, however, Carter concluded it was impracticable to base a legal system directly on them. What then, was the precise role of the ideal in Carter's jurisprudence? James Grafton Rogers, in a 1932 biographical essay, contended that even Carter himself did not know the answer to this question.

[Carter's] conception of law as a moral code, eternal in time and space, is coupled . . . by a thought that law must conform to the accepted standards of the community at large. This is really a transition stage in legal philosophy halfway between classical and medieval theory of natural law and the growing view of law as a simple reflection of relative social standards. The confusion puzzled even him.⁸⁸

In light of the seemingly contradictory statements sprinkled throughout Carter's writings, it is easy to see why Rogers thought he was befuddled. Nonetheless, Carter's simultaneous embrace of natural law notions and historical evolutionism was not simply a case of jurisprudential schizophrenia. His thought represented a coherent, if not always clearly expressed, melding of the two approaches.

Consider how other thinkers of Carter's era clung to timeless norms, even while recognizing the inevitability of historical change. As Dorothy Ross

86. Pound, review of *Law: Its Origin, Growth, and Function*, 318–19; David Dudley Field, "Codification—Mr. Field's Answer to Mr. Carter," *American Law Review* 24 (1890): 265; "Carter on Codification," *The Nation*, 28 Nov. 1889, 437. On the moral objectivism of the antebellum moral philosophers, see Howe, *American Whigs*, 28; Tucker, *Mugwumps*, 5.

87. Carter, "The Ideal and the Actual," 236–37.

88. Rogers, *American Bar Leaders*, 84.

explains, Gilded Age gentry intellectuals, disconcerted by their realization that the American republic could not avoid the historical forces that had led to corruption, mass poverty, class struggle, and despotism in Europe, developed "historico-political" theories that stressed the continuity of principle within material flux. According to Ross, these Mugwumps accepted historical transformation in the United States, but they viewed it as the gradual unfolding of reason and liberty, or, alternatively, as a "dynamic atomistic movement contained within a larger stasis" of republican values. Stephen Siegel has identified a parallel impulse among legal thinkers of the time. The "historist" laissez-faire constitutional jurists he has examined believed that "societies, social norms, and institutions are the outgrowth of continuous change effected by secular causes" but "evolve according to [objective] moral ordering principles that are discoverable through historical studies."⁸⁹

In a similar fashion, Carter believed that the evolution of custom was characterized by the gradual unfolding of eternal, objective moral principles. Therefore, the common law, by reflecting customary standards of justice, embodied elements of natural law. As Carter explained, "[The law] possesses as an essential feature a *moral* character; . . . it springs from and reposes upon that everlasting and infinite Justice which is one of the attributes of Divinity; and . . . it is so much of that attribute as each particular society is able to comprehend and willing to apply to human affairs." Because Anglo-American civilization was highly advanced, its customs, and hence its law, were approaching the ideal. Carter provided various concrete examples of this phenomenon. For instance, he described how in the field of sales, "[a]n improved sense of fairness led honest [merchants of goods] to disclose defects known to them but not apparent to ordinary observation." This practice had become so customary in the United States that the courts had replaced the traditional principle of caveat emptor with a legal duty to disclose.⁹⁰

In short, although Carter sometimes made assertions that, in isolation, sound almost modernist in their apparent relativism and positivism, it is important to consider such statements in light of his overall philosophy, which retained a core of moral objectivism. For example, when he stated, "I have sought to discover those rules only which *actually* regulate conduct, not those which *ought* to regulate it," he seemed to anticipate the positivism of Oliver Wendell Holmes and the legal realists. Tellingly, however, he then remarked, "I imagine that the rule which will be found in fact to exist, is the best."⁹¹

Carter's disposition to locate higher morality in the realm of the actual was illustrated by his approach to the greatest intellectual development of

89. Ross, *American Social Science*, 66; Siegel, "Historism," 1438. See generally Ross, *American Social Science*, 64–77.

90. Carter, *Provinces*, 13; Carter, *Origin, Growth, and Function*, 327–28.

91. Carter, *Origin, Growth, and Function*, 145.

his time, Darwinian evolution. Like many American thinkers after the Civil War, Carter was profoundly influenced by the theory of evolution. "The law of any people, savage or civilized," he argued, "is, and of necessity must be, a gradual and slow evolution—a growth—proceeding from their original nature acting upon, and being acted upon by, the circumstances with which they are surrounded." Clearly, Darwinism bolstered Carter's theory of legal change. Nonetheless, if the driving principle behind evolution was a brutal, individualistic struggle for existence, as was commonly believed, it posed a problem for Carter and others who embraced an ethical paradigm of cooperative self-restraint.⁹²

Hence Carter's delight on discovering a "grand book" on a trip to Great Britain, Alexander Sutherland's treatise on animal and human evolution, *The Origin and Growth of the Moral Instinct*.⁹³ As Carter himself described the book, "[Sutherland] shows in great detail how the increasing care of offspring leads to self-sacrifice for others, develops by degrees the kindly and generous feelings, how it extends from the immediate family to a whole kindred, thence successively to a community and a nation and ultimately to the whole human race, manifesting itself in the cultivation of the higher individual qualities and in the improvement of society with all its intellectual appliances and charities."⁹⁴

In Sutherland's work, Carter found a scientific basis for his faith that custom, and therefore law, evolved toward an ideal of altruistic morality. "Under this natural process, physical well-being and moral progress advance *pari passu* and the whole company of human virtues spring into action and propagate their influences in ever widening circles." Carter was thus able to conclude that evolutionary theory, far from undermining the moral basis of his jurisprudence, actually reinforced it.⁹⁵

The Role of Mugwump Reform

Despite Carter's frequently voiced belief in inexorable moral progress, he sometimes intimated a concern that such progress in his own time had slowed to a crawl, or perhaps stagnated altogether. "[W]e have only to look

92. Carter, *Proposed Codification*, 70. On the challenge of Darwinism to ethics, see Hofstadter, *Social Darwinism in American Thought*, rev. ed. (Boston: Beacon Press, 1955), 85–104.

93. James C. Carter to William Bourke Cockran, 27 Sept. 1903, Cockran Papers; Alexander Sutherland, *The Origin and Growth of the Moral Instinct* (London: Longmans, Green, and Co., 1898). The great value that Carter assigned to Sutherland's work is suggested by the similarity between its title and that of Carter's own book, *Law: Its Origin, Growth, and Function*, completed seven years later.

94. Carter, *Origin, Growth, and Function*, 322.

95. *Ibid.*, 325. For a discussion of other Darwinian theorists who postulated the evolution of mutual aid and a moral sense, see Hofstadter, *Social Darwinism*, 90–98.

at history and we see that civilization never goes back. It goes slowly, sometimes very slowly indeed. . . . but still, it does not go back, and we need not be afraid of that."⁹⁶

Carter pondered whether anything could be done to ensure continued improvement. He acknowledged that "[u]nder the great process of Evolution," early man's moral and intellectual advance out of savagery resulted not from "his own conscious effort," but from the interaction between "the nature of his original constitution and the environment in which he was placed." However, like the prominent sociologist Lester Ward, Carter contended that in modern times, the evolution of human beings was subject to purposive direction and "want[ed] active and affirmative help." He explained, "The progress thus begun [by the spontaneous process of evolution] has been carried forward by designed effort, and it is that effort, and the rules which should govern it, which most deserve our attention."⁹⁷

What form did Carter think this "active and affirmative" help should take? He maintained that the primary instrument for progress was not legal compulsion, but moral reform. "[S]o far as law proceeds from habits and customs, being merely the jural form in which they are exhibited, it cannot be improved except by improvements in habits and customs." Therefore, Carter asserted that "a law, in order to be efficacious, must always be preceded by a corresponding degree of moral education extending through the community."⁹⁸

For Carter, as for other Mugwumps, "moral education" meant the indoctrination of the masses by the gentry elite. As early as his Harvard College graduation, he stressed the "high duty of those whose part it is to lead and control public opinion." Throughout his career, he urged the "better classes of society" to expend "zeal and labor . . . in kindly and sympathetic efforts to change and elevate the thoughts and desires of those less fortunate than themselves" and to "cultivat[e] and develop[] . . . those moral sympathies which find their activity in co-operation and mutual aid." Carter thought these efforts were likely to succeed, for the "more cultivated and enlight-

96. James C. Carter, "President's Annual Address," *Proceedings of the Third National Conference for Good City Government and of the Second Annual Meeting of the National Municipal League* (Philadelphia: National Municipal League, 1896), 61 (hereinafter cited as "1896 Municipal League Address").

97. Carter, *Origin, Growth, and Function*, 321; Carter, "1896 Municipal League Address," 61; Carter, *Origin, Growth, and Function*, 321. On Ward, see Hofstadter, *Social Darwinism*, 67-77; Herbert Hovenkamp, "Evolutionary Models in Jurisprudence," *Texas Law Review* 64 (1985): 671-74; Herget, *American Jurisprudence*, 129.

98. Carter, "The Ideal and the Actual," 239; Carter, "1895 ABA Presidential Address," 229.

ened . . . are looked up to and imitated, and their influence flows down through all ranks of society and manners and morals rise in response.”⁹⁹

Carter believed that judges, who generally were drawn from the same natural aristocracy as the reformers, recognized these ethical advancements and transposed them into their decisions. By this process, the Mugwumps had a greater influence over the development of the common law than they could ever attain over the content of legislation in a political world increasingly dominated by plutocrats and party bosses. The nation was being rapidly transformed by immigration, urbanization, and industrialization, and Carter sought to ensure the continuity and growth of Mugwump authority and values in the midst of these developments. Thus, like the Whigs, he proffered a nostalgic, elitist vision of a civilization guided both morally and legally by cultivated gentlemen. The uneducated masses would accept the leadership of the affluent and classically educated, and the select few would in turn instill virtue in the population as a whole.¹⁰⁰

VI. The Challenge of Diversity

Carter’s view of the patrician elite as a moral vanguard with values superior to those of the general population did not square with another important aspect of his jurisprudence. He frequently declared that the customs of the people were “universal” and that there was a single, uniform “national standard of justice.”¹⁰¹ These assertions were critical, because any acknowledgment that there was a diversity of customs threatened to undermine the defense of the common law that Carter fashioned in response to the codifiers’ attacks.

The codifiers frequently condemned the common law’s *ex post facto* quality. Because the common law was inaccessible to nonlawyers, they argued, citizens were not aware of what was legally required of them until a judge issued his decision. A code, by contrast, would allow any person to determine his duties and responsibilities before taking action. David Dudley Field declared, “[T]hat only is truly law which has been provided beforehand.” Carter’s response hinged on the uniformity of custom. He contended that it was fair to presume that the people were familiar with common law rules, because the common law was based on custom, and “[t]he term [*custom*]

99. Carter, “Harvard College Class Day Oration,” 39; Carter, *Origin, Growth, and Function*, 251, 326. On moral education, see Ross, *American Social Science*, 70; McFarland, *Mugwumps, Morals, and Politics*, 36.

100. Howe, *American Whigs*, 31, 33, 36–37; Watson, *Liberty and Power*, 11, 219–20, 244–45.

101. See, e.g., Carter, “The Ideal and the Actual,” 229; Carter, *Proposed Codification*, 41.

itself imports that it is known to *all*." He explained, "A man can hardly live in society without knowing how men act—that is, what custom is. . . . Custom is of all things the one most universally known."¹⁰²

The codifiers also often protested that judges did not "find" the unwritten law among the customs of the people, as Carter claimed, but rather "made" it themselves. Field argued, "[T]he legislative and judicial departments should be kept distinct. . . . [W]e violate [this maxim] every hour that we allow judges to participate in the making of the laws."¹⁰³ In response, Carter maintained that it was inaccurate to state that judges made law, because custom was an objective, nondiscretionary basis for their decisions. This theory could only be cogent, however, if custom was consistent throughout society. If Carter had conceded the existence of multiple, competing customs, he also would have had to acknowledge that judges did not simply find the law, but rather selected which customs to follow.

Carter's contention that custom was uniform throughout society also allowed him to suggest that the common law was actually more democratic than legislation, particularly when the legislature was dominated by corrupt and plutocratic interests. "Customs . . . being common modes of action, are the unerring evidence of common thought and belief, and as they are the joint product of the thoughts of all, each one has his own share in forming them. In the enforcement of a rule thus formed no one can complain, for it is the only rule which can be framed which gives equal expression to the voice of each." Carter argued that because judges themselves were "part of the community," they "knew" and "felt" the common standard of justice and relied on it when deciding cases.¹⁰⁴

For all these reasons, Carter clung to the notion of a single national standard of justice. Although he acknowledged that parties often disagreed about the specific rule to be derived from custom in a particular case, he rarely conceded the possibility that such clashing positions were rooted in conflicting customs within the community itself. Carter could not, of course, deny that there were variations in conduct among individuals. He argued, however, that such differences tended to diminish as a society progressed and "customs ar[o]se of carefully avoiding conduct giving offence to others." As custom evolved, nudged along by the moral education pro-

102. David Dudley Field, *Codification, An Address Delivered before the Law Academy of Philadelphia* (Philadelphia: Printed for the Law Academy, 1886), 22, no. 70 in *Nineteenth-Century Legal Treatises*; Carter, *Origin, Growth, and Function*, 255, 77–78. For an extended discussion by Carter on these points, see *ibid.*, 225–28.

103. David Dudley Field, "Codification," *American Law Review* 20 (1886): 2.

104. Carter, *Origin, Growth, and Function*, 143. Carter, *Provinces*, 48. Because New York judges were directly elected, it was not quite as audacious to wrap them in the cloak of democracy as it would have been if they were appointed.

vided by the genteel elite, it produced a universal code of behavior embodying "all the graces of social life" valued by Mugwump gentlemen, including "courtesy, deference, [and] politeness." Even the different nations of the earth "[f]ell, or rather r[o]se, more and more into identity" as they progressed toward this universal ideal.¹⁰⁵

Despite his view that the customs of the people were coalescing around ideal moral standards, however, Carter could not deny the persistence of widespread practices that conflicted with these standards. He performed semantic and intellectual contortions to reconcile his jurisprudential theories to this uncomfortable reality. Consider, for example, his analysis of how a court should approach a hypothetical case in which a customer has alleged that a milkman sold him watered milk. Carter argued that even if the milkman were able to demonstrate that watering is a universal custom among milkmen, this showing should not affect the court's ruling because a deceptive act of this sort is not properly termed a "custom."

The trouble with these so-called customs—that which constitutes their badness—really is that they are not customs, but violations of custom. . . . [The watering of milk by milkmen] is a secret act designed to deceive those who deal with them. This surely, even were it a custom of milkmen generally . . . is not the custom of men in general. It is not the general custom in society to practice this deceit; but quite the contrary. . . . It is the very purpose of the whole machinery of the law to repress such practices and compel compliance with the general custom.¹⁰⁶

Passages like this reveal the fragility of Carter's intellectual construct. His jurisprudence, premised on the notion that judges did not make law, but rather found it within a general body of customs shared by jurists and citizens alike, would have collapsed had he acknowledged the true diversity of customs. Moreover, the existence of practices that conflicted with his moral code challenged his assumption that a custom-based legal system would inevitably embody ideal ethical norms. To sidestep such problems, Carter simply posited a broad uniformity of habits and values in American society, presumed they reflected his Mugwump moral standards, and defined away instances of conduct inconsistent with these standards by terming them "bad practices" rather than "customs."¹⁰⁷

Decades later, modernist critics would point out how Carter's dubious distinction between customs and bad practices exposed the fallacy of his objective theory of judging. John Dickinson, for example, asserted, "Mr.

105. Carter, *Origin, Growth, and Function*, 78, 123, 124, 143; Carter, "1895 ABA Presidential Address," 236.

106. Carter, "The Ideal and the Actual," 234.

107. *Ibid.*

Carter . . . assumes an identity between partial customs and 'bad' customs which is not borne out by the facts; the legal ratification of a custom is not due to the simple factual question of whether it is universal or not, but apparently to a value-judgment of whether it is right or wrong, good policy or bad policy." The great institutional economist and legal realist John Commons criticized Carter in similar terms. "Customs are, indeed, the raw material out of which justice is constructed. But customs differ, customs change, customs are good and bad, and customs conflict. They are uncertain, complex, contradictory, and confusing. A choice must be made. Somebody must choose which customs to authorize and which to condemn or let alone. . . . Whoever chooses is the lawgiver."¹⁰⁸

Interestingly, Carter himself occasionally verged on revising his position that judges merely found the law among universal customs. He remarked, "[Judges] are chiefly employed in the consideration of doubtful cases, in determining under what custom a particular transaction should be brought, and this enables them to prefer good customs to bad ones, to adopt what is fit, convenient and useful, and reject what is unfit and hurtful. They can thus sanction and encourage what is just and condemn what is unjust. . . . [T]he work approaches, although it does not fully assume, a creative character."¹⁰⁹

Ultimately, however, Carter drew back from ascribing any significant degree of discretionary lawmaking power to the courts. The primary function of judges in his jurisprudence was to serve as objective experts. Like most elite Gilded Age jurists, Carter believed it was imperative to preserve a firm separation between law and politics.¹¹⁰ Indeed, as a combatant in the codification wars, he had to be particularly careful about maintaining the law-politics distinction, for a denial of this distinction lay at the core of the codifiers' assault on the common law.

VII. Custom and the Limits of Legislation

Since Carter thought judges had at most a limited role in resolving clashes between competing customs, it is interesting to consider what function

108. John Dickinson, "The Law Behind the Law," *Columbia Law Review* 24 (1929): 132; John Commons, *Legal Foundations of Capitalism* (1924; reprint, Madison: University of Wisconsin Press, 1959), 299–300. For similar criticisms, see *Encyclopedia of the Social Sciences*, s.v. "Carter, James Coolidge," by Karl N. Llewellyn (1931); Roscoe Pound, "The Ideal and the Actual in Law—Forty Years After," *George Washington Law Review* 1 (1933): 441–42.

109. Carter, "The Ideal and the Actual," 240.

110. On the law-politics distinction, see generally Horwitz, *Transformation II*, 9–31.

he thought the legislature might play in such situations. In other words, if natural evolution and Mugwump moral education were not enough to create a homogenous moral consensus, should the legislature attempt to impose such uniformity by statute?

For the most part, Carter said no. Although the Mugwumps inherited their Whig forbears' focus on private morality, there was an important difference between their approaches. The Whigs believed that government had a major part to play in policing moral standards. They were, for example, much more likely than their Democratic counterparts to support measures such as prohibition and sumptuary taxes on luxury items and alcohol. While the postbellum Republican party carried on the Whigs' faith in enforced moral uplift, the Mugwumps, though maintaining the impulse to promote a virtuous society, lost much of their faith in the power of law to do so. As Carter declared, "Men cannot be made better by legal command."¹¹¹

As this statement suggests, Carter came to question the application of Austinian command theory not only to the common law, but also to statutes. Because legislation appeared at first glance to satisfy Austin's definition of law as a sovereign command enforced by sanction, Carter acknowledged that statutes seemed to be an exception to his own equation of law with custom.¹¹² On further reflection, however, he argued that even statutes did not truly qualify as laws when they conflicted with the customs of the people. "The thing . . . which gives [statutes] life and efficacy—that which makes them laws—is not the fact that they are commands, but that they are expressions of existing habit and opinion."¹¹³

In Carter's eyes, this was not just a theoretical issue, for whereas judges usually based their decisions on universal societal customs, legislatures often passed statutes that clashed with the customs of a significant portion of the population. Carter deemed such legislation to be "tyrannical," even when issued under a republican form of government. Self-government, he opined, was not a "scheme by which different parts of the community may alternately enjoy the privilege of tyrannising over each other."¹¹⁴

Because tyranny inevitably provoked resistance, legislation contrary to custom was usually doomed to be ineffective. Carter argued that judges

111. Carter, *Origin, Growth, and Function*, 323. On Whig support for the regulation of morality, see Gerring, "Party Ideology," 92; Watson, *Liberty and Power*, 245; Howe, *American Whigs*, 19–22; Paul E. Johnson, *A Shopkeeper's Millennium: Society and Revivals in Rochester, New York, 1815–1837* (New York: Hill and Wang, 1978), 128–35. On the Republican continuation of this attitude, see Gerring, "Party Ideology," 92.

112. Carter, *Origin, Growth, and Function*, 173, 182.

113. Carter, "The Ideal and the Actual," 228.

114. Carter, *Origin, Growth, and Function*, 246. Carter points out the tendency of legislatures to legislate against custom in "1895 ABA Presidential Address," 233.

would use whatever interpretative devices were necessary to read the language of a statute in a way that conformed with the social standard of justice. This was a "violent process [that] necessarily carri[ed] with it a grave mischief," because it overrode "those settled rules of interpretation which are the chief means of securing stability in the administration of justice." Moreover, a statute contrary to custom was likely to be ineffective even if its language was clear beyond dispute. Carter explained, "[W]hen a statute is passed which conflicts with the opinions, customs, and habits of a large part, although it may be a minority, of the community, it is difficult, and often wholly impossible to enforce it. In many instances such enactments are absolutely futile." He asserted that "such an enactment, when never enforced, does not deserve the name of law at all."¹¹⁵

One cannot fully understand Carter's jurisprudence without grasping the fundamental role of the enforceability issue. It was not the mere futility of legislation contrary to custom that troubled Carter and inspired his struggle to narrow the province of written law. He was even more distressed by the "contempt for law" engendered by the passage of unenforceable legislation.¹¹⁶ Worst of all, in Carter's mind, was the corruption that inevitably resulted from society's efforts to avoid the application of such a statute.

Carter tried to cabin the domain of statutory law within narrow limits largely because he thought legislators were the unprincipled lackeys of wealthy patrons and party bosses. In his view, however, assemblymen and senators were not the only public servants who routinely violated the public trust. Perhaps as a result of his municipal reform activities, he presumed that nearly every executive official, government bureaucrat, and police officer was also corrupt.¹¹⁷ Indeed, for Carter, corruption in the administration and enforcement of statutes was perhaps an even graver problem than corruption during their formulation. He observed that public employees, "when they are in office . . . begin to be seized with the notion of using [their] places, not for the good even of the party which employs them, but for their own good." They thus routinely accepted, or extorted, bribes from citizens seeking "protect[ion] against the laws."¹¹⁸ When a large por-

115. Carter, *Proposed Codification*, 43; Carter, "The Ideal and the Actual," 227; Carter, *Origin, Growth, and Function*, 3.

116. Carter, "1895 ABA Presidential Address," 228.

117. In 1892, a state legislative committee headed by state senator Clarence Lexow conducted a comprehensive review of the New York City police department and concluded, as Carter put it, that "from bottom to top the police system . . . [was] corrupt." "The Committee of Ten Bills," *New York Times*, 3 Apr. 1895. See also David C. Hammack, *Power and Society: Greater New York at the Turn of the Century* (New York: Russell Sage Foundation, 1982), 147-48.

118. *Report of Discussion Before the Nineteenth Century Club*, 16-17.

tion of the community opposed a particular law, it could, with the collusion of corrupt public servants who failed to enforce the law, negate its effect altogether.

Take, for example, the prohibition of liquor. Carter and two other prominent Mugwumps, Charles Eliot and Seth Low, presided over a highly publicized study on the liquor problem. Carter himself later remarked, "The evils of drunkenness are so manifest that great numbers of excellent people are impressed with a conviction that some measures must be taken to repress them." Nonetheless, in their introduction to the published report of the study, the three Mugwumps came down against prohibitory legislation. They concluded that such laws were largely ineffective, especially in districts "where public sentiment has been adverse or strongly divided."¹¹⁹

Even more troubling than the futility of such laws, however, was the fact that "[a]lmost every sort of liquor legislation creates some specific evil in politics."¹²⁰ In his own book, Carter explored what those evils were.

The object the lawmaker seeks to gain by this legislation is to do away with, or greatly diminish, the indulgence in intoxicating drinks. . . . He wholly fails to gain the object in view; but objects not in view, and by no means desired, are brought about on the largest scale: vast and useless expenditure, perjury and subornation of perjury, violation of jurors' oaths, corrupt bribery of public officers, the local elections turned into a scramble for the possession of the offices controlling the public machinery for the punishment of offences in order that that machinery may be bought and sold for a price; law and its administration brought into public contempt, and many men otherwise esteemed as good citizens made insensible to the turpitude of perjury, bribery, and corruption; animosity created between different bodies of citizens, rendering them incapable of acting together for confessedly good objects!

Many Mugwumps joined Carter, Low, and Eliot in opposing prohibition, probably for similar reasons.¹²¹

Carter thought the post-Civil War Reconstruction also exemplified the perils of enacting legislation contrary to the customs of the community. For Carter, as for many of his Mugwump brethren, the course of Reconstruction

119. Carter, *Origin, Growth, and Function*, 247–48; Charles W. Eliot, Seth Low, and James C. Carter, Introduction to *The Liquor Problem in Its Legislative Aspects*, by Frederic H. Wines and John Koren (Boston: Houghton, Mifflin, 1897), 5. This introduction was reprinted in full in the *Atlantic Monthly*. Charles W. Eliot, "A Study of American Liquor Laws," *Atlantic Monthly*, Feb. 1897. Although Eliot received sole credit in the magazine, it seems likely that Carter was the primary author, based on the language and content of the piece.

120. Eliot, Low, and Carter, Introduction to *The Liquor Problem*, 19.

121. Carter, *Origin, Growth, and Function*, 249–50. On Mugwump opposition to prohibition, see McFarland, *Mugwumps, Morals, and Politics*, 63. On Low's vacillating approach, when mayor, to the Raines liquor law, see Gerald Kurland, *Seth Low: The Reformer in an Urban and Industrial Age* (New York: Twayne Publishers, 1971), 190.

appears to have been a major source of his conviction that government activism tended to breed corruption. Although most Mugwumps initially approved of congressional Reconstruction, and some even helped shape the laws and constitutional amendments enacted to implement it, by the mid-1870s, they shared a disgusted dissatisfaction with the whole experiment. Among the most important reasons for their growing disenchantment was their sense that Reconstruction contributed to a rising tide of corruption in the country. It did so, in their eyes, not only by diverting attention away from initiatives such as civil service reform, but also by triggering an explosion of sordid political behavior in the Southern states by both blacks and whites.¹²²

Carter was struck by the South's stubborn unwillingness to embrace the egalitarian and republican principles contained in the Reconstruction acts and constitutional amendments. He thought the problem lay partly with the freed slaves, for even as late as 1892, he considered black people to be "unequal, for the present at least, to the great office of self-government."¹²³ Carter's primary explanation for the failure of Reconstruction, however, was the strength and persistence of Southern white customs, in the face of which written law was entirely impotent. When Carter described how Southern whites defeated, through "force and fraud," the Reconstruction enactments' mandate of black political equality, it is unclear whether he was more disturbed by the continued subjugation of African Americans or by the moral stain cast upon the legal and political process by the whites' evasive efforts.¹²⁴

In short, Carter believed that legislation designed to elevate the private morality of a large portion of the population not only was doomed to failure, but also tended to pervert public morality. To make matters worse, legislation framed to improve public morality was also often futile. For example, although Carter supported civil service reform, he believed it would be only marginally useful, because "[c]ivil service rules are *laws* only, and their utility and effectiveness are dependent upon the dispositions and qualifications of those appointed to enforce them, and these are now unfortunately the representatives of the corrupt alliance which the rules are designed to break up." Regarding federal corrupt practices legislation, he warned, "[I]f the people are not sufficiently interested in the matter to attempt to enforce a law . . . then no law will be enforced." In Carter's view, "[I]t is practically impossible to have . . . a . . . government

122. Foner, *Reconstruction*, 385–90, 497–99; Sproat, *The Best Men*, 12–44; Hoogenboom, *Outlawing the Spoils*, 39; McFarland, *Mugwumps, Morals, and Politics*, 139; John Tomisch, *A Genteel Endeavor: American Culture and Politics in the Gilded Age* (Stanford: Stanford University Press, 1971), 71–72, 98.

123. James C. Carter, "Mr. Tilden," *Atlantic Monthly*, Oct. 1892, 445.

124. Carter, *Origin, Growth, and Function*, 214–17.

superior in character to the general standards of morality and honesty prevailing among its citizens."¹²⁵

VIII. Carter's Ambivalent Embrace of Laissez-Faire

Carter attacked codes, statutes, and legislators themselves so frequently that one might conclude that he saw no positive role whatsoever for legislative governance. Indeed, scholars have generally depicted him as an exemplar of laissez-faire thought.¹²⁶ It is hard to gainsay these descriptions in light of statements by Carter such as the following:

[T]he sole function both of law and legislation . . . [is] to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of the like liberty to all others. Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgement of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong. To leave each man to work out in freedom his own happiness or misery, to stand or fall by the consequences of his own conduct, is the true method of human discipline.¹²⁷

But Carter elsewhere acknowledged that legislation was "the source of so many advantages." He believed that written law was necessary to establish the details of the administrative structure of the state and that it was the only appropriate form of law in the criminal field. More important, he set forth a variety of circumstances in which legislation was a desirable, or even necessary, supplement to the common law in the regulation of private affairs. If Carter was a laissez-faireist, he was certainly an ambivalent one, and the same can be said of Mugwumps generally.¹²⁸

Mugwump Statism

The Mugwumps' economic program focused overwhelmingly on tariff and currency reform, the most hotly debated topics of their day. According to the standard view, however, their free trade and sound money positions

125. Carter, "1895 Municipal League Address," 287–88; James C. Carter to William Bourke Cockran, 10 Jan. 1905, Cockran Papers; Carter, "1895 Municipal League Address," 262.

126. See, e.g., Twiss, *Lawyers and the Constitution*, 174–82, 190–95, 199–200; Fine, *Laissez-Faire*, 162–64.

127. Carter, *Origin, Growth, and Function*, 337.

128. Carter, "1895 ABA Presidential Address," 229. On acceptable functions for written law, see Carter, *Proposed Codification*, 17–21; Carter, *Provinces*, 52–55; Carter, *Origin, Growth, and Function*, 254–62.

reflected a broader embrace of laissez-faire. If legislatures were unfit to regulate currency or trade, they were unfit to regulate much of anything else either. Some scholars have observed that the Mugwumps bolstered their antiregulatory stance with the classical economic theories of Adam Smith and John Stuart Mill. According to John Sproat, "[The Mugwumps] believed nature had created a perfectly balanced economic order, governed by immutable laws. Left alone, the order ideally served man's needs; any tampering with a single component would destroy the entire system or radically alter it. Free to function naturally, the system worked in perfect harmony to provide the greatest possible good to mankind."¹²⁹

For many Mugwumps, however, laissez-faire was not so much a scientific law as a "handy rule of practice," useful for deflating the power of the interests that inevitably captured the legislative process. The Yankee gentry often supported positive government when they were confident it was being exercised for pure and unselfish reasons. As historian Richard J. Ellis has observed, "For all of their skepticism about democracy, there remained a readiness among the more genteel Mugwumps to look to government to secure societal ends."¹³⁰

The Mugwumps, as a group, were neither doctrinaire laissez-faire liberals nor committed proto-progressives. Rather, they wavered between the two poles. Carter himself illustrates this ambivalence; just one page before his ardent advocacy of limited government quoted above, he wrote:

When we consider the enormous mass of apparently necessary legislation found in modern societies, we are almost led to doubt the soundness of the maxim that the best government is that which governs least, as well as the soundness of the teaching that the sole function of government and of law is to secure to every man the largest possible freedom of individual action consistent with the preservation of the like liberty for every other man.

In Carter's mind, a deep-seated apprehension that government could be used to advance "selfish purposes and personal enrichment" coexisted with an understanding that "[w]ithin its province [legislation] is capable of a work of great and increasing beneficence."¹³¹

In view of the Mugwumps' debt to antebellum Whig ideology, it is not surprising that many of them clung to the notion that government could be

129. Sproat, *The Best Men*, 146. On Mugwumps and laissez-faire, see also *ibid.*, 142–68, 206–8; Hofstadter, *Age of Reform*, 142; Tucker, *Mugwumps*, 59, 62, 83–84.

130. Tucker, *Mugwumps*, 84; Ellis, *American Political Cultures*, 113. On the "genteel critique of laissez-faire," see Tomisch, *Genteel Endeavor*, 94–112; McFarland, *Mugwumps, Morals, and Politics*, 47, 58–59.

131. Carter, *Origin, Growth, and Function*, 335; Carter, "1895 Municipal League Address," 271; Carter, *Origin, Growth, and Function*, 135.

an active force for good. The Whigs had faith in what Lee Benson called the "positive liberal state," a government that would seek "to promote the general welfare, raise the level of opportunity for all men, and aid all individuals to develop their full potentialities." They thus advocated protective tariffs, public subsidy of internal improvements, a powerful national bank with the power to issue paper currency, and state support for a whole range of commercial and charitable endeavors. Furthermore, as noted above, the Whigs' moralism led them to support various types of enforced moral uplift. Richard Gerring, describing the Whigs' "statist" tendencies, has observed, "The instrument of government held an almost mystical attraction for [them]." Many Mugwumps continued at times to manifest this statist impulse.¹³²

Undeniably, something about the attitude of the patrician elite changed in the years between the heyday of the Whigs and that of the Mugwumps. Late nineteenth and early twentieth-century Republicans inherited the Whigs' statist tendencies and continued to preach the virtues of strong government.¹³³ By contrast, by the time Carter and other Mugwumps abandoned the Republican party in the 1880s, they had developed a highly suspicious view of the activist state. Distressed by rampant urban corruption, the course of Reconstruction, and the permanence and power of party structures, they became convinced that government activism redounded to the benefit, not of the public, but of the plutocratic and corrupt interests that controlled the political system. The Mugwumps therefore embraced many of the laissez-faire positions that the Jacksonians had embraced before the Civil War.

Nonetheless, numerous Mugwumps continued to believe that the state had a positive role to play in promoting the general welfare. Moreover, the numbers of Mugwumps who favored active government grew as the problems of urban industrialism became more apparent after 1890. Many genteel reformers decided that a limited night watchman state did not satisfy the needs of modern civilization. R. Fulton Cutting predicted that the "religion of the twentieth century is destined to employ Government as one of its principal instruments for the solution of social issues." Carter himself asserted that the line "determin[ing] how far society may go in limiting and directing individual conduct . . . changes with the changing conditions of life." He remarked, "The vast increase of our population, the great changes produced by the increase of manufacturing industries, the vastly greater proportional increase of urban populations, the prodigious activities of modern societies, the enormous revenues which the public service

132. Lee Benson, *The Concept of Jacksonian Democracy: New York as a Test Case* (Princeton, N.J.: Princeton University Press, 1961), 86, 103; Gerring, "Party Ideology," 67. On Whig support for positive government, see also Watson, *Liberty and Power*, 186, 245. On Mugwump inheritance of this Whig trait, see Tomisch, *Genteel Endeavor*, 94, 97–98.

133. Gerring, "Party Ideology," 66–79.

requires, have all combined to raise the most difficult questions of legislation, many of which are now pressing for better solutions."¹³⁴

It was in his guise as municipal reformer that Carter most unambiguously acknowledged the importance of government action. All Mugwumps supported structural changes in urban administration that would promote nonpartisanship, honesty, and businesslike efficiency, but their ultimate goals differed. Some hoped merely to dethrone the corrupt politicians, reduce graft, and economize. In the 1890s, however, many Mugwumps, including Carter, moved beyond structural reform and embraced a program of social reform dedicated to improving the delivery of public services to the urban masses and even expanding the functions and powers of the government.¹³⁵

Gentry support for enlarged government is evidenced by the endeavors of the Citizens' Union, a nonpartisan political association in New York City. Carter was a founder of this organization, and he and numerous other Mugwumps were active figures in it. The Citizens' Union nominated Mugwump Seth Low for mayor twice, unsuccessfully in 1897 and successfully in 1901. Its platforms included not only anticorruption and efficiency measures, but also increased construction of public facilities such as schools, libraries, baths, and parks; enhanced public assistance to the sick, poor, aged, and insane; and an eight-hour day for municipal employees and laborers working on public works projects. In addition, the platforms called for the strengthening and strict enforcement of New York's tenement house laws. Finally, the Citizens' Union supported municipal ownership of the water supply system, gas and electric light utilities, and mass transit. When Low won the mayoralty in 1901, he implemented all these proposals except municipal ownership.¹³⁶

Low's fusion candidacies received support from an alliance of working class and immigrant voters, on the one hand, and reform-minded affluent voters, on the other. Many prosperous uptown New Yorkers who backed the Citizens' Union did so mainly because they had a desire for honest and efficient government, not a thirst for social reform. Such individuals did not always welcome the measures intended to help the poor urban masses. Nonetheless, there were numerous genteel members of the Citizens

134. Hammack, *Power and Society*, 151–52; Carter, *Origin, Growth, and Function*, 336–37; Carter, "1895 ABA Presidential Address," 227. On increasing Mugwump support for active government after 1890, see McFarland, *Mugwumps, Morals, and Politics*, 107–23.

135. On Mugwump involvement in municipal reform, see McFarland, *Mugwumps, Morals, and Politics*, 86–106. On structural municipal reform versus social reform, see Holli, "Urban Reform."

136. Kurland, *Seth Low*, 83–84, 125–26, 162–68; Hammack, *Power and Society*, 151–52, 155–57; McFarland, *Mugwumps, Morals, and Politics*, 99–105. On Carter's role in the founding of the Citizens' Union, see Martin, *Causes and Conflicts*, 165–66.

Union, Mugwumps most prominent among them, who sincerely sought to address the needs of the downtown working class.¹³⁷

Carter himself devoted more energy to opposing legislation favoring the wealthy than to supporting laws aimed at easing the plight of the lower classes. Nonetheless, during the 1890s, he began explicitly to endorse exceptions to the laissez-faire principle such as tenement building regulations, restrictions on child labor, factory safety statutes, and other "legislation . . . preventing evils which arise from the competitive struggles of modern life in industrial pursuits." He remarked that a statute requiring that laborers be paid in "bankable money" (instead of company scrip) was a measure "evidencing a bold, but perhaps not impolitic, estimate of the just extent of legislative power in growing, thickening and active populations." In an 1894 graduation speech at Columbian (now George Washington) University Law School, Carter proclaimed, "Do not legislate *against* the rich, but yet legislate *for* the poor."¹³⁸

That Carter and many other Mugwumps held such views raises questions about the prevailing interpretation of elite legal thought in the Gilded Age. According to the now dominant revisionist theory, discussed above, jurists of that era were driven primarily by their opposition to class or special legislation benefiting any particular individual or group, rich or poor. Michael Les Benedict, for example, asserts, "To what we might call the laissez-faire libertarians, all these instances of special legislation, whether to promote the interests of businessmen, or farmers, or laborers, were of a piece."¹³⁹ It is important to recognize, however, that many Mugwumps, including Carter, supported legislation benefiting the working class even while railing against laws lining the pockets of plutocrats.

To Carter, special legislation favoring businessmen was not "of a piece" with legislation favoring laborers, because it was businessmen, not laborers, who manipulated the levers of the state. As Benedict himself observes, laissez-faire proponents believed that "the great danger to liberty had al-

137. Kurland, *Seth Low*, 125–26; Hammack, *Power and Society*, 151–52; McFarland, *Mugwumps, Morals, and Politics*, 103–4.

138. Carter, *Origin, Growth, and Function*, 245; Carter, "1895 ABA Presidential Address," 193; Carter, *Hints to Young Lawyers: Address to the Graduating Class of the Law School of the Columbian University at the Commencement* (Washington, D.C.: Judd and Detweiler, 1894), 21. Historians are in general agreement that the Mugwumps did not dedicate themselves to correcting the "most serious abuses of the unfolding economic order of the Gilded Age": the broad distributional problems afflicting laborers and farmers. Hofstadter, *Age of Reform*, 142. Scholars do not all agree, however, with John Sproat's conclusion that the Mugwumps generally feared and scorned "the dangerous classes." Sproat, *The Best Men*, 205. Both Geoffrey Blodgett and David Tucker, for example, suggest that other historians' presumptions about the Mugwumps' hostility to the needy are based on the anachronistic imposition of New Deal redistributionist paradigms on these Gilded Age reformers. Blodgett, "The Mugwump Reputation," 873; Tucker, *Mugwumps*, 122–23.

139. Benedict, "Laissez-Faire and Liberty," 313.

ways emanated from the temptation to misuse the powers of government *for the benefit of those who controlled it.*"¹⁴⁰ Despite his abhorrence for the heartland populism of William Jennings Bryan, a feeling he shared with most Mugwumps, Carter did not frequently dwell on the danger that popular forces might capture control of the government.¹⁴¹ In his view, the urban poor and working class were merely the hapless tools of the plutocrats and party politicians. Because the lower classes had limited influence over government affairs, Carter could view legislation on their behalf as noble paternalism in the Whig tradition rather than as a threat to liberty.

The Limits of Individualism and Individual Rights

The revisionist historians identify an intellectually coherent libertarian and individualistic foundation for Gilded Age laissez-faire constitutionalism. They argue that the widespread opposition to special legislation was rooted in a deep concern about the relationship of individual liberty to government.¹⁴² William Wiecek places an even greater stress on the era's focus on individual liberty. He writes, "Like most other Americans in the late nineteenth century, classical lawyers were captives of an individualist outlook. In nineteenth-century law, as in other areas of Victorian culture, the individual was the exclusive focus of concern in legal, moral, and political reasoning." Wiecek asserts that for Gilded Age jurists, "[b]asic liberties, which Americans had come to think of as rights adhering to the individual, reflected the underlying values of individualism and the role of will."¹⁴³

At times, Carter's jurisprudence appears to reflect just such a philosophy. He routinely condemned any legislation that reached outside its limited province and "invade[d] the domain of liberty." He proclaimed, "For myself I reject that view of the cosmical scheme which would regard society as the unit for the well-being of which our efforts should be immediately directed, even though individual happiness and perfection were thereby sacrificed."¹⁴⁴

Nonetheless, Carter's fumbling embrace of a Whiggish statism was mirrored by his willingness, also characteristic of the Whigs, to allow community concerns to trump individual rights. Whereas antebellum Jacksonian rhetoric was characterized by frequent references to rights, the Whigs tended to stress morality, duties, and the problems posed by unrestricted

140. *Ibid.*, 306 (emphasis added).

141. On Carter's and other Mugwumps' opposition to Bryan, see "Heard James C. Carter," *New York Times*, 15 Oct. 1896; McFarland, *Mugwumps, Morals, and Politics*, 73–76.

142. Benedict, "Laissez-Faire and Liberty," 293–98, 314–26; Gillman, *The Constitution Besieged*, 33–60.

143. Wiecek, *Classical Legal Thought*, 8, 108.

144. Carter, *Origin, Growth, and Function*, 135, 337.

liberty. The Republicans perpetuated these attitudes after the Civil War, and the Mugwumps continued to sustain to them to some degree even after they abandoned the Republicans in 1884. As Richard J. Ellis has observed, "The Mugwumps' anti-individualistic ethos should not be exaggerated. . . . However, it would be a mistake to assume that Mugwumpery was simply another expression of laissez-faire individualism."¹⁴⁵

In this connection, it is important to observe that Carter's clearest expression of his concept of limited government, quoted earlier, contains within it an important proviso: "[T]he sole function both of law and legislation . . . [is] to secure to each individual the utmost liberty which he can enjoy *consistently with the preservation of the like liberty to all others*."¹⁴⁶ This qualification was hardly an original proposition; it was embodied, for example, in the ancient common law maxim of *sic utere tuo ut alienum non laedas* (one should use his own property in such a manner so as not to injure that of another). What is notable is that Carter deemed the offensive or harmful conduct of private individuals to be a violation of others' "liberty" and that he made this issue a central focus of his jurisprudence. Private encroachments on liberty loomed at least as large in his thought as did state encroachments.

Despite Carter's assertion, quoted above, that his main concern was the happiness of the individual rather than the well-being of society, earlier in his book he proclaimed, "[S]ociety . . . is right, and whatever is necessary to society is, in itself, necessary and right. . . . The notion that each individual should be left to follow the dictates of his own conscience must [therefore] be at once abandoned." In Carter's view, customary morality, driven by the social instinct, imposed clear limits on individual autonomy. He described the evolution of custom through the ages as the growth of an ethic of avoiding selfish conduct that might harm or offend others in the community.

Man seeking, as by his nature he must, his own happiness, first thinks to find it in the unrestrained gratification of his original appetites and tendencies; but this leads him into conflict with his fellows, and brings upon him the miseries and suffering always attendant upon self-indulgence. He finds no way of avoiding these consequences except by self-restraint, and he soon begins to learn that by postponing immediate indulgence and enjoyment he can gain a larger and wider, though more distant, good.¹⁴⁷

Carter argued that the development of custom "results in tracing out a sphere of conduct within which the individual can move and act with freedom and security, and beyond which he cannot pass without encroaching upon the like sphere of another and exciting resentment with its conse-

145. Ellis, *American Political Cultures*, 112. On Whigs' and Republicans' views of individual rights, see Howe, *American Whigs*, 21; Gerring, "Party Ideology," 87, 89, 92.

146. Carter, *Origin, Growth, and Function*, 335 (emphasis added).

147. *Ibid.*, 141-42, 324.

quences." Law, as a mere reflection of custom, had the same purpose. "[T]he function of the law," he explained, "is to distinguish and separate the things which each individual may do or enjoy from the things which he may not do or enjoy without invading the equal liberty of others; and when this is done, the nearest approach to perfect liberty is reached."¹⁴⁸

Therefore, for Carter, restrictions on individual autonomy were a corollary to the protection of individual rights. The role of "society's organised power" was to maintain customary restraints on private conduct objectionable to others. In earlier times, social sanctions and occasional recourse to the courts had been sufficient to enforce these customary norms. As the country urbanized and industrialized, however, "[m]en touch each other in a vastly greater number of ways and may consequently the more encroach upon and abridge the individual liberty of each other." Therefore, "[a]dditional and more complex legislation" was needed.¹⁴⁹

Although Carter was most concerned with private encroachments on liberty that caused measurable physical or economic harm, he was even willing to entertain state regulation of personal conduct that simply offended others' sensibilities. As discussed above, he thought the law should generally stay its hand when society was divided on the moral propriety of a practice, such as the consumption of alcoholic beverages. However, when a very large proportion of citizens condemned a practice, Carter was less hesitant about using the "machinery of the law," including legislation, to force dissenters to conform to the majority's ethical standards. He explained, "Of course the question how far a Legislature may go without exercising tyranny is a different question at different times in different places. If there were a community where nine-tenths of its members never drank intoxicating drinks, it might not be tyranny to prohibit the sale of liquor. A small fraction in a crowded population must yield to the views and wishes of the great majority."¹⁵⁰

This is not the language of a champion of individual rights. In Carter's jurisprudence, despite his repeated paeans to liberty, the interests of the individual were often lost in the grand sweep of evolving societal customs and customary law.

Conclusion

In his examination of Mugwumps who survived past 1900, into the age of progressivism, Gerald W. McFarland astutely observes that the Mugwumps'

148. *Ibid.*, 126–27, 134.

149. *Ibid.*, 135, 336.

150. "James C. Carter on the Excise Question," *New York Times*, 7 March 1904.

fusion of orthodoxy and innovation, and thus the movement itself, came apart at the seams under the pressure of modernity. Some Mugwumps gravitated toward orthodoxy, continuing to fight the old battles for civil service and tariff reform. A larger group responded positively to the social justice impulses of progressivism and participated in progressive causes and organizations. Nevertheless, as McFarland points out, "There was a point . . . beyond which mugwumpery, as such, could not go. . . . [T]he Mugwump men could never totally share the enthusiasm of progressivism's young advocates for all the new allies, methods, and programs the progressive spirit seemed to force on its adherents."¹⁵¹

Carter was one of those Mugwumps who edged toward the innovative pole. In the years before his death in 1905, he revised his views of government and law to accommodate them to modern times. Like other Mugwumps, however, his intellectual commitment to traditional notions prevented him from going too far. His legal theories, which he developed in the midst of his campaign against codification in the 1880s, remained at their core an attack on legislation. Even as he accepted the need to expand the "province of written law" to address the problems of an urban, industrial, and immigrant nation, he struggled to preserve the court-centered, custom-based essence of his legal vision. Only at the very end of his life did he finally seem to realize that he could not bend his jurisprudence enough to make it relevant to contemporary conditions without breaking it completely.

One aspect of modern life that threatened to overwhelm Carter's customary common law jurisprudence was the fast pace of the country's development. He observed, "[S]ociety in most fully civilised nations is in a condition of incessant change, which means that customs are subject to incessant change and that the law resting upon custom must change in accordance with it." However, while customs changed quickly, the common law evolved only "by insensible gradations." Consequently, situations of uncertainty arose in which rapidly changing social norms raced ahead of legal rules. Carter admitted that legislation was often the only way to make the "sharp and direct changes" that were necessary to adapt the law to "existing wants." As the transformation of American society accelerated, however, this exception to the strict limits on written law threatened to erode those limits altogether.¹⁵²

Another feature of contemporary society that Carter's customary common law was ill-equipped to confront was the intensifying "conflict[] . . . between different bodies or classes in respect to their rights against each other." As explained above, Carter's jurisprudence rested on the assump-

151. McFarland, *Mugwumps, Morals, and Politics*, 173–77.

152. Carter, *Origin, Growth, and Function*, 257–59; Carter, "The Ideal and the Actual," 241–43; Carter, *Provinces*, 52–53; Carter, *Proposed Codification*, 18–19.

tion that the customs of the people were essentially uniform and that there was a single national standard of justice. He had to acknowledge, however, that in modern times, there was not always a clearly discernable universal custom to which judges could turn. Immigration was one cause of this diversity, although Carter did not often focus on this issue. More troubling to him were "[t]he conflicts so menacing at the present day between labourers and the employers of labour."¹⁵³

Carter's inclination, inherited from the Whigs, was to downplay the significance of class divisions and see American society as bound together organically by common economic interests.¹⁵⁴ Nevertheless, maintaining such an outlook was difficult in light of the labor unrest and social discord that marked the end of the nineteenth century. "Protracted as [class conflicts] are through long periods, practices grow up under which the parties become organised, as it were, in hostile camps, and the public peace becomes endangered; the passions become inflamed and whole communities are divided against each other; great difficulty arises in the execution of the ordinary law, and what may and what may not be lawfully done becomes itself clouded with doubt and uncertainty."¹⁵⁵

Carter concluded that legislation was essential to address this situation.

It seems necessary in such cases that the conflict should continue until, by the attrition between the parties, some reconciling custom begins to take form, and to foreshadow the promise of peace. Then the time will have arrived for wise legislation to put the growing tendencies into enacted law. . . . The office of legislation is to permit this war to be carried through to its result, but without violence. The doctrine that the majority must rule has a rightful sway here, for violence can be avoided only by permitting the stronger party to prevail without resort to actual force, and the stronger party is made manifest by the control of the Legislature. Such legislation, imposing, as it does, the thoughts and beliefs of one part of society upon another is tyrannical in its nature, but in such cases, as violence cannot otherwise be avoided, tyranny is necessary.¹⁵⁶

Carter's recognition that law might be the product of social struggle rather than a reflection of uniform custom is strikingly similar to developments in Oliver Wendell Holmes's thought around the same time.¹⁵⁷ Whereas Holmes still had decades to explore and expand on his ideas, however, Carter's realization simply led him to doubt his own life's work as his life

153. Carter, *Origin, Growth, and Function*, 260.

154. "Heard James C. Carter," *New York Times*, 15 Oct. 1896; Watson, *Liberty and Power*, 219, 238–39, 244; Schlesinger, *Age of Jackson*, 269–71; Howe, *American Whigs*, 21.

155. Carter, *Origin, Growth, and Function*, 261.

156. *Ibid.*, 260–62.

157. Horwitz, *Transformation II*, 109–43.

approached its end. In a letter he wrote a few months before his death, Carter confessed that he was tormented by "a suspicion that [his customary jurisprudence] is *old man's* thought after all and does not amount to much."¹⁵⁸ Ultimately, even Carter himself recognized how ill-suited his jurisprudence was to American society in the twentieth century.

158. James C. Carter to Joseph Choate, 21 Aug. 1904 (emphasis in original), Joseph H. Choate Papers, Library of Congress. In 1949, Roscoe Pound, commenting on the decline of Carter's brand of historicist, antilegislativ jurisprudence, remarked, "At most, the historian of juristic thought in America would note [Carter] in passing as a belated exponent of a body of doctrine already moribund when the book, by which he is best known, was published [in 1907]." Roscoe Pound, "David Dudley Field: An Appraisal," in *David Dudley Field*, 7.