4 The United States: A Government of Life?

> "Here is action untied from strings
> necessarily blind to particulars and details
> magnificently moving in vast masses."
>
> Walt Whitman, *Leaves of Grass* (1855) 1

4.1 Introduction

1870 was a year marked by several births that would have a significant impact on the American scholarly profession: Roscoe Pound and Benjamin N. Cardozo were born, the same was – more or less – Oliver Wendell Holmes's legal theoretical scholarship,[452] and at Harvard University, Christopher Columbus Langdell gave birth to the so-called "case method" as a way of teaching law. The case method would spread to other universities and become a lasting feature of American legal education, but apart from that, Langdell has by many been portrayed as the chief representative of an orthodox, sterile legal thinking (even though this picture is, as we will see, not wholly uncontested). Holmes and Pound, and to some extent Cardozo, on the other hand, are gener-

452 Holmes's (unsigned) 'Codes, and the Arrangement of the Law', (1870) 5 AM. L. REV. 1 was not his first publication, but it contains his perhaps first famous legal theoretical quote: "It is the merit of the common law that it decides the case first and determines the principle afterwards." It has been considered his "first major essay", cfr. Thomas C. Grey, 'Langdell's Orthodoxy' in Thomas C. Grey, *Formalism and Pragmatism in American Law* (Brill 2014) 46, 46. Around 1870 was also the time when Holmes, according to his biographer, embarked upon his "proving years" and decided to go into "the solitude of the thinker", cfr. Mark DeWolfe Howe, *Justice Oliver Wendell Holmes. The Proving Years, 1870–1882*, vol. II (The Belknap Press 1963), quote taken from 4.

ally seen as the first shepherds that would start the process of leading American legal scholars onto a new path.

If we fast forward to the years around the turn of the century, Langdell passed away, the development of Holmes's legal scholarship came – again more or less – to an end with his famous article 'The Path of the Law', combined with his advancement from State to Federal Supreme Court Justice, while Pound's sociological jurisprudence was being developed through a number of articles. In these 30 years or so, the American society had left the Reconstruction period and the Gilded Age, and entered the Progressive Era. Both the society at large and the legal system had been through considerable changes in various fields: the American population had doubled, the number of law schools tripled, and the number of law students increased almost fivefold.

The idea in the following is basically the same as in the previous chapter: In order to understand the theoretical debates within constitutional scholarship, it is necessary to start with a closer look at important developments within the American society and the legal system in the period leading up to the turn of the century (section 4.2). Then, section 4.3 will continue with an analysis of the critique that followed in the first decades of the 20th century. This section will include overviews of the legal thinking of Oliver Wendell Holmes (4.3.1), Roscoe Pound (4.3.2), Benjamin N. Cardozo (4.3.3), and Felix Frankfurter (4.3.4.), before I will give an overview of the context of legal realism (4.3.5.) and then proceed to an analysis of two of the most famous legal realists, Karl N. Llewellyn (4.3.6) and Jerome Frank (4.3.7). Finally, I will have a brief look at the idea of a "living constitution" and the much-debated issue of the "constitutional revolution" in 1937 (4.3.8).

4.2 The backdrop: The United States in an age of transition, 1870–1900

4.2.1 Industrialisation of society and modernisation of the legal system

"Out of timber so crooked as that from which man is made, nothing entirely straight can be built", Immanuel Kant once famously remarked.[453] This assertion is at least apt for the history of the United States. Felix Frankfurter (cfr. Section 4.3.4) noted in 1933 that "[f]oreigners are fond of calling this the land of paradoxes."[454] He was right. If one looks at the final decades of the nineteenth century, there were a number of contradicting movements, action and reaction, and opposing tendencies in the American society: commitment to the improvement of the freedmen and black peoples' situation in general following the Civil War, yet widespread blatant racism;[455] the ideal of a small-scale economy based on free competition, yet increasing corporative centralization and monopolization; a growing acknowledgment of the need for public regulation, yet a deep hostility towards governmental intervention; a strong emphasis on localism and self-government, yet increased power on the hands of the federal government; and a

453 Immanuel Kant, 'Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht' (1784), here quoted from and translated by Isaiah Berlin, *The Crooked Timber of Humanity. Chapters in the History of Ideas* (Henry Hardy ed, Pimlico 2003) V.

454 Felix Frankfurter, 'Social Issues Before the Supreme Court', (first published in 1933, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 286, 299.

455 The ambivalence in terms of racial equality is embodied in the infamous Supreme Court judgment in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Here, the Court upheld a law passed by the state of Louisiana which stipulated that railway companies should provide "equal but separate accommodations for the white, and colored races".

firm belief in individualism, yet a tendency towards collectivization of labour relations.[456]

But in the economic sphere, one trend was unequivocal: the increasingly industrialized economy was growing rapidly. Notwithstanding the economic depression that hit the United States, just like Germany, in 1873, the annual per capita gross national product more than doubled between the 1870's and the first decade of the 1900's.[457] An important driver – literally speaking – for this growth was the railroad, which made it possible to transport raw materials, people, and goods over vast distances.[458] Yet the railroad visualized the Janus-faced reality of industrial capitalism; in the 1890's, it killed between 6,000 and 7,000 people and injured 30,000 to 45,000 per year. The railroad was perhaps the dominant issue in administrative and regulatory law, tort law, and corporation law in the second half of the century.[459] The significance of the railroad issue is demonstrated by the fact that the first federal regulatory agency, the Interstate Commerce Commission (ICC), was established in 1887 to regulate transportation rates.[460] Another sign of the economic developments and its transformative social effects was the growth of large-scale corporations. The trusts emerged in the 1880's, with Standard Oil as the first one in 1882, and later came the holding companies.[461] Furthermore, the period saw a drastic intensification of labour conflicts, with major strikes in 1877, 1886, and the early 1890's.

456 For an overview, see Morton Keller, *Affairs of State. Public Life in Late Nineteenth Century America* (The Belknapp Press 1977). The tendency of contradicting trends is pointed out several places, see e.g. summaries on 85, 162, 289, and 409.

457 *Ibid.* 371 with further references.

458 On the railroad as "the age's symbol of mechanization and of economic and political change", see Alan Trachtenberg, *The Incorporation of America. Culture & Society in the Gilded Age* (Hill and Wang 1982) 57 f.

459 Keller (1977) 402 and Friedman (1973) 389.

460 Keller (1977) 429 considers the agency to be "a milestone in the late nineteenth century effort to impose some restraints on an industrial economy of frightening scale and power." Horwitz (1992), *The Transformation* 216 describes it as "the first institutionalization of the regulatory state".

461 For the developments, see Horwitz (1992), *The Transformation* chapter three, in particular 80–85; Keller (1977) 431 f.

The importance of these and other developments was that they challenged some widely held conceptions in American society. The centrifugal forces of industrial capitalism called into question the possibility of a decentralized small-business economy. The concentration of power also resulted in grossly unequal bargaining power between employers and employees, a development that would have implications for the classical views on freedom of contract. Furthermore, increased communication and trade across the state borders called for coordination and harmonization, ultimately something that the federal government would have to ensure.[462] And faced with the many dark sides of industrial production and urbanization, the need for public control and regulation became more pressing.

And indeed, the government *did* struggle in the second half of the 19th century to regulate railroads, insurance companies, public utilities, occupational licensing, and labour relations, as well as to protect society by adopting a number of public health related laws.[463] The Interstate Commerce Commission is already mentioned, and well known is also the Sherman Antitrust Act in 1890, which was an attempt to combat monopolization and restraint of trade. Writing in 1889, Thomas M. Cooley, the chairman of the ICC and, as we will see later, an influential constitutional scholar in the period, had the following impression, which is worth quoting at length:

> The power to regulate interstate commerce when the constitution was adopted had so little immediate interest that it scarcely afforded occasion for the slightest forensic discussion. How is it to-day? The application of steam to locomotion and of electricity to correspondence has worked relatively as great a change in government as it has in the industrial world; it is the federal government, whose functions at first concerned the citizen in his private relations

462 On this, see Keller (1977) 419.

463 See Lawrence M. Friedman, *A History of American Law* (Simon and Schuster 1973), part III, chapter V. The increased number of bills that were introduced in Congress, as well as the specialisation of congressional committees, are testimonies to the developments, see Keller (1977) 300 and 304–305.

> so remotely, which now through its control over internal and external transportation, its cheap and rapid postal service, its taxes that reach us all and reach us often, its absolute control of the currency, and the not remote probability that it may grasp with its unquestionable powers still other subjects which constitute public conveniences; it is the central government rather than the State that now seems to stand before the people as the chief representative of public order and governmental vigor, and as the possessor of general rather than of exceptional and particular powers.[464]

In short, from looking at the government and law as "ways to unleash the capacity of the nation" before the Civil War, the government was now seen more as "regulator and trustee".[465] With higher ambitions for governmental regulation, there was also a need for professionalisation of the growing bureaucracy. In this regard, the Civil Service Reform Act of 1883 was important, as it stipulated that positions within the federal civil service should be awarded based on merits. The federal bureaucracy increased from 51,000 employees to 100,000 between 1871 and 1881.[466]

As the 19th century came to a close, some of the tensions that had built up over the last decades were unleashed in the Progressive Era. The years up until the First World War were marked by forward-oriented reformism and progressivism, revolving – as in many other industrialized countries – in particular around social politics and the "labour question".[467] The progressives even entered the White House, with Theodore Roosevelt as president from 1901 to 1909 and Woodrow Wilson from 1913 to 1921. From a constitutional perspective, Roosevelt's opposition to state courts that hampered social legislation is of par-

464 Thomas M. Cooley, 'Comparative Merits of Written and Prescriptive Constitutions' (1889) 2 HARV. L. REV. 341, 355.

465 Friedman (1973) 297.

466 See Keller (1977) 239.

467 For an overview, with strong emphasis on the international dimensions of progressivism, see Daniel T. Rodgers, *Atlantic Crossings. Social Politics in a Progressive Age* (The Belknap Press of Harvard University Press 1998) in particular 52–75.

ticular interest. In his (unsuccessful) run for presidency in 1912, he even made it a part of his campaign that the people should have the opportunity to overturn State court judgments that struck down reform legislation.[468] Wilson, for his part, had as a political scientist put forward an organic constitutional theory. He presented this as an alternative to a Newtonian-mechanistic theory based on checks and balances, contending that "[n]o living thing can have its organs offset against each other as checks, and live." For Wilson, "[l]iving political constitutions must be Darwinian in structure and in practice."[469]

But progressivism was not confined to the field of politics. The years around the turn of the century was also a period of academic avant-gardism. The pragmatism of William James was already mentioned in the introduction to this book; in addition, one finds figures such as the sociologist and economist Thorstein Veblen, the philosopher John Dewey, and the historians James Harvey Robinson and Charles A. Beard – the latter famous for his *An Economic Interpretation of the Constitution of the United States* from 1913. The historian Morton G. White has pictured these scholars, in company with Oliver Wendell Holmes, as "revolting against formalism" in their respective fields. According to White, they were "convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life."[470]

This, then, was the political and intellectual environment – the life – that surrounded the legal community around 1900. They were influenced by the dominant progressivism and became, seen from a posterior perspective, part of progressivism themselves. But they also

468 Theodore Roosevelt, 'The Right of the People to Rule' (address delivered 20 March 1912, Carnegie Hall, New York, available at <https://www.americanrhetoric.com/speeches/teddyrooseveltrightpeoplerule.htm> (accessed 7 September 2024).

469 Woodrow Wilson, *Constitutional Government in the United States* (lectures delivered in 1907, Columbia University Press 1917) 56–57.

470 White (1949) 11. See similarly the overview in Kalman (1986) 14–16 of functionalism as a broad intellectual phenomenon in the social sciences.

stood with one foot planted in the legal system, a legal system that had undergone profound changes in the late 19th century.

The legal system had, more precisely, tried to adapt to the more general modernization of society during the 19th century. In 1848, the State of New York had enacted a new Code of Civil Procedure. The Code abolished the centuries-old common law system of different forms of action and introduced a much more simplified procedure for litigation. For business, it was important to have a well-functioning and attractive court system that could handle an increased number of disputes that followed with the growing market economy. Over the next decades, other states would adopt similar procedural reforms.[471]

There was a movement for codification of the private law as well, but this was in general unsuccessful. The traditional common law persisted, which meant that law was still to a great extent developed by the courts. Yet an inherent challenge in the American legal culture was how to ensure the legal unity of the common law within a multijurisdictional system of different states.[472] Added to this was an immense growth in the number of published judgments, especially as West Publishing Company began to publish volumes of case law reporters successively from 1879, something that made it increasingly difficult for legal actors to try to keep up with the overwhelming case law.[473] In 1897, West published a fifty-volume digest where references to more than 500,000 cases were ordered thematically, and the company also indexed the cases with a key-number system. Moreover, another company introduced the Citator system in 1873, which provided an overview of all citations made to different cases. These were mitigating factors, but for the legal profession, both the dismantling of the common law

471 See Friedman (1973) part III, chapter III on the procedural reforms.

472 See Twining (1985) 6–7.

473 Writing about case law in common law England in 1913, Eugen Ehrlich compared it to "a tropical jungle, where the lost traveller is threatened by surprises and danger at every new tree he sees", see Ehrlich (1929) 238. James Bryce wrote in 1907 that "[t]he Common Law is admittedly unsymmetrical. Some people might call it confused, however exact may be the propositions that compose it." The latter quote is taken from Tamanaha (2010) 26.

system of forms of action that they were used to and the constant flow of new cases, led to a need for reconciliation of conflicting cases, re-systematisation of the law, and a search for general principles.[474] The following prediction made by the legal scholar John Chipman Gray in 1909 illustrates the mood:

> The enormous number of judicial decisions, and the rapidity in their rate of increase, has been so great as to indicate that the function of the jurist will rise more and more in importance in the Common Law, from the mere fact that the mass of material will become too great for any one to cope with it all, and that it can be dealt with only by systematic study directed to particular parts.[475]

Similarly, Benjamin N. Cardozo noted dryly in 1924 that "[t]he fecundity of our case law would make Malthus stand aghast" and that "[t]he perplexity of the judge becomes the scholar's opportunity."[476]

Another by-product of the modernisation and increased complexity of the American society and legal system was a growing need for lawyers. The number of lawyers grew from approximately 22,000 in 1850 to 60,000 in 1880, and 114,000 in 1900.[477] From 1870, lawyers started to organize in state and federal bar associations (the American Bar Association was founded in 1878), and particularly after 1890, there was a tightening of admission requirements to the bar. The increased demand for lawyers affected, in turn, the educational system. Up until around 1850, most lawyers had received training in private law offices or were self-educated. The number of law schools increased from 15 in 1850 to 31 in 1870 and to 102 in 1900. In 1870, there were 1,611 law

474 See Horwitz (1992), *The Transformation* 11 f. and 200–201; Wiecek (1998) 88. See also Tamanaha (2010) 33–36 on the legal uncertainty resulting from the growth of published cases, and how it fuelled demands for codification.

475 John Chipman Gray, *The Nature and Sources of the Law* (first published 1909, reprint of second revised edition by Roland Gray from 1921, Columbia University Press 1972) 280

476 Benjamin N. Cardozo, *The Growth of the Law* (first published 1924, reprinted in *Cardozo on the Law,* The Legal Classics Library 1982) 4 and 6.

477 Friedman (1973) 549.

students, a number that had risen to 7,600 in 1894.[478] But the scientific level of the universities was poorly developed in the common law tradition. In 1846, an English committee set up by the House of Commons had stated that "no Legal Education, worthy of the name, of a public nature, is at this moment to be had" in either England or Ireland.[479] The same was true for the United States. When the above-mentioned Christopher Columbus Langdell arrived at Harvard in 1870, he wanted to do something with this. He tried to reform the didactical methods by introducing the case method and a new genre of case-books, that is, compilations of cases. Langdell's reform at Harvard also included stricter admission criteria, a requirement of three years of studies, and annual examinations.[480] In addition, he created a model where the law school was "staffed by a career faculty committed to research", something that "has since been the institutional basis for the development of modern legal thought".[481]

To sum up, the United States was undergoing a period of great change in the last decades of the 19th century, propelled by the transition to an industrialized society. In this regard, it paralleled the developments in Germany. Classical liberalist thought had a stronger hold in the United States than in Germany, but the Americans as well responded to the needs of an industrialized society by increased regulation, albeit on a smaller scale. One of the responses of the legal system was an increased professionalisation, in particular through the reform or, perhaps more apt: the real birth of legal education at the universities. From this, two fundamental legal cultural differences between the Ger-

478 *Ibid.* 525–527. Friedman offers an instructive account of the development of American legal education, including different ways of professionalisation, and goes more into detail than I will do here. For a contemporaneous description, see Roscoe Pound, 'The Evolution of Legal Education' (inaugural lecture delivered 19 September 1903, Jacob North & Co. 1903)

479 Quoted from Peter Stein, *Legal Evolution. The story of an idea* (Cambridge University Press 1980) 78.

480 Christopher Columbus Langdell, 'The Harvard Law School' (celebration speech at the Harvard University 5 November 1886, printed in (1887) 3 LQR 118) 124–125. See more on Langdell below in section 4.2.3.

481 Grey (2014) 47.

man and the American legal system should be highlighted: First, the Germans had strong university traditions and consequently a sophisticated legal scholarship, whereas this was something the Americans had to build up from scratch. And second, while German legal scholarship laid the fundament for the great codifications, the emerging American scholarship entered first and foremost into a dialogue with courts.[482]

4.2.2 Constitutional law: The Fourteenth Amendment and the infamous due process of law

In the field of constitutional law, there were important developments taking place as well after the Civil War. Generally speaking, a persistent source of tension in the American legal and political system ever since its foundation has been that between popular government – "We the People" – and the protection of "certain unalienable Rights".[483] These "radical and conservative traditions have coexisted as a polarity of American constitutionalism" since the Founding era, and "[s]ubsequent constitutional development has oscillated between them."[484] Closely related is the question of constitutional review. Alexander Hamilton advocated that the courts should be vested with this competence, arguing in *The Federalist Papers* from 1788 that the judiciary would be the department of power "least dangerous to the political rights of the Constitution" and that the courts would "be an intermediate body between the people and the legislature", as the people had expressed their will in the Constitution.[485] Constitutional review was then confirmed and established on a federal level by the Supreme Court during the Mar-

482 See, however, section 4.3.5 on the Restatement Project in the 1920's, where scholars tried to make a quasi-codification of private law.

483 See the Preamble of the Constitution of the United States (1789) and the American Declaration of Independence (1776).

484 Wiecek (1998) 24.

485 Alexander Hamilton, *The Federalist Papers*: No. 78, 1788. I have used the digital version published by Yale Law School, Lillian Goldman Law Library, 'The Avalon Project. Documents in Law, History, and Diplomacy'. Available at http://avalon.law.yale.edu/18th_century/fed78.asp (accessed 7 September 2024).

shall Court (1801–1835). In the landmark decision *Marbury v. Madison*, Justice John Marshall (1755–1835) basically affirmed and translated into case law what Hamilton had argued in the Federalist.[486]

After the Civil War, three amendments to the Constitution were adopted, sometimes referred to as the Reconstruction Amendments. In our context, the Fourteenth Amendment from 1868 is the most important one.[487] The first section of the Amendment grants a right to federal and state citizenship for all persons born or naturalized in the United States, and forbids states to "abridge the privileges or immunities of citizens of the United States" (the Privileges and Immunities Clause), to "deprive any person of life, liberty, or property, without due process of law" (the Due Process Clause), or to "deny to any person within its jurisdiction the equal protection of the laws" (the Equal Protection Clause).[488] With its open-ended wording, the Amendment had the potential to become a powerful tool for courts. And if so, the vertical division of power between state and federal level could be affected, as the Amendment was a check upon the states' exercise of power.[489] But in the first case where the Supreme Court had to construct the meaning of the Amendment, the *Slaughter-House* cases from 1873, the

486 *Marbury v. Madison*, 5 U.S. 137 (1803).

487 The other two were the Thirteenth Amendment (1865) and The Fifteenth Amendment (1870), abolishing slavery and ensuring voting rights for black people respectively.

488 The Fifth Amendment from 1791 already contained some similar restrictions on the federal government. It prescribes, *inter alia*, that no person shall "be deprived of life, liberty, or property, without due process of law" and that private property shall not "be taken for public use, without just compensation".

489 In this regard, the fifth section of the Amendment is important, as it states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article". Thus, the scope of application of the Amendment would affect the competence of Congress to regulate affairs within the states. On the issue of federal balance, see Edward S. Corwin, 'The Supreme Court and the Fourteenth Amendment' (1909) 7 MICH. L. REV. 643, 644 f. It is, in a comparative perspective, interesting to note that similar concerns about the federal balance was present in the scholarly debates in Weimar about the status of the equality clause of the Constitution (Art. 109). See Anschütz, *VVDStRL* 1927 47, 48; Thoma, *VVDStRL* 1927 58, 58.

majority chose a narrow and cautious construction.[490] Justice Samuel F. Miller, writing for the majority, saw the Amendment first and foremost as a consolidation of the emancipation of the former black slaves. Hence, it did not apply to the disputed case, which concerned a law that conferred upon a corporation the exclusive privilege to operate the livestock-landing and slaughter-house business in a certain area for reasons of public health. Other farmers could not claim that this monopolization violated their rights under the Amendment, the majority concluded. There were three concurring dissenting opinions, and in one of those, Justice Bradley held that the law, being an "onerous, unreasonable, arbitrary, and unjust" restriction upon the privilege of free trade, was a violation of all of the three clauses of the first section of the Amendment.

And Bradley's broader construction would eventually prevail. Around 1890, the Supreme Court made a turnaround and started to develop a doctrine of so-called substantive due process, including freedom of contract as part of the protected individual liberty.[491] At the same time, cases involving general socio-political issues and the relationship between individuals and public authorities, typically decided under the Fourteenth Amendment, started to occupy a greater part of the Court's docket.[492] The ensuing decade has generally been seen

490 *Slaughter-House Cases*, 83 U.S. 36 (1872).

491 See e.g. the *Chicago, M. & St. P. Ry. Co. v. State of Minnesota* ex rel. *Railroad and Warehouse Commission* 134 U.S. 418 (1890) (the *Milwaukee* case); *Reagan v Farmers Loan and Trust Co*, 154 U.S. 362 (1894); *Allgeyer v. Louisiana,* 165 U.S. 678 (1897). Relevant in order to understand the criticism levied against the Court for being conservative are also a row of cases decided in 1895 on other grounds than the Fourteenth Amendment: One rejecting a federal antitrust measure (*United States v. E. C. Knight Co.,* 156 U.S. 1 (1895)), two invalidating a federal progressive income taxation scheme (*Pollock v. Farmers' Loan and Trust Co.,* 157 U.S. 429 (1895) and *Pollock v. Farmers' Loan and Trust Co.,* 158 U.S. 601 (1895)), and one denying a writ of habeas corpus in a labour case (*In re Debs*, 158 U.S. 564 (1895)). For an overview, see Linda Przybyszewski, 'The Fuller Court 1888–1910: Property and Liberty' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 147; Wiecek (1998) 136–146.

492 Felix Frankfurter, 'The Supreme Court and the Public' (first published 1930, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution,* The Belknap Press of

as a period where the Court took a conservative position and struck down a considerable amount of laws. In most of the cases, however, the Court actually upheld the legislation in question. A study conducted in 1927 showed that in cases involving substantive legislation of a social or economic character that were decided under the due process clause by the Court in the period 1868–1912, the Court struck down legislation in only 6 % of the cases.[493] Thereinafter, the numbers of cases struck down remained stable at 7 % in the period from 1913 to 1920 but would rise to 28 % in the period from 1921 to 1927.[494] A similar statistical survey from 1913 concluded likewise in regard to the period 1887–1911, the author contending that "the alleged evil in the trend of the Court is a purely fancied one" and that "[t]he National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all State legislation of a progressive type."[495] In a speech delivered the same year, Felix Frankfurter noted with satisfaction that

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Harvard University Press 1970) 218, 220. According to Edward S. Corwin, as referred to in Friedman (1973) 302, the Court decided three cases concerning the Amendment in the first decade following the adoption, then 46 in the next decade, and then 297 in the period from 1896–1905. Charles Warren counted fourteen cases decided under the due process or the equal protection clauses in the period 1868–1886, and 560 such cases in the period 1887–1911, see 'The Progressiveness of the United States Supreme Court' (1913) 1 COLUM. L. REV. 294, 295.

493 Ray A. Brown, 'Due Process of Law, Police Power, and the Supreme Court' (1927) 40 HARV. L. REV. 943. See 944 for a description of the criteria Brown used for selection, in particular footnote 7. As apparent there, Brown has excluded cases decided under the equal protection clause of the Fourteenth Amendment.

494 The number of cases in the latter time sequence were significantly lower than in the two first time sequences, with only 38 cases, compared to 92 and 90.

495 Warren (1913) 295. Warren studied cases where State laws "involving a social or economic question of the kind included under the phrase 'social justice' legislation" were being tested against the due process or the equal protection clauses. Out of the 560 cases in the period 1887–1911, the Court only struck down the legislation in three of the cases. Those were, in addition to *Lochner*, the *Allgeyer* case (cfr. footnote 491) and *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902). See in the same direction Przybyszewski (2005) 148, who contends that the Fuller Court (1888–1910) "sustained the overwhelming majority of exercises of the police power [...] that came before it." See, further, Howard Lee McBain, *The Living Constitution. A Consideration of the Realities and Legends of our Fundamental Law* (The MacMillan Company 1928) 258: "The Supreme Court, by reason of one

the more progressive direction he preferred had, "during the last few years, received the tremendous authority of, and increasing application from, the Supreme Court of the United States".[496] Louis Brandeis, another progressivist and later an important Supreme Court Justice from 1916–1939, remarked a few years later in an article titled 'The Living Law' that a movement, which had begun some years prior to 1912, had "resulted in a better appreciation by the courts of existing social needs." Courts had, namely, turned away from "reasoning from abstract conception" and started "reasoning from life".[497] This was perfectly in line with Brandeis' progressive views on legal reasoning. As a counsel for the state of Oregon in *Muller v. Oregon* in 1908,[498] a case concerning maximum hour laws, Brandeis had revolutionized legal thinking with his famous "Brandeis brief" before the Court. "The people's lawyer" Brandeis, assisted by his social reformist sister-in-law Josephine Goldmark, devoted three pages to legal arguments, while the remaining 110 contained sociological, economic, medical, and psychological data from a wide range of sources.[499]

The statistical numbers are worth emphasizing in light of the infamous *Lochner* case from 1905, a case which lends its name to the pejorative term "Lochner jurisprudence" – the American equivalent to "jurisprudence of concepts".[500] In *Lochner*, the Supreme Court struck

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or two unfortunate decisions, came in for far larger opprobrium than was its just desert."

496 Felix Frankfurter, 'The Zeitgeist and the Judiciary' (first published 1913, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 1, 3. See similarly Frankfurter, 'The Law and the Law Schools' (1915) 38 *Annual Reports of the American Bar Association* 365, 367.

497 Louis D. Brandeis, 'The Living Law' (address delivered before the Chicago Bar Association, January 3, 1916) (1916) 10 ILL. L. R. 461, 464–465. The address was delivered a couple of weeks before he was nominated to the Supreme Court by Woodrow Wilson, see 'Louis Brandeis', *Wikipedia, The Free Encyclopedia*, available at <https://en.wikipedia.org/wiki/Louis_Brandeis> (accessed 7 September 2024).

498 208 U.S. 412 (1908).

499 On the brief, see e.g. John W. Johnson, *American Legal Culture, 1908–1940* (Greenwood Press 1981) chapter 3; Horwitz (1992), *The Transformation* 209.

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

down a provision in the labour law of the state of New York providing that no employees should be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day. Under the substantive doctrine developed by the Court since the 1890's, freedom of contract was protected by the Fourteenth Amendment as part of individual liberty. At the same time, the states could make limitations on this freedom under the doctrine of the so-called police power of the state, as long as the limitation related to safety, health, morals and general welfare of the public. Justice Peckham, writing for the majority, found, however, that the maximum work hour provision fell outside the scope of the police power; it was not a health law, but an illegal interference with the freedom of contract of the employer and the employee.[501] No doubt, most people would probably say today, an odd view. Nevertheless, if one looks at the statistics, the much-told story in American constitutional history that *Lochner* testifies to a Supreme Court chopping down reform legislation becomes questionable.[502] In fact, a more representative case was probably the above-mentioned *Muller v. State of Oregon* from 1908, where the Court upheld a maximum hours labour law for women employed in laundries.[503] A conservative turn would only take place in the 1920's, as I will come back to. But *Lochner* is nevertheless considered as "epitomiz[ing] the abuse of judicial power" and one that "galvanized Progressive opinion and eventually led to a fundamental assault on the legal thought of the old order."[504] And even if the judgment was perhaps not very representative, there were indeed vehement reactions against it and court practice in general at the time. It is important, first, to keep in mind that even if the legislation was left untouched in most of the cases, the mere *threat*

501 *Ibid.* at 61.

502 See similarly Jacobson and Schlink (2000) 33.

503 The Court distinguished the case from *Lochner* by pointing to the different physical capacities of men and women. Moreover, "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."

504 Horwitz (1992), *The Transformation* 33.

of judicial review was latent.[505] Moreover, not only the Supreme Court, but state supreme courts as well could hamper reform legislation.[506] It is illustrating that in a speech titled 'The Right of the People to Rule', delivered in 1912, Theodore Roosevelt proposed a system where the people by referendum could overturn judgments where state courts had struck down legislation as unconstitutional. But he underlined that he did not propose anything like that for the Federal constitution.[507]

That *Lochner* has been the chosen target for innumerable pages of criticism may perhaps be, at least in part, due to the rhetorical power of Oliver Wendell Holmes's dissenting opinion (cfr. Section 4.3.1). The main point to be emphasized at this stage, is that when American legal thinkers in the first half of the 19th century claimed that "law" had gotten out of joint with "life", they were oftentimes having in mind cases where courts used the broadly formulated constitutional provisions to strike down reform legislation.

4.2.3 A bird's view on some of the legal thinkers in the period: Christopher Columbus Langdell and James C. Carter

In contrast to the sophisticated German legal scholarship, a theoretical scholarship remained undeveloped in the United States until the end of the 19th century.[508] It was to some extent Oliver Wendell Holmes, but first and foremost Roscoe Pound who, as we will see, were the first legal thinkers to develop an elaborated theoretical program. Still, there were some voices preceding, and contemporary to, Holmes and

505 Friedman (1973) 316 and, as a more general point, McBain (1928) 246–247.

506 Wiecek (1998) 126 claims that in the period 1885–1900, state supreme courts "sprinted ahead as the avant-garde of classicism in public law." For a similar contention by a contemporary witness, see Horace A. Davis, *The Judicial Veto* (Houghton Mifflin Company 1914) 4. In 1914, Congress amended the procedural framework so that also cases where a state supreme court had found a *violation* of the federal constitution could be appealed to the Supreme Court. The reform was introduced precisely to place a check on conservative state courts, see McBain (1928) 249–250.

507 Roosevelt (1912).

508 See Herget and Wallace (1987) 419.

Pound. As pointed out in the chapter on methodology, the connection to general theoretical debates is important in order to understand the more specific debates within the realm of constitutional legal thinking. And if one wants to understand these general debates, it is necessary to have a look at some of the forerunners and those who were criticized by Holmes, Pound, and their descendants.

The need to take a closer look at the predecessors becomes even more pressing when taking into consideration that one of the main controversies in the debates about the legacy of Holmes, Pound, and the legal realists has been precisely the interpretation of the legal thinking of the late 19th century. One main interpretation of this legal thinking has been that it was "classicist", "formalist", "orthodox" or so. It was, according to one commentator, "abstract, formal, conceptualistic, categorical, and (sometimes) deductive", marked by individualism, (opportunistic) laissez-faire and social Darwinism, and with a belief that "law was derived from universal principles of justice and moral order" and constituted a closed system.[509] Another interpretation is that legal thinking in this period tried to "create an autonomous legal culture as part of their 'search for order'", and that this de-politicization was sought by a clear distinction between public and private law, generalization and abstraction of legal concepts, a self-contained system of legal reasoning, categorical thinking, and an ideal of a neutral state.[510] More recently, like in Germany, this picture of late 19th century thinking has been challenged. One scholar has argued that several of the ideas that have been ascribed to the realists in the 1920's and 1930's as ground-breaking, were actually rather common in the "classical" period, in particular when it comes to their views about judging.[511] Another scholar has stressed the historical element of legal thinking in the period, claiming that "the late nineteenth-century American legal scholars were historically sophisticated thinkers in the mainstream of

509 Wiecek (1998) prologue.
510 Horwitz (1992), *The Transformation* chapter one, the quote is from 9.
511 Tamanaha (2010) e.g. chapter 5.

transatlantic intellectual life, often dedicated to legal reform, and sometimes in the vanguard of original scholarship in legal history."[512]

The first scholar to take a closer look at is *Christopher Columbus Langdell* (1826–1906).[513] Langdell would later be seen by many as the stereotype representative of the "classical" era in American legal thinking. This claim is contested, but Langdell is in any event worth mentioning because he played an important role in the modernization of the law schools and legal education, which, as we have seen, ran parallel to the general modernization of society. Langdell was appointed professor at Harvard Law School in 1870 and became the law school's first dean the same year. At this time, university and college based legal education was in a rather poor state, both at Harvard and in the common law cultures in general. As already mentioned, legal education in the United States mainly took place outside of law schools before 1850. One of Langdell's main objectives when he entered Harvard was to do something with the "anomalous condition of legal education in English-speaking countries" and to bring the law school closer to "the position occupied by the law faculties in the universities of continental Europe."[514] Langdell thought that if law was not a science, "a university will consult its own dignity in declining to teach it". He had an *ad fontes* approach, which in the American system meant that the object of study should be cases, printed in the case reports. The relevant materials of legal science were "contained in printed books" and the "proper workshop of professors and students alike" was the library, which was to the lawyer all that the laboratories were to the chemists and physicists.

Langdell's didactic approach influenced the way law was presented in books and taught to students. His *Selection of Cases on the Law of Contracts* (1871) was the first case-book in American scholarship. A *prima facie* challenge when composing such a book, Langdell noted

512 Rabban (2012) 473.

513 For bibliographical information, see Marcia Speziale, 'Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory' (1980) 5 VT. L. REV. 1, 8 f.

514 For this and the following quotes, see Langdell (1887) 118–125.

in the preface, was the vast amount of court decisions. But this challenge could easily be overcome by the fact that "[l]aw, considered as a science, consists of certain principles or doctrines." In order to grasp these principles and doctrines, which was the result of a growth that took place through a series of cases, only a small proportion of the reported cases would have to be presented. This, and the fact that "the number of fundamental legal doctrines is much less than is commonly supposed" would make it possible to "select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines".[515] As a parallel within legal teaching, Langdell introduced the case method, which was based on a discussion of cases with the students instead of lectures.[516] This method would spread to other law schools and eventually become paradigmatic in American legal education.[517] Langdell also stressed that practical experience from the bar or the bench did not in itself qualify for teaching, but that the teachers had to be professional qua teachers.[518]

In other words, Langdell held a belief that law could be studied scientifically as an autonomous and independent object, and that it could be reduced to a few principles or doctrines. The proper method was an inductive one, where the principles were to be established through

515 Christopher Columbus Langdell, *Selection of Cases on the Law of Contracts* (2nd edn, Boston 1879) vii–ix.

516 See on this Speziale (1980) 15 f.; Friedman (1973) 531 f.

517 Friedman (1973) 535.

518 Langdell (1887) 124. This was a controversial point. A colleague of Langdell complained in a letter to the President of the university in 1873 that Langdell was "contemptuous" of judges, because they did not treat "this or that question as a philosophical professor, building up a coherent system as they would have done." Langdell also had an "extreme unwillingness to have anything furnished by the School except the pure science of the law". The letter is cited in Friedman (1973) 533–534 with reference to Arthur E. Sutherland, *The Law at Harvard, A History of Ideas and Men, 1817–1967* (1967). Another colleague, John Chipman Gray, complained to the President the same year, with reference to Langdell, that "a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil." This letter is cited in DeWolfe Howe (1963) 158.

a study of cases – something that could be done at the library desk. A challenge, however, that is sometimes overlooked when Langdell's general theory of law is analysed, is that he did not develop anything even close to an elaborate theory in his writings. The sparse material calls for a certain cautiousness, and the temptation to draw broad conclusions from the sources is probably one of the reasons why one can find very diverging characteristics of "Langdellian" thought. One possible strategy employed by Thomas C. Grey is to examine one of Langdell's doctrinal expositions within contract law and reconstruct a methodology from that analysis.[519] Grey describes Langdell's system as a division of law into three levels: principles, rules, and decision of cases. The principles were established by induction from cases, rules were derived conceptually from principles, and cases were decided conceptually from rules.[520]

The idea of law as an autonomous object of study and as a system consisting of some fundamental principles and doctrines resembles the classical German *pandectism*. There are, however, certain important differences. Langdell drew his conclusions inductively from court practice, while the *pandectists*' concepts were more abstract. Somehow schematically and simplified, one could say that the *pandectists*' method was modelled more on mathematics and speculation, while Langdell's approach bore closer resemblance to the methods of biology.[521] Another way of putting it is to compare Langdell's method with John Stuart Mill's geometry, where Mill established axioms by way of induction, and then deduced theorems from these axioms.[522]

Another influential writer in the late 19th century was *James C. Carter* (1827–1905). Carter was an influential jurist, and Roscoe Pound

519 Grey (2014) 48 f. The example Grey uses is how Langdell derives the rule that an acceptance by mail is binding only when it is received and read from principles of consideration as a necessary element in the making of contracts.

520 *Ibid.* 61 f., especially 65.

521 Mathias W. Reimann, 'Holmes's *Common Law* and German Legal Science' in Robert W. Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford University Press 1992) 72, 108. Reimann sees Langdell as "a hybrid with parents from two different ages", that is, the Pandectists and Oliver Wendell Holmes.

522 See Grey (2014) 64–65.

considered him to be a prominent exponent of mainstream legal thinking.[523] Carter, who was a close friend of Langdell in law school, is perhaps most famous for his strong criticism of codification proposals.[524] The basis for this scepticism was his evolutionary theory of law. For Carter, the "great feature of society" was human conduct, and human conduct was determined by thought. Thought was again determined by society, which *a fortiori* meant that our conduct must follow rules of custom. In other words, these rules could not "be formed or changed per saltum by an act of legislation".[525] Law, Carter claimed, "being nothing but enforced custom, is self-existent, and cannot be made by legislation [...]".[526] Carter stressed a distinction between the activity of stating the law and the activity of enacting it. To state the law was "the scientific work of putting into orderly form those customary rules of conduct which men in society have come to observe, and requires scientific knowledge in any one undertaking the task." Enactment of law was

> the giving of a command such as a superior gives to an inferior, and does not absolutely require any knowledge at all in him who gives it, and such commands are in fact often given by those who have

523 Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 AM. L. REV. 12. In his classical economic study of the American Constitution from 1913, Charles A. Beard as well mentioned Carter as a characteristic representative of mainstream legal thinking, which was poorly developed and dominated by "all sorts of vague abstractions". Beard was more enthusiastic about European legal scholars, such as Jhering, Anton Menger, and Rudolf Stammler, who paid due attention to socio-economic factors. See *An Economic Interpretation of the Constitution of the United States* (first published 1913, reprinted version with a new introduction, Free Press 1986) 7 f.

524 For bibliographical notes, see Rabban (2012) 27 f.

525 James Coolidge Carter, *Law: Its Origin, Growth, and Function* (published posthumously, G.P. Putnam's Sons 1907) 269. See also 320: "Law we have found to be based upon and to be dependent upon Custom, and therefore we cannot materially change Law without changing Custom, and to change Custom, is, as we have found, a thing beyond our power, that is beyond our direct and immediate power."

526 *Ibid.* 312–313. This did not completely exclude the possibility of legislation, which could "shape, enlarge, and modify" law, see e.g. 318.

> no, or little, knowledge or whose knowledge is of a kind not at all desirable."[527]

Custom, which originated in society, was reflected or reproduced in law by judges. Learned judges, who were "men of science", were "the experts in ascertaining and declaring the customs of life".[528] In other words, judges did not create, but merely found and applied the already existing customs. If a case arose where there was no precedent, however, the role of the judge was to "observe the consequences of the conduct in question and approve or condemn it according as it appears to be or not to be in accordance with fair expectation".[529] The idea of a mere declaration of the law in hard cases is even more outspoken in a speech delivered in 1890:

> It is agreed that the true rule must be somehow found. Judge and advocates – all together – engage in the search. Cases more or less nearly approaching the one in controversy are adduced. Analogies are referred to. The customs and habits of men are appealed to. Principles already settled as fundamental are invoked and run out to their consequences; and finally a rule is deduced which is declared to be the one which the existing law requires to be applied to the case.[530]

Like Langdell, Carter stressed law's scientific character. The judge was supposed to "put into orderly form" the customs of society, and the scholars to conduct an "Inductive Science engaged in the observation and classification of facts".[531] And by this scientific character, law also attained an autonomy and a sharp distinction from politics, something

527 *Ibid.* 271.
528 *Ibid.* 327 and 332.
529 *Ibid.* 332–333.
530 James Coolidge Carter, 'The Ideal and the Actual in the Law' (address delivered at the Thirteenth Annual Meeting of the American Bar Association 21 August 1890, reprinted from the Report of the Transactions of the Association, Dando Printing and Publishing Company 1890) 10.
531 *Ibid.* 17.

that is characteristic for the opponents of codification.[532] While being in opposition to politics, law had, in Carter's view, a close relationship to society. Carter approved of the new Langdellian way of teaching at the universities, because he saw cases as being in reality a compilation of vast amounts of human conduct, and the way to achieve a scientific understanding of human conduct was to study it.[533] Moreover, his anti-legislation ideal of law was a purely negative one, bent towards classical liberalism: "[T]he function of Government is the same as that of Law – to mark out the line within which each individual can freely act without encroaching upon the like freedom in others' […]".[534]

4.2.4 A bird's view on constitutional scholarship in the period: Thomas M. Cooley and Christopher G. Tiedeman

If we move on to constitutional scholarship more specifically, the idea here is the same as in the previous subsection; if one wants to understand the scholarly debates in the first part of the 20th century, one has to start by taking a look at the forerunners. The two most prominent American constitutional scholars in the late nineteenth century were Thomas M. Cooley and Christopher G. Tiedeman.[535] Cooley wrote the influential book *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union,* first published in 1868, while Christopher G. Tiedeman published the similarly popular A *Treatise on the Limitations of Police Power in the*

532 Horwitz (1992), *The Transformation* 9 (primarily related to antebellum debates over codification).

533 Carter (1907) 339: "All the actions of men – *quidquid agunt homines* – are the proper theme of the lawyer's study."

534 *Ibid.* 343.

535 See Stephen A. Siegel, 'Historism in Late Nineteenth-Century Constitutional Thought' (1990) Volume 6 *Wisconsin Law Review* 1431, 1452: "Other than Cooley and Tiedeman, no late-nineteenth-century constitutional commentator is an indispensable subject in a study of that era's dominant jurisprudence." In addition to Cooley and Tiedeman, Siegel studies John Norton Pomeroy in his overview article. See 1452 (footnote 87) for a list of other constitutional law treatise writers in the late nineteenth century.

United States Considered from both a Civil and Criminal Standpoint in 1886. Already the titles are instructive, in the sense that their focus was the *limitations* of public power.

Thomas M. Cooley (1824–1898), whose diverse career included practice as a politician, professor, judge, treatise-writer, and, as already mentioned, the first chairman of the Interstate Commerce Commission, did not try to hide his political-ideological views in his writings.[536] In the preface to his treatise on constitutional law, Cooley admitted that he had "full sympathy" for the restrictions on official power that the founding fathers had written into the constitution and that he had "faith in the checks and balances of our republican system".[537] In a later article, he made it plain that he regarded a constitution to be good that "yield[s] to the thought of people; not to the whim of the people, or the thought evolved in excitement or hot blood […]".[538] This view was part of a more general reluctance towards legislation: "The power to legislate, the people of America have discovered, unless carefully restrained and limited, is quite likely to prove a 'power to frame mischief by a law;' and by their constitutions they give special and careful attention to the necessary restraints." He was content to note that "[t]here is no legislative omnipotence in America, nor ever likely to be."[539]

At the same time, he underlined in the preface to the treatise that he would not present his personal views and that he had not "designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions."[540] Moreover, he stated that "[t]he courts are not the guard-

536 For bibliographical information, see Rabban (2012) 21 f.; Siegel (1990) 1485 f.

537 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (5th edn, Little, Brown, and Company 1883) iii (preface).

538 Cooley (1889) 350. See further 354: "[I]n changing things excellent in government, no maxim of statesmanship can be wiser than to make haste slowly. The constitution stands before the people as an emblem of strength and stability, and it begets in them a conservative habit of thought and of action which of itself is invaluable."

539 Thomas M. Cooley, 'The Uncertainty of the Law' (1888) 22 AM. L. REV. 347, 367.

540 Cooley (1883) iii (preface).

ians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance."[541] But this positivism – in the sense that he rejected natural, social, or political rights as the basis for constitutional claims – was to some extent neutralized by his view that constitutional provisions had to be interpreted in light of common law principles. According to one scholar, this "historism turns his positive approach to constitutional law into a vision of America as founded upon principles of civil liberty and natural law."[542]

Christopher G. Tiedeman (1857–1903) followed in Cooley's footsteps, but added some new ideas transported from abroad as well. In the mid-1870's, American students started to travel to German universities,[543] and the young Tiedeman – who came from an upper-class family – went to Göttingen and Leipzig to study in 1877–1878.[544] This was, it should be noted, one year after the publication of Laband's treatise, but I have not found any references to it in Tiedeman's writings. Instead, he attended the lectures of another prominent scholar, namely Rudolf von Jhering in Göttingen.[545] And in his general legal theory, he adopted some heritage from Jhering. Tiedeman regarded it as "a general proposition that a legal rule is the product of social forces, reflecting the prevalent sense of right." The prevalent sense of right was not "the quiet, smooth, uneventful development, which is found to prevail in the growth of a language, and which is claimed by the jurists of the Savigny-Puchta school to prevail in the growth of a system of jurisprudence", but rather the result of a "vigorous contest between opposing forces."[546] In order to apply this general theory to the field

541 *Ibid*. 168.
542 Siegel (1990) 1514, see also the accompanying footnote 488 to the quote for some closer remarks.
543 See Rodgers (1998) 76.
544 See Rabban (2012) 57, also for more general bibliographical information.
545 Christopher G. Tiedeman and others, 'Methods of Legal Education' (1892) 1 YALE L.J. 139, 151.
546 Christopher G. Tiedeman, *The Unwritten Constitution of the United States*, (G. P. Putnam's Sons 1890) 9 and 11–12, where the latter quote is accompanied by a reference to Jhering's *Kampf ums Recht*.

of constitutional law, he introduced a distinction between written and unwritten constitutional law:

> [T]he Federal Constitution contains only a declaration of the fundamental and most general principles of constitutional law, while the real, living constitutional law, – that which the people are made to feel around them, controlling the exercise of power by government, and protecting the minority from the tyranny of the majority – the flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution.[547]

The basis for the decisions of the courts and acts of the legislature was "the popular will", because all law "is but an expression of the popular sense of right through the popular agents, the legislator or the judge […]".[548] In order to interpret the law rightly, the judge or the practitioner "must find out what the possessors of political power now mean by the written word."[549] Thus, the real driver for legal development, and indirectly the source of the unwritten constitutional law, was changing beliefs in civil society, which were to be merely declared by the legislator or the courts.[550]

Tiedeman's writings contain, however, certain tensions. While claiming that the "popular sense of right" was the real source of law, he feared

547 *Ibid.* 43.

548 Tiedeman and others (1892) 154.

549 Tiedeman (1890) 151.

550 It seems like Tiedeman believed that legal provisions or judgments were only part of the "living law" as far as they reflected the popular will, see 'Doctrine of Stare Decisis, And a Proposed Modification of its Practical Application, in the Evolution of the Law' (1896) 3 *The University Law Review* 11, 18: "The Legislature and the Court, alike, consciously or unconsciously, obey the popular mandate, and so far as either of these departments of the Government correctly interpret this mandate, the enactment or judgment, as the case may be, becomes a part of the living law of the land. To the extent to which the Legislature has failed in its enactment to interpret the popular will, the enactment will become a dead letter, unless the Courts, under the influence of a more correct conception of the popular will, may by construction and interpretation, bring the statute into closer conformity therewith".

the democratic majority, which he juxtaposed with socialism, communism, and anarchism.[551] Furthermore, he claimed on the one hand that courts "must find out what the possessors of political power now mean by the written word", and on the other hand – 12 pages later – that the real value of a written constitution and judicial review was that "[i]t legalizes, and therefore makes possible and successful, the opposition to the popular will."[552] In addition, he warned on one hand, in his treatise from 1896, against "encroachments by the judiciary upon the sphere and powers of the legislature" and argued for a presumption of constitutionality in cases of doubt.[553] But on the other hand, he wrote four years later that

> [i]n these days of great social unrest, we applaud the disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provision of the Constitution. These general provisions furnish sufficient authority for judicial interference.[554]

Perhaps the solution lies in the distinction Tiedeman draws – like Cooley did – between "the people's will" and "their whims and ill-con-

551 Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* (first published 1886, reprinted version, The Lawbook Exchange 2001) vi–vii. See also Tiedeman (1896) 17, where he has a remarkable theory about why the doctrine of *stare decisis* was confined to the common law system. His theory was that *stare decisis* ensured more legal certainty, and that the need for stability was more prominent among the Anglo-Saxon peoples because there, the threat to "vested interests" by democracy had been more serious than at the continent. And thus, even though he opposed the doctrine in general, he had to make some concessions: "So far as the doctrine of *Stare Decisis* serves the purpose of a brake on the wheels of democracy, with its socialistic and other more or less revolutionary demands for change, it is a precious heritage of the common law, and should be jealously guarded against destruction or abrogation".

552 Compare Tiedeman (1890) 151 with 163–164.

553 Tiedeman (2001) 12. The limit should, according to Tiedeman, be "clear cases of natural injustice".

554 Tiedeman (1890) 81. The paragraphs preceding this quote are more or less identical to the treatise from 1886, but this paragraph is added in the book from 1890.

sidered wishes."[555] But then, who was to decide authoritatively on the 'real' versus the 'apparent' will of the people? In the quote above, Tiedeman praises the courts, but it seems like it is the legal scholars who are supposed to occupy the most prominent place in Tiedeman's legal universe. Like so many others in this era, he was concerned with law's scientific character. He was of course full of reverence for judicial giants in the history of common law like Marshall, Kent, Story, Taney, Miller, but he claimed that they

> could have rendered as incalculably greater service in the development of our jurisprudence along scientific lines if they had been charged by the country with duties similar to those required of the Roman jurisconsults, viz., the analytical composition and construction of the law in all its branches.[556]

In an American context, this was not an insignificant thesis. Again, the influence from his days of studies in Germany is an important explanation. When discussing methods of legal education, Tiedeman made it clear that he preferred the German way of teaching law that he had "learned to admire" from Jhering's lectures. Adapted to an American context, a main issue was the role of cases in the education. Tiedeman commended that the advocates of the case method had infused "more life" into the education, but warned against moving in a too practically oriented direction at the expense of theoretical studies.[557] His position was that cases should be used "not for the purpose of learning directly from them what is the law, but to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence."[558]

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555 *Ibid.* 164. Tiedeman does not refer to Cooley here, but instead to James Russell Lowell's *Democracy, and Other Addresses* from 1887. It might be that this was the source for the expression made by Cooley in his article from 1889 as well, cfr. footnote 538 above.

556 Tiedeman (1896) 21–22.

557 Tiedeman and others (1892) 157.

558 *Ibid.* 154. See also the following from the same page: "[t]he adjudicated cases constitute nothing more than materials out of which the scientific jurist is to construct a science of jurisprudence."

A lawyer who wanted to learn their subjects should go "to his library, instead of to his laboratory." And in the library, he should primarily consult treatises, not commentaries or casebooks. In treatises, he would find a scientific system, constructed by a learned mind who had done what at least the average student would not be able to do, namely to "construct for himself, out of the mass of judicial decisions, an orderly and logical presentation of the fundamental principles, which are the groundwork of every system of jurisprudence".[559] In sum, what he wanted was a more theoretical education.[560] (He even dared to propose what is perhaps the secret dream of many university lawyers: "During the entire course in the law school I would place the ban upon the resort of the student to the law office"[561]).

To sum up, the scientific character of law was a constant concern for the late 19th century American legal thinkers, both in general and within constitutional scholarship more specifically. It was nothing like the concept-building *pandectism* they had in mind, but still, their ideal picture of science maintained a rather narrow scope. Regardless of whether they preferred cases (Langdell and Carter) or scholarly works (Tiedeman), the object of the study was law as a relatively autonomous and isolated phenomenon – something that could be studied in the law library.[562] Even the "society" Carter wanted lawyers to study was in reality case law. And precisely this idea, that law could be seen as phenomenon isolated from the broader "life" of societal and political developments, was something that would be challenged intensively by the critical scholars in the early 20th century.

559 *Ibid*. 153–155.

560 But he regarded a pure transplantation of the German teaching method to be unsuited for "the ordinary American law school, for the reason that the average law student does not come to the law school with such a trained mind as a college course generally insures.", cfr. *ibid*. 151.

561 *Ibid*. 158.

562 Twining (1985) 13 makes a similar observation in regard to Langdell.

4.3 Crisis and criticism, ca. 1900–1937

4.3.1 Oliver Wendell Holmes: Experience as the life of the law

The real founding father of a theoretical doctrine in American legal scholarship was Oliver Wendell Holmes (1841–1935). With his famous article 'The Path of the Law' from 1897, Holmes "pushed American legal thought into the twentieth century."[563] And as Justice at the U.S. Supreme Court from 1902 to 1932, Holmes wrote influential opinions, among other a dissenting opinion in the *Lochner* case (cfr. below). In our context, it is worth mentioning that as an academic, Holmes barely touched upon constitutional issues. Both the small articles and reviews he published in *The American Law Review* from 1867 and onwards, and his major work from 1881, *The Common Law*, mainly concerned different fields of private law. But in these works, he trod the path that would culminate with 'The Path of the Law'.

One thread that runs through Holmes's authorship is his scepticism towards the role of logic and deduction in law. In an article from 1870, he writes that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards."[564] Here, Holmes rejects the idea of a syllogistic way of reasoning and seems to claim that the judge bases his or her decision more or less on intuition. Only when several cases have been decided, he continues, will there be a need for reconcilement, but this will happen through an inductive process where a more general principle is established. Ten years later, he published – anonymously –[565] a harsh critique of Langdell's *Summary of the Law of Contracts*, where he wrote the following:

563 Morton J. Horwitz, 'The Place of Justice Holmes in American Legal Thought' in Robert W. Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford University Press 1992) 31, 69.

564 Holmes (1870), here cited from Sheldon M. Novick, *The Collected Works of Justice Holmes. Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, Vol. 1 (The University of Chicago Press 1995) 212.

565 According to Reimann (1992) 93–94, Holmes's *The Common Law*, where German legal scholarship is criticized, was in reality, at least partly, a hidden attack on Langdell. His cautiousness is explained by the fear of serious detriment to his

> Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or logical integrity of the system as a system. [...] If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law. The life of the law has not been logic: it has been experience.[566]

The famous last sentence was also repeated in the opening passage of *The Common Law* from 1881.[567] In the book review, he followed up by claiming that judicial reasoning was dressed up in a logical form, but that "[t]he important phenomenon is the man underneath it, not the coat". In *The Common Law*, moreover, he argued that

> "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[568]

In 'The Path of the Law', the nucleus of Holmes's theory is developed even further and given a more definite and clear-cut form. Legal reasoning, Holmes argues, is draped in the language of logic in order to satisfy our longing for certainty and repose. But the logical form

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personal reputation and career, as Langdell was the most respected man at Harvard. This may of course also be one of the reasons why he published the review anonymously.

566 Oliver Wendell Holmes, 'Unsigned Book Notice' (1880) 14 AM. L. REV. 233. In Mark DeWolfe Howe, *Justice Oliver Wendell Holmes. The Proving Years 1870–1882* (Harvard University Press 1963) 157, it is quoted from a letter from Holmes to Frederick Pollock, where the former writes that Langdell "is all for logic and hates any reference to anything outside of it".

567 Oliver Wendell Holmes, *The Common Law*, Lecture I: Early Forms of Liability (1881). Here cited from Sheldon M. Novick, *The Collected Works of Justice Holmes. Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, Vol. 3 (The University of Chicago Press 1995) 115.

568 *Ibid*. He also insisted that law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

conceals what is "the very root and nerve of the whole proceeding": a judgment.[569] Now, a decisionist element is moved to the forefront, and there is a certain link between this element and Holmes's famous prediction theory presented in the same article: that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[570] With this, the courts were regarded as the gravitation point of the legal system and the proper object of study. In an article written two years later, the decisionist element is, however, somewhat modified. Now Holmes introduces a distinction between doubtful and indisputable cases, and the judges' "sovereign prerogative of choice" is restricted to the former.[571]

If logic was thrown overboard, at least in doubtful cases, then one could ask what the replacement would be. For Holmes, experience was the life of the law, but what kind of experience? The analytical-descriptive part of Holmes's theory is the aforementioned idea that law is a prophecy of what the courts will do in fact. But Holmes also presents normative ideas about how the jurist should reason. In *The Common Law*, Holmes had claimed that "[w]e must alternately consult history and existing theories of legislation".[572] In 'The Path of the Law', there is a remarkable shift in the relationship between history and policy.[573] Now, history has lost its value and has become a purely auxiliary discipline. Historical inquiries were still considered useful as a first step, in order to understand the law – to "get the dragon out of his cave". But the real task lay in a critical consideration of the worth of the rules – the decision on whether "to kill [the dragon], or to tame him and make him a useful animal".[574] This critical consideration was to be based on articulate references to the social ends which the rules subserve and

569 Holmes (1897) 466.
570 See *ibid.* 461.
571 Oliver Wendell Holmes, 'Law in Science and Science in Law' (1899) 12 HARV. L. REV. 443, 460–461.
572 Novick (1995), *Collected Works of Justice Holmes* Vol. 3 115.
573 This development in Holmes's thought is described and analysed by Horwitz (1992), 'The Place of Justice Holmes'.
574 Holmes (1897) 474 even "look[ed] forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious

the grounds for desiring these ends. In other words: the path of the law led straight to social ends; policy considerations were the kind of experience that should guide the judge when breathing life into law.

One of the implications of this new guiding principle of social ends was that it was "the man of statistics and the master of economics", not "the black-letter man", that would be "the man of the future" for the rational study of law.[575] Secondly, the recognition of the significant element of choices in legal reasoning, and that judges had an inevitable duty to weigh considerations of social advantage, led to an insistence on openness, articulation and transparency. Holmes thought that the Constitution was used by some judges as a class instrument, that new principles were "transplanted" into it from the outside, and that the judges would be more hesitant if they actually considered the social consequences of the rules they laid down.[576] This was further combined with an insistence that law would have to be justified "in some help which the law brings toward reaching a social end *which the governing power of the community has made up its mind that it wants*."[577] With this, a powerful conclusion was implicitly reached: the courts should defer to the policy considerations decided by the legislator. In other words, the economic and statistical education should *not* make the judge a (social) philosopher king. It should only make him realize and reflect over the fact that his choices had real and social effects.

It was as Supreme Court Justice that Holmes would perhaps level the most serious and influential attack on mainstream legal thinking. His dissenting opinion in *Lochner* has become one of the most appraised dicta in the history of the Supreme Court and contributed to the picture of Holmes as a legal sage. To recap, the majority of the Court had struck down a maximum hours provision as an unconstitutional inference with the right to liberty protected under the Fourteenth Amendment. Holmes was relentless in his dissent, where one finds

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research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

575 *Ibid.* 469.

576 *Ibid.* 467–468.

577 *Ibid.* 452 (emphasis added).

several elements from his legal theory.[578] By stating that the case was "decided upon an economic theory which a large part of the country does not entertain" and that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics", Holmes bluntly dismissed the majority opinion as a personal, not a legal reasoning, based on non-legal factors.[579] "General propositions", he wrote, "do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." There were, of course, no references to neither Spencer's theory nor other economic theories in the majority opinion, so the allegation Holmes made was in fact that the majority had failed to reason in an open and transparent way. Holmes positively proposed a constitutional test that testifies to his idea about judicial deference. It was only when a "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law" that it should be found unconstitutional.

With his wit, his brilliant, sharp pen, and his vivid catchphrases, Holmes was successful in effectively spreading the new message to a large audience. His *bon mot* about "the life of the law" as experience, not logic, painted a radically different picture of law and legal reasoning than mainstream legal thinking before him. Moreover, his thoughts about law resonated well with the progressive ideas that were in the air in this period. In sum, one could say that Holmes introduced a kind of legal "futurism": Instead of perceiving legal decision-making as a logico-deductive application of pre-existing legal norms to facts, he looked at it as a forward-looking, consequentialist activity concerned with social policy. Secondly, law was thought of as predictions about

578 198 U.S. 45 (1905). Justice Harlan wrote another dissenting opinion, to which Justice White and Justice Day concurred.

579 Holmes' reference to Spencer might also have been subtly directed against Tiedeman. According to Tiedeman, Spencer's understanding of freedom in his *Social Statics* was "the ruling principle of police power in the United States, and the necessary fundamental principle in every system of sociology in a free State". Cfr. Tiedeman (2001) 329, see also 67.

how courts would decide in the future. Holmes's man of the future, then, had to be precisely that: a man of the future.

4.3.2 Roscoe Pound: "Law" and "life" as a question of continuity and change (I)

Around the turn of the century, there was a baton handoff between Oliver Wendell Holmes and Roscoe Pound (1870–1964). Holmes went to the US Supreme Court in 1902, while Pound became dean of the Law School of Nebraska in 1903.[580] Over the next ten years, Pound would publish a number of important law review articles, and he also became professor of law at Harvard (1910) and eventually dean (1916), a position he would hold for 20 years. The message conveyed by Pound in these early articles was that the American legal system was in a state of crisis. There was a "real and serious dissatisfaction with courts and lack of respect for law" in the United States, he wrote in 1906.[581] Pound argued that law and legal scholarship had become "mechanical" and out of touch with societal and scientific developments, and that a "sociological jurisprudence" would be needed in order to escape the lamentable state of affairs. Pound was a towering character in American legal scholarship for several decades, and a complete overview of his writings would exceed the limits of this study. In the following, I will focus mostly on his pre-WWI writings, which "had an enormous influence in shaping the Progressive ideal of social reform through law."[582]

At the core of Pound's legal theory is the tension between continuity and change. Pound makes a distinction between law and public opinion and observes that as a general rule, the former develops more slowly than the latter.[583] Thus, there is a tendency that there will be

580 Pound had studied law at Harvard for one year in 1889–1890. For a biographical overview, see Paul Sayre, *The Life of Roscoe Pound* (Iowa 1948).

581 Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice' (paper read at the 29th Annual Meeting of the American Bar Association, 29 August 1906, reprinted in (1964) 10 (4) *Crime & Delinquency* 355).

582 Horwitz (1992), *The Transformation* 217.

583 See e.g. Pound (1964) 358–359.

a discrepancy between the two. Moreover, he claims that law contains an inherent mechanical and rigid element, in the way that rules have a general form but are supposed to apply in individual cases, where there may be conflicting ethical demands.[584] These were constant sources of tension, but Pound claims that they would play out differently in different historical contexts. He operates with an evolutionary theory where law oscillates between "periods of growth, periods in which the law is developing through juristic activity", and "periods of stability, periods in which the results of juristic activity of the past are summed up or worked out in detail or merely corrected here and there by legislation".[585] The state of crisis he felt he was witnessing stemmed from the fact that both public opinion and the socio-economic forces had developed, while law was in a period of stability. Legal scholarship more specifically was lagging behind developments in other scientific branches. As a result, Pound felt that there was a wide gulf between "law" and "life", a gulf he wanted to bridge by leading legal thought in a new direction.

The importance of socio-economic change for Pound's analysis can be seen from the several references he makes to "our modern industrial society", "an era of transition", "the business world of today", and so on.[586] According to Pound, the common law was built on theories of equality, but industrial progress had led to a state of actual inequality.[587] Moreover, there was a conflict between "the individualist spirit of the common law and the collectivist spirit of the present age".[588] One of

584 *Ibid.* 357–358.

585 Pound (1910) 22; see also Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 COLUM. L. REV. 605, 607–608 and 611–612.

586 See e.g. Pound (1964) 358 and 361; Roscoe Pound, 'The Need of a Sociological Jurisprudence' (1907) 19 *Green Bag* 607, 607 and 608; Roscoe Pound, 'Liberty of Contract' (1909) 18 YALE L.J. 454, 468; Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence' (1912) 25 HARV. L. REV. 489, 501; Pound (1910) 33.

587 Pound (1912) 501 and 502; Pound (1909) 454.

588 Pound (1964) 361. See also Pound, 'Do We Need a Philosophy of Law?' (1905) 5 COLUM. L. REV. 339, 344, on the common law: "[I]t exhibits too great a respect for the individual, and for the intrenched position in which our legal and political history has put him, and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age."

the fields where this clash was most acutely felt was, he asserted, in the field of constitutional law. Here, the individualistic concept of liberty of contract was used as an *a priori* rule from which conclusions were drawn, and the field was full of natural law reasoning.[589] Moreover, the courts were "privatizing" political matters by handling cases of great public importance as mere private law disputes between two individuals.[590] The courts played a double negative role, in the sense that they were on the one hand failing to develop new doctrines to meet new conditions, while on the other hand they were striking down legislation that sought to do so. The courts, Pound lamented, were "doing nothing and obstructing everything".[591]

Even though Pound located the problem on several levels, his main concern was the state of legal thought. It is illustrating that in an early article, from 1905, Pound argued that the remedy for the backwardness of the legal system would be neither to pack courts nor to codify the law. It was rather to be found in law schools and in "training the rising generation of lawyers in a social, political and legal philosophy abreast of our time."[592] Legal thought had become mechanical, that is, it had degenerated into "a rigid scheme of deductions from a priori conceptions."[593] Pound saw James C. Carter as a prototype of American legal thought, as he "lays down a criterion of law and legislation a priori, deduces from it an absolute test of right and wrong and proceeds to define the limits of legislative law-making accordingly."[594] Pound held this to be an "acceptance of Herbert Spencer's Kantian formula of justice". This method was anachronistic, because "[w]e no longer hold anything

589 See in general Pound (1909, but also Pound (1905) 344 and Pound (2010) 28.
590 See Pound (1964) 364. See also Pound (1905) 353, where he dryly speaks of the US as "a state wherein the most intimate problems of sociology and economics are tried in actions of trespass and suits to enjoin repeated trespasses".
591 Pound (1964) 362; see Pound (1905) 344 as well.
592 Pound (1905) 352; Pound (1907) 611 as well. In addition, compare the space he devotes to elaborating the problems of "juristic thought" on the one hand, and legislation and administration as other causes behind the state of affairs on the other hand, in Pound (1910), see in particular the comments on 34.
593 Pound (1908) 608.
594 Pound (1910) 28.

scientific merely because it exhibits a rigid scheme of deductions from a priori conceptions."[595] Pound – who had received a doctoral degree in botany in 1897 – noted that legal thinking was "in the rags of a past century, while kindred sciences have been reclothed".[596] His ideal was a pragmatist philosophy, which, as Pound quoted William James, the leading philosopher of pragmatism, saying, saw theories as "instruments, not answers to enigmas, in which we can rest".[597]

Another element of mechanical jurisprudence was, Pound argued, that principles had ceased to have importance and that law had become a body of rules.[598] Pound offers no precise definition of what he means by "rules" and "principles", but it seems like his ideal principles were something like the general clauses in the German Civil Code (BGB). When he states that the BGB was in conformity with a sociological theory of legal science, because it "lays down principles from which to deduce, not rules, but decisions", he highlights the "good faith" clause in § 242 as an example.[599] The problem with American jurisprudence was that:

> [w]e have developed so minute a jurisprudence of rules, we have interposed such a cloud of minute deductions between principles and concrete cases, that our case-law has become ultra-mechanical, and is no longer an effective instrument of justice if applied with technical accuracy.[600]

But this was only in theory. Pound thought that "[i]n practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice."[601]

595 Pound (1908) 608.
596 Pound (1910) 30.
597 Pound (1908) 608, cfr. James (2010) 22.
598 Pound (1909) 462. See also Pound (1908) 607: "it is in the nature of rules to operate mechanically."
599 Pound (1908) 613 (footnote 33).
600 Pound (1910) 20.
601 *Ibid.* 20.

Pound's suggested way out of the impasse was to replace mechanical jurisprudence with a sociological jurisprudence. As noted earlier, a source of inspiration was pragmatist philosophy, but Pound, who was extremely well-read, was also influenced and inspired by German and French legal theoretical writings. The sociological tendency was "already well-marked in Continental Europe", he noted in 1907, referring to works by Stammler, Ehrlich, Gumplowicz, Vaccaro, and Grasserie.[602] In 1915, he wrote the following about Ehrlich in a letter to Oliver Wendell Holmes, who wanted to have Ehrlich's address from Pound: "To my mind for many years he has been very close to the top, if not at the top among Continental legal scholars."[603] Yet another source of inspiration was other branches of science. According to Pound, the new general scientific ideal, which legal scholarship should adopt as well, was that science should be measured according to its utility:

> Law is not scientific for the sake of science. Being scientific as a means towards an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.[604]

The insistence on law as a mere tool implies that the ends to be achieved were externalised. This instrumentalization of law and externalisation of ends are crucial features of Pound's theory, and they illustrate clearly his attempt to bridge the gulf between "law" and "life", as well as between legal thinking and other sciences. Instead of looking to the past and end up with a "government of the living by the dead",[605]

602 Pound (1907) 609. It is worth mentioning that several of these works were very recently published when Pound wrote his article, indicating that he was following closely the developments in Europe. In Pound (1908) 610, he refers to Jhering as "the pioneer in the work of superseding [the] jurisprudence of conceptions (*Begriffsjurisprudenz*) by a jurisprudence of results (*Wirklichkeitsjurisprudenz*)." See also all the references to German authors in Pound (1912) 515 (footnote 101).

603 Letter dated 22 July 1915, printed in Sayre (1948) 272.

604 Pound (1908) 605.

605 Pound (1964) 359. The quote is taken from Herbert Spencer.

the lawyers should look to the present conditions, put "the human factor in the central place"[606] and focus on "a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society to-day."[607]

In order to implement this, norms had, as we have seen, to be formulated and understood differently than what was commonplace. Jurists had to be given more leeway and discretion. With reference to authors such as Ehrlich and Kantorowicz (whom he held in high esteem[608]) he argued for an "equitable application of law":

> [The sociological jurists] conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men."[609]

It might seem like a paradox that Pound opted for more flexibility for judges, taking into account the experience with broad constitutional provisions and judgments like *Lochner v. New York*. Wouldn't a more feasible solution be to restrict the judges' scope of discretion? A plausible answer is that as we have seen, the fundamental distinction for Pound was between continuity and change, where he had a marked inclination towards progress. Progress could be achieved through judicial developments, yes, perhaps even better so than for instance through legislation.[610] There was in other words nothing inherently wrong with legal development through court practice, but of course, there was a

606 Pound (1908) 610.
607 Pound (1907) 611.
608 On Pound's admiration for Kantorowicz, cfr. the letters referred to in Schmidt (2023) 97–98.
609 Pound (1912) 515. See 516 as well: "legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds."
610 In Pound (1908) 612, he points out that usually, legislation had consisted mainly of codification. "The further step, which is beginning to be taken in our present era of *legal development* through legislation, is in reality an awakening of juristic activity, as *jurists perceive that they may effect results through the legislator as well as through the judge or the doctrinal writer*." (emphasis added)

risk that judges could favour conservatism and stability and turn out to be the most dangerous branch. For Pound, this implied, as noted above, that the curricula and teaching methods of law schools, where judges were educated, were of utmost importance. The solution would be to ensure that judges were taught a philosophy of law "founded on a sound knowledge of the elements of the social and political science of to-day".[611] This implied an approach to legal education that was radically different from the Langdellian ideal, and which deserves a lengthy quotation:

> The modern teacher of law should be a student of sociology, economics, and politics as well. He should know not only what the courts decide and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. Legal monks who pass their lives in an atmosphere of pure law, from which every worldly and human element is excluded, cannot shape practical principles to be applied to a restless world of flesh and blood. The most logical and skilfully reasoned rules may defeat the end of law in their practical administration because not adapted to the environment in which they are to be enforced. It is, therefore, the duty of American teachers of law to investigate the sociological foundations, not of law alone, but of the common law and of the special topics in which they give instruction, and, while teaching the actual law by which courts decide, to give to their teaching the color which will fit new generations of lawyers to lead the people as they should, instead of giving up their legitimate hegemony in legislation and politics to engineers and naturalists and economists.[612]

To summarize, Pound offered a way more comprehensive theoretical underpinning to the criticism of mainstream legal thinking than

611 Pound (1905) 353.
612 Pound (1907) 611–612.

Holmes had done. Holmes stood out with his memorable aphorisms, whereas Pound wrote lengthy articles where he drew upon extensive knowledge of legal history and contemporary continental legal thinking in order to formulate a more elaborated theoretical program. The main message that was rammed home, and theorized as a concrete manifestation of a more general pattern of how law developed, was the diagnosis of a society where "law" and "life" had drifted apart from each other.

4.3.3 Benjamin N. Cardozo: "Law" and "life" as a question of continuity and change (II)

Benjamin N. Cardozo (1870–1938) was born the same year as Pound but came from a different background. His family was part of the distinguished Sephardic Jewish community in New York, although the family prestige had suffered severely when his father was involved in a corruption scandal in 1872 and had to resign from the New York State Supreme Court. With Benjamin, who would rise to become one of the most esteemed personalities of American law in the 20th century, the family pride would eventually be rehabilitated. After having practiced as a New York lawyer for some 20 years, Cardozo was appointed judge at the New York Court of Appeals in 1914. In 1927, he advanced to the position of chief judge, and then, in 1932, his career was coronated with the appointment to the Supreme Court as Holmes's successor, a position he held until his death in 1938.[613] His Supreme Court turn was brief, but intense, located in a turbulent period dominated by the New Deal quarrel between the Court and Franklin D. Roosevelt. Together with Louis Brandeis and Harlan Fiske Stone, Cardozo made up the liberal fraction of the bench, usually branded as the Three Musketeers. They were, as I will come back to in more detail later,

613 For a brief overview of Cardozo's life, see David G. Dalin, *Jewish Justices of the Supreme Court. From Brandeis to Kagan* (Brandeis University Press 2017) chapter 4. A more complete biography is Richard Polenberg, *The World of Benjamin Cardozo. Personal Values and the Judicial Process* (Harvard University Press 1997).

often outnumbered by the conservative wing of the Four Horsemen.[614] The following analysis will focus on some of Cardozo's extrajudicial writings from the 1920's. Cardozo gave two lectures at Yale in 1921 and 1923 that secured him nation-wide fame, published as *The Nature of the Judicial Process* and *The Growth of the Law*.[615]

Cardozo's writings were impregnated with Poundian thought, in particular the idea about a persistent tension between stability and progress.[616] "Law must be stable, and yet it cannot stand still", he quoted Pound saying, and added that "[h]ere is the great antinomy confronting us at every turn." It was the task of legal philosophy to "mediate between the conflicting claims of stability and progress, and supply a principle of growth."[617] In constitutional law, the tension was particularly felt in relation to the concept of liberty. Cardozo referred to Holmes's dissenting opinion in *Lochner* as "the conception of liberty which is dominant today" and spoke additionally of a "fluid and dynamic conception which underlies the modern notion of liberty".[618]

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614 Cfr. section 4.3.8 below.

615 For an overview of the lectures and the positive reception, see Polenberg (1997) 85 f. According to Horwitz (1992), *The Transformation* 189, *The Nature of the Judicial Process* "remained perhaps the most widely read American work on legal thought for over a half century."

616 Cardozo referred to Pound's 'Mechanical Jurisprudence' as an "illuminating paper" and held that "[i]n the analysis of ends, the most fruitful generalizations yet reached, at least in Anglo-American law, are those of Roscoe Pound", see *The Growth of the Law* (first published 1924, reprinted in *Cardozo on the Law*, The Legal Classics Library 1982) 66 and 81.

617 Cardozo (1982), *The Growth* 1 and 2, quoting Roscoe Pound, *Interpretations of Legal History* (1923) 1. In Cardozo's *The Paradoxes of Legal Science* (first published 1927, reprinted in *Cardozo on the Law*, The Legal Classics Library 1982), two of the subheadings in the first chapter are titled "rest and motion" and "stability and progress".

618 Benjamin N. Cardozo, *The Nature of the Judicial Process* (first published 1921, reprinted in *Cardozo on the Law,* The Legal Classics Library 1982) 79–81. He also predicted, quite rightly so, that "[i]t is the dissenting opinion of Justice Holmes, which men will turn to in the future as the beginning of an era." Cardozo admired, by the way, Holmes. "He is", Cardozo wrote in 1931, "today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages.", see Benjamin N. Cardozo, 'Mr. Justice Holmes' (1931) 44 HARV.

Courts had to be aware of this fluidity and seek as much factual and up-to-date information as possible – he extolled, in this context, Justice Brandeis's opinions – or, if unable to disclose the facts fully, defer to the legislator.[619]

While an admirer of Pound, he noted that the value of sociological jurisprudence had first and foremost been of a negative character.[620] Cardozo's own theory can be seen as an attempt to take a positive step further and systematize the principles of legal reasoning at work in the judicial process into four categories, or, in his own terminology, "forces". He distinguished between a principle of logic ("the rule of analogy or the method of philosophy"), a principle of historical development ("the method of evolution"), a principle of customs ("the method of tradition"), and a principle of justice, morals, and social welfare ("the method of sociology").[621] But this taxonomy of principles was, or could at least only work as, a descriptive account, not a methodological programme offering guidance to lawyers. As a description, moreover, it was crude and general. Cardozo's writings are pervaded by countless reservations and qualifications pervading his writings, almost to the point of straight-forward hesitation; as such, it was possible for anyone to find something to his or her liking. In a symptomatic fashion, Cardozo concluded that "[i]f you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[622]

L. REV. 682, 684. Furthermore, in a personal letter to Holmes in 1928, Cardozo described him as "the greatest judge that ever lived", see Polenberg (1997) 173.

619 Cardozo (1982), *The Growth* 117; Cardozo (1982), *The Paradoxes* 124–125.

620 Cardozo (1982), *The Growth* 84.

621 Cardozo (1982), *The Nature* 30–31, see also a succinct summary on 112.

622 *Ibid.* 113. Similarly, when concluding the 1923 lecture with some final remarks on the relationship between stability and progress, he said that "I shall not take it amiss if you complain that I have done little more than state the existence of a problem. It is the best I can do.", see Cardozo (1982), *The Growth* 143. Karl N. Llewellyn comments that "[e]xactly what the proper limits [for judges to drive legal change] are he did not describe; he *felt* them, and then he used them. What they are, you gather not from his books; those books tell you chiefly that there is some freedom for a judge, and that it is severely restricted […]", see 'On Reading

Notwithstanding all the reservations, there is no doubt that Cardozo was a legal progressivist. His writings are, just like Pound's works, full of references to continental scholars such as Gény, Ehrlich, Kantorowicz, Saleilles, Duguit, Zitelmann, Stammler, and many more, as well as to the pragmatists James and Dewey. More importantly, he referred to the method of sociology as "the force which in our day and generation is becoming the greatest of them all" and claimed, in a Holmesian way, that "[t]he final cause of law is the welfare of society."[623] He also referred approvingly to Jhering's teleological method and contended as well that "[r]ules derived by a process of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady and erosive action of utility and justice."[624] The reference to "justice" and not merely "utility" is indicative of Cardozo's broad definition of a sociological method and his belief in a close connection between law and morals. The judge was, within the limits of his discretionary powers, under a duty "to

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and Using the New Jurisprudence' (I) (1940) 26 *American Bar Association Journal* 300, 301–302 (emphasis in original). Horwitz (1992), *The Transformation* 191–192 has also pointed out that Cardozo's theory was full of opposing propositions. Polenberg (1997) 87 notes that *The Nature of the Judicial Process* "had something to please everyone". Another scholar has called Cardozo's approach to judging "eclectic and pragmatic", see James B. Staab, 'Benjamin Nathan Cardozo: Striking a Balance Between Stability and Progress' in William D. Pederson and Norman W. Provizer (eds), *Leaders of the Pack. Polls & Case Studies of Great Supreme Court Justices* (Peter Lang Publishing 2003) 99, 108.

623 Cardozo (1982), *The Nature* 65–66, see also 73. In this context, the ambivalence of Cardozo's theory can be illustrated by juxtaposing two statements. On 66, he writes that "[l]ogic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will *dominate* them all." (emphasis added). On 137, however, we learn that the scope of discretion for the judge is very limited and that "[a]ll that the method of sociology demands is that within this narrow range of choice, [the judge] shall *search* for social justice." (emphasis added).

624 Cardozo (1982), *The Nature* 99–100 and 102. Yet he was far from an iconoclast advocating a banishment of concepts and logic from judicial reasoning, see e.g. 32–33 and 46. In Cardozo (1982), *The Paradoxes* 61, he spoke of a potential "tyranny of concepts", but this could be avoided by dealing with concepts as "provisional hypotheses to be reformulated and restrained when they have an outcome in oppression or injustice."

maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."[625] This idea of law's moral value distinguished him from the more nihilist inclinations of some of the legal realists.[626]

Cardozo's sociological legal theory was built on a premise about the creative role of the judge. In his characteristic prose style, he spoke of "that strange compound which is brewed daily in the caldron of the courts" and declared bluntly that "I take judge-made law as one of the existing realities of life."[627] In a manner that bears a striking resemblance to a significant element in Kelsen's *Stufenbau* theory, he asserted that the difference between the judge and the legislator was one of degree, not of kind.[628] Furthermore, he argued that "[t]he law which is the resulting process [of the judge's creative acts] is not found, but made." Even though he hastened to add that there was "in truth nothing revolutionary or even novel in this view of the judicial function", these words were not insignificant when they came from the mouth of a judge.[629]

To sum up, Cardozo furthered the progressive agenda by following in the footsteps of Holmes and Pound; in relation to the former, also in the sense that he inherited his robe. In one way, it is possible to see him as a hybrid of the two – in terms of theoretical depth more sophisticated than Holmes, but not as thoroughgoing as Pound; in terms of eloquence, not as sharp-penned as Holmes, still more audience friendly than Pound. The fame he achieved from his speeches in the 1920's,

625 Cardozo (1982), *The Nature* 133–134.

626 See Staab (2003) 119; Horwitz (1992), *The Transformation* 190–191.

627 Cardozo (1982), *The Nature* 10.

628 Cardozo (1982), *The Nature* 113 and 119, where he makes a reference to Gény. I have found no references to Kelsen in Cardozo's theoretical writings from the 1920's. And anyways, Kelsen's theory on interpretation was not developed in 1921, see text accompanying footnote 150 above. A later acquaintance with Kelsen cannot be ruled out, though, as he makes a reference to Kaufmann's *Kritik der neukantischen Rechtsphilosophie* in Cardozo (1982), *The Paradoxes* 36.

629 Cardozo (1982), *The Nature* 115–116. Cardozo's attempt to normalize his own views was not unfounded. As Tamanaha (2010) has shown, an acknowledgment of the discretionary and creative element of judicial decision-making can be found in a number of writings dating at least back to the 1880's, see e.g. 71–84.

which were also published, bears witness to his qualities, but they also indicate a public that was receptive to progressivist ideas. For the judge Cardozo, it was obvious that the judiciary *made* – and should make – law, and that the judges' source of knowledge would have to be "life itself".

4.3.4 Felix Frankfurter: Law as the reading of life

Felix Frankfurter (1882–1965) was, like Cardozo, another renowned and influential 20th century American Jewish jurist. The Frankfurter family belonged to a completely different social stratum than the Cardozo's, though, arriving in New York as Austrian immigrants in the 1890's. Yet Felix quickly climbed the ladders and joined the Harvard Law School faculty staff in 1914, served as an adviser to President Franklin D. Roosevelt in the New Deal era, and replaced the deceased Cardozo at the Supreme Court bench in 1939, where he stayed until 1962. Frankfurter's judicial enterprise turned out to be a great disappointment to the many who had expected him to be a liberal judge because of his affiliation with progressive circles. For whereas the postwar years, especially under the Warren Court (1953–1969), was a period of markedly judicial activism in favour of civil rights, Frankfurter remained a staunch and principled advocate of judicial restraint. For that reason, he gained a reputation as a conservative judge, and one of his biographers has noted that "[h]istory has not been kind to Felix Frankfurter."[630] We will leave this fascinating part of Frankfurter's biography aside and focus on some of his small academic pieces.

630 Michael E. Parrish, 'Justice Frankfurter and the Supreme Court' in Jennifer M. Lowe, *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas* (Supreme Court Historical Society 1994) 61, 71, quoted in Dalin (2017) 178. For an overview of Frankfurter as a judge, see Dalin (2017) chapter 6, in particular 159–168, and 176–183 for his legacy. For positive assessments of Frankfurter, underlining his principled ideal of judicial deference, see Dennis J. Coyle, 'Felix Frankfurter: Constitutionalist Progressive' in William D. Pederson and Norma W. Provizer (eds), *Leaders of the Pack. Polls & Cases of Great Supreme Court Justices* (Peter Lang 2003) 142; William D. Bader, 'Felix Frankfurter's Transition to the

Frankfurter was heavily influenced by Holmes and Pound, to whom his writings are full of references. About Holmes, whom he held an intimate personal friendship with, he stated in 1929 that "[i]t may fairly be said that we have been living on Holmes ever since – that the effort of the modern science of law is to investigate law in the perspective in which he has set the problems of law."[631] Another place he wrote, with reference to Pound, that "the eternal struggle in the law between constancy and change is largely a struggle between the forces of history and the forces of reason, between past reason and present needs."[632] What is more, his theory about legal development was fully in line with that expounded by Pound. An early article from 1915 opens with the following Poundian statement: "Public opinion, the dominant factor in our national life, is also the most elusive."[633] Frankfurter sensed a dramatic shift in the direction of the American mindset – asking if they were not "in the very midst of a definite shift of emphasis from individualistic ends to co-operative ends" – caused by the industrial developments since the Civil War, again an idea that was present in Pound's writings. And, Frankfurter reasoned, these changing public perceptions implied in turn that law had to change as well: "If facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life, for facts are stubborn and will not yield."[634]

Judicial Role' in Stephen K. Shaw, William D. Pederson and Frank J. Williams (eds), *Franklin D. Roosevelt and the Transformation of the Supreme Court* (M. E. Sharpe 2004) 126.

631 'The Conditions for, and the Aims and Methods of, Legal Research' (paper read at a meeting of the Association of American Law Schools at New Orleans, Louisiana, 27 December 1929, printed in (1930) 15 IOWA L. REV. 15 *Iowa Law Review* 129, 133. On the friendship between Frankfurter and Holmes, see Dalin (2017) 122.

632 Felix Frankfurter, 'Twenty Years of Mr. Justice Holmes's Constitutional Opinions' (1923) 36 HARV. L. REV. 909 (reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution*, The Belknap Press of Harvard University Press 1970) 112, 138. The reference is to Pound's *Interpretations of Legal History* chapter I.

633 Frankfurter (1915) 365.

634 Frankfurter (1970), 'The Zeitgeist and the Judiciary' 3, cfr. as well the foregoing pages of the article.

Frankfurter regarded constitutional law, at least in its relation to social legislation, to be "not at all a science, but applied politics, using the word in its noble sense".[635] It was a "sheer illusion to assume that this power [to decide questions of policy] is exercised by drawing meaning out of the words of the Constitution"; the questions were not to be answered "by mechanical magic distilled from the four corners of the Constitution".[636] Instead, judges made choices and exercised creative power. They were dealing with "things", not "words", and they gathered meaning "not from reading the Constitution but from reading life".[637] In general, he argued, "[l]aw is seen to be more and more related to the organic processes of life outside of the law."[638] The turn to "the life outside of the law" can be illustrated by his comments on *Muller v. Oregon*, the previously mentioned Brandeis Brief-case where the Supreme Court upheld legislation restricting the hours of work for women. The Court, Frankfurter notes, "invoked no legal principles, it resorted to no lawbooks for guidance, but considered the facts of life".[639]

It is important to underline that Frankfurter was not an opponent of judicial review.[640] What he called for was judicial restraint when facing social legislation that aimed to mitigate the negative consequences of industrial developments. The lawyers' mindset had to be changed, and they had to be more sensitive towards "the facts of life" and present needs. Again, this is a view fully in line with Pound's theory.

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635 *Ibid.* 4.

636 Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 114 and 116. See also Felix Frankfurter, 'The Task of Administrative Law' (1926–1927) U. PA. L. REV. 614, 620: "[W]e must travel outside the covers of lawbooks to understand law."

637 Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 135; Frankfurter (1970), 'Social Issues' 290.

638 Felix Frankfurter, 'The Paradoxes of Legal Science' (first published 1929, reprinted in Philip B. Kurland (ed), *Felix Frankfurter on the Supreme Court. Extrajudicial Essays on the Court and the Constitution,* The Belknap Press of Harvard University Press 1970) 202, 205. In Frankfurter (1915), he writes that "law is not outside of life; it is part of it.", see p. 367.

639 Frankfurter (1970), 'The Zeitgeist and the Judiciary' 2–3.

640 See e.g. Frankfurter (1970), 'The Zeitgeist and the Judiciary' 6–7.

One important way to bring about this change of mindset was to adopt a more appropriate legal education. Once again, this point was also one made by Pound and Holmes. Frankfurter formulated this as a more general critique of the Langdellian ideals about legal didactics and legal thought:

> Langdell's method was inductive, but his outlook was that of a theologian – he was an implacable logician, a brilliant reasoner within a fixed formal framework. The extent to which every law library and every law writer today goes beyond case law for the understanding of cases is the measure of Langdell's preoccupation with formal law – marvelously tough-minded in his preoccupation and serving as a constant admonition against loose talk, but nevertheless too neglectful of "the secret root from which the law draws all the juices of life."[641]

What was to come instead of the Langdellian education was – not surprisingly – an education oriented towards life: "We fail in our important office if [the students] do not feel that society has breathed into law the breath of life and made it a living, serving soul. We must show them the law as an instrument and not an end of organized humanity".[642]

4.3.5 Legal realism and its context: The Restatement Project and proposals for educational reform

If we move to the 1920's and 1930's, an influential current in American legal thinking emerged that came to be known as legal realism. In the following, I will briefly have a look at the context of legal realism, and then the next two sections will be devoted to an analysis of two leading realists: Karl N. Llewellyn and Jerome Frank.

641 Frankfurter (1930) 132. Frankfurter's reference at the end of the quote is to Holmes's *The Common Law* (1881) p. 35.
642 Frankfurter (1915) 372.

A major concern for the legal realists was, broadly speaking, that law was out of touch with life.[643] To remedy this problem, they made what I will call two broadening operations. First, they broadened the idea of law internally, by turning their attention from rules to other legal factors. Secondly, they broadened the idea of law externally, by urging that law had to be understood in its social context and by directing a considerable amount of their efforts precisely to this context and to factual issues. This externally broadened understanding of law was accompanied by an openness towards other social sciences and a belief that legal research would become more scientific if it drew upon neighbouring disciplines.

These basic common denominators notwithstanding, there is a certain scepticism among legal historians towards the use of the term "legal realism". The first problem is that it brings the idea of a movement or a school of thought, which might conceal the heterogeneity of the different actors.[644] The idea of a definable entity of legal realists may in part have to do with the fact that Karl N. Llewellyn, a leading realist, compiled a list of twenty realists in a famous article from 1930 (cfr. below). There seems to be a general agreement that the list had considerable shortcomings.[645] In fact, it was never Llewellyn's intention to make an exhaustive list of legal realists, and he emphasized time and again that the legal realists were not a group or a school of thought. The second problem with the term is that it underscores the continuity between the progressive and sociological legal thinkers – such as Pound and Holmes – and thus "oversells" the novelty of the realists.[646]

One way of trying to come to grips with legal realism as an intellectual current is to situate it in a broader legal cultural context. Two

643 Horwitz (1992), *The Transformation* 187. Kalman (1986) 9 writes that all realists tried to "breach the gap between 'law in books' and 'law in action.'".

644 See Horwitz (1992), *The Transformation* 169; Wiecek (1998) 198; Johnson (1981) 13, for a contemporary witness, see Hermann Kantorowicz, 'Some Rationalism about Realism' (1934) 34 YALE L.J. 1240, 1240. Twining (1985) 82 finds it meaningful to speak of a movement up until 1928, but then it became too diverse.

645 Horwitz (1992), *The Transformation* 180–185; Twining (1985) 73–77.

646 Horwitz (1992), *The Transformation* 169–170; Wiecek (1998) 198; Kalman (1986) 17.

important contextual factors were the general state of law and the state of legal education. As described earlier, the American legal profession faced considerable challenges in the late 19th century. The explosion of published cases made the law chaotic and fragmented, precisely at a time when a commercialized and increasingly regulated society was in need of a more sophisticated law and skilled lawyers. Moreover, the law students made their inroad at the universities, adding further to the need for professionalization. A legal academic culture was in its inception, but Rome wasn't built in a day; it takes time to erect and consolidate robust academic structures. The challenges in terms of systematization and educational improvement would continue to confront the profession in the first decades of the new century.

One of the most significant responses was the founding of the American Law Institute (ALI) in 1923 and the Institute's Restatement of the Law project. In a 1923 report leading up to the foundation of the Institute, a Committee on the Establishment of a Permanent Organization for the Improvement of the Law noted that "the two defects in the American law are its uncertainty and its complexity." This uncertainty and complexity arose from a lack of common agreement upon the fundamental principles of the common law, "conflicting and badly drawn statutory provisions", "lack of precision in the use of legal terms", "the ignorance of judges and lawyers", and "the number and nature of novel legal cases".[647] The idea behind the incredibly ambitious Restatement project was to have legal experts work through the piles of case law and "restate" the applicable legal principles in statutory form. This idea of a quasi-code was supposed to make some order out of the chaos, and thus remedy the "uncertainty and complexity". Several Restatements were published in the 1930's and the 1940's, with *The Restatement of the Law of Contracts* from 1932 as the first one.

647 Quoted from Herbert F. Goodrich, 'The Story of the American Law Institute' (1951) No. 3 *Washington University Law Quarterly* 283, 283 and 285. See also White (2000) 176–177.

Yet the Restatement project was not to everyone's liking. Many legal realists rebuffed it as a narrow "black-letter law" project.[648] It has even been claimed that the Restatements played an analogous role to the BGB in Germany as a crown jewel of ivory tower legal positivism unleashing a counter-attack from critical opponents.[649] The controversy over the project is suggestive in the sense that it reveals two conflicting ideas about law.[650] The Restatement project sought to remedy the "uncertainty and complexity" by improving the level of conceptual and terminological clarity. It maintained, in other words, a conception of law as a relatively self-contained system, as illustrated by the fact that the project was driven entirely by legal experts. Moreover, the project had its roots in progressive and reform-oriented circles, who believed optimistically in the social benefits of an improved conceptual apparatus.[651] The driving forces behind the establishment of the institute were inspired by, among others, Wesley Newcomb Hohfeld, whose analysis of fundamental legal concepts is still widely read today.[652] Hohfeld had claimed in a 1914 speech that "[t]he clarifying and refining of our terminology is […] an indispensable prerequisite

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648 See Wiecek (1998) 199; White (2000) 187–193. See Horwitz (1992), *The Transformation* 183 (footnote 106) for references to critical articles written by legal realists. For a historian's critique, see Friedman (1973) 582: "They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones."

649 Herget and Wallace (1987) 430 and 437.

650 The following is to a considerable degree informed by White (2000) chapter 6.

651 For the progressive origins of the Institute, see N. E. H. Hull, 'Restatement and Reform: A New Perspective on the Origins of the American Law Institute' (1990) 8 LAW & HIST. REV. 55. Commenting on Hull's article, Wiecek (1998) 199 contends that even if the foundational intention was built on progressivism, the actual Restatements were not. In a nuanced assessment, Johnson (1981) 61 points out that the Depression reduced the ALI's finances, and as a result, they abandoned the planned publication of supplementary treatises. These commentaries might have added information about the socio-economic context of the rules.

652 See Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916) 23 YALE L.J. 16. For Hohfeld as a source of inspiration for the ALI founders (he himself passed away untimely in 1918), see Hull (1990) 58 f. and White (2000) 184 f.

to any substantial improvement of our future legislation".[653] Benjamin Cardozo, who was elected vice president of the Institute in 1923, said about the Restatement project that he had "great faith in the power of such a restatement to unify our law".[654] The realists' idea about law, on the other hand, was diametrically opposite in the sense that they rejected the feasibility of reducing uncertainty and complexity by means of conceptual sophistication. Consequently, they argued that a sound methodology for the study of law should not be geared towards concepts, terminology, and classification, but rather position itself open towards the empirical social sciences.

The realists' attempt to open the gates of the law schools and introduce a more interdisciplinary approach could be observed in debates over educational reform as well. While Harvard had been the focal point of the development of modern legal education in the United States since Langdell's days in the 1870's, some scholars from other universities now started to look upon Harvard – where Pound was dean – as "the headquarters of 'legal theology'".[655] In the 1920's and 1930's, Johns Hopkins Institute of Law and in particular Yale and Columbia stepped up as the central loci for academic avant-gardism.[656] These movements sought didactic reforms and the replacement of what they regarded as an insufficient case method. At Columbia in the early 1920's, Noel Dowling and Herman Oliphant started to offer what they termed "functional courses". These courses resystematized the classification of the subjects along "functional" instead of "legal" categories, and they placed law in a social context and interacted with the social sciences. The courses were successful and after a couple of years a

653 Wesley Newcomb Hohfeld, 'A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?' (address delivered before The Association of American Law Schools, at its Annual Meeting in Chicago, December 28, 29 and 30, 1914) 23.

654 See Cardozo (1982), *The Growth* 9, see also 6.

655 Twining (1985) 25.

656 The following builds on *ibid.* chapter 2 and 3, and Johnson (1981) 96–106. As Johnson documents elsewhere, another part of the criticism that comes in addition to the aspects I am focusing on here was that the common-law centred case method failed to give due attention to statutory materials, see 83 and 94–95.

process was initiated to reorganize the entire curriculum of the law school. Oliphant, a leading force behind the reform process, had in his earlier days left the study of philology for law school, hoping to "get in touch with something more closely allied to life." He would learn the hard way that the grass is always greener on the other side of the fence, noting that "I completed the Law School course with a pretty keen feeling as to law's detachment from life."[657] Working on the curriculum reform, he claimed that "[o]ur present classification is pretty much out of touch with life", a problem he sought to remedy with the functional approach.[658] But the reform process eventually stranded, to a great extent due to disagreement over whether the faculty should be a "teaching" or a "research" institution as well as an agonizing debate over the appointment of a new dean. A host of scholars subsequently left the law school for Johns Hopskins and Yale. Still, the proposals were significant, and a Columbia student at the time referred to the reform movement as "a frontal challenge to the concept of the common law as a closed legal system, yielding answers to all questions by conformity to earlier decisions or deductions from the principles that they declared."[659] Similarly, at both Johns Hopkins and Yale, empirical legal studies, including both gathering of statistics and field research, bloomed in the late 1920's and early 1930's.

The demands for educational reform and the opposition against the Restatement project shows that the progressivists' attack on mainstream legal thinking was now being further developed. The reform proposals can be seen as a concrete attempt to implement progressivism in legal education. But the destiny of the proposals indicates that they perhaps went too far.

657 Quoted from Twining (1985) 44.
658 Quoted from *ibid.* 48.
659 The words belong to Herbert Wechsler, quoted in Johnson (1981) 98.

4.3.6 Karl N. Llewellyn: In the Beginning was Behaviour

Karl N. Llewellyn (1893–1962), the perhaps most well-known American legal realist, had affiliations with both of the avantgarde universities in New Haven and New York. He taught at Yale in the period 1914–1918 and 1922–1923 and moved to Columbia in 1924, where he stayed until 1951.[660] According to his biographer, his position on the educational debates there was ambivalent. He supported the reformers but wanted to maintain the faculty as a "teaching" and not merely a "research" institution.[661]

Llewellyn played a crucial role in shaping the idea of a legal-intellectual current labelled "realism", through two law review articles published in 1930 and 1931. Llewellyn's first article was titled 'A Realistic Jurisprudence: The Next Step'.[662] In the article, already his opening move is interesting. He deliberately avoided to attempt a definition of the concept of law and saw it more fruitful to choose a certain "*focus* of matters legal" or a "*point of reference*".[663] The reason was that he had "no desire to exclude anything from matters legal. In one aspect law is as broad as life, and for some purposes one will have to follow life pretty far to get the bearings of the legal matters one is examining."[664] While primarily an attempt to find a suitable strategy for approaching and discussing legal phenomena, the choice at the same time displays a view that law cannot be seen as something autonomous and distinctly separated from other social factors. His next step was to argue that traditional legal thinking was too obsessed with rights and rules – that "the use of precepts, or rules, or of rights which are logical counterparts of rules – of *words*, in a word – as the *centre* of reference in thinking about law, is a block to a clear thinking about matters legal".[665]

660 See Twining (1985) 102–103.
661 *Ibid.* 103–104.
662 Karl N. Llewellyn, 'A Realistic Jurisprudence: The Next Step' (1930) 30 COLUM. L. REV. 431.
663 *Ibid.* 432 (emphasis in original).
664 *Ibid.* 432.
665 *Ibid.* 442 (emphasis in original).

Llewellyn's Copernican turn was to substitute *behaviour* for "words" as the centrepiece of the legal universe, a move Holmes had hinted at already in 1899 when he wrote that "[w]e must think things not words".[666] Llewellyn emphasized that there was still a place for rules in legal thinking but admitted, at the same time, that his shift of focus "turns accepted theory on its head."[667] Again, it is worth noting that a close relation between law and society plays a crucial role in Llewellyn's argument: it was precisely because behaviour was particularly well-fitted to elucidate this relation that he chose it as a centre of reference.[668] His more precise idea was, namely, that instead of taking for granted that the written rules actually described the judicial decision-making process and actually controlled the behaviour of ordinary people, an empirical legal scholarship had to investigate *if* this was the case. And this could only be done by investigating behaviour, not by looking at mere "words".

The following year, Roscoe Pound published an article in *Harvard Law Review* titled 'The Call for a Realist Jurisprudence'.[669] Although not explicitly presented as a reply to Llewellyn, it is difficult not to read it as, at least in part, precisely that.[670] And indeed, Pound had his reasons to respond. In his article, Llewellyn had presented some polite and laudatory comments about Pound, but these seemed to drown amidst the not-so-diplomatic criticism. Pound was "partially caught in the traditional precept-thinking of an age that is passing", his "brilliant buddings ha[d] in the main not come to fruition" and his

666 Holmes (1899) 460. See also Frankfurter (1970), 'Mr. Justice Holmes's Constitutional Opinions' 135.

667 Llewellyn (1930) 442 and 443.

668 *Ibid.* 443: "And it would seem to go without demonstration that *the most significant* (I do *not* say the *only* significant) aspects of the relations of law and society lie in the field of behavior [...]" (emphasis in original).

669 See Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44 HARV. L. REV. 697.

670 Horwitz (1992), *The Transformation* 175 suggests that Pound's reply might also have been sparked by the publication of Jerome Frank's eccentric *Law and the Modern Mind* in 1930 (on this book, cfr. section 4.3.7). Twining (1985) 71 also points out that Llewellyn's *The Bramble Bush* was published in 1930.

works were "embarrassed by the constant indeterminacy of the level of his discourse" – sometimes he wrote "on the level of considered and buttressed scholarly discussion", sometimes on level of the "thoughtful but unproved essay", and sometimes "on the level of bed-time stories for the tired bar".[671] Pound's reply, which was allegedly written in a haste,[672] was somewhat ambiguous. He stressed that he tried to "understand" the realists, yet he did not refer to any concrete authors or works in his text. Moreover, the reply is written with an apparently positive and sympathetic tenor, yet he criticized the realists along several lines. Pound's main objection was that "the new juristic realists" exaggerated their points. They had, so he argued, a naïve belief in finding "the pure fact of fact", they wrongly excluded the challenging question of ought – law's normative element – from legal thinking, and they ignored the logical and rational elements of law and the "art of the common-law lawyer's craft", which served as stabilizing factors and ensured a certain degree of uniformity to legal application.[673] Overall, however, I think Pound's article can best be understood as an attempt, albeit somewhat obscurely formulated, to bring together and reconcile the new realism with the sociological jurisprudence he himself had advocated. In my opinion, it is significant that when he launched a seven-point program for legal research at the end of the article, he called it a program for a "relativist-realist jurisprudence";[674] he did not, in other words, reject legal realism. And this might help underscore the point Morton J. Horwitz has made, that "[f]or many purposes, it is best to see Legal Realism as simply a continuation of the reformist agenda of early-twentieth-century Progressivism."[675]

Llewellyn's rejoinder, titled 'Some Realism about Realism – Responding to Dean Pound', was published in *Harvard Law Review* a

671 Llewellyn (1930) 434 and 435 (partly in footnote 3).
672 This was, according to Twining (1985) 72, later admitted by Pound.
673 See Pound (1931) 700, 703 and 706.
674 *Ibid.* 710.
675 Horwitz (1992), *The Transformation* 169. Horwitz' explanation of Pound's 1931 critique is that Pound himself had begun to change, see also 174–175.

few months later.[676] The article served (at least) three purposes: First, it gave Llewellyn an opportunity to convey with even more force the message that the realists were the ones who negated, the ones who were trying to wipe out an old-dated way of thinking about law. His opening lines read: "Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. Before rules, were facts; in the beginning was not a Word, but a Doing." And he followed up by situating this in a broader intellectual context:

> The ferment is proper to the time. The law schools threatened at the close of the century to turn into words – placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble.[677]

The second purpose was to refute Pound's criticism as being unwarranted and completely undocumented, in fact a strawman. Llewellyn did this in a systematic fashion, by providing a list of twenty potential realists and going through their works in order to see whether Pound's claims could be supported. The answer was on the whole negative.[678] Third, Llewellyn tried to sketch positively some common characteristics for the legal realists – who he, by the way, was at pains to underline did not make up a school of thought or a group.[679] A general description was the following:

> They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the

676 Karl N. Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1931) 44 HARV. L. REV. 1222. Jerome Frank contributed to the article, see 1222 (footnote).

677 Llewellyn (1931) 1222.

678 The "test" is presented on 1228–1233. The meticulous methodology is presented in more detail on 1226–1228 (in footnote 18).

679 See *ibid.* 1224, 1225, 1233, 1246, and 1256. On 1234 he spoke instead of a "movement", on 1250 of "a mass of trends".

life around them moving fast, *that some law may have gotten out of joint with life*.[680]

In addition, Llewellyn pointed out seven more concrete characteristics; one of these are of particular interest in our context. The realists, he claimed, sought "[t]he *temporary* divorce of Is and Ought for purposes of study".[681] But in a Kelsen-turned-upside-down-way it was the "Is"-es that were the proper study object.[682] Similarly, he explained in the preface to a book he wrote on American law in German language, published in 1933, that he would deal with "*Seinstoff*", not "*Sollstoff*".[683] The idea was simply that the proper researcher should deal with a science of observation, and therefore had to start by investigating the actual content of the law before he or she could put on normative glasses and take an evaluative position.

A recurring theme in Llewellyn's writings was, as we have seen, the contrast between "words" (alternatively "rules") and "behaviour". Sometimes, this was dressed up in a "law" and "life" clothing; he wrote about "making law and life allies",[684] about the importance for legal research of "checking up on the effects of the law in life", and he hoped that his scientific program would have the result that "the law of the

680 *Ibid.* 1223 (emphasis added).

681 *Ibid.* 1236 (emphasis in original).

682 Speaking of Kelsen; Llewellyn was not very fond of his theory. "I see Kelsen's work as utterly sterile," he wrote, "save in by-products that derive from his taking his shrewd eyes, for a moment, off what he thinks of as 'pure law'.", see 'Law and the Social Sciences – Especially Sociology' (1949) 62 HARV. L. REV. 1286, 1290 (footnote 5).

683 Karl N. Llewellyn, *Präjudizienrecht und Rechtsprechung in Amerika. Eine Spruchauswahl mit Besprechung* (Verlag von Theodor Weicher 1933) VIII (preface) (emphasis added). The background for the book was that Llewellyn had been a visiting professor at the Faculty of Law in Leipzig in 1928–1929. In his young days, Llewellyn had also studied at a *Realgymnasium* in Mecklenburg in 1911, and during the First World War, he actually fought for the Germans, was wounded in Flanders in November 1914 and received the Iron Cross. For the fascinating details about Llewellyn's relation to Germany, see Twining (1985) 89–91, 106–109 and in particular 479–487 (appendix). On the relationship between Llewellyn and Hermann Kantorowicz (cfr. section 3.3.2 above), see Schmidt (2023).

684 Llewellyn (1933) 94.

schools will no longer be out of joint with the life of the lawyer."[685] At this point, his theory reached its most complete form in *The Common Law Tradition* from 1960, where he launched a dichotomy of two "period-styles" of legal reasoning: a Grand Style and a Formal Style. In The Formal Style – which had been the dominant style in the late 19th century and at the beginning of the 20th, and for which Langdell was the archetype – "the rules of law are to decide the cases; policy is for the legislature, not for the courts, and so is change even in pure common law." Moreover, "[o]pinions run in deductive form with an air of expression of single-line inevitability" and "what had been life-closeness has drifted away from life".[686] The Grand Style reasoning, by contrast, was a more complex process. It relied on precedent but additionally, it took into consideration the reputation of the opinion-writing judge, broad "principles" of common sense and order, and future-oriented "policies". It sought a "functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need."[687] The Grand Style had been dominant in the period 1820–1860 and was, so Llewellyn claimed to observe, once again gaining foothold. It shouldn't come as a surprise that Llewellyn's sympathy lay with the Grand Style.

What is of particular interest here is that the distinction between the two period styles offers a window into an important feature of Llewellyn's legal thinking: his attempt to broaden the idea of things legal. While the Formal Style, according to his view, equalled "law" and "rules", he sought, with his numerous references to "the crafts of law" and "institutions", to underline that rules were embedded in a number of legal-professional factors.[688] Legal rules were not islands

685 Karl N. Llewellyn, Felix Frankfurter and Edson R. Sunderland, 'The Conditions for and the Aims and Methods of Legal Research' (addresses delivered at the meeting of the Association of American Law Schools, 27 December 1929, printed in (1930) Volume 6 *American Law School Review* 663) 674.

686 Karl N. Llewellyn, *The Common Law Tradition. Deciding Appeals* (Little, Brown and Company 1960) 38 and 186.

687 Llewellyn (1960) 36–37.

688 See in particular the line of argument in Llewellyn (1960) 184 f.

surrounded by an anarchic sea of extra-legal and random psychological and social facts; they rather belonged to an archipelago of various legal-professional factors. Illustrating is the list he presented in *The Common Law Tradition* of 14 major steadying factors in the work of the appellate courts, which included, *inter alia*, legal doctrine, known doctrinal techniques, adversary argument by counsel, a collegial decision, and the judges' responsibility for justice.

The question of how the discretionary freedom of judges was kept within certain boundaries – boundaries that were not made by rules – was of course an issue with constitutional undertones, yet Llewellyn did not explicitly phrase his discussions in this language. Nevertheless, the link is present through his confrontations with the classical formulation of so much pride in American political-constitutional history: that of a "Government of Laws, not of Men". He rebutted the formula and argued that it was more apposite to speak of a government of laws *and* men or of decisions *by* the law, and then precisely with a broad and professional-institutional understanding of "law".[689] In general, Llewellyn barely wrote about constitutional law. In *The Common Law Tradition*, he had deliberately omitted the Supreme Court from his study.[690] And in his German *Präjudizienrecht und Rechtsprechung in Amerika*, he seemed to claim that constitutional law was something atypical, merely a political balancing of interests.[691] But in 1934, he advanced a somewhat embryonic theory of the Constitution as an institution, i.e., "in first instance a set of ways of living and doing" instead of "a matter of words or rules."[692] Not very surprisingly, he contrasted

689 Karl Llewellyn (1934), 'The Constitution as an Institution' (1934) 14 OR. L. REV. 108, 110; Llewellyn (1960) 12, with reference to 184 f. See also Karl N. Llewellyn, 'On Reading and Using the New Jurisprudence' (II) (1940) 40 COLUM. L. REV. 581, 583 f.

690 See, however, Llewellyn (1960) 384–393.

691 Llewellyn (1933) 70–71. On a side note: Llewellyn explained the conservatism of the Supreme Court in constitutional cases by referring to their class background and their old age. The old age argument was precisely what Roosevelt would use when he launched his court packing plan in 1937.

692 Karl N. Llewellyn, 'The Constitution as an Institution' (II) (1934) 34 COLUM. L. REV. 1, 17.

the words of the Constitution with the practice of the government, and gave the latter precedence. He spoke of "the working Constitution", "the going Constitution", and "the living Constitution", wanted to "dethrone the Words", and exclaimed that it was practice that gave "continuing life" to the constitutional text.[693] The radicality of the theory is shown by his claim that "the working Constitution is amended whenever the basic ways of government are changed."[694]

Llewellyn's idea about informal amendments of "the working Constitution" is important. It was a natural part of a theory that sought to switch the focus from "words" to "behaviour". But it is striking that Llewellyn did not elaborate on the consequences of such a shift within constitutional law. Again, we are confronting the problem discussed in relation to Rudolf Smend: if a constitutional theory assigns precedence to constitutional practice rather than constitutional legal norms, isn't there an obvious risk that a core constitutional function – the fact that constitutional law is supposed to be more difficult to change – is undermined? Llewellyn did not say much about this, apart from vague references to a government of laws *and* of men. What seemed to be Llewellyn's main concern was to do something with the unlucky situation where law had "gotten out of joint with life", and where lawyers had forgotten that "law is as broad as life". His recipe was radical enough: legal scientists and lawyers should focus on "behaviour" instead of "words", on the "*Seinstoff*" instead of the "*Sollstoff*".

4.3.7 Jerome Frank: In the Beginning was Certainty

In 1930, the same year as Llewellyn published his famous article about realism, Jerome Frank, at that time a practising lawyer, printed a con-

693 Llewellyn (1934) 'The Constitution as an Institution' (II) 14–16; Llewellyn (1934), 'The Constitution as an Institution' 114.

694 Llewellyn (1934), 'The Constitution as an Institution' (II) 22 (the entire quote was italicized in the original text). Llewellyn would, by the way, claim that he was merely offering a theory that would reveal what was *actually* going on in constitutional law, see 39–40.

troversial book called *Law and the Modern Mind*. The book was to become widely read, and the picture of legal realism intimately associated with its content, albeit Frank was seen by many of his colleagues as a peripheral outsider.[695]

Law and the Modern Mind was a psychoanalytically oriented book, and the writing had commenced while Frank was himself undergoing psychoanalytic therapy. The fundamental problem of the book was the following puzzle: Most people, both laymen and lawyers, want law to be certain and predictable, yet law is, according to Frank, inherently unstable, unpredictable, and changing. The longing for stability – a longing for something unreal – had consequently to be based on a myth.[696] Frank offered a partial explanation of the roots of this "basic myth". He traced it back to a feeling of utmost certainty and control in our infancy, a feeling that turns, as the child grows up and realizes its lack of omnipotence, into a demand for fatherly authority. In a next developmental stage, the child realizes that this fatherly certainty-by-proxy is insufficient as well, and now law enters the stage as a haven of stability. The diagnosis of people seeking an unrealizable certainty in law, then, was that "they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute for those attributes of firmness, sureness, certainty and infallibility ascribed in childhood to the father."[697]

This had bearings on legal thinking. As most legal thinkers shared an infantile longing for certainty, they refused, according to Frank, to acknowledge that judges created and not merely applied established law.[698] What is more, they were inbred with a mechanistic thinking where law was treated as formulas, as something settled once and for all, abstract and generalized, inflexible, and static – no leeway was made for novelty, creativity, discretion, and adaption to concrete

695 Horwitz (1992), *The Transformation* 176.
696 See Jerome Frank, *Law and the Modern Mind* (Brentano's 1930) 3–12.
697 *Ibid.* 21.
698 *Ibid.* 35.

circumstances.[699] Creativeness was the life of the law, he wrote, alluding to Holmes.[700]

Frank pursued several motives that testifies to his intellectual affinity with the other American thinkers that have been analysed so far, but his rhetoric is more reminiscent of Ernst Fuchs, the German free lawyer. Frank poured out epithets like "verbalism", "scholasticism", "absolutism", "legal fundamentalism", and "Bealism" (after the Harvard professor Joseph Beale) to describe his opponents. He attacked "Word Magic", formal logic, and deductive models of legal decision-making.[701] At the heart of his theory was, not very surprisingly, a certain rule-scepticism: Rules and principles

> may be the formal clothes in which [the judge] dresses up his thoughts. But they do not and cannot completely control his mental operations and it is therefore unfortunate that either he or the lawyers interested in his decision should accept them as the full equivalent of that decision.[702]

This did not mean, however, that he rejected the place of rules in law. But, just like Llewellyn, he directed the spotlights away from rules and towards courts instead. Their past and future *decisions* – emphasized here in order to distinguish from the reasoned opinion, which "you will study […] in vain to discover anything remotely resembling a statement of the actual judging process" –[703] were the essence of law.[704] Frank was not alone among the realists in emphasizing this distinction.[705]

In Frank's theory, there is also an important grand story about the need for emancipation. The lawyer must grow up, that is, he must break free from the shackles of his childish longing for certainty and repose, and reconcile himself with the uncertainty of law, and, most

699 *Ibid.* 118–119.
700 *Ibid.* 138.
701 See *ibid.*, e.g. the subheadings of part one, chapter VI and VII, and pp. 60 and 66.
702 *Ibid.* 131–132. See also appendix II (264 f.) on "rule-fetichism [sic] and realism".
703 *Ibid.* 103.
704 See *ibid.* 46, 55, 128.
705 See Kalman (1986) 6–7.

fundamentally, life itself. Frank made this grand story vivid by filling in well-known legal names. Roscoe Pound, for instance, had – one can read between the lines – not reached maturity, as he seemed to recognize as socially desirable the strive for legal certainty in some areas.[706] Even though Pound was also duly acclaimed, it is no wonder that the relationship between him and Frank grew cold.[707] What about Benjamin Cardozo? Frank was full of reverence, but even Cardozo had a vision about legal certainty and a "yearning for the absolute".[708] But weren't there any grown up jurists (except, one might guess, Frank himself)? Yes, there was, and the subheading of the final chapter of the book (apart from the several appendixes) speaks for itself: "Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist". Holmes had "abandoned, once and for all, the phantasy of a perfect, consistent, legal uniformity" and had "put away childish longings for a father-controlled world".[709]

The glorification of Holmes at the end of the book doesn't come as a surprise, taking into account the fact that Frank's thinking was full of Holmesian elements. Frank spoke of rules and principles as "the formal clothes in which [the judge] dresses up his thoughts"; Holmes had contended that the important phenomenon was "the man underneath it, not the coat". Frank rejected the longing for legal certainty as an expression of infantilism; Holmes had trumpeted that "certainty generally is illusion, and repose is not the destiny of man."[710] And finally, Frank's decisionism was in line with Holmes's thinking. This means that Frank was following up on ideas that were already existing in American legal thinking, yet he dressed up his theory in a novel psychoanalytic clothing that made him, not very surprisingly, extremely controversial.

706 See Frank (1930) 207–216, see also 289–294. On 214, Frank contends that "Pound has never completely freed himself of rule-fetichism [sic]".

707 For an appraisal of Pound, see *ibid.* 207. For Pound's reaction to the book, see Horwitz (1992), *The Transformation* 180.

708 Frank (1930) 238–239.

709 *Ibid.* 253.

710 See Holmes (1897) 466.

4.3.8 "The Living Constitution" and the Supreme Court's volte-face

The American constitutional system is, as already noted on several occasions, full of tensions and frictions. Most fundamentally, it encompasses the ideas of both "We the People" and "certain unalienable rights". Moreover, the basic tenet of "a Government of Laws, not of Men" is a powerful ideological component; but it has still, as we have seen, not been completely uncontested. In addition, the system has over the course of the time struggled to find a balance between stability and change – something probably all legal systems do, and in particular the ones governed by an archetypical modern constitution with a built-in rigidity through strict amendment requirements. A final and closely related tension – that will be looked at in the following – is the one between "originalism" on the one hand and the idea of a "living Constitution" on the other. The general inclinations among the scholars and movements that have been analyzed in the previous sections went in the direction of "We the People" (progressivism in general), towards questioning the postulate of "a Government of Laws, not of Men" (Llewellyn), towards favoring change before stability (Pound and Cardozo), and – not surprisingly – towards a concept of a *living Constitution*.

One Supreme Court case that is illuminating as a starting point is *Home Building & Loan Association v. Blaisdell* from 1934.[711] The essence of the case is that in 1933, in the wake of the Great Depression, the state of Minnesota had enacted a Mortgage Moratorium Law where mortgage debtors were offered an extended time for redemption of their debts. The emergency measures were introduced in order to protect homeowners who were unable to pay their mortgage from foreclosure. The creditors claimed that this violated their rights under the Contracts Clause in Article I, section 10, clause 1 of the Constitution, which forbids states to pass any "Law impairing the Obligation of Contracts". A majority of five judges upheld the statute, while a minority of four held it to be unconstitutional. What is of interest here is how the

711 290 U.S. 398 (1934).

judges drew upon different authorities to substantiate their arguments. Chief Justice Hughes, writing for the majority, invoked famous dicta by Chief Justice John Marshall in *McCulloch v. Maryland* from 1819: "We must never forget, that it is a *Constitution* we are expounding", "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[712] The spokesperson of the dissenting minority, on the other hand, Justice Sutherland, called upon another notability from the graveyard of famous Chief Justices: Roger B. Taney, and his opinion in the landmark *Dred Scott* case:

> [Taney] said that, while the Constitution remains unaltered, it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'[713]

These are two diametrically opposite ideas about constitutional interpretation. While Hughes and Marshall considered the Constitution to be dynamic and adaptable – a *living constitution* – Sutherland and Taney argued that it had a fixed meaning, was stable and rigid, something that expresses more of an *originalist* position.

The context of *Home Building* is important. It was handed down in 1934, that is, in a period in which the Supreme Court is generally seen as anti-reformist and known for a string of conservative decisions that eventually led to the clash with President Roosevelt in 1937. In *Home Building*, it was the dynamic and reform-friendly interpretation

712 *Ibid.* at 443, with reference to *McCulloch v. Maryland*, 17 U.S. 316 (1819), at 407 and 415. I have quoted directly from *McCulloch*, where the word "Constitution" is written with capital letter and in italics, something that is omitted in Hughes' reference.

713 *Ibid.* at 450, with reference to *Dred Scott v. Sandford*, 60 U.S. 393 (1857), at 426.

of the Constitution that prevailed. Yet the dissent 5–4 reveals a sharply divided Court. And the four judges dissenting in the case – George Sutherland, Willis Van Devanter, James Clark McReynolds, and Pierce Butler – are often referred to as "The Four Horsemen": the reform-hostile, conservative wing of the Court in the early and mid 1930's, (in)famous for their strong opposition against Roosevelt's New Deal legislation. The pro-government liberals in the opposite corner counted Cardozo (from 1932), Brandeis, and Harlan Fiske Stone – "The Three Musketeers". Then there were Owen J. Roberts and Chief Justice Evan Hughes moving to and fro and tipping the scales. In *Home Building*, they joined the Musketeers, but in a row of New Deal cases in 1935 and 1936, at least one of them parted with the Horsemen and formed a majority against Roosevelt's reforms (although several of the cases where New Deal legislation was struck down were in fact unanimous).[714] Following the renewal of his popular mandate in the landslide victory in the 1936 elections, Roosevelt tried to strike back at the Court with his infamous court-packing plan, officially named the Judicial Procedures Reform Bill.[715] The Bill, submitted to Congress in February 1937, would permit the President to appoint one new judge per judge that had not retired within six months after he had turned 70 years. This would have given Roosevelt an immediate opportunity to appoint six new judges and thus redistribute the balance of power within the Court. The proposal was met with fierce criticism and public outcry and was eventually never enacted. But through a number of cases during the spring of 1937, the Court made a volte-face on its own and turned remarkably more government friendly, a change which is sometimes referred to as a "constitutional revolution".

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714 See in particular *Panama Refining Co v. Ryan,* 293 U.S. 388 (1935) (Cardozo dissented); *A.L.A. Schechter Poultry Corporation v. U.S.,* 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Humphrey's Ex'r v. U.S.*, 295 U.S. 602 (1935); *U.S. v. Butler,* 297 U.S. 1 (1936) (the Musketeers dissented); *Carter v. Carter Coal Co*, 298 U.S. 238 (1936) (the Musketeers dissented, Hughes dissented in part); *Morehead v. People of State of New York ex rel. Tipaldo,* 298 U.S. 587 (1936) (the Musketeers and Hughes dissented).

715 For an overview, see e.g. Barry Cushman, *Rethinking the New Deal Court. The Structure of a Constitutional Revolution* (Oxford University Press 1998) 1.

In standard accounts of American legal and political history, the "revolution" is often seen as a direct response by the Supreme Court to Roosevelt's threat.[716] The turning point is considered to be *West Coast Hotel Co. v. Parrish* from March 1937, where Judge Roberts reversed his position on the constitutionality of minimum fair wage laws for women and tipped the scales of the Court – "the switch in time that saved nine", i.e., the number of nine judges on the bench.[717] The standard account has been challenged, however. For instance, research has shown that the formal voting in *West Coast* actually took place in December 1936, in other words, before Roosevelt launched his court packing plan.[718] More generally, and based on several additional and more detailed counter-arguments to traditional accounts that we will leave aside here, some scholars have asked whether the explanation of the altered course should be sought more in internal factors within law rather than external ones like political pressure.[719]

And at this point we may turn back to our domain, that of legal thinking. Could it be that the Court's lasting volte-face in 1937 should

716 The literature on the Supreme Court and the New Deal is voluminous. For a traditional account, see e.g. Wiecek (1998) 218–234. For a critical yet nuanced and informative overview of the mainstream story-telling, see White (2000) chapter 1. For a short version, see William G. Ross, 'The Hughes Court (1930–1941): Evolution and Revolution' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 223, 231–238.

717 300 U.S. 379 (1937) (the Horsemen dissented). Less than a year before, the majority of the Court – including Roberts – had struck down a similar statute in *Morehead v. People of State of New York ex rel. Tipaldo*, 298 U.S. 587 (1936), thus the reference to a "switch" by Roberts. An important difference between the cases was, however, that in *Morehead*, the parties had not argued that an earlier precedent – *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) – should be overruled, whereas this was precisely what the Court was asked to do – and did – in *West Coast Hotel*. Roberts would claim that this was the reason why he voted as he did, see Cushman (1998) 18.

718 Cushman (1998) 18. In December, justice Stone was absent due to illness. Because everyone knew how Stone would vote, the case was stayed until Stone returned in early February and cast his vote – before the court-packing plan was announced. The publication of the opinion was withheld until the end of March because Chief Justice Hughes wanted to avoid the impression that the Court was influenced by Roosevelt's proposal. This was obviously unsuccessful.

719 See e.g. White (2000) 28–32 and 198–204.

be seen against the background of a decades-long criticism of a legal system out of touch with "life", and that the judges were now finally leaving the idea of "mechanical magic distilled from the four corners of the Constitution" (Frankfurter) and instead joining the forces that were becoming "interested again in the life that swirls around things legal" (Llewellyn)? Was the truth finally revealed to them that law's task was to reach "a social end which the governing power of the community has made up its mind that it wants" (Holmes) and that the "final cause of law is the welfare of society" (Cardozo)?

Writing on the New Deal and legal development, the American legal historian G. Edward White has put forward a theory about an *interpretive* revolution in the 1930s and 1940s, centring on "a crisis in the meaning of constitutional adaptivity". The essence of this alleged interpretive revolution was that the legal community went from viewing the Constitution as a document not designed to change with time to seeing it as a "living" document, whose meaning was capable of changing with time. Two main features of this change of mindset were an idea about the Constitution's ability to respond to changed circumstances and an idea about the human or subjective element in constitutional interpretation.[720]

One of the works White draws upon to substantiate his argument is Howard Lee McBain's *The Living Constitution* from 1927. In his book, McBain started out by discussing the notion of "a Government of Laws, not of Men". He rejected it by asserting that "[a]ll governments are governments of men as well as of laws" and that "under democratic conditions it is absurd to strike a complete contrast between a government of laws and a government of men." And then he continued:

> We speak of the 'living' body of the law, but this is mere metaphor. The life of the law is a borrowed life. It is, like the life of man's other material and intellectual products, borrowed from the life of man. Laws live only because men live and only to the extent that men will to have them live. Apart from men a government of laws is a thing

720 *Ibid.* 204–206.

> inert, a thing that is harmless because useless, a thing that has no existence outside the realm of imagination.[721]

Intimately connected with this more nuanced view on constitutional law was the idea that "a living constitution cannot remain static" and that the Constitution had changed informally in various ways, including in particular through judicial interpretation.[722] McBain quoted Holmes saying that a word "is the skin of an idea" and commented that "[a]s applied to the words of a living constitution the expression is peculiarly apt; for living skin is elastic, expansile, and is constantly being renewed."[723]

McBain's scepticism towards the idea of a "Government of Laws, not of Men" and his concept of a "living constitution" resonated, as we have seen, well with Llewellyn, who had read his book and probably gathered some inspiration there.[724] But these ideas were not entirely new in the late 1920's and the 1930's. The concept of a "living constitution" was used by an American author at least as far back as in 1900,[725] and ten years earlier, the conservative Christopher Tiedeman had presented similar thoughts about the dynamic nature of the Constitution in his *The Unwritten Constitution of the United States*. More generally, and more importantly, a number of critical propositions and ideas had permeated American legal thinking at least since Holmes's *Lochner* dissenting opinion and Pound's writings at the beginning of the century.[726] Pound had, for instance, argued in 1910 that "men, and not rules, will administer justice".[727]

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721 McBain (1927) 1–3.
722 *Ibid.* 11.
723 *Ibid.* 33.
724 Llewellyn (1934) 'Constitution as Institution' (II) 1–2 refers to McBain's book, see also 11 (footnote 26).
725 White (2000) 356 refers to Arthur W. Machen, Jr.'s 'The Elasticity of the Constitution' (1900) 14 HARV. L. REV. 200, 205, as the first text where he has found the expression.
726 Tamanaha (2010) chapter 5 even contends that a number of the ideas often ascribed to progressivism and legal realism were present in American legal thinking from the late 19th century.
727 Cfr. above at footnote 601.

With this in mind, one could ask: If the academic criticism had been blowing in the wind since at least about 1900, why was it only in 1937 that it seemed to reach the Supreme Court, or, more precisely, the majority of the men in robes? This question could be developed even further by considering that in the 1920's, the Court made a conservative turn. As I have argued earlier, the Lochner era around 1900 was not as Locknerish as it is often portrayed, and it is rather the Taft Court (1921–1930), named after Chief Justice William Howard Taft (who was also President of the United States from 1909–1913), that is seen today as an archconservative court.[728] Felix Frankfurter, for instance, who, as we have seen earlier, was content with the progressive trend of the Court in 1913, regretted in 1930 that "[…] the Court has invalidated more legislation than in fifty years preceding. Views that were antiquated twenty-five years ago have been resurrected […]".[729] And then comes the point: If the explanation of the Court's volte-face in 1937 is developments in legal thinking, and these developments can be traced back to at least the beginning of the century, how come that the Court not only did not respond to these developments at an earlier point, but even made a conservative turn in the 1920's?

According to White, and this would probably be his answer to the questions raised here, it was only in the 1930's that the critical ideas – and at this point he is focusing specifically on the proposition that judges were making law – went from "the status of critique" to "something approaching orthodoxy".[730] As a general observation, leg-

728 Melvin I. Urofsky, 'The Taft Court (1921–1930): Groping for Modernity' in Christopher Tomlins (ed), *The United States Supreme Court. The Pursuit of Justice* (Houghton Mifflin Company 2005) 199, 219; Paul L. Murphy, *The Constitution in Crisis Times 1918–1969* (Harper & Row 1972) 219; Robert C. Post, 'Defending the Lifeworld: Substantive Due Process in the Taft Court Era' (1998) 78 B. U. L. REV. 1489, 1492; Roger W. Corley, 'Was There a Constitutional Revolution in 1937?' in Stephen K. Shaw, William D. Pederson and Frank J. Williams (eds), *Franklin D. Roosevelt and the Transformation of the Supreme Court* (M. E. Sharpe 2004) 36, see in particular 38 (table 1); Wiecek (1998) 205 and 207; Brown (1927).

729 Quoted from Murphy (1972) 60 (footnote 57). For Frankfurter's position in 1913, see footnote 496 above. He was, moreover, not alone, see Post (1998) 1493 (footnote 30) with numerous references to other contemporary works.

730 White (2000) 235.

al cultural changes pertaining to patterns of thinking and theoretical paradigms often take place gradually, and consequently, White's thesis seems plausible.

These discussions turn on a more general question about the nature of legal developments. White himself speaks of "internalist" versus "externalist" explanations, where he defends an internalist explanation of the New Deal Court. This means that he emphasizes how the Court was influenced by law-internal factors, *in concreto* new modes of thought. At the same time, he decentres law-external factors, in particular the threat from Roosevelt's court-packing plan. By doing so, he manages to shed light on a crucial explanatory factor; it can be no doubt that the theoretical developments in American legal thinking played an important role in preparing the ground for the Court's volte-face. But there seems, in my opinion, to be a missing link somewhere, and that missing link might very well be located law-externally. It seems plausible, for instance, that the Court's conservative turn in the 1920's in part can be seen as a counter-reaction against the massive expansion of government power during the Great War,[731] and that its progressive turn in the late 1930's was influenced by the strong position progressivism had gained in the American society in general.

This, then, is probably from one perspective the life of the law, if we look at it as an historical phenomenon – it is influenced and shaped by both internal and external factors, but we are constantly struggling to grasp the relative weight the different factors contribute with.

731 In this direction Post (1998) 1491 and 1493.