An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law

Published online by Cambridge University Press: **27 December 2018**

Stephen M. Feldman

Abstract

Among legal scholars, Anthony T. Kronman and David M. Trubek have provided the leading interpretations of Weber's theory of law. Kronman and Trubek agree on two important points: Weber's theory is fundamentally contradictory, and Weber's theory relates primarily to private law subjects such as contracts. This article contests both of these points. Building on a foundation of Weber's neo-Kantian metaphysics and his sociological categories of economic action, this article shows that Weber's theory of law is not fundamentally inconsistent; rather it explores the inconsistencies that are inherent within Western society itself, including its legal systems. Furthermore, Weber's insights can be applied to modern constitutional jurisprudence. Weberian theory reveals that modern constitutional law is riddled with irreconcilable tensions between process and substance—between formal and substantive rationality. In the context of racial discrimination cases involving equal protection and the Fifteenth Amendment, the Supreme Court's acceptance of John Hart Ely's theory of representation-reinforcement demonstrates the Court's resolute pursuit of formal rationality, which insures that the substantive values and needs of minorities will remain unsatisfied.

Type

Articles

Information

Law & Social Inquiry, Volume 16, Issue 2, Spring 1991, pp. 205 - 248
DOI: https://doi.org/10.1111/j.1747-4469.1991.tb00919.x

References

1 T. Bottomore & W. Outhwaite, “Introduction,”*in* Karl Lowith, *Max Weber and Karl Marx* 16, trans. H. Fantel (London: George Allen & Unwin, 1982) (“Lowith, *Weber and Marx*”); Trubek, David M., “Max Weber's Tragic Modernism and the Study of Law in Society,” Law & Soc'y Rev. 20 573–592 (1986). CrossRef Google Scholar

2 See, e.g., Anthony T. Kronman, *Max Weber* (Stanford, Cal.: Stanford University Press, 1983) (“Kronman, *Max Weber*”); Donald N. Levine, *The Flight from Ambiguity* (Chicago: University of Chicago Press, 1985) (“Levine, *'The Flight*”); Wolfgang Schluchter, *The Rise of Western Rationalism* (Berkeley: University of California Press, 1981) (“Schluchter, *The Rise*”); Berman, Harold J., “Some False Premises of Max Weber's Sociology of Law,” Wash. L.Q. 65 758 (1987); Campbell, David, “Truth Claims and Value-Freedom in the Treatment of Legitimacy: The Case of Weber,” J.L. & Soc'y. 13 207 (1986); Ewing, Sally, “Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law,” Law & Soc'y Rev. 16 487 (1987);Trubek, 20 *Law & Soc'y Rev.*; Trubek, David M., “Reconstructing Max Weber's Sociology of Law“, Stan. L. Rev. 37 919 (1985) (reviewing Kronman, *Max Weber*). Google Scholar

3 See Kronman, *Max Weber*; Trubek, 20 *Law & Soc'y Rev.*; Trubek, 37 *Stan. L. Rev.*; David M. Trubek, “Max Weber on Law and the Rise of Capitalism,” 1972 *Wis. L. Rev.* 720. Google Scholar

4 Trubek, 20 *Law & Soc'y Rev.* at 575 (quoting Kronman, *Max Weber* 185 (Kronman writes: “There is ... something in Weber's writings that can almost be described as an intellectual (or moral) schizophrenia, an oscillation between irreconcilable perspectives that helps to explain why he has found supporters as well as detractors on both the Left and Right”)); cf. Jurgen Habermas, 1 *The Theory of Communicative Action* 253–54, trans. T. Mc Carthy (Boston: Beacon Press, 1984) (“Habermas, *Communicative Action*”) (Weber's sociology of law is contradictory). Google Scholar

5 See Kronman, *Max Weber* 96–117; Trubek, 37 *Stan. L. Rev.* at 933–35; Trubek, 1972 *Wis. L. Rev.* at 752 (Weber's ideal types should not be applied in new contexts); see also Ewing, 21 *Law & Soc'y Rev.* at 497–502. Google Scholar

6 See *infra* text accompanying notes 10–46. Google Scholar

7 See *infra* text accompanying notes 47–124. In this section, I argue that Weber is, for the most part, consistent, not that he always is entirely consistent. For an example of a minor inconsistency on Weber's part, see *infra* text accompanying notes 80–86. Nonetheless, I do claim that Weber is not fundamentally contradictory; he is, to the contrary, fundamentally consistent. In other words, the core of Weber's theory of law is not riddled with irreconciliable contradictions. Google Scholar

8 See *infra* text accompanying notes 125–214. Google Scholar

9 See John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) (“Ely, *Democracy and Distrust*”). For a critique of Ely's theory (and other “realist” theories)

from an interpretivist perspective, see Feldman, Stephen M., “The New Metaphysics: The Interpretive Turn in Jurisprudence“, Iowa L. Rev. 76 (forthcoming). Ely's theory serves as the foundation for Cass Sunstein's influential republican-based constitutional theory. See Sunstein, Cass, “Naked Preferences and the Constitution,” Colum. L. Rev. 84 1689 (1984). For a critique of Sunstein's theory, see Feldman, Stephen M., “Exposing Sunstein's Naked Preferences“, Duke L.J. 1989 1335. Google Scholar

10 See Max Weber, From *Max Weber: Essays in Sociology* 139, ed. H. Gerth & C. Mills (New York: Oxford University Press, 1946). Google Scholar

11 See Reinhard Bendix, *Max Web: An Intellectual Portrait* 391 (Berkeley: University of California, 1978) (“Bendix, *Weber*”); see, e.g., Max Weber, *Economy and Society*, ed. G. Roth & C. Wittich (Berkeley: University of California Press, 1978) (“Weber, *Economy and Society*”). Google Scholar

Weber's emphasis on rationalization and its virtues for Western society may be the reason that he is sometimes unfairly characterized as an apologist for liberalism, supporting the related rises of capitalism and bureaucratic domination. See, e.g., Frug, Gerald E., “The Ideology of Bureaucracy in American Law“, Harv. L. Rev. 97 1276, 1297–1300 (1984) (characterizes Weber as apologist for bureaucratization); Herbert Marcuse, “Industrialization and Capitalism in the Work of Max Weber,” in *Negations* 208 (Boston: Beacon Press, 1968). This interpretation of Weber is further supported by his clear and intentional disagreement with Marx, the symbol of anticapitalism. See, e.g., Max Weber, *The Methodology of the Social Sciences* 68 ed. E. Shils & H. Finch (New York: Free Press 1949) (“Weber, *Methodology of the Social Sciences*”). CrossRef Google Scholar

Despite Weber's important disagreements with Marx, Weber and Marx nonetheless share several common views and goals. Most important, both Weber and Marx criticize capitalism. Weber himself acknowledges that he and Marx agree that while capitalism increases rational calculability of means and ends in the marketplace, it nonetheless decreases the rational satisfaction of real human needs. See Karl Marx, *The Marx-Engels Reader* ed. R. Tucker; 2d ed. (New York: W. W. Norton & Co., 1978) (“Marx, *Reader*”); Richard Schmitt, *Introduction to Marx and Engels* (Boulder, Col.: Westview Press, 1987); Max Weber, *Max Weber Selections in Translation* 252–53, ed. W. Runciman (Cambridge: Cambridge University Press, 1978) (“Weber, *Selections*”); see also Lowith, *Weber & Marx* 48 (cited in note 1). Google Scholar

12 Weber, *Economy and Society* 4 (emphasis added). Google Scholar

13 Id. Google Scholar

14 Id. Google Scholar

15 Weber, *Methodology of the Social Sciences* 72 (emphasis in original). With regard to freedom, Weber suggests that individual humans choose their own values, and this ability to choose must ultimately entail freedom. For example, Weber states that *“human beings*

confer meaning and significance" on the infinite reality and that humans are "endowed with the capacity and the will to take a deliberate attitude towards the world and to lend it *significance.*"*Id* at 81 (emphasis in original). These statements regarding human will and freedom explain Kronman's recent and compelling characterization of Weber as believing in the positivity of values. See Kronman, *Max Weber* 16–22. But see Schwartz, Nancy L., "Max Weber's Philosophy", Yale L.J. 93 1386, 1392 (1984) (reviewing Kronman, *Max Weber*) (criticizing Kronman's argument). Nevertheless, Weber does not simplistically accept the concept of human freedom. He self-consciously wrestles with the tension between freedom and determinism, even questioning the meaning of the concept of human freedom. He argues that many believe that human freedom is equivalent to incalculability or irrationality: A person is free if his or her actions cannot be calculated. Max Weber, *Roscher and Knies: The Logical Problems of Historical Economics* 120, trans. G. Oakes (New York: Free Press, 1975) ("Weber, *Roscher and Knies*"). Weber maintains, however, that human action is no less calculable than natural processes. For example, the forecast of the weather "is far from being as 'certain' as the 'calculation' of the conduct of a person with whom we are acquainted."*Id.* at 121. Furthermore, according to Weber, insofar as a human action is attributable to a concrete motive, the human action is less irrational than the natural event. *Id.* at 125, 191–98. Incalculability, indeed, "is the principle of the 'madman.'"*Id.* at 125. CrossRef Google Scholar

16 See Immanuel Kant, *Critique of Pure Reason*, in *Kant Selections*, ed. T. Greene (New York: Charles Scribner's Sons, 1929) ("Kant, *Critique of Pure Reason*") cf. Levine, *The Flight* 143–44 (cited in note 2) (on Weber and Kant); Schluchter, *The Rise* 13–15 (cited in note 2) (on Weber and Kant). Weber states that modern epistemology derives from Kant. Weber, *Methodology of the Social Sciences* 106. On the Cartesian opposition of the subject and the objective world, see Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* 115–18 (Philadelphia: University of Pennsylvania Press, 1983); Frederick Copleston, 4 A *History of Philosophy* 55 (Garden City, N.Y.: Image Books, 1960); Rene Descartes, *Meditations* (1641), trans. J. Veitch, in *The Rationalists* 97, 112–27 (Garden City, N.Y.: Anchor Books, 1974). This view of the world replaced a more unified vision, which had its roots in Aristotle. Cf. Alasdair MacIntyre, *After Virtue* 52–61, 81–82, 2d ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984) (Aristotle was rejected in the 17th and 18th centuries). Richard Rorty writes: "The veil-of-ideas epistemology which took over philosophy in the seventeenth century ... [gave] rise to a new philosophical genre—the system which brings subject and object together again. This reconciliation has been the goal of philosophical thought ever since." Richard Rorty, *Philosophy and the Mirror of Nature* 113 (Princeton, N.J.: Princeton University Press, 1979). Google Scholar

17 Weber, *Methodology of the Social Sciences* 72; see *id.* at 78. Google Scholar

18 Id. at 81. Google Scholar

19 Weber, *Roscher and Knies* 122. Google Scholar

20 Id.; see *id.* at 194, 196. Google Scholar

21 Weber, *Methodology of the Social Sciences* 78 (emphasis in original) (cited in note 11). Google Scholar

22 Id. at 84. Google Scholar

23 Id. at 110 (emphasis in original). Google Scholar

24 See Kant, *Critique of Pure Reason*, 3–5, 14–27, 43–66. Google Scholar

25 See id.; cf. D. W. Hamlyn, *A History of Western Philosophy* 217–28 (New York: Viking, 1987) (summarizing Kant's arguments). Google Scholar

26 See Jurgen Habermas, *Communicative Action* 154 (cited in note 4); Schluchter, *The Rise* 13–15; F. Dallmayr & T. McCarthy, "Introduction" in F. Dallmayr & T. McCarthy, ed., *Understanding and Social Inquiry* 19 (Notre Dame, Ind.: University of Notre Dame Press, 1977). For a general discussion of neo-Kantianism, see Frederick Copleston, 7 *A History of Philosophy* 361–73 (Garden City, N.Y.: Image Books, 1965). Google Scholar

27 Weber, *Methodology of the Social Sciences* 81 (emphasis in original). Google Scholar

28 Id. at 78 (emphasis in original). Google Scholar

29 Consequently, at least in the social sciences, pure objective knowledge is impossible: "In no case does [meaning] refer to objectively 'correct' meaning or one which is 'true' in some metaphysical sense." Weber, *Economy and Society* 4. Google Scholar

30 Id. at 696. Google Scholar

31 Id. at 1006; see *id.* at 1006–7. Weber's neo-Kantian metaphysics also serves as the foundation for his use of "ideal types" to analyze social phenomena. *Id.* at 20–22. The ideal type is a "mental construct for the scrutiny and systematic characterization of individual concrete patterns which are significant in their uniqueness, such as Christianity, capitalism, etc." Weber, *Methodology of the Social Sciences* 100. Weber forms his ideal types by accentuating particular points of view of phenomena, and then by using those points of view to synthesize aspects of concrete phenomena into unified analytical constructs. *Id.* at 90. Thus, no ideal type can "be found empirically anywhere in reality. It is a *utopia.*"*Id.* (emphasis in original). Weber's argument for a neo-Kantian notion of experience and knowledge facilitates his creation of ideal types. If one accepts Weber's argument that all reality is experienced and known through human categories or presuppositions or, in other words, through human constructs, then one can easily imagine and accept the use of mental constructs as heuristic devices to aid in the analysis of social phenomena. Weber writes: "Who ever accepts the proposition that the knowledge of historical reality can or should be a 'presuppositionless' copy of 'objective' facts, will deny the value of the ideal-type."*Id.* at 92. Google Scholar

Weber uses his ideal types to analyze and interpret historical phenomena. He is able to identify and emphasize aspects of history—that is, to give meaning to historical social actions—because he focuses on where the historical phenomena merge with and diverge

from the ideal types. He writes: “Historical research faces the task of determining in each individual case, the extent to which this ideal-construct approximates to or diverges from reality, to what extent for example, the economic structure of a certain city is to be classified as a ‘.city-economy.’”*Id.* at 90. Moreover, the ideal types are common denominators that allow him to compare different historical phenomena to each other: Historical events are interpreted and compared on a common ground. The ideal types, thus, facilitate Weber's analyses of the subjective meanings of historical phenomena and the cause and consequences of those phenomena. In particular, he constructs his ideal types to allow him to explore the degrees and forms of rationality in various societies, with an eye toward explaining the development and unique characteristics of modern Western society and capitalism. Google Scholar

32 Weber, *Economy and Society* 893 (cited in note 11). Google Scholar

33 See Kronman, *Max Weber* 185 (cited in note 2); Trubek, 20 *Law & Soc'y Rev.* at 575 (cited in note 1); *supra* text accompanying note 4. Google Scholar

34 Weber, *Economy and Society* 85–86. Google Scholar

35 See *id.* Google Scholar

36 The translation of the German word *zweckrational*, is open to dispute. Compare Max Weber, *Max Weber on Law in Economy and Society* 1–2, trans. Rheinstein & E. Shils (Cambridge: Harvard University Press, 1954) (*“Weber on Law in Economy and Society*”) (translates it as purpose-rational), *with* Weber, *Economy and Society* 24 (translates it as instrumentally rational). I use “purpose-rational” because it better captures the differentiation from value-rational social action, which involves the rational selection of only a means as opposed to the rational selection of means and goals that is entailed in purpose-rational social action. See Weber, *Economy and Society* 26; Gero Lenhardt, “On Legal Authority, Crisis of Legitimacy and Schooling in the Writings of Max Weber” 4–5 (unpublished manuscript from the Institute for Research on Educational Finance and Government, R. Meyer trans., Nov. 1980). Google Scholar

37 Weber, *Economy and Society* 26. Google Scholar

38 See *id.* at 85–86. Google Scholar

39 For example, Weber writes that in some situations, substantive and formal rationality “unavoidably collide” in the context of bureaucratic organizations. *Id.* at 980. Google Scholar

40 Capitalism is largely characterized by the use of money and by capital accounting. The use of money, first, allows individuals to eliminate in-kind exchanges—dollars can be substituted for goods—and, second, creates the possibility for money accounting, which dramatically increases the degree of formal rationality of economic action. See *id.* at 80–87. Money accounting is reflected in “budgetary management”: “[t]he continual utilization and procurement of goods, whether through production or exchange, by an economic

unit for purposes of its own *consumption* or to procure other goods for *consumption.*"*Id.* at 87. The "budget" thus "states systematically in what way the needs expected for an accounting period—needs for utilities or for means of procurement to obtain them—can be covered by the anticipated income."*Id.* Google Scholar

Weber argues further that the use of money leads to the possibility of capital accounting. Capital accounting is unique because it is directed toward economic "profit making."*Id.* at 91. Profit making is "activity which is oriented to opportunities for seeking new powers of control over goods on a single occasion, repeatedly, or continuously."*Id.* at 90. In other words, market entrepreneurs, using capital accounting, constantly desire and strive for profit, not merely for the procurement of goods for consumption. *Id.* at 92. Google Scholar

41 For example, according to Weber, capitalism necessarily requires both the expropriation of workers from the means of production and shop discipline. *Id.* at 137–38. Weber argues that, in a capitalist business, power becomes increasingly centralized within a bureaucratic organization in order to increase calculability. Workers consequently become increasingly distanced from control of the means of production and the means of administration, necessarily submitting to the authority relations within the bureaucratized work place. Workers cannot question the orders of superiors: They must immediately and simply obey. The workers are treated as objects, not as subjects: Their substantive needs and desires remain unfulfilled (or at best, only arbitrarily fulfilled). See Weber, *Selections* 252 (cited in note 11). Google Scholar

Moreover, according to Weber, capitalism oppresses not only the workers but also the capitalist owners themselves. Weber writes that capitalism "presupposes the *battle of man with man"* (Weber, *Economy and Society* 93); the free market system of capitalism is based on strict competition between autonomous subjects (*id.*) In the economic marketplace, one must follow the maxims for success or suffer "economic destruction." Weber, *Roscher and Knies* 193 (cited in note 15). Thus, even the owner of the means of production, if he or she intends to survive, is forced constantly to calculate and to seek the highest profit possible: The fulfillment of the owner's substantive needs or values must be suppressed beneath the desire for profits. Cf. *id.* at 253 (in many instances, a "boss" can respond to a "worker's" demand for higher wages by truthfully stating that an increase in wages will destroy the business). Google Scholar

42 Weber argues that "effective demand, not actual demand or wants, determines what goods are produced by capitalist enterprises. Weber, *Economic and Society* 108–9. Google Scholar

43 See Trubek, 20 *Law & Soc'y Rev.* at 593 (cited in note 1). Google Scholar

44 Weber writes: "All this [capitalism] is seen by socialism as the 'domination of people by things,' in other words, the domination of the end (the supply of needs) by the means."

Weber, *Selections* 253 (cited in note 11); see Lowith, *Weber and Marx* 47–48 (cited in note 1). Google Scholar

45 Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 181, trans. T. Parsons (New York: Charles Scribner's Sons, 1958) ("Weber, *The Protestant Ethic*"). Google Scholar

46 Weber disagrees with Marx's vision of the future of Western society. Although Marx sees the workers as being inevitably ground under the wheels of capitalism—alienated from the self, the society, and the means of production—he also envisions a historically inevitable revolution—and thus the demise of capitalism. In the communist society that Marx imagines will emerge after the revolution, each person will be free and self-fulfilled: "[I]t [will] be possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic." Marx, *Reader* 160 (cited in note 11). Google Scholar

Weber attacked this Marxian vision of the future as romantic Utopian drivel. See Weber, *Economy and Society* 1401–2 (cited in note 11); Weber, *Selections* 256–59 (cited in note 11); see also Lowith, *Weber and Marx* 47–48 (Weber rejected Marx as Utopian). Weber's criticism of Marx as succumbing to the allure of utopianism is especially biting—and tinged with irony—because Marx, himself, had railed against several of his contemporaries for succumbing to the same allure. See, e.g., Marx, *Reader* 497–99. Google Scholar

47 See Weber, *Economy and Society* 656–57. Google Scholar

48 Compare *id.* at 85–86 (categories of economic action) with *id.* at 656–57 (categories of legal thought). Google Scholar

49 See M. Rheinstein, "Preface,"*in Weber on Law in Economy and Society* at xv (cited in note 36); Rheinstein, "Introduction"*in id.* at xlviii; Trubek, 37 *Stan. L. Rev.* at 919–20 (cited in note 2). Google Scholar

Other attempts to decipher Weber's categories of legal thought include Bendix, *Weber* 398–400 (cited in note 11); Kronman, *Max Weber* 72–95 (cited in note 2); Levine, *The Flight* 150–62, and Schluchter, *The Rise* 87–89 (both cited in note 2); Trubek, 1972 *Wis. L. Rev.* at 727–31 (cited in note 3). Google Scholar

50 Weber, *Economy and Society* 656–57. Google Scholar

51 See *supra* text accompanying notes 34–35. Google Scholar

52 Purely as a matter of logic, calculability could increase without increasing the degree of formally rational legal thought. That is, Weber suggests that formal rational legal thought increases if and only if the clarity and generality of legal rules increase. Moreover, calculability increases if clarity and generality increase. But Weber does not logically eliminate the possibility that calculability might increase, not *because* of an increase in clarity and generality, but due to some other causal factor. In other words, Weber does not

expressly state that calculability increases if and only if clarity and generality increase. This logical point meshes with Weber's statement that the bourgeoisie want a calculable law, but not necessarily logically formal rational legal thought. Weber, *Economy and Society* 855. Google Scholar

On the other hand, this logical possibility is contrary to Weber's analysis of economic action, and Weber does not explain why formal rationality in economic action should be distinguished from formal rationality in legal thought. More important, Weber's discussion of legal training in England emphasizes that "empirical legal training," see *infra* notes 97–98 and accompanying text, does not create formally rational legal thought because it creates law that is easily manipulated—"turned around and around, interpreted, and stretched in order to adapt it to varying needs." Weber, *Economy and Society* 787. Such manipulable law would not be calculable. Weber therefore suggests that manipulability is inversely proportional to formal rationality, and consequently, calculability is directly proportional to formal rationality. Again, however, purely as a matter of logic, Weber expressly states only that if there is no calculability—that is, there is manipulability—then there is no formal rationality of legal thought. In other words, whenever there is formally rational legal thought, there is calculability, but not vice versa —an increase in calculability does not logically or necessarily entail an increase in formal rationality. Nonetheless, in his essay, "Science as a Vocation," Weber unequivocally states that increasing rationality generally means increasing calculability. See *supra* note 10 and accompanying text. Google Scholar

53 Weber, *Economy and Society* 657. Google Scholar

54 Id. at 657. Google Scholar

55 Id. Google Scholar

56 Id. at 656. Google Scholar

57 Id. at 657. Google Scholar

58 See *supra* text accompanying notes 38–39. Google Scholar

59 Weber, *Economy and Society* 656 (cited in note 11). Google Scholar

60 See *supra* text accompanying notes 38–39. My analysis of Weber's categories of legal thought finds them to be simpler—but not less sophisticated—than many other analyses find the categories. See, e.g., Kronman, *Max Weber* 72–95; Levine, *The Flight* 150–62; Schluchter, *The Rise* 87–89 (all cited in note 2). In a sense, according to my interpretation, Weber's categories are sophisticated, not because of their intricacies, but because of their elegance. Schluchter, for example, argues that Weber opposes formal law to substantive law, not just formally *rational* law to substantively *rational* law. That is, according to Schluchter, Weber talks about law being more formal without it necessarily being more formally rational. See Schluchter, *The Rise* 87–89. Levine, on the other hand, complicates

Weber's categories by arguing that Weber implicitly distinguishes objective rationality from subjective rationality. See Levine, *The Flight* 150–62. Google Scholar

61 See *supra* text accompanying notes 34–46. Google Scholar

62 Weber, *Economy and Society* 672. Google Scholar

63 Id. Google Scholar

64 Id. Weber also calls these contracts "fraternization contracts."*Id.* Google Scholar

65 Weber adds that a status contract "meant that the person would 'become' something different in quality (or status) from the quality he possessed before."*Id.* Google Scholar

66 Id. Google Scholar

67 Id. at 673. Google Scholar

68 Id. at 674. Google Scholar

69 Id. Google Scholar

70 See *id.* Google Scholar

71 See *supra* text accompanying note 10. Google Scholar

72 See Weber, *Economy and Society* 729 (cited in note 11). Google Scholar

73 Id. at 811. Google Scholar

74 See Levine, *The Flight* 151 (cited in note 2). Google Scholar

75 Early in "The Sociology of Law, Weber sketches the contours of his responses to these issues. See Weber, *Economy and Society* 654–55. Google Scholar

76 According to Weber, Marx reduces the historical development of Western society solely to the interplay of economic forces. Law, religion, and other aspects of society are, according to Marx, merely part of a superstructure: The foundation or base of society is economic. The material conditions of production shape legal and religious relations, but law and religion do not significantly shape the economy. See Marx, *Reader* 4—5, 157 (cited in note 11). Weber vehemently disagrees with this historical materialism, writing, "The so-called 'materialistic conception of history'... as a formula for the casual [*sic*] explanation of historical reality is to be rejected most emphatically." Weber, *Methodology of the Social Sciences* 68 (cited in note 11); see Weber, *Economy and Society* 333–37. This basic disagreement between Weber and Marx underscores one of Weber's purposes. In works such as *The Protestant Ethic and the Spirit of Capitalism* (cited in note 45), and "The Sociology of Law," in *Economy and Society* (641–900), Weber painstakingly describes how factors such as religion and law have influenced the development of Western society and, more particularly, have influenced the development of capitalism within Western society. Google Scholar

77 See *supra* text accompanying notes 10–33. Google Scholar

78 See Weber, *Economy and Society* 692–93. Google Scholar

79 Id. at 687; accord *id.* at 694–95. In more current terminology, Weber is suggesting that the

legal system is relatively autonomous. See Robert W. Gordon, “New Developments in Legal Theory,” in D. Kairys, ed., *The Politics of Law* 286 (New York: Pantheon Books, 1982). Google Scholar

80 Weber, *Economy and Society* 655. Google Scholar

81 Id. at 667. Google Scholar

82 Id. at 814. Google Scholar

83 Weber writes: “For the modern form of capitalism, based on the rational enterprise, requires not only calculable technical means of production, but also a calculable legal system and administration in accordance with formal rules.” Weber, *Selections* 339 (cited in note 11). For example, Weber argues that “[a]s long as religious courts had jurisdiction over land cases, capitalistic exploitation of the land was thus impossible.” Weber, *Economy and Society* 823 (cited in note 11). Google Scholar

84 See Weber, *Economy and Society* 891–92, 976–77. Google Scholar

85 See *id.* at 814, 890–92. Google Scholar

86 Id. at 890. Google Scholar

87 Id. at 655. Google Scholar

88 Id. at 883. Google Scholar

89 Id. at 334. Google Scholar

90 Id. at 672. Continuing his discussion of contract law, Weber argues that “[i]n an economy where self-sufficiency prevails and exchange is lacking, [law] will mainly define and delimit a person's noneconomic relations and privileges with regard to other persons in accordance, not with economic considerations, but with the person's origin, education, or social status.”*Id.* at 668. But Weber continues, “[i]n an increasingly expanding [exchange] market, those who have market interests constitute the most important group. Their influence predominates in determining which legal transactions the law should regulate by means of power-granting norms.”*Id.* at 669. Weber expands beyond contract law when he adds that “the bourgeois strata have generally tended to be intensely interested in a rational procedural system and therefore in a systematized, unambiguous, and specialized formal law which eliminates both obsolete traditions and arbitrariness and in which rights can have their source exclusively in general objective norms.”*Id.* at 814; see *id.* at 847. Google Scholar

91 See Weber, *Selections* 339 (cited in note 11). Google Scholar

92 Weber, *Economy and Society* 687–88. Google Scholar

93 Weber writes: The legal system can “remain unchanged while economic relations are undergoing a radical transformation.”*Id.* at 333–34. Google Scholar

94 Id. at 892; see *id.* at 720, 883; Weber, *Selections*, 339. Google Scholar

95 See Weber, *Economy and Society* 775–76 (cited in note 11). Google Scholar

96 Id. at 776. Google Scholar

97 Id. at 785. Google Scholar

98 Id. at 789; see also *id.* at 792–802 (legal training by *honoratiores*, which occurred during the medieval times in northern Europe). Google Scholar

99 Id. at 784. Google Scholar

100 Id. at 785–86. On the training of barristers and solicitors in England, see generally B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System* 1750–1965 (Cambridge: Harvard University Press, 1967); P. Smith & S. Bailey, *The Modern English Legal System* 92–131 (London: Sweet & Maxwell, 1984). Google Scholar

101 Weber, *Economy and Society* 787–88. Google Scholar

102 See *id.* at 785. Google Scholar

103 Id. at 789. Weber adds: "This logical systematization of the law has been the consequence of the intrinsic intellectual needs of the legal theorists and their disciples, the doctors, i.e., of a typical aristocracy of legal literati."*Id.* at 855. Google Scholar

104 See *supra* text accompanying notes 40–45. Google Scholar

105 See *supra* text accompanying note 74. Google Scholar

106 Weber, *Economy and Society* 811. Google Scholar

107 Id. at 813; accord *id.* at 811, 813, 893, 976; see Bendix, *Weber* 399 (cited in note 11) Google Scholar

108 Weber, *Economy and Society* 893 (cited in note 11). Google Scholar

109 See *supra* text accompanying note 74. Google Scholar

110 Weber, *Economy and Society* 812–13. Google Scholar

111 See *id.* at 729–31. Google Scholar

112 Id. at 729. Google Scholar

113 See *id.* at 729–30. Google Scholar

114 See *id.* at 699, 729–31. Google Scholar

115 See *id.* at 886. See generally E. Allan Farnsworth, *Contracts* 211–323 (Boston: Little, Brown & Co., 1982). Google Scholar

116 Weber, *Economy and Society* 973–80. Google Scholar

117 See *id.* at 223. Google Scholar

118 Id. at 975. Google Scholar

119 Id. at 1402. Google Scholar

120 Id. at 220. Google Scholar

121 Weber states: "[O]bedience [in the bureaucracy] is owed to the legally established impersonal order. It extends to the persons exercising the authority of office under it by

virtue of the formal legality of their commands and only within the scope of authority of the office."*Id.* at 215–16. Google Scholar

122 Id. at 979–80 (emphasis in original). Google Scholar

123 Id. at 895. Google Scholar

124 See *supra* text accompanying notes 45–46. Thomas McCarthy writes: "Weber clearly regarded [the increasing rationalization and bureaucratization of western society] as irreversible." Thomas McCarthy, *The Critical Theory of Jurgen Habermas* 19 (Cambridge: MIT Press, 1978). Google Scholar

125 See *infra* text accompanying notes 130–37. Google Scholar

126 See *infra* text accompanying notes 149–205. Google Scholar

127 Weber, *Economy and Society* 890 (cited in note 11). Google Scholar

128 See generally Grant Gilmore, *The Ages of American Law* 19–40 (New Haven, Conn.: Yale University Press, 1977) ("Gilmore, *Ages*"); Karl Llewellyn, *The Common Law Tradition* 36–37, 63–72 (Boston: Little, Brown & Co., 1960). Google Scholar

129 See, e.g., Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In *Worcester*, Chief Justice Marshall's opinion reads more like a historical tale than a current legal opinion. See, e.g., Worcester v. Georgia, 31 U.S. 542–43; see also "Carriers," 1 *Am. L. Reg.* 65, 66–67 (1852) (celebrating the Grand Style). Google Scholar

130 See Gilmore, 42–48; C. Warren, 2 *History of the Harvard Law School* 372–74 (New York: Da Capo Press, 1970) (reprint of 1908 ed.); Grey, Thomas C., "Langdell's Orthodoxy", U. Pitt. L. Rev. 45 1, 1–2 (1983). Langdell can be placed within a broader societal commitment to formalism characteristic of the middle to late 19th century. Cf. Morton White, *Social Thought in America: The Revolt Against Formalism* (London: Oxford University Press, 1976) (examines the revolt against formalism in the late 19th and early 20th centuries). Google Scholar

131 See *supra* text accompanying notes 95–103. For a discussion of how the academic training of attorneys in Europe, especially Germany, relates to the academic training of attorneys in the United States, see David Clark, "The Role of Legal Education in Defining Modern Legal Professions," 1987 *B.Y.U L. Rev.* 595, 601–4. Google Scholar

132 See Christopher C. Langdell, *Cases on Contracts* viii-ix, 2d ed. (Boston: Little, Brown &. Co., 1879) (preface to 1st ed.) ("Langdell, *Cases on Contracts*"); see also Joseph Beale, 1 A *Treatise on the Conflict of Laws* 147–49 (New York: Baker, Voorhis & Co., 1916). Google Scholar

Thomas Grey has suggested that the classically orthodox or Langdellian legal system is comprehensive, complete, formal, and conceptually ordered. Grey, 45 *U. Pitt. L. Rev.* at 6–10. A legal system is comprehensive if it has no procedural gaps; every case gets decided. It is complete if it has no substantive gaps; every case has a preexisting substantively correct answer. It is formal if the result in every case is indubitably deduced through

unquestionable or at least compelling reasoning. And it is conceptually ordered if "its substantive bottom—level rules can be derived from a small number of relatively abstract principles and concepts, which themselves form a coherent system."*Id.* at 8. Google Scholar

133 Weber, *Economy and Society* 657–58. Google Scholar

134 Langdell, *Cases on Contracts* ix. Google Scholar

135 Id. Google Scholar

136 Christopher C. Langdell, *Summary of the Law of Contracts* 21, 2d ed. (Boston: Little, Brown & Co., 1880). Google Scholar

137 Weber writes: "[T]hat conception of law which still prevails today and which sees in law a logically consistent and gapless complex of 'norms' waiting to be 'applied' became the decisive conception for legal thought." Weber, *Economy and Society* 855. Google Scholar

138 See *supra* text accompanying notes 61–74. Google Scholar

139 Weber, *Economy and Society* 894 (cited in note 11). Google Scholar

140 Id. at 882–89. Google Scholar

141 Id. at 888. Google Scholar

142 Id. at 886, 894. Google Scholar

143 Id. at 886; see *id.* at 979. Google Scholar

144 See, e.g., Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921); Pound, Roscoe, "Mechanical Jurisprudence," Colum. L Rev. 8 605 (1908); *id.*, "The Scope and Purpose of Sociological Jurisprudence," 25 *Harv. L. Rev.* 489 (1912). See generally G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America," in *Patterns of American Legal Thought* 99 (Charlottesville, Va.: Michie Co., 1978) ("White, *Patterns*") (discussing sociological jurisprudence and realism). CrossRef Google Scholar

145 See, e.g., Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930); Cohen, Felix, "Transcendental Nonsense and the Functional Approach," Colum. L. Rev. 35 809 (1935); Hutcheson, Joseph, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," Corn. L.Q. 14 274 (1929); Llewellyn, Karl, "Some Realism About Realism—Responding to Dean Pound," Harv. L Rev. 44 1222 (1931); see Herget, J. & Wallace, S., "The German Free Law Movement as the Source of American Legal Realism," Va. L. Rev. 73 399 (1987) (argues that the German free law movement was the foundation for American legal realism). CrossRef Google Scholar

146 Weber, *Economy and Society* 895. Google Scholar

147 Id. Google Scholar

148 See *id.* at 888, 895. Google Scholar

149 H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*

(Tentative ed. 1958) ("Hart &. Sacks, *The Legal Process*"). For a discussion of the transition from American legal realism to legal process, see G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," in White, *Patterns* 136, 137–44 ("White, 'Evolution of Reasoned Elaboration'"). Google Scholar

150 Hart & Sacks, *The Legal Process* 3. Google Scholar

151 Id. at 366–68, 662; see Wellman, Vincent A., "Dworkin and the Legal Process Tradition: The Legacy of Hart &. Sacks", Ariz. L. Rev. 29 413, 431–34 (1987). Google Scholar

152 Cf. Hart & Sacks, *The Legal Process* iii (on the importance of institutions and processes). Google Scholar

153 Id. at 160–68; see White, "Evolution of Reasoned Elaboration," at 144–48. Google Scholar

154 Hart &. Sacks, *The Legal Process* 166. Google Scholar

155 See *id.* at 164–67. Google Scholar

156 Id. at 165. Google Scholar

157 Hart, Henry, "Foreword: The Time Chart of the Justices," Harv. L. Rev. 73 84–100 (1959). CrossRef Google Scholar

158 See White, "Evolution of Reasoned Elaboration," at 145. Google Scholar

159 But cf. Teubner, Gunther, "Substantive and Reflexive Elements in Modern Law," Law & Soc'y Rev. 17 239 (1983) (focus on legal processes represents a postmodern advance beyond the Weberian dichotomy of formal and substantive rationality). CrossRef Google Scholar

160 Wechsler, Herbert, "Toward Neutral Principles of Constitutional Law," Harv L Rev. 73 1 (1959); see Alexander M. Bickel, *The Least Dangerous Branch* 49–59, 2d ed. (New Haven, Conn.: Yale University Press, 1986) (1st ed. 1962) ("Bickel, *Least Dangerous Branch*"). CrossRef Google Scholar

161 Hart & Sacks, *The Legal Process* 665. Google Scholar

162 Compare Alexander M. Bickel, *Least Dangerous Branch* 49–59 (Supreme Court should develop and enforce neutral principles), with *id.*, *The Supreme Court and the Idea of Progress* 99, 165 (New Haven, Conn.: Yale University Press, 1978 ed.) (1st ed. in 1970) (questions the possibility of finding neutral principles). See generally Wright, J. Skelly, "Professor Bickel, The Scholarly Tradition, and the Supreme Court," Harv. L Rev 84 769 (1971) (criticizing Bickel's transition). CrossRef Google Scholar

163 Ely, *Democracy and Distrust* (cited in note 9); see also Jesse Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980). Google Scholar

164 Ely, *Democracy and Distrust* 1; see, e.g., Bork, Robert H., "Neutral Principles and Some First Amendment Problems", Ind. L.J. 47 1 (1971). Ely actually distinguishes "interpretivism" from "noninterpretivism." I have substituted the term "originalism" for Ely's "interpretivism" and the term "nonoriginalism" for Ely's "noninterpretivism" in order to

avoid confusion with the interpretivism of the more recent "interpretive turn" in jurisprudence. This latter form of interpretivism differs radically from Ely's notion of interpretivism. See Feldman, 76 *Iowa L. Rev.* (cited in note 9). Compare Thomas C. Grey, "Do We Have an Unwritten Constitution?" 27 *Stan. L. Rev.* 703 (1975) (in the manner of Ely, distinguishes interpretivism from noninterpretivism), with Grey, Thomas C., "The Constitution as Scripture", Stan. L Rev. 37 1, 1 (1984) (questions the coherence of the distinction between interpretivism and noninterpretivism). Google Scholar

165 See Ely, *Democracy and Distrust* 43–72; see, e.g., Grey, 27 *Stan. L. Rev.* 703, 715–16. Google Scholar

166 Bickel, *Least Dangerous Branch* 16 (cited in Note 160); see Ely, *Democracy and Distrust* 4–7. Google Scholar

167 Ely, *Democracy and Distrust* 1, 7–9. According to Ely, another reason why originalism initially appears better than nonoriginalism is that the originalist model better fits our usual conceptions of the law and judicial decision making. For instance, when a judge interprets a statute, he or she is limited to considering its language and the intent of the drafters. The judge is not free to consider other substantive values as a means of supplementing the statutory text. The originalist argues, therefore, that judges should be similarly limited when interpreting the Constitution. See *id.* at 3. Google Scholar

168 Id. at 11–12. Google Scholar

169 Id. at 1, 12–14. Google Scholar

170 Id. at 48–54. Google Scholar

171 Id. at 69–70. In addition to considering natural law and the prediction of progress as possible sources or methods of substantive values, Ely considers the personal values of judges, neutral principles, the method of reason, tradition, and societal consensus as other possible sources. See *id.* at 44–69. Google Scholar

172 Id. at 43–72. For example, when considering whether the Court should inject the widely shared values of the society (societal consensus) into the open-ended constitutional provisions, Ely offers several criticisms, including the following. The existence of a consensus on any important issue is often questionable, and if a consensus were to exist, it may merely reflect one group's domination of another. Moreover, there is no reason to think that the Court is able to discover any existing consensus. As between the Court and Congress, the latter—being elected—is more likely than the former to reflect widely shared values. See *id.* at 63–69. Google Scholar

173 Id. at 50. Google Scholar

174 Id. at 73–104. Ely argues further that the constitutional text is primarily concerned with process and that federal judges are in the best position to police the majoritarian democratic process since they do not have to worry about reelection. *Id.* at 88–103. Google Scholar

175 Id. at 105. Google Scholar

176 Id. at 135. Google Scholar

177 Id.at 105–34. Google Scholar

178 Id. at 117. Google Scholar

179 Id. at 248 n.52; see *id.* at 15; Ely, John Hart, "The Wages of Crying Wolf: A Comment on Roe v. Wade," Yale L.J. 82 920 (1973). CrossRef Google Scholar PubMed

180 Ely, *Democracy and Distrust* 135–79 (cited in note 9). Google Scholar

181 Id. at 101. Google Scholar

182 Id. at 137. Google Scholar

183 Id. at 135–45. Google Scholar

184 The equal protection clause is U.S. Const, amend. 14, § 1. It applies to the federal government through the due process clause of the Fifth Amendment. U.S. Const. amend. 5; see Boiling v. Sharpe, 347 U.S. 497 (1954). The Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const, amend. 15, § 1. Google Scholar

One of the earliest statements and applications of representation-reinforcement theory was in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819) (Chief Justice Marshall reasoned that the structure of the government protects against abuses of the government's taxing power). Footnote 4 of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), foreshadowed the application of representation-reinforcement theory to racial discrimination cases. See also Ely, *Democracy and Distrust* 73–74 (Warren Court followed representation-reinforcement theory). Another context in which the Court has applied representation-reinforcement theory is the dormant commerce clause. U.S. Const, art. 1, § 8, cl. 3; see, e.g., South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938). Google Scholar

185 426 U.S. 229 (1976). Although *Washington v. Davis* was decided in 1976, four years before Ely published *Democracy and Distrust*, representation-reinforcement theory was nonetheless an already important approach to constitutional issues. See *supra* note 184. Moreover, Ely had been publishing articles advocating representation-reinforcement throughout the 1970s, before *Washington v. Davis* was decided. See, e.g., Ely, John Hart, "The Constitutionality of Reverse Racial Discrimination," U. Chi. L Rev. 41 723 (1974); *id.*, 82 Yak L.J. 920 (1973). Ely's *Democracy and Distrust* was, however, the most complete and definitive defense of representation-reinforcement theory. CrossRef Google Scholar

186 Washington v. Davis, 426 U.S. at 239; see Boiling v. Sharpe, 347 U.S. 497 (1954). Google Scholar

187 Washington v. Davis, 426 U.S. at 239 (emphasis in original). Google Scholar

188 See *id.* at 238–48. Google Scholar

189 458 U.S. 483 (1982). Google Scholar

190 Id. at 486 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973)); see Crawford v. Board of Education, 458 U.S. 527, 541 (1982) (upholding state constitutional amendment because it did not distort the political process for racial reasons). Google Scholar

191 109 S. Ct. 706 (1989). Google Scholar

192 Id. at 722. Google Scholar

193 481 U.S. 279 (1987). Google Scholar

194 Id. at 297–99. The Court also rejected claims that the capital sentencing scheme was administered in a racially discriminatory manner, id. 289–98, and that it violated the prohibition against cruel and unusual punishment. *Id.* at 298–319; see U.S. Const, amend. 8. Google Scholar

195 McCleskey v. Kemp, 481 U.S. at 298 (emphasis in original). Google Scholar

196 Id. at 286. Google Scholar

197 Id. at 321 (Brennan, J., dissenting). Google Scholar

198 Id. Google Scholar

199 Id at 297–99. Google Scholar

200 446 U.S. 55 (1980). Google Scholar

201 Id. at 71. Google Scholar

202 Id. at 122 (Marshall, J., dissenting). Google Scholar

203 Id. at 62. The plurality consisted of Justices Stewart, Powell, and Rehnquist, and Chief Justice Burger. Justice Stevens concurred in the judgment and agreed that discriminatory impact alone does not establish a constitutional violation, but he did not agree that discriminatory intent should be the standard for determining a constitutional violation. Id. at 83–94. Justice Blackmun concurred in the result. *Id.* at 80–83. Google Scholar

204 Id. at 61–65. The Court also rejected claims under the equal protection clause, *id.* at 65–80, and under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976). City of Mobile v. Bolden, 446 U.S. at 60–61. Google Scholar

205 City of Mobile v. Bolden, 446 U.S. at 65. Google Scholar

206 Process-oriented constitutional law previously has been subjected to three standard criticisms. One criticism is that process-oriented approaches to the Constitution are not truly value-free. In other words, commitment to an approach such as Ely's representation-reinforcement theory necessitates certain substantive value choices, and thus the theory fails to satisfy its own prerequisite for success. See, e.g., Ackerman, Bruce, “Beyond Carolene Products,” Harv. L. Rev. 98 713, 737–40 (1985); Brest, Paul, “The Substance of Process,” Ohio St. L.J. 42 131 (1981); Tushnet, Mark, “Darkness on the Edge of Town: The

Contributions of John Hart Ely to Constitutional Theory," Yale L.J. 89 1037–1045 (1980). For example, one commentator argues that the Constitution is not self-evidently committed to pure democracy. Indeed, the Constitution appears to contain strong counter-majoritarian strands. If true, then the process theorist's focus on policing the democratic process, instead of identifying and protecting other substantive values, arises from that theorist's own tacit substantive commitment to pure democracy. See Lyons, David, "Substance, Process, and Outcome in Constitutional Theory," Cornell L. Rev. 72 745–748, 755–56 (1987). CrossRef Google Scholar

A second criticism is that even if a process-oriented approach were to avoid substantive value choices, we simply should not be following such a tack. To the contrary, constitutional law should focus on the identification and protection of substantive values and needs. Policing the political process should be secondary to making substantive value choices. See e.g., Sherry, Suzanna, "Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction," Geo. L.J. 73 89 (1984); Tribe, Laurence, "The Puzzling Persistence of Process-based Constitutional Theories," Yale L.J. 89 1063 (1980). For example, one commentator argues that the Court should focus on what classes of people—African Americans, aliens, women, homosexuals—need special judicial protection, not on whether a legislature has intentionally discriminated against a certain class. Sherry, 73 *Geo. L. J.* at 119. Google Scholar

A final standard criticism of process-oriented approaches is that an apparently fair process can be skewed by social and economic inequalities. For a minority that is disproportionately situated on the lower end of the socioeconomic scale, fair process may lead to unfair results. Yet the fair process tends to deflect any criticism of the substantive results, thus leaving the minority in its oppressed position. A process-oriented approach to constitutional law, in other words, tends to allow societal inequalities to continue. See, e.g., Delgado, Richard, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature," U. Pa. L Rev. 132 561, 568–71 (1984); Parker, Richard D., "The Past of Constitutional Theory—and Its Future", Ohio St. L.J. 42 223 (1981); cf. Charles Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 *Stan. L Rev.* 317 (1987) (intent requirement overlooks the problem of unconscious racism). See generally Derrick Bell, *Race, Racism and American Law* 2d ed. (Boston: Little, Brown & Co. 1980) (minorities tend to gain rights and opportunities when those gains coincide with the interests of the white majority). Pursuing this criticism, some commentators have attacked process-oriented approaches to racial discrimination for accepting a "perpetrator perspective"—in other words, for focusing on governmental actors. If a governmental actor does not infect the political process with intentional discrimination, then the governmental action is constitutional regardless of any discriminatory effect on a disadvantaged minority. The Court, by focusing on the governmental actor or perpetrator of discrimination, ignores the plight of the victim, who may be a member of a minority

group effectively locked into a disadvantaged position by economic disparities. Delgado, 132 *U. Pa. L. Rev.* at 571; Freeman, Alan, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," Minn. L. Rev. 62 1049, 1052–57 (1978); see Minow, Martha, "Foreword: Justice Engendered," Harv. L. Rev. 101 10, 83–84 (1987). CrossRef Google Scholar

Weber's theory of law suggests an additional and stronger critique of process-oriented constitutional law. The force of the Weberian critique arises from its acceptance of the basic structures of constitutional law as it is currently conceived, and from the conclusion of the critique, that constitutional jurisprudence is laced with irreconcilable tensions. See *infra* text accompanying notes 207–14. Google Scholar

207 See *supra* text accompanying note 39 (on the meaning of "inevitability"). Trubek argues that one should be wary of applying Weber's ideal types in new contexts. See Trubek, 1972 *Wis. L. Rev.* at 752. Indeed, Weber did not apply his sociological theory to constitutional law, and for the most part, he dealt with public law issues only when they overlapped with private law questions. See Weber, *Economy and Society* 641–44, 655, 710–13 (cited in note 11). Weber did, however, contribute to the writing of the constitution of Germany after the First World War. See S. Turner & R. Factor, "Decisionism and Politics: Weber as Constitutional Theorist," in S. Lash & S. Whimster, eds., *Max Weber, Rationality and Modernity* 335 (London: George Allen & Unwin, 1987). More important, my discussion of the metaphysical underpinnings of the categories of legal thought (see *supra* text accompanying notes 12–33) suggests that they can be applied to Western legal institutions beyond those expressly focused on by Weber; a similar metaphysics underlies current constitutional law. See Feldman, 1989 *Duke L J.* at 1347–49; *id.*, 76 *Iowa L. Rev* (cited in note 9). Moreover, the close fit between Weber's categories and the current categorizations of thought in constitutional law supports the applicability of Weber's ideal types. See *infra* text accompanying notes 208–14. Google Scholar

208 See *supra* text accompanying notes 50–55. I do not mean to suggest that a process-oriented approach successfully reduces constitutional law to a calculable or predictable field. A strong argument can be made that no method can perform that task. See Mark Tushnet, *Red, White, and Blue* 1–187 (Cambridge: Harvard University Press, 1988); Brest, Paul, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," Yale L.J. 90 1063 (1981); Feldman, 1989 *Duke L J.* at 1347–49; *id.*, 76 *Iowa L. Rev. If*, however, we accept the metaphysical foundations of Weberian theory and the similar metaphysical foundations of current constitutional law, and *if* we accept the separation of process and substance, then a process-oriented approach theoretically should maximize formal rationality. The acceptance of these premises or foundations is nonetheless problematic. See *infra* note 214. The point of the Weberian critique is that it is internal: It accepts the structures of constitutional law as currently

conceived and proceeds to underscore the tensions inherent within those structures. CrossRef Google Scholar

209 See *supra* text accompanying notes 61–74. One can question, however, whether logically formal rational legal thought actually has this advantage. See *supra* note 208. Google Scholar

210 See *supra* note 44 and accompanying text; see also Ely, *Democracy and Distrust* 181–83 (cited in note 9); Grey, Thomas C., "Procedural Fairness and Substantive Rights," Nomos. 18 182 (1977). I do not mean to suggest that fair process never leads to fair substantive results; sometimes it in fact does. The problem arises, however, when fair process itself becomes a goal. Then the pursuit of fair process necessarily leads only to fair process: Substantive results will sometimes be fair and sometimes unfair (since substantively fair results are no longer being actively pursued). Consequently, some substantively unfair results inevitably follow from an undue focus on fair process. Google Scholar

211 One can reasonably argue that legal thought has oscillated between extremes defined by a subjective and an objective attitude toward the law, which reflects the Cartesian separation of the subject and external world. See Feldman, 1989 *Duke L.J.* at 1347–49 (the Cartesian either/or in constitutional law; either we have objective knowledge or no knowledge at all); id., 76 *Iowa L Rev.*; cf. Morton J. Horwitz, *The Transformation of American Law* 1780–1860 at 29–30 (Cambridge: Harvard University Press, 1977) (early 19th century saw an ascendancy of substance over form); Teubner, Gunther, "Substantive and Reflexive Elements in Modern Law," Law & Soc'y Rev. 17 239–241 (1983) (asking whether legal thought has oscillated between antagonistic principles or has evolved generally in one direction). CrossRef Google Scholar

212 See *supra* text accompanying notes 170–73. Even critics of Ely acknowledge the effectiveness of his attacks on nonoriginalism. See, e.g., Brest, Paul, "The Substance of Process," Ohio St. L.J. 42 131 (1981); Tushnet, 89 *Yale L J.* 1037, 1057 (cited in note 206). Weber himself clearly doubts whether a rejection of formally rational legal thought, if it were possible, would lead to substantively rational results. See Weber, *Economy and Society* 893 (cited in note 11); Ewing, Sally, "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law," Law & Soc'y Rev. 21 487–510 (1987); see, e.g., Feldman, Stephen M., "Felix S. Cohen and His Jurisprudence: Reflections on Federal Indian Law", Buff. L. Rev. 35 479 (1986) (the rejection of formalist approaches in American Indian law has not led to substantive justice). Google Scholar

213 See Crenshaw, Kimberle, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," Harv. L Rev. 101 1331 (1988); cf. Lawrence, Charles, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," Stan. L Rev. 39 317 (1987) (intent requirement in equal protection law overlooks the problem of unconscious racism in American society). See generally Derrick Bell, *Race, Racism and American Law*, 2d ed. (Boston: Little, Brown & Co., 1980) (minorities tend to

gain rights and opportunities when those gains coincide with the interests of the white majority). Google Scholar

214 One can argue that we can escape the iron cage of constitutional law if we can reconceive the basic structures of the field. In particular, we must escape the Cartesian either/or in constitutional law: either we have objective knowledge or no knowledge at all. See Feldman, 1989 *Duke L. J* at 1347–49. The path to this escape may lie in the interpretive turn. See *id.* at 1349–56; *id.*, 76 *Iowa L. Rev* (cited in note 9); Williams, Joan, "Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells," N.Y.U. L. Rev. 62 429 (1987). For discussions of hermeneutics and the interpretive turn, see Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983); Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer & D. Marshall, 2d rev. ed. (New York: Crossroad, 1989) (originally published in German in 1960; the first English translation was Hans-Georg Gadamer, *Truth and Method*, trans. W. Glen-Doepel (New York: Crossroad, 1975)); Richard E. Palmer, *Hermeneutics* (Evanston, III.: Northwestern University Press, 1969); Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, N.J.: Princeton University Press, 1979); P. Rabinow & W. Sullivan, "The Interpretive Turn: Emergence of An Approach," in P. Rabinow & W. Sullivan, eds. *Interpretive Social Science—A Reader* 1–21 (Berkeley: University of California Press, 1979). Google Scholar

For a discussion of the difficulties of applying an interpretive approach to empirical social science studies of our legal system, see David Trubek & John Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?" 14 *Law & Soc. Inquiry* 3 (1989). CrossRef Google Scholar

Related content

Published online: 2 September 2013

Article

Max Weber and the Legal-Historical Ramifications of Social Democracy

John P. McCormick

Canadian Journal of Law & Jurisprudence

Published online: 20 July 2015

Article

Strategy as a vocation: Weber, Morgenthau and modern strategic studies

Review of International Studies

Published online: 1 April 1998

Book

The Work of Politics

Steven Klein

The Work of Politics: Making a Democratic Welfare State

Published online: 30 September 2020

Chapter

Introduction

D. L. d'Avray

Rationalities in History

Published online: 5 June 2012

Book

The Cambridge Handbook of Social Theory

The Cambridge Handbook of Social Theory

Published online: 3 December 2020

Chapter

The Historical Logic(s) of Habermas's Critique of Weber's “Sociology of Law”

John P. McCormick

Weber, Habermas and Transformations of the European State

Published online: 14 May 2010

Chapter

Toward a Theory of Democratic Constitutionalism

Andreas Kalyvas

Democracy and the Politics of the Extraordinary

Published online: 4 August 2010