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## SAVING THE COMMON LAW OF CONTRACTS FROM POLITICS AND CODIFICATION: HOLMES, LANGDELL, AND LEGAL SCIENCE

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## INTRODUCTION

In the late nineteenth century, the common law of contracts needed saving. Or so Oliver Wendell Holmes, Jr., and Christopher Columbus Langdell believed.<sup>1</sup> The threat to the common law of contracts was twofold. First, it might become infected by the popular trends in political philosophy. Second, the state legislatures might bring an end to the common law of contracts entirely by codifying the law of contracts. To save the common law of contracts from descending into politics and from codification, Holmes and Langdell would bring legal science to the common law and, in Holmes's words, seek to create "a new Jurisprudence."<sup>2</sup> For example, Langdell famously wrote that when he became dean of Harvard Law School in 1870, it was indispensable for him to establish that law is a science,<sup>3</sup> and he would become "the most famous American law professor to claim that the law ought to be studied empirically, much as the natural sciences were beginning to be studied (in Germany and America) as physical phenomena revealing constant rules and principles."<sup>4</sup> In October 1870, Holmes (then a young lawyer) either wrote, co-wrote, or at least approved of an anonymous note written in the *American Law Review* (of which he was a co-editor) complaining of the legal education at Harvard,<sup>5</sup> and he hoped

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<sup>1</sup> See, e.g., Carl N. Edwards, *In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law*, 8 S. CAL. INTERDISC. L.J. 1, 16 n.46 (1998) ("Holmes dedicated much of his life to the preservation of the common law tradition as the foundation of American jurisprudence . . ."); Stephen B. Presser, *Do Law Professors Really Understand American Law?*, 43 OHIO N.U. L. REV. 373, 380 (2017) ("[Joseph] Story's successors in the legal academy, such as Christopher Columbus Langdell, the great Harvard dean and legal educational reformer, were able to continue his work in essentially preserving the insights of the English common law (in Langdell's case in the law of contract) and to rework them to enable the rise of a professional cadre of American lawyers who could meet the needs of a maturing capitalist economy."). During the relevant time (1870–81), Holmes was a practicing lawyer and Langdell was the Dean of Harvard Law School. Sheldon M. Novick, *Holmes, Oliver Wendell, Jr.*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 271, 271 (Roger K. Newman ed., 2009); Bruce A. Kimball, *Langdell, Christopher Columbus*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 323, 323 (2009).

<sup>2</sup> Letter from Oliver Wendell Holmes, Jr. to A.G. Sedgwick (July 12, 1879) (quoted in Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 719 (1982)).

<sup>3</sup> See *Professor Langdell's Address*, in HARVARD LAW SCH. ASS'N, REPORT OF THE ORGANIZATION AND OF THE FIRST GENERAL MEETING AT CAMBRIDGE 48, 49–51 (1887), reprinted in 3 LAW Q. REV. 124 (1887), as reprinted in 21 AM. L. REV. 123–24 (1887).

<sup>4</sup> STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW 63 (2017).

<sup>5</sup> See Mark DeWolfe Howe, *Oliver Wendell Holmes at Harvard Law School*, 70 HARV. L. REV. 401, 419 (1957) ("Although it cannot be established that Holmes wrote the comment, it is hardly conceivable that he disagreed with its substance. The youthful editors, in any case, permitted the note to be published and in doing so gave it their editorial approval."); Richard K. Neumann, Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 LEGAL COMM. & RHETORIC: JALWD 151, 164

Harvard Law School's objective would become what the President of Northwestern University believed a law school's objective ought to be: "[T]o furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought."<sup>6</sup> Holmes later remarked that the gap between his generation and his father's had been due to "the influence of the scientific way of looking at the world."<sup>7</sup>

But if science was the solution, a problem was that in the late nineteenth century no one agreed on what was meant by "legal science."<sup>8</sup> Holmes and Langdell's ability to succeed was thus much in doubt. John Norton Pomeroy, a law professor and treatise writer,<sup>9</sup> warned Holmes in 1871 that most lawyers "would simply gaze at you in stupid amazement if you showed [them that Blackstone's *Commentaries*, the immensely popular eighteenth century treatise on the English common law,] was not perfection."<sup>10</sup> Started in 1870, by March 1881 their project of bringing legal science to the common law of contracts was complete.<sup>11</sup> In June 1880, Langdell published his *Summary of the Law of Contracts*,<sup>12</sup> a work that fully displayed his "work as a legal scientist."<sup>13</sup> In November and December 1880,<sup>14</sup> Holmes gave perhaps the most

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(2013) (attributing authorship to Holmes). Holmes became a co-editor of the *American Law Review* in the summer of 1870. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 124 (1989).

<sup>6</sup> *Summary of Events, Harvard University Law School*, 5 AM. L. REV. 177, 177 (1870–71).

<sup>7</sup> Letter from Oliver Wendell Holmes to Morris R. Cohen (Feb. 5, 1919), quoted in Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 14 (1948).

<sup>8</sup> Mathias Reimann, *The Historical School against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 108–09 (1989).

<sup>9</sup> Lewis A. Grossman, *Pomeroy, John Norton*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 431, 431 (2009).

<sup>10</sup> DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 223 (2012) (quoting Letter from John Norton Pomeroy to Oliver Wendell Holmes, Jr. (Feb. 6, 1871)).

<sup>11</sup> See BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION 103 (2009).

<sup>12</sup> *Id.*

<sup>13</sup> Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1706 (2000).

<sup>14</sup> See STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS 176–77 (2019) (noting that the lectures began on November 23, 1880, and concluded on December 31, 1880).

famous Lowell Lectures ever (“The Common Law”),<sup>15</sup> with his lectures—including “his astonishing series of lectures on Contracts”<sup>16</sup>—being published in book form in March 1881.<sup>17</sup> The common law legal science they developed was impressive because it drew on aspects of each of the leading approaches to legal science at the time—legal positivism (an empirical approach that maintains that law is simply the rules that the government adopts and has no necessary connection with what is just),<sup>18</sup> the historical school (the idea that law is a nation’s customs and traditions),<sup>19</sup> and analytical jurisprudence (an approach that seeks to identify the meanings of terms and concepts and that emphasizes identifying logical consistency within the law)<sup>20</sup>—despite the tensions among the three approaches.

Holmes was “the first and probably still the greatest of Langdell’s critics,”<sup>21</sup> and one of the purposes of his 1881 book *The Common Law* was to attack Langdell’s overly logical method of legal reasoning<sup>22</sup>—“[t]he life of the law has not been logic: it has been experience,” he famously wrote.<sup>23</sup> Yet, from 1870 to 1881, Holmes and Langdell shared the same goal. Further, their methods of legal science had more in common than not, with “Holmes’s own scholarship on the law of contract [being] hardly distinguishable from Langdell’s.”<sup>24</sup> It was for this reason that they were both responsible for creating the foundations of classical contract law,<sup>25</sup> which reigned

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<sup>15</sup> Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century Legal Education*, 17 L. & HIST. REV. 421, 465 (1999).

<sup>16</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 6 (2d ed. 1995). Holmes did not focus on contract law (as opposed to other areas of the common law) until the summer of 1880, just before giving the lectures. Kelley, *supra* note 13, 1682.

<sup>17</sup> See BUDIANSKY, *supra* note 14, at 177.

<sup>18</sup> See ANDREW FORSYTH, *COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS* 114–15 (2019); Kelley, *supra* note 13, at 1687.

<sup>19</sup> See FORSYTH, *supra* note 18, at 116.

<sup>20</sup> See Kelley, *supra* note 13, at 1687; Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 984 (1983) (“Analytical jurisprudence began as an effort to express clearly the formal concepts used by judges and lawyers in legal reasoning. The central issue in the history of analytical theory is the debate about the definitions of legal rights and legal liberties.”); H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PENN. L. REV. 953, 956 n.7 (1957) (“Analytical jurisprudence seeks to achieve certainty by relying on an allegedly complete logical system.”) (citation omitted).

<sup>21</sup> PRESSER, *supra* note 4, at 75.

<sup>22</sup> See *id.* at 78–79.

<sup>23</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (Mark DeWolfe Howe ed., 1963).

<sup>24</sup> PRESSER, *supra* note 4, at 81.

<sup>25</sup> See GILMORE, *supra* note 16, at 15.

from the late nineteenth to the early twentieth century.<sup>26</sup> They can also be credited as succeeding in avoiding the codification of the common law of contracts. For example, Grant Gilmore wrote in the early 1970s that the common law of contracts “resisted, and continues to resist, codification long after most, if not all, of the fields of law apparently most closely related to it had passed under the statutory yoke.”<sup>27</sup> As Gilmore observes, due to classical contract law, “instead of a Uniform Contracts Act, [in 1932] we got a *Restatement of Contracts*.”<sup>28</sup>

This Article explores the foundations of legal science upon which Holmes and Langdell built their common-law legal science and their resulting theory of contract law. Part I provides the background for their project to use legal science to save the common law from politics. Part II discusses the “Baconian method” they used to identify the data for their common-law legal science. Part III discusses the historical school’s method that they adopted for identifying the common law of contracts’ fundamental legal principles. Part IV discusses the enlightened, fundamental principles Holmes and Langdell found in the common law of contracts. Part V discusses the analytical jurisprudence and the related geometric paradigm that they then used to identify lower-tiered rules of contract law. Part VI is a brief conclusion that recognizes that Holmes’s and Langdell’s use of legal science was directed toward the shared goal of preserving the common law.

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<sup>26</sup> See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. UNIV. L. REV. 854, 855 n.2 (1978) (“Classical contract law refers (in American terms) to that developed in the 19th century and brought to its pinnacle by Samuel Williston in THE LAW OF CONTRACTS (1920) and in the RESTATEMENT OF CONTRACTS (1932).”).

<sup>27</sup> GILMORE, *supra* note 16, at 8.

<sup>28</sup> *Id.* Among other areas of commercial law, the law of contracts for the sales of goods has been codified. Samuel Williston’s Uniform Sales Act was adopted in 1906 and ultimately enacted in thirty-seven states. Kevin M. Teeven, *Development of Reform of the Preexisting Duty Rule and Its Persistent Survival*, 47 ALA. L. REV. 387, 478 (1996). Its successor, Article 2 of the Uniform Commercial Code—dealing with contracts for the sale of goods—has been adopted as statutory law in forty-nine states. Article 2 is, however, different from a typical code because, rather than seeking to cover an entire area of law, it incorporates most of the common-law rules of contract. EDITH R. WARKENTINE, SALES: A CONTEXT AND PRACTICE CASEBOOK 8 (2d ed. 2016). The European codes were intended to be complete and provide an answer to all possible legal questions. MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000–1800, at 2 (1995).

## I. SETTING THE STAGE: THE NINETEENTH CENTURY'S NEED FOR A COMMON-LAW LEGAL SCIENCE

While civil law scholars on the continent had sought to develop systematic contract doctrine since as early as the sixteenth century,<sup>29</sup> by the start of the nineteenth century, the Anglo-American common law of contracts remained unsystematic,<sup>30</sup> and there really was no such thing as a common law of contracts.<sup>31</sup> Instead, the common law was built on England's writ system and its unsystematic forms of action,<sup>32</sup> and from the beginning of the seventeenth century, contract law had developed primarily through the writ of *assumpsit*.<sup>33</sup> Substance lurked underneath the writ system's procedure, but the forms of action had made it difficult to discern the substance.<sup>34</sup> While the common law of contracts (to the extent it existed) slowly developed despite the writ system's rigidity, it had to be done through "judicial fictions and evasions," thus preventing contract law from developing in a principled way,<sup>35</sup> and over time, the law of *assumpsit* accumulated "ambiguities, refinements, and subtleties."<sup>36</sup> And as long as the forms of action prevailed, there was no perceived need to systematize the common law around categories such as contract, tort, and property,<sup>37</sup> and "[n]o one ever developed a theory of *assumpsit*."<sup>38</sup>

In the late nineteenth century, however, with the writ system gradually disappearing and the chaotic nature of the common law being more fully revealed, legal scholars like Holmes and Langdell felt a pressing need to provide a rational and

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<sup>29</sup> See James Gordley, *Contract, Property, and the Will—The Civil Law and Common Law Tradition, in THE STATE AND FREEDOM OF CONTRACT* 66, 75 (Harry N. Scheiber ed., 1998).

<sup>30</sup> *Id.* at 74.

<sup>31</sup> See James Gordley & Hao Jiang, *The Maze of Contemporary Contract Theory and a Way Out*, 68 AM. J. JURIS. 1, 2 (2023).

<sup>32</sup> See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1231 (2001). Under the writ system with its forms of action, there was only a cause of action if the facts fit within a specific writ. JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 6 (5th ed. 2011).

<sup>33</sup> See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 40 (1977).

<sup>34</sup> See CATHARINE MACMILLAN, *MISTAKES IN CONTRACT LAW* 106 (2010).

<sup>35</sup> FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY T. KRONMAN, *CONTRACTS: CASES AND MATERIALS* 23 (3d ed. 1986).

<sup>36</sup> MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870–1882*, at 226 (1963).

<sup>37</sup> See Grey, *supra* note 32, at 1231.

<sup>38</sup> See GILMORE, *supra* note 33, at 40. Gilmore did not necessarily see this as a bad thing, writing that "the common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts." See GILMORE, *supra* note 16, at 5.

systematic explanation of it.<sup>39</sup> One of the great efforts of the nineteenth century, of which Holmes and Langdell would be leaders, was thus to systematize the common law, including the common law of contracts.<sup>40</sup> The young Holmes of the early 1870s (he was in his late 20s and early 30s) hoped to save the common law from its unprincipled state,<sup>41</sup> and by the end of the decade he wrote to a friend (referring to a series of articles Holmes had written over the decade): “My notion in writing these articles is to take up from time to time the cardinal principles and conceptions of the law and make a new and more fundamental analysis of them—For the purpose of constructing a new Jurisprudence or New First Book of the law.”<sup>42</sup> In 1871, Langdell similarly wrote that “the number of fundamental legal doctrines is much less than is commonly supposed [and] [i]f these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable [in] their number.”<sup>43</sup> Holmes and Langdell each conceived of the common law as being plausibly distinct from politics,<sup>44</sup> and they sought to build a new jurisprudence reflecting and preserving its autonomous nature.<sup>45</sup>

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<sup>39</sup> See Grey, *supra* note 32, at 1232 (“The opening given to legal theory by procedural innovation caught the attention of a new generation of legal intellectuals in England and America who wanted to make the study of law into a modern ‘scientific’ discipline on the model of German legal scholarship. In company with others of his generation, the young Holmes eagerly took up the challenge of developing a new rational and systematic classification of substantive law.”); G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 8 (2003) (“Holmes might not have been able to apply [conceptualist] methodologies so readily to the law had not the principal classification device of nineteenth-century jurisprudence, the system of writ pleading, collapsed, leaving a perceived void that was ultimately to be filled by the theories of the conceptualists.”). By the 1870s, twenty-three states had abolished the writ system. *Id.* at 9.

<sup>40</sup> See JAMES GORDLEY, FOUNDATIONS OF AMERICAN CONTRACT LAW 3 (2023).

<sup>41</sup> See Mathias W. Reimann, *Holmes’s Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 77 (Robert W. Gordon ed., 1992).

<sup>42</sup> Letter from Oliver Wendell Holmes, Jr. to A.G. Sedgwick (July 12, 1879) (quoted in Gordon, *supra* note 2, at 719).

<sup>43</sup> C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi–vii (1871).

<sup>44</sup> See Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES JR., *supra* note 41, at 52, 67 (discussing Holmes’s efforts to maintain a distinction between common-law modes of thought and politics); A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2021 n.298 (2012) (“Langdell . . . believed that the common law was the core feature of the American legal system, representing a coherent set of enduring principles that transcended politics . . .”).

<sup>45</sup> See Horwitz, *supra* note 44, at 47 (noting that Holmes’s lectures on *The Common Law* were efforts to “split the difference between the unpalatable extremes of natural rights and legislative positivism.”); Jeremiah A. Ho, *Function, Form, and Strawberries: Subverting Langdell*, 64 J. LEGAL EDUC. 656, 672

Their goal to preserve the common-law method from politics was clear from the outset. Holmes, in his first major essay, written in 1870, addressed the issue of codification, which was under much discussion at the time.<sup>46</sup> He came out decidedly against it, and the essay's first sentence disclosed his reverence for the common-law system: "It is the merit of the common law that it decides the case first and determines the principle afterwards."<sup>47</sup> He also made clear—as early as 1871—his belief that general propositions (the types of propositions typically found in a statutory code) could not decide particular cases, writing that "[t]he common law begins and ends with the solution of a particular case."<sup>48</sup> In 1873, he reiterated his opposition to codification and warned: "The best [statute] draughtsman that ever lived can feel a ground of decision more accurately than he can state it," and "it is in the highest degree probable that some future case will require some more refined discrimination not allowed by the words of the code."<sup>49</sup> For Langdell's part, in 1856, he expressed displeasure with New York's recently adopted Field Code of Procedure, writing: "The legislation here in New York . . . , which has followed the adoption of the new constitution in [18]46, is the most frightful mass of stuff . . . ever beheld. I have groaned under it every hour since I came here."<sup>50</sup> While the methodology Langdell adopted for his legal science has usually been linked to the later *Restatement* project and likened in nature to codification,<sup>51</sup> the more perceptive view recognizes that he "ripped apart civil-law legal science and continental attempts to rationalize whole

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(2015) ("Langdell's idea [was] that the common law tradition was a complete and autonomous system . . . ."); Charles W. Collier, *Law and Interpretation*, 76 CHI.-KENT L. REV. 779, 779 (2000) ("The standard account of the development of law as an independent or relatively autonomous discipline begins with the efforts of Langdell to make the common law more scientific.").

<sup>46</sup> See LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 203 (1991).

<sup>47</sup> 1 OLIVER WENDELL HOLMES, JR., *Codes, and the Arrangement of the Law*, in *THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES* 212 (Sheldon M. Novick ed., 1995).

<sup>48</sup> OLIVER WENDELL HOLMES, JR., *The Academical Study of Civil Law*, in *THE COLLECTED WORKS OF JUSTICE HOLMES*, *supra* note 47, at 250.

<sup>49</sup> OLIVER WENDELL HOLMES, JR., *Book Review*, in *THE COLLECTED WORKS OF JUSTICE HOLMES*, *supra* note 47, at 320.

<sup>50</sup> Letter from Christopher Columbus Langdell to Arthur Machen (Mar. 19, 1856), *quoted in* Bruce A. Kimball & R. Blake Brown, "The Highest Legal Ability in the Nation": *Langdell on Wall Street, 1855–1870*, at 29 L. & SOC. INQUIRY 39, 48 (2004).

<sup>51</sup> See, e.g., Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 102 (2000) ("Langdell's scientific approach to law, an attempt to reduce cases to black-letter principles, was a late nineteenth-century precursor to the Restatements of Law. Both Langdell's quest for scientific principles, and the Restatements, are essentially an alternative method of codification—stating the law in a clear fashion so that courts might more easily follow it and less easily strike off on a different path.").

systems of law by codification and refashioned a common-law legal science based on the case method.”<sup>52</sup>

Holmes and Langdell’s project was consistent with a post-Civil War conservative shift by Northeastern intellectuals from their antebellum emphasis on transcendent individualism, anti-institutionalism, and social humanitarianism (which had included abolitionism) to an emphasis on dutifully working within society’s institutions to create professional competence and eliminate corrupt practices.<sup>53</sup> Holmes, who entered the war as (in his own words) “a pretty convinced abolitionist,”<sup>54</sup> returned home detesting those who had a superior certitude about moral issues,<sup>55</sup> and he “felt impelled after the conflict to follow the practical career of law rather than studying philosophy or writing poetry.”<sup>56</sup> The war had changed “Holmes from an idealist into a tough-minded anti-utopian.”<sup>57</sup> Langdell, although nearly fifteen years older than Holmes and working on Wall Street as a lawyer during the war rather than serving in the military, in the late 1860s became disgusted by the corruption of the New York legal system by Tammany Hall.<sup>58</sup> At the end of 1869, he left Wall Street for an institutionalized setting where he believed he could best help reform a corrupt legal system, becoming professor at and then dean of Harvard Law School in 1870.<sup>59</sup> One of the principles Langdell took from his experiences with the corrupt New York legal system was a respect for the “apolitical, scientific nature of law.”<sup>60</sup> As George Fredrickson observes, Holmes’s generation

had been, in a sense, a “lost generation” at the beginning of the war. At its end, if they survived, they had a feeling that they had found themselves—that they had

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<sup>52</sup> Juan Javier del Granado & M.C. Mirow, *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 CHI.-KENT L. REV. 293, 301 (2007).

<sup>53</sup> See GEORGE M. FREDRICKSON, *THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION* x–xiii, 203 (Illini Books 1993).

<sup>54</sup> Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Nov. 5, 1926), in 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 892–93 (Mark DeWolfe Howe ed., 1953).

<sup>55</sup> See LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* 62 (2001).

<sup>56</sup> FREDRICKSON, *supra* note 53, at 174.

<sup>57</sup> *Id.* at 230.

<sup>58</sup> See Kimball, *supra* note 1, at 323.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

become a generation that was committed to working in useful ways in a dynamic, activist society with little place for purely intellectual or artistic experience.<sup>61</sup>

And, relevant to Langdell, “[f]rom positions in the new universities . . . the intellectuals could give guidance to social and economic development.”<sup>62</sup> As Fredrickson notes, “[d]riven by a growing faith in science and the war-born desire to be ‘useful citizens,’ they hastened to offer themselves as candidates for the scientific elite. . . . They sought the ‘laws’ underlying social, economic, or legal phenomena in the hope of finding ways to discipline society and control events.”<sup>63</sup> Holmes and Langdell’s desire to save the common law from codification was also consistent with the northern intellectuals’ distrust of legislation and governmental action to fix society’s problems, such intellectuals believing that “the evolutionary process should be allowed to take its course, unimpeded by coercive state regulation.”<sup>64</sup> With respect to law, the common law, although a type of governmental action, was, unlike legislation, the product of an evolutionary process.

To fashion a common-law legal science based on the evolutionary nature of the case method, Holmes and Langdell built upon and created a synthesis of the diverse range of methods of legal science that had preceded them, ones that were in some respects inconsistent. As early as 1871, Holmes had written that

[a] treatise on sources of the law which shall strike half way between the somewhat latitudinary theorizing of [Friedrich Carl von] Savigny [the founder of the German historical school]<sup>65</sup> and the too narrow exclusiveness of [John] Austin [the English legal positivist and analytical jurist],<sup>66</sup> will form a chapter of jurisprudence which is not yet written, and which it is worthy of the ambition of an aspiring mind to write.<sup>67</sup>

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<sup>61</sup> FREDRICKSON, *supra* note 53, at 175.

<sup>62</sup> *Id.* at 207.

<sup>63</sup> *Id.* at 201–02.

<sup>64</sup> *Id.* at 206.

<sup>65</sup> Friedrich Karl von Savigny, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Friedrich-Karl-von-Savigny> (last visited Sept. 13, 2025).

<sup>66</sup> See Thomas Broden, Jr., *The Straw Man of Legal Positivism*, 34 NOTRE DAME LAW. 530, 530 (1959).

<sup>67</sup> OLIVER WENDELL HOLMES, JR., *Book Review*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 266.

The common-law legal science they created started with the English statesman Francis Bacon (1561-1626), and the so-called Baconian method.<sup>68</sup>

## II. FRANCIS BACON AND THE BACONIAN METHOD

Because Holmes openly rejected codification as a solution to the perceived disarray of the common law, and Langdell implicitly rejected it, the conceptual ordering they desired had to be drawn from the caselaw. In doing so, Holmes and Langdell built on an English empirical tradition dating to Francis Bacon's scientific method of induction.

### A. Bacon's New Approach

Bacon has been described as “the literal inventor of modern inductive social science.”<sup>69</sup> His method arose in response to what he perceived as the inadequacies of the sixteenth-century methods of learning, notably Aristotelian scholasticism (the medieval philosophy that sought to synthesize Aristotle's philosophy with Christian doctrine),<sup>70</sup> which in Bacon's time was still the general mode of learning in English universities.<sup>71</sup> Bacon found scholasticism strong for academic debate but weak in practical benefits,<sup>72</sup> believing its focus on deduction from assumed first principles (rather than induction from data) was contrary to obtaining knowledge for practical purposes.<sup>73</sup> He also rejected scholasticism's merging of theology and science.<sup>74</sup> Bacon was religious, but he believed God had simply set things in motion and did not thereafter intervene in nature, and Bacon thus thought that the study of nature could not reveal anything about theology.<sup>75</sup>

Bacon believed that an approach to learning that was better than scholasticism was to work inductively by collecting numerous instances of the particular and

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<sup>68</sup> See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 29-30 (1994).

<sup>69</sup> Daniel R. Coquillette, *Past the Pillars of Hercules: Francis Bacon and the Science of Rulemaking*, 46 U. MICH. J.L. REFORM 549, 562 (2013).

<sup>70</sup> See G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1096-99 (2002).

<sup>71</sup> See ANTHONY QUINTON, *FRANCIS BACON* 12 (Keith Thomas ed., 1980).

<sup>72</sup> Blakey & Murray, *supra* note 70, at 1096-99.

<sup>73</sup> See Jeremy N. Sheff, *Jefferson's Taper*, 73 SMU L. REV. 299, 344 (2020).

<sup>74</sup> QUINTON, *supra* note 71, at 22.

<sup>75</sup> *Id.* at 22.

thereby identifying generalizations.<sup>76</sup> For him, the way forward was thus to use inductive reasoning based on sensory experiences.<sup>77</sup> As noted by one commentator: “Validation by empirical research, in Bacon’s method, is the only true source of legitimacy. All other deduced tests of theory, whether from theology or mathematics, must give way to systematic observation, free of bias.”<sup>78</sup>

### B. Bacon Seeks to Develop a Common-Law Legal Science

Bacon was not only a natural scientist, he was a lawyer.<sup>79</sup> Having studied Roman law (the foundation of most civil law systems), he saw the common law (in the words of one of his biographers) “as limited by medieval technicalities and accretions” and considered it to be “rigid and slow.”<sup>80</sup> This sad state of affairs had multiple causes: England had resisted the reception of Roman law and instead held to its rigid and unsystematic writ system; the common law was not taught in English universities;<sup>81</sup> there were few treatises on the common law; and the common lawyers—unlike the civilian lawyers—had not been building theories of law.<sup>82</sup> Bacon believed a restatement of the common law was necessary,<sup>83</sup> and, in the words of Paul Kocher, he set out to mold it “into a clearer and more coherent system permitting greater certainty of prediction by client, lawyer, and judge in new cases—in short, at bringing law closer to a science of prediction.”<sup>84</sup> Bacon, despite desiring greater predictability, rejected codification as the cure for the common law’s ills,<sup>85</sup> preferring the common law’s flexibility.<sup>86</sup> As an Englishman wishing to preserve the common-law system, he would be the first to seek to develop a common-law legal

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<sup>76</sup> Barbara J. Shapiro, *Law and Science in Seventeenth-Century England*, 21 STAN. L. REV. 727, 732 (1969).

<sup>77</sup> See QUINTON, *supra* note 71, at 18.

<sup>78</sup> Coquillette, *supra* note 69, at 566.

<sup>79</sup> *Id.* at 562 (“[F]irst and foremost, [Bacon] was a lawyer.”); Brian P. Levack, Book Review, 39 AM. J. LEGAL HIST. 112, 112 (1995) (“Bacon was . . . a trained common lawyer, and he served as Solicitor-General, Attorney-General, and Lord Chancellor during the reign of James I.”).

<sup>80</sup> CATHERINE DRINKER BOWEN, FRANCIS BACON: THE TEMPER OF A MAN 50 (1963).

<sup>81</sup> See Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3, 3 (1957).

<sup>82</sup> See Gordley, *supra* note 29, at 69.

<sup>83</sup> See Kocher, *supra* note 81, at 3.

<sup>84</sup> See *id.* at 4–5.

<sup>85</sup> *Id.* at 14–15; see QUINTON, *supra* note 71, at 73.

<sup>86</sup> See Kocher, *supra* note 81, at 15.

science.<sup>87</sup> But, in keeping with his desire for progress,<sup>88</sup> he did not have a religious reverence for the common law,<sup>89</sup> and he was thus willing to undertake an effort to bring order to it.<sup>90</sup>

C. *Bacon's Inductive, Scientific Approach to Bringing Order to the Common Law*

Bacon's proposed solution for bringing order to the common law was to have the ablest lawyers use the inductive method to create a book of maxims covering all areas of the common law,<sup>91</sup> such that harmony could be brought to the law as a whole.<sup>92</sup> To achieve certainty in the law, he believed these legal generalizations needed to be sufficient such that each new case would fall under one of them.<sup>93</sup> Bacon the empiricist, however, did not believe that the common law existed outside of the caselaw, maintaining that any maxims would not themselves be law,<sup>94</sup> but would be a "magnetic needle" pointing toward the law though not settling it.<sup>95</sup> Bacon also believed that generalizations in the form of maxims should not be too abstract, such as ones describing the nature of justice.<sup>96</sup> While Bacon had knowledge of Roman

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<sup>87</sup> DANIEL R. COQUILLETTE, FRANCIS BACON 3 (1992) ("Bacon was the first truly analytical and critical jurist in the Anglo-American tradition.").

<sup>88</sup> See QUINTON, *supra* note 71, at 72.

<sup>89</sup> *Id.* at 73.

<sup>90</sup> See Coquillette, *supra* note 69, at 570 ("Bacon's starting proposition was simple. There was a lot that was good about the current state of English law, but it was far from perfect. On the one hand, worshipping the common-law status quo was absurd, but radical reform, without respect for what experience had established, was equally foolish.").

<sup>91</sup> He wrote that "[a] good and careful treatise on the different rules of law conduces as much as anything to the certainty thereof; and it deserves to be entrusted to the ablest and wisest lawyers." Kocher, *supra* note 81, at 18.

<sup>92</sup> See *id.* at 19.

<sup>93</sup> See *id.* at 16.

<sup>94</sup> See *id.* at 6.

<sup>95</sup> John C. Hogan & Mortimer D. Schwartz, *On Bacon's "Rules and Maxims" of the Common Law*, 76 L. LIBR. J. 48, 63, 71 (1983).

<sup>96</sup> See Shapiro, *supra* note 76, at 736.

law<sup>97</sup> and drew on civil law theory,<sup>98</sup> he viewed his proposed approach as superior to that of the civil law, which set down maxims “like short dark oracles.”<sup>99</sup>

*D. Holmes and Langdell Adopt the Baconian Method for Their Common-Law Legal Science*

The scientific method and, in particular, its lack of metaphysics, was in the air in Boston and Cambridge in the 1870s, at the time when Holmes and Langdell were working to bring order to the common law.<sup>100</sup> That Holmes and Langdell would adopt the Baconian empirical method for their legal science is thus unsurprising.<sup>101</sup> Adopting the method meant that Holmes and Langdell had to select the “instances of phenomena” to be identified for generalization.<sup>102</sup> While those seeking to bring order to the common law typically looked to the civil law for guidance, and thus to Roman law and the German legal science that was building on Roman law,<sup>103</sup> Holmes ultimately rejected any reliance on Roman law for discovering the fundamental principles of the common law, writing in 1873 “that any one intending to be a lawyer ought to acquire a habit of thinking in terms of his own system before dallying with another.”<sup>104</sup> Holmes also viewed Roman law as unhelpful because its fundamental principles had been “obscured by traditions which prevented their consistent application,” and because its principles of classification and its philosophy were outdated.<sup>105</sup> Further, as stated by Holmes biographer Mark DeWolfe Howe: “The fact that the very process of the common law was experimental and inductive, where that of the Roman law was categorical and deductive, led Holmes . . . to see

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<sup>97</sup> See Levack, *supra* note 79, at 112.

<sup>98</sup> See Kocher, *supra* note 81, at 9 & n.28.

<sup>99</sup> *Id.* at 9 (quoting FRANCIS BACON, THE WORKS OF FRANCIS BACON: LAW TRACTS. MAXIMS OF THE LAW 14 (Legare St. Press 2022) (1737)).

<sup>100</sup> See generally FREDRICKSON, *supra* note 53, at 199–216; KIMBALL, *supra* note 11, at 199–200.

<sup>101</sup> Holmes was familiar with the Baconian Method, having read of it in GEORGE HENRY LEWES, A BIOGRAPHICAL HISTORY OF PHILOSOPHY (1845–46). See OLIVER WENDELL HOLMES, JR., *Plato*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 145, 149 n.\*. Langdell borrowed Bacon’s *Essays* while a student at Phillips Exeter Academy in the mid-1840s. KIMBALL, *supra* note 11, at 18.

<sup>102</sup> See SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 44 (3d ed. 2016) (noting that the Baconian method requires “instances of phenomena” to be identified).

<sup>103</sup> See Reimann, *supra* note 41, at 80.

<sup>104</sup> OLIVER WENDELL HOLMES, JR., *Book Review*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 321.

<sup>105</sup> *Id.*

the English law as possessed of a favoring affiliation with the methods of science.”<sup>106</sup> Langdell seemingly agreed with Holmes’s opinion about Roman law’s lack of value for the common law.<sup>107</sup> When Professor James Barr Ames wanted to expand Harvard’s law library to include more Roman law texts, Langdell was reluctant, though (in the words of Harvard’s president) he “was ultimately convinced that a great law library should include even that somewhat remote or detached subject.”<sup>108</sup>

Because Holmes and Langdell were seeking to preserve the common-law method, they naturally derived the fundamental principles of contract law from the court opinions themselves.<sup>109</sup> Langdell stated that “[t]he work done in the Library is what the scientific men call original investigation” and that “[t]he Library is to us what a laboratory is to the chemist or the physicist, and what a museum is to the naturalist.”<sup>110</sup> Langdell is also famous for introducing the case method for studying law and for publishing the first casebook.<sup>111</sup> With respect to Holmes, as William LaPiana has recognized, “the ultimate basis of the sort of systematic legal science sought by . . . Holmes was the decided case [and he] approved the study of cases as the source of the law—as a place where the principles are found.”<sup>112</sup> Thus, as LaPiana observes, Holmes and Langdell “shared the Austinian belief in the separation of the is and the ought. All that there is of law is in the cases. Anything else is the province of another field of study.”<sup>113</sup>

Holmes and Langdell relied not only on current cases but believed that analyzing the development of doctrines was necessary to understand a doctrine’s current form, much like investigating the evolution of a species to understand its present condition.<sup>114</sup> Langdell was clear that a legal science for the common law required that the development of doctrines be traced through the history of caselaw, writing: “Each of these doctrines has arrived at its present state by slow degrees; in

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<sup>106</sup> Mark DeWolfe Howe, *Introduction to OLIVER WENDELL HOLMES, THE COMMON LAW* xvii (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

<sup>107</sup> See Charles W. Eliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 523 (1920).

<sup>108</sup> *Id.*

<sup>109</sup> See William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes’s Early Legal Scholarship*, 90 COLUM. L. REV. 809, 830 (1990).

<sup>110</sup> *Id.* at 349 (quoting Christopher C. Langdell, *Annual Report of the Dean of the Law School, 1873–74*, in Harvard University, Annual Reports of the President and Treasurer of Harvard College).

<sup>111</sup> See Kimball, *supra* note 1, at 323.

<sup>112</sup> LaPiana, *supra* note 109, at 826, 828.

<sup>113</sup> *Id.* at 830.

<sup>114</sup> See *id.* at 827–28, 832.

other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases . . .”<sup>115</sup> Holmes agreed, writing, “[t]he chronological arrangement [of the cases in Langdell’s casebook] . . . we have found to be most instructive and interesting. Tracing the growth of a doctrine in this way not only fixes it in the mind, but shows its meaning, extent, and limits as nothing else can.”<sup>116</sup> Because both believed that the fundamental principles of the U.S. common law of contracts were the product of historical development, this necessitated tracing their development from the English common law. Notably, Holmes’s famous prediction theory of the law, which provided that the law was simply a prediction of what the courts would say it was,<sup>117</sup> was consistent with the Baconian method. Holmes understood, as well as anyone, that law was a human creation,<sup>118</sup> and thus the legal scientist was not observing data to discover natural laws; he was observing past human behavior to predict future human behavior.

### E. Stare Decisis *or* Stare Principiis

Holmes and Langdell, in developing a common-law legal science, understandably placed value on *stare decisis*. To the extent legal science is intended as a curb on political power in a civil-law system, *stare decisis* plays that role in the common-law system.<sup>119</sup> Importantly, however, their view was that while an opinion’s holding was binding, the judge’s reasoning was not,<sup>120</sup> an approach to precedent later described by Samuel Williston as the doctrine of *stare principiis* (“to stand by principles”).<sup>121</sup> Under this approach, the legal doctrine that a case establishes as a precedent is “the one that best explains its outcome, regardless of

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<sup>115</sup> LANGDELL, *supra* note 43, at vi.

<sup>116</sup> OLIVER WENDELL HOLMES, JR., Book Review, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 243.

<sup>117</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

<sup>118</sup> See HOLMES, *supra* note 23, at 5 (“The life of the law has not been logic: it has been experience. The 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 a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”).

<sup>119</sup> See John Reitz, *The Importance of and Need for a Legal Science*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 647, 654 (2013).

<sup>120</sup> See Jody S. Kraus, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory*, 94 VA. L. REV. 157, 161–62 (2008).

<sup>121</sup> See Samuel Williston, *Fashions in Law with Illustrations from the Law of Contracts*, 21 TEX. L. REV. 119, 133 (1942); Samuel Williston, *Change in the Law*, 69 U.S. L. REV. 237, 239 (1935).

whether that doctrine is also a plausible interpretation of, or even consistent with, the express reasoning offered by the deciding judge.”<sup>122</sup> This approach was consistent with Holmes’s belief that “the merit of the common law [is] that it decides the case first and determines the principle afterwards,”<sup>123</sup> and that if an opinion is new and valuable, “no one, not even the judges, can be trusted to state the *ratio decidendi*.”<sup>124</sup> Explaining this approach with respect to the Baconian method, it means that “[t]he bare outcomes of cases, and not the express reasoning in cases, provide the data that doctrinal theories must explain and justify.”<sup>125</sup>

Jody Kraus convincingly argues that “[w]e can speculate that the adherents of classical orthodoxy were attracted to the precedents-as-outcomes view because they aspired to impose scientific rigor—or their late nineteenth-century conception of it—on contract law by demonstrating that it was coherent, conceptually ordered, precise, complete, and determinate.”<sup>126</sup> As he further explains: “[T]he view that precedential authority resides in case outcomes alone increases the flexibility of the cases to accommodate a more theoretically elegant theory of contract law.”<sup>127</sup> If Holmes and Langdell had to follow the reasoning rather than simply the holdings of the cases, their task of creating a common-law legal science and of identifying the fundamental principles of the common law of contracts would have likely been insurmountable. Using *stare principiiis* instead was thus a practical necessity stemming from tension between the historical data and the goal of systematization.<sup>128</sup>

### III. THE HISTORICAL METHOD: CUSTOM CULTIVATED BY THE JURISTS

In addition to using the Baconian method discussed above, Holmes’s and Langdell’s theories of common-law legal science also incorporated substantial elements of an approach to law that arose in Germany in the early nineteenth century—the German historical school. The historical school’s founder is generally

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<sup>122</sup> Kraus, *supra* note 120, at 161.

<sup>123</sup> OLIVER WENDELL HOLMES, JR., *Codes, and the Arrangement of the Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 212.

<sup>124</sup> *Id.* at 242.

<sup>125</sup> Kraus, *supra* note 120, at 161.

<sup>126</sup> *Id.* at 168.

<sup>127</sup> *Id.* at 168–69.

<sup>128</sup> See Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 884–85 (1990) (discussing the tension between the two).

considered to be Friedrich Carl von Savigny (1779–1861),<sup>129</sup> who adopted a Romantic approach to law focusing on the “conception of the nation as a cultural entity characterized by its language and literature.”<sup>130</sup>

*A. Savigny’s Romantic, Historical Method: The Nation’s Volksgeist as the Source of Law*

For Savigny, law’s validity was based on a historical process.<sup>131</sup> He thus rejected the eighteenth-century Enlightenment’s secular, natural law view that law was simply the emanation of reason;<sup>132</sup> the legal positivist’s view that true law was simply what the sovereign had enacted;<sup>133</sup> and the idea of a divine law.<sup>134</sup> For Savigny, “[l]aw is the product of the beating force within the nation . . . a traditional growth,”<sup>135</sup> what came to be called the *Volksgeist* (“spirit of the people” or “national spirit”).<sup>136</sup> Thus, while Savigny rejected the idea that true law was simply what the sovereign had enacted, like the Baconian method, his approach “excluded from legal science metaphysical speculation as well as moral judgments[, and i]t required that the law be accepted as historically given material without changing its substance according to the rules of reason.”<sup>137</sup>

But Savigny’s historical approach had an idealistic strain, in that it included a belief that there was an “order in the evolution of legal ideas . . . [and] [p]ositive data were the external form of ultimate ideas.”<sup>138</sup> For example, Savigny believed there was an ideal scheme of legal development, where the law of a nation emerged from the life of the people and was then developed by jurists,<sup>139</sup> though legal change was

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<sup>129</sup> Susan Gaylord Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 STAN. J. INT’L L. 123, 130 (1982).

<sup>130</sup> PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 59 (2009).

<sup>131</sup> Gale, *supra* note 129, at 131.

<sup>132</sup> M.H. Hoefflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 106 (1986).

<sup>133</sup> See ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 125 (Henry Hardy ed., 1999).

<sup>134</sup> See Christopher Tomlins, *History in the American Judicial Field: Narrative, Justification, and Explanation*, 16 YALE J.L. & HUMANS. 323, 352 (2005).

<sup>135</sup> BERLIN, *supra* note 133, at 125.

<sup>136</sup> Reimann, *supra* note 128, at 853.

<sup>137</sup> *Id.* at 890.

<sup>138</sup> *Id.* at 890–91.

<sup>139</sup> See STEIN, *supra* note 130, at 62.

seen as developing automatically, rather than as dictated by individuals.<sup>140</sup> The German historical school was grounded in the Romanticism of the time, a movement reacting against the eighteenth-century Enlightenment's "stiff rationality."<sup>141</sup>

Savigny believed that legal scientists should be responsible for the law's development at an advanced stage of civilization,<sup>142</sup> and thus considered law to essentially be "custom cultivated by the jurists."<sup>143</sup> The method's reliance on jurists to develop the law also bears a resemblance to Bacon's desire to have the ablest lawyers use the inductive method to create a book of maxims. Savigny rationalized the prior reception of Roman law into Germany by arguing that the German jurists who brought Roman law to Germany (after studying it in the Italian law schools) had served as representatives of the *Volksgeist*,<sup>144</sup> and that the reception was part of the necessity prompting all changes in law.<sup>145</sup> For Savigny (as explained by a commentator), "Roman law was indeed the product of an alien people, but German jurists had expended their scholarly energies upon it for centuries; accordingly, it had become effectively German."<sup>146</sup>

### B. *Integrating the Historical Method with the Geometric Paradigm*

For Savigny, historical studies were a tool to identify the fundamental principles of law from which the legal system should then be built.<sup>147</sup> Savigny and his followers were not content to simply trace the historical development of a nation's laws; they wanted to then systematize the law<sup>148</sup> and build a system that was "perfect and complete."<sup>149</sup> The historical study of the development of a nation's laws

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<sup>140</sup> *Id.* at 60.

<sup>141</sup> BLACKBURN, *supra* note 102, at 418.

<sup>142</sup> *See* Reimann, *supra* note 128, at 883.

<sup>143</sup> *Id.* at 888 n.183.

<sup>144</sup> Gale, *supra* note 129, at 141.

<sup>145</sup> *See id.* at 134. Savigny, viewing Roman law as the model of his ideal scheme of legal development, also "spent much effort in separating the pure Roman law from non-Roman (mainly German) adulteration." STEIN, *supra* note 130, at 62, 63.

<sup>146</sup> JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE* 109 (1990).

<sup>147</sup> *See* Reimann, *supra* note 128, at 872.

<sup>148</sup> *See* Gale, *supra* note 129, at 143.

<sup>149</sup> Reimann, *supra* note 128, at 881.

was thus a means to an end.<sup>150</sup> “[A]ccording to Savigny, the jurist must discover the leading principles and their relationships to each other, so that a judge, given a real-life situation, may determine the correct legal result by utilizing a process of logical deduction similar to the mathematician’s.”<sup>151</sup> Savigny’s approach to system building differed, however, from the natural law approach, in that Savigny’s system was based on “the inherent order of positive law,” rather than being “an artificial creation of an external order superimposed on law.”<sup>152</sup> As noted by Mathias Riemann, “[b]ased on positive, historical material, it was objective and thus truly scientific.”<sup>153</sup> Once this work was done and the system was in place, the study of history would then be relegated to simply studying the past for its own purpose.<sup>154</sup>

While under the historical method the law’s substance might be derived from the *Volksgeist*, once general principles were derived from it and the system was in place, the geometric method—whereby lower-tiered rules were derived from general principles—was then to be used.<sup>155</sup> In this sense, the historical school drew from the natural law approach to system building, though the source of its principles was different.<sup>156</sup> Savigny’s achievement was thus to integrate the geometric paradigm with the historical approach,<sup>157</sup> in contrast to his predecessors who had integrated the geometric paradigm with the law of reason.<sup>158</sup> The goal was “to provide a sophisticated scheme for the coordination of increasingly complex affairs, without getting involved in the political battles of [the] time.”<sup>159</sup> For Savigny, “the proper function of legal science is to isolate and put into ordered form the culturally grounded parts of a people’s law in order to preserve them as its true long-term tradition.”<sup>160</sup>

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<sup>150</sup> See STEIN, *supra* note 130, at 60.

<sup>151</sup> Gale, *supra* note 129, at 133 (footnote omitted).

<sup>152</sup> Reimann, *supra* note 128, at 880.

<sup>153</sup> *Id.* at 880–81.

<sup>154</sup> See generally *id.*

<sup>155</sup> See *id.* at 881.

<sup>156</sup> See *id.* at 882.

<sup>157</sup> Hoeflich, *supra* note 132, at 107.

<sup>158</sup> *Id.* at 101–02.

<sup>159</sup> Reimann, *supra* note 128, at 893.

<sup>160</sup> *Id.* at 887.

### C. *Holmes, Langdell, and the Anglo-American Volksgeist*

A historical method like Savigny's would be appealing to American jurists like Holmes and Langdell. Americans were very much attracted to the idea of law as a science,<sup>161</sup> and Savigny's theory seemed to fit nicely within Darwin's theory of evolution<sup>162</sup> and the view that the common law had developed over time.<sup>163</sup> In fact, the German historical school was perhaps a better fit for the common law than for its own civilian culture.<sup>164</sup> Also, the German historical school was rooted in a nation's identity, and American Victorians possessed a lot of national identity.<sup>165</sup> For example, when Holmes wrote that "law embodies the story of a nation's development through many centuries," he "reflected the widespread view of late nineteenth-century legal scholars . . . that the nation is the basic unit of historical study."<sup>166</sup> And, for intellectual elites like Holmes and Langdell, "the notion of an organic, self-reproductive system appealed to the believers in the autonomy of the common law who wanted to see it in the hands of the lawyers and not of the democratically elected legislatures."<sup>167</sup>

Interestingly, however, for their data, Holmes and Langdell relied on numerous English cases to identify the fundamental principles of U.S. contract law, including English cases decided after the American Revolution.<sup>168</sup> For example, of the 336 cases in Langdell's 1871 casebook, 310 were from England.<sup>169</sup> In *The Common Law's* lectures on contracts, Holmes followed Langdell's lead by citing to English cases and relying on English treatises,<sup>170</sup> and as late as 1897 Holmes was still

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<sup>161</sup> See Reimann, *supra* note 8, at 108.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See Michael H. Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM. J. COMPAR. L. 17, 35–36 (1989).

<sup>166</sup> RABBAN, *supra* note 10, at 235.

<sup>167</sup> Reimann, *supra* note 128, at 897.

<sup>168</sup> See GILMORE, *supra* note 16, at 14 (noting that the cases in Langdell's casebooks "turned out to be mostly English cases . . .").

<sup>169</sup> KIMBALL, *supra* note 11, at 91.

<sup>170</sup> See HOLMES, *supra* note 23, at 195–264.

referring to the common law as “a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years.”<sup>171</sup>

Holmes and Langdell have been criticized for building a theory of U.S. contract law primarily from English cases.<sup>172</sup> Like using the doctrine of *stare principis* to aid in identifying fundamental principles, their reliance on English caselaw—including caselaw from after the American Revolution—was likely necessary because the English common law of contracts was more uniform than U.S. common law, which differed among states.<sup>173</sup> English caselaw was likely also ahead of U.S. law with respect to society’s increasing commercialization and industrialization.<sup>174</sup> Further, Anglophilia and “Eastern snobbery” were probably also factors in their reliance on English caselaw,<sup>175</sup> with Holmes, “an unabashed Anglophile,”<sup>176</sup> considering England to be more civilized than the United States,<sup>177</sup> and Langdell also arguably holding Anglophilic sentiments.<sup>178</sup>

Holmes and Langdell, by relying on English cases, were thus performing their critical role in developing the American *Volksgeist*, like the German jurists who (in Savigny’s view) acted as representatives of the German *Volksgeist* in bringing Roman law to Germany. With respect to Langdell, E. Allan Farnsworth has written that Langdell “recalled his contracts professor, [Theophilus] Parsons, exhorting beginning students to study English decisions because ‘England governs us still, not

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<sup>171</sup> Holmes, *supra* note 117, at 457. In 1928, Holmes the Supreme Court Justice sounded a different tune. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting). But the tunes were not inconsistent. In 1881, Holmes the lawyer-commentator was seeking to encourage judges to bring order to the common law, but, as discussed, he adopted an empirical approach that viewed the law as a prediction of what the courts would say it was. *Id.* at 461.

<sup>172</sup> See GILMORE, *supra* note 16, at 61.

<sup>173</sup> See *id.* at 61–62; E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 SW. L.J. 903, 911 (1988).

<sup>174</sup> See KIMBALL, *supra* note 11, at 93.

<sup>175</sup> E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1439 (1987).

<sup>176</sup> Dan Priel, *Conceptions of Authority and the Anglo-American Common Law Divide*, 65 AM. J. COMP. L. 609, 615 (2017).

<sup>177</sup> See RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870–1930*, at 109 (1987).

<sup>178</sup> Paul D. Carrington, *Teaching Civil Procedure: A Retrospective View*, 49 J. LEGAL EDUC. 311, 321 (1999); 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5082.3, cmt. 588 (2d ed. 2005).

by reason of force but by force of reason.”<sup>179</sup> With respect to Holmes, he believed that the English common law, like all true bases of law, reflected “fundamental drives and social realities,”<sup>180</sup> whereas recent German legal science was inconsistent with social reality, and he thought that “[t]he first call of a theory of Law is that it should fit the facts.”<sup>181</sup> Because Holmes saw in the historical development of the English common law of contracts an approach of which he approved, he used history—in a manner similar to which Savigny would have approved—to protect the common law of contracts from alien influences (specifically German metaphysics).<sup>182</sup> As Mark DeWolfe Howe notes, Holmes believed that “[w]ere the Anglo-American law of contracts forced into the [German metaphysics] mold, lawyers and businessmen would find their affairs governed by the metaphysics of will rather than the realities of the market place.”<sup>183</sup> To Holmes, German metaphysics threatened (in Howe’s words) “to qualify or discard well-settled [common law] doctrine.”<sup>184</sup> As Howe further notes, Holmes’s suspicion of German interpretations of Roman law led him to have “a somewhat exaggerated hostility [to] the view that the common law had been, as a matter of historic fact, appreciably affected by Roman influence.”<sup>185</sup>

Thus, Holmes’s approach to history was similar to Savigny’s historical approach, which was used to try and preserve a conservative view of the law from new or outside influences. In Germany, the Romanists and the Germanists battled over the true source of German customary law.<sup>186</sup> While the Germanists saw Roman law as an alien law that had infiltrated German law<sup>187</sup> (as discussed more later), Holmes was concerned that the German metaphysics of Immanuel Kant (1724–

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<sup>179</sup> Farnsworth, *supra* note 175, at 911.

<sup>180</sup> Reimann, *supra* note 41, at 90.

<sup>181</sup> *Id.* In what appears to be the only direct analysis of whether Holmes believed in a nation’s *Volksgeist* as a source of law, James Knudson, in a thoughtful analysis, concluded that “Holmes’ social Darwinism appears logically opposed to the concept of the *Volksgeist*,” in that social Darwinism is not about a people’s spirit but instead is about “conflict amongst the members of a society.” James Knudson, *The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes*, 11 FLA. STATE U. J. TRANSNAT’L L. & POL’Y 407, 418 (2002). But I believe that this was more Holmes’s view of the legislative process, and that with respect to the common-law process, he saw it more as a conflict between competing ideas.

<sup>182</sup> *See* Howe, *supra* note 106, at xix.

<sup>183</sup> *Id.* at xvi.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Reimann, *supra* note 128, at 868–70.

<sup>187</sup> *Id.* at 868.

1804), which had been incorporated into Savigny's theory of law, was finding its way into the English common law.<sup>188</sup> For Holmes, like Langdell, the "experience" of the English common law of contracts was an objectivist, bargained-for exchange based approach, and this was an approach worth preserving.<sup>189</sup> Holmes wrote in *The Common Law* that he would "use the history of our law so far as it is necessary to explain a conception or interpret a rule, but no further."<sup>190</sup> This was consistent with Savigny's view that once the historical analysis had identified the nation's fundamental legal principles, the work of history was done.<sup>191</sup>

#### D. *Accounting for Holmes's Negative and Skeptical View of History*

An argument that Holmes's common-law legal science had something in common with the German historical school must account for the general belief that Holmes had a negative view of the common law's historical development, and that "Holmes' method in *The Common Law* was intended . . . to free his generation from the past."<sup>192</sup> This section therefore explains how Holmes's negative view of history did not mean custom had no role in his common-law legal science.

For Holmes, history's most important use with respect to legal science was helping to identify "rubbish" (i.e., legal doctrines that had survived despite outliving their purpose) so it could then be "clear[ed] away."<sup>193</sup> But Holmes's positive and respectful view of the Anglo-American common-law system was perhaps the more important part of his project that culminated in *The Common Law* in 1881. While Holmes is often referred to as a precursor of Legal Realism,<sup>194</sup> this is because commentators often assume that he equated common-law decision-making with traditional policymaking by legislators. This is not an unreasonable assumption. After all, Holmes wrote in *The Common Law* that "[e]very important principle which

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<sup>188</sup> See Howe, *supra* note 106, at xv–xvi.

<sup>189</sup> See Daniel P. O'Gorman, *The Birth of Contract: Holmes, Langell, and 1880*, at 62 LOUISVILLE L. REV. 49, 110 (2023).

<sup>190</sup> HOLMES, *supra* note 23, at 6.

<sup>191</sup> See Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 541 (2000).

<sup>192</sup> G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1252 (1976).

<sup>193</sup> 3 OLIVER WENDELL HOLMES, JR., *Law in Science and Science in Law*, in THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 413 (Sheldon M. Novick ed., 1995).

<sup>194</sup> See Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2442 (2017) ("Holmes is often credited with being the first Legal Realist, or at least an important precursor to Legal Realism.") (footnote omitted).

is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.”<sup>195</sup> And he later wrote that a “true science of the law” would involve “the establishment of its postulates from within upon accurately measured social desires instead of tradition”<sup>196</sup> and that it was “revolting to have no better reason for a law than that so it was laid down in the time of Henry IV.”<sup>197</sup>

It is a mistake, however, to believe that Holmes considered the common law method as no different from traditional legislation. Such a view overlooks his writings prior to *The Common Law* and incorrectly assumes that his famous book represented a break from his prior thinking. Holmes was in part to blame for being misunderstood, as his veiled attacks on Langdell’s method<sup>198</sup> made it difficult to realize that he and Langdell were each working toward the same goal: distinguishing the common law method from legislative policymaking so as to differentiate the common law from mere politics.

While Holmes was frustrated by the state of the common law he encountered when studying law and starting to practice (“a ragbag of details,”<sup>199</sup> “a thick fog of details”<sup>200</sup>), he had a respect bordering on reverence for the common law’s evolutionary system.<sup>201</sup> He was relieved by the demise of the writ system’s ancient forms of action as they were based on procedure rather than substance<sup>202</sup> and believed it opened the door to a “broader treatment of the subjects.”<sup>203</sup> Though Holmes maintained that common-law judges had to exercise “the sovereign prerogative of choice” based on policy considerations,<sup>204</sup> this was to be done “whenever a *doubtful case* arises, with certain analogies on one side and other

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<sup>195</sup> HOLMES, *supra* note 23, at 32.

<sup>196</sup> *Id.* at 413.

<sup>197</sup> *Id.* at 469.

<sup>198</sup> *See id.* at 5.

<sup>199</sup> OLIVER WENDELL HOLMES, JR., *Introduction to the General Survey by European Authors in the Continental Legal Historical Series*, in *THE COLLECTED WORKS OF JUSTICE HOLMES*, *supra* note 193, at 439, 440.

<sup>200</sup> OLIVER WENDELL HOLMES, JR., *Address at Brown University Commencement, 1897*, in *id.* at 517, 518.

<sup>201</sup> *See* Howe, *supra* note 106, at xvii.

<sup>202</sup> *See* Reimann, *supra* note 41, at 247 n.25.

<sup>203</sup> HOLMES, *supra* note 23, at 5.

<sup>204</sup> *Id.* at 419.

analogies on the other.”<sup>205</sup> Holmes earlier referred to the common law as being “administered by able and experienced men, who know too much to sacrifice good sense to a syllogism.”<sup>206</sup> Further, while they had administered the common law according to their “more or less definitely understood views of public policy,” they had done so “under our practices and *traditions*.”<sup>207</sup> Holmes viewed the common law’s evolutionary system as encompassing society’s collective wisdom rather than any one person’s moral judgment<sup>208</sup> and believed that the common-law system had resulted in a body of law that was wiser than the wisdom of any individual judge,<sup>209</sup> writing that “there has been . . . much good sense in every stage of our law.”<sup>210</sup> If Holmes was a skeptic who doubted his own beliefs and was also ambivalent about democracy,<sup>211</sup> he at least believed in the common-law system.

It has been argued, however, that “[t]he main point of Holmes’s jurisprudence was to undercut any sharp distinction between the legislative and judicial functions,”<sup>212</sup> but the lack of a *sharp* distinction does not mean no distinction. For example, it is a mistake to believe that Holmes meant to reject the use of logic in the common law method; it was just that he felt that “experience” had “a good deal *more* to do than the syllogism in determining the rules by which men should be governed.”<sup>213</sup> It is similarly a mistake to believe that Holmes thought custom should

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<sup>205</sup> *Id.* at 418 (emphasis added).

<sup>206</sup> *Id.* at 32.

<sup>207</sup> *Id.*

<sup>208</sup> See CATHARINE PIERCE WELLS, OLIVER WENDELL HOLMES: A WILLING SERVANT TO AN UNKNOWN GOD 197 (2020).

<sup>209</sup> See E. Donald Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 120 (1984).

<sup>210</sup> HOLMES, *supra* note 23, at 22.

<sup>211</sup> See Thomas C. Grey, *The Colin Raugh Thomas O’Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 528 (1992).

<sup>212</sup> *Id.* at 529.

<sup>213</sup> HOLMES, *supra* note 23, at 5 (emphasis added); see also LOUIS MENAND, AMERICAN STUDIES 38 (2002) (“[T]he celebrated sentence in the opening paragraph of *The Common Law*, ‘The life of the law has not been logic; it has been experience,’ does not say that there is no logic in the law. It only says that logic is not responsible for what is living in the law.”) (footnote omitted).

play no role in common-law decision-making.<sup>214</sup> As noted by Louis Menand, when Holmes wrote that “The life of the law has not been logic: it has been experience,”

Holmes was using that word in a particular sense. He meant it as the name for everything that arises out of the interaction of the human organism with its environment: beliefs, sentiments, customs, values, policies, prejudices—what he called “the felt necessities of the time.” Our word for it (in many ways less satisfactory) is “culture.”<sup>215</sup>

Holmes, as noted by one commentator, did believe “that the history of common-law doctrine is one of mistake, linguistic confusions, and ‘survivals,’”<sup>216</sup> and that “common-law doctrine should not be venerated for its deep historical continuity.”<sup>217</sup> But based on his early writings, it can be inferred that Holmes was not seeking to provide in *The Common Law* only what he believed was a factual account of the way the common-law method actually operated, but was seeking also to describe it in a positive light that would thus discourage efforts at codification. Because common-law judges were unconsciously making policy choices, they were a part of the process of moving the law forward in an enlightened direction, though constrained at the outer edges by what society would tolerate.<sup>218</sup>

Merely because Holmes was critical of aspects of the way the common law had developed does not mean he rejected all aspects of it and considered it no different from the legislature’s lawmaking function. This is demonstrated by Holmes’s favorable view of the common-law doctrine of precedent, viewing it as “about the best thing in our whole system of law.”<sup>219</sup> In contrast to Holmes’s favorable view of the common-law system, his view of democracy (and hence legislation) seems much

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<sup>214</sup> See Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 24 (1995) (“Taken by themselves, [some of Holmes’s] statements suggest that Holmes wanted to dispense with custom, tradition, and precedent and to promote an aggressive campaign of utilitarian law reform through judicial activism—indeed some commentators have so taken them. But the statements cannot be taken by themselves.”).

<sup>215</sup> MENAND, *supra* note 213, at 38.

<sup>216</sup> Kunal Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 26 POL. & LEGAL ANTHROPOLOGY REV. 60, 70 (2003).

<sup>217</sup> *Id.*

<sup>218</sup> See HOLMES, *supra* note 23, at 36 (“The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”).

<sup>219</sup> OLIVER WENDELL, HOLMES, JR., *Summary of Events*, in THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 47, at 323.

different. As noted by Thomas Grey, Holmes's "belief that the majority should rule was in a sense a matter of blind faith for him, something he was committed to as a soldier of his country—his country, right or wrong."<sup>220</sup> That Holmes viewed common-law decision making (judicial legislation) different from traditional legislation was made clear in 1899, near the end of his tenure on the Supreme Judicial Court of Massachusetts: "I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province."<sup>221</sup> In 1900 he wrote that the general duty of courts

is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain. No one supposes that this court might have anticipated the legislature by declaring parties to be competent witnesses, any more than to-day it could abolish the requirement of consideration for a simple contract.<sup>222</sup>

Holmes wrote in 1902 that

I have considered the present tendencies and desires of society and have tried to realize that its different portions want different things, and that my business was to express not my personal wish, but the resultant, as nearly as I could guess, *of the pressure of the past* and the conflicting wills of the present.<sup>223</sup>

In contrast to judicial lawmaking, he wrote with respect to traditional legislation and one of the fundamental principles of the common law of contract: "As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it wise to do so, without the slightest regard to continuity with the past."<sup>224</sup> With respect to traditional

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<sup>220</sup> Grey, *supra* note 214, at 538.

<sup>221</sup> HOLMES, *supra* note 193, at 418.

<sup>222</sup> *Stack v. New York, N.H. & H.R. Co.*, 58 N.E. 686, 687 (Mass. 1900).

<sup>223</sup> OLIVER WENDELL HOLMES, *Twenty Years in Retrospect*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 156 (Mark DeWolfe Howe ed., 1962) (emphasis added).

<sup>224</sup> HOLMES, *supra* note 193, at 406.

legislation, he saw it as the mere product of whoever had the most political power to pass legislation.<sup>225</sup>

Morton Horwitz, perhaps more than any other scholar, has recognized that Holmes believed common-law judges should use custom as an important factor to keep judicial lawmaking distinct from legislative policymaking, and he seems correct in asserting that Holmes sought to tie “law to custom.”<sup>226</sup> He also is correct in viewing this as part of an effort by Holmes to maintain “traditional sources of legal reasoning” and a “law-politics distinction.”<sup>227</sup> While Holmes denied giving any normative force to custom, his defense of the common-law system necessarily had to give weight to custom, as Holmes believed that the common-law judges had, for the most part, done a good job of developing the law in an enlightened direction.<sup>228</sup> Holmes (according to Horwitz) believed that “[w]ith some exceptions . . . the evolution of law by and large proceeded according to functional rationality.”<sup>229</sup> Horwitz believes that Holmes also thought “that common-law categories were capable of providing neutral constraints on judicial decision making.”<sup>230</sup> As Thomas Grey notes: “The only kind of judicial legislation Holmes did explicitly endorse in *The Common Law* was the minimal sort that occurs when judges establish rules by drawing relatively arbitrary lines in the penumbral areas of vague legal concepts so that the law might be clearer and more predictable.”<sup>231</sup>

#### IV. THE ENLIGHTENED, FUNDAMENTAL PRINCIPLES OF THE COMMON LAW OF CONTRACTS

An essential part of Holmes and Langdell’s project was to identify the enlightened, fundamental principles of the common law of contracts. Holmes and Langdell extracted from the English and U.S. common law of contracts the following fundamental principles: (1) an objectified “will” theory of contract formation<sup>232</sup> and

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<sup>225</sup> See Grey, *supra* note 214, at 531.

<sup>226</sup> Horwitz, *supra* note 44, at 52.

<sup>227</sup> *Id.*

<sup>228</sup> See *id.* at 52–54.

<sup>229</sup> *Id.* at 54.

<sup>230</sup> *Id.* at 66.

<sup>231</sup> Grey, *supra* note 214, at 31.

<sup>232</sup> C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 246 (2d ed. 1880) (“[M]ental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable . . . .”); HOLMES, *supra* note 23, at 240 (“[T]he making of a contract does not depend on

(2) bargain consideration as a necessary and sufficient requirement to make an agreement legally enforceable.<sup>233</sup>

True to their Baconianism, they did not invent either of these doctrines; they found them in English common law. As Joseph Perillo has shown, “objective approaches have predominated in the common law of contracts since time immemorial.”<sup>234</sup> And as John Dawson has demonstrated, the idea of a bargain was central to the English law of contract long before Holmes and Langdell.<sup>235</sup> What Holmes and Langdell did was identify them as the common law’s fundamental principles of contract law, and thus help fend off the unenlightened metaphysics of the foreign, civilian natural law that, at the time, threatened to lay claim as fundamental principles. For Holmes, this meant pointing out that courts had recently started veering off track,<sup>236</sup> writing that “the courts may have sometimes gone a little far in their anxiety to sustain agreements”<sup>237</sup> and criticizing courts who “have gone far towards obliterating [the] distinction [between a bargained-for detriment and a condition on a gratuitous promise].”<sup>238</sup> As Grant Gilmore wryly noted, “what is clear to Holmes ‘has not always been sufficiently borne in mind’ by others.”<sup>239</sup> Langdell

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the state of the parties’ minds, it depends on their overt acts.”). The “will” theory aspect was based on the idea that a contract was the voluntary assumption of a risk, with the courts not assessing the adequacy of what was received. *See id.* at 236 (referring to a contract as “the taking of a risk”); *id.* at 237 (referring to the effect of a contract as “the assumption of the risk of a future event”); A SUMMARY OF THE LAW OF CONTRACTS, at 81 (“[W]hatever a promisor chooses to accept as the consideration of his promise, the law will regard as equal to the promise in value, provided the law can see that it has any value”).

<sup>233</sup> LANGDELL, *supra* note 232, at 68 (“The consideration of a promise is the thing given or done by the promisee in exchange for the promise.”); *id.* at 108 (“The way in which a common-law consideration was attempted to be found in these cases was by saying that the promisee’s changing his position in reliance upon the promise constituted consideration; but there are several conclusive objections to that view.”); HOLMES, *supra* note 23, at 230 (“The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.”).

<sup>234</sup> Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000).

<sup>235</sup> *See* JOHN P. DAWSON, GIFTS AND PROMISES: CONTINENTAL AND AMERICAN LAW COMPARED 197–98, 203–04 (1980).

<sup>236</sup> *See* Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 379, 390 (1999) (“[C]urrent cases are most often brought into the discussion in order to be cavalierly dismissed; too many nineteenth-century judges had evidently allowed themselves to become mired in the swamps of subjectivism and moralism. If we take the historical overlay seriously, we are left with the astonishing idea that the common law of England, correctly understood, had been of a piece for five hundred years.”) (footnote omitted).

<sup>237</sup> HOLMES, *supra* note 23, at 230.

<sup>238</sup> *Id.* at 229.

<sup>239</sup> GILMORE, *supra* note 16, at 23.

too criticized courts for failing to keep proper distinctions in mind, and if they had, their decisions might have been different.<sup>240</sup>

Each of these fundamental common-law principles of contract law had its rival in civilian natural law. With respect to the objective will theory of contract, its natural-law rival was the subjective will theory of contract, which seemed to be a true threat, and which was making inroads from the civil law into the common law of contracts.<sup>241</sup> The natural-law rival of bargain consideration was the idea that a contract required that a sale be for a “just price.”<sup>242</sup> To understand these natural law theories of contract, it is necessary to go back far in time, first to Ancient Greece, then to the Middle Ages, and then to the Enlightenment.

### A. Aristotelianism and Virtue

The civilian’s natural-law notion of contracting had its basis in Aristotelianism.<sup>243</sup> Aristotle (384–322 B.C.), believing that the state’s purpose was to enable persons to pursue the good life (which was a life of virtue),<sup>244</sup> considered the “good” (an excellent life) more important than the “right” (liberty).<sup>245</sup> Another Aristotelian concept that would later become important for contract theory was Aristotle’s assertion that each individual thing has four “causes,” one of which is its “efficient cause,” which brings it into existence by uniting its matter into a single “substantial form.”<sup>246</sup> This substantial form is its “essence,” which can be signified with a definition.<sup>247</sup> Another cause was its “final cause,” which is the way the thing behaves and is a single end.<sup>248</sup>

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<sup>240</sup> See LANGDELL, *supra* note 232, at 80–83.

<sup>241</sup> For example, “Frederick Pollock’s solid, careful treatise, *Principles of Contract*, published in 1876, . . . related in a systematic way the prevailing will theory of contract to the current English law.” Kelley, *supra* note 13, at 1683 (footnote omitted); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 141 n.153 (2000) (“The British classical legal theorists, including Anson and Pollock, had started out to incorporate Continental subjective will theory, particularly Savigny, wholesale . . .”).

<sup>242</sup> JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 14 (1991).

<sup>243</sup> See *id.* at 10.

<sup>244</sup> IAIN MCLEAN & ALISTAIR MCMILLAN, *THE CONCISE OXFORD DICTIONARY OF POLITICS* 26 (3d ed. 2009).

<sup>245</sup> N.E. SIMMONDS, *CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS* 10 (3d ed. 2008).

<sup>246</sup> GORDLEY, *supra* note 242, at 17–18.

<sup>247</sup> *Id.* at 18.

<sup>248</sup> *Id.* at 17–18.

Aristotle applied his concept of “causes” to each matter he investigated,<sup>249</sup> including human virtues.<sup>250</sup> For Aristotle, “[v]irtue is the spring from which good activity flows,” and with the good “being activity in accordance with virtue, Aristotle [proceeded] to discuss the nature of virtue.”<sup>251</sup> Because virtues are part of man, to understand them one had to also understand man (through the four causes).<sup>252</sup> With respect to man’s essence, to Aristotle it was that he acted through reason—meaning he can understand the world through concepts<sup>253</sup> and understands the ends of his actions and how they contribute to his ultimate end<sup>254</sup>—and has the capacity to make choices to achieve man’s ultimate end.<sup>255</sup> And man’s ultimate end is to realize his capacity for rational action and for understanding.<sup>256</sup> Importantly, for Aristotle, “[i]t is only for voluntary actions that men are praised or blamed [and] [a]ctions are involuntary if they are due either to compulsion or to ignorance.”<sup>257</sup> With respect to particular virtues, those that related to interactions with others were part of a virtue called “justice.”<sup>258</sup> One type of justice is commutative justice,<sup>259</sup> which requires that when there is an exchange, it should be of things having equal values.<sup>260</sup> Thus, for Aristotle, “the unjust man takes more than his share,”<sup>261</sup> and he gives as an example

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<sup>249</sup> *Id.* at 17.

<sup>250</sup> *Id.* at 19.

<sup>251</sup> SIR DAVID ROSS, *ARISTOTLE 200* (6th ed. 1995).

<sup>252</sup> *Id.* at 201 (“He is at bottom asking what kind of life will give a man most satisfaction, but to answer this he finds it necessary to ask what is the characteristic function of man.”).

<sup>253</sup> See GORDLEY, *supra* note 242, at 19.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> ROSS, *supra* note 251, at 205.

<sup>258</sup> Jonathan Barnes, *Introduction to ARISTOTLE, THE NICOMACHEAN ETHICS* 115 (Hugh Tredennick ed., J.A.K Thomson trans., Penguin Books 2004).

<sup>259</sup> See David W. Lutz, Book Review, 41 *AM. J. JURIS.* 385, 385 (1996) (describing the Aristotelian virtues as including commutative justice).

<sup>260</sup> James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 *CAL. L. REV.* 1815, 1850 (2000). It has been questioned whether Aristotle’s work in fact supports a “just price” theory. See Randy E. Barnett, *A Consent Theory of Contract*, 86 *COLUM. L. REV.* 269, 284 n.56 (1986) (“[Aristotle] may only be attempting here to explain exchange transactions as a modern day economist would, rather than normatively assess the ‘justice’ of the exchange.”).

<sup>261</sup> Barnes, *supra* note 258, at 113.

of acting justly “the farmer or manufacturer, in exchanging his goods at a fair price.”<sup>262</sup>

*B. A Marriage of Faith and Reason: Scholasticism and St. Thomas Aquinas*

In the Late Middle Ages (roughly 1250 to 1500), Europe experienced the great spiritual movement that is now called scholasticism.<sup>263</sup> Scholasticism was part of a hope to bring order to the world’s chaos,<sup>264</sup> and the scholastics sought to combine (or reconcile) Christian faith and Aristotelian philosophy.<sup>265</sup> A natural-law philosophy that would put the “good” before the “right” took shape.

A leader in scholasticism was the thirteenth-century Dominican friar St. Thomas Aquinas (1225–1274),<sup>266</sup> who resolved moral problems by applying natural law to them.<sup>267</sup> Aristotelianism was conducive to his mind because he believed reason was a divine gift given to all men, even pagans like Aristotle,<sup>268</sup> and that truth could therefore not only be obtained directly from God (as in Scripture), but also through man’s use of reason.<sup>269</sup> According to Aquinas, when philosophers like Aristotle reasoned, they used God’s gift of reason as intended,<sup>270</sup> and Aquinas considered Aristotle’s philosophy to be the greatest example of the use of human reason without Christian inspiration.<sup>271</sup> But if reason was a divine gift, then it must necessarily be consistent with revealed truth.<sup>272</sup> Aquinas thus set out to synthesize

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<sup>262</sup> ROSS, *supra* note 251, at 221.

<sup>263</sup> JAMES HANKINS, VIRTUE POLITICS: SOULCRAFT AND STATECRAFT IN RENAISSANCE ITALY 4 (2019).

<sup>264</sup> *Id.*

<sup>265</sup> See Rodney D. Chrisman, *Can a Merchant Please God?: The Church’s Historic Teaching on the Goodness of Just Commercial Activity as a Foundational Principle of Commercial Law Jurisprudence*, 6 LIBERTY U. L. REV. 453, 494 n.85 (2012) (“Broadly speaking, the Scholastics of the Middle Ages sought to reconcile the views of the early Church Fathers with those held by Aristotle (whose *Nicomachean Ethics* summarized his ideas of ‘just price,’ etc.) and with the practical needs of the growing business community.”).

<sup>266</sup> PETER WATSON, IDEAS: A HISTORY OF THOUGHT AND INVENTION, FROM FIRE TO FREUD 330 (2005).

<sup>267</sup> See GORDLEY, *supra* note 242, at 72 n.8.

<sup>268</sup> See THOMAS GLYN WATKIN, THE ITALIAN LEGAL TRADITION 12 (1997).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> WATSON, *supra* note 266, at 330.

<sup>272</sup> See D.D. RAPHAEL, MORAL PHILOSOPHY 3 (2d ed. 1994) (“[H]aving seen the rational strength of much Greek philosophy, they concluded that its apparent truth *must* be reconcilable with what they took to be the undoubted truth of the revealed religion.”).

Aristotelian philosophy with Christian principles and accomplish a “marriage of faith and reason.”<sup>273</sup>

Aquinas’s natural law would play an important role in later natural-law contract theory, as it would premise the theory of contract on Aristotle’s notion of parties’ free exercise of choice in a virtuous manner.<sup>274</sup> While Aquinas maintained that all promises were binding under natural law because of the virtue of fidelity,<sup>275</sup> an important issue for the scholastics was what constituted a voluntary promise. Aquinas followed Aristotle’s argument that an action was voluntary only if it proceeded from a person’s specifically human principles.<sup>276</sup> Thus, a person was responsible for his actions only if it proceeded both from his reason and from his will.<sup>277</sup> And an action was only the product of both reason and will if the actor knew the action’s essential features (reason) and chose to perform it (will).<sup>278</sup> Thus, even if a promisor understands the essential features of his promise, because the act must be not only based on reason but must be willful, he is bound by his promise only within the circumstances he intended.<sup>279</sup> Also, for Aquinas, for a promise to be binding, it must be communicated to the promisee, since promises are commitments between persons.<sup>280</sup> Thus, with Aquinas, working from Aristotle’s ideas, one can see the development of a subjective will theory of contract.

Importantly, however, in keeping with Aristotle, this free will was to be used only in a virtuous manner, and it was a sin against God to act unjustly in a commercial transaction.<sup>281</sup> Aquinas, following Aristotle’s notions of justice, asserted that when one makes a promise, one is engaging in either an act of distributive or commutative justice,<sup>282</sup> and, as previously noted, acts of commutative justice require equality of

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<sup>273</sup> PETER KREEFT, *A SHORTER SUMMA: THE MOST ESSENTIAL PHILOSOPHICAL PASSAGES OF ST. THOMAS AQUINAS’ SUMMA THEOLOGICA* para. 7 (1993).

<sup>274</sup> See GORDLEY, *supra* note 242, at 82 (describing Aquinas’s belief that a person is responsible for his action if it stems from his “reason and will.”).

<sup>275</sup> *Id.* at 11, 45.

<sup>276</sup> *Id.* at 82.

<sup>277</sup> *Id.* at 88.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 87.

<sup>280</sup> *Id.* at 79.

<sup>281</sup> Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 848–49 (1999).

<sup>282</sup> GORDLEY, *supra* note 242, at 12–13.

exchange.<sup>283</sup> It followed from the requirement of commutative justice that it is unjust to sell something for an unjust price.<sup>284</sup> As a result of Aquinas's use of Aristotle's concept of commutative justice in contracting, a just price became recognized as part of the Christian natural-law concept of contracting in the Middle Ages.<sup>285</sup>

### C. *The Late Scholastics Develop a Natural Law Theory of Contract*

Scholastic jurisprudence and its natural law survived the Renaissance's humanist challenge, and a neo-Thomist school of legal philosophy arose in the sixteenth century.<sup>286</sup> This school was centered in Spain at the University of Salamanca, and its views thus became known as those of the School of Salamanca, with its members becoming known as "the late scholastics."<sup>287</sup> Their goal was to turn Aristotelian and Thomistic ethics into legal doctrine,<sup>288</sup> including achieving a synthesis of Roman law and Thomism.<sup>289</sup> The late scholastics dedicated much effort to a natural law theory of contracts, and they were the first to construct a theory of contract law.<sup>290</sup>

While Aquinas had considered it a breach of fidelity to break any promise, he had not considered whether it would also be *unjust* to break any promise.<sup>291</sup> Without injustice, no legal remedy was warranted under positive law, and the late scholastics took up this issue that Aquinas had not addressed.<sup>292</sup> To build a theory of contract law, the late scholastics would apply the Aristotelian metaphysics of essences.<sup>293</sup> As previously discussed, Aristotle's view was that each individual thing has an "essence," and when a thing's essence is understood, it can be identified in a

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<sup>283</sup> *Id.* at 94.

<sup>284</sup> *Id.* at 14 (describing selling a thing at an unjust price as a violation of commutative justice).

<sup>285</sup> DiMatteo, *supra* note 281, at 847.

<sup>286</sup> See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1663–64, 1664 n.30 (1994) (describing the sixteenth century rise of "strong neo-Thomist school of legal philosophy").

<sup>287</sup> Martin J. Doris, *Did We Lose the Baby with the Bath Water? The Late Scholastic Contribution to the Common Law of Contracts*, 11 TEX. WESLEYAN L. REV. 361–63 (2005).

<sup>288</sup> GORDLEY, *supra* note 242, at 72 n.8.

<sup>289</sup> *Id.* at 3.

<sup>290</sup> *Id.* at 73–74.

<sup>291</sup> *Id.* at 73.

<sup>292</sup> *Id.* at 77.

<sup>293</sup> *Id.* at 23.

definition.<sup>294</sup> For the late scholastics, as it was for Aquinas, definition was thus the key to understanding.<sup>295</sup> So once a contract's essence was understood and defined, from it one could then deduce when a contract should be legally enforceable.<sup>296</sup> For Thomas and the late scholastics, a contract was "defined by an end that is at once the immediate end of the parties and a means to their ultimate end."<sup>297</sup> The late scholastics, using Aristotelian virtues, deduced that for a promise to be legally enforceable (and not simply morally binding), it must be accepted by the promisee (consent), and the agreement must be made for a good *causa* (a good reason).<sup>298</sup>

With respect to consent, while, like Aquinas, the late scholastics considered all promises to be morally binding under the virtue of fidelity,<sup>299</sup> they believed that consent was an essential component of a promise.<sup>300</sup> And because a contract was defined by the parties' immediate end, at a minimum, the parties must know the agreement's immediate end (its essence).<sup>301</sup> With respect to *causa*, for the late scholastics a promise was morally binding not simply because of the promisor's will (though this was necessary), but also because of the Aristotelian virtues, including promise-keeping.<sup>302</sup> But whether there was good cause for an agreement to be *legally* binding depended on whether breaking the promise would lead to injustice. This meant it was important to determine if the parties were engaging in an act of commutative justice (a so-called onerous contract) or an act of liberality (a so-called gratuitous contract).<sup>303</sup> Commutative justice involved an exchange of things of equal value.<sup>304</sup> Thus, if a contract whose purpose was commutative justice included an

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<sup>294</sup> *Id.* at 18.

<sup>295</sup> *Id.* at 105.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 23.

<sup>298</sup> *Id.* at 73.

<sup>299</sup> *Id.* at 45.

<sup>300</sup> *Id.* at 41.

<sup>301</sup> *Id.* at 23.

<sup>302</sup> Doris, *supra* note 287, at 363.

<sup>303</sup> GORDLEY, *supra* note 242, at 14, 78.

<sup>304</sup> See Joseph Burke, *Distributive Justice and Subsidiarity: The Firm and the State in the Social Order*, 13 J. MKTS & MORALITY 297, 299 (2010).

exchange of things of unequal value, corrective justice required a restoration to the equality existing before the exchange.<sup>305</sup>

Aquinas and the late scholastics did not view the requirement of equality of exchange for a contract whose purpose was commutative justice as being imposed against the parties' will.<sup>306</sup> The parties to an exchange must have intended to preserve equality because otherwise the promisor simply would have made a gift.<sup>307</sup> The late scholastics believed that it was easy to integrate Aristotelian and Thomistic requirements of equality in exchange into Roman law, as Roman law had provided a remedy for a severely unjust price.<sup>308</sup> Importantly, however, the late scholastics identified the just price with the market price and one that varied in time and by region.<sup>309</sup> Thus, they showed an appreciation for the work of markets and a willingness to accept the merchant's point of view.<sup>310</sup> But the late scholastics, who wrote both for the faithful and for merchants, reminded merchants of the danger to their souls if they were too greedy.<sup>311</sup> Most importantly, however, "for the first time, the theoretical question of when a contract should be enforced was argued among jurists."<sup>312</sup>

#### D. *Hugo Grotius and the Natural Right to Contract*

The subjective will theory and the just price requirement would survive natural law's secularization during the seventeenth-century Scientific Revolution and the eighteenth-century Enlightenment. Hugo Grotius (1583-1645),<sup>313</sup> the Dutch Protestant jurist who stood at the crossroads of the medieval and the modern concepts

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<sup>305</sup> See BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 44 (2004) (defining "corrective justice" as "a return to the equality (baseline status quo) that existed between two parties prior to some injury or unjust enrichment . . .").

<sup>306</sup> GORDLEY, *supra* note 242, at 110.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 94.

<sup>309</sup> *Id.* at 95.

<sup>310</sup> James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1860 (1996).

<sup>311</sup> *Id.*

<sup>312</sup> GORDLEY, *supra* note 242, at 77.

<sup>313</sup> BLACKBURN, *supra* note 102, at 207.

of natural law,<sup>314</sup> is credited with developing a modern, secular natural law based solely on reason.<sup>315</sup> Grotius's most famous work was his 1625 *De jure belli ac pacis* (On the Law of War and Peace),<sup>316</sup> which provided for a general theory of law<sup>317</sup> and set forth principles of natural law, binding on all people and nations, irrespective of local custom.<sup>318</sup> Grotius asserted that natural law was not dictated by God but by natural reason,<sup>319</sup> and, under his so-called impious hypothesis, asserted that natural law would be binding even if God did not exist.<sup>320</sup> Grotius, however, was influenced by the late scholastics' natural-law theory<sup>321</sup> and can thus be seen as providing "a middle way between the Thomistic conception of a divinely implanted natural law . . . and the merely prudential systems of Bacon . . ."<sup>322</sup>

Grotius shifted away from Thomism in an important way, a way that makes his natural law seem modern.<sup>323</sup> With Grotius, Aristotelianism's primacy of the "good" over the "right" was replaced with the primacy of the "right" over the "good."<sup>324</sup> Grotius believed that every human being possessed certain subjective rights simply by being human<sup>325</sup> and that the relationship between rights-holders and those with a duty to respect them was governed by what he called "expletive justice" (a form of Aristotelian commutative justice).<sup>326</sup> Possessing a right meant everyone else had a

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<sup>314</sup> Jeremy Seth Geddert, *Natural Rights and History: Hugo Grotius's Modern Translation of Aristotle*, in CONCEPTS OF NATURE: ANCIENT AND MODERN 71, 72 (Steven F. McGuire & R.J. Snell eds., 2016) (noting that Grotius is considered to "stand at the crossroads of the medieval and the modern").

<sup>315</sup> See Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 982 n.192 (1991) ("Grotius is cited as the first promulgator of a natural law wholly premised on Enlightenment rationalism . . .").

<sup>316</sup> STEIN, *supra* note 130, at 99.

<sup>317</sup> Martti Koskenniemi, *Imagining the Rule of Law: Rereading the Grotian "Tradition,"* 30 EUR. J. INT'L L. 17, 22 (2019).

<sup>318</sup> *Id.* at 23.

<sup>319</sup> *Id.* at 41.

<sup>320</sup> John Witte, Jr., *Law and Religion: The Challenges of Christian Jurisprudence*, 2 UNIV. ST. THOMAS L.J. 439, 451 (2005).

<sup>321</sup> John Witte, Jr., *The Nature of Family in Seventeenth-Century Liberal Protestant Thought: Hugo Grotius and John Selden*, 5 UNIV. ILL. L. REV. 1947, 1952 (2017).

<sup>322</sup> J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 224 (1992).

<sup>323</sup> Koskenniemi, *supra* note 317, at 35–36.

<sup>324</sup> *Id.* at 36.

<sup>325</sup> *Id.* at 37.

<sup>326</sup> *Id.*

duty to not interfere with it and a duty to provide restitution for violating it.<sup>327</sup> Unlike Aristotle's emphasis on promoting virtue and the medieval Catholic emphasis on duties to the sovereign and other men,<sup>328</sup> Grotius viewed law as principles defining individual rights, and "[s]uch rights are not derived from some notion of the common good, but are (in effect) domains of self-ownership, within which one may order one's own actions."<sup>329</sup> Thus, while Grotius's view of the natural right to contract was taken in large part from the late scholastics,<sup>330</sup> he is considered the creator of the modern theory of contract law.<sup>331</sup>

While, unlike the late scholastics, Grotius did not explain the contract doctrines he adopted as based on Aristotelian and Thomistic principles,<sup>332</sup> he did continue their focus on the parties' subjective will and the requirement of a just price. For example, Grotius believed that "what made a contract binding was the promisor's declaration of his will which bound him to keep his word."<sup>333</sup> "As Grotius explained in his *Introduction to Dutch Jurisprudence*, the sole criteria from which to judge economic transactions were [1] the will of the parties and [2] the equality of their relationship—this equality being measured by the standards of commutative (expletive) and not distributive (attributive) justice."<sup>334</sup>

With respect to the requirement of a just price, Grotius wrote that "[i]n all Contracts Nature demands an Equality, insomuch that the aggrieved Person has an Action against the other, for over-reaching him."<sup>335</sup> With respect to the equality necessary in the exchange, "[t]he Equality required in the principal Act of a Bargain is, that no more be exacted than what is just and fit," and "[f]or whatsoever Men promise or give, they are supposed to do it, in Proportion to what they are to receive . . . ."<sup>336</sup> As with the late scholastics, the concept of just price was weakened

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<sup>327</sup> *Id.*

<sup>328</sup> KELLY, *supra* note 322, at 227.

<sup>329</sup> SIMMONDS, *supra* note 245, at 143.

<sup>330</sup> GORDLEY, *supra* note 242, at 71.

<sup>331</sup> Stig Jørgensen, *Grotius's Doctrine of Contract*, 13 SCANDINAVIAN STUD. L. 107, 109 (1969).

<sup>332</sup> GORDLEY, *supra* note 242, at 71.

<sup>333</sup> STEIN, *supra* note 130, at 39.

<sup>334</sup> Koskenniemi, *supra* note 317, at 46.

<sup>335</sup> HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 736 (Richard Tuck & Knud Haakonssen eds., 2005) (1625).

<sup>336</sup> *Id.* at 740.

somewhat by making the market price the just price (absent a monopoly).<sup>337</sup> But even more importantly, Grotius acknowledged that Roman law had generally tolerated a deviation from the just price when it was the result of an agreement entered into without fraud, the law treating what was exchanged as equals:

[W]here the Contributions are unequal, yet if they are consented to, and there be no Lie in the Case, nor any Thing concealed which should have been discovered, in all external Actions, they shall be looked upon as equal; so that . . . no Action [is] allowed in Court against such an Inequality.<sup>338</sup>

Thus, according to Grotius, the civil law traditionally did not provide for relief in such a situation.<sup>339</sup> He believed, however, that this was for pragmatic reasons, explained as follows by a commentator: “[I]f one needed to prove the equality of a transaction, this would, ‘by reason of the uncertain Prices of Things,’ lead to unending disputes as parties would be tempted to go back on bargains that turned out to be less advantageous than foreseen.”<sup>340</sup> But Grotius also believed there was nothing wrong with profit seeking and that it was beneficial to the state.<sup>341</sup>

#### *E. Pothier and the Subjective Will Theory of Contract*

Thereafter, because of the continuing decline of the Aristotelian philosophical tradition, the prior natural-law limitations on the will started to disappear.<sup>342</sup> While Grotius’s focus was on the rights of economic actors rather than private individuals,<sup>343</sup> the scholastics’ contract theory—particularly its requirement of a just exchange in addition to consent—was soon replaced with an ideology based on individual sovereignty.<sup>344</sup> As noted by James Gordley, “the innovation of the [later] will theorists was not to use the concept of the will but to use it to the exclusion of

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<sup>337</sup> GORDLEY, *supra* note 242, at 96.

<sup>338</sup> GROTIUS, *supra* note 335, at 763.

<sup>339</sup> *Id.*

<sup>340</sup> Koskenniemi, *supra* note 317, at 47.

<sup>341</sup> Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae—The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates,”* 31 BROOK. J. INT’L L. 741, 760 (2006).

<sup>342</sup> Gordley, *supra* note 29, at 82.

<sup>343</sup> Koskenniemi, *supra* note 317, at 51.

<sup>344</sup> Doris, *supra* note 287, at 366–67.

any other principle by which the will could be limited.”<sup>345</sup> This had an important effect on the view of law and commerce: “Gone was the Aristotelian framework that assessed the permissibility of mercantile activity by reference to the good of the community . . . .”<sup>346</sup> By the seventeenth century, “‘nature’ had come to connote, not divine ordinance, but human appetites, and natural rights were invoked by the individualism of the age as a reason why self-interest should be given free play.”<sup>347</sup> Natural law was becoming the law of natural rights.<sup>348</sup>

The most important jurist of the developing subjective will theory of contract was the Enlightenment-era French jurist Robert Joseph Pothier (1699-1772). Pothier set out to bring order to French law, which at the time was customary law that had been strongly influenced by Roman law.<sup>349</sup> His first work as part of this effort was *Traité des obligations* (“*Law of Obligations*”), published in 1761.<sup>350</sup> Rather than seeking to explain the particular characteristics of different types of contracts, as had been done in Roman law, he sought to explain contract law’s substance in general.<sup>351</sup> And for Pothier, at the center of the conception of contract was the parties’ consent or will.<sup>352</sup> He defined a contract as “a particular kind of agreement”; he defined “agreement” as “the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made”;<sup>353</sup> and he wrote that “[a] contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.”<sup>354</sup> Thus, for Pothier, “every contract derives its effect from the intention of the parties,”<sup>355</sup> and this will theory

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<sup>345</sup> Gordley, *supra* note 29, at 73.

<sup>346</sup> Koskenniemi, *supra* note 317, at 46.

<sup>347</sup> KELLY, *supra* note 322, at 227 (quoting R.H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 183 (1926)).

<sup>348</sup> See KELLY, *supra* note 322, at 227.

<sup>349</sup> MACMILLAN, *supra* note 34, at 97.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> 1 M. POTHIER, A TREATISE ON OBLIGATIONS, OR CONTRACTS 3 (William David Evans, Esq. trans., 1806).

<sup>354</sup> *Id.* at 4. For the latter statement he cited Grotius. *Id.*

<sup>355</sup> Anat Rosenberg, *Contract’s Meaning and the Histories of Classical Contract Law*, 59 MCGILL L.J. 165, 177 (2013).

followed a subjective approach,<sup>356</sup> though objective evidence of the party's subjective intention was required.<sup>357</sup> The “essence” of contract was subjective agreement, and this subjective will theory of contract became the basis of the French theory of contract.<sup>358</sup>

Pothier, in *Law of Obligations*, also discussed equality of exchange.<sup>359</sup> He started with a general rule requiring such equality: “Equity ought to preside in all agreements . . . [A]s equity in matters of commerce consists in equality, when that equality is violated, when one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it.”<sup>360</sup> For Pothier, an inequality of exchange not only violated the requirement of equality of exchange, it vitiated consent because “he would not have given what he has given, except upon the false supposition that what he was receiving in return was of equal value; and he would not have had any disposition to give it if he had known that what he received was of inferior value.”<sup>361</sup> But he also wrote that:

the price of things does not ordinarily consist in an indivisible point; there is a certain latitude within which there is room for the contracting parties to contest; and there is no injury, nor consequently any want of equity in a contract, unless what one of the parties receives is *above the highest or beneath the lowest value of what he gives*.<sup>362</sup>

Further, restitution was unavailable “when the price of the thing which is the object of the contract is so uncertain, that it is difficult or almost impossible to determine what the just price is . . . .”<sup>363</sup> For example, because the just price of an aleatory

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<sup>356</sup> Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267, 287 (2005).

<sup>357</sup> *Id.* at 286. For example, “a mere change in the intention of an offeror to make an offer cannot be proved except by objective evidence such as the dispatch of a letter of revocation.” *Id.*

<sup>358</sup> Doris, *supra* note 287, at 367 n.33.

<sup>359</sup> POTHIER, *supra* note 353, at 21.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* (emphasis added).

<sup>363</sup> *Id.* at 22.

contract (contracts based on an uncertain event, such as insurance contracts) was uncertain, there could be no restitution based on an alleged inequality of exchange.<sup>364</sup>

Pothier, however, explained that not charging above the highest value, or buying below the lowest value (if a just price could be determined), was simply a general rule regarding moral contracting in an Aristotelian sense of virtue, and was not a requirement for positive law. He wrote that under positive law “persons of full age are not allowed in point of law to object to their agreements as being injurious, unless the injury be *excessive*, a rule widely established for the security and liberty of commerce.”<sup>365</sup> Pothier stated “[t]hat injury is commonly deemed excessive which amounts to more than a moiety [i.e., half] of the just price.”<sup>366</sup> Further, and perhaps most importantly, “[c]ontracts which relate only to moveables [goods] are not subject to rescission, on the ground of inequality, however great it may be.”<sup>367</sup> Thus, with Pothier, while the subjective will theory had been retained, the just-price theory, at least as an aspect of positive law, had been whittled down essentially to land-sale contracts.

The subjective will theory of contract gained influence not only in France, but in Germany, particularly because it was consistent with the current German idealism grounded in Immanuel Kant’s moral philosophy. For example, Savigny was influenced by Kant,<sup>368</sup> and he built upon Kant’s moral philosophy in identifying the general principles of law that his historical research discovered.<sup>369</sup> As explained by Mathias Reimann: “Kant had defined law as the conditions under which the freedom of one individual can coexist with the freedom of other individuals. Adopting this view, [for Savigny] . . . [t]he function of law was the protection of one individual’s freedom against another’s . . . .”<sup>370</sup>

#### F. *The Common Law’s Brief Flirtation with the Subjective Will Theory*

In the early nineteenth century, Pothier’s *Law of Obligations* became popular in England because it provided the systematization and clarity lacking in English

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 21 (emphasis added).

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 23.

<sup>368</sup> Reimann, *supra* note 41, at 82.

<sup>369</sup> *Id.* at 83.

<sup>370</sup> Reimann, *supra* note 128, at 891–92.

treatises.<sup>371</sup> Also, at this point, English lawyers were beginning to think of law in terms of general principles,<sup>372</sup> and English lawyers already understood the common law of contracts as being based on the parties' agreement.<sup>373</sup> Further, Sir Henry Maine's historical conclusions about the development of law (announced in 1861 in his book *Ancient Law*) were consistent with Savigny's will theory. Maine famously argued that the movement of progressive societies was from status to contract, and "[t]hose who saw history as the gradual attainment of an ideal like freedom recognised in his exposition the gradual unfolding of the idea of the self-determination of the free individual, projected on the plane of law."<sup>374</sup> Thus, in the mid-nineteenth century the subjective will theory seemingly prevailed in England.<sup>375</sup>

But the civilian natural law theory of contract conflicted (or at least arguably conflicted) with the English common law in important respects. With respect to the "just price" theory, while the theory—and its idea of a "moral economy"<sup>376</sup>—had exerted influence in the common law in both England and the United States,<sup>377</sup> its influence waned in the eighteenth century and came to be eclipsed by the notion that the adequacy of consideration was irrelevant.<sup>378</sup> This Aristotelian-based limitation on the will—the requirement of a just price—was even inconsistent with the subjective will theory's "emphasis on the sovereignty of the individual [as well as] the economic theories of those such as Adam Smith, who stressed the benefit of free market capitalism or laissez-faire economics . . ."<sup>379</sup> The emphasis on the will theory led to "jurists in the nineteenth century [stating] that to [examine the adequacy of consideration] would interfere with the will of the parties and entail mystical notions of value."<sup>380</sup>

But a pure will theory, under which a party could merely will a legal obligation by making a promise, was in turn inconsistent with the traditional common-law

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<sup>371</sup> See MACMILLAN, *supra* note 34, at 106.

<sup>372</sup> P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 351 (1979).

<sup>373</sup> See MACMILLAN, *supra* note 34, at 104.

<sup>374</sup> STEIN, *supra* note 130, at 101.

<sup>375</sup> Perillo, *supra* note 234, at 429.

<sup>376</sup> See William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 *YALE J. ON REG.* 721, 740 (2018).

<sup>377</sup> See *id.* at 746.

<sup>378</sup> See generally ATIYAH, *supra* note 372, at 169–77 (discussing just-price concept in English law).

<sup>379</sup> Doris, *supra* note 287, at 373–74.

<sup>380</sup> Gordley, *supra* note 29, at 75.

requirement of consideration, which had developed as a limit on the enforceability of promises.<sup>381</sup> Additionally, a “subjective” will theory was also in conflict with the English common law’s objective test for determining whether a party had assented to a contract.<sup>382</sup> Thus, while in the mid-nineteenth century the subjective will theory seemingly prevailed within the common law, it was in fact just as a brief flirtation<sup>383</sup> that “produced the rhetoric of a subjective approach but had little effect on the outcome of cases . . . .”<sup>384</sup>

### G. *Holmes and Langdell’s Acceptance of the Objective Will Theory of Contract*

The common law’s brief flirtation with the subjective will theory helped, however, make the will become the exclusive basis for contractual liability, and made it easy for Holmes and Langdell to identify effectuating the parties’ will as a fundamental principle of the common law. As Roy Kreitner has noted, “[a]ccording to [the classical legal scholars of the late nineteenth century], everything in contract could be conceptualized around two things: promise, coupled with consideration.”<sup>385</sup> For example, Holmes wrote in *The Common Law* that “[t]he common element of all contracts might be said to be a promise,”<sup>386</sup> and that “the relation of contractor and contractee is voluntary . . . .”<sup>387</sup> For Holmes, a contract involved each party assuming the risk of the nonoccurrence of an event,<sup>388</sup> and he wrote that “[c]ontracts are dealings between men, by which they make arrangements for the future.”<sup>389</sup> Seeking to differentiate tort obligations from contractual obligations, Holmes wrote that “[t]he liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from tort are independent of any previous consent of the wrong-doer to bear the loss occasioned by the act.”<sup>390</sup>

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<sup>381</sup> See KESSLER, *supra* note 35, at 37 (“In England, the consideration doctrine was gradually developed to set limits of the enforceability of promises.”).

<sup>382</sup> See Perillo, *supra* note 234, at 428.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE 9 (2007).

<sup>386</sup> HOLMES, *supra* note 23, at 227.

<sup>387</sup> *Id.* at 237.

<sup>388</sup> *Id.* at 236.

<sup>389</sup> *Id.* at 239.

<sup>390</sup> *Id.* at 63.

He further noted that “[t]he law means to carry out the intention of the parties . . . .”<sup>391</sup> With respect to why certain doctrines make a contract voidable, Holmes argued in *The Common Law* that “[t]his must be because of the breach of some condition attached to its existence either expressly or by implication.”<sup>392</sup>

For Holmes, the requirement of bargain consideration reinforced the will theory, as it meant that there must be a bargain struck between the parties, and whether something counted as consideration was based on whether “the parties have dealt with it on that footing.”<sup>393</sup> Thus, according to Holmes, “the same thing may be a consideration or not, *as it is dealt with by the parties.*”<sup>394</sup> Holmes famously wrote that

it is the essence of consideration, that, by the *terms of the agreement*, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and the promise.<sup>395</sup>

John Dawson has thus argued that if there was anything revolutionary about Holmes’s theory of bargain consideration, it was that he applied the will theory of contract to it: “He seemed to say that both parties must *agree* that each was induced to promise or to act by the promise or act of the other.”<sup>396</sup>

That a contract was based on the parties’ will was made clear when Holmes wrote that “[i]t is laid down, with theoretical truth, that, beside the assurance or offer on the one side, there must be an acceptance on the other.”<sup>397</sup> He further asserted that:

[t]he qualities that make sameness or difference of kind for purposes of a contract are not determined by [Louis] Agassiz [the biologist and geologist] or Darwin, or

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<sup>391</sup> *Id.* at 261.

<sup>392</sup> *Id.* at 246.

<sup>393</sup> *Id.* at 229.

<sup>394</sup> *Id.* (emphasis added).

<sup>395</sup> *Id.* at 230 (emphasis added).

<sup>396</sup> DAWSON, *supra* note 235, at 204.

<sup>397</sup> HOLMES, *supra* note 23, at 238.

by the public at large, but by the *will of the parties*, which decides that for their purposes the characteristics insisted on are such and such.<sup>398</sup>

With respect to Langdell, he has been credited with identifying mutual assent (offer and acceptance) as one of the “abstract, parsimonious dimensions of contract.”<sup>399</sup> As Langdell’s biographer notes, “the 1870 edition of *Cases on Contracts* became the first text on contracts published in the United States or Britain that was organized around ‘the basic requirements of offer, acceptance, and consideration’ or, more parsimoniously, ‘the two most important common elements, consideration and assent.’”<sup>400</sup> In Langdell’s 1880 *A Summary of the Law of Contracts*, he wrote that “[m]utual consent is of the essence of every contract (as it is of every transaction requiring the consent of two parties), and therefore it must always exist, in legal contemplation, at the moment when the contract is made.”<sup>401</sup> For Langdell, as it was for Holmes, the “essence” of every contract was mutual consent.

But to keep a will theory of contract law consistent with the common law, Holmes and Langdell objectified it. Holmes wrote in *The Common Law* that “although the law starts from the distinctions and uses the language of morality, it necessarily ends in external standards not dependent on the consciousness of the individual.”<sup>402</sup> Thus, he wrote in *The Common Law* that “the making of a contract does not depend on the state of the parties’ minds, it depends on their overt acts,”<sup>403</sup> and wrote in the margin of his copy that “[t]he whole doctrine of contract is formal & external.”<sup>404</sup> And the objective theory of contract fit perfectly with Holmes’s overall view of the common law, which he believed had developed from fault to

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<sup>398</sup> *Id.* at 258 (emphasis added).

<sup>399</sup> KIMBALL, *supra* note 11, at 84.

<sup>400</sup> *Id.* at 94 (first quoting Kelley, *supra* note 13, at 1706; and then LAPIANA, *supra* note 68, at 59).

<sup>401</sup> C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 193 (photo. reprinted 2009) (Boston, S.J. Parkhill & Co. 2d ed. 1880).

<sup>402</sup> HOLMES, *supra* note 23, at 253.

<sup>403</sup> *Id.* at 240.

<sup>404</sup> Daniel P. O’Gorman, *Oliver Wendell Holmes’s Theory of Contract Law at the Massachusetts Supreme Judicial Court*, 13 NE. UNIV. L. REV. 75, 82 (2021).

objective standards.<sup>405</sup> He later wrote that he viewed the objective theory as enlightened.<sup>406</sup> Langdell, in the *Summary*, referring to mutual consent, wrote that

[i]t never, however, is the subject of direct allegation or proof, partly because it is generally incapable of direct proof, and partly because every contract is made by acts performed. Proof of the necessary acts, therefore, is always indispensable, and proof of them carries with it presumptive proof of mutual consent.<sup>407</sup>

That Holmes and Langdell identified an *objective* will theory as one of the fundamental principles enables scholars, with equal justification, to make the seemingly inconsistent claims that “[i]n the common law world, a genuinely dogmatic will theory did not appear, perhaps, until Langdell,”<sup>408</sup> and that Langdell “refuted the will theory.”<sup>409</sup>

With respect to bargain consideration, both Holmes and Langdell rejected a promisee’s non-bargained-for reliance as a basis for making a promise legally binding.<sup>410</sup> Langdell specifically rejected any argument that a promise should be binding based on an antecedent moral obligation.<sup>411</sup> And Holmes’s belief in the will theory as the exclusive basis for contract law led him to reject the just-price theory, asserting that “[a] consideration may be given and accepted . . . solely for the purpose of making a promise binding.”<sup>412</sup> Langdell similarly wrote that “[i]f anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and therefore, if one promise be given in exchange for another promise, there is a sufficient consideration for each.”<sup>413</sup> Langdell wrote:

[T]he law has never in theory abandoned the principle that a consideration must be commensurate with the obligation which is given in exchange for it; that,

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<sup>405</sup> Howe, *supra* note 106, at xxi.

<sup>406</sup> Letter from Oliver Wendell Holmes, Jr. to E.A. Harriman (Jan. 4, 1896) (quoted in HOWE, *supra* note 36, at 233).

<sup>407</sup> LANGDELL, *supra* note 401, at 193.

<sup>408</sup> Gordley, *supra* note 29, at 79.

<sup>409</sup> KIMBALL, *supra* note 11, at 84.

<sup>410</sup> HOLMES, *supra* note 23, at 95; LANGDELL, *supra* note 401, at 99–100.

<sup>411</sup> LANGDELL, *supra* note 401, at 90.

<sup>412</sup> Holmes, *supra* note 23, at 94.

<sup>413</sup> LANGDELL, *supra* note 401, at 59.

though the smallest consideration will in most cases support the largest promise, this is only because the law shuts its eyes to the inequality between them; and hence any inequality to which the law cannot shut its eyes is fatal to the validity of the promise. The value of most considerations, as well as of most promises, is a thing which the law cannot measure; it is not merely a matter of fact, but a matter of opinion.<sup>414</sup>

Unlike Holmes, Langdell did not necessarily view the consideration requirement as an enlightened doctrine, and believed not requiring it might have been a more rational course.<sup>415</sup> Further, similar to why Grotius's and Pothier's just-price theories were weak, Langdell's rejection of the just-price theory was based on the practical difficulties of assessing value.<sup>416</sup> Holmes, however, was determined to continue moving the common law forward in what he believed was an enlightened direction, referring to the doctrine of bargain consideration as founded "in good sense, or [it] at least falls in with our common habits of thought . . ."<sup>417</sup> With respect to his rejection of the just-price theory, he made clear that he believed parties should be able to enter into whatever deals they choose, and should likewise be bound by whatever deals they make.<sup>418</sup> This put the "right" before the "good," and was consistent with Holmes's view that eliminating the moral from the law was a sign of progress.<sup>419</sup>

The will theory from civilian natural law was thus borrowed by the common law but objectified and limited to bargained-for exchanges. Holmes and Langdell had thus identified the fundamental principles of the common law of contracts. The principles were modern, to the extent modern is equated with a concept of contract as an instrument of a modern economy. They were also very Baconian, as having practical purposes. While the objective will theory of contract made more promises legally binding than the natural law's subjective theory and its just-price theory—in that a person would be bound by their objective manifestation of assent even if they had not subjectively intended and even if they had entered into a bad deal—it was necessary to promote the modern needs of commerce by protecting the parties' reliance on the deal. It was in this sense that it was utilitarian in purpose (promoting

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<sup>414</sup> *Id.* at 70–71.

<sup>415</sup> Thomas C. Grey, *Langdell's Orthodoxy*, 45 UNIV. PITT. L. REV. 1, 26 (1983).

<sup>416</sup> LANGDELL, *supra* note 401, at 71.

<sup>417</sup> HOLMES, *supra* note 23, at 215.

<sup>418</sup> *Id.* at 230.

<sup>419</sup> RABBAN, *supra* note 10, at 224.

the overall good—the needs of modern society), with this utilitarian purpose being effectuated in part by protecting the “right” (the will of the parties).

## V. ANALYTICAL JURISPRUDENCE AND THE GEOMETRIC METHOD: THE SPIRIT OF THE LAW ITSELF

If Holmes and Langdell were to bring order to the common law of contracts, they had to use the fundamental principles they discovered—the objective will theory and bargain consideration—to identify correct lower-level rules and to reject those that were inconsistent with these fundamental principles. This necessarily involved adopting a dialectical and geometric approach to deducing lower-level rules. The dialectical method (the reconciliation of opposites) can be traced to ancient Greece (with the Socratic method being the best-known example);<sup>420</sup> it was continued in the Middle Ages by Emperor Justinian’s *Digest* of Roman law,<sup>421</sup> the Italian glossators,<sup>422</sup> and then the scholastics;<sup>423</sup> and culminated in the early nineteenth century with the Pandectists (the German scholars who studied and taught Roman law<sup>424</sup>) and John Austin’s analytical jurisprudence.<sup>425</sup> Holmes and Langdell really had no other choice than to adopt this approach because this type of legal reasoning reflects (in the words of Ryan Alford) the “spirit of the law itself,”<sup>426</sup> and, as Louis Menand has observed, “if there are formalist elements in *The Common Law*, it is because there are formalist elements in the law.”<sup>427</sup>

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<sup>420</sup> See BLACKBURN, *supra* note 102, at 113.

<sup>421</sup> PETER STEIN, *STEIN ROMAN LAW IN EUROPEAN HISTORY* 32–36 (1999).

<sup>422</sup> *See id.* at 45–49.

<sup>423</sup> GORDON LEFF, *MEDIEVAL THOUGHT ST. AUGUSTINE TO OCKHAM* 92–94 (photo. reprt. 2019) (1958), <https://archive.org/details/medievalthoughts/mode/1up?q=pandectists&view=theater> [<https://perma.cc/RZR4-XETU>].

<sup>424</sup> FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 275 (photo. reprt. 2019) (Tony Weir trans., 1958), <https://archive.org/details/historyofprivate0000wiewa/page/168/mode/1up?q=pandectists&view=theater> [<https://perma.cc/9PDV-ZZUM>].

<sup>425</sup> BIX, *supra* note 305, at 11–12.

<sup>426</sup> Ryan Patrick Alford, *How Do You Trim the Seamless Web? Considering the Unintended Consequences of Pedagogical Alterations*, 77 *UNIV. CIN. L. REV.* 1273, 1277 (2009).

<sup>427</sup> MENAND, *supra* note 213, at 38.

A. *The Socratic Method: The Search for Soundness of a Position*

For Socrates (469 B.C.-399 B.C.),<sup>428</sup> reason was all-powerful,<sup>429</sup> and his method—known as the elenchus<sup>430</sup>—was a mode of investigation designed to determine truth or at least come closer to it (to help one think clearly) by attempting to refute any particular truth claim by exposing inconsistencies within it.<sup>431</sup> It was a logical and dialectical method (dialectical coming from the Greek word *dialektikē*, meaning “the art of conversation or debate”).<sup>432</sup> It started with a truth claim and involved asking the claimant (the so-called interlocutor) questions to attempt to expose inconsistencies within the claim.<sup>433</sup> Socrates, a moral philosopher<sup>434</sup> searching for the definitions of the moral virtues,<sup>435</sup> often used the method to determine the truth of another’s claim about the meaning of a particular virtue, such as courage, piety, or justice.<sup>436</sup> To help determine the claim’s validity, Socrates asked for a definition of a particular term or concept (rather than for examples), and then pressed the interlocutor with questions to assess whether the provided definition was accurate, all in an effort to determine the “form” or “idea” of the term or concept.<sup>437</sup> By eliminating inconsistencies and false beliefs, the interlocutor would then hopefully be left with knowledge of the definition.<sup>438</sup>

The Socratic method’s search for a definition<sup>439</sup> can, however, be used in two different ways. One is as a process rather than a way to answer fundamental questions, and considers all conclusions provisional and is content with

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<sup>428</sup> BLACKBURN, *supra* note 102, at 449.

<sup>429</sup> GREGORY VLASTOS, SOCRATES: IRONIST AND MORAL PHILOSOPHER 86 (1991).

<sup>430</sup> *Id.* at 111.

<sup>431</sup> WARD FARNSWORTH, THE SOCRATIC METHOD: A PRACTITIONER’S HANDBOOK 221–22 (2021).

<sup>432</sup> BLACKBURN, *supra* note 102, at 133.

<sup>433</sup> FARNSWORTH, *supra* note 431, at 224.

<sup>434</sup> VLASTOS, *supra* note 429, at 47.

<sup>435</sup> *Id.* at 91.

<sup>436</sup> Richard Robinson, *Socratic Definition*, in THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS 110, 110 (Gregory Vlastos ed., 1971).

<sup>437</sup> THOMAS A. BLACKSON, ANCIENT GREEK PHILOSOPHY: FROM THE PRESOCRATICS TO THE HELLENISTIC PHILOSOPHERS 44–45 (2011).

<sup>438</sup> *Id.* at 53.

<sup>439</sup> VLASTOS, *supra* note 429, at 91.

uncertainty.<sup>440</sup> Viewed this way, it is designed to discover invalid truth claims, but not necessarily to achieve the discovery of truth, including the truth of moral issues.<sup>441</sup> This is considered the approach of the historical Socrates, depicted by his student Plato in Plato's early dialogues,<sup>442</sup> and this was Holmes's view of the historical Socrates.<sup>443</sup>

The other way is represented by Socrates in Plato's later dialogues, where the Socratic method is designed to discover the truth,<sup>444</sup> with the idea that there is a true definition that can be identified through a rigorous Socratic method. There is reason to believe that these views are Plato's, rather than those of his teacher.<sup>445</sup> This approach includes Plato's "Theory of Forms" (or "Theory of Ideas") and the belief that "*X*-ness itself exists and that being *X* is somehow the mode of existence *X*-ness possesses."<sup>446</sup> Thus, for Plato, "forms" are "fixed in nature"<sup>447</sup> and "are the 'patterns or paradigms' specified in definition."<sup>448</sup> As noted by Ward Farnsworth, "Plato treats dialectic not just as a method but as a system of philosophy in which the essences of things are found through investigation by question and answer."<sup>449</sup>

The value for law of the inductive, dialectic Socratic method used by the historical Socrates stems from the fact that rules of law are typically viewed as preexisting, in the sense that people believe that there is—or at least should be—an answer to the question, "What is the law with respect to this particular matter?" Thus, the Socratic method of the historical Socrates, where one seeks to determine "What is *X*?" can be used with *X* referring to a particular aspect of the law.<sup>450</sup> If "consistency in case outcomes is a characteristic of the rule of law,"<sup>451</sup> then a claim about the law can withstand the Socratic method if the claim is true; if it does not withstand it, the

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<sup>440</sup> FARNSWORTH, *supra* note 431, at 62.

<sup>441</sup> *Id.* at 63.

<sup>442</sup> *Id.* at 68.

<sup>443</sup> See HOLMES, *supra* note 101, at 147 (referring to the historical Socrates as "a man rather of a keen and caustic spirit of enquiry, than of great constructive power . . .").

<sup>444</sup> FARNSWORTH, *supra* note 431, at 68.

<sup>445</sup> *Id.* at 104–05.

<sup>446</sup> BLACKSON, *supra* note 437, at 115.

<sup>447</sup> *Id.* at 116.

<sup>448</sup> *Id.*

<sup>449</sup> FARNSWORTH, *supra* note 431, at 69.

<sup>450</sup> *Id.* at 11, 96.

<sup>451</sup> Alexandra D. Lahav, *The Case for "Trial By Formula,"* 90 TEX. L. REV. 571, 572 (2012).

claim is false, and the law is otherwise. Note that using the Socratic method to identify a rule of law does not necessarily say anything about the legitimacy or morality of the rule of law. It is simply designed to determine if an interlocutor's definition accurately describes all the results that the interlocutor believes fall within the definition. The problem, however, with using the Socratic method to identify the law is that one is often trying to identify a definition of *X* that is consistent with decisions by different decision makers (particularly under the common law), and at a certain point, some of those decisions might simply be irreconcilable. After all, the historical Socrates did not claim to find a true definition, and it would likely have been difficult to do so, as his interlocutors surely had somewhat different meanings for the definitions under discussion.

The value of the later Socratic method (as used by Plato himself) for law stems from the belief that law is preexisting, and that the preexisting rules of law should provide the answer to a particular case—like a geometric proof. Thus, once *X* has been determined (with *X* being a rule of law), syllogistic reasoning should be used to decide the outcome. This does not mean that one must believe that law is axiomatic; it simply means that one believes that persons should only be subject to rules of law that existed at the time they engaged in the conduct at issue.

### *B. The Roman Method: Creating an Orderly System of Law*

The Romans took the dialectic method, and being ever practical, used it to become the first to develop a practical legal science, a method of doing law.<sup>452</sup> Roman law developed over a millennium, starting with the Twelve Tables in 451-450 BC<sup>453</sup> and culminating in the sixth century AD when Justinian, the Eastern Roman Emperor, ordered the compilation of legal materials that, in the words of a leading scholar, “were the product of a thousand years of unbroken legal development. . . .”<sup>454</sup> Whereas the ancient Greeks often theorized about the nature of law but had little science of law,<sup>455</sup> the Romans, though developing a highly-specialized body of law,<sup>456</sup> were “strictly practical,”<sup>457</sup> and did not give legal theory

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<sup>452</sup> KELLY, *supra* note 322, at 5.

<sup>453</sup> PETER SARRIS, JUSTINIAN: EMPEROR, SOLDIER, SAINT 117 (2023).

<sup>454</sup> PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 1 (1999).

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> KELLY, *supra* note 322, at 49.

much attention.<sup>458</sup> But the Roman jurists took from the Greek philosophers—including Aristotle<sup>459</sup>—the dialectic method to create an orderly system of law “by a process of division and sub-division into genera and species, arrived at by establishing differences . . . on the one hand, and analogies or affinities . . . on the other.”<sup>460</sup> The Romans thus used the early Socratic method to clarify legal concepts, not by deducing them from general principles but rather by testing them against hypothetical situations.<sup>461</sup> As noted by Thomas Glyn Watkin: “The Roman genius for law was closely allied to the great Roman feats in engineering. In both disciplines, the Romans were not great theorists like the Greeks, but rather endowed with a tremendous practicality, for ever conquering the problems they encountered with practical, workmanlike answers.”<sup>462</sup>

In 476 AD, the Western Roman Empire fell, but the Eastern Roman Empire (also known as the Byzantium empire) continued.<sup>463</sup> In the sixth century, the eastern emperor Justinian I directed the compilation of Roman law as part of his program to renew Rome’s ancient glory.<sup>464</sup> By this point, knowledge of Roman law had sunk to a low point,<sup>465</sup> and for its content, Justinian looked back to Roman law’s golden age.<sup>466</sup> The most important part of the final product was the *Digest*, a compilation, distillation, abridgement, and harmonization of the writings of Rome’s great, classical jurists.<sup>467</sup> Justinian instructed the commission working on the *Digest* to eliminate all repetition and contradiction.<sup>468</sup> No juristic writings were to be thereafter

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<sup>458</sup> STEIN, *supra* note 454, at 1; Gordley, *supra* note 29, at 70 (“Neither the ancient Romans nor the medieval civilians had been given to theorizing.”); GORDLEY, *supra* note 242, at 30 (“As has often been said, the Romans had no theory or general law of contract.”); GORDLEY, *supra* note 242, at 68 n.157 (noting that there was “tension between a Roman legal tradition and a Greek philosophical tradition.”).

<sup>459</sup> See Harold J. Berman, *The Origins of Western Legal Science*, 90 HARV. L. REV. 894, 910 (1977) (“Aristotle greatly refined Plato’s concepts of dialectical reasoning.”).

<sup>460</sup> KELLY, *supra* note 322, at 50.

<sup>461</sup> Gordley, *supra* note 29, at 70.

<sup>462</sup> WATKIN, *supra* note 268, at 1.

<sup>463</sup> STEIN, *supra* note 454, at 30–33.

<sup>464</sup> *Id.* at 33.

<sup>465</sup> WATKIN, *supra* note 268, at 4.

<sup>466</sup> STEIN, *supra* note 454, at 33. As noted by Watkin, “Justinian was well aware that the law by which the inhabitants of his Christian, mainly Greek-speaking empire now lived was but a poor reflection of the great system which had been developed in ancient Rome itself and which had reached its apogee in the first half of the third century AD.” WATKIN, *supra* note 268, at 2.

<sup>467</sup> STEIN, *supra* note 454, at 33.

<sup>468</sup> *Id.* at 34; SARRIS, *supra* note 453, at 122.

cited in court, with the *Digest* to be “as if fortified by a wall, with nothing outside it.”<sup>469</sup> The result “recast the inherited mass of juristic opinions into a coherent and updated compilation,”<sup>470</sup> and “various legal subjects [were] presented in a systematic, indeed scientific manner.”<sup>471</sup> By 534 AD the *Digest*, along with the *Codex* (consisting of legal enactments of the emperors)<sup>472</sup> and the *Institutes* (an introductory textbook),<sup>473</sup> were put into statutory form,<sup>474</sup> with this body of law later coming to be known as the *Corpus Juris Civilis* (“body of civil law”), in contrast to the Church’s canon law.<sup>475</sup>

Having been dormant in the West for several centuries after the fall of the Western Roman Empire, Roman law—and its method of dialectical reasoning—made a comeback in the High Middle Ages, with Justinian’s *Digest* gradually being “rediscovered” in Italy in the late eleventh century.<sup>476</sup> The rediscovery was not only important in the sense of rediscovering Roman law’s substance,<sup>477</sup> but because of the dialectical method the Italian jurists used in their study of the *Digest*, a method that in turn helped lead to scholasticism in the High Middle Ages.<sup>478</sup> With respect to the *Digest*’s text, to the Italian jurists it appeared as written reason.<sup>479</sup> And accepting Justinian’s assurance that it included no contradictions and could answer any legal question,<sup>480</sup> they sought to reconcile any apparent contradictions in it, their technique being to “gloss” the text (i.e., interpret it by including marginal and interlinear

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<sup>469</sup> SARRIS, *supra* note 453, at 122.

<sup>470</sup> *Id.* at 124.

<sup>471</sup> WATKIN, *supra* note 268, at 3.

<sup>472</sup> *Id.* at 4.

<sup>473</sup> *Id.* at 3.

<sup>474</sup> STEIN, *supra* note 454, at 35.

<sup>475</sup> *Id.*; WATKIN, *supra* note 268, at 4.

<sup>476</sup> Igor Stramignoni, *Francesco’s Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 219 n.270 (2004); see also Wolfgang P. Müller, *The Recovery of Justinian’s Digest in the Middle Ages*, 20 BULL. MEDIEVAL CANON L. 1, 4 (1990) (noting that “most scholars have agreed that there are weighty reasons to argue that the recovery of the Digest did not take place with a sudden appearance of the whole work, but came about in stages. This meant that the text turned up gradually and in portions, in a process that stretched out over many years.”).

<sup>477</sup> STEIN, *supra* note 454, at 1.

<sup>478</sup> *Scholasticism*, NEW CATHOLIC ENCYCLOPEDIA 757 (2d ed. 2003), <https://evdvn.net/wp-content/uploads/2018/05/new-catholic-encyclopedia-vol-12.pdf> [<https://perma.cc/S8E4-X6LM>].

<sup>479</sup> WATKIN, *supra* note 268, at 12.

<sup>480</sup> STEIN, *supra* note 454, at 46.

notes).<sup>481</sup> The method of these so-called Glossators was thus the dialectic method that the Roman jurists had inherited from the Greek philosophers,<sup>482</sup> and was a method of legal science devoted to the idea of a closed body of law that could provide the answer to any legal question.<sup>483</sup> Although the age of the Glossators came to an end at the close of the High Middle Ages, their dialectic method continued in the Late Middle Ages with scholasticism,<sup>484</sup> which, as previously discussed, involved synthesizing Church doctrine with Aristotelianism and Roman law, and involved providing a definition and then deducing consequences from it.<sup>485</sup>

### C. *The Rise of the Geometric Method in Law*

The geometric method, as applied to law, has been described as “the idea that law can be reduced to a set of first principles, on the order of mathematical axioms, and that by the use of deductive method, these principles can yield all necessary consequences.”<sup>486</sup> The first great modern jurist to apply the geometric approach to law was the German Enlightenment polymath Gottfried Wilhelm Leibniz (1646-1716).<sup>487</sup> Leibniz’s geometric method of logical analysis was an ancestor of John Austin’s later analytical jurisprudence,<sup>488</sup> but (unlike the positivism of Austin) Leibniz sought to identify the substance of law through pure reason, and this rationalism gave rise to the natural law approach that based its axioms on such reason.<sup>489</sup> The geometric method came to dominate legal theory in Germany in the eighteenth century,<sup>490</sup> and the geometric/natural law approach would also gain popularity in France,<sup>491</sup> with Pothier being one of the leaders to bring the nation’s law into rational order.<sup>492</sup> The geometric method was also used by the German

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<sup>481</sup> WATKIN, *supra* note 268, at 9.

<sup>482</sup> HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGAL* 163–64, 303–04 (1949).

<sup>483</sup> GEOFFREY SAMUEL, *RETHINKING LEGAL REASONING* 18 (2018); STEIN, *supra* note 454, at 46.

<sup>484</sup> HANKINS, *supra* note 263, at 4.

<sup>485</sup> GORDLEY, *supra* note 242, at 14.

<sup>486</sup> Hoeflich, *supra* note 132, at 96.

<sup>487</sup> See Hoeflich, *supra* note 132, at 99; BLACKBURN, *supra* note 102, at 271.

<sup>488</sup> See generally Roger Berkowitz, *From Justice to Justification: An Alternative Genealogy of Positive Law*, 1 U.C. IRVINE L. REV. 611, 612–13 (2011).

<sup>489</sup> *Id.* at 612–13.

<sup>490</sup> Hoeflich, *supra* note 132, at 103; Reimann, *supra* note 128, at 843.

<sup>491</sup> STEIN, *supra* note 454, at 109.

<sup>492</sup> WATKIN, *supra* note 268, at 21.

historical school in the nineteenth century.<sup>493</sup> Although Savigny had held together the diverse groups within the German historical school for a time, the school came to be dominated by Romanists, whose method was to build comprehensive, logical systems based on abstract concepts.<sup>494</sup> The geometric paradigm's inspiration was Roman law,<sup>495</sup> as the Roman legal method was viewed as an elegant alternative to chaotic customary laws.<sup>496</sup> This view led to a more rational Romanist jurisprudence displacing customary law.<sup>497</sup>

The Enlightenment idea that reason and logical abstractions could be the foundation of an ideal and gapless system of law that could conceivably answer any legal question encouraged a series of codifications in Europe in the late eighteenth and early nineteenth centuries,<sup>498</sup> these codes being “the latter-day successors of their great Byzantine ancestor[,] [Justinian’s Code].”<sup>499</sup> This use of reason to create codes had, however, a stifling effect: “The result, even in the academic world, was the discouragement of theoretical reflection, or historical research, which might destabilize, and rob of its effects, this ‘organic body of norms, planned and in their logical order.’”<sup>500</sup>

*D. John Austin’s Method: Escaping from the Empire of Chaos and Darkness to the Region of Order and Light*

Ironically, the geometric method (developed by the civilian natural lawyers) was buttressed by the English analytical jurisprudence that arose out of attacks on natural law. Britain had a strong empirical tradition compared to the continent’s rationalist tradition, but the attacks of Jeremy Bentham (1748-1832) on Blackstone were giving rise to a desire for theoretical clarity in the law.<sup>501</sup> It would be Bentham’s

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<sup>493</sup> Reimann, *supra* note 128, at 882.

<sup>494</sup> Reimann, *supra* note 41, at 83, 85.

<sup>495</sup> *Id.* at 96.

<sup>496</sup> *Id.* at 98.

<sup>497</sup> *Id.*

<sup>498</sup> STEIN, *supra* note 130, at 52. Compare WATKIN, *supra* note 268, at 21 (“For many [the Napoleonic Code] was the ultimate triumph of reason . . .”), with KELLY, *supra* note 322, at 311 (The French Code civil, however, was “in content . . . largely sticking to traditional French rules and by no means an exercise in wholesale rationalist innovation.”).

<sup>499</sup> WATKIN, *supra* note 268, at 25.

<sup>500</sup> KELLY, *supra* note 322, at 312 (quoting 3 GUIDO FASSÒ, STORIA DELLA FILOSOFIA DEL DIRITTO [HISTORY OF THE PHILOSOPHY OF LAW] 26 (1970)).

<sup>501</sup> Andreas B. Schwarz, *John Austin and the German Jurisprudence of His Time*, 1 POLITICA 178, 179 (1934).

disciple, John Austin (1790-1859), who would develop a positivist, analytical jurisprudence. Austin was the first Professor of Jurisprudence at the newly-established University of London,<sup>502</sup> but his influence was insignificant until after his death in 1859,<sup>503</sup> when the second edition of his 1832 *The Province of Jurisprudence Determined* (the introductory part of his course of lectures) was published in 1861 (due to the efforts of his widow)<sup>504</sup> and the remainder published in 1863 as *Lectures on Jurisprudence, or The Philosophy of Positive Law* (through the efforts of his widow and Austin's friends, including John Stuart Mill).<sup>505</sup> Austin believed that the English practice of learning the law through an apprenticeship had led to harmful consequences, writing that "the knowledge of an English Lawyer, is nothing but a beggarly account of scraps and fragments" and "[h]is memory may be stored with numerous particulars, but of the Law as a whole, and of the mutual relations of its parts, he has not a conception."<sup>506</sup> And he was confident that developing a legal science for the common law could correct the problem.<sup>507</sup> With the temperament to systematize,<sup>508</sup> the goal of his law lectures was to clarify the universal concepts in law.<sup>509</sup>

To prepare for his lectures, Austin asked for a leave of absence to study civil law<sup>510</sup> and Roman law in Germany,<sup>511</sup> being impressed by the work of the Pandectists to create a body of systemized, modern Roman law.<sup>512</sup> To Austin, Roman law, including the work on it by the German Pandectists, was superior to English law.<sup>513</sup>

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<sup>502</sup> *Id.* at 180.

<sup>503</sup> Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 986 (1981).

<sup>504</sup> STEIN, *supra* note 130, at 85; Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMPAR. L. 811, 836–37 (2010).

<sup>505</sup> Kennedy, *supra* note 504, at 837; Michael Lobban, *Austin and the Germans*, in THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE 255, 255 (Michael Freedman & Patricia Mindus eds., 2013).

<sup>506</sup> 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 467–68 (Robert Campbell ed., London, John Murray, 5th ed. 1885).

<sup>507</sup> Rumble, *supra* note 503, at 994.

<sup>508</sup> Michael H. Hoeflich, *Savigny and his Anglo-American Disciples*, 37 AM. J. COMP. L. 17, 32–33 (1989) (footnote omitted).

<sup>509</sup> Rumble, *supra* note 503, at 995.

<sup>510</sup> Hoeflich, *supra* note 508, at 32.

<sup>511</sup> Schwarz, *supra* note 501, at 189.

<sup>512</sup> STEIN, *supra* note 130, at 71.

<sup>513</sup> *Id.*

For example, he wrote that “[t]urning from the study of the English to the study of the Roman law, you escape from the empire of chaos and darkness to a world which seems by comparison, the region of order and light.”<sup>514</sup> Austin was aware of Savigny’s historical approach, but preferred that of the Pandectists.<sup>515</sup> Thus, rather than seeking out Savigny and the historical jurists, he went to Bonn, a center of natural law jurists,<sup>516</sup> studying there during the winter of 1827-1828.<sup>517</sup>

The goal of *The Province of Jurisprudence Determined* was to identify the “province of jurisprudence[,]”<sup>518</sup> and included Austin’s famous command theory of law,<sup>519</sup> under which he insisted “that all law was the command of a sovereign and [rejected the idea] that customs could be law before a judicial decision.”<sup>520</sup> The command theory’s significance was that it excluded, as a source of law, both natural law (whether divine or based on reason) and custom,<sup>521</sup> and rejected any necessary connection of law with either morality or reason.<sup>522</sup> It was not that Austin did not have ideas of what the law should be; he was a disciple of Jeremy Bentham, the utilitarian.<sup>523</sup> But he argued for a strict separation between identifying law as it is from law as one believed it ought to be.<sup>524</sup> Austin thus resurrected in England Bacon’s scientific approach to the law to use in opposition to Blackstone’s approach focused on natural law and custom.<sup>525</sup> For example, Austin attacked Lord Mansfield (the eighteenth-century jurist) for having sought to eliminate from the common law of contracts the requirement of consideration, the criticism appearing to be that Mansfield was seeking to enforce morality, rather than existing law.<sup>526</sup> Austin’s

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<sup>514</sup> AUSTIN, *supra* note 506, at 58.

<sup>515</sup> Hoeflich, *supra* note 508, at 27.

<sup>516</sup> *Id.* at 32.

<sup>517</sup> Lobban, *supra* note 505, at 256.

<sup>518</sup> *Id.*

<sup>519</sup> *Id.* at 256.

<sup>520</sup> *Id.* at 262.

<sup>521</sup> KELLY, *supra* note 322, at 314; BIX, *supra* note 305, at 12.

<sup>522</sup> Berkowitz, *supra* note 488, at 613.

<sup>523</sup> J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL’Y 351, 395 (2019).

<sup>524</sup> BIX, *supra* note 305, at 11.

<sup>525</sup> *See id.* (“Austin specifically, and legal positivism generally, offered a quite different approach to law [than was common at the time]: as an object of ‘scientific’ study, dominated neither by prescription nor by moral evaluation.”).

<sup>526</sup> W.L. MORISON, JOHN AUSTIN 78 (1982).

*Lectures on Jurisprudence, or The Philosophy of Positive Law* was a work of analytical jurisprudence,<sup>527</sup> in that it involved uncovering “principles, notions, and distinctions” necessary for a coherent system of law.<sup>528</sup> Inspired by German Pandectism,<sup>529</sup> it was primarily “directed to the analysis of the legal notions which were common to English law and the Pandectist form of Roman law, for he assumed that concepts found in these two systems were universally applicable.”<sup>530</sup> Thus, “[i]f the English influences shaped Austin’s theory of what law was, the German ones taught him how it worked.”<sup>531</sup>

Austin thereby “pioneered the analytical form of positivist jurisprudence, and was the first writer to suggest the presentation of a legal system as a structure of ‘laws properly so called’ considered without regard to their goodness or badness.”<sup>532</sup> But, as noted by Duncan Kennedy, while “[t]he lectures are often referred to as the foundation of the English school of analytical jurisprudence, . . . what is [also] important . . . is that their publication marked the arrival of classical legal thought and the influence of the German pandectist scholars in England.”<sup>533</sup> Austin’s jurisprudence—both in adopting an English empirical, positivist approach and rejecting natural law for the substance of law, yet adopting an analytical approach as the method—would “open the path to the formalist approaches of late nineteenth century American legal writers, for whom law was to be developed by scientific jurists rather than by legislators.”<sup>534</sup>

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<sup>527</sup> See Lobban, *supra* note 505, at 256 (referring to the “analytical jurisprudence of the later lectures”).

<sup>528</sup> *Id.* at 256; 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* 1108 (Robert Campbell ed., London, John Murray, 4th ed. 1873).

<sup>529</sup> Lobban, *supra* note 505, at 256.

<sup>530</sup> STEIN, *supra* note 130, at 72.

<sup>531</sup> Lobban, *supra* note 505, at 256 (emphasis omitted).

<sup>532</sup> KELLY, *supra* note 322, at 315 (footnote omitted).

<sup>533</sup> Kennedy, *supra* note 504, at 837. Austin himself did not, however, believe that the judicial process should simply involve rigid deductive reasoning from a few existing general principles to decide cases. See MORISON, *supra* note 526, at 163 (“For all Austin’s interest in logic, he certainly did not believe that the law could be deduced from a few first principles, and stressed and approved the creativeness of judicial experience.”); Alfrid Rumble, *John Austin, Judicial Legislation and Legal Positivism*, 13 UNIV. W. AUSTL. L. REV. 77, 93–96 (1977) (discussing those situations in which Austin supported judges making law); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 (1958) (“[O]nly an entire misconception of what analytical jurisprudence is and why [Austin] thought it important has led to the view that he, or any other analyst, believed that the law was a closed logical system in which judges deduced their decisions from premises.”).

<sup>534</sup> Lobban, *supra* note 505, at 256–57.

*E. Holmes and Langdell and Analytical Jurisprudence: In Search of Certainty for the Ever-Tangled Skein of Human Affairs*

Holmes and Langdell followed not only Austin's positivism (in the sense of adopting the Baconian method and thus rejecting natural law as a basis for identifying the fundamental principles of the common law), but also his analytical jurisprudence. Holmes, who as a member of the Metaphysical Club in the early 1870s "found himself more and more deeply committed to that philosophical point of view which was derived from British empiricism, sharpened by skepticism, and strengthened by the achievements of science,"<sup>535</sup> saw Austin as a prophet.<sup>536</sup> Holmes thus began his effort to bring order to the common law by employing the Austinian analytical method, having "a youthful rationalism marked by an earnest faith that legal contradiction could be overcome by thought and hard effort."<sup>537</sup> Starting in 1870, Holmes thus set out, with Austin as his guide, to (in his own words) "analyse what seem to [be] the fundamental notions and principles of our substantive law, putting them in an order which is part of or results from the fundamental [legal] conceptions."<sup>538</sup> Holmes in fact viewed himself as even more of a (or better) positivist than Austin, later writing that "[t]he trouble with Austin was that he did not know enough English law."<sup>539</sup> As Reimann has recognized, while Holmes in the later 1870s rejected the Austinian idea that logic and reason could be the *source* of legal principles, he did not reject the Austinian goal of identifying the fundamental principles of the law and arranging them in a logical order.<sup>540</sup> And Langdell famously wrote that "the number of fundamental legal doctrines is much less than is commonly supposed," and that "[i]f these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number."<sup>541</sup> If one could then master these principles or

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<sup>535</sup> Howe, *supra* note 106, at xiii.

<sup>536</sup> *Id.* at xiv.

<sup>537</sup> Horwitz, *supra* note 44, at 67.

<sup>538</sup> HOWE, *supra* note 193, at 25 (quoting letter from Oliver Wendell Holmes, Jr., to James Bryce (Aug. 17, 1879) (on file with Harv. Univ. L. Libr., Historical & Special Collections, Modern Manuscripts Collection)); *see also* Oliver Wendell Holmes, Jr., *Trespass and Negligence*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 76, 76 n.\* (Sheldon M. Novick ed., 1995) (stating his articles were "parts of a connected scheme to analyze the fundamental conceptions of law").

<sup>539</sup> Holmes, *supra* note 117, at 475.

<sup>540</sup> Reimann, *supra* note 41, at 79.

<sup>541</sup> LANGDELL, *supra* note 43, at vi–vii.

doctrines, one could “apply them with constant facility and certainty to the ever-tangled skein of human affairs.”<sup>542</sup>

Thus, not only did Holmes and Langdell use the Baconian method and the historical approach to identify the fundamental principles of the common law of contracts—the objective will theory and bargain consideration—they then used analytical jurisprudence to give meaning to these concepts and the geometric method to identify lower-level rules. It might have been “Holmes’s genius as a philosopher to see that the law has no essential aspect,”<sup>543</sup> but he viewed the common law concept of contract as having, in a sense, an essence (though not a fixed essence and certainly not a Platonic form),<sup>544</sup> and that was that a contract was a voluntary agreement under which each party agreed to assume the risk of the nonoccurrence of an event.<sup>545</sup>

Holmes used the consensual nature of contract liability to distinguish contract damages from tort damages.<sup>546</sup> Holmes, for example, argued that because of the will theory, a defendant should only be liable for indirect, foreseeable damages if the defendant had tacitly consented to be liable for those losses,<sup>547</sup> an issue that divided courts.<sup>548</sup> Holmes also argued that the doctrines that make a contract voidable were based on the tacit agreement of the parties.<sup>549</sup> The will theory also meant that “[i]f a man [when entering into a contract] states a thing reasonably believing that he is speaking from knowledge, it is contrary to the analogies of the law to throw the peril of the truth upon him unless he agrees to assume that peril [as] part of the contract.”<sup>550</sup>

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<sup>542</sup> *Id.* at vi.

<sup>543</sup> MENAND, *supra* note 213, at 35.

<sup>544</sup> Holmes was not an “essentialist” to the extent that term refers to someone who believes “some category has a fixed nature, when in fact the category has the shape it does due to human choices.” BIX, *supra* note 305, at 62. With respect to the distinction between Aristotle’s idea that each thing has an “essence” and Plato’s Theory of Forms, Aristotle’s idea rejected Plato’s theory, as the latter asserted that there was a world of universals separate from tangible things. *See* ROSS, *supra* note 251, at 164.

<sup>545</sup> HOLMES, *supra* note 23, at 237.

<sup>546</sup> *Id.* at 236–37.

<sup>547</sup> *Id.*; *see also id.* at 63 (“The liabilities incurred by way of contract are more or less expressly fixed by the agreement of the parties concerned . . . . If A fails to pay a certain sum on a certain day, or to deliver a lecture on a certain night, after having made a binding promise to do so, the damages which he has to pay are recovered in accordance with his consent that some or all of the harms which may be caused by his failure shall fall upon him.”).

<sup>548</sup> *See* Larry T. Garvin, *Globe Refining Co. v. Landa Cotton Oil Co. and the Dark Side of Reputation*, 12 NEV. L.J. 659, 670–75 (2012).

<sup>549</sup> HOLMES, *supra* note 23, at 246.

<sup>550</sup> *Id.* at 252.

With respect to the objective theory, this meant that “[a] promise in certain words has a definite meaning, which the promisor is presumed to understand.”<sup>551</sup> It also meant that if the parties used the language of a bargain, there was consideration even if it was very probable one of the parties would have performed for free.<sup>552</sup> For Holmes, contractual obligations were based on the “form of words which the parties chose to employ for the purpose of affecting the legal consequences.”<sup>553</sup> The objective theory also meant that an acceptance could be effective upon mailing because, since “the making of a contract does not depend on the state of the parties’ minds [but] their overt acts,” “[t]he offeree, when he drops the letter containing the counter-promise into the letter-box, does an overt act.”<sup>554</sup> It also meant that “a representation may be morally innocent, and yet fraudulent in theory of law.”<sup>555</sup>

Holmes and Langdell also justified numerous rules as being derived from the concept of bargain consideration. For example, Holmes used this principle to show that the following promises were not legally binding because they had not been given in exchange for consideration: a promise that was merely subject to a condition;<sup>556</sup> a promise of a reward when the offeree performed the act without knowledge of the offer;<sup>557</sup> and a promise for a benefit previously received.<sup>558</sup> Langdell, like Holmes, used the concept of bargain consideration to deduce that performing the act necessary to accept a reward offer does not constitute consideration if the offeree had been unaware of the offer at the time of performing the act.<sup>559</sup> He agreed with Holmes that past consideration was not sufficient consideration, as this rule flowed from the general principle “that the consideration is given in exchange for the promise.”<sup>560</sup> Langdell also believed that the requirement of bargain consideration meant that an offer for a unilateral contract did not become a binding promise until the consideration was provided, and this in turn meant that on principle an offer should

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<sup>551</sup> *Id.* at 253.

<sup>552</sup> *Id.* at 231–32.

<sup>553</sup> *Id.* at 232.

<sup>554</sup> *Id.* at 240.

<sup>555</sup> *Id.* at 254.

<sup>556</sup> *Id.* at 228–29.

<sup>557</sup> *Id.* at 231.

<sup>558</sup> *Id.* at 232.

<sup>559</sup> LANGDELL, *supra* note 232, at 2–3.

<sup>560</sup> *Id.* at 96–97.

remain revocable until the performance was completed, even if the offeree had started performing.<sup>561</sup>

Langdell's debt to the dialectic method—dating back to ancient Greece—is particularly clear.<sup>562</sup> Langdell “reinvigorated the Socratic method at a critical moment in American legal history, or at the very least, at a critical juncture in the history of legal pedagogy in this country.”<sup>563</sup> Thus, Langdell, who adopted the Socratic method for teaching Contracts, “revived the classical method of legal instruction based on dialectical reasoning and casuistry, whereby common legal principles are teased out of seemingly incompatible texts and tested through dialectical disputation.”<sup>564</sup> The Socratic method used by Langdell in his Contracts class, combined with the Baconian and historical method, “required students to read original sources rather than textbooks, to analyze particular controversies rather than general propositions, to formulate their own interpretations in response to questions, and to respond to hypotheticals and opposing views.”<sup>565</sup> The casebook was thus part of his “inductive Socratic method of teaching.”<sup>566</sup>

Langdell's approach differed, however, from the natural-law tradition in that his casebook did not include any headnotes or commentary.<sup>567</sup> Langdell's “inductive approach contrasted [also] with the antecedent treatise tradition that endeavored ‘to render cases subordinate to principles, . . . to throw the main body of [cases] into the notes, and to incorporate those only in the text, which seemed to afford the best *illustrations* of the doctrine under consideration.’”<sup>568</sup> Langdell's goal was to force the students to derive principles from the cases, rather than to simply read cases as illustrations of previously announced principles.<sup>569</sup> Also, the method, by focusing on the development of the common law, treated the common law as organic and

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<sup>561</sup> *See id.* at 11–12.

<sup>562</sup> Alford, *supra* note 426, at 1317.

<sup>563</sup> *Id.* at 1318.

<sup>564</sup> *Id.* at 1280–81; *see also id.* at 1314 (noting “the scholastic emphasis on highlighting contradictions and ambiguities through dialogue as a means of instruction”).

<sup>565</sup> KIMBALL, *supra* note 11, at 131.

<sup>566</sup> *Id.* at 88.

<sup>567</sup> *Id.*

<sup>568</sup> *Id.* at 88–89; WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS v (1844); 1 WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS xiii (Melville M. Bigelow ed., 5th ed. 1874).

<sup>569</sup> KIMBALL, *supra* note 11, at 89.

Darwinian and rejecting immutable absolutes.<sup>570</sup> In this sense, it has been argued that Langdell's method can be viewed as the beginning of the end to formalism.<sup>571</sup>

The Socratic method—the scientific method—of teaching law was not, as is commonly assumed, simply a pedagogical device, though this might have been its most obvious use. As stated by G. Edward White:

While the case method was a training device in analytical reasoning itself, it also was a stimulus for the promulgation of orderly arrangements of substantive legal fields. The constant consideration of governing principles in diverse factual contexts allegedly produced a refined sense of the relation of the general to the specific. An interplay of general principles and specific fact situations characterized the massive analytical synthesis of the scientific generation of legal scholars . . . .<sup>572</sup>

As Edward Purcell has observed, “[f]ocusing on the logical analysis of judicial opinions and emphasizing the desirability of doctrinal consistency, the case method reinforced a rationalistic and deductive theory of judicial decision.”<sup>573</sup>

There is no reason to believe Holmes disagreed with the use of the Socratic method to identify fundamental legal principles, as Holmes's praise at the 1880 Harvard Commencement of the Law School's Socratic method makes clear.<sup>574</sup> We also know that Holmes agreed with Langdell's emphasis on cases and their development over time, as Holmes praised Langdell's 1870 casebook<sup>575</sup> and in 1886 stated that “there is no way to be compared to Mr. Langdell's way.”<sup>576</sup> Further, Holmes's membership in the Metaphysical Club was consistent with a belief in the value of the Socratic method, as members of the club seemed to have a penchant for

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<sup>570</sup> LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 10–11, 13 (Lawbook Exch., Ltd. 2010) (1986); KIMBALL, *supra* note 11, at 90 n.38; Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1, 35 (1980).

<sup>571</sup> Speziale, *supra* note 570, at 3–4, 4 n.10; LAPIANA, *supra* note 68, at 188 n.11.

<sup>572</sup> WHITE, *supra* note 39, at 33.

<sup>573</sup> EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 75 (1973).

<sup>574</sup> See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 197–98 (1993).

<sup>575</sup> HOLMES, *supra* note 47, at 243.

<sup>576</sup> OLIVER WENDELL HOLMES, JR., *The Use of Law Schools*, in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES*, *supra* note 193, at 478.

using it.<sup>577</sup> Holmes was particularly influenced by Chauncey Wright (a member of the Metaphysical Club), and Wright's role model was Socrates,<sup>578</sup> Wright's approach being described as a "Socratic manner of prolonged and thorough discussion in which the vagueness of ideas could be exorcised . . . ."<sup>579</sup>

While Holmes, in his 1860 college essay on Plato, was critical of Socrates, it was not so much Socrates's method as his execution of it.<sup>580</sup> Holmes's view in 1860 of Socrates' failings was still his view late in life. He wrote to Harold Laski in 1919 that "my impression is that an intelligent modern would have landed a sock dologer under his jaw in two minutes,"<sup>581</sup> and wrote to Laski in 1927 of "the ease with which the 'merciless logic' of Socrates very generally could be smashed."<sup>582</sup> In the margin of his copy of his college essay on Plato, Holmes wrote that George Henry "Lewes [in his book *Biographical History of Philosophy*] also was the first, as far as I know, to point out the difference of the Socratic and Baconian induction."<sup>583</sup> Lewes argued that Bacon's inductive method was more rigorous than Socrates' method had been.<sup>584</sup> For Holmes, the problem was not Socrates' method; it was the skill of the player.

It is sometimes asserted that Holmes, who taught at Harvard in the early 1870s, left due to frustration with the law school's use of the Socratic method,<sup>585</sup> but there is insufficient support for this. When he stopped teaching part-time at Harvard Law School in 1873, the decision has usually been attributed to his desire to return to full-time practice.<sup>586</sup> The belief that Holmes quit teaching at Harvard because of frustration with the Socratic method stems from what is arguably a misinterpretation

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<sup>577</sup> For example, Chauncey Wright and Nicholas St. John Green used the Socratic method. See PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 209 (1949) (Wright); KIMBALL, *supra* note 11, at 347 n.3 (Green).

<sup>578</sup> MENAND, *supra* note 55, at 206–07.

<sup>579</sup> WIENER, *supra* note 577, at 209.

<sup>580</sup> HOLMES, *supra* note 101, at 146.

<sup>581</sup> THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 153 (2013) (quoting Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (July 21, 1919)).

<sup>582</sup> Letter from Oliver Wendell Holmes, Jr. to Harlod J. Laski Letters (July 8, 1927), in 2 HOLMES-LASKI LETTERS, *supra* note 54, at 961, 961.

<sup>583</sup> HOLMES, *supra* note 101, at 149 n\*.

<sup>584</sup> GEORGE HENRY LEWES, *THE BIOGRAPHICAL HISTORY OF PHILOSOPHY: FROM ITS ORIGIN IN GREECE DOWN TO THE PRESENT DAY* 409–10 (1845–46).

<sup>585</sup> BAKER, *supra* note 46, at 208–09.

<sup>586</sup> WHITE, *supra* note 574, at 128.

of a letter he wrote in 1871 to the English jurist James Bryce. In the letter, he wrote that “[t]he common law training (e.g. in our law school) is to keep [a student] at the solution of particular cases. Just as Agassiz would give one of his pupils a sea urchin and tell him to find all about it that he could.”<sup>587</sup> Holmes’s comments to Bryce can be seen as in fact praising Langdell’s method. They were immediately preceded by his statement that he thought “it would be dangerous to set a student at the civil law here [in the U.S.] as tending to let him satisfy himself with generalities.”<sup>588</sup> Thus, Holmes believed that Langdell’s Socratic method, which kept a student “at the solution of particular cases,” prevented the student from satisfying himself with “generalities,” which would be consistent with Holmes’s opposition to the civil law’s natural-law approach.<sup>589</sup>

Holmes’s primary concern with the Socratic method was how it had been misused by Plato. Even before the Civil War destroyed his youthful idealism, Holmes was critical of Plato’s Theory of Forms and Plato’s belief that complex conceptions could have abstract, eternal meanings.<sup>590</sup> For Holmes, the problem with Plato was not the use of the Socratic method, but Plato’s belief that it could be used to determine the truth of something that was, in Holmes’s view, incapable of having an absolute and eternal meaning.<sup>591</sup>

It is, however, often asserted that there were “two Holmes” within the 1870s, the Holmes of the early 1870s working in the Austinian analytical tradition and the

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<sup>587</sup> Letter from Oliver Wendell Holmes, Jr. to James Bryce (May 17, 1871) (on file with the Harvard Law School Library).

<sup>588</sup> *Id.*

<sup>589</sup> *Id.* Further, Holmes wrote the letter to Bryce in 1871, when he was teaching Constitutional Law at Harvard College to undergraduates, not while teaching at the Law School (he did not teach at the Law School until 1872–73), HOWE, *supra* note 36, at 61, so he would have no reason to quit teaching at Harvard because of the Socratic method. Holmes’s letter to Bryce was written almost a decade before he became critical of Langdell, and his later reference to Langdell’s “misspent piece of marvellous [sic] ingenuity” and to him representing the “powers of darkness” were references to Langdell’s appendix to his casebook, Letter from Oliver Wendell Holmes, Jr., to Frederick Pollock (Apr. 10, 1881), in HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932 (Mark DeWolfe Howe ed., 1942) (which was later published separately as the *Summary of the Law of Contracts*), not the Socratic method. See HOLMES, *supra* note 193, at 102 (referring to the index that “has grown into a series of systemic discussions.”). Further, he wrote in 1886 that when he taught Torts as Harvard Law School in the early 1880s, “[w]ith some misgivings, I plunged a class of beginners straight into Mr. Ames’s collection of [Torts] cases, and we began to discuss them in Mr. Langdell’s method. The result was better than I even hoped it would be.” HOLMES, *supra* note 576, at 478.

<sup>590</sup> See HOLMES, *supra* note 101, at 148–49 (marginal note).

<sup>591</sup> *Id.* at 149.

later Holmes working in a historical and anthropological tradition.<sup>592</sup> Notably, it is argued that the latter Holmes came to believe that his initial efforts to devise a scientific and logical classification of the common law in the Austinian tradition had been a mistake,<sup>593</sup> with this work in the early 1870s being critical and his work in the later 1870s being constructive.<sup>594</sup> That Holmes believed he had entered a new phase in the mid-1870s is confirmed by a letter he wrote to his idol Ralph Waldo Emerson, stating: “It seems to me that I have learned, after a laborious and somewhat painful period of probation that the law opens a way to philosophy as well as anything else, if pursued enough . . . .”<sup>595</sup>

But while Holmes’s primary method might have shifted in the late 1870s, asserting that there were “two Holmes” in the 1870s, one replacing the other, risks failing to appreciate that these different methods in fact complemented each other, and that each was an essential part of Holmes’s *The Common Law*. It was these two different parts reflected in the final product that enables Holmes to be viewed as both a formalist and a pre-Realist. If Holmes was going to preserve the common-law system against the threat of politics and codification, then he needed to both discover how the common-law system actually worked—including how it had developed to its present state—yet also employ the Austinian analytical approach and the geometric method to bring order to it. In this regard, Holmes’s efforts, while superficially contradictory, were in fact complementary, much as Savigny’s historical school sought both to uncover the historical growth of the law but to then construct a system from what was discovered. As recognized by Horwitz, “[b]ecause of the mediation of Darwinism,” in *The Common Law* “Holmes managed to achieve a subtle balance between the ‘analytical’ and the ‘historical’ elements of law” and “experienced no ultimate contradiction between the two.”<sup>596</sup>

So why did Holmes seek to distance his theory of law from logic? He of course famously wrote that “[t]he life of the law has not been logic: it has been experience,” and that

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<sup>592</sup> See, e.g., G. Edward White, *The Integrity of Holmes’ Jurisprudence*, 10 HOFSTRA L. REV. 633, 637 (1982) (“And that shift from analytic classification to philosophical synthesis was characteristic of [Holmes’] scholarship in the late 1870’s. In five articles in the *American Law Review* between 1876 and 1880 Holmes revealed a new style of scholarship.”) (footnote omitted).

<sup>593</sup> *Id.*

<sup>594</sup> FREDERIC ROGERS KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 41 (1984).

<sup>595</sup> BAKER, *supra* note 46, at 251.

<sup>596</sup> Horwitz, *supra* note 44, at 68.

[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 syllogisms in determining the rules by which men should be governed.<sup>597</sup>

It was in part because he believed Langdell had overused logic in an effort to build a complete structure of law, and that Langdell's method was at risk of becoming "unscientific." But there was more to it than that. "Logic" was associated with the natural-law tradition, and the natural-law tradition was associated with the subjective will theory. The use of logic could overturn the enlightened principles to which the experience of the common law had led. The use of logic could be put to progressive and revolutionary goals that were unenlightened. For Holmes, any whiff of natural-law rationalism needed to be nipped in the bud because it could lead to legal concepts that were incompatible with what he believed was "enlightened" law.

F. *Holmes and Langdell's Great Divide: The Danger of Becoming Unscientific*

The difference between Holmes and Langdell was not about the enlightened, fundamental principles of the common law of contracts (on these they agreed). It was not even about the general method of bringing order to the common law of contracts. Rather, their disagreement was over a particular aspect of analytical jurisprudence and the geometric method.

Holmes understood that to bring order to the common law, synthesis was necessary, but he opposed defining legal concepts by using their meaning from outside of law.<sup>598</sup> It was when Langdell defined a concept not through the Baconian method, but by giving it a Platonic-like meaning derived from natural-law theories, that Holmes objected. In particular, Holmes disagreed with the meaning Langdell gave to *promise*,<sup>599</sup> which was the meaning it had been given by the natural lawyer Hugo Grotius.<sup>600</sup> Holmes believed that the wise common-law judges had given a legal meaning to *promise* that was more practical than the meaning Langdell was giving it, leading Langdell to slip into a subjective theory of contract at times. For example, Langdell believed that because of the meaning of *promise*, the acceptance of a bilateral contract could not be effective until it was received and read by the

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<sup>597</sup> HOLMES, *supra* note 23, at 5.

<sup>598</sup> *Id.*

<sup>599</sup> *Id.* at 238–39.

<sup>600</sup> LANGDELL, *supra* note 232, at 1.

offeror,<sup>601</sup> and (following Pothier) believed that a party could not make a promise about the occurrence or nonoccurrence of an event in the past.<sup>602</sup> Holmes believed that Langdell's narrow meaning of *promise* was inconsistent with both the objective theory of contract and with the principle that a contract was simply an agreement for each party to assume a risk.<sup>603</sup> By importing into contract law a meaning of *promise* from outside the common law, Langdell was importing morality into the law and at the same time failing to apply the Baconian method, all toward the goal of consistency. And for Holmes, it would be foolish for the law "to aim at merely formal consistency . . ."<sup>604</sup> As Holmes wrote: "[T]he effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data."<sup>605</sup> And the danger of codification was shown by the English incorporating an incorrect concept of *promise* into the Indian Contract Act of 1872.<sup>606</sup>

The issue was important to Holmes because he feared that using concepts whose definitions came from outside of the law would prevent wise common-law judges from having the flexibility to resolve doubtful cases based on policy considerations. It also conflicted with the objective will theory of contract, which sought to enforce what one would believe the parties had intended (rather than what they actually intended). He viewed Langdell as thus permitting his legal science to include a rigid form of Platonism and scholasticism at the expense of both the objective will theory and the use of policy in doubtful cases. Langdell's use of an external meaning for *promise* also threatened to make the common law of contracts like a legal code, which is what Holmes and Langdell were presumably both working against.

Simply put, Langdell, unlike Holmes, had more of the scholastic and natural law tradition left in him. For example, even with respect to the issue of just price, Langdell (as previously discussed) did not outright reject it by arguing that it was inconsistent with the common law or that it was unenlightened. He instead stated "that the law has never in theory abandoned the principle that a consideration must be commensurate with the obligation which is given in exchange for it" but in

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<sup>601</sup> *Id.* at 15.

<sup>602</sup> *See id.* at 111.

<sup>603</sup> HOLMES, *supra* note 23, at 238–40.

<sup>604</sup> *Id.* at 256.

<sup>605</sup> HOLMES, *supra* note 589.

<sup>606</sup> HOLMES, *supra* note 23, at 233–34.

practice “shuts its eyes to [any] inequality between them.”<sup>607</sup> Holmes, like Langdell, wanted to bring order to the common law, but not simply for the sake of consistency itself. He wanted the lower-tiered rules to flow from the enlightened fundamental legal principles he had discovered, but with respect to doubtful cases that did not seem to have high stakes—like when a dispatched acceptance was effective—he did not seem particularly interested, satisfied to have the rule based on the common law judge’s policy choice.<sup>608</sup> Langdell, in contrast, believed such policy arguments were “irrelevant” if deduction provided an answer.<sup>609</sup>

### CONCLUSION

Although Holmes and Langdell are typically viewed as having competing theories of legal science (the former a pre-Realist approach and the latter a formal approach), from 1870 to 1881 they were working toward the same goal: achieving a common-law legal science (“a new Jurisprudence”) that would preserve the common law’s autonomy, distinguish it from mere politics, and avoid codification. Further, the “apolitical” system of contract law that the two academically trained, scientific jurists built—a synthesis of positivism, historical jurisprudence, and analytical jurisprudence—was more alike than different, and the fundamental principles they discovered were the same (the objective will theory and bargain consideration). It was for this reason that Grant Gilmore was correct to link them as two of the architects of classical contract law.<sup>610</sup>

The problem, however, was that the fundamental legal principles Holmes and Langdell found in the common law of contracts (the objective will theory and bargain consideration), coupled with the geometric paradigm, resulted in what was perceived as a rigid, politically conservative, laissez-faire common law of contracts, a body of law that in the early twentieth century would come to be viewed as anything but apolitical.<sup>611</sup> In the mid-twentieth century, the quest for fundamental legal principles

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<sup>607</sup> LANGDELL, *supra* note 232, at 70–71.

<sup>608</sup> See HOLMES, *supra* note 23, at 239 (“If convenience preponderates in favor of either view, that is sufficient reason for its adoption.”).

<sup>609</sup> See LANGDELL, *supra* note 232, at 21–22.

<sup>610</sup> GILMORE, *supra* note 16, at 15.

<sup>611</sup> David Kennedy & William M. Fisher III, *Introduction*, THE CANON OF AMERICAN LEGAL THOUGHT 10 (David Kennedy & William W. Fisher III eds., 2006). A rigid use of the geometric paradigm was dubbed “formalism,” a term used “to describe analysis (in either articles or judicial opinions) that moves mechanically or automatically from category or concept to conclusion, without considerations of policy, morality, or practice.” BIX, *supra* note 305, at 69.

underlying the common law of contracts was abandoned,<sup>612</sup> only to return in the late twentieth century with a quest to identify a single fundamental legal principle (a unitary theory of contract). The renewed quest became dominated by three schools of thought: one which maintained that the fundamental principle was protecting the harm caused by reliance (a tort-like approach often referred to as the “death of contract” theory);<sup>613</sup> one which maintained that it was the moral obligation to keep one’s promise (a Kantian will-theory approach);<sup>614</sup> and one which maintained that it was economic efficiency (a utilitarian approach).<sup>615</sup> The search for some form of order in the common law of contracts continued.

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<sup>612</sup> See generally Kennedy & Fisher III, *supra* note 611, at 10–11.

<sup>613</sup> ATIYAH, *supra* note 372, at 1–7; see also ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 7 (1997) (referring to the “Death-of-contract analysts.”).

<sup>614</sup> See generally CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

<sup>615</sup> See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

