

Book Reviews

Did Formalism Never Exist?

BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING. By Brian Z. Tamanaha. Princeton, New Jersey: Princeton University Press, 2010. 252 pages. \$24.95.

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In *Beyond the Formalist-Realist Divide*, Brian Tamanaha seeks to rewrite the story of the differences between the age of formalism and the age of legal realism. In essence, Tamanaha thinks there never was an age of formalism. For he sees legal thought even in the Gilded Age of the late nineteenth and early twentieth centuries—what is commonly known as the age of formalism¹—as embracing what he terms “balanced realism.”² Legal history³ and jurisprudence⁴ both make important use of that divide, or, to use somewhat less dramatic language, the shift from formalism (known often as classical legal thought) to realism. Moreover, as Tamanaha describes it, recent studies of judicial behavior that model the extent to which judges are formalist—that is, the extent to which they apply the law in some neutral fashion or, conversely, recognize the centrality of politics to

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1. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 16–18 (1992) [hereinafter HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*] (discussing formalism, generally); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 253–66 (1977) [hereinafter HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780-1860*] (discussing the rise of legal formalism). That era is also known as the era of “classical legal thought,” and sometimes as the Gilded Age. See Stephen A. Siegel, *Francis Wharton’s Orthodoxy: God, Historical Jurisprudence, and Classical Legal Thought*, 46 AM. J. LEGAL HIST. 422, 422, 440 (2004) (describing Wharton as among the Gilded Age’s leading scholars and later noting that the era’s jurisprudence has been described as “classical legal thought”). I prefer the latter term in this Review because it describes a time period rather than a reasoning style, the content of which is in dispute.

2. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 6 (2010).

3. See generally WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937* (1998) (detailing the historical evolution of legal classicism and its swift collapse in the face of ascendant realist thought in the New Deal Era).

4. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 1 (1995) (suggesting that those who try to explain American jurisprudence tend to rely on key concepts such as formalism or realism in order to represent their ideas); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 23–24 (2007) (describing a conceptual difference between realism and formalism).

judging, are asking the wrong questions.⁵ As a result, studies of how judges think⁶ have been focused on categories that did not—to Tamanaha’s reading—make sense.⁷

Beyond the Formalist-Realist Divide ranges from the early nineteenth century⁸ to the twenty-first and covers legal history, jurisprudence, and empirical legal studies. It seeks to change in fairly important ways how we view the world of legal thought. Because other people have already critiqued the jurisprudence of *Beyond the Formalist-Realist Divide*,⁹ and to a lesser extent its implications for the behavioralist model of judicial politics,¹⁰ I want to focus on the book’s depiction of the nature of nineteenth- and twentieth-century legal thought. For this book poses an important challenge to legal history in that it blurs the distinctions in legal thought from the nineteenth century to the twentieth century.¹¹ I am

5. See, e.g., TAMANAHA, *supra* note 2, at 92, 107–08 (critiquing the centrality of skepticism about the neutrality of judges in the modern discourse and providing historical examples of such skepticism in an effort to discredit its current centrality). Among the many examples that one might also add to the Jacksonian Era criticisms of the political nature of judging include James Kent’s criticism of the politics of the Taney Court’s *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), decision. See James Kent, *Supreme Court of the United States*, 2 N.Y. REV. 372, 385–95 (1838) (describing the change in Chief Justice Taney’s Court as “so great and so ominous, that a gathering gloom is cast over the future”). William Sampson, who had a very different political agenda than Kent, criticized the common law in colorful terms:

[L]ong after [Americans] had set the great example of self-government upon principles of perfect equality, . . . [they] had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabalistic name of Common Law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use or purpose, but to be praised and worshipped by ignorant and superstitious votaries.

WILLIAM SAMPSON, AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK 17 (N.Y.C., E. Bliss & E. White 1824).

6. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 1 (2008) (recognizing, at the outset of this seminal statement of judicial pragmatism, that legalist approaches such as formalism have been declining in the face of more realist approaches); David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1791–93 (2009) (reviewing POSNER, *supra*) (substituting empiricism as a model for judicial decision making while noting Posner’s disdain for legal formalism).

7. See TAMANAHA, *supra* note 2, at 111–12 (“The study of judging by political scientists has been warped by the false formalist-realist antithesis.”).

8. *Id.* at 18 (citing *Written and Unwritten Systems of Law*, 9 AM. JURIST & L. MAG. 5, 10 (1833)).

9. See Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 113 (2010) (arguing that the evidence supporting Tamanaha’s thesis is problematic and that Tamanaha overstates his conclusions).

10. See Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863, 873 (2011) (reviewing TAMANAHA, *supra* note 2) (“A great virtue of Tamanaha’s theory of judicial decision making is that it takes full account of the motivations that the judges themselves identify.”).

11. More recently in the pages of this journal, he has extended this analysis. See Brian Z. Tamanaha, *The Unrecognized Triumph of Historical Jurisprudence*, 91 TEXAS L. REV. 615, 615–

particularly interested in Tamanaha's narrative about the absence of "formalism." I have several points of contention. First, I question his account of formalism in the late nineteenth and early twentieth centuries. Second, I wonder about types of evidence he uses to assess the nature of Gilded Age legal thought. Third, I ask how Tamanaha's picture of late nineteenth-century thought matches up against the evidence of how judges thought—especially how some who have critiqued judicial thought saw judicial behavior. Fourth, I examine how this picture relates to its successor, the realist thought of the Progressive Era and afterwards. Finally, I am interested in the political implications of Tamanaha's interpretation.

I. The Era of Formalism in *Beyond the Formalist-Realist Divide*

Beyond the Formalist-Realist Divide is, as its subtitle, "The Role of Politics in Judging," suggests, about a theory of judging.¹² Tamanaha sees judges as employing what he calls "balanced realism."¹³ That has two key parts: first, an acknowledgment that judges sometimes "make" law¹⁴ and second, a skepticism about the binding force of precedent (or what some call mechanical jurisprudence).¹⁵ Tamanaha suggests these insights are central to understanding judicial thought in the nineteenth and twentieth centuries.¹⁶ He approaches this in two parts. First, he provides an account of formalism drawn from the secondary literature—that is, he constructs a picture of how some people think about formalism now. Second, he provides an alternative reading of the era, which presents his vision of legal thought in the Gilded Age.

Tamanaha's version of the accepted history of formalism has two parts. First, that judges actually made law (which he calls the common law myth).¹⁷ He argues that people at the time acknowledged that judges made law—that was part of the common law process. The point of his second chapter is to argue that judges made law and that people knew it. Tamanaha quotes extensively from a range of thinkers to make the point that people at the time knew that judges made (rather than discovered) law. For instance, he quotes the English jurist Albert Dicey as writing, "As all

19 (2013) (reviewing DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013)). As Brian Leiter points out, the primary target of the book is a historical rather than philosophical thesis. Leiter, *supra* note 9.

12. TAMANAHA, *supra* note 2, at 2 ("This ubiquitous formalist-realist narrative is not a quaint story of exclusively historical interest: it structures contemporary debates and research on judging.").

13. *E.g.*, *id.* at 6 (discussing balanced realism).

14. *Id.* at 13–26.

15. *Id.* at 6, 27–43.

16. *Id.* at 7.

17. *See, e.g.*, *id.* at 13–26.

lawyers are aware, a large part and, as many would add, the best part of the law of England is judge made law. . . . it is, in short, the fruit of judicial legislation.”¹⁸ Columbia Law Professor Monroe Smith wrote in 1887 in the *Political Science Quarterly* that “[j]udicial legislation is hampered by the fiction that the courts do not make law, but only find it.”¹⁹ He went on to say that “[n]obody really believes in the fiction, but few judges have been bold enough to defy it openly.”²⁰ Even Thomas Cooley, a central figure in classical legal thought,²¹ is quoted to demonstrate that “[e]ven judges openly acknowledged that they made law.”²²

The second part comes in the next chapter, “The Myth About ‘Mechanical Jurisprudence,’”²³ which responds to the charge made most prominently by Roscoe Pound that judges made decisions in a mechanical fashion.²⁴ Tamanaha construes “mechanical” reasoning as involving reasoning deductively from first premises.²⁵ He argues that judges did not reason deductively,²⁶ that they also understood there was substantial indeterminacy in the precedents,²⁷ and that judges did not rigidly adhere to stare decisis.²⁸

The chapter concludes with an important and revealing insight into the nature of the shift from the Gilded Age to the Progressive Era: that judges of the Gilded Age had different political ideas from those of the Progressive Era and that the former were, therefore, more reluctant to alter the law than those of the Progressive Era. Tamanaha writes:

Owing to these differences of opinion, the reluctant judges allowed small and slow changes, found some of the desired changes contrary

18. *Id.* at 14 (alteration in original) (emphasis omitted) (quoting A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 359–60 (1905)).

19. Munroe Smith, *State Statute and Common Law*, 2 POL. SCI. Q. 105, 121 (1887).

20. *Id.*; see also TAMANAHA, *supra* note 2, at 19 (quoting Smith, *supra* note 19).

21. Duncan Kennedy places Cooley in the preclassical legal thought category. See DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 39–46 (1998).

22. TAMANAHA, *supra* note 2, at 19 (quoting Judge Cooley, *Another View of Codification*, 2 COLUM. JURIST 464, 465 (1886) [hereinafter Cooley, *Another View of Codification*] (“The decisions continue to accumulate as causes arise which present aspects differing at all from any which preceded; and a great body of laws being made under the statute which is and can be nothing but ‘judge-made law.’”). I discuss in subpart II(B), below, questions about the context of this quotation and its effectiveness at demonstrating that so central a figure in classical legal thought embraced judicial legislation. See *infra* note 99. The *Columbia Jurist* was an excerpt of a somewhat longer piece. See Thomas M. Cooley, *Codification*, 20 AM. L. REV. 331, 333 (1886) [hereinafter Cooley, *Codification*].

23. TAMANAHA, *supra* note 2, at 27–43.

24. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 617 (1908).

25. See TAMANAHA, *supra* note 2, at 28–32.

26. *Id.*

27. *Id.* at 33–36. By certainty in precedent many seem to have meant that there would not be radical change in precedent. See *id.*

28. *Id.* at 38–40.

to long-standing law and ill advised, and in particular instances did not feel that the heavy burden required to change the law (at the cost of increasing legal uncertainty) had been met. At the same time, the jurists and public in favor of change thought desired shifts in the law were long overdue.²⁹

Observers at the time, similarly, attributed the appearance of charges of mechanical jurisprudence to “rapid change[.]”³⁰ Judge Leonard Crouch of the Appellate Division of the New York Supreme Court explained in 1927 that the judges who were labeled as mechanical jurists were representatives of a nineteenth-century ideology of individualism.³¹ That individualism promoted freedom of contract and liability only upon a showing of fault.³²

Another chapter follows up on the first two: a chapter on the holes in the story of legal formalism.³³ That chapter raises additional issues about formalism. The first is that it is difficult to know which opinions to classify as formalist. “What makes an opinion ‘formalist’ is in the eye of the beholder.”³⁴ Moreover, legal historians have used differing explanations for why judges employed formalist reasoning.³⁵ Some have interpreted formalism as a cover for politically motivated decisions;³⁶ others interpreted it as a way of avoiding politically difficult decisions.³⁷ Others think that judges embraced a formalist mentality.³⁸ That is, formalism was used to explain many different motives. Moreover, the charges of formalism seem to be of relatively recent vintage. Tamanaha tells of how “[a]most without

29. *Id.* at 43. I believe this to be a fairly accurate description of the conflict between the Gilded Age jurists and the Progressive Era jurists (and commentators). My issue is how to interpret that division—and whether it is appropriate to think that the division is solely over political values or whether those political values correlate with differences in judicial method.

30. *Id.* at 40–42.

31. *Id.* at 42 (quoting Leonard C. Crouch, *Judicial Tendencies of the Court of Appeals During the Incumbency of Chief Judge Hiscock*, 12 CORNELL L.Q. 137, 142 (1927)).

32. *Id.* That insight, here underdeveloped, explains a great deal of the differences between the judges of the two eras and explains the difference between Gilded Age jurisprudence and that of the Progressive Era.

33. *Id.* at 44–63.

34. *Id.* at 57.

35. *See id.* at 58–59.

36. *See id.* (discussing the charge made by Morton Horwitz in HORWITZ, TRANSFORMATION OF AMERICAN LAW, 1780–1860, *supra* note 1, at 253–63, that judges used formalism to mask the political and economic implications of their decisions).

37. For instance, Robert Cover hypothesized that judges facing cases involving fugitive slaves before the Civil War variously retreated to formalism to relocate moral responsibility for their actions elsewhere and also because they genuinely believed that the law was proslavery. *See id.* at 59 (citing ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 232–38 (1975) (writing that judges used formalism as a form of cognitive dissonance in an attempt to distance themselves from the immorality of their judgments)).

38. In HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, Horwitz suggests that judges used formalism because they believed in narrow construction.

warning, a cluster of articles from important legal historians and legal theorists discussing the ‘legal formalists’ and ‘legal formalism’ arrived in the mid-1970s.”³⁹

Tamanaha also raises questions about the novelty of the realist movement and whether it differed significantly from the legal thought of the formalist era.⁴⁰ He sees it as moderate and not very different, if at all, from what came before it.⁴¹ Tamanaha identifies several key assumptions about realists. Their core idea about judging (apparently that judges “make” law) “was commonplace decades before the legal realists came on the scene.”⁴² The realists were not radical skeptics about judging; “[t]heir goals were to explain and improve the predictability of law and judging, not to argue that judging was a fraud.”⁴³ The realists were similar in their thinking to historical jurisprudence, so the argument goes. “Virtually every one of the core insights about judging now associated with the realists was prominently stated decades before, often by historical jurists.”⁴⁴ Those insights included “that legal rules can be interpreted in various ways and that how judges interpret the rules will be a function of their personal views and the surrounding social forces”⁴⁵ and that realists thought judges had broad discretion in interpreting both statutes and case precedents,⁴⁶ in part through a selection of facts and in part because of conflicting and ample precedent.⁴⁷ Moreover, they wrote that a primary task of lawyers “is to predict outcomes.”⁴⁸ And they were committed to law.⁴⁹ In particular, Tamanaha sees important continuities between the historical school of

39. TAMANAHA, *supra* note 2, at 60 (footnote omitted).

40. *Id.* at 91. Tamanaha writes:

It was apparent to many that the law has inconsistencies, runs out, and routinely comes up against unanticipated situations and that judges possess a substantial degree of flexibility when working with legal materials. It was obvious to observers that the law can be interpreted differently by judges with different views. . . . [T]he fundamentals of what [realists] put out had been said much earlier by other astute and candid observers of judging, of whom there were many in the late nineteenth century.

Id.

41. *See id.* at 68.

42. *Id.* at 67. *See also id.* (“The core points about judging announced by the legal realists in the 1920s and 1930s, it turns out, were presaged to a remarkable extent by the historical jurists of the 1880s and 1890s.”).

43. *Id.* at 68.

44. *Id.* at 79.

45. *Id.*

46. *See id.* at 80 (“The realists maintained that statutes no less than precedents are open to different interpretations. . . .”).

47. *See id.* at 82 (discussing both “the substantial freedom judges have to select and characterize the facts” and that “judges can regularly find legal support for whatever decision they desire”).

48. *Id.* at 80.

49. *See id.* at 93–94 (arguing that realists were not deeply skeptical of the law but rather “believed in the law and fervently labored to improve it”).

jurisprudence of the nineteenth century and realists. “The realists insisted that law is not autonomous from society and that law must evolve with and serve social needs. Historical jurisprudence championed the same propositions,” Tamanaha writes.⁵⁰ Moreover, the realists are given too much credit:

[T]he named realists were a few dozen individuals singled out for attention and given credit, for what was the work and success of two generational waves of jurists with similar views about judging, engaging in the same enterprise, working to bring the law into a closer match with a vastly transformed society and set of social understandings.⁵¹

Tamanaha also asks whether realism was more the creation of a dispute than a movement.⁵² He turns to the 1931 exchange between Roscoe Pound and Karl Llewellyn where Pound first used the word realist and where they disputed the content and personnel of the realist movement.⁵³ Tamanaha asks a counterfactual question: If Pound and Llewellyn had not had their dispute, would realism exist?⁵⁴ This makes realism look haphazard. Of course it was that, as many historians have acknowledged.⁵⁵

50. *Id.* at 85.

51. *Id.* at 106. This is an odd formulation of the process of intellectual change, for this statement focuses on elite members of both the historical-jurisprudence school and the realists; much more likely is that the realists are a gauge of larger shifts in society—and especially in politics—that took away the majesty of the law. So while Tamanaha is quite right in suggesting that credit for causation is inappropriate for the realists, so, too, would it be inappropriate for the historical jurists. If anything, the efforts of historical jurisprudence to make law appear natural in response to gradual social change impeded the diffusion of realist insights.

52. *See id.* at 69–71 (describing the academic “skirmish” between Karl Llewellyn and Roscoe Pound that contributed to the birth of “legal realism”).

53. *Id.*

54. *See id.* at 71. Legal historians have for some years now been investigating the important intellectual connections of sociological jurisprudence, from Holmes to Pound, to legal realism. *See, e.g.*, HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 1, at 187–91 (discussing the relevance of Holmes, Pound, and Benjamin Cardozo in the development of realism); N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 17–35* (1997) (chronicling the rise of realist thinking in the years following the Civil War and detailing some of the contributions of the initial realists); LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960*, at 16 (1986) (recognizing the influence of Holmes and Pound on the “intellectual revolution against conceptualism”); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004–13 (1972) (discussing the influence of both Holmes and Pound on the development of sociological jurisprudence and linking that jurisprudential disposition with the emergence of a more realist mode of judicial decision making).

55. Historians have recognized that legal realism lacked definition. *See, e.g.*, HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 1, at 169 (“Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.”). Horwitz remarked of the Pound–Llewellyn debate that “historians have been misled into looking for sharper distinctions between sociological jurisprudence and Legal Realism than

There is one important point where Tamanaha acknowledges the differences. The historical jurists were by and large not social reformers, but conservative thinkers.⁵⁶ Realists, on the other hand, sought significant social change.⁵⁷ “Wielding the sharp blade of their skeptical critique of judging, . . . the realists picked up the banner of the Progressives, joined the fight against *laissez-faire* (formalist) judges, finally defeating obstructionist courts in 1937”⁵⁸

In sum, Tamanaha seeks to blur the lines between the techniques of the eras of formalism and realism.⁵⁹ For as he states about realism, “beneath the label there was *nothing* distinctive—nothing unique or unifying—about the legal realists.”⁶⁰ It almost seems as though there was no difference in the modes of reasoning of the Gilded Age, and the Progressive and the New Deal Eras. “When stripped to the basics, formalism comes to nothing more than rule-bound judging. The notion of formalism can be struck from the theoretical discussion without loss, saving much confusion.”⁶¹ The rhetoric in *Beyond the Formalist-Realist Divide* is dramatic. For instance, there are charges that legal historians have had a “gross misunderstanding of our legal history.”⁶² The Afterword expresses “wonderment” that the “largely false story” had “occurred on such a grand scale and [that it] lasted for so long.”⁶³ But for reasons explained in Part II of this Review, I think much of what Tamanaha reports as new is actually accepted wisdom among legal

are justified.” *Id.* at 171. He continued, “Legal Realism needs to be seen primarily as a continuation of the reformist attack on orthodox legal thought.” *Id.*

56. TAMANAHA, *supra* note 2, at 88.

57. *Id.*

58. *Id.* at 68.

59. *See id.* at 84–89. Tamanaha concludes his discussion on the overlap of formalism and realism thus:

The pivotal point to take away from the striking similarities demonstrated here is not that the realists did not say much that was new about judging, or that they had much in common with historical jurists, although both points are correct. The most profound lesson lies implicit in the positions they held in common.

Id. at 89.

60. *Id.* at 68.

61. *Id.* at 8.

62. *Id.* at 5.

63. *Id.* at 200. The last sentence of the text concludes that “[i]f I am right” about the story here, “our collective construction of knowledge went spectacularly amiss.” *Id.* at 202. Such locution could be strategic, for it is certainly a way to gain attention. A similarly hyperbolic tone appeared in Tamanaha’s review of David Rabban’s *Law’s History*. *See* Tamanaha, *supra* note 11, at 618, 620 (referring to Rabban’s account variously as “unpersuasive,” “deeply problematic,” and “dubious”). This is surprising given that other legal historians have a dramatically different assessment of the book. *See, e.g.*, Alfred L. Brophy, *When History Mattered*, 91 TEXAS L. REV. 601, 601 (2013) (book review) (identifying *Law’s History* as “one of the finest works of legal history produced in recent memory and one of the finest works of the branch of legal history that deals with intellectual history of the last several decades”); Herbert Hovenkamp, Book Review, 100 J. AM. HIST. 538, 539 (2013) (“As Rabban illustrates so compellingly, the late nineteenth century was a golden age for what might be called ‘history in law.’”).

historians and what actually is novel about legal history in this book is incorrect.

II. Questioning the Account of Formalism in *Beyond the Formalist-Realist Divide*

Given such dramatic language, we should keep in mind that Tamanaha recognizes that there are important political distinctions between formalists and realists.⁶⁴ One wonders if politics can be isolated from judicial practice? Did formalism and realism have differences only with regard to their politics, or did they have different techniques in argument and interpretation?

Much of the *Beyond the Formalist-Realist Divide* account fits with decades of writing on the realists. For instance, the statement that the realists are in essence the end point of generations of insight on the political implications of judging⁶⁵ is consistent with legal historical scholarship,⁶⁶ though the realists made that case more robustly and effectively than people before.⁶⁷ The hypothesis that realists characterized judges as formalists because they were adherents of individualism, embraced the doctrine of

64. TAMANAHA, *supra* note 2, at 88–89.

65. *Id.* at 67, 79. This is one place where Brian Leiter and I somewhat disagree on the nature of realist thought. Leiter sees the “law is politics” argument as an insignificant part of realism in the 1920s and 1930s. LEITER, *supra* note 4, at 15–103 (grounding the origins of realist thought, in a series of three essays, in the traditions of positivism and naturalism, not in politics); Leiter, *supra* note 9, 118 & n.36. While realists did not focus on the argument that law was naked politics (which I take to be Leiter’s point), they referenced the ways that legal decisions turned on political ideology. *See, e.g.*, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 79 (1921) (quoting Holmes’s aphorism in *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), that the Constitution “does not enact Mr. Herbert Spencer’s Social Statics”). I intuit that our perspectives differ on this because he is coming from the vantage of jurisprudence and me from history. On this important issue I hope to have something more substantial to say at a later date.

66. *See, e.g.*, DUXBURY, *supra* note 4, at 32 (“[R]ealism did not just sprout up overnight. Even by the late nineteenth century, challenges to both *laissez-faire* and legal science were being made.”).

67. Formalists said that law was neutral and natural and that others corrupted its neutrality. This was presented in stark form by Chancellor Kent’s criticism of the Taney Court in 1838. *See* Kent, *supra* note 5, at 386 (referring to “eternal principles of justice, and the cultivated jurisprudence of civilized nations” to criticize Taney Court Contract Clause jurisprudence that lessened protections of rights under a state charter); *see also* TAMANAHA, *supra* note 2, at 92 (citing similar criticism of the Taney Court). That is, while they acknowledged that some judges were political and corrupted law, they believed that there was something one might correctly identify as law and that this was separate from politics. Kent thought judges should be above politics, evidenced by the conclusion of his attack on the Taney Court’s Contracts Clause opinions with the charge that “[i]t is [the] duty” of judges “to enlighten, instruct, and guide the public opinion, and to seek, with a generous emulation, that sort of reputation which is not run after, but which follows *the pursuit of noble ends by noble means.*” Kent, *supra* note 5, at 404. Progressives believed the law itself was the result of politics. *See, e.g.*, TAMANAHA, *supra* note 2, at 71–72 (quoting President Roosevelt’s statement that “[t]he decisions of the courts on economic and social questions depend upon their economic and social philosophy”).

freedom of contract, and were reluctant to depart from precedent is accepted wisdom among legal historians.⁶⁸ So too is the idea that realists defined the formalists in unflattering terms and in distinction to what the realists did.⁶⁹ Much in *Beyond the Formalist-Realist Divide* presents accepted wisdom of legal historians. And some of the pieces that may not be quite accepted wisdom fit with the recent reexamination of Gilded Age legal thought, which has shown shades of gray among what once appeared to be stark lines. Those nuances include the understanding that historical jurisprudence had more adherents than we had previously thought and that those adherents developed deep work on how law fit into its context and evolved,⁷⁰ and that the Gilded Age jurists were intellectually consistent and perhaps not even as rigidly antilabor and antilegislation as they have been depicted by Progressive historiography.⁷¹

But the near-eradication of nonteleological lines between formalism and realism is not accepted wisdom. That blurring occurs in several ways.

68. See HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 188 (discussing whether the disparity between formalist and realist judges could be attributed to a shift from an individualist society to an interdependent urban society or additionally whether it could be attributed to a system of “mechanical jurisprudence” whose application caused a lag between precedent and the realities of everyday life); WIECEK, *supra* note 3, at 123–64 (recognizing that “[f]ew of the Justices who served on the Supreme Court in the half-century after 1890 were untouched by the *mentalité* of classical legal thought” and proceeding to discuss the rise of legal formalism); cf. TAMANAHA, *supra* note 2, at 135–43 (discussing a study of federal appellate court judges that demonstrated the “importance of law in determining judicial outcomes”).

69. See DUXBURY, *supra* note 4, at 158–59 (suggesting that realism’s true definition inured in its opposition to formalism); HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 188–90 (detailing the different ways that realists attacked formalism).

70. See, e.g., KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 3 (2011) (discussing how nineteenth-century legal thinkers saw history, law, and democracy as interrelated and how this mode of thinking has, until recently, been obscured by a more recent modernist tradition); RABBAN, *supra* note 11, at 1 (asserting that, by reexamining the defining doctrines of the formalism era, we can “strip away a century of distortions and oversimplifications by twentieth-century commentators”); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1435 (stating that *laissez-faire* constitutionalism was partially grounded in “historicism” and explaining that historicism “conceived law as an evolving product of the mutual interaction of race, culture, reason, and events”). Rabban in particular shows that many late-nineteenth-century legal theorists (as opposed to jurists) were Mugwumps who believed in moderate reform and viewed a significant part of their work as investigating the history of law to determine whether survivals from past law had become dysfunctional for present society. See, e.g., RABBAN, *supra* note 11, at 3–6, 379–80. In this way he and other scholars blur some, but by no means all, of the lines separating legal thought of the Gilded Age and realism. See also Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 580 (2002) (recognizing that many Gilded Age legal thinkers were Mugwumps).

71. See, e.g., Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism,”* 123 HARV. L. REV. F. 55, 56–57, 66–69 (2010) (suggesting that a subsequent generation of scholarship has undermined the key premises of the Progressives’ interpretation of the *Lochner* Era); Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 239 (1999) (book review) (disagreeing with the idea that Gilded Age judges read their own antilabor biases into the Constitution).

Tamanaha sees formalists—as well as realists—as embracing three key ideas: that law changed in response to changing economic and social conditions, that judicial decisions reflected political decisions, and that judges could shape outcomes by selective use of facts and precedents. I have a series of questions about the account of legal history here. I want to begin with a question about whom we are talking, then I will turn to questions about sources and periodization, the core idea of “formalism,” and the central tendency of the two eras.

A. *Whom Are We Talking About?*

No one identified himself as a “formalist.”⁷² That is a term created afterwards to define and discredit the judges of the Gilded Age who had—so the charge went—a narrow focus on precedent that emphasized freedom of contract and refused to take account of a rule’s impact on society.⁷³ The term “formalism” was used in the 1920s by Benjamin Cardozo.⁷⁴ He wrote in *Nature of the Judicial Process* that the “demon of formalism tempts the intellect with the lure of scientific order.”⁷⁵ The term was popularized in the 1950s and then revived and expanded in the 1970s as legal philosophers and legal historians sought a term to characterize the nature of legal thought in the nineteenth century, particularly the late nineteenth century.⁷⁶ Formalism is a term that twentieth-century legal theorists have used to describe how judges reasoned from what those commentators consider a narrow set of principles, such as freedom of contract, and dismissed considerations of humanity or the effects of their decisions.⁷⁷ Because formalism (as well as its synonym, mechanical jurisprudence) is a term

72. TAMANAHA, *supra* note 2, at 59. Similarly, no one called themselves mechanical jurisprudes. “Mechanical jurisprudence” was a term coined by Roscoe Pound to describe a certain set of beliefs that he did not like. Pound, *supra* note 24, at 607. Mechanical jurisprudence is often considered synonymous with formalism. See, e.g., WIECEK, *supra* note 3, at 192 (“Pound dethroned the classical model of law, which he called ‘mechanical jurisprudence.’”).

73. See HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 1, at 11–16 (discussing the increasingly generalized manner in which formalist judges decided cases and recognizing that this generalization allowed those judges “to apply the same set of rules that were applicable between sophisticated businessmen of relatively equal information and bargaining power to labor and consumer contracts between vastly unequal parties”); WIECEK, *supra* note 3, at 89–93 (detailing how certain formalist thinkers viewed legal principles as being “arranged in a hierarchy of ever greater abstraction, generalization, and applicability”).

74. CARDOZO, *supra* note 65, at 66.

75. *Id.*

76. See TAMANAHA, *supra* note 2, at 60–63.

77. William W. Fisher III et al., *Introduction to AMERICAN LEGAL REALISM* xi, xii (William W. Fisher III et al. eds., 1993) (discussing how during the formalist era, consequentialist judging (i.e., judging based on desires to protect innocent parties from economic harm) fell into disfavor in exchange for a system that adhered to precedent); see also *supra* note 74 and accompanying text.

employed by its detractors,⁷⁸ there is the potential for the politics and particular issues of concern to Progressive Era writers to contort their depiction of the era that preceded them. That is, we may be dealing with the image of the *Lochner* Era in the Progressive legal mind rather than the reality of the *Lochner* Era. In fact, this is a concern that legal historians have raised before.⁷⁹ And work of the past several decades has revised somewhat our understanding of the nature of Gilded Age legal thought.⁸⁰ Many see *Lochner*⁸¹ now as a partway point between formalism and realism.⁸²

Tamanaha argues that “[t]he formalists never speak for themselves.”⁸³ That is true only to the extent that we think about “formalism” as something that is in the minds of people who came afterwards.⁸⁴ There are people

78. See, e.g., HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 18–19 (noting that early-twentieth-century legal thought attacked categorical thinking as “formalistic and artificial”).

79. See generally DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 3 (2011) (“*Lochner* is . . . due for reconsideration because modern sensibilities diverge significantly from those of the Progressives who created the orthodox understanding of the liberty of contract era.”).

80. See, e.g., Morton J. Horwitz, *Progressive Legal Historiography*, 63 OR. L. REV. 679, 681–82 (1984) (discussing revisionist attacks questioning the dominant Progressive view of the late-nineteenth-century judiciary); Lindsay, *supra* note 71, at 56–57 (citing studies of the *Lochner* Era by legal historians and constitutional scholars that represent a “comprehensive historical revision of the progressive narrative”). For purposes of this Review I am construing formalism, mechanical jurisprudence, and classical legal thought as essentially the same and considering the age of formalism as the late nineteenth century through the early twentieth century (about 1870 to 1920), though there were elements of formalism both before and after that period. Following Tamanaha, I am construing many of those who engaged in historical jurisprudence as overlapping with the formalists.

81. *Lochner v. New York*, 198 U.S. 45 (1905).

82. See, e.g., Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1093–94 (2000) (presenting a hypothesis that the commitments evidenced by decisions during this era were not conflicting, but instead were parts of an integrated structure of evolving doctrine); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 4 (1991) (describing the *Lochner* Era as transitional); Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEXAS L. REV. 661, 695 (1995) (book review) (stating that the Fuller Court, which decided *Lochner*, “was more transitional than generally realized, bridging the chasm between nineteenth- and twentieth-century constitutionalism”). Some aspects of the *Lochner* Era linked to the past, while others anticipated the future. Most distinct eras may be seen as transitions from what came before to what comes after. Perhaps part of the problem is that Tamanaha mistakes the anticipatory notes for the whole.

83. TAMANAHA, *supra* note 2, at 4. Some people embrace the label of formalist for themselves and defend it now. See, e.g., Charles Fried, *The Nature and Importance of Liberty*, 29 HARV. J.L. & PUB. POL’Y 3, 6 (2005) (“[W]hen the law is formal, when those who adjudicate do so not purposefully but formally, indeed formalistically, there is an attempt to honor the law as the definition of our property, our liberty space, and not to change that definition. . . .”).

84. See TAMANAHA, *supra* note 2, at 4.

whom we now identify as formalists,⁸⁵ and they certainly speak for themselves. Next, I want to talk about the sources used in this book.

B. Sources in Beyond the Formalist-Realist Divide

There are two issues with Tamanaha's use of sources: They are almost exclusively addresses and treatises, and almost no attention is given to judicial opinions. There is, I believe, not a single opinion discussed in the section of the book devoted to the formalists.⁸⁶ The first judicial opinion discussed in the text is *United States v. E.C. Knight Co.*⁸⁷ It appears on page seventy-five, in the section on the legal realists, as part of a brief acknowledgment that the Supreme Court did much that could draw the criticism of Progressives.⁸⁸ Thence follow *Pollock v. Farmers' Loan & Trust Co.*⁸⁹ and *In re Debs*⁹⁰—two other cases from 1895.⁹¹ That is it for the section of the book devoted to the realists. This is odd if what one is trying to do is divine the nature of applied legal thought in the late nineteenth century. For the realists aimed at judges rather than the historical jurisprudence.⁹²

The addresses, articles, and treatises might be very useful for understanding historical jurisprudence and maybe even something about

85. For example, Christopher Columbus Langdell, Samuel Williston, and Judge Thomas Cooley. *Id.* at 51–55.

86. There is a quotation from Holmes's *Lochner* dissent but no discussion of the case. TAMANAHA, *supra* note 2, at 16–17. There is also a quotation, *id.* at 38–39, from *Leavitt v. Blachford*, 17 N.Y. 521, 543–44 (1858) taken from William Green, "Stare Decisis," 14 AM. L. REV. 609, 635 (1880).

87. 156 U.S. 1 (1895).

88. TAMANAHA, *supra* note 2, at 75.

89. 157 U.S. 429 (1895).

90. 158 U.S. 564 (1895).

91. TAMANAHA, *supra* note 2, at 76.

92. DUXBURY, *supra* note 4, at 25 ("Those legal realists who attacked *laissez-faire* were confronting not an academic but a judicial world-view."). If we are to evaluate the classical jurists—other than as David Rabban has done in *Law's History*, as an exercise in intellectual history—it should be on the basis of their most important decisions. It may be that the neoprogressive legal historians like WIECEK, *supra* note 3, at 136–39, 152–56, and HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 25–26, 33–34, have endowed decisions like *Pollock* and *Lochner* with undue importance, but even if that is so, there do not appear to be other decisions that rival them in significance that point towards a different dominant trend. Whether the cases like *Lochner* are representative of the era is a question that people have been asking since the Progressive Era itself, when the legal historian Charles Warren surveyed hundreds of cases and concluded that courts more frequently upheld government regulation than struck it down. Charles Warren, *A Bulwark to the State Police Power—the United States Supreme Court*, 13 COLUM. L. REV. 667, 669 (1913); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913). Of course it is entirely possible that cases like *Lochner* established a baseline hostility to regulation that curtailed significant regulation, thus changing the permissible areas and amounts of regulation. Warren's data do not speak to this issue.

judges of the era. Though even extrajudicial statements by judges are relatively scarce in the chapters devoted to formalism.⁹³

Obscure thinkers are often given outsized importance as representatives of their age, and even in some of those cases, I wonder if Tamanaha's source fully supports the use that is made of it. For instance, William Hornblower's speech to Columbia Law School graduates, *A Century of "Judge-Made" Law*,⁹⁴ is used to support the proposition that formalists understood that judges made rather than discovered law,⁹⁵ for Hornblower talks about the "comfortable fiction" that judge-made laws "have always been the law."⁹⁶ And yet while Hornblower accepts that judge-made law is not discovered, he says that judge-made law (that is, common law) is in keeping with what people would expect; Hornblower said in the next paragraph that

the principles of law are based upon certain ideas of right and wrong and certain notions of good sense, which, when declared by the Judge, appeal to the conscience and the sense of justice of the individual, and to which the individual, if he had applied his conscience and his good sense to the questions involved, would have conformed his conduct.⁹⁷

93. Even when there is a judge's extrajudicial statement in those chapters, it sometimes comes from a judge who is probably more aligned with Progressive thought than classical legal thought, such as Judge Leonard Crouch. See TAMANAHA, *supra* note 2, at 42–43 (quoting Crouch, *supra* note 31, at 140–42).

94. William B. Hornblower, Address, *A Century of "Judge-Made" Law*, 7 COLUM. L. REV. 453, 453 n.1 (1907). Hornblower is incorrectly identified as a professor. TAMANAHA, *supra* note 2, at 19. In fact, he was a practicing lawyer. In 1893, Grover Cleveland had nominated him to the United States Supreme Court, but Hornblower was not confirmed by the Senate. Obituary, *William Butler Hornblower '71*, 14 PRINCETON ALUMNI WKLY. 770, 770–71 (1914). Hornblower was nominated to serve on the New York Court of Appeals on February 2, 1914, the same day as Benjamin Cardozo. *Hornblower Goes on Appeals Bench: Glynn Also Designates Cardozo for that Tribunal and Names Weeks for Supreme Court*, N.Y. TIMES, Feb. 3, 1914 [hereinafter *Hornblower Goes on Appeals Bench*], <http://query.nytimes.com/mem/archive-free/pdf?res=9B0DEED81F3BE633A25750C0A9649C946596D6CF>.

95. TAMANAHA, *supra* note 2, at 19. This is largely a straw argument, for as Brian Leiter has pointed out, formalists and realists largely agreed that judges made law at least in instances when precedent was lacking. Leiter, *supra* note 9, at 115 & n.24. However, the talk of discovery of law persisted among some of Tamanaha's subjects. See *infra* note 103 and accompanying text.

96. Hornblower, *supra* note 94, at 461; see also Leiter, *supra* note 9, at 115–16 (noting that formalists and realists largely agree that judges make law and had done so since Bentham's attack on natural law in the early nineteenth century).

97. Hornblower, *supra* note 94, at 461. This part of Hornblower's Address sounds very much like what New York lawyer Daniel Lord had told Yale students more than half a century before about the role of lawyers in American society. For instance, Lord told the Yale Phi Beta Kappa Society that the virtue of lawyers was that they—and the institution of law—helped restrain change. See DANIEL LORD, ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR: AN ORATION DELIVERED AT NEW HAVEN, BEFORE THE PHI BETA KAPPA SOCIETY, OF YALE COLLEGE, AT THEIR ANNIVERSARY MEETING, JULY 30, 1851, at 16 (N.Y.C., S.S. Chatterton 1851).

Hornblower advances an argument that judge-made law—in the rare instances when there is an extension of principles—is about what one would expect. In fact, Hornblower’s Address was largely an attack on the idea of codification and in favor of retaining power in the hands of judges. It was judges and lawyers, we learn at the end of Hornblower’s Address, who should protect against radical reformers of the Progressive Era.⁹⁸ For lawyers and judges are

the chosen champions of vested rights and of the institutions handed down to us by our fathers. It is to the members of the Bar that the community must look in the future, as they have looked in the past, for that safe, sane and wise conservatism, which does not allow itself to be stampeded by popular clamor into supporting radical and revolutionary and confiscatory measures. . . .⁹⁹

Tamanaha also cites Professor William G. Hammond, who was an adherent of historical jurisprudence.¹⁰⁰ As part of making the case for legal education in a law school, Hammond argued law was less mechanistic in the late nineteenth century than it had been earlier.¹⁰¹ And as Tamanaha points out, Hammond acknowledged that judges decided cases without

98. See Hornblower, *supra* note 94, at 474–75 (admonishing law graduates to be stalwart in the face of “radical and revolutionary” measures, notwithstanding their popularity).

99. *Id.* at 474. As I wrote in note 22, Tamanaha’s quotation of an article by Thomas Cooley discussing the problems with codification poses a similar issue. While Cooley does refer to judge-made law, the article criticizes codification because—as with Hornblower—Cooley did not believe that codification would remove the problems attendant to interpretation of precedent or statute. See Cooley, *Codification*, *supra* note 22. And in fact, the paragraph that Tamanaha quotes deals with precedents interpreting a statute. See *id.*; see also TAMANAHA, *supra* note 2, at 19. Cooley noted in that paragraph that it was necessary to know the precedents and that “[w]hoever should undertake to give his clients advice upon mere consideration of the plain terms of the statute would be reasonably certain to lead them into difficulty and loss.” Cooley, *Codification*, *supra* note 22. Cooley is discussing more problems of interpretation and uncertainty than the political nature of judging. See *id.* at 334 (noting that the “infinite variety of human transactions” imbues the administration of law with inherent uncertainty that cannot be remedied by codification); see also JAMES C. CARTER, *THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW* 58 (N.Y.C., Banks & Bros. 1889) (discussing uncertainty in law as a “perpetual springing up of new points of controversy” and concluding that it is vain to hope “to frame a system of written law which shall meet beforehand the new problems unceasingly raised by the activity and progress of the race”); Leiter, *supra* note 9, at 119–20 (noting that Cooley’s attack on codification is unrelated to realist theories of statutory interpretation).

100. TAMANAHA, *supra* note 2, at 4–5, 55 (citing William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 537–42, 555, 557 (1992)); see also RABBAN, *supra* note 11, at 38–39, 368–71. Rabban labels Hammond as a key figure in the use of inductive reasoning that was central to the historical school. See *id.* at 368–71 (chronicling Hammond’s substantial contributions to the field of legal history as an inductive science).

101. See W.G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. 400, 405–08 (1881) (“In law we have broken a complicated machine, and returned to the freedom of individual effort.”).

always relying on precedent.¹⁰² Yet Hammond also wrote of the common law as the reflection of the existence of a Divine order.¹⁰³ Hammond believed that judges ought to adhere to fixed principles of law,¹⁰⁴ even as he acknowledged the uncertainty in law and flexibility of precedent.¹⁰⁵ He wrote in support of Blackstone and against Austin's idea that judges legislate. "The belief in a common law, of which all precedents and decided cases are merely the evidence and exposition, cannot be a delusion or a fiction, so long maintained."¹⁰⁶

Tamanaha points out that some realist-sounding work appeared in the 1880s and 1890s as though that were an indictment of the realists:

Holmes's views were presaged by others, were not unusual among his contemporaries, and were tame in comparison to some; what Cardozo said about judging in the 1920s had been openly stated by leading judges decades earlier; the realists' views of judging closely match what the historical jurists wrote in the 1880s and 1890s.¹⁰⁷

One of the real gems of data in this book is the discovery that twelve years before Holmes's aphorism in his *Lochner* dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics,"¹⁰⁸ C.B. Labatt, writing in the *American Law Review*, criticized, in similar terms, a Pennsylvania Supreme Court opinion that struck down on freedom of contract grounds a statute prohibiting mine owners from paying miners in

102. TAMANAHA, *supra* note 2, at 4–5, 55 (quoting Hammond, *supra* note 101, at 412–13, as claiming that precedent allows judges to conceal "the real grounds of decision . . . under the statement of facts with which it is prefaced").

103. See William G. Hammond, *Supplementary Notes* to FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 229, 328 (William G. Hammond ed., St. Louis, F.H. Thomas & Co. 3d ed. 1880) (stating that "[u]nless we are willing to surrender entirely the belief that there is a Divine order . . . we cannot assume that all the principles upon which cases of the first impression have been decided for centuries were the creation of the judges who wrote . . . the particular opinions").

104. See LaPiana, *supra* note 100, at 542 ("Hammond believed in inviolable principles, such as the existence of vested rights which simply exist without reference to any explanation except that they inhere in the nature of things.").

105. Another problem with Tamanaha's indictment of the era of formalism is that there is relatively little in *Beyond the Formalist-Realist Divide* about the literature on formalism in nineteenth-century thought outside of law. However, Morton G. White presents a critique of "formalism" across a broad spectrum of late-nineteenth-century thought, including law. MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1952) White's picture fit with how the Progressives viewed the world. See HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 320 n.144 (citing numerous Progressive Era works critical of American jurisprudence).

106. Hammond, *supra* note 101, at 327–28; see also Leiter, *supra* note 9, at 122 (recognizing that Hammond's acknowledgement of the inherent uncertainty of the law was given reluctantly).

107. TAMANAHA, *supra* note 2, at 5. "Holmes, the master of epigrams, said it more concisely, but it was said before." *Id.* at 77.

108. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

scrip redeemable only at a company store.¹⁰⁹ Labatt wrote, “The court seems to have given the question very little consideration, and thus pronounced its opinion in terse and emphatic language, which breathes the very spirit of Mr. Herbert Spencer himself”¹¹⁰ While Holmes deserves credit for his aphorisms,¹¹¹ it would be an odd theory of historical change that saw a few elite intellectuals as the sole agents of change. A more modest way of looking at this is to say that beneath the American renaissance of legal thought, as exemplified by Holmes, Pound, and Cardozo, were many other similar thinkers and that they built on ideas of previous generations.¹¹²

Part of the issue relates to timelines. There were certainly people—Holmes is one of them, Columbia law professor Munroe Smith in 1887 is another—who did not believe the self-serving statements about judges just declaring law.¹¹³ Munroe Smith was quoted approvingly by Cardozo in *Nature of the Judicial Process*.¹¹⁴ In fact, many of the people whom Tamanaha assembles to show that in the heart of the era of formalism people understood that judges made rather than discovered law might be characterized as those seeking to topple classical legal thought.¹¹⁵ Others are so muddled or unimportant in their thinking that they are best left out of the discussion.¹¹⁶ One expects to see that strains of thought appear before they become dominant and for them to appear in public as well as elite circles.¹¹⁷

109. C.B. Labatt, *State Regulation of the Contract of Employment*, 27 AM. L. REV. 857, 863–65 (1893), cited in TAMANAHA, *supra* note 2, at 78 (discussing the Pennsylvania Supreme Court opinion of *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886)).

110. *Id.* at 863–64. Though he did not use the term, he identified the court’s opinion as what we would now think of as formalism. *Id.* at 864 (describing the opinion as writing a doctrine of *laissez-faire* into constitutional law).

111. See HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 1, at 110 (describing Holmes’s aphorisms as “brilliant, often revolutionary, but easily misunderstood”).

112. Cf. DAVID S. REYNOLDS, *BENEATH THE AMERICAN RENAISSANCE* 4–5 (1988) (discussing literary success as influenced by a wide range of popular cultural voices as well as historical voices).

113. Smith, *supra* note 19. Smith, a professor of Roman law at Columbia, seems a poor choice to represent the dominant views of the judges who were in control during the Gilded Age.

114. CARDOZO, *supra* note 65, at 23. The issue of formalism is how much judges talk about stopping attacks on property and using law as a shield versus how much they talk about evolution towards justice.

115. Labatt, *supra* note 109, at 873–75 (concluding, with a harsh tone, that judges who invalidated state police power statutes “have been guilty of a gross usurpation of authority” and that the judges went out of their way to seek support for their positions, albeit, in his view, unsuccessfully).

116. See, e.g., John S. Ewart, *What Is the Common Law?*, 4 COLUM. L. REV. 116, 125 (1904) cited in TAMANAHA, *supra* note 2, at 19 & 205 n.40 (expressing skepticism towards the claim that judges divine preexisting universal principles when making decisions but coming to no concrete conclusion on the matter).

117. To draw some from Tamanaha’s evidence, he uses a number of statements by politicians and academics that indict judges for their political decisions during the heart of the era of classical

Cardozo represented the capstone of decades of thought about the reform of law by disposing of irrational precedent, by looking to the consequences of judicial decisions, and by relying on the social scientific study of law. One example that I am particularly fond of comes from antislavery lawyer William Goodell's *The American Slave Code in Theory and Practice*, which turned to an empirical study of the system of slavery—based largely on newspaper accounts of runaway slaves—as well as an intensive study of judicial opinions to map out the inhumanity of the slave code.¹¹⁸ It was, as its title says, both an empirical and theoretical analysis.¹¹⁹ Cardozo may be the person most associated with those ideas, and as a judge was a key vehicle for their implementation,¹²⁰ but he, like Holmes, built on the work of others.

Where some understood the nature of law evolving in response to history in the Gilded Age, those people did not use that insight for reform, but for justification of the present. We need to be mindful of how ideas were used and the central tendency of the ideas.

C. *The Central Tendencies of Formalist Thought*

The issues regarding sources and periodization, even the originality of realism, are relatively minor issues within legal history. My final set of

legal thought. Thus, he notes that President Theodore Roosevelt indicted judges for their political behavior, *see* TAMANAHA, *supra* note 2, at 71–72 (referencing a speech before Congress in which Roosevelt called judges the “chief lawmakers” of the country in an effort to chastise the overtly political resistance of some judges to legislative efforts to ease some of the social and economic burdens of the time); that a book on judicial oligarchy charged judges with political decision making, *id.* at 73; and that an article in 1912 in the *Yale Law Journal* hypothesized that corporate lawyers who became judges would favor corporations, *see id.* All of that is evidence for the proposition that “realistic observations about judging were widely expressed well before the realists.” *Id.* at 79. This raises an important issue, though not one discussed here, of causation. Some might like to credit the realists with causing changes in law, as intellectual leaders were credited with leading the popular mind in the nineteenth century. But it is better to see them as gauges of the popular mind rather than governors of it. That is how leading legal historians view legal realism. *See, e.g.*, HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 169 (“For many purposes, it is best to see legal realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism.”). William Wiecek, whose book *The Lost World of Classical Legal Thought* is the leading work in this area, similarly sees the challenge to classical legal thought as having academic, judicial, and popular political branches. *See* WIECEK, *supra* note 3, at 176–82 (summarizing the modernist academic critique, populist political critique, and judicial critique from Holmes, all challenging classical legal thought). In fact, realists linked the reforms they wrote about to popular reform. *See, e.g.*, Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 344 (1905) (describing popular dissatisfaction with the legal system as a ground for necessary change).

118. *See* WILLIAM GOODSELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 119–20 (N.Y.C., John A. Gray 1853) (citing several newspaper offers for rewards for escaped slaves); *id.* at 126 (analyzing a judicial opinion on master–slave relationships).

119. *See id.* at 19–20 (introducing the text as a survey of both the actual uses of slaves and the judicial decisions used to enforce the slave code).

120. *See* HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 189–92.

questions about *Beyond the Formalist-Realist Divide* goes to the blurring of the line between formalist and realist thought. Here, I think the differences between Tamanaha's account and that of legal historians are important. To recap the issue, Tamanaha says that formalists understood that the common law evolved in conjunction with economic and social changes, that judges were political, and that they also understood that judges could select facts and precedent. In these ways, the ideas of formalists were similar to those of realists. For that reason, Tamanaha wants us to abandon the distinction between formalism and realism.¹²¹

The construct of "formalism" describes well—even if in censorious terms—the process of many nineteenth-century jurists. Invoking it helps us understand what those judges did and what those who followed thought as well as how they behaved. There were significant divisions within the judiciary and legal thought, and erasing those distinctions causes us to miss an important story. Most cases were, unsurprisingly, noncontroversial. For those cases that were controversial, there is a story to be told about differing approaches to what is law and how to resolve conflicts under it.

1. Examples of Formalism.—If one looks back a little earlier in United States legal history, to the era of slavery, there are some other examples of formalism—or what we now think of as formalism. One of the most prominent examples is that of Justice Thomas Ruffin of the North Carolina Supreme Court, who in an 1830 opinion in *State v. Mann*¹²² released a man who abused a slave in his custody from criminal liability for injury to her.¹²³ In that opinion, Ruffin made a classic statement about how he was constrained by precedent, which was in turn supported by economic reality.¹²⁴ Ruffin rationalized that he was required to follow the legal community's rule of nonliability for such acts.¹²⁵ Even if he thought differently, he wrote, "we could not set our notions in array against the judgment of every body else, and say that this, or that authority, may be safely lopped off."¹²⁶ His acknowledgment of the constraints of law make the opinion seem like one where he had no choice.

Antislavery advocates repeatedly invoked Ruffin's *State v. Mann* decision for its honest and clear interpretation of the nature of slave law.

121. TAMANAHA, *supra* note 2, at 8–9.

122. 13 N.C. (2 Dev.) 263 (1829).

123. *Id.* at 267–68.

124. *See id.* at 268 (stating that the judges are bound by the current rule of law and that, unless excepted by the legislature, the slave must remain a slave because that ownership is "essential to the value of slaves as property").

125. *Id.* at 265 ("The established habits and uniform practice of the country in this respect, is the best evidence of the portion of power, deemed by the whole community, requisite to the preservation of the master's dominion.").

126. *Id.*

Harriet Beecher Stowe turned to it as an example of cold legal logic.¹²⁷ Stowe hoped that Ruffin, once he recognized the humanity of the slaves, might modify the law: “So abhorrent is the slave-code to every feeling of humanity, that just as soon as there is any hesitancy in the community about perpetuating the institution of slavery, judges begin to listen to the voice of their more honourable nature, and by favourable interpretations to soften its necessary severities.”¹²⁸ But Ruffin, according to Stowe, did not listen to the voice in drafting his opinion; instead, he applied cold logic to the issue.¹²⁹ It was this cold logic that led to so many perverse conclusions:

Every act of humanity of every individual owner is an illogical result from the legal definition; and the reason why the slave-code of America is more atrocious than any ever before exhibited under the sun, is that the Anglo-Saxon race are a more coldly and strictly logical race, and have an unflinching courage to meet the consequences of every premise which they lay down, and to work out an accursed principle, with mathematical accuracy, to its most accursed result. The decisions in American law-books show nothing so much as this severe, unflinching accuracy of logic.¹³⁰

Although Stowe did not use the term formalist, this is the kind of opinion that was later dismissed as formalist.¹³¹ In fact, Stowe’s second antislavery novel, *Dred; A Tale of the Great Dismal Swamp*, which followed up on *Uncle Tom’s Cabin*, had a fictional character based on Ruffin.¹³² That fictional judge was antislavery in sentiment but felt compelled by the constraints of law to issue a proslavery decision that was based on the *State v. Mann* decision.¹³³ When asked by his wife whether he must issue the decision, the judge said:

A judge can only perceive and declare. What I see, I must speak, though it go against all my feelings and all my sense of right.

....

127. See HARRIET BEECHER STOWE, *THE KEY TO UNCLE TOM’S CABIN* 133 (Arno Press 1968) (1853) (“Men who make the laws, and men who interpret them, may be fully sensible of their terrible severity and inhumanity; but if they are going to preserve [slavery], they have no resource but to make the laws and to execute them faithfully . . .”).

128. *Id.* at 134.

129. *Id.* at 145–48 (“One cannot but admire the unflinching calmness with which a man, evidently possessed of honourable and humane feelings, walks through the most extreme and terrible results and conclusions, in obedience to the laws of legal truth.”).

130. *Id.* at 155.

131. See COVER, *supra* note 37, at 78 (“It must be understood that . . . Ruffin [did not] . . . depart[] from the positivist formal assumptions of the day.”).

132. See 2 HARRIET BEECHER STOWE, *DRED; A TALE OF THE GREAT DISMAL SWAMP* 99 (Bos., Phillips, Sampson & Co. 1856).

133. *Id.* at 99–100; Alfred L. Brophy, Essay, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1119 (1998).

. . . I sit in my seat, not to make laws, nor to alter them, but simply to declare what they are. However bad the principle declared, it is not so bad as the proclamation of a falsehood would be. I have sworn truly to declare the laws, and I must keep my oath.¹³⁴

While that is a fictional account—in which a critic of the southern judicial system constructed a character—it gives a sense of how people at the time interpreted what judges were doing.

Another example of this kind of reasoning appeared in Thomas R.R. Cobb's *An Inquiry into the Law of Negro Slavery*. “Philosophy is the handmaid, and frequently the most successful expounder of the law. History is the groundwork and only sure basis of philosophy. To understand aright, therefore, the Law of Slavery, we must not be ignorant of its history,” Thomas R.R. Cobb told his readers in the first paragraph of *An Inquiry*.¹³⁵ Cobb then turned to several hundred pages of history, which he used to show that slavery and the law supporting it was natural and necessary.¹³⁶ Published in 1858, *An Inquiry* was the most comprehensive proslavery legal treatise ever written, and it represented the capstone of decades of development of proslavery legal thought.¹³⁷

Cobb critiqued the famous 1772 antislavery decision, *Somerset v. Stewart*,¹³⁸ which freed a slave brought from the West Indies to England.¹³⁹ Cobb's critique was that Lord Mansfield had allowed his sentiments to interfere with his legal thought, for Mansfield announced a new doctrine.¹⁴⁰ Since the time of *Somerset*, the issue of slaves' status while temporarily on free soil engaged significant attention among judges and the public.¹⁴¹ Cobb aimed to show that Lord Mansfield's decision was limited.¹⁴² He sought to show that it did not represent the law at the time;¹⁴³ that it was an emotional, rather than a legal opinion;¹⁴⁴ and that it had subsequently been

134. STOWE, *supra* note 132, at 99–100.

135. 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA xxxv (Univ. of Ga. Press 1999) (1858).

136. See, e.g., *id.* at xxxvi–xxxvii (documenting slavery among the ancient Jewish peoples); *id.* at xliv (documenting slavery in ancient Egypt); *id.* at l (India); *id.* at lix (Greece).

137. See Paul Finkelman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 ROGER WILLIAMS U. L. REV. 75, 75, 84 (1999) (recognizing the comprehensiveness and influence of Cobb's work).

138. (1772) 98 Eng. Rep. 499 (K.B.); Lofft 1.

139. See *id.* at 510, Lofft at 19; COBB, *supra* note 135, § 128.

140. COBB, *supra* note 135, §§ 185–189.

141. See *id.* § 190 (describing another case dealing with a similar issue and examining Lord Mansfield's opinion in *Somerset*).

142. See *id.* § 184 (arguing that Lord Mansfield himself thought the *Somerset* decision was more limited than subsequently interpreted).

143. See *id.* § 187 (arguing that “the case was placed upon an entirely false issue” and that the opinion ignores the controlling doctrines of international comity).

144. See *id.* § 188 (describing Lord Mansfield as almost reaching the correct holding but ultimately “[s]inking] under the oppression of the difficulties”).

rejected¹⁴⁵—or misinterpreted,¹⁴⁶ for international law required comity to other nations (or to other states) and rejection of comity invoked the specter of a much greater harm—the destruction of the United States.¹⁴⁷

Following the critique of *Somerset*, a significant part of the legal treatise dealt with slaves who were in interstate (or international) transit and spent at least some time in a free state.¹⁴⁸ Those opinions often relied upon *Somerset*.¹⁴⁹ So it was natural to both try to undermine that decision and to undermine other bases for those decisions. Cobb reasoned to a result from major premises regarding international law.¹⁵⁰ In addition to showing that slavery was consistent with natural law¹⁵¹ (and therefore that there should be no preference for freedom under *Somerset*), Cobb also argued from the centrality of slavery that there should be substantial comity for the laws of places where slavery was legal.¹⁵² Cobb further grounded the doctrine of comity in the need for peace and the conclusion that “[w]hatever injures one State, injures the [Union].”¹⁵³

Cobb saw the common law as something that should be emotionless, and it should be freed in particular from the abolitionists’ empathy for slaves. He praised, for instance, the dissenting opinion of Justice Clark Bissell of the Connecticut Supreme Court (and later a professor at Yale) in the 1838 case of *Jackson v. Bulloch*,¹⁵⁴ which dealt with the question of whether a slave in transit through the state should be kept in slavery.¹⁵⁵ Cobb praised Justice Bissell, who professed his opposition to slavery, for “boldly” arriving at the conclusions “to which principle and law guided him.”¹⁵⁶ That is, Bissell wrote that he had to follow the law rather than his internal moral compass.¹⁵⁷

The role of historical thought was to teach what the law was and what it ought to be. That is, historical study of law frequently served a

145. See *id.* § 190 (describing Lord Stowell’s later successful attack on “the only foundation upon which the [*Somerset*] decision is based”).

146. *Id.* § 196.

147. *Id.* §§ 199–201.

148. *E.g., id.* §§ 219–223.

149. See, *e.g., id.* § 217 (discussing *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611–12 (1842), in which Justice Story indicated that the territorial limits of slave codes was “fully recognised” in *Somerset*).

150. *Id.* § 192.

151. *Id.* § 50.

152. See *id.* §§ 198–201.

153. *Id.* § 201.

154. 12 Conn. 38 (1837).

155. *Id.* at 39; COBB, *supra* note 135, § 229.

156. COBB, *supra* note 135, § 229.

157. See *Jackson*, 12 Conn. at 57 (Bissell, J., dissenting) (“As a citizen and as a man, I may admit the injustice and immorality of slavery; that its tendencies are all bad; that it is productive of evil, and of evil only. But as a jurist, I must look at that standard of morality, which the law prescribes.”).

conservative purpose. It explained why the law was as it was and made clear that changes would be disastrous. Thomas Cobb built on decades of historical writing on law that argued that emancipation of slaves in the British West Indies was an economic and demographic disaster.¹⁵⁸

History showed that different people were entitled to different amounts of rights and that law should adapt to the culture of the people it governed. That is, it served to justify inequality in treatment, particularly along the lines of race. For instance, an 1854 address by John Randolph Tucker to the William and Mary literary societies joined historical analysis to abstract discussion of the political theory of republicanism. Tucker argued that humans are entitled to the utmost civil liberty that can exist while still maintaining society.¹⁵⁹ The amount of rights that individuals were entitled to varied according to their station in society.¹⁶⁰

Tucker's theory calibrated rights to social position; it was a long way from the Enlightenment idea that all people are created equal. Instead, the theory was that rights and constitutions should be made to fit the separate and special condition of the people being governed.

The man who writes constitutions by the dozen, and keeps them on hand for use or distribution, without a careful investigation of the social capacities of the people for whom they are designed—he who *guesses* that our institutions would be admirably suited for China or Japan, or that our federative system of republics would work with facility and success under a President Roberts upon the coast of Africa, is a dangerous empiric—a mere pretender, whose reward should be fixed in a perpetual banishment from the counsels of a wise people, and in the solitude of an asylum for political lunatics.¹⁶¹

Tucker spoke about the reality of life in the South, about the place of enslaved people, and about history. He asked whether “any man” could

158. Such historical, economic, and legal common arguments stretched back for decades. In 1832 William and Mary professor Thomas Roderick Dew had published a pamphlet opposing emancipation of slaves because the social conditions of the enslaved people would not allow emancipation; he perhaps ingenuously suggested that perhaps generations later the enslaved would be ready for emancipation. See THOMAS R. DEW, REVIEW OF THE DEBATE IN THE VIRGINIA LEGISLATURE OF 1831 AND 1832, at 97 (Richmond, T.W. White 1832) (“Liberty has been the heaviest curse to the slave, when given too soon . . .”). This adopted a sense of evolution, though it proceeded at a glacial pace. In fact, Dew was quite explicit that the evolution would take generations. *Id.* at 130. Dew’s legal history of western civilization similarly saw the progress of law and culture as proceeding over generations and the protection of private property as what spurred the advance of civilization. See THOMAS DEW, A DIGEST OF THE LAWS, CUSTOMS, MANNERS, AND INSTITUTIONS OF THE ANCIENT AND MODERN NATIONS (N.Y.C., D. Appleton & Co. 1856).

159. JOHN RANDOLPH TUCKER, ADDRESS OF JOHN RANDOLPH TUCKER, ESQ. DELIVERED BEFORE THE PHOENIX AND PHILOMATHEAN SOCIETIES, OF WILLIAM AND MARY COLLEGE, ON THE 3D OF JULY, 1854, at 10–11 (Richmond, Chas. H. Wynne 1854).

160. See *id.* at 9–10.

161. *Id.* at 11.

deny that “the most favorable condition for the African is slavery, and the only condition for the Saxon, consistent with his progress or even existence, is that of being the director of the physical and moral energies” of the enslaved people.¹⁶² Historical jurisprudence recognized evolution, but that it was gradual is what is key. This was true in the post-Civil War historical jurisprudence, as well as pre-War.¹⁶³

There was a new use of history emerging, however, in the hands of people like Oliver Wendell Holmes. Where history taught some lessons of conservatism—of the need to protect against change—in other hands it showed the irrationality of the present law. Holmes’s aphorism that “[t]he life of the law has not been logic: it has been experience”¹⁶⁴ illustrates the worldview that history explains the irrationality of law and that law does not necessarily make sense (that is, that it is not logical).¹⁶⁵ The use of history was now to demystify law instead of making its rules seem natural and necessary. Holmes turned to history for reform, to tell us why the law is as it is, so that we may then change it. For some historians, law became a project of reform, not justification of the present. This is the fulcrum between Cobb, who turned to history to explain law, and Holmes, who turned to history to undermine it.¹⁶⁶ But there was another more powerful tool for the reformer mission: to demonstrate that the rules were unfair.

2. *Defining Formalism.*—What was formalism, then? One way of approaching the nature of formalism is to ask what its critics saw as its key elements and distinctions.¹⁶⁷ In the late nineteenth century, judges reasoned from a relatively narrow set of principles—such as freedom of contract and preexisting ideas about society, like white supremacy. The realists drew

162. *Id.* at 15.

163. See Brophy, *supra* note 63, at 610 & n.58 (“[T]here is a gradual, insensible and unconscious progress in the law. We do not perceive the movement, but it becomes apparent by comparing its condition at different and widely separated periods of time.” (alteration in original) (quoting JAMES C. CARTER, *THE IDEAL AND THE ACTUAL IN THE LAW* 26 (Phila., Dando Printing & Publ’g Co. 1890))).

164. O.W. HOLMES, JR., *THE COMMON LAW* 1 (Bos., Little, Brown & Co. 1881).

165. See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 599 (1911) (“[T]he historical jurist [conceives] that a principle of human action or of social action is found by human experience and is gradually developed into and expressed in a rule.”).

166. See CARDOZO, *supra* note 65, at 52–54 (discussing how history can be used to explain the past and then to liberate from the past). David Rabban offers an important relocation of Holmes on the continuum from historical jurisprudence to realism, for Rabban sees Holmes as more in line with historical jurisprudence and less in keeping with Pound. See RABBAN, *supra* note 11, at 432, 523. For my purposes here, Holmes is closer to Pound than to Cobb, but Rabban has sparked an important discussion about Holmes as a transition figure in historical thought in the nineteenth century.

167. See Fisher et al., *supra* note 77, at xi (stating that classical legal thought’s “best-known manifestation was a series of decisions by appellate courts that strengthened the positions of business corporations in their struggles with workers and consumers”).

several key distinctions between formalism and realism. They charged formalists with reasoning narrowly from precedents and refusing to take account of the social context of the legal rules they employed. Pound identified two key parts of the “mechanical jurisprudence” as “(1) over-individualism in our doctrines and rules, an over-individualist conception of justice, and (2) over-reliance upon the machinery of justice and too much of the mechanical in the administration and application of rules and doctrines.”¹⁶⁸ Pound identified this overemphasis on individualism, which was rooted in historical doctrine, in numerous articles.¹⁶⁹ Quite simply, the law was too backward looking; it had not kept pace with changes, and the public knew this:

Men have changed their views as to the relative importance of the individual and of society; but the common law has not. Indeed, the common law knows individuals only. In the seventeenth and eighteenth centuries, when the theory of the state of nature was dominant, this feature of our legal system made it popular. But today the isolated individual is no longer taken for the center of the universe. . . . To-day, we look instead for liberty through society.¹⁷⁰

Pound asked for a law that was not so individualist, not so backward looking, and he was more interested in how common law rules might injure society: “Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood.”¹⁷¹ Or, as Pound explained it, history exercised a powerful hold on law. “[L]aw has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning.”¹⁷² Such a focus on the past was detrimental because law lagged behind public opinion. There was “the inevitable difference in rate of progress between law and public opinion.”¹⁷³ Pound’s critique and that of other realists shared one idea in common, as Morton Horwitz says, that “the law had come to be out of

168. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 26 (1910). Neil Duxbury identifies the key elements of classical legal thought as science and entrenched *laissez-faire*. DUXBURY, *supra* note 4, at 11.

169. See, e.g., Pound, *supra* note 117, at 345–46 (“This right of the individual and this exaggerated respect for his right are common-law doctrines.”).

170. *Id.* at 346.

171. Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 612 (1907).

172. Pound, *supra* note 168, at 25. Here Pound was drawing a sharper line of demarcation between sociological jurisprudence and some of the historical jurisprudence than we now see. Rabban, for instance, sees many of the historical-jurisprudence scholars supporting some reform, even though not to the same extent as the realists. See RABBAN, *supra* note 11, at 432, 523.

173. Pound, *supra* note 168. In fact, Tamanaha at one point perceptively acknowledges these differences. See *supra* text accompanying note 29.

touch with reality.”¹⁷⁴ The result of Progressive Era critiques of judges who focused on individualism undermined the majesty of the law. By 1907, Pound wrote that “Law is no longer anything sacred or mysterious.”¹⁷⁵

Pound illustrated the mechanical jurisprudence of judges with examples from civil procedure¹⁷⁶ and the principles of freedom of contract. Freedom of contract was a key part of the realist critique of formalism. Pound explained in *Mechanical Jurisprudence* how judges reasoned from basic principles about freedom of contract to their decisions:

The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty. As Mr. Olney says of the *Adair* Case, “it is archaic, it is a long step into the past, to conceive of and deal with the relations between the employer in such industries and the employee, as if the parties were individuals.” The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation. It does not observe that the result will be to produce a condition precisely the reverse of that which the conception originally contemplated. Again, the Commerce Clause of the Federal Constitution has been taken by one judge, at least, to be a constitutional enactment of a conception of free trade among the states. Deductions from this and like conceptions, assumed to express the meaning and the sole meaning of the clause, have given us rules which, when applied to the existing commercial and industrial situation, are wholly inadequate.¹⁷⁷

An important difference between formalists and realists is the purposes to which they put the insight that judges sometimes make law. For Pound it was to undermine the authority of such politically influenced opinions. Pound illustrated this point with *State v. Fire Creek Coal & Coke Co.*,¹⁷⁸ which struck down on freedom of contract grounds legislation that protected employees from having to pay more money for goods than other customers paid.¹⁷⁹

174. HORWITZ, TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 1, at 187.

175. Pound, *supra* note 171, at 610.

176. *See* Pound, *supra* note 24, at 617 & n.51 (discussing *Mescall v. Tully*, 91 Ind. 96 (1883)).

177. *Id.* at 616 (footnotes omitted). Pound also mentioned judges’ respect for property rights, Pound, *supra* note 171, at 612–13, including one case where a court found a natural right to pass property by will. *Id.* at 613 (citing *Nunnemacher v. State*, 108 N.W. 627, 629–30 (Wis. 1906), where the court, after surveying ancient European history, concluded that there is a natural right to inherit property via will).

178. 10 S.E. 288 (W. Va. 1889).

179. *Id.* at 288–89 (relying on the principles set forth in *State v. Goodwill*, 10 S.E. 285, 288 (W. Va. 1889), where the court struck down a statute that protected workers from being paid in script only redeemable at a company store); *see also* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 472 (1909) [hereinafter Pound, *Liberty of Contract*] (summarizing the holdings of *Fire*

The realists, on the other hand, turned to economics and sociology. Pound's call for a sociological jurisprudence turned from individualism to "the circumstances and conditions, social and economic," that applied to judicial principles.¹⁸⁰ Where jurists, he wrote, "are repeating individualist formulas of justice, sociologists are speaking rather of 'the enforcement by society of an artificial equality in social conditions which are naturally unequal.'"¹⁸¹ He wanted law teachers, lawyers, and judges to adopt those principles as well. In *The Nature of the Judicial Process*, Cardozo explained "that the social value of a rule has become a test of growing power and importance."¹⁸²

III. The Politics of *Beyond the Formalist-Realist Divide*

These questions about how to characterize the distinctions between the eras of formalism and realism—which seem strangely narrow and the province of a handful of scholars obsessed with legal history—may really be about contemporary politics, for there is a distinct political interpretation to *Beyond the Formalist-Realist Divide*. The book is a critique of the academic left.¹⁸³ The narrative about the career of the idea of formalism is that it was a product of the legal academy in the late 1960s and early 1970s, "a time of seething skepticism about law" among left-leaning academics.¹⁸⁴ "Once given a name, the notion of legal formalism and beliefs about 'the formalists' swept the legal culture, rapidly ensconcing the now ubiquitous formalist-realist divide."¹⁸⁵ "Any jurist with politically conservative views

Creek and Goodwill). Pound later pointed out that while the West Virginia Supreme Court saw the statute as an interference with contract, "those who had studied the actual situation were pointing out that the contrary was true in fact." Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 196 n.5 (1914). Pound continued with a quotation from a sociology textbook: "He is not free to make such a contract as might please him because, like every party to a contract, he must come to such conditions as can possibly be agreed upon. He is less free than the parties to most contracts . . ." *Id.* (quoting CARROLL D. WRIGHT, *OUTLINE OF PRACTICAL SOCIOLOGY* 226 (6th ed. 1906)); Pound, *Liberty of Contract*, *supra*, at 463 & n.54 (same).

180. Pound, *supra* note 171.

181. *Id.* (quoting LESTER F. WARD, *APPLIED SOCIOLOGY* 23 (1906)).

182. CARDOZO, *supra* note 65, at 73.

183. See TAMANAHA, *supra* note 2, at 61 ("A group of leftist scholars deeply disaffected with the law in the 1970s thus reached back to the work of the previous episode of disaffection (Pound and the legal realists) to resurrect a portrait of what was perceived to be a common enemy."). The primary problem, apparently, was "[s]everal generations of progressive or leftist critics of courts" who "constructed accounts of beliefs about judging that served their respective political agendas." *Id.* at 200.

184. *Id.* at 61.

185. *Id.* There is some tension here with the argument that the Progressives had already labeled Gilded Age jurisprudence as "mechanical jurisprudence." But I take it that the point is that the label formalism gave a new life to charges of mechanical jurisprudence.

who believes in liberty or in fidelity to legal rules,” Tamanaha writes, “is a prime candidate for being branded a formalist.”¹⁸⁶

One purpose of this book is to defeat excessive skepticism about the rule of law.¹⁸⁷ Thus, the book is a brief in favor of the belief that law has meaning and a not-so-subtle suggestion that left-wing academics of the 1970s did not believe in it. But there is substantial question about what “the rule of law” means—the breadth with which we read statutes and precedent, the extent to which we look to the purpose of a statute or a legal principle in interpreting it, the external sources such as sociological data that we look to in interpreting it, and the extent to which judges should look to the ultimate effect of their interpretation. Its purpose is to acknowledge that at many points in our history law has been biased and left some outside of its protection. History does not show continuity in jurisprudence. Many find that Gilded Age jurisprudence was not interested in what Cardozo called “social values.”¹⁸⁸ Legal history is a way of showing that we should strive to follow a comprehensive approach to legal reasoning that considers the role of humanity, the economic effects of what we do, and whether the rules judges use will effect the goals set for law.¹⁸⁹

Conclusion

Beyond the Formalist-Realist Divide aims at large targets. It seeks to erase the distinction between formalism and legal realism. Despite the dramatic and distracting claims of novelty (such as the talk of the “largely false story” and the “false ideas” that have been “widely disseminated”),¹⁹⁰ much of the story is well-accepted in legal history, such as that realism is built on legal thought stretching back to the nineteenth century. The remainder of legal history here is at best misleading; parts are outright wrong. The realist criticism of formalism was based on real political differences; there were important differences between the central tendencies of Gilded Age thought and realist thought. Other differences appear, for instance, in attitudes toward individualism, history, and sociology. The historical school of jurisprudence was largely backward looking and

186. *Id.* at 63; *see also id.* at 200 (“Several generations of progressive or leftist critics of courts (Pound, Frank, the Left in the 1960s and 1970s) constructed accounts of beliefs about judging that served their respective political agendas. . . . [T]hey shared a critical, reformist orientation that was served by attacking aspects of rule-oriented judging.”).

187. *Id.* at 9.

188. *See* CARDOZO, *supra* note 65, at 75 (listing logic, coherence, and consistency as “social values”).

189. *See id.* at 73 (stating that “the social value of a rule has become a test of growing power and importance”).

190. TAMANAHA, *supra* note 2, at 200. Perhaps the hyperbole is partly attributable to the lack of attention to detail to other scholars, so that Tamanaha thinks that he has stumbled upon new data that is in fact well established, and partly to the reading of the historical evidence; for quotations taken from context make his subjects look more alike than they actually were.

apologetic for the status quo; to the extent that realists turned to history, it served a different purpose, to delegitimize the law. Realists appealed to economics and society to delegitimize the world of classical legal thought, which emphasized freedom of contract and constitutional rights against legislatures. Realists exposed that the law of the Gilded Age was “out of touch with reality.”¹⁹¹ Across a broad spectrum, there was a rejection of irrational precedent. That correlates with the shift from the world of the pre-New Deal jurists to the world of the New Deal and the Civil Rights revolution.

191. HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1870–1960*, *supra* note 1, at 187. This emphasizes that the differences are related to goals of law—such as individualism versus society—and the techniques one uses to interpret the law—such as narrow reliance on precedent, use of history to justify a current rule, or looking to broader implications of a rule. Cardozo interpreted the differences between the formalists and realists as related to goals:

There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law. The difference from age to age is not so much in the recognition of the need that law shall conform itself to an end. It is rather in the nature of the end to which there has been need to conform.

CARDOZO, *supra* note 65, at 116 (footnote omitted).