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# Democracy, The Consitution, and Legal Positivism in America: Lessons from a Winding and Troubled History

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DEMOCRACY, THE CONSTITUTION, AND LEGAL POSITIVISM  
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## DEMOCRACY, THE CONSTITUTION, AND LEGAL POSITIVISM IN AMERICA: LESSONS FROM A WINDING AND TROUBLED HISTORY

*Edward A. Purcell, Jr.\**

### Abstract

This Article explores the political and philosophical background of the current debate between positivist “originalism” and evolutionary “living constitutionalism” and, more generally, the significance of positivist ideas for both democratic and constitutional theory. Noting the tensions between positivist and nonpositivist ideas that existed in early American constitutionalism, it focuses on the impact of John Austin’s theory of legal positivism in the United States after the Civil War and the way successive generations of Americans interpreted positivist ideas to develop their theories of democracy and constitutionalism. It argues that Austin inspired rival jurisprudential approaches that quickly, but misleadingly, became entangled with opposing theories of democracy and constitutionalism. Positivist ideas subsequently became the instrument first of Progressives who criticized the “*Lochner* Court,” then of New Deal justices who preached “judicial restraint,” then of many critics of the Warren Court, and finally of the conservative originalists in the present day who broadly condemn “liberal judicial activism.” The Article shows that, as American politics changed over the years, so too did the alleged significance and practical uses of positivism for arguments about both democracy and constitutionalism. The Article concludes that positivism contributed—and is able to contribute—little to coherent normative theories of either democracy or constitutionalism but that it nonetheless has substantial practical value for both. Positivism’s emphasis on the social and

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behavioral realities that underlie the law highlights the need to constantly examine the extent to which the legal system honors a society's democratic values and constitutional principles not just in words and slogans but in the actual operations and social consequences of its legal system.

INTRODUCTION .....	1458
I. LEGAL POSITIVISM AND AMERICAN JURISPRUDENCE: A HISTORICAL OVERVIEW .....	1461
A. <i>The American Context: Inherent Tensions</i> .....	1462
B. <i>Austinian Positivism Comes to Post-Civil War America</i> .....	1464
C. <i>Transformations in a New Age of International Crises: Nazism, World War II, and the Cold War</i> .....	1479
D. <i>Legal Positivism in Contemporary America</i> .....	1483
II. SOME HISTORICAL LESSONS .....	1490
A. <i>Positivism and Democracy</i> .....	1491
B. <i>Positivism and American Constitutional Law</i> .....	1495
C. <i>Positivism and Its Potential Virtues for Constitutional Democracies</i> .....	1503
CONCLUSION .....	1510

## INTRODUCTION

The current debate between "originalism" and "living" constitutionalism is the latest phase in a long and shifting history of jurisprudential conflict that traces to the nation's founding.<sup>1</sup> Although both "isms" encompass a variety of formulations, the nub of their disagreement is clear. Originalists argue that the idea of a written

1. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985) ("[T]here was a tension [at the founding] between a global rejection of any and all methods of constitutional construction and a willingness to interpret the constitutional text in accordance with the common law principles . . ."). The classic citation for the early debate on the Court over the use of natural law to construe the Constitution is *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.), which argues that "the general principles of law and reason" limit legislative power, and *id.* at 399 (opinion of Iredell, J.), which argues that ideas of "natural justice" cannot invalidate a statute otherwise within a legislature's delegated constitutional authority. See generally ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* (2009).

constitution and the principles of democracy demand that courts interpret the Constitution according to the meaning that its text conveyed to its drafters and ratifiers. In contrast, “living” constitutionalists deny that an originalist approach is practicable or even possible in many areas. They maintain that a written constitution must adapt to changing times and that the principles of democracy allow, or even require, that the Constitution’s broad and abstract terms reflect the changing values of the American people.<sup>2</sup>

As today’s “originalists” rely on essentially positivist reasoning, the contemporary debate reframes and reargues two paramount issues over which legal positivists and their critics locked horns for the past century and a half. As a matter of constitutional theory, do the principles of legal positivism provide proper prescriptions for interpreting the Constitution? As a matter of political theory, do the principles of legal positivism support or undermine the values of democracy?

That extended debate centered around four fundamental principles of classical legal positivism.<sup>3</sup> The first, usually called the “sources thesis,” holds that “law” is necessarily based on an identifiable and authoritative source and backed by a sanction.<sup>4</sup> That source is the “command” of a “sovereign” or, more recently, the decision of an official who follows

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2. For contributions to the current phase of the debate, see, for example, JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); GARY L. MCDOWELL, *THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (2010); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171 (2012); Symposium, *Debating the Living Constitution*, 59 DRAKE L. REV. 961 (2011); Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMMENT. 621 (2011), reviewing STRAUSS, *supra*; Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011 (2012), reviewing BALKIN, *supra*, and STRAUSS, *supra*.

3. The principles are those that most, but not all, “legal positivists” commonly advance. H.L.A. Hart notes that the term “positivism” is used “to designate one or more” of five propositions and that major figures in the history of legal positivism—Jeremy Bentham, John Austin, and Hans Kelsen—neither held all five nor held the ones they shared in exactly the same form. H.L.A. HART, *THE CONCEPT OF LAW* 302 (3d ed. 2012). On “classic” legal positivism—the ideas developed by Jeremy Bentham and especially John Austin in the late eighteenth and early nineteenth century—see generally J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 244–347 (1992); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986); WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* (1985); ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998).

4. But see SEBOK, *supra* note 3, at 31 (calling it the “command theory,” and using “sources thesis” to refer to a combination of what this Article calls the “traceability thesis” and the “social thesis”).

procedures and applies rules "recognized" as authoritative.<sup>5</sup> The second principle, essentially a corollary of the first, is the "traceability thesis." It holds that, in order to be valid, any particular rule or decision must be "traceable" to an authoritative legal "source."<sup>6</sup> "Traceability" legitimates rules and decisions independent of their substantive content.<sup>7</sup> The third principle holds that the authoritative legal status of "sources" and "traceable" rules—their claim to be recognized as law "properly so called"—is a question of social fact. This "social thesis" means that sources and rules are truly "law" only if a community generally recognizes them as authoritative and its members generally obey them as a matter of observable social practice.<sup>8</sup> The last principle is that "law" and "morals" are distinct and should be separated for purposes of legal analysis.<sup>9</sup> This so-called "separation thesis" does not mean either that law and morals are necessarily unrelated or that moral truth is irrelevant or unknowable. It simply means that the two realms of "law" and "morals" are different, and that confusion is avoided and "law" more precisely identified when analysts treat "law" as distinct from "morals."<sup>10</sup>

5. "Laws proper or properly so called, are commands . . ." JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, at 1 (Noonday Press "Library of Ideas" ed. 1954) (1832). The "command" theory has a long history that antedates by centuries the rise of modern legal positivism and the work of Bentham and Austin. See, e.g., Gerald J. Postema, *Law as Command: The Model of Command in Modern Jurisprudence*, 11 *PHIL. ISSUES* 470, 471 (2001). Hart helped shift positivism from its early and relatively simple "command" theory to a more sophisticated theory based on "secondary" rules which "specify the ways in which the primary [substantive] rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." HART, *supra* note 3, at 94; see *id.* at 116–17. For Hart's critique of the "command" theory, see *id.* at 6–7.

6. See, e.g., SEBOK, *supra* note 3, at 31–32 (noting the substance of the traceability thesis, though conflating it with the social thesis).

7. Viewing law more simply as a command, Austin largely assumed the principle of traceability. AUSTIN, *supra* note 5, at 133–34, 184–85, 228–30, 253–54. Recognizing the issue more clearly, Hart proposed his famous rules of recognition as an institutionalized method of addressing the necessary traceability requirement. See HART, *supra* note 3, at 92–99, 100–01.

8. One of the hallmarks of sovereignty is "habitual obedience from the bulk of a given society." AUSTIN, *supra* note 5, at 194. "So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists." HART, *supra* note 3, at 114. See also Vincent Wellman, *Positivism, Emergent and Triumphant*, 97 *MICH. L. REV.* 1722, 1734 (1999) (reviewing, SEBOK, *supra* note 3) ("In Austin's theory, that source was the will of the determinate sovereign and the social fact that the sovereign was owed a habit of obedience by the bulk of the populace, but in Hart's version of positivism, the relevant social fact would be the acceptance of the rule of recognition by the officials of the legal system." (footnote omitted)).

9. See, e.g., SEBOK, *supra* note 3, at 30.

10. "The existence of law is one thing; its merits or demerits are another thing." AUSTIN, *supra* note 5, at 184. "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality,

With those four classic principles in mind, the constitutional question—does legal positivism provide proper principles for interpreting the Constitution?—can be rephrased more specifically. Does the fact that the Constitution is the “supreme Law of the Land”<sup>11</sup> mean that interpretations of its meaning are valid only when they are based on specific provisions or principles incorporated in the text? Does American constitutionalism mean that the “sources” and “traceability” theses of legal positivism identify the correct prescriptive limits of constitutional interpretation? Further, are constitutional rulings consequently illegitimate if they are based on extratextual principles and values? Does American constitutionalism, in other words, also imply a recognition of legal positivism’s “separation thesis?”<sup>12</sup>

Similarly, the question of political theory—does legal positivism support or undermine democratic values?—can also be rephrased more specifically. Does legal positivism’s “social” thesis mean that any rule or command obeyed and enforced as a matter of empirical fact is truly and properly “law”—no matter how evil, unjust, or discriminatory? Does legal positivism’s “separation” thesis mean that governments and their laws cannot properly be criticized “as law” on moral grounds? Do positivism’s “social” and “separation” theses, in other words, deprive “law” of any moral basis and thereby either negate the principles of democracy or render them irrelevant to proper legal analysis?

As stated, those questions may sound bloodless and academic. Repeatedly, however, new national challenges, political conflicts, and constitutional crises forced them to the forefront. They address, in fact, some of the most fundamental questions of American law and government.

### I. LEGAL POSITIVISM AND AMERICAN JURISPRUDENCE: A HISTORICAL OVERVIEW

In a general sense “positivist” ideas played a part in American legal thought from the colonies’ earliest days. Those ideas came into new and far sharper focus, however, in the tumultuous years after the Civil War when the nation underwent rapid social changes and the ideas of John

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though in fact they have often done so.” HART, *supra* note 3, at 185–86. Bentham insisted “on a precise and so far as possible a morally neutral vocabulary for use in the discussion of law and politics,” Hart maintained, and that insistence, “though it may seem a merely linguistic matter, was the very centre, and I would say the sane and healthy centre, of the legal positivism of which Bentham may be regarded as the founder.” H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 28 (1982).

11. U.S. CONST. art. VI, cl. 2; *see also id.* art. VI, cl. 3 (stating that state and federal officials must take an oath to support the Constitution).

12. Some could consider legal positivism solely as a descriptive theory designed to explain how, in fact, some or all legal systems operate. On the normative qualities of classical positivism, *see* POSTEMA, *supra* note 3, at 328–36.

Austin attracted fresh attention from prominent legal and political thinkers. From that time forward the principles of Austin's "legal positivism" were important, if controverted and often unrecognized, parts of the nation's constitutional debates.

#### A. *The American Context: Inherent Tensions*

The basic ideas behind the "sources" and "traceability" theses are characteristic elements of American constitutional thought. In contrast, the "social" and "separation" theses are not. From the beginning, then, American law reflected tensions between positivist and nonpositivist ideas.<sup>13</sup>

Across the colonies, settlers sought to establish clear and written legal rules.<sup>14</sup> Many were anxious to limit the prerogatives of colonial governors or local elites, while most recognized that the absence of established precedents meant that their communities could not rely solely on the slow development of an indigenous common law. Making a "fresh start," Lawrence Friedman noted, "demands codification."<sup>15</sup> Moreover, as disputes with England arose and recurred, the colonists often sought to defend their claimed rights and prerogatives by appealing to the provisions of their colonial charters.<sup>16</sup> Then, as they gradually recognized the need for increased intercolonial cooperation, they produced a series of charters designed to accomplish that goal: Benjamin Franklin's ill-fated Albany Plan of 1754, the revolution-induced Articles of Confederation, and finally the Constitution itself. After Independence, too, they altered their colonial charters or drafted—and frequently redrafted—constitutions for the governments of the individual states.<sup>17</sup> In codifying their laws, appealing to charter rights, and drafting state and national constitutions, they pursued a kind of legal positivist enterprise, seeking to establish formal "sources" of an authoritative law that was known, written, accessible, and clearly

13. For a discussion of the conflicting ideas and assumptions that lay behind the founders' ideas of the sources of "rights" and the nature of constitutionalism in the late eighteenth century, see, for example, *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* (Barry Alan Shain ed., 2007), and JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* (1986).

14. "Colonial leaders everywhere sought the certainty of written codes." KERMIT L. HALL & PETER KARSTEN, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 15 (2d ed. 2009). See generally STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* (1983); G.B. WARDEN, *Law Reform in England and New England, 1620 to 1660*, 35 WM. & MARY Q. 668 (1978).

15. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 50 (3d ed. 2005).

16. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 59 (abr. ed. 1995). See generally MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (VOL. 1-2) (2002).

17. See generally JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006); CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008).

settled.

At the same time, however, Americans never committed to the completeness and exclusivity of written laws. Many opposed codification in the name of an unwritten and honored common law, while others believed that written constitutions would inevitably prove incomplete or ambiguous. However carefully drafters chose their words, the "cloudy medium"<sup>18</sup> of language never allowed them to convey all that would be necessary and desirable in a charter of government.<sup>19</sup> Many also believed that a "higher" law, natural or divine, reigned above human laws and conferred "unalienable" rights on all mankind.<sup>20</sup> Thus, when they drafted and ratified the Constitution, they employed many general terms and immediately thereafter adopted two amendments—the Ninth and Tenth—that affirmed the existence of unspecified "rights" and "powers."<sup>21</sup>

In the decades after ratification, Americans became increasingly aware of the tension between their written Constitution and their ideas of unwritten and higher laws and rights. By the early nineteenth century, especially after the War of 1812, they embraced the Constitution with a new fervor and conviction while still clinging to the belief that law reflected a natural or divine moral order.<sup>22</sup> Slavery and the rise of abolitionism confronted those paired beliefs with a terrible challenge, one that only a Civil War and the repudiation of slavery in the nation's positive law could resolve.<sup>23</sup>

18. THE FEDERALIST No. 37, at 237 (James Madison) (Jacob E. Cooke ed., 1961).

19. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 291–305 (1969) (discussing the ambiguous nature of American law).

20. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). See generally EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955).

21. U.S. CONST. amends. IX, X; see, e.g., KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009).

22. See, e.g., Alfred S. Konefsky, *Piety and Profession: Simon Greenleaf and the Case of the Stillborn Bowdoin Law School, 1850–1861*, 85 NEW ENG. Q. 695, 709–10, 717–18 (2012); William P. LaPiana, *Jurisprudence of History and Truth*, 23 RUTGERS L.J. 519, 524–27 (1992); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 [hereinafter Siegel, *Historism*] (indicating such by discussion of three great legal minds of the mid- to late-nineteenth century); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) (discussing the constitutional tradition before the *Lochner* era); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1527 (2001) [hereinafter Siegel, *John Chipman Gray*] (arguing that the Harvard faculty of the late nineteenth and early twentieth centuries "adhered to the view that law was deeply embedded in sound social mores and morals"). On the battle between advocates of codification and defenders of the common law in the antebellum period, see generally CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* (1981).

23. U.S. CONST. amend. XIII. On antislavery and positivism, see ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975). Cf. William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century*

### B. *Austinian Positivism Comes to Post-Civil War America*

The Civil War and the decades that followed marked a turning point in American history. Socially, a rural, agrarian, and decentralized society with a predominantly Anglo-Saxon Protestant population transformed itself into an urbanizing, industrializing, and centralizing nation with a religiously and ethnically diversifying population.<sup>24</sup> Economically, businesses organized into larger corporations that employed thousands and then tens of thousands of workers and conducted ever more expansive national and international operations. Intellectually, the era witnessed the controversial arrival of Darwinism and, more broadly, the rapidly burgeoning influence of science and technology.

Those transforming events reverberated through the law and accelerated the organization and nationalization of the legal profession. Lawyers established state and local bar associations, and in 1878 a newly emerging national legal elite founded the American Bar Association.<sup>25</sup> In booming cities across the land, lawyers began to form multimember and hierarchically structured firms designed to serve the diverse and expanding legal needs of the powerful national corporations that drove the nation's economic expansion and centralization.<sup>26</sup> Charles W. Eliot and Christopher Columbus Langdell brought a new rigor to legal education, drew apprentices away from lawyers' offices and into the universities, and heralded both a new "case method" of study and an ostensibly more rigorous idea of "legal science."<sup>27</sup>

For constitutional law, four critical developments began to remold the legal landscape. First, the three Civil War amendments not only abolished slavery and thereby resolved a major source of antebellum tension between positive and moral law, but they also introduced into

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*America*, 87 HARV. L. REV. 513 (1974) (discussing the shift from instrumentalism to formalism in judicial decision-making).

24. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 11 (2000).

25. Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2010-11, 2020-21, 2094-104 (2005).

26. See *id.* at 2023-24. See generally WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999); *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerald W. Gawalt ed., 1984); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* (Gerald L. Geison ed., 1983); PURCELL, *supra* note 24, at 17; Spaulding, *supra* note 25.

27. See generally BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* (Daniel Earnst & Thomas A. Green eds., 2009); WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994); DAVID M. RABBAN, *LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY* (2013).

American law the great and amorphous clauses of the Fourteenth Amendment and thereby laid the foundation for new tensions between positive and moral law.<sup>28</sup> Second, the U.S. Supreme Court gradually ascended to a position of the highest authority. Its role in American government had been contested from the nation's beginning, and the antebellum years witnessed bitter attacks on its constitutional authority, not only in the slave states, but in a number of northern states as well.<sup>29</sup> Despite the embarrassment of *Dred Scott*<sup>30</sup> and its ostensible weakness during Reconstruction, however, the Court gradually emerged in the last two decades of the nineteenth century as an increasingly powerful and centralizing force in American government and the generally accepted authority on the Constitution's meaning.<sup>31</sup> Third, the paramount constitutional issues that came before the Court shifted from questions of federalism to questions of separation of powers. They involved, most critically, not the relation between central and state governments but the relation between the judiciary—especially the national judiciary—and the legislatures of both states and nation.<sup>32</sup> Finally, evolutionary assumptions began to suggest that constitutions, like all other natural phenomena, were “living” organisms that adapted to their changing social environments. “The growth of the nation and the consequent development of the governmental system,” the young political scientist Woodrow Wilson wrote in 1885, “would snap asunder a constitution which could not adapt itself to the new conditions of an advancing society.”<sup>33</sup> By the early twentieth century, some legal Progressives embraced the idea of a “living” Constitution in their critique of

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28. See, e.g., Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States*, 19 HARV. J.L. & PUB. POL'Y 443, 443–44 (1996) (noting the tension between the Fourteenth Amendment as interpreted and its plain language meaning to nonlawyers).

29. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (recounting the emergence of judicial review in early U.S. history).

30. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

31. See generally EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* 140–60 (2007) (tracing the rise of the Court's authority as the generally accepted final interpreter of the Constitution); Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931 (2009) (arguing that between approximately 1890 and 1917 the Supreme Court reshaped large areas of American law to expand the federal judicial power and increasingly centralize American government).

32. PURCELL, *supra* note 24, at 11–16.

33. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 8–9 (1885); accord WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 193 (1908) (arguing that the difficulty of constitutional amendment leads to broader interpretations of the Constitution by courts than if constitutional amendment was easier).

probusiness and antireformist courts,<sup>34</sup> while conservatives scorned the idea and rushed to defend both the belief that the Constitution enshrined unchanging principles and the authority of the judiciary, especially at the federal level.<sup>35</sup>

In this dynamic new context legal positivism as a distinct and self-identified jurisprudential theory arrived in the United States in powerful form. In 1861 John Austin's *The Province of Jurisprudence Determined*, little noticed when originally published in 1832, was reissued, and two years later Austin's *Lectures on Jurisprudence or the Philosophy of Positive Law* followed.<sup>36</sup> Together, the two books gave the theses of classical legal positivism their most thorough and coherent presentation. Both Austin and his predecessor, Jeremy Bentham, were known in the United States before the Civil War, but—like other European thinkers who advanced positivist ideas—they had generated little interest and gathered few followers.<sup>37</sup> In the decades after the Civil War, however, that reception changed. In the altered social and political context of the late nineteenth century, the ideas of Bentham and Austin—especially the latter—spread widely among lawyers, philosophers, and members of the educated public.<sup>38</sup> Legal academics, in particular, as members of a new and unproven profession, seemed particularly attracted to Austin's approach. It promised them obvious

34. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 107 (1962) (Justice Louis Brandeis); Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191, 218–24 (1997).

35. ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895* (1969); PURCELL, *supra* note 24, at 16–19. See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986) (discussing the Constitution in American culture).

36. Austin died in 1859, and his wife, Sarah, brought out the new edition of *The Province* and then organized her husband's lecture notes to produce *Lectures*. H.L.A. HART, *Introduction*, in AUSTIN, *supra* note 5, at ix. Ironically, Austin's ideas changed substantially after the early 1830s, and by the late 1840s "he was ceasing to be an Austinian." LOTTE HAMBURGER & JOSEPH HAMBURGER, *TROUBLED LIVES: JOHN AND SARAH AUSTIN* 189 (1985). The fact that he did not publish widely later in life and was never able to revise his earlier works, especially *The Province*, largely obscured his subsequent change of views. *Id.* at 178–91.

37. "The outspoken positivism of Mill or Comte was virtually nonexistent [in the United States] before the Civil War." DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* 50 (1991).

38. See generally JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970*, at 82–116 (1990); PETER J. KING, *UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY* (1986); LAPIANA, *supra* note 27, at 76–78; SEBOK, *supra* note 3, at 20–112. On Bentham's work, see HART, *supra* note 10; DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* (1989), and POSTEMA, *supra* note 3. On Austin's work, see RUMBLE, *supra* note 3. On the influence of Bentham and Austin on Holmes, see H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* (1984).

and immediate professional rewards: a “scientific” method of analysis that legitimated their new role, a basis for claiming special authority vis-à-vis the practicing bar, and an appealing rationale for concentrating on relatively abstract doctrinal scholarship.<sup>39</sup>

Three factors complicated the history and significance of Austinian positivism in America. The first involved the term “positivism” itself, a label both loosely applied and culturally loaded. In the mid-nineteenth century, many associated it primarily with the ideas of the French social theorist Auguste Comte who preached that humanity was leaving its “theological” stage of development and entering a more advanced rationalistic and scientific phase that would expand human knowledge, foster a new religion of humanity, and inspire widespread social and moral progress.<sup>40</sup> In 1871 Comte’s followers established a Positivist Society in New York City, while David G. Croly, the father of the future progressive theorist Herbert Croly, published *The Positivist Primer* to herald the intellectual supremacy of science and the moral supremacy of humanity.<sup>41</sup> Although Comtean positivism faded quickly as a distinctive movement, the growing faith in science and progress that nourished it continued to underwrite the continuing spread of naturalistic, evolutionary, and pragmatic ideas among American intellectuals.<sup>42</sup>

Of equal—but quite discordant—significance, many associated the term “positivism” not only with popular ideas of science and progress but also with generally unpopular and sometimes hated ideas of irreligion. Comte scorned humanity’s primitive “theological” beliefs, and many Americans considered positivism a philosophy of materialism, relativism, determinism, and atheism.<sup>43</sup> Such associations

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39. See NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 133–38 (2004); Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC’Y REV. 9, 30–33 (1975). On the change from early to late nineteenth century jurisprudential thinking, see WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937*, at 38–41, 89–93 (1998), and Christopher Tomlins, *Framing the Field of Law’s Disciplinary Encounters: A Historical Narrative*, 34 LAW & SOC’Y REV. 911, 913–46 (2000).

40. RALPH HENRY GABRIEL, *THE COURSE OF AMERICAN DEMOCRATIC THOUGHT* 183 (2d ed. 1956).

41. *Id.* at 183, 194.

42. See, e.g., ROSS, *supra* note 37; HAMILTON CRAVENS, *THE TRIUMPH OF EVOLUTION: AMERICAN SCIENTISTS AND THE HEREDITY-ENVIRONMENT CONTROVERSY, 1900–1941* (1978); HERBERT W. SCHNEIDER, *A HISTORY OF AMERICAN PHILOSOPHY* 56–58, 67–76 (1946); DANIEL J. WILSON, *SCIENCE, COMMUNITY, AND THE TRANSFORMATION OF AMERICAN PHILOSOPHY, 1860–1930* (1990).

43. For example, in 1922 Roscoe Pound described “a positivist sociological thinking” that taught that “[a]ll phenomena were determined by inexorable natural laws to be discovered by observation. Moral and social and hence legal phenomena were governed by laws as completely

made "positivism" the despised enemy of those committed to religious faiths, "higher law" principles, or ideas of free will and human agency.<sup>44</sup> Thus, to many Americans "positivism" was a brand of condemnation.

Reacting to that negative connotation, those who embraced naturalist assumptions and scientific methods generally sought to avoid the "positivist" label and identified themselves, instead, as "pragmatists," "empiricists," "naturalists," "instrumentalists," or simply "scientists."<sup>45</sup> Most of them, in fact, seemed to reject sweeping forms of Comtean "philosophical" positivism and scorned approaches they deemed rigidly materialist, mechanistic, and determinist.<sup>46</sup> Similarly, those intellectuals

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beyond the power of conscious human control as the movements of the planets." ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54-55 (1922).

44. As Bruce Kuklick explained:

Stimulated by August Comte's "positive" philosophy, [John Stuart] Mill took an austere attitude toward religion, and few considered him a Christian. His simultaneous emphasis on the world of science made the word "positivism"—applied broadly to Mill, Comte, and others—a term of abuse and contempt in many circles. In short, the Unitarians interpreted Mill as a champion of skeptical empiricism; he represented an anti-religious extreme.

BRUCE KUKLICK, THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS, 1860-1930, at 20, 85-87 (1977). Mill himself defined positivism as "the substitution of the scientific for the religious point of view." Morton J. Horwitz, *Why Is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD. 551, 581 n.160 (1997) (internal quotation marks omitted). See generally DAVID A. HOLLINGER, IN THE AMERICAN PROVINCE: STUDIES IN THE HISTORY AND HISTORIOGRAPHY OF IDEAS 3-22 (1985); JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 21-26 (1986). Ironically, the intellectual roots of a narrower and strictly "legal" positivism trace to the writings of Martin Luther and Philip Melancthon in the early sixteenth century. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 141-85 (1993).

45. William James was the most prominent and indefatigable of the naturalists who waged an extended campaign against deterministic positivism. See, e.g., WILLIAM JAMES, A PLURALISTIC UNIVERSE (Bison Books 1996) (1909); WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907); WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE (1902). Innumerable efforts were made to reconcile science and religion in their various forms. In *Christianity and Positivism*, for example, James McCosh, the leader of American Presbyterianism and the president of Princeton University, accepted Darwinian evolution and argued that it did not contradict traditional Christian teachings. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 26-27 (Beacon Press rev. ed. 1955) (1944).

46. E.g., THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY 250-51 & n.22 (Johns Hopkins Univ. Press 2000) (1977). The early twentieth-century theories of "operationalism" and "behaviorism" were exceptions. Morris Cohen, for example, criticized legal positivism's narrow focus on "facts" and warned of "the dangers of introducing the language of behaviorism into legal theory." Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 357, 365 (1931). Responding to Cohen, the legal realist Hessel E.

who became Progressives in the late nineteenth and early twentieth centuries advanced ideas about democracy that rejected the kind of materialist and determinist assumptions associated with “philosophical positivism” and relied, instead, on pragmatic, moralistic, voluntaristic, and often religiously based premises.<sup>47</sup>

Understandably, then, legal theorists in the United States shunned the positivist label. Those who adopted Austin’s approach and developed it systematically characterized their work, instead, as “analytical jurisprudence,”<sup>48</sup> a term that quickly came into general use. The term “positivism,” in turn, largely disappeared. Revealingly, not until the middle of the twentieth century would the label “positivism” return to prominence in American legal discourse, and its revival would spring from a spirited new determination to exploit its old and highly negative connotations.<sup>49</sup>

The second factor complicating the history of Austinian positivism was that it lost its distinct identity as it seeped through American legal thought. Commentators differed widely in adopting, modifying, and rejecting the elements of Austin’s jurisprudence.<sup>50</sup> In the late nineteenth

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Yntema rejected the label, vigorously denying that “legal realists” were “positivists.” Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925, 946 n.62 (1931). They were, instead, advocates of an entirely different type of “empirical legal science.” *Id.*

47. Pound, for example, noted that sociological jurisprudence derived in part from Comtean positivism, but he insisted that it was a non-deterministic legal version of philosophical pragmatism. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 161, 212–15 (1921). See generally RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE: ARABESQUES AND ENTANGLEMENTS* 119–49 (2011); KLOPPENBERG, *supra* note 44; T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880–1920* (1981).

48. See, e.g., Charles Malcolm Platt, *The Character and Scope of Analytical Jurisprudence*, 24 AM. L. REV. 603, 603 (1890). Henry Sumner Maine may have coined the term. See Wilfrid Rumble, *John Austin and His Nineteenth Century Critics: The Case of Sir Henry Sumner Maine*, 39 N. IR. LEGAL Q. 119, 119 (1988). Both Gray and Pound, for example, identified Austin’s ideas with “analytical jurisprudence.” JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 2–3 (2d ed. 1972) (1921); Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557, 564–67, 577–78 (1937). On the linkage between Austinian positivism and American “analytical” jurisprudence, see SEBOK, *supra* note 3, at 39–47.

49. Anthony Sebok suggests that scholars did not use the term in its revived and derogatory sense until the appearance of Lon L. Fuller’s book, *The Law in Quest of Itself*, in 1940. SEBOK, *supra* note 3, at 39–41.

50. E.g., JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 181–82, 195 (1907) (arguing Austin failed to understand the role of custom in shaping the law); Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1891) (arguing that Austin failed to understand the role of courts in making law). See generally HERGET, *supra* note 38, at 82–116. Austin’s jurisprudence also exerted a major influence in England where it provoked extensive criticism and modification. RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 23–28, 69–73 (1980); Richard A. Cosgrove, *The Reception of Analytic Jurisprudence: The Victorian Debate on the*

century "it was fashionable for every tyro to have his fling at Austin," Roscoe Pound reported,<sup>51</sup> and in 1894 John Dewey complained that commentators so distorted the Englishman's original ideas about sovereignty that they created an "Austinian myth."<sup>52</sup> John Chipman Gray's mixed reaction was typical. He praised Austin for articulating the "separation" thesis and rejecting the "declaratory" theory of law,<sup>53</sup> but dismissed his claims that the state was a "fictitious entity" and that courts implemented the sovereign's "commands."<sup>54</sup> Oliver Wendell Holmes, Jr. similarly picked with care among Austin's ideas.<sup>55</sup> He agreed with Austin that law was ultimately the command of a sovereign, that it was distinct from morals, that it was a social phenomenon that scholars should study as a "science," and that its compulsion arose from the blunt fact that "the whole power of the state will be put forth" to enforce its judgments.<sup>56</sup> He refused, however, to accept other Austinian

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*Separation of Law and Morality, 1860-1900*, 74 DURHAM U. J. 47 (1981); DUXBURY, *supra* note 39, at 85-138.

51. Pound, *supra* note 48, at 558.

52. John Dewey, *Austin's Theory of Sovereignty*, 9 POL. SCI. Q. 31, 31 (1894).

53. GRAY, *supra* note 48, at 94-95, 222.

54. *Id.* at 65-67, 88. Similarly, Gray emphasized the discretion that judges enjoyed in construing statutes. *Id.* at 170-87. "While Gray is commonly considered to be a forerunner of American legal realism, his jurisprudential perspective in fact fits far more squarely within the tradition of Austinian positivism. Considered thus, Gray, like Holmes, can be conceived equally to be an anti-formalist and a formalist." NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 53 (1995). "Gray essentially accepts the Austinian analysis as a helpful clarification of terminology, but with a mild skepticism toward its theoretical pretensions." HERGET, *supra* note 38, at 97; *see also id.* at 149-50, 153 (describing Gray's criticism).

55. "Holmes agreed with Austin's objectives but disagreed with most of his specifics." HERGET, *supra* note 38, at 38; *see* RICHARD A. COSGROVE, OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930, at 110-27, 129-30 n.66 (1987); Martin P. Golding, *Holmes's Jurisprudence: Aspects of Its Development and Continuity*, 5 SOC. THEORY & PRAC. 183, 185-92 (1979). Holmes read Austin in 1861 and was about to read Hobbes when he was called to war, and between 1863 and 1871, he read Austin five more times. MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870, at 76-77, 194 n.d. (1957). "The Austinian strain in Holmes's thought was vigorous and persistent," possibly in some part because of his Civil War experience. *Id.* at 194. Holmes' emphasis on the legislative policy basis of judicial decisions and the impact that outside social forces had on the evolution of legal doctrine were two of Holmes' principal contributions to American jurisprudence. Both of those ideas seem in some tension with Austin's jurisprudence.

56. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).

The scope of state sovereignty is a question of fact. It asserts itself as omnipotent in the sense that it asserts that what it sees fit to order it will make you obey. You may very well argue that it ought not to order certain things, and I agree. But if the government of England or any other first class European power, or, under a changed Constitution, the Congress of the U.S., does see fit to order them, I conceive that order is as much law as any other—not merely from the point of view of the Court, which of course will obey it—but from any

ideas. He adopted a broader and simpler theory of tort liability,<sup>57</sup> gave greater emphasis to the role of both historical evolution and judgments of policy in shaping the law, dismissed the view that civil liability depended on a party's state of mind,<sup>58</sup> rejected Austin's picture of the judicial process as wholly rational and deductive,<sup>59</sup> and scorned his belief in the supremacy of a "Divine law." By 1937 Albert Kocourek concluded that, overall, Austin's ideas had met "violent criticism" in America. Although he titled his study "The Century of Analytic Jurisprudence Since John Austin," Kocourek told the story not of Austin as the fountainhead of a movement but of the subsequent theorists who transformed, enriched, and sharpened the ideas Austin had sketched. "The brilliance of [the century's] ending," Kocourek declared in disparaging the Englishman, "stands in marked contrast to the dismal aspects of its beginning."<sup>60</sup>

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other rational point of view—if as would be the case, the government had the physical power to enforce its command. Law also as well as sovereignty is a fact. If in fact Catholics or atheists are proscribed and the screws put on, it seems to me idle to say that it is not law because by a theory that you and I happen to hold (though I think it very disputable) it ought not to be.

Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Sept. 15, 1916), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1925, at 21 (Mark DeWolfe Howe ed., 1953).

57. POHLMAN, *supra* note 38, at 45–47.

Following Austin, Holmes supposed that tort law was about duties imposed and enforced by the sovereign as against its subjects through the courts. Unlike either Blackstone or Austin, however, Holmes supposed that the imposition of sanctions through private suits had nothing to do with breaches of "relative" or "relational" duties owed by one person to others, and indeed nothing whatsoever to do with wrongs. Indeed, Holmes criticized Austin for being insufficiently positivistic and overly moralistic in supposing that modern law would be interested in what he took to be the somewhat childish and barbaric practices of blaming, retaliating, and punishing on the basis of wrongdoing.

John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 464 (2006) (footnotes omitted). Holmes rejected Austin's distinction "between 'relational' and 'absolute' duties" as the basis for distinguishing between tort and criminal law, and instead "focused on the *nature of the consequence* that the state had attached to unreasonable conduct in these two classes of legal proceedings." *Id.* at 465.

58. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 67, 85–88 (1881).

59. "Austin and the realists developed both similar and contrasting ideas about judicial legislation. The most notable contrast may be their divergent accounts of how judges reach decisions. Austin's description of this process assumes that it is highly rational, an assumption which a number of realists explicitly criticized." Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 1017 (1981).

60. Albert Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in 2 LAW: A CENTURY OF PROGRESS, 1835–1935, at 195, 221 (Alison Reppy ed., 1937). Kocourek identified Austin vaguely as but "one of the founders of analytic jurisprudence," *id.*, and added

More important, Austinian jurisprudence lost its identity during the late nineteenth century because Americans developed its implications along two divergent lines, and their efforts gave rise to ostensibly rival movements that submerged and superseded their common inspiration. One line of development, identified by the label of "analytical" jurisprudence, drew on Austin's systematic rational method, accepted the principle that law and morals were separate, emphasized the importance of clarifying legal concepts and categories, and sought to organize doctrine into ordered sets of internally consistent principles and rules. Harvard's dean, Christopher Columbus Langdell, emerged as the leading proponent of this "analytical" approach, which also became known to its subsequent critics as "Langdellianism," "conceptualism," "formalism," and eventually "mechanical" jurisprudence.<sup>61</sup> The other line of development, whose varying strains were subsequently characterized as "sociological," "realist," "pragmatic," and "functionalist" jurisprudence, agreed with the "analytical" school that law and morals should be separated for study but spurned its methodological approach as abstract, deductive, and out of touch with real-world problems.<sup>62</sup> Woodrow Wilson sounded the theme of those who rejected Langdell's "analytic" jurisprudence. "[T]he latest writers of the Austinian school," he charged in 1893, "have reduced jurisprudence to a merely formal science, professing to care nothing for the actual manner in which law may originate . . ."<sup>63</sup> Sociological jurists emphasized different elements of Austin's jurisprudence—the "social" character of law, the importance of behavioral compliance, and the necessity of enforcement sanctions—and argued that law was an evolving human phenomenon that could be understood only contextually and empirically.<sup>64</sup> Holmes famously highlighted the charge

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in a footnote that it was "not improbable that Bentham must be put down as the originator of analytic jurisprudence," *id.* at 230 n.150.

61. "The most thoroughgoing attempt to apply" a rigorously consistent theory of contract "to be found in the books is Langdell's working out of a system of the so-called conditions implied in law or dependent promises on that basis. As an example of vigorous legal analysis it rivals Austin." POUND, *supra* note 43, at 259. See generally KIMBALL, *supra* note 27; LAPIANA, *supra* note 27, at 77-78, 122-24; SEBOK, *supra* note 3; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); M.H. Hoefflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

62. See, e.g., Rumble, *supra* note 59.

63. WOODROW WILSON, *AN OLD MASTER AND OTHER POLITICAL ESSAYS* 68-69 (1893). Roscoe Pound and Morris Cohen voiced another criticism typical of the "sociological" school. The "analytic jurist" presupposes "the possibility of a complete body of legal rules sufficient for every case," Pound declared, but "all legal experience has demonstrated its futility." ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 112 (1950); accord Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237, 238 (1927).

64. The "sociological" and "realist" strains drew not only on Austinian ideas but also on other schools of jurisprudence, such as the "historical" school of Savigny and Maine, as well as

of abstractionism in 1880 when he termed Langdell “the greatest living theologian” of American law,<sup>65</sup> and he quickly emerged as the oracle of the rival “sociological” line. By the 1930s, when Morris R. Cohen sketched the history of American legal philosophy, he barely mentioned Austin and his “positive jurisprudence”<sup>66</sup> but focused, instead, on the struggle between “Langdell and His School” on one side and Holmes and the varieties of sociological jurisprudence on the other.<sup>67</sup>

Of course, neither of the two wings of American jurisprudence was monolithic. While Langdell reshaped legal education and attracted many admirers, a number of them—including members of his own Harvard faculty—disagreed with various elements of his approach.<sup>68</sup> Gray, for example, stood with a foot in each of the two opposed camps, accepting Langdell’s analytical method and doctrinal focus but giving far greater weight to practical considerations of policy and the de facto influence of moral ideas.<sup>69</sup> Indeed, Langdell himself was hardly the purely abstract “conceptualist” that his critics pictured.<sup>70</sup> Similarly, those thinkers labeled “sociological” and “realist” were even more notoriously diverse. “[I]t is rather difficult,” Cohen concluded, “to

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on general “scientific,” “empiricist,” and “experiential” approaches that spread across American intellectual life. See generally DUXBURY, *supra* note 54, at 9–64; LaPiana, *supra* note 22; David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 THEORETICAL INQ. L. 541 (2003). The roots of the sociological and realist strains were far more complex than many realized. Cf. SHERWIN, *supra* note 47, at 122–38.

65. Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880). For a critique of Holmes’s attack on Langdell, including later criticisms in the mid-1890s, see KIMBALL, *supra* note 27, at 108–11, 125–28, 327–29.

66. Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America*, in 2 LAW: A CENTURY OF PROGRESS, 1835–1935, at 266 (Alison Reppy ed., 1937). Cohen stated that “most of [Bentham’s] ideas came to us rather through Austin,” and compared Langdell to Austin by noting that “neither [Langdell] nor any of his followers went beyond the Austinian system of legal categories.” *Id.* at 284, 288.

67. *Id.* at 287–96 (“Langdell and His School”); *id.* at 296–314 (discussing Pound, Holmes, realism, and functionalism). Speaking of Langdell, Cohen wrote: “The neglect of the social-economic factors that actually mold legal as well as other institutions naturally went together with the tendency to elevate into the rank of fixed principles legal rules that are by no means universally valid but can be more appropriately explained by reference to specific historical conditions.” *Id.* at 289. In contrast, Cohen commended “the essential soundness of Holmes’s main views on the nature of law” and the “enduring quality” of his work. *Id.* at 302. He praised Holmes as “a realist,” the “author of the greatest legal classic that this country has produced,” and the inspiration for “the latest school of American jurisprudence.” *Id.* at 300–02.

68. Some prominent and “conservative” jurists, for example, continued to retain natural law ideas as part of their jurisprudence. See, e.g., Siegel, *Historicism*, *supra* note 22; Siegel, *John Chipman Gray*, *supra* note 22. See generally KIMBALL, *supra* note 27, at 193–232, 264–308.

69. See generally Siegel, *John Chipman Gray*, *supra* note 22.

70. KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 247–69 (2011); KIMBALL, *supra* note 27, at 121–29; LAPIANA, *supra* note 27, at 55–78; Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 LAW & HIST. REV. 277 (2004).

formulate any positive doctrine on which they all agree."<sup>71</sup> Karl Llewellyn and Jerome Frank, for example, who became two of the leading "realists" in the 1930s, rejected the type of codification that Austin favored but disagreed between themselves on both the desirability of codes and the extent to which codification could clarify and stabilize the law.<sup>72</sup>

The third factor that complicated the history of Austinian positivism in America was the way its competing Langdellian and Holmesian strains became linked to the nation's constitutional politics. As a matter of logic and theory, Austin's jurisprudence answered none of the legal and constitutional questions that wracked the United States during the late nineteenth and early twentieth century. The variety of jurisprudential views that blossomed among those who drew on his work evidenced the indeterminate quality of his ideas in terms of choosing among the substantive policies that struggled for public acceptance.<sup>73</sup> Yet, as the contrasting images of a "conceptualistic," "formalistic," and "mechanical" Langdellian jurisprudence on one side and a "sociological," "realist," and "functional" Holmesian jurisprudence on the other crystallized and began to circulate, legal and political writers came to see the two divergent approaches as rival theories that supported opposed political and constitutional positions.

71. Cohen, *supra* note 66, at 303. H.L.A. Hart agreed: "But in what did the realism of the Realists consist? I find it very difficult to say because this active group of jurists differed from as much as they resembled each other." H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 131 (1983). See generally N.E.H. Hull, *Networks & Bricolage: A Prolegomenon to a History of Twentieth-Century American Academic Jurisprudence*, 35 AM. J. LEGAL HIST. 307 (1991); N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921.

72. Rumble, *supra* note 59, at 1024-25.

73. The attitudes of the founders of jurisprudential positivism—Hobbes, Bentham, and Austin—illustrate the range of political views that can coexist with positivist ideas. Hobbes, the most extreme case, was neither a democrat nor an advocate of limited constitutional government. Bentham, in contrast, was an outspoken reformer who sought to make law accessible to all, grew increasingly sympathetic toward democratic ideas and the extension of the franchise, and developed a theory of constitutionalism that located sovereignty in the people. See, e.g., POSTEMA, *supra* note 3, at 260, 373-76, 448. Unlike Bentham, Austin grew deeply suspicious of "the people," bemoaned their "prejudices" and "ignorance," placed his faith in the educated and well-to-do classes, and fought against the extension of the franchise. See *id.* at 327-28; AUSTIN, *supra* note 5, at 61-87; HAMBURGER & HAMBURGER, *supra* note 36, at 26-52; RUMBLE, *supra* note 3, at 197-205. His assumptions about the nature of science and his distinctive "personality" may have shaped Austin's political attitudes. See generally W.L. MORISON, JOHN AUSTIN (1982) (presenting a comprehensive study of Austin). Similarly, Bentham and Austin differed in their views of non-positivist "law." Bentham rejected the idea of "natural law" as a fiction that represented the mere expression of "private opinion in disguise," quoted in POSTEMA, *supra* note 3, at 269, while Austin affirmed "without hesitation" the existence of "Divine laws" and declared that its obligations were "paramount to those imposed by any other laws," AUSTIN, *supra* note 5, at 184.

The Langdellian strain became linked with ideas about property, liberty of contract, corporate enterprise, laissez-faire economics, and the essential role of the courts in protecting the established social and economic order.<sup>74</sup> It became linked, in other words, with late nineteenth and early twentieth century political "conservatism" and subsequently with what more recent scholars termed "classical legal thought."<sup>75</sup> In contrast, the Holmesian strain became linked with ideas about social justice, communal welfare, governmental regulation, and the essential role of the legislature in ameliorating the harsh consequences of industrialization and urbanization. The Holmesian strain became linked, in other words, with campaigns for social reform and identified as the jurisprudence of Progressivism and then the New Deal.<sup>76</sup>

Why, exactly, legal and political writers forged those dual jurisprudential and political linkages has been a subject of extended debate. Surely Langdell was no more a typical conservative than Holmes was a typical Progressive.<sup>77</sup> Conservative judges, moreover, could prove as "instrumental" in their decision-making as progressive judges could prove "formalistic."<sup>78</sup> Subsequent decades, moreover,

74. For example, "It may be that this positivism is largely due to the expansion of modern industry and commerce which has caused lawyers to be more concerned with the protection of private economic interests than with the larger issues of social well-being." Cohen, *supra* note 63, at 237. Similarly, sometimes scholars pictured "historical jurisprudence," another prominent element in late nineteenth-century legal thought, as "conservative," but it too could be used to support "both conservative and liberal positions." RABBAN, *supra* note 27, at 71.

75. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); see, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-32 (1992); 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). See generally WIECEK, *supra* note 39 (discussing classical legal thought).

76. See, e.g., AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993) (collecting excerpts from primary Legal Realist sources); *id.* at xiii (noting that the Legal Realists were "steeped in the political tradition of Progressivism"); HORWITZ, *supra* note 75, at 109-43. James Bradley Thayer attracted many Progressives with his positivist argument that courts should not invalidate legislative acts unless they clearly and unmistakably violated constitutional provisions. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (argument); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978) (discussing the attraction to Thayer's argument by many Progressive Justices).

77. Langdell suggested government ownership as a useful way to resolve the problem of railroad regulation. KIMBALL, *supra* note 27, at 331-37. Moreover, he "had few qualms about legislative power"—the focus of progressive hopes—perhaps in part because of his sympathy for the Austinian concept of sovereignty. LAPIANA, *supra* note 27, at 124. For his part, "Holmes repeatedly professed skepticism about the efficacy of hours and wages legislation, child labor reform, and other policy goals of 'progressives.'" G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 320 (1993).

78. On some of the substantive values that underlay late nineteenth-century constitutional law, see HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937*, at 182 (1991), and Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV.

demonstrated that advocates of both political persuasions could readily use the assumptions and methods of either jurisprudential approach.<sup>79</sup>

"Analytic jurisprudence" and political conservatism had, in fact, only a partial and sharply contested connection. Seeking to protect private property and liberty of contract, defend common law rules that favored business, and strengthen the judiciary against the legislature, some conservatives did find the assumptions behind analytic jurisprudence congenial. Its emphasis on abstract principles, bright-line categories, and relatively abstract doctrinal reasoning could serve to underwrite faith in unchanging constitutional principles while insulating the courts from political criticism for the harsh practical consequences of some of their rulings.<sup>80</sup> Not all analytic jurists, however, were conservatives. Langdell, for example, criticized the growth of corporate power and urged tighter regulation of business along with governmental ownership of railroads and other public utilities.<sup>81</sup> More important, many and perhaps most political conservatives rejected analytic jurisprudence. They believed that its positivist foundation emphasizing "command" and "sanction" undermined the idea that law was based on fundamental principles of natural or divine law. Even more, they feared that the positivist concept of "sovereignty" made governments—especially those in the hands of popularly elected legislatures—the wielders of dangerous and potentially unlimited power that threatened liberty, property, and republican principles.<sup>82</sup> Thus, the proclaimed

379 (1988). On the instrumentalist nature of the turn-of-the-century Court; see generally Edward A. Purcell, Jr., *Some Horwitzian Themes in the Law and History of the Federal Courts*, in 2 *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS—ESSAYS IN HONOR OF MORTON J. HORWITZ* 271 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010); Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927, 1954–75 (2003). The "conservative" Chief Justice William Howard Taft could be coldly instrumental, and the "Progressive" Justice Louis D. Brandeis could be ruthlessly conceptualistic. On Taft's instrumentalism, see EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 109–12 (1992) [hereinafter PURCELL, *LITIGATION AND INEQUALITY*], and Robert C. Post, *Chief Justice William Howard Taft and the Concept of Federalism*, in *FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS* 53–74 (Harry N. Scheiber ed., 1992). On Brandeis's conceptualism, see ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* 118 (1957), and PURCELL, *supra* note 24, at 155–64.

79. General jurisprudential theories are elastic and capable of serving many purposes. As Morton J. Horwitz commented, "Most of the basic concepts and definitions used by Bentham, Austin and their successors changed in meaning over time depending on the political commitments of their authors." Horwitz, *supra* note 44, at 558.

80. See HORWITZ, *supra* note 75, at 9–31.

81. KIMBALL, *supra* note 27, at 331–37.

82. PARKER, *supra* note 70, at 237–44. See generally Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577 (2002); Louise A. Halper, Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale

linkage between analytic jurisprudence and political conservatism was far more imagined than real.

In contrast, the linkage between sociological jurisprudence and political Progressivism was substantial and even inspirational. The Holmesian emphasis on the scope of judicial discretion, the role of policy considerations and personal values in judicial decision making, and the instrumental function of the law in serving society's dominant forces combined to make his ideas welcome weapons for those who believed that the courts favored organized wealth and corporate power. Further, Holmes' stress on the need for judicial deference to legislative judgments resonated deeply with the Progressives' faith in the legislature and their call for sweeping social and economic reforms. Finally, Holmes' emphasis on the role of social "experience" in shaping the "life" of the law pointed to the idea of a "living Constitution," and suggested the need for scientific study of changing social conditions along with the possibility that such studies could enable people to use government intelligently to improve those conditions for everyone.<sup>83</sup>

That linkage between "sociological jurisprudence" and political Progressivism was not only real, but it was also largely responsible for forging the derogatory counter image of "mechanical" and "conceptualistic" jurisprudence as well as for hanging that label on conservative judicial decisions and anti-Progressive courts. In advocating legislative reforms and attacking conservative judicial decisions, Progressives found powerful ideological leverage in characterizing their adversaries as out-of-touch "conceptualists" and abstract "formalists" who failed to understand the modern industrial world and the unprecedented social problems it created.<sup>84</sup> Like the derogatory concept of an allegedly merciless and politically retrograde

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*Property in the Gilded Age*, 51 OHIO ST. L.J. 1349 (1990); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); LaPiana, *supra* note 22; Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. 473 (2006); Siegel, *Historism*, *supra* note 22.

83. Holmes famously incorporated his idea of a living Constitution into his opinion in *Missouri v. Holland*, 252 U.S. 416 (1920). In 1938, Pound opined that "Austin now stands much better than he did fifty years ago" because his ideas were compatible with "régimes of social control" and a "rejection of the idea of restriction of state action to the minimum." Pound, *supra* note 48, at 564. Austin's reputation rose, Pound suggested, because his views were relatively compatible with the triumphant views of Progressivism and sociological jurisprudence. *Id.*

84. Morris Cohen, for example, used an infamous state judicial decision to illustrate the "tragic absurdity of a court's failure to understand modern industrial conditions." Cohen, *supra* note 46, at 354 n.4. Herbert Croly echoed the same theme: "The particular expression of the conservative spirit to which progressivism finds itself opposed is essentially, and, as it seems, necessarily doctrinaire and dogmatic." HERBERT CROLY, *PROGRESSIVE DEMOCRACY* 20 (1914).

"social Darwinism,"<sup>85</sup> the idea of a conservative "mechanical," "formalist," and "conceptualistic" jurisprudence was for the most part another polemical construct of Progressivism, not an accurate description of the thinking of either political conservatives or anti-Progressive judges.<sup>86</sup>

Beyond the level of politics and polemics, however, sociological jurists and political Progressives did advance constitutional arguments that were consistent with the theses of legal positivism. Although they did not take its name or use its vocabulary, their charges reflected its fundamental ideas. The "conservative" jurisprudence of the Supreme Court and much of the judiciary was biased and unsound, they argued, because it was suffused with illegitimate, extraconstitutional value judgments that distorted the Constitution's true meaning.<sup>87</sup> In effect, they made two parallel claims: first, that the anti-Progressive courts frequently violated three of positivism's fundamental principles, the theses of "separation," "sources," and "traceability"; and second, that their own reformist jurisprudence would honor those principles by excluding extraconstitutional value judgments and enforcing only the clear commands of the Constitution and the positive enactments of the legislature.

Not surprisingly, however, the Progressive embrace of positivism was also limited and carefully contoured. The idea of a "living" Constitution, after all, raised questions about the exact meaning of all three of those positivist theses—"separation," "sources," and

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85. While Darwinism was a major intellectual influence and large numbers of American scientists and intellectuals sought to apply evolutionary ideas to the study of human beings and their societies, the phrase "social Darwinism" became a political label used to discredit "conservatives" and their neoclassical economic ideas by equating them with a cruel and brutal philosophy of "survival of the fittest." Few businessmen and political "conservatives" actually believed in, or invoked, such "Darwinian" ideas. See, e.g., ROBERT C. BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* (1979); MIKE HAWKINS, *SOCIAL DARWINISM IN EUROPEAN AND AMERICAN THOUGHT, 1860-1945: NATURE AS MODEL AND NATURE AS THREAT* 7-8 (1997) ("social Darwinism" as pejorative); Edward A. Purcell, Jr., *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 J. AM. HIST. 561, 574-75 (1967); Irvin G. Wyllie, *Social Darwinism and the Businessman*, 103 PROC. AM. PHIL. SOC. 629 (1959).

86. On the complexities and policy concerns of late nineteenth-century conservative legal writers, see, for example, DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 1-22 (2011); MARK WARREN BAILEY, *GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860-1910* (2004); PURCELL, *LITIGATION AND INEQUALITY*, *supra* note 78, at 395-396 nn.14-15; Halper, *supra* note 82; Hovenkamp, *The Political Economy of Substantive Due Process*, *supra* note 78; Jones, *supra* note 82; Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Siegel, *Historism*, *supra* note 22.

87. See, e.g., BAILEY, *supra* note 86; PURCELL, *LITIGATION AND INEQUALITY*, *supra* note 78, at 262-91; Hovenkamp, *supra* note 78; McCurdy, *supra* note 86.

"traceability." Insofar as Progressives believed in a "living" Constitution, they believed that it reflected their own adaptive interpretations of such key constitutional concepts as "liberty" and "justice." Implicitly, they remolded those positivist theses and reinterpreted them to serve their ideas of social evolution and their goals for wide-ranging reform.

Thus, by the early decades of the twentieth century Austinian positivism had threaded itself into the complex tapestry of American legal thought, contributed to a range of diverse jurisprudential theories, and developed real and alleged linkages with opposing political and constitutional ideologies. As a distinct jurisprudential approach identified by its own name, however, it had essentially disappeared. When Pound discussed the history of American legal thought in 1938, he dismissed "positivism"—apparently thinking of it only in its Comtean sense—as insignificant. "Only a few words need be said about positivism," he wrote. "It had little or no effect on judicial decision," and for the most part merely "confirmed the ideas of the historical jurists."<sup>88</sup> Revealingly, he saw its only import as negative. "So far as it had influence," he commented, "it furthered the characteristic juristic pessimism of the end of the last century."<sup>89</sup>

### C. *Transformations in a New Age of International Crises: Nazism, World War II, and the Cold War*

While Pound's dismissive judgment about the significance of a distinctly "positivist" jurisprudence likely reflected a common attitude into the late 1930s, that view changed drastically in a remarkably short span of years. The events of the late 1930s and early 1940s—the rise of Nazism, the onset of a new world war, and the shattering events that followed—profoundly altered the nation's concerns and assumptions.<sup>90</sup> Casting both scientific advances and naturalist ideas in a newly ominous light, those events transformed the relationship of legal positivist ideas to both democratic theory and constitutional law.

During the early years of the twentieth century, naturalist and relativist assumptions had become tightly interwoven with democratic ideas and constitutional values. From Holmes' skeptical deference to the legislature<sup>91</sup> and Pound's expertise-oriented reform proposals<sup>92</sup> to

88. POUND, *supra* note 63, at 116.

89. *Id.*; accord Cohen, *supra* note 63; Pound, *supra* note 48, at 558, 562.

90. See generally BENJAMIN L. ALPERS, *DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S–1950S* (2003).

91. "I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants." Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Apr. 23, 1910), in 1 HOLMES-POLLOCK LETTERS: THE

the romantic egalitarianism of John Dewey<sup>93</sup> and the social investigations of Jane Addams's Hull-House,<sup>94</sup> pragmatic ideas and faith in scientific methods had spread widely, and American intellectuals commonly saw them as rational supports for both democratic values and an intelligent constitutionalism. "The perfect type of authoritative technical methods are those which prevail among scientific men in respect to scientific work," Herbert Croly had declared.<sup>95</sup> Turned toward the goal of "social improvement," those methods were "doing more to revolutionize and reconstruct the American democracy than can a regiment of professional revolutionists and reformers."<sup>96</sup>

As Americans confronted the unnerving threat of Nazism and the massive challenges of war and cold war, however, many came to see naturalist and empiricist philosophies as barren and inadequate, while scientific achievements appeared newly unnerving and—with the disclosure of Nazi death camps and the arrival of the atomic bomb—newly terrifying. Political, religious, and philosophical critics of sociological and realist jurisprudence, and often of the Progressive and New Deal policies they commonly supported, grew in numbers and fervor. Critics began to charge that naturalist ideas led to intellectual relativism and moral nihilism and that they consequently undermined democratic ideals by denying any rational moral basis for either condemning Nazism or justifying democracy. Indeed, such critics insisted, those who adopted Holmesian attitudes could not rationally distinguish the most evil Nazi edicts from what was properly and truly "law." Rather than being allies of democracy, then, Holmesian and realist ideas were its lethal enemies.<sup>97</sup>

It was at this juncture that critics of legal realism revived the term "positivism." They did so to merge the variety of naturalist and empiricist ideas that inspired sociological and realist approaches with the highly negative idea of an amoral and anti-religious "philosophical

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CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 163, 163 (Mark DeWolfe Howe ed., 1942).

92. DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 198-200 (1974).

93. See, e.g., ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 86-88 (1995).

94. "We continually conduct small but careful investigations at Hull-House . . ." JANE ADDAMS, TWENTY YEARS AT HULL-HOUSE WITH AUTOBIOGRAPHICAL NOTES 301 (1943).

95. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 434 (1909).

96. *Id.* at 439. Progressive reform "implies the selection of peculiarly competent, energetic, and responsible individuals to perform the peculiarly difficult and exacting parts in a socially constructive drama." *Id.* at 428. "The more clear-sighted progressives almost unanimously believe in a body of expert administrative officials . . ." CROLY, *supra* note 84, at 355-56.

97. See generally EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 159-78 (1973).

positivism" that most nineteenth-century Americans had rejected. As a general philosophy, the critics maintained, positivism was materialist, determinist, relativist, and irreligious, and as a political philosophy it was now proving itself nihilistic, antidemocratic, and ultimately totalitarian. Lon L. Fuller's 1940 book, *The Law in Quest of Itself*, was pivotal in shifting legal attitudes because it assaulted legal realism and modern intellectual developments by merging them as examples of a pervasive and debilitating "positivism." Fuller focused in particular on the "separation thesis" and "the inability of positivism, in all its forms, to deal with the *content* of the law."<sup>98</sup> Positivism, he charged, entailed moral skepticism and nihilism, and it gave birth to a morally unmoored and "peculiarly modern conception of democracy" that would prove "suicidal" to western democracies.<sup>99</sup> That skeptical and nihilistic conception "accelerated the disintegrative forces which threaten modern society" and was "demonstrably incapable of sustaining a nation in time of crisis."<sup>100</sup> He left no doubt about his point. "This negative conception of democracy played an important part, I am convinced, in bringing Germany and Spain to the disasters which engulfed those countries."<sup>101</sup>

In the frightening context of the 1940s, Fuller's charges drew blood. The decade witnessed the disintegration of legal realism as a

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98. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 88 (1940) (emphasis in original). The "common objective of all systems of positivism is to preserve a distinction between the law that is and the law that should be or is trying to be." *Id.* at 132. Fuller's use of the term "positivism" may also have been encouraged by the arrival in the United States in the 1930s of a school of philosophy known as "logical positivism," which taught that metaphysics was meaningless, that intelligible statements were limited to assertions about observable phenomena, and that moral propositions represented nothing but declarations of personal preferences and emotions. See R.W. Ashby, *Logical Positivism*, in *A CRITICAL HISTORY OF WESTERN PHILOSOPHY* 492 (D.J. O'Connor ed., 1964).

99. FULLER, *supra* note 98, at 120–21.

100. *Id.* at 125. Similarly, Morris R. Cohen became more critical of realist ideas in the 1930s. Compare Cohen, *supra* note 63, at 239 (1927) ("Yet positivism or respect for positive law cannot be eliminated."), with Cohen, *supra* note 46, at 357, 360, 365 (1931) (warning against the danger of legal realism as similar to behaviorism and criticizing positivism for "view[ing] the law exclusively as uniformities of existing behavior, in total disregard of any ideals as to what it should be").

101. FULLER, *supra* note 98, at 122. Friedrich A. Hayek advanced similar arguments in his 1944 book, *The Road to Serfdom*, and linked Nazism and totalitarianism explicitly to "legal positivism" in FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 155–56, 236–39 (1960) [hereinafter HAYEK, *THE CONSTITUTION OF LIBERTY*]. In the latter work, Hayek quoted the Swiss neo-orthodox theologian Emil Brunner, who declared that "[t]he totalitarian state is simply and solely legal positivism in political practice." EMIL BRUNNER, *JUSTICE AND THE SOCIAL ORDER* 7 (Mary Hottinger trans., 2d ed. 1945), quoted in HAYEK, *THE CONSTITUTION OF LIBERTY*, *supra*, at 499 n.83. The political scientist John Hallowell used the term for similar purposes in 1944, charging that positivism led to "nihilism in thought and anarchy in practice." GEORGE H. NASH, *THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA: SINCE 1945*, at 44–45 (1976) (internal quotation marks omitted).

recognizable movement, a renewed interest in theories of natural law, and a "religious revival" that gave new impetus to the idea that religion was the foundation of democracy.<sup>102</sup> Further, the horrors of Nazism generated a powerful drive to bring its perpetrators to justice, a goal that seemed unjustifiable under positivist principles.<sup>103</sup> Thus, the Nuremberg and Tokyo war crimes trials rejected the positivist ideas that law and morals were separate and that only the "command" of the sovereign was truly "law." In their place grew revitalized ideas of "higher" laws, newly established institutions of international law, and spreading appeals to universal "human rights."<sup>104</sup>

The crises of the 1940s generated a vibrant national consensus that proclaimed the moral superiority of democracy and the need for "faith" in its moral goodness and ultimate triumph, while the subsequent Cold War strengthened and sustained that cultural formation.<sup>105</sup> Throughout the remainder of his long career, Fuller, for one, continued to warn against the fatal dangers of positivism. When H. L. A. Hart, the Professor of Jurisprudence at Oxford University and the foremost postwar advocate of legal positivism, taught at Harvard in 1957–58, he was acutely aware that Fuller thought him "a radically mistaken positivist."<sup>106</sup> More important, Hart recalled, "[t]he word positivist had a tremendously evil ring."<sup>107</sup>

While critics condemned positivist ideas in the name of democracy,

102. NASH, *supra* note 101, at 57–83. See generally RICHARD H. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE: AMERICAN INTELLECTUALS IN THE 1940S AND 1950S* (1985); PURCELL, *supra* note 97, at 235–66.

103. Compare, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618–20 (1958) (criticizing the German postwar courts for allowing a criminal conviction where the act in question was legal at the time), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648–57 (1958) (defending the German courts).

104. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 29–33 (2000); see, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004) (presenting an account of the often unspoken "dark side" of humanitarianism); GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994). See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (presenting a personal account of the Nuremberg trials).

105. See, e.g., ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988); PURCELL, *supra* note 97, at 235–72; JOHN F. WILSON, *PUBLIC RELIGION IN AMERICAN CULTURE* (1979). For the classic work that argues the political compatibility of the major American religions with democracy, see WILL HERBERG, *PROTESTANT-CATHOLIC-JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (rev. ed. 1960).

106. NICOLA LACEY, *A LIFE OF H. L. A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 181 (2004).

107. *Id.* Hart also remembered Fuller's academic and philosophical ally, Henry M. Hart, Jr., for "castigating" him over "his mistaken positivist views." *Id.* at 187 (quoting Lacey's text, not H.L.A. Hart himself). See generally Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013) (discussing the origins of Henry M. Hart, Jr.'s critique of positivism).

however, others honored positivist ideas in the name of constitutionalism. During the late nineteenth and early twentieth centuries sociological jurists and political Progressives had used positivist ideas to attack both Langdellian "formalism" and the "conservative" Court, and in the years after 1937 those ideas came to the supreme bench. President Franklin Roosevelt's new appointees shared the views of the sociological and Progressive critics of the old Court, and they heralded an era of "judicial restraint" and broad deference to legislative directives.<sup>108</sup>

The subsequent jurisprudence of the New Deal Court reflected the legal positivist ideas inherent in the Progressive critique of the old Court. The Roosevelt Justices hailed the legislature as the fundamental lawmaking body in a democracy and insisted that judges should interpret statutes to achieve the legislature's purpose and refrain from reading their own personal and extraconstitutional values into the law. Courts should invalidate the actions of other governmental branches, they maintained, only when those actions clearly and unquestionably transgressed the commands of the Constitution. The Roosevelt Justices, in other words, upheld positions generally consistent with positivism's "sources," "traceability," and "separation" theses.

Thus, the years that surrounded World War II and the Cold War brought fundamental, if radically bifurcated, changes in American attitudes toward the ideas of legal positivism. With respect to democratic theory, positivism and the naturalist ideas associated with sociological jurisprudence and political Progressivism came to be seen as dangerous and destructive. With its "separation" thesis spotlighted as amoral and nihilistic, legal positivism stood as democracy's deadly enemy. In contrast, with respect to constitutional law, those same positivist ideas appeared authentically democratic. They underwrote a jurisprudence that constrained "unelected" judges, prohibited them from infusing their own personal moral values into their legal decisions, and directed them to follow only the authoritative commands of the Constitution and the legislature. Progressivism had made positivist ideas a bulwark of both constitutionalism and democracy, but Nazism and the age of war and Cold War fractured that union and made some positivist ideas the foundation of constitutionalism but cast others as the destroyers of democracy.

#### *D. Legal Positivism in Contemporary America*

During the last half century, debate about the meaning and

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108. See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947* (1948) (discussing the politics and values of President Roosevelt's appointees as discerned from split opinions of the Supreme Court).

significance of "positivism" underwent further shifts and realignments.<sup>109</sup> The debate over positivism's significance for democracy waned as the tensions of war and Cold War relaxed and then faded. In contrast, the debate over positivism's constitutional salience waxed as the Warren Court replaced the New Deal Court and provoked an intense political and jurisprudential reaction that transformed positivist ideas once again, this time switching them from weapons of post-New Deal liberalism into weapons of post-sixties conservatism.

In discussions of democracy, the postwar debate over positivism cooled as world conditions and foreign policy challenges changed drastically.<sup>110</sup> The softening and eventual end of the Cold War and the concurrent emergence of a new "globalizing" world brought bewildering new complications, while recurring experiences of regime change raised agonizing problems of "transitional justice" that highlighted enduring tensions between positive law and morality.<sup>111</sup> Positivist appeals to newly institutionalized practices of international law confronted nonpositivist appeals to norms of universal "human rights." Peoples and nations hailed democracy across the world, but they also widely and often bitterly contested its meaning and implications. The old and rigid Cold War debate over the consequences of positivism and antipositivism for democracy seemed simplistic and outmoded.

Beyond those broad historical shifts, positivism's relevance for

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109. Even when memories of Nazism and the war faded, critics continued periodically to attack the debilitating character of positivism and relativism. "Holmes was at the forefront of a revolution whose achievements were mostly negative. This revolution was not a 'revolt against formalism' but a revolt against objective concepts of right and wrong—a revolt against natural law." ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 10 (2000) (endnote omitted).

110. The term "positivism" continued in use in the social sciences, perhaps most commonly in the field of economics. "Positive economics is in principle independent of any particular ethical position or normative judgments," Milton Friedman wrote in 1953. "As Keynes says, it deals with 'what is,' not with 'what ought to be.'" MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 4 (1953). The positivist label again became a term of scorn in the 1960s and 1970s as part of the Left's critique of science, expertise, and objectivism. "One common element" of the period's intellectual and social critique was "its attack on positivism, and more generally its attack on the claims of objectivity . . ." Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1839 (1988); see also Edward A. Purcell, Jr., *Social Thought*, 35 AM. Q. 80, 83–90 (1983) (relating the period's attack on objectivism). During the last quarter of the twentieth century the term returned to use in a favorable light in connection with the development of "positive political theory," a movement that sought to use game theory, statistical methods, and social choice analysis to explain the logic of individual and institutional political behavior. See, e.g., WILLIAM H. RIKER & PETER C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (1973); 1–2 DAVID AUSTEN-SMITH & JEFFREY S. BANKS, *POSITIVE POLITICAL THEORY* (1999, 2006).

111. See, e.g., RUTI TEITEL, *HUMANITY'S LAW* (2011) (discussing these recently emergent issues); TEITEL, *supra* note 104.

debates over democracy also declined in importance because the academic field of legal theory itself changed internally. While an ongoing debate between Fuller and Hart kept the Nazi-era experience alive through the 1950s, their exchanges gradually muted the apparent salience of their disagreement. The two paramount postwar representatives of natural law and legal positivism showed themselves in general agreement on most specific political and moral issues, and their theoretical differences came to seem ever more slender and arcane.<sup>112</sup>

Moreover, the publication in 1961 of Hart's magnum opus, *The Concept of Law*,<sup>113</sup> which stimulated positivist thinking among academic specialists, turned the field of legal philosophy away from popular and public political disputes. The book shifted the discipline's focus to the conceptual analysis of "legal systems" as they existed "in general," and it altered the field's method from relatively common-sense legal and political reasoning to the technical tools of modern British language philosophy. The book eclipsed practical and empirical concerns and made legal positivism more generalized, more analytically rigorous, and more tightly focused on the internal "rules" necessary to create a "general" legal system.<sup>114</sup> As positivist legal philosophy grew more technical and abstract, it gained conceptual precision but lost popular and political relevance.<sup>115</sup>

Indeed, by the late twentieth century legal positivism bore only a tenuous relationship to its classical nineteenth-century form. Hart

112. Both Hart and Fuller agreed, for example, that an overtly retrospective statute would have best dealt with the problem of transitional justice after the fall of Nazism. See Fuller, *supra* note 103, at 661; Hart, *supra* note 103, at 619–20. Needless to say, both favored democracy, condemned "totalitarianism," and readily affirmed that Nazism established an evil and immoral regime whose "laws" did not deserve allegiance. Indeed, Fuller's theoretical position was based in large part on philosophical pragmatism. Kenneth I. Winston, *Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law*, 8 OXFORD J. LEGAL STUD. 329 (1988).

113. HART, *supra* note 3.

114. Most of those working in the positivist tradition abandoned Austin's ideas about "sovereignty" and "command" in favor of more complex theories based on social rules and formal institutional procedures. See, e.g., Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 683, 686 (2006). On Hart's impact on modern positivism, see THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert P. George ed., 1996); HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* (Jules Coleman ed., 2001); LACEY, *supra* note 106; Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1711–17 (1996) (reviewing H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994)); Frederick Schauer, *Re(taking) Hart*, 119 HARV. L. REV. 852, 866–67 (2006) (reviewing LACEY, *supra* note 106).

115. See Schauer, *supra* note 114. Hart's "philosophical predilections proceeded to transform the field of jurisprudence," *id.* at 862, but the "antiempirical purity" of his approach imposed a "distinct cost" of narrowness and abstractness on his "legacy," *id.* at 868. See also William Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 LAW Q. REV. 557, 561–62 (1979).

himself noted the many "ambiguities" and disagreements that existed among those who pursued positivist approaches,<sup>116</sup> while another scholar concluded that the term "positivism" was used to describe twelve different and sometimes contradictory positions.<sup>117</sup> Most striking, modern adherents divided sharply over one of positivism's foundation principles, the "separation" thesis. Some, including Hart, advocated a "soft," "inclusivist," or "incorporationist" positivism that recognized that moral principles and values—as "social" products, not as elements of a "higher" natural or divine law—could be authoritative "sources" of law.<sup>118</sup> Others held to a "hard" or "exclusivist" positivism that insisted that moral values and principles should be kept wholly separate from the positive and authoritative sources of law "properly so called."<sup>119</sup>

Finally, when Ronald Dworkin, who became the leading legal philosopher of American liberalism in the 1970s, extended Fuller's critique of Hart's work and launched repeated broadsides against its theoretical adequacy and political relevance, legal positivism was once again forced onto the defensive. Dworkin boldly carried the banner of post-New Deal liberalism, the civil rights movement, and the Warren Court, and he identified all three with individual rights, democratic values, and foundations in moral philosophy.<sup>120</sup> In a series of works he sought to justify his interrelated claims on the basis of a philosophical examination of the nature of law and its relationship to rationally knowable moral principles.<sup>121</sup> In the process Dworkin rejected or

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116. HART, *supra* note 3, at 302.

117. Robert S. Summers, *Legal Philosophy Today—An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY* 1, 15 (Robert S. Summers ed., 1968).

118. See HART, *supra* note 3, at 250–54. For thoughtful and diverse efforts to define positivism in more careful and nuanced terms, see JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 3–27 (1988); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); JEREMY WALDRON, *LAW AND DISAGREEMENT* 165–70 (1999).

119. See, e.g., Scott J. Shapiro, *On Hart's Way Out*, 4 *LEGAL THEORY* 469, 475–76 (1998); Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 311–15 (1985); cf. Marmor, *supra* note 114.

120. While Dworkin focused on legal issues, see, e.g., sources cited *infra* note 121, John Rawls advanced similar "liberal" ideas on a more abstract level in his construction of an elaborate egalitarian political philosophy, JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

121. For example, Dworkin wrote, "the American ideal of government not only under law but under principle as well is the most important contribution our history has given to political theory." RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 6 (1996). Under the "moral reading," the Constitution's provisions "refer to abstract moral principles and incorporate these by reference, as limits on government's power." *Id.* at 7; accord RONALD DWORKIN, *LAW'S EMPIRE* 33–43 (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 131–37, 365–72 (1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*]; see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14–80 (1978) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*] (criticizing legal positivism).

severely criticized all four of legal positivism's classic theses,<sup>122</sup> and, in the process, spurred new and intriguing debates among academic specialists but further removed the discussion from popular political discourse.<sup>123</sup>

As positivism's role in discussions of democracy faded, its role in debates over constitutional interpretation flourished. There, however, political shifts reversed its practical and ideological utility. Although the Justices who dominated the New Deal Court tended to reflect the judicially restrictive views of Progressive legal positivism, the new liberal Justices of the Warren Court broke away from that mindset and abandoned its restrictive view of the judicial power. In the context of the Civil Rights Movement and an inspiring new social activism, they reoriented the Court's jurisprudence once more. The Justices of the Warren Court replaced the "judicial restraint" of the New Deal Court with a new determination to enforce "fundamental" rights, and they saw the Constitution as a nationalist and egalitarian charter designed to protect an expansive range of rights that all Americans properly enjoyed.<sup>124</sup> They drastically broadened the constitutional mandate of equal protection, pressed the nation toward elimination of racial discrimination, and recognized a variety of substantive rights involving speech, voting, privacy, marriage, religion, and criminal procedure—rights sometimes drawn from the Constitution's textual provisions only by strained implication. Along with Dworkin, many of the Court's supporters sought to articulate normative theories to justify its liberal rulings, and they often appealed to relatively amorphous and sometimes abstract concepts such as "human" or "fundamental" rights and generalized principles of equality and democracy.<sup>125</sup>

As the Warren Court helped define and implement a new liberal nationalist jurisprudence, those who either questioned or rejected its reasoning and methods began to draw more heavily on positivist ideas. Understandably, critics—some of whom were liberals sympathetic with

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122. Although Dworkin seemed to modify some of his views over the decades, as a general matter he rejected the "social" thesis, at least severely qualified the "separation" thesis (rejecting its classic or "hard" positivist sense and at least substantially altering its "soft" positivist sense), and reinterpreted the "sources" and "traceability" theses by infusing both with the principles of moral philosophy. For a critique of Dworkin's analysis of positivism, see Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165 (2004).

123. See, e.g., Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008); Frederick Schauer, *Positivism Before Hart*, 24 CAN. J.L. & JURISPRUDENCE 455 (2011).

124. See generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

125. Such a "social philosophy," Hart wrote, "has much affinity with the eighteenth-century doctrines of the unalienable rights of man which were for long thought to have succumbed to their great utilitarian critic[us], Bentham[us]." HART, *supra* note 71, at 148.

much of the Court's jurisprudence—focused on the gaps between the Court's decisions and the Constitution's provisions, and they pointed out that the rights the Court created and the values it invoked were sometimes found not in the Constitution but in the Justices' personal values.<sup>126</sup> In the 1970s and early 1980s the debate over positivistic ideas took on a sharper urgency, recharacterized for a time in newly adopted terms as “a debate between the ‘interpretivists,’ who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and the ‘noninterpretivists,’ who believe that the Court may protect norms not mentioned in the Constitution's text or in its preratification history.”<sup>127</sup>

While “liberals” debated the quality of the Warren Court's work and the arguments of Dworkin and other “rights” theorists, conservatives reacted more sharply, attacking the Court roundly and turning fully and far more insistently to positivist principles.<sup>128</sup> The Constitution, they increasingly argued, had a determinate “original” meaning found in its text and in the original “intent” or “understanding” of those who drafted and ratified it.<sup>129</sup> They argued that judges must follow that “original”

126. For critiques of the Warren Court, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 1991); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Edwin Meese III, *Construing the Constitution*, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in 19 U.C. DAVIS L. REV. 22 (1985).

127. Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1208–09 (1984); see also, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (discussing the two theories while proposing a third theory); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

128. “The first causes of the conservative countermobilization were changes in constitutional law in civil rights, criminal procedure, and sexual and religious freedom. . . . Richard Nixon ran for president in 1968 promising to brake the Warren Court's activism . . . .” STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 60 (2008). For more on Nixon's battle against the Warren Court, see JAMES F. SIMON, *IN HIS OWN IMAGE: THE SUPREME COURT IN RICHARD NIXON'S AMERICA* (1973). The correlation between the political right and philosophical positivism was imperfect, but it increased sharply over time. In 1968, for example, as he charged that the Warren Court “was voting its preferences into law,” Robert H. Bork suggested that the Court could resolve the interpretative problems it faced “by giving content to the concept of natural rights.” Robert H. Bork, *The Supreme Court Needs a New Philosophy*, *FORTUNE*, Dec. 1968, at 138, 168. Bork subsequently repudiated parts of this article as his views changed and he moved toward positivist principles. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) [hereinafter Bork, *Neutral Principles*].

129. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823–24 (1986); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705 (1976); see ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1–109

meaning and were prohibited from interpreting it in light of either their own personal values or the changing values of contemporary society.<sup>130</sup> The Warren Court violated those principles, they charged, and its jurisprudence was wrongheaded and illegitimate.

Edwin Meese III, President Ronald Reagan's attorney general in the 1980s, announced the official conservative embrace of positivistic originalism. Denouncing the "radical egalitarianism and expansive civil libertarianism of the Warren Court," he maintained that its jurisprudence was "ad hoc," "bizarre," and "more policy choices than articulation of constitutional principle."<sup>131</sup> The solution, he declared, was to return to the "original" intentions of the founders as "the only reliable guide for judgment."<sup>132</sup> Such an approach would "produce defensible principles of government that would not be tainted by ideological predilection."<sup>133</sup> For those reasons, he announced, it "has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention."<sup>134</sup>

Thus, as many liberals moved away from legal positivism in defense of constitutionally unspecified rights and often in support of a "living" constitutionalism, conservatives turned to positivistic ideas in the form of constitutional "originalism" to discredit both. "I wish to demonstrate," Robert Bork proclaimed, "that original intent is the only legitimate basis for constitutional decisionmaking."<sup>135</sup> His political objection was apparent. "For the past half-century, whenever the Court

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(Steven G. Calabresi ed., 2007). "[T]he appeal of originalism was confined almost exclusively to those who opposed the activism of the Warren Court and sought to de-legitimize the Court's claimed powers." Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 67 (1993).

130. Invocation of the original intent or understanding of the Founders is a standard method of constitutional argumentation, variously invoked by Justices and commentators in support of all political positions. See generally JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005). What was new about the debate beginning in the late twentieth century was the fact that conservative politicians, commentators, and judges seemed to advance "originalism" collectively as a formal—and often allegedly exclusive—theory of constitutional interpretation while shaping it into a rhetorical weapon directed specifically against "liberal" policies and many of the Warren Court's decisions. In doing so, they often employed historical sources dubiously and selectively in an effort to create support for their contemporary ideological preferences. See, e.g., MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* 148–86, 247–80 (2013); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014).

131. Edwin Meese III, Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in THE FEDERALIST SOCIETY, *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (1986).

132. *Id.* at 10.

133. *Id.* at 9.

134. *Id.* at 10.

135. Bork, *supra* note 129, at 823.

has departed from the original understanding of the Constitution's principles," he charged, "it has invariably legislated an item on the modern liberal agenda . . . ."<sup>136</sup> Not surprisingly, then, when conservative appointees gradually came to dominate the Court in the late twentieth century, they began shifting its language of constitutional jurisprudence back toward positivist principles, this time—unlike the prior swing toward constitutional positivism after 1937—shaped to serve not the liberal values of the New Deal but the conservative values of the post-sixties Republican coalition.<sup>137</sup>

The conservatives' success was striking. Not only did they reshape many of the Court's substantive doctrines, but they also made originalism a dominant rhetoric of constitutional argumentation and justification. Positivist originalism had seldom been so influential, or at least so commonly advanced as the ostensible ground of decision.<sup>138</sup>

## II. SOME HISTORICAL LESSONS

Drawing "lessons" from history is a perilous endeavor. Human cultures and social contexts are astonishingly complex as well as

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136. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 130 (1990). On the incoherence of Bork's "originalism," see RICHARD A. POSNER, *OVERCOMING LAW* 237–55 (1995).

For other "originalist" statements, see, for example, *Alden v. Maine*, 527 U.S. 706, 724–28 (1999); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38, 45 (Amy Gutmann ed., 1997) [hereinafter *Scalia, Common-Law Courts*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989). It is probably fair to say that most "conservative" theorists adopted some form of "soft" positivism and accepted the relevance of moral principles that they believed the Constitution incorporated into its text. *E.g.*, Bork, *Neutral Principles*, *supra* note 128, at 10 ("Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute."). For examples of varied versions of such conservative "soft" positivism, see SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 15, 58, 89–90, 197–200 (1995), and LASH, *supra* note 21, at 84, 88–89.

137. See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004). For the inconsistent and problematic uses of "originalism" by the post-1960s conservative Court, see, for example, DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 44–54 (2002); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51–53 (1989); Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 70 (Earl M. Maltz ed., 2003).

138. See, for example, *District of Columbia v. Heller*, 554 U.S. 570 (2008), where both the five-Justice majority, *id.* at 573 (Scalia, J.), and the four-Justice dissents, *id.* at 636 (Stevens, J., dissenting); *id.* at 681 (Breyer, J., dissenting), invoked originalist arguments. Although conservatives pressed originalism most strongly, liberals also began to employ its rhetoric and method. See, *e.g.*, Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999).

continuously and unevenly changing. However similar, or even purportedly "identical," historical events may seem, they are invariably marked by critical differences. Thus, the inexorable realities of change, complexity, and variation severely limit the lessons that societies can soundly draw from the past. In the case of legal positivism in America, however, those very realities help identify three fundamental lessons that emerge from positivism's winding and troubled history.

### A. *Positivism and Democracy*

While history establishes few general lessons, it does demonstrate rather convincingly that there is no "necessary" relationship—pro or con—between legal positivism and democracy. Thomas Hobbes and Austin were no democrats, while many antipositivists, like Fuller, surely were.<sup>139</sup> Equally, however, history also demonstrates that the same is true of the relationship between antipositivism and democracy. Theories of natural or divine law—stressing, for example, the moral equality of all humans as children of God—can readily serve democratic purposes.<sup>140</sup> Equally true, however, historical experience from Luther and the Inquisition through seventeenth-century Massachusetts Puritanism and nineteenth-century Catholic authoritarianism to the wide range of shrill and discordant voices in our own day that purport to speak in God's name make it only too apparent that ideas about "natural moral orders" and "divine commands" hardly

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139. Some claim that "legal historians and legal theorists in the main occupy different intellectual territories and eschew, where they do not affect to despise, each other's endeavors." Andrew Lewis, *Legal Positivism – Some Lessons From Legal History*, in *POSITIVISM TODAY* 65, 65 (Stephen Guest ed., 1996); see, e.g., LEITER, *supra* note 118, at 103–04. On Hobbes and Austin as antidemocrats, see *supra* note 73.

140. Father John A. Ryan, for example, was a Catholic priest who defended church doctrine and the idea of a natural moral law as vigorously as he defended progressive economic ideas and the rights of labor. The Church's teachings on "natural rights," he argued, meant that "the right to a livelihood and the right to an education will include a greater amount of the means of living and greater opportunities of self-improvement in the cases of those who have greater needs." JOHN A. RYAN, *A LIVING WAGE: ITS ETHICAL AND ECONOMIC ASPECTS* 47 (1906). Attacking the Supreme Court's "liberty of contract" decisions, Ryan quoted Holmes approvingly and insisted "no employer can reasonably claim the right to make a contract which ignores the natural right of the employee to a decent livelihood." JOHN A. RYAN, *DECLINING LIBERTY AND OTHER PAPERS* 30 (1927).

Similarly, Dr. Martin Luther King, Jr., a Baptist minister, invoked "the moral law or the law of God" when he defended civil disobedience as a method of challenging "unjust laws" that imposed racial segregation and discrimination. "One who breaks an unjust law," he explained, "must do so openly, lovingly, and with a willingness to accept the penalty." MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 94, 95 (1963). In implicitly challenging positivist definitions of law, he used the standard image: "We should never forget that everything Adolph Hitler did in Germany was 'legal.'" *Id.* at 96.

lead by necessity to democratic conclusions.<sup>141</sup> Just as there is no necessary connection between democracy and positivism, there is no necessary connection between democracy and antipositivist theories of natural or divine law.<sup>142</sup>

Similarly, it is clear that there is no necessary connection between legal positivism and any form of moral relativism, skepticism, or nihilism.<sup>143</sup> Indeed, legal positivism could quite logically embrace forms of “moral realism” that affirm the objective existence of true and binding moral principles.<sup>144</sup> While some philosophical versions, such as “logical positivism” with its ethical theory of “emotivism,”<sup>145</sup> entail forms of moral relativism or agnosticism, the narrower and more precise ideas of “legal” positivism do not. The “separation” thesis, after all, maintains only that law is “distinct” from morality, not that the two are unrelated or that the former negates the significance and worth of the latter.<sup>146</sup>

Thus, for democratic theory the most important lesson of history would seem to be that the fundamental premises of any general theory

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141. For recent studies of the varied and often conflicting roles and political uses of religion in American politics, see, for example, KELLY J. BAKER, *GOSPEL ACCORDING TO THE KLAN: THE KKK'S APPEAL TO PROTESTANT AMERICA, 1915-1930* (2011); DENIS LACORNE, *RELIGION IN AMERICA: A POLITICAL HISTORY* (George Holoch trans., 2011); STEPHEN H. MARSHALL, *THE CITY ON THE HILL FROM BELOW: THE CRISIS OF PROPHETIC BLACK POLITICS* (2011); DAN MCKANAN, *PROPHETIC ENCOUNTERS: RELIGION AND THE AMERICAN RADICAL TRADITION* (2011); AXEL R. SCHÄFER, *COUNTERCULTURAL CONSERVATIVES: AMERICAN EVANGELICALISM FROM THE POSTWAR REVIVAL TO THE NEW CHRISTIAN RIGHT* (2011); TOBIN MILLER SHEARER, *DAILY DEMONSTRATORS: THE CIVIL RIGHTS MOVEMENT IN MENNONITE HOMES AND SANCTUARIES* (2010).

142. “Doubtless the natural law theorist cannot plausibly make strong claims about the ready and uncontroversial knowability of particular moral truths, if for no other reason than the protracted irreconcilability of moral beliefs held by undoubted leading natural law theorists.” R. George Wright, *Natural Law in the Post-Modern Era*, 36 AM. J. JURIS. 203, 206 (1991) (reviewing *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert P. George ed., 1992)). For examples of the diversity among natural law theorists, see *NATURAL LAW THEORY*, *supra*.

143. For an interesting argument that there is no necessary logical connection between legal positivism and democratic theory but that they are nonetheless largely consistent, see Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675 (2009).

144. For a modern philosophical version, see ALAN GEWIRTH, *REASON AND MORALITY* (1978), and Gewirth's response to comments in Alan Gewirth, *Replies to My Critics*, in *GEWIRTH'S ETHICAL RATIONALISM: CRITICAL ESSAYS WITH A REPLY BY ALAN GEWIRTH* 192 (Edward Regis, Jr. ed., 1984).

145. Ashby, *supra* note 98, at 505-06.

146. “[T]he divine law is the measure or test of positive law and morality: or (changing the phrase) law and morality, in so far as they *are* what they *ought* to be, conform, or are not repugnant, to the law of God.” AUSTIN, *supra* note 5, at 6. “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.” HOLMES, *supra* note 56, at 170. For an interesting effort to rethink positivism's separation of law and morality, see Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2 (2011).

have little determinative power and that it is the "intermediate premises" and embedded, if implicit, culturally based significations that determine, at any given time and place, a general theory's practical implications. It is not the abstract "principles" that control but the particular, granulated, and ingrained cultural values and assumptions that inform them. Those values and assumptions infuse concrete social and political meaning into general theories, narrow the scope of interpretive possibilities, and guide the understanding of those who apply them in practice.

The radical changes in significance that Americans in the 1940s attributed to "positivist" and "natural-law" ideas confirm the political elasticity of jurisprudential theories. The practical meanings of both sets of ideas arose not from their intrinsic nature but from changing historical contexts and the changing goals and values of those who used them. Holmes illustrates the point.<sup>147</sup> "All my life," he wrote in 1916, "I have sneered at the natural rights of man."<sup>148</sup> That statement, and a raft of others like it, led many to find his ideas repulsive, immoral, and profoundly antidemocratic.<sup>149</sup> It is equally true, however, that Holmes' personal moral code was traditional and honorable, that his commitment to American government and its constitutional order was deep and genuine, and that his relationship to democracy was far more complex than his sneer about "natural rights" might suggest. Indeed, if Holmes appeared antidemocratic to some, he appeared to others as both an exemplar and spokesman for a compelling theory of democracy.<sup>150</sup> In fact, during the century and a half since the Civil War, legal positivists as well as antipositivists in the United States have commonly been democrats of one variety or another, and it seems clear that it was not their positivism or antipositivism that dictated their democratic affinities but, rather, their democratic affinities that shaped the political conclusions they read into their contradictory views of positivism. On the most general level, then, Richard Rorty surely hit the mark when he concluded that, in determining political values and assumptions, "democracy takes precedence over philosophy."<sup>151</sup>

147. Pound illustrates the same point, but with a different twist. An ostensibly "democratic" theorist, he in fact viewed "democracy" with some disdain. "The wail of the unfit," he wrote in 1915, "is very apt to be made in the name of the Demos." WIGDOR, *supra* note 92, at 199 (internal quotation marks omitted). Pound "put little faith in the wisdom of the masses" and "was not troubled by the antidemocratic implications of social engineering." *Id.*

148. Oliver Wendell Holmes, Jr. to Harold J. Laski (Sept. 15, 1916), *supra* note 56, at 21.

149. See, e.g., ALSCHULER, *supra* note 109; John C. Ford, *The Totalitarian Justice Holmes*, 159 CATH. WORLD 114 (1944); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493 (1942).

150. PURCELL, *supra* note 97, at 207-09.

151. 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 192 (1991). Rorty declared that pragmatism is "neutral between democrats and fascists," a claim

General principles are essential to organize, guide, and test our thinking, but they are by their nature indeterminate and manipulable in their implications. If people truly believe in democratic principles and values, one need not know whether they believe in science or the Bible, tradition or natural law, historical inevitability or—as Mark Twain might have said—the Deity him- or her-self. Indeed, one need not know whether people who claim to believe in God believe that their God is “good” or “great,” “angry” or “merciful,” “exacting” or “loving.” What one needs to know, rather, is exactly what implications and conclusions people draw from those principles and beliefs and, in particular, what they think those principles and beliefs allow or compel them to do to control, exploit, punish, imprison, or kill other people.<sup>152</sup>

While it is essential to recognize the contingent nature of the relationship between legal positivism and democracy, it seems equally important to note that such “contingency” does not mean that there is no logic that can reasonably shape positivist principles into an intellectual support for democratic values. Indeed, as many theorists show, positivist ideas—in both narrow jurisprudential forms as well as broader philosophical ones—are readily understood as compatible with democratic principles and easily used to reinforce and justify those principles. One of John Dewey’s most far-reaching contributions was to suggest some of the ways in which naturalism, relativism, pragmatism, and the rejection of “absolutism” in law and morality support and strengthen democratic ideals and practices.<sup>153</sup> More recently, Professor Jeremy Waldron similarly suggested ways in which the narrower principles of legal positivism can lead to the same result. Positivism’s “sources thesis” can serve to legitimate constitutional government, promote political accountability, and affirm limits on official discretion and power, while its “social thesis” can support the need for transparency in governmental processes, popular access to information

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that would depend in the first instance on how, exactly, one defined pragmatism. Richard Rorty, *The Professor and the Prophet*, 52 *TRANSITION* 70, 75 (1991) (book review). For a different view of pragmatism, see ROBERT B. WESTBROOK, *DEMOCRATIC HOPE: PRAGMATISM AND THE POLITICS OF TRUTH* (2005).

152. Prior to his arrest in 2005, Bernardo Provenzano, the man regarded as the supreme leader of the Sicilian mafia for the previous forty-three years, reportedly sent instructions to his underlings in secret, hand-carried written messages in which “there was always a mention of God and his will and protection.” Andrea Camilleri, *When a Godfather Becomes Expendable*, *N.Y. TIMES* (Apr. 21, 2006), <http://www.nytimes.com/2006/04/21/opinion/21camilleri.html>.

153. In the late 1930s, Dewey began to explore the relationship between culture and democracy and to identify the cultural and social roots of democratic values. *E.g.*, JOHN DEWEY, *FREEDOM AND CULTURE* (1939); see PURCELL, *supra* note 97, 200–17; WESTBROOK, *supra* note 151. For general studies of Dewey and his contributions to naturalistic democratic theory, see RYAN, *supra* note 93, and ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* (1991). For an effort to revive and develop from Dewey’s work an “epistemological” defense of democracy, see HILARY PUTNAM, *RENEWING PHILOSOPHY* 180–202 (1992).

about “public” matters, and continuing and informed consent by the citizenry.<sup>154</sup>

Indeed, Waldron suggests—as Dewey did—that the recognition of moral disagreements and the willingness to hold in abeyance all allegedly “absolute” values serves the cause of toleration, individual freedom, and peaceful democratic government.<sup>155</sup> “Democrats, more than most other political theorists, are sensitive to the realities of moral disagreement,” Waldron explained.<sup>156</sup> Thus, democrats “believe these disagreements should be resolved politically by fair procedures of voting; but they have no reason to say that anyone is required to change his *opinion* about justice simply because he was defeated in a fair vote.”<sup>157</sup> Thus, democratic theorists will readily distinguish between the fairness of electoral procedures and the substantive moral quality of the decisions that follow. “And this,” Waldron concludes, “will be something like a democratic version of the separability thesis.”<sup>158</sup>

Thus, positivism can serve as an intellectual support for democratic government and a prescriptive guide for exploring many of its problems. The extent to which it will actually serve those purposes, however, will depend not on positivist theory itself, legal or philosophical, but on the “intermediate premises” and specific cultural values that inspire the goals and inform the reasoning of those who seek to use it.

### B. Positivism and American Constitutional Law

Unlike its relationship to democracy, legal positivism’s relationship to constitutional law seems more direct and readily apparent. In positivist terms, the Constitution is the authoritative “source” of American law; its provisions are “separate” from the personal moral values of those who interpret it; and all lawful acts of the national government must be “traceable” to its provisions. Thus, American constitutionalism and the very idea of a written constitution readily reflect ideas associated with legal positivism.

Even if one embraces those positivist principles, however, they do

154. Waldron, *supra* note 143. Along somewhat compatible lines, Barry Friedman emphasized the “social” bases that support the constitutional practice of judicial review and legitimate it as a tool of democratic government, while Morton J. Horwitz stressed the extent to which “natural rights” ideas frequently served conservative and anti-egalitarian purposes. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 980, 983–84 (2000); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399–403 (1988).

155. PURCELL, *supra* note 97, at 200–02, 211–12.

156. Waldron, *supra* note 143, at 700.

157. *Id.* (emphasis in original).

158. *Id.* For a thoughtful analysis along similar lines, see JETHRO K. LIEBERMAN, *LIBERALISM UNDRRESSED* (2012).

not carry us far in the difficult tasks of constitutional interpretation. They do not specify how the *general* values and *general* structural principles incorporated in the Constitution are to be given specific content and application in individual cases, and they do not specify how we are to understand and apply in new and changing situations the broad or abstract terms in the authoritative "source."<sup>159</sup> Nor do they specify any specific methods for determining whether controversial policies or decisions are, in fact, properly "traceable" to that authoritative source. Understandably, those inadequacies generated disputes from the nation's beginning.

The pattern was set at the new government's birth. Those who supported ratification described—and praised—the Constitution's language as clear and the powers it granted to the proposed national government as limited; those who opposed ratification described—and condemned—its language as vague and the powers it granted to the national government as vast and undefined. Once the Constitution went into effect, however, there was a marked reversal in their constitutional views. Those who had supported ratification and subsequently took control of the new national government began to insist that the Constitution's language was general and that it granted broad and ample powers. Conversely, those who had opposed ratification and went into opposition began to insist that its language was clear and that it granted only narrow and limited powers.<sup>160</sup> From the beginning then, the Constitution's meaning and the proper methods for ascertaining that meaning were sharply contested and shaped by the values and purposes of its interpreters. While its basic institution-specifying provisions were relatively clear and generally determinative, its systemic, operational, and rights-granting provisions were not. As the changing attitudes of the founders after 1787 suggested, in those latter areas it was not the constitutional text but the perspectives of its interpreters—where they stood in the institutional structure and what they sought to accomplish—that proved critical and often decisive.

As a normative matter, in fact, both agreement and disagreement—albeit on quite different levels—marked the way Americans thought about the Constitution's meaning. On one hand, they generally agreed that it contained a relatively clear and definite meaning and that moral

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159. These would include the Constitution's "axial" principles of federalism and separation of powers, related general principles such as "checks and balances" and popular accountability, and any number of specific provisions and words including, for example, U.S. CONST. pmbl., "Justice," "general Welfare," and "Blessings of Liberty," *id.* art. I, § 8, cl. 1, "general Welfare," *id.* art. IV, § 2, "Privileges and Immunities of Citizens," *id.* art. IV, § 4, guaranteeing to each state a "Republican Form of Government," *id.* amend. IV, "right of the people to be secure in their persons, houses, papers and effects," *id.* amend. V, "due process of law," and *id.* amend. XIV, "due process" and "equal protection of the laws."

160. PURCELL, *supra* note 31, at 24–34.

values and principles were relevant in determining that meaning. On the other hand, they regularly disagreed about the actual content of that meaning, the application of the values and principles it incorporated, and the relevance of the moral values and principles it did not explicitly itemize. While Americans believed that the Constitution had a definite and ascertainable meaning and that its proper interpretation was cabined by moral principles, they nonetheless constantly disagreed about the content of that meaning and the nature and implications of those cabining moral principles.<sup>161</sup> Consequently, the Constitution became both a preeminent symbol of national unity and the continuous focus of political dispute.

Thus, legal-positivist assumptions, though compatible with American constitutionalism in theory, provided little actual interpretative direction on controversial issues. Increasingly, commentators recognized that simple theories of written constitutionalism and legal positivism did not begin to describe their actual constitutional practice.<sup>162</sup> Several factors contributed to that sharpening recognition. One was the nation's lengthening history of seemingly ceaseless constitutional dispute. Another was the gradual breakdown of what was a widely shared politico-religious-cultural assumption that the legal system was underwritten by a discernible, overarching, and divinely inspired moral order. A third was the growing recognition in the decades after the Civil War that the nation was changing rapidly and that interpretations of the Constitution should change—and in fact were changing—in response. A fourth was the spreading impact of Darwinism and the theories of social and cultural evolution it spawned, theories that assumed that change ruled all things—not only animal species but also human customs, societies, institutions, ways of thinking, and moral values themselves.<sup>163</sup> Finally, a

161. American attitudes toward law were confused and ambiguous during the revolutionary period, and the constitutional theory forged and implemented in the 1780s remained “diffusive and open-ended.” WOOD, *supra* note 19, at 291–305, 615. For recent efforts to reconcile the various “sources” of American constitutional law, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); BALKIN, *supra* note 2; LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

162. With respect to the legal systems of England and the United States, Jeremy Waldron notes, “descriptive positivism is almost certainly false.” WALDRON, *supra* note 118, at 166.

163. “The influence of Darwin upon philosophy,” Dewey declared in 1909, “resides in his having conquered the phenomena of life for the principle of transition, and thereby freed the new logic for application to mind and morals and life.” JOHN DEWEY, *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT* 8–9 (1910). “The morality of a group at a time is the sum of the taboos and prescriptions in the folkways by which right conduct is defined. Therefore morals can never be intuitive. They are historical, institutional, and empirical.” WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 29 (1906). See generally, e.g., CRAVENS, *supra* note 42 (discussing further Darwin’s impact).

swelling chorus of legal writers began to argue that the law's driving source was not logic but experience and that, in Holmes's words, the "felt necessities of the time" were far more important in its evolution than "the syllogism."<sup>164</sup> By the early decades of the twentieth century many American legal thinkers were ready to agree with Felix Frankfurter's contention that it was "sheer illusion" to believe that the power of judicial review was "exercised by distilling meaning out of the words of the Constitution."<sup>165</sup>

Increasingly, then, the theses of legal positivism came in practice to serve not as interpretive principles that provided actual direction but, rather, as rhetorical munitions for those who disagreed with the constitutional decisions of the courts. By the early twentieth century the charge that conservative judges were "reading their personal values" into the Constitution—the point of Holmes's renowned dissent in *Lochner v. New York*<sup>166</sup>—became the common refrain of Progressives across the land. Positivist assumptions—that "law" was separate from morals, rooted in social practices, and valid only when traceable to an authoritative constitutional source—became staples of Progressive rhetoric and established themselves at the core of anti-Court polemics. Indeed, the "harder" the positivist stance, the easier and more powerful the charge of judicial wrong-doing; and, reversing the relationship, the more one wished to undermine the legitimacy of judicial decisions, the greater the utility of a "hard" positivist stance.

The subsequent history of positivist, anti-Court rhetoric highlighted four general characteristics of the nation's constitutional politics. First, positivist principles proved plausible and effective polemical tools, and those who opposed the Court's reigning jurisprudence regularly took them up.<sup>167</sup> When the Roosevelt Court gave way to the Warren Court and the Justices turned the federal judicial power vigorously to liberal nationalist ends, for example, the political salience of positivist ideas

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164. HOLMES, *supra* note 58, at 1.

165. Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 125 (1927).

The words of these [constitutional] provisions are so unrestrained by their intrinsic meaning as well as by their history and traditions, that each Justice is impelled to depend upon his own controlling conceptions, which are in turn bound by his experience and imagination, his hopes and fears, his faith and doubts.

*Id.* at 126.

166. *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

167. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1428–38 (2001); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Barry, *Part Five*]; Friedman, *supra* note 154.

changed. Suddenly, the Court's liberal defenders began to develop theories of individual rights which often sounded suspiciously like refurbished versions of "natural rights," while its conservative critics picked up the old Progressive rhetoric of legal positivism and insisted that constitutional principles were distinct from moral principles and that the Court's only role was to construe the explicit text and "original" understanding of the Constitution.<sup>168</sup>

Second, positivist ideas did not, in fact, particularly constrain even those who advanced them most forcefully. Although Progressives who went on the bench after the New Deal struggled to root their decisions in authoritative constitutional sources, their decisions and theories nonetheless tended over the years to reflect distinctively "progressive," New Deal, and liberal values. Similarly, "conservatives" who began to fill the federal bench after 1969 voiced similar positivist principles,<sup>169</sup> but their decisions reflected not the consistent use of originalist and textualist methods, but the substantive values and policies of the post-Sixties Republican coalition.<sup>170</sup>

168. See, e.g., Barry, *Part Five*, *supra* note 167.

169. See, e.g., BORK, *supra* note 136, at 251–59; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Rehnquist, *supra* note 129; Scalia, *Common-Law Courts*, *supra* note 136, at 3–47.

170. See, e.g., Purcell, *supra* note 130; *supra* sources cited in note 137. In spite of their positivistic rhetoric, for example, the Court's conservative Justices repeatedly expanded the scope of the Eleventh Amendment to limit federal judicial and legislative power as they narrowed or invalidated a number of federal regulatory and civil rights statutes. Their interpretation bore essentially no relation to the amendment's text. Indeed, they easily dismissed an argument based on the actual text as an irrelevant "straw man." *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996) (Rehnquist, C.J.). Three years later, as they demonstrated the elasticity of both their originalism and their positivism, they announced that they looked to "the original understanding of the Constitution" and that the Eleventh Amendment stood for "fundamental postulates implicit in the constitutional design" and that the amendment incorporated into the Constitution a preexisting common law sovereign immunity. *Alden v. Maine*, 527 U.S. 706, 727–29 (1999) (Kennedy, J.).

Similarly, Justice Scalia embraced the "positivist" doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), in order to restrict claims under the Alien Tort Statute, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739, 745 (2004) (Scalia, J., concurring in part and concurring in the judgment), but ignored *Erie*'s positivism when he wished to establish a judge-made defense against tort claims, see *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (Scalia, J.) (making no reference to *Erie*); cf. *id.* at 516–19 (Brennan, J., dissenting) (discussing *Erie*). On the pervasive inconsistencies in Scalia's positivistic "textualism," see Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

On the ideological and political biases of the Court's "conservatives" after 1969, see AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE (Denise C. Morgan, Rachel D. Godsil & Joy Moses, eds., 2006); THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES (Charles M. Lamb & Stephen C. Halpern eds., 1991); KECK, *supra* note 137, at 107–283; EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER,

The Court's recent opinion in *District of Columbia v. Heller*<sup>171</sup> illustrates the point. There, announcing "our adoption of the original understanding of the Second Amendment,"<sup>172</sup> a five-Justice conservative majority reshaped the amendment's historical meaning by excluding ordinary military weapons from its scope and extending its coverage to reach handguns held in the home for personal protection.<sup>173</sup> They construed the amendment, in other words, to reject a relatively clear "original" purpose of the amendment (to ensure the right to hold "ordinary" military weapons for militia service and for protection against governmental tyranny), while remolding it to serve a purpose that began to gather substantial strength only in the nineteenth century (to ensure the right to hold handguns for personal protection). Support for the latter purpose rose and fell for more than a century before it was vigorously advanced in the twentieth century by organized lobbying efforts, growing fears of modern urban crime, and the Republican Party's embrace of an ideology of "gun rights."<sup>174</sup> Thus, the majority opinion reveals the easy malleability of "originalist" argumentation, the compelling power of changing social and political pressures, and ultimately the enduring fact that the "living" nature of the Constitution, however much denied or condemned, stands as an intrinsic characteristic of American law and government.<sup>175</sup>

Third, the use of positivist ideas to attack the judiciary became habitual and reflected a fundamental change in American law and governance since the Civil War. As the Supreme Court became increasingly active and its decisions increasingly far-reaching, larger numbers of Americans grew concerned about the nature of its decisions and the legitimacy of its expanding role. As the Court became an ever

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1969–1986 (2000); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995); TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* (2000).

171. 128 S. Ct. 2783 (2008) (Scalia, J.).

172. *Id.* at 2816. *Heller* also illustrated the elasticity of the majority's positivist originalism, for the majority opinion combined an elaborate textualism with the non-positivist assertion that the Second Amendment protected a "pre-existing right" that was, whatever its nature, not dependent on the actual text of the Constitution. *Id.* at 2797. Thus, as with their Eleventh Amendment jurisprudence, *supra* note 170, the conservative Justices were highly flexible in deciding when and how to apply their originalist and positivist principles.

173. *Id.* at 2817–18. The dissents present much of the historical evidence that contradicts the majority's position. *Id.* at 2822 (Stevens, J., dissenting); *id.* at 2847 (Breyer, J., dissenting).

174. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008); Robert Leider, *Our Non-Originalist Right to Bear Arms*, 89 IND. L.J. 1587 (2014); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

175. Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1144 (2012). Justice Scalia, the author of the majority opinion in *Heller*, has rejected the idea of a "living" Constitution. Scalia, *Common-Law Courts*, *supra* note 136, at 37–47.

more prominent force in national affairs, the need to establish limits on its power seemed ever more important. Hence, the Court's critics invoked positivist ideas more frequently against the judiciary, and the problem of identifying or creating proper limits on the judicial power loomed ever more important in the twentieth and early twenty-first century.

Finally, the use of legal positivist ideas was consistently uneven and partisan in the treatment of governmental power. American legal thinkers seldom wished to impose the restrictions of legal positivism rigidly and across the board because they seldom wished to limit all levels and branches of government equally. Indeed, Progressives sought to limit the judiciary in order to expand the power of the legislature, while anti-Progressives sought to expand judicial power in order to limit the legislature. Similarly, contemporary "conservatives" who invoke positivist ideas to limit both the legislative and judicial branches mock those ideas when they attribute unprecedented, unchecked, and wholly unspecified powers to the executive.<sup>176</sup> Indeed, they equally mock those ideas when they choose to assert the judicial power expansively in the service of their own ideological goals.<sup>177</sup> The positivist ideas that served both Progressives and modern conservatives so well in their efforts to limit one branch of government seemed of much less use in their concurrent efforts to expand the powers of another more favored branch. In each case, it was political commitment and partisan utility, not the application of positivist principles or the text of the Constitution, that determined which branch the various groups sought to empower and which to shackle.

Indeed, the very structure of American government made classical legal positivism an unavoidably ambiguous and politically erratic constitutional guide for two related reasons. First, the Constitution did not confer "sovereignty" on any one unit or branch of government.<sup>178</sup>

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176. For defenses of the theory of the "unitary executive," see, for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993). The decisive issue is not whether the executive is "unitary" in some administrative sense, but instead, how broadly its powers may stretch in practice and whether and how the law and the other branches of government may limit it.

177. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *supra* notes 137, 170.

178. Sovereignty was a foundational concept in classic legal positivism, AUSTIN, *supra* note 5, at 199–200, 267–68, and Hart retained the concept while he qualified and refined it, e.g., HART, *supra* note 3, at 79–81. The Founders placed "sovereignty" in "the people," though the Constitution severely restricted the ability of "the people" to exercise their ultimate power. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 105–08 (1996) (discussing how the framers were aware of the radical possibilities of the idea of popular sovereignty and sought to restrict it in the ratification

Rather, it limited all the levels and branches of government, and it divided national power among three separate branches in a way that gave each the power to "check" the others. Given both the divided structure of American government and the existence of "checking" powers in each of the national branches, "sovereignty" resided in no single institution, and the principles of legal positivism could consequently do no more than highlight the contested nature of imprecisely defined and potentially checking branch powers.

Second, the Constitution required its interpreters not only to define the power of one federal branch against another, but also to define various national powers against state powers and, further, to delineate constitutional lines of authority in disputes that involve complex inter-level and inter-branch combinations: two federal branches against a third; one informal group of states against another; one or more federal branches allied with a coalition of states against one or more other federal branches allied with a different coalition of states.<sup>179</sup> The practical problems of American constitutional law and politics, in other words, did not usually pit one unit of government against another. Instead, they ordinarily pitted varied and shifting combinations of diverse local, state, regional, and national units against one another. Insofar as positivist ideas suggested the existence of some clear and stable allocation of constitutional authority, that allocation was anything

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process). In modern political theory, many often identify "sovereignty" with the legislature, as the "popular" and "law making" branch of government. Lon Fuller, for example, had his positivist spokesman, Judge Keen, affirm "a clear-cut principle, which is the supremacy of the legislative branch" and declare that "[f]rom that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice." Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 633 (1949). The *Federalist*, of course, warned repeatedly against the dangers of legislative power. E.g., THE FEDERALIST NO. 49, at 339-40 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that the legislative department "possesses so many means of operating on the motives of the other departments"); *id.* NO. 48, at 333 (James Madison) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."); *id.* NO. 71, at 483 (Alexander Hamilton) ("The tendency of the legislative authority to absorb every other [authority], has been fully displayed and illustrated by examples . . .").

179. PURCELL, *supra* note 31, at 38-52. Classic examples are *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), upholding a delegation of power on the ground that both congressional and executive power combined to support it, and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), relying on a combination of executive and judicial power to limit the power of Congress to control federal jurisdiction. Similarly, Justice Sandra Day O'Connor argued that the power of Congress over federal jurisdiction, in particular its power to deny jurisdiction over federal constitutional claims, was at its broadest when the claims implicated "the core of 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'" *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part) (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 320).

but clear and stable in practice because the complex and interdependent powers of the various levels and branches of American government continuously changed in their uses and realigned their relationships.<sup>180</sup> In such a system even the most exacting forms of positivism could offer little if any consistent and generally acceptable interpretative guidance on disputed constitutional issues.

### C. *Positivism and Its Potential Virtues for Constitutional Democracies*

In spite of its contingent relationship with both democracy and constitutionalism, legal positivism has one paramount virtue with respect to the principles and values that underlie each.<sup>181</sup> It focuses attention on the actual operations of the legal system. Centrally, classical positivism identified law as a social and behavioral phenomenon. Its “sources” thesis looked to existent *de facto* authority; its “social” thesis highlighted the necessity of actual behavioral compliance; and its “separation” thesis proclaimed a divide between rules claimed to be morally right and those followed and enforced in practice.<sup>182</sup> Whatever his exact meaning, even Hart—despite his technical philosophical method and focus on “general” rules—described his own major work, *The Concept of Law*, as “an essay in descriptive sociology.”<sup>183</sup>

Most fundamentally, then, legal positivism by its very nature points to a focus on the social workings and practical operations of the law. One of its major contributions to American legal thought, in fact, was the impetus that its “social” focus gave to the development of “sociological” and “realist” perspectives on law and government. Pound gave classic formulation to what, in truth, should be recognized as legal

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180. PURCELL, *supra* note 31, at 85–110. As Doni Gewirtzman has argued, for example, the “authoritative” federal judiciary is itself pluralistic and diverse, and the rulings of the lower courts are often only tangentially related to, or sometimes even at odds, with Supreme Court precedents. Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457 (2012).

181. Positivism could have different uses and implications in legal systems built on different normative principles, such as theocracies or single-party dictatorships.

182. “Law also as well as sovereignty is a fact.” Oliver Wendell Holmes, Jr. to Harold J. Laski (Sept. 15, 1916), *supra* note 56, at 21.

183. HART, *supra* note 3, at vi.

My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense ‘normative’) aspect.

*Id.* at 239. Whatever Hart meant, his characterization retained positivism’s concern with the *de facto* world of human behavior. See Schauer, *supra* note 114, at 860.

positivism's *second* "separation" thesis<sup>184</sup>: the proposition that the "law in books" is separate from the "law in action." There is no necessary connection between the two, Pound suggested, and a yawning gulf may divide them.<sup>185</sup> There are, consequently, not two but three distinct areas involved in the proper study of law—not just the realms of morality and rules, but also the arena of practice.<sup>186</sup>

That arena is both complex and multifaceted, for it includes all of the social factors that affect the way "the law" functions in practice, anything and everything that shapes the ways in which disputes are generated, perceived, constructed, channeled, and resolved.<sup>187</sup> It includes, in other words, the ways in which "Justice" and the Constitution's other substantive values are—or are not—actually served.<sup>188</sup> Karl Llewellyn captured this insight in his famous essay that helped launch "legal realism." The "law in books" states that a person has "a right to the performance of a contract," he wrote, but that "right could rather more accurately be phrased somewhat as follows":

if the other party does not perform as agreed, you can sue,

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184. Pound's "positivist" inspiration came primarily from Darwinism, pragmatism, and progressive reform ideas rather than from Austin. WIGDOR, *supra* note 92, at 183–206. Pound, moreover, was a severe critic of the "analytic" jurisprudence that was developed by Langdell and his disciples, an approach that Pound scored as "mechanical" jurisprudence. *Id.* at 167–69.

185. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). The "basic content" of this essay and Pound's other early work, Karl Llewellyn wrote, "is the basis of our forward-looking thought of the '20's and '30's and has provided half of the commonplace equipment on and with which our work since has builded." KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 496 (1962).

186. Discussing "the rule of law," Ronald Dworkin adopted the familiar dualism when he considered "two very different conceptions" of law, the "rule-book conception" and the "rights conception." DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 121, at 11 (internal quotation marks omitted). He saw the former as a positivist conception that focused on adherence to written rules and the latter as a moral conception based on the principle "that citizens have moral rights and duties" that the state must honor. *Id.* Dworkin, of course, criticized the first and affirmed the second. That traditional dichotomy, however, slights the critical fact that social practice often fails to honor both "legal rules" and "moral rights." Thus, any serious examination of a "rule of law" requires a third category, one that focuses on social behavior, highlights the extent to which practice may frustrate or ignore both "rules" and "rights" in practice, and inspires the search for strategies, incentives, and mechanisms designed to maximize the extent to which all members of a democratic society actually enjoy the benefit of such rules and rights.

187. It includes, for example, the ways in which modern electronic arts portray and understand "law" and the "legal system." See Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in The Sweet Hereafter*, 34 LAW & SOC'Y REV. 3 (2000) (discussing a film); Richard K. Sherwin, *Law's Enchantment: The Cinematic Jurisprudence of Krzysztof Kieslowski*, in 7 LAW AND POPULAR CULTURE: CURRENT LEGAL ISSUES 2004, at 87 (Michael Freeman ed., 2005).

188. *E.g.*, U.S. CONST. pmbl. ("[T]o form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .").

and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay.<sup>189</sup>

Llewellyn's statement was suggestive but hardly exhaustive. Empirical studies of the American legal system demonstrate that his "if" clauses should be radically expanded to include a wide range of additional contingencies:<sup>190</sup>

*if* you do not lack the knowledge or understanding necessary to realize that you have a cognizable legal claim to assert; and

*if* filing suit would not put you at grave risk because your adversary is your employer, landlord, creditor, or other party able to dissuade you from your suit by the threat of

189. LLEWELLYN, *supra* note 185, at 10. The quote originally appeared in Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437–38 (1930).

190. There is a vast literature that shows the negative impact of a range of social factors on the ability of injured or aggrieved persons to assert and prevail on claims. Much of this literature is summarized under topical headings in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M. Kritzer eds., 2010). For specific studies, see, for example, KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988); DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 245–49 (2003); MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES (2010); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999); Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1 (2012); Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991 (2011); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981); Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113; Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309 (1996); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (2005); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 440–59 (1992); Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771 (1996).

extralegal but compelling social or economic sanctions against you; and

*if* you possess the sophistication and resources necessary to locate and secure the services of an attorney capable—in reality—of handling your case effectively; and

*if* social factors such as race, class, gender, ethnicity, educational level, sexual orientation, and other practical conditions and biases do not intimidate or otherwise prevent you from seeking a legal remedy; and

*if* those same social factors and biases do not unfavorably influence the behavior of any of the personnel you confront in the litigation process or in the courthouse itself; and

*if* your adversary has not used substantial resources to lobby and thereby successfully induced the legislature or the courts to impose heavier pleading or evidentiary requirements on your claim or to create legal immunities or defenses that block your suit; and

*if* your claim does not involve an adhesion contract containing obscure technical provisions that you did not understand but that deprive you of a judicial forum capable of providing full relief or that compel you to litigate in an unfavorable forum, meet harsh procedural prerequisites for maintaining your suit, or limit the substantive scope or value of your claim; and

*if* the continually mounting combination of risks, costs, delays, vexations, inconveniences, and uncertainties involved in discovery and motion practice does not exhaust your resources or wear you down psychologically; and

*if* pressing medical bills, family obligations, or other financial hardships do not compel you to discount your claim steeply and settle it cheaply out of court before a trial date becomes available;

*then*—and only then—you might win something which will, in any event, almost certainly be less than full compensation for your loss or injury.<sup>191</sup>

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191. The salience of these informal social factors may grow substantially as the number of trials in American courts continues to decline and the Supreme Court continues to deny access to the federal courts to more and more Americans. *E.g.*, ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters*

Legal positivism's implicit and second "separation" thesis should force such "if" clauses to the center of our attention and highlight the necessity of examining with the greatest care the law's social and behavioral features.<sup>192</sup> Such scrutiny is essential to ensure that the law's lofty democratic values and its noble constitutional principles—both its underlying morality and its formal rules—are honored not merely in soaring rhetoric but in actual practice.

Second, legal positivism's recognition of the "social" nature of law should warn theorists more broadly about the potentially misleading character of the classic distinction between law and morality, between the law that "is" and the law that "ought to be."<sup>193</sup> The traditional and sometimes intense debate over that issue deflected attention from pivotal aspects of the law's "social" nature. Many legal realists insisted on the need to separate the "is" from the "ought" in studying the law, for example, but Fuller rejected the possibility of such a separation on the ground that the law's constant process of "becoming" necessarily involved both.<sup>194</sup> Moral views shaped the law, Fuller insisted, just as the law shaped moral views. Even if one accepts Fuller's insight,<sup>195</sup> it is

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in *Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 522–31 (2004); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012).

192. Dworkin fairly criticized Hart for Hart's inadequate theory of adjudication. "[I]t is worth asking," Frederick Schauer notes, "whether a theory of law that does not include an account of adjudication can be a satisfactory theory of law for advanced democracies." Schauer, *supra* note 114, at 875 n.79. One could also question, however, the importance of a theory of adjudication when only a minuscule fraction of disputes are ever "adjudicated." E.g., BURNS, *supra* note 191; Galanter, *supra* note 191. More basically, one could ask how, and in what ways, "the law" itself is important under such circumstances. The familiar metaphor of "bargaining in the shadow of the law," though inexact, suggests that the context and pressures of "bargaining" as well as the reach, intensity, and distortions of the "shadow" are at least as important as "the law" itself in shaping results. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

193. By the beginning of the twenty-first century, theorists for the most part have abandoned the idea of a rigid distinction between the two. Most would likely agree with three rather unexceptional propositions: that there may be a difference between the law that "is" and the law that "ought to be"; that it might be uncertain in a given situation what the relevant law "is" or even whether there actually *is* any "existing" law on a point; and, that moral values and principles frequently shaped the law that "is."

194. A "statute or decision [wa]s not a segment of being, but . . . a process of becoming," and therefore "to distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us." FULLER, *supra* note 49, at 10. Ronald Dworkin and Fuller's colleague, Henry M. Hart, Jr., adopted similar views. See Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951); DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 121, at 326–27.

195. Fuller did urge legal philosophers to "give up their endless debates about definitions" and to "turn instead to an analysis of the social processes that constitute the reality of law." LON L. FULLER, *THE MORALITY OF LAW* 242 (rev. ed. 1969). His concept of the "social processes," however, seemed to refer to broad ideas about human purposes and reasonable legal procedures

nonetheless essential to note that his focus on the role of moral values in the law's "becoming" obscured the fact that "nonmoral" social factors also played a role in that dynamic process.<sup>196</sup> The law's process of "becoming," in other words, includes a sweeping range of "nonmoral" forces that are likely to prove of equal, if not greater, importance than overtly "moral" ideas. Those "nonmoral" factors include ruthless lobbying efforts by waves of special-interests, strategic litigation campaigns by narrowly-focused pressure groups, massive and secret campaign contributions by organized and wealthy donors, and covert and self-seeking bargaining among political and institutional insiders.<sup>197</sup>

Whatever the exact relationship between "law" and "morals," then, the interaction between the two constitutes only one aspect of the law's "becoming." It is understandable why questions about the relationship between law and morality became particularly acute as a result of the horrors of Nazism, just as it is understandable why such questions remain vital in our own day, when profound moral disagreements over such issues as abortion and gay rights create acute legal and political divides. Nonetheless, moral controversies and changes in the society's values remain just one of the many forces that drive the law's evolution. Put to the service of democracy and constitutional government, legal positivism's social orientation urges the careful study of far more than the role of "morals" in the law's process of becoming. It also requires the careful study of the role of powerful and self-interested forces in the process and, further, a cold-eyed examination of the frequently inequitable social, economic, and political conditions that those forces too often impose on ordinary Americans.

Finally, by highlighting the complex social nature of law, legal positivism warns theorists to avoid what is sometimes called "the autonomy of ideas," a fallacy that frequently plagues those who focus

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rather than to the specific social, political, economic, and institutional forces that worked to shape the law in the service of select and partisan interests.

196. Realists denied the charge that they discounted moral values and insisted that their work sought to bring about greater justice in the legal system. "The point is," Jerome Frank declared, "that the rational and ethical factors are thwarted in their operations by the conventional tendency to ignore the non-rational and non-ethical factors." Jerome Frank, Book Review, 40 YALE L.J. 1116, 1121 n.1 (1931) (reviewing K.N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* (1930)). "[T]he verification of theory by fact will not destroy but rather fortify the applicability of norms of Ought in the realm of reform, propaganda, and practical government." (emphasis in original). Yntema, *supra* note 46, at 953.

197. For the growth of inequality in the United States and the disproportionate political influence of wealth on public policy, see, for example, LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013).

on theory and philosophy. The fallacy lies in considering “ideas” as independent historical agents and assuming that they exert influences unmediated by social contexts or by the human beings who formulate, communicate, and exploit them. Thus, awareness of the fallacy should counsel against attempts to resolve the problem that some regard as the most pivotal practical issue that divides positivists from nonpositivists, the issue that the classic debate in the 1950s between Hart and Fuller placed in the spotlight.<sup>198</sup>

A central question those two theorists debated was what difference it made, as a practical matter, whether one adopted a positivist or a natural law position on the “separation” thesis. Hart maintained that law and morals were separate and, consequently, that an “evil rule” must be recognized as “law” in a society if that society enforces that rule. Failure to separate law and morality promoted obscurantism and “romantic optimism,” whereas viewing them as separate prepared the way for a “powerful” form of “moral criticism.” People should say, Hart declared, “that laws may be law but too evil to be obeyed.”<sup>199</sup> Fuller countered that, because law and morals could never truly be separated, one should not use the name “law” to dignify an “evil rule.” Laws, “even bad laws, have a claim to our respect” because our “ideal of fidelity to law” made such laws “something deserving loyalty.” Thus, Fuller insisted, allowing a society to give an “evil rule” the name of “law” would confer a degree of moral authority on that rule, lead people to believe that it must therefore be reasonable, and ultimately induce them to respect and obey it.<sup>200</sup> Their contrary arguments pointed to two different risks: Hart underscored the danger that an excessively disobedient citizenry would spurn morally acceptable rules merely because they were personally burdensome or operationally imperfect, while Fuller stressed the obverse danger that an excessively placid citizenry would accept “evil rules” as morally proper and therefore binding.<sup>201</sup>

Warning against the “autonomy of ideas,” positivism’s recognition of the social nature of law should immediately provoke two conclusions. First, the dispute between Hart and Fuller concerns the practical consequences of ideas and thus presents an empirical question that simply cannot be answered in the abstract or as a general matter.

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198. See, e.g., Norman E. Bowie, *The ‘War’ Between Natural Law Philosophy and Legal Positivism*, 4 IDEALISTIC STUD. 145 (1974); Liam Murphy, *The Political Question of the Concept of Law*, in HART’S POSTSCRIPT, *supra* note 114, at 371.

199. Hart, *supra* note 103, at 620. Hart’s charge echoed Bentham’s attack on Blackstone almost two centuries earlier. The failure to distinguish law and morality, Bentham argued, fostered a “spirit of obsequious *quietism*” that invariably led to an identification between “what is and what ought to be.” Murphy, *supra* note 198, at 387.

200. Fuller, *supra* note 103, at 632–33.

201. Neither, of course, denied that people should use moral values to test positive law or that the state might vigorously enforce “evil rules.”

Second, and as a result, neither Hart nor Fuller was convincing. If ideas are not “autonomous” but rather depend on social context and practical support, then the question whether a citizenry would tend to be rebellious or quiescent cannot be answered by unspooling some “logic” supposedly inherent in the citizenry’s real or imagined conception of law. Thus, the debate over the practical significance of the choice between legal positivism and natural law can hardly turn on which view, as a necessary and general matter, seems more desirable on some hypothetical Hart–Fuller “rebellious-quiescent scale.” Whatever practical results might follow from a choice of one view over the other, those consequences would not stem from any logic inherent in either of the two rival theories.<sup>202</sup> They would stem from the society’s fundamental moral commitments, the nature of its specific political and institutional culture, and the extent to which it seeks fairly and honestly to honor those commitments and respect the integrity of that culture.

Until we ask such “social” questions—and focus, in particular, on the role of both informal social power in the arena of legal practice and the “nonmoral” forces that drive the law’s process of “becoming”—and until we answer those questions on the basis of satisfactory empirical evidence, we will not fully understand the role and significance in the law of either doctrinal rules or moral principles. Until we consistently ask and answer such questions, moreover, legal positivism will not fulfill its intellectual potential as a powerful support for those committed—on whatever moral grounds—to the twin causes of constitutionalism and democracy.

### CONCLUSION

Legal positivism has no necessary relationship to either constitutionalism or democracy, but its core insight promises invaluable assistance to both. That insight teaches us that to understand our legal and political systems clearly, we must examine their practical operations in depth and detail. It warns us that, in spite of sound-bytes

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202. For a similar view, see Frederick Schauer, *The Legality of Evil or the Evil of Legality?*, 47 TULSA L. REV. 121, 131 (2011). In fairness to Hart, he himself seemed to suggest this point:

[T]here is an extraordinary naïveté in the view that insensitiveness to the demands of morality and subservience to state power in a people like the Germans should have arisen from the belief that law might be law though it failed to conform with the minimum requirements of morality. Rather this terrible history prompts inquiry into why emphasis on the slogan “law is law,” and the distinction between law and morals, acquired a sinister character in Germany, but elsewhere, as with the Utilitarians themselves, went along with the most enlightened liberal attitudes.

Hart, *supra* note 103, at 617–18. For Fuller’s version of the antipositivist charge, see Fuller, *supra* note 103, at 658–59.

and sloganeering, neither democracy nor constitutionalism necessarily or automatically works as its theory posits and that, to sustain and ensure the vitality of both, we must constantly and rigorously test our current institutional practices and their accompanying social consequences against those noble ideals.