SEDUCTION, INTEGRATION AND CONCEPTUAL FRAMEWORKS: THE INFLUENCE OF LEGAL SCHOLARSHIP ON JUDGES

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It is a source of continuing frustration to legal academics that judges fail to cite their work, even when that work is directly on point. Their expectation that judges would do so, however, arises from some special circumstances. Few decision makers in society provide a carefully crafted, publicly available written record of their decision process. Managers of private firms often issue their decisions orally or in brief and largely telegraphic written memos. If they do create a detailed written record of their decision, it is generally a proprietary document, jealously guarded by the firm until it is no longer relevant, at which point it is shredded or deleted. Public officials in the executive or legislative branches tend to do the same; the results of their deliberations may be published in the form of orders, regulations, statutes or press releases, but their decision process generally remains undisclosed or unrecorded. The judicial practice of creating an elaborate written record of one's decision process that is then published, made widely available and superbly indexed is unusual, if not unique.

This practice creates an expectation among scholars who write about the judiciary that can be described as the seduction of direct citation. Consider an assiduous legal scholar who has just written an article providing a new theory for resolving certain types of cases, a theory that is certainly superior to anything that any judge has articulated in the past. It has been accepted and published by a leading law review, and – once again – superbly indexed (law is a field that knows how to alphabetise, summarise and categorise). Surely, the next judge who confronts the type of case that this incisive article discusses will be hungry for enlightenment and, after eagerly consulting the secondary literature, will gratefully acknowledge and adopt the insights that our scholar has provided.[1] Or perhaps the judge is someone who harbours the wrong approach to law – appointed by the wrong political party, for example. In that case, he or she cannot be expected to adopt our scholar's conclusions, but will surely feel an intellectual obligation to dispute the formidable arguments that the scholar has advanced, thus generating critical citations that are almost as desirable as complimentary ones. But no, the text of the opinion appears and it has nothing but string citations to other cases, and perhaps a passing reference to some ancient figure like H.L.A Hart or Karl Llewellyn. Its reasoning repeats the old, inferior approach that the scholar has decisively refuted, or perhaps adopts a new, but insufficiently conceptualized and shoddily developed new approach instead. Once again, the legal scholar has been jilted; the seduction of direct citation has led our scholar down the path to textual frustration.[2]

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1 In an earlier work, I noted the unity of discourse between legal scholars and judges, the fact that both often rely on the same methodology for their analysis. Edward Rubin, 'The Practice and Discourse of Legal Scholarship' (1988) 86 *Michigan Law Review* 1835. This choice of methodology by legal scholars adds force to the seduction of direct citation. It is natural to expect judges to find one's work directly relevant if one has chosen to speak in the same mode of discourse.

2 One possible response to this frustration is to conclude that scholars are speaking primarily to each other, and not to their purported judicial audience at all. See, Meir Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience' (1992) 63 *University of Colorado Law Review* 569.

Scholars in other fields are protected from this sense of frustration because they have no expectation that their work will be cited by decision makers. Business managers do not produce written decisions that cite academic economists, politicians do not refer to political scientists when addressing their constituents, preachers do not cite religion professors in their sermons, and leaders of social movements do not punctuate their exhortations with references to sociologists.[3] Isolated, pre-industrial tribes may be more likely to cite academic anthropologists ('Bronislaw Malinowski was here last year, and he told us why it's important to keep performing this ritual') than the decision makers of our complex and sophisticated society are to cite the work of those who study them.

This bleak picture, like most bleak pictures, is somewhat overdrawn. Judges do indeed cite scholarly work. Although this often consists of work by the great figures that they learned about in law school, rather than by contemporary legal scholars, it would be possible to provide at least a partial refutation of the dread hypothesis that scholarship has no effect on judges by compiling a long list of direct citations to contemporary scholarship in judicial decisions. But thrilling though this list may be for the scholars whose names appear on it with regularity, the exercise is best avoided – not only for the mental health of the remaining scholars, but for a realistic understanding of the basic relationship between scholarship and the judiciary. To assess that relationship, we need to set the baseline at the same level that it is set for other academic disciplines, and resist the seduction of direct citation.

The true impact of scholarship on the judiciary, as on decision makers in other fields, lies in the creation of conceptual frameworks. Scholarship achieves its real influence by shaping the judiciary's general approach to law. To be sure, the concepts that are operative in a given culture at a given time are the product of deep forces, but scholars play a crucial role in articulating and advancing those concepts. Influence of this nature generally does not yield citations because it is diffuse and generalized, rather than the product of specific sources. Judges may be only vaguely aware of the concepts on which they are relying and, unless they are unusually assiduous, they will be unaware of the specific scholarly works that articulated and ramified those concepts. They may even complain that much of the scholarship being produced is irrelevant to their decision making process, as Judge Harry Edwards did in a well-known article.[4] But it is through such conceptual frameworks that the scholar's influence is primarily exerted.

Any attempt to trace the contours of this influence will clearly be a harder job than amassing direct citations to scholarly work. Because the task is both enormous and diffuse, this essay is limited to one area of judicial decision-making – the conception of common law that has appeared in the decisions of the American judiciary from the beginning of the republic to the present time. This is still a massive topic, but conceptual frameworks, as opposed to specific references, must be approached at a certain level of generality and are best treated over fairly extensive periods of time as well. After a brief account of the way that scholarly influence operates (Part I), this essay will discuss the specific influence of Blackstone (Part II), the formalists (Part III) and the legal realists (Part IV) on the American judiciary's approach to common law. It will end with a discussion of modern empirical scholarship where, somewhat surprisingly, the possibility of direct citation emerges as a potential consummation, rather than a mere seduction (Part V).

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[3] This seems to be true even for decision makers who were scholars themselves at an earlier point in their career, like Marsilius of Padua or Woodrow Wilson.

[4] Harry Edwards, 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan Law Review* 34.

I A FRAMEWORK FOR THE INFLUENCE OF SCHOLARSHIP ON JUDICIAL DECISIONS

With the exception of a few titanic figures who were able to take military and political control of their era for good or ill, such as Alexander, Caesar, Napoleon, Washington and Hitler, scholars are the most influential people in human history.[5] Ordinary political figures seem to have more impact in their own time, but their influence is typically of limited duration. All too often, their principal role is to kill people who would have died a few decades later in any event, something that is dreadfully important to the people involved but of minor historical significance. Ideas shape human history, even at the most basic level that would appear to be the preserve of war and politics.[6] France exists because the people who live in a particular region of Europe think of themselves as being citizens of something called France and act in a manner that makes that something function as a means of organizing human life.[7] Rome did not decline because of the barbarian invasion; the barbarians wanted to take over Rome and control its wealth, not dissolve it into the rude conditions of their pre-conquest tribalism. The problem – the source of the decline – was that the barbarians, despite their best intentions and best efforts, simply did not know how to act like Romans.[8]

Ideas are the stock in trade of scholars, together with poets, artists and musicians.[9] While deep-seated and long acting forces are the primary engine of historical change, scholars articulate and advance those forces, bringing their chthonic themes into the light of day and advancing them at the increased velocity of conscious thought. In other words, scholars are actually in closer contact with the basic motive force of history than the decision makers who seem to control its particular events. Their contributions shape the way that people think, and the way people think controls the way they act.

To some extent, our collective historical memory recognizes this crucial role that scholars play. Because their efforts are recorded and preserved, the works of leading scholars remain available to subsequent generations and subsequent societies. They live

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5 For purposes of this discussion, scholarship refers to non-authoritative writing that derives its value from the quality of its arguments. Although most scholarship these days is produced by academics, that is, people who hold professorships at institutions of higher learning, the term is not limited to their work. A judge or practicing lawyer can produce scholarship. But a judicial opinion, no matter how erudite, is not scholarship for purposes of this discussion because it is authoritative; it has effects as the authorized pronouncement of a state-appointed official. Similarly, the memoir of a former judge or other state official will not be treated as scholarship for present purposes because its effect is likely to result from the insight it provides into the official's authoritative judgments, rather than from the quality of its arguments alone.

6 See, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2006).

7 Graham Robb, *The Discovery of France: A Historical Geography* (2007); Eugen Weber, *Peasants Into Frenchmen: The Modernization of Rural France, 1870-1914* (1976).

8 See, Roger Collins, *Early Medieval Europe 300-1000* (1999) 100-34, 153-72; Patrick Geary, *Before France and Germany: The Creation and Transformation of the Merovingian World* (1988); Chris Wickham, *The Inheritance of Rome: A History of Europe from 400 to 1000* (2009) 76-149.

9 This essay will not discuss the influence of art. For the present, it is sufficient to note that what is said of scholars applies a fortiori to art. That is, art is generally not cited directly by decision makers but sometimes – less often than scholarship but sometimes more dramatically – shapes thought in deep and significant ways. The development of perspective by Masaccio, Ucelo and others changed our way of looking at the world around us. In small nations, a sense of identity may coalesce around the development of a national literature. See, Anderson, above n 6, 73-82; Eric Hobsbawm, *The Age of Revolution, 1789-1848* (1962) 163-77.

in our historical memory in a way that political and military leadership does not.[10] We remember our own country's recent leaders of course; Lincoln's name recognition is obviously much greater than Emerson's. But who, other than a few scholars (significantly enough), remembers the leaders who were contemporaneous with Plato, Aristotle, Augustine, Aquinas, Machiavelli, Newton, Locke, Montesquieu, or Freud? Yet all educated people know the names of these scholars, most have read some of their work, and many can recall their basic contributions.

Nonetheless, the primary influence of even these great intellectual figures does not reside in the direct citation of their works. The basic concepts of the state, of governance, of policy and of politics that prevail in the Western World were shaped by some of the scholars listed above, but people rarely invoke their names when they make use of these concepts. Similarly, some of these scholars have shaped our concept of physical reality and human nature, but again they often go unnamed. And many of the lesser figures who made important contributions are largely unknown, except to a few specialists, or briefly remembered by students studying for exams and then assiduously forgotten. What is important is that scholars – both famous and obscure – create the mental furniture of the world that we inhabit. When we look into the sky, we see something different from what people saw in Classical or Medieval times because of the insights of astronomers. When we look inside ourselves, we see something just as different because of the work of philosophers and psychologists.

The basic relationship between scholars and decision makers must thus be traced through the medium of animating ideas, rather than by looking for direct citations. To delineate this relationship, we must first determine the ideas that underlay the actions of a decision maker or a population, and then identify the scholar or, much more commonly, the group of scholars, who conceptualized and articulated that idea. The result of this analysis is an inevitably messy causal chain. When Stagger Lee shoots Billy, we can unproblematically identify the direct cause of Billy's death.[11] The relationship between scholars, ideas and decision makers is much more complex. In fact, it is interactive or co-causal because, unlike a shooting, it occurs over long periods of time and involves many individual events. An idea, as articulated by one scholar, mayhave some effect on a decision maker's actions, but the actions of decision makers will then suggest new ideas to scholars or even, in extreme cases, necessary revisions of the original idea. The messiness of this situation can be ameliorated by careful analysis, but it cannot be eliminated, and it should not be resolved by ignoring its existence.

Once we get past the seduction of direct citation, it seems apparent that the relationship between the legal scholar and the judge conforms to this model. This relationship is complicated, however, by its imbrications with the ongoing controversy about the influence of politics on judicial decisions. Political scientists who study judges generally conclude that their decisions – at least those that interpret the law rather than resolving factual disputes – are predominantly determined by the their

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[10] On collective memory generally, see, Paul Connerton, *How Societies Remember* (1989); Maurice Halbwachs, *On Collective Memory* (Lewis Coser trans, 1992); Eric Hobsbawm and Terrence Ranger (eds), *The Invention of Tradition* (1983); Caroline Pearce, *Contemporary Germany and the Nazi Legacy: Remembrance, Politics and the Dialectic of Normality* (2008); Edward Shils, *Tradition* (1981); Bruce Smith, *Politics and Remembrance: Republican Themes in Machiavelli, Burke and Tocqueville* (1985).

[11] Recorded by various singers, including Mississippi John Hurt, Lloyd Price and The Grateful Dead.

political preferences.[12] Legal scholars and judges tend to dispute this conclusion and argue that legal doctrine has at least a significant effect, and perhaps a determinative one, in the majority of cases.[13] Politically-motivated disagreements among judges, they argue, are limited to a small minority of the total caseload, 10% being the commonly stated figure. My own view is that ideology always operates on judges' decision making processes, that judges always want to reach results which, according to their own lights, have good consequences and implement good policy.[14] In this sense, judges are political actors, or judicial legislators, as the attitudinalists assert. Because they also want to fulfil their role responsibly, however, and be well regarded by their colleagues, other government officials and the public at large, judges feel obligated to express their ideological inclinations in doctrinal terms, that is, in terms consistent with the established, albeit evolving case law. As a result, they strive to integrate their ideological position with legal doctrine; if they find themselves unable to do so, most judges will reluctantly reach results that contravene their ideology.

The basic role of ideas within this model is to create the conception of legal doctrine that judges try to integrate with their ideological predilections. What is relevant is not an understanding of a specific case, or line of cases. Such interpretations are malleable and can generally yield to the hydraulic pressure of the judge's ideology. After all, it is always possible for the judge to argue that a particular case or line of cases should be overruled because of changing circumstances,[15] and if that is possible, any lesser alteration should be possible as well. Rather, the accommodation that judges must make with doctrine is at a much more general level. Judges must be able to frame their arguments in recognizably 'legal' terms, that is, in a discourse that comports with the prevailing conception of legal doctrine. A simple but inaccurate way to state this is that judges who choose to alter the existing case law, rather than following it, must be able to explain their decision in doctrinal terms. A more precise formulation is that character of case law, and what it means to follow it, are a product of the same conceptual process that determines the range of acceptable arguments for interpreting or altering that law.

Given that the legal constraint on judicial decision making operates at this conceptual level, the impact of scholarship on judging becomes clear. Scholars articulate the general conception of legal doctrine that exercises the real disciplining effect on judicial decision makers. Their work, taken collectively, determines the prevailing mode of legal discourse – what counts as a legal argument and what does not. It is through the medium of this basic conception, this overarching framework, that the real influence of scholars on the judiciary is exercised. The lack of direct citation of scholarly work in judicial opinion, however frustrating, is consequently understandable. Judges do not rely on scholars for the interpretation of specific cases; they can do that

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12 See, eg, Lawrence Baum, *American Courts: Process and Policy* (1990) 295-358; Robert Dahl, 'The Supreme Court as a National Policy Maker' (1957) 6 *Journal of Public Law* 279; Lee Epstein and Jeffrey Segal, *Advice and Consent* (2005); Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model* (1993); Jeffrey Segal, Harold Spaeth and Sara Benesh, *The Supreme Court in the American Legal System* (2005); Glendon Schubert, *Judicial Policy Making: The Political Role of the Courts* (revised ed, 1974); Harold Spaeth, *Supreme Court Policy Making: Explanation and Prediction* (1979).

13 See, Frank Cross, *Decision Making in the U.S. Court of Appeals* (2007); H.L.A. Hart, *The Concept of Law* (1961); Jon Newman, 'Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values' (1984) 72 *California Law Review* 200; Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010).

14 Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (1998) 204-52; Edward Rubin and Malcolm Feeley, 'Creating Legal Doctrine' (1996) 69 *Southern California Law Review* 1989.

15 See, Melvin Eisenberg, *The Nature of the Common Law* (1988) 104-45.

for themselves and, indeed, generally pride themselves on this capacity. Scholarship's real impact on judicial decision making operates at a level that is simultaneously more general and less conscious. For both these reasons, it is less likely to produce direct citations. But the lack of direct citation is not a measure of the far-reaching and profound effect that scholarship exercises on judicial decision making.

II BLACKSTONE

As stated above, this essay will attempt to trace the influence of scholarship on judges through the judiciary's concept of the common law over the course of America's history as an independent nation. We can begin with William Blackstone.[16] Blackstone, of course, hardly lacks for direct citations, but the influence of his treatise extends far beyond any explicit reference to it. Building on the work of earlier jurists, most notably Edward Coke,[17] Blackstone articulated the idea that the common law is a coherent system that embodies the collective wisdom of society. This idea was certainly present in the general legal culture; as Pocock writes about Coke's era, 'the law in force in England was assumed to be the common law; all common law was assumed to be custom ... and all custom was assumed to be immemorial'.[18] Perhaps this notion derives from the traditionalism of pre-modern society, the sense that anything that has survived the passage of time possesses an inherent value. This is certainly St. Thomas' view. While he believes that the best law comes from God,[19] he is astute enough to realize that this law only sets the outer boundaries for the quotidian rules that govern society. Those rules are human law, he says,[20] the product of people's God-given rationality that has been exercised over the course of centuries.[21] In other words, the best human law is established custom, the common law that governs the society.

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16 William Blackstone, *Commentaries on the Laws of England* (1765). Blackstone was a professor at Oxford from 1753 to 1766; the Commentaries were published between 1765 and 1769. He also held a judicial appointment as an assessor from 1751 to 1759. He was elected to Parliament in 1761 and became a judge again (at a higher level) in 1770. On his performance as a judge, see, Emily Kadens, 'Justice Blackstone's Common Law Orthodoxy' (2003) 103 *Northwestern University Law Review* 1553, 1560 (arguing that he was, in effect, too academic or scholarly to be an effective judge). The Commentaries would count as a work of scholarship even had they been written by someone without an academic appointment, but in fact, he was a professor at Oxford during most of the time when the Commentaries were written, and he delivered Oxford's first set of lectures on English law during this time.

17 Edward Coke, 'Institutes of the Lawes of England' in Steve Sheppard (ed), *Volume II of The Selected Writings of Sir Edward Coke* (2003) 577-1183.

18 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (2nd ed, 1987) 261.

19 Thomas Aquinas, *Summa Theologica, IaIIae 91, 93, 94* (English Fathers trans, 1948) vol 2, 996-1000, 1003-13. God's law, according to St. Thomas, comes in three forms, eternal law, which structures the universe, divine law, which determines the path to salvation, and natural law, which, roughly, governs the moral aspects of relations among people.

20 Of course, according to St. Thomas, human law must comport with divine and natural law or it is not law at all. Ibid, 95. 2 at 1014 ('But if at any point it deflects from the law of nature, it is no longer a law but a perversion of law'). Its particular provisions, however, are not determined by divine and natural law. Ibid, 95 at 1014-15.

21 Ibid, 97 at 1022-25. See, ibid, 97.2 at 1023 ('laws derive very great force from custom ...: consequently they should not be quickly changed'). See generally, Paul Sigmund, *Law and Politics, in Norman Kretzmann and Eleonore Stump, The Cambridge Companion to Aquinas* (1993) 217.

Interestingly, the way that this general notion was applied to English common law by Coke and others was largely incorrect. Common law was not, as they thought, a continuous and cumulative tradition extending back into the misty reaches of England's Anglo-Saxon past. We now know, due to the work of Pollack and Maitland,[22] that the common law was established by Henry II through several assizes and other enactments in the last half of the twelfth century.[23] His primary purposes in doing so were to impose uniform legal rules on fractious England and to obtain the fees and fines that the legal decision maker collected in resolving disputes.[24] Coke's mythic view of common law prospered as a result of the seventeenth century conflict between the common law courts and the Stuart monarchy. English monarchs could trace the continuity of their throne no further back than 1066, when a Norman duke – an illegitimate Norman Duke, no less – seized it by force. In asserting that the common law extended back into Anglo-Saxon times, common law judges, most notably Coke, could thus claim that their authority was more ancient than the monarchy.[25] This was a powerful claim in an era when the venerable was venerated, and it fixed the image of the common law for the centuries that followed. Blackstone believed it implicitly;[26] when he packaged the common law for export in his treatise, this image was inevitably included.[27]

But had Blackstone been content to rely on this justification for the common law, his influence, and perhaps the common law itself, would have waned long before Pollack and Maitland's work. Blackstone was writing during the height of the Enlightenment, when faith in custom and tradition was being dismantled by the onrush of modernity,[28] and the momentous notion that the golden age lay in the future, not the past, was gaining force.[29] Thus, while still committed to the wisdom of the common law, he could no longer ascribe that wisdom to venerable custom derived from the past's accumulated rationality. Rather, in true Enlightenment fashion, he attributed it to overarching principles that lay behind the various common law decisions.[30] As Emily Kadens notes, 'Blackstone came early to the conviction that the law was a system that

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22 Frederick Pollack and William Maitland, T*he History of English Law before the Time of Edward I* (2nd ed, 1968) (originally published in 1895).

23 See, Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition 440-57 (1983); Ibid, 136-73; W.L. Warren, *Henry II* (1973) 317-61.

24 Berman, ibid, 458; Pollock and Maitland, above n 22, 153-61. Henry, who was born Prince of Anjou, had obtained the English throne as part of the settlement for the civil war between Stephen and Maude. Warren, ibid, 12-53. Consequently, he attached a high value to civil accord; imposing legal uniformity on the fractions was an aspect of that policy.

25 See, Pocock, above n 18, 30-55.

26 Blackstone, above n 16, 67-70 and 85-91.

27 And widely accepted as well. As Jefferson said, 'we know that the Common law is that system of law which was introduced by the Saxons on their settlement in England'. Gilbert Chinard (ed), *The Commonplace Book of Thomas Jefferson: a Repertory of His Ideas on Government* (1926) 354.

28 See generally, Peter Gay, *The Enlightenment: The Rise of Modern Paganism* (1966) vol 1; Peter Gay, *The Enlightenment: The Science of Freedom* (1969) vol 2; David Williams, *Condorcet and Modernity* (2004). The further progress of the Enlightenment would lead Bentham to excoriate Blackstone for making this assumption. See, Jeremy Bentham, *A Comment on the Commentaries* (1976).

29 See J.B. Bury, *The Idea of Progress: An Inquiry into its Growth and Origin* (1932); Gay, ibid, vol 2, 56-125; Williams, ibid, 277-87.

30 See Gay, above n 28, vol 2, 140-66; Williams, above n 28, 69-91. Periodization is always approximate of course. The idea of unifying secular principles, according to Gay, drew its inspiration from the work of Newton in the previous century, and its political version can clearly be traced back to Hobbes. See, Thomas Hobbes, *Leviathan* (C.B. McPherson (ed), 1968).

could be discovered, sorted into neat boxes, and explained'.[31] He supported this idea with voluminous evidence, thus making it available in definitive and readily stated form.[32] The *Commentaries* are a treatise, and thus a useful reference work, but they are a treatise with a message.

That message, that intellectual insight, not only insulated the common law from America's revolutionary fervour, but gave it an appeal it had not previously possessed. When the thirteen colonies declared their freedom, they naturally deposed all the judges who had been appointed by the British colonial administration.[33] The new judges who were appointed in their place had the option of seeking a new source of law, but they never seriously considered doing so.[34] Perhaps this would have been difficult amid the chaos of the Revolutionary period, although patriotic enthusiasm might have been expected to induce more change than actually occurred. But by the second decade of the nineteenth century, the national and state governments had stabilized, Louisiana was part of the United States, and the Napoleonic Code, promulgated by the charismatic leader of America's ally, was becoming dominant across all of Europe.[35] American courts might have begun to invoke that new Code's principles and American legislators might have begun to consider its possibilities, which is essentially what occurred in the newly independent republics to the South during this time.[36]

But not in the United States; there, Blackstone's treatise reigned supreme.[37] According to Daniel Boorstin, '[i]n the first century of American independence, the

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31 Kadens, above n 16, 1560. This may have been the attitude that, according to Kadens, made Blackstone an ineffective judge.

32 For general discussions of the *Commentaries,* see, Daniel Boorstin, *The Mysterious Science of Law; An Essay on Blackstone's Commentaries* (1996); Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review* 205; S.F.C. Milsom, 'The Nature of Blackstone's Achievement' (1981) 1 *Oxford Journal of Legal Studies* 1.

33 They were particularly motivated to do so because colonial judges were generally members of the colonial legislatures' upper house, see, Leonard Labaree, *Royal Government in America: A Study of British Colonial System Before 1783* (1958) 401-15, because they were more directly subject to the Crown than their British compatriots, see, Gordon Wood, *The Creation of the American Republic, 1776-1787* (1969) 160, and because they were effectively local administrators as well as traditional judges, see, Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 299-300; Gordon Wood, *The Radicalism of the American Revolution* (1991) 81-82.

34 Because of the confusion in the revolutionaries' minds about whether law was written or unwritten, natural or positive, judges during the revolutionary period had an unusual amount of discretion to determine the legal sources on which they would rely. Wood, *The Creation of the American Republic*, ibid, 296-99. It is certainly true that most of the new state constitutions provided for retention of English statutory and common law, but this was hardly a clear or definitive provision, and it generally was made subject to variation on the basis of circumstance, which made it even more open-ended. Wood, *The Creation of the American Republic*, ibid, 299-300.

35 See, John Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (2007) 27-33.

36 See, M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Latin America* (2004).

37 Boorstin, above n 32, 1-6. See, Bernard Bailyn, *The Ideological Origins of the American Revolution* (revised ed, 1992) 30-31; Rakove, above n 33, 19; Wood, *The Creation of the American Republic,* above n 33, 10 and 264; Dennis Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731. Regarding the *Commentaries'* influence on specific areas of law, see, Gerald Leonard, 'Toward a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code' (2003) 6 *Buffalo Criminal Law Review* 691; David Schorr, 'How Blackstone Became a Blackstonian' (2009) 10 *Theoretical Inquiries in Law* 103.

Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law'.[38] Alfred Alschuler adds that '[b]efore 1900, almost every American lawyer read at least part of Blackstone'.[39] While this was due in part to Blackstone's workmanlike summary of the law, which generated the direct citations, the treatise's real influence, and its contribution to the continuation of the common law in the Revolutionary United States, was its conceptual framework of the common law in its entirety. As Gordon Wood notes, 'The great appeal for Americans of Blackstone's *Commentaries* stemmed not so much from its particular exposition of English law, which, as Jefferson said, was all 'honeyed Mansfieldism', sliding men into Toryism, but from its great effort to extract general principles from the English common law and make it, as James Iredell said, 'a science'.[40] Wood goes on to note that Blackstone's treatise made the common law a part of the English constitution and that the colonists were revolting in favour of that constitution, not against it.

In short, Blackstone's scholarly achievement was to replace the pre-modern justification for the common law, a justification based on the implicit value of custom and tradition, with a modern justification based on its derivation from embedded and yet overarching principles. The Revolutionary generation and its successors were prepared to break with tradition; indeed, if the Revolution itself was not a sufficient break, then certainly the idea of creating an entirely new governmental structure through a written document represented a rejection of custom and continuity. But Americans obtained both the motivation and the courage to make that break by means of their commitment to great, overarching principles – liberty, popular sovereignty, and a strong government ruled by countervailing forces. Blackstone's reformulation of the common law fit perfectly with this new mentality. His intellectual achievement gave English common law its continuing vitality in the new republic, and t created the image of the common law that prevailed until the twentieth century.[41] It enabled American judges to integrate their political commitment to an independent nation with their inherited doctrinal framework of English common law. They could follow the law of England, and treat it as determinative precedent, without seeing themselves as subordinate to the English king or Parliament, because Blackstone taught them that this

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38 Boorstin, above n 32, 3. As Alschuler notes, 'One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772. This edition supplied another 1400 sets at a substantially lower price; and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the Commentaries had been sold on the American as on the English side of the Atlantic'. Alfred Alschuler, 'Rediscovering Blackstone' (1996) 145 *University of Pennsylvania Law Review* 1, 3.

39 Alschuler, ibid, 6.

40 Wood, *The Creation of the American Republic*, above n 33, 10.

41 True to the nature of scholarly influence, it was Blackstone's conception, not his personal authority, that proved persuasive. In personal terms, he was just another one of evil George III's judicial henchmen. Thus, the parts of his *Commentaries* that opined on other subjects, such as sovereignty, representation and legislative supremacy, were spurned by the American revolutionaries. See, Bailyn, above n 37, 201-03; Wood, *The Creation of the American Republic*, above n 33, 264-66, 530. In arguing against Blackstone's concept of representation, for example, Revolutionary pamphletist Arthur Lee declared that Blackstone 'founds his opinion on that fiction of a person's being, after he is elected, the representative of the whole kingdom, and not a particular part. The sophistry of this argument is sufficiently manifest, and has been fully exploded'. As if that were not a sufficient dismissal of the great man, Lee goes on to say: 'The British Constitution is not to be new modeled by every *court* lawyer. [*footnote*:] *Mr. Blackstone is solicitor to the Queen'.* (quoted in Bailyn, above n 37, 171 (emphasis in original)). It was only as the author of the *Commentaries* that Blackstone escaped the obvious charge of being a servant of the new nation's oppressor.

law was a coherent structure that embodied the legal concepts of the English speaking peoples in their entirety.

III FORMALISM

A *Common Law Itself*

Much could be said about the effect of nineteenth century treatise writers on the judiciary, but the overlap between these authors and practicing judges is sufficiently large to blur the issue. In the absence of organized law schools, formal lectures on law were typically offered by judges and commentaries on the law were often written by judges as well.[42] The emergence of law schools after the Civil War generated the first group of American legal academics, but they did not exist in significant numbers until the end of the century approached. This group of scholars, now disparagingly described as 'formalists', continued and elaborated Blackstone's conception of the common law as a coherent body of doctrine built on abiding principles and stretching back into the Anglo-Saxon past.[43] They were particularly insistent that these principles, like the principles that ruled the natural world, made law a science, because that scientific character then endowed their subject with a dignity that justified its entry onto university campuses.[44] Common law decisions were the data by which they discerned the underlying principles of Anglo-American law, and thus – they actually said this – the law library was their laboratory.[45] The formalists' insistence on teaching common law and rigorously excluding statutory law, whose importance they well understood, derived from this same desire to maintain the law's coherent, scientific character.

According to this theory, the conceptual framework of common law decisions is based on precedent; that is, previously decided cases were the discourse of the court's

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42 Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983) 1-34.

43 On legal formalism, see generally, Grant Gilmore, *Ages of American Law* (1977); Thomas Grey, 'Langdell's Orthodoxy' (1938) 45 *University of Pittsburgh Law Review* 1 (1938); Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 *Columbia Law Review* 1138. Brian Tamanaha convincingly challenges the view that the formalists – a term they never applied to themselves, as he points out – never made the claim that common law principles could be mechanically applied and would definitively resolve every case. Tamanaha, above n 13, 14-43. But he does not dispute the formalists' belief that the common law was derived from embedded principles.

44 William Chase, *The American Law School and the Rise of Administrative Government* (1982) 27-31; William LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (1994) 55-78; Stevens, above n 42, 52-59; Grey, ibid, 13-39; Howard Schweber, 'The "Science" of Legal Science: The Model of Natural Sciences in Nineteenth Century American Legal Education' (1999) 17 *Law and History Review* 421, 455-64; Marcia Speziale, 'Langdell's Concept of Law as Science: the Beginning of Anti-Formalism in American Legal Theory' (1980) 5 *Vermont Law Review* 1; Russell Weaver, 'Langdell's Legacy: Living with the Case Method' (1991) 36 *Villanova Law Review* 517, 527-31.

45 Christopher Langdell, 'Harvard Celebration Speeches' (1997) 3 *Law Quarterly Review* 123, 124 ('the library is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists'). C.C. Langdell was the creator and first dean of Harvard Law School. He is generally regarded as the epitome of formalism, see Grey, above n 43. Although it is sometimes argued that Langdell was inspired by Darwin in characterizing law as science, see Speziale, ibid, my own view is that he was more likely to have been influenced by Louis Aggasiz, who was Langdell's colleague on the Harvard University faculty. Edward Rubin, 'What's Wrong with Langdell's Method, and What to Do About It' (2007) 60 *Vanderbilt Law Review* 609 633-35.

analysis. This did not mean that a judge could not disagree with precedents, extend them, or even overrule them. Rather, it was based on Blackstone's idea, as elaborated by the so-called formalists, that the common law was driven by underlying principles that could be distilled from the cases. A particular case might apply the principle incorrectly, or a new situation might arise that rendered the prior application of the principle outdated. In that event, the proper approach, according to formalist theory, was to explore the general pattern of the cases to determine the correct application of the principle or to discern the principle more clearly so it could be applied to the new situation. This was the 'science' that the formalists were propounding and, in this context, one can see the force of their otherwise far-fetched methodological assertion. Just as natural scientists discern the underlying principles that govern physical or biological phenomenon by inducing these principles from observations of specific phenomena, and then apply the principles to create new technology, so the judges were discerning the unwritten legal principles and applying them to the fact situations of the cases that they were called on to decide.

The irony of this theory is that the more influential it was, the less likely courts would be to cite it, or cite any other work of scholarship. The effort to discern underlying principles from decided cases means that in a judicial opinion, the important documentation consists of citations to previously decided cases.[46] Even if the court is making new law – and the formalists were quite willing to acknowledge that this occurred – it will tend to justify its decision as a correction or modernization of the precedents.[47] Citations to academic literature are considered supererogatory; they are something to dress up or amplify the argument, not to prove the point. Some judges seek such citations as proof of their erudition, others shun them as pretentious, and others simply do not bother. But for all, prior decisions are the data that they discover in their laboratory-libraries. Academic arguments about the reasoning in these decisions are truly secondary sources, just as books about the history or philosophy of science are secondary to the empirical findings on which natural scientists rely.

One notable example of this approach is Judge Benjamin Cardozo's decision in *McPherson v Buick Motor Co*[48] It is not only notable because it is a leading case, and a leading example of lawmaking by a common law judge, but also because Cardozo was certainly one of the most activist and creative judges to ever sit on an American court. In *McPherson*, the plaintiff's car crashed and the finder of fact concluded that the cause was a mechanical problem resulting from negligent manufacture of the car by the defendant company. The company, however, argued that it was not liable to the plaintiff because it was not in privity with him. Cardozo's treatment of the case began with *Thomas v Winchester*,[49] a 1852 New York decision that held the manufacturer of a falsely labelled poison liable to the ultimate purchaser because poison is an inherently dangerous product, and the injury to the ultimate purchaser from falsely labelling it is thus foreseeable by the manufacturer. He conceded that 'early cases suggest a narrow reading of the rule' that the plaintiff does not need to be in privity with the manufacturer when an inherently dangerous product is involved. But Cardozo went on to say that later cases 'evince a more liberal spirit'.[50] In support he cited two other New York

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46 See, Eisenberg, above n 15, 50-103. Eisenberg argues that scholarly literature plays an important role in establishing non-local cases as established doctrine, at 96-99. This is a somewhat different, and less conceptual form of influence from the one discussed in this article, but the two are fully consistent. The one Eisenberg notes probably produces more direct citations.

47 Ibid, 132-35.

48 217 N.Y. 382 (1916).

49 6 N.Y. 397 (1852).

50 217 N.Y. at 386.

cases, involving a scaffold and a coffee urn, and the language from an English Court of Appeal decision.

On this basis, Cardozo declared that 'the principle of *Thomas v Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected'.[51] He then concluded that an automobile, if negligently manufactured, is inherently dangerous. Thus, the structure of his reasoning was to extend a common law rule, derived from a series of precedents, to a new product that did not exist at the time most of the precedents were decided.[52] In fact, Cardozo was virtually abolishing the doctrine of privity; any product that is negligently manufactured and then injures its purchaser can be said to be inherently dangerous in Cardozo's sense, unless the purchaser was using the product for an unintended purpose, in which case the manufacturer would have a separate defense and there would be no liability at all.[53] What he was really holding was that modern mass marketing of manufactured products had rendered the doctrine of privity obsolete. This rationale broke through the carapace of common law reasoning when Cardozo wrote that 'the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain'.[54] Before returning to his discussion of decisional law, he added: '[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be'. [55] But Cardozo, activist and creative though he was, chose to employ the methodology of formalism to reach a result that does not appear to be either motivated or justified by that methodology. In this case, the prevailing scholarly theory of law did not seem to determine the result, but it appears to be quite influential in determining the structure and reasoning of the decision. Cardozo was able to integrate his policy judgments about liability in a mass marketing with common law doctrine because legal scholars, following Blackstone, had generalized that doctrine into a capacious conceptual structure.

B *General Common Law*

Another aspect of common law where the influence of scholarship can be discerned involves a particular application known as general common law. Blackstone's view of common law involved a mixture of generality and particularism. Common law was derived from general and enduring principles, but those principles occupied a middle ground, in his view, between two areas where particularism prevailed. At the high end, the common law was particular to England; Blackstone was not only aware that the Continental European nations were governed by a different law but, like most English jurists, he was intensely proud of that difference. At the low end, Blackstone was equally aware that the common law was promulgated by individual judges and thus displayed an inevitable variability. Judges not only made mistakes, which could be

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51 Ibid, 389.

52 The exception was the most recent case Cardozo cited, *Statler v Ray Mfg*, 195a N.Y. 478 (1909).

53 As Melvin Eisenberg puts it: 'This formulation adopted the cloak of the old rule, insofar as it made the manufacturer's liability turn on whether the product was "a thing of danger" but it completely changed the substance of the old rule'. Eisenberg, above n 15, 60.

54 217 N.Y. at 390-91.

55 217 N.Y. at 391.

critiqued and ultimately corrected by reference to general principles, but also correctly adapted those principles to changing circumstances at varied rates.

American federalism added another element of particularity. Because the states represent separate legal jurisdictions, common law could develop in each state in somewhat different ways as a result of different rates of change, as well as different economic and political circumstances to which the general principles of common law were being adapted.[56] During the nineteenth century, federal courts, when deciding state law cases that came to them under the diversity jurisdiction[57] could apply either the common law of the state or the 'general common law', that is, the version of common law that they deemed to be the most accurate application of the common law's abiding principles. Prior to the Civil War, the federal courts applied general common law, rather than state law, primarily in commercial cases where a strong argument for the value of uniformity could be advanced.[58] In tort cases, the federal courts deferred to the common law of the state governing the case, presumably out of regard for the need to adapt principles of common law to the particular conditions of each state, and their sense that uniformity was not important in this context.

In the last decades of the nineteenth century, however, federal courts began to expand the reach of general common law from commercial cases to tort cases.[59] Typically, this meant rejecting a particular state's precedent favouring the plaintiff and invoking instead a general rule favouring the defendant. Ideology was clearly at work in these cases; conservative federal courts were overriding decisions from states where Populism was influencing the judiciary. But the discourse that enabled the federal courts to reach these decisions stemmed from the deification of the common law that formalist scholars had effectuated. The opinions did not speak about need to protect American business from the elected judiciary in Populist-dominated states.[60] Rather, they relied on the amplified importance of the general principles of common law, the same principles that the new generation of legal academics were articulating in the newly established law reviews, and which they were using to bedevil their bewildered

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[56] Moreover, some of the precedents that developed in common law were 'rules of the road', that is, arbitrary choices that had to be made for the sake of certainty but that were not governed by principle. For example, the New York Rule for check collection subjected the initial collecting bank to liability for negligence by any subsequent collecting bank, while the Massachusetts rule made each bank in the collection chain liable for its own negligence. See, Uniform Commercial Code § 4-202, Comment 4.

[57] Under the Judiciary Act of 1789 as amended, 28 U.S.C. § 1652, federal courts have jurisdiction in cases that are governed by federal law ('federal question' jurisdiction) but also in cases governed by state law where the two parties are citizens of different states ('diversity' jurisdiction). In addition, if a question of federal law and a question of state law are presented in the same case, the federal courts can take jurisdiction of the entire case and decide the state law issue as well as the federal one ('pendant' jurisdiction). As a result, federal courts decide a substantial number of cases governed by the law of the particular states.

[58] The leading case is: *Swift v Tyson*, 41 U.S. (16 Pet) 1 (1842) (involving the negotiability of a bill of exchange). The decision, written by Justice Joseph Story, focused specifically on the need for uniformity in this area, not only within the nation but among nations. The law of negotiable instruments he wrote, was 'not the law of a single country only, but of the commercial world'. Ibid, 19.

[59] See, *Baltimore and Ohio RR. v Baugh*, 149 U.S. 368 (1893).

[60] William Ross, *A Muted Fury: Populists, Progressives and Labor Unions Confront the Courts, 1890-1937* (1993). On Populism, see generally, *Rebecca Edwards, New Spirits: Americans in the Gilded Age*, *1865-1905* (2006) 225-53; Lawrence Goodwyn, *The Populist Movement: A Short History of the Agrarian Revolt in America* (1978); Richard Hofstadter, *The Age of Reform* (1955) 60-130; Robert McMath, Jr, *American Populism: A Social History, 1877-1898* (2006).

students with the newly introduced Socratic Method. In short, the academic literature of the time enabled judges to integrate their ideology with legal doctrine, and thus expand the reach of general common law.

C *Substantive Due Process*

A third major influence of formalist scholarship on the understanding of the common law during this era did not actually involve common law at all, but constitutional law. Beginning at the very end of the nineteenth century, and continuing until the 1930s, the federal courts invalidated a variety of Progressive Era regulatory statutes on the grounds that they violated the U.S. Constitution.[61] This is sometimes called the '*Lochner* Era' after its leading case, *Lochner v New York*, which held maximum hours legislation in the baking industry unconstitutional.[62] In fact, various litigants had been urging the federal courts to strike down economic regulation for over a quarter of a century, but the courts regularly rejected these demands.[63] The turning point came in an 1897 case, *Allgeyer v Louisiana*,[64] and more notably in *Lochner* eight years later.[65] The doctrine that the courts fashioned in these cases and the ones that followed is now described as substantive due process, that is, the idea that the due process clause places limits on the kind of statutes that a legislature can enact, in addition to the more familiar limits on the procedures by which those statutes are applied to individuals. While the Court has continued to rely on substantive due process to strike down laws regulating intimate relations,[66] it has largely abandoned the use of the due process clause to strike down the economic regulations that were held unconstitutional during the *Lochner* Era.

The traditional interpretation by legal academics is that the economic substantive due process cases were motivated by the conservative politics of the judges, a solicitude for big business that made them hostile toward the reform initiatives of the Progressive Era.[67] Political motivation of this sort would appear to place judges beyond the reach of scholarly influence, but in fact it could be seen as being grounded in the ideology of

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61 See, eg, *New State Ice Co. v Liebmann*, 285 U.S. 262 (1932); *Jay Burns Baking Co. v Bryan*, 264 U.S. 504 (1924); *Adkins v Children's Hospital*, 261 U.S. 525 (1923); *Coppage v Kansas*, 236 U.S. 1 (1915); *Adair v United States*, 208 U.S. 161 (1908); *Lochner v New York*, 198 U.S. 45 (1906).

62 198 U.S. 45 (1906). For a description of the case in context, see, Paul Kens, *Lochner v New York: Economic Regulation on Trial* (1998).

63 See, eg, *Mugler v Kansas*, 123 U.S. 623 (1887); *Railroad Commission Cases*, 116 U.S. 307 (1886); *Davidson v New Orleans*, 96 U.S. 97 (1877); *Munn v Illinois*, 94 U.S. 113 (1877); *Slaughter House Cases*, 83 U.S. (16 Wall) 36 (1873); *Murray v Hoboken Land and Improvement Co*, 59 U.S. (18 How.) 272 (1856); *The Railroad Rate Cases*, 83 U.S. (16 Wall) 36 (1873).

64 165 U.S. 578 (1897).

65 198 U.S. 45 (1905).

66 See, eg, *Lawrence v Texas*, 539 U.S. 558 (2003); *Roe v Wade*, 410 U.S. 113 (1973). For this purpose, the Court has identified the 'liberty' that the Due Process Clause protects as a right of personal privacy.

67 Regarding these reform efforts, see Ballard Campbell, Public Policy and State Government, in Charles Calhoun (ed), *The Gilded Age: Perspectives on the Origins of Modern America* (2007) 353; Sean Cashman, *America in the Gilded Age: From the Death of Lincoln to the Rise of Theodore Roosevelt* (1984) 354-80; John Whiteclay Chambers II, *The Tyranny of Change: America in the Progressive Era, 1890-1920* (2000) 132-71; Lewis Gould, *America in the Progressive Era, 1890-1914* (2001); Hofstadter, above n 60, 174-271; Melvin Holli, 'Urban Reform in the Progressive Era' in Lewis Gould (ed), *The Progressive Era* (1974) 133; Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (2003) 77-181; Robert Wiebe, *The Search for Order, 1877-1920* (1967) 164-223.

laissez-faire economics, as Justice Holmes famously noted when dissenting in *Lochner*.[68] As such, it was explicitly articulated by several leading treatises written during the decades immediately preceding the Court's decisions.[69]

In recent years, however, scholars have re-evaluated the economic substantive due process cases. According to one such re-evaluation, the cases were primarily motivated by the Republican Party's anti-slavery tradition and centred on the idea that people should be free to sell their labour.[70] This is intriguing, but does not explain all the anti-Progressive cases of the era,[71] nor does it explain why the Court rejected requests to strike down economic legislation for the first three decades after the Civil War, and only did so during the next three decades, that is, after 1897.[72] Another explanation that scholars have advanced is that the Court was not hostile to all reform legislation, but only to legislation that unfairly benefitted one group, or class, at another's expense, rather than acting in the general public interest.[73] The timing of the substantive due process cases, as well as their extent, can then be explained by the increasing class conflict of the late nineteenth century, which gradually persuaded the Court that it needed to act to enforce neutrality in legislative action.[74] Howard Gillman, in advancing this theory, also points to academic literature in adumbrating the judicial doctrine, although he does not seem to regard it as a major influence.[75]

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68 198 U.S. at 75 ('The Fourteenth Amendment does not enact Mr Herbert Spencer's Social Statics. … [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire'*).

69 Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868); Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States Considered from Both Civil and Criminal Standpoint* (1886). These works took different positions on the limitations themselves, but both made an argument for some substantive constitutional constraints of state as well as federal legislation on laissez-faire grounds.

70 William Forbath, The Ambiguities of Free Labor: Labor and Law in the Gilded Age, 1985 Wis. L. Rev 767; Charles McCurdy, 'The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867-1937' (1984) *Supreme Court Historical Society* 20; William Nelson, 'The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America' (1974) 87 *Harvard Law Review* 513.

71 See, eg, *New State Ice Co v Liebmann*, 285 U.S. 262 (1932) (striking down statutes requiring a license to sell ice); *Tyson and Bro – United Theatre Ticket Offices v Banton* (273 U.S. 418 (1927) (striking down a statute setting ticket prices); *Weaver v Palmer Bros*, 270 U.S. 402 (1926) (striking down a statute forbidding the use of rags for bedding).

72 Another difficulty with this explanation is that all but one of the Justices (Nathan Clifford) were Republican appointments as early as 1870, so it is not clear why the Court waited another three decades to express its Republican principles. One of these new appointments, to be sure, was a Democrat, but that was Stephen Field (appointed by Lincoln), who championed substantive due process in dissent and can be regarded as one of the originators of the doctrine. Moreover, some of the Justices who formed the substantive due process majority in various cases during the three decades that followed, including Melville Fuller (Chief Justice from 1888-1910); Morrison White (Chief Justice from 1910 to 1921), Rufus Peckham (the author of *Lochner*), James McReynolds, and Pierce Butler, were Democrats, while regular dissenters, such as William Day and Oliver Wendell Holmes were Republicans. Holmes was also a Civil War veteran, certainly the only one on the Court by the 1930s.

73 See, eg, Michael Benedict, 'Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism' (1985) 3 *Law and History Review* 293; David Gold, 'Redfield, Railroads, and the Roots of "Laissez-Faire Constitutionalism"' (1983) 27 *American Journal of Legal History* 254; Howard Gillman, *The Constitution Besieged: The Rise and Demise of the Lochner Era Police Powers Jurisprudence* (1993); William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988).

74 Gillman, ibid, 61-146.

75 Ibid, 114-26.

This explanation seems more convincing than its predecessors, but it is not complete. Virtually all legislation favours one group over another: how did the Court decide which types of legislation should be subjected to the heightened scrutiny that characterized the *Lochner* Era decisions? Noga Morag-Levine, Robert Post and Cass Sunstein have suggested that the common law served as a baseline, or protected domain; legislation that addressed matters beyond the ambit of the common law was presumptively valid, but when legislation changed the common law, the Court demanded a demonstration of its public benefit.[76] In fact, this point can be stated more strongly. The doctrine that enabled the Justices to express their ideological commitments – whether we interpret these commitments as involving support for laissez-faire economics or concern about class conflict – was 'liberty of contract', the right of individuals to enforce any economic agreements they had freely entered into. In the earlier cases where the Court rejected due process challenges to economic regulation, it interpreted the right that was being potentially violated as the right to practice a trade, as in the *Slaughter-House Cases*,[77] or the natural right of private property, as in the *Railroad Commission Cases*.[78] Liberty of contract was a new formulation in *Algeyer* and *Lochner*. Contracts had certainly been discussed in the prior cases. In *Mugler v Kansas*,[79] for example, the Court upheld legislation prohibiting the sale and manufacture of alcoholic beverages against a challenge that legislation violated the social contract[80] and that it abrogated agreements between the manufacturer and the state in violation of the Contracts Clause.[81] But it was only when the Justices conceptualized the private party's right as liberty of contract that they were able to integrate their pro-business or anti-slavery ideology with legal doctrine. Only then were they willing to strike down Progressive legislation as unconstitutional.

The social contract is a jurisprudential idea, and the Contracts Clause is a constitutional provision, but the contracts that were protected by the Court's newly articulated liberty of contract doctrine were defined as agreements enforceable under common law. What the Court was holding, in effect, was that common law had constitutional status, that the state needed to make a substantial showing that it was protecting public safety, public health or public morals before it could displace the common law of contracts with a legislative provision. The Justices were aware, of course, that the Constitution authorized Congress to displace state law, including common law, in exercising is very broad enumerated powers, and that state legislatures, which possessed the even broader police power, were authorized to displace the common law in its entirety by enacting a code. In fact, Blackstone explicitly concedes this point with respect to Parliament. In the liberty of contract cases, however, the Court treated this legislative authority as contesting with a countervailing force. That force was identified as 'liberty' in deference to the terminology of the Fourteenth Amendment, which the Court was invoking to strike down the legislative action. But the liberty involved was generated by the common law. When the Court described the right being protected as '[t]he right of a person to sell his labour upon such terms as he deems proper [which] is, in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labour from the person

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76 Noga Morag-Levine, Chasing the Wind: Regulating Air Pollution in the Common Law State (2005); Robert Post, 'Defending the Lifeworld: Substantive Due Process in the Taft Court Era' (1998) 78 *Boston University Law Review* 1489 (1998); Cass Sunstein, '*Lochner*'s Legacy' (1987) 87 *Columbia Law Review* 873.

77 83 U.S. (16 Wall) 36 (1873).

78 116 U.S. 307 (1886).

79 123 U.S. 623 (1887).

80 Ibid, at 660 (Justice Harlan used the term 'implied compact' but he meant the same thing).

81 Ibid, at 665.

offering to sell it',[82] it was not only reacting against slavery or even class-based legislation. It was protecting the integrity of the common law.

By the time the substantive due process decisions were handed down, several decades of legal scholarship had championed the inherent logic and coherence of the common law. Perhaps more important than mere declaration of this concept, the scholarship had used it as an analytic framework to critique judicial decisions, recommend revisions to existing doctrine, and extend legal doctrine to the novel situations that were arising as the United States industrialized. It thus generated the idea that the common law was an organized system that merited protection and that could only be altered or overridden for good reason. The earlier treatises explicitly urging the Court to adopt this position were not without effect, but they were rarely cited by the Court. The body of scholarship advancing the idea that the common law was a coherent, principle-based system was similarly slighted. But it was this scholarship that created the conceptual framework for the substantive due process decisions that dominated the Court's constitutional jurisprudence for the first third of the twentieth century. It was this scholarship that enabled them to integrate their politics with legal doctrine.

IV LEGAL REALISM

A *The Tenets of Legal Realism*

Legal realism was first, and perhaps foremost, an attack on formalism. Adumbrated by the earlier work of Oliver Wendell Holmes, Roscoe Pound and others,[83] the realist movement took hold during the 1920s and continued until World War II.[84] The realists excoriated their predecessors for being overly mechanical, pseudo-logical, and out of touch with the realities of contemporary society – criticisms that have continued to the present day.[85] A recent work by Brian Tamanaha refutes one important part of this condemnation; the first generation of American legal academics (whom we, not the realists and certainly not that first generation, describe as formalists), were perfectly aware that the principles of common law could not definitively and unambiguously resolve every case.[86] They knew that judging requires judgment and that courts needed to craft new rules to deal with novel fact situations and new circumstances.

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82 *Adair v United States*, 208 U.S. 161, 174 (1908).

83 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; Roscoe Pound, 'Courts and Legislation' (1913) 7 *American Political Science Law Review* 361; Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605.

84 See generally, Morton Horowitz, *The Transformation of American Law 1870-1960*, (1992) 169-266; Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986); William Twining, *Karl Llewellyn and the Realist Movement* (2nd ed, 1985); Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1960) 70 *Yale Law Journal* 1037; Edward Purcell, 'American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory' (1969) 75 *American Historical Review* 424.

85 For characteristic works of legal realist scholarship, see, Benjamin Cardozo, *The Nature of the Judicial Process* (1921); Jerome Frank, *Law and the Modern Mind* (1930); Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809; Morris Cohen, 'The Basis of Contract' (1933) 46 *Harvard Law Review* 553; Morris Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8; Louis Jaffe, 'Law Making by Private Groups' (1937) 51 *Harvard Law Review* 201; Karl Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 *Columbia Law Review* 431 (1930); Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed' (1950) 3 *Vanderbilt Law Review* 395.

86 Tamanaha, above n 13, 59-63.

Perhaps the major focus of the realist critique, however, and one that seems more accurate, involved a challenge to the status of the common law. Because of their political commitments, which were distinctly Progressive, their critical sensibilities and their intellectual background, realist scholars were hostile to the legal status quo that the common law represented.[87] They were greatly aided in this critique by the publication of Pollack and Maitland's work, which finally revealed the true origins of common law and undermined its increasingly threadbare claim to being the wellspring of the Anglo-American legal system. This enabled the realists to argue that the common law was nothing more than an expression of government policy that had no greater dignity, and no more mystery, than an ordinary statute. On this basis, they pilloried the formalist claim that the common law possessed an internal logic and coherence.

The realist attack on common law went beyond critique, however, and led American legal academics toward a new conception of the law itself. Law, the realists asserted, was nothing more than the positive enactment of the state, an extension of its power to govern. This is, of course, the central insight of European legal positivism as well,[88] but the positivists generally use this insight to argue that law is separate from morality. That is not the battle that American legal realists were fighting. Their statist sentiments were the product of iconoclastic enthusiasm, not coherent jurisprudential thought;[89] for the most part, they were intent on taking the mystery, not the morality, out of law. As a result, they moved from the idea that law is a creation of the state in almost the opposite direction from the positivists, arguing that law is a product of the structure and beliefs of the society in which that state existed. This approach was obviously related to the insights of the European school of historical jurisprudence, which was not unknown to the formalist scholars whom the realists were so anxious to disparage.[90] But the realists articulated it in a way that was distinctive, at least in the United States, in part because they linked it to their demotion of the common law. No legal system was logical and coherent, or based on overarching principles they insisted; all reflected the political and social milieu that generated them. As Holmes, the great proto-realist, famously asserted at the very beginning of his treatise on the common law: 'The life of the law has not been logic; it has been experience ... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with

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87 See, Horowitz, above n 84, 169-92.

88 See, John Austin, *The Province of Jurisprudence Determined* (1954) (originally published in 1834); Hans Kelsen, *General Theory of Law and the State* (1945); Hans Kelsen, *Pure Theory of Law* (1967). See also, Jeremy Bentham, *Of Laws in General* (H.L.A. Hart (ed), 1970) (if not a full-fledged positivist, Bentham is certainly a precursor).

89 Llewellyn said so explicitly in the 1951 re-issue of The Bramble Bush, which had originally been published in 1931. Regretting the error of his 'thirteen short words' viz, 'What these officials do about disputes is, to my mind, the law itself', he acknowledged that the machinery of law reflects an 'almost unconscious questing for the ideal'. Karl Llewellyn, *The Bramble Bush* (1951) 7-9. He is reaffirming, not retreating, from his major point that law is the product of society; the error that he now corrects is his failure to recognize the aspirational inclinations that every society maintains and generally infuses into its legal system.

90 See, eg, Henry Sumner Maine, *Ancient Law: Its Connection With the Early History of Society and Its Relation to Modern Ideas* (1961); Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Haywood, trans, 2nd ed, 1975) (originally published in 1831).

as if it contained only the axioms and corollaries of a book of mathematics'.[91]

This insight led, in turn, to the realization that law is a social science, that is, a study of the behaviour and beliefs of human beings – an obvious point, perhaps, but one that was of methodological significance in American legal scholarship because the formalists had insisted that law was a natural science, akin to biology or chemistry, and the law library was the scholar's laboratory. They cannot be faulted for advancing what has seemed, in retrospect, this odd idea; when they succeeded in ensconcing law as a subject of graduate study, there was no empirical social science in American universities.[92] Natural science was the only model available to legitimatize a subject that had previously been taught by apprenticeship, or by practitioners who rented university space the way a private scuba diving instructor might now rent the university pool. In the decades that followed their achievement, however, the work of Charles Dunbar, Franklin Giddings, Franz Boaz, Woodrow Wilson and others had established empirical social science as an important university discipline.[93] Drawing on this work by their fellow university professors, the realists were able to link law with social science and argue that the study of its actual practices would be more useful that the effort to discern its overarching principles. The apotheosis of this position was *The Cheyenne Way*, a book about the law and lifeways of a people who made little distinction between the two. It was written by Karl Llewellyn, one of the leading legal realists, in collaboration with an anthropologist.[94]

It is worth noting here, because it will be of significance below, is that the realists' enthusiasm for social science was not matched by their practice of it. As John Henry Schlegel has pointed out, the realists were not particularly good social scientists.[95] They lacked formal training in the field and their autodidactic efforts were often casual or

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91 Oliver Wendell Holmes, *The Common Law* (1881) 1. Given the standard periodization of American legal scholarship, which has been used in this essay as well, the early date of this statement is a bit startling, but Holmes was an anti-formalist from the beginning. His review of Langdell's contracts casebook argued that judicical decisions could not be treated as embodiments of overarching principles, Oliver Wendell Holmes, 'Book Review' (1880) 14 *American Law Review* 233. As indicated above, he was a consistent dissenter from virtually all the substantive due process cases, not on the ground that the state had made its case for regulation (which was the standard argument of the other dissenters), but rather on the realist ground that the state had the power to regulate, and did not need to make a case for it. He was of course, a hero of the realists, but the early date of his insights indicates the messiness of any effort to cabin intellectual history into discrete schools and periods.

92 See, Paul Buck, *Social Sciences at Harvard, 1860-1920* (1965); Craig Calhoun, *Sociology in America: A History* (2007); Bernard Crick, *The American Science of Politics: Its Origins and Conditions* (1959); Michael O'Connor, *The Origins of Academic Economics in the United States* (1944); Regna Darnell, 'North American Traditions in Anthropology: The Historiographic Baseline', in Henrika Kuklick, *A New History of Anthropology* (2007) 35.

93 See, eg, Franz Boaz, *Indian Myths and Legends from the North Pacific Coast of America* (Dietrich Bertz, trans, 2006) (originally published in 1895); John Burgess, *Political Science and Comparative Constitutional Law* (1893); Charles Dunbar, *Chapters on the Theory of Banking* (2d ed, 1901); Franklin Giddings, *The Principles of Sociology: An Analysis of the Phenomena of Association and of Social Organization* (1914) (originally published in 1896); Franklin Giddings, *The Elements of Sociology: A Textbook for Colleges and Schools* (1908) (originally published in 1898); W.W. Willoughby, *Government and Administration of the United States* (1891); Woodrow Wilson, *Congressional Government: A Study in American Politics* (1885).

94 Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (1941).

95 John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995); John Henry Schlegel, 'American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore' (1980) 29 *Buffalo Law Review* 459. See also Horowitz, above n 84, 181-85.

intermittent. All too often, their critical instincts got the better of their constructive ones, and they used social science as ammunition against the all-too-tempting target of their predecessors' claim, still heard among legal educators, that law was a form of natural science.

B *General Common Law*

The impact of realist scholarship on judging was rapid and profound. One such impact, and a striking one, was the abolition of general common law in the federal courts. The decision came in the 1938 case of *Erie Railroad Co v Tompkins*, where the federal court below, applying general common law, had exempted the railroad from tort liability that it would have been subjected to by the common law of the state where the tort had occurred. This was precisely the type of issue that had been absorbed into the federal common law under the influence of legal formalism. The *Erie* opinion, written by Louis Brandeis, relied heavily on the insights and perspectives of the legal realists.[96] Brandeis began with an empirical observation: 'Experience in applying the doctrine of *Swift v Tyson* had revealed it defects, political and social, and the benefits expected to flow from the rule did not accrue'.[97] He then went on to argue that law is a positive enactment of the state, and whether it 'shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern'.[98] 'The fallacy underlying the rule declared in *Swift v Tyson* is made clear by Mr Justice Holmes', he continued. '[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally, but the law of that State existing by the authority of that State'.[99]

In its heavy reliance on Holmes, the opinion may be seen as adopting the perspective of a fellow Justice, particularly since the quotes come from prior judicial opinions by Holmes, not from his scholarship.[100] But Holmes' statements were issued in dissent, and the doctrine of general common law had been quite robust until the 1930s; the 1928 decision from which Brandeis quotes upheld a general common law decision by a 6-3 vote, one of the other dissenters being Brandeis.[101] In fact, Brandeis quoted legal scholarship extensively in support of his position. His interpretation of the Judiciary Act was based directly on a law review article by Charles Warren, which he described as 'the more recent research of a competent scholar',[102] and he cited a number of law review articles by legal realists in support of his conclusion.

This explicit reliance on legal scholarship makes *Erie* a tempting example to invoke about the influence of scholarship on the judiciary, but the point is not dependent on the citations. Even if the decision had not been so explicit in its debt to scholarship, the influence of scholarship through the medium of conceptualization would be apparent. The decision, after all, is difficult to explain with reference to politics or political ideology. General common law proved to be a useful instrument for

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96 304 U.S. 64 (1938).

97 Ibid, 74.

98 Ibid, 78.

99 Ibid, 79.

100 Ibid, 79 (citing *Kuhn v Fairmont Coal Co*, 215 U.S. 349 370-72 (1910) (Holmes J, dissenting); *Black and White Taxicab Co v Brown and Yellow Taxicab Co* 276 U.S. 518, 532-36 (1928) (Holmes J dissenting)).

101 In addition, Holmes held a special position among the realists. In his incendiary declaration of extreme realist principles, Jerome Frank celebrated Holmes as America's only 'completely adult jurist'. Jerome Frank, *Law and the Modern Mind* (1930) 270-77.

102 Ibid, 73, see n 5 (citing Charles Warren, 'New Light on the Judiciary Act of 1789' (1923) 37 *Harvard Law Review* 49).

judges to use in advancing their own goals, as critics of the doctrine had observed. Judges with different opinions might well have changed their conclusions about the content of general common law to correspond to their predilections without abandoning the approach in its entirety. Nor can the decision be explained by renewed support for federalism, since the political climate of New Deal involved extensive nationalization of the law. Rather, the decision can be traced to the insights of legal realism: first to its attack on common law and the demotion of that law from a coherent system based on enduring principles to a body of decisions by a group of all-too-human judges; and second, to the realist insistence that law was nothing more than the projection of state authority and not, to quote Holmes once again, 'a brooding omnipresence in the sky'.[103]

C *Substantive Due Process*

A second impact of legal realism's re-conceptualization of the common law involved the rejection of *Lochner* and its progeny. A substantial amount of legal scholarship had urged the Court to adopt this course of action,[104] but the political crosswinds that accompanied the transformation of the Court's substantive due process doctrine were so powerful that they seem to drown out any possible effect of legal scholarship. During the first five years of Franklin Roosevelt's presidency, the Court struck down a number of major New Deal initiatives, culminating with the invalidation of the National Industrial Recovery Act, the centrepiece of Roosevelt's economic program at the time.[105] Roosevelt responded to these decisions with his notorious 'court packing' plan, his worst political defeat. Quite suddenly, and over the objections of his legal advisors,[106] Roosevelt proposed that a new justice be appointed for every sitting Justice over seventy on the nine-member Court. After the firestorm of criticism that ensued, a heavily Democratic and previously compliant Congress rejected the plan. But according to many observers, it produced its intended effect nonetheless. A few weeks after it was announced, the Court, with Owen Roberts, the Court's swing vote, in the majority, overruled a decision from the previous term, *Morehead v New York ex rel Tipaldo*.[107] That case had invalidated New York's minimum wage law for women; now, in *West Cost Hotel v. Parrish*, the Court upheld, a virtually equivalent Washington State law.[108] A series of other decisions upholding reform legislation followed.[109] Roberts' vote was widely described as the 'switch in time that saved nine' and regarded ever

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[103] *Southern Pacific Co v Jensen*, 204 U.S. 205, 222 (1917) (Holmes J, dissenting).

[104] See, eg, Cohen, Property and Sovereignty, above n 85; Robert Hale, 'Rate Making and the Revision of the Property Concept' (1922) 22 *Columbia Law Review* 209; Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44 Harvard Law Review 697 (1931); Ray Brown, 'Due Process, Police Power and the Supreme Court' (1927) 40 *Harvard Law Review* 943; Thomas Powell, 'The Judiciality of Minimum Wage Legislation' (1924) 37 *Harvard Law Review* 37. See generally Gillman, above n 73.

[105] *A.L.A. Schechter Poultry v United States*, 295 U.S. 495 (1935). The case did not rely on substantive due process, but on the non-delegation doctrine. Other federal statutes that were overturned included the Agricultural Adjustment Act, *United States v Butler*, 297 U.S. 1 (1936) and the *Bituminous Coal Act, Carter v Carter Coal Co*, 298 U.S. 238 (1936).

[106] See Conrad Black, *Franklin Delano Roosevelt, Champion of Freedom* (2003) 404-06.

[107] 298 U.S. 587 (1936).

[108] 300 U.S. 379 (1937).

[109] See, eg, *Phelps Dodge Corp v NLRB*, 313 U.S. 177 (1941) (upholding NLRA provision protecting unions and overruling *Adair* and *Coppage*); *United States v Darby*, 312 U.S. 100 (1941) (upholding maximum hours and minimum wage legislation and overruling *Lochner*); *United States v Carolene Products Co*, 304 U.S. 144 (1938) (upholding restriction on milk substitute, effectively overruling *Weaver v Palmer Bros Co*, 270 U.S. 402 (1926)).

after as clear evidence that the Court's decisions are determined by political considerations.[110]

But politics cannot be a complete explanation. Even if the Court was prepared to reverse its conclusions, and even if the new appointments that Roosevelt was soon able to make were loyal New Dealers,[111] the Justices had to articulate their revised conclusions in doctrinal terms. They could have opted to preserve the structure of substantive due process and simply reach different judgments about the extent to which regulatory legislation promoted public safety, public health or public morals. This would have been a relatively easy step, since that was the basis on which three Justices, including the Chief Justice, dissented in *Lochner*,[112] and the basis on which the Court had upheld many reform statutes during the substantive due process era. Acknowledging the good will and endorsing the good judgment of progressive state and federal legislators in this way would have satisfied Roosevelt, who had no particular concern for the niceties of legal doctrine, and would have also satisfied the legislators.

Instead, the Court quickly adopted the legal realist perspective. Explicitly, it declared that the constitutional issue relevant to economic legislation was one of government power, not of good will or good judgment. Implicitly, it rejected the idea that the common law possessed the *mana* that Blackstone and the formalists ascribed to it and was thus entitled to any constitutional protection from statutory initiatives. It is impossible to say that one of these positions was the cause of the other. If the common law had no intrinsic, supra-statutory value, government would naturally have the power to intrude upon it; if the government had plenary power in the economic realm, then it could naturally intrude upon the common law. These complementary positions constituted a single legal sensibility; while the combination of the two was not inevitable, it was certainly self-reinforcing. Virtually a restatement of the legal realist position, it became the defining feature of the Court's approach to economic regulation. Holmes had articulated a similar position in his *Lochner* dissent,[113] but had not garnered any support; as noted above, the three other Justices who dissented did so on the grounds that the statute in question was good public policy.[114] By the 1930s, however, after legal realism had risen to prominence, the Justices were prepared to rely on this position as a means of integrating their ideology with doctrinal argument.

The position was stark enough to cause its proponents some discomfort, however, and so they retained a vestige of the substantive due process rationale by adding the caveat that the legislation must have a rational basis, that is, it must be rationally related to its purpose. In *West Coast Hotel,* the Court's opinion stated the policy justifications for a minimum wage law at some length, but then concluded by saying that the legislation 'cannot be regarded as arbitrary or capricious and that is all we have to

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[110] In fairness to Roberts, he had written the majority opinion in *Nebbia v New York*, 291 U.S. 502 (1934), joining with the opponents of substantive due process to uphold price limits on the sale of milk. Of course, this decreases his reputation for political expediency only at the cost of increasing his reputation for vacillation.

[111] Ironically, the advanced age of his judicial opponents, which Roosevelt had obviously used as an excuse to advance his court packing plan, turned out to be his best ally in another way. In less than three years after the plan failed, three of his four most adamant opponents, Willis Van Devanter, Pierce Butler and George Sutherland, retired from the Court, along with two allies, Brandeis and Cardozo. With the commanding Democratic majority in the Senate, Roosevelt was able to remake the Court as he wished, appointing loyal New Dealers Hugo Black, Felix Frankfurter, William Douglas, Frank Murphy and Stanley Reed.

[112] 198 U.S. at 69 (Harlan, with whom White and Day concur, dissenting) ('It is plain that this statute was enacted in order to protect the physical wellbeing of those who work in bakery and confectionary establishments').

[113] 198 U.S. 74.

[114] Ibid, 65 (Harlan J, dissenting).

decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment'.[115] A year later, the Court, after again offering policy justifications for the challenged statute, concluded that 'the existence of facts supporting the legislative judgment is to be presumed for, regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators'.[116] A few years later, the Court was prepared to say: 'We are not concerned, however, with the wisdom, need, or appropriateness of the legislation'. Differences of opinion on that score suggest a choice which 'should be left where ... it was left by the Constitution – to the states and to Congress. ... There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field'.[117]

The rational basis test proved to be a verbal concession, while the Court's basic rationale, and the results it reached, remained true to the legal realist perspective that the legislature has plenary power over economic matters. By the 1950s, the last shred of the substantive due process approach was gone. In *Williamson v Lee Optical*, Justice Douglas, one of Roosevelt's replacements for the anti-New Deal justices, wrote that a regulatory law 'may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement'.[118] He added: 'The day is gone when this Court uses the Due Process clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought'.[119] And, in fact, the Court never again invalidated any economic legislation on substantive due process grounds.

D *Common Law Itself*

Legal realism not only influenced the judiciary's approach to federal common law, and to the constitutional status of state common law, but also to the common law in general. The shift in judicial attitudes during the latter half of the twentieth century is widely observed and well documented. Generally speaking, judges became more explicit about the public policy implications of their decisions and more instrumental in their treatment of legal doctrine. Rather than attempting to trace these themes through various areas of modern common law, which would be impossible within the confines of this essay, the discussion that follows will focus on the language of one famous and highly influential common law decision, *Henningson v Bloomfield Motors*.[120] Thus, the goal is not to prove conclusively that legal realism influenced modern common law judges, but rather to demonstrate the way that influence actually operated.

Common law courts had already held that every product marketed to the public carries with it an implied warranty of merchantability and fitness for its intended purpose. In *Henningson*, the plaintiff's car crashed and the finder of fact concluded that the cause was a mechanical problem resulting from its violation of the implied warranties. The company, however, argued that it was not liable because it had limited the scope of these warranties in the fine print of the contract that the Henningsons had

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115 300 U.S. at 399.
116 *United States v Carolene Products Co*, 304 U.S. 152.
117 *Olsen v State of Nebraska ex rel. Western Reference and Bond Ass'n*, 313 U.S. 236, 246 (1941) (quoting *Ribnick v McBride*, 277 U.S. 350 (1928) (Stone J, dissenting)).
118 *Williamson v Lee Optical*, 348 U.S. 483, 487 (1955).
119 Ibid, 488.
120 32 N.J. 358, 161 A. 2d 69 (N.J. 1960).

signed. In rejecting this argument, the Supreme Court of New Jersey began by articulating the general principles on which its decision rested: 'The conflicting interests of the buyer and seller must be evaluated realistically and justly, giving due weight to the social policy evinced by the Uniform Sales Act, the progressive decisions of the courts engaged in administering it, the mass production methods of manufacture and distribution to the public, and the bargaining position occupied by the ordinary consumer in such an economy'.[121] This states the legal realist position that law emerges from a social context and can only be understood with reference to that context. It may not seem particularly surprising, but it represents a departure from the common law methodology of the previous period.

The Court went on, in its extremely thorough opinion, to cite a great many cases, far more than Cardozo cited in *McPherson*. But a notable shift had occurred in the way these citations were used, a shift that again illustrates the impact of the legal realist perspective. Judge Francis, writing for a unanimous court, cited cases in order to delineate the existing state of the law, to support his reasoning, and to illustrate other fact situations where the same reasoning can be applied. But the reasoning itself is based on considerations of fairness and public policy. This does not necessarily mean that the decision is ideological or political, as the judicial attitude scholars maintain. While the political valence of the decision is clear enough, the decision itself is stated in doctrinal terms and is a fair extension of existing doctrines, specifically the contract of adhesion principle[122] and the emerging doctrine of unconscionability,[123] as well as the developing law on implied warranties of merchantability and fitness for a particular purpose. What is significant is that the Court was not relying on the underlying principles of common law to reach its conclusion; the formalist-inspired effort to dress up a new insight as the correct interpretation of age-old principles, or as the application of those principles to a new fact situation was no longer in force. Instead, Judge Francis accepted the legal realist position that these underlying principles do not exist, or in any case are not the basis for decision. He was willing to identify the ideological basis of his decision explicitly, as the legal realists urged, and to treat the integration of that ideology with existing doctrine as sufficient to satisfy the demands of proper judicial decision making.

In the decision's crucial passage, where Judge Francis explains the policy basis for his decision, there are only two citations to prior cases. The first one is to Judge Cardozo's opinion in *McPherson*. Francis' quotation from McPherson reads as follows:

> Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles per hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. ... The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. ... Precedents drawn from the days of travel by stagecoach do not fit the

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121 Ibid, 386.

122 For discussions of this doctrine that were earlier or generally contemporaneous with the Henningson decision, see, Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 629; Alfred Meyer, 'Contracts of Adhesion and the Doctrine of Fundamental Breach' (1964) 50 *Virginia Law Review* 1178. For a discussion of these developments, see, Todd Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173, 1197-1220.

123 Unconscionability was a relatively new idea in 1960, but it had been incorporated into the final version of the Uniform Commercial Code, U.C.C. § 2-302, which had been adopted by two states, including neighbouring Pennsylvania. See, Robert Braucher and Robert Riegert, *Introduction to Commercial Transactions* (1977) xxxvii; William Schnader, 'A Short History of the Preparation and Enactment of Uniform Commercial Code' (1967) 22 *University of Miami Law Review* 1.

> conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.[124]

This quotation does not summarize Cardozo's actual reasoning in the case; rather, it skips through the opinion and selects all the policy-oriented passages, all the points where Cardozo's real concerns break through the formalist carapace of the decision and articulate the kinds of concerns that the realists had taught the judiciary to regard as determinative.

But Francis did not ignore the issue of the common law and common law reasoning in his crucial passage. The other citation, also worth quoting in full, is to Chief Justice Hughes' dissent to the Supreme Court's substantive due process decision in *Morehead v People of New York ex rel Tipaldo:*

> We have had frequent occasion to consider the limitations on liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard.[125]

What was important to Francis was the demotion of the common law from a system of principles that represented the very essence of our legal system, so much so that it had constitutional significance, to a set of judicial decisions that represent ordinary authoritative statements, and must yield to his own authoritative statements if their rationale was no longer convincing. This was, once again, one of the basic lessons of the legal realists.

V EMPIRICAL LEGAL SCHOLARSHIP

Much more could be said about the influence of American legal scholarship on judges' conception of the common law. Developments in this field did not end with legal realism; in fact, there has been an ever-accelerating succession of scholarly movements in the American legal academy since World War II. The first, and probably most influential of these was the legal process school.[126] Legal process largely continued the realist approach to common law, however, so the separate influence of this important school of thought would be difficult to disentangle from its predecessor's. The next set of developments, however, represented a more distinctive

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[124] 32 N.J. at 387 (quoting McPherson J, 217 N.Y. at 390-91).

[125] 32 N.J. at 388 (quoting Morehead J, 298 U.S. at 627).

[126] See, eg, Alexander Bickel, *The Most Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); Charles Black, *The People and the Court* (1960); Lon Fuller, *The Morality of Law* (1964); Henry Hart and Albert Sacks, *The Legal Process* (William Eskridge and Philip Frickey, eds, 1994); Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; David Shapiro, 'The Choice of Rulemaking or Adjudication in the Development of Administrative Policy' (1965) 78 *Harvard Law Review* 921; Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1. The heyday of Legal Process was the 1950s and 60s. Hart and Sacks' casebook and Fuller's *Forms and Limits* article were written and circulated at this time, although neither work was published until later. But the movement maintained its vitality for many years thereafter, although it lost its dominant position; two leading statements regarding constitutional law were published in 1980, for example. See, Jesse Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980); John Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

break with prior views. The law and economics movement included the startling claim that the common law is intrinsically efficient, that is, its major rules, resulting from the uncoordinated and unplanned decisions by litigants, correspond to those that would be chosen by a policy maker who wanted to achieve the goal of economic efficiency.[127] The critical legal studies movement included the equally startling claim that common law is a means of oppression and class domination.[128] It is not clear that either of these claims had much of an effect on the judiciary; judges seemed to find the first claim implausible and the second unpalatable. It was during the florescence of these movements that Judge Harry Edwards wrote his article condemning legal scholarship for its increasing irrelevance.[129]

But as law and economics evolved past its ideological origins and attracted increasing numbers of trained economists, it joined with the law and society movement,[130] and perhaps even with critical legal studies,[131] to generate a new

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[127] William Landes and Richard Posner, *The Economic Structure of Tort Law* (1987) 1-24; Richard Posner, *Economic Analysis of Law* (2nd ed, 1977) 25-191; Richard Posner, *The Economics of Justice* (1981) 254-67, 282-99; Richard Posner, 'A Theory of Negligence' (1972) 1 *Journal of Legal Studies* 29; Richard Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 *Hofstra Law Review* 487; George Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 *Journal of Legal Studies* 65; Paul Rubin, 'Why Is the Common Law Efficient?' (1977) 6 *Journal of Legal Studies* 51. This claim was strongly contested by other scholars, some part of the law and economics movements, others critics of that movement. See, eg, Kim Lane Scheppele, Legal Secrets (1988) 248-65; Robert Cooter and Lewis Kornhauser, 'Can Litigation Improve the Law Without the Help of Judges?' (1980) 9 *Journal of Legal Studies* 154-56; Jon Hanson and Melissa Hart, 'Law and Economics', in Dennis Patterson (ed), *A Companion to the Philosophy of Law and Legal Theory* (1996); Lewis Kornhauser, 'A Guide to the Perplexed: Claims of Efficiency in the Law' (1980) 8 *Hofstra Law Review* 591, 610-39; Frank Michelman, 'A Comment on Some Uses and Abuses of Economics in Law' (1979) 46 *University of Chicago Law Review* 307. For a discussion of the serious epistemological difficulties with the claim, see Jon Elster, 'Perfect Rationality: Beyond Gradient Climbing' in John Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1979) 1-35.

[128] See, eg, Clare Dalton, 'An Essay in the Deconstruction of Contract Doctrine' (1985) 94 *Yale Law Journal* 997; Horowitz, above n 84; Mark Kelman, 'Interpretive Construction in Substantive Criminal Law' (1981) 33 *Stanford Law Review* 591; Gary Peller, 'The Metaphysics of American Law' (1985) 73 *California Law Review* 1151.

[129] Edwards, above n 4. As it turns out, Critical Legal Studies would soon come close to withering away, but that may not have been apparent at the time Judge Edwards wrote the article; Mark Kelman's survey of the field had been published just a few years before. Mark Kelman, *A Guide to Critical Legal Studies* (1987).

[130] Law and Society is a post-War effort to continue and expand the legal realist effort to understand the way that law affects human behaviour. It is based, in part, on the distinction between law on the books and law in action. While some of the leading figures in this movement have been social scientists (typically political scientists and sociologists, not economists), others have the same educational background as the typical law professor, ie, the professional degree. For seminal and characteristic works, see, Eugene Bardach, *The Implementation Game: What Happens After a Bill Becomes a Law* (1977); Eugene Bardach and Robert Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (1984); Malcolm Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1992); H. Lawrence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* (1970); Philip Selznick and Philippe Nonet, *Law and Society in Transition* (1978); Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1975) 9 *Law and Society Review* 95 (1975); Steward Macaulay, 'Elegant Models, Empirical Pictures and the Complexities of Contract' (1977) 11 *Law and Society Review* 507.

[131] See, David Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575.

approach to legal scholarship –empirical legal studies. The juncture of its two principal predecessors -- law and economics and law and society -- in the arena of empirical scholarship reveals the power of this new movement's appeal. In virtually every other way, law and economics and law and society spring from opposite concerns and inclinations. Law and economics takes efficiency as its master value; law and society scholars have generally focused on fairness. Law and economics scholars assert that their methodology is applicable to nearly every area; law and society scholars have denied the value of extending microeconomic analysis, and have generally relied on sociology, anthropology and political science to provide insights into legal issues. More deeply, law and economics has strongly asserted the microeconomic principle of methodological individualism, while law and society has just as strongly denied it and looked to collective attitudes and actions as its source of explanation. More superficially, or perhaps even more deeply, law and economics scholars have tended to be political conservatives, while law and society scholars are usually political progressives.

Despite their differences, these two movements have joined to generate the empirical legal studies movement for several reasons. First, both have finally moved past the formalist claim that law is a form of natural science. No one has taken this claim seriously for many years, but its residual force shaped the methodology of legal scholarship in many areas until quite recently. Legal scholars have continued to base their research on an effort to discern the underlying principles of common law and use them to critique particular judicial decisions or deal with new factual situations, somewhat as if modern chemists had ignored the periodic table and continued to research the elemental qualities of air, fire, earth and water. Law and economics and law and society have finally moved legal scholarship past this view, and fully integrated the long-acknowledged insight that the regularities in common law cases have no significance beyond their mere existence.

A second, closely related reason why law and economics and law and society have jointly generated the empirical legal studies movement is that they both rely on the legal realist insight that law is a product of the society that produces it and reflects that society's beliefs and structure. The realists knew perfectly well that this insight pointed toward a new, empirically-based methodology for studying law, but as noted above, they lacked the capacity to implement it. Perhaps the novelty of their approach in the American context made the project too institutionally complex; perhaps their largely critical program of combating formalism and its constitutional avatar of substantive due process distracted them; perhaps the onset of World War II, and the subsequent aversion to the legal positivism made them abashed; perhaps the crackling normativity of legal issues drew them away from empirical methodology and toward a more policy oriented discourse; and perhaps they continued to succumb to the seduction of direct citation which required that they maintain a unity of discourse with the courts. In any case, it was not until the advent of law and economics and law and society that a serious commitment to empirical scholarship finally took hold.

Now that these two movements have flourished, and outgrown their ideological origins, they have begun to generate the institutional structure necessary to sustain serious empirical research. Most importantly, the new faculty members being hired by

research-oriented law schools[132] are empirically trained; Kim Scheppele's informal survey of the 30 top-ranked law schools revealed that half of their new hires during a recent five-year period had PhD's in addition to a law degree. In addition, a variety of journals have been established as outlets for empirical research. The law and economics movement and the law and society movement both created journals in their early days,[133] and these have now been joined by others. Significantly, these journals tend to be peer-edited, as opposed to the student-edited journals that have previously been the norm in the legal academy, reflecting the sophistication of the research and its divergence from the law school curriculum, which remains mired in its formalist origins.

Other institutional features are developing more slowly. The federal government and private foundations generally do not fund legal research and a grant-oriented academic culture has been slow to develop in law schools. This problem is partially alleviated by the fact that law schools, unlike arts and science schools, have sufficient resources to support a certain level of empirical research on their own. But more ambitious projects will require outside funding and thus a change in the attitudes of funding sources. A somewhat more difficult problem is the lack of graduate students to assist with the research. For the most part, professional school students are neither motivated nor qualified to play this role. The short term solution, given the interdisciplinary character of the research, will probably involve reliance on graduate students from the department of the law professor's arts and sciences collaborator.[134]

It is too early to tell whether the empirical legal studies movement will influence the judiciary's concept of the common law. At one level, the answer may be no – not because modern judges have an inconsistent view of common law, but rather because their views have already been shaped by legal realism. Empirical legal studies, as just described, builds on the insights of the realists, who fully understood that their concept of law led toward empirical investigation of its behavioural effects. Thus, as with the legal process school, it might be difficult to distinguish the influence of the empirical legal studies movement from its legal realist predecessor, at least at the conceptual level.

On the other hand, the realists only grasped empiricism at an abstract level. One great lesson of empiricism is that the actual operation of a social practice often differs from its theory – that things 'look different on the ground'. This lesson may apply to scholarship as well as law. It may be that the real impact of empiricism, the way it changes the prevailing conception of legal doctrine, is somewhat different from the realists' idea of what that impact was likely to be. For example, modern legal

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[132] According to the U.S. New and World Report rankings. These tend to be schools whose faculties produce a high volume of research. U.S. News' most heavily weighted criterion is peer assessment of the law school's calibre, and those assessments are typically based on research production. The reason is in part that such production is visible to the legal academy, in part a self-reinforcing tendency, and in part a reflection of deep-seated cultural attitudes. The rankings do not necessarily reflect the quality of the education that the law schools are providing for their students.

[133] In law and economics, the *Journal of Legal Studies* (published since 1972), joined by the *Journal of Law, Economics and Organization* (published since 1985); in law and society, the *Law and Society Review* (published since 1966), joined by the *Journal of Empirical Legal Studies* (published since 2004).

[134] On the institutional challenges that law professors face in carrying out empirical research, see, Lawrence Friedman, 'The Future of Law and Social Sciences Research' (1974) 52 *North Carolina Law Review* 1068; Peter Schuck, 'Why Don't Law Professors Do More Empirical Research?' (1989) 39 *Journal of Legal Education* 323; David Trubek, 'The Place of Law and Social Science in the Structure of Legal Education' (1985) 35 *Journal of Legal Education* 483; David Trubek, 'A Strategy for Legal Studies: Getting Bok to Work' (1983) 33 *Journal of Legal Education* 586.

empiricism often emphasises the cognitive constraints on human thought, in addition to noting the social contingency of legal behaviours that the realists observed.[135] As judges assimilate these insights into their view of law, they may begin to see the effect of legal rules as approximate or indeterminate as well as socially contingent.

There is, moreover, a possibility that empirical legal studies could also have a direct impact on judicial decision making, in addition to the indirect impact mediated through larger conceptualizations. Contrary to the claims that this essay has advanced thus far, this might result in direct citations to legal scholarship and a consequent consummation of the unrequited seduction that scholars have previously experienced. The reason lies in an organizational atavism of the American judiciary, namely, that judges do not have professional staff support. Typically, the staff for federal judges consists of two or three recent law school graduates and a secretary. Although the law school graduates are all extremely intelligent and, of course, superbly trained by their law schools, the paucity of staff is striking, particularly in comparison with other branches of the federal government. In terms of numbers and importance, a federal judge is equivalent to a member of Congress or a politically appointed head of an executive department; there are about 875 federal judges, there are 535 members of Congress, and there are about 1,100 politically appointed agency, department or office heads.[136] But members of Congress have substantially larger professional staffs and executive officials, even if they head minor departments, generally have an entire hierarchy of staff members under their direct supervision.[137]

The lack of judicial staff is an atavism because the assumption that federal judges, despite their importance, do not need staff support derives from the pre-realist conception of law. If the judges' main task is to discern the underlying principles that animate the common law, and also to interpret statutes and constitutional provisions, the only staff they will need are those brilliant, well-trained law graduates. They can read cases and statutes on their own. The realist and post-realist approach, in contrast, requires that judges make empirical assessments of economic and social phenomena. Consider the *McPherson* and *Henningson* cases. As long as Cardozo was content to interpret prior cases, however aggressively, that is, as long as he was operating within the formalist conceptual framework, he needed very little help. In contrast, the reasoning in *Henningson* is not based on precedents, but on an empirical assertion that

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[135] See, eg, 'Symposium: Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behaviour' (2003) 97 *Northwestern University Law Review* 1075 (2003); Donald Langevoort, 'Behavioural Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review' (1998) 51 *Vanderbilt Law Review* 1499; Jeffrey Rachlinski, 'The New Law and Psychology: A Response to Critics, Skeptics and Cautious Supporters' (2000) 85 *Cornell Law Review* 739. This scholarship draws on the pioneering work of Daniel Kahneman and Amos Tversky. See, Daniel Kahneman and Amos Tversky, *Choices, Values and Frames* (2000); Daniel Kahneman, Paul Slovic and Amos Tversky, *Judgement under Uncertainty: Heuristics and Biases* (1982).

[136] That is, politically appointed officials at a level where they need to be approved by the Senate. There are about another 2,500 who are politically appointed but do not need Senate approval. Some of them are relatively minor officials, others are direct advisors to the President, and some are 'czars' that help the President control other political appointees. There is a widespread view that there are too many politically appointed officials, and that the number should be reduced to about 2,000. See, Al Kamen, *Senators Seek to Slash the Number of Presidential Appointees* (2010) The Washington Post <http://voices.washingtonpost.com/44/ 2010/03/senators-seek-to-slash-number.html> at 5th June 2010.

[137] Without pushing the comparison too far, federal trial judges (there are about 675) can be analogized to the 435 Representatives, and the appellate judges, about 200 in all, can be compared to the 100 Senators, or to the federal agency heads, who number somewhere around 100 (16 executive departments, about 20 separate units in the President's executive office, and about 65 independent agencies).

people do not read the fine print in a sales agreement and would not understand the liability terms if they did so. Francis was willing to assume this, but suppose he had wanted to demonstrate it. He could not possibly have done so himself; he would have needed a staff of survey researchers to determine how consumers read and understand the contracts that they sign.

Once judges fully assimilate the realist methodology of judicial decision making, they will realize, as the legal realists did, that empirical data is essential to deciding the cases that are presented to them. In order to generate such data, particularly in this complex, technological society, they will need a professional staff on the order of magnitude that a member of Congress or a department head possesses. This will include survey researchers, economists, engineers, biologists and chemists, sociologists, political scientists and anthropologists. The logical response would be for legislatures to provide judges with such staff members, as they have for themselves, at least at the federal level. But logic of this sort is expensive, and thus a few centuries may pass before it is translated into action. In the meantime, the residual strength of the formalist conception of law makes the expenditure seem unnecessary and perhaps over-indulgent.

This situation creates the possibility that judges may not only derive their conception of common law from legal scholars, but also rely explicitly on their work and -- turning seduction into consummation -- cite that work in their opinions. If judges become conscious of their need for staff, and recognize that empirical legal scholarship can serve as a substitute, they may begin to rely on scholarship in a more explicit manner than they have in the past. Judges will not consistently cite scholars as scholars, but they may cite them as substitute staff. For this to occur, of course, judges will need to become aware of the work that scholars are doing and to become sufficiently conversant with its methodology so that they can read it, understand it, and apply it.

For this process to occur, however, empirical legal scholarship will need to advance to the point where it provides insights across the entire range of legal questions with which judges are presented. One of the oldest observations in Western philosophy is that adopting a consistent approach to a task depends on habit;[138] for consultation of empirical scholarship to become habitual for judges, the scholarship must be comprehensive. Although many advances have occurred during the past several decades, empirical scholarship continues to reveal the pattern of its origins in the sociological study of trials and courtroom behaviour and the law and economics study of business strategy. To engage is some extremely primitivism empiricism in evaluating the increasingly sophisticated field of legal empiricism, the recently-established *Journal of Empirical Legal Studies* has published 171 articles thus far.[139] Of these, 38 focus on the litigation process and another 12 on jury behaviour, amounting to about 29% of the total. Another 29 articles, or 17%, deal with either business generally or corporate law.[140] Thus, these two topics account for nearly half the articles published in this journal.. The only other topics that are represented by more than a few articles are criminal law generally (11 articles) and judicial attitudes (13 articles).

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[138] Aristotle, *Nicomachean Ethics* 1103[a].

[139] As of March, 2010. 1-7 *Journal of Empirical Legal Studies* (2004-10). The tally excludes a few articles that introduce the Journal or comment on its other articles.

[140] These totals could be seen as being skewed by the two symposium issues that the Journal has published thus far (out of 22 separate issues): Vol. 4, Issue 1 (2007) on Medical Malpractice; Vol. 1, Issue 3 (2004) on the Vanishing Trial. The fact is, however, that the editors chose these two topics; since it is their choices, after all, that determine what ultimately appears in the journal, the decision process for the two symposium issues is not particularly different from that of the other issues. Of course, the topics of the ordinary issues might be a more accurate reflection of the general pattern of empirical scholarship, but the choice of symposium topics is necessarily affected by the editors' (almost certainly accurate) sense of what the scholarly community is interested in writing about and reading about.

The business of twenty first century courts, however, consists of a great many regulatory cases, public benefits cases, tax cases, family law cases, contract cases and consumer cases. If judges are to develop the habit of consulting legal scholarship in place of the staffing that they need but that fiscal concerns and out-dated views of law seem to be denying them, more empirical work on these and other topics will need to be carried out. The scholarship will need to tell judges how people behave in legally relevant areas and what effects various kinds of legal interventions produce. It will need to do so in a careful way, avoiding tendentious ideological assertions that will make judges feel that they are being manipulated rather than informed. Of course, scholars may have other goals besides being cited by judges, particularly as societal decisions are increasingly made by legislatures and administrative agencies. But given the direction that empirical scholarship seems to be taking, it is at least possible that judges will be citing that scholarship more frequently than in the past. Given the increasing complexity of the decisions they confront, they may be well advised to do so.

VI CONCLUSION

As this examination of common law decision-making reveals, judges are powerfully influenced by legal scholarship. That influence, however, cannot be measured by direct citation of scholarly works in judicial opinions. However seductive the prospect of being cited by a court may be for legal scholars, direct citation is only the adventitious tip of a conceptually compelling iceberg. In reaching their decisions, most judges strive to integrate their sense of social policy – what is good for the country – with the body of existing doctrine in that decision's field. Over the course of American legal history, scholars have played a major role in shaping the prevailing conception of doctrine. Sometimes this involves specific groups of cases, but more often it involves the basic rules by which those cases are interpreted – Blackstone's idea that common law derives from overarching principles, the formalists' elaboration of this notion that equated it with natural science, the realists' countervailing notion that common law is a social artefact that embodies social goals. Empirical legal studies promises to continue shaping the conception of the law that judges employ in their efforts to integrate their ideological predilections with legal doctrine in accordance with the demands of their position. In addition, as the body of empirical legal scholarship grows, these staff-starved judges may actually provide scholars with more of the direct citations that they were denied in earlier and simpler times.