

2010

The Vanity of Dogmatizing

Marc O. DeGirolami

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

DeGirolami, Marc O., "The Vanity of Dogmatizing" (2010). *Constitutional Commentary*. 658.
<https://scholarship.law.umn.edu/concomm/658>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Book Reviews

THE VANITY OF DOGMATIZING

BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING. Brian Z. Tamanaha.¹ Princeton University Press. 2010. Pp. xii + 252. Cloth \$70.00, Paper \$24.95.

*Marc O. DeGirolami*²

The year 1661 saw the publication of Joseph Glanvill's *The Vanity of Dogmatizing*, a polemic advocating an intellectual break from Aristotle and the Schoolmen in favor of the sort of empiricism that eventually came to fruition in the philosophy of David Hume. Glanvill was deeply irritated by what he perceived as the encrusted academic orthodoxies of his age: "The Disease of our *Intellectuals*," he railed, "is too great, not to be its own [evidence]: And they that feel it not, are not less *sick*, but stupidly *so*."³ What was needed was a skeptical cast of mind—thinkers who would shatter the tiresomely durable scholarly categories of the past centuries. The entrenchment of certain archetypical ways of knowing had led to the desiccation of knowledge and eventually to its distortion. True knowledge, said Glanvill, "requires an acuteness and intention to its discovery; while verisimilitude . . . is an obvious sensible on either hand, and affords a large and eas[y] field for loose [i]nquiry."⁴

The passing of academic generations often witnesses challenges to older scholarly categories in favor of the next best

1. Professor of Law, Washington University School of Law.

2. Assistant Professor of Law, St. John's University School of Law. I am grateful to Brian Tamanaha for generous and thoughtful comments. Thanks also to William Baude, Brian Bix, Samuel Bray, Rick Garnett, Orin Kerr, Mark Movsesian, Steven Smith, Lawrence Solum, and the participants in the St. John's Law School summer brown bag series.

3. JOSEPH GLANVILL, *THE VANITY OF DOGMATIZING: THE THREE 'VERSIONS'* 62 (Stephen Medcalf ed., Harvester Press 1970) (1661).

4. *Id.* at 64.

thing. But it is rarer to see the attempted upending of an entire way of thinking about a historical phenomenon whose existence has achieved unspoken universal assent. In his book, *Beyond the Formalist-Realist Divide*, Brian Tamanaha takes up Glanvill's mantle, and his target is one of the most deep-rooted jurisprudential dichotomies of the last century: the concepts of legal formalism and legal realism. The book aims "to free us from the formalist-realist stranglehold," an exercise that, it is claimed, will allow "us [to] recover a sound understanding of judging" (p. 3).

The book makes three contributions—historical, critical, and theoretical. First, it convincingly resuscitates several unjustly discredited figures in American legal history. Second, it offers various perceptive criticisms of the way in which legal scholars and commentators have distorted the views of their predecessors for ideological and other ill-gotten gains. Third, it calls for the repudiation of the formalist and realist categories in favor of what the author touts as "balanced realism" (p. 6), which he claims is both an accurate picture of the way that many judges always have done and continue to do their work, and a normatively attractive jurisprudential account.

This essay summarizes and praises the historical features of the book in Part I. These are the best parts of a very good book. In Part II, the essay explores Tamanaha's interesting critical reconstruction, one which attempts to explain why the formalist/realist dichotomy achieved such salience in the face of copious contrary historical evidence. In the context of assessing the author's critique, the essay expresses some reservations about Tamanaha's appeal to "balanced realism." In specific, it argues that Tamanaha's ultimate reliance on the very scholarly categories that he spends the bulk of his book debunking is surprising and somewhat deflating. This recursive move suggests that even after all the historical smudge-marks have been identified and retouched, the best that can be done is resignation to a kind of murky *via media* somewhere between formalism and realism's grosser excesses. The essay offers two interpretations of Tamanaha's backslide to "balanced realism," which it calls the metaphysical and the historicist interpretations.

What might all of this mean for legal scholarship? The question is too large to be pursued in any detail here, but Part III speculates about how adopting the metaphysical and historicist modes in legal theory might influence one facet of constitutional theory: originalist and living constitutionalist theories of

interpretation. It is tentatively suggested that in light of the sorts of systematic academic distortions that Tamanaha so adeptly documents in the area of jurisprudence, the historicist mode, though rarely pursued by legal theorists, offers a more promising future for this debate in constitutional theory as well as for the formalist/realist question itself.

I

The most successful portion of Tamanaha's illuminating study demonstrates that the so-called "legal formalists" of the late nineteenth and early twentieth centuries have been consistently caricatured and mis-described (sometimes in bad faith) by scholars of later periods. These distortions were often absorbed uncritically—as if by rote—into subsequent academic treatments of American legal history. Tamanaha uncovers evidence that gives shape and texture to the historical portrait of the formalists. He vanquishes the myth that they were "mechanical" jurisprudences fixated on "finding" the law in some sort of nebulous jurisprudential ether, and he shows them to have been keenly aware of the realities of indeterminacy, subjectivity, law's non-autonomy as a discipline, and many other insights of contemporary legal thought. Long-reviled jurists and scholars, including Sir Henry Maine, Thomas Cooley, John Dillon, James Carter, Joseph Beale, Christopher Tiedeman, William Hammond, and Christopher Columbus Langdell, are given well-earned makeovers by Tamanaha's evidence. They are shown to be thinkers in full; no longer robots with cartoonish views, but complex and sophisticated minds.

Conversely, Tamanaha takes legal historians and theorists of later periods to task for gross mischaracterizations of their predecessors. Jerome Frank, Grant Gilmore, and Roscoe Pound come off particularly poorly. Frank is shown to have wantonly manipulated the writings of Maine and Beale by carefully interposed ellipses and other shoddy academic sleight of hand. Where Maine unequivocally asserted that the law was elastic, that judges make law, and that few people then believed that the law was "a complete, coherent, symmetrical body" (p. 14), Frank made it appear that Maine had said precisely the opposite and that lawyers in the 20th century continued to believe Maine's fantastic theories (p. 16).⁵

5. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

Gilmore's description of a "Formal Style" of American law in the post-Civil War period, in which as a rule people believed that "law is a closed, logical system" and that a judges' role was to "discover[] what the true rules of law are and indeed always have been"⁶ is exposed as a fallacy (p. 18). Tamanaha offers an abundance of fin-de-siècle articles and statements in which lawyers, scholars, and even judges openly acknowledge the existence of "judicial legislation," examples of which include passages from arch-"formalist" historical jurists Cooley and Dillon (pp. 19–20). In Gilmore's telling, Benjamin Cardozo was the great prophet of the "third age" of American law—legal realism—auguring it with his revelation in *The Nature of the Judicial Process*⁷ that judges "made law instead of merely declaring it"; this position, according to Gilmore, "was widely regarded as a legal version of hard-core pornography" at the time (p. 21). In fact, Tamanaha shows that much of what Cardozo wrote about judicial legislation was uncontroversial in 1921 and had been said repeatedly at least twenty years earlier (pp. 21–22), though one should point out there is a difference between a well-known and respected judge saying something and someone else saying it. It is a pity that Tamanaha devotes scant attention (p. 104) to Samuel Williston, a "formalist" giant (unlike at least some of the figures Tamanaha resurrects) who was also maltreated by Gilmore as a pedantic conceptualist technician.⁸ In his autobiography and elsewhere, Williston acidly remarked that the realists' brash claims to having discovered the fact of law's indeterminacy and their clarion call that judges must treat the law as "a means to social ends"⁹ were old news: "brave men lived before Agamemnon."¹⁰

As for Pound's influential 1908 article, "Mechanical Jurisprudence," which purported to attack the American "jurisprudence of conceptions" in which "everything is reduced to simple deduction" from procrustean, "predetermined" legal ideas,¹¹ this critique is shown to have been properly directed at a foreign theoretical construct—German legal science, and its

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

7. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

8. GRANT GILMORE, *THE DEATH OF CONTRACT* 14 (1974).

9. SAMUEL WILLISTON, *LIFE AND LAW* 210–11 (1941)

10. Samuel Williston, *The Case Method of Studying Law*, 43 HARV. L. REV. 972, 972 (1930) (book review). For a thoughtful treatment of Williston's intellectual legacy, see Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

11. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610–12 (1908).

scattered academic partisans (pp. 27–32, 54). Whatever its salience among the scholarly set in the United States (and even among academics, Pound’s account was hotly contested (pp. 32–33)), “mechanical jurisprudence” was an exceptionally poor description of how most American judges and lawyers thought about law and adjudication.

Even Pound’s constitutional mechanical *bête noire*—*Lochner v. New York*¹² (about which, Pound claimed, “rules have been deduced that obstruct the way of social progress”¹³)—was interpreted by other leading jurists of the time in exactly the opposite fashion: the *Lochner* majority had been aggressive with the facts, substituting its own interpretation for that of the New York legislature.¹⁴ *Lochner* instantiated the tyranny of facts, not mechanical concepts (p. 36). And Justice Holmes’s celebrated dissent in *Lochner*, in which Holmes famously thundered against the constitutionalization of “Mr. Herbert Spencer’s Social Statics,”¹⁵ was in reality a re-run of nearly identical arguments in 1893 by C.B. Labatt in the *American Law Review* in response to a Pennsylvania Supreme Court decision striking down legislation prohibiting mine owners from engaging in various abusive payment practices (p. 78).¹⁶

Likewise for the doctrine of stare decisis. In Pound’s telling, the mechanistic quality of jurisprudence had led to slavish obeisance to precedent and the “petrification” of law.¹⁷ But Tamanaha shows that few, if any, jurists in the formalist era believed precedent to be inviolable; not even Blackstone held this view, let alone formalist lawyers like Christopher Tiedeman, Munroe Smith, or Wilbur Larremore, all of whom plainly acknowledged that while precedent had its claims, those must always be balanced by competing, “irrepressibl[y] conflict[ing]” demands (pp. 38–40).

In sum, late nineteenth century jurists’ displeasure with legal fictions (pp. 48–49), their keenly felt distinction between law as ideally conceptualized and law as applied in practice (p. 54), their fretfulness over the perils of legal uncertainty and the

12. 198 U.S. 45 (1905).

13. Pound, *supra* note 11, at 616.

14. For similar historically sensitive treatment of *Lochner*, see David Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 7–12 (2003).

15. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

16. The similarities are startling, and Tamanaha suggests that there is strong reason to believe that Holmes would have been familiar with Labatt’s article (221–22 n.91).

17. Pound, *supra* note 11, at 606.

rapid proliferation of reported decisional law (pp. 33–36, 55), their skepticism about mechanical or “deductive” adjudication (pp. 49–56), and nothing less than their occasional repudiation of “formalism” itself (pp. 45–48)—Tamanaha brings together all of these historical theses, supported by evidence from many writers of the formalist age, thoroughly debunking the exaggerated claims that have been made about it.¹⁸

Tamanaha does similar complicating work for the legal realist period. A plain statement of legal realism has always been rather difficult to pin down. This elusiveness reflects both significant differences among self-described legal realists even within the era of their ascendancy and the fact that the realists sometimes defined themselves negatively, in response to what they perceived as the formalist bogeyman (p. 71). Yet the fact that there was no clear-cut manifesto of legal realism does not mean that there was nothing distinctive about it; there would be few academic movements at all if cast-iron marching orders were a requirement. At all events, as an admittedly imprecise formulation of legal realism, one that surely would provoke particular intramural disagreements, Tamanaha’s working list of general characteristics is serviceable:

- “legal rules can be interpreted in various ways and [] how judges interpret the rules will be a function of their personal views and the surrounding social forces” (p. 79)
- “one of the main tasks of lawyers is to predict outcomes . . . [which] cannot be done well by attention to the rules only” (p. 80)
- “statutes no less than precedents are open to different interpretations, and judges make law in the course of applying statutes in particular situations” (p. 80)
- “judges have broad leeway in connection with stare decisis” (p. 81)
- judges have “substantial freedom” to “select and characterize the facts upon which the decision is based” (p. 82)

18. Tamanaha’s evidence is interesting and important, but (as he acknowledges, at p. 4) he is not the first theorist to make some of these clarifying claims about the formalist era. For a nuanced treatment along similar lines, see ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 57 (1998).

- “judges can regularly find legal support for whatever decision they desire, working backward from the result” (p. 82)
- “there are gaps in the law—and in these situations judges try to work out the right outcome, making new law in the process” (p. 82)
- “when approaching cases judges typically respond to what they perceive as clusters of fact situations or types” (p. 83)
- “when rendering decisions—interpreting the law, precedent, and facts—judges are influenced by subconscious factors” (p. 84)

Tamanaha’s case for debunking even a soft formalist/realist divide—that is, one which reflects a transition from formalist to realist thought over several decades—is most powerful with respect to nineteenth century writers, or at least those who wrote primarily, if not exclusively, in the late nineteenth century. As one moves closer to the 1920s and 1930s, the appearance of realist-sounding statements might be more predictable and unremarkable; after all, if legal realism *was* a distinct school of legal thought, it would likely have had some antecedents and one would expect to find some evidence of “proto-realism.” It would be unrealistic to insist on a hard divide from, say, one year to the next: “Realism did not simply come about overnight; its evolution was, rather, a hesitant one.”¹⁹

But Tamanaha is alive to this criticism. In each of the nine cases of prototypical legal realism listed above, he presents evidence that at least one prominent “formalist” writing before the year 1900 espoused something very much like the realist view (pp. 79–84). One still might observe that the fact that one or two, or even a few, nineteenth century writers made statements here and there that were congruous with certain legal realist ideas does not indicate anything about either (1) the representativeness of such statements in the nineteenth century;²⁰ or (2) the degree of commitment of the speakers themselves to their realist-sounding statements.²¹ Taken cumulatively, however, Tamanaha’s evidence does a respectable

19. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 72 (1995).

20. Brian Leiter makes similar acute criticisms about representativeness. See Brian Leiter, *Legal Formalism and Legal Realism: What Is The Issue?*, 16 *LEGAL THEORY* 111, 116–17 (2010) (manuscript at 9–10) (reviewing BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* (2010)).

21. For example, someone might say something off-the-cuff in a speech or minor writing that was in tension with the bulk of his or her other writing.

job of rebutting the charge of unrepresentativeness or cherry-picking. And as for depth of commitment, Tamanaha might persuasively respond that he is not out to prove that these earlier writers were more authentically or devotedly realist than the writers of the '20s and '30s. He is only interested in showing that they were aware of and had themselves expressed similar insights about law and adjudication. In this, he succeeds.

Just as many legal formalists had embraced many realist insights, so did many legal realists retain the valuable ideas of legal formalism, particularly the necessity and healthfulness of legal rules and principles. Walter Wheeler Cook, Karl Llewellyn, and Felix Cohen are cited as legal realists who knew the worth of legal rules and such “steady factors” as a legal education focused on the authority of doctrine and its development as well as the desire of judges to live up to an impartial ideal (pp. 95–96). Again, Jerome Frank is presented as something of an impediment to the recognition that most realists were committed to some moderately formalist beliefs. Frank’s contention that “the rational element in law is an illusion” and his fixation on individual judges’ personalities were not shared by fellow realists (pp. 96–97, 115). Yet it is just these extreme positions—ones which not even Frank held consistently (p. 98)—which are all-too-commonly associated with legal realism.²² “A careful reading,” writes Tamanaha, “shows that Llewellyn and Frank, and the rest of those identified as realists, all along recognized the stabilizing and constraining factors in law” (p. 98). These were important features of formalist legal theory.

There is an unaddressed question lurking here about why many in the generation succeeding legal realism overtly castigated it. Karl Llewellyn, for example, is well known to have retreated from legal realism in the post-war years, a view culminating in his decidedly anti-realist remarks in *The Common Law Tradition*.²³ Tamanaha sometimes relies on this very late work (1960) as evidence that Llewellyn always believed in something less full-bloodedly realist than what he had written earlier (p. 95). But it is not entirely fair to cite a piece thirty years after the heyday of a period of thought to show that there was “*nothing* distinctive” (p. 68, emphasis in original) about that period; indeed, the language in *The Common Law Tradition* is at

22. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997) (“Even among Realists, of course, Frank’s view represented a particular sort of extreme—as Frank himself recognized.”).

23. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 3–4 (1960).

least equally consistent with the view that legal realism was a distinct historical period, features of which later writers (even writers who had been realists themselves) attacked and rejected.²⁴ Decades earlier, Lon Fuller, no legal realist he, surely felt himself to be criticizing *something* distinctive when he objected to the “crusade against ‘conceptualism’” of the American legal realist movement,²⁵ even as he recognized that “[t]here were, to be sure, premonitions of it as early as the beginning of the present century.”²⁶ And again later, it was clear enough to Alexander Bickel that he was praising “[t]he realists, who were a substantial company of original minds working in a time of great ferment,” and simultaneously taking aim at certain strains of “arrested [legal] realism or surrealism would be more accurate.”²⁷ What were these theorists repenting, commending, or reacting against, if not legal realism or some variety of it?

Lastly, it is not convincing for Tamanaha to point to the seemingly serendipitous quality of the arrival of legal realism on the scene to support the claim that there was nothing distinctive about these writers as a group (pp. 102–03). Much the same serendipity attends many historical phenomena whose distinctiveness is not in doubt.

Despite these unresolved questions, Tamanaha’s deconstruction of the more extreme claims made on behalf of formalism and realism is generally plausible and well documented. The evidence that Tamanaha brings to bear is substantial and revealing: the received account is problematic on a number of fronts and anyone doing future work in this field must come to terms with Tamanaha’s historical revision.

II

One obvious question is why, given the plentiful evidence that Tamanaha marshals, the distorted and exaggerated view of formalism and realism has, and continues to have, such staying power. Tamanaha offers several explanations for the reasons that certain standard modes of theoretical and historical

24. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 247–50 (1992). In fairness, Tamanaha also relies on other earlier work by Llewellyn to raise doubts about his commitment to a more thoroughgoing legal realism.

25. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

26. *Id.* at 429.

27. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 80–81 (1962).

narratives achieve prominence and become entrenched. He claims that histories tend to be written as stock narratives, with an emphasis on canonical heroes and arch-villains in order to lend a certain psychological satisfaction to the account (pp. 200–01). When the narratives are repeated again and again, generation after generation—and when legal academic citation protocols reinforce that parroting—the meme becomes not merely one narrative among many, but the legal theorist’s idea of reality itself. Thus did the distortions of the likes of Frank, Gilmore, and Pound achieve authoritative status in later generations of legal theory and history.

Tamanaha also emphasizes the role of political ideology in perpetuating the false dichotomy. Progressive scholars in the 1920s and ’30s used “formalism” to smear whatever socio-ideological view they opposed. The strategic invocation of formalism was rhetorically effective to pump up various political and personal agendas. It also had the ideologically salutary effect of making their political enemies look retrogressive and passé, but it masked important conceptual similarities between formalists and realists (pp. 59–63, 84–89). The very same tropes were welcomed by legal theorists in the 1970s to give scholarly heft and historical continuity to their “seething skepticism” (p. 61) about the law, all in the service of radical political reform (p. 200). How much more appealing—how much grander—to claim with evident historical warrant that one was reliving an epic clash of the titans of American legal theory than to admit that one was engaged in local, modestly contingent, ideologically motivated policy debates.²⁸

Likewise, Tamanaha notes the appeal of dichotomous historical and theoretical constructions. Clean, tidy, and radically opposed pairs of intellectual options are easily digested and regurgitated at need. Deep down, legal historians and theorists may know well enough, in dark corners that rarely find the light of the printed page, that reality is more complicated, but the dichotomies are felt to be useful in pointing up basic intellectual currents (pp. 120, 201–02). Something like this, Tamanaha

28. For those who might bridle at the seemingly partisan quality of Tamanaha’s anti-Progressive claims, fear not! He restores the balance with some generously anti-conservative sniping at the politicization of the judicial appointments process: “Ronald Reagan was the first president to systematically screen lower court appointees for their ideological views. The practice has continued ever since, especially vigorously by Republican presidents, at the urging and under close scrutiny of conservative and liberal interest groups” (pp. 152–53).

argues, explains the binary distortions of attitudinal studies of judging, the birth of the field of “judicial politics,” and the profound influence of the work of attitudinalist theorists on the public’s hunger for easy political explanations of law (pp. 111–25). Clownish reductions are, in short, helpfully facile; they are pragmatically useful for the inter-generational inculcation of the gross outlines of academic ideas.²⁹

This is an interesting and delightfully bleak perspective on certain features of the academic enterprise. It is the view that the natural—indeed, perhaps the inevitable—tendency of a good deal of theoretical scholarship, at least in law, is toward dogma.³⁰ Legal theorizing, both as a historical and a philosophical exercise, moves inexorably toward legal dogmatizing. And the movement of legal theory toward legal dogma is catalyzed in each generation of scholarship by the political, professional, and personal vanities of the theorists themselves. The dogmatization of reality—its reduction to simplistic distortions, even sound-bites (e.g., “mechanical jurisprudence” or “activist judging”)—is often the way that knowledge is transmitted most effectively and enduringly.

One might take the view that there is nothing to do or fix about this situation; putative fixes are themselves only new distortions. But that is not Tamanaha’s approach. There is something to do. There is a fix to be had. Because there are more and less accurate distortions, they ought to be embraced as they approximate the real and discarded as they veer away from it. The formalist/realist distortion should be repudiated because it “obscures more than it clarifies” (p. 202), while his “balanced realism” is enlightening and normatively attractive.

Balanced realism includes the following propositions; some are descriptive while others are both descriptive and normative:

- judges’ personalities and beliefs will and should influence their decisions (what Tamanaha terms “cognitive framing”), but this is not the same as “willful judging,” which balanced realism condemns (pp. 187–89)

29. What Tamanaha says about the likely response of attitudinal political scientists to his charges bespeaks this view: “Quantitative scholars will defend against these criticisms by saying that the attitudinal and strategic models are just simplified constructs—they are well aware that judging is more complicated.” (p. 120).

30. Tamanaha himself suggests the possibility that theorists who are wedded to their academic categories will “dogmatically” reject his evidence. (p. 78)

- the purposes and consequences of a rule will and should nearly always “have a bearing” on judicial decisions (p. 189)
- the law is often uncertain, and when it is, a decision will be “essentially contestable” (p. 190)
- the significance of legally uncertain cases tends to be substantial (pp. 190–91)
- judges are sometimes confronted with what they think are “bad rules and bad results,” and their approach to such bad rules or results is varied (pp. 191–92)
- “hard cases” may be divided into cases involving gaps in the law and cases involving bad rules or results, but for either variety, the potential influence of judges’ personal values is enhanced (p. 192)
- where the law contains an “open provision,” judicial decisions will not and should not be made in “rule-like fashion” (p. 192)
- the influence of social factors on adjudication should be accepted and embraced (pp. 193–94)
- judges are not machines and their prejudices will and should influence their decisions (p. 194)
- many areas of law are always “in the making” or “under construction” (pp. 195–96)
- notwithstanding all of the above, judicial decisions are often rule-based and the institutional quality of judging “helps hammer out a collective product that is distinctively legal in a way that transcends” particular interests (pp. 194–95)

As it happens, balanced realism, Tamanaha believes, is an accurate description of what most judges in both the formalist and realist eras were really up to anyway (pp. 68–69, 90, 125–31, 186–87), so history itself can be conscripted to “recover” balanced realism as a “sound understanding of judging” (p. 3). Balanced realism is used to unify the views of very different judges and theorists sometimes separated by centuries: Francis Lieber, Cooley, Cardozo, Pound, Llewellyn, Richard Posner, Antonin Scalia, and even Duncan Kennedy—all of them and many more share a commitment to balanced realism in adjudication (p. 187). “We are (nearly) all,” Tamanaha seems to say, “and we have (generally, in our more reflective moments) always been, balanced realists.”

It is at this point that Tamanaha is less convincing. First, one suspects that any theory of adjudication which is sufficiently capacious to accommodate Antonin Scalia, Richard Posner, and Duncan Kennedy (to say nothing of all the others) is overlooking critical distinctions for the sake of an illusory cohesion. True, at some extremely general level, many theorists may recognize as a descriptive matter that certain tenets of realism and formalism in some way affect adjudication. But while stating these tenets may help to pare away some of the more dubious and extreme ascriptions that theorists have made to formalism and realism over the years (something Tamanaha did with great success in the earlier portions of the book), Tamanaha has serious normative fish to fry with balanced realism. On this front, there is a great deal of room for disagreement left within the borders of balanced realism.

And Tamanaha admits as much: “the general recognition of balanced realism . . . will not magically dissolve the many differences that now divide jurists in debates over judicial decision making” (p. 196). If that is true, then one wonders what the payoff of balanced realism is as a normative account of adjudication. Justice Scalia and Judge Posner will have radically different views about the circumstances in which the purposes and consequences of a rule should affect a decision, or whether judges ought to embrace the influence of social factors in adjudication, or whether many important areas of the law are “under construction,” or whether “open provisions” should not be interpreted in “rule-like fashion” (*vide* the unenumerated rights of the Constitution), or the extent to which personal values ought to influence “hard cases,” and so on. What exactly is gained by grouping Scalia and Posner (and so many others with their own idiosyncratic and historically contingent views) in the same balanced realist basket? Tamanaha gives us little justification for balanced realism as a normative theory of adjudication. Indeed, because balanced realism is so catholic, it is difficult to see how he could.

Second, and more importantly, one might have expected that a book which so assiduously and insightfully illuminates the illusions of the theoretical enterprise when it trains its sights on history would follow through on those very insights. A book that purports to debunk certain scholarly distortions should not return to the same dry conceptual well after purporting to drain it. It is true that Tamanaha does not explicitly use the term “formalism” when he describes balanced realism. At times,

Tamanaha advocates discarding formalism altogether as a meaningless concept (pp. 159–67), but really what he attacks throughout the book are the more *implausible* features of formalism—those which have been used as a club to beat up straw men (e.g., “mechanical jurisprudence,” “deductive conceptualism”). He is fully in support of a strong sense of strict, rule-bound decision making (per the last thesis of balanced realism), and he writes favorably of the notion of “fidelity to legal texts—constitutions, statutes, and precedents” (p. 178).

To take one context in which the formalist/realist divide might make a difference, John Manning, whom Tamanaha cites as a new formalist, has argued that formalism involves the lexical privileging of the constitutional structure over other methods of constitutional interpretation: “[B]efore testing whether a default rule promotes any particular interpretive value, we must first ascertain whether the Constitution either enjoins or permits the judiciary to recognize such a value as worthy of promotion”³¹ Anti-formalists might well reject this lexical prioritization, and that is a legitimate difference—one which survives Tamanaha’s historical clarifications.³²

In fact, Tamanaha overstates his theoretical claims when he argues that all meanings of formalism are “empty” (pp. 176–80), or that self-described “new formalists” can excise the term without any loss. The overstatement is surprising because Tamanaha is well-aware of the differences between the new formalism and anti-formalism; indeed, he compiles a list of seven salient differences, and he says (rightly) that “[w]hen this cluster of ideas is taken at the most general level, a broad contrast among contemporary jurists can be drawn between those identified as formalists and their opponents” (p. 179). Why isn’t that enough to preserve the divide? That these new formalists and anti-formalists may reject “exaggerated” (p. 179) claims does not mean that there are no non-exaggerated differences

31. John Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999); *see also id.* at 692. An anti-formalist would not give any lexical priority to a text where it produced a result contrary to what the anti-formalist believed was the overall policy of the legislation; he would adapt the text to its “real” purpose. The formalist would reject this approach. *See id.* at 694–95.

32. For reasons which will appear shortly, the neo-formalist example selected here is drawn from constitutional law, but there has been at least a mild neo-formalist renaissance in contract law as well which in some ways parallels the rise of moderate jurisprudential neo-formalism. *See, e.g.*, Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1530–31 (2002) (reviewing *THE RISE AND FALL OF THE FREEDOM OF CONTRACT* (F.H. Buckley ed., 1999)).

between them. Likewise, the fact that Tamanaha purports to incorporate these various moderate formalist theses into balanced realism does not mean that he has stripped formalism of any legitimate content. He has simply subsumed it. Perhaps Tamanaha still can make the case for junking the term “formalism” for pragmatic reasons (e.g., because by this point the term itself is confusing, given its history), but this is merely a matter of picking names. Conceptually, balanced realism is still committed to formalism.

In light of his ostensible aim to debunk the “formalist-realist divide,” Tamanaha’s backslide to “balanced realism” as normative prescription—a bit of formalism and a bit of realism, in appropriately “balanced” moderation—is confounding. The confusion is especially acute because Tamanaha at one point says that, like formalism, *realism* is also “empty of theoretical content” (p. 180). But Tamanaha is unlikely to believe that realism is empty, or at least as empty as he claims formalism to be, since that would reduce “balanced realism” to the rather unassuming state of “balanced emptiness.”

The mystifying backslide to “balanced realism” requires some unpacking: it might be interpreted in two very different ways. The claim here is not that Tamanaha himself interprets his balanced realist project in these terms, but that his appeal to balanced realism powerfully reflects one approach to the intersection of history and legal theory, while the nature of his historical evidence actually might suggest a very different approach to that intersection.

First, the appeal to balanced realism might mean that there is at bottom something essentially true about formalism and realism—something which, once scrubbed clean of its dubious features, is inescapable. If this were so, Tamanaha’s injunction to discard or get “beyond the formalist-realist divide” would be nothing of the sort. To the contrary, it would be a reaffirmation of some hybrid of these shopworn categories as intrinsic to theorizing about these issues. The perfect account of law or adjudication (or both) would represent some philosophical blend of the foundational categories of formalism and realism, and it would be up to legal scholars to hunt that elusive beast down. Once we accepted that bits of both formalism and realism were necessary to construct the ultimate normative theory, it would also become clear how much we actually had in common with our theoretical antagonists. The scales of academic distortion would then be lifted from our eyes, as Tamanaha has lifted them

in this book. We can call this the *metaphysical interpretation* of Tamanaha's appeal to balanced realism. Likewise, we can call this general approach to legal theory—one which displays these characteristics—the *metaphysical mode* of legal theory.

Alternatively, Tamanaha's balanced realism backslide might suggest that Tamanaha has not followed through on the implications of his historical evidence. That is, the solution to the many deficiencies of legal scholarship that the book identifies is not to construct a better distortion ("balanced realism"), and continue blindly on the very same trajectory as the vain dogmatizers of the past—enlisting history in the service of theoretical perfection. The solution is instead to abandon the yearning for distortion altogether. One certainly could continue to talk about formalism and realism as a loosely related hodgepodge of dispositions or moods to which this or that figure, today or in the past, shows variable affinity.³³ One could describe historically inflected varieties of formalism and realism—strains of formalism and realism which were particularly influential at distinct historical moments in American law—and one could praise or condemn a decision in which formalist or realist reasoning was used to reach a particular outcome. But one would have no grander aspirations for these categories, no vain desire to conceive *the* ultimate normative judicial or legal theory. The future for legal theory would lie not in devising still more philosophical abstractions of the perfect jurisprudential account, but in the careful study of the history of ideas and how various theories of law or adjudication affected, or are likely to affect, particular legal controversies. We can call this the *historicist interpretation*, and similarly we can call this general approach to legal theory the *historicist mode*.

III

The movement of legal theory in either the metaphysical or historicist direction might have powerful implications not only for the formalist/realist debates but also for scholarship in other legal disciplines. Constitutional theory is perhaps an obvious example, and it is worth a small excursion to consider how the

33. See, e.g., Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN.* 155, 170 (2006) ("As it has developed over the years, American legal realism is as much a mood as a set of doctrines."); DUXBURY, *supra* note 19, at 68 ("Emphasis is placed instead on what can only be described as the 'feel' of realism as an intellectual tendency . . .").

metaphysical and historicist modes might affect a particularly prominent scholarly disagreement: the contest between originalism and living constitutionalism.³⁴

A cursory recapitulation: Originalism is the collective name for a cluster of theories of constitutional interpretation all of which in different ways rely on historical materials—chiefly those that attended the Constitution’s ratification in 1789 and the approval of the Fourteenth Amendment in 1868³⁵—to understand the meaning of the Constitution’s provisions. While early originalists were said to champion a variation that emphasized the framers’ intentions in enacting the particular provision at issue,³⁶ current originalists often (but not always) look instead to the original meaning that a particular constitutional provision would have had for the founding generation. The evidence for such original meaning is broad, consisting of everything from the constitutional text itself, to canonical documents such as *The Federalist Papers*, to the debates at the Constitutional Convention, to the views of the individual state ratifiers, to the ways in which a particular locution or turn of phrase might have applied and been understood by a hypothetical audience in other constitutional provisions or contemporaneous legal contexts, and so on.³⁷

The major competitor to originalism of whatever variety has generally gone under the name of “nonoriginalism”³⁸ or “living constitutionalism.”³⁹ An important part of what distinguishes

34. Tamanaha’s book does not focus on constitutional theory, but I consider it here because constitutional theory dominates jurisprudential discussion today.

35. See, e.g., Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088 (1995) (arguing that it is to the period in which the Establishment Clause was incorporated against the states—that is, the mid-19th century—that originalists ought to look to locate its public meaning).

36. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 145 (1990) (“If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended.”). For well-known criticisms of original intentions originalism, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

37. I am bypassing vast oceans of theoretical work on originalism at light speed. This is regrettable but it does not particularly affect my speculations about how the metaphysical or historicist modes in legal scholarship might impact these issues.

38. See, e.g., KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS* 12 (2006).

39. See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007). I set to the side arguments to distinguish non-originalism from living constitutionalism. Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24

living constitutionalists from originalists is that the former “simply do not privilege history . . . in constitutional interpretation. They don’t necessarily sideline text, history, and structure; these are just parts of the motley constellation that is constitutional interpretation.”⁴⁰ The dispute between living constitutionalists and originalists is too complex to go into in great detail, and there is a real question whether it survives the ecumenism of the so-called new originalism (more on this below). Some former opponents of originalism have recently reversed course and become “compatibilist” supporters of the new originalism,⁴¹ reflecting the degree to which the aspiration to constrain judges’ power, which was the centerpiece of paleo-originalism, bears an uncertain relationship to the new originalism.⁴² Others continue to fly the living constitutionalist flag.⁴³

There is little doubt that originalism has powerful affinities with formalism, at least when the subject is the ever-fraught terrain of the interpretation of unenumerated rights. And the same might be said for the instrumental qualities of legal realism and living constitutionalism. Lawrence Solum usefully describes the relationship of the former:

[T]he core of contemporary originalism is the idea that the Constitution should be interpreted in light of the original public meaning of the constitutional text. That core idea appeals to formalists because (as compared with the alternatives), it seems to provide a method for reducing disagreement about constitutional meaning. To the extent that the Supreme Court’s unenumerated rights cases require a

n.52 (2009).

40. Leib, *supra* note 39, at 358.

41. Jack Balkin is an example. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007); see also Lawrence B. Solum, *Semantic Originalism* 166 (Ill. Pub. Law Research Paper No. 07-24, Nov. 22, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

42. See Kurt T. Lash, *Originalism as Jujitsu*, 25 CONST. COMMENT. 521, 527 (2009) (reviewing DANIEL A. FARBER, *RETAINED BY THE PEOPLE* (2007)) (“Today, most originalists have moved away from instrumentalist justifications like ‘judicial restraint,’ and instead tend to ground the originalist enterprise on the normative theory of popular sovereignty.”).

43. See Leib, *supra* note 39; see also SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

more latitudinarian approach to constitutional interpretation, formalists will be suspicious.⁴⁴

To say that there is an affinity is not to suggest an identity of outlook: one can certainly be an originalist and reject the formalist's respect for horizontal stare decisis, especially if the precedent in question used an overtly non-originalist methodology to reach its result—if, say, it was insufficiently deferential to the relevant constitutional text or history.⁴⁵ Nevertheless, the notion that the textual “form” and historical “form(ation)” of the Constitution ought to be a constraining force on the discretion of judges to decide cases⁴⁶—rather than merely one non-binding factor among many in reaching the best outcome—distinguishes originalists from their opponents.

How might adopting the metaphysical mode in legal theory affect the originalist/living constitutionalist debate? That is, could we think about originalism and living constitutionalism in a way that analogizes from Tamanaha's reconstruction of and normative pitch for balanced realism from the shards of formalism and realism as foundational, inevitable categories of legal theory? The first stage would be the view that there is, in fact, something inescapable in defining our normative constitutional possibilities in the dichotomous categories of originalism and living constitutionalism. These constitutional interpretive outlooks are essential, fundamental, and those academics who work in the realm of constitutional theory are consigned to join one team and do ideological battle with the other. That is simply the way constitutional theory gets done.

This first stage of the metaphysical mode was reached years ago. It is reflected in the decades-long fights about what was essentially a *political* question: originalists were exercised about

44. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 163 (2006); see also Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97, 102 (2009) (book review) (“In its strongest form, the legalist model is often identified with formalist and, in the constitutional field, originalist judges like Antonin Scalia and Clarence Thomas.”).

45. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

46. Mitchell Berman has described this view as splintering into two possible subtypes: the position that original meaning should be the sole object of interpretation; and the position that original meaning should be given “lexical priority,” but that other meanings can be considered if original meaning does not resolve the issue. Berman, *supra* note 39, at 10. I am doubtful about how many contemporary originalists hold to the former view.

what they perceived as judicial excesses; living constitutionalists celebrated those very same decisions. Because of the political nature of the fight and the polarities that it sometimes embraced and continues to embrace, it is the kind of debate that can capture the public's political imagination. It can be understood by non-specialists and showcased in, say, judicial confirmation hearings (Robert Bork's, for example, and to a lesser degree, Elena Kagan's), where the phrase "judicial philosophy" has now become a not very mysterious code for judicial methodology.⁴⁷ First-stage originalism may not have many scholarly defenders any longer but, as Jamal Greene has elegantly shown, it still commands the attention and approbation of a significant segment of the population, judges included.⁴⁸ In this first stage, the common-sense simplicity of the originalist/living constitutionalist divide has an appealing Manichean quality that fosters and perpetuates it. It can reach and influence the public's political cerebral cortex⁴⁹; it is a user-friendly distortion, just in the way that formalism and realism (at least pre-Tamanaha) have often been.

The second stage of the metaphysical mode would in one sense reflect a moderating touch. It would introduce conceptual nuance to support the claim that there is some theoretically complex middle road between originalism and living constitutionalism which represents the best of all possible worlds. The distance between originalism and living constitutionalism would thus be narrowed considerably, at least for those scholars laboring in the fields of constitutional theory. Former enemies could now come together with the aim of relocating their disagreements within a single, somewhat murky, constitutional interpretive method, in which original meaning was consulted and given its due, but because of the underdeterminate quality of many constitutional provisions (the ones people usually fight about), other interpretive tools would be necessary. Those on the outside of the treaty between the warring camps would be viewed as recalcitrant fringe figures, or

47. See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 98–100 (2007).

48. Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657, 681–82, 690 (2009).

49. See *id.* at 690 ("A second outgrowth of the originalism movement of the 1970s and 1980s is increased public attention to constitutional methodology generally and to originalism in particular."); see also Dawn Johnsen, *The Progressive Political Power of Balkin's "Original Meaning"*, 24 *CONST. COMMENT.* 417, 418 (2007) ("[O]riginalism's enormous influence has come less as a theory of jurisprudence than as a highly persuasive political ideology that inspires passionate political engagement.").

simply people who did not realize that the turbid middle had already absorbed whatever was legitimate in their views. After all, almost everyone agrees that original meaning ought to figure in *somewhere* in our theories of adjudication, just as nearly everyone can agree that the consequences of a rule ought *somehow* to make a difference to a rule's adoption (p. 189). As the approaches began to merge, articles with such titles as "Living Originalism" would begin to appear.⁵⁰ In many ways, we have reached the second stage of the metaphysical mode as well. We might even re-describe the new, big-tent originalism in Tamanaha's locution—as the arrival of "balanced originalism." Indeed, it may be that Tamanaha's appeal to balanced realism represents just this second stage of the metaphysical mode in the formalist/realist debate.

The third stage of the metaphysical mode would be characterized by fragmentation.⁵¹ Thomas Colby and Peter Smith have ably documented this feature of contemporary originalist discourse, but the upshot is that rather than representing anything like a single, unified "best" account of constitutional interpretation, the middle-way, big tent approach of the new originalism invariably resulted in fission. The big tent simply could not accommodate all comers. Philosophical sophistication begat a kind of hyper-refined scholasticization of originalism, spawning the categories of original subjective meaning, original objective-public-meaning textualism (which itself fragments into Randy Barnett's "presumption of liberty" variety, Michael Perry's moral reading of the crucial underdeterminate provisions, Lawrence Solum's "semantic originalism," and likely others), original intent (Larry Alexander's sophisticated version, for example), original expected-application, "common law originalism,"⁵² and the "method of text and principle,"⁵³ in which "each generation of Americans can seek to persuade each other about how the text and its underlying principles should apply to

50. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). The varieties of originalism that I offer below are drawn from Colby and Smith's article.

51. See JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 190–205 (2005) ("Much of academic constitutional theory in the 1990s was devoted to elaborating, refining, coopting, or attacking originalism. In the process, originalism became a more subtle, complex, and fragmented doctrine."). What O'Neill describes as a single movement toward splintering, I think may be better characterized as an almost seamless transition from an illusory unity to fragmentation.

52. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

53. Balkin, *Abortion*, *supra* note 41, *passim*.

their circumstances, their problems, their grievances.”⁵⁴ “[T]here are today countless variations of originalism,” explain Colby and Smith, “and the differences among them are sometimes so stark that it is difficult to treat them as one coherent methodology.”⁵⁵ Once the question, “Are we all originalists now?”⁵⁶ was asked and answered affirmatively by a growing chorus of scholars, doom was not far off.⁵⁷

In one sense, the growing philosophical complexity and granularity of originalism was an enormously positive development: in the hands of thoughtful and careful scholars, originalism was stripped of its dubious rhetorical excesses and imbued with theoretical bona fides. But in another sense, it was a serious loss. Originalism now became the exclusive province of the constitutional theorist; it no longer had any claim on the public as a live subject of debate, and it became increasingly difficult to implement by judges, at least those who were not extremely well-versed in the latest state-of-the-art conceptual advances. Steven Smith perceptively observes:

However the case may be for law generally, though, or for philosophy, *for originalism* exclusion [of non-theorists] has to be counted as a cost, I think—and a significant one. After all, originalism is supposed to be an approach that actual lawyers and judges can employ in deciding actual cases. So if the approach becomes so conceptually cumbersome that only a theoretical elite can fully understand and participate in it, then what good is originalism?⁵⁸

54. *Id.*

55. Colby & Smith, *supra* note 50, at 245.

56. See, e.g., James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007), (noting the prevalence of the question, though inclining toward a negative answer); Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of the Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 135 (2008), <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf> (Tillman, Opening Statement) (“If there was any doubt before, there can be no doubt now, post-*Heller*, we are all originalists now—at least those of us who wish to remain relevant and within the mainstream of our ever-evolving judicial culture.”); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 496 (1996) (“[W]e are all originalists.”).

57. See Jamal Greene et al., *Profiling Originalism* 1 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-232, 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567702 (“Hands have been wrung, voices raised, and much ink spilled over the question of whether, to paraphrase Jefferson, we are all now originalists.”).

58. Steven D. Smith, *That Old-Time Originalism* 9 (Univ. San Diego Sch. Law, Research Paper No. 08-028, June 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447.

Something analogous might be said for Tamanaha's use of the psychologically abstruse notion of "cognitive framing" to explain the real import of the influence of judicial personality on adjudication (pp. 187–89).⁵⁹ If we are interested in "balanced realism" as a normative theory of adjudication—one which we hope can at least to some extent guide and constrain judges—then much depends, Tamanaha says, on whether a judge's subconscious inclinations lead her to (benign) "framing" or (malign) "willful judging" (pp. 187–88). But since these two modes of adjudication often "can shade into one another" (p. 188), it seems that we will need to subject our judge to an extensive battery of training in cutting-edge psychological research (or psychotherapy?) and cognition theory in order to stand a chance of distinguishing between the two.⁶⁰ Otherwise, only the experts will be able to tell the difference.

Be that as it may—and because my aim here is really to consider legal scholarship and not adjudication—the run-away quality of originalism's ecumenism would elicit efforts to delimit it, to cabin and pin down originalism's core claims; to "strong" views, for example, that bear a resemblance to the position held in the first stage (but which few scholars now hold⁶¹), and which could then be debunked.⁶² But even that descriptive core would be disputed by other theorists with their own originalist core commitments.⁶³ The eventual result would be that the big tent would be torn asunder and while the label "originalism" would continue to be plausibly assigned to any of its constituent theories, there would cease to be any unifying normative vision

59. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (arguing that courts should take steps to cleanse their decisions of "cognitive biases" using the techniques of social psychology).

60. It is unlikely that a judge's "sincerity" can bear the weight that Tamanaha demands of it in distinguishing between "framing" and "willfulness." The distinction between framing and willfulness can be quite fine and self-delusion might well obliterate it.

61. Even original expected-application theorists such as John McGinnis and Michael Rappaport do not claim that the original expected applications of the constitutional text should be the *exclusive* interpretive target; they are simply non-exclusive evidence of original meaning. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007).

62. Berman, *supra* note 39, at 18–20 ("Originalism proper is strong originalism—the thesis that original meaning is the only proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings . . .").

63. See, e.g., the attempt by Solum to defend a core of originalism in what he calls the "semantic content" of the Constitution. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411 (2009).

for originalism. Constitutional theorists would tend to their respective normative vineyards, each of them developing their own “best” accounts of originalism, each of them claiming that something like their own version ought to control, and each of them enlisting history to serve their purposes and “empower” their socio-political allies.⁶⁴ In this way, the fundamental categories of originalism and living constitutionalism would be fixed in amber as a subject of speculative academic study and contestation.⁶⁵ If we have not reached the third stage yet, we are not too far from it.

It is not my intention in the least to disparage this way of proceeding. There is value in continuing to parse and distinguish, to slice finer and more elegant cuts of originalism, to claim theoretical and political preeminence for each as they come and go, and to enlist history as an aid in shoring up those prescriptive claims. This is the way that many non-originalist theories of constitutional interpretation have been developed and championed—perhaps the arch-example being Ronald Dworkin’s “right answer” approach and its use of legal history as the handmaid of theory.⁶⁶ There is no question that as a result our normative theories of the Constitution have become more philosophically rich.

But I do want at least to suggest—not an alternative, exactly, but another course for legal scholarship, one which I will call a historicist possibility.⁶⁷ This is not the place to offer a fully

64. Dawn Johnsen conjectures giddily about the “progressive political power” that Jack Balkin’s origino-revisionist interpretation of *Roe v. Wade* might portend. Johnsen, *supra* note 49, at 418 (“Progressives will benefit from *Abortion and Original Meaning* As they read, they will feel their spirits soar and at times will silently (perhaps audibly) cheer.”).

65. See O’NEILL, *supra* note 51, at 204–05 (“Although these recent developments add nuance and sophistication to originalism, they also bespeak a certain fragmentation and diffusion of the originalist project into possibly incompatible versions. Careful historical recovery and philosophical grounding of originalism are more complicated and perhaps more divisive tasks than the critique that particular decisions or doctrines of the Warren and Burger Courts bore little readily discernible relationship to the original meaning of the Constitution.”).

66. See RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 279–90 (1977).

67. The eminent historian of philosophy Frederick Beiser has cautioned that anyone who uses the term “historicism” “enters an intellectual minefield.” Frederick Beiser, *Historicism*, in *THE OXFORD HANDBOOK OF CONTINENTAL PHILOSOPHY* 155, 174 (Brian Leiter & Michael Rosen eds., 2007). One of the many dangers, Beiser writes, is that historicism:

has acquired opposing meanings because it has been used to refer to diametrically opposed views of history. According to one view, the purpose of history is to know the general laws or ends of history; its aim is to find the system or unity behind the chaos of the past. According to the other view, the

developed theory of historicism in constitutional theory, and only some sketchy outlines will be presented here. The key difference is that the approach to legal scholarship in the historicist mode would require that we forsake the aspiration to devise *the ultimate* constitutional interpretive theory. The historicist theorist would recognize that a wide variety of theories of constitutional interpretation exist, each with its advantages and drawbacks. He would be sensitive to the ways in which these competing theories had been used in the past to ground and justify certain outcomes. He could describe originalism and living constitutionalism as an agglomeration of loosely-related dispositions or moods (rather than hard-edged normative programs), composed of numerous strands of sometimes incompatible arguments, to which this or that figure might more or less closely adhere. And he would analyze how these rivals, or some combination of them, might be used by courts to decide future cases.

Admittedly, taking up the historicist mode might well entail a bit less normative constitutional theory than is now fashionable, at least of a certain kind. This is something of a virtue, though it is not often regarded as such by constitutional theorists. It is the virtue of stopping short,⁶⁸ of withholding final normative judgment about the lessons of history. It is the conscious decision not to write “Part III” of the law review article, in which the problems of history are resolved decisively with the neat and tidy coup de grace represented by the “unified theory.” The virtue of stopping short is characterized by prescriptive and methodological reserve—not disinterest, but a distinctly conservative reticence—in the face of historical complication.

When constitutional theory confronts constitutional history, the historicist mode is well-suited to interpreting past legal conflicts and historical figures with particular attention to the social concerns and problems out of which they grew. This is not to say that legal history with an explicitly metaphysical

purpose of history is to know the individual, to plumb the depths of the unique and the singular, through exacting detailed research; it rejects the possibility of discovering general laws or ends of history.

Id. In using the term “historicism” here, I do not mean to appeal directly to the philosophical program in nineteenth century German philosophy that Beiser describes. I am not expert in that literature and it would be anachronistic and intellectually presumptuous to attach myself to that rich philosophical school. Nevertheless, it is fair to say that I intend something much closer to the latter meaning of historicism.

68. I owe this way of putting it to Samuel Bray.

orientation—that is, an orientation which proceeds by way of apology, attempting to explain historical events as fitting or not fitting a particular premeditated theoretical construct—cannot be careful, edifying, and exceptionally well done.⁶⁹ Indeed, most historical inquiry proceeds along the lines of explaining events by recourse to some organizing meta-principle or idea, and there is no reason at all to exclude originalism and living constitutionalism from the range of possible organizing concepts.

The point is merely that it might be refreshing to see more work by constitutional theorists whose very purpose for being was not to justify or condemn a particular legal event according to originalist or living constitutionalist premises. Such efforts would not work backwards from history strategically to reach the authors' own brand of originalism or living constitutionalism—with the result that one could conscript history to buttress the perfect theory of the Constitution. History would not be used to justify or condemn contemporary theories of interpretation, or as an instrument to “bash” theoretical rivals in the contest for methodological supremacy.⁷⁰

For example, Professor Balkin's originalist apology for *Roe v. Wade* is as deft and clever a revisionist account as one is likely to see, one which he intends as a weapon to pierce his now intramural methodological rivals. Balkin's originalist reconstruction of *Roe* is meant explicitly to serve the “larger purpose of . . . demonstrat[ing] why the debate between originalism and living constitutionalism rests on a false dichotomy.”⁷¹ Using the originalism of the “method of text and principle,” Balkin is able to recharacterize what scores of scholars have deemed the poster-child of living constitutionalist adjudication as actually, truly, originalist, assuming that originalism is understood aright. Yet it ought to surprise no one that Balkin's originalist opponents (those who subscribe to very different originalist premises) would parry his thrust with the claim that the “method of text and principle” originalism—which embraces the power of social movements as agents of change in

69. Michael McConnell's reconstruction of *Brown v. Board of Education* along originalist lines, for example, is a remarkable achievement and a model of careful historical scholarship in the metaphysical mode. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

70. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 272 (1997) (“Each school of contemporary constitutional thought claims *Dred Scott* embarrasses rival theories.”).

71. Balkin, *Abortion*, *supra* note 41, at 292.

constitutional meaning—could be used just as effectively to justify *Lochner v. New York*:

We cannot help but also point out that Balkin's method of interpreting the text in light of meaning that social movements bestow on it may well justify *Lochner* as well as *Roe*. The free labor movement that began in the mid-nineteenth century suggested that the right to contract was an essential liberty.⁷²

It is something of a surprise, however, that one of the most brilliant and distinctly historicist treatments of *Lochner* was written by none other than Balkin himself just a few years before his piece on abortion.⁷³ Indeed, Balkin's historical analysis of the way in which *Lochner* has regularly been used strategically by successive generations of legal academics to condemn or praise contemporary legal theories to which those scholars had pledged allegiance (e.g., the claim by John Hart Ely that *Roe* represented illegitimate "Lochnering," and contrary claims with mirror-image motivations a generation later) embodies a deeply historicist ethic⁷⁴: "Political agitation and social movement activism, followed by successful elections and judicial appointments change constitutional common sense," and in the process, "both critics and defenders found new uses for *Lochner*."⁷⁵

Balkin concludes that if *Lochner* was wrongly decided, "it will not be for any of the reasons that we law professors continually offer for why it was wrongly decided," but because the judges who actually decided it did not make the fullest use of "the tools of understanding that their legal culture offered them."⁷⁶ This claim matches up nicely with Tamanaha's evidence about the way in which *Lochner* was generally received (*pace* Pound) as a piece of legal craft when it was decided. And what is true for *Lochner* should be true for *Roe*: that is, historical treatments of *Roe* by constitutional theorists should not be the exclusive province of interpretive methodologists with contemporary normative axes to grind.

One advantage of adopting the historicist mode might be that it would allow those constitutional theorists who approach

72. McGinnis & Rappaport, *supra* note 61, at 380 n.13.

73. Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005).

74. *Id.* at 688–92.

75. *Id.* at 702–03.

76. *Id.* at 725.

historical events and figures to confront them more forthrightly, particularly when those histories represent dark points in American history. Owning up to the painful truth that the Constitution has been enlisted by what were likely well-meaning and committed theorists and judges to support political and social programs that are widely deemed moral failures is useful for a clear-eyed and realistic view to the problem of the possibility of constitutional evil, in the past and today.⁷⁷

A quite different but perhaps even more important benefit would be distinctly normative: historicism leads to the possibility of acknowledging the costs of methodological commitment. For any given approach to constitutional interpretation is attended by gain and loss, and crowning any single theory king masks the degree to which the loss and sacrifice of values represents a pervasive feature of constitutional law.⁷⁸ Even worse than this—methodological fidelity sometimes demands the commitment to making real sacrifice appear either unimportant or a positive good.

Taking the historicist mode would permit a more nuanced view of historical events, and it would entail the belief that there likely exists a legitimate and reasonably broad range of plausible outcomes in any given case: not just “off the wall” or undeniably correct but a gray zone of legitimacy in between, using a variety of historically contingent interpretive approaches.⁷⁹ As time passes, the plausible range of interpretive possibilities may shift, but this is not to say that the range is infinite or even ever-expanding. It will always be controlled—by the tether of doctrinal and social history.⁸⁰

“Constitutional theory—both normative and positive,” Michael Klarman once wrote, would “benefit from a substantial dose of historicism.”⁸¹ This is especially true whenever

77. Mark Graber has developed similar arguments against both originalist and “perfectionist” constitutional theories. MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

78. For more on this issue, as well as the development of a particular style of historicism in constitutional interpretation, see Marc O. DeGrolami, *Tragic Historicism: A Theory of Religious Liberty* (on file with author).

79. Balkin, *supra* note 73, at 717.

80. On the former, see Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (arguing that if we were really interested in judicial restraint, we would favor a strong theory of precedential constraint far more than originalism, because the norms of precedent are “thicker,” the raw materials of precedent far more accessible, and the style of reasoning much more familiar to lawyers and judges).

81. Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A*

2010]

BOOK REVIEWS

229

constitutional theory engages (as it always must) with constitutional history.

The contrast between the metaphysical and historicist modes of legal scholarship leads us directly back to Brian Tamanaha's book. Can we turn the analogy to constitutional theory back onto his formalist/realist divide? If the analogy is persuasive, there is reason to think that Tamanaha has embraced the metaphysical mode: he is chasing down an ideal theory, and he is conscripting history to shore up his arguments for balanced realism. But as sophisticated and inclusive a theory as balanced realism may be, it is unlikely to win the prize he seeks for it, at least for any fixed term. Indeed, and ironically, the nature of the historical evidence that Tamanaha uncovers and the pungency of his criticisms of the legal theoretical enterprise when it sets its sights on history are themselves tacit, but powerful, arguments for historicism in scholarly discussion of the formalist/realist divide. That would manifest the virtue of stopping short.

Yet it is well to conclude with praise. These reservations about the balanced realism prescription should not be read to detract in any way from the genuine achievements of this book. In it, Brian Tamanaha shows himself to be a fair-minded scholar—intellectually, a straight shooter. The book that he has produced—careful, devastating in its criticisms, eye-opening in the evidence that it uncovers—is an authentic reflection of those admirable qualities and is well worth reading by anyone with an interest in jurisprudence and American legal history. It is, in all, a credit to an institution all too often bedeviled and beguiled by the vicious charms of vanity.