

The Mounting Evidence Against the “Formalist Age”

Brian Z. Tamanaha*

In *Beyond the Formalist-Realist Divide*,¹ I challenge the widely held view that the American legal culture at the turn of the twentieth century was dominated by belief in legal formalism, which the legal realists came on the scene to shatter. This narrative has been repeated innumerable times by jurisprudents, political scientists, legal historians, and jurists generally. Several political scientists write,

Until the twentieth century, most lawyers and scholars believed that judging was a mechanistic enterprise in which judges applied the law and rendered decisions without recourse to their own ideological or policy preferences. . . . In the 1920s, however, a group of jurists and legal philosophers, known collectively as “legal realists,” recognized that judicial discretion was quite broad and that often the law did not mandate a particular result.²

A legal historian observes, “Formalist judges of the 1895–1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics. . . . Legal Realists of the 1920s and [19]30s, tutored by Holmes, Pound, and Cardozo, devastated these assumptions”³

My book argues that the standard image of the so-called formalist age is largely untrue. Professor Brophy, a legal historian, argues in *Did Formalism Never Exist?* that I am wrong.⁴ To engage we must first have a conception of “legal formalism.”

I. What Was “Legal Formalism”?

Although characterizations of legal formalism vary, they share a defining core of propositions about the nature of law and judicial decision making. To put it concisely, law is logically ordered, autonomous, and

* William Gardiner Hammond Professor of Law, Washington University School of Law.

1. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010). This Response pulls together key parts of a more extensive argument and body of evidence presented in Chapters One through Five of the book.

2. VIRGINIA A. HETTINGER, STEFANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT* 30 (2006).

3. WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988).

4. Alfred L. Brophy, *Did Formalism Never Exist?*, 92 *TEXAS L. REV.* 383, 385 (2013) (book review).

gapless, and judges render decisions through mechanical rule application. The following is an account of legal formalism by Hanoch Dagan, a legal theorist who has written extensively on legal realism:

Classical formalism – culturally personified in the figure of Christopher Columbus Langdell of Harvard Law School – stands for the understanding of law as an autonomous, comprehensive, and rigorously structured doctrinal science. On this view, law is governed by a set of fundamental and logically demonstrable scientific-like principles. Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world, and the predominance of formal logic within this autonomous universe.

In formalism, law is ‘an internally valid, autonomous, and self-justifying science’ in which right answers are ‘derived from the autonomous, logical working out of the system.’ Law is composed of concepts and rules. With respect to legal concepts, formalism endorses ‘a Platonic or Aristotelian theory,’ according to which ‘a concept delineates the essence of a species or natural kind.’ Legal rules, in turn, embedded either in statutes or in case law, are also capable of determining logically necessary legal answers: induction can reduce the amalgam of statutes and case law to a limited number of principles, and legal scientists can then provide right answers to every case that may arise using syllogistic reasoning – classifying the new case into one of these fundamental pigeonholes and deducing correct outcomes.

Because legal reasoning is characterized by these logical terms, internal to it and independent of concrete subject matter, formalism perceives legal reasoners as technicians whose task and expertise is mechanical: to find the law, declare what it says, and apply its pre-existing prescriptions. Because these doctrinal means generate determinate and *internally* valid right answers, lawyers need not – indeed, should not – address social goals or human values.⁵

“The realist project begins with a critique of this formalist conception of law,” Dagan adds.⁶

This is an elaborate theoretical reconstruction of what legal formalism held, rather than a statement of the beliefs of any jurists in particular. As a theoretical construction, it cannot itself be empirically falsified. However, it is based upon actually held beliefs about law that purportedly were dominant at the turn of the twentieth century, and Dagan cites historical

5. Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611–12 (2007) (footnotes omitted).

6. *Id.* at 612.

sources to back his representations.⁷ Thus, if it turns out that beliefs along these lines were not widespread among jurists of the day, then doubt is cast on the standard story about the formalist age.

A crucial factor in the entrenchment of this narrative is that the conventional image of the formalist age crossed over different disciplines. The story originated in legal history in the 1970s, as I will elaborate, and then quickly spread to legal theory, political science, and throughout the legal culture. Once the story went outside legal history, it took on a life of its own, shorn of nuance and untouched by subsequent refinements in legal history. As a jurist investigating the formalist–realist antithesis, the inquiry I pursued in the book was whether the conventional image of the formalist age is correct: Did jurists at the time believe law is logically ordered, autonomous, and gapless and judging is mechanical?

II. The Origins of the “Formalist Age” Narrative

Grant Gilmore’s *The Ages of American Law* was an immensely influential account of the formalist age, cited over a thousand times in law reviews.⁸ He divided American legal thought into three periods.⁹ Running from the Revolution to the Civil War, the first period was as an “Age of Discovery,” during which courts flexibly applied rules and principles in a “Grand Style” to adjust law to changing circumstances and meet social needs.¹⁰ In the second period, which began “at about the time of the Civil War,” the “Grand Style lost out to a Formal Style.”¹¹ The 1920s then witnessed “a root-and-branch rejection of the formalism or . . . the conceptualism of the proceeding period,”¹² giving way to a more realistic approach. Gilmore characterized the formal style as follows:

The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor

7. See, e.g., *id.* at 611–12 (citing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992); Thomas C. Grey, *Modern American Legal Thought*, 106 *YALE L.J.* 493 (1977) (book review); D. Kennedy, *Legal Formalism*, in 13 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 8634 (Neil J. Smelser & Paul B. Baltes eds., 2001)).

8. TAMANAHA, *supra* note 1, at 17–18.

9. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 11 (1977).

10. See *id.* at 12, 19–22 (discussing the “Grand Style” and titling Chapter Two the “Age of Discovery” while discussing the period before the Civil War).

11. *Id.* at 12.

12. *Id.*

corrections can be made, but the truth, once arrived at, is immutable and eternal.¹³

These were the defining faiths of the formalist age, according to Gilmore.

Another influential, early formulation was Morty Horwitz's 1975 essay, *The Rise of Legal Formalism*. Similar to Gilmore, Horwitz argued that early in the nineteenth century, judges developed private law in a utilitarian and instrumentalist fashion to facilitate economic growth; after the mid-century, courts shifted to a strictly formalistic style to entrench legal benefits for commercial interests and prevent the use of law for redistributive purposes.¹⁴ "There were, in short, major advantages in creating an intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable, and which, by making 'legal reasoning seem like mathematics,' conveyed 'an air . . . of . . . inevitability' about legal decisions."¹⁵

That decade saw a burst of pieces about legal formalism by prominent legal theorists and historians. Duncan Kennedy published a theoretical analysis of "Legal Formality."¹⁶ William Nelson elaborated on the rise of legal formalism in relation to antislavery cases.¹⁷ Legal formalism was a central theme in *Justice Accused*, Robert Cover's book on judicial treatment of slavery cases.¹⁸ These scholars were politically on the left, with Kennedy and Horwitz as founding members of Critical Legal Studies.¹⁹ Several of these works had an openly presentist bent, with the authors

13. *Id.* at 62.

14. Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 251–52 (1975).

15. *Id.* at 252 (omission in original).

16. See Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973) (describing legal formality as a "system . . . that takes it as a premise that there are only two processes of decision a theorist need take into account when he sets out to build a theory of social order. These are rule application and decision according to purposes, or substantive rationality"). Although circulated among historians and theorists at the time, Duncan Kennedy's influential book on this topic, *The Rise & Fall of Classical Legal Thought*, was not published until 2006. A piece of this book was published at the time in Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980), reprinted in DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 1–30 (2006).

17. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 518, 548 (1974) (describing how judging in the mid-nineteenth century turned from instrumentalism to formalism when dealing with issues of slavery).

18. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 149–91 (1975) (comparing the history of formalism and the transition to positivism).

19. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516, 1523 (1991); see also John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 392, 396 (1984) (discussing Kennedy's and Horwitz's roles in establishing Critical Legal Studies).

expressing alarm about what they saw as a modern reemergence of legal formalism among conservative judges and legal thinkers.²⁰

Their account of the formalist age, which linked back to preexisting arguments by Oliver Wendell Holmes, Roscoe Pound, and the legal realists, quickly gained acceptance. As Gilmore triumphantly declared in 1979,

[Recent historical research] has produced one proposition, which, so far as I know, had never been heard of before World War II, but which has, with extraordinary speed, become one of the received ideas of the 1970s. That is the proposition that the fifty year period from the Civil War to World War I was one of *legal formalism*.²¹

This broad consensus was swiftly achieved despite an odd absence in the historical record. If it was indeed the dominant view, one would expect to see many declarations by jurists that law is logically ordered, autonomous, and gapless and that judging is mechanical. But such statements are hard to find. Every theory of law that one can point to has a host of advocates who explicitly articulate and justify its core propositions—with the striking exception of legal formalism. As legal theorist Tony Sebok noted, “Formalism, so to speak, does not really have an identity of its own: As a theory of law, it exists only as a reflection of scholars like Holmes, Pound, Llewellyn and Frank.”²² Statements about formalism almost invariably come from the pens of critics attacking judicial decisions.²³ Historical accounts of the dominance of formalism, it turns out, are theoretical constructions nearly devoid of supportive avowals from the jurists of the day.

In response to this contention, Professor Brophy insists that the formalists “certainly speak for themselves,”²⁴ yet he does not supply any statements from jurists affirming that law is logically ordered, autonomous, and gapless and that judging is mechanical. Ironically, Brophy inadvertently confirms my argument, when he sets out to show the dominance of formalism, by relying on extended quotes from Harriet Beecher Stowe and Roscoe Pound criticizing judicial reasoning.²⁵ This is how the image of the formalist age was constructed: built on progressive objections to conservative court decisions.

20. See TAMANAHA, *supra* note 1, at 50–62 (drawing a connection between criticism of legal formalism by politically left-leaning legal scholars and the civil rights and antiwar protests during the 1960s and 1970s).

21. Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 441 (1979) (emphasis added).

22. ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 57 (1998).

23. See, TAMANAHA, *supra* note 1, at *id.* at 62–63 (discussing how formalists such as Langdell and Joseph Beale attacked several judicial opinions using formalist principles).

24. Brophy, *supra* note 4, at 395.

25. See *id.* at 402, 407–09.

Legal historians also point to legal decisions as proof of the formalist age. As Lawrence Friedman worried, however, “‘Formalism’ is hard to measure; and there is always a nagging doubt whether or not this is a useful way to characterize the work of the judges.”²⁶ Lacking clear criteria, what makes a decision “formalistic” is in the eye of the beholder—and it is always a critic who levels the charge.²⁷ A study of written decisions of the turn-of-the-century Supreme Court, furthermore, found that different justices used different styles of analysis, making it dubious to lump them under a single “formalist” label.²⁸ Another reason to be cautious is that judicial opinions are stylized presentations that justify rulings and provide legal guidance; hence one cannot extrapolate theories of law or judicial decision making from modes of opinion writing.²⁹ Nor can the full panoply of supposed formalist beliefs about law be derived solely from written opinions. To establish that, we must know in greater detail what they actually thought about law and judging.

III. The Evidence Against the “Formalist Age”

Many jurists at the turn of the century expressed consummately realistic accounts of law and judging. Even jurists who supposedly were leading legal formalists said surprisingly realistic things. Legal historian William LaPiana writes:

The [historical-school-of-thought] legal theories of thinkers like Hammond, Cooley, Bliss, Tiedeman, Phelps, Dillon, and Carter provide the basis for a “formalistic” view of law and judging. As long as the ultimate repository of law is declared to be a body of principles beyond the reach of political processes, especially legislative processes, and once the guarantees of the Constitution are proclaimed to embody these unwritten principles, the decision of cases can become the mechanical application of transcendent rules.³⁰

To test LaPiana’s assertions, I will let the formalists he identified speak for themselves.

William G. Hammond, on the occasion of his installation as Dean and Professor at St. Louis Law School in 1881, said,

It is useless for judges to quote a score of cases from the digest to sustain almost every sentence, when *every one knows* that another

26. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 623 n.39 (2d ed. 1985).

27. See TAMANAHA, *supra* note 1, at 56–57.

28. *Id.* at 56 & 215 n.92 (citing Walter F. Pratt, *Rhetorical Styles on the Fuller Court*, 24 AM. J. LEGAL HIST. 189 (1990), which studies a sample of Supreme Court terms from 1895 to 1905 and reaches the same conclusion).

29. *Id.* at 56, 57 & 215 n.93 (citing John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924)).

30. William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 557 (1992).

score might be collected to support the opposite ruling. The perverse habit of qualifying and distinguishing has been carried so far that all fixed lines are obliterated, and a little ingenuity in stating the facts of a case is enough to bring it under a rule that will warrant the desired conclusion. . . . [T]he most honest judge knows that the authorities with which his opinions are garnished often have had very little to do with the decision of the court—perhaps have only been looked up after that decision was reached upon the general equities of the case. . . . He writes, it may be, a beautiful essay upon the law of the case, but the real grounds of decision lie concealed under the statement of facts with which it is prefaced. It is this power of stating the facts as he himself views them which preserves the superficial consistency and certainty of the law, and hides from careless eyes its utter lack of definiteness and precision.³¹

This is as skeptical as anything the legal realists would say five decades later. And notice that Hammond assumed his audience would agree about the ubiquity of conflicting precedents (“every one knows”).

Christopher Tiedeman was similarly blunt in 1896:

If the Court is to be considered as a body of individuals, standing far above the people, out of reach of their passions and opinions, in an atmosphere of cold reason, deciding every question that is brought before them according to the principles of eternal and never-varying Justice, then and then only may we consider the opinion of the Court as the ultimate source of the law. This, however, is not the real evolution of municipal law. *The bias and peculiar views of the individual judge do certainly exert a considerable influence over the development of the law.* . . . The opinion of the court, in which the reasons for its judgment are set forth, is a most valuable guide to a knowledge of the law on a given proposition, *but we cannot obtain a reliable conception of the effect of the decision by merely reading this opinion. This thorough knowledge is to be acquired only by studying the social and political environment of the parties and the subject matter of the suit, the present temper of public opinion and the scope and character of the popular demands, as they bear upon the particular question at issue.*³²

Law is not autonomous, in Tiedeman’s view; nor is judging mechanical.

In 1890 James C. Carter recognized gaps, uncertainty, and the necessity to meet social needs:

It is in *new cases* that nearly all the difficulty in ascertaining and applying the law arises. The great mass of the transactions of life are

31. W.G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. 400, 412–13 (1881) (emphasis added).

32. Christopher G. Tiedeman, *The Doctrine of Stare Decisis*, 3 U. L. REV. 11, 19–20 (1896) (emphasis added).

indeed repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigation springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance Several different rules—all just in their proper sphere—are competing with each other for supremacy.³³

In new situations, “[t]he standard of justice must be *adapted* to human affairs Systems of law must be shaped in accordance with the actual usages of men.”³⁴ Legal uncertainty cannot be eliminated, Carter observed, because new facts arise and society continually changes. In these situations, the law is not known until it “has been subjected to judicial decision.”³⁵

Judge Thomas Cooley wrote in 1886 that legal uncertainty is inevitable:

[T]he law is uncertain in its administration because in the infinite variety of human transactions it becomes uncertain which of the opposing rules the respective parties contend for should be applied in a case having no exact parallel, and because it cannot possibly be known in advance what view a court or jury will take of questions upon which there is room for difference of opinion.³⁶

Even with respect to the interpretation of clear legal rules, the cases can be “numerous and variant;”³⁷ “just and well-instructed minds” can differ on how to interpret statutes.³⁸ These difficulties in the judicial application of law “must always exist so long as there is variety in human minds, human standards, and human transactions.”³⁹ Cooley also acknowledged that judges make law: “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

33. James C. Carter, *The Provinces of the Written and the Unwritten Law*, 24 AM. L. REV. 1, 15 (1890) [hereinafter Carter, *Provinces*]; see also JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 69–72 (1907) [hereinafter CARTER, *LAW*] (making similar statements by way of a concrete example).

34. Carter, *Provinces*, *supra* note 33.

35. CARTER, *LAW*, *supra* note 33, at 279.

36. Thomas M. Cooley, *Codification*, 20 AM. L. REV. 331, 334 (1886), *as excerpted in Another View of Codification*, 2 COLUM. JURIST 464, 465 (1886).

37. *Id.*

38. *Id.*

39. *Id.* at 465–66.

‘*judge-made law.*’”⁴⁰ When unanticipated situations arise, Cooley candidly stated, “[I]t is evident that what the law was to be could not have been known in advance of decisions, and it is also evident that when declared by the court its effect must be retroactive.”⁴¹

Judge John Dillon, in 1886, portrayed the law as messy:

It is manifest from the foregoing discussion, that the Judges from the very nature of their functions, can not develop the general principles of the law so as to take in the entire subject, or do anything except (if you will pardon the expression) automatically (that is depending upon the accident of cases arising for judicial action) towards giving anything like completeness to the law, or any branch of it. Not only is the case law incomplete, but the MULTIPLICITY AND CONFLICT OF DECISIONS is one of the most fruitful causes of the unnecessary uncertainty, which characterizes the jurisprudence of England and America. Thousands of decisions are reported every year. An almost unlimited number can be found upon almost any subject. What any given case decides, must be deduced from a careful examination of the exact facts, and of the positive legislation, if any, applicable thereto. A general principle will be found adjudged by certain courts. Other courts deny or doubt the soundness of the principle. Exceptions are gradually but certainly introduced. Almost every subject is overrun by a more than tropical redundancy of decisions, leaving the most patient investigator entangled in doubt.⁴²

Like Judge Cooley, Dillon acknowledged that judges make law: “[S]tupendous work of *judicial legislation* has been silently going on” for a “long period.”⁴³

The jurists quoted above have been identified as seminal purveyors of legal formalism. Yet their actual statements about law and judging are directly contrary to the standard image of the formalist age.

To explain away the many realistic depictions of law and judging I quote in the book, Professor Brophy suggests that I merely uncovered more examples of early realism, which does not refute legal formalism because there are always exceptions to a dominant view.⁴⁴ Others have raised this critique. Professor Frederick Schauer objects, “[A]s with any distinction, even multiple counterexamples on one or the other side do not undercut the plausibility of a probabilistically accurate distinction. It is sometimes warm

40. *Id.* at 465 (emphasis added).

41. *Id.*

42. John F. Dillon, *Codification*, 20 AM. L. REV. 29, 36 (1886) (first emphasis omitted).

43. *Id.* at 32.

44. See Brophy, *supra* note 4, at 398–99 (claiming that behind my examples of realist-sounding work were similar thinkers to Holmes, Pound, and Cardozo that provided the foundation for latter generations to build their ideas upon).

in January (in the northern hemisphere) and cold in June, but January is still, in general, colder than June.”⁴⁵

A few counterexamples undoubtedly would not suffice. But that begs the essential question: What would be enough to falsify the conventional view of the formalist age? If every showing—no matter how plentiful—is dismissed as a counterexample, the story is impervious to refutation; immune from the evidence.

I quote *dozens* of jurists—including many judges—in leading law journals and speeches before the bar uttering remarkably realistic statements about law and judging.⁴⁶ I will repeat just two examples here, from among many in the book, to reveal awareness on par with views today. Columbia law professor Munroe Smith, in 1887, frankly described how judges alter law while claiming to adhere to *stare decisis*:

[W]hen new law is needed, the courts are obliged to “find” it, and to find it in old cases. This can commonly be done by re-examination and re-interpretation, or, at the worst, by “distinction.” By a combination of these means, it is even possible to abrogate an old rule and to set a new one in its place. When the old rule is sufficiently wormholed with “distinctions,” a very slight re-examination will reduce it to dust, and a re-interpretation of the “distinguishing” cases will produce the rule that is desired.⁴⁷

Or consider an article published in the leading *American Law Review* in 1893 with the transparently skeptical title, *Politics and the Supreme Court of the United States*: “Viewing the history of the Supreme Court at large, and stating conclusions somewhat broadly,” the author wrote, “it may be said that its adjudications on constitutional questions have in their general tendencies conformed, in a greater or lesser degree, to the maxims and traditions of the political party whose appointees have, for the time being, dominated the court.”⁴⁸ The author criticized several Supreme Court opinions as “vague[,]” “weak, incoherent, and uncandid,”⁴⁹ better explained not by the stated legal reasoning but by the political views of the judges. “[T]o say that no political prejudices have swayed the court[] is to maintain that its members have been exempt from the known weaknesses of human nature, and above those influences which operate most powerfully in

45. Frederick Schauer, *Legal Realism Untamed*, 91 TEXAS L. REV. 749, 753 n.18 (2013) (book review).

46. See TAMANAHA, *supra* note 1, at 32–33 (quoting jurists and judges including Wilbur Larremore, Edward Whitney, and Judge Emlin McClain); *id.* at 34–35 (quoting various jurists including Judges Oscar Fellows and Seymour Thompson); *id.* at 71–79, 125–31, 143–45, 183–86 (providing many more examples).

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

48. Walter D. Coles, *Politics and the Supreme Court of the United States*, 27 AM. L. REV. 182, 207 (1893).

49. *Id.* at 204–05.

determining the opinions of other men.”⁵⁰ Especially when no clear precedent exists, he asserted, a judge’s conclusions “will be largely controlled by the influences, opinions and prejudices to which he happens to have been subjected.”⁵¹

Many realistic observations about law and judging from the period were left out of the book because it seemed redundant to pile example upon example (or so I thought). Let me now add a set of observations from 1906, not included in the book, by Chief Judge Walter Clark of the North Carolina Supreme Court, a progressive critic of conservative courts:

But the passage of a judge from the bar to the bench does not necessarily destroy his prejudices or his predilections. . . . [A]nd usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims, this will unconsciously, but effectively, be reflected in the decisions they make. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench.⁵²

The due process and equal protection clauses, Clark said, “are very elastic and mean just whatever the court passing upon the statute thinks most effective for its destruction.”⁵³ He continued, “This, of course, makes of vital importance the inquiry, ‘What are the beliefs of the majority of the court on economic questions, and what happens to be their opinion of a sound public policy?’”⁵⁴

In addition to citing *many* realistic statements along these lines, in the book I also directly refute key claims Gilmore made about beliefs in the formalist age,⁵⁵ like his assertion that it “became an article of faith, for lawyers and non-lawyers alike,” that “courts never legislate.”⁵⁶ I cite over a dozen articles and statements from the 1870s through the turn of the century indicating that judicial legislation was widely acknowledged,⁵⁷ including a *Harvard Law Review* article published in 1891 entitled, *Judicial*

50. *Id.* at 182.

51. *Id.* at 189–90.

52. Walter Clark, Some Defects of the Constitution of the United States, Address to the Law Dep’t of the Univ. of Pa. (Apr. 27, 1906), in 2 THE PAPERS OF WALTER CLARK 553, 569–70 (Aubrey Lee Brooks & Hugh Talmage Lefler eds., 1950).

53. *Id.* at 577.

54. *Id.*

55. See TAMANAHA, *supra* note 1, at 17–22.

56. GILMORE, *supra* note 9, at 15.

57. See TAMANAHA, *supra* note 1, at 19–20.

*Legislation: Its Legitimate Function In Developing the Common Law.*⁵⁸ A commentator in 1884 stated that courts for a long time “have pretended that they simply declared the law, and did not make the law; yet *we all know that this pretense is a mere fiction.*”⁵⁹ Prominent judges also admitted this, as stated earlier with quotes from Cooley and Dillon.⁶⁰ In a 1903 Address to the American Bar Association, Federal Circuit Judge LeBaron Colt forthrightly stated judges “have carried on judicial legislation from the infancy of the law in order that it might advance with society.”⁶¹

My case is much stronger than producing dozens of realistic statements and refuting core claims about purportedly dominant formalistic beliefs. As I showed, the very jurists that historians have identified as *leading legal formalists*, themselves, offered realistic accounts of law and judging—Hammond, Tiedeman, Carter, Cooley, and Dillon. They acknowledged gaps and inconsistencies in the law, that law could point to different outcomes, that judges make law, that law should serve social needs, that social views of justice and policy influence the development of law, and even (as Tiedeman stated) that the personal biases of judges have an impact on their decisions.⁶² These jurists did not agree among themselves on all points, and several expressed highly idealized views of law as something to strive toward, but none of them described law as logically ordered, autonomous, and gapless and or judging as mechanical. Their depictions of law and judging bear no resemblance to Dagan’s characterization of legal formalism.

In light of this, the proper way to frame Schauer’s analogy is not to presuppose it is January and discount the occasional warm days, but to start with a clean slate and try to determine what month it is by tallying cold (formalism) and warm (realism) days. What the evidence shows is a great deal of explicit realism about law and judging and a scarcity of statements embracing legal formalism. Judging from the evidence, it looks like June.

A final piece of circumstantial evidence bears mention. There are multiple references in this period to significant advances the legal system had recently made in overcoming its earlier formalism.⁶³ An 1876 article observed that “the archaic period . . . is the period of rigid formalism” and

58. See Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172, 172 (1891) (arguing that judicial legislation is a necessary feature of the legal system).

59. *Current Topics*, 29 ALB. L.J. 481, 481 (1884) (emphasis added) (quoting Mr. C.B. Seymour).

60. See *supra* notes 36, 41–42 and accompanying text.

61. LeBaron B. Colt, United States Circuit Judge for the First Circuit, Address at the Am. Bar Ass’n Meeting at Hot Springs, Va.: Law and Reasonableness, in 37 AM. L. REV. 657, 674 (1903).

62. See TAMANAHA, *supra* note 1 at 84–89 (discussing the views of multiple legal realists who acknowledge that law is a reflection of social processes and serves social needs).

63. See *id.* at 45–48 (outlining some historical criticism of formalism and a transition away from formalism).

optimistically opined that the U.S. common law system had progressed beyond the formalist stage.⁶⁴ A jurist in 1895 identified several instances of “a triumph of the spirit of the law over its early formalism.”⁶⁵ A jurist in 1893 noted “the *Zeitgeist* and its dislike of formalism.”⁶⁶ These comments came in the heart of what we now think of as the formalist age.

IV. What Brophy’s Response Ignores

Brophy offers several “examples of formalism” to counter my evidence. He discusses the *State v. Mann*⁶⁷ opinion written by Judge Thomas Ruffin around 1830, Thomas Cobb’s critique of slavery law published in 1858, the *Jackson v. Bulloch*⁶⁸ case of 1837, and an 1854 Address by John Randolph Tucker.⁶⁹ Nothing in what he says shows that jurists at the time believed law was logically ordered, autonomous, and gapless and judges rendered decisions mechanically. Most of what he conveys involves objections by critics of slavery decisions.

More to the point, his examples are from the wrong period. Horwitz identified legal formalism with the second half of the twentieth century, describing “extremely deep and powerful currents which moved American law to formalism *after* 1850.”⁷⁰ According to Gilmore, “the fifty year period from the Civil War to World War I was one of legal formalism.”⁷¹ Another legal historian who has written about legal formalism, William Wiecek, titles a chapter, “The Formalist Era, 1873–1937.”⁷² That was the time period I examined in the book. Even if I were to accept Brophy’s contention that judges in antebellum slavery cases were formalistic, that does not tell us legal formalism was the dominant view of law at the turn of the century.

Brophy’s second main evidence for formalism, in the section “Defining Formalism,” relies on Roscoe Pound’s criticisms of courts in *Mechanical Jurisprudence* and other articles.⁷³ Pound is indeed a crucial figure, and Brophy’s argument exemplifies why. The uncritical acceptance of Pound’s representations by historians and theorists lies at the heart of the story of the formalist age. Pound claimed that the legal culture had

64. *Reform in Legal Education*, 10 AM. L. REV. 626, 626 (1876).

65. Alex Thomson, *The Historical and Philosophical Methods in Jurisprudence*, 7 JURID. REV. 66, 69–70 (1895).

66. Edward Jenks, *On the Early History of Negotiable Instruments*, 9 L.Q. REV. 70, 76 (1893).

67. 13 N.C. (2 Dev.) 263 (1829).

68. 12 Conn. 38 (1837).

69. Brophy, *supra* note 4, at 401–06.

70. Horwitz, *supra* note 14, at 264 (emphasis added).

71. Gilmore, *supra* note 21.

72. WIECEK, *supra* note 3, at 110.

73. Brophy, *supra* note 4, at 406–09.

embraced the idea of scientific law. “[T]he marks of a scientific law are, conformity to reason, uniformity, and certainty.”⁷⁴ The danger of scientific law is a “petrification.”⁷⁵ Contemporary U.S. law was mired in this state, failing to adequately adjust at a time of rapid social change.⁷⁶ Pound argued that historical jurisprudence and analytical jurisprudence, the main legal theories of the day, exacerbated stultification by emphasizing abstract concepts and logical analysis.⁷⁷

Mechanical Jurisprudence, I assert in the book, “was seminal in creating the image of judging as an exercise in mechanical, deductive reasoning.”⁷⁸ In a chapter entitled “The Myth About ‘Mechanical Jurisprudence,’” and across two additional chapters, I make four arguments about the unreliability of Pound’s characterizations.⁷⁹

The first problem is that, when elaborating legal science and mechanical jurisprudence, Pound extensively referred to German sources and views of law and judging.⁸⁰ “The elementary error made by Pound, Frank, and others who drew liberally from German discussions when constructing the image of the formalist age is that these two systems were dissimilar in design, construction, and orientation.”⁸¹ To show this error, I quote a passage from Max Weber setting forth the tenets of present day legal science in Germany—“a logically clear, internally consistent, and, at least in theory, gapless system of rules”⁸²—which resembles Dagan’s depiction of U.S. legal formalism. Weber noted, however, “not every body of law (e.g., English law) claims that it possesses the features of a system as defined above.”⁸³ The unsystematic state of U.S. law was captured in 1907 by James Bryce, author of *American Commonwealth*:

The Common Law is admittedly unsymmetrical. Some people might call it confused There are general principles running through it, but these are often hard to follow, so numerous are the exceptions.

74. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

75. *Id.* at 606.

76. *See id.* at 611–12 (arguing that the United States was not reexamining the conceptions behind the common law and that the law had become a “body of rules”).

77. *See id.* at 607–13 (outlining factors that should be considered in applying the law rather than following mechanical rules).

78. TAMANAHA, *supra* note 1, at 27.

79. These arguments are set forth in *Beyond the Formalist-Realist Divide* in Chapters Two, Three, and Four. *See id.* at 24–26 (arguing that Pound relied on an idealized version of civil code legal theories); *id.* at 27–43 (arguing that Pound was arguing against a position that nobody at the time held); *id.* at 44–63 (arguing that a mischaracterization of formalist views was inspired by political concerns).

80. *See* Pound, *supra* note 74, at 606, 610, 612.

81. TAMANAHA, *supra* note 1, at 26.

82. 2 MAX WEBER, *ECONOMY AND SOCIETY* 656 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1922). The full passage I quote is from WEBER, *supra*, at 657–58. *See* TAMANAHA, *supra* note 1, at 25 & 208 n.100.

83. WEBER, *supra* note 82.

There are inconsistencies in the Common Law, where decisions have been given at different times and have not been settled by the highest Court of Appeal or by the Legislature. There are gaps in it.⁸⁴

The second problem is that Pound interpreted historical jurisprudence through its German sources, giving it a metaphysical cast that was absent in the Anglo–American version. Pound asserted that this metaphysical–historical jurisprudence had a substantial influence on judges in the final quarter of the nineteenth century.⁸⁵ The eminent English historical jurist Frederick Pollock expressed incredulity at these claims: “So, when I am confronted with Professor Pound’s unqualified assertion that a historical-metaphysical doctrine ‘was dominant in the science of law throughout the [nineteenth] century,’ I feel tempted to ask which of us is standing on his head.”⁸⁶

Pound’s claim that jurists believed law is a science was a third problem. While jurisprudence scholars might have been enamored with this idea, practitioners demurred. The editors of the *Albany Law Journal* noted the contrast in 1874: “This view[—law is a science—]is now taken by all theoretical legists; but it has not come down to the professional level, and for the most part, the jurist and the practitioner do not stop to inquire whether their system is a science.”⁸⁷ A commentator put it more colorfully in 1895: “Much debate has been expended on this question[—Is law a science?]. The assertion that it is, by jurists having high ideals, has provoked no little repugnance among practical lawyers.”⁸⁸

The fourth and most profound problem with Pound’s claim that judges reasoned mechanically is that many jurists at the time said the opposite, owing to the proliferation of inconsistent precedents.⁸⁹ An article published in the *Yale Law Journal* observed, “The truth is that, much in the same manner that expert witnesses are procurable to give almost any opinions that are desired, judicial precedents may be found for any proposition that a counsel, or a court, wishes established, or to establish.”⁹⁰ To “a large degree,” the author continued, “courts do what they think is just in the case at bar and cite the nearest favorable previous decisions as pretexts.”⁹¹ An article in the *Michigan Law Review* similarly contended, “[T]he courts in general tend more and more to decide each case according to their own

84. James Bryce, *The Influence of National Character and Historical Environment on the Development of the Common Law*, 19 GREEN BAG 569, 571 (1907).

85. ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 34 (1923).

86. Frederick Pollock, *A Plea for Historical Interpretation*, 39 L.Q. REV. 163, 164 (1923).

87. *Is the Law a Philosophy, a Science, or an Art?*, 10 ALB. L.J. 371, 371 (1874).

88. *Is Law a Science?*, 2 U. L. REV. 257, 257 (1895).

89. See TAMANAHA, *supra* note 1, at 32–36 (examining contemporaneous articles and jurists’ comments).

90. Wilbur Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 312, 317–18 (1905).

91. *Id.* at 318.

ideas of fairness as between the parties to that case, and to pass the previous authorities by in silence, or dispose of them with the general remark . . . that they are not in conflict.”⁹² This is not mechanical reasoning.

Professor Brophy cites Pound’s arguments as authority without responding to any of the questions I raise about their reliability. Brophy also fails to address the evidence presented in Professor David Rabban’s recent book, *Law’s History*. “[I]n many significant respects,” Rabban asserts, “Pound was misleading or inaccurate in characterizing his predecessors.”⁹³ Rabban continues:

His views about the judicial decisions might have contributed to his assumption of a pervasive deductive formalism that extended to legal scholarship as well, even though the legal scholarship itself did not support that conclusion.

Generations of scholars perpetuated Pound’s association of deductive formalism with late nineteenth-century American legal thought. In his own analysis of deductive formalism, Pound focused on European rather than American scholars, treating the Americans as derivative imitators. Scholars after Pound barely explored nineteenth-century thought at all, invoking deductive formalism mostly as an epithet against which to define their own thought as anti-formalist.⁹⁴

Exactly right. Rabban’s showing, which is far more detailed than mine, prompted legal historian Robert Gordon to comment, “[T]he standard picture of this era’s legal scholars as political reactionaries and abstract deductive ‘formalists’ cannot possibly survive this splendid and important book.”⁹⁵

92. Edward B. Whitney, *The Doctrine of Stare Decisis*, 3 MICH. L. REV. 89, 100 (1904).

93. DAVID M. RABBAN, *LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* 430 (2013). I was startled to read Brophy’s assertion that my review of Rabban’s book had a “hyperbolic tone.” Brophy, *supra* note 4, at 390 n.63. As evidence, Brophy points out that I use the terms “unpersuasive,” “deeply problematic,” and “dubious.” *Id.* I apologize if those terms appear excessively harsh to legal historians. That was not my intention. In jurisprudence discussions, which typically are blunt, using terms like “unpersuasive” or “dubious” is not considered hyperbole. The book, in my view, was powerful and convincing. My objections were narrow. I disagreed with Rabban’s claim that Pound’s advocacy of sociological jurisprudence was a major factor in the demise of historical jurisprudence. See Brian Z. Tamanaha, *The Unrecognized Triumph of Historical Jurisprudence*, 91 TEXAS L. REV. 615, 618–24 (2013).

94. RABBAN, *supra* note 93, at 525. Rabban bases his findings on a review of the scholarship, not a study of legal decisions. As I argued, legal decisions alone cannot be a basis for demonstrating the formalist age.

95. Robert W. Gordon, Review of *Law’s History: American Legal Thought and the Transatlantic Turn to History*, CAMBRIDGE UNIVERSITY PRESS, <http://www.cambridge.org/us/academic/subjects/history/american-history-1861-1900/laws-history-american-legal-thought-and-transatlantic-turn-history>.

Legal historians and theorists who continue to hold the story of the formalist age, like Professors Brophy and Schauer, cannot make their case with a few skeptical objections to my book. Now they must answer Rabban. And they must address other recent showings by historians that question the standard image of the formalist age, including Bruce Kimball’s demonstration that Langdell has been distorted⁹⁶ and Lewis Grossman’s showing that Carter expressed realistic views of law.⁹⁷

V. The Politics of the Formalist Age

My argument raises a puzzle: if the formalist age never was, what were the legal realists challenging? Schauer objects, “[T]o claim that Arnold, Cook, Douglas, Frank, Llewellyn, Oliphant, Sturges, Yntema, and many others were all aiming at a phantom target seems a stretch.”⁹⁸ Their targets were not phantoms, but very real. They criticized law as too individualistic in orientation and common law-centered at a time when legislation and administrative regulations were becoming predominant, and they objected that (conservative) judges were too focused on the application of rules without attention to modern social circumstances.⁹⁹ Their target was not, however, the full blown “formalist age” that we think of today (per Dagan). As Gilmore noted, that image was not formulated by the legal realists and was not established until the 1970s.¹⁰⁰

I argue in the book that the standard image of the formalist age is the product of several generations of progressive critics of law and courts building on the objections of their predecessors. “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.”¹⁰¹ “The particular agenda of each generation differed, but across

96. See Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 373–94 (2007) (attacking Holmes’s characterization of Langdell as a formalist); Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277, 329 (2004) (criticizing the “deeply sedimented mound of [Langdell] scholarship” for neglecting and consequently obscuring the original source material).

97. For Grossman’s challenges to the portrayal of James Carter, see Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 183–87 (2007). Cf. Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 216–23 (1998) (showing that throughout the nineteenth century the creative aspects of judging were well recognized).

98. Schauer, *supra* note 45.

99. I elaborate on what the realists were criticizing in TAMANAHA, *supra* note 1, at 93–106.

100. Frank is the lone exception because he did construct a phantom: “The Basic Legal Myth.” As I detail in the book, in addition to distorting Beale’s position, when constructing this image Frank excised key passages from Henry Maine’s *Ancient Law* in a way that reversed Maine’s meaning. *Id.* at 14–17.

101. *Id.* at 61.

these differences they shared a critical, reformist orientation that was served by attacking aspects of rule-oriented judging.”¹⁰² Pound’s “mechanical jurisprudence” morphed into the “formalist age,” thereby entrenching the formalist–realist narrative.

Brophy calls my position “political,” saying, “The book is a critique of the academic left.”¹⁰³ This ignores that my claim is descriptive. It is either true or false that the standard image of the formalist age was constructed in the 1970s by leftist historians and theorists who built on earlier progressives critical of law and judges. Brophy does not confirm or deny the truth of this contention. Instead, he suggests that I was politically motivated, as if that discredits my position.

What Brophy does not indicate is that I too am a member of the academic left. On several prior occasions, I too have repeated the formalist–realist narrative, citing the very historical and theoretical accounts I now doubt.¹⁰⁴ One day while learning how to use an electronic research engine, I stumbled across Hammond’s remarkably skeptical statements about judging. That accidental discovery prompted me to investigate whether the standard image of the formalist age is correct.

Brophy’s overall complaint appears to be that my study is flat and narrow, lacking historical nuance, and does an injustice to the rich accounts of the period produced by legal historians. This misses what the book is about. It is a work in jurisprudence on how best to frame debates about the nature of judging. My limited historical exploration in the first part of the book focused on a narrow target. In jurisprudence circles, and more generally, it is widely thought that the turn of the century was the formalist age when the dominant view saw law as logically ordered, autonomous, and gapless and judging as mechanical. The evidence I discovered strongly indicates that this image is a distortion of what jurists actually believed.

102. *Id.* at 200.

103. Brophy, *supra* note 4, at 409.

104. *See, e.g.*, BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 24–28, 47–52, 60–70 (2006) (stating that the formalist view held sway through the twentieth century and citing, among others, Horwitz, Llewellyn, and Pound).