JUDICIAL REVIEW AND LEGAL PRAGMATISM

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What has *Marbury v. Madison* (standing for the institution of constitutional judical review) meant for legal thought, the general approach lawyers, judges, and the teachers and scholars of the law generally take toward their work? Looking back at American history and around us in the world today naturally suggests a simple relationship, as follows.

For a long time, the United States was the only legal system with a flourishing institution of constitutional judicial review. And according to conventional wisdom, the general style of legal thought in this country has long been more pragmatic, or less formalistic, than in other systems. Over the last half-century, other legal systems have taken up judicial review, and now seem themselves to be moving away from traditionally formalist approaches to law. Maybe judicial review stimulates legal pragmatism, by making more vivid the intimate relationship of law with governance and public affairs.

Actually, while something like that may well have happened abroad in recent times, I believe that what happened in this country was more complex. Judicial review did help entrench jurisprudential pragmatism, but in an indirect way, by way of a backlash. Thus we see a convergence in results, but reached by quite different paths.

Introductory: The Two Stories

A story of direct influence would begin with recent history abroad. Over the last half-century, judicial review has gone from rare to almost universal in democratic regimes around the world. The judges who review legislation for constitutionality seem generally to do so in a style that is relatively informal or pragmatic, compared to what is usual in the rest of their legal system. This less formal juristic style seems to be contagious, spreading out to influence the way judges, lawyers, law teachers and legal scholars look at law more generally in the systems that have adopted active judicial review. Partly as a result of this, civil law systems are moving away from their traditional conceptualist notion of law as a gapless and determinate system of general principles controlling subordinate rules. And under the same influence, common-law systems in the English tradition are qualifying traditionally inflexible doctrines of precedent and strict textualist approaches to interpretation.

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A similar story might be told about American law in the early years of the republic. American judges were reminded from the beginning that when they undertook judicial review, it was a *constitution* they were expounding. This might have taught them to approach that daunting task with the "statesman's breadth of view" later commended by James Bradley Thayer as representing the best in the American tradition of judicial constitutionalism.[1] And because judicial review was so striking a feature of the legal scene, this might in turn have influenced how judges and commentators understood their work more generally, contributing to the flexible and instrumental Grand Style of juristic thought that historians have noted as characteristic of ante-bellum American law.[2] This story would bring early American developments together with the recent ones overseas, explaining both by the tendency of constitutional judicial review to encourage a pragmatic and value-conscious rather than a formalist or legalist approach to law generally.

I derive the story about postwar overseas developments from my own survey of the secondary literature, and I hope that it is plausible enough to invite the scrutiny of experts.[3] However I'm pretty sure the parallel American story is only a myth. What really happened was quite different.

The Grand Style celebrated by Llewellyn as the glory of ante-bellum American private law does not seem to have been influenced by judicial review, and in any case on Llewellyn's own account, it was thoroughly displaced by the Formal Style that dominated both private and public law in the late 19th century. The Formal Style was in turn overthrown in favor of the modern functional approach mainly at the instance of early 20th century Progressives, who were partly animated by their opposition to aggressive judicial review.

That is, indeed, the indirect way in which, so I conjecture, judicial review contributed to our exceptionally early adoption of a less formal mode of legal thought in the United States. The point is fortified by a comparison with developments in Europe in the same period. A similar formal style dominated private law in both European and American legal systems during the late 19th century. It called forth very similar critiques in both systems, from Ihering, Ehrlich, Gény and others in the civil law world, and from Holmes, Pound, Cardozo and others in this country.[4] But the attack on formalism had more lasting influence here, as a relatively pragmatic style became orthodox in law teaching and scholarship, and to some degree in the language and thought of judges and practitioners as well. In Europe, by contrast, the antiformalist critique

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[1]James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* 7 HARV. L. REV. 129, 138 (1893).

[2]*See* ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 118-19 (1938); KARL N. LLEWELLYN, THE COMMON LAW TRADITION 64-72 (1960); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 1-30 (1977).

[3]Not being a comparative law expert myself, I can't make any stronger claim than one to plausibility, based on the authorities set out below.

[4]*See* THE SCIENCE OF LEGAL METHOD (Ass'n of Am. Law Schools ed., Ernest Bruncken & Layton B. Register trans., 1917) for English translations from the leading French and German antiformalist writers; *see also* James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 407-12, 422-29 (1987). For Holmes, Pound, and Cardozo see what follows.

seems not to have extended its effect much beyond the level of theory, as working legal thought is said to have stayed closer to the traditional formalist approach.[5]

The presence of active judicial review in America seems to have made the difference between the two cases. Starting with Holmes in the 1890s, reformist American legal thinkers yoked the private-law conceptualism of Langdell and his followers to the activist classical-liberal judicial review of the *Lochner* era. In doing so, they created a single impressive and threatening bogeyman, Holmes's fallacy of logical formalism,[6] Pound's "mechanical jurisprudence,"[7] Cardozo's "demon of formalism,"[8] and Felix Cohen's "transcendental nonsense."[9] Association with the politically important *Lochner* line of cases gave formalism great practical significance in this country, and this motivated two generations of lawyers and legal theorists, most of them political Progressives and New Dealers, to work hard at entrenching an antiformal working orthodoxy in American law.

The joinder of Langdellian private-law theory and *Lochner*-type public law to create a single impressive target – the Demon of Formalism – was a creative act on the part of Holmes and his followers among the early modern American legal thinkers. The two tendencies were dissimilar in important ways, and could as easily have been kept distinct or even set in opposition to each other. But Holmes, Pound, Cardozo, and the others managed to get them joined in the collective mind of the profession so successfully that many American lawyers have come to associate the evils of *Lochner* with something larger, often called formalism, and to think of themselves as having rejected those supposed evils in the name of something equally large and different, often called Legal Realism.[10]

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[5]For this point, I rely mostly on what I am told by those with experience working or studying in both U.S. and other legal systems; for some confirmation in print *see* Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1365-70 (1968); JAMES HERGET, CONTEMPORARY GERMAN LEGAL PHILOSOPHY 108-120 (1996); Anna Mestitz & Patrizia Pederzoli, *Training the Legal Professions in Italy, France, and Germany*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 155, 163-164 (C. Neal Tate & Torbjorn Vallinder eds., 1995).

[6]OLIVER WENDELL HOLMES, THE COMMON LAW 32 (1881) ("the failure of all theories which consider law only from its formal side"); Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 465 (1897) ("The fallacy ... that the only force at work in the development of the law is logic").

[7]Roscoe Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605 (1908).

[8]BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

[9]Felix Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809 (1935).

[10]"'We are all realists now.' The statement has been made so frequently that it has become a truism to refer to it as a truism." LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 229 (1986). There is a debate over whether the term "Legal Realism" should be confined to those claimed as associates by Karl Llewellyn and Jerome Frank around 1930, or should be extended backward in time to include Holmes, Pound, Cardozo, and the other earlier critics of formalism, and promoters of a functional policy jurisprudence. For a good statement of the latter position, *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-192 (1992). I agree with Horwitz that if there is any truth in "we are all Realists now," Realism must include the early critics. But I think he understates the extent to which there was a distinctive Legal Realist movement circa 1925-1940 that can be distinguished from the "sociological jurisprudence" formulated by Holmes, Pound, Cardozo and carried on by many

This story leaves it problematic how the egalitarian activist American constitutional developments of 1940-1980 ("the Warren Court" writ large) fits into an account in which a still-vital antiformalist orthodoxy arose in reaction to aggressive judicial review. I will conclude with some thoughts about that question, linking up the post-war American story with the parallel overseas developments.

Formalism and Pragmatism

Before I develop the overseas and the American stories in more detail, I should say a word about terms and categories. I'm focusing on what I call working legal thought, by which I mean the cluster of attitudes and approaches to law that lawyers take on during their apprenticeship, and then actually manifest in their work as practitioners, judges, teachers, and doctrinal commentators. This leaves to one side, without at all meaning to deprecate, the kind of jurisprudential high theory whose influence reaches only to those who take a specialized academic interest in jurisprudence or legal philosophy.

My taxonomy opposes formalism to pragmatism,[11] but I don't need here to engage in the controversies surrounding the latter term, any more than I do in those surrounding "Legal Realism." If you resist the connotations of "pragmatism" or otherwise think it inappropriate as a label for what I'm talking about, you can just call the broad tendency "antiformalism."

Legal formalists emphasize the specifically legal virtues of the clarity, determinacy and coherence of law, and try to sharpen the distinction between legislation and adjudication. Roughly, they can be divided into rule-formalists and concept-formalists. The former place more value on determinacy, emphasizing the importance of clear rules and strict interpretation, while the latter more emphasize the importance of system and principled coherence throughout the law.[12]

It used to be always pejorative to describe a jurist as formalistic, but today no less a figure than Justice Scalia proclaims "Long live formalism!"[13] The term invokes a heritage

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others. The Realists were distinguished by a number of features: an irreverent tone; a skepticism about conceptual doctrinal work, including doctrinal work organized around "interests" and "policies;" an alternative program of formulating doctrine around narrow real-world categories; a primary focus on private law; and a greater interest in serious empirical social scientific study, what we call "law and society" work. I keep the name "Legal Realist" for this latter movement, while sharing Horwitz's view that it was much less significant for the history of American legal thought than were the earlier innovations of Holmes, Pound, and Cardozo. *See* Thomas C. Grey, *Modern American Legal Thought,* 106 YALE L. J. 493, 497-502 (1996).

[11]My own argument for identifying the critics of formalism as pragmatists is sketched in *id.* at 497-498, and spelled out at length for the case of Holmes in Thomas C. Grey, *Holmes and Legal Pragmatism,* 41 STAN. L. REV. 787 (1989)

[12]Max Weber's famous account of logically formal legal rationality, modeled on German Legal Science in the late 19th century, likewise emphasizes the qualities of autonomy, systematicity, and calculability; Weber's "substantively rational" mode of legal thought matches up with pragmatism as I describe it. *See* MAX WEBER, LAW IN ECONOMY AND SOCIETY 62-64 (Max Rheinstein ed., Harvard Univ. Press, 1954); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, WIS. L. REV. 720 (1972); ANTHONY T. KRONMAN, MAX WEBER 72-95 (1983).

[13]*See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (Amy Gutmann ed., 1997).

including at least two older episodes in American legal thought as well as the recent turn to originalism and textualism. First, Langdellian legal science treated private law as by its nature a coherent body of autonomous and axiomatic principles, inferred from decided cases without help from philosophical, moral, or religious sources, and able to solve all legal questions by deduction. This resembled the conceptualist legal science that dominated German private law at the same time, and which seems to survive in somewhat watered-down form as a working orthodoxy in much of the world to this day. Second, at about the same time, the *Lochner* phenomenon in constitutional law emphasized the moral and political aspects of fundamental legal principles, raising their scope and significance, but downplaying both their determinacy and their autonomous derivation from a distinctive legal science. Now our first self-proclaimed formalism – associated with Justice Scalia and such other important figures as Robert Bork and Frank Easterbrook – emphasizes coherence and principles less, strict interpretation and rules more, much like the traditional English formal approach to law.[14] All three strands have in common the emphasis they place on the virtue of fidelity – for the rule of law to obtain, law must be a body of objective rules or principles that can control the decisions of those willing to act as its faithful servants.

On the other side of the divide, pragmatism (or antiformalism) in legal thought shows up today in two principal forms: policy jurisprudence and modern rights theory. Policy jurisprudence treats law as a means to social ends, the fulfillment and accommodation of the interests of those the law is meant to serve. Interests give rise to policies, which are balanced against each other in the formulation of legal rules, standards, and principles. Interpretation of legal enactments tends to be purposive, with an eye on the relevant interests and policies, rather than confined to plain meaning. Categorical and rule-based approaches to law are justified (where they are) on grounds of policy – administrative convenience, coordination, protection of expectations, accountability – not as something following from the very nature of law.[15]

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[14]*See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Frank Easterbrook, *Formalism, Functionalism, Ignorance, Judges,* 22 HARV. J.L. & PUB. POL'Y. 13, 20 (1998) ("The dominant question should be whether there are rules, and this entails formalism.") For the connection to English legal method, see P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 32 (1987), who argue that a textualist approach to statutes and a strict doctrine of precedent are the main features differentiating the predominant "formalism" of English law from the "substantivism" more prevalent in American law.

[15]This is the jurisprudence promoted today by Richard Posner under the pragmatist label, see RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 130-148 (Harvard Press, 1990). Felix Cohen called it "the functional approach" in his famous 1935 manifesto, and contrasted it with the "transcendental nonsense" of formalism, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809. The functional approach had earlier been urged and concisely summarized by Holmes as early as 1897: "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." *The Path of the Law*, 10 HARV. L. REV. 457, XXX, 3 COLLECTED WORKS 391, 399. Pound and Cardozo took up this program, calling it "sociological jurisprudence" and "the method of sociology" respectively. Roscoe Pound, *The Need of a Sociological Jurisprudence,* 19 GREEN BAG 607 (1907); CARDOZO, NATURE OF THE JUDICIAL PROCESS, *supra* note 8, at 65-76. Most of the distinctively Legal Realist writers of the 1925-1940 period (Felix Cohen was a notable exception) moved away from it; they were as skeptical about basing law on general interests and policies as on general concepts and principles. In the terms of Weber's taxonomy, they thought law was "substantively irrational" (kadi-justice, the

Rights-oriented pragmatists differ from policy jurists in making qualitative distinctions between interests and rights, and between policies and principles, giving evaluative priority to rights and principles. They take rights more or less seriously, consider them trumps, and regard courts as peculiarly forums of principle. A jurisprudence of rights and principles can be formalist, if the rights are conceived as conceptually sharp-edged and the principles are thought of as axioms. But the rights-based jurisprudence of the last half century is not generally conceived as a moral or legal geometry. Rights and principles are stated in vague and contestable terms, and are not conceived as absolutes, meant to control wherever they obtain, but rather as presumptive in force, with a dimension of weight. As such, they invite being balanced and accommodated with each other, with strong interests and policies, and with overall regime purposes. Finally they are not derived autonomously by a distinctively legal form of reasoning; rather they are roughly the same moral rights and principles that are invoked in ordinary political and moral disputation.[16]

The Overseas Story: Judicial Review Brings Informality

Comparative law scholarship suggests that as constitutional judicial review has spread throughout the democratic world since 1945, it has been implemented by judicial methods that are informal, compared both to the traditional civil law conceptual approach, and the rule-based textualism characteristic of modern English law and the systems derived from it. Alec Stone Sweet provides a convenient summary of the theme as applied to civil-law regimes in his recent study of judicial review in Germany, France, Italy and Spain. Stone Sweet emphasizes the importance both of the centralization of review, and the procedure of abstract review, and argues that constitutional courts in these systems have been brought into close collaboration with legislative and executive officials in the making and shaping of public policy in a way that is new in Europe, and perhaps more generally.[17]

On Stone Sweet's account, politics is increasingly "judicialized" in these regimes, as legislators anticipate judicial review and debate legislation in terms of constitutional doctrine. At the same time constitutional adjudication becomes more openly legislative in style. This has a

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jurisprudence of the hunch) as against the policy-based "substantive rationality" proposed by Holmes and his followers. WEBER, *supra* note 12, at 213.

[16]As my summary of its tenets suggests, I include Ronald Dworkin in this school. This is not the place to defend labeling him a pragmatist, when he has he has declined the honor with some vehemence; see Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991). Some would see him as a modern formalist, one who believes all cases have right answers, that judges don't properly decide with reference to policy, and so on. Dworkin is a very sophisticated academic theorist, and more exemplary of rights-pragmatism in working legal thought are the manifestoes of two judges who have been crucial figures in the shaping of modern constitutionalism, William J. Brennan and Aharon Barak. See William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, Address at Georgetown University Law Center (Oct. 12, 1985), *in* 75 TEX. L. REV. 433 (1986); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy,* 116 HARV. L. REV. 16 (2002).

[17]*See generally* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

substantive dimension, as the constitutional court adopts an openly evaluative discourse, giving content to rights defined broadly and in moral terms, and balancing them against each other and against countervailing public policies using proportionality tests.[18] Procedurally, courts increasingly suggest changes that will allow legislation to pass constitutional muster, hence in effect joining in the legislative drafting and negotiation process, an approach particularly encouraged by the abstract mode of review. European constitutional courts thus increasingly act, Stone Sweet argues, essentially as third legislative chambers. An American constitutional lawyer reading his account naturally is reminded of the "councils of revision" that were tried under state constitutions in the early years of American independence, and proposed but rejected at the Philadelphia convention in 1787.[19]

Comparative scholars note a number of factors that have gone into bringing about this breakdown in the traditional European notion that law should be insulated from politics, and courts from legislation and administration. First, as a general matter, a culture of rights became established throughout the world, and particularly in Europe, in the aftermath of World War II and the Holocaust. The protection of rights and the rule of law came to be seen as values closely linked to the defense of democracy, promoting an open political system and first-class citizenship for minorities, rather than as right-wing slogans to be invoked against democratic social reform.[20] With parliamentarism discredited by its failure to forestall the rise of totalitarianism in Europe between the wars, rights-oriented courts were increasingly seen as defenders of ordinary people against the knock on the door in the night, rather than as a conservative rearguard bent on frustrating the labor movement and the welfare state through the *gouvernement des juges.*[21]

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[18]For the virtual universality of proportionality review, *see* David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 136-37 (1996). For a more refined taxonomy of emerging styles in the cross-fertilizing world of modern judicial human rights protection, *see* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819 (1999).

[19]*See* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1056-60 (1997); *see generally* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989). The Council of Revision in the New York Constitution of 1777 served as an early model and was incorporated into the Virginia Plan proposed at the Philadelphia Convention.

[20]A good (if uniformly celebratory) general statement of these ideological developments as the basis for the spread of active judicial review can be found in MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 117-211 (Paul J. Kollmer & Joanne M. Olson eds., 1989). These themes are well captured by the tendency to call the postwar German regime after the seat of the German Constitutional Court, rather than the seat of parliament. *See* Gerhard Casper, The Karlsruhe Republic, Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court (Sept. 28, 2001), *in* 2 GERMAN L. J. no. 18, Dec. 1, 2001. A comprehensive normative exposition of the position, written for an American audience, is Barak, *supra* note 16.

[21]Proposals to adopt American-style judicial review during the first half of the 20th century in Europe were mostly defeated and contained by Social Democrats, who often appealed to the classic French critique based on the American experience of the *Lochner* era, EDUOARD LAMBERT, GOVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIAL AUX ETATS-UNIS (1921). Resistance from the left to the spread of judicial review is by no means dead; for an all out polemic along these lines, see Michael Mandel, *Legal Politics Italian Style*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER, *supra* note 5, at 261-286; and for a still more recent development of this line of argument, *see* Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization:*

Second, at the institutional level, most of the new systems centralized judicial review in a constitutional court, which had no function but to hear constitutional questions.[22] The judges of these courts were chosen in a political process and generally recruited from outside the traditional judiciary, from scholars and lawyers with political experience. They were thus not locked into the formal style of opinion-writing that had been standard in civil law systems. Further, the very creation of such a court naturally encouraged active review. A supreme court with general appellate jurisdiction which then gets jud icial review powers may shy away from exercising them, whether out of inertia, or trust of legislature and executive, or disbelief in *gouvernement des juges.*[23] But a court with nothing to do but engage in judicial review is less likely to choose to do nothing.

Third, most post-1945 constitutions contained explicit protections of constitutional rights, and the way these were drafted virtually required a relatively informal style of interpretation if they were to be enforced by courts at all. Modern rights typically are phrased in terms of broad moral concepts – for example the right of human dignity was made the central organizing value in the German Constitution, and the prestige of that constitution, and of the German Constitutional Court in implementing it, have made that "dignity clause" particularly influential for other constitutional regimes around the world.[24] It's hard to imagine a less juridically formal limitation on legislative authority.

After being stated very broadly, rights are then not treated as absolutes, but generally qualified in a way that makes them into presumptions subject to override on the basis of competing considerations of principle or policy. This explicit balancing approach can be enacted wholesale as with Section 1 of the Canadian Charter of Rights and Freedoms,[25] or retail as with

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Lessons from Four Constitutional Revolutions, 25 LAW & SOC. INQUIRY 91 (2000) (treating the introduction of judicial review in Israel, Canada, New Zealand, and South Africa as a political strategy to bypass electoral opposition to neo-liberalism and globalization). The themes of the *gouvernement des juges* critique animate recent important books opposing judicial review by Jeremy Waldron and Mark Tushnet. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[22]Named for the Austrian judicial review system devised by Hans Kelsen in the interwar years. Kelsen argued, however, for judicial review limited to formal and procedural matters, on the ground that courts could not protect substantive human rights without making themselves legislators concealed behind a jurisprudential facade of natural law. *See* STONE SWEET, *supra* note 17, at 34-37.

[23]As is said to be the case in the Scandinavian countries; *see* Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 AM. J. COMP. L. 345, 375-80 (2000).

[24]*See* Izhak Englard, *Human Dignity: from Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1921-27 (2000) (describing the increasing dominance of the concept of human dignity in contemporary constitutional human rights law.) *See id.* at 1924-26 for discussion of the interpretation of the unamendable Article 1 of the German Basic Law: "Human dignity is inviolable."

[25]Enumerated rights and freedoms are "subject only to such reasonable rights and limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. New Zealand's Bill of Rights Act repeats this language verbatim. Bill of Rights Act, 1990 (N.Z.) pt. I § 5.

many specific rights provisions in modern constitutions.[26] A typical modern constitution declares many protected rights of broad scope, most with indefinite boundaries, and the need to accommodate them to each other in cases of conflict further promotes the tendency to use balancing tests and to reason purposively from conceptions of overall regime purposes and values.[27] In several instances, courts have found the authority to articulate and enforce a body of unwritten constitutional rights, most notably in the European Court of Justice's determination that European Union legislation is implicitly subject to a body of general human rights drawn from the common traditions of the member states.[28] Most post-war constitutions guarantee social rights as well as traditional negative civil rights and liberties, and where these are regarded as justiciable, they virtually require a flexible and pragmatic style of interpretation and enforcement.[29]

Fourth is a cluster of phenomena usefully grouped under the label "judicial globalization."[30] In Europe, the treaties establishing the European Union, and the European Convention on Human Rights agreed to by members of the Council of Europe, have taken on higher law status within the domestic law of European states, and the European Court of Justice and the European Court for Human Rights have increasingly actively exercised judicial review powers over trade and human rights law respectively. Legal tests of proportionality are common in both kinds of transnational European law, and this has helped spread the policy-oriented pragmatic style of adjudication throughout Europe. The prestige of both the national constitutional courts, and the transnational European courts, has also tended to transmit their adjudicative style beyond western Europe as well. Systems that come relatively late to strong judicial review, like the Eastern European countries after 1989, and the democratizing countries in Asia during the 1990s,[31] find an established international style of constitutional and human rights adjudication ready for adoption. Human rights provisions are often borrowed from existing constitutions and conventions in the drafting of new ones, and this makes it natural for courts of different countries to cite each other's decisions, thus furthering the emergence of a new *jus*

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[26]*See* STONE SWEET, *supra* note 17, at 96-97 for examples.

[27]Thus in South Africa, issue of constutional restraints on defamation law is discussed in terms of striking a balance between the express constitutional rights of freedom of the press and human dignity. *See* Khumalo v. Holomisa, 2002(8) B.C.L.R. 771 (CC) at *52-*53.

[28]STONE SWEET, *supra* note 17, at 170-174. *See also* STONE SWEET, *supra* note 7, at 99-100, giving French, Spanish, and Italian examples, and noting the German court's development of the overarching "human dignity" right as an equivalent.

[29]*See* VICKI C. JACKSON & MARK TUSHNET (eds.), COMPARATIVE CONSTITUTIONAL LAW (1999) at 1046-1136 (constitutionally required affirmative action in India), 1452-1476 (judicial protection of welfare rights in Hungary). Cf. Minister of Health v. Treatment Action Campaign, South Africa Constitutional Court, July 5, 2002 (government provision of anti-AIDS drug Nevirapine required by South African Constitution).

[30]Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

[31]Healy, *Judicial Activism in the New Constitutional Court of Korea*, 14 COLUM. J. ASIAN L. 213 (2000); Cooney, *Why Hong Kong is not Taiwan: A Review of the PRC's "One Country Two Systems" Model for Reunification with Taiwan*, 6 PAC. RIM L. & POL'Y 497 (1997).

gentium of human rights. Judges increasingly meet with each other across national lines to discuss their work, and this creates more avenues for transmitting judicial techniques and doctrines that have proved successful and prestigious, for building collective judicial esprit de corps, and encouraging newer or less secure constitutional judiciaries to imitate the confident exercise of sweeping powers that has become characteristic of the most admired and best-established ones.[32]

British developments provide an interesting case-study of the tendency of judicial globalization to undermine national traditions of legal formalism. The English courts have long been noteworthy for their strict textualist approach to statutory interpretation, a practice reinforced by the exact and detailed style of legislative drafting characteristic of the British Parliament. When Britain joined the European Common Market in 1972, this brought their law under the authority of the relevant treaties and associated directives, as authoritatively interpreted by the European Court of Justice. European statutory drafting style is typically more open-ended, and the approach of European courts interpreting trade law more purposive that what was usual in Britain. This has tended to nudge the English courts toward a more freewheeling mode of adjudication at least in cases affected by EU law, and reformers (like Lord Denning) who would prefer to see English legal style move in that direction generally seized the opportunity to press their case.[33] With the adoption of the Human Rights Act of 1998, Britain has given partial domestic effect to the European Convention on Human Rights, which carries with it a characteristic modern human-rights style of free interpretation dominated by purposive reasoning, balancing, and proportionality. The European human-rights style is now expected to make further inroads upon the traditional formalism of the British courts.[34]

The British case opens up the final issue, which is the extent to which the world-wide growth of the new juristic style characteristic of modern constitutionalism is extending its influence to modify the treatment of ordinary law by lawyers, judges, teachers and commentators. In a limited way, this is clearly happening, as constitutional courts have increasingly mandated that constitutions must be given more or less effect "horizontally," which is to say, taken into account by the rest of the national court system in the interpretation and enforcement of ordinary law. Perhaps the best-known example of this is the German Constitutional Court's insistence that the *Grundgesetz* enacts not merely a list of discrete provisions but an "objective order of values," a system of implicit legal principles meant to pervade the German legal order, including what had at one time been thought of as the autonomous domain of private law.[35] Though comparative research on this question has barely begun, there may be a general trend for the new style characteristic of judicial review to

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[32] Slaughter, *supra* note 30, at. 1120-21.

[33]Jonathan Levitsky, *The Europeanization of the British Legal Style*, 42 AM. J. COMP. L. 347 (1994).

[34]Douglas Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 366-369 (2002); Cf. Sir David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 IND. J. GLOBAL LEG. STUD. 323 (2001).

[35]*See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 368-76 (1989); STONE SWEET, *supra* note 15, at 115-117.

influence the regular work of the ordinary courts, and to undermine the dominion of the traditional conceptual civilian style.[36]

What about the exemplary effect of judicial review on ordinary law in the smaller number of legal systems that practice active judicial review in the American mode, without a specialized constitutional court?[37] Examples would be Ireland, Canada, and New Zealand, systems which have practiced relatively active review of legislation under human-rights limitations since 1937, 1982, and 1990 respectively. In constitutional cases, the highest courts of these systems do seem to have moved toward the modern informal style of human-rights adjudication, with broad moral-political "rights talk," tempered by proportionality tests and balancing.[38] In these common-law systems, each with a tradition of British-style formalism – strict *stare decisis*, highly specific statutes, textualist rather than purposive interpretation – it will be interesting to see how the informal human-rights style influences the way in which judges, lawyers, law teachers and legal scholars approach ordinary legal questions.

A Parallel American Story?

Do these contemporary overseas developments recapitulate an earlier sequence of events in America? One could sketch such a story. It would begin with John Marshall in *Marbury*, treating the Constitution as supreme ordinary law, simply a more authoritative statute, as he applied a technical aspect of Article III to invalidate an equally technical provision of the first Judiciary Act. The jurisdiction was inescapable, the method formal and positivistic – laying the Constitution alongside the statute.

But then in later cases, when great national issues came up for decision, Marshall reverted to an older tradition that distinguished "fundamental" from "ordinary" law;[39] hence the

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[36]STONE SWEET, *supra* note 7, at 114-125, recounting Spanish, Italian, and French examples of horizontal influence in addition to the German. Stone Sweet notes, however, that "major comparative research on the impact of constitutional review on the [ordinary] judiciary does not exist." *Id*. at 115.

[37]A number of systems appear to have decentralized review as a formal matter, but a strong tradition of deference means there is little active review, so that the modern rights-based style could not have made inroads.

[38]*See* Steven Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 719-731 (2001), for Canada and New Zealand. Gardbaum's main focus is on what Mark Tushnet calls in his paper for this symposium the "weak form" of judicial review – in which judicial enforcement of rights against legislation is subject to legislative override without constitutional amendment – in Canada and New Zealand, and now in Great Britain under the Human Rights Act, 1998. The "weak form," which had almost no effect in Canada under the statutory Bill of Rights of 1960, has not prevented active judicial review in Canada since the Charter, and in New Zealand under a provision much like the earlier Canadian one – just as formally "strong form" review does not guarantee active exercise of judicial powers, for example in Scandinavia. For a brief overview of the Irish situation, which involves active judicial enforcement of an entrenched bill of rights, *see* Garrett Fitzgerald, *The Irish Constitution in its Historical Context*, *in* IRELAND'S EVOLVING CONSTITUTION, 1937-1997, at 29, 38-40 (Tim Murphy & Patrick Twomey eds., 1998).

[39]For the distinction between the Constitution as fundamental law and as supreme ordinary law, *see* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 5-12 (1990); Larry D. Kramer, *The Supreme Court Term 2000 Foreword: We the Court*, 115 HARV. L. REV. 4, (2001).

celebrated reminder in *McCulloch v. Maryland* that "we must never forget it is a *constitution* we are expounding."[40] Not only should the Constitution be read broadly to allow the national government to adapt to the contingencies of "ages to come" through legislation, but also (as in *Fletcher v. Peck)* constitutional limitations protecting individual rights should likewise be read broadly in the light of "general principles... common to our free institutions," that is to say, common-law tradition seen through a natural-law lens.[41]

American constitutional law thus became all at once ordinary law, pragmatic statesmanship, and enlightened reason. Here is the recipe for what Karl Llewellyn would later describe as the Grand Style characteristic of early 19th century American judges, a style that started with formal authoritative sources but always checked them against principle and policy in their application. Llewellyn listed Marshall among the "giants" of the Grand Style,[42] and we might suppose him to have been peculiarly influential, given his stature as the Great Chief Justice. virtually the personification of American law. His judicial style was shaped above all by his work as a public law judge, the founder and for a generation the primary expounder of the law of the Constitution.

Llewellyn set up the Grand Style as the authentic American judicial tradition, and argued it had been revived by the best twentieth century judges in their escape from dark ages of the late 19th century dark ages, dominated by the Formal Style. Cardozo was Marshall reborn – so the story would go. Progressive and New Deal lawyers argued along these lines as they invoked "it is a constitution we are expounding" against the old Supreme Court's narrow construction of federal powers in the first third of the century.[43] All they seemed to ask for – and if the story holds good, all that happened when the Court opted for a broad interpretation of national power in 1937 – was a return to Marshall both in substance and judicial approach, the Grand Style reborn, the Golden Age recovered. By easy extension we might readily see the same revival in the common law decisions of Cardozo and then Roger Traynor, and finally (keeping in mind Marshall's invocation of "general principles" to construe individual rights protections) in the free development of the constitutional law of human rights by Earl Warren and William J. Brennan.

Well that story goes very fast, all too fast. Insofar as an account along those lines may have gained currency for a time – I seem to recall hearing something like it back in law school – it was a law-office myth designed to make the innovations of the New Deal seem like a restoration of the Founders' design. In fact, as Morton Horwitz and others have noted,[44] the public law jurisprudence of the Marshall Court was notably formal and categorical, quite in contrast to the flexible and openly instrumental Grand Style of the judges of the same period in private law. Marshall did not admit to exercising judicial statesmanship in laying down the

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[40]McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[41]10 US 87, 139 (1810) (Contract Clause interpreted broadly to protect vested property rights).

[42]LLEWELLYN, *supra* note 2, at 36.

[43]*See, e.g.*, CARDOZO, *supra* note 8, at 78-79.

[44]HORWITZ, *supra* note 3, at 255; *see also* Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition,* 70 N. C. L. REV. 1, 26-52 (1991).

constitutional law he created. His rhetoric was Blackstonian, Montesquiean, declaratory, denying all discretion, all authority or ambition to legislate, portraying the judge as possessed of no will but only judgment.

Llewellyn seems to have simply tossed Marshall's name into his list of important Grand Style judges; when he came to develop his account of the style, he paid no attention to any Marshall decisions, or any public law decisions at all. In fact the creative private-law instrumentalism of the ante-bellum American judges can be fully explained without any reference to the existence of constitutional judicial review. The American courts' reception of English common law went forward on the understanding that only doctrines adapted to American conditions were to have authority, a judicial assignment that required making functional and instrumental judgments explicit. In addition, the absence of state apparatus comparable to those found in the old world – the "sense of statelessness" that accompanied the dominance of American governance by courts and parties[45] – made the courthouse the seat of government and the judges the main representatives of authority, and also important partners to the part-time legislatures in lawmaking. It is not surprising that judges who found themselves serving in effect as the government took on a less legalistic and more expansive conception of their role than judges surrounded by a corps of executive officials wielding state power.

Finally and decisively, the Grand Style was, as Llewellyn and others have observed, entirely superseded by the strict Formal Style that came to dominate American law in the late 19th century. That Formal Style was in turn displaced not by any revival of the thought and methods of John Marshall, the father of judicial review, but by the distinctively modern policy jurisprudence promoted by the legal Progressives and pragmatists of 1880-1930, led by Holmes, Pound, and Cardozo. These writers were not champions of judicial review, but skeptical critics of it, by and large proponents of the supremacy of democratic legislatures, dedicated to reining in the aggressive public law style of the classical liberal judges of the *Lochner* era.

So John Marshall's great labors in establishing judicial review cannot be made to connect in any direct way to Holmes, Pound, Brandeis, Cardozo and Llewellyn, and on to Traynor, Brennan, Warren and the pragmatic judicial activism of the late 20th century in this country. And more generally, the American experience reminds us that giving judges power to override legislation can as easily inspire them to formalism as to pragmatism in jurisprudence. The counter-majoritarian difficulty and the specter of *gouvernement des juges* supply a standing incentive to portray activist judicial review in formalist terms, as merely the application of determinate principles, sometimes conceived as the enactments of God or of History, but more often as the will of the Sovereign People themselves expressed in the text of the Constitution.[46]

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[45]STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 5 (1982).

[46]Copious illustration can be found in Barry Friedman's series of studies of the "countermajoritarian difficulty." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court* (2001) (unpublished manuscript, on file with the author); *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. Rev. 1383 (2001); *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); *The History of the Countermajoritarian Difficulty, Part Five: The Birth of an Academic Obsession,* 112 YALE L. J. 153 (2002*).* Friedman's main theme is that the politics of the "countermajoritarian" aspect of judicial review has been a

And of course that rhetorical tradition is familiar, from Marshall himself in many cases, Taney in *Dred Scott,* Owen Roberts in *Butler,* Hugo Black throughout his career, right up to the Rehnquist Court today.[47]

A Better American Story: Backlash, and the Construction of Formalism

What really happened was more complicated. We start with the triumph of the Formal Style in the late 19th century, as conceptualist jurisprudence came to dominate private-law scholarship throughout the newly industrialized world. This was the "legal science" common to the German Pandectists and American Langdellians, developed by the law professors of the systems in which university-based legal education and scholarship had become well-established. The less professorial English version of formalism emphasized rules and precedents more than the professorial doctrinal apparatus of general concepts, principles, and taxonomy. But all exemplified what Llewellyn called the Formal Style, and more or less implemented the jurisprudential ideal-type that Max Weber called "formal legal rationality."[48]

Starting in the late 19th century, conceptualist legal science was subjected to critique. Ihering in Germany and Holmes in the United States attacked the view that private law developed through the unfolding of abstract concepts and principles found to underpin existing law. When Holmes first proclaimed that "the life of the law has not been logic; it has been experience" his target was Langdell's claim that considerations of fairness and convenience were

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contextually variable matter, not a single "difficulty," but the his studies show that a tendency to revert to strong formalist rhetoric when judicial review comes under political pressure is a constant strand throughout.

[47]*See,* for Marshall, *supra* note 44; Dred Scott v. Sanford, 60 U.S. 393, 405 (1856) (Taney, CJ) ("It is not the province of the court to decide upon ... justice or injustice ... policy or impolicy.... The duty of the court is, to interpret the instrument .... with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."); United States v. Butler, 297 U.S. 1, 62 (1936) (Roberts, J) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."); Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting) ("I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field.") *Cf.* Bush v. Gore, 531 U.S. 98, 111 (2000) (per curiam) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.")

[48]WEBER, *supra* note 12, at 62-64. Weber's overall thesis was (to oversimplify a bit) that it was the unique and coincidental conjunction of formally rational legal technique with Protestant religion in modern Europe that launched capitalism. He treated the casuistic English legal style as lacking the logically formal rational mode of legal thought of continental legal conceptualism, which lead some to find an "England problem" for his theory, since England's was the first great capitalist economy. But Weber can also be read as arguing that formal rationality (impersonal administration of generally knowable pre-existing law) was all that was required for capitalist development, and that despite its lack of "logic" English common law adequately supplied this, indeed with the added advantage of allowing more flexible judicial response to anti-capitalist disorder. Compare KRONMAN, *supra* note 12 at 87-89, with Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 LAW & SOC'Y REV. 487-512 (1987). I thank Duncan Kennedy for this point.

"irrelevant" in determining the doctrines governing formation of contracts.[49] In *The Common Law* he repeated his criticism of Langdell's "merely logical" treatment of contract formation, urging that such problems should be (and were) solved on the basis of "convenience;"[50] he extended his critique to the German Pandectist private-law scholars, grouping them together with Langdell as practitioners of the same fallacy.[51] The fallacy was formalism; judges and scholars were naturally tempted to "consider the law only from its formal side" and to indulge the fiction that each new decision was logically dictated by those that went before. This neglected the reality that the logical exposition of doctrine always left plenty of room for the exercise of discretion, and that "the growth of the law" was in fact "legislative" reflecting "views of public policy in the last analysis," with judges exercising (in his later phrase) "the sovereign prerogative of choice." The "logical cohesion" of doctrine was indeed a practical virtue for law, but it was only one policy among many, to be balanced against others, with the ultimate test being "what is expedient for the community concerned."[52]

Holmes had nothing to say either in his review of Langdell or in *The Common Law* about the public law of his day. He had commented on constitutional law issues as a young scholar during the 1870s, generally anticipating his later inclination toward judicial restraint; thus he had praised the United States Supreme Court for allowing states to regulate prices given new trends in the economy, and had criticized the invalidation of paper money as improper judicial second-guessing of Congress on "a question of political economy." But in these early writings, he did not suggest that the kind of aggressive judicial review he deplored had anything to do with a jurisprudence that gave too much weight to "merely logical" considerations, or to the "formal side" of legal thought. [53]

In 1897, after he had served as a judge for fifteen years, Holmes had occasion again to condemn "merely logical" formalism in very much the same terms as he had used in the

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[49]Holmes, *Book Review*, 14 Am. L. Rev. 233, 234 (1880), 3 COLLECTED WORKS 102, 103.

[50]Holmes, *The Common Law* 5, 239; 3 COLLECTED WORKS 115, 271.

[51]*See* Mathias W. Reimann, *Holmes's* Common Law *and German Legal Science,* in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72-114 (R. Gordon ed., Stanford Univ. Press, 1992).

[52]*Common Law,* 32; Oliver Wendell Holmes, *Law in Science and Science in Law,* 12 HARV. L. REV. 443, XXX (1899); 3 COLLECTED WORKS 406, 419.

[53]*See* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 26-60 (1963). The criticism of the Legal Tender Court was that it had too aggressively second-guessed a judgment of "political economy" within Congress's authority in deciding whether making greenbacks legal tender had been good policy under the Necessary and Proper Clause. 1 COLLECTED WORKS 318. Holmes had earlier argued, however, that the greenback law was unconstitutional on the ground that the grant of power to "coin money" excluded by implication any power to make paper money legal tender, ID. at 212 – an argument that Holmes may later have repented, particularly in light of the forceful criticism of James Bradley Thayer. *See* HOWE, at 55. On the Granger Cases, Holmes said the power to regulate prices should turn not on whether the business subjected to price regulation was a "statutory monopoly," as Field had argued in dissent, but on whether there was "actual power on the one side and actual dependence on the other." The Court should stand ready to review the reasonableness of the rate set, striking it down only if it was a "mere cover for confiscation;" when this point was reached was a question of degree, but (a familiar Holmesian observation) so were most legal questions. 3 COLLECTED WORKS 36.

Langdell review and *The Common Law*. In the meantime as a judge he had dissented from politically controversial pro-business decisions in both common-law and constitutional cases during the upsurge of conflict between capital and labor during the 1890s.[54] In the common-law labor cases particularly, he believed he had seen his fellow judges deluding themselves into thinking they were merely applying general principles deductively, when really they were weighing public policy considerations of "rather a delicate nature," so that "judges with different economic sympathies might ... decide such a case differently."[55]

No doubt influenced by this experience, he now extended the critique he had earlier directed only at Langdellian and Pandectist private-law methods to blame formalist jurisprudence for the increasing activism of the courts in reviewing social legislation. Conceiving legal decisions as invariably logical deductions from first principles rather than seeing that they sometimes required judgments of policy encouraged judges, who were members of "the comfortable classes" and hence fearful of socialist agitation, to use their positions as "expounders of the Constitutions" to import principles from "outside the bodies of those instruments" that did no more than reflect "the economic principles which prevailed about fifty years ago."[56]

The connection Holmes drew between jurisprudential formalism and laissez-faire constitutionalism seems to have been something new, at least in the standard American legal debates of the time. Progressive lawyers had from the beginning criticized the increasing tendency of conservative judges to invalidate labor protection and business regulation starting in the 1880s. But so far as I have been able to tell, they had not linked the decisions to an excessive formalism, or abstract conceptualism, or devotion to logical coherence in the formulation of legal doctrine, of the sort Holmes had criticized in Langdellian or German Pandectist private-law jurisprudence.[57]

After Holmes first linked private-law formal conceptualism to active laissez-faire judicial review in the 1890s, the connection quickly went on to become canonical. By 1911, he could invoke it offhand, describing Lochnerism as the "drily logical" and "scholastic" treatment of the Fourteenth Amendment and the Bill of Rights.[58] This had been preceded by a series of celebrated articles by Roscoe Pound, spelling out the premises of policy jurisprudence (which he called "sociological jurisprudence"), which he described as the application of the philosophy of pragmatism to law. In two of these articles, "Mechanical Jurisprudence" and "Liberty of Contract," both published in 1908, Pound followed Holmes in linking the "mechanical"

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[54]*See* Commonwealth v. Perry, 28 N.E. 2d 1126 (Mass. 1891); Vegelahn v. Guntner, 167 Mass. 92, 104-109 (1896); and *see also* Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

[55]Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1, XXX, XXX (1894), 3 COLLECTED WORKS 371, 376.

[56]Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 467-468; 3 COLLECTED WORKS 391, 398.

[57]See the catalog of Progressive complaints during the 1890s collected by ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 39-60 (1960) – none makes the connection to formalism or conceptualism of the sort represented by the Langdellians.

[58]Noble State Bank v. Haskell, 210 US 104, 110 (1911.)

tendencies of formalist late-19th-century private law scholarship to the aggressive constitutional resistance against of Progressive-era laws meant to protect workers from exploitation by their employers.[59]

By 1913, it seemed natural for the young Felix Frankfurter, a scholar entirely focused on public-law concerns, to lead off a critique of Lochnerian tendencies with the "not-logic-but-experience" passage from *The Common Law.*[60] In 1921, Cardozo warned against "the demon of formalism," and associated the Supreme Court's tendency to import laissez-faire principles into constitutional law with (quoting Pound) the false theory of "eternal legal conceptions ... containing potentially an exact rule for every case to be reached by an absolute process of logical deduction" – in short, with Langdellism.[61] In 1935, in the midst of the New Deal constitutional crisis of the judiciary, Felix Cohen's Legal Realist manifesto repeated the now-familiar critique of private-law conceptualism; he varied it only by starting with the favorite alternative to Holmes's "not logic but experience," Ihering's satirical critique of the German Pandectist's project of locating private law docrine in a "heaven of juridical concepts."[62] Cohen then interchangeably invoked conceptualistic private law doctrines and the U. S. Supreme Court's decisions confining public utility regulators' ratemaking authority to illustrate the evils of "transcendental nonsense" and lobby for the virtues of the "functional approach."[63]

The joinder of Langdellism with Lochnerism, first made by Holmes in the 1890s, and repeated again and again by leading American legal thinkers in the years since, has become so familiar that it now in retrospect seems inevitable. I'd like to suggest it was by no means so. It *was* indeed inevitable that Progressives (and later, New Dealers) would mount a sustained attack on the *Lochner* line of cases. But it did not follow that they would find a common enemy, "formalism," manifested jointly in those decisions and in the legal science of the Harvard private-law scholars and the German Pandectists. Langdellian and Lochnerian tendencies could

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[59]Roscoe Pound, *Mechamcal Jurisprudence,* 8 COLUM. L. REV. 605, 608 ("rigid scheme of deductions from *a priori* conceptions"), 610-611 (examples of conceptual jurisprudence defeating sound commercial practice in private law), 615-616 (*Lochner* decision treated as example of same phenomenon) (1908); Roscoe Pound, *Liberty of Contract,* 18 YALE L. J. 454, 457 (mechanical jurisprudence one ground of excessive judicial devotion to liberty of contract), 462-464 (disregard of "actual facts" of inequality between contractors result of "rigorous logical deductions from predetermined conceptions") (1908).

[60]*The Zeitgeist and the Judiciary*, *in* FELIX FRANKFURTER ON THE SUPREME COURT 1, 4 (Philip B. Kurland ed., 1970).

[61] CARDOZO, *supra* note 8, at 66, 77-78, quoting Roscoe Pound, *Juristic Science and the Law*, 31 HARV. L. REV. 1047, 1048 (1918).

[62]Cohen, *supra* note 9 at 809, citing VON IHERING, IM JURISTISCHEN BEGRIFFSHIMMEL in SCHERZ UND ERNST IN DER JURISPRUDENZ 245 (11th Ed. 1912) 245.

[63]Cohen, *supra* note 9, at 820 (every field of law displays fallacy of "ignoring practical questions of value or of positive fact" and instead "manipulating legal concepts in certain approved ways;" examples of such concepts include "corporate entity," "property rights," "fair value," and "due process" from public law, and also "title," "contract," "conspiracy," "malice," "proximate cause" from private law; arguments of this kind are "circular" in the same way as Moliere's physician's discovery that opium puts people to sleep because it contains a dormitive principle.)

have been seen as quite distinct from each other – in which case I don't know if we would have an orthodoxy in American legal thought that proclaims us to be all Realists now.[64]

As it happened, though, the same influential group of legal thinkers disliked both Langdell and Lochner and decided, consciously or not, to stress the similarities between them, while submerging the substantial differences. While Langdellian private-law theory was naturally stigmatized as scholastic, merely formal, and drily logical, these were in many ways odd terms to apply to the classic-liberal public law decisions, which might more naturally have been attacked as all too juicy.[65] Indeed they typically were attacked in just these terms – and by the very same critics. Thus Holmes's famous quip that "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*"[66] charged the Court, not with excessive legalism or scholastic obsession with logic, but rather with wandering off the legal reservation to do speculative political philosophy in a libertarian vein.

To understand the relations between Lochnerism and Langdellism, it's helpful to sketch the elements of what we call legal formalism, treating the term as it has come to be used in recent years, which is to say not as an invariably pejorative epithet, but as a name for certain permanent tendencies in legal thought.[67] All versions of formalism have in common an insistence that certain specifically legal virtues be honored when they compete with substantive considerations of fairness and utility. Of course the legal virtues themselves often honor fairness and promote utility, but not always, and a jurisprudence is formalist to the extent it insists on adherence to the legal virtues in cases where they conflict with other substantive values. We have the legal virtues in mind when we praise an institution or regime for its lawfulness, its conformity to the rule of law. On the other hand when we condemn practices or arrangements or ways of thinking as legalistic, that reflects our judgment that these virtues are being carried too far.

There are many ways to taxonomize the specifically legal virtues,[68] but I find it useful to separate them into three desiderata, all of which derive their political appeal from the central rule-of-law ideal that those exercising coercive power should generally act according to law. The first requirement is that the law have substantial *autonomy*; the rule of law requires that law should be derived from distinctively legal sources, should be law, that is, and not something else

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[64]*See supra* note 10. Duncan Kennedy suggests that "[p]ublic law issues ... drew the attention of liberals and progressives to the critique of private law" in his important study THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 267(unpublished 1998; orig. 1975.)]

[65]*See* Robert Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era,* 78 B.U.L. REV. 1489 (1998) (interpreting the Lochnerian decisions of the 1920s, as nostalgic organic conservatism, triggered by resistance to the great advance of the rule of techological expert bureaucrats during World War I).

[66]Lochner v. New York, 198 U.S. 45, 75 (1905). **[*See* Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 381-383 (1988) (Holmes charges majority not with formalism, but with legally unsubtantiated value choice.)]**

[67]This brief sketch is worked out more fully in my forthcoming article, "The New Formalism;" an early version of which can be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=200732.

[68]*See* LON L. FULLER, THE MORALITY OF LAW 41-91 (1964) for one influential account, formulating the "inner morality" of law in eight precepts.

– preferably (under the pluralistic conditions of modernity) not religion, morality, or philosophy, and certainly not political ideology. The second requirement is *determinacy* – law should be clear and predictable in its application once identified. That is, it should as much as possible take the form of rules rather than standards, so that individuals can predict its incidence, plan their lives in accord with it, and hold judges and officials accountable to it. The third requirement is *transparency* – law should be intelligible, coherent, systematic and principled as a whole and in its larger component parts, so that its requirements can more easily be identified and understood, and the relations between them made clear.

These requirements often work in support of each together, and indeed the appeal of Langdellian jurisprudence was its promise to achieve them all at once in a way that guaranteed them to be mutually reinforcing. Legal scientists inferred from the cases the unique simple structure of principles that at the same time fit most of the reported decisions. The outlier decisions that couldn't be reconciled with this structure were then discarded as unprincipled, hence wrongly decided. The principles then could serve as geometric axioms, abstract yet precise premises covering all possible cases, with the particular rules of the system deduced from them as theorems. Every decision was made in advance by a body of law that was at once simple and comprehensive (hence, transparency), and exact (hence, determinacy.) The body of law thus established was autonomous and properly scientific, because its authority derived not from controversial religious, moral or political judgments, but from positive legal sources, the reported appellate decisions.

The Langdellians, perhaps only rivaled in this by their contemporaries the German Pandectists, exemplified the most nearly pure case of formalist jurisprudence.[69] Other theories admit the possibility of conflict among the formal legal goals of determinacy, autonomy and transparency. When legislatures enact, or established precedents support, standards rather than rules, there is a conflict between autonomy (which respects authoritative sources) and determinacy. Determinacy can also conflict with transparency, which is promoted when a body of law is organized around a few general principles and concepts; but these are likely to be less determinate than a detailed code of precise but relatively arbitrary rules. The conscientious effort to ascertain the actual intent of the enacting authority, even when this conflicts with plain meaning, can be thought of as serving law's autonomy, by locating its source in the concrete intentional acts of an authoritative lawgiver – but this brings it into conflict with the determinacy-promoting textualist approach to interpretation.[70]

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[69]The Pandectists created a more fully articulated systematic account of the whole law; the Langdellians more rigorously eschewed any suggestion of philosophical (Kantian) justification for their system, thus achieving a more nearly perfectly autonomous system. Holmes divided his opponents who "consider the law only from its formal side" between the Kantians who "attempt to deduce the *corpus* from *a priori* postulates" the Langdellians who "fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part." *Common Law,* at 32; 3 COLLECTED WORKS at 133.

[70]Holmes supplied much-quoted formulations on both sides: "The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Johnson v. United States, 163 F. 30, 32 (CA1, 1908), and "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation,* 12 HARV. L. REV. 417, XXX (1899); 3 COLLECTED WORKS 422, 424. Nope, general principles do not decide concrete

And when these (and other) conflicts among the legalist virtues have been resolved, formalists still must face the question how much (if any) of an independent role to allow substantive considerations of justice and utility in the ordinary interpretation and application of law. We may think of the formality of an approach to law as a matter of degree, determined by the relative weights of formal and substantive considerations in making ordinary legal judgment; on this conception, pure formalism, allowing no consideration of substantive values, is only the theoretical limiting case.[71]

The contemporary formalism of Justice Scalia and others is both different in emphasis and less pure overall (or at least less ambitious in its formalist aspirations) than Langdellianism. Scalia strongly emphasizes determinacy as the most important of the formal virtues. Autonomy is important, but it cannot be complete; there are concededly gaps in the law that judges must fill from outside. In addition, existing law must be interpreted with a tilt toward determinacy in order to forestall the maneuver perfected by contemporary liberal activists, the pledge of strict fidelity to broad and vague abstractions, whose interpretation in practice allows the judge free-wheeling discretion. For Justice Scalia, transparency is likewise a significant but subordinate value; the overall consistency of the law is important,[72] but the most important thing is that law should be put in the form of rules wherever possible.[73] Finally, Justice Scalia admits to being a "faint-hearted" (meaning only presumptive) formalist overall; considerations of acceptability can override all the formal virtues when their demands are insistent enough.[74]

Now what about the jurisprudence that produced and justified the *Lochner* line of cases – how does it fit into this picture? There has been much renewed (and revisionist) attention to this body of law and legal thought in recent years.[75] The *"Lochner* revisionists" have attacked the

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cases.

[71]Even Langdellian private-law formalism allowed consideration of acceptability in the choice between comparably abstract principled accounts of existing caselaw; *see* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13-15 (1983).

[72]Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. Rev. 581, 588-589 (1990).

[73]This is the message of his best-known jurisprudential manifesto, Antonin Scalia, *The Rule of Law As a Law of Rules*, 53 U. CHI. L. REV. 1175 (1989).

[74]See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861-62 (1989) (as judge, he could not uphold flogging as a punishment permitted under the Cruel and Unusual Punishment clause even if he were convinced that formalist criteria indicated otherwise.)

[75]A good summary of "*Lochner* revisionism" can be found in Gary D. Rowe, *The Legacy of Lochner Lochner Revisionism Revisited,* 24 LAW & SOC. INQUIRY 221 (1999). Representative works in the tradition are Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 Law and Hist. Rev. 293 (1985); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE (Duke University Press, 1993); OWEN M. FISS. HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (MacMillan, 1993).

allegedly misleading picture of these cases drawn by the Progressives, often attributed to the influence of Holmes's *Lochner* dissent, with its reference to the decision as embodying the "economic theory ... of laissez-faire" and "Herbert Spencer's *Social Statics, "* the latter sometimes thought to be an allusion to Social Darwinism.[76] Actually, say the revisionists, the *Lochner* approach was a coherent (if perhaps misguided) judicial initiative, the relatively conventional doctrinal unfolding of the older Jacksonian tradition condemning class legislation and special privilege, fortified by the Republican free labor ideology that underpinned the Reconstruction Amendments.

My concern with *Lochner* is oblique to the issues debated between the revisionists and their Progressive opponents,[77] but related to it. What I'm interested in revising is the understanding of Lochnerism as jurisprudentially "formalist," where that term implies an obvious kinship with the Langdellian (and German Pandectist) private-law theory that had been Holmes's target when he coined his celebrated contrast between logic and experience.

In what sense might *Lochner* and Langdellism be considered aspects of the same formalist jurisprudence? There certainly are some similarities. To start with, both of them endorsed the traditionally orthodox declaratory view of adjudication; every case was decided by pre-existing law, and there was no need for quasi-legislative judicial gap-filling. The best further argument for the identity of the two tendencies emphasizes the reliance of Lochnerians on fundamental common-law principles as the basis of constitutional rights of property and freedom of contract.[78] The common law thus elevated to constitutional status was not the traditional status-based law of master and servant, or the feudal law of estates in land. Rather it was an updated and liberalized common law, organized into substantive private-law categories of contract, tort, and property, emphasizing freedom of contract, fault as the basis for tort liability, and simple full ownership with freedom of alienation as the normal form of property.

This "new common law" was mainly the work of late 19th century legal scholars, many of whom, like Samuel Williston, Joseph Henry Beale, and James Barr Ames, were Langdellian in approach – though others, like Holmes, James Bradley Thayer, John Henry Wigmore, and John Chipman Gray,[79] were not. The Langdellians did portray fundamental common law principles as

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[76]198 U.S. at 75. What Holmes was referring to was not Spencer's Social Darwinism, but rather, as he had indicated earlier, "Mr. Herbert Spencer's" axiom that "Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors." *The Path of the Law, supra* note 6, at 466.

[77]The revisionist literature does not to my mind successfully discredit applying the label "laissez-faire constitutionalism" to the *Lochner* developments; it shows them as a serious attempt to work out the constitutional implications of classical liberalism, but laissez-faire, including freedom of contract, was an important component of classical liberalism.

[78]See Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 874 (1987). Duncan Kennedy suggests the "parasitism" of Lochnerian public law on the private law thought of the period in KENNEDY, *supra* note 64, at 266-267.

[79]Gray was the great elaborator of the new common law of simplified property; see Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1547-1570 (2001). Holmes was an important contributor to the classical theory of contract, see Patrick Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681 (2000), and perhaps the most important single architect of the classical synthesis of tort doctrine, see Thomas C. Grey, *Accidental Torts,* 54 Vand. L. Rev. 1225, 1266-1281(2001).

derived scientifically from the decided cases – which might then be thought to justify treating them as a politically neutral and objective baseline of legal entitlements, a defense against the commonly made charges of partiality.[80] (By contrast, functionalist commentators like Holmes and Gray saw common law doctrines as the product of a process of judicial legislation, and as such deserving no presumption when they came into conflict with actual legislation.)

There is considerable question about how much Lochnerian judges and commentators actually treated the common law as a baseline source of constitutional rights.[81] But even assuming they did, there were very significant differences between Langdellian private-law theory and the classical liberal public law jurisprudence of the *Lochner* era. Langdellian legal science was deliberately and self-consciously confined to the private law sphere, for important reasons internal to the theory. Langdellians were devout legal positivists; that was what established the crucial *autonomy* of the law in their version of formalism. As positivists, they accepted the legal authority of the sovereign legislature, except to the extent it was limited by equally positive higher law in the form of definite constitutional enactment. Private law could be autonomous and also scientific, as legal scholars derived its principles objectively, using the decisions of the appellate courts as their sole source. Public law, conceived positivistically as whatever was enacted by a sovereign legislative process, could not.

Thus conceptualist common-law jurists like Langdell and Williston gave no support to constitutional "liberty of contract," which they associated with an outmoded and unscientific natural-law jurisprudence.[82] In this, they were like European and English formalists, who were

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Thayer and Wigmore were the main synthesizers of evidence law, and Wigmore made important contributions to tort theory.

[80]Progressive critics in this country did not in general try to link formalist private-law *methods* with laissez-faire or free-market *content*. By contrast this was very common in Europe; one of the great themes of Weber, *supra* note xx, was how formally rational legal method promoted capitalism. Otto von Gierke urged that the German Pandectists' "lifeless abstractions" betrayed a "hidden social agenda" to promote "the individualistic and exclusively capitalistic agenda of the purest Manchesterism... that program of fortifying the strong in their struggle against the weak, that frankly anti-social tendency." JAMES WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA230-31 (Princeton University Press, 1990). In our own day, this point is familiar, made from the Right by Hayek and his followers in praise of formalism, and from the Left by Critical Legal Studies writers in its condemnation; see for the latter Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976). The American Legal Realists of 1925-40 were more inclined to condemn formalist private law doctrine for retarding the efficient workings of commercial markets than for promoting capitalism too slavishly.

[81]David Bernstein will argue in a forthcoming article (I thank him for sharing his draft) that the U. S. Supreme Court relied on a common-law baseline to identify infringements of property and liberty of contract much less than has been supposed in the recent literature. Still, something like an idealized Whiggish version of the common law – the common law standing at the end of 19th century liberals' imagined progress from a regime of status to one of contract – seems to have been the legal substratum or baseline assumed by the laissez-faire constitutionalists. See Siegel, *Lochner Era*. *supra* note 44, at 66-99.

[82]*See* Williston, *Freedom of Contract*, 6 CORNELL L. REV. 365, 375-380 (1921). I don't know of any comment by Langdell on the *Lochner* line of cases, but he took a sharply textual approach to constitutional interpretation in his essay on the *Insular Cases*, Langdell, *The Status of our New Territories,* 12 HARV. L. REV. 365 (1898). Langdell and his followers regarded legislation as supreme over case law, but not amenable to principled scientific treatment; for them constitutions were just another, hierarchically superior, form of legislation. Stephen

also strict positivists,[83] and so as jurists were not inclined very strongly or effectively to resist (though many of them as classical liberals disliked) social democracy and the legislative development of the modern welfare/administrative state insofar as these were embodied in the form of duly enacted statutory law.[84]

Langdell and his followers were fervent in their belief that public law could not be legal science. They insisted, for example, that law students at Harvard and at other schools purporting to follow its example not be exposed to public law subjects until their third year, so that they would not be distracted from their inculcation in proper legal scientific methods by exposure to mere legislation.[85] At the same time, their rigorous positivism made them deny natural law force to the common law principles they derived from the caselaw. Langdell insisted, for example, that there was nothing "natural" (or moral, or convenient) about the common law doctrine of consideration in contract – the civil law had no such doctrine, and perhaps was the better for it.[86] But this did not detract from the "fundamental" character of consideration as a requirement of the common law of contract. Being "fundamental" in the legal-scientific sense did not mean that a principle was required by justice or sound policy.

By contrast, the *Lochner* line of cases had clear natural law overtones. As the Court put it in 1898, the due process clauses protected "principles" like liberty of contract because they were "fundamental" in the sense that they represented "immutable principles of justice which inhere in

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Siegel has pointed out that Joel Bishop, a commentator who did much of his work before the Civil War and never was affiliated with a university law school, pursued essentially Langdellian methods and yet regarded the doctrines he derived as a legal scientist as emanations of the Divine Will; he was inclined to find implied constitutional limitations in common-law principles. *See* Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 255 (1995). Legal scientists varied on how positivistic they were as well on how secular; Ames, for example, was more inclined than Langdell or Williston to evaluate legal doctrines in terms of morality, and to build a notion of moral progress into his account of common law development. See, e.g., James Barr Ames, *Law and Morals,* 22 HARV. L. REV. 97 (1908). In a recent article, Siegel argues that Ames was more typical of the Harvard legal scientists in this respect than the more positivistic Langdell and Williston; see Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1590-96 (2001).

[83]FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 341-362 (Tony Weir trans., 1995).

[84]*See* A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (1905). This is not to say that English and European classic-liberal judges generously welcomed the labor movement and the welfare state; only that their resistance was less dramatic and effective than the comparable American episode. For an account of the anti-labor efforts of the English judiciary, *see* Michael Klarman, *The Judges Versus the Unions: The Development of British Labor Law, 1867-1913,* 75 VA. L. REV. 1487 (1989).

[85]Langdell's followers Ames and Beale felt so strongly about this aspect of the classical creed that they at first threatened to withdraw their offer to loan Beale as temporary start-up Dean for the new University of Chicago Law School when they learned that the Chicagoans proposed to teach public law courses in the first two years, thus adulterating what on classical principles should be a pure private-law curriculum. FRANK ELLSWORTH, LAW ON THE MIDWAY 57 (1977).

[86]See Grey, *supra* note 71, at 26-27.

the very idea of free government."[87] Many of the *Lochner* judges and commentators carried forward an older tradition of blurring common law and natural law,[88] Common law in this view was not just an array of culturally specific and arbitrary English or Anglo-American customs. On the other hand, it was not a set of principles inductively derived from the appellate cases by purely positive scientific methods, a la Langdell. Rather it was "right reason" rooted in history and culture, and the combination reason with positive custom was what made its principles legally fundamental. Without the blurring of evolutionary custom and reason, it would have been difficult to justify elevating freedom of contract to constitutional status, as a fundamental aspect of the liberty protected by the 5th and 14th amendments.

The public law doctrines proclaimed by the judges and commentators of the *Lochner* era also lacked the clearcut objectivity and determinacy of formulation that Langellian formalists required of scientific law. Judicial scrutiny was triggered when legislation infringed rights of property or liberty of contract. The next step was to determine whether the legislation in question came within the police power, which permitted legislation reasonably calculated to protect the public health, safety, or morals. A less rule-like and "scientific" standard than this inquiry into means-end reasonableness can scarcely be imagined. It is essentially the "proportionality" inquiry that dominates the strikingly informal post-1945 constitutional judicial review around the world, and as its critics have pointed out, makes constitutional law track (and second-guess) the policy judgments of legislatures.[89]

This is not to deny that the *Lochner*-era judges and commentators thought their police-power jurisprudence was objective, that they were applying pre-existing law when they invoked the test of reasonable promotion of health, safety, and morals. This however was an affirmation of the formal virtue of fidelity – that the test was not one they simply made up, but it existed in the nature of things, or arose out of the history of Anglo-American legal development. However

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[87]Holden v. Hardy, 169 U.S. 366, 389 (1898). For a good account of the ambiguous role of natural law in establishing fundamental principles for constitutional purposes during the *Lochner* era, see Siegel, *Lochner Era Jurisprudence, supra* note 44, at 82-83.

[88]*See* Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 (1990), for a good account of the blurring, characteristic of the American Historical School jurisprudence of the later 19th century. *Cf.* Pound's account in INTERPRETATIONS OF LEGAL HISTORY 9-11 (1923).

[89]Justice Peckham was explicit about the informality of the doctrine he was applying in *Lochner*, noting that the "somewhat vaguely termed" police powers lacked "exact description and limitation" but "broadly-stated ... relate to the safety, health, morals and general welfare of the public;" and that "property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers...." 198 U.S. at 53.

It's worth noting that proportionality tests don't have to involve balancing – they can be an (informal) method for identifying whether laws have been adopted for improper reasons; *see* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); *Affirmative Action*, 107 YALE L.J. 427 (1997); and Richard H. Pildes, *The Structural Conception of Rights and Judicial Balancing*, 6 REV. CONST. STUD. 179 (2002); *Against Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994). Both Rubenfeld and Pildes argue for construing American constitutional guarantees as generally categorical, rather than as involving balancing. This is very much the spirit of the *Lochner* majority opinion. For an influential critical history of the use of the balancing metaphor, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

no one could contend it that was a strongly determinate or rule-like test. And indeed the main argument of the Progressives, constantly reiterated, was that the particularistic and fact-intensive nature of the police power inquiry made judicial deference to legislative judgment in this sphere the only appropriate approach. The point was made most forcefully in favor of worker-protective legislation, which Progressives thought simply responded to the obvious factual inequality of condition between workers and employers.[90]

The desire of classic-liberal judges and commentators to justify aggressive judicial review may have been one of the factors that helped natural law jurisprudence survive longer in the United States than it did in the legal thought of other countries. A purely positivistic "legal science" formalism of the Langdellian or German Pandectist variety would not have had the normative force to motivate and justify judicial intervention against legislative authority, in the absence of strong positive textual backing, which was lacking in the case of liberty of contract.[91] This instrumental motive for classical liberals to sustain in natural law doctrines in order to justify judicial activism on behalf of their policy program was even occasionally made explicit.[92] Probably it mostly exerted what influence it had at the unconscious level. And of course there were other reasons for the persistence of natural law thinking among American lawyers – the greater vitality of religion in American as compared to other modernizing countries, and the prestige surviving from the natural law roots of the antislavery movement, which in turn informed the ideology of free labor.[93]

But to legal intellectuals who had taken on the values of secular science that animated the emerging modern university, natural law thinking, with its religious overtones, had become hopelessly old-fashioned and unscientific by the turn of the century. And the Progressive critics' successful assimilation of Lochnerian natural law thinking to formalism added a further cultural (but relatively nonpolitical) motivation to the antiformalist jurisprudential crusade in the US, one that was lacking in other systems – the association of formalism with natural law. This helped inspire adherence to anti-formalism in the minds of the many legal thinkers who wanted American law to be modern and scientific, and hence free of natural law elements, but who were not dedicated Progressives in politics – including the many relatively apolitical or centrist legal intellectuals who were drawn to antiformalism even against the grain of their own politics.

Holmes in particular was strongly motivated by this cause in his own leadership of American antiformalism. This is important, because I believe he was the first significant

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[90]Friedman,*The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, *supra* notexx, at x; PAUL, *supra* note 53, at x.

[91]Holmes related his own judicial inclination to stick with established rules to his skeptical "doubt as to the absolute worth of a very large part of the system we administer, or any other system," and added: "I have noticed the opposite tendency in minds that regarded our corpus juris as an image, however faint, of the eternal law."Address to the Middlesex Bar Association, December 3, 1902, in 3 COLLECTED WORKS 533, 534.

[92]CHRISTOPHER TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 76-82 (1890) (after debunking theory of natural rights, applauds readiness of courts to invoke them as basis for invalidating laws reflecting "the demands of the Socialists and Communists.")

[93]*See generally* William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

spokesman of the view that joined Langdell to *Lochner.* Unlike Pound, Brandeis, Cardozo, Frankfurter, Morris Cohen, Learned Hand and most of the other pre-Realist critics of formalism, he did not generally sympathize with the Progressive legislation the *Lochner* judges were invalidating. It was the conservative judges' natural law jurisprudence, not their results, that he deplored; and he believed that this jurisprudence shared with the geometric Langdellian/Pandectist conception of legal science the tendency to encourage judges to enact their prejudices into law without having to confront just what they were doing.

What About Earl Warren?

To summarize the argument, antiformalism became part of working legal thought in the United States because formalism was associated with activist classic-liberal constitutionalism by prestigious legal thinkers, Holmes first, and then most of the leading Progressives, Pound, Cardozo, Frankfurter, Felix Cohen, and others. In creating this association, these thinkers successfully convinced themselves, and others, that a critique developed to undermine Langdellian private law theory, first given influential statement by Holmes in a few quotable paragraphs of *The Common Law,* applied as well to laissez-faire constitutionalism.

Langdellian private law theory was in political terms unimportant compared to laissez-faire constitutionalism.[94] And only because *Lochner* was conceived as an application of the larger phenomenon "formalism" did the entrenchment of jurisprudential antiformalism – enacted through the ritual disinterment and reburial of Langdell every decade or so along the way – become a major preoccupation of 20th century American legal thinkers. No similarly high stakes attended the cause of antiformalist critique in legal systems lacking judicial review. So the teachers and scholars of those systems were free to revert, in the working jurisprudence they taught to beginning lawyers, to the relatively autonomous doctrinal conceptualism that tends to be the default orthodoxy of academic lawyers.[95]

The entrenchment of antiformalism in American private law can be seen, for example, in late 20th century American tort doctrine, in which judges and commentators like Roger Traynor, William Prosser, Fleming James and Guido Calabresi redescribed a system of private-law corrective justice as an exercise in balancing policies of loss-spreading, accident deterrence, and litigation-cost minimization. Here common law came increasingly to be understood as sublegislation,[96] with the courts as the administrative agency delegated to combine rulemaking and adjudication in pursuit of legislative policies, in standard New Deal fashion.

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[94]*See* Richard A. Epstein, *Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1985). Who but a doctrine-obsessed law professor really cares about the details of consideration doctrine – the kind of issue Langdellians debated with their critics?

[95]The business of academic lawyers is teaching and commenting on relatively large bodies of law, and organizing these requires an apparatus of general categories, concepts, and principles. Having formulated and worked with the generalities, it's natural for the academic lawyer to want and expect them to have operative force.

[96]Compare the nearly classical common-law style of Cardozo's *MacPherson* opinion, 217 N.Y. 382, 383-95 (1916), with the overt policy-science language of Traynor's *Escola* concurrence, 24 Cal.2d 453, 461-68 (1944). *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA xxx-xxx (1980) (describing the "legislative" work of William Prosser and Roger Traynor in shaping 20th century tort law.)

But what about the Warren Court? Unlike the account I rejected as mythical, mine doesn't find an obvious place for the activist liberal constitutionalism of post-1937 American courts. According to my story, functional legal thought in America was strengthened by the public-law impulse to make courts subordinate to legislatures. Such subordination comes naturally to a jurisprudence based on policy and balancing, the staples of the legislative process, and, as my story stresses, policy jurisprudence gained much of its early impetus from the intellectual case it made against the activist judicial review practiced by the conservative courts of the pre-New-Deal period.

There were Progressive adherents to policy jurisprudence who did go on to oppose post-1937 liberal constitutionalism on jurisprudential grounds – Learned Hand, for example, and sometimes Felix Frankfurter. But most Progressives (who came to be rechristened Liberals during the New Deal) found themselves able and eventually quite happy to put strong judicial review to the uses of their own politics, once their judicial selections made up a majority on the bench.

One reconciliation of liberal activist judicial review with policy jurisprudence is the *Carolene Products*[97] approach, and it is this on which academic commentary has mostly focused. Activism in the name of democracy (political free speech and press, reapportionment, franchise expansion) is said to make the legislature into a better democratic policy-making organ. And additional judicial activism on behalf of the members of marginal racial and religious groups is justified on the notion that political market imperfections left the interests of discrete and insular minorities under-represented in the policy-making process. According to this approach, constitutional activism aims to approximate the body of law that would be generated by a purified democratic policymaking legislature. On this account, Earl Warren indeed was the product, jurisprudentially as well as politically, of his origins in early 20th century California Progressivism – adding a later alertness to minority issues – and it's not surprising that this defense of liberal activism was given its best-known formulation by a former Warren clerk, John Ely.[98]

And the developments culminating in Warren-Brennan liberal judicial activism did have roots going back well before 1937 in the writings of the same (mostly) Progressive writers who canonized Holmes's identification of Langdellian private law with laissez-faire constitutionalism. These writers showed that a jurisprudence centered around balancing interests to shape public policy did not have to be uniformly hostile to judicial review. Progressives began to reshape themselves into modern liberals beginning sometime after 1910.[99] It was Holmes and

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[97]United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[98]JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). *See also* the account of "bifurcated review" in G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000) at 4, 129-32, 160-63. Actually the *Carolene Products* rationale did not make much of a showing in the Vinson-Warren-Burger Court activist opinions; it was more an academic theory than one explicitly used by judges.

[99]LEONARD T. HOBHOUSE, LIBERALISM (1911) is an early theoretical statement of a Social Democratic conception of liberalism, paralleling the policies of the British Liberal party under Asquith and Lloyd George , emphasizing broad state power of economic regulation, the importance of measures to limit extremes of wealth, and the special importance of protection of individual freedom of speech, thought, and religion.

Brandeis, seconded by Cardozo,[100] who led the Supreme Court's move towards active protection of freedom of speech starting in 1919, and Zechariah Chafee gave free-speech activism a Progressive doctrinal formulation in interest-balancing terms.[101] Holmes and Brandeis also led the way toward the active judicial protection of criminal defendants that would be another hallmark of later liberal activism.[102] And from the beginning, Pound argued that the rule of law required subjecting the administrative state to review by judges imbued with the common law tradition.[103]

So even the pre-Realist Progressives had begun to construct a self-consciously non-formalist version of judicial rights talk. Holmes especially always emphasized that judges are not disabled from reviewing legislatures by the fact that this requires them to deal with questions of policy and matters of degree.[104] Formalism lets judges fool themselves into believing they deduce their conclusions from uncontroversial abstract concepts, where really they resolve constestable clashes of value. It does not follow – and indeed it would enshrine formalist notions of separation of powers to insist – that just because a question involves a judgment of policy it must be left to the legislature.

Here we see the origins of modern rights theory – the familiar contemporary judicial-activist mode of legal thought – in the developing ideas of the Progressive legal pragmatists. The line of descent runs quite directly from these origins to the jurisprudence of the Warren Court. And that genealogical relation is not confined within the borders of the United States. Aharon Barak, President of the Supreme Court of Israel, is perhaps the quintessential judge of the new

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[100]United States v. Abrams, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) On the U.S. Supreme Court, Cardozo would describe freedom of speech as the "indispensable matrix" of rights in a regime of ordered liberty, Palko v. Connecticut, 302 U.S. 319, 326-327 (1937). He had stated this view extra-judicially as early as 1928, in an essay that drew heavily on HOBHOUSE, LIBERALISM, *supra* note 98, BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 107-108 (1928). My thanks to Ken Katkin for drawing this to my attention. In his 1921 discussion of constitutional law, Cardozo had not focused on judicial protection of civil liberties, *see supra* note 8 at 76-94, and the change between 1921 and 1928 is an index of the gradual infiltration of focus on this concern as Progressives transformed into modern liberals.

[101]*See* ZECHARIAH CHAFEE, FREEDOM OF SPEECH (1920); *see,* for the Progressive development of a theory of free speech, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 211-380 and WHITE, *supra* note 97, at 128-163.

[102]Frank v. Mangum, 237 US 309, 345 (1914) (Holmes, J., dissenting); Olmstead v. United States, 277 US 438, 469 (Holmes, J. dissenting), 471 (Brandeis, J., dissenting) (1928).

[103]*See* Roscoe Pound, *Executive Justice*, 46 AMER. L. REG. 144 (1907). For a good discussion of the early development of judicial-review oriented administrative law doctrine by Progressives like Pound, Frankfurter, and Dickinson, *see* WHITE,, *supra* note 97, at 117-27.

[104]*See* Panhandle Oil Co. v. Mississippi, 277 US 218, 223 (1928) (Holmes, J, dissenting) "[M]ost of the distinctions of the law are distinctions of degree.... The power to tax is not the power to destroy while this Court sits." Pennsylvania Coal Co. V. Mahon, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.")

world-wide constitutional order – a liberal, pragmatic, moderately civil-libertarian and human-dignity-promoting activist judicial balancer. When he explains the judicial philosophy which informs his work as a constitutional judge, it is striking to see how deep is his jurisprudential kinship is with one of the founders of the distinctive American legal discourse of antiformalism, Benjamin Cardozo.[105]

[105] *See* AHARON BARAK, JUDICIAL DISCRETION 6 (Yadin Kaufman, trans., 1989) ("Cardozo's writing still serves as the Urim VeTummim – Lux et Veritas – of any approach to the nature of the judicial process.") There are 15 references to Cardozo in the index of this short book. *See* also Barak, *supra* note 16, at 23 n.18.