The Realism of the “Formalist” Age

By Brian Z. Tamanaha

American legal thought is commonly divided into three eras. After the Revolution came the formative, founding period, when judges used broad principles and flexible analysis to develop the common law and interpret the Constitution to meet rapid social change and facilitate economic development. Natural law ideas were influential; legislation and judicial decisions rejected or adapted old English common law rules to better fit the circumstances in America. Judicial opinions were written in a “Grand Style,” with plain language, clear reasoning, and attention to policy in the furtherance of the common good. This was followed by the “Formalist” age—running from the 1870s through the 1920s—during which judges applied strictly logical methods, relied heavily upon conceptual analysis, and rendered decisions in a rigidly rule bound manner that paid little heed to...
social consequences. The common law was characterized as comprehensive, gapless, and logically consistent, producing a right answer for every case. Judicial opinions were written in a crabbed style that emphasized logical necessity and adherence to precedent, and were filled with string citations to cases. The third period, which continues today, was ushered in by the Legal Realists, who built upon the writings of Oliver Wendell Holmes and Roscoe Pound to destroy formalistic thought. The Realists argued that the law is substantially indeterminate: there are gaps and inconsistencies in the law, exceptions can be found for most every rule or principle, precedent often can be enlisted to support opposite outcomes. They argued that judicial decisions should not be based exclusively upon abstract conceptual or logical analysis, and should not slavishly adhere to precedent; above all else, law is a means to social ends. Legislators and judges, accordingly, must make legal rules and decisions with close attention to social consequences, and aim at advancing social policies. Judicial decisions in this third period routinely consider issues of public policy and engage in balancing of conflicting social interests.

This narrative, set out in 1977 in Grant Gilmore’s celebrated *Ages of American Law*—which expanded on Karl Llewellyn’s periodization —dominates our collective understanding of the successive changes that have taken place in the past two hundred years with respect to how law was perceived and how judicial decisions were made. The formalists, we all know, were “essentially stupid” (as Gilmore said of Langdell), or duplicitous (as Morton Horwitz characterized them), or honorable but deluded. Only after the coming of the Realists did the blinders fall away from our collective eyes, allowing us to develop a mature recognition of the indeterminacy of law and openness of judging. This often repeated tale is a set piece of the long accepted lore about our past.

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4 Id. 42.
6 Robert Gordon lays out a concise summary of these three periods, which he labels the “conventional view,” in Comment: John W. Johnson, supra 648. Tellingly, for the purposes of this paper, although, in the mid-1970s, John Johnson proclaimed the need for revisionist studies to challenge standard historical portrayals of the first and third periods, he did not advocate a rethinking of the formalist period. John W. Johnson, *Creativity and*
The realism of the “formalist” age is fundamentally wrong. Prevailing understandings of law and of judicial decision making throughout the second period were, in essential respects, every bit as realistic as the accounts propounded by the later Realists. Consider the following observations set down in 1881, smack in the period identified by Llewellyn as formalist and by Pound as the “height” of “mechanical jurisprudence:”

It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. . . . [T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case. . . . He writes, it may be, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is the power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.

These startlingly realistic observations were delivered in an Address by William G. Hammond upon his installation as the first full time Dean and Professor at St. Louis Law School (now Washington University School of Law). Hammond, it must be emphasized, not only was not a radical, he has

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been identified by scholars as one of the leading figures in legal formalism.¹⁰

According to the standard account, during much of the formalist era Oliver Wendell Holmes was a solitary proto-Realist, a man before his time who alone saw the light. This is incorrect. Law professors, judges, and members of the bar issued many realistic observations about the law and about judicial decision making in an unbroken stream throughout the entire formalist period. Here is a brief sampling: In 1871, the Editors of the *Albany Law Journal*, a leading professional journal, declared in commentary on judicial elections that “excision of politics from the judicial mind is impossible,” and worried that a partisan judge would “fight for the cause in secret, and shelter his animosity under the pretext of law.”¹¹ A member of the bar, Henry Craft, urgently wrote in 1878 (also in connection with judicial elections) that people must be advised of “the magnitude and vast range of powers and discretion confided to the judiciary....”¹² Craft warned about the “details of unsettled rules of property and personal rights—of inconsistent and conflicting decisions—of instability in adjudication made, and want of adherence to what was of old established [precedent]...”¹³ Judge Seymour D. Thompson, in an 1888 Address to the Georgia Bar, observed that “doubts and infirmities seem to permeate every title of our case made law,”¹⁴ adding, “what is called legal sense is often the rankest nonsense.”¹⁵ In 1890, Judge Thomas Ewing told the annual meeting of the Kansas Bar that in about 40% of the cases litigated in Kansas there is either no authority or “the decisions conflict, and a large weight of reason and authority is found on both sides.”¹⁶ Lawyer-professor John Chipman

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¹³ Id.


¹⁵ Id. 44.

Gray (founder of Ropes & Gray) asserted in 1892 that one of the main sources of law is “the opinion of judges on matters of ethics and public policy;...[though] the judges themselves have a deprecatory habit of minimizing it, and of speaking as if their sole function was to construct syllogisms...”17 The President of the American Bar Association (ABA), Judge Uriah Milton Rose, remarked in his 1902 Address that, owing to the proliferation of cases, judges have “discretion...in deciding cases...; for our courts can generally find precedents for almost any proposition.”18 In 1911, United States Senator Robert L. Owen asserted that judicial decisions are to some unavoidable degree a function “of previous predilections, of previous fixed opinion, of the point of view which has molded itself in the personal experience of the judge and become a part of him.”19 Chief Justice Albert Savage of the Maine Supreme Court, in 1914, acknowledged that cases arise in which authority can be found on both sides or precedent is lacking—“And it would be contrary to all human experience to say that his temperament and his predictions may not give color to his conception [of the law].”20 In his 1916 Presidential Address to the ABA, Elihu Root, one of the nation’s leading lawyers and public officials (a Senator, Secretary of State, and winner of the Nobel Peace Prize), observed that “The vast and continually increasing mass of reported decisions which afford authorities on almost every side of almost every question admonish us that by the mere following of precedent we should soon have no system of law at all, but the rule of the Turkish cadi who is expected to do in each case what seems to him to be right...”21

While ample realistic statements of this sort can be found throughout the six decade period (roughly 1870s-1920s) identified by Gilmore as the Formalist age, there is far less talk of law as a logically consistent, comprehensive body of rules and principles that dictates the right answer in every case, or of judging as a mechanical, deductive process—and many of

17 John C. Gray, Some Definitions and Questions in Jurisprudence, 6 Harv. L. Rev. 21,33 (1892).
the statements that were made along these lines issued from academics. Root declared that “The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method.”22 Henry White, a member of the bar, wrote in the *Yale Law Journal* in 1892: “If the law were an exact science and furnished a complete system of rules which could be applied without serious difficulty and with certain results in every case, perhaps it would be better not to look beyond the written law in determining controversies. But...most cases of any difficulty present questions of law on which no one can confidently predict the decision. Most important battles in the courts, which do not turn on questions of fact, are fought on the frontier of the law, where the ground is unsettled, and where new rules are being formulated and new precedents made.”23

To get a sense of prevailing attitudes about judicial decision making, it is also helpful to know how they viewed formalism at the time. Unlike the Realist movement, which was self-labeled and self-defined,24 the judges and jurists purportedly guilty of formalism never identified themselves as “formalists.” Critics—led by Llewellyn—pejoratively tagged this label on the judges of the period. In the final quarter of the 19th century (and earlier25), however, “formalism” was condemned. A judge in 1857 castigated “ignorant and slavish formalism.”26 The term was generally understood as the rigid adherence to procedural requirements and technical pleading rules that produced unjust or absurd results. Although many vestiges of it remained, by mid-century this approach was considered primitive27; thereafter, the label “formalistic” was a term of abuse. An article on legal education written in 1876 remarked that “the archaic

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22 Root, Address of the President, supra 364.
23 Henry C. White, “Three Views of Practice,” 2 *Yale L.J.* 1,6 (1892)
25 See “Legal Education,” 6 Law Mag. Quarterly Rev. 175,175 (1847)(“pedantic formalism”).
period…is the period of rigid formalism,” and observed that, while residual procedural formalism remained to be rooted out, the U.S. common law system had moved beyond the formalist stage to focus on principles.\textsuperscript{28} An article written in 1889 detailing ongoing procedural and substantive reforms noted with satisfaction that in 9 states “Justice is administered, as it should be, without reference to the artificial and technical rules of the common law…”\textsuperscript{29} To call a judge “a formalist and a hairsplitter” was an insult.\textsuperscript{30} The great evidence scholar John Henry Wigmore, in 1892, charged that judges who enforced a particularly impractical rule (on the admission of scientific testimony) would “be guilty of a formalism which is neither creditable to the law nor beneficial to litigants,” although he went on to note that the rule was in practice “partially evaded and nullified” by judges.\textsuperscript{31} “The tendency of the day is towards creating more competent trial judges and vesting in them a larger discretion, and that policy should be here exemplified.”\textsuperscript{32} These various references suggest that there was a general belief during this period that they had freed themselves from the worst kinds of formalism and that additional progress, while still admittedly necessary, was underway.

We have for many decades now held on to and perpetuated a profound misperception about an essential period in our legal history. The significance of rectifying this error extends beyond just getting history right. The formalists are “the great villains of contemporary jurisprudence.”\textsuperscript{33} Being a “formalist” connotes foolishness or dishonesty: a slavish adherence to rules contrary to good sense, or manipulation under the guise of adherence. These unflattering qualities appear to leave being a “realist” the only option for the smart and honorable. But “realism,” or certain veins of Legal Realism,\textsuperscript{34} seems to suggest that judicial decision making is not truly rule-bound at all, which strikes many as an unpalatable and extreme position. This article bears on both positions. It will show not only that our

\textsuperscript{28} “Reform in Legal Education,” 10 \textit{American L. Rev}. 626,626 (1876).
\textsuperscript{29} S.S.P. Patterson, “Law Reform,” 13 \textit{Virg. L.J.} 460,466 (1889).
\textsuperscript{32} Id.
\textsuperscript{34} See e.g. Jerome Frank, Law and the Modern Mind (NY: Anchor 1963).
image of the formalist era is flawed, but also that the Legal Realists were not mavericks voicing radical new insights, as we tend to think of them, but merely the latest—most self-conscious and sophisticated—articulation of views about law and judging that had been expressed for many decades. If we come to realize that there was a great deal of continuity between what we now think of as contrasting periods, it might be possible to discard the formalist-realist antithesis that structures and constrains current thought on these matters. Helping free us from the paralyzing grip of this intellectual vise is the ultimate ambition of this article.

The term “realistic” is utilized herein not in any technical sense unique to the Legal Realists, but rather in common sense terms to reflect a full awareness of the limitations and flaws in the law and the complexity and openness of judicial decision making. Legal professionals were well aware that the law was often uncertain, that conflicting precedents were available to support different outcomes, that judges changed the law (without announcing it) by distinguishing precedents or through the use of legal fictions, that judges made policy decisions, and that the personal predilections of judges potentially influenced their legal decisions. At first blush, the lengthy expression of realistic views of judging might seem remarkable, since we have long thought that the Legal Realists (and Holmes) were the first bold thinkers willing to tell it like it is. But upon reflection it makes sense: Why should we think that our forebears would be any less cognizant of, experienced with, and willing to acknowledge, the struggles and dilemmas produced by the law and the demanding, uncertain, often politically and morally fraught task of judging?

How we could have gotten matters so wrong for so long is a fascinating question not easy to answer. The overarching strategy applied here will be to revive a large, mostly forgotten body of realistic discourse about law and judging and match this against our image of the formalist age. Focusing on the work of Pound and Gilmore, Part One will trace out the formation and consolidation of the formalist image, and will articulate reasons to be skeptical of their portrayals. The critics who cemented the formalistic image of period, it turns out, built their accounts of the formalists on what were widely understood at the time to be ideals, fictions, or facades; and these critics systematically left out of their accounts the many realistic statements about law that circulated in the same period. One of the more
telling findings of this study is that certain individuals identified by historians and theorists as leading legal formalists, like Hammond, actually made very realistic observations about law. The explanation for this apparent paradox, set out at the end of Part One, will clear up a persistent misunderstanding of the so-called formalists.

During the formalist period, candid, realistic discussions of the manifold flaws of law and of problems with judging were offered in connection with these contexts: effectuating law reform or legal change, doing justice in particular cases, expressing concerns about judicial elections, promoting codification, and criticizing courts for excessive judicial invalidation of legislation. This will be laid out in Part Two. As the discussion will reveal, much of what they said at the time is surprisingly similar to what is said today on some of the very same issues.

The final Part will summarize the findings and implications of this study. Although this article is dedicated to dislodging the standard view rather than to providing a substitute, it makes one point abundantly clear: a large chunk of what we have long thought to be true about our legal tradition is simply not so.

THE CREATION OF OUR IMAGE OF THE FORMALIST AGE

A. Four Sources of the Formalist Image

The image of legal formalism was built on four basic sources: the traditional image of judges as the mere mouthpiece of the law; the centuries old characterization of the common law as immemorial customs of the people refined by judicial reason into enduring principles; the writings of Langdell and historical jurists who promoted the view that law is a science; and the style of published judicial opinions. Each will be set out briefly in order below.

“Judicial power is never exercised for the purpose of giving effect to the will of the judge,” wrote Chief Justice John Marshall nearly two centuries ago. “Judicial power, as contradistinguished from the power of laws, has no existence…” “Courts are mere instruments of law, and can
will nothing.”35 Marshall was expressing what had long been the standard ideal of the role of the judge. In *The Laws*, Cicero wrote that “it is true to say that a magistrate is a speaking law, and law a silent magistrate.”36 Alexander Hamilton set forth the same idea in the *Federalist Papers*: “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”37 The “canonical” account of this view of judging was provided by William Blackstone: “[T]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law and fact….Which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on settled and invariable principles of justice.”38

The ideal that the judge rules according to the law alone is a mainstay of the United States legal tradition.39 This ideal, however, has been constantly tested by the common law system of judge made law and by constitutional judicial review based on open-ended clauses. Neither feature is easy to reconcile with the notion that judges do not will the law. Benjamin Cardozo noted the irony that Marshall would make the above statement, for Marshall “gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.”40

Initially, the bigger problem was to justify the common law system in a democracy. The most vociferous defender of the common law in the late

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38 Wieck, Lost World of Classical Legal Thought, supra 6 (quoting Blackstone, and characterizing this as the “canonical justification”).
19th century was the prominent lawyer James C. Carter. In a speech to the ABA in 1890, he laid out the standard defense:

That the judge can not make law is accepted from the start. That there is already a rule by which the case must be determined is not doubted....It is agreed that the true rule must somehow be found. Judges and advocates—all together—engage in the search. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case....[O]ur unwritten law—which is the main body of our law—is not a command, or a body of commands, but consists of rules springing from the social standard of justice, or from the habits and customs from which that standard has itself been derived.41

Carter’s observations were the latest strident articulation of a centuries old story about the common law. Jesse Root, in 1789, wrote along the same lines: “[Our] common law was derived from the law of nature and of revelation; those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things, which need only to be understood, to be submitted to; as they are themselves the highest authority; together with certain customs and usages, which had been universally assented to and adopted in practice, as reasonable and beneficial.” According to Root, the common law: “is the perfection of reason;” “universal;” “embraces all cases and questions that can possibly arise;” “is in itself perfect, clear and certain;” “is superior to all other laws and regulations;” “all positive laws are to be construed by it, and wherein they are opposed to it they are void;”

“It is immemorial.”42 Statements about the common law of a similar sort can be found among English jurists going back centuries.43

This view of the common law was overlaid and bolstered in the course of the 19th century by the characterization of law as a science. Following the 18th century Enlightenment, science was the ascendant form of legitimation for all knowledge.44 Blackstone, who in the mid-18th century gained unparalleled influence among lawyers in England and in the U.S. through his organization of the common law in the Commentaries, claimed that “law is to be considered not only as a matter of practice, but also as a rational science.”45 Richard Rush, a leading U.S. lawyer, published an essay in 1815 declaring that “The law itself in this country, is, moreover, a science of great extent. We have an entire substratum of common law as the broad foundation upon which every thing else is built.”46 An unattributed 1851 essay in a leading law journal described it in these terms: “Like other sciences, [law] is supposed to be pervaded by general rules, shaping its structure, solving its intricacies, explaining its apparent contradictions. Like other sciences, it is supposed to have first or fundamental principles, never modified, as the immovable basis on which the whole structure reposes; and also a series of dependent principles and rules, modified and subordinated by reason and circumstances, extending outward in unbroken connection to the remotest applications of law.”47

The “law as a science” view most often cited today is this passage from Christopher Columbus Langdell’s Preface to his casebook on contract:

44 For a general history of this period, see Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (NY: Cambridge Univ. Press 2006) Chap. One.
Law, considered as a science, consists of certain principles or doctrines. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. The growth is to be traced in the main through a series of cases. It seems to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines...

Portending things to come, Langdell’s casebook provoked a review by Oliver Wendell Holmes, who, with a mix of sarcasm and admiration, called Langdell “the greatest living legal theologian.” “The end of all his striving, is the *elegantia juris*, or logical necessity of the system as a system.” Holmes dismissed this view with a line that would become one of his most famous: “The life of the law has not been logic: it has been experience.” But Langdell was not alone in viewing law in scientific terms. The historical jurisprudence of Savigny and Maine was in its heyday in the late nineteenth century, with adherents that included Carter and others. An article by the influential lawyer Christopher Tiedeman in an 1892 *Yale Law Journal* symposium on legal education described law as a science in terms similar to Langdell. Statements of this sort, it bears noting, were often made in essays relating to legal education. During this period, law was thought to be a craft best learned by engaging in practice, and many lawyers received their legal training in apprenticeships, not in law schools. The insistence that law is a science raised its status, making it worthy of study in

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49 Id. 234.
50 Id.
51 Christopher G. Tiedeman, *Methods of Legal Education*, 1 Yale L.J. 150 (1892).
a university.\textsuperscript{52} This was the reigning continental European view of law, with a great deal of prestige.\textsuperscript{53}

The final element that formed the basis for the image of formalistic judging was the prevailing style of written judicial decisions. Legal historian Lawrence Friedman captures the consensus view that “many high court opinions, in the late 19th century, make tortuous reading; they are bombastic, diffuse, labored, drearily logical, crammed with unnecessary citations.”\textsuperscript{54} This style, according to Friedman, “reflected the training and philosophy of judges.”\textsuperscript{55}

\section*{B. Construction of the Formalist Image—Pound’s \textquotedblleft Mechanical Jurisprudence\textquotedblright \textsuperscript{56}}

The seminal originating piece in the creation of the image of the formalist age was Roscoe Pound’s 1908 “Mechanical Jurisprudence” article, which begins with the question: “What is scientific law?” To which, Pound answers: “the marks of a scientific law are, conformity to reason, uniformity, and certainty. Scientific law is a reasoned body of principles for the administration of justice, and its antithesis is a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural justice.”\textsuperscript{57} Pound warned that the danger of the former type of system is a “petrification” which “tends to cut off individual initiative in the future, to stifle independent consideration of new problems and of new phases of old problems, and so to impose the ideas of one generation upon the other.”\textsuperscript{58}

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\item 52 Langdell explicitly made this connection between the view of law as a science and fitness for study in a university in a speech, reprinted in Christopher Columbus Langdell, 21 Am. L. Rev. 123,123 (1887).
\item 54 Lawrence M. Friedman, \textit{A History of American Law} 2\textsuperscript{nd} ed. (NY: Touchstone 1985) 382-83.
\item 55 Id. 383.
\item 56 Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 Colum. L.Rev. 605,605 (1908).
\item 57 Id.
\item 58 Id. 606.
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As an example of what can result from such an approach, Pound cited a period in Roman law which “confined the judge, when questions of law were in issue, to the purely mechanical task of counting and of determining the numerical preponderance of authority….The rules were at hand in a fixed and final form, and cases were to be fitted to the rules.”

Contemporary U.S. law, according to Pound, was mired in a parallel stage:

The development of the common law in America was a period of growth because the doctrine that the common law was received only so far as applicable led the courts, in adapting English case-law to American conditions, to study of the conditions of application as well as the conceptions and their logical consequences. Whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.

He argued that historical jurisprudence and legal positivism, leading legal theories of the day, exacerbated this stultified approach because they tended to emphasize abstract concepts and logical analysis. Pound urged that law must be seen as a means to social ends, and for this purpose a sociological perspective of law is superior.

Pound cited various examples when the law failed to meet the “vital needs of present day life,” including: the absence of a uniform commercial law, unresolved issues about future interests, problems with civil procedure, impractical evidence rules, and flawed trial procedures (the distinction

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59 Id. 607.  
60 Id. 611-12.  
61 Id. 607-613.  
62 Id. 614.
between law and fact, jury instructions, and so forth). In instance after instance, Pound charged, judges mechanically deduced conclusions from conceptions without considering the underlying point or purpose of the rule. “Court decisions and discussions are full of such solving words: estoppel, malice, privity, implied, intention of the testator, vested and contingent,—when we arrive at these we are assumed to be at the end of our juristic search.”63 As one example of conceptual jurisprudence, Pound offered the infamous *Lochner* (and *Adair*) case, in which the Supreme Court invalidated as a violation of the freedom of contract a New York law limiting the working hours of bakers to no more than 10 hours a day and six days a week.64 “The conception of freedom of contract is made the basis of a logical deduction” wrote Pound. “The court does not inquire what the effect of such a deduction will be, when applied to the actual situation.”65 The reality was that the employees did not have much choice in the matter. With the courts paralyzed in this state of mechanical jurisprudence, Pound concluded that the only viable solution was for legislation to provide new starting points for the common law. He proposed that legal scholars—akin to jurists of earlier ages—should work out the necessary conceptions that better fit the new age, “to lay sure foundations for the ultimate legislative restatement of the law, from which judicial decision shall start afresh.”66

Pound’s article brought together the two interwoven themes that fueled discussions about the role of judges at the turn of the century: the long contest between the common law (judges) and legislation (legislators) for primacy as sources of law, and disputes over the increasing practice of judicial invalidation of legislation. Portraying the courts and common law as caught in a bad stage of a natural cycle that law goes through periodically, requiring unusual measures to break out of, Pound threw his lot on the side of legislatures against the courts and the common law. Judges were conscientious but trapped within their way of thinking, according to Pound’s account, to the detriment of legal progress. Although he pitched the argument in jurisprudential terms, its thrust lined up with

63 Id. 621.
64 Although he mentions both cases, Pound emphasizes *Adair* more than *Lochner*; I have taken the liberty of reversing this emphasis because *Lochner* stands out more today..
65 Id. 616.
66 Id. 622.
Pound’s general support for legislated social welfare programs, which the courts were hindering.67

It is useful here to momentarily pause the account of the construction of the formalist image to juxtapose Pound’s observations against three articles that came out at about the same time. Four years earlier, in the Yale Law Journal, Wilbur Larremore wrote “Judicial Legislation in New York,” portraying the contemporary legal universe almost the opposite of Pound: “The tendency towards judicial arbitration, as distinguished from the scientific administration of the law, has been noticeable in most American State courts during the past few decades...”68 Elaborating on several cases from the New York Court of Appeals, Larremore charged that the Court misapplied or disregarded stare decisis, used pretextual reasoning, and blatantly stretched principles “to the point of absurdity.”69 He suggested that the Court’s decisions were “sympathetic with and effectuating an extra-judicial sentiment.”70 Larremore remarked:

In this condition of affairs judges indulge in the delusion that they are observing stare decisis merely because they cite precedents. The truth is that, much in the same manner that expert witnesses are procurable to give almost any opinions that are desired, judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish. We are not living under a system of scientific exposition and development of abstract principles, but, to a large degree, under one of judicial arbitration, in which courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts...[The Court of Appeals] has now developed the disposition to act as an independent and creative law-giver to engage in what, from any point, must be termed judicial legislation.71

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68 Wilbur Larremore, Judicial Legislation in New York, 14 Yale L.J. 312,312 (1904).
69 Id. 314.
70 Id. 314.
71 Id. 318.
Although Larremore indicated that he concurred with the results in many of these cases, and he accepted that courts must and should constantly remake the law through the “extension and development of settled principles,” he opposed “radical departure from existing rules” by courts to achieve ends, which he criticized as an improper encroachment on the power of the legislature.\(^2\)

Larremore’s essay focused on the high court of New York, but he characterized this as part of a broader trend going back decades. His observations were seconded in the same year in an article by Edward Whitney in the *Michigan Law Review*, “The Doctrine of Stare Decisis.”\(^3\) Whitney claimed that in both federal and state courts the doctrine of *stare decisis* “has already to a considerable extent been weakened.”\(^4\) According to Whitney, judges were overwhelmed by heavy case loads and plagued by conflicting authorities:

> Nevertheless the judges and the bar and community at large have all continued nominally to treat the doctrine of *stare decisis* as still in full force; and, with all the modern difficulties in their way, so many judges stand bravely by it that the citizen must always be prepared to have it enforced against him in a given case with a rigidity and technicality that would have been quite improbable in the days when time permitted the precise state of facts and the precise line of reasoning underlying each previous authority to be more carefully analyzed, and tacit limits to the breadth of its statements recognized. On the other hand, as the wilderness of authorities presented upon the briefs of counsel tends every year to become more hopeless, the courts in general tend more and more to decide each case according to their own ideas of fairness as between the parties to that case, and to pass the previous authorities in silence, or dispose of them with the general remark…that they are not in conflict. Different men, however, are of different minds…[T]he

\(^{2}\) Id. 319.


\(^{4}\) Id. 94-95.
chances of difference in decision of two substantially similar cases coming before different sets of judges, or even before the same judge in different years, tends to increase. Apparent conflicts of authority thus arise.\footnote{Id. 100.}

Larremore and Whitney concurred with Pound that legislation or codification in some form was the best solution to the situation, but otherwise the former two presented the existing state of affairs in a radically different way than Pound. Pound saw judges as reasoning in a rule bound, precedent bound, strictly deductive manner that kept the law from changing. Larremore saw judges as freewheeling in changing the law and manipulating precedent to suit their visions of justice. Whitney saw some judges as rule bound (or at least giving that appearance), while more and more judges were playing fast and loose with precedent to support the outcomes they preferred. Whitney’s attribution of these problems to the abundance of precedents on all sides and to heavy case loads that overburdened judges are themes that extended back decades. A writer in 1883 likewise argued that judges, overwhelmed by heavy dockets and too many inconsistent reported cases, made sloppy mistakes and overlooked or “trampled” \textit{stare decisis}; under present conditions, he added, the judge “is far more liable to err because he is liable to be influenced by his biases, his prejudices, or his peculiar views.”\footnote{John M. Shirley, \textit{The Future of Our Profession}, 17 American L. Rev. 645,656 (1883).}

Judge Emlin McClain of the Supreme Court of Iowa published “The Evolution of the Judicial Opinion” in 1902, offering an account much like Whitney’s, noting the present tendency for some judges to rule in an overly precedent bound fashion,\footnote{Emlin McClain, \textit{The Evolution of the Judicial Opinion}, 36 American L. Rev. 801,814 (1902).} while others used the surplus of inconsistent precedents to come to ends they desired:

The multiplicity of precedents has led to a greater freedom in adopting rules which shall be suitable to the attainment in general of substantially satisfactory results. No one case or series of cases has the arbitrary and
inherent authority which was earlier in our judicial history accorded to the rulings of the courts. There is much greater liberality exercised in modifying, by way of restriction or expansion, rules which have once been announced. Moreover, the common law has been found to possess the capacity which all living organisms have, of getting rid of that which has become dead or useless.\footnote{80}

By his account, judges were not trapped in a mechanical jurisprudence, dictated to by precedent and logical deduction, but rather were relatively free to modify the law in desired ways. Unlike Pound, Larremore, and Whitney, he did not see legislation or codification as superior. Judge McClain argued that codes would be just as static and statutes and code provisions must still be interpreted by judges, generating many of the same difficulties experienced with the common law.\footnote{81}

These contemporaneous writings in prominent journals by Larremore, Whitney, and McClain establish that at the very moment Pound set out to construct the image of the formalist age, a very realistic depiction of the situation directly at odds with Pound’s account was also in circulation.

Nonetheless, in ensuing decades Pound repeated and developed this basic set of ideas—that judges had become trapped within mechanical, deductive reasoning from abstract conceptions and legal rules, and consequently law was failing to keep up with current social needs.\footnote{82} In a 1923 article on the “Theory of Judicial Decision Making,” he reiterated his view that this mechanical jurisprudence was not a façade but an ingrained mode of reasoning: “They are mental habits governing judicial and juristic craftsmanship.”\footnote{83} Pound blamed (again) the influence of legal positivism for reinforcing this mindset—“It has led to a merely superficial certainty; to a belief in a mechanical, logical application of fixed legal precepts in the teeth of facts.”\footnote{84}

\footnote{82} Id. 660.
Finally, a book Pound published in 1938, *The Formative Era of American Law*, contained a lengthy chapter entitled “Judicial Decision.” In the latter part of the 19th century, according to Pound:

> It was considered that courts found the grounds of decision in the rules authoritatively prescribed, or in the traditional legal precepts embodied in judicial decisions of the past, or through logical development of the historically discovered universals. In either case the judicial function was taken to be one of discovery of the definitely appointed precept, or development of such a precept, already existing potentially in the historically discoverable universals, by an absolute method admitting of no scope for anything but logical identification of the actual or deduction of the potential legal precept and mechanical application thereof.\(^{83}\)

Pound acknowledged that this was an idealized vision, but he also presented it as the dominant judicial mindset of the period.\(^{84}\) He pointedly rebutted the growing chorus of voices arguing that the judges were deliberately shaping the law to meet the wishes of the economic elite;\(^{85}\) Pound insisted that the problematic decisions followed as a matter of logic from existing lines of precedent.

A heavy emphasis on Pound is warranted here because, beyond any other figure, he is responsible for the portrayal of judges of the late 19th century as imprisoned in the grip of precedent bound and logically driven, deductive reasoning.\(^{86}\) Pound reiterated this portrayal for decades. He was


\(^{84}\) Id. 117-20.

\(^{85}\) Id. 88-91. This book coincided with the controversy surrounding President Roosevelt’s court packing plan aimed at reversing the Supreme Court’s invalidation of social welfare legislation.

the Dean of Harvard Law School and a major jurisprudence scholar of the
day. This powerful combination of repetition and reputation effectively
cemented the formalistic image of judging. Helping it take hold, the image
he constructed also matched a broader perception that the bench was filled
with judges stuck in a bygone day, obstructing legislative efforts to
ameliorate social problems. For those not inclined to go so far as to charge
judges with crassly manipulating the law to favor the capital-owning class,
as more radical critics suggested, Pound offered a plausible explanation for
their decisions as the unfortunate product of good faith obedience to what
they saw as their legal obligations.87 In this way, he charted a course that
was at once critical of court decisions impeding legislation but not so
critical as to discredit judges or undermine the law.

To close this discussion of Pound, three crucial points must be made.
First, core elements of the idealized image of law that Pound attributes to
this period were widely understood at the time, and indeed at least since the
early 19th century, to be fictional. Back in 1833, a jurist wrote: “[T]he
ancient customs are supposed to furnish a rule of decision for every case
that can by possibility occur….The supposition of an ancient and forgotten
custom, is, as every one knows, a mere fiction….And proceeding on the
groundwork of this fiction in the administration of justice, the courts in
point of fact make the law, performing at the same time the office of
legislators and judges.”88 To be sure, James Carter and others described the
law in traditional idealized terms in the 1890s (although a judge in 1890
acidly called Carter’s account “purely fanciful”89). Throughout this period,
however, there were many expressions of knowing winks or outright
disbelief—literally—“I don’t believe it.”90 A lawyer wrote in 1871,
“Though the rules of the judge-made law are enacted for the cases as they
occur, the fiction is that they have existed from of old and are not enacted
but declared.”91 Another lawyer wrote in 1883 that “we all know this is one

87 For a 1917 article critical of the courts that closely tracks Pound’s analysis of
mechanical jurisprudence, see Edwin R. Keedy, The Decline of Traditionalism and
88 Written and Unwritten Systems of Law, 9 Am. Jurist & l. Mag. 5,11
(1833)(emphasis added)(no author indicated).
89 Ewing, Codification, supra 440.
90 John S. Ewart, What is the Common Law? 4 Colum L. Rev. 116,125 (1904).
91 Edward M. Doe, Codification, 5 Western Jurist 289, 289-90 (1871)(emphasis
added).
of the resplendent fictions…”92 In 1888: “By a singular fiction the courts, from time immemorial, have pretended that they simply declared the law, and did not make the law; yet we all know that this pretense is a mere fiction…”93 Judge McClain, a supporter of the common law, in 1902 matter-of-factly described the “fictitious assumption that the [newly laid down] rule is already law.”94 A historical study of the common law written in 1905 called this set of ideas “the baldest legal fiction.”95 In 1907, a year before Pound’s publication of “Mechanical Jurisprudence,” William Hornblower wrote in the Columbia Law Journal that this old story was a “comfortable fiction.”96 “We of this day and generation are not disposed to accede to the eulogy of the common-law as the ‘perfection of reason.’ We smile at this eulogy, conscious as we are of the manifest imperfections of the common law.”97 Nevertheless, the very next year in the same journal, Pound would hold up this “comfortable fiction” to characterize how members of the legal culture at the time thought about law, and how judges reasoned about law when rendering their decisions. In the face of many contrary assertions going back decades, Pound claimed about the formalist era that “the lawyer believes that the principles of law are absolute, eternal, and of universal validity, and that law is found, not made…”98

The second crucial point is that, in his rendering of it, Pound made a subtle yet major transformational emendation to the classic characterization of the common law. The classical portrayal was about the nature of the common law itself. Pound built on top of this old story a description of how judges actually reasoned when rendering legal decisions: in a mechanical, precedent bound, logical, deductive process. Although these two aspects appear to be associated, they are separate notions (as will be elaborated in greater detail later). One may think that the common law (like natural law)

93 Editors, Current Topics, 29 Albany L. J. 481,481 (1884)(quoting a Mr. Seymour)(emphasis added).
94 McClain, Evolution of the Judicial Opinion, supra 811 (emphasis added).
95 Hannis Taylor, Legitimate Functions of Judge-Made Law, 17 Green Bag 557,562 (1905)(emphasis added).
97 Id. 473.
is perfect and complete, while admitting that judges, as fallible humans operating under less than ideal circumstances, do not reason perfectly or deductively in connection therewith. Traditional common law theory distinguished the common law itself—preexistent, perfect, comprehensive, in some netherworld—from judicial decisions, which were merely evidence of the common law.\textsuperscript{99} This crucial distinction allowed for the possibility of judicial mistakes that did not taint the perfect common law. An essay written in 1889 by George Smith, “Of the Certainty of the Law and the Uncertainty of Judicial Decisions,” at once espoused the majestic vision of the common law as the epitome or reason, principle and certainty, while also complaining about conflicting precedents, and uncertain, loose, confusing, poorly reasoned, and erroneous judicial decisions.\textsuperscript{100}

Prior to Pound’s characterization, it is not easy to find any jurist in the United States who specifically developed the notion that the actual thinking process of judges when rendering legal decisions operates in rigidly logical, deductive terms.\textsuperscript{101} Philosopher John Dewey, in a 1914 article on “Logical Method and the Law,” focused on the “mental operations” aspect of Pound’s account of mechanical jurisprudence.\textsuperscript{102} Dewey made a key distinction between the actual mode of judicial reasoning in the process of arriving at a decision, and the written opinion as a public justification for the decision:

Courts not only reach decisions; they expound them, and the exposition must state justifying reasons….The logic of exposition is different from that of search and inquiry. In the latter, the situation as it exists is more or less doubtful, indeterminate, and problematic with respect to what it signifies. It unfolds itself gradually and is


\textsuperscript{101} Perhaps the closes example is this statement in an 1843 (well before the formalist period) tribute to a deceased Judge that “His preference was rather to deduce the sentence he was about to pronounce, as a logical consequence from some proposition of law which he had previously stated and settled with great brevity.” Horace Binney, \textit{Life of Chief Justice Tilghman}, 1 American L. Mag 1,11 (1843).

\textsuperscript{102} John Dewey, \textit{Logical Method and the Law}, 10 Cornell L.Q. 17,22 (1914).
susceptible of dramatic surprise; at all events it has, for the time being, two sides. Exposition implies that a definitive solution is reached, that the situation is now determinate with respect to its legal implication. Its purpose is to set forth grounds for the decision reached so that it will not appear as an arbitrary dictum, and so that it will indicate a rule for dealing with similar cases in the future.103

This passage suggests that judges do not in fact reason in a mechanical, logical fashion, even if their decisions are written that way. Dewey continued:

It is at this point that the chief stimulus and temptation to mechanical logic and abstract use of formal concepts come in. Just because the personal element cannot be wholly excluded, while at the same time the decision must assume as nearly possible an impersonal, objective, rational form, the temptation is to surrender the vital logic which has actually yielded the conclusion and to substitute for it forms of speech which are rigorous in appearance and which give an illusion of certitude.104

Dewey also asserted that judges at times actually do reason in a mechanical fashion, although he characterized this as a matter of “routine habits of action”—for example, “making rules of pleading hard and fast”—rather than as a matter of logic.105 Concurring with Pound, Dewey argued that judges who reason in this manner fail to keep law abreast of ongoing social change; this type of legal certainty exacerbates public uncertainty with respect to law because judicial decisions become increasingly out of touch with and unpredictable from a common sense point of view.106

Dewey’s analysis straddles uneasily a persistent ambiguity in subsequent interpretations of judicial decisions of the formalist era: did the

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103 Id 24.
104 Id.
105 Id. 25.
106 Id. 25-26.
style of written decisions reflect their actual mode of thinking, or was it merely formalistic cover for decisions they determined on other (more subjective) grounds? Lawrence Friedman made a pivotal comment at the close of his description of the style of this period: “‘Formalism,’ thus, was less a habit of mind than a habit of style, less a way of thinking than a way of disguising thought.”107 A few observers at the time, including Hammond and Larremore, also suggested that the style of written decisions did not reflect the way judges actually reasoned when deciding cases. Morton Horwitz, in his history of the period, suggested that judges took on the formalistic style as a guise to lock in and conceal that the substantive law operated in favor of business interests,108 although judges may have come to actually reason in this formalistic fashion. Llewellyn, Pound, and Gilmore suggested that the manner of writing was consistent with their mode of reasoning. “The judges who thought this way and wrote this way,”109 Gilmore put it. In a study of formalist thought, legal theorist Duncan Kennedy found a genuine “experience that appears to have been common at the turn of the century: that of the compulsion by which an abstraction dictates, objectively apolitically, in a non-discretionary fashion, a particular result.”110 The difficulty in resolving this issue is that it is impossible to assess which view is correct by consulting the style of written decisions alone because the surface style is consistent with either interpretation.

A preliminary question exists as to whether published opinions were in fact so rigidly deductive. A recent historical study of the written decisions

107 Friedman, A History of American Law, supra 384.
108 Horwitz, Transformation I, supra 10,254; Morton J. Horwitz, The Rise of Legal Formalism, 19 Am. J. Legal Hist. 251,264 (1975)(“For the paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law.”). Robert Gordon described the conventional view (without endorsing it) of the period as follows: “after the Civil War, the law suffered a deterioration into sterile formalism, or “mechanical jurisprudence,” which served to mask its deployment as a tool of reactionary social views.” Gordon, “Commentary: John W. Johnson,” supra 648. This formulation leaves open the question whether the judges were actually reasoning in a formalistic fashion or merely writing their opinions to give it that appearance, though it suggests the latter.
109 Gilmore, Ages of American Law, supra 63.
110 Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America, 1850-1940, 3 Research in Law and Soc. 3 (1980).
of the turn of the century Supreme Court found that different justices used different styles of analysis in their written opinions, which makes it dubious to lump them all together under a single “formalist” label. An 1897 article by Henry Merwin complained about the flawed contemporary “Style in Judicial Opinions.” He offered the following example, taken from a U.S. Supreme Court opinion:

The decision of the motion was postponed to the argument upon the merits, and upon that argument counsel for plaintiffs in error, clearly recognizing the necessity they were under of showing that the State court did give effect to the subsequent legislation, in order to show the existence of a Federal question, claimed that it appeared in the record that no judgment could have been given for the defendant in error in the court below without necessarily giving effect to some of the subsequent legislation, and they claimed that an examination of the whole record would show such fact, notwithstanding the statement contained in one of the opinions of the State court already alluded to.

Merwin attributed this kind of writing, which he contrasted unfavorably to the opinions of earlier generations, to haste and carelessness owing to heavy caseloads. Merman lamented that he could find “many examples of inelegance and incorrectness.” He characterized the style as “a narrow and technical view of the law”—“so technical as to hardly rise above the level of legal slang.”

111 Walter F. Pratt, Rhetorical Styles on the Fuller Court, 24 Am. J. Legal Hist. 189 (1980). David Bernstein’s recent reexamination of the Lochner case argues that Peckham’s majority opinion cannot be labeled formalist in Pound’s sense because Peckham referred to the absence of studies that would demonstrate the unhealthiness of the situation for bakers, suggesting that such studies would have weighed in the decision. Bernstein cite.
112 Quoted without identification in Henry C. Merwin, Style in Judicial Opinion, 9 Green Bag 521,521 (1897).
113 Id. 523.
114 Id. 525.
115 Id. 524.
The third crucial point has to do with another subtle but essential transformation Pound accomplished. Most of the examples of conceptual formalism he identified were problems with pleading and procedure or other matters that earlier generations of reformers had bemoaned as “technicalities” with unfortunate results, or useless holdovers in the law.116 The example he used to illustrate mechanical jurisprudence in evidence, for instance, was Wigmore’s analysis of the rules on the admission of scientific testimony, alluded to in the Introduction117 (although Pound failed to note Wigmore’s observation that judges in practice evaded or nullified the absurd rule). In effect, what Pound did in his portrayal of mechanical jurisprudence was box together sundry complaints about the defects of law and procedure, wrap them in jurisprudential packaging—discussing legal science, historical jurisprudence, legal positivism—and ramp up their implications. Although lawyers and judges talked about the same kinds of problems, what they criticized as absurd or outdated rules with unfortunate consequences, Pound portrayed as frozen conceptualism, and precedent and logic-bound judicial reasoning that characterized an entire age.

The thrust of these three points must not be misunderstood. My argument is not that espousals of the old vision of the common law vision were shams. Carter and others repeated the classical common law image with a passion born of conviction, sincerely embracing these idealizations about the law. Carter and other American legal scholars were influenced by evolutionary views of law that gained popularity among jurists in the late nineteenth century.118 But they should not be taken as representative of general views of the reality of law at the time. As I will later document, by the purported onset of the formalist period many legal professionals no longer believed in this set of ideas.

Furthermore, I am not denying that judges ruled in a precedent bound fashion, as Pound contended. Rather, my argument is that judges in

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116 See discussion in Introduction of attitudes against formalism.
117 Pound, Mechanical Jurisprudence, supra 620.
118 See Rabban, “The Historiography of Late Nineteenth Century American Legal History,” supra (describing these views of Carter and others as consistent with late nineteenth century belief in evolutionary views of law); see also Mathias Reimann, The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code, 37 Am. J. Comp. L. 95 (1989); see generally Tamanaha, Law as a Means to an End, supra Chap. 1.
common law systems typically rule in a precedent bound fashion, and are always hesitant to break away from a line of long established precedent (though they may be more willing change the law *sub silentio* through the art of distinguishing precedent); thus there was nothing unique about the way judges functioned during the formalist age in this respect alone. Nor am I disputing that judges during the formalist period frequently derived consequences from presumed concepts, as Pound and the later Realists charged. His examples of “conceptions” included longstanding rules of procedure, evidence, and rules about jury instructions, as well as words like “estoppel, malice, privity, implied, intention of the testator, vested and contingent.” Just about every legal term of art is a conception, by Pound’s usage, and he is surely correct that courts applied these legal notions without rethinking their premises. The same process occurs today, with some of the very same concepts. At any given time, judges (especially those with heavy caseloads) apply the vast bulk of legal conceptions habitually and routinely without much thought. Again, there is nothing unique about the judges in the formalist period in this respect. A more skeptical point must be made as well, however. A theme raised again and again during this period—often by judges—is that the law was plagued by an overflow of precedents available on all sides of legal issues, which suggests that many decisions could not be a matter of logical deduction from given premises, for the premises themselves were a matter of dispute.

The late 19th and early 20th century witnessed a rising chorus of voices inside and outside the law clamoring for legal change. Perhaps more than any other single factor, this is what made the age distinctive. During such moments of agitation for rapid and substantial legal change, the precedent restrained methods of common law judging are experienced as obnoxious barriers. Prompted by external factors, this resentment toward judging and the common law says little about the actual mode of reasoning of judges, and provides no evidence that judges were doing anything different.

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120 Id. 617-20.
121 Id. 621.
122 See Friedman, History of American Law, supra; Tamanaha, Law as a Means to an End, supra
C. Consolidation of the Formalist Image—Grant Gilmore’s Contribution

Karl Llewellyn laid out the three part periodization of American law in a ten page discussion in The Common Law Tradition (1960),123 attaching the label “Formalist Style” to the second period. I will pass over his discussion entirely, however. Much of what he said matched Pound, and, as Grant Gilmore noted, “Llewellyn’s book seems to be largely unread.”124 In contrast, Gilmore elaboration of these three periods, The Ages of American Law, delivered as the prestigious Storrs Lecture at Yale in 1974, achieved a wide audience. Gilmore acknowledged at the outset that “a great many people” already accepted the idea that a “fundamental change” in thinking about law had occurred “at about the time of the Civil War and another at about the time of World War I.”125 The “Grand Style” dominated up to the Civil War. It “lost out to a Formal Style, which was as bad a way of deciding cases as the previous way had been good.”126 The formal style began to disintegrate in the 1920s—involving “a root and branch rejection of the formalism or…the conceptualism of the proceeding period”127—finally giving way to a more realistic approach by judges.

It is not necessary to recapitulate Gilmore’s full portrayal of the formalist age because the basic elements he refers to were set out in Section A. Gilmore identified Langdell’s vision of law as science as providing the intellectual underpinnings of the age.128 He labeled judicial decisions as formalistic “Landgellianism in action.”129

The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical

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123 Llewellyn The Common Law Tradition, supra 35-45.
124 Gilmore, Ages of American Law, supra 11.
125 Id. 12
126 Id.
127 Id.
128 Id. 41-48.
129 Id. 62. Thomas Grey has written a far more nuanced account of Langdell’s position, though in outline it is basically consistent with Gilmore’s description. Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983).
system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing circumstances; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal. Change can only be legislative and even legislative change will be treated with wary and hostile distrust. A statute in derogation of the common law—as what statute is not—will be strictly construed even if it cannot be set aside on constitutional grounds as beyond the power of the legislature to enact.

This predisposition of the judges reflected itself in the style of opinion-writing which came into vogue.\textsuperscript{130} Gilmore, as indicated earlier, identified the style of writing with the style of thinking: “The judges who thought this way and wrote this way set their faces against change.”\textsuperscript{131}

Reasons to doubt this standard characterization of formalistic judges have already been raised, and more will be said on this subject in Part Two. The focus here will instead be on historical evidence that relates to Gilmore’s account. Because his lucid and lively book has been highly influential in perpetuating the image of the formalist age, the \textit{Ages of American Law} must be deflated if any reexamination of this period is to take place.\textsuperscript{132} To pierce his account, I will pointedly respond to two critical

\textsuperscript{130} Gilmore, \textit{Ages of American Law}, supra 62.
\textsuperscript{131} Id. 63.
\textsuperscript{132} Two historians objected in private correspondence that I should not give Gilmore’s \textit{Ages} book centrality in my analysis because it is not respected by historians (on file with author). Even if that is the case, I feature his text for two reasons. Gilmore’s account precisely matches what Bob Gordon labeled the “conventional view” in the mid-1970s. Gordon, \textit{Comment: John W. Johnson}, supra 648. And Gilmore stated at the outset that he was presenting what many people already believed. Thus, \textit{Ages of American Law} remains a superb statement of conventional views at the time, and, I assert, what remains the conventional view today. Second, the book has enjoyed a wide readership outside of legal historians, remaining influential to this day. Whatever the skepticism might be among
assertions Gilmore made about the formalist age, and to a third assertion he made about the initial sign of its impending demise.

“It was also during the post Civil-War period,” Gilmore claimed, “that the idea that courts never legislate—that the judicial function is merely to declare the law that already exists—became an article of faith, for lawyers and non-lawyers alike.” This statement is refuted overwhelmingly by the facts. Earlier I supplied quotations showing that it was widely understood to be a fiction that judges do not create the law but rather always declare already existing law. Many writers at the time explicitly acknowledged that judges “necessarily legislate.” Consider the dates and titles of these articles, every one of which acknowledged the fact of judicial legislation, accepted it as inevitable, and noted its benefits: “Judicial Legislation” (1870), “Judicial Legislation” (1872), “Judicial Legislation: Its Legitimate Function in the Development of the Common Law” (1891), “Judicial Legislation” (1902), “Legitimate Functions of Judge-Made Law” (1905); “A Century of ‘Judge-Made’ Law” (1907); “The Process of Judicial Legislation” (1914). “There is an ‘irrepressible conflict’ between the pretense of ‘stare decisis’ and the actuality of judicial legislation,” observed the Editors of the *Albany Law Journal* in 1885. The president of the New York Bar declared in an 1894 speech that “the courts have indulged in judicial legislation for centuries.” Directly contrary to Gilmore’s blanket assertion that lawyers and non-lawyers historians of Gilmore’s account, this skepticism appears not to have not spread more broadly. For both reasons, it is not just fair but essential to construct the argument directly in response to Gilmore.

133 Gilmore, Ages of American Law, supra 15 (emphasis added).
135 *Judicial Legislation*, 1 Albany L.J. 105 (1870)(no author indicated).
believed as an article of faith that courts never legislate, the notion that judges legislated was commonly acknowledged, both by supporters of the common law and by supporters of legislation. It is correct that people opposed this practice as inconsistent with the separation of powers and improper, but many scholars, judges, government officials, and practitioners, in the realistic awareness of the age, thought it was inevitable and/or laudable for courts to make law.

Gilmore made another statement about the period that requires correction: “The American codification movement had apparently died about the time of the Civil War; nothing more had been heard from or about it since then.”144 In fact, the issue of codification remained a topic of concern through the turn of the century, enjoying a heated revival in the mid-1880s, when David Dudley Field, the indefatigable 19th century champion of codification, renewed his codification drive.145 Consider these titles and dates of articles: “Codes, and the Arrangement of the Law” (1870),146 “Codification” (1871),147 “Inter-State Revision and Codification” (1878),148 “Codification” (1886),149 “Codification” (1890);150 “The Common-Law System of Judicial Precedent Compared with Codification as a System of Jurisprudence” (1918).151 The American Law Review, a leading journal of the period, dedicated a symposium issue in 1886 to the subject of codification, with a lead article from Field, followed by five supportive articles, including one by the prominent judge, John F. Dillon. The New York City Bar commissioned a committee in the mid-1880s to consider the merits of codification.152 James Carter’s strident “formalist” statements in

144 Gilmore, Ages of American Law, supra 69.
146 Oliver Wendell Holmes, Codes and the Arrangement of the Law, 5 American L. Rev. 1 (1870).
147 Doe, Codification, supra.
148 P.N. Bowman, Inter-State Revision and Codification, 3 Southern L. Rev. 573 (1878).
149 David Dudley Field, Codification, 20 American L. Rev. 1 (1886).
150 Ewing, Codification, supra.
152 Hornblower, A Century of Judge Made Law, supra 456.
defense of the common law, cited by Pound to exemplify the formalistic mindset of the age, were made in the course of opposing codification.\textsuperscript{153}

It is vital to document these two erroneous assertions by Gilmore because many of the realistic observations voiced about law and judging during the formalist era came in the context of discussions about the undeniable reality of judicial legislation and the merits of codification. Gilmore’s declarations that, during the formalist era, it was “an article of faith” that “courts never legislate,” and “nothing more” was heard from the codification movement, reveal that he was unaware of this copious literature and, consequently, did not see the ready evidence that realism permeated the formalist age.

To herald the dawning of the third (current) age in American law, Gilmore pointed to the 1921 publication of Benjamin Cardozo’s \textit{The Nature of the Judicial Process},\textsuperscript{154} a penetrating account of how judges decide cases. Cardozo wrote that in most cases the applicable legal rules and principles clearly dictate the decision,\textsuperscript{155} and judges must rule as required. But in a number of cases there is no clear legal answer. When deciding such open cases, judges should strive to promote social ends, asserted Cardozo, for he saw law as a means to advance the social welfare (citing Pound’s “Mechanical Jurisprudence”\textsuperscript{156}). He asserted forthrightly that these situations involve “judicial legislation.” The judge must, when rendering these decisions, strive to decide in an objective fashion and further the community’s view of the proper end, not the judge’s own view.\textsuperscript{157} Cardozo acknowledged that is difficult to keep these two strictly separate, conceding that judges perhaps cannot be entirely free of “subconscious loyalties.”\textsuperscript{158} For its nuanced, concise, inside look at judging, \textit{Judicial Process} is a remarkable book.

Here is Gilmore’s description of the reception it received:

\begin{itemize}
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Cardozo, \textit{Nature of the Judicial Process}, supra 102.
  \item \textsuperscript{155} Id. 136-37,170.
  \item \textsuperscript{156} Id. 102.
  \item \textsuperscript{157} Id. 108-09, 121.
  \item \textsuperscript{158} Id. 175.
\end{itemize}
THE REALISM OF THE “FORMALIST” AGE

The thing that is hardest to understand about The Nature of the Judicial Process is the furor which its publication caused. Nothing can better illustrate the extraordinary hold which the Langdellian concept of law had acquired, not only on the legal but on the popular mind. Cardozo’s hesitant confession that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it, was widely regarded as a legal version of hard core pornography…[A] less saintly man than Cardozo might, in 1920, have found himself running close to the reefs of impeachment.159

Gilmore, once again, got matters opposite the facts in his assertion (without supportive citation) that Cardozo’s book generated a “furor.” The truth is that, as an exhaustive biography of Cardozo noted, “The applause that followed each of Cardozo’s lectures at Yale was echoed in the reviews of the published work.”160 Much of what Cardozo wrote in the book had been said openly by judges, lawyers, and law professors well prior to and leading up to 1920 (as set forth throughout this article). Hence Judicial Process was hardly legal blasphemy. Another indication that it was by no means radical is that early Realists Max Radin and Walter Wheeler Cook, while praising the book, chided Cardozo for overstating the determinacy of law.161 No hint of scandal is present in reviews of his books at the time.162

159 Gilmore, Ages of American Law, supra 77.
161 Max Radin, Book Review, 10 Cal. L. Rev. 367 (1921); Walter Wheeler Cook, Book Reviews, 38 Yale L.J. 404 (1929).
Cardozo surely would not have been elevated to the United States Supreme Court with acclaim in 1932 if he was condemned as a heretic in the preceding decade.

One can only speculate that Gilmore failed to recognize or acknowledge the ample expressions of realism that could be found in the formalist age because he, like most scholars of his generation, could not easily see past the image of the formalists they inherited from Pound and the Realists. Similarly, the current generation of scholars (myself included\textsuperscript{163}) has been nigh completely oblivious to the realism of the period because we have been taught by Gilmore and his generation.\textsuperscript{164} In this manner, a selectively constructed image of the period—built by critics of the courts—has become, with the passage of time, tantamount to a verity.

\textit{D. Two Distinct Senses of “Legal Formalism”}

Before proceeding, it is essential to unpack a persistent ambiguity in discussions of legal formalism, for this label is invoked in the literature in two distinct senses that are improperly associated and frequently confused.\textsuperscript{165}

\textsuperscript{163} In Law as a Means to an End: Threat to the Rule of Law (NY: Cambridge 2006), I expressed a bit of skepticism about standard jurisprudential views of the formalists (calling the label “tendentious”), and I cited several of the realistic statements mentioned in this article, but I was not fully aware of the depth of realistic views at the time. This lack of knowledge does not affect the central theme of the book, which traces out the shift at the level of ideals from a non-instrumental to an instrumental view of law in the United States over the past two centuries, though it adds another layer of complexity to the analysis and chronology.

\textsuperscript{164} As Mark Movsesian notes, there has recently been a reexamination of this period, leading to greater appreciation of the complexity of prevailing ideas. Mark L. Movsesian, \textit{Rediscovering Williston}, 62 Wash. & Lee L. Rev. 207,212 (2005).

\textsuperscript{165} See Brian Bix, Jurisprudence: Theory and Context (Durham, N.C.: Carolina Academic Press 2004) 178-200 (Bix mentions both senses, and recognizes that they are distinctive, though he says nothing about what makes them distinct or their interrelations).
The label legal formalism is regularly applied to the characterization of the common law as comprehensive, gapless, conceptually consistent and logically ordered.\textsuperscript{166} Langdell’s law as science is one version of this; another version is Carter’s historical view of law as a product of the customs and immanent principles of society. Although these late nineteenth century scientific views of law differ from one another,\textsuperscript{167} they overlap in seeing the law as ordered, consisting of immanent principles or legal concepts discoverable through reason, and both resonate with the traditional image of the common law as customs descended from time immemorial, continually renewed in connection with society, rationalized over time by judges into a systematic body of rules and principles.\textsuperscript{168} This first sense of legal formalism is a theory or account of the common law as a body of law.

The label legal formalism is also often applied to a particular characterization of judicial decision making as a matter of pure logical deduction from legal concepts, principles, precedents, or rules.\textsuperscript{169} A judge, by this account, mechanically reasons from controlling legal dictates in connection with the facts of a given case. As Thomas Grey put it, “'Formalism' describes legal theories that stress the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles.”\textsuperscript{170} This second sense of legal formalism is an account of the process of judicial decision making, of how judges actually think (or claim to think) when deciding cases.

\textsuperscript{166} An excellent account of this understanding of law can be found in Grey, \textit{Langdell’s Orthodoxy}, supra. Owing to dissatisfaction with the label legal formalism, legal historians have more recently come to use different labels for this period, the most popular of which is perhaps “classical legal thought.” See Wieck, The Lost World of Classical Legal Thought, supra. These historical recognize that “legal formalism” has also been applied to this complex of ideas. See e.g. Siegal, \textit{John Chipman Gray and the Moral Basis of Classical Legal Thought}, supra, 1514 (“Between the 1870s and the 1930s, American law was dominated by a jurisprudential style variously described as ‘mechanical jurisprudence,’’ ‘legal formalism,’ and ‘classical legal thought.’”).

\textsuperscript{167} These differences are explored in Stepen A. Siegal, \textit{John Chipman Gray and the Moral Basis of Classical Legal Thought}, supra; see also LaPiana, \textit{Jurisprudence of History and Truth}, supra.

\textsuperscript{168} See Tamanaha, Law as a Means to an End, supra Chapter 1.

\textsuperscript{169} An excellent philosophical exploration of this type of formalism is Duncan Kennedy, \textit{Legal Formality}, 2 J. Legal Stud. 351 (1973).

\textsuperscript{170} Grey, \textit{Langdell’s Orthodoxy}, supra 9.
Pound linked these two senses of formalism, as indicated earlier, when he appended to the traditional story of the common law his description of judges as stuck in mechanical decision making. Morton Horwitz conjoined the two in this assertion: “There were…major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making ‘legal reasoning seem like mathematics,’ conveyed ‘an air…of…inevitability’ about legal decisions.”¹⁷¹ Historian William LaPiana suggested that the second sense of legal formalism follows from the first:

The [historical school of thought] legal theory of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a “formalistic” view of law and judging. As long as the ultimate repository of law is declared to be a body of principles beyond the reach of political processes, especially legislative processes, and once the guarantees of the Constitution are proclaimed to embody these unwritten principles, the decision of cases can become the mechanical application of transcendent rules.

The above statements suggest that these two senses of legal formalism deliver linked, complementary payoffs: owing to the first sense, the law (legal concepts, principles, legal rules) is objective, and owing to the second sense, judging is objective. When the two senses of legal formalism are conjoined, the law is what rules—or that is the claim purportedly made by formalism.

This seemingly natural identification of these two senses tends to obscure the fact that they go together only when a particular condition is met: one must believe that the first sense of legal formalism is an accurate description of the actual state of the common law. A deductive view of judging cannot get off the ground—it has no purchase or plausibility—if the law is not seen as a complete and logically ordered system. Significantly, however, some of the most important jurists identified as “legal formalists”

¹⁷¹ Horwitz, The Rise of Legal Formalism, supra 252; see also Grey, Langdell’s Orthodoxy, supra 9-10 (connecting these two senses of legal formalism).
did not take the first sense of legal formalism as a description of the state of the legal system.

Recall that Hammond, cited by LaPiana as a key contributor to legal formalism (in both senses), uttered the realistic observations recited at length in the Introduction:

> It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another score might be collected to support the opposite ruling. …[T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case.\(^\text{172}\)

Another person on LaPiana’s list of influential legal formalists, Judge John Dillon, made similarly realistic observations about the law and judging (taken up in greater detail later). Dillon wrote: “Not only is the case law incomplete, but the MULTIPLICITY AND CONFLICT OF DECISIONS is one of the most fruitful cases of the unnecessary uncertainty, which characterizes the jurisprudence of England and America….Almost every subject is overrun by a more than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.”\(^\text{173}\)

How could these two purported believers in legal formalism in the first sense, charged with responsibility for legal formalism in the second sense, make such realistic statements about law that deny core aspects of both senses of legal formalism?

While Hammond and Dillon may have accepted the traditional view of the common law (the first sense of legal formalism) as a *theory or idealized vision of law*, by their own accounts the actual state of the common law fell woefully short of the ideal. As the discussion in the following Part will


\(^{173}\) John F. Dillon, *Codification*, 20 American L. Rev. 29,36 (1886)(emphasis in original).
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establish, moreover, many legal professionals during the formalist period did not buy this traditional story as a theory or ideal of the common law, but instead considered it a known fiction collectively maintained for the sake of appearances.

A jurist who perceives the reality of the common law as abjectly failing to meet the ideal (or the fiction) cannot believe that judging is a simple deductive matter because the disordered state of the law would preclude such a method of reasoning. Judicial decisions may well have been written in this style, but Hammond and others at the time noted that this was merely a façade.

Langdell is another case in point. In his famous 1897 article The Path of the Law, which has been credited with striking a decisive blow against legal formalism, Holmes wrote:

So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them.

Holmes in this passage is not offering an account of how judges reason (or purport to reason) when rendering their judicial decisions; rather he is criticizing conceptualist “schools” of thought, of which Langdell’s might be taken as representative. Horwitz’s earlier quoted sentence about legal formalism—“making legal reasoning seem like mathematics”—is an obvious allusion to this passage from Holmes, although he subtly shifts it from a statement about the claimed logical structure of the law to a statement about judicial decision making.

175 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457,466 (1897).
176 Holmes goes on to discuss judicial decisions in the next paragraph, but he vacillates between suggesting that judges reason in a deductive matter or merely give that appearance in their decisions. Id. 466
While Langdell can be fairly saddled with Holmes’ characterization, he cannot be charged with Horwitz’s. One of the more remarkable features of Langdell’s view of law was his penchant for disregarding or dismissing as mistaken the grounds judges explicitly provided in their written opinions to justify their decisions. \(^{177}\) Langdell believed, as Thomas Grey pointed out, that “Judges often did not accurately state the rules on which they decided cases. Further, the basic principles had not been properly formulated and arranged. The law consisted of a mass of haphazardly arranged cases: a ‘chaos with a full index.’”\(^{178}\)

Hence, the most famous legal formalist (in the first sense), Langdell, argued that the common law of his time was a distant shadow of the idealized scientific vision of the law he strove to build, and he believed that judges did not in fact reason in a logical manner, for by his lights their decisions were filled with errors, errors that created faulty doctrine marring the logical structure of the common law.

Whatever their views might have been about how judging *should* be conducted, there is little doubt that Hammond, Dillon, and Langdell, all identified by later generations as leading legal formalists of the day, did not describe actual judging as a matter of mechanical, logical deduction. This would have been a preposterous claim given the messy state of the common law they all lamented. It is one matter to assert that in its ideal state the common law is (or should be) a comprehensive and logically ordered body of rules and principles that scholars and judges can discern through careful study; but it is an entirely different matter to believe that judges engage in purely mechanical deduction when rendering their decisions. The former is an abstraction or ideal (or fiction) about the law, whereas the latter is an empirical claim about how judges actually reason that must, to be plausible, meet the tests of experience and observation. Ignoring this large difference, scholars who characterize the legal formalists tend to run these two senses together.

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\(^{177}\) See Grey, *Langdell’s Orthodoxy*, supra 11 n. 33.

\(^{178}\) Id. 13.
When launching their attack on the so-called formalists, the Legal Realists criticized both senses of legal formalism.\(^{179}\) As the following Part will make clear, much of what the Realists said against legal formalism had already been said during the formalist period.

PART II. THE CONTEXTS OF REALISM ABOUT LAW AND JUDGING

Many expressions of a realistic understanding of law and judging have been scattered throughout the preceding text, most taken from the formalist period between 1870 to 1920, along with a few from much earlier. Here is a realistic statement by Robert Rantoul in 1836:

> The judge is human, and feels the bias which the coloring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make new law….

> Almost any case, where there is any difference of opinion, may be decided either way, and plausible analogies found in the great storehouse of precedent to justify the decision. The law, then, is the final whim of the judge, after counsel for both parties have done their utmost to sway it to the one side or the other.\(^{180}\)

Other early examples of such realism can be found. In 1834, a prominent labor leader slammed the common law and judges: “One of the most enormous usurpations of the judiciary is the claim …of common law jurisdiction. Common law, although contained in ten thousand different books, is said to be unwritten law, deposited only in the head of the judge,

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\(^{179}\) See Bix, Jurisprudence, supra Chap. 17; Tamanaha, Law as a Means to an End, supra 65-69.

so that what he says is common law, must be common law.” 181 A comprehensive report on common law rules and procedures written in 1829 recommended against allowing litigants to pick the particular judge who hears their case because “An unfair advantage is also attainable, when the predilection of a fixed judge can be calculated on.” 182 A remarkably learned, scorching critique of common law crimes was published in 1819 by John M. Goodenow, who argued that decisions can be found on all sides of issues, that judges have a great deal of discretion, that many common law rules protect the political interests of the elite, and that court decisions “are liable to be infused with the error and prejudice which infects all human reasoning.” 183 Jeremy Bentham, in the late 18th century, viciously criticized the common law and judges on some of the same grounds. 184

Skepticism and complaints about the common law and about judging goes back centuries in the United States legal system, 185 and might be endemic to the common law—a system that proudly (if opaquely) claims to be “unwritten,” is not easily identified, and is produced and controlled by judges. During the formalist era, there were several fertile contexts for the expression of realism about law and judging: 1) the struggle to deal with social and legal change in a common law system that claims to be immemorial; 2) the problems associated with achieving justice in particular cases; 3) the difficulty of reconciling judicial elections, partisan appointments, and external political activities by judges, with the apolitical role of the judge; 4) the issue of uncertainty, and its connection with codification; and 5) unfriendly judicial treatment of legislation. Each context will be conveyed briefly.

183 John M. Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence (Steubenville, Ohio: James Wilson 1819) 375. The entire book is a critique of the common law, but the most concentrated arguments on these issues can be found in Chapter VII.
185 See Gordon, The American Codification Movement, supra (making this point).
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A. The Problem of Social and Legal Change, and The Legal Fiction Solution

The classical image of the common law contained two integral aspects in direct tension. The common law was said to consist of customs descended from time immemorial, developed by judges to embody reason and unchanging principle, and it was said to conform to contemporary community values by virtue of its ongoing application by judges in specific cases. The common law was likened to a ship at sea in which each plank is replaced en route, continuously absorbing new material (customs and values), while remaining fundamentally the same (immemorial customs and enduring reason and principle).186

This set of views explains what defenders of the common law meant when they claimed that judges do not create law but rather declare preexisting law. Judges were said to extend previously declared rules and principles into new situations, or to make explicit rules taken from the immanent norms of the community. The announcement of a previously undeclared rule in a case by a court, accordingly, was not judicial legislation and was not an ex post facto imposition of law by a judge on the parties because that rule already existed.

The claims to be descended from time immemorial and consist of unchanging principle, reinforced by the doctrine of stare decisis, makes change difficult to accomplish. Common law systems struggle constantly with this because social, economic, technological, and political change is constant.187 Following the Revolution, American courts enjoyed a brief, limited freedom to strike out anew and shape rules that better fit the circumstances of the new country.188 Even then, however, the common law was filled with archaic forms, practices and rules that succeeding generations chafed against. An obvious means to alter the common law to

187 See Written and Unwritten Systems of Law, supra (discussing this).
188 See Law of Real Property, 1 Am. Jurist & L. Mag. 58 (1829)(discussing modifications of the common law to suit the new circumstances).
conform to the times is through legislation. But for much of the nineteenth century legislation was relatively infrequent and irregular; and legislators, who do not typically care about mundane legal issues, were not knowledgeable or concerned enough to provide overdue legal change.

Judges effected legal change through a device unique to the common law: resort to legal fictions. In a multitude of procedural and substantive contexts, judges invented and utilized fictions to maintain the appearance of continuity with standing law while circumventing undesirable rules or consequences. A writer in 1841 remarked that “All manner of pleadings and proceedings, both in law and equity, are stuffed with falsehoods and lies.”

Past examples of this practice include fake pleadings and assertions of facts (in trover), fake parties and transactions (Richard Roe and John Doe), and a variety of other fictions large and small, including the unity of husband and wife upon marriage, and the treatment of corporations as “persons” or “citizens.”

Ejectment actions, observed the same writer in 1841 in a sardonic essay lampooning legal fictions, contained not “a single tittle of truth in any one of the facts that are put upon the record.”

Popular ditties were sung ridiculing legal fictions. Bentham scorned legal fictions: “What you [judges] have been doing by the fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.”

“Wheresoever the use of a fiction prevails, and in proportion as it prevails, every law-book is an institute of vice; every court of judicature is a school of vice.”

The topic of legal fictions was a fecund source of realistic statements about the law throughout the 19th century and the formalist era. Lawyers

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191 See Legal Fictions, supra 76.
194 Id. 149.
195 See e.g., The Law of Real Property, supra; Legal Fictions, supra; Oliver R. Mitchell, The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth, 7 Harv. L. Rev. 249 (1893); Clifford Thorn, Correction of the Law, 33 American L. Rev. 1897.
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knew that the law and legal proceedings were shot through with deliberate falsehoods—belying claims about its logical coherence—and lawyers knew that they masked (transparently) alterations in the law—belying claims that the law consisted of enduring principles and customs descended from time immemorial.\(^\text{196}\) The claim of adherence to \textit{stare decisis} was also made a mockery of by legal fictions, for compliance with precedent was maintained on the surface when lawyers knew that its operation had been evaded. Many judges and jurists saw this practice as a useful way to modify the law when necessary, while regretting fictions as an embarrassing device out sync with modern sensibilities; “[T]here is many a legal fiction which both young and old [lawyers] accept with reluctance,”\(^\text{197}\) wrote a legal editor in 1870. “At the present time,” a jurist wrote in 1917, “there is no longer any need to resort to subterfuges or to employ fictional phraseology,” although he made this remark in a two part article cataloging a long list of still active legal fictions.\(^\text{198}\) In a 1919 Address about legal change, a state judge told a knowing audience, “I have barely suggested a few of the multitude of fictions that will occur to you. The law is simply full of them.”\(^\text{199}\)

Henry Sumner Maine’s \textit{Ancient Law}, published in 1861, created a sensation in legal circles England and America in the second half of the 19\textsuperscript{th} century.\(^\text{200}\) “Legal Fictions” was the title and subject of the second chapter of the book. His observations provide compelling evidence that a realistic awareness about law was well established at least by mid-century:

We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one

\begin{footnotesize}

522 (1899); Simeon Baldwin, \textit{A Legal Fiction with its Wings Clipped}, 41 American L. Rev. 38 (1907); Sidney T. Miller, \textit{The Reasons for Some Legal Fictions}, 8 Mich. L. Rev. 623 (1908)


\(^{197}\) Editors, \textit{Legal Reform}, 1 Albany L.J. 291,291 (1870).


\(^{200}\) Henry Sumner Maine, \textit{Ancient Law} (Tuscon: Univ. Arizona Press 1986 [1861])

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line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas….It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge or acumen, is not forthcoming to detect it. Yet the moment the judgement has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought….The applicable rules of law have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed.201

Maine held up the traditional image of the common law and disclosed that it involves the knowing use of a “double language.” He postulated an explanation for why lawyers “acquiesce in these curious anomalies”: “Probably it will be found that originally it was the received doctrine that somewhere, in nubibus or in gremio magistratuum, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances.” Maine immediately followed this with a revealing comment: “The theory was at first much more thoroughly believed in than it is now…”

The routine use by judges of legal fictions to patch over changes in the law—which Maine accepted but saw as disruptive of the logical coherence of law—thus served to prop up the grander fiction that the law was always already complete and enduring. To modern ears, the entire arrangement sounds so peculiar as to be beyond plausibility, but it makes sense if not

201 Id 30 (emphasis added).
202 Id. 31.
203 Id.
204 Id (emphasis added).
understood as an account of the law as it is. This elaborate story about the common law was understood to be an ideal, or a deceptive fiction in the eyes of critics; some in law were truly committed to the ideal notwithstanding its marked departure from reality, and some even perceived the legal world through the lens it provided.\textsuperscript{205}

At the very cusp of the purported outset of the formalist age, Maine announced that the traditional image of the common law, while still often repeated, could not be taken at face value as a widespread belief. An 1883 statement confirms Maine’s basic point—as do the string of quotations to this effect recited in the earlier discussion of Pound—and dates it to much earlier in the century: “The fact that, under the fiction of declaring the law, the judges in reality make it, has been recognized by everyone who has studied the subject with candor and intelligence, since the days of Bentham, at least.”\textsuperscript{206}

\subsection*{B. Achieving Justice in Particular Cases}

It is commonly said that judges both apply the law and do justice. The relationship between law and justice, however, is problematic. A common law judge renders a decision that simultaneously resolves a particular dispute and, owing to the operation of \textit{stare decisis}, establishes a rule for future cases.\textsuperscript{207} This two-sided task generates two types of justice issues, respectively: justice for the individual parties, and a just social rule. The first issue of justice arises when the application of clearly binding rules would produce an unjust result, not because the rule itself is unjust but owing to factors unique to the particular situation of application. A judge who follows the law would visit an injustice on the party. The second issue arises when the existing rule itself is unjust or obsolete, or when no clear rule exists, and the judge is called upon to formulate a rule. Social justice in this latter case is a broad term not limited to what is fair or morally

\textsuperscript{205} In his study of the common law, Pocock argued that this idealized image of the common law was so strong that it shaped perceptions. See Ancient Constitution, supra.

\textsuperscript{206} Shirley, \textit{The Future of Our Profession}, supra 659.

\textsuperscript{207} See Carpenter, \textit{Court Decisions and the Common Law}, supra.
correct, but includes what furthers the social welfare (socially expedient, correct public policy).208

Whichever type of question is raised—doing justice for the individual or producing a just social rule—the same intransient problem arises: how does the judge know or determine what is just? This issue, in both variations, also generated realistic comments about judicial decision making during the formalist period. Previously, resort to equity could be had to avoid situations where application of the law led to an unjust result in an individual case. The old saw that equity varies with the length of the Chancellor’s foot reflects the suspicion that justice is a function of the subjective views of the judge who decides.209 The same suspicion plagues inquiries into what is or should be a socially just rule. A number of jurists took the position that this inquiry must be answered by resort to objective natural law principles,210 but the more common answer to this, which Cardozo gave in the Judicial Process, is that the judge must consult the community’s standard of justice or welfare rather than the judge’s personal views of justice.

With full awareness of these familiar suspicions and difficulties surrounding questions of justice, a number of judges in the formalist era thought the correct path was to avoid the issue entirely. Judge McClain, in 1902, explained why:

The popular objection is that in the attempt to administer law on the basis of precedent, the courts lose sight of the administration of justice….It would be a great shock to those who make the complaint if they were told that courts are not established for the purpose of administering justice, and yet that is the real answer, for the conception of justice which is assumed in the criticism is that of a result which shall satisfy the moral feeling of the persons who assume to criticise the conclusion

208 See Carpenter, Court Decisions and the Common Law, supra 607.
209 See Horwitz, The Rise of Legal Formalism, supra 263 (equity attacked in early 19th century for being inherently political).
210 John Young, The Law as an Expression of Community Ideals and the Lawmaking Functions of Court, 27 Yale L.J. 1,4-5 (1917).
reached, and as the elements in a controversy which appeal to the moral feelings are extremely diverse, intangible and uncertain, it is evident that if the courts should undertake to announce results with this object in view they would fall into hopeless confusion, and the rights of parties would be determined by whim and caprice, and not by any system of established rules and principles.211

The notion of “legal justice” is the proposition that over the long run greater justice is achieved through consistent application of the rules, because seeking to advance justice (individual or social) in particular cases, outside of existing rules, creates uncertainty, leads to unequal application of the law, and subjects people to the will of the judge rather than the rule of law, producing greater injustice overall. These are compelling considerations that weigh upon every judge. Although Cardozo argued that the ultimate end of law is to advance the social good,212 he counseled that “We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance.”213 Pound also warned about the impropriety of creative interpretation of legislation by courts to advance social justice, which “reintroduces the personal element into the administration of justice. The whole aim of the law is to get rid of this element….The application of the individual standard instead of the legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred.”214 If courts indulge in this kind of interpretation to remake law to advance public policy, Pound predicted, this would bring increased political pressure on courts for more of the same, with detrimental consequences for the rule of law.215

It was recognized that, even when they did not use legal fictions or forthrightly declare new rules, judges motivated by social justice concerns could, when distinguishing and applying precedents and principles to new situations, de facto produce new rules that lead to desired consequences.

212 Cardozo, Judicial Process, supra 66.
213 Id. 103.
214 Roscoe Pound, Spurious Interpretation, 7 Colum. L.Rev. 379,385 (1907).
215 Id. 384-86
Awareness of this potential also generated realistic observations. Some commentators opined that this process of decision making is driven by the judge’s identification of the community’s values and preferences, while others remarked that this is driven by the judges’ personal views of justice or public policy. John Ewart wrote in 1904 that “each judge is consulting, not any body of law, ‘true’, ‘common’, or otherwise, but is declaring what to him with all his personal idiosyncracies, his dreads, his antipathies, his sympathies, his forecasts, his characterizations and mental climate—what to his particular brain, appears to be best.” Joseph Bingham observed, in 1912, that “to require judicial reasoning to proceed always within the confines of promulgated rules and principles, will not prevent individual bias from affecting a decision. It could be demonstrated that judges are able to manipulate generalized expressions to suit their preferences as easily as they could plausibly justify the same decision by free reasoning. Indeed previous judicial and legislative expressions may be misused as a plausible mask to conceal the real motives or incapacity of the judge.” Bingham’s point was that such manipulation could not be prevented if a judge desired to engage in it, so judges should openly articulate their reasoning and justifications for their choice of the rule, providing a way for others to evaluate the grounds of the decision.

C. Judicial Elections and Political Party Behavior

Judicial elections and political behavior in connection with judges also prompted realistic comments about the possibility that the predilections of judges could influence judicial decisions while remaining concealed beneath legal analysis. A group of lawyers in 1869 protested the participation of several Supreme Court judges in a political party event: “From the unerring lessons of the past we are assured that a judge who openly and publicly displays his political party zeal, renders himself unfit to
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hold the ‘balance of justice,’ and that whenever an occasion may offer to serve his fellow-partisans, he will yield to the temptation, and the ‘wavering balance shake.’”220 On another occasion, a writer asked in connection with a judge who participated in political party affairs: “How can he expect to be above suspicion in his judicial acts? How can he expect to attain that judicial nirvana of being without party bias?”221 It was thought that partisan consideration in connection with a judge’s appointment to the bench “casts suspicion upon the disinterestedness of his decisions.”222 Two examples of this concern in connection with judicial elections were quoted in the Introduction,223 and will not be repeated here, other than to mention that the second writer warned that the availability of precedents on various sides of issues facilitates politically biased judging. Judge Thomas Cooley remarked in 1888 that people regularly perceived political motivations behind judicial decisions based on very little “beyond the suspicions springing from former political affiliations of the judges.”224 During the formalist age, people were not oblivious to potential for political considerations to influence judging.

D. The Uncertainty of the Law, and the Codification Debate

An often repeated theme in the legal literature of the 19th century was the manifest uncertainty of the common law owing to the surfeit of disorganized and conflicting precedent. Kent wrote in 1823 in his Commentaries that “The evils resulting from indigestible heaps of laws and authorities are great and manifest. They destroy the certainty of the law, and promote litigation, delay, and subtilty.”225 Nearly a century later, in 1912, the same complaint was echoed by a Judge: “The reported decisions in all our states so enormously multiply that the lawyer’s problem is not so

220 Editors, Legal Notes, 18 Am. L. Reg. 250, 250 (1870).
222 Charles A. Boston, Some Conservative Views on the Judiciary and Judicial Recall, 23 Yale L.J. 511, 525 (1914).
223 See Editors, An Elective Judiciary, 8 Albany L.J. 245 (1873).
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much where to find the law as to weigh and estimate the value of what he
discovers. It is in truth more than ever ‘the lawless science of the law, the
countless myriad of precedents.”

Judge Thomas M. Cooley, one of the most renowned jurists of the
formalist age, gave an address in 1888 on “The Uncertainty of the Law,”
acknowledging that this was a common (age old) complaint about the law,
although he thought the charge unjustified. Cooley argued that many areas
of law are relatively settled (criminal, property, family, trusts and estates),
the commercial system predictably handles innumerable economic
transactions, and society enjoys peace and order.

The very next year, Judge Seymour Thompson followed him to the
same podium and, with apologies to Cooley, extensively argued the
opposite. After a lengthy exploration of several areas of law, he asserted
that “the jumble through which I have just conducted you, though full of
legal technicality, is utterly destitute of any element of certainty; and every
title of law abounds in such labyrinths.” Thompson articulated an
argument (in 1889) that would be identified with the later Legal Realists
and Critical Legal Studies—that there are exceptions for every legal
principle which can be invoked at any time: “Again, take the general
proposition that a request is necessary to raise an implied promise. This is
reiterated in many legal judgments. But it is easily shown that in many
cases the law will imply a promise where there has been no request; but in
what cases it will imply it and what not, who can tell? Similar doubts and
infirmities seem to permeate every title of our case-made law.”

Thompson’s essay, it should be noted, was endorsed by the professional
editors—openly skeptical of Cooley’s claims of legal certainty—of the
Albany Law Journal as “brilliant, vigorous, and judicious.”

226 Oscar Fellows, The Multiplicity of Reported Decisions, 6 Maine L. Rev. 263,264
(1912).
22,44 (1889).
229 See Robert W. Gordon, Critical Legal Studies, 10 Legal Stud. F. 335,338
(1986)(describing the indeterminacy thesis of CLS in terms remarkably reminiscent of
Judge Thompson’s description of the state of the law).
230 Id. 47-48.
231 Editors, Current Topics, 39 Albany L.J. 221,222 (1889).
Many realistic comments about the uncertainty of law and its implications for judicial decision making were uttered in the context of the codification debate. This debate was launched by Jeremy Bentham in the final quarter of the 18th century, and continued through the 19th century, into the 20th. Enthusiasts for codification typically made their case by detailing the sorry state of the common law. The realistic 1836 passage quoted at outset of this Part was produced by Robert Rantoul in the course of advocating codification, as was John Goodenow’s harsh attack on the common law.

The standard collection of arguments against the common law was articulated early in the 19th century. A pro-codification article in 1833 noted that the “unwritten” common law could not easily be found; there were too many volumes and reports of cases (which were too costly for ordinary lawyers to maintain); there were precedents on all sides; the law was filled with legal fictions; judges had a great deal of discretion to create law; when doing so they imposed rules on parties \textit{ex post facto}; and owing to these factors the law was terribly uncertain.

In 1886, Judge John F. Dillon summed up pro-codification position with these remarks:

\begin{quote}
It is manifest from the foregoing discussion, that the Judges from the very nature of their functions, can not develop the general principles of the law so as to take in the entire subject, or do anything except (if you will pardon the expression) automatically (that is depending upon the accident of cases arising for judicial action) towards giving anything like completeness to the law or any branch of it. Not only is the case law incomplete, but the MULTIPLICITY AND CONFLICT OF DECISIONS is one of the most fruitful cases of the unnecessary
\end{quote}


\footnote{233 See \textit{The System of Law Reports}, 9 Law Mag. Quart. Rev. Juris 1,21-23 (1848)(no author indicated)(emphasizing the problem of cost).}

\footnote{234 \textit{Written and Unwritten Systems of Law}, 9 Am. Jurist & L. Mag. 5 (1833)(no author indicated).}
uncertainty, which characterizes the jurisprudence of England and America. Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts, and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually but certainly introduced. Almost every subject is overrun by a more than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.235

This luxuriant mess was made worse, Dillon added, because legislation was “irregular and fragmentary.”236 It bears repeating that Dillon was a prominent judge, who at various times was a law professor and corporate lawyers, and is often identified as a conservative legal formalist237 No trace can be found in his account of the purportedly formalist views that law is logically ordered complex of rules and principles, with judges mechanically deducing right answers in every case.

Codes were presented by proponents as the solution to the flaws of the common law. They were to be written by legal experts, including judges and scholars. They would constitute a wholesale articulation of a comprehensive, consistent, set of rules or procedures governing a particular subject or practice. The law could henceforth be easily found, and would be unified, systematic, precise, and certain.238 Opponents of codification argued in response that the fixed form codes take would soon render them obsolete, unlike the constantly adapting common law; that legislation would constantly be added, destroying the code’s original coherence and certainty;

235 John F. Dillion, Codification, 20 American L. Rev. 29,36 (1886)(emphasis in original).
236 Id.
237 See LaPiana, Jurisprudence of History and Truth, supra 549-550. LaPiana suggests that Dillon (and others) theory actually laid the “basis for a ‘formalistic view’ of law and judging.” Given Dillon’s above description of judging, based upon his first hand experience, LaPiana’s assertion seems dubious. It is difficult to imagine that Dillon thought judging could be a matter of mechanical deduction.
238 See Shenton, Common Law System of Judicial Precedent, supra 46.
and that the general provisions in codes require interpretation by judges in any event.\(^\text{239}\) One opponent of codification conceded that the common law case system is uncertain, but continued in a realistic vein: “uncertainty is the essence of all law, because every new combination of facts calls either for a new application of the principles of reason and justice, or of some rigid statutory or code provision; and this application depends always on the judge…”\(^\text{240}\)

As indicated earlier, Carter’s late 19\(^{th}\) century idealized account of the common law was offered in the fight against codification and the growing encroachments of legislation. It should now be evident that Carter’s statements, which Pound held up as characteristic of the formalist age, represented just one side in a century long debate, with many on the other side taking the position that this idealized vision of the law bore no resemblance to reality.

The debate about codes was in a sense an intramural fight between two factions within the legal culture over how best to make the law more clear and certain.\(^\text{241}\) Supporters of codes, which included a fair number of judges, were disenchanted with the disheveled condition of the common law. Late nineteenth century treatise writers, who attempted to clarify and systematize areas of law, tried to answer the concerns of those who promoted codification, although treatises quickly became voluminous and required continuous updating. After the turn of the century, some of the energy behind codification would be funneled into the restatement activities of the American Law Institute,\(^\text{242}\) which promised to bring organization and uniformity to the common law while maintaining greater flexibility than codes. Neither side in the codification debate, it should be noted, was especially sympathetic to legislation, which was perceived by many legal professionals as unsystematic, shallow, disruptive of law, written by people

\(^{239}\) Id. 43-44. As Robert Gordon points out, “Probably the most common objection to codes was that they would be too rigid to meet rapid social change.” Gordon, Book Review, supra 446.


\(^{241}\) See Gordon, Book Review, supra 445-47 (early nineteenth century codification debate about means rather than ends, reflecting a broader consensus on both sides).

\(^{242}\) See George W. Wickersham, The American Law Institute, 72 Univ. of Pennsylvania L. Rev. 1 (1923)(describing the continuity between the codification movement and the restatement effort).

\[E. \textit{Judges Versus Legislation}\]

The codification debate was part of a broader century-and-a-half-long (late 18\textsuperscript{th} century through early 20\textsuperscript{th} century) contest waged between the common law and legislation over which would have preeminence as a source of law.\footnote{See LaPiana, Jurisprudence of History and Truth, supra 524-542; Rabban, The Historiography of Late Nineteenth-Century American Legal History, supra 574.} The common law held the advantage in this contest for much of the 19\textsuperscript{th} century. During the formalist era, when the battle intensified, the triumph of legislation was anything but evident. Historical views of law, with influential advocates in the late nineteenth century (including Carter, Hammond, and Dillon, among others), carried a skeptical, resistant attitude toward legislation.\footnote{See generally Tamanaha, Law as a Means to an End, supra Chap. 1 & 2.} One commentator remarked confidently in 1894 that the common law was “by far the greater part of our law,”\footnote{Alfred Russell, The Making of Our Law, 3 Mich. L.J. 331,335 (1894).} and legislation “the least important method of law making.”\footnote{Id.} But the scope and volume of legislation would soon swamp the common law. Harvard Law School convened a conference in 1937 to consider “The Future of the Common Law,” the subtext of which was, as one participant noted: “Has the common law, as we know it, a future?”\footnote{Oliver Winslow Branch, Remarks, in Greenville Clark, ed., The Future of the Common Law (Cambridge, Ma. 1937) 149.}

Judicial antipathy toward legislation has deep roots in the common law tradition. The most often cited early example of this was Edward Coke’s decision in \textit{Doctor Bonham’s} case declaring that “the common law will control acts of parliament, and sometimes adjudge them to be utterly void.”\footnote{Quoted in James R. Stoner, Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism (Lawrence: Univ. Press of Kansas 1992) 52.} Although judicial review was soon repudiated in the English
tradition in favor of parliamentary superiority, the Parliament remained wary of judges, as reflected in this preemptive provision inserted in an old English statute: “And be it finally enacted, that the present act, and every clause, article and sentence comprised in the same, shall be taken and accepted according to the plain words and sentences therein contained, and shall not be interpreted, nor expounded, by color of any pretense or cause, or by any subtle arguments, or inventions, or reasons, to the hindrance, disturbance or derogation of this act, or any part thereof, etc.”

Recognizing the perpetual tension between legislators and judges, an 1894 article quoted Bishop Hoadly’s well worn skeptical observation: “Nay, whoever hath an absolute authority to interpret any written or spoken law, he it is who is truly the law-giver, to all intents and purposes; and not the persons who first wrote or spoke them.”

Judges in the U.S. legal tradition, bolstered by the power of judicial review, assumed a more assertive posture vis a vis legislation than English judges. In the early 19th century, a number of state courts, without citing specific constitutional provisions, invalidated legislation on the broad grounds of violating “principles of justice” or the “dictates of reason.” More commonly and subtly, courts controlled legislation through niggardly interpretations, backed by a rule of construction that statutes in derogation of the common law are to be strictly construed to cover only what is clearly within their express terms. This rule was a judicial invention grounded upon a presumption first articulated by Kent in his Commentaries that legislatures do not wish to interfere with the common law.

The most compelling arguments made on behalf of legislation were that it is the best mechanism for keeping the law up to date in quickly changing times, and that, in a democracy, legislatures express the will of the

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250 See A.V. Dicey, Introduction to the Law of the Constitution (Indianapolis: Liberty Fund 1982 [1908]).
251 Quoted in Russell, The Making of Our Law, supra 338.
252 Id. 338; also quoted in Gray, “Some Definitions and Questions in Jurisprudence,” supra 33 n.1.
253 Pound, Formative Era of American Law, supra 57.
254 Pound, Common Law and Legislation, supra 396.
255 See Pound, Common Law and Legislation, supra 400-01.
people. Maine had already made the first argument in 1861. A strikingly modern-sounding 1903 address to the ABA by a First Circuit Judge, Le Baron B. Colt, emphasized the classic dilemma of law—managing the tension between legal stability and change:

The phenomenon which always presents itself in progressive societies may be thus described: On the one hand, there is a body of legal rules which by nature are stable and enduring; on the other hand, there is a society with ever-changing social necessities and opinions. From the very nature of these conditions, which are permanent, there is the inevitable result that the old rules of law cease to conform to the new facts of life; that they are not adapted to the ever-varying views of society; and that consequently they come, in part at least, to be regarded as narrow, unreasonable, and out of touch with progress and enlightened public sentiment.

After acknowledging the role of legal fictions and equitable interpretation in changing the law to meet the times, Colt (following Maine) identified legislation as “by far the most important remedial agency” in modern society.

Colt then insisted upon a proposition—which he attributed to a long list of famous jurists, including Mansfield, Story and Shaw— that would be pressed years later by Pound, Cardozo, and the Realists: “The purpose and end of law are the welfare of society and the happiness of the people. The law should always be viewed from the standpoint of the society, and not from the standpoint of the law itself.” To ensure that his point was not lost on anyone, Colt continued, “The law is made for society, and not society for the law. The interests of society are primary; the interests of the law secondary. Society is the master, and law its handmaiden. The law

258 Id. 668. Colt’s analysis clearly tracked Maine’s, who he cites. Id. 659,661.
259 Id. 660-61.
260 Id. 675.
must march with society; the constitution must march with the nation.”

In the context of the time, these comments must be understood as a thinly veiled protest by a judge of ongoing restrictions by courts on legislative activity.

Advocates for the superiority of common law as a source of law, like Carter, countered that the common law indeed changes over time, albeit gradually, in a more measured fashion. Making allusions to democracy, they also contended that the common law reflects the norms of the community and is thus more representative of the people than legislation. “We find [the common law] to spring from and rest upon the habits, customs and thoughts of a people, and that from these a standard of justice is derived by which doubtful cases are determined.” Arguing that legislators are liable to be influenced by the “tawdry gabble of agitators” who are unrepresentative of the people as a whole, a member of the bar proclaimed that “Our judges are far more capable than are our legislators to give expression and effect to the people’s will.”

This claim of the superior “democratic” quality of the common law is convincing only as long as court decisions do not obviously thwart the popular will, however. In 1886, pointing out the recent extension by courts of the due process clause to police legislation with economic implications, a critic argued that judges were using “vague and general” doctrines to limit actions by legislatures that had previously been acceptable. “For the courts to undertake to uproot them…is judicial legislation of a very mischievous description, because, for the most part, it is made at the instance of persons who seek the aid of the new departure in order to escape their fair share of a common duty or burden.” The author presciently characterized this new mode of analysis as a kind of “fashion” sweeping the judiciary.

This essay was an early skirmish in what would become a decades-long pitched battle—running roughly from the 1880’s through the 1930s—over

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261 Id.
262 Carter, The Ideal and the Actual in the Law, supra 765. See also John Young, The Law as an Expression of Community Ideals and the Lawmaking Functions of Court, 27 Yale L.J. 1 (1917).
263 Charles J. Bonaparte, Judges as Law Makers, 23 Green Bag 507,514 (1911).
the proper role of courts in connection with legislation. Many realistic statements about judging were made during the formalist era in the course of this contest, which requires a bit of historical context to appreciate. Heightened by severe depressions in the 1870s and 1890s, conflicts between organized groups took place in the streets and in the law. Disputes were fought out in legislatures and courts between debtors and creditors, between mortgagors and mortgagees, between capital and labor, between urban and rural interests, between industrial and agrarian sectors, between major trusts or business combinations and the government.265 A loser in the legislative arena turned to the courts to re-fight the battle, and vice versa. During this period, contests among economic interests “moulded, dominated, shaped American law,”266 observed legal historical Lawrence Friedman.

Citing the liberty of contract and the right to property, citing the Due Process clause, the Commerce Clause, the Equal Protection Clause, or using common law principles, and sometimes offering nothing more than vague references to reason and natural justice, state and federal courts began, in the 1880s and continuing for decades, to invalidate legislation, especially legislation favorable to labor.267 One study found that sixty-seven pro-labor statutes were invalidated by courts in this period, while twenty six were upheld.268 Much of this was the work of state courts, but the U.S. Supreme Court was also active. “According to one count, in the period before 1898, the Supreme Court invalidated a total of twelve federal statutes and 125 state laws, while in the single generation after 1898, it trebled those figures (fifty federal and 400 state).”269

An outcry of protest was raised against these court actions (although it must also be said that most social welfare and labor legislation survived

266 Friedman, History of American Law, supra 339.
267 A contemporaneous article reviewing and defending some of these decisions is Charles A. Boston, Some Conservative Views upon the Judicial and Judicial Recall, 23 Yale L.J. 511 (1913); an article reviewing and opposing these actions is Dale, Implied Limitations on the Exercise of Legislative Power, supra.
269 Id. 135.
judicial scrutiny). An 1890 article presented a detailed historical study challenging the legitimacy of judicial review, ending with a flourish on the calamitous consequences of this unwarranted power: “laws solemnly passed…are set aside at the mere whim of a body of men not amenable to the people through holding a life term of office, a body which has repeatedly and almost uniformly shown the disposition to apotheosize aggrandized wealth and corporate power above the general good.”270 What results is “judicial despotism.”271 A 1901 article examined the various state courts that (without clear constitutional mandate) invalidated legislation; the author suggested that judges were inappropriately substituting their “own opinion” for that of the legislature.272 Professor W.F. Dodd observed in 1909 that “In this field [public policy] decisions of the courts necessarily depend not upon any fixed rules of law but upon the individual opinions of the judges on political and economic questions; and such decisions, resting as they must, upon no general principles, will be especially subject to reversal or modification when changes take place in the personnel of the courts.”273 A lawyer charged in the 1912 Yale Law Journal that corporate lawyers who become judges carry an unconscious class bias onto the court,274 adding: “So long as our judicial opinions are formed by the mental processes of the intellectual bankrupts these will only be crude justifications of predispositions acquired through personal or class interests and sympathy, ‘moral’ superstitions, or whim and caprice.”275

Remonstration against court invalidations of legislation provoked a concrete attack on the judiciary in the first decade of 20th century, when a number of states (including California, Oregon, and Arizona) enacted a judicial recall provision;276 a bill proposing recall for federal judges was also introduced (unsuccessfully). The debate over judicial recall generated a host of realistic statements about judging. A Senator promoting the bill

271 Id.
275 Id. 26-27.
276 See e.g. Editors, The Adoption of the Recall in California, 23 Green Bag 634 (1911).
authorizing the recall of federal judges wrote that through their decisions judges are engaging in “judicial legislation” on issues of “public policy;” their decisions are unavoidably influenced by their “predilections.”277 Since judges are political actors in these respects, Senator Owen argued, they should be subject to political accountability. A pro-recall article averred that the public believes that the “great interests” influence judicial selection, a belief given support by their rulings, and therefore citizens should have a say in the matter.278 Professor Dodd also wrote in favor of the recall, asserting that judges strike legislation “because they conflict with the economic views or the social philosophy held by the judges and by them read into the constitution.”279 Theodore Roosevelt, running for president on an independent ticket, gave a speech arguing that individual court decisions that are essentially political should be subject to recall in a vote by the people.280

Many in the bar fought judicial recall as a grave threat to judicial independence,281 and it soon lost momentum. But opposition to the restriction or invalidation of legislation by courts remained a burning issue well into the 1920s and 1930s (when the Realists wrote). A 1920 article that examined state court and U.S Supreme Court decisions striking legislation argued that judges have gathered “to themselves further powers of legislation by referring to tests resting in their inner consciousness and likely to vary with the predilections of the judge.”282 This theme was the centerpiece of a 1918 article, “Psychologic Study of Judicial Decisions,” published by Professor Theodore Schroeder in the California Law Review.

280 See Hornblower, The Independence of the Judiciary, The Safeguard of Free Institutions, 22 Yale L.J. 1,10 (1912);
282 Jackson H. Ralston, Judicial Control Over Legislatures as to Constitutional Questions, 54 American L. Rev. 193,212 (1920).
Schroeder asserted that “every judicial opinion necessarily is the justification of the personal impulses of the judge, in relation to the situation before him, and that the character of these impulses is determined by the judge’s life-long series of previous experiences, with their resultant integration in emotional tones.”

PART III. WHAT WE KNOW; WHAT WE DON’T KNOW; A HYPOTHESIS

This brief study establishes beyond doubt that many realistic views about the law circulated throughout the formalist age, the 1870s through the 1920s. Substantial evidence has been presented, furthermore, that many people in law, including people who have later been identified as influential legal formalists, regarded the core components the formalist view of the law—as portrayed by Pound, Llewellyn, and Gilmore—to be fictions, ideals far from reality, or facades. Throughout this period, people recognized that judges legislated; people knew that the law was not a matter of pure logic and reason (confirmed by the open fact of legal fictions); people complained frequently about the uncertainty of law and about discretion in judging, and people recognized that precedents could be found on all sides. The fact that many of these statements were voiced by judges and leading members of the bar, who presumably had a personal and professional interest in concealing this flawed reality, adds to their veracity. A notable number of these realistic comments, moreover, included statements like “as everyone knows,” which suggests that they were broadly accepted.

Every one of the many realistic statements quoted in this article was made before Cardozo’s Judicial Process and before the Realists emerged as a group. Many of these statements preceded or coincided with Holmes’s

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284 Legal historians are correctly skeptical of “the rhetoric spun out by lawyers on celebratory or self-congratulatory occasions,” Horwitz, *The Conservative Tradition in the Writing of American Legal History*, supra 275. By the same reasoning, however, statements at bar gatherings or in bar journals openly critical of the law, especially when couched in terms of “as we all know,” arguably should be accorded added credibility as an indication of shared views of the law.
more renowned observations. This fuller history helps place the Realists in context as the latest episode in a long history of skepticism about the common law and judging prompted by concerns about the disordered state of the law, or by objections, often politically motivated, to the actions of courts. The Realists stand out in our minds perhaps because, unlike earlier critics, they took a name and were labeled a movement. They pressed more sophisticated arguments when criticizing legal doctrines, and referred a lot to social science. One difference of note is that earlier critics tended to describe problems in law like indeterminacy as flaws that could be rectified, whereas the Realists viewed them as endemic to law. But the substance of most the Realists’ critical observations of law and judging had been expressed for many decades.

Indeed, the evidence suggests that the battle against formalism the Realists are credited with fighting—which is better described as a fight against excessive technical or procedural “legalism”—had enjoyed significant advances before the Realists joined the fray. As indicated at the outset, mid-nineteenth century jurists already frowned upon formalism. Wigmore asserted in 1892 that “the tendency of the day” was to vest in judges “a larger discretion.” Professor Edwin Keedy bore witness in 1916 to the substantial reduction in formalism in court procedures, to the shift in judicial opinions from string citations toward greater explanation, and to the general “revolt” against “intellectualism, with deduction as the common method of reasoning.” It would be an unfair irony if history were to condemn as “formalists” a generation in law that was consummately realistic and that worked to achieve a reduction in rigid legalism.

What this study does not establish, it must be said, and what is exceedingly difficult to know, is whether the judges of the formalist era in fact reasoned in an unusually mechanical, rule bound fashion—to a degree notably greater than how judges in earlier and later periods reasoned. When evaluating whether the “formalism” tag appended upon judges during this period is merited in this respect, it is pertinent to keep in mind that the label and image of formalism was created by critics of the courts. Pound, Llewellyn and Gilmore point to the style of their written decisions as

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285 Bob Gordon made this point in a private correspondence on file with the author.
evidence for their charge. But there are significant reasons to doubt this claim. A few commentators at the time remarked that the style of decisions was a matter of presentation or justification, not an account of how decisions were actually made (as remains true today). And deductive reasoning is impossible when reason and precedent can be found on both sides, as many observers, including judges, noted repeatedly throughout this period. What Pound taught us to think of as mechanical reasoning from presumed concepts, upon closer inspection, looks a lot like the ever-present routinization of law in taken-for-granted concepts, formulas, and habits. This is not unique to the formalist age. Certain types of conceptual analysis, like that involving liberty of contract, Pound’s strongest example, appears excessively abstract perhaps because their way of thinking is alien to us, not because it is any more abstract than our conceptual analysis; consider that contemporary constitutional privacy analysis is also abstract.

The most intriguing issue about judges in the formalist age is seemingly impenetrable: were they trapped within the confines of legal analysis, or did they merely use a legalistic façade to conceal decisions designed to favor a particular class or interest. It might well be impossible to answer this question, for no evidence can in principle conclusively resolve it (short of the unlikely discovery of a mass confession of bad faith by the judges). One implication of this article—considering that many of the realistic observations issued during the formalist era can also be heard today—is that the suspicion is a perennial one. Skepticism about judges along these lines was raised during the formalist period, it was raised earlier, and it is raised now.

There are observable differences in the style of judicial decisions in the three periods identified by Pound, Llewellyn, and Gilmore. Many judicial opinions at the appellate level in the early period offered broad reasoning in support of the decision, but this was a unique time at the birth of the nation. Judicial opinions today, compared to opinions during the formalist age, contain more explicit discussions of public policy, though rules still weigh heavily in the analysis. The greater willingness of contemporary courts to openly discuss public policy appears to correlate with a reduction in resort to legal fictions, which suggests that the shift in style may be more a matter of form than function. Courts utilized different techniques in these latter two periods to do the same thing (previously unannounced, but now
openly)—to change the law to accommodate social, economic, and political change. These differences in the surface of judicial decisions, when compared against the substantial continuity of views documented in this article, are not enough to suggest that judges in the intervening period were doing anything sufficiently distinct to be demonized.

My tentative hypothesis is that judges throughout the formalist period reasoned in the same ways that judges in common law systems have always reasoned, grappling with all of the problems endemic to this system. Circumstances around them shifted rapidly, undergoing manifold economic, technological, and political changes. A broad cultural movement was underway toward recognition that the conditions of mass society call for greater collective action 287 (collective risk sharing in torts, collective labor action, collective protection for job loss and retirement), a transition which, initially, neither existing common law doctrines nor many judges were amenable to. Legislation entered a phase of rapid ascent to become the preeminent fount of law making, and democracy won out as the preeminent legitimation for law. While courts plodded along interpreting, creating, and applying law in the ways they always had, this confluence of circumstances came to a head, exposing the courts for criticism from political factions that desired more substantial and immediate legal change. This proved to be a pivotal period for courts, engaged as they were in a struggle to maintain their primacy within the system. By the close of this period, not only did the common law permanently take a back seat to legislation and administrative regulation as sources of law, the traditional story about the common law, along with its late nineteenth century scientific updates, were all but defunct. Since that time, the common law has carried on in an orphaned state, lacking a theory of legitimation.

These closing remarks are admittedly speculative. This article establishes only that a lot of realism was present during the supposedly formalist era, and that much of what we thought was original to the Realists had been openly said for decades. These findings are sufficient to merit a thorough reexamination of our taken-for-granted story of this essential period in our legal history. The longstanding formalist-realist antithesis that dominates our perspective on judging is deeply suspect.

287 For an article at the time that discussed this shift in views, see Keedy, The Decline of Traditionalism and Individualism, supra.