Ages of American Formalism

Daniel Farber

Berkeley Law

Follow this and additional works at: http://scholarship.law.berkeley.edu/facpubs

Part of the Law Commons

Recommended Citation
THE AGES OF AMERICAN FORMALISM

Daniel Farber*

I. INTRODUCTION

This Symposium commemorates the publication two decades ago of Grant Gilmore's classic, *The Death of Contract*.¹ The precise nature of the book that we are commemorating, however, is less than clear. In retrospect, the book's title may have been unhelpful. In this Essay, I will suggest that a more revealing title might have been *The Death of Formalism, Part I*. Before explaining this somewhat cryptic suggestion, a few words are in order about the reasons why Gilmore's project has seemed puzzling to much of his audience.

After the genuinely delightful experience of reading the book, many readers are apt to be a little unsure of just what it is they have read. While *Death of Contract* discusses the history of contract law, it is decidedly odd as an exercise in legal history,² This is not altogether surprising from our vantage today—we know that in his later book, *The Ages of American Law*,³ Gilmore rejected "legal history" as a discipline.⁴ Nor is the book really an analysis of contract law—it dis-

---

* Henry J. Fletcher Professor and Associate Dean, University of Minnesota. I would like to thank Ed Adams, Jim Chen, and Suzanna Sherry for their helpful comments.


³ GRANT GILMOR, THE AGES OF AMERICAN LAW (1977) [hereinafter AGES]. This book too presents its puzzles. An anonymous student reviewer complained that "the real point of Gilmore's discourse is elusive at best." Book Note, 91 HARV. L. REV. 906, 908 (1978). Although the book purports to be a work in legal history, it disavows that genre; indeed, some of the discussion is sufficiently dubious as history to prompt one reviewer to question whether the historical discussion in the book might not be an "elaborate hoax." Lester S. Mazor, Book Review, 46 GEO. WASH. L. REV. 520, 522 (1978). Another reviewer could only view the book as a "strategy for reconciling lawyers and historians with the futility of their endeavors." Mark Tushnet, Book Review, 21 AM. J. LEGAL HIST. 373, 376 (1977). I think Gilmore's purposes would have been more clearly communicated if the book had been seen as part of a continuing project on the death of formalism.

⁴ The following passage makes Gilmore's attitude clear:
discusses doctrine in a haphazard way and has nothing systematic to say about how contract cases should be decided.\(^5\) And as to interdisciplinary work, Gilmore seems to have been decidedly skeptical about the value of economics and the other social sciences for understanding law.\(^6\) Certainly, Death of Contract is quite lacking in citations to work in other fields of study; indeed, it is not exactly laden with citations to cases, treatises, or law review articles.

It is little wonder that reviewers were puzzled about the point of the book.\(^7\) It seems to fall in no recognizable genre, being neither legal history, nor jurisprudence, nor doctrinal analysis, nor interdisciplinary research. Either Gilmore was trying to engage in legal history or one of these other genres and failed rather badly—though quite stylishly—or else he was attempting something quite different. Given his impressive abilities, we should not leap to the conclusion that Gilmore simply failed in fairly obvious ways to achieve his goals. Instead, we should pause to reconsider whether we have correctly understood those goals. Whatever was he trying to do?

Unlike the contemporary reviewers of Death of Contract, we have the advantage of being able to read it in the context of Ages, the later book. Putting the two books side by side, we can understand Gilmore’s purposes much more clearly. I believe that we misjudge Gilmore if we think he was engaged in legal history, or even that his real subject was contract law. His true subject, I would suggest, was not the history, content, or philosophy of law, but rather its psychology.\(^8\) Taken together, the two books provide a sustained and critical

---

\(^5\) As one disappointed reviewer noted, “[e]ven as a study of pure doctrine, the work’s perspective is limited.” Arthur T. von Mehren, Book Review, 75 Colum. L. Rev. 1404, 1404 (1975). Another complained that “with all these interesting things going on around him, Gilmore chooses to focus on the least distinctive aspect of 20th century contract law.” Robert W. Gordon, Book Review, 1974 Wis. L. Rev. 1216, 1236; see also id. at 1216 (complaining of the book’s “myopic” perspective).

\(^6\) See Death of Contract, supra note 1, at 95-96, 108-09.

\(^7\) One reviewer spoke of a “sense of opportunities missed,” Clare Dalton, Book Review, 24 Am. U. L. Rev. 1372, 1379 (1975), while another remarked that “this plum is sweet but lacks the protein of substantial study,” Danzig, supra note 2, at 1134. Also moved to the use of metaphor, yet another reviewer said that “[a]lthough the trip was fun, the announcements by the driver were not always complete and at times were less than reassuring.” Richard Speidel, An Essay on the Reported Death and Continued Vitality of Contract, 27 Stan. L. Rev. 1161, 1183 (1975).

\(^8\) At least one reviewer seems to have been aware that Gilmore’s real attention was on the makers of law rather than on its content. See Horwitz, supra note 2, at 794 (referring to the “brilliant anthropology” of legal development offered by Gilmore). One of the reviews of Ages
evaluation of the formalist impulse in legal thinking. They are not in any sense philosophical refutations of formalism. Rather, Gilmore's view is that formalism is psychologically unhealthy because it leads to excessive rigidity and an exaggerated attitude of deference to the past—a past which is for that matter as much invented as real. He seeks to persuade us of this view by showing us that formalism has in practice misserved us and that our best judicial minds have exhibited virtues quite different from those celebrated by formalism.

Antiformalists may take this Essay as confirming their concerns about formalism as a legal theory. Formalists should take it as sounding a cautionary note. Formalists believe that certainty, stability, and logic are the primary values to be sought by judges, but admit that in practice these values cannot be attained completely. To implement these values, they embrace formalist methods, such as textualism as a system for interpreting statutes, adherence to established doctrine in common-law cases, and originalism as a method of constitutional interpretation. Much of the debate about formalism has centered on these formalist methods. In theory, fidelity to these methods is supposed to achieve formalist values; thoughtful formalists admit that on occasion the formalist methods must be tempered in order to keep the legal system from becoming unbearably rigid and closed to current social values. But in practice, the temptation for formalists is to err in the opposite direction, abandoning formalist methods when such methods fail to satisfy their craving for stability, logic, or order. Antiformalists have their own excesses to worry about, but formalists should not be complacent about the risk that their impulses will run out of control.

In Part II of this Essay, I explain my reading of the two Gilmore books. When he wrote *Death of Contract*, Gilmore hoped that formalism was dead—as dead as the title proclaimed Contract to be—but by the time of *Ages* he realized that formalism was making a comeback in the academy. Part III traces the revival of formalism in an area particularly dear to Gilmore's heart, the law of admiralty. Finally, Part IV examines the leading judicial formalist of our day, Justice Antonin Scalia. Again focusing on one of Gilmore's particular interests, commercial law, it considers Scalia's formalism in the context of his most notable bankruptcy opinion. That opinion, I suggest, tells us little about the defects of formalist methods, but much about the risks of formalism as a judicial psychology.

---

is also illuminating in this regard, pointing out that "it is particular individuals—not cases, statutes, doctrines or even theories—who dominate these lectures." Mazor, *supra* note 3, at 521.
II. GILMORE AND THE PSYCHOLOGY OF FORMALISM

_Death of Contract_ is puzzling as much for what it excludes as for what it covers. For a book that is supposed to be about contract law in general, it chooses to focus only on one small (though significant) area, the doctrine of consideration. Its focus is also narrow in another respect because it discusses primarily the work of contracts scholars, such as Williston and Corbin, with relatively little attention to the evolution of the case law. The few cases that are discussed in any depth are old chestnuts found in most casebooks; Gilmore’s historical research seems to have been mostly limited to reading the original arguments and opinions in those cases. When he finishes his analysis, it is unclear whether we have really learned anything of substance about contract law, past or present.

As I suggested in the introduction, _Death of Contract_ can be better understood in the context of Gilmore’s next book, _The Ages of American Law_. Like the earlier book, _Ages_ republishes a set of short, witty, and provocative lectures. It seems likely that Gilmore viewed the two books as closely connected, for _Ages_ incorporates several discussions about contract law that draw on the earlier book. _Ages_ is an effort to chart the broad currents of American law. Following some earlier scholars, it divides the development of American law into three ages.

The first age was dominated by what Gilmore (following Llewellyn) called the Grand Style. It lasted from the time of Independence until around the Civil War. During this period, judges were uneasy about following English precedent and lacked sufficient American precedent to guide them. Hence, they were forced to be creative in adapting the common law to the requirements of a new and quickly growing country. Gilmore wholeheartedly approved of this approach. In a summary of his discussion, he said:

My description of American law before the Civil War sounded like a romp through the Garden of Eden. Wherever we went we paused to admire the happy sight of great judges deciding great cases greatly, aware of the lessons of the past but conscious of the needs of the future, striking a sensitive balance between the conflicting claims of local autonomy and national uniformity in an immense, diverse, and rapidly growing country, creating a new law for a new land.

The Age of Formalism followed the Civil War. During this period, the “juice of life” was squeezed out of judicial opinions; judicial decisions “became so many dry husks.” Among its other flaws, for-

---

9 See _Ages_, supra note 3, at 7-8, 42-48, 64, 72-74, 79-80, 107 (discussing various aspects of contract law).
10 _Id._ at 21-25.
11 _Id._ at 41.
12 _Id._ at 63.
Ages of American Formalism

The post-Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists. The judicial function has nothing to do with the adaptation of rules of law to changing conditions; it is restricted to the discovery of what the true rules of law are and indeed always have been. Past error can be exposed and in that way minor corrections can be made, but the truth, once arrived at, is immutable and eternal. Change can only be legislative and even legislative change will be treated with a wary and hostile distrust.\(^\text{13}\)

"The judges who thought this way and wrote this way," Gilmore added, "set their faces against change" and became the "apostles of reaction."\(^\text{14}\)

The latest age of American law, according to Gilmore, was inaugurated by Corbin and Cardozo. They worked to make the law a flexible instrument for social evolution, mediating between the need for stability and the necessity of change. Ideally, Gilmore would have preferred a return to the Grand Style. Indeed, Gilmore so admired the common-law method as practiced by great judges such as Cardozo that he proposed granting judges the power to nullify obsolete statutes just as they overrule outmoded judicial decisions.\(^\text{15}\) He did not, however, share the view that judges should remake society according to their personal vision of social justice. Instead, he saw judges (and law generally) as performing a more modest role. I cannot resist quoting at length the following passage:

As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. . . . [T]he mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a continuing process which will be orderly, gradual, and, to the extent that such a thing is possible in human affairs, rational. The function of the lawyer is to preserve a skeptical relativism in a society hell-bent for absolutes. When we become too sure of our premises, we necessarily fail in what we are supposed to be doing.

When we think of our own or of any other legal system, the beginning of wisdom lies in the recognition that the body of the law, at any time or place, is an unstable mass in precarious equilibrium. . . . [T]he principal lesson to be drawn from our study is that the part of wisdom is


\(^{14}\) Ages, supra note 3, at 63.

\(^{15}\) Id. at 97. This brief discussion prefigured Judge Calabresi's later argument for this thesis. Guido Calabresi, *A Common Law for the Age of Statutes* (1982).
to keep our theories open-ended, our assumptions tentative, our reactions flexible. We must act, we must decide, we must go this way or that. Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm—at all events it is the human condition from which we will not escape—so long as we do not delude ourselves into thinking that we have finally seen our elephant whole.16

With Gilmore’s overall perspective on law in mind, we may profitably return to Death of Contract. The villain of the piece is Langdell, whom Gilmore blames for the creation of contract doctrine as a formalist system.17 Even on its own terms, however, Langdell’s theory never really worked. It purported merely to describe and clarify the firmly established, stable structure of the common law. Yet, as Gilmore took pains to show, its claim to descriptive validity was suspect. Langdell and his followers made highly selective use of existing case law. They chose a few arbitrary cases, usually English, at the expense of the great body of American contracts decisions. Even those cases required surgery to make them fit the Procrustean bed of Langdellian contract theory. The result, however, was a theory that boasted not only clarity and logical consistency, but also made the legal system more orderly and rational by strictly limiting the role of juries.18

According to Gilmore, the basic idea of the formalist theory of contracts “seems to have been that there really is such a thing as the one true rule of law, universal and unchanging, always and everywhere the same—a sort of mystical absolute.”19 The appeal of jurisprudential systems, whether formalist or antiformalist, is psychological and time bound: “Had we lived a hundred years ago, I dare say that we too would have felt the compelling attraction of Langdell’s simplistic jurisprudence.”20 We can never be sure that the process of legal change has come to an end, for every era has its own intellectual mood. Gilmore closes Death of Contract with the speculation that formalism may yet return:

We have witnessed the dismantling of the formal system of the classical theorists. We have gone through our romantic agony—an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead—but who knows what unlikely resurrection the Easter-tide may bring?21

---

16 AGES, supra note 3, at 109-10.
17 DEATH OF CONTRACT, supra note 1, at 5-6.
18 Id. at 107-08.
19 Id. at 106-07.
20 Id. at 107.
21 Id. at 112.
By the time he wrote *Ages*, Gilmore suspected that what he had intended only as a stylistic flourish would instead prove prophetic: formalism might yet again be emerging. Among his primary suspects was Richard Posner, then a young member of the University of Chicago faculty. As it turned out, Posner eventually became a leading opponent of formalism and an ardent pragmatist. But two other Chicago professors, Frank Easterbrook and Antonin Scalia, did eventually emerge as the leading advocates of a renewed formalism. Even among those judges who were less theoretically inclined, formalist values such as certainty, predictability, and logical consistency began to exercise a greater appeal. Perhaps a fourth age of American law has begun—or at least a formalist interlude in an antiformalist age.

The new formalists advocate originalism in constitutional interpretation, textualism in statutory interpretation, and adherence to settled rules in the common law. But in application, as we will see, these formalist methods have sometimes been secondary to the overpowering appeal of formalist values. The next Part examines the victory of formalist values (at the expense of formalist methods) in admiralty law, one of Gilmore’s specialties. The final Part examines our leading formalist judge, Justice Scalia.

### III. The Ebb and Flow of Formalism in Admiralty

Among the judges he discussed, Gilmore had a special appreciation of Cardozo, who had the ability to work within legal forms to bring the law into line with society’s needs. This Part examines *Moragne v. States Marine Lines*, an admiralty opinion written by Justice Harlan that Gilmore applauded for exhibiting similar strengths.

Understanding *Moragne* requires a brief review of the history of personal injury law. The common law provided no cause of action for wrongful death. In the nineteenth century, American state legislatures abolished this absurd rule by establishing statutory rights to sue for wrongful death. Somewhat later, Congress also enacted reme-

---

22 *Ages*, supra note 3, at 107-08.
23 See *id.* at 146 n.11.
25 See *Death of Contract*, supra note 1, at 63-64, 68-69, 85; *Ages*, supra note 3, at 74-77.
28 *Id.*
dial legislation for maritime torts cases. The Jones Act provides a cause of action for the negligent death of a seaman, and the Death on the High Seas Act (DOHSA) establishes a cause of action for death of workers on the high seas—outside the territorial waters of the United States—"caused by wrongful act, neglect, or default."

In Moragne, a widow attempted to sue for the wrongful death of her husband, who had died from injuries suffered in American territorial waters. Her claim was that the vessel was "unseaworthy," which is the basis of a well-established admiralty tort. Her claim did not fit the federal wrongful death statutes, however. The Jones Act reaches wrongful death in the territorial waters, but is limited to negligence claims; DOHSA encompasses unseaworthiness actions, but reaches only wrongful death on the high seas. In short, Ms. Moragne had fallen into a gap between the statutes' coverage due to the combination of the nature of the wrongful conduct and the place where the accident occurred. The only other law to apply, the common law of admiralty, would preclude her action as well, because of the old rule against recovery for wrongful death. If her husband had died on shore or on the high seas, all would have been well; even if he had been maimed in territorial waters, a cause of action would exist. But because he died in territorial waters, federal law provided no remedy.

What was obviously needed in Moragne was some way to update federal law in order to provide the plaintiff a recovery that would be routine anywhere else. The statutory language was not easily amenable to any construction that would allow her to recover. The solution was to abandon the old common-law rule, which the Supreme Court did in Moragne in a well-crafted opinion by Justice Harlan. Justice Harlan concluded that Congress in 1920 was simply fixing the problems squarely presented to it, not comprehensively addressing an area of law and freezing it from judicial creativity. Drawing not only from the federal maritime statutes but also from the consistent pattern of state statutes, the Court found a well-established public value in favor of recovery for wrongful death.

Gilmore applauded what he called Harlan's "remarkably far-ranging opinion" and reported with some satisfaction that it "reduced both DOHSA and the FELA death provisions incorporated in the

---

31 Moragne, 398 U.S. at 376.
32 Also, the Jones Act provides relief only for "seamen." 46 U.S.C. § 688(a). Mr. Moragne, however, was a longshoreman, and not a "seaman."
33 Moragne overruled an aged precedent, The Harrisburg, 119 U.S. 199 (1886). Justice Harlan's opinion in Moragne contains one of the Court's most thoughtful explorations of the role of stare decisis. See Moragne, 398 U.S. at 403-05.
34 Id. at 387-98.
35 Id. at 393-403.
Jones Act to the level of nonstatutory Restatements.” He went even farther with regard to some other Supreme Court cases dealing with longshoremen, which he thought presaged a judicial power to nullify obsolete statutes. In short, Gilmore saw Moragne as exemplifying a new era of common-law creativity. But it was not to be.

The first post-Moragne decision was the high-water mark for Moragne. In Sea-Land Services, Inc. v. Gaudet, the Court held that, because the Moragne cause of action was common law in nature, modern tort rules about damages should apply, including recovery for nonpecuniary losses like “loss of society.” But the Court was sharply divided, and the closeness of the decision hinted at a loss of momentum.

The next decision marked the turning of the tide. In Mobil Oil Corp. v. Higginbotham, the Court confined Moragne actions to territorial waters—thereby relegating the surviving spouse of a seaworker killed on the high seas to damages only as granted by DOHSA, which explicitly provides recovery only for pecuniary loss. Higginbotham is in great tension with Moragne, for it reflects quite a different attitude about the relationship between statutes and the common law. The Higginbotham Court saw its discretion as foreclosed by DOHSA: “Congress has struck the balance for us.” Justice Harlan’s conclusion in Moragne, however, was that “no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.” Where Harlan had tried to strike a balance between the pull of the past (in the form of old precedents and statutes) and the needs of the present, the Higginbotham Court seemed uneasy about exercising any kind of creative role.

Twelve years later, the Court made clear its abdication of any active role in favor of formalism. In Miles v. Apex Marine Corp., the Court held that damages for loss of society cannot be recovered in a Moragne action brought on behalf of a seaman. This decision virtually limited Gaudet to its facts. The Court refused to allow such damages in a common-law action because they are unavailable under the Jones Act: “It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judi-

36 Gilmore & Black, supra note 27, § 6-32, at 368.
37 Id. § 6-56; accord Ages note 3, at 146-47 n.11.
40 See 46 U.S.C. § 762 (“a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought”) (emphasis added).
41 436 U.S. at 623.
42 Moragne, 398 U.S. at 400.
44 Id. at 36-37.
cially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence.\textsuperscript{45}

This deference to a congressional policy decision might have been more credible if the Jones Act said anything at all about damages for loss of society. In reality, the Jones Act is silent on the matter; the Court has implied such a limitation in the Jones Act based on the unavailability of such damages under the FELA—and even the FELA rule was created by a 1913 judicial decision rather than by Congress.\textsuperscript{46} Deference to Congress seems to have less to do with the Court’s decision in \textit{Miles} than a preference for reaffirming the past rather than engaging the issues of the present.

Although the Court has not revisited \textit{Moragne} since \textit{Miles}, a recent FELA decision reaffirms the Court’s inclination to seek answers to the issues of tort law at some comfortable distance in the past. The issue in \textit{Consolidated Rail Corp. v. Gottshall}\textsuperscript{47} was whether a worker could recover damages for negligent infliction of emotional distress.\textsuperscript{48} The statute merely provides for damages to “any person suffering injury while he is employed by such carrier” due to the railroad’s negligence.\textsuperscript{49} The Court held that emotional distress can constitute “injury” for purposes of the statute, but it limited the plaintiff’s recovery based on an old common-law test (“zone of danger”) that is now followed in only fourteen states.\textsuperscript{50} Refusing to give full effect to the statutory language (which seemingly would go beyond even the current common law), the Court concluded that it would not take such a “radical step” without “support in the common law.”\textsuperscript{51} The opinion was written by Justice Thomas and joined by Justice Scalia—the Court’s two leading textualists—but the opinion makes no effort to link the analysis with the text of the statute.\textsuperscript{52}

For present purposes, the issue is not whether loss of society or emotional distress should be compensable in various kinds of federal torts actions; no doubt respectable arguments could be mustered in

\textsuperscript{45} Id. at 32-33.
\textsuperscript{47} 114 S. Ct. 2396 (1994).
\textsuperscript{48} Id. at 2403.
\textsuperscript{50} \textit{Gottshall}, 114 S. Ct. at 2410.
\textsuperscript{51} Id. at 2412. Justice Ginsburg’s dissent provides a convincing critique of the majority opinion.
\textsuperscript{52} The text of the Jones Act is open to the interpretation that emotional distress does not count as an injury, but it is not readily open to the interpretation that the same emotional distress, caused by the same defendant, is sometimes an “injury” and sometimes not. A more plausible argument would be that under some circumstances the injury isn’t \textit{proximately} caused by the railroad’s negligence, but that argument was apparently foreclosed by precedent. \textit{See} Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957) (holding that under FELA, liability may be found if “employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought”).
favor of the Court's post-\textit{Gaudet} decisions. Nor can the defects in the Court's opinions be tallied as evidence against the validity of formalist legal methodology. In reality, to the extent formalist methods apply to these cases, they probably point to what in this situation would be considered liberal results.

Only in \textit{Gottshall} was there a controlling statutory text. With respect to statutory interpretation, formalists avow a belief in textualism.\textsuperscript{53} As we have just seen, \textit{Gottshall} was a dubious decision on textual grounds—the text allows one position or the other regarding psychological injuries, but does not allow splitting the difference. And if the text is thought to be a delegation to the Court to engage in common-law decisionmaking, as Easterbrook might consider it,\textsuperscript{54} then the Court's emphasis on the tort law of 1908 seems senseless.

In none of the other cases did any statute directly govern the case. The truly formalist position under those circumstances is simply that the statutes are therefore irrelevant.\textsuperscript{55} Indeed, formalism seems quite irreconcilable with the view that legal rules have penumbras beyond their strict domain of application—unless, that is, one is willing to concede that Justice Douglas's decision in \textit{Griswold}\textsuperscript{56} was an example of formalism. There being no relevant statutory texts, the \textit{Moragne} line of cases is easily disposed of.

Once we set aside the statutes, \textit{Moragne} presented only the question of whether, in a common-law case, the Court should overrule one of its prior decisions; the later cases then involve the contours of the new common-law cause of action. Thus, under a formalist perspective, none of the statutory provisions that concerned the Court in any of these cases were relevant. Instead, we had merely a common-law rule that everyone agreed was unjustifiable and which was therefore overruled, and some resulting issues of tort law that seem to have been fairly well-settled in the current common law. For a true formalist theorist, then, the post-\textit{Moragne} cases should be easy wins for the plaintiffs.

As Judge Posner has pointed out, the enduring appeal of formalism as a jurisprudence is partially explained by its inherent bias against legal change.\textsuperscript{57} Or, as a leading modern advocate of formalism puts it, "[r]ules stabilize by inflating the importance of the classifica-

\textsuperscript{53} For extensive discussions of the formalist revival of textualism, see, e.g., William N. Eskridge, Jr., \textit{The New Textualism}, 37 UCLA L. Rev. 621 (1990); Muriel M. Spence, \textit{The Sleeping Giant: Textualism as Power Struggle}, 67 S. Cal. L. Rev. 585 (1994).


\textsuperscript{56} Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{57} Posner, \textit{The Problems of Jurisprudence}, supra note 24, at 41.
tions of yesterday,” leading to “inflexibility in the face of a changing future.” Sometimes, however, formalist methods would require an uncomfortable break with the past, and the formalist judge must then choose between his methods and his impulses. As the cases discussed in this section indicate, formalist psychology may well overwhelm formalist jurisprudence when the two conflict.

Although formalist theory is less to blame than formalist psychology for the outcomes in these cases, it is not wholly innocent. Formalist theory may have made a bad situation worse. Although the Court’s actual decisions made little sense as a matter of formalist theory, the attachment of some Justices to formalist theory made it difficult for them to admit that their actual methods of analysis were not formalist at all. To so admit, however, might then have led them to question the quality of their nonformalist analysis. Thus, formalism had two psychological effects: it encouraged the Justices to overemphasize the legal past, and it blinded them to what they were actually doing in the legal present. The worst of these decisions was Miles, in which the Court succeeded in persuading itself that it was bowing to the will of Congress, when it was actually reasoning only by analogy to an inapplicable statute and construing that statute itself on the basis of a 1913 judicial decision involving another statute entirely. The formalist impulse was triumphant, even at the expense of the legal methods propounded by the formalists themselves.

IV. JUSTICE SCALIA AND FORMALIST METHODS

Justice Scalia may turn out to be for the early twenty-first century what Holmes and Cardozo were for this one—a leader in refashioning the legal process both through his jurisprudential writings and his example as a judge. He has campaigned tirelessly against the use of legislative history in statutory interpretation, advocating in its place more firmly text-based methods of interpretation. In constitutional law, he has attacked current judicial methodologies in favor of reliance on original intent. Although these views have given rise to a great deal of scholarly discussion, much of this discussion has overemphasized the role of these judicial methods in his thinking. In his scholarly writings, and as we will see, in his work as a judge, Scalia favors these methods only to the extent that they further his passion for clarity, logic, and stability in law.

---

60 See Spence, supra note 53, at 587.
Consider, for example, Scalia’s desire for consistency, which he views as the first of all legal virtues, the “very foundation of the rule of law.”

Consistency is especially important to the work of judges:

Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law. ... The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. ... [C]ourts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce “fair” or textually faithful results.

So powerful is Scalia’s impulse for consistency that it overrules even his embrace of textualism. For example, he says, the law of creditors’ rights has produced an elaborate set of rules governing liens. At the margin, the mandate for a consistent and logical conceptual structure trumps the duty to obey the text of democratically enacted legislation:

When this elaborate intellectual structure produces a result that seems to the judge patently ... contrary to governing text, it is not acceptable for him to disregard the structure. ... He must, if possible, design a new sub-rule or sub-fiction whose application will not only lead to the result he thinks correct but will also be compatible with the remainder of the structure and conform with prior holdings. If he cannot do that, then (the theory of our system holds) his notions of fairness or textual fidelity are simply out of whack, and he must subordinate them to the law.

Surely Langdell could not have said it any better.

Because of his desire for clarity, certainty, and consistency, Scalia is also like the Langdellians—or at least, like Gilmore’s portrait of them—in his attitude toward the common-law process. Gilmore’s hero was Corbin, who revelled in the facticity of judicial decisions and their responsiveness to context, unlike the Langdellians, who used them only as raw material from which to extract an abstract rule. Scalia rejects the common-law process in which law grows, “not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time.” For according to Scalia “it is the essence of the judicial function to draw lines, because it is the essence of the judicial function to be governed by lines, the lines of the logical and analytical categories. ...” Only by announcing and following clear rules can judicial decisions be respected, and only so can they provide certainty, limit future judicial discretion, and

---

63 Id. at 588-89.
64 Id. at 589.
65 See Death of Contract, supra note 1, at 64-65; Ages, supra note 3, at 79-80.
67 Scalia, Canards, supra note 62, at 593.
create uniformity. Indeed, judges who do not provide abstract rules but instead rely on the totality of the circumstances are “not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding.” No wonder another leading formalist was moved to ask whether the common law qualifies as law at all.

In his jurisprudential writings, it is only fair to note, Scalia sometimes qualifies these views. “[I]n a crunch,” he confesses, he might prove to be only “a faint-hearted originalist.” He cannot imagine himself, “any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” Similarly, he concedes that general rules are not always possible:

I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the Rule of Law, the law of rules, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do not more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.

Thus, as a theorist, Scalia attempts to keep his formalist impulses in rein. It is less clear whether he is able to do so as a judge, even when the alternative is to overrun the formalist methods he himself endorses.

A notable recent Scalia opinion illustrates how the psychology of formalism can overwhelm the theoretical scruples of some of its adherents. BFP v. Resolution Trust Corp. involved Section 548 of the Bankruptcy Code, which invalidates certain pre-bankruptcy transfers

---

68 Scalia, Law of Rules, supra note 66, at 1179-80.
69 Id. at 1180-81.
70 See Frederick Schauer, Is the Common Law Law?, 77 CAL. L. REV. 455, 455 (1989) (noting that “the central features of common law method appear inconsistent with some of the primary assumptions of a traditional view of the rule of law”).
71 Scalia, Lesser Evil, supra note 61, at 864.
72 Id.
73 Scalia, Law of Rules, supra note 66, at 1186-87.
74 Judge Easterbrook has also confessed to some qualifications of his formalism: Lest you think that my legal education stopped with Blackstone, I disclaim the idea that judges are like clocks, with gears producing outcomes. Interstitial (“molecular,” Holmes would say) movements are desirable, and anyway are inevitable. Frank H. Easterbrook, What's So Special About Judges?, 61 U. COLO. L. REV. 773, 782 n.17 (1990).
76 114 S. Ct. 1757 (1994).
unless the debtor received "a reasonably equivalent value." The transfer in BFP was a foreclosure on the debtor's real estate. This problem had given the lower courts a great deal of difficulty. Since forced sales rarely take place at 100% of market value, a literal reading of the provision might invalidate most foreclosures. Some courts had set aside such sales, but only when the sale price was far below fair market value. Others, such as the lower court in BFP, had found compelling policy reasons for upholding foreclosures even when the sale was well below fair market value.

Justice Scalia upheld the foreclosure, but on a far different rationale. Rather than invoking public policy, he purported to be providing only an exegesis of the text. According to him, whatever amount is received in a lawful forced sale, however minute compared to the market value of the property, is by definition "a reasonably equivalent value." In an effort to reconcile his interpretation with the language of the statute, Scalia argued that the value of property is inevitably depressed if it is the subject of foreclosure proceedings. "[I]t is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station)." Thus, under Scalia's view, if a mortgagee buys in the property at a small fraction of its perceived market value, that is simply its true "value" under the circumstances. It is some indication of Scalia's discomfort with his own interpretation of the statute that he explicitly "emphasize[d] that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." As a matter of logic, of course, these other situations are absolutely indistinguishable on the basis of Scalia's rationale.

---

78 114 S. Ct. at 1759.
79 See the leading case, Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980) (setting aside sale when purchase price is less than 70% of fair market value).
81 BFP, 114 S. Ct. at 1761-62.
82 Id.
83 Id. at 1762.
84 Id. at 1761 n.3.
Despite Justice Scalia's frequently expressed view that law must be based on general principles, the opinion makes no effort to give a principled definition of the meaning of "value" under Section 548.86 Ultimately, value means what someone would be willing to pay for something; what we need to be told is who that someone is, and the circumstances in which he or she is assumed to be acting. Scalia purports simply to be applying the concept of property value to the specific context of a foreclosure, but he never defines the precise interest to be evaluated, the time of the evaluation, or the party whose willingness to pay is relevant.87 His claim to be merely interpreting the statutory reference to value rings hollow, since he fails to establish the parameters for determining that value.

Whatever else may be said of Justice Scalia's argument, it hardly corresponds with the textualist's call for a "relatively unimaginative, mechanical process of interpretation."88 Perhaps it is not completely inconceivable that an ordinary speaker of English would use the phrase "reasonably equivalent value" to mean "fair market value, except in the case of a foreclosure, when it means whatever the debtor receives." It does, however, seem highly unlikely. As Justice Souter's dissent cogently demonstrates, Scalia's interpretation of the statute simply makes a hash of Congress's deliberate decision to subject involuntary transfers to Section 548.89 Notably absent from Scalia's opinion is any effort to relate his interpretation to the overall structure of the Bankruptcy Code or Section 548's function within that structure—both of which would be highly relevant, one would think, to a textualist.

---

87 There are a number of possibilities, all of which have some complications. If, for example, the relevant individual is the debtor, we need to know when and how the debtor's willingness to pay is to be evaluated. If we ignore the fact that the debtor is insolvent, he would presumably be willing to pay just as much as anyone else would for the property—its fair market value. On the other hand, if we take into account the debtor's insolvency in the foreclosure context, we seem to be committed to doing so for all transfers. This might produce odd results for voluntary transfers, since all of the debtor's nonexempt property is worth less to him because of his urgent need for cash and the prospect that it may soon be seized by creditors. Or do we want to know what the creditor would be willing to pay the debtor for a release of his interest? If so, just what rights do we assume that the debtor is relinquishing? Because of his insolvency, the debtor might gain some bargaining power from the threat of immediately filing for bankruptcy and throwing a monkey wrench into the foreclosure proceedings. Do we take this into account? Or is the question what another creditor or other third party would pay for the debtor's interest or for the property as a whole? In short, to establish value, we need to flesh out the scenario in some detail, which Justice Scalia conspicuously fails to do.
89 BFP, 114 S. Ct. at 1767-78.
BFP is hardly an impressive example of formalist methods in action. Indeed, as the leading contemporary authorities on statutory interpretation observe, "BFP is an astonishing decision for a textualist . . . ." Their overall evaluation of the opinion verges on the caustic: "By giving its policy-driven result an unsupportable formalist gloss, Justice Scalia's opinion flunks any requirement of judicial candor . . . ." Although they are right to question Scalia's application of formalist methods, they may underestimate the role of formalism in the decision.

It is true that Scalia's formalist methods fit poorly with BFP. Nevertheless, formalist psychology runs deep in the opinion. Consider the following passage, which most clearly explains the motivating force behind the opinion:

Fraudulent transfer law and foreclosure law enjoyed over 400 years of peaceful coexistence in Anglo-American jurisprudence until the Fifth Circuit's unprecedented 1980 decision in Durret. . . . Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy . . . to disrupt the ancient harmony that foreclosure law and fraudulent-conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance than the phrase "reasonably equivalent value" . . . we will not presume such a radical departure. Scalia's overwhelming desire for consistency and stability in the law is obvious in this passage. Indeed, in a later footnote, he goes so far as to intimate a constitutional basis for "the essential sovereign interest in the security and stability of title to land." Somewhere, Blackstone must be smiling.

BFP, like the post-Moragne decisions considered in the previous section, exhibits the tendency for the formalist impulse to overflow the banks of formalist methods. The desire for certainty, clarity, consistency, and stability can become so strong that textualism or originalism must give way. In the end, as Gilmore taught us, it may be the psychology of formalism, rather than its methods, that has the greatest impact on the legal system.

Lest I be misunderstood, I should make it clear in closing that I see nothing wrong with the formalist's values and methods in themselves. Certainty, stability, logical consistency, and predictability are important goals for any legal system. And both original intent and statutory text deserve weighty consideration. Formalism can serve as a useful reminder of these wise precepts. The occupational hazard of

91 Id. at 84; see also Peter Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 SUP. CT. REV. 429, 449-54.
92 BFP, 114 S. Ct. at 1764.
93 Id. at 1765 n.8.
formalism, however, is an unbalanced obsession with formalist values at the expense of all else.