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Twenty-First Century Formalism

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Formalism is one of the most widely applied but misunderstood features of law. Embroiled in a series of conflicts over the course of the twentieth century, formalism's meaning has become confused as formalism has been enlisted by both proponents and opponents of specific legal methodologies. For some, formalism has simply become an epithet used to describe virtually anything they dislike in legal thinking. Used often and inconsistently as a stand-in (and frequently a strawman), formalism's distinct identity has been lost, its meaning merged with whatever methodology it is being used to support or attack.

This Article seeks to separate formalism from those debates, identifying formalism for what it is: a commitment to form in legal thinking. Form is critical to understanding law; because law is a shared enterprise, it can only be understood and applied as it exists in some form. Formalism recognizes the form-bound nature of law and expands on that recognition by engaging with law in its various forms rather than as an abstraction.

The Article makes three main contributions to understanding formalism: First, it provides a modern definition of formalism, separating it from confusion over formalism caused by its invocation in a series of debates over law in the twentieth century. Second, it describes how formalism

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operates in methodologies and contexts beyond textualism and originalism, the two methodologies with which formalism is usually identified. Third, it explores the power of formalism beyond its value in determining the content of law. The form of law is what drives the various ways the law categorizes conduct, and law's categories in turn give meaning to conduct beyond just the application of enforceable legal constraints. It is time for us to bring formalism into the twenty-first century and recognize it for its distinct role in understanding law and legal institutions.

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INTRODUCTION

Formalism is an approach to law that provokes strong responses. To Roscoe Pound, formalism is the "mechanical jurisprudence"[1] he derided. To H.L.A. Hart, formalism is a "vice" that disguises the choices that judges make.[2] To Cass Sunstein, it is at worst a "sham"[3] and at best an attempt to make law deductive and mechanical.[4] Steven Smith describes formalism as "unduly rigid or impervious to experience or new information."[5] To Richard Pos-

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[1] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608 (1908); *see also* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936) ("If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.").

[2] H.L.A. HART, THE CONCEPT OF LAW 129 (3d ed. 2012) ("The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down.").

[3] *See* Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 756 (1993) [hereinafter Sunstein, *On Analogical Reasoning*] ("Often reasoning by classification is indeed a sham, in the sense that some judgment of value is being made but not disclosed.").

[4] Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999) [hereinafter Sunstein, *Empirically*] ("[F]ormalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases.").

[5] Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 428 (1990) ("'[F]ormalism' is . . . more commonly[] used in a second, pejorative sense to refer to thinking that is not only structured, but that is unduly rigid or impervious to experience or new information."); *see also* Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 92–93 (1995) [hereinafter Farber, *Ages*] ("Among its other flaws, formalism sought to hold the law captive to the past, in the interest of order, logic, and stability . . . ."); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 431 (1985) ("Many modern legal scholars have performed Gilmore's skeptical function well, condemning or

ner, it is an "unworkable ideal."[6] According to Fred Schauer, "formalist" has essentially become an insult: "Few judges or scholars would describe themselves as formalists, for a congratulatory use of the word 'formal' seems almost a linguistic error."[7] As Ernest Weinrib explains, "[f]ormalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors."[8] Many leading scholars simply treat formalism as a synonym for any combination of intellectual tendencies considered shameful in lawyers.[9]

Not all uses of formalism are so negative, though. Justice Antonin Scalia, widely acknowledged as the scion of modern formalism,[10] embraced formalism as a label: "Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.' The answer to that is, of course it's formalistic!"[11] Scalia's formalism is

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reluctantly accepting formalism as an antiquated concept implying rigidity, immutability, conservatism, and even naiveté.").

[6] Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1656, 1666 (1990).

[7] Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) [hereinafter Schauer, *Formalism*].

[8] Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of the Law*, 97 YALE L.J. 949, 950 (1988).

[9] *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 923 (2003) (describing a tendency among law professors to describe judicial blunders as a result of acting "'woodenly,' 'mechanically,' or 'formalistically,' with insufficient attention to history, policy, and nuance").

[10] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 15 (1997) ("In contemporary debates, perhaps the most prominent formalist is Justice Antonin Scalia . . . ."); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 530 (1997) (book review) ("We might even say that Justice Scalia is the clearest and most self-conscious expositor of democratic formalism in the long history of American law."); Erwin Chemerinsky*, Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 205 [hereinafter Chemerinsky, *Foundation*].

[11] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 25 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (emphasis omitted).

commonly associated with textualism[12] or originalism[13] (or both[14]), but Scalia was virtually alone in taking up the mantel of formalism.[15] For many, Scalia's formalism was cause for derision,[16] and

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[12] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1762 (2010) [hereinafter Gluck, *States as Laboratories*] (describing a "textualist approach" as being "associated most closely with Justice Scalia's legisprudence"); Sunstein, *Empirically*, *supra* note 4, at 639 ("Formalism . . . entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law."); *see also* Schauer, *Formalism*, *supra* note 7, at 511–12 (describing a formalistic opinion as hiding its choice behind "linguistic inexorability").

[13] Chemerinsky, *Foundation*, *supra* note 10, at 205 ("Formalism is inherent to the originalism of conservative Justices like Scalia and Thomas who believe that the meaning of a constitutional provision is fixed when it is adopted and changeable only by constitutional amendment.").

[14] Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 355 (2016) ("[F]ormalism tends to be associated with both textualist and originalist theories of constitutional interpretation . . . ."); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 859 (1990) ("[F]ormalism is inextricably tied to both textualism and originalism . . . ."); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 11 (1998) (grouping together "[t]extualism, originalism, and other brands of formalism"); Farber, *Ages*, *supra* note 5, at 91 ("Formalists believe that certainty, stability, and logic are the primary values to be sought . . . . To implement these values, they embrace formalist methods, such as textualism as a system for interpreting statutes, adherence to established doctrine in common-law cases, and originalism as a method of constitutional interpretation.").

[15] But not completely. *See, e.g.*, Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing*," 16 WM. & MARY BILL RTS. J. 113, 114 (2007) (claiming to apply an "originalist-formalist conception of law"); Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2493–94 (2014) (book review) (arguing for a "neoformalist" approach to legal interpretation). Similarly, Frank Easterbrook favorably describes textualism as "mechanical" despite the pejorative sense in which Pound used the term. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994) [hereinafter Easterbrook, *Statutory Interpretation*] (arguing that the answer to many difficult questions facing judges can be answered by a "relatively unimaginative, mechanical process of interpretation"); Pound, *supra* note 1, at 607.

[16] David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1796 (1998) (attempting to demonstrate "the rigid, unconvincing character

even Justice Scalia occasionally fell into the pejorative use of the term.[17]

Mostly, though, modern treatment of formalism results in confusion: one set of modern "antiformalists"[18] attacking one version of formalism and modern originalists, along with other self-described "neoformalists,"[19] defending another. In some areas of law, like separation of powers, formalism (juxtaposed with functionalism) plays a central role.[20] But even in an area like separation of powers, there is confusion over what role formalism plays.[21]

This Article seeks to clear the confusion[22] about a concept so widely debated in legal discourse. Rather than follow the extreme positions taken by either the anti- or neo-formalists, I propose an understanding of modern formalism for what it is: *a commitment to form in legal thinking.*

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of [Justice Scalia's] formalistic interpretive methodology"); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 416 (1991) ("I am not sure that Justice Scalia's formalist vision will make much headway in the Court.") [hereinafter Eskridge, *Overriding*].

[17] Oregon v. Ice, 555 U.S. 160, 174 (2009) (Scalia, J., dissenting) (deriding a "formalistic distinction" that ignores practical difference between concurrent and consecutive sentences).

[18] *Cf.* Sunstein, *Empirically*, *supra* note 4, at 639 (grouping various approaches opposed to formalism as "antiformalist").

[19] *See* Solum, *supra* note 15, at 2494.

[20] *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 526 (1987) [hereinafter Strauss, *Foolish Inconsistency*]; John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958–61 (2011); Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513, 1527–28 (2015).

[21] *Compare* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138 (2000) ("For the formalist, questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules.") *with* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2014 SUP. CT. REV. 1, 2 (describing "institutional formalism" as "formalism [that] consists of treating the governmental institution involved as more or less a formal black box").

[22] *See* Sunstein, *Empirically*, *supra* note 4, at 638 ("It is not easy to define the term 'formalism,' partly because there is no canonical kind of formalism.").

Formalism is not a blank slate, though. The twentieth century saw two distinct battles over formalism, and much of our current understanding of formalism is shaped by the ways formalism was enlisted on both sides of those battles.[23] Consequently, understanding modern formalism requires one to distinguish it from other ideas that merged into formalism in the course of those two conflicts: the early twentieth century realist rebellion against the classical, Langdellian legal orthodoxy and the late twentieth century debates over interpretation, especially constitutional interpretation.[24]

Once we separate formalism from the roles it has been assigned in these twentieth century conflicts, we can better identify its characteristics and implications. That inquiry reveals how formalism unites almost all approaches to legal interpretation. We're all formalists in that we all believe form is relevant to understanding law, even if there is disagreement about *how* form is relevant to understanding law.[25] Although formalism is often painted as the rigid application of rules,[26] it need not be so. A commitment to form can be rigid or flexible in the same way other methodological commitments can be held to different degrees.[27]

Far from inflexible and rigid thinking that avoids nuance, formalism provides a unique perspective on law and the value of legal

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[23] *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 1–3 (2010) (providing an overview of formalism-realism debate in American legal thought).

[24] *See id.* I argue below that the picture of formalism applied by realists was a caricature, but it is also easy to over-state the degree to which the realist movement was solely a rebellion against formalism. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 10 (1995) (describing simple characterization of a realist rebellion against formalism as a "myth"). The views of the realists and the formalists were far more complex than either simple label suggests. *Id*.

[25] *Cf*. Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE, at 8:30 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg (in which Justice Kagan states, "I think we're all textualists now").

[26] *See* Farber, *Ages*, *supra* note 5, at 91.

[27] *See id.* ("[T]houghtful formalists admit that on occasion the formalist methods must be tempered in order to keep the legal system from becoming unbearably rigid and closed to current social values."); Solum, *supra* note 15, at 2489–91 (comparing "absolute formalists" with "perfect realists").

rules. Law works by categorizing behavior, and it is the form, not the substance, of legal rules that drives that categorization.[28] Those categories affect outcomes,[29] but even when determining outcomes is hard (when the substance of the law is uncertain), form guides by setting the terms of the debate. For instance, equality is a major subject of debate in U.S. constitutional law, but only because the Equal Protection Clause requires "equal protection of the laws"[30] instead of a different formulation, like "fair" or "reasonable" treatment. By adopting rules of a particular form, rule makers also signal how much discretion is being devolved on adjudicators, providing important information about the allocation of responsibility in the legal system.[31]

In addition to providing the means to discuss the substance of law, the form of legal rules communicates information about how society views particular behavior—different forms of legal prohibition or sanction express society's views on the nature of particular conduct.[32] For instance, if society's goal is to reduce traffic fatalities, choosing to criminalize speeding carries a different meaning (by altering the meaning of the underlying conduct) than other ways to reduce fatalities, like offering subsidized traffic safety classes or requiring that all cars have airbags installed. It is formalism that separates law from other systems of social control, and it is only formalism that can account for the ways that the law's form guides and controls the way we think about legal rules.

The Article proceeds in three parts. Part I defines formalism as a commitment to form in legal thinking and describes the role of formalism as central to theories of rule-based decision-making[33] before defending this definition from the misperceptions generated by a hundred years of attacks on formalism. After discussing the realist and formalist debates of the early twentieth century, I consider usage of the term in the late twentieth century, which (follow-

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[28] *See infra* Part III.A.1.

[29] *See* Schauer, *Formalism*, *supra* note 7, at 539–40.

[30] U.S. CONST. amend. XIV, § 1.

[31] *See* FREDRICK SCHAUER, PLAYING BY THE RULES 158 (1991).

[32] *See infra* Part III.B.

[33] *See* Schauer, *Formalism*, *supra* note 7, at 548. *See generally* SCHAUER, *supra* note 31, at 10–12.

ing the realist tradition) is mostly negative and largely unhelpful for understanding what separates formalism from other approaches to law. Although frequently equated with several legal methodologies—textualism, originalism, and the rigid application of rules—formalism is a component of a variety of methodologies rather than a methodology in its own right.

Leaving the battles of the twentieth century behind, Part II carries forward this understanding of formalism to describe how it is a distinct component of different interpretive methodologies. I then consider how formalism operates in two areas of the law—procedure and constitutional separation of powers—that demonstrate the use of this richer understanding of formalism.

Finally, Part III reconsiders the role that formalism should play in legal thinking. Form is not only relevant to outcomes. It is the form of rules that determines the language we use to think about the law; the same rule expressed in different forms can have very different meanings to those who apply, and are subject, to the rule. So understood, formalism has major implications for the scholarship exploring the power of law to affect behavior not only through sanctions but also through the social expression conveyed by those sanctions: the expressive function of the law.[34] It is only by considering the forms of law—as distinct from the underlying rules that form represents—that we can appreciate all of the ways that form affects how we talk and think about law.

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[34] *See generally* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW 1–9, 11–13 (2015); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1540 (2000); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–24 (1996) [hereinafter Sunstein, *Expressive Function*].

I. CONSTRUCTING FORMALISM

Although the term "formalism" is a common one, there is no authoritative definition of formalism in law.[35] Formalism describes a practice and a particular approach to understanding law that is implicit in many legal methodologies. Unfortunately, opponents of formalism (or, rather, opponents of specific methodologies associated with formalism) have taken to using it as an epithet to describe virtually anything they dislike in legal thinking.[36] Consequently, in addition to providing an affirmative definition of formalism, it is necessary to disentangle formalism from what have become rhetorical *ad hominem* uses ("formalistic" or "formulaic") leveled during scholarly and judicial battles over various legal methodologies. Liberating our attention to formalism from the quarrels over specific formalist methodologies frees us to engage formalism on its own terms.

Once we do so, even a brief consideration of formalism reveals that it is both nuanced and pervasive throughout the legal system. Although formalism represents a commitment to rules, it is no more or less rigid than other interpretive practices, and despite reports of its demise, formalism not only persists, it continues to dominate legal thinking, dwarfing virtually any other approach to law.[37]

A. *Pure Formalism*

In its most basic sense, formalism is a commitment to form in legal thinking. It reflects an approach that determines the meaning of law by looking at its form. This might seem commonsensical or even almost automatic. We all use the form of law—for instance, its text, which is an attribute of form—to determine legal meaning. That need not be the case. If law were contained in the intuitions of philosopher kings who decided all cases that came before them, it

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[35] Sunstein, *Empirically*, *supra* note 4, at 638 ("It is not easy to define the term 'formalism,' partly because there is no canonical kind of formalism.").

[36] *See infra* Part I.B.

[37] *See infra* Part I.B.

could exist without form or without regard to its form.[38] Form would be irrelevant to determining the content of the law, and consequently, form would not affect the content of the law. Modern legal systems, however, are not predicated on the intuitions of philosopher kings. The laws exist in various forms, and formalism is the recognition that those forms control the content of the law.

Formalism is the recognition, for instance, that the content of a smoking prohibition changes whether it is contained in a statute, a no-smoking sign posted by a restaurant, or a parental reprimand. Formalism is reflected in the concern that a jury verdict has a different meaning than a judge's finding[39] or that the forms of government adopted by the Constitution—the division of executive, legislative, and judicial branches—must be respected, even if they cannot be justified in a particular case.[40] Formalism is everywhere in law and legal argumentation. When John Marshall argued that the Necessary and Proper Clause[41] was an extension of congressional power rather than a limitation because it was located in the power-conferring parts of the Constitution,[42] he was making an argument based on form. Finally, formalism is the means we use to figure out what is and what is not law; it tells us that congressional resolutions complying with bicameralism and presentment have a different legal meaning than those issued by one house or a committee and that the President's statements have different legal ef-

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[38] *See* PLATO, THE REPUBLIC OF PLATO 170—71 (B. Jowett trans., Oxford Univ. Press 3d ed. 1925) (c. 375 B.C.E.) (introducing the concept of "philosopher kings").

[39] *See* U.S. CONST. amend. VI.

[40] *See* Eskridge, *Overriding*, *supra* note 16, at 405 ("Under formalist ideology, the Court's role in statutory interpretation is not to facilitate the dominant political coalition's evolving preferences, but to protect the formal structures of our democracy.").

[41] U.S. CONST. art. I § 8.

[42] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819) ("The clause is placed among the powers of Congress, not among the limitations on those powers."). Indeed, Marshall provided this as the "1st" reason for interpreting the clause as an expansion rather than a restriction of congressional power, ahead even the text of the clause itself, which he listed "2d." *Id.* at 419–20.

fect when they appear in the *Federal Register* than when they appear on Twitter.[43]

Robert Summers advanced perhaps the purest understanding of this sense of formalism: a consideration of form in the legal system.[44] Summers's work was an attempt to identify the variety of forms existing in the legal system and how law's form is distinct from its substance.[45] Rather than an attempt to describe the role form plays in modern debates about the meaning of law, Summers avoided those modern debates, allowing himself to see the role of form in law more clearly.[46] Formalism is everywhere in law, and law's form tells us more about whether a particular rule applies to our conduct than does the substance of the rule itself. I don't have to know what the speed limit is in order to know that I must comply with it. All I need to know is that the limit follows the forms (in terms of origin, process, and (usually) publication on a sign I can read) that qualifies it as enforceable law.

1. THE FORM OF FORMALISM

If formalism is commitment to form, we need a working understanding of form. "Form," as Ernest Weinrib explains,

> is the ensemble of characteristics that constitute the matter in question as a unity identical to that of other matters of the same kind and distinguishable from matters of a different kind. Form is not separate from content but is the ensemble of characteris-

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[43] *See* Federal Register Act of 1935, 44 U.S.C. § 1505 (requiring all presidential proclamations and orders with general legal effect to be published in Federal Register).

[44] *See generally* Robert S. Summers, *The Formal Character of Law*, 51 CAMBRIDGE L.J. 242, 242–45 (1992) (explaining that formality is a fundamental feature of law).

[45] *Id.* at 242 ("I define a 'formal' feature of law as one that is in some way independent of the substantive content of the law.").

[46] *Id.* at 245 ("I must stress that I will not report the results of any legal research nor will I reveal any discoveries of fact about legal phenomena . . . . [Rather,] I will re-order, reconceptuali[ze], and introduce a nomenclature for much that is already very familiar. This will sharpen our perception of formal features in diverse legal phenomena.").

> tics that marks the content as determinate, and therefore marks the content as a content.[47]

Weinrib's definition points out two important characteristics of form: First, form is relevant to distinction—to grouping things of like character with each other and excluding things that are dissimilar.[48] Second, and more important for present purposes, form is used to identify content.[49] A necessary implication of recognizing form as the means through which we identify content is that form is *necessary* for identifying content. It is an acknowledgement that content might have a meaning apart from its form, but that meaning cannot be understood by an observer except through attributes of form.[50] This characteristic of form is hardly unique to law; as Weinrib explains, we can only identify a table as a table because it exhibits characteristics ("elevation, flatness, hardness, typical function, and so on") that mark it as a table.[51] Similarly, law does not present itself as law at a purely conceptual level but has to be confronted, considered, and manipulated through some form. Because we are not ruled by philosopher kings who can access their intui-

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[47] Weinrib, *supra* note 8, at 958.

[48] *See id.* at 959–60.

[49] *See id.* Here, Weinrib's approach to form diverges from that of Robert Summers. Summers defines form as anything "independent of the substantive content of the law." Summers, *supra* note 44, at 242. That broad definition leads Summers to identify a very wide variety of "forms," from "the degree of completeness of a rule" to "foundational rules and other legal precepts" (somewhat resembling Hart's rule of recognition) to a "methodology for adherence to common law precedent" to "administrative bodies and administrative procedures" to "some special mode of protection of basic individual rights." *Id*. at 245–46. Summers's definition is not only broad, it is negative—Summers essentially defines form as "not content." *Id.* at 242. As a result, Summers's approach is not interested in identifying form's role in the content of law but rather to identify how form exists apart from the content. *See id.* at 246. It is not clear how successful he was in maintaining the distinction. His last category of form, for instance, is itself defined by the content (the protection of fundamental rights) of a particular rule. *Id.* But the fact that form and substance affect each other only underscores his larger point: that form plays an important role in our understanding of law. *See id*. at 259–60.

[50] *See* Weinrib, *supra* note 8, at 961.

[51] *Id*. at 958–59.

tions directly, we can only identify the content of law by observing its form.

Recognizing the importance of form necessarily acknowledges that the complete content of the law is inherently unknowable apart from the form we experience; that all we can really know is the law *as represented by its form*. This is so even if thought can exist apart from language.[52] Our notional philosopher kings might be able to think without language, but we do not rely on individuals to set and apply the law. Our law is an inherently social and therefore inherently shared enterprise.[53] That sharing has to take place in some form decipherable to all participants in the legal system.[54] Before we can play chess, we have to agree on its rules,[55] and before we can do that, we have to agree on the rules for talking about rules.[56] Formalism identifies as the first rule of law that law is primarily determined by looking at its form, not by an individually held but unshared understanding of its content.

2. FORMALISM AS RULE-BASED DECISION-MAKING

The reason why formalism must have a place of privilege in understanding law has to do with the nature of law as governance by rule. As Fred Schauer explains, "[a]t the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*."[57] Schauer's concern (and his usage of "rule") goes to the fundamental distinction between "rules" and "standards."[58] "Rules" (such as a numerically defined and objec-

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[52] *See id.*

[53] *See id.* at 64 (describing legal interpretation as "a social enterprise").

[54] *See id.*

[55] *Cf.* JOSEPH RAZ, PRACTICAL REASON AND NORMS 108–10 (2d ed. 1990) (describing playing chess and other acts as "normative acts based on constitutive rules," which shape "new forms of behavior").

[56] *See* JOHN R. SEARLE, SPEECH ACTS 48 (1969) (distinguishing between the meaning intended by a sentence and the need for rules of grammar as a "conventional means of achieving the intention to produce" that meaning in the mind of the listener).

[57] Schauer, *Formalism*, *supra* note 7, at 510.

[58] *Compare id.* (discussing how rules function by "screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account"), *with* HART, *supra* note 2, at 124–35.

tively measured speed limit) provide clear rules for deciding cases but are not sensitive to particular circumstances (whether there was some justification for driving so fast).[59] "Standards" (such as a negligence or recklessness standard) provide less guidance but allow for more consideration of whether the particular case falls within the ambit of the prohibition.[60] Although rules might be based on underlying justifications—they are "instantiations" of a justification for acting—decision according to rule requires a choice: to pay more attention to a rule than to the underlying justifications for the rule.[61] When that happens, the instantiation of the justification effectively displaces the justification itself and the rule governs the relevant conduct even if its justification would not.[62] Even though we all know that the twenty-five mile-per-hour speed limit on Main Street is there to promote safety, we will still break the law if it would be safe to drive over twenty-five miles per hour in a particular instance. The same is not true of a "reckless driving" law. The justification (deterring reckless driving) would be relevant to deciding an individual case because guilt would depend on whether the driving was in fact the reckless driving that the law seeks to deter.[63]

But rules themselves go beyond justification to the question of how decision-making authority is allocated in a legal system.[64] Rules allow authors to constrain the discretion of adjudicators who

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[59] *See* Schauer, *Formalism*, *supra* note 7, at 510.

[60] *See* HART, *supra* note 2, at 124–35; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588–90 (1992); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985). Schauer himself deviates from this usage by focusing not on specificity but on the degree to which the rule or standard deviates from its underlying justification. SCHAUER, *supra* note 31, at 104 n.35. He rightly points out that a standard that tracks its underlying justification might be very specific while a rule that substitutes for it might be vague. *Id.*

[61] *See* SCHAUER, *supra* note 31, at 112–13.

[62] *Id.* at 112.

[63] *See*, *e.g.*, VA. CODE ANN. § 46.2-852 (1989) ("Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving.").

[64] Schauer, *Formalism*, *supra* note 7, at 543; *see also* SCHAUER, *supra* note 31, at 162–66.

will be applying the rule in a particular case.[65] They do this, in large part, by excluding from consideration factors (such as the safety of driving over twenty-five miles per hour) that the adjudicator might otherwise find relevant.[66] As Schauer explains, rules provide a reason for compliance that is independent from the policies they seek to further—indeed that is the very nature of a "rule."[67]

Schauer thus justifies rules not only on their ability to generate better outcomes, which can happen if rule-makers make systematically better decisions than adjudicators would acting alone,[68] but also on their ability to allow allocations of power among the institutions of government.[69] Under Schauer's understanding of the value of rules, the correct way to evaluate formalism is not necessarily whether it is more deterministic or leads to better outcomes—but rather it is whether one can defend a practice in which rule authors (legislators) allocate power to themselves and away from adjudicators (judges) who will apply the law to particular cases.[70]

In his theory of rule-based decision-making, Schauer has much in common with Justice Scalia, whose formalism was committed to

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[65] *See* Schauer, *Formalism*, *supra* note 7, at 538; SCHAUER, *supra* note 31, at 158.

[66] Schauer, *Formalism*, *supra* note 7, at 544 ("Part of what formalism is about is its inculcation of the view that sometimes it is appropriate for decisionmakers to recognize their lack of jurisdiction and to defer even when they are convinced that their own judgment is best.").

[67] SCHAUER, *supra* note 31, at 112 ("When the existence of an instantiation adds normative weight beyond that supplied by its underlying substantive justifications, the instantiation has the status of a rule.").

[68] *Id*. at 151–54.

[69] *See id*. at 158. Summers drew a similar distinction in his discussion of formality, distinguishing between first-level policy goals (to control behavior in a desired way) and second-level rationales for formality (to allocate discretion away from officials or to increase the clarity and, hence, the reliability of substantive rules of law). Summers, *supra* note 44, at 247–48.

[70] SCHAUER, *supra* note 31, at 214; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) [hereinafter Easterbrook, *Original Intent*] ("Congress may think the costs of rules less than the combined costs of vagueness and the risk that courts will set off in the direction the law points without seeing the stopping point.").

constraining the discretion of judges.[71] His defenses of textualism and originalism were closely aligned to his defense of rules; in *The Rule of Law as a Law of Rules*, Scalia defended both originalism and textualism for their ability to supply the "raw material" for rule-based decision-making.[72] But Scalia's defense of textualism and originalism was more explicitly institutionalist than Schauer's: First, Schauer justifies rules both on their ability to generate better outcomes and their ability to allocate power[73] while Scalia concentrated solely on the their power-allocating function.[74] Although many of his critics considered his formalism to be grounded in ideological conservativism,[75] Scalia himself justified his formalism (both textualism and originalism) on institutional rather than empirical or instrumental grounds.[76] Second, Scalia's justification for formalism emphasized dangers presented not only by appliers of rules but also by their authors.[77] Scalia's formalism sought to con-

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[71] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–84 (1989) [hereinafter Scalia, *Rule of Law*]; Solum, *supra* note 15, at 2494; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 33 (1994) ("The turn-of-the-century formalists and their current heirs maintain that the Court has a single goal: declaring and enforcing the rule of law.").

[72] Scalia, *Rule of Law*, *supra* note 71, at 1184 ("Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction. The raw material for the general rule is readily apparent."); *see also* Solum, *supra* note 15, at 2494.

[73] *See generally* SCHAUER, *supra* note 31, at 158–59, 229–233

[74] *See* Scalia, *Rule of Law*, *supra* note 71, at 1176.

[75] *E.g.*, Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243, 1257 (2010) ("The suspicion that politics is what drives charges of 'formalism' is heightened when one recognizes that the jurists most often condemned as formalists were usually conservatives of some stripe . . . ."); Eskridge, *Overriding*, *supra* note 16, at 410 ("Formalism . . . embodies a relatively antigovernmental philosophy. This may reflect the libertarian bias of some formalists . . . .").

[76] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter Scalia, *Originalism*]; *see also* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 688–89 (1999) (distinguishing among various constitutional values that formalism might reflect).

[77] Scalia, *Rule of Law*, *supra* note 71, at 1176; Scalia, *Common-Law Courts*, *supra* note 11, at 17.

strain drafters by requiring them to exercise control in readily identifiable forms (text).[78]

3. RULES AND FORMS OF RULES

But rules and form are not the same thing, and there is considerable daylight between Schauer's account of rule-based decision-making[79] and Scalia's formalism; "formalism," even in common rather than legal usage is a "strict or excessive adherence to prescribed *forms*"[80] not "a strict or excessive adherence to *rules*."[81]

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[78] *See* Scalia, *Rule of Law*, *supra* note 71, at 1176; Scalia, *Common-Law Courts*, *supra* note 11, at 17–18; Scalia, *Originalism*, *supra* note 54, at 863. Scalia thought textualism could simultaneously require legislatures to state rules clearly (to avoid "Nero's trick" of posting laws high on pillars where they could not be read) and prevent judges from substituting their own preferences in the service of discerning unstated legislative intent. Scalia, *Common-Law Courts*, *supra* note 11, at 17–18; *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (describing limits that textualism imposes on Congress).

[79] Various modern anti-formalist critiques of formalism, from modern realism, to critical legal studies, to attitudinal theories of judicial decision-making share that critical view of formalism as predicated on law as an autonomous system. Solum, *supra* note 15, at 2465–66. If formalism represents decision by rule, then modern formalism, like conceptual formalism, is predicated on the existence of law as an autonomous system. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 438 (1989) ("This is, at bottom, a formalist position—formalist because it sees the process as entirely autonomous and free from value-laden inquiries."). These critiques of formalism that invalidly depend on the autonomy of law are, like criticisms of determinacy, leveled not at formalism itself but rather at the existence of a settled meaning of law regardless of one's method for determining that meaning. Thus, my answer to the criticism from autonomy is the same as my answer to the criticism from determinism: it represents a confusion between conceptualist orthodoxy and modern formalism, which is a method for determining the meaning of law but does not itself posit that law has a single, unsettled meaning. Indeed, modern formalism is predicated on exactly the opposite supposition, as evidenced by the formalist rejection of intentionalism discussed immediately below.

[80] Frederick Schauer, *Formalism: Legal, Constitutional, Judicial*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 428 (Keith E. Whittington et al. eds., 2008) [hereinafter Schauer, OXFORD HANDBOOK] (emphasis added) (quoting 6 THE OXFORD ENGLISH DICTIONARY 83 (R.W. Burchfield ed., 2d ed., 1989)).

[81] Thus, I would distinguish formalism itself from so-called "rule formalism," which is the term frequently used to describe rule-based approaches like

Form certainly mattered to Justice Scalia, who justified textualism and originalism based on a commitment to shifting power from judges toward legislatures but rejected attempts to determine the intent of the legislatures he was attempting to empower: Scalia's originalism was textual, and he attacked so-called "intentionalism" (even intentionalism as to the meaning of rules) as threatening to democracy because it ignores the need for legislative will to appear in an objectively expressed form.[82] Similar concerns underlie the formalism of Frank Easterbrook, who attacks legislative intent (if such a thing could even exist) as irrelevant because the nature of the legislative process (aconceptual as it is) requires agreement, which arrives not in the form of an understood intent but rather as a text.[83]

Both textualism and originalism are methodologies predicated on analysis of law according to its form. Form itself matters to textualists and originalists because, in their view (given the available alternatives), text (in either its plain or original meaning) is the only form that can serve the dual purpose of adequately constraining both legislators and the judges who will be applying the law in particular cases.[84]

Schauer's. *See*, *e.g.*, Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2157 n.97 (1999) (describing a rule-based approach as "rule formalism"); *cf*. Brian Z. Tamanaha, *The Combination of Formalism* and *Realism* 1 (Wash. Univ. in St. Louis Sch. of L. Working Paper, Paper No. 17-03-01, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929038 [hereinafter Tamanaha, *Combination*] (distinguishing types of formalism between "conceptual formalism" and "rule formalism"). My point is that "rule formalism" doesn't adequately capture modern formalist approaches because it does not depend on form.

[82] Scalia, *Common-Law Courts*, *supra* note 11, at 17 (arguing that it is wrong "to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated").

[83] Easterbrook, *Original Intent*, *supra* note 70, at 63 ("[T]the original intent approach to legislation ignores the fact that laws are born of compromise. Different designs pull in different directions."). That decidedly formalist sentiment was shared by the realist Oliver Wendell Holmes, who similarly rejected legislative intent as a guide to statutory interpretation. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

[84] *See, e.g.*, Scalia, *Rule of Law, supra* note 71, at 1176–77; Scalia, *Common-Law Courts, supra* note 11, at 17–18.

In many ways, though, formalism's connection to textualism and originalism is part of the problem. As described below, formalism is not synonymous with either textualism or originalism, but much of the modern confusion over the meaning of formalism is the result of the term's use by both sides in debates over the merits of textualism and originalism.[85] Part of understanding formalism is to separate it from those debates without denying its connection to both methodologies.

4. RULES, FORMS, AND LEGAL MEANING

Formalism goes beyond the ability to identify the law; it informs our understanding of the substance of the law. It is possible for rules to be understood in a variety of forms. Thus, to borrow Hart's example (expanded upon by Schauer), suppose a "rule" against wearing hats in church.[86] That rule may appear to different people in different forms. One person may simply observe that others are removing their hats on entering the church and do so themself so as not to stand out. Another may have studied the particular religion and know that the religion considers it disrespectful to hide one's head from God (while knowing that other religions consider it disrespectful not to). A third person, a child coming in from a baseball game, may simply be told by an adult to remove their hat when coming into the church without further explanation. All three individuals experience the hat-removal rule as a "rule" in Schauer's terms in that the instantiation of the rule displaces its underlying justification[87]—the person removes their hat because of the rule even if they do not believe wearing a hat is in fact disrespectful to God.

If a rule can be expressed in many forms, the question is whether the *form* of the rule matters apart from the content of the rule—whether the form of the rule has significance independent from the content of the rule it expresses. The answer to that question seems self-evidently "yes." The hat doffer who seeks to avoid embarrassment, the religious scholar, and the admonished child all understand very different rules by virtue of the way they came to

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85 *See infra* Part I.B.3.

86 HART, *supra* note 2, at 124–26; SCHAUER, *supra* note 31, at 69–72.

87 SCHAUER, *supra* note 31, at 112.

learn the content of the rule—by the form of the rule they experienced.[88] The form in which a rule is expressed might affect how closely people conform their behavior to the rule (I might be more (or less) likely to slow down based on a speed limit sign than based on a suggestion from a billboard), but the form of a rule might carry meaning beyond its ability to generate compliance; it might send a message about the social meaning of conduct by virtue of how it subjects that conduct to law.[89]

Understanding "formalism" as an approach to law that considers form might seem obvious, but the meaning of "formalism" has been clouded by its use on both sides of a series of arguments about law.[90] In order to clear those clouds, it is necessary to revisit the various ways formalism was used in the twentieth century before we can free formalism to fulfill its potential in the twenty-first century.

B. *Twentieth Century Formalism*

In many ways, the battle over formalism was the defining legal controversy of the twentieth century.[91] The early twentieth century saw the rise of realism, which was a direct assault on the formal-

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[88] From this perspective, Schauer's rule-based decision-making seems not particularly formalist, since rules might be applied in a more or less rule-like fashion without regard to their particular form, and Schauer came to rely less on formalism as his theory of rules developed. Although Schauer launched his theory of rule-based decision-making as a defense of formalism, the connection to formalism is more attenuated in Schauer's later work on rule-based decision-making. In *Formalism* itself, Schauer first defined his approach as "presumptive formalism" before switching the label at the end of the paper to "presumptive positivism." *See* Schauer, *Formalism*, *supra* note 7, at 546, 548. In the later *Playing by the Rules*, Schauer completed the move he began in *Formalism*, shifting his emphasis away from formalism and toward a positivist approach to law. *Compare id.* at 546 *with* SCHAUER, *supra* note 31, at 196 (featuring term "presumptive positivism").

[89] *See infra* Part III.

[90] *See* TAMANAHA, *supra* note 23, at 1–3 (describing history of academic debates between formalists and realists).

[91] *See* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 197 (2009) ("Of all the great disputes that have marked American law, formalism vs. realism might well be among the most pervasive and significant.").

ism exhibited by the Langdellian orthodoxy that had preceded it, and many developments in law over this period could be seen as a rejection of formalist approaches.[92] Any number of developments, from the rejection of the separate-but-equal doctrine of *Plessy v. Ferguson*[93] to the practical approach to education that the Court took in *Brown v. Board of Education*,[94] could be described as the triumph of realism over formalism. In the late twentieth century, formalism became embroiled in a second battle, this time over the rise of textualism[95] and originalism[96] as the dominant methodologies of legal interpretation. I will address this historical divide between early and late twentieth century battles over formalism, describing first the realist critique of the orthodoxy before discussing the modern understanding of formalism, an understanding held largely by critics, many of whom are methodologically united only in their criticism of formalism (a group I refer to collectively as "anti-formalists"[97]). To find formalism, we must consider formalism for what it is, not the most contentious ways in which it is used.

1. THE EARLY TWENTIETH CENTURY: THE "CLASSICAL ORTHODOXY" AND THE REALIST RESPONSE

In American law, the first half of the twentieth century was marked by the rise of legal realism, and with it the demise of its primary intellectual rival: so-called "legal formalism."[98] But label-

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[92] TAMANAHA, *supra* note 23, at 2.

[93] Plessy v. Ferguson, 163 U.S. 537 (1896).

[94] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[95] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1995) ("[C]onsistent with its interest in textualism as its dominant interpretive methodology, the current Court emphasizes clear statement rules much more than presumptions.").

[96] *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 245 (1995) ("The dominant rhetoric of judges . . . is originalist, for originalism is the legal profession's orthodox mode of justification.").

[97] *Cf.* Sunstein, *Empirically*, *supra* note 4, at 639 (grouping various approaches opposed to formalism as "antiformalist").

[98] *See generally* TAMANAHA, *supra* note 23, at 1–3; Schlag, *supra* note 91, at 201–04; *cf.* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 35–39 (1960) (distinguishing between the "formal" style and its predecessor, the

ing the opposite of realism as "formalism" is itself largely a modern habit;[99] contemporary uses of "formalism" or "formalist" were less frequent.[100] The focus of the realist criticism was not "formalism" per se but rather a concept of law as complete, logically ordered, and objectively determinable;[101] a conception of the completeness of law that has been alternatively (and occasionally collectively) associated with the classical positivism of Jeremy Bentham and John Austin;[102] and "analytical jurisprudence"[103]—what Thomas Grey labeled the "classical orthodoxy": a conception of law inseparably identified with Dean Christopher Columbus Langdell.[104] Although formalism has, in modern times, been generally identified with this complete conception of law,[105] formalism was merely one component of it; Langdell's orthodoxy was much bigger than "formalism."[106] As Grey points out, Langdell's universal-

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"grand" style); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 447 n.12 (1930).

[99] *E.g.*, Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999) (book review) [hereinafter Leiter, *Positivism*] ("[W]e may characterize formalism as the descriptive theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is *autonomous*, since the class of *legal* reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.").

[100] *See, e.g.*, Pound, *supra* note 1, at 607–08 (attacking formalistic ideas as "mechanical jurisprudence" without using term formalism or formalist).

[101] Richard H. Pildes, *Forms of Formalism*, 66 U. CHI. L. REV. 607, 608–09 (1999) [hereinafter Pildes, *Forms of Formalism*] ("To the classical formalists, law meant more: it meant a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.").

[102] ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 23, 30–32 (1998).

[103] Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2068–72 (1995).

[104] Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 2–3 (1983).

[105] *See, e.g.*, Pildes, *Forms of Formalism*, *supra* note 101, at 608–09; Leiter, *Positivism*, supra note 99, at 1145–46.

[106] *See* Grey, *supra* note 104, at 6.

ist picture of law encompassed not only formalism but other essential components: comprehensiveness, completeness, conceptual order, and acceptability.[107]

With Grey's more careful parsing of the classical orthodoxy, this "formalism" takes on a more specific meaning: a method for describing the connection between a principle and its application in an objective and logical fashion—a procedural approach to deriving meaning.[108] Adherents to the classical orthodoxy borrowed concepts like formality from mathematical reasoning, likening law to geometry, in which principles and formal reasoning were combined with physical observation to discover objective truth.[109] Formalism was a distinct part of the orthodoxy and could exist in a system that lacked other attributes of the classical orthodoxy, such as completeness or autonomy[110] (Richard Posner, for instance, frequently employs elements of formal reasoning[111] while denying that law is autonomous[112]). Formalism was, therefore, merely one

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[107] *Id.*

[108] *Id*. at 8 ("A legal system is *formal* to the extent that its outcomes are dictated by demonstrative (rationally compelling) reasoning.").

[109] *See id*. at 19.

[110] *Cf.* Leiter, *Positivism*, *supra* note 99, at 1150–51 (describing formalism as a theory of adjudication existing independently from any particular theory about nature or source of law).

[111] *See, e.g.*, Am. Hosp. Supply Corp. v. Hosp. Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (writing for majority, Judge Posner explained that a preliminary injunction could only be granted if "$P \times H_p > (1 - P) \times H_d$").

[112] *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 761–62 (1987); *see also* Smith, *supra* note 5, at 425 ("Posner's efforts to make law more scientific and his well-known attempts to resolve a multitude of legal problems and to unify numerous and diverse areas of law within the regime of law and economics are arguably instances—indeed, extreme instances—of formalist thinking." (footnotes omitted)); David A. Strauss, *The Anti-Formalist*, 74 U. Chi. L. Rev. 1885, 1886 (2007) ("Some might say that Posner's economic analysis of legal issues does sometimes succumb to the 'lure of scientific order,' simplifying problems excessively so that they can be analyzed with the tools of economics. However true that may be, Posner, as a judge, is one of the great anti-formalists of our time."). Approaches like Posner's have led some to conflate social-science driven approaches with textualism, labeling both as different kinds of "formalism" when the two could not be more distinct. *See* Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms*, 106 CORNELL L. REV. (forthcoming 2020) (manuscript at 4) (electronic copy available at http://ssrn.com/abstract=3553508) ("[Law and

part of the classical orthodoxy, which encompassed other equally (if not more) contestable claims about law, such as its coherence and autonomy.[113]

But the converse was not true; the Langdellian vision was not constructed out of methods or concepts that could be applied in other areas.[114] The orthodoxy was specific to the common law.[115] The formalism (as in the procedural approach to deriving meaning) of the model was itself dependent on the existence of the conceptual ordering of a system like that of the common law.[116] Followers of the classical orthodoxy did not argue that statutes could be procedurally interpreted using formalism; the components of the orthodoxy were specific to inquiry into the common law and did not exist outside of it.[117]

Formalism in the sense of objective reasoning may have been part of Langdell's admittedly problematic vision of law, but it was a relatively minor component along with others, most especially conceptualism: the idea that the law applicable in a particular case could be derived from fundamental principles[118] (a claim that itself implied the autonomy of law since being able to determine the law from a few principles meant that there was no need for recourse to information other than those principles[119]). When Hart criticized formalism, he did so by attacking conceptualism in both label and substance:

> When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the

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economics] is economic formalism. [Originalism and textualism] is legal formalism.").

[113] *See* Grey, *supra* note 104, at 6.

[114] *See generally id.* at 2, 5–6.

[115] *See id.* at 19.

[116] *See id.* at 8–9; 40–41.

[117] *Id*. at 34.

[118] *Id*. at 8.

[119] Weinrib, *supra* note 8, at 951–52. Weinrib posits that conceptualist formalism sought to reject the distinction between concept and form exhibited by most concepts (such as tables) by insisting that the tools for understanding law must come from law itself—in other words, "the internal intelligibility of law." *Id*. at 961–62.

> way which best satisfies us . . . . The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down.[120]

The enterprise of the realists, led by Pound, Karl Llewellyn, and Oliver Wendell Holmes, was to dismantle the classical orthodoxy, which they found theoretically unsatisfactory and practically unworkable.[121] When one considers the combination of claims upon which the classical orthodoxy depended, its eventual demise seems almost inevitable. It is of course impossible to envision a comprehensive (which is to say gapless), complete (and hence autonomous), objectively logical, and socially acceptable legal system in practice; too many legal questions are contested to permit anyone to seriously believe that such a system exists. The realist enterprise was negative—the classical orthodoxy was the "indispensable foil, the parental dogma that shapes the heretical growth of a rebellious offspring."[122] The strict requirements of conceptualism made the realist's deconstructive enterprise an easy one, since establishing any gaps or inconsistency would undermine the absolute claim upon which such a system must rest.[123] Attacking formality itself was even easier, since what is objectively determinable to one is not necessarily objectively determinable to another; Langdell himself was convinced that the fundamental principles of contract law could be objectively applied to conclude that acceptance of an offer be effective only on receipt of the acceptance

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[120] HART, *supra* note 2, at 129.

[121] *See* Grey, *supra* note 104, at 49.

[122] *Id.* at 3; Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 476 (1988) ("Realism was a reaction against classical legal thought . . . .").

[123] *See* Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 653–54 (1873). *See generally* DENNIS PATTERSON, LAW AND TRUTH 23 (1996) ("The plausibility of the formalist enterprise depends upon the success of its metaphysical claims, specifically that law has a conceptual and normative structure independent of the play of external, usually political, interests.").

by the offeror,[124] and yet courts have largely reached a different conclusion.[125]

Of course, many of these points of criticism were strawmen—it's not clear that anyone ever held the most contentious of these views.[126] The orthodoxy itself was an aspirational, not a descriptive, claim.[127] The criticism from determinacy was particularly misplaced, since the requirements of conceptualism were applicable not to the outcomes of particular cases but rather to the principles themselves; inconsistent outcomes in specific cases weren't really a demonstration of the failure of the system at all.[128] Whether the criticism from determinacy was a fair one or not, it is clear that realism won, or at least that the orthodoxy lost. There are no serious adherents to Langdellian conceptualist formalism today.[129]

2. FORMALISM AND *LOCHNER*ISM

As Fred Schauer has pointed out, the *Oxford English Dictionary* defines "formalism" as "*strict or excessive* adherence to prescribed forms,"[130] and even today the term is frequently used to describe an excessive degree of rigidity,[131] which is the sense in

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[124] *See* Grey, *supra* note 104, at 3–4.

[125] *See, e.g.*, Adams v. Lindsell, 1 B. & Ald. 681–82 (K.B. 1818).

[126] *See* Brian Z. Tamanaha, *The Mounting Evidence Against the "Formalist Age*," 92 TEX. L. REV. 1667, 1679–83 (2014) [hereinafter Tamanaha, *Formalist Age*] (discussing problems with Pound's account of formalism and resulting confusion).

[127] Grey, *supra* note 104, at 13.

[128] Weinrib, *supra* note 8, at 1009.

[129] *See* Smith, *supra* note 5, at 427 ("Does anyone today contend that law is 'a body of immutable principles'?" (quoting Posner, *supra* note 6, at 1656)). Even those who ascribe to a conceptualist formalism have a far more limited view of the power of conceptualism. *See* ALLAN BEEVER, FORGOTTEN JUSTICE 243–44 (2013).

[130] Schauer, OXFORD HANDBOOK, *supra* note 80, at 428 (emphasis added) (quoting OXFORD ENGLISH DICTIONARY, *supra* note 80, at 83).

[131] *E.g.*, William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 712 (1991) (describing "rigid, rule-like deductivism associated with formalism"); Golove, *supra* note 16, at 1796 (describing the "the rigid, unconvincing character of [Justice Scalia's] formalistic interpretive methodology"); Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 345 (2014) (describing formal-

which Scalia himself invoked it as a term of opprobrium in his dissent in *Oregon v. Ice*.[132]

The attack on formalism as rigidity is particularly unfair, since the existence of a commitment and the degree of that commitment are distinct. One could have a rigid commitment to formalism or a flexible one, in the same way one could be a committed pragmatist (for instance, by devaluing a statute's text if it works a result inconsistent with received intent or socially optimal outcomes) or a flexible one (by using practical considerations only in cases of textual ambiguity).[133] The view of formalism as rigidity is held exclusively by its critics[134] (I have found no one brave enough to argue that one *should* apply the law with excessive rigidity), and so it would be easy to ignore the equation of formalism with rigidity as no more than an attempt to overstate the claims of formalism in order to make them easier to attack—much like the realist critique of Langdellian determinism[135]—but for the widespread popularity of this view.[136] Although this view is held in modern times, it deserves treatment as part of the early twentieth century battles over formalism because of its close association with the supremely unpopular decision in *Lochner v. New York*.[137]

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ism as "strict adherence to a rigid rule, coupled with a refusal to consider the merit of a possible exception"); *cf.* Summers, *supra* note 44, at 244 ("Americans frequently threw the baby—formality, out with the bath water—excessive formality.").

[132] *See* Oregon v. Ice, 555 U.S. 160, 173–78 (2009) (Scalia, J., dissenting); *infra* note 198.

[133] Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 559 (1992) [hereinafter Farber, *Inevitability*]; Sunstein, *Empirically*, *supra* note 4, at 640 ("The real question is 'what degree of formalism?' rather than 'formalist or not?'").

[134] *See, e.g.*, *supra* note 129.

[135] *See* Grey, *supra* note 104, at 49; Tamanaha, *Formalist Age*, *supra* note 126, at 1679–83.

[136] *See supra* note 129.

[137] Lochner v. New York, 198 U.S. 45 (1905); *see* J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 400 (discussing what "a *Lochner*-era formalist might argue"); Schauer, *Formalism*, *supra* note 7, at 511 ("Few decisions are charged with formalism as often as *Lochner v. New York*."); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 972 (1999) ("The prevailing wisdom today is that *Lochner*-era jurispru-

Attempting to rescue formalism from its cursed association with *Lochner*, Schauer himself has explained that *Lochner* is actually "false formalism" in the sense that the Court's formalistic treatment of the "liberty" question in the case was actually a deceptive use of formalism; the Court in *Lochner* hid the true, contingent basis for the decision in a falsely deterministic one.[138] I would make that claim in even stronger terms: *Lochner* was not "false formalism" because it was not formalist at all.

Any number of cases could be pointed to as examples of judges deciding cases on highly controversial grounds while attributing the outcome to another seemingly more deterministic one. As I have written elsewhere, Justice Brennan employed exactly that approach in *United States Department of Agriculture v. Moreno*[139]—a case in which he intended to apply a fundamental rights approach but turned to the false objectivity of rationality when that strategy failed.[140] No one would consider *Moreno* to be a formalist application of the rational basis test, even if it was a falsely deterministic one, and I think the same is true of *Lochner*. *Lochner* may be deceptively deterministic, but it is a mistake to label all deceptively deterministic cases "formalist" or "formalistic."[141]

My point of disagreement with Schauer's characterization of *Lochner* comes with his claim that the choice made by the Court

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dence was rigidly formalistic."); *see also* David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1504, n.228 (2005) (collecting citations to *Lochner* as formalist).

138 Schauer, OXFORD HANDBOOK, *supra* note 80, at 428–29.

139 U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

140 Thomas B. Nachbar, *Rational Basis "Plus"*, 32 CONST. COMMENT. 449, 450–51 (2017).

141 Schauer, OXFORD HANDBOOK, *supra* note 80, at 429–30; *cf*. Lyrissa Barnett Lidsky, *Defensor Fidei: The Travails of a Post-Realist Formalist*, 47 FLA. L. REV. 815, 821 n. 41 (1995) ("Perhaps, however, it is unfair to keep bringing up *Lochner* to challenge the formalist account of legal reasoning. Justice Peckham's error was not that he was a formalist; it was that he was formalistic."). Lidsky, too, was attempting to rescue formalism from the tarred brush of *Lochner*, but it's not clear that the "ic" of "formalistic" can do that much work. Dictionaries tend to indiscriminately define both "formalistic" and "formalist" an adjectival forms of "formalism." *See, e.g.*, OXFORD ENGLISH DICTIONARY, *supra* note 80, at 83 (defining these terms).

was "masked by the language of linguistic inexorability,"[142] by which he suggests a false textualism.[143] That view has a solid pedigree; Holmes's famous dissent in *Lochner* accuses it of being formalist through his citation to the compass of "liberty"[144] (the textual basis of Peckham's opinion[145]). But a textual connection does not formalism make—if it did, then any equal protection case striking a law as inconsistent with "equal protection of the laws" would also deserve to be called formalist.[146]

As it happens, *Lochner* was not a particularly textualist decision. Although ostensibly protecting the "liberty" of the Due Process Clause of the Fourteenth Amendment, the *Lochner* decision did not hold that the restraint at issue (a working hours limitation) was categorically unconstitutional because it was inconsistent with a fixed understanding of the word "liberty" but rather that the particular regulation at issue (one applied only to bakers) was "unrea-

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[142] Schauer, *Formalism*, *supra* note 7, at 512.

[143] Schauer's criticism of *Lochner's* "linguistic inexorability" raises a question about which form of formalism he is applying. Textualism is more a product of modern understandings of formalism than the conceptualist formalism attributed to Langdell, *see supra* Part I.A.3., although both are equally open to charges of (false) determinacy.

[144] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion."); *see*, *e.g.*, Sunstein, *On Analogical Reasoning*, *supra* note 3, at 756 ("Consider, for example, the view that the liberty to contract is necessarily, and purely as a matter of semantics, part of the 'liberty' protected by the Due Process Clause." (citing *Lochner*, 198 U.S. at 53)).

[145] *Lochner*, 198 U.S. at 53 ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.").

[146] U.S. CONST. amend. XIV, § 1. If anything, it is Holmes, not Peckham, who was the better formalist in 1905. Holmes's condemnation of the majority's reliance on "an economic theory which a large part of the country does not entertain" and "Mr. Herbert Spencer's Social Statics" is a claim that the Court was importing non-legal materials into its consideration of a legal question, which would have been a violation of Langdellian conceptualist formalism. *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting). *See generally* DUXBURY, *supra* note 24, at 45-46 (describing broader implications of Holmes's *Lochner* dissent for use of outside sources).

sonable, unnecessary, and arbitrary."[147] The discussion of "liberty" in Justice Peckham's decision is literally conditional: "Both property and liberty are held on *such reasonable conditions* as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere,"[148] and nowhere does Peckham suggest that separating unreasonable conditions from reasonable ones was a textual enterprise.[149] Nor was the case solely focused on the word "liberty."[150] The *Lochner* Court pointed to a variety of problems well outside of textualism, including a concern that the legislature had dissembled with regard to its legislative purpose,[151] a decidedly non-formalist approach.

Even if one believes the *Lochner* majority was being deceptive, it is difficult to see how they were being deceptive *in a formalist way*, and so it is little surprise that the formalist argument for *Lochner* was made primarily by opponents rather than friends of either formalism or *Lochner*.[152] Indeed, Langdell and his followers did not think that conceptualist formalism, which was a creature of private law, could be applied to constitutional law at all.[153] Thomas Grey posits that the association between *Lochner*ism and formal-

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147 *Lochner*, 198 U.S. at 56 (citing standard: "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty"); *see* Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 95 (2003) ("*Lochner* is not in fact an example of a formalist mode of adjudication; it is an example of the use of a balancing test, albeit one employed in service of a laissez faire agenda.").

148 *Lochner*, 198 U.S. at 53 (emphasis added).

149 *Id.* at 52–64.

150 *See id.*

151 *Id*. at 64 ("It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon the health of the employ[ee], as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employ[ees] (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in any real and substantial degree, to the health of the employés.").

152 *See* David E. Bernstein, Lochner's *Legacy's Legacy*, 82 TEX. L. REV. 1, 18 n.87 (2003).

153 *See* Grey, *supra* note 104, at 34.

ism was drawn by Progressives, who confused the social economic conservatism of *Lochner*ism with conceptualist formalism (whose conservatism was doctrinal rather than economic),[154] and in recent years, the view of *Lochner* as formalist has come under considerable scrutiny.[155]

When considered as part of the series of cases—some upholding limitations and others striking them—throughout the period, *Lochner* is better viewed as an understandably controversial application of the Court's far-from-formalist "police powers" jurisprudence.[156] *Lochner* may have been a misapplication of the doctrine, but neither the doctrine itself nor *Lochner*'s application of it was formalist. Even if one equates formalism with rigidity rather than deception, the police-powers doctrine would have been a poor candidate for a formalistic approach; it was acknowledged by the Court to be an open-ended inquiry.[157] The Court itself was keenly aware of its inability to define the scope of the police power,[158] and neither courts nor commentators ever made the kind of conceptual-

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[154] *See* DUXBURY, *supra* note 24, at 25 ("The second strand of legal formalism . . . —the tradition of *laissez faire*—was not a product of the academy; this was, rather, a product of the courts."); Grey, *supra* note 104, at 39 ("Progressive and later New Deal lawyers saw classical orthodoxy as a form of conservative ideology. In part this was a confusion of Langdellian legal science with the laissez-faire constitutional doctrines epitomized by the *Lochner* decision."); Singer, *supra* note 122, at 478 ("In contrast, legal theorists in the classical period (1860-1940) tried to separate strictly the private sphere of individual contractual freedom from the public sphere of government regulation."); *see also* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 477 (2003) ("The joinder of Langdellian private law theory and *Lochner*-type public law to create a single impressive target—the Demon of Formalism—was a creative act on the part of Holmes and his followers among the early modern American legal thinkers.").

[155] *See* Grey, *supra* note 104, at 39; *see also* Bernstein, *supra* note 152, at 18 n.87 (collecting sources); Cox, *supra* note 147, at 95 n.166 (same).

[156] *See* Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 885–95 (2005); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1639–41 (2016).

[157] Nachbar, *supra* note 156, at 1644–45.

[158] *See*, *e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1873) ("This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.").

ist deterministic claims about the scope of the police power that some would have attributed to the legal formalism of the day.[159] Indeed, if the police powers doctrine had a particular advantage, it was that it required the Court to take responsibility for making the choices it did in due process and equal protection cases without being able to ascribe outcomes to a purportedly objective rationale[160] in the way that many claim the *Lochner* Court did.[161]

3. THE LATE TWENTIETH CENTURY: TEXTUALISM, ORIGINALISM, AND THE ANTI-FORMALISTS

Although many modern scholars are united in their disdain for formalism, they share less agreement on its definition. For some, like Martha Nussbaum and Henry Smith, formalism is a narrow[162] or even wrongheaded[163] approach to legal thinking. Others follow Pound in considering it the mechanical,[164] rigid,[165] slavish,[166] or

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159 *See* Nachbar, *supra* note 156, at 1644–47.

160 *Id.* at 1680–81.

161 *See, e.g.*, Lidsky, *supra* note 141, at 821 n.41 ("Justice Peckham's opinion in Lochner . . . is actually an extreme version of the formalist faith in the mechanical deducibility of results from rules.").

162 Martha Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 62 (2007) (describing a case as demonstrating "why judges should not hold too narrow, or too formalistic, a conception of their role").

163 Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1034 (2004) (describing a decision as "wrongheaded formalistic reasoning leading to economic waste").

164 Pound, *supra* note 1, at 608 (describing "mechanical jurisprudence"); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 878–79 (2003) [hereinafter Dorf, *Legal Indeterminacy*] (explaining that under realist view of formalism, "judges mechanically apply a disembodied entity called 'The Law'").

165 Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945 (1987) (decrying "the formalism of the common law writ system and its rigid and inflexible procedural steps").

166 Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* 3 (St. John's Univ. Legal Studs. Research Paper Series, Paper No. 08-0130, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123498 (discussing attacks labelling formalism as "a slavish adherence to rules contrary to good sense").

even intellectually dishonest[167] application of rules.[168] For still others, like Posner, it represents a simplistic and deductive approach to law.[169]

It is also common to pair "formalistic" and "formulaic,"[170] perhaps encouraged by Roscoe Pound's famous description of the formalist component of conceptualist formalism as "mechanical jurisprudence,"[171] which signaled the decline of a scientifically

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[167] Singer, *supra* note 122, at 520 ("[I]t would be disingenuous—it would be formalist—to claim that one set of principles emerged from the original position."); David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 547 (1992) [hereinafter Strauss, *Bill of Rights*] ("Even if the formalist approach would be more effective, however, it might still be unacceptably disingenuous.").

[168] Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 521 (2001) (describing "the tendency of a rule-enforcement system to create separate, formalistic procedures that discourage problem solving"); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1673 (2003) (discussing Jay Thomas's conclusion that "the unifying theme in Federal Circuit jurisprudence over the last ten years is a shift toward simple rules and legal formalism"). Scholars are hardly alone in this view of formalism. *See*, *e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (describing Court's movement away from "rigid or formalistic limitations").

[169] Posner, *supra* note 6, at 1664 (defining formalist interpretation as "attempts to derive legal outcomes by methods superficially akin to deduction").

[170] *E.g.*, Strauss, *Foolish Inconsistency*, *supra* note 20, at 497 ("The Chief Justice's opinion . . . was formulaic and skeletal, emphasizing a formalistic analysis . . . ."); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 616–17 (2004) (discussing "the Court's constitutional rule formalism and the resulting formulaic administrative approach"); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1339 (1990) ("What he could do was use his positivist formalism to transform the inevitable value judgment these cases required into a more formulaic judgment by strictly applying standard rules concerning the burdens of proof."); Stephen J. Toope, *Preface*, 41 MCGILL L.J. 739, 740 (1996) ("In meeting that challenge, it is not enough to rehearse the formulaic and formalistic response that binding norms follow from the consent of states.").

[171] Pound, *supra* note 1, at 607 ("Undoubtedly one cause of the tendency of scientific law to become mechanical is to be found in the average man's admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of mysterious technicality.").

derived jurisprudence into the mechanical application of rules (and especially technicalities) over substance.[172] These uses, too, seem to miss much of what is behind modern formalism, but even if they didn't, it is important to note up front that formulaic approaches need not be rooted in any particular approach, formalistic, conceptualist, or otherwise. Learned Hand's formula for determining whether an act was negligent in *United States v. Carroll Towing Co.* was formulaic, but no one would call it formalist.[173] Conversely, purportedly formalist approaches like originalism require considerable discretion in their application—hardly the application of a formula.[174] The "formulaic" label does little to reveal the meaning of modern formalism.

Like modern references to *Lochner*'s formalism,[175] modern realists have also continued to attack what they perceive to be Langdellian "legal formalism,"[176] but in doing so, they completely miss the mark. As an initial matter, the conceptualist enterprise was fo-

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[172] *E.g.*, Nussbaum, *supra* note 162, at 62 (discussing "why judges should not hold too narrow, or too formalistic, a conception of their role"); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 58 U. CHI. L. REV. 671, 689 (1989) ("Delineations between branches of the federal government are . . . not sharp, as a rigid separation of powers doctrine is rejected in favor of a less formalistic and more fluid model.").

[173] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) ("[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL."). So, too, Judge Posner's preliminary injunction formula in *American Hospital Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589 (7th Cir. 1985). *See supra* note 111, at 593.

[174] *See infra* the text accompanying note 213.

[175] *See supra* the text accompanying notes 133–37.

[176] *E.g.*, Dorf, *Legal Indeterminacy*, *supra* note 164, at 878–79 (describing realist view that formalism requires "judges [to] mechanically apply a disembodied entity called 'The Law'"); Eskridge & Peller, *supra* note 131, at 712 (describing the "rigid, rule-like deductivism associated with formalism"); Posner, *supra* note 6, at 1664 (defining formalist interpretation as "attempts to derive legal outcomes by methods superficially akin to deduction"); Strauss, *Foolish Inconsistency*, *supra* note 20, at 501 ("This is *not* a bright-line inquiry; Justice White preferred the uncertainty of functional inquiry to the difficulties of 'formalistic and unbending rules.'").

cused on common law adjudication,[177] while most modern formalist debates are primarily about interpretation of statutes and constitutions,[178] a very different form of legal analysis than that envisioned by Langdell.

More importantly, conceptualism is also entirely absent in any modern understanding of formalism. To borrow Grey's description, the formalism of the Langdellian orthodoxy was procedural.[179] Formalism in this sense is not the "strict or excessive adherence to prescribed forms" of the first definition of the *Oxford English Dictionary*;[180] rather, it is the mathematical sense of the sixth definition for the same entry: a "particular mathematical theory or mode of description of a physical situation or effect."[181] As Professor Brian Leiter explains, the "science" expounded by Langdell is better understood as approximating "Wissenschaft," which Leiter translates from German as "a method or discipline that when correctly followed secures the reliability of its results."[182] Modern formalist approaches, like textualism, can be open-ended searches for meaning drawing on a variety of sources (cases, dictionaries and treatises, or even newspapers, popular press, and private letters

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[177] *Cf.* Grey, *supra* note 104, at 6, 8–10 (describing formalist view of "Conceptual Order").

[178] Thus, Cass Sunstein's recent essay, *Formalism in Constitutional Theory*, begins, "In law, what does it mean to 'interpret' a text, including the Constitution?" Cass R. Sunstein, *Formalism in Constitutional Theory*, 32 CONST. COMMENT. 27, 27 (2017); *see also* Farber, *Inevitability*, *supra* note 133, at 535–547 (1992) (discussing topic of "Practical Reason Versus Formalism in Statutory Interpretation").

[179] *See supra* the text accompanying notes 108–11.

[180] Schauer, OXFORD HANDBOOK, *supra* note 80, at 428 (quoting OXFORD ENGLISH DICTIONARY, *supra* note 80, at 83).

[181] OXFORD ENGLISH DICTIONARY, *supra* note 80, at 83. The third definition also borrows from mathematics, although in the sense of symbology rather than proof: "The conception of pure mathematics as the manipulation according to certain formal rules of symbols that are intrinsically meaningless." *Id.* The second definition is specific to religion, and the fourth and fifth refer to different movements in Russian theater and literature. *Id.*

[182] Brian Leiter, *Legal Realisms, Old and New*, 47 VAL. U. L. REV. 949, 959 (2013) [hereinafter Leiter, *Old and New*]; *see also* Tamanaha, *Combination*, *supra* note 81, at 12 ("What jurisprudents now think of as classical formalism, it turns out, sounds a lot like nineteenth century German legal science.").

depending on the topic)[183]—a stark contrast to conceptualist formalism's application of logical steps approximating a mathematical proof.[184] Far from early twentieth century conceptualism, late twentieth century formalism recognizes the shared and therefore necessarily form-bound nature of law; eschewing the determinism of conceptual formalism, modern formalism is exactly the opposite: it rejects the possibility that the law is coherent, conceptual, and complete because it must be discussed in some form.[185] Indeed, when understood as describing a process for determining law, the conceptual orthodoxy's "formalism" has more in common with the realists (who saw themselves as superior practitioners of the Wissenschaft of law by including materials outside of cases[186]) than it does with modern "formalist" approaches like textualism and originalism.[187]

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[183] If one were to apply the rigors of mathematical formalism to textualism, it would fail. *See* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2057 (2017) [hereinafter Gluck, *Unfinished Business*] ("I have argued the merits of a single controlling interpretive approach to statutory interpretation; for statutory interpretation methodology to be given stare decisis effect; for a theory of the canons that understands their source and their legal status as common law. But I now believe that, although there is space for progress on this front, formalism will never be fully effectuated in this field."). Thus, Abbe Gluck concludes that textualism as practiced today should not be called formalist. *See id*. at 2053 ("[T]he textualism that Justice Scalia deserves so much credit for creating never really embraced formalism at all.").

[184] *Cf*. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9. U. PA. J. CONST. L. 155, 173–74 (2006) ("A formalism that emphasizes fidelity to legal texts—constitutions, statutes, and precedents—cannot fairly be characterized as conceptualist, much less as relying on some form of Platonism.").

[185] *See infra* the text accompanying notes 226–41; *see also* Easterbrook, *Original Intent*, *supra* note 70, at 65–66 (acknowledging that statutes have gaps and may simply fail to address a particular topic); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 542 (1988) (considering problem of statutes that do not apply to conduct).

[186] Leiter, *Old and New*, *supra* note 182, at 959. The conception of the realists as reductivist social scientists has been dramatically over-stated. *See generally* Brian Leiter, *Legal Realism and Legal Doctrine*, 165 U. PA. L. REV. 1975, 1975 (2015).

[187] On realism's failure to deliver on its promise, see Schlag, *supra* note 91, at 217–18.

Thus, the most important thing to recognize about debates over "formalism" in the late twentieth century is that they pertained to a "formalism" that is quite different from the "formalism" criticized by the likes of Pound, Llewellyn, and Holmes.[188] These attacks are really just a hangover from the early twentieth century realist attack—they are attacking a conceptualist vision that has had no more than a handful of academic (and as far as I can tell no judicial) adherents for almost 100 years. Today's "formalism" and (critics of) yesterday's "formalism" are getting at very different senses of the word, which means that comparisons among Langdellian conceptualist formalism, *Lochner*ism, and modern formalist methods like textualism or originalism should be advanced cautiously.[189] It would be pretty hard to confuse one of Justice Scalia's "formalist" opinions with one of Justice Peckham's.

If modern "formalism" is not Langdellian conceptualist formalism, then what is it? One point of consistency between the historical debates and modern ones is the largely negative treatment of the concept of formalism. By "negative" in this context I mean not that formalism is cast in a negative light (although it frequently is) but that formalism is frequently defined not as an abstract matter for its own purpose but rather in juxtaposition to some alternative.[190] To a critic of textualism who describes it as "formalistic," formalism might mean something very different than it does to someone using the term to describe an approach that simply ignores consequences. Some use the term with some connection to the conceptualist formalism of yesteryear: to describe a logical method of reasoning, usually based on concepts rather than conse-

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[188] *But cf.* Eskridge & Frickey, *supra* note 71, at 33–34 (1994) ("The turn-of-the-century formalists and their current heirs maintain that the Court has a single goal: declaring and enforcing the rule of law.").

[189] *Cf.* Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 215–16 (1991) [hereinafter Sunstein, *Judge Bork*] ("I conclude that originalism is merely the latest version of formalism in the law. It represents the pretense that one can decide hard cases in law by reference to value judgments made by someone else.").

[190] *See, e.g.*, Schlag, *supra* note 91, at 197 ("Of all the great disputes that have marked American law, formalism vs. realism might well be among the most pervasive and significant."); Sunstein, *Empirically*, *supra* note 4, at 639 (describing various approaches opposed to formalism as "antiformalist").

quences.[191] But such uses are relatively uncommon, at least in discussing modern approaches, for the reasons described above: the lack of adherents to a conceptualist understanding of law means that there would be little for modern critics of conceptualist formalism to attack. Other uses are more varied.

"Formalist" and "formalistic" are frequently used with neither explanation nor specificity to describe an approach that lacks sophistication. Thus, "formalistic" is deployed as a (frequently redundant) synonym for "simplistic"[192] or lacking nuance[193] or any number of intellectual errors.[194] For others, it's "a sham"[195] or "a lie."[196] As Robert Summers describes it, "American academics and practitioners came almost instinctively to condemn nearly every-

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[191] *E.g.*, Posner, *supra* note 6, at 1663 ("Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact.").

[192] *E.g.*, Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1681 (2009) ("In determining whether the First Amendment applies to civil liability, the nature of the injury approach has the undeniable virtue of attempting to avoid simplistic formalist solutions.").

[193] *E.g.*, Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 411 (2015) ("This is obviously a highly stylized, even formalistic, vision of how actual lawmaking processes operate."); Trina Jones, *Anti-Discrimination Law in Peril*, 75 MO. L. REV. 423, 425 (2010) ("In examining discrimination claims under the Equal Protection Clause, the Court has resorted to a type of analytical formalism, similar to what one sees in pretext cases, that thwarts a nuanced and contextual examination of discrimination claims and impedes greater understanding of the nature of discrimination.").

[194] *E.g.*, Sunstein & Vermeule, *supra* note 9, at 923 ("It is very common to see a law professor complaining that some generalist court has blundered in its latest interpretation of the specialized statute that the professor has made a career of studying; usually the blunder occurs because the court has, in the critic's view, interpreted 'woodenly,' 'mechanically,' or 'formalistically,' with insufficient attention to history, policy, and nuance.").

[195] Sunstein, *On Analogical Reasoning*, *supra* note 3, at 756.

[196] *E.g.*, JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY 82 (2005) (describing "legal formalism" as "in less polite language, a lie"); Singer, *supra* note 122, at 520 (using "disingenuous" and "formalist" interchangeably); Strauss, *Bill of Rights*, *supra* note 167, at 547 (same); Sunstein, *Judge Bork*, *supra* note 189, at 215–16 (describing formalism as a "pretense" that allows judges to make value judgments "covertly").

thing wrong with law and legal reasoning as 'formalistic' (a practice that continues today in many quarters)."[197] Even the modern era's most famous, self-acknowledged formalist, Antonin Scalia, could not resist the temptation to enlist "formalistic" as an attack.[198] There is not much to be said for or about such uses—many are either unthinking or are extensions of more specific criticisms, which I address above—except to point out the comfort with which "formalist" is thrown around as an insult.

Not all uses of the term have been so unthinkingly negative, though. Late twentieth century formalism is frequently encountered as a component of statutory or constitutional interpretation, and many have equated it with textualist approaches to interpretation.[199] According to Cass Sunstein, formalism "entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law,"[200] and according to Dan Farber, "[f]ormalist writers stress that law contains a good many rules, and that in many contexts, the application of those rules requires little more than a grasp of English usage. They recommend a heavier reliance on plain meaning in statutory interpre-

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[197] Summers, *supra* note 44, at 244. For his part, Summers fought back, labeling approaches to law that ignore form as "substantivistic," *id*. at 251, a usage that does not seem to have caught on.

[198] *See* Oregon v. Ice, 555 U.S. 160, 174 (2009) (Scalia, J., dissenting) ("This rule leaves no room for a formalistic distinction between facts bearing on the number of years of imprisonment that a defendant will serve for one count (subject to the rule of *Apprendi*) and facts bearing on how many years will be served in total (now not subject to *Apprendi*)." (citing Apprendi v. New Jersey, 530 U.S. 466 (2000))). In fairness to Justice Scalia, he did use the term correctly (as I would define it) by comparing the forms of two rules and suggesting the form of one (the *Apprendi* rule) should take precedence over the form of another (the elements of a specific crime). *See id*. at 173 ("We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee. We long ago made clear that the guarantee turns upon the penal consequences attached to the fact [relevant to determining punishment, the category of facts subject to jury determination under *Apprendi*], and not to its formal definition as an element of the crime.").

[199] *See* Sunstein, *Empirically*, *supra* note 4, at 639.

[200] *Id.*

tation."[201] Justice Scalia described himself as a formalist in large part based on his commitment to textualism.[202]

What is it about textualism that makes it formalist?[203] Most make the connection between textualism and formalism through their mutual connection to language.[204] An approach to formalism in law that emphasizes the role of text resembles the literary formalist tradition, which treats text as autonomous and ignores the historical or social context in which the work was written.[205] But other forms of formalism seem to have less of a connection to language as an autonomous system, and so they strain the language-dependent understanding of formalism evident in the treatments of textualism.[206]

Another methodology commonly associated with formalism is originalism.[207] According to Erwin Chemerinsky, for instance,

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[201] Farber, *Inevitability*, *supra* note 133, at 543; *see also* Gluck, *States as Laboratories*, *supra* note 12, at 1758 (offering a "modified textualism"—"a theory that retains the fundamental text-first formalism of traditional textualism and yet still appears multitextured enough to offer a middle way in the methodological wars").

[202] Scalia, *Common-Law Courts*, *supra* note 11, at 25 ("Of all the criticisms leveled against textualism, the most mindless is that it is 'formalistic.'").

[203] *See, e.g.*, Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 5 (2007) ("I will argue that textualists have placed undue emphasis on formalist strategies.").

[204] *See* Farber, *Inevitability*, *supra* note 133, at 543; *see also* Farber, *Ages*, *supra* note 5, at 101–02 (comparing Scalia and Langdell).

[205] *See generally* LOIS TYSON, CRITICAL THEORY TODAY: A USER-FRIENDLY GUIDE 141 (2d ed. 2006) ("Because of New Criticism's belief that the literary text can be understood primarily by understanding its form (which is why you'll sometimes hear it referred to as a type of formalism), a clear understanding of the definitions of specific formal elements is important."); Farber, *Inevitability*, *supra* note 133, at 534 ("Formalist interpretation, ultimately, relies on a faith in the raw power of the word to communicate . . . ."); *see also* Allan Beever, *Formalism in Music and Law*, 61 U. TORONTO L.J. 213, 216–17 (2011) (describing the use of formalism in music, which focuses on music's form rather than its meaning and its connection to (conceptualist) formalism in the law).

[206] *Cf.* Farber, *Ages*, *supra* note 5, at 91 ("[T]he temptation for formalists is to err in the opposite direction, abandoning formalist methods when such methods fail to satisfy their craving for stability, logic or order.").

[207] *See, e.g.*, Farber, *Ages*, *supra* note 5, at 91; Dorf, *supra* note 14, at 11 (noting that when originalism is challenged, it "is typically defended in formalist terms"); Peter M. Shane, *Independent Policymaking and Presidential Power: A*

"[f]ormalism is inherent to the originalism of conservative Justices like Scalia and Thomas."[208] As with textualism, not all reference is negative. Michael Rappaport claims to apply an "originalist-formalist conception of law."[209] Others, like Lawrence Solum, include both textualism and originalism as elements of what he calls a "neoformalist" approach to constitutional interpretation.[210]

But the claim that originalism is formalist seems strained, at least if formalism is going to have any independent meaning. As Mark Tushnet points out, "[i]t seems worth noting that there is no necessary connection between formalism and originalism."[211] Of course, the two are not synonymous, and the better reading of such claims (including Chemerinsky's) is not that originalism and formalism are identical but rather that originalism is either one type of formalism or that originalism depends in some way on formalism.[212] But even such claims seem to overstate the case. It's not clear what is formalistic about originalism; originalism's historical interpretation of understood meaning shares neither the clarity of textualism nor the same deductive objectivity of formal logical reasoning.[213] "Nonetheless," as Tushnet points out, "the connection

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Constitutional Analysis, 57 GEO. WASH. L. REV. 596, 598 (1989) (discussing "formalist interpretations of the Constitution, including originalism").

[208] Chemerinsky, *Foundation*, *supra* note 10, at 205.

[209] Rappaport, *supra* note 15, at 114.

[210] *See* Solum, *supra* note 15, at 2494.

[211] Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 584 n.11 (1992).

[212] *Cf.* Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905, 1907 (2007) ("This latter form of pragmatism is simply not amenable to the formalism that originalism requires . . . .").

[213] Nor does originalism necessarily push toward *non*-textual clarity. *See* Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL'Y 45, 45–46 (2011) ("Justice Scalia likes originalism; he also likes formalism. In some cases, however, a judge must choose between the two. Sometimes originalism contradicts doctrines such as the exclusionary rule even though, intuitively, modern formalists should embrace the exclusionary rule because it is clear, simple, and instructs police exactly what not to do." (footnotes omitted)).

between formalism and originalism seems to be asserted regularly."[214]

It is possible that the connection to textualism is doing much of the work of associating originalism with formalism.[215] Many historical sources are expressed in textual terms, allowing textual meaning to provide originalist understanding,[216] and originalism can be used to identify (and freeze) the meaning of text, thus freezing the law.[217] But the comparison to textualism is also instructive on the other side of the argument: If textualism is formalist by virtue of the objectivity and logic of textual analysis, originalism is far *less* formalist than textualism[218] and maybe even less so than

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[214] Tushnet, *supra* note 211, at 584, n.11.

[215] *See* Farber, *Ages*, *supra* note 5, at 91; Lawson, *supra* note 14, at 859 ("[F]ormalism is inextricably tied to both textualism and originalism . . . ."); Molot, *supra* note 203, at 7 ("[T]hose who favor textualism in statutory interpretation often favor originalism in constitutional interpretation."); Krotoszynski, *supra* note 20, at 1545 ("In circumstances where the Constitution provides conflicting textual mandates, formalism—particularly its strictest, originalist-textualist variety—does not work.").

[216] Scalia, *Common-Law Courts*, *supra* note 11, at 16–18 (distinguishing atextual intentionalism from textualist originalism); Raban, *supra* note 131, at 345; Shane, *supra* note 207, at 602 ("Originalism is the species of formalism—that is, history partly expressed in text . . . .").

[217] HART, *supra* note 2, at 129 ("One way of [disguising and minimizing the need for judges to make choices in applying rules to specific cases] is to freeze the meaning of the rule so that its general terms must have the same meaning in every cases where its application is in question."); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 188 (2005).

[218] Scalia, *Originalism*, *supra* note 76, at 856 ("[I]t is often exceedingly difficult to plumb the original understanding of an ancient text."). By conceptualist standards, originalism is not formalist at all because it denies that law is a conceptually complete enterprise, since it requires the consideration of so many extra-legal materials. *Id*. at 857 (describing the difficulty of applying originalism and explaining that "[i]t is, in short, a task sometimes better suited to the historian than the lawyer"); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017) ("[A] rigorous account of originalist methodology . . . requires an interdisciplinary approach that critically evaluates and adapts techniques from linguistics and history but retains and modifies the sophisticated interpretive techniques that have been developed by lawyers.").

explicitly consequentialist theories like those underlying Hand's *Carroll Towing* formula.[219]

The focus of modern arguments in favor of formalism (as opposed to criticizing it) has been on textualism and originalism, but formalism goes beyond textualism and originalism. Any method of legal reasoning that focuses on the law's form is formalist. For example, Chief Justice Marshall's argument in *M'Culloch v. Maryland* that the Necessary and Proper Clause is better seen as an enhancement rather than a restriction on Congress's powers because it is found among the power-conferring clauses of Article I, Section 8 rather than among the limits in Section 9 was formalist because it focused on the clause's location, an attribute of form.[220]

4. UNITY IN DISAGREEMENT: A RESPONSE TO THE ANTI-FORMALISTS

Even if it is clear that modern formalist methodologies have little to do with early twentieth century Langdellian conceptualist formalism, the arguments *against* them do overlap. The most obvious characteristic attacked by critics of both strains of formalism is their purported determinism.[221] As discussed above, criticisms of the purported determinism of formalism are hardly new; they were an essential (perhaps the singularly most important) element of the realist critique of conceptualist formalism,[222] and criticism of determinism unites critics of (what I consider misplaced) *Lochner*ian formalism with critics of modern "formalist"[223] techniques such as textualism[224] and originalism.[225]

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[219] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[220] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819) ("The clause is placed among the powers of Congress, not among the limitations on those powers.").

[221] *See, e.g.*, Leiter, *Positivism*, *supra* note 99, at 1152–53.

[222] *See* Singer, *supra* note 122, at 499–502. Certainly it was the determinism of combined conceptualism and formalism that motivated Holmes, whose rejection of formalism spanned both public and private law. *See* William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of* Mahon, 86 GEO. L.J. 813, 854–55 (1998).

[223] *E.g.*, Dorf, *supra* note 14, at 11–12 ("Textualism, originalism, and other brands of formalism do not trade flexibility for predictability, but for the false

As was the case with the similar claim made by the realists, the claim against the determinism of modern formalism is overstated. While it may be difficult to find modern scholars claiming to be formalists, it is practically impossible to find ones making a claim that any of the "formalist" methodologies are perfectly deterministic. Justice Scalia, the figure most widely associated with modern formalism,[226] never advanced such a view. Although Scalia did claim among the advantages of both textualism and originalism that they were deterministic, his claim was entirely comparative (as suggested by the title of one of his earlier papers on originalism: "*The Lesser Evil*"[227]), not absolute.[228] In addition to the historical interpretive problems presented by originalism,[229] Justice Scalia was more than willing to acknowledge that text could be indeterminate, which he believed could be either accidental or intentional.[230] Modern critics of formalism tend to overstate the claim of

promise of predictability."); Farber, *Inevitability*, *supra* note 133, at 534 ("[F]ormalism cannot deliver on its promise to provide greater implementation of these important 'rule of law' virtues.").

[224] *E.g.*, Farber, *Inevitability*, *supra* note 133, at 547–48 ("Even eliminating the canons in favor of pure textualism would not leave statutory interpretation a mechanical task."); Gluck, *Unfinished Business*, *supra* note 183, at 2060 ("By applying consistent interpretive rules, formalism seeks to realize 'rule of law values' such as transparency, predictability, and objectivity in the law. We have not gotten there in statutory interpretation and we likely never will.").

[225] *E.g.*, Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1072–73 (2006) [hereinafter Chermerinksy, *Emperor's Clothes*].

[226] Fallon, *supra* note 10, at 15.

[227] Scalia, *Originalism*, *supra* note 76, at 855 ("It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him.").

[228] *See infra* note 234. *But see* Leiter, *Positivism*, *supra* note 99, at 1150 ("Hart thinks it the duty of judges to exercise discretion . . . . Formalists like Dworkin and Scalia are, of course, committed to denying all of these . . . claims.").

[229] *See supra* text accompanying note 218.

[230] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 (1989) ("An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it; or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency."); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717,

modern formalists that methodologies like textualism and originalism conclusively determine outcomes through a process of deduction.[231]

Although such a deductive claim might have been part of the Langdellian conceptualist formalism, it is decidedly lacking in modern formalist claims, which are focused more on constraining discretion than on providing deterministic outcomes.[232] The distinction between deductive determinacy and constraint is a key for understanding modern formalist theories like Scalia's. If constraint can exist even in the absence of complete determinism—such as by limiting the sources available for argument without claiming that those sources necessarily resolve all arguments[233]—then modern formalism's lack of deductive determinacy is not a failure at all. My point is not to refute the determinacy argument[234] but rather to highlight it as unifying a multitude of criticisms of "formalist" methodologies. As with the realist attack on the Langdellian orthodoxy, though, formalism's unsustainable claim of determinacy is

732 (1988) (Scalia, J.) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."); Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2015–16, 2023–24 (2017) (discussing Justice Scalia's interpretation of the Sherman Act).

[231] *E.g.*, Chemerinsky, *Emperor's Clothes*, *supra* note 225, at 1073 (claiming that originalists and formalists "argue that their theory allows judges to deduce answers without discretion").

[232] *See, e.g.*, Scalia, *Rule of Law*, *supra* note 71, at 1179–1180.

[233] Lawrence B. Solum, *Pluralism and Public Legal Reason*, 15 WM. & MARY BILL RTS. J. 7, 15–16 (2006) (describing the various steps, including default rules of indeterminate texts, of a neoformalist approach to interpretation).

[234] In the end, the determinacy argument is more properly addressed and responded to by modern positivism than by modern formalism. Hart himself acknowledged that any source of law will in the hardest of hard cases ultimately require an act of discretion on the part of a judge. *See* HART, *supra* note 2, at 129. I don't think such an eventual jump to discretion depends on what interpretive methodology the judge employs, but more importantly, it doesn't seem to me that Hart needs my help in addressing what to do when the law "runs out." *Cf.* Schlag, *supra* note 91, at 203 n.28 (on the difficulties faced by formalists when the law fails to comply with the "legal formalist ideal").

one of its critics' own construction, perhaps because it makes such an attractive target.[235]

Not only is the "formalism" of today different than the "formalism" of yesterday, the nature of the *determinism* being attacked by modern anti-formalists is entirely different than that attacked by the realists. The determinism attacked by the realists was a determinism founded in conceptualism—a determinism based in the conceptual completeness of the law.[236] Modern formalism involves no similar conceptualist claim, even in the eyes of its critics. I suggested that modern textualists and originalists have been unfairly painted as suggesting their methods were determinist,[237] but no one has even suggested (unfairly or otherwise) that the purported determinism of modern "formalist" techniques like textualism and originalism is a product of conceptual completeness—that the Framers foresaw every eventuality or that text captures every potential application of a statute.

Instead, the modern anti-formalist criticisms are of the ability of particular *forms* (largely text) to convey the meaning of the law.[238] Any particular text is open to several readings, and even practitioners of originalism confess the difficulty of determining original meaning.[239] Again, these concerns may or may not be valid, but they are completely different than a claim that there is a set of completely determinative principles underlying the law. The latter is a point about the substance of the law; the former is one about the ability of different forms to supply the meaning of the law. One is about whether law is conceptual; the other is about the limits of form.

Thus, it is commitment to form that unites both the proponents and (far more numerous) opponents of the various methodologies criticized under the rubric of modern formalism. One thing that textualism and originalism have in common is that they privilege

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[235] Leiter, *Positivism*, *supra* note 99, at 1146 (describing the "'vulgar formalist' of popular imagination" who "accepts the rational determinacy of the law" and "the mechanical nature of judging").

[236] *See supra* text accompanying notes 120–26.

[237] *See supra* text accompanying notes 221–32.

[238] *See* Farber, *supra* note 133, at 534 ("Formalist methods of statutory interpretation . . . [fail to] ease communication between legislatures and citizens.").

[239] *See supra* the text accompanying note 218.

form over substance, and most of their critics advance methodologies that emphasize the importance of substance.[240] The argument they levy against formalism is that its comparative advantage of increased determinism is not enough to outweigh the suboptimal outcomes it leads to in individual cases.[241] The same was true of early critics, such as Holmes, whose objection to formalism was similarly pragmatic.[242] Defining formalism as commitment to form identifies its essence—from the standpoint of not only its supporters but also its critics.

5. LEAVING THE TWENTIETH CENTURY BATTLEFIELDS OF FORMALISM BEHIND

Even as it has been the subject of debate over the last century, formalism retains its essential feature as a commitment to interpreting law through its form instead of deriving its meaning in some other way. Although "formalism" is a term that has become caught up in battles over methodologies that have little to do with formalism (such as the Langdellian conceptualism) and has been attacked for its association with methodologies (like originalism) for reasons having little to do with their formalism, it is still possible to identify formalism as distinct from those methodologies and as a distinct approach to law.[243] It is understandable that formalism would become a target in those battles, but it is time to step away from those battles to consider formalism in its own right.

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[240] *E.g.*, Chemerinsky, *Foundation*, *supra* note 10, at 206; Dorf, *supra* note 14, at 9–10 ; Farber, *Inevitability*, *supra* note 133, at 550; Posner, *supra* note 6, at 1663–64; Sunstein, *Empirically*, *supra* note 4, at 650–52.

[241] Farber, *Inevitability*, *supra* note 133, at 534 ("[F]ormalism cannot deliver on its promise to provide greater implementation of . . . important 'rule of law' virtues."); *see also* Sunstein, *Empirically*, *supra* note 4, at 641 ("More specifically, I claim that formalism, as an approach to statutory interpretation, must be defended by empirical claims about the likely performance and activities of courts, legislatures, administrative agencies, and private parties.").

[242] Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 819–20 (1989).

[243] *See supra* Part II.B.4.

II. BRINGING FORMALISM INTO THE TWENTY-FIRST CENTURY

Although formalism has served as a proxy for other approaches to law, from methodologies like conceptualist determinism or textualism or more general approaches,[244] formalism is not the same as the methodologies with which it has been associated. By considering formalism separately, not only does the concept of "formalism" become more useful as a way to articulate the degree to which a particular methodology is comparatively concerned with form, it allows for both consideration of legal form in determining the substance of the law and the possibility that legal form might have its own independent meaning apart from the substance of the law. By looking at how formalism is used outside of its twentieth century battlegrounds, we can get a better idea of how formalism contributes to legal thinking. Formalism has been used productively in two areas of law: understanding the role of process in law and debates over separation of powers.

A. *Formalism as an Independent Component of Legal Understanding*

Saying that formalism is a commitment to considering law based on its form is either saying a lot or nothing at all. No one takes either extreme view that form is irrelevant or that it is the only consideration. At least as a matter of informing legal analysis that drives outcomes, the claim that form matters may at first seem to be a pretty weak one.[245]

But even the limited claim that formalism is an acknowledgement that form matters goes a long way toward both classifying and understanding arguments as comparatively formalist or nonformalist. Textualism and originalism have gotten most of the attention, but as I suggested above, there are any number of ways that an approach can be formalist, and so it can be helpful simply to acknowledge the degree to which a particular approach is either formalist or not. Chief Justice Marshall's reliance on the location

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244 *See, e.g.*, Chemerinsky, *Emperor's Clothes*, *supra* note 225, at 1071–73.

245 *Cf.* Pildes, *Forms of Formalism*, *supra* note 101, at 610 (describing an approach to formalism as "emphasis on forms" as "something of a pun: forms matter").

of the Necessary and Proper Clause was formalist; by contrast, his argument in the same case that Congress's Article I powers should not be read restrictively because the Framers understood that the Constitution would have to be applied to many unforeseen circumstances was comparatively less formalist.[246] Simply having a concept to distinguish approaches that depend on form from those that depend on something else is valuable. Thus, understanding "formalism" as relying on form as a component of legal understanding (and argumentation) has its own value by allowing descriptive claims about the use of form quite apart from normative claims about whether or when to do so.

One might be a formalist for widely varying reasons based in widely varying commitments. Justice Scalia justified his formalism on institutional grounds, as necessary to a system that allocates power to authors rather than appliers of positive law,[247] but he could also have justified it on a claim that the Framers were simply smarter than we are and that their utterances were therefore deserving of our deference. Those would be very different normative justifications for originalism even though the formalism of the approach might remain the same. Similarly, one could argue the relative difficulty of deciphering text that was written ten years ago and that which was written 230 years ago means that textualism is less valuable in the latter than the former case while still acknowledging that textualism would be equally formalist in either case. Many methodologies represent a commitment to form, and some of them for similar reasons, but formalism and formalist methodologies are not all justified by a single set of considerations.[248] Recognizing formalism as a distinct element of a number of methodologies allows one to separately consider both of those methodologies themselves and the formalism that they rely upon.

Distinguishing formalism from the methodologies it has been associated with opens the door to considering formalism's broader role in many theories of law. Formalism is present not only in tex-

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246 *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–10 (1819).

247 Scalia, *Rule of Law*, *supra* note 71, at 1182–85.

248 Sunstein, *Empirically*, *supra* note 4, at 638 ("It is not easy to define the term 'formalism,' partly because there is no canonical kind of formalism." (internal citation omitted)).

tual approaches like textualism and originalism but also in approaches that focus on source (as in positivism), process, and structure.[249] Although Hart himself criticized conceptualist "formalism,"[250] his positivism was perfectly formalist in that it suggested the centrality of form—in his case the point of origin—of law.[251] Hart's rule of recognition is itself formalist, since it defines what is law by virtue of its discernible features, not its substance.[252] It is little wonder, then, that Schauer started with formalism in developing what he would eventually come to call "presumptive positivism;"[253] it is formalism that unites Schauer's account of rule-based decision-making (which, as I suggested above, need not be formalist) with Hart's positivism. Formalism extends not only to text or location (as in Marshall's analysis of the Necessary and Proper Clause in *M'Culloch*[254]), but also to source.[255] The predilection that we have in most cases to identify law by its source (we treat judicial opinions differently than statutes and statutes differently than political stump speeches) is itself formalist. In this sense, originalism's emphasis on the text *as understood by a specific group* (those alive at the time)[256] makes it doubly formalist because it emphasizes a form of form—text as both the basis for understanding and the source of the accepted understanding of that text.

Thus my argument that we are all formalists, since form plays a part in virtually any practical understanding of law. Hart's formalist rule of recognition works for most purposes—most debate is on its ability to handle the hard cases, an implied concession that it largely handles the easy ones.[257] That is not to say we are all for-

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[249] *See, e.g.*, Sebok, *supra* note 103, at 2061 ("Legal positivism overlaps with *both* legal realism and legal formalism, although it is identical to neither.").

[250] *See supra* the text accompanying note 120.

[251] *See* HART, *supra* note 2, at 94–95.

[252] *Id.*

[253] SCHAUER, *supra* note 31, at 196.

[254] *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407–10 (1819).

[255] *See* Meese, *supra* note 230, at 2027–28 (Describing "super statutes" and how judges impute the source of a text when deciding how to apply interpretative methods).

[256] *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552–53 (1994) (describing process of determining original meaning).

[257] HART, *supra* note 2, at 94–95.

malists to the same degree or that formalism informs all interpretive methodologies equally. But simply being able to identify formalism as a component of different methodologies and to evaluate the merits of that formalism in its own right—as a distinct component of those methodologies with its own justification—is a step toward engaging formalism on its own terms.

But modern formalism goes beyond an abstract understanding that form matters to law; it is a claim about *why* form matters to law. Modern formalist methodologies like textualism and originalism are grounded in an understanding that our conversations about law are necessarily limited to characteristics of law we can perceive in a shared way.[258] Modern formalism recognizes that, much more than assigning winners and losers in disputes, law communicates.[259] Separating formalism from the outcome-driven debates that have dominated discussion of its merits—like debates over textualism and originalism and their alternatives—allows a whole new set of claims about formalism and its value. Part of law's value is in its ability to communicate, and it is through formalism that that value can be recognized and realized.

In the end, the question is not whether form matters—form clearly matters. The real question is how viewing the law through the lens of form helps us better understand the law and how it operates. I will focus briefly on how formalism operates in two very different aspects of law before considering some consequences of formalism for how we think about law.

B. *Formalism and Process*

All process appears as form, but considering formalism as a separate aspect of process allows us to distinguish its role in process. In U.S. constitutional law, the process of bicameralism and presentment is arguably the most central process there is, since it

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[258] *See* HART, *supra* note 2, at 125; Easterbrook, *Statutory Interpretation*, *supra* note 15, at 64 (describing legal interpretation as "a social enterprise").

[259] *See, e.g.*, *id.* at 124–25; Farber, *Inevitability*, *supra* note 133, at 549 ("[T]he best argument for formalism is that it makes the meaning of legal texts more transparent, and therefore more accessible to ordinary citizens, legislators, and others . . . .").

defines what is and is not federal statute law.[260] A formalist approach to bicameralism and presentment allows one to distinguish the process itself from its justifications, thereby providing intellectual space to consider both separately. That ability is particularly helpful with a process like bicameralism and presentment, a process that has remained unchanged even while many of its underlying justifications have changed.[261] The adoption of the Seventeenth Amendment altered the constituency of the Senate (from the legislatures of the States to the people of the States), thereby shifting the role of the Senate and with it the justification underlying the process for making federal statute law without changing the form of the process at all. [262] A formalist approach would ignore this underlying change in the Senate's constituency, but more importantly, a formalist approach allows one to distinguish this change in the Senate's constituency from other changes and their effects on the Senate's role in making federal statute law, such as the Fifteenth and Nineteenth Amendment's expansions of the franchise[263] or the Civil War's alteration of the political and economic forces that may have justified the original organization of the Senate.[264]

A formalist approach to process treats process as distinct from its underlying purpose. In *Neder v. United States*, the Supreme Court confronted the question of whether taking an element of a criminal offense away from the jury could ever be harmless er-

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[260] U.S. CONST. art. I, § 7.

[261] U.S. CONST. art. I, § 7; Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1353–55 (1996).

[262] U.S. CONST. amend. XVII; *see* Amar, *supra* note 261, at 1353–55; David N. Schleicher & Todd J. Zywicki, *The Seventeenth Amendment*, INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvii/interps/147 (last visited Nov. 18, 2020).

[263] U.S. CONST. amend XV (prohibiting denial of right to vote "on account of race, color, or previous condition of servitude"); U.S. CONST. amend. XIX (prohibiting denial of the right to vote "on account of sex").

[264] *See generally* Schleicher & Zywicki, *supra* note 262 (explaining how the Seventeenth Amendment was passed in the wake of the Civil War and "removed from state legislatures the power to choose U.S. Senators and gave that power directly to voters in each state").

ror.[265] The majority concluded it could, especially when the appellate court found that the element at issue (whether Neder's failure to report "over $5 million in income" was a material falsehood for the purposes of the tax fraud statute[266]) "was uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the error."[267] In so doing, the Court applied the standard for evaluating such errors it had established in *Johnson v. United States*,[268] whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."[269] To the majority, the question was one of fairness, perhaps the most substantive question of all.[270]

Justice Scalia, whose formalism reached far beyond textualism and originalism, dissented in a characteristically formalist way.[271] For him, the question was simply whether the conviction had complied with the Sixth Amendment requirement of trial by jury, explicitly rejecting the majority's fairness analysis.[272] The trial, according to Scalia, did not follow the required form for a federal criminal trial and the certainty of the outcome (a matter of substance) was no answer to the defect in form.[273]

That is not to say that the form exists absent a justification (Scalia offered one: mistrust of judges[274]), but whether we could all agree that Neder was actually guilty (which was the majority's understanding of the justification for the form[275]) or whether the

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[265] Neder v. United States, 527 U.S. 1, 9 (1999). In the interest of full disclosure, I was one of Neder's attorneys at the Supreme Court, although I did not work on the harmless-error portion of the case.

[266] *Id*. at 16.

[267] *Id*. at 17.

[268] Johnson v. United States, 520 U.S. 461 (1997).

[269] *Neder*, 527 U.S. at 9 (quoting *Johnson*, 520 U.S. at 469).

[270] *See id.* at 9.

[271] *See id.* at 30–40 (Scalia, J., concurring in part and dissenting in part).

[272] *Id.* at 31–32; U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

[273] *Neder*, 527 U.S. at 34 ("The very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right.").

[274] *Id.* at 32.

[275] *Id.* at 18–20 (majority opinion).

judge in question was actually untrustworthy (which was Scalia's understanding of the justification for the form[276]) was beside the point. And here we see the connection to Schauer's rule-based decision-making.[277] Although there might be a justification underlying the form, for Scalia, that justification was irrelevant to the question of whether to insist that the form be observed in the particular case.[278] For the majority, the justification was always relevant.[279] Justice Stevens, who dissented separately, was also willing to consider justification over form, suggesting that the Court's insistence on juries might vary depending on the type of case, since some cases present greater threats to the justification he credited than others.[280]

Scalia's formalism, unlike the majority's pragmatism, allows juries to have value independent of their justifications. The independent value of forms like juries is important in a variety of ways. As Schauer explains, it allows judges to be wrong about the (comparatively difficult to determine) justifications for particular forms while still having the power to adjudicate disputes over the forms themselves.[281] But it also allows for the possibility that juries are an instantiation of an under-theorized set of justifications, some of which are unrelated or might even be in tension with each other.

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[276] *See id.* at 39. (Scalia, J., concurring in part and dissenting in part).

[277] SCHAUER, *supra* note 31, at 231–32.

[278] *See Neder*, 527 U.S. at 39–40; *see also* Apprendi v. New Jersey, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring) (discounting "bureaucratic realm of perfect equity" suggested by Justice Breyer's dissent but not arguing that that the jury might have come to a different conclusion than a judge would have). Not that Justice Scalia was allergic to purpose. He advanced one in *Neder* itself (even if he didn't think the purpose was served in the case) and in other cases on the jury right. *See Neder*, 527 U.S. at 39–40 (Scalia, J., concurring); *see also* Blakely v. Washington, 542 U.S. 296, 308 (2004) (Scalia, J.) ("[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.").

[279] *See Neder*, 527 U.S. at 17–18 (majority opinion).

[280] *Id.* at 28 (Stevens, J., concurring in part and concurring in the judgment) ("[T]his Court has not been properly sensitive to the importance of protecting the right to have a jury resolve critical issues of fact *when there is a special danger* that elected judges may listen to the voices of voters rather than witnesses. A First Amendment case and a capital case will illustrate my point." (emphasis added)).

[281] SCHAUER, *supra* note 31, at 131–34.

Are juries really better at finding facts than judges (which figured prominently in the majority's justification[282] but was lacking in Scalia's political one[283]), and are they less susceptible to political pressures than judges (which figured in both Scalia's and Stevens's justifications, albeit in opposing fashions[284])? Who knows? The answer might even depend on who is asking.[285]

The purpose of juries is many-faceted and it may be that no single theory justifies juries.[286] Perhaps because it cannot identify a particular justification for juries, the Court has consistently remained committed to the jury form *as a form* independent of the effect on outcomes in jury-rights cases, from *Strauder v. West Virginia*[287] in 1880 through the twenty-first century *Apprendi-Blakely-Booker* line of cases regarding the role of juries in the modern criminal sentencing system.[288] In all of those cases, the Court has relied on the Constitution's insistence of the jury form without requiring the defendant to articulate that the justification for the form was implicated in his particular case.[289]

Far from formalism in the sense of rigidity, acknowledging the independent value of form allows for the justifications for and meaning of forms to vary over time, circumstance, and perspective. In *Strauder*, for instance, the Court identified two separate harms

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[282] *See Neder*, 527 U.S. at 17–20 (majority opinion).

[283] *Id.* at 34 (Scalia, J., concurring in part and dissenting in part).

[284] *See id.* at 28 (Stevens, J., concurring in part and concurring in the judgment); *id* at 34. (Scalia, J., concurring in part and dissenting in part).

[285] It is also possible that we might want juries because of their ability to consider factors outside the facts or law in rendering their verdicts, *see* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 129–32, a justification whose contours would be particularly difficult to articulate since the sensibilities required might be very different in very different circumstances. Of course, that raises the question of why acquittals by judges receive similar finality. *See id.* at 132–35.

[286] *See* Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 321–23 (2005) (discussing numerous historical opinions on role and importance of juries).

[287] Strauder v. West Virginia, 100 U.S. 303 (1880).

[288] *See generally Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004); United States. v. Booker, 543 U.S. 220 (2005).

[289] *See Strauder*, 100 U.S. at 308; *Apprendi*, 530 U.S. at 500; *Blakely*, 542 U.S. at 308; *Booker*, 543 U.S. at 230.

(the inability to have members of the same race on one's jury and limitations on the right to serve on a jury) suffered by two separate individuals (the defendant and the prospective juror respectively), but required that neither harm be realized (there being no affirmative right for members of any particular race to serve on any particular jury) for there to be a violation.[290] *Strauder*'s insistence on the jury form opened up the possibility of a shift in the meaning of jury service—one that emphasizes the role in governance that jury service signifies and the implications of including different groups in that form of governance.[291]

C. *Formalism and Separation of Powers*

As the previous mention of bicameralism and presentment suggests, formalism can play (and has played) a prominent role in the field of constitutional separation of powers.[292] Why "formalism" should play an important role in separation of powers is something of a mystery. If "formalism" is a textual interpretive approach,[293] it

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[290] *Strauder*, 100 U.S. at 306–09; *see also* Batson v. Kentucky, 476 U.S. 79, 85–88 (1986).

[291] *See* Georgia v. McCollum, 505 U.S. 42, 48–49 (1992) (holding that racially motivated strikes by defense lawyers are constitutional violations in part because of political significance of jury service to jurors).

[292] *See* Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 IND. L.J. 665, 676 (2016) (describing "formalism's ascendancy" in separation of powers doctrine); Krotoszynski, *supra* note 20, at 1517–18; Lawson, *supra* note 14, at 859; Magill, *supra* note 21, at 1183; Strauss, *Foolish Inconsistency*, *supra* note 20, at 489–90; Resnik, *supra* note 172, at 675–76; Huq & Michaels, *supra* note 14, at 425; Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 449–50 (1991). As with many treatments of formalism and functionalism, though, it is easy to over-state the divide. *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998); Huq & Michaels, *supra* note 14, at 435.

[293] Krotoszynski, *supra* note 20, at 1527–28 ("Formalism relies on a kind of textualist analysis and places great structural weight on the Vesting Clauses of Articles I, II, and III."); Linda D. Jellum, *''Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 861 (2009) ("Formalism is, thus, a textually literal approach that relies primarily on the vesting clauses to define categories of pow-

is not clear why it would apply in a distinct way in the separation of powers context. Separation of powers cases do not present unusual interpretive challenges[294] (although there is a paucity of applicable text and the Court's determinations are difficult to reverse, the same is true of virtually any constitutional question). Liz Magill suggests that separation of powers cases present the rules/standards problem that Schauer treats under the rubric of formalism,[295] but again, it's not clear how separation of powers presents this problem in a distinct way, and I think formalism can be distinguished from rule-based decision-making in the separation of powers context as easily as it can in any other.[296] Yet formalism is acknowledged to be one of the two dominant approaches to separation of powers[297]—a primacy of position it enjoys in virtually no other area of legal thought.

The answer, I think, lies in the centrality of form to separation of powers debates.[298] The question in such cases is how to attribute power to the institutional forms defined in the Constitution rather

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er—legislative, executive, and judicial—and to identify the owner of each power."). Nor is the formalism of separation of powers particularly originalist.

[294] Manning, *supra* note 20, at 1947–50.

[295] Magill, *supra* note 21, at 1138; *see also* Huq & Michaels, *supra* note 14, at 355–56.

[296] The rules versus form distinction is readily apparent in the "formalist" position of attributing actions to branches. *See* Lawson, *supra* note 14, at 858 ("The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending."). That approach to applying the constraints of form is dependent on identifying the nature of a particular governmental action as either executive, legislative, or judicial, an inquiry that is about as rule-like as determining whether a particular act was "reasonable." *See* Magill, *supra* note 21, at 1141–42; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1238 n.45 ("The problem of distinguishing the three functions of government has long been, and continues to be, one of the most intractable puzzles in constitutional law.").

[297] Magill, *supra* note 21, at 1136 ("Among commentators there are two well-defined and competing positions: formalism and functionalism.").

[298] *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 853 (2014) (citation omitted) ("I focus here on formal or structural attributes of organizations, including agency design and assigned functions . . . . I limit my attention to these less subjective and more formalist, structural elements in order to gain some descriptive and predictive traction.").

than a substantive evaluation[299] of an act in comparison to a constitutional standard like "equal protection of the laws"[300] or "freedom of speech."[301] That is, separation of powers controversies are no more amenable to resolution by rule than other areas of constitutional discourse, but they are more closely tied to form than other areas of constitutional discourse. Formalism continues to matter in separation of powers debates because form matters in separation of powers debates.

Moreover, unlike in many contexts, formalism itself is not agnostic as to outcome in separation of powers cases. As Magill explains, applying formalism in separation of powers can "have dramatic practical consequences;"[302] adherence to the forms of the Constitution could place in question the existence of most of the administrative state.[303] Formalism's claim that form matters is also a claim that form *should* matter. It is a commonplace in the separation of powers debate that the innovations of the administrative state are at the very least in tension with governmental form as described in the Constitution, and so formalism is hardly neutral with regard to the existence of such innovations on constitutional form.[304] (How much it should matter is a question beyond the scope of my inquiry.)

But even with regard to institutions clearly falling within the constitutional forms—Congress, the executive, and the courts—formalism plays a major part in the debate. Magill describes both formalism and its purported opposite, functionalism:

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299 *See* Summers, *supra* note 44, at 256 ("The very subject-matter of rules establishing government structures is formal, in contrast to the content of the law created and administered by and through the system of government."); Eskridge, *Overriding*, *supra* note 16, at 405 ("Under formalist ideology, the Court's role in statutory interpretation is not to facilitate the dominant political coalition's evolving preferences, but to protect the formal structures of our democracy.").

300 *See* U.S. CONST. amend. XIV § 1.

301 *See id.* amend. I.

302 Magill, *supra* note 21, at 1140.

303 *Id*. at 1140–41; Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 494 (1987).

304 *See* Magill, *supra* note 21, at 1140.

> Among commentators there are two well-defined and competing positions: formalism and functionalism . . . .
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> . . . . [T]he structural provisions of the Constitution specify the type (legislative, executive, judicial) and place (Congress, President, Supreme Court) of all governmental power. The judge assessing the validity of an institutional arrangement must first identify the type of power being exercised and, unless one of the explicitly provided-for exceptions is relevant, make certain that that power is exercised by an official residing in the appropriate governmental institution.
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> . . . .
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> Formalism's competitor, functionalism, is likewise a set of postulates rather than a single precept. Where a formalist is committed to rule-based decisionmaking, a functionalist . . . would resolve structural disputes "not in terms of fixed rules but rather in light of an evolving standard designed to advance the ultimate purposes of a system of separation of powers." The agreed-upon "ultimate purpose" is to achieve an appropriate balance of power among the three spheres of government.[305]

Putting aside the rules and standards distinctions for the reasons outlined above, Magill's description of formalism in the separation of powers context tracks an understanding of formalism as commitment to form.[306]

Indeed, it is in separation of powers that one currently sees formalism taking a central role in the scholarship, being applied in

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[305] *Id.* at 1136–43 (footnotes omitted) (quoting Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231 (1991)).

[306] *See id.* at 1138–40.

at least two ways: First, formalist separation of powers decisions are generally more concerned with giving effect to the forms laid out in the Constitution[307] than with other considerations, such as convenience or giving effect to the justifications underlying those forms.[308] One can readily identify *Myers v. United States*[309] as more "formalist"[310] than *Morrison v. Olson*[311] because *Myers* produces a rule more closely tied to the forms described in the Constitution[312] than *Morrison*, which requires an analysis of the consequences of any particular limit on the President's power.[313] That is not to say that *Morrison* does not attempt to follow the Constitution, just that *Morrison* is more concerned with satisfying what it

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[307] *See* O'Connell, *supra* note 298, at 899–900 ("A formalist approach, which focuses on structural attributes in defining the constitutional boundaries among the three branches, would find many boundary organizations problematic.").

[308] Pildes, *Institutional Formalism*, *supra* note 21, at 2 ("This formalism consists of treating the governmental institution involved as more or less a formal black box to which the Constitution (or other source of law) allocates specific legal powers and functions."); *see also* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB POL'Y 13, 14–15 (1998) (answering any number of functionalist arguments in voice of Robert Bork saying, "That's not what the Constitution says").

[309] Myers v. United States, 272 U.S. 52 (1926).

[310] *See* Magill, *supra* note 21, at 1138 n.37 (listing cases that show that Supreme Court uses both "formalist and functionalist approaches").

[311] Morrison v. Olson, 487 U.S. 654 (1988).

[312] *See Myers*, 272 U.S. at 116 ("From this division on principles, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."). Even if one thinks that Chief Justice Taft's understanding of the relative powers of the three branches was incorrect (that the correct understanding of the "legislative" power includes with it the power to regulate removal of executive officers, *see id.* at 128), the analysis required is form-driven. *Myers* is itself a study in the distinction between formalism as an analytical tool and a methodology. Although the rule announced in *Myers* was formalist, *see id.* at 175–76, the analysis leading to that formalist rule, which was largely a combination of intentionalist originalism and consequentialism, was not.

[313] *Morrison*, 487 U.S. at 693 (expressing concern over whether a limitation "sufficiently deprives the President of control . . . to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws").

considers the principles served by the forms rather than the forms themselves.[314]

Second, formalist separation of powers approaches maintain that the forms described in the Constitution actually determine the answers in separation of powers cases.[315] The determinism of separation of powers formalism seemingly harkens to the Langdellian conceptualist formalism I've argued is a creature of the past,[316] but this "formalist" determinism is actually quite different. Whereas conceptualist formalism supposedly maintained that first principles provide an answer to every legal question without gap,[317] separation of powers formalism explicitly accepts the existence of gaps—gaps in power whose consequence is that a particular exercise of power is unconstitutional because it does not fit the constitutionally prescribed forms.[318] Indeed, if Magill's description of the functionalist approach (whether a particular assertion of power advances "the ultimate purposes of a system of separation of powers"[319]) is correct, it is functionalists who more closely resemble the Langdellian conceptualism of the past by suggesting that those "ultimate purpose[s]" are both identifiable and are capable of determining the outcomes in every case.[320] By relying on form rather than purpose, formalist approaches do not require that there be a conceptually complete understanding like an "ultimate purpose" un-

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[314] *See* Barnett, *supra* note 292, at 675–76 (describing *Morrison* as a "notable exception" to formalism that has dominated presidential removal decisions).

[315] *See* Magill, *supra* note 21, at 1139–42 ("When examining the validity of an institutional arrangement . . . a formalist would first have to determine what sort of power these entities or officers were exercising.").

[316] *See*, *e.g.*, Redish & Cisar, *supra* note 292, at 454 ("It is important to emphasize that formalism, as we employ the term, is not intended to imply imposition of rigid, abstract interpretational formulas derived from an originalistic perspective.").

[317] *See* Grey, *supra* note 104, at 7–8, 11 ("[T]he heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order.").

[318] *See* Lawson, *supra* note 14, at 859–60 (claiming that formalists find that "[a]ny exercise of governmental power . . . must either fit within one of the three formal categories thus established or find explicit constitutional authorization").

[319] Magill, *supra* note 21 at 1142 (quoting Merrill, *supra* note 223, at 231).

[320] *Id.* at 1142.

derlying the system laid out in the Constitution[321] because it is the forms, not the purposes of the Constitution that determine whether a particular power can be exercised by a particular part of the federal government.[322]

The separation of powers context, which in many ways is an inquiry into the consequences of form, is an attractive place to apply a reconsidered conception of formalism, and it is here that one indeed sees formalism seriously engaged by both sides of the debate. But if one truly engages formalism, the implications reach far beyond questions of process and separation of powers and certainly beyond its typical modern application in statutory and constitutional interpretation. Formalism has long been recognized as a way of thinking about law, although past debates have sought to limit it to either particular methodologies (in support of textualist and originalist claims) or readily refutable claims of complete determinacy and intentional ignorance of consequences (in support of realist ones), with both sides worried about the implications of formalism for ascertaining the substance of the law. If we are all indeed formalists (as I claim we are), it is appropriate to consider the implications of our formalism, implications of thinking about the form of law as distinct from its substance. When one steps aside from debates about formalism animated by concerns over the outcomes it purportedly leads to, we are free to see the true power of

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[321] Formalist separation of powers approaches have been criticized for relying on "workable distinctions among the three categories of governmental power," Magill, *supra* note 21, at 1141, which one could translate into similarly conceptually complete understandings of the difference between "executive," "legislative," and "judicial" power. *See id.* at 1139 (quoting Lawson, *supra* note 14, at 859–60); *see also* Barnett, *supra* note 292, at 711 ("Formalism is ill-suited for interpreting indeterminate text."). But that criticism of modern formalism is, like the Realist criticism of conceptualist formalism, a misplaced criticism of determinism, not formalism. Of course, as is the case with the modern anti-formalist critique, there is little argument that separation of powers formalism is comparatively *less* deterministic than its functionalist counterpart. The question of whether a prosecutor's function is "executive" is subject to more widespread agreement than whether a particular restriction on a particular officer is one that "sufficiently deprives the President of control . . . to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws." *Morrison*, 487 U.S. at 693.

[322] *See* Magill, *supra* note 21, at 1139–1140.

formalism as informing the content of law in ways distinct from case outcomes.

III. FORMALISM AND THE LANGUAGE OF LAW

Many are understandably consumed with formalism's role in controlling outcomes in legal disputes—for determining the substance of the law.[323] Most scholars (and hopefully all judges) seek approaches for their ability to determine outcomes, and students of formalism are no different. That was certainly true of the various approaches to formalism in the twentieth century debates. In the early, Langdellian orthodoxy, formalism provided a process for divining the common law.[324] The early realists attacked formalism in order to provide space for their more pragmatic approach.[325] The rise in the last half of the twentieth century of formalist methodologies like textualism and originalism were similarly driven by a desire to determine outcomes, albeit motivated by the desire to constrain judges rather than to realize some ultimate conception of law.[326] The late twentieth century realist/pragmatist response similarly attacked what it perceived as the formalism of textualism and originalism to provide discretion to judges to find better answers than could be found in the text.[327] Those twentieth century debates, concerned as they were about how formalism might drive outcomes, largely ignored formalism for its ability to understand law aside from outcomes.

Formalism does have a role in driving outcomes, but the power of formalism goes beyond outcomes. Formalism not only provides a way to identify law's content, it explains much of the meaning of

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[323] *See, e.g.*, Grey, *supra* note 104, at 5 (emphasis added) (describing "heart of the theory" as Langdell's idea "that through scientific methods lawyers could derive *correct legal judgements*").

[324] *See* Grey, *supra* note 104, at 5 ("Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts . . . .").

[325] *See, e.g.*, *id*. at 4–5.

[326] Scalia, *Rule of Law*, *supra* note 71, at 1176, 1184.

[327] *See*, *e.g.*, Chemerinsky, *Foundation*, *supra* note 10, at 206; Dorf, *supra* note 14, at 9–10; Farber, *Ages*, *supra* note 5, at 91; Posner, *supra* note 6, at 1157; Sunstein, *Empirically*, *supra* note 4, at 639.

law. Like rule-based decision-making, formalism requires the categorization of conduct, and that categorization has profound effects far outside the determination of cases.[328] The categorization that formalism requires establishes the language of law, a language through which the law expresses societal approval and disapproval of particular conduct.[329] That language (of social sanction and condemnation) affects the meaning of conduct far beyond the question of whether an individual will be held civilly or criminally liable.[330]

A. *Formalism's Role in Legal Decision-making*

Absent the demands of formalism, there would be no need for—indeed, no means by which to have—conversations about the law. As discussed above, because law is a shared enterprise, the content of the law can only be described through reference to its form.[331] Although our philosopher kings might be able to apply the law without reducing it to language, we cannot. If the form of the law determines the language we use to discuss legal concepts, the dictates of formalism control the conceptual language of law, and it is only through formalism that one can understand and realize the meaning of law, quite apart from the outcomes produced by law.

1. FORMALISM AND CATEGORIES

As Fred Schauer points out, rule-based decision-making is an exercise in generalization and, hence, categorization.[332] Rules gen-

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[328] *Infra* Part III.A.1. *See generally* SCHAUER, *supra* note 31, at 25–26, 10–12.

[329] *Infra* Part III.A.1.

[330] *Infra* Part III.B.

[331] *See supra* the text accompanying notes 47–51.

[332] SCHAUER, *supra* note 31, at 25–26; *see also* HART, *supra* note 2, at 123 ("All rules involve recognizing or classifying particular cases as instances of general terms."); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CALIF. L. REV. 1103, 1125, 1131–32 (2004) (describing cognition and categorization in law); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 593 (1989) ("[I]t is the essence of the judicial function to draw lines, because it is the essence of the judicial function to be governed by lines, the lines of the logical and analytical categories." (emphasis omitted)).

eralize by describing specific instances of conduct, such as the speed I happen to be driving, as either "over the limit" or "within the limit." On Main Street, both thirty miles per hour and ninety miles per hour are "over the limit" compared to the twenty-five mile-per-hour speed limit, and both eight miles per hour and twenty-four miles per hour are "within the limit." Both statements are true even though thirty is only one-third as fast as ninety and twenty-four is three times as fast as eight and whether I am an experienced NASCAR driver in a golf cart covered in pillows or a blindfolded inebriate driving a gasoline tanker. Conduct that looks quite different from some perspectives (even the limited perspective of dangerousness) is generalized by the twenty-five mile per hour speed limit as either "over the limit" or "within the limit."

In the course of generalizing, rules categorize. In the case of my speed example, the rule categorizes by lumping all speeds over twenty-five as "over the limit" and all speeds twenty-five and under as "within the limit" but also by evaluating my driving in terms of its speed. Before a rule can be applied to conduct, the conduct must first be categorized as subject to the rule[333]—in my case, speeding instead of blindfolded driving or drunk driving. Schauer, in his institutional approach to rule-based decision-making, describes this function of rules as "jurisdictional" in that the rule, by including some conduct as within the rule and some conduct outside it, establishes the scope of the conduct subject to any particular adjudicator and, hence, its jurisdiction.[334] In Schauer's institutional model, categorization both allows adjudicators to decide whether a rule has been violated and also allocates power between authors and appliers of law.[335] The categories both provide the rule of decision and remove some aspects of conduct from the purview of the adjudicator.

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[333] SCHAUER, *supra* note 31, at 24 ("Once we separate a prescriptive rule's factual predicate from its consequent, we see the factual predicate as a generalization . . . ."); *see also* Schauer, *Formalism*, *supra* note 7, at 534, 539–40 (on categories).

[334] *See* SCHAUER, *supra* note 31, at 231–32 ("[T]hus, the essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers.").

[335] *See id.* at 158, 231–232.

But, in addition to making it easier to decide cases or allocate power, the categorization that rules require has an another effect: it makes the categories themselves a relevant (or irrelevant) subject for law, and this is where formalism departs from rule-based decision-making. Formalism acknowledges that rules must appear in some form, and it is the form of those rules that controls the categories of conduct subject to legal regulation. Categorization is necessary for decision by rule, but it is not the same as decision by rule. Before we can evaluate whether I'm exceeding the speed limit, we have to agree that my speed is what is relevant rather than whether I am blindfolded or drunk.

And it is the form of the rule that sets the categories. It is the traffic safety rule's form as a speed limit that dictates an inquiry into a single attribute of my driving—how fast I am driving—as opposed to an open-ended inquiry as to whether my driving is likely to result in some social harm. Conversely, if we phrase the inquiry as whether I am driving the car "well," we don't know whether we're having a conversation about how fast I am driving, whether I have avoided hitting other cars or pedestrians, or whether I am driving with panache. Categorization limits the conversation to one about speed, drastically constricting the range of arguments relevant to whether I have violated the applicable law.

It is again tempting to revert to rules rather than form, but the act of categorization is driven by the rule's form, not by the degree to which a particular mandate is either rule-like or standard-like. Form can limit arguments without setting a rule that determines outcomes. The inquiry into whether I am driving "too fast" is of a more limiting form than the inquiry into whether I am driving "well" because it requires me to ignore some aspects of "well" that are irrelevant to my speed, such as whether I am blindfolded. The form of the inquiry is a limitation on available arguments even though "too fast" (like "well") more closely resembles a standard than a rule. Even among standards, form has power. Tort law's categorization of conduct as "reasonable" and "unreasonable" suggests a different comparison between actors than if the law had

settled on "cautious" or "thoughtful" as the standard for avoiding liability in a negligence action.[336]

Recognizing the power of form to categorize presents an additional challenge to the anti-formalist critique, which is centered largely on formalism's inability to provide what critics consider to be suitably determinative outcomes.[337] That is not to say that form is irrelevant to outcomes; it certainly is. Under the common law forms of action, failure to satisfy the form dictated by a particular writ necessarily led to the lack of a remedy: the forms dictated by the writs dictated the substantive law.[338] But the force of law is not only its determinations, it is also in the categories we use to talk about whether behavior is an appropriate subject for the legal system in the first place. In order for critics of formalism to complete their case, they need to recognize and answer this second strength of formalism over other methods of legal inquiry, particularly realism, which provides answers without need or benefit of clear categories.[339] Focused as it is on outcomes, the realist critique generally ignores the effect of law on argumentation—that arguments are either included or excluded from consideration, not by virtue of the substance of the law, but by its form.[340] Llewellyn was more right than he knew when he explained that "to classify is to disturb."[341]

It is not that outcomes are irrelevant, but it takes little imagination to visualize how different our legal system would be if outcomes—even identical outcomes—were dictated by notions of justice unencumbered by the necessities and inconveniences of form. Such "rule of law" concerns are at the root of much of the formalist enterprise; they certainly were for Justice Scalia when he declared, "Of all the criticisms leveled against textualism, the most mindless is that it is formalistic. The answer to that is, *of course*

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336 *See* BEEVER, *supra* note 129, at 253–54.

337 *See supra* Part I.B.3.

338 Subrin, *supra* note 165, at 914–16.

339 *See id.* at 1001 (discussing how realism "became skepticism about any type of legal categories and definitions").

340 *See id.*

341 Llewellyn, *supra* note 98, at 453. Llewellyn did not seem to notice that his response—to continually adjust the "*received* categories," *id*., based on new information—was no less a disturbance than the "received" categorization he resisted.

it's formalistic! The rule of law is *about* form . . . . Long live formalism! It is what makes us a government of laws and not of men."[342] It is not the social optimality or political legitimacy of legal outcomes that distinguish law from majority vote or brute force, it is law's reliance on form and what that form requires of legal actors in the course of generating those outcomes. Formalism does not reject the possibility of any particular outcome; it rejects the possibility of philosopher kings. Any evaluation of formalism must include in its calculus the value that form contributes to the process of generating outcomes, not just the outcomes that the process generates.

2. DETERMINACY VS. THE DELIBERATIVE PROCESS

Even if formalism's categories do not always lead to definite outcomes, they nevertheless shape the deliberative process. Such has been the experience of both the Due Process[343] and Equal Protection Clauses[344] of the Constitution. Equal protection, in particular, has faced a troubled history despite the fact that all can agree on the nature of the equality inquiry[345]: that it is a comparative one. This is so because the equality comparison lacks any meaningful and widely agreed upon form[346] and therefore lacks workable categories for analysis;[347] there is nothing inherent in the concept of "equality" to tell us what is relevant or irrelevant in any particular

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342 Scalia, *Common-Law Courts*, *supra* note 11, at 25 (emphases in original).

343 U.S. CONST. amend. V; *id.* amend. XIV § 1.

344 *Id.* amend. XIV § 1.

345 *See, e.g.*, Derek W. Black, *The Contradiction Between Equal Protection's Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It,* 15 WM. & MARY BILL RTS. J. 533, 534–36 (2007) (explaining that question of "what is means to deny someone equal protection under the law" has a complex history, especially with regard to racial discrimination).

346 In this regard, one can also compare the history of procedural due process, which deals with a relatively small, closed set of procedural forms, with substantive due process, which deals with a limitless, open set of substantive ones.

347 *See* Black, *supra* note 345, at 534 ("The predominant meaning [of equal protection under the law] at any single time has often been more of a reflection of the cultural context than of an inherent legal principle.").

application of the "equality" comparison.[348] But it would be a mistake to consider the Equal Protection Clause, or equal protection doctrine, a failure for its inability to land upon a widely shared and readily applicable rule for determining when the protection of the law is equal enough for the Constitution.

The value of the rule requiring "equal protection of the law"[349] is not primarily in its ability to determine outcomes in cases, it is in the form it gives to the deliberative process. The Equal Protection Clause explicitly rejects arguments from inequality (that I should receive a benefit in order to preserve inequality or that a new inequality should be created to benefit me) and renders irrelevant a variety of other arguments that do not sound in equality (such as, that I should receive a benefit if doing so increases net social welfare). Even if the Equal Protection Clause is a failure at determinatively classifying conduct, it is a comparatively modest success by requiring adjudicators to categorize arguments by their connection to equality. The Equal Protection Clause does generate outcomes that themselves shape society,[350] but more important than the individual outcomes (America is a fundamentally different place because whites and blacks go to public school together;[351] it is not clear that America is a fundamentally different place because Oklahoma can regulate opticians differently than optometrists[352] even though both outcomes are the product of the Equal Protection Clause) is that the Equal Protection Clause's mandate is instantiated in the form of a rule of equality. Relying on the form "equality" encourages legal actors to make arguments in terms of equality and

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[348] SCHAUER, *supra* note 31, at 227 (noting lack of a social understanding of "equality" sufficient to provide its legal meaning); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) ("Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.").

[349] U.S. CONST. amend. XIV § 1.

[350] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (finding state laws establishing racial segregation in schools to be unconstitutional).

[351] *Id.* at 494–95 (1954); Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954).

[352] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486, 491 (1955).

requires courts to explain their decisions in terms of equality.[353] By adopting the form "equal protection,"[354] the Constitution injects equality into the deliberative process and does so even in cases in which equality provides little guidance as to the right outcome. Even if equality's indeterminacy renders it unattainable in practice, we can all agree that the quest for "equal protection of the laws"[355] remains important.

The Constitution is not the sole locus of American aspiration, but it is an important one,[356] and equality is included among its values by virtue of the form of the Equal Protection Clause. A similar mandate requiring states to treat all citizens with "fairness" or in accordance with the "law of the land"[357] (or simply afford them "due process of law"[358]) might drive courts to similar outcomes but would structure the deliberative inquiry, and the terms of debate, completely differently. That equality enjoys the position of prominence it does in American constitutional discourse is the product of the form of the Equal Protection Clause.

3. FORMALISM AS INFORMATION FORCING

This is all a rather long way of saying that formalism's value is not in avoiding the indeterminacy and, hence, discretion that Hart himself identified exists in hard cases;[359] it is to enable us to distinguish those cases when discretion is being applied from those that it is not and to distinguish different kinds of discretion from each other. A judge applying a speeding law can credibly claim she is not exercising discretion; a judge applying a reckless driving law less so. A judge who finds my driving "reckless" has taken for her-

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353 *See, e.g.*, *Brown*, 347 U.S. at 492–95 (providing an example of "equal protection" analysis encouraging equality and discouraging inequality).

354 U.S. CONST. amend. XIV § 1.

355 *Id.*

356 H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 2D 369, 372–73, 378–79 (2006).

357 Nachbar, *supra* note 156, at 1639–40.

358 *Compare* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking same-sex sodomy law for lack of "legitimate state interest" as due process violation), *with id*. at 580 (O'Connor, J., concurring in the judgment) (finding an equal protection violation).

359 HART, *supra* note 2, at 127–28.

self more authority than one who finds it "over the limit." Similarly, when the legislature displaces discretion with rules (such as by setting a numerical blood alcohol limit for drunk-driving violations), it allocates authority away from judges. If rules operate to allocate discretion away from adjudicators to authors, formalism allows us to identify whether such an allocation has taken place—it requires both authors and adjudicators to account for allocations of authority within the legal system.

4. FORMALISM AND COMMUNICATION

By emphasizing forms over substance, formalism allows the debate to move up a level of abstraction—from discussion about individual outcomes to the rules that lead to those outcomes. This happens at a basic level whenever a court announces not just the outcome of a case but also the rule that generated the outcome. Outcomes ("the lower court ruling is affirmed" or "the case is remanded with an instruction to enter judgment for appellant") do little to guide behavior; it is the rule announced in a particular case that provides that guidance.[360] Rules categorize,[361] and the form the rule takes drives that categorization. Thus, while formalism is not the same as rule-based decision-making,[362] it is essential to talking about the rules being applied in a system of rule-based decision-making. Just as it's hard to compare two tables without talking about attributes of form,[363] it's hard to talk about two rules (or apply one) without discussing the form they take.

B. *Formalism and the Expressive Function of the Law*

Law's power to communicate has been the focus of much work on the "expressive function" of the law.[364] According to expressive theories, law not only affects behavior by setting sanctions, behav-

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[360] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 808 (1982).

[361] *See supra* Part III.A.1.

[362] *See supra* Part I.A.2.

[363] *See* Weinrib, *supra* note 8, at 958–59.

[364] *See generally* MCADAMS, *supra* note 34, at 1–9; Anderson & Pildes, *supra* note 34, at 1503 (providing an overview of expressive theories of practical reason and then arguing that law is expressive in nature).

iors change according to the message those sanctions convey.[365] For instance, imprisonment and fines operate on society differently; the form of a sanction alters its meaning,[366] and different rules can have different "expressive dimensions."[367] Laws alter social norms by altering the meaning of behavior.[368] According to expressive theories, law not only regulates, it communicates.[369]

As described above, that communication occurs more through the form of law than through its content. The point is intuitive with regard to the criminal law. If particular conduct is recognized as socially undesirable, it can be addressed any number of ways. If cars driven quickly are dangerous, we can exclude cars from a particular location (like a pedestrian mall), prohibit the selling of cars capable of exceeding twenty-five miles per hour, provide subsidies for public transportation, build bike lanes, punish speeders, or outlaw other activities that combine with speed to make cars more dangerous, such as texting while driving. Even if each choice equally reduces the number of car-related injuries, it does so in different ways, and those differences dramatically affect the social meaning of the underlying conduct. Those differences are realized by the form of the rule used to effectuate the social goal. The point is exaggerated in the distinction between subsidizing public transportation and a criminal prohibition on texting, but the same difference in expressive content is presented in the choice to interpret two different criminal rules. Suppose two possible choices for outlawing texting while driving: a statute that criminalizes texting while driving or a judicial interpretation of the reckless driving statute to include texting while driving as "reckless." A statute outlawing texting while driving carries different meaning than defin-

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365 MCADAMS, *supra* note 34, at 136–38; Feinberg, *supra* note 34, at 400; Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 371–72 (2000).

366 Kahan, *supra* note 34, at 620.

367 Hellman, *supra* note 34, at 3 n.10. The expressive dimension of a rule is distinct from the effect that the rule's substance has on behavior. Compare *id*. *with* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 946–47 (1995) (on "social meaning" of rules).

368 Sunstein, *Expressive Function*, *supra* note 34, at 2024–25.

369 *Id*. at 2050 ("For law to perform its expressive function well, it is important that law communicate well.").

ing texting while driving as "reckless driving," and those differences stem from differences in the form of the mandate, even if the punishment for texting while driving is identical to that for reckless driving.

The same is true for the inclusion of conduct within the legal system at all. Waging war against the United States subjects one to lethal targeting by U.S. armed forces, but it is also punishable as treason if done by someone who owes allegiance to the United States.[370] Although it is conceivable that the threat of a treason conviction provides additional deterrent to those citizens considering waging war against the United States, reliance on the criminal form also conveys American society's view that those who owe allegiance to the United States have a distinct duty not to wage war against the United States;[371] a duty that is not conveyed by a more extreme sanction (lethal targeting, essentially death without legal process) delivered in another form (as the product of armed conflict).[372] Treason's "wrongness" is communicated by its criminality in a way that lethal targeting does not. The same is true of America's drug laws, which not only seek to solve the problem of drug abuse but to convey a message about drug use through the choice of means for doing so.[373]

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[370] 18 U.S.C. § 2381.

[371] Carlisle v. United States, 83 U.S. (16 Wall.) 147, 155 (1873). On the Framers' problematical relationship with treason, see Cramer v. United States, 325 U.S. 1, 8–12 (1945).

[372] The same is true of terrorism (punishable under Title 18), although terrorism can exist outside the context of armed conflict and so does not present the same equality of opportunity for resolution by legal or military means. As a practical matter, though, the United States considers itself to be in an armed conflict with any number of organizations that employ terrorism, (including both al Qaeda and the Islamic State of Iraq and Syria), which means terrorists participating on behalf of either organization subject to three different actions: (1) criminal conviction, 18 U.S.C. § 2332; 10 U.S.C. § 950t(2); (2) lethal targeting, *see* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); or (3) to the extent they present a continuing threat to the United States, detention without trial, *see* Exec. Order No. 13567, 3 C.F.R. § 227 (2011). Defining terrorism as a crime has as much to do with applying the criminal form to terrorism as it does with either deterring or incapacitating terrorists.

[373] *See* 21 U.S.C. § 801.

And what is true of substance is doubly true of procedure, which, as described above,[374] is explicitly tied to form. The Sixth Amendment's situation of juries as criminal adjudicators communicates a message about the relative role of judges and juries, even in cases in which either would reach an identical result,[375] and even if, as the debate between Justices Scalia and Stevens in *Neder* shows, the content of that message is not perfectly clear.[376]

Although formalist approaches do not necessarily account for all of these expressive influences of form, formalism itself provides the intellectual space to do so by distinguishing the form of a rule from both its content and its justification. It is only by considering the forms of law separately—as distinct from driving particular case outcomes—that we can appreciate all of the ways that forms control how we talk about and consequently think about law. Law's form influences behavior and social meaning apart from the degree to which rules of a particular form instantiate their underlying justifications.

CONCLUSION

Formalism has a long history in American legal thought, serving a primarily antagonistic role in both historical and modern debates.[377] But the arguments over formalism made both in support of formalist methodologies and in derision of them has blinded many to its deeper meaning. Many criticisms of formalism—both historical and modern—are really criticisms of the possibility that law can be perfectly determinative, a question that is not presented any more centrally by formalism than by other forms of legal thinking. Holmes, for instance, embraced formality while rejecting the determinism of legal conceptualism.[378] To the extent that the attack on formalism is motivated by concerns about its determina-

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374 *See supra* Part II.B.

375 *See* U.S. CONST. amend. VI.

376 *See* Neder v. United States 527 U.S. 1, 28 (1999) (Stevens, J., concurring in part and concurring in the judgment).

377 *See* TAMANAHA, *supra* note 23, at 1–3.

378 *See* Grey, *supra* note 104, at 44 ("[G]eneral principles do not decide concrete cases."(quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

cy,[379] those criticisms are misguided, at least as to formalism as practiced today, which is predicated not on determinacy but rather on the inherent indeterminacy of law. Another typecast villain, *Lochner v. New York*, unites critics of formalism of all stripes by its purported claim to deterministic simplicity.[380] I think such claims are overstated, but *Lochner* (and the criticism it has attracted over time) provides a good vehicle for distinguishing determinism from formalism, since *Lochner*, while possibly falsely deterministic, was hardly formalist.

It is possible to derive from all the heat and light that formalism has generated a definition of formalism that serves not only its followers but its critics: as commitment to form in legal discourse. "Commitment to form" may seem like a fairly weak place for a movement as widely and hotly debated as formalism, but attention to form can have considerable consequences. Formalism is not agnostic to the effect of those forms—formalism is an argument to apply the forms of law in preference to deducing the justifications represented by those forms and attempting to apply those justifications directly. Others have already covered much ground in discussing how paying attention to particular forms (especially text in both its present and original meanings) can drive outcomes,[381] but formalism is much broader than textualism or originalism: it is a claim about the role of form more generally and includes arguments about form not specific to text, including claims about the structure and source of legal materials, claims that resonate in positivist legal thinking. In addition to its contribution to understanding substance, formalism allows for the independent value of form and provides a lens through which to realize meaning in law unrecognized by non-formalist methodologies. Hardly an exercise in rigid thinking, formalism allows for nuance that cannot be captured by considering law as a system that simply produces legal outcomes.

In the end, formalism is the product of acknowledging that law's meaning can only be revealed through its forms. Consequently, it is the forms of law that control the terms by which we understand and discuss the law; it is the forms of law that provide

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379 *Id*. at 39–40.

380 *See supra* Part I.B.2.

381 *See supra* Part II.A.

the language of the law. The categories required by law's forms effectively label conduct, not only as "legal" and "illegal" (which are outcomes) but also as within or outside of legal review. The forms of our legal rules drive not only our thinking about legal questions, but also capture society's aspirations, even for questions not readily subject to legal determination.[382] By acknowledging the power of the form of law, formalism offers a richer understanding of law as an act of communication. In addition to prescribing and proscribing conduct, forms of law express social values, and formalism is an approach unique in its ability to account for these widely varying roles of form.

That is not to say that that accounting is complete. Saying that to ignore form is to miss much of the value of the law does not answer the question of what role form should serve in any particular context. I have offered only a rudimentary start on that enterprise. By reclaiming the mantel of "formalism" from its role as both weapon and target and by identifying how it can provide a unique perspective on law, we can reboot old debates over formalism—to retake formalism from its place as an epithet and allow it to serve as a vehicle for inquiry into the role and value of form in the legal system.

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[382] *See supra* Part III.B.