Shifting Concepts of Law

March 11, 2022

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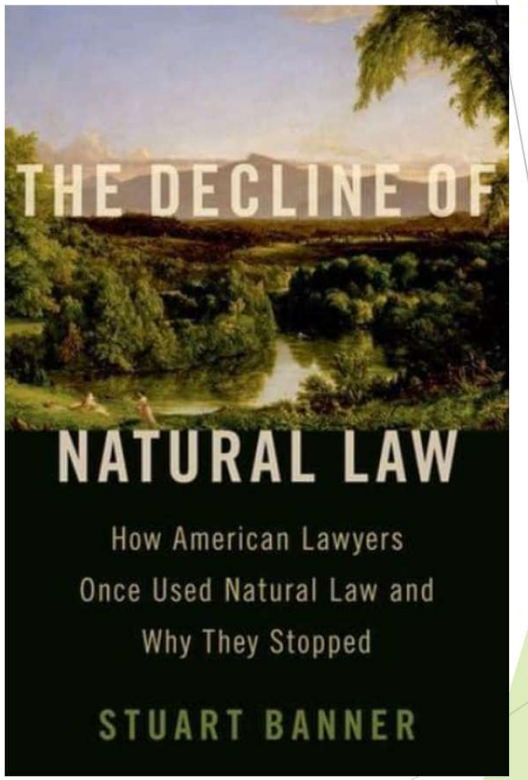
Introduction

- Longstanding debate between positivists and antipositivists over the relationship between law and morality.
- Insofar as the debate concerns the concept of law, it is assumed that the same concept has been shared across many jurisdictions and times.
- That assumption is hard for positivists to maintain, given evidence that lawyers in centuries past held an antipositivist concept of law.
- Falls to positivists to explain why our concept of law has changed. What follows for the methodology of general jurisprudence?

Introduction

- This project grows out of my review of Stuart Banner's *The Decline of Natural Law* (2021).
- Nevertheless, the project is new and could go in a number of directions.
- Especially interested in ideas or resources concerning:
  - Nature of concepts
  - Conceptual analysis
  - Conceptual change
  - Semantic change
  - Similar methodological issues in other philosophical debates



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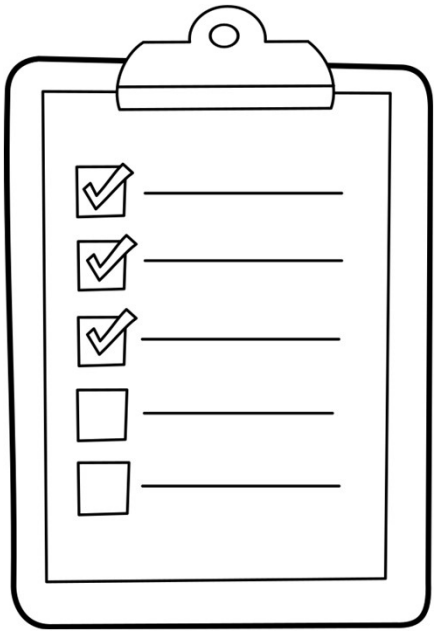


Two Debates in General Jurisprudence

What is Law?

- Not about *the* law of a particular jurisdiction.
- About the nature of law, wherever and whenever law is found.
- How do evaluative facts (facts about what is right, good, rational, etc.) relate to the existence and content of law (whether a legal norm exists and, if so, what it requires, permits, etc.)?

The Positivism-Antipositivism Debate

- These definitions are controversial. (*E.g.*, Greenberg 2004; Gardner 2001)

- **Antipositivism:** the existence or content of the law is necessarily grounded partly in evaluative facts

- **Positivism:** the existence or content of the law is <u>not</u> necessarily grounded partly in evaluative facts
  - *Exclusive positivism:* the existence and content of law are necessarily grounded in only descriptive facts about people's attitudes and behaviors, never in evaluative facts
  - *Inclusive positivism:* the existence or content of the law may be contingently grounded in evaluative facts, though only if descriptive facts about people's attitudes and behaviors make it so.

The Methodological Debate

- What do positivist or antipositivist theories of law aim to do?

- Descriptive:
  - Analyze our concept of law. (Shapiro 2011; Raz 2009a)
  - Analyze law itself. (Marmor 2013; Leiter 2007)

- Normative:
  - Determine what our concept of law should be. (Hershovitz 2015; Perry 1995; Dworkin 1986)

Conceptual Analysis

- When does something count as a K, according to our ordinary, or folk, understanding of K or something suitably close to our ordinary understanding? (Jackson 1998: 46-47; ; *see also* Chalmers & Jackson 2001)

- A modest role: "Conceptual analysis is not being given a role in determining the fundamental nature of our world; it is, rather, being given a central role in determining what to say in less fundamental terms given an account of the world stated in more fundamental terms." (*Id.* 43-44)

- Conceptual analysis of law aims to clarify and systematize our shared, though often inchoate, intuitions about the essential features of law and what counts as law.

Exclusive Positivism

- Ability to explain certain aspects of legal thought. (Raz 2009b: 48-50)
  - Why we distinguish between an argument's legal acceptability and moral merit.
  - Why we distinguish between judges' legal skill and moral or political leanings.
  - Why we see law as settled to the extent that we agree on descriptive facts and unsettled to the extent that we disagree about those facts.
  - Why we see judges as making law insofar as their decisions rest on not just descriptive facts but also evaluative facts.

Exclusive Positivism

- Law's claim of authority. (Raz 1985)
  - It is an essential feature of law that it claims to give authoritative directives.
  - Law must be the sort of thing that has the capacity to give such directives.
  - For law to have that capacity, we must be able to identify its directives without reference to the very reasons that law claims to settle for us.
  - Therefore, the existence and content of law must be identifiable by descriptive facts alone.

Evidence of a Shift in Our Concept of Law

Helmholz's *Natural Law in Court*

- Studies natural law in practice: "[F]or all that had been written about the law of nature—and there has been a lot—almost none of it dealt with the subject of its place in law courts." (Helmholz 2015: viii-ix)
- It is tempting to explain away lawyers' mention of natural law in centuries past as "a kind of appeal to vague notions of fairness to which desperate lawyers were driven when they lost on the law." (*Id.* 11)
  - In fact, "lawyers and commentators of the medieval and early modern periods of history believed that it played an important, indeed essential, part in their legal system." (*Id.*)
  - "[N]atural law arguments seem to have made a real difference in the outcome of disputed cases at least as often as they made none." (*Id.* 12)

Helmholz's *Natural Law in Court*

- United States, Independence to Civil War
  - Influence of Blackstone's *Commentaries*. (*Id.* 133)
  - Many legal treatises mentioned natural law. (*Id.* 139)
  - Many case reports did as well. (*Id.* 144-71)
  - E.g., one lawyer argued in 1819 that natural law "everywhere forms a part, and the best part, of the municipal code.'" (*Id.* 170 (quoting *Sturges v. Crowninshield*, 17 U.S. 122, 155 (1819))
- Conclusions:
  - "[L]awyers learned something about the basic characteristics of the law of nature as part of their early training." (*Id.* 174)
  - Lawyers relied on natural law in court. (*Id.* 175)
  - Natural law was almost always treated as a source of law, not as an alternative to law. (*Id.* 176)

Banner's *The Decline of Natural Law*

- "American lawyers of the late 18th and early 19th centuries had no doubt that natural law played an important role in the legal system." (Banner 2021: 11)
  - "The law of nature forms part of the municipal law." (*Id.* (quoting *United States v. Holmes*, 26 F. Cas. 360, 368 (C.C.E.D. Pa. 1842) (Baldwin, J.))
- What was natural law?
  - "Because natural law was created by God and was based on human nature, it followed that natural law, unlike positive law, was the same everywhere and at all times." (*Id.* 13)
  - "The human instinct toward reasonableness provided one path to knowledge of the law of nature." (*Id.* 17).

Banner's *The Decline of Natural Law*

- How did lawyers use natural law?
  - "[N]atural law was used much more often to interpret statutes than to strike them down." (*Id.* 19)
  - "When positive law is silent, an appeal must be made to natural law." (*Id.* 28 (quoting *State ex rel. Kneeland v. City of Shreveport*, 29 La. Ann. 658, 661 (1877)).
  - E.g., in a case addressing whether a mother had the right to make employment arrangements for minor children, the NJ Supreme Court held that, since "[t]he right is not regulated by statute," the case turned on "the clear principle of natural law" that a mother has authority over children. (*Id.* 28 (quoting *Osborn v. Allen*, 26 N.J.L. 388, 391, 393 (1857)).

Atiq on Laws of Justice

- "Judges regularly cited, analyzed, and predicated their decisions on the 'laws of justice' which they claimed had universal legal import." (Atiq forthcoming: 1).
- Classical Roman law
  - Justinian: "[P]rivate law …. consists of precepts belonging to natural law, to the law of nations and to the civil law," where "natural law" referred to 'rules prescribed by natural reason.'" (*Id.* 4 (quoting J. INST. 1.1.4., 1.2.1 (T.C. Sandars trans., 1883)).
  - Pomeroy on Roman law: "[A] body of moral principles was introduced into the Roman law, which constituted equity. This resulting equity … penetrated the entire jurisprudence, displacing what of the ancient system was arbitrary and unjust, and bringing the whole into an accordance with the prevailing notions of morality." (*Id.* 5-6 (quoting J.N. Pomeroy, *A Treatise on Equity Jurisprudence* §8 (1907))

Atiq on Laws of Justice

- Early modern European law
  - Chief Justice Hobart: "[E]ven an act of parliament, made against natural equity … is void in itself; for *jura naturae sunt immutabilia* (the Laws of Nature are unchangeable), and they are *leges legum* (the laws of law)." (*Id.* 8 (quoting *Day v. Savadge* 80 Eng. Rep. 235, 237 (1614)).
- Pre-20th Cent. American law
  - State takings. (*Id.* 10 (citing *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Johns. Ch. 1816))
  - Legislative discharge of foreign debts. (*Id.* 11 (citing *Page v. Pendleton*, Wythe 211, 212-13 (Va. High Ch. 1793))

A Conceptual Shift?

- American lawyers of the early 19th century took certain principles to be part of their legal system in virtue of those principles' rationality.
- They did not consider authority (in the Razian sense) an essential feature of law; rather, they thought that one sometimes had to determine what was the rational thing to do to find out what the law directed.
- Put another way, they believed that evaluative facts grounded some of the content of their law. They held an antipositivist concept of law.
- Assuming that American lawyers now hold an exclusive-positivist concept of law, when and why did American lawyers' concept of law shift?

Explaining the Conceptual Shift

Trend Toward Codification

- Movement toward codification and an attendant increase in the number of statutes.
  - "The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law … to one in which statutes, enacted by legislatures, have become the primary source of law." (Calabresi 1982; *see also* Scalia 1997; Frankfurter 1947)
- U.S. Code grew from two volumes in 1928 to twenty-nine volumes in 1988. (Ellickson 2000)
- Widespread adoption of uniform laws, like the Uniform Commercial Code or Model Penal Code.

Expansion of the Administrative State

- Expansion of the administrative state and an attendant increase in the number of regulations.

- Code of Federal Regulations grew from 15 volumes when it was first published in 1939 to 110 volumes in 1967 (Off. of the Fed. Reg. 2006)

- Administrative guidance documents.
  - "Nobody knows exactly how much guidance there is, … but its page count … is estimated to dwarf that of actual regulations by a factor of twenty, forty, or even two hundred." (Parillo 2019)

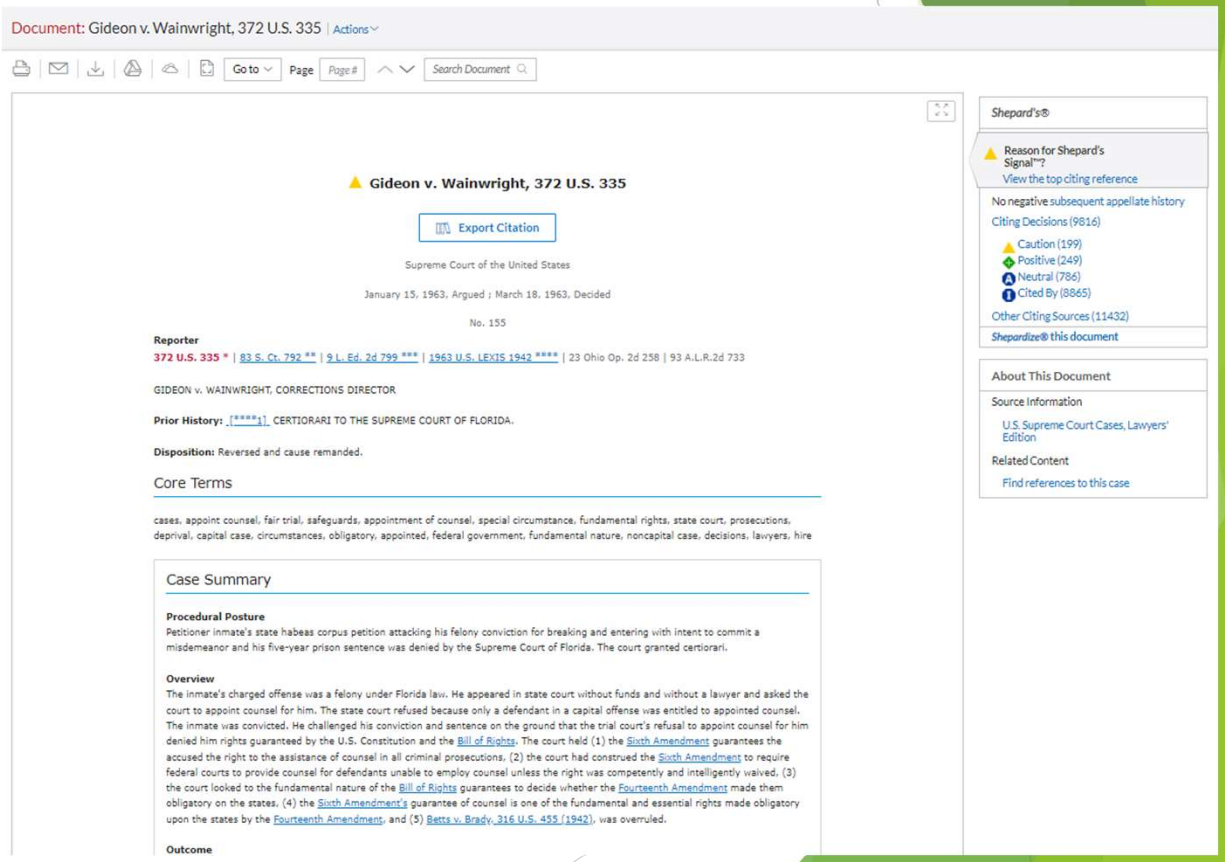
Explosion in Case Reporting

- Banner details the rise in volumes of American case reports during the nineteenth century:
  - 1804: 8 volumes
  - 1836: 450 volumes
  - 1883: 3,100 volumes
  - 1910: 8,208 volumes. (Banner 2021: 120-22)

- As one lawyer at the time put it: "[W]e are in a mighty sea of books …. We can scarce glance at one, ere another rises to our view." (*Id.* 121 (quoting Joseph Willard, *An Address to the Members of the Bar of Worcester County, Massachusetts* (1830)).

Accessibility & Useability

- Nineteenth-century difficulties accessing and using positive sources of law.
- 1870s: Shepardizing.
- 1970s: Advent of Lexus and Westlaw.



Summing Up

- A dramatic change in legal technology led to an equally dramatic change in legal practice, which gradually brought about a shift in lawyers' concept of law.
- Whereas there were few positive sources of law two centuries ago, there has since been an extraordinary proliferation of such sources. As the number of positive sources of law increased, lawyers and judges began to rely on them more and more.
- We now have the tools to make those sources widely accessible and easily to use. For most legal questions that arise today, it is easy to find positive sources of law that definitively answer that question.
- While there remain hard legal questions, they are far rarer than they once were, and that rarity makes it easier to view them as the exception in which there is no law to apply.

Implications for Methodology

Whose Concept of Law?

- Our concept of law is more parochial—more limited by time and place—than it is often assumed to be. (*E.g.*, Raz 2009a: 38)
- If we wish to give an informative answer to the positivist–antipositivist debate, we should analyze *contemporary American lawyers'* concept of law or a similarly restricted community's concept.
- Put another way, any concept of law shared across many jurisdictions and times is too thin to be of much interest. Two ways to proceed:
  - Conclude that the answer to the question under discussion is indeterminate; or
  - Consider whether a more restricted community has a more determinate concept, and if so, analyze *that* concept. (*Cf*. Himma 2015: 73)

Whose Concept of Law?

- Focusing on contemporary American lawyers' concept of law gives exclusive positivists new responses to common objections.
  - Objections from 19th-century cases.
  - Objection from judges' convention of announcing holdings in hard cases as if they are discovering what the law already was.

    "[N]atural law lingers in the voice lawyers and judges adopt in their professional lives…. In their public-facing professional discourse, when addressing courts or deciding cases, lawyers and judges speak as if judges merely apply preexisting law to decide cases, as if judging involved nothing more than looking up the appropriate rule in a book. By contrast, when talking candidly among themselves, lawyers say that judges often make law where none existed before…. This difference between what lawyers say and what they think is a holdover from an era in which lawyers really did believe that judges found the law. They would gradually stop believing this, but the officials discourse of the legal system did not change accordingly." (Banner 2021: 244-46)

Is This Still General Jurisprudence?

- Are we still inquiring into the nature of law, wherever and whenever law is found?
- Conceptual analysis explicates the concept of law that we hold here and now; it identifies the necessary features of law according to our concept of law, even though we hold that concept only contingently. (Raz 2009a: 25-27; *see also* Bix 2003: 549)
- While our concept of law is parochial in the sense that it is our concept, it is universal in the sense that it is our shared understanding of the nature of law, wherever and whenever law exists.
- A community need not possess our concept of law to have law according to our concept. As long as we recall that we are analyzing our concept, we can sensibly talk about the necessary features of law everywhere and anywhere, including in communities whose concept of law differs from our own. (Raz 2009a: 95)

Is This Still General Jurisprudence?

- Is this just an invitation to do sociology—or worse, an invitation to do bad sociology uninformed by data? (*Cf*. Leiter 2007: 177)
- Law is one of our most complex social practices. Just clearly formulating questions about the nature of law can be difficult philosophical work.
- Lawyers give little thought to the essential features of law; their intuitions on the subject may be muddled or internally inconsistent.
  - Pumping our intuitions with cases and systematizing those intuitions to reach a theory that possesses epistemic virtues like simplicity, coherence, etc., is traditional philosophical work.
  - Much of this can be done from the armchair by anyone sufficiently familiar with the community in question.
  - Yet empirical work is important too, and legal philosophers should take such work into account, probably more than they do now.

Conclusion

- My conclusion is modest yet surprising:
  - Haven't shown that exclusive positivism is true of American lawyer's concept of law today.
  - Haven't shown that descriptive conceptual analysis of law is possible or that it is what the positivism-antipositivism debate is about.
  - Have shown that, if exclusive positivism is true of American lawyer's concept of law today, there was likely a prior conceptual shift.
  - That conceptual shift is plausibly explained by an extraordinary increase in the number and useability of positive sources of law.
  - Legal philosophers have not properly attended to the possibility of such a conceptual shift. Doing so opens up new lines of argument in an old debate but also raises methodological questions.

Questions?

Bibliography

Atiq, Emad, Legal Positivism and the Moral Origins of Legal Systems, Can. J.L. & Juris. (forthcoming)

Banner, Stuart, The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped (2021)

Bix, Brian H., Raz on Necessity, 22 L. & Phil. 537 (2003)

Calabresi, Guido, A Common Law for the Age of Statutes (1982)

Chalmers, David J. & Frank Jackson, Conceptual Analysis and Reductive Explanation, 110 Phil. Rev. 315 (2001)

Dickson, Julie, Methodology in Jurisprudence: A Critical Survey, 10 Legal Theory 117 (2004)

Dworkin, Ronald, Law's Empire (1986)

Ellickson, Robert C., Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?, 74 S. Cal. L. Rev. 101 (2000)

Frankfurter, Felix, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947)

Gardner, John, Legal Positivism: 5½ Myths, 46 Am. J. Juris. 199 (2001)

Bibliography

Greenberg, Mark, How Facts Make Law, 10 Legal Theory 157 (2004)

Helmholz, R. H., Natural Law in Court: A History of Legal Theory in Practice (2015)

Hershovitz, Scott, The End of Jurisprudence, 124 Yale L.J. 1160 (2015)

Himma, Kenneth Einar, Conceptual Jurisprudence: An Introduction to Conceptual Analysis and Methodology in Legal Theory, 26 Revus 65 (2015)

Jackson, Frank, From Metaphysics to Ethics: A Defence of Conceptual Analysis (1998)

Leiter, Brian, Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence, in Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 153 (2007)

Marmor, Andrei, Farewell to Conceptual Analysis (in Jurisprudence), in Philosophical Foundations of the Nature of Law 209 (Wil Waluchow & Stefan Sciaraffa eds., 2013)

———Legal Positivism: Still Descriptive and Morally Neutral, 26 Oxford J. Legal Stud. 683 (2006)

Off. of the Fed. Reg., A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register (2006)

Bibliography

Parrillo, Nicholas R., Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. Reg. 165 (2019)

Perry, Stephen R., Interpretation and Methodology in Legal Theory, in Law and Interpretation: Essays in Legal Philosophy 97 (Andrei Marmor ed., 1995)

Putnam, Hilary, The Meaning of "Meaning", 7 Minn. Stud. Phil. Sci. 131 (1975)

Raz, Joseph, Between Authority And Interpretation: On the Theory of Law and Practical Reason (2009a)

———The Authority of Law (2d ed., 2009b)

———Authority, Law and Morality, 68 Monist 295 (1985)

Scalia, Antonin, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3 (Amy Gutmann ed., 1997)

Shapiro, Scott J., Legality (2011)

Watson, Bill, The Decline of Natural Law and the Rise of Exclusive Positivism, 75 SMU L. Rev. F. 174 (2022)

Extra Slides

Whose Concept of Law?

- Why lawyers' concept?
  - Layperson presumably defer to lawyers' use of "law"—they outsource, so to speak, their concept of law to the relevant experts. (*Cf*. Jackson 1998: 46-47; Putnam 1975: 144-45)
- Why not go even more fine-grained?
  - The choice of whose concept to analyze is a function of our theoretical interests. It is more interesting to see how the experts on the law of some legal system conceive of law.
  - Moreover, there does not seem to be significant divergence in more restricted communities' concepts of law.
  - Indeed, it may turn out that a wider community than that which I suggested shares the same concept (e.g., contemporary lawyers' in common-law legal systems).

Helmholz's *Natural Law in Court*

- Continental Europe, 1500 to 1800 A.D.
  - "[W]e can be confident that [legal education] … would have brought students into contact with the law of nature…. The basic books of both Roman and canon law opened with texts recognizing its existence and stressing its centrality in shaping the law's purposes." (*Id.* 39-40)
  - "The law of nature, taken up and used as a source of legal argument and decision, appeared within virtually every collection of *decisiones* and *consilia* consulted." (*Id.* 42)
- England, 1500 to 1800 A.D.
  - Many treatises on the law of England discussed natural law. (*Id.* 91–92
  - "As is true of the Continental *decisiones*, evidence from the English reports demonstrates that in litigation the law of nature had a status commensurate with its place in the treatises written by common lawyers." (*Id.* 124)

Banner's *The Decline of Natural Law*

- "Lawyers once believed that some of the rules of our legal system were not created by humans. They now believe that all the rules of the legal system are created by humans. In 1850, when a lawyer spoke in court, it would have been entirely normal for the lawyer to discuss the law of nature alongside statutes and court decisions as acknowledged sources of law. Today, if a lawyer tries to discuss natural law in court, the judge will look puzzled, and opposing counsel will start planning the victory party. Natural law is no longer a part of a lawyer's toolkit." (Banner 2021: 1)
- "When judges used natural law [in the 19th century and earlier], they were usually engaging in what today we call policymaking—the explanation of why one rule makes the most sense, in situations where alternative rules are possible." (*Id.* 3; *see also id.* 42, 64)

Banner's *The Decline of Natural Law*

- Lawyers and judges in the late 19th to early 20th centuries repudiated the once common view that judges always "discover" the law. (*Id.* 213–21)
  - A speaker at the American Bar Association's meeting in 1883 called the idea that judges never make law a "resplendent fiction." (*Id.* 214)
  - A guide for law students in 1891 posited that case law was "a creation of the courts." (*Id.*)
  - Justice Holmes wrote in 1917 that "judges do and must legislate." (*Id.* 220)
- By the mid-twentieth century, "[v]irtually all lawyers agreed that judges make law." (*Id.* 218-19)
  - Justice Scalia: "I am not so naïve . . . as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as though they were 'finding' it." (*Id.* 219 (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in judgment))

Banner's *The Decline of Natural Law*

- "The decline of natural law thus led to a reconceptualization of judging. After decades of controversy in which lawyers proposed various replacements for natural law as sources of principles for judges to find, the profession eventually rejected all of them in favor of rethinking the judge's role. Thereafter, the judge would be a maker of law, not a finder of law." (*Id.* 221)
- "Two centuries ago, perhaps the most common use of natural law in the course of deciding cases was to fill in the gaps where positive law ran out…. Today we describe what judges do in such cases as interstitial lawmaking, in the gaps where no law yet exists." (*Id.* 247)
- "Modern courts still discuss policy, but now they think of it as an end in itself rather than as means of discerning the law of nature. Policy discussion was once said to be part of law-finding; now it is said to be part of law-making." (*Id.* 249)