The Unity Thesis: How Positivism Distorts Constitutional Argument

John Lunstroth

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HOW POSITIVISM DISTORTS CONSTITUTIONAL ARGUMENTS

John Lunstroth
Research Professor
University of Houston Law Center

MPS #201M
100 Law Center
Houston, TX  77204-6060

Office:  713-743-2183
Cell:    713-412-0077

Words (counting footnotes): 22,811

DRAFT
Abstract

Democracy and civil rights are distorted and polarizing ideas that pit the rich against the poor, and should be abandoned in favor of an emphasis on the common good. To reach that conclusion I argue the US Constitution is and has always been designed to protect the wealth of the ruling class. All political associations or states have this as a central idea.

My argument rests on a unique jurisprudential principle, the Unity Thesis. The main school of legal theory, positivism (the science of law) is based on the idea law is always separate from morals. I argue the opposite, that law cannot be understood apart from the moral. There are fundamental legal things, such as consent, iustum bellum and the state, that have persisted since classical times in our legal regimes. However, the Enlightenment acted to refract those legal things into a scientific part and a moral part. All positivist (or scientific) legal concepts, such as the Enlightenment idea of a constitution, have to be reunited with their moral part in order to be properly understood. The unified legal thing out of which constitutionalism emerged is the state, and is associated with the Hobbesian/Lockean individual, social contract theory, inalienable rights, implicit consent, popular sovereignty, slavery, the constitution, limited suffrage, the electoral college, and oligarchic control. The moral part of the US Constitution is democracy and civil rights; the legal part oligarchy. If we merge the various meanings back into the idea of the state (as a legal thing), then we see democracy/rights continue to enable civil discord by unbalanced focus on the Hobbesian individual, and that instead we should focus on the common good.
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1. INTRODUCTION: THE ENLIGHTENMENT AND THE UNITY THESIS

Between about 1650 and 1815 a way of understanding the natural and human worlds developed that still holds powerful sway. That period is known as the Enlightenment, and the special way of understanding nature “science.” This paper is about the effect of scientific thinking, or positivism, on legal things. I argue that under Enlightenment values legal things were split into a scientific part or artifact, and a prudential part or artifact. I develop an interpretive principle,

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1 Thanks to Jessica Mantel and Jessica Roberts for providing useful comments. An earlier version of this paper is posted at www.academia.edu as “History and Characterization of the Law: Just War and Other Legal Things in the Age of Positivism.”

2 This paper addresses theoretical issues I encountered in an unfinished critique of just war doctrine (iustum bellum). I rely heavily on the structure of Alasdair MacIntyre’s argument about the Enlightenment project in After Virtue, although I read MacIntyre after I had read Ian Hacking and Michel Foucault, and it is to Hacking that I trace my interest in the historicist approach.


4 Positivism has many meanings. See e.g., PETER HALFPENNY, Positivism and Sociology: Explaining Social Life (Gregg Revivals. 1992). (describing 12 kinds of positivism).

5 I use the word “prudential” instead of the usual “moral” because “moral” is at once too limited and too broad. Originally, moral translated ethics into Latin, but in the Enlightenment it became a residuary category for politics, justice, ethics, right and natural law, and it somehow has acquired a unique association with the Christian idea of evil. Natural law disappeared by the end of the Enlightenment, and by the end of the 19th century the moral came to have almost exclusively negative connotations from the scientific point of view. ALASDAIR MACINTYRE, After Virtue: A Study in Moral Theory 38-9 (University of Notre Dame Press 3rd ed. 1981/2007). JEREMY WALDRON, The Decline of Natural Right, in The Cambridge History of Nineteenth Century Philosophy (Allen Wood & Songsuk Susan Hahn eds., 2009). I want to make it clear I am making a secular argument. See Part 2(b). Natural law and the moral order are now seen as the same thing by positivists. H.L.A. HART, The Concept of Law 185 (Clarendon Press 2 ed. 1994). (... a question [that is said to concern the relation between law and morals] … may still be illuminatingly described as the issue between Natural Law and Legal Positivism, though each of these titles has come to be used for a range of different theses about law and morals).
The "Unity Thesis", to accommodate the changes in legal discourse brought on by the scientific worldview, and then apply it to the Constitution of the United States ("Constitution").

The focus of the paper is on legal things. A legal thing can be a law, a legal system or a legal concept. I refer to three specific legal things in the course of making my arguments: consent, just war, and the state. Consent is in the nature of a right, just war of a legal doctrine or law, and the state of a comprehensive legal system. Consent and just war play minor roles, but the idea of the state and constitution play major roles in my arguments.

I use the phrase "legal things" because as I studied the effects of the Enlightenment on legal discourse, I realized that the changes were so profound one almost has to start over with a new descriptive language for the law. Now, at this point we should notice that I am talking about history, or doing history. I am saying that there were legal things before the Enlightenment, and that the Enlightenment acted on them, and afterwards the legal things were changed, in some cases unrecognizably disconnected from the thing they were before.

As I work through a description of the Enlightenment ideologies, of the values of science, we will encounter the positivist rejection of history as a source of valid explanations of things. Science is ahistorical, or at best utopian, in which the most accurate knowledge of nature is yet to be discovered. This raises a problem for my analysis, since my readers will one and all be steeped in scientific sensibilities, for them the idea history can be of fundamental importance in understanding the law will seem outdated, if it has any validity at all. I discuss this and some other theoretical issues for the purpose of managing the scientific worldview in Part II. I want to alert you to those problems, and now return to the idea of the legal thing and the problem of talking about the law in the scientific age.

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6 Part 3(a)
7 Part 3(b & c)
8 Part 5
9 An example is Dworkin’s *summa*. He does a masterful job of explaining a state (as I define the term below), and yet his historical references are practically nil. Had he anchored his work in the history of philosophy, he would have had to acknowledge his great debt to Aristotle and Hegel. However, he studied under Hart, and in the Oxford of the time legal philosophy was heavily influenced by positivism. RONALD DWORKIN, *Justice for the Hedgehogs* (Harvard Universities Press, 2011). A.W. BRIAN SIMPSON, *Reflections on The Concept of Law* (Oxford University Press, 2011).
10 By the scientific age I mean the entire period from the origins of empirical science in the 16th and 17th centuries, as glorified by the Enlightenment and received by contemporary thinkers as naturalism or positivism.
Although the Unity Thesis can be applied to all legal things, the importance of it as an analytic or interpretive tool is much less with some kinds of legal things. Before typing legal things though, I have to say some more about the English word “law.” Since English only has one word for the many things law can be, and since positivism dominates legal discourse, “law” is, or seems to be, synonymous with positive law. But the positivist definition of law is so limited or contentious it is not helpful. However, when we look outside of English we find that most languages have two words for law. I use the Latin terms, *ius* and *lex*. *Lex* is the familiar positive law, so what is *ius*? Historically *ius* is a very complicated word, but let us put that aside for the moment. Instead of asking what *ius* is, let us ask what the law is, but not in the sense of positive law. That is, why do other languages (including most Indo-European languages, Chinese and Arabic) have at least two words for law? What could they possibly mean by the other word? Often *ius* is translated as “right”. That is a correct translation, but it is not the main translation, which is “law”. For complicated reasons I explain below, the core idea of *ius* is that it consists of *lex*, or a system of *lex*, and it includes the purposes for which the *lex* exists. Those purposes are always ethical, in which ethical invokes right, justice, the moral and the political. In other words, in positivist terms, *ius* is *lex* plus the morality of the *lex*. There is no *lex* without *ius*. Therefore, I argue positivism distorts all legal arguments because it denies the identity of *ius* and *lex*, but to understand legal things we must recognize the unity of their scientific and prudential artifacts. That in short is the “Unity Thesis”.

The Unity Thesis holds that the separation of law and morality in all cases leads to misunderstandings about the law because the category of the moral, a residuary category, is artificial and confusing. The confusion arises from Enlightenment ideologies about nature and science that were improperly applied to the ethical order. The unity thesis holds that when the confusion is sorted out, it becomes clear that the two artifacts of any legal idea, the scientific and the prudential, must be rejoined if the underlying legal thing is to be understood properly.

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11 In general, I use the word “law” in the paper in the broad sense of right (*ius*), not in the narrow sense of scientific law (*lex*). HLA Hart defines *ius* as the narrower idea of law, but his reading of these meanings must be rejected; they stand common sense on its head. *Lex* is the narrower meaning, because *ius* refers to the political/moral context of the law in addition to the *lex*. See HART, 207-12.

12 Simpson discusses this in his interesting history of Hart’s *The Concept of Law*. SIMPSON, 86. (… in [Hart’s] famous exchange with Lon Fuller over the vehicle in the park he doggedly maintained the view …[that] … whether a particular thing was a vehicle should be decided without reference to context. In particular any use of the supposed purpose of the legislation was not to be treated as relevant. All you needed was the word, and the normal conventions of ordinary language. Citing HLA HART, *Positivism and the Separation of Law and Morals*, 71 Harvard Law Review 593, 607 (1958). )
Now I can distinguish two kinds or types of legal things. From a historicist perspective we observe that legal things can be described on a continuum from the long-lasting, fundamental or structural to the accidental or contingent. The more fundamental a legal thing is, the stronger its \textit{ius}. The more historically contingent legal things have stronger \textit{lex}. A constitution is a law with strong \textit{ius}, a speed limit one with strong \textit{lex}, yet in neither is there one without the other. The Unity Thesis is most helpful with fundamental legal things, such as the idea of the state, consent, and just war. Those are the kinds of legal things that do not sit easily within the positivist limitations on what it means to be a law. For example, is the Constitution only the words written at the time with their original meaning? Is it a living thing? Is it alive and dead at the same time? Is it something to have faith in, some kind of deity? Or is it a fiction, or invisible, or something new?

I applied my analytic methodology without knowing what the outcome would be, and was surprised at what I was forced to conclude. The US has always been an oligarchic political association, first as a colony and then as a state, not a democracy concerned with inalienable rights, and that will not change. In other words, America has always had, and will always have, an oligarchic constitution. To understand the implications of that, and to ameliorate the negative outcomes for the many that are characteristic of oligarchy, we have to disentangle how we came to be convinced we are a democracy that protects inalienable rights.

The very idea of the “constitution” was by the late 18th century the outcome of a pre-positivist splitting of a legal thing, the state and the idea of the common good. The prudential fragment

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15 JACK M. BALKIN, Living Originalism (Belknap Press 2011).
18 Oligarchy, which I discuss below in Part 4, is on Aristotle’s account a degraded form of constitution in which the few/rich rule for their own benefit. See generally, JOHN MCCORMICK, Machiavellian Democracy (Cambridge University Press. 2011).
19 See Part 5. Actually, the common good was a notable feature of political discourse among the Founders, distinguishing the goals of anti-democratic republicans. See e.g., RUSSELL HANSON, Democracy, in Political Innovation and Conceptual Change 68. 77, (Terence Ball, et al. eds., 1989). That is one of the features of the earlier theory of the state that kept on functioning, but now in an entirely different context of Hobbesian men, and other scientific things.
of the state that would become the root idea of our constitutionalism is based on the Hobbesian individual who enters into a social contract thinking only of his own self-interest. Democracy and inalienable rights were his safeguard from the state and each other. The scientific fragment, the document itself, established rule by the wealthy few. A conflict was established in the formation of the American state: the document was said to embody one thing, when it embodied something else. It would have been very unusual had the oligarchs allowed the many to rule, either directly or through a democratic republic. Oligarchic rule is a feature of most, if not all, states. If we bring the prudential and scientific parts of the Constitution together, democracy and rights merge with oligarchy to form a common identity that can focus on common goods. The autonomous citizen who is fully in charge of their destiny is transformed into a dependent political being whose life is embedded in a complex unified matrix of meanings and values focused on the other. The greatest virtue becomes compassion, not self-interest.

In Parts 2 and 3, I develop some of the theoretical background for the Unity Thesis. Readers with little philosophical background or interest can skip those parts, and move directly to Parts 4, 5 & 6. In these latter parts of the paper I examine the US Constitution in light of the Unity Thesis. In Part 4, I describe the relevance of the Enlightenment and introduce enough of a historical narrative to identify the meanings associated with the legal thing, the state, that was split by Enlightenment processes. In Part 5, I explore the implications of the Unity Thesis for understanding the Constitution, in the process elucidating the Thesis itself. In the Conclusion, Part 6, I speculate on how democracy and civil rights require a tension between the rich and poor, the few and the many, whereas a vision of a unified American Constitution and the common good requires the few and the many to identify with each another. Instead of battling each other for competing interests, maybe Americans could focus on what’s good for everyone and cooperate in achieving that good.

2. THE NECESSITY AND NATURE OF HISTORY; HISTORY AND THE LAW

... a vague memory has no power against the vitality and freedom of the present.20

Some general comments about my approach to history are necessary.21 The project of justifying a position on the problem of the universal (the one) and the particular (the many) is far beyond

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the scope of this paper. However, anyone with a philosophical nature who dwells on the past quickly encounters the strangeness of history. It is about the past but everything we know about it exists in the present. It appears we are constrained by nature from existing either in the past or in the future, although if we look closely at the whole enterprise of knowing we might be forgiven to thinking it exists entirely just in the immediate past. When we stop being in the present, we turn our attention to memories, sensations, feelings, thoughts, language, and other phenomena and it is easy to think that means we are in some kind of past, or non-present. We might ask, where are we when we are not engaged here and now? For that matter, where are we when we do engage in the here and now? As we turn to these questions it should be clear that we are on the verge of a theory of the person, or a theory of mind, or some kind of overarching coordinating theory about life. Western philosophy does a spectacularly bad job of dealing with these questions, with perhaps the exception of Aristotle and Hegel. In any event, I am only interested in these questions as mechanisms to open the mind of the reader to a broader idea of history, to sensitize the reader to the idea history is more than factual accounts of what happened in the past.

a) THE UNIVERSAL AND THE PARTICULAR

A set of inquiries that flow from the foregoing concerns itself with the identity of what we are paying attention to, thinking about, seeing, feeling or otherwise experiencing. We can group together the answers to these inquiries as history. History is more than mere recitations of things that happened in the past. Aristotle says that “poetry is something more philosophic and graver import than history since its statements are of the nature rather of universals, whereas those of history are singulars. By a universal statement I mean one as to what such or such a kind of man will probably or necessarily say or do ….”22 Here Aristotle introduces the notions of the singular and the universal in the discussion of history, but his explication is not entirely useful because he does not develop the idea very clearly. Much later Hegel does develop the idea in a useful way. He reflects that there are three “methods of treating history:

Original History
Reflective History
Philosophical History.”23

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21 I have been deeply influenced by Alasdair MacIntyre’s approach to and uses of history, and to the importance he ascribes to Aristotle in After Virtue, although I do not share all of his perspectives on either. 22 ARISTOTLE, 2323 (1451b5-8) § 2 (Jonathan Barnes ed., Princeton University Press 1984). 23 HEGEL, 3.
“Original historians … transform the events, actions, and situations present to them into a work of representative thought.” But the scope of such histories is limited, because

… their essential subject is what is actual and living in their environment. The culture of the author and that of the events created in his work, the spirit of the author and that of the actions he relates are one and the same. … He is not concerned with reflections about the events. He lives the spirit of the events, he does not yet transcend them.”

Hegel holds up Herodotus as an exemplary original historian, and it is also to Herodotus that Aristotle looks as his model historian.

In the history of an idea that ranges over hundreds of years, such as just war, original history is not possible. Hegel is well aware of that, and it is in his other categories that we see histories that look more familiar. I believe we are safe in understanding Aristotle’s comments about poetry to apply to the categories of reflective and philosophical history, for although in these “thinking is subordinate to the data of reality,” as it must be in history, yet there is no way to avoid the intervention of the historian’s predilections and culture, his creativity and reason, in these histories.

The category of reflective history, “that kind of history which transcends the present – not in time but in spirit,” has several subcategories:

- Universal
- Pragmatic
- Critical
- Fragmentary

Universal history concerns itself with surveying long periods of a people, a country or the world. It covers so much material it “must give up the individual representation of reality and abridge itself by means of abstractions, not only in the sense of leaving [things] out,” but also by concentrating great things into simple thoughts or sentences. For example, Livy simply says of a series of important wars: “This year war was carried on with the Volsci.” This kind of history can be closely linked with original history.

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24 Id. at, 4.
25 Id. at, 10.
26 Id. at, 3-10.
27 Id. at, 7.
Pragmatic history is written when, after study of the past,

“… there opens up for the mind an actuality which arises out of its own activity and as a reward for its labor. The events are many, but their universal idea and their inner connection are one. This nullifies the past and makes the event present.”

This is extremely interesting, as Hegel begins to describe the method by which history becomes abstract. The historical events continue to exist in their historical space, but the understanding of them not only extends over the events themselves, it extends into the present.

“Here belong, in particular, moral reflections and the moral enlightenment to be derived from history, for the sake of which history has often been written.”

When the historian links the events under consideration with a unifying idea, he is not only linking them to the present, he is engaging in a moral undertaking. Hegel warns us though not to think these kinds of history necessarily affect political leaders to do the right thing, because

“in the turmoil of world affairs no universal principle, no memory of similar conditions in the past can help us – a vague memory has no power against the vitality and freedom of the present.”

Only the “deep understanding” of, e.g., Montesquieu in Spirit of the Laws, can make such reflections “true and interesting.”

Critical history is history of historiography, and not relevant.

Fragmentary history “is abstractive but, in adopting universal points of view – for example the history of art, of law, of religion – it forms a transition to the philosophical world history.” This kind of reflective history is “conceptual,” and if it

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28 Id. at.
29 Id. at, 8.
30 Id. at.
31 Id. at. Hegel takes the opportunity to reflect on the difference between German and French historians, noting that “[w]e Germans are content with [pragmatic histories]; the French, however, spiritedly create a present for themselves and refer the past to the present state of affairs.” Foucault’s “history of the present” is surely an example of this.
32 Id. at. 9.
33 Id. at.
“succeeds in presenting general points of view and if these points of view are true, it must be conceded that such histories are more than the merely external thread and order of events and actions, that they are indeed their internal, guiding soul.”34

Here we find the history of the law. Law is both deeply historical and deeply teleological or purposive. It arises from custom and through such historical processes as legislation, judicial decision and juristic reasoning. It is intended to guide the development of history, of the particular. As such it is also deeply philosophical. This kind of history, fragmentary reflective history, provides the bridge to the third method of history, philosophical history.

Hegel begins by pointing out that original and reflective history need no justification, “their concept was self-explanatory.” Then, even though he suggests philosophical history could have the seemingly unproblematic definition of “the thoughtful contemplation of history,” he moves into his complex territory.35

“In history, thinking is subordinate to the data of reality, which latter serves as guide and basis for historians. Philosophy, on the other hand, allegedly produces its own ideas out of speculation, without regard to given data.”36

The danger then, in philosophical history, is to avoid shaping history by preconceived philosophical commitments. Hegel “explained and refuted” this problem in the bulk of Reason in History: A General Introduction to the Philosophy of History. The “simple concept of Reason,” he says, is the “sole thought which philosophy brings to the treatment of history.”37 He follows this opening statement with a most complex description of Reason, the details of which are not important for this paper. In short, Reason, as a philosophical matter, is “the infinite content of essence and truth,” and it is “infinite form, for only in its image and by its fiat do phenomena arise and begin to live.”38 We can perhaps, safely think of Aristotle’s ideas of substance and of final and formal causes here; Reason as logos. Hegel will operationalize this idea of Reason in history through the idea of “essence and truth,” since “history is supposed to understand events and actions merely for what they are and have been, and is the truer, the more factual it is . . . .”39

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34 Id. at, 10.
35 Id. at.
36 Id. at.
37 Id. at, 10.
38 Id. at.
39 Id. at, 9.
I am less concerned with the accuracy of the details of Hegel’s taxonomy of history, than with the clarity with which it demonstrates how ideas or reason operate in the construction of history. In the age of science, the Enlightenment and post-Enlightenment period, we value, as Hegel points out, history to the extent it is “true,” and we understand truth to be related to the accuracy of the “facts.” Whether we agree with Hegel or not, what I think he effectively does is show that regardless of what kind of history we do, we must use reason to thread the facts together, and as the subject of the historian becomes less temporally, spatially and culturally confined, the more reason plays a role. Hegel also points out that history becomes connected to morality through reason. Although in the discussion above morality is mentioned only in relation to pragmatic histories, elsewhere in Hegel we understand that Reason and morality are deeply linked through the institution of the state.40

What Hegel was getting at is that the identity of the historical thing is more or less a product of reason. Just war, e.g., began life as a thing of reason, and throughout its life it has been continually used, renewed, restricted and/or expanded through reason. Therefore, when the context and powers of reason changed in the Enlightenment, just war (i.e., iustum bellum, the Augustinian law of war) changed also; as did every other prudential concept. After the Enlightenment living things as a class could only be operated on by reason in a certain, restricted way.41 This restriction of reason, linked to a reduced vision of nature, including human nature, was universal in the Occident, and would become universal in the world after WW2 through the ideology of science.42 Science, especially the science of living things, law, political theory, the social sciences and other bodies of knowledge about living things, and philosophy itself, were all distorted, or limited, in the Enlightenment transformation of reason.

40 See e.g., G.W.F. HEGEL, Elements of the Philosophy of Right (Allen W. Wood ed., Cambridge University Press 1991). Hegel, through his theory of the state, has been understood to, and argued he did, destroy the idea of natural law, in the sense natural law represents some kind of universal. He argued that Right (ius) is the reason of the state expressed through its will, it is the essence of the ethical state, and therefore. ALESSANDRO PASSERIN D’ENTREVES, Natural Law: An Introduction to Legal Philosophy, 72-4 (1951). (Recht or ius Hegel defines in the most extensive sense as the realization of “free” or “ethical” will.) In turn, Hegel got the idea of the “general will” from Rousseau. Id. at, 75. It is not clear to me that there is a substantive difference between understanding natural law to emanate from or inhere in nature or human nature or thinking of it as emanating from or inhering in the state or history. In both cases law can be understood as essence or form. It may that Hegel was not fighting the Aristotelian idea of natural law, but the Christian one, in which natural law was a kind of downgraded divine universal law, that like divine law did not inhere in nature. WIL WALUCHOW, Constitutionalism, The Stanford Encyclopedia of Philosophy (Fall 2008 Edition), (2008). I lump together all non-positivist theories of law into the phrase “natural law” for simplicity in this paper, although that usage violates some important theoretical boundaries.

41 See discussion in Part 4 below.

This means, I think, that no “fact” or other form of knowledge or science about anything in these categories can be said to be complete unless it can be demonstrated it does not belong to the family of knowledge growing from one of the positivist fragments.

The idea of the universal runs through the discussions in this section. Reason and law are associated with it; perhaps can be said to exist closer to the universal than to the particular. And yet, as Hegel argues, following Aristotle, if we understand things as having essence, intrinsic identity, then it is through that identity that the particular and the universal are linked. That analysis is impossible for the positivist because positivism, the child of the Enlightenment, does not admit essence. It is easy to understand law as something universal, albeit universal for a time and place. We call it jurisdiction; and we look to the law so constituted to generate and maintain order. We generalize that vision of the law, or coordinate it, with political theory and ideas of justice; and perhaps we can think of those as broader universals functioning in their time and place.

Can the universal or the law exist without history? Some argue that to the extent something is universal it is ahistorical (Platonic form), but without history of some kind it has nowhere to exist (Aristotelian form). This raises questions of substance and form that have long plagued philosophers. Scientism holds that there is only physical matter and accident, and accordingly neither the possibility of history or universals, at least not in the sense history has anything to do with reason and human events that unfolded to some degree as a consequence of choice, free will. More abstract eastern theories, such as Advaita Vedanta, understand consciousness as a formless entity which exists prior and superior to all form and substance; therefore all animate and inanimate things are imbued with varying degrees of consciousness or essence and are subject to the rules of dharma or law, and therefore history, as a condition of their kind of existence. As a philosophical matter, to do the kind of history of the law we have been considering it is not necessary to adopt a position regarding the universal and the particular, other than to avoid positions in which the only that exists is the universal or the particular. For example, scientism, or legal positivism, must be rejected a priori, otherwise there is no history.

b) Right and evil

Earlier I said I use the word law broadly, and want to emphasize that, especially in light of the discussion about the universal and the particular. We have seen that the word moral is

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44 See note ___, [on Right=ius]
problematic in at least three ways. As a fragment set afloat on the surface of history by the Enlightenment we understand it as being historically contingent. As the word positivists use to describe the thing law is not, we both give it more than it’s due, and at the same time strip it of meaning. As a word created in a Christian matrix, it evil is connoted by the label immoral. So, when I say I want to include the moral in the definition of law, what I am not saying is that I want to include a disabled concept with connotations of evil, but that I want references to the law to include references to secular right, justice and political theory. When I use the word law, I mean by it secular right, ius, Recht, etc.

Although we do not get the word moral in its modern sense until the 17th century, I argue that when Augustine philosophized the Christian state he set up the ideas about right and wrong that would eventually be encapsulated or spun off in the idea of the moral. This bears directly on the idea of e.g., just war.

Augustine incorporated the idea of evil into the law. Evil is the thing that keeps the Christian from heaven, from the blessings of eternal life promised by Christ. This notion of the bad, or wrong, arises in the context of a different historical sensibility than that found in non-Judeo-Christian thought. The Christian life was unidirectional, the end clearly defined. Evil was to be fought at all costs, for it kept the Christian from his righteous end. Cyclical ideas of life lead to an entirely different sense of the wrong, the unethical. Wrong could lead to suffering, but suffering is far from being evil, even if causing it or being tremendously unjust was widely understood to be a bad thing. It is the presence of evil in just war that is the cause of its being so problematic; and it is the presence of evil in the idea of the immoral that makes moral discourse so problematic. The idea of evil is an historical idea, and an historically contingent idea, and to the extent we can extirpate it from the law we are freeing ourselves from a kind of oppression. If being unjust or immoral is not the same as being evil, then the stigma of unjust or immoral can no longer legitimate, underwrite or mask the kinds of claims about the other that drive the incredible cruelties and violence that the Judeo-Christo-Islamo tradition drives. If we are going to be tyrannical, let us just label it for what it is, tyranny, gross violations of human rights, injustice; but let us not think it evil for then we mask our own drive to tyranny.

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45 MA C I N T Y R E, 38. ; see also note ____.
47 MACINTYRE, 176.
So by the word law I mean to invoke a family of meanings about right and wrong that does not connote evil in any way. I intend to speak of law more globally, temporally and spatially, and to the extent possible remove the religious currents that still distort it. I mean to recognize and utilize the intimate connection between law and history.

c) IDEOLOGY AND CRITIQUE; GENEALOGY, ARCHEOLOGY AND HISTORY OF THE PRESENT

Once positivism dominated reason, then a new set of problems presented themselves to philosophy and history. They were challenged by sociological and political structures in a dis-coordinated metaphysical space. In response, as I have noted, things were no longer what they seemed to be. Perhaps this is truest of things defined by positivism, as those things were no longer understood to include their metaphysical parts. There were no longer essences, ends, moral or inner nature.

Historians and philosophers found new [positivist] ways to describe the world, in which their central claim revolved around the idea that the insightful or thoughtful observer could reveal that things we relied on to be true were in fact not true. This is not the same as claiming there is some inner knowledge that only the philosopher/historian has access to, as there is no inner nature to things. Rather, the trained observer looks to various institutional, sociological, linguistic, political, legal, cultural and other structures and languages to disclose through careful and creative analysis that what we thought is true is not, or who we thought had power did not, or who we thought we were we were not. The idea of power also plays a central role in these structures, as it is in the ends of those with power that we now discern truth or meaning, or the origin of structures that define and convey truth and meaning. Ideology is how we identify the misleading thing, and critique is what we do to disclose the ideology, and ultimately the “real” driving forces behind the things that have power in our lives. We still look to the telos as the identity holder, but now the telos exists in our environment, especially in those individuals, institutions or structures with power. Marx, Neitzsche, and Freud are fathers of ideology/critique; and Mannheim, Geertz, Foucault and others developed the idea.  

Foucault is the historian/philosopher par excellence in this field. He developed the notions of history as archeology and genealogy, and described writing a “history of the present.” These kinds of observations are only possible, I think, when doing what Hegel called reflective fragmentary history, when tracking the transformations an idea can undertake. Perhaps the narrative of how the ideas of consent and just war are institutionalized in constitutional legal

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48 See Harcourt note
regimes engage history as genealogy or archeology to the degree those institutions or structures become the context of truth against or within which further subordinate histories unfold. Be that as it may, what is important about the concepts of genealogy and archeology is that in an important way they are histories of the present. A history of the present is an excavation of the past in order to understand something moral/political about the present. I have argued that post-Enlightenment thought is all ideological, and here I extend that thought by arguing that all histories of ideology are histories of the present. Hegel was certainly aware of this kind of history, describing it as a form of reflective pragmatic history. When the historian finds the inner connection between past events, that connection “nullifies the past and makes the event present.” Although Foucault worked from a metaphysics that may have been unrecognizable to Hegel, inasmuch as for Foucault meaning emanated from power, structure and language onto a nature without essence, nonetheless Hegel well understood the kind of history at the heart of Foucault’s project. Because histories that relate to the Enlightenment all have ideological components, all such histories are to some degree histories of the present, histories with moral/political overtones.

d) Utopia

An idea can be a kind of utopia. Utopias can be found in the past as well as the future. Platonic, Baconian, and Marxist utopias are of the future; as is human rights. Classical Rome and Greece, and all the other Edens and Golden Ages, have been or are utopias of the past. Utopias can be concerned not only with socio-political life, but with states of knowledge. We often see perfect states of knowledge in the past that we strive towards today associated with religion in the West; but in the East we find also them associated with prudential knowledge, e.g., with the highest medical knowledge in China (The Yellow Emperor's Inner Classic (huangdi neijing) and Divine Husbandman's Materia Medica (shennong bencao jing). These works are “canonical in status, that is to say they are considered to contain a revelation of the wisdom of legendary sages.”

That revealed knowledge will always define the best way to practice Chinese medicine.

Just war is, for some historians, a utopia of ideas or knowledge, and what Moyn says about historians of human rights is equally, if not more, applicable to them. They “approach their subject, in spite of its novelty, the way church historians once approached theirs. They regard

the basic cause … as a saving truth, discovered rather than made in history.” With its solemn use of Latin phrases, and references to immensely learned church fathers and classical jurists with exotic names, just war doctrine is fertile hunting ground for moralists who add weight to their prudential arguments without adding substance.

A utopia is an ideal or aspirational state; it is an idea that seems to be universal, of a better life, of a life that could be but for historical and other contingencies. The unified concepts I seek to elucidate are a bit like utopias. They existed and functioned in the past, they are identifiable but somehow non-existent now, and they can exist in the future. I cannot argue they will exist in the same way as they did in the 4th century BCE, or the 14th century CE, because historical circumstances will have changed too much. But I can argue the concepts are universal enough to exist in the future in a way fundamentally identical to the way they existed in the past. The unities I speak of are somewhat utopian inasmuch as they abut the universal, and things universal are always utopian. They are not utopian inasmuch as they are, by this work, being reintroduced into actual political discourse as a way of describing facts on the ground.

3. **Types of Historical Transformations (of legal things)**

There are several kinds of transformations a concept/word can undergo over the course of time. In addition, there are interpretive issues arising from the more abstract interplay between the realm of ideas we necessarily use to understand or organize history and the actual unfolding of historical events and things themselves.

The types of transformation are:

1. Morphological transformations;
2. Semantic transformations;
3. Transformation into an historical institution;
4. Transformations from changing temporal perspective; and
5. Transformations in the epistemological environment brought on by the Enlightenment.

These features overlap and interpenetrate, and although I discuss each in turn it is difficult to do so without referring to the other concepts. Features 1-3 occur in normal historical space; i.e., historical space in which no metaphysical assumptions about history change in the period of time under examination, and in which history is read for a standard purpose, either for
understanding the development of a thing over a fixed period of time, or to understand something about the present.

I use three word/concepts to illustrate my points. The first is the idea of consent, and I use it to illustrate transformations 1 and 2. The second illustrative word/concept, for transformation types 3 & 4, is just war (iustum bellum, the law of war). Today just war is represented in a complex discussion among philosophers, political scientists, sociologists, anthropologists, and historians who are trained in or opine on morals or ethics; international lawyers; and military thinkers. Military thinkers study just war in search of reasons for military acts; international lawyers study it as a set of legal doctrines to be applied in various circumstances; and the others moralize about it because they feel no-one else is paying sufficient attention to the problematic of war, it excites them in some way, or they know little about it.

I discuss Enlightenment transformations in their own section, Part 4, since they are the focal point of the paper. I use the concept of state to illustrate those transformations.

a) MORPHOLOGICAL AND SEMANTIC TRANSFORMATIONS

When tracing a concept/word through very long time periods form and meaning will change. Changes in form occur as language develops, or the concept/word is assimilated into another language. Changes in meaning occur as the context and function of the word/concept develop.

I illustrate using the concept/word of consent. Consent began life, for our purposes, in Justinian (c. 526-532), in which it reflects a rule in the law of guardianships recognizing the power of guardians:

"Necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur. (It is necessary that everyone exercise his own authority so that what touches everyone may be approved by everyone.)" Justinian's Code 5.59.5.2

In the late middle ages it gets refracted through Gratian (c. 1148) into important and formative juristic writings, both in canon and civil law.

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Gratian, D.12 c.6 (Justinian's Institutes 1.1): “Diuturni mores consensu utentium approbatis legem innitatur.” (Long standing usages (mos) approved by the consent (consensus) of those following them are like ordinances (lex)).

Pope Boniface VIII (1294-1303), Liber Sextus, 5.12.29: "Quod omnes tangit debet, ab omnibus approbari (What touches all must be approved by all)"

It was familiar in English common law by 1251 (“quod enim omnes angit et tangit ab omnibus debet trutinari.”), and in 1295 the English king, Edward I, in an election writ, transmuted the principle from “a mere legal maxim into a great political and constitutional maxim.”

In origin the concept is primarily associated with the Latin cognate for “approval,” and in some circumstances with the Latin cognate for “consent.” More importantly, the concept is associated with a phrase that in time is shortened to “quod omnes tangit.” It is not just one word, it is a concept. By the end of the Enlightenment it was broadly disseminated through private and public, constitutional and international, law and legal institutions. Today its

53 TIERNEY, 24-5.;

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57 Brian Tierney captures the idea of how such an idea is acted on by historical processes when discussing why the generations after Grotius saw him as an innovator, the founder of new theories of rights and international law, when much of what he said is found in earlier scholastic jurists. BRIAN TIERNEY, The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law: 1150-1625 339 (John Witte Jr. ed., William P. Eerdmans Publishing Company. 1997). (To say that Grotius merely restated old ideas in a new way might seem to trivialize this work, but that would miss the point of his achievement. … Grotius was deploying old arguments, not only in a new idiom, but also in a changed context where they took on new meanings and found a new significance.). It is the basis for all private corporations. POST.
meaning is generally either confined to discussions in the health sector,\(^{58}\) or it is discussed in the way one discusses a constitutional principle.\(^{59}\)

b) Transformation into Socio-Political Institutions

\textit{iustum bellum} developed in the Occident as a way to address certain politico-legal problems that later disappeared because they had been solved more generally in the development of the legal system as a whole.\(^{60}\) The main problem \textit{iustum bellum} was developed to solve was the legality or legitimacy of going to war. If the sovereign did not follow divine and/or natural law, then the loss of grace and eternal life was a real and present threat.\(^{61}\) As I argue elsewhere, the reasoning of the jurists on this matter were the law of war, \textit{iustum bellum}.

Jurists provided the \textit{iustum bellum} until the early 20\textsuperscript{th} century, although the Enlightenment brought changes that resulted in the widespread acceptance and practice of legal positivism. As secular constitutional order and democratic ideals spread, as absolutism seemed to fade, and legislative bodies grew in importance as sources of law, the need for \textit{iustum bellum} in the sense of a set of discriminatory doctrines to guide absolute sovereigns simply disappeared in the increasingly complex positive legal/moral procedures and systems of the sovereign state, and relations among sovereign states.

Through the same period international law remained a parochial, but increasingly influential set of institutions among Occidental states until the 20\textsuperscript{th} century, when its forms, in fits and starts, motivated by the two world wars, did indeed become universal in the UN Charter, the primary


\(^{60}\) The world of the late Middle Ages, in which \textit{iustum bellum} was refined by the jurists, consisted of three spheres: the Occident, what would become Western Europe; the Orient, the eastern Christian domain, and the Islamic political entities. International law as we know it developed exclusively among the states of the Occident, and did not achieve universality until the advent of the UN Charter. WILHELM G. GREWE, The Epochs of International Law (Michael Byers trans., Walter de Gruyter. 2000). ANTONIO CASSESE, International Law (Oxford University Press 2nd ed. 2005).

\(^{61}\) The reality, and enforcement power, of such an idea is central e.g., to Whitman’s portrayal of the ethical problem faced by judges and jurors, and is discussed in numerous places in his book on reasonable doubt. It was a significant feature of legal/political life well into the 18\textsuperscript{th} century. WHITMAN.
purpose of which was to regulate war, after the false starts of the League of Nations and the Kellogg-Briand Pact.  

Certainly at the international level jurists still play a role in developing law that is denied them in constitutional order, but it is the least important source of law, only playing a supporting role in interpreting treaties and customary international law.  

c) TRANSFORMATIONS FROM CHANGING TEMPORAL PERSPECTIVE

History can be told both from the present towards the past, and from the past towards the present. I will recapitulate some of my research into the history of just war (ius ad bellum) to describe this kind of transformation. Kolb, a younger contemporary historian, informs us that the twinned Latin phrases *ius ad bellum* and *ius in bello*, by which we understand just war doctrine today, in all likelihood were coined in the early 1930s by Josef Kunz, an international lawyer and scholar active from the 1920s through the 1960s. I identified Michael Walzer’s 1977 work, Just and Unjust Wars, as a key staging point for the popularity of the twinned doctrine, and I wanted to draw a defined historical line from Kunz to Walzer as part of the argument. As I investigated Kunz and his contemporaries, I saw that many of them characterized the 19th century as a period in which there was no law of war, no *ius ad bellum*, no *ius in bello*. This led me to understand the 19th century advent of the Geneva Conventions (*ius in bello*) a certain way. I could argue that what we understand in the twinned doctrine as *ius in bello* could not have come into existence unless there was no *ius ad bellum* (*ius ad bellum*).

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62 Grewe. Some see the UN Charter as a symbol of the end of international law because it represents an institutional and categorical shift in the idea of sovereignty. After it all sovereigns are subject to constitutional Charter law which establishes a policing function for the Permanent Five. That P-5 have in many ways disabled or instrumentalized the policing function is in significant ways beside the point.

63 See e.g., the Statute of the International Court of Justice, Art 38(d), which provides that “the teachings of the most highly qualified publicists of the various nations” are the least important sources of law and should be used only “as subsidiary means.”

64 Robert Kolb, Origin of the Twin Terms Jus ad Bellum/Jus in Bello, 320 International Review of the Red Cross 553(1997). In fact, it was probably one of Kunz’s professors at the University of Vienna who coined the terms. Heinrich Lammasch, Unjustifiable War and the Means to Avoid It, 10 American Journal of International Law 689(1916).


66 N Berman quoting someone else who thinks this; ditto Kolb.
Thus, to make the argument about the nature of *ius in bello*, that in the presence of *ius ad bellum* it does not make much sense, for reasons I go into at length elsewhere, I take Kunz et al’s assessments about the state of the law of war in the 19th century at face value. That is, I gaze back into the 19th century through the historical assessment of Kunz et al, and take their assessment of the law of war as of about 1815 at face value in interpreting the events of that period. But I can change perspectives and look forward from antiquity through Augustine and Gratian into the Enlightenment. I gaze forward into the law of war in the 19th century, and from the perspective of the past have to take into account the Enlightenment, since I must look right through it. From that perspective I can draw a quite different conclusion about the law of war in the 19th century; rather than concluding there is no law of war, I can argue that indeed war was entirely legal, that the absence of law is not the absence of legality. In the classical period of international law and statism, states could war at will; war was legal.

I could make that argument in any event, and then simply argue Kunz et al are wrong, but that line of reasoning does not quite get at the problem. The problem is not that Kunz et al were wrong, but that had they not been positivists they might have read the law of war in the 19th century differently. They concluded there was no law of war because there was no positive law of war. But what had changed was not the existence of the law of war, rather what changed was that there were no longer any restrictions on going to war, there were no *iustum bellum* rules. States had full right to war at will. The positivists concluded there was no law because there was nothing scientific to identify as law, the moral/legal piece being invisible to them. Looking forward then, the interpretation of Kunz et al can be read as containing an element of false consciousness, of being influenced by the ideologies of science and positivism.67

If we reject or bracket the Enlightenment splitting of law into scientific and prudential artifacts, then we are less apt to misread the normative environment concerning war. That is not only of antiquarian interest, it gives us better access to our own normative environment.

67 See note 30 (beginning “Marx”)
4. Transformations Brought on by the Enlightenment

During the Enlightenment (roughly 1630-1850) the discourse about right was transformed. It was one of the most momentous jurisprudential events of written history, as it profoundly affected the relationship between law, science, right, morality and history.

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68 MACINTYRE, 38. (In that period 'morality' became the name for that particular sphere in which rules of conduct which are neither theological nor legal nor aesthetic are allowed a cultural space of their own. It is only in the later seventeenth and the eighteenth century, when this distinguishing of the moral from the theological, the legal and the aesthetic has become a received doctrine that the project of an independent rational justification of morality becomes not merely the concern of individual thinkers, but central to Northern European culture. at 39). See generally, COMMAGER.

69 The introduction of Justinian's Code into the Occident through Gratian and his predecessors was of more moment; and perhaps the introduction of Christian universalism into the jurisprudential stream was of equal importance; but there can be no argument the Enlightenment deeply changed our moral/legal environment. See e.g., MACINTYRE. Of course, I do not refer to pre-Enlightenment changes in other legal systems, such as the interplay between legalism and Confucianism in China, or the legalistic trend in Indian political philosophy. See e.g. Li MA, A Comparison of the Legitimacy of Power between Confucianist and Legalist Philosophies, 10 Asian Philosophy 49. ; G.W.F. HEGEL, The Philosophy of Right (T.M. Knox trans., Oxford University Press. 1942 (1820)). However, it is clear that the Enlightenment ideology of science functions as a powerful epistemological, ontological and moral disjunction with the past in all political entities in which it takes hold. See e.g., WALLERSTEIN, 51-70. (Beginning at least in the second half of the eighteenth century, the humanist mode [of universalism] came under severe attack. Many came to perceive an inherent weakness in the claims of humanist universalism. The dominant humanism of the modern world - Western Christian values (transmuted into Enlightenment values) - was cognitively a self-validating doctrine, and therefore could be taxed with being merely a subjective set of assertions. That which was subjective seemed to have no permanence. As such, its opponents said that it could not be universal. Beginning in the nineteenth century, the other principal modern modern style of universalism - scientific universalism - consequently gained in relative strength in terms of social acceptance. After 1945, scientific universalism became the unquestionably strongest form of European universalism, virtually uncontested. at 51). Note that Wallerstein argues, along with others, that scientific universalism develops from Christian universalism. FRANCIS OAKLEY, Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas 38-62 (Continuum. 2005). ; WALLERSTEIN, 51. See also, ROBERT N. PROCTOR, Value-Free Science? Purity and Power in Modern Knowledge (Harvard University Press. 1991). (There is also an institutional aspect to the early exclusion of values from science. … In the twentieth-century formulation, propositions about “what ought to be” can never be derived from propositions about “what is”; facts cannot be derived from values. … Beginning in the nineteenth century, it becomes popular to suggest that the scientific attitude is exceptionally fitted to the resolution of social conflict. Science in this view is a great and neutral arbiter, an impartial judge to whom social problems may be posed and from whom “balanced” answers will be forthcoming. Science provides a neutral ground upon which people of all creeds and colors might unite, on which all political contradictions might be overcome. Science is to provide a balance between opposing interests, a source of unity amidst diversity, order amidst chaos. At 7,8).

Jurists were quick to develop the “science of law.” See e.g., Sir James Mackintosh, A discourse on the study of the law of nature and nations: introductory to a course of lectures on that science to be commenced in Lincoln's Inn Hall, on Wednesday, Feb. 13, 1799; Georg Friedrich von Martens, The law of nations: being the science of national law, covenants, power, etc founded upon the treaties and customs of nations in
The Enlightenment refers to a set of philosophical doctrines centered on the idea that nature has no Aristotelian or Christian essence, that nature can be known objectively, that the best way to know objective nature is through empirical science, and that metaphysics, natural law, the moral order and similar “things” are subjective, not subject to empirical techniques and

Europe, 1829; Henry Wheaton, Elements of international law: with a sketch of the history of the science, 1836; James Reddie, Inquiries elementary and historical in the science of law, 1840. The “science of law” is known to us as positivism. HANS Kelsen, Pure Theory of Law (Max Knight trans., University of California Press. 1967). (The Pure Theory of Law is a theory of positive law. … It is a science of law (jurisprudence) … at 1).

A search of Google books for the phrase “science of law” in titles returns only one hit for the 18th century, Macintosh in 1799, although Barbeyrac’s introduction to Pufendorf’s On the Law of Nature and Nations uses the phrase “science of morality.” The same search for the 19th century returns numerous (~20-40) uses of the phrase in the title of law books, as demonstrated above. A search of the exact phrase “science of law” in text or title from 1400-1800 returned only one out of 86 results prior to 1700, and that on a gravestone. Of the remaining 85 uses of that phrase the large majority occurred in the latter half of the 18th century. The same search for the 19th century returns about 19,000 hits. There are many reasons searches in Google books are not sufficient for authoritative answers to questions, but the results in this case cannot be ignored: the attitude towards and understanding of the law changed dramatically from the 18th to the 19th century. GEOFFREY NUNBERG, Google’s Book Search: A Disaster for Scholars, The Chronicle of Higher Education (August 31, 2009). ; Geoffrey Nunberg, Google Books: A Metadata Train Wreck, Aug 29, 2009, blog entry at http://languagelog.ldc.upenn.edu/nll/?p=1701. NATALIE BINDER, Google's word engine isn't ready for prime time § December 15, 2011 (2010). (http://nataliebinder.wordpress.com/2010/12/17/googles-word-engine-isnt-ready-for-prime-time).

Austin uses the phrase “science of law,” and in the same breath refers to Bentham’s use of the phrase “science of deontology.” John Austin, The province of jurisprudence determined, 1832 (Consequently, an all-important object of the science of ethics (or, borrowing the language of Bentham, "the science of deontology") is to determine the nature of the index to the tacit commands of the Deity, or the nature of the signs or proofs through which those commands may be known, —I mean by "the science of ethics" (or by "the science of deontology"), the science of law and morality as they respectively ought to be: or (changing the phrase) the science of law and morality as they respectively must be if they conform to their measure or test. At xiii,iv).(Bentham coined “deontology. "Robert B. Louden, Toward a Genealogy of ‘Deontology’, 34 Journal of the History of Philosophy 571, 573 (1996). ) Hart does not use the word science to describe what he does. HART.

In an interesting historical development then, whereas once law provided the analytic methods by which the natural sciences could develop (the Scholastic methods of textual exegesis), in the 18th century science returned the favor and provided ideological methods by which law could develop (if that is what legal positivism is). See e.g., BERMAN, 151-159. The idea of the science of law led to the late 18th and 19th century focus on constitutional-level, comprehensive, hierarchical and ahistorical statements of the law, or codes, although the idea as such did not manifest in Anglo-American jurisprudence. See e.g., FREDERICK CHARLES SAVIGNY, Of the Vocation of Our Age for Legislation and Jurisprudence (Arno Press. 1975). ROGER BERKOWITZ, The Gift of Science: Leibniz and the Modern Legal Tradition (Harvard University Press. 2005). Other types of codification though, such as legislative and non-legislative systematic compilations of existing laws covering specific sub-constitutional bodies of law, would heavily influence American jurisprudence. See e.g., NILS JANSEN, The Making of Legal Authority (Oxford University Press. 2010).
therefore nonsense or not capable of ever being objective knowledge or science.\textsuperscript{70} The apotheosis of knowledge is Newtonian mechanics, and such knowledge aspires to be ahistorical, universal. These ideas came to be collected in the word \textit{positivism} in the first part of the 19\textsuperscript{th} century.\textsuperscript{71} Positivism developed in intensity and became more restrictive under the late 19\textsuperscript{th}, early 20\textsuperscript{th}, century influence of Russell, Moore and the logical empiricists.

Ian Hacking, the philosopher of science, summarizes the key ideas of positivism:

1. An emphasis upon \textit{verification} (or some variant such as \textit{falsification}): significant propositions are those whose truth or falsehood can be settled in some way.

2. \textit{Pro-observation}: What we can see, feel, touch, and the like, provides the best content or foundation for all the rest of our non-mathematical knowledge.

3. \textit{Anti-cause}: There is no causality in nature, over and above the constancy with which events of one kind are followed by events of another kind.

4. \textit{Downplaying explanations}: Explanations may help organize phenomena, but do not provide any deeper answer to \textit{Why} questions except to say that the phenomena regularly occur in such and such a way.

5. \textit{Anti-theoretical entities}: Positivists tend to ... restrict reality to the observable [given (1)-(4)].

6. Positivists sum up (1) to (5) by being \textit{against metaphysics}. Untestable propositions, unobservable entities, causes, deep explanations – these, says the positivist, are the stuff of metaphysics and must be put behind us.\textsuperscript{72}

When science (i.e., the laws of nature) ended its formal relationship with natural law, the nature of legal discourse was fundamentally changed.\textsuperscript{73} Legal positivism, the science of law, became

\textsuperscript{70} MACINTYRE. \textit{id. at.;} See also, JOHN LAMONT, \textit{Fall and Rise of Aristotelian Metaphysics in the Philosophy of Science}, 18 Science \& Education, 862-3 (2009).

\textsuperscript{71} Auguste Compte coined the word “positivism” in his Course of Positive Philosophy (1830-1842), but the origins of the movement or ideology lay in Hume, especially \textit{A Treatise of Human Nature} (1739/40). The idea of positive law as a type of law is endemic in legal systems and can be found in the earliest jurisprudential thought. But the positivism discussed here is a metaphysical project, not a description of a kind of law, and it the word is taken up in modern jurisprudence it refers to the metaphysical project, not to the mere description of a kind of law.

\textsuperscript{72} IAN HACKING, Representing and Interviewing: Introductory Topics in the Philosophy of Natural Science 41-52 (Cambridge University Press. 1983).

\textsuperscript{73} Science is a complex word that does not refer to anything concrete. It is a genus to the many species of the different sciences. It is abstract, philosophical. Like all philosophical objects, its meaning is contested.
the dominant ideology of law. Natural law discourse went underground, and was replaced by the idea of the moral.\(^{74}\) The moral is the residue of natural law/right after its legal nature has been stripped from it. It is an ethics without political content; no right, and no power.

Since it is a dominant philosophical concept, there are innumerable philosophical arguments about its meaning, and little consensus. The Oxford English Dictionary offers a succinct and sensible outline of the taxonomy of science. The first five definitions recapitulate the historical development of its meaning and demonstrate how the meanings fit together like a Russian doll.

At its most general, the word refers to “the state or fact of knowing.” (OED, 1). Less generally, but still very general, it means “knowledge acquired by study.” (OED, 2). The third meaning in the OED is the genus (for my purposes), “a particular branch of knowledge or study.” At this level both science and morality/law are sciences.

Since science and morality were both sciences of equal standing prior to the Enlightenment, we need a more restricted meaning of the word, and the OED provides that as the fourth meaning. Science is

\[\text{[i]n a more restricted sense: A branch of study which is concerned either with a connected body of demonstrated truths or with observed facts systematically classified and more or less colligated by being brought under general laws, and which includes trustworthy methods for the discovery of new truth within its own domain.}\]

This is the level of granularity at which science is distinct from the moral order, because, naturalists assume that the demonstrated truths and observed facts can only relate to the material, physical world. Sense 5.b. in the OED captures these distinctions:

\[\text{In modern use, [science is] often treated as synonymous with ‘Natural and Physical Science’, and thus restricted to those branches of study that relate to the phenomena of the material universe and their laws, sometimes with implied exclusion of pure mathematics. This is now the dominant sense in ordinary use.}\]

Science in this sense is opposed to and rejects the moral order. This version of science is an ideology, referred to as scientism or naturalism, that is strongly associated with positivism. “Scientism” was first used in 1895 to describe the “habit and mode of expression of a man of science.” (OED, 1989). In time it came to have two, often pejorative, meanings. Friedrich von Hayek, quoted with approval by Karl Popper in 1972, said it was the “‘the slavish imitation of the method and language of (natural) science’, [especially by social scientists.]” (OED, 1989). It also came to mean, more broadly, “a belief in the omnipotence of scientific knowledge and techniques” and is used in this sense synonymously with “naturalism.”(OED, 1989).

\(^{74}\) See note 56 above [Macintyre and the history of morality]. The is/ought distinction is the clearest expression of the separation thesis. Understanding the is/ought distinction is essential for bridging the conceptual gap from a world in which natural law was ubiquitous, to a world in which it barely exists. See notes ____ & on Hart. A teleological understanding of living things dictates that is and ought are never separate, but part of a continuum. In the “is” they are a close fit, but as the potential goals are considered the fit can get quite loose or probabilistic. Hart discusses the theory, HART. 185-200. A main problem with the Humean is/ought distinction is that teleology makes it meaningless; in any event, Hume’s words themselves have lent themselves to controversy about their meaning. DAVID HUME, A Treatise of Human Nature Bk. III, Pt. 1, Sects 1&2, pp 455-476 (L.A. Selby-Bigge ed., Oxford University Press 1973). ; see e.g., HART, 185-212. JOHN FINNIS, Natural Law and Natural Rights 33-48 (Oxford University Press. 1980). DWORKIN, 44-46; 428-430. The distinction is intimately related to the formation of positivism and our ideology of science (naturalism), the privileging of empiricism, and the rejection of natural law (for the new empirical “science of law”). HACKING, 41-52.
Everything regarding law and right is scientifically reduced to positive law; and law is opposed to a vague, emotivist, subjective, powerless morality. No jurist after this admitted to doing anything but “science.”\(^{75}\) In spite of the scientific distaste for the moral, until the latter part of the 19\(^{th}\) century it was thought that there was some part of it that could be brought under the discipline of Newtonian rules. This movement, associated with Compte, led to the development of statistics (i.e. knowledge of the state), and the social sciences.\(^{76}\) Eventually, as positivism became more rigid and analytic, the idea of legal science likewise became more restrictive, and contemporary legal positivism emerged with Kelsen and Hart as its founders.\(^{77}\)

This historical development presents profound challenges to the historian of law whose work focuses on the meaning of legal concepts, such as consent, the state, or *iustum bellum*. The entire nature of legal discourse changed in that period. The Age acted as cleaver, cleaving every concept that entered it into a scientific part and a moral/political/legal (prudential) part, and the latter part was banished to the realm of the metaphysical, the subjective, the non-existent, and the nonsensical. All of natural law went this way. This was extremely problematic for international law as it was not only deeply infused with natural law principles, it lacked the institutional support that Bentham and Austin and their successors would associate with the science of law, or positive law. It did not emanate from a constitution, it was not passed by a legislature or judge, and there were no other similar sources of legitimacy. We should not be surprised then to see *iustum bellum* disappear as international law by the first part of the 19\(^{th}\) century, its death still solemnly remarked on 100 years later by jurists responding to the world wars. Its apparent disappearance is a sign of the profundity of the change in the legal landscape.

\(^{75}\) See footnote on the enlightenment this Part


\(^{77}\) See e.g., BRIAN LEITER, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, Oxford Journal of Legal Studies 1, 9 (2011). (Kelsen and Hart, as everyone knows, were both metaphysical anti-realists about moral norms: that is, they denied that such norms had any objective existence, they denied that the best metaphysical account of what the world contains would include facts about what is morally right and wrong.) Brian Leiter is a kind of shill for positivism. He thinks “science [is] perhaps the most important and transformative human artifact of recorded history.” (at 8). He fails to understand the relationship between science and positivism, that when he privileges science he is determining his choice for positivism, since it is science, not legal positivism, in which the metaphysical rejection of the moral order transpires. The Enlightenment functions as a metaphysical barrier to the world view of naturalists, such as Lieter, and so he will never understand that what he sees as absolute others, who are not constrained by the Enlightenment, will see as dependent or contingent.
The change in the discourse of law meant that law was reduced to positive law, and the other part of law, now known as morality, was no longer defined or understood as law. This unnatural state of affairs has been the bane of juriprudes since, but for us it raises another issue. We will recognize, later in the argument, that the “moral” or “natural” or “prudential” part of the law never really disappeared, it just got reassigned to other, non-legal, categories of existence. These two streams then have come down from the 18th century as two halves of a whole, seeking always to be united, but forbidden by the positivist rules of legal discourse. In assessing the law of war and similar legal things we have not only to take account of the positivist laws, but seek out and identify the natural side of the law to see how it functions, as certainly it continues to function in the same normative space as the positive law. This could not be clearer than in the post 9/11 attitude adopted by the Christian United States against “terrorism,” identifying it with an entire religion, and based on that attitude stripping the enemy of the rights conveyed by the Geneva Conventions. The liberal academy was aghast at this but it was nothing other than the assertion of iustum bellum in all of its medieval glory, despite the fact iustum bellum per se was dead, that there is a positive legal regime, albeit deeply conflicted, outlawing war, and that there is another body of positive law granting Geneva Convention rights to everyone, including “terrorists.”

It should be somewhat clear now why I categorize the Enlightenment as a unique event. There is no ordinary historical space for the law when the Enlightenment is taken into account, or when legal concepts are traced from pre-Enlightenment periods into post-Enlightenment periods. Once the post-Enlightenment period is reached we enter a conceptual space in which the split of legal things into the scientific and prudential parts gives rise to critique as the intuitive attempt to rejoin the parts using the language of ideology, false consciousness, truth regimes, etc. We can define a kind of ordinary historical space in the post-Enlightenment

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78 Until it was put in charge of key legal departments in the administration, e.g., the appointment of the vocal critic of Bush, Harold Koh, who upon appointment to the state department legal department became a champion of the Bush policies, at which point most critics of the Bush policies went peacefully along. See e.g., PAUL STAROBIN, A Moral Flip-Flop? Defining a War, New York Times August 7, 2011. 2011. OWEN FISS, Leary Lecture: Aberrations No More, 4 Utah Law Review 1085, 1095-99 (2010).

79 Marx, the student of the great philosopher of history, Hegel, got the ball rolling with the idea of false consciousness, and it was later elaborated by Nietzsche, Freud, and others. Foucault focused on the same problem, but from the perspective not of falsity, but of regimes of truth. For a brief overview, see BERNARD HARCOURT, Radical Thought from Marx, Nietzsche, and Freud, Through Foucault, to the Present: Comments on Steven Lukes’ ‘In Defense of False Consciousness’, U of Chicago, Public Law Working Paper No. 355. (2011). ( Notice the shared idea that our dominant ways of talking about “just punishment” somehow mask the true forces at play … The explicit reasons on which we ground our judgments about punitive practices … are not really, in the end, the driving force behind those punitive practices. Something else is driving them. At 9) See also, SUSAN MARKS, The Riddle of All Constitutions: International Law,
period, and in fact we find many legal and other naturalists writing as though the Enlightenment is the beginning of history. But these histories are all degraded by positivist values, they cannot function with the full authority history can command, because positivism does not understand history as a source of real knowledge.

5. **The Unity Thesis and the Constitution of the United States**

... only can the government ever be stable where the middle class exceeds one or both of the other [rich and poor] ... The more perfect the admixture of the political elements [poor, middle, rich], the more long lasting will be the constitution. Many ... make a mistake, not only in giving too much power to the rich, but in attempting to overreach the people. There comes a time when out of a false good there arises a true evil, since the encroachments of the rich are more destructive to the constitution than those of the people. Aristotle, McKeon p. 1223. 1296b38-1297a13. Jowett, Politica.

In this Part I apply the Unity Thesis to the Constitution of the United States (“Constitution”). The application of the Thesis begins with an inquiry into the historical emergence of the idea of the constitution and constitutionalism. Is the word/concept new, or does it emerge as the Enlightenment develops? If it emerges with the Enlightenment, from what legal thing does it emerge? Since that legal thing from which it emerged was split, what is the other part(s) that

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80 Brian Leiter is a prime example. Harcourt also provides an interesting example of this. He argues that it is only when economic science emerged that our attitude about punishment came into existence. In other words, economic science is naturally twinned with a moral/legal/political attitude; a scientific artifact is linked to a prudential artifact. HARcourt, 17. (The idea of natural order in economics emerged in the 18th century hand-in-hand with an ideal of punishment despotism, or in other words with the idea that the quasiexclusive competence of the state was in the area of security. It is this paradoxical juxtaposition that has facilitated the growth of the penal sphere—not just during the period of neoliberalism during the past 40 years, but also at the beginning of the 19th century with the birth of the penitentiary. Periods of strong belief in free market ideals have gone together with the birth and expansion of the carceral domain.)
are linked to constitutionalism? Which is the scientific and which the prudential parts? How do the parts relate to one another? What other features of the Unity Thesis are developed as the analysis proceeds? What does the analysis mean for our understanding of the Constitution?

a) **The pre-Enlightenment Constitution**

What was the idea of the constitution before it was split? The word “constitution” itself in the sense of the Constitution only developed over the course of the 18th century, so itself is not helpful. The idea of the nation-state provides some assistance. First used towards the end of the 19th century, the phrase distinguishes between nations and states. A nation is a group of people bound by culture, language, tradition, ethnicity, etc., that may or may not be organized politically. The label “nation” does not necessarily include political/legal content, whereas a state, in this formulation, is a sovereign political entity with a central government and a defined territory. In this formulation a state can contain multiple nations. We see in this phrase an echo of the distinction I want to bring to the fore, but it is not quite what I want to get at. So, I am looking for a concept from which the 18th century idea of constitution developed or was derived, but that concept is not readily found in the word “constitution” or in the word “nation.” The word “state” is a candidate, especially in the meanings attributed to it and gathered in the OED entry for state in meanings 21-32. In the numerous quotations using the word reproduced in the OED, one can see the concept developing into its modern meaning in the period from about 1300-1600. The story of the development of the modern state is well told in numerous political/legal histories, but I am not as interested in how the idea of the modern state developed, as in describing the thing from which our idea of constitution emerged. I am going to use the word “state” to refer to the entity from which “constitution” emerged, and I am now going to paint a picture of it that generalizes its meaning over the period from 1200-1600.

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84 I rely primarily on the following, e.g. Berman. ;Grew. ;Arthur Naussbaum, A Concise History of the Law of Nations (The Macmillan Company, 1947). ;Oakley. ;Tierney. ;Tierney. The influence of Roman law on the form and functions of the modern state cannot be overrated. Berman.
Such a generalization will be rough, but it will serve, bolstered by Aristotelian constitutional theory, as the utopian edifice implied by the principle of jurisprudential unity.\(^{85}\)

Aristotle provides the metaphysical basis for understanding the state (*politeia*). The beginning and end of his description is summarized in his famous pronouncement that “man is a political animal.”\(^{86}\) He intends to say here that man’s nature is such that he or she cannot flourish without political life, that man needs the state to fulfill himself. A man without a state is either a beast or a god.\(^{87}\) An important part of the identity of man is political, is located in the group. Man exists as both individual and a part of the group. The constitution for Aristotle is the unity or identity of the political group, it embodies the purpose for which the identity functions, the common good.\(^{88}\) Because the whole must come before the parts, and here the parts are the citizens, then the constitution, or the state, comes before and orders all that comes after.\(^{89}\) That which comes before is for the sake of that which comes after.\(^{90}\) Constitutions are of three kinds, and for each kind there is a good form and a degraded form. Constitutional order, or rule, can be by the one, its two forms being monarchy and tyranny; by the few, its two forms being aristocracy and oligarchy; and by the many, the two forms of which are polity and democracy.\(^{91}\) Each of the six forms of constitution has its own purposes that define the ways people find fulfillment, their system of justice, and their virtues.\(^{92}\) The form of the state and its purposes are identical, the formal and final causes. The forms/purposes can be distinguished not only by the number of those who primarily benefit, but by their wealth.\(^{93}\) The number of wealthy will always be few relative to the total population, so we can understand issues of justice in terms of not only how wealth is distributed, but how it is managed. In the positive forms of state, if wealth is not more equitably distributed among a middle class but is concentrated with the wealthy, then it is managed for the benefit of all, so even those without wealth can participate in and take some benefit from the state.\(^{94}\)

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\(^{85}\) On “utopian” see Part 2 above.

\(^{86}\) On “man is a political animal.”

\(^{87}\) An important part of the identity of man is political, is located in the group.

\(^{88}\) This is the more theoretical side of Aristotle’s description of the politeia, the political association in which it is described as a whole. His analyses of particular forms of constitutional order do not seem to imply such unified self-identity. This is a potential weakness of my identification of the state as the entity from which our constitution emerged. It may be a more accurate reading of the Constitution using the Unity Thesis can be found. Authority on the idea of the common good.

\(^{89}\) That which comes before is for the sake of that which comes after.

\(^{90}\) Constitutions are of three kinds, and for each kind there is a good form and a degraded form.

\(^{91}\) Each of the six forms of constitution has its own purposes that define the ways people find fulfillment, their system of justice, and their virtues.

\(^{92}\) The form of the state and its purposes are identical, the formal and final causes.

\(^{93}\) The number of wealthy will always be few relative to the total population.

\(^{94}\) The number of wealthy will always be few relative to the total population, so we can understand issues of justice in terms of not only how wealth is distributed, but how it is managed.
for the benefit of all, not merely for their own benefit; if the middle class rules (polity), then it also rules for the benefit of all. In the degraded forms of government, the few rule for their own benefit; and if there is mass or democratic rule, good things can result, but they result by accident.\(^5\) Aristotle recognized mixed constitutions, in which occurred more than one form of governance; and he recognized that citizens can and do renegotiate their constitutions, sometimes with great frequency.

In the period from roughly 1100-1600 CE the contemporary idea of the state emerged on an historically and philosophically complex path.\(^6\) In general, it can be described as the period in which first the Church extricated itself from the control of the secular princes, and then underwent a series of intense internal conflicts that were reflected into secular order, out of which eventually emerged the secular state, the state of which we speak. For our purposes one of the most salient conflicts was whether control of the church was vested in the Pope, in the Bishops, or in the laity.\(^7\) In this deeply philosophical conflict the idea of the corporation, dating as so many of the legal concepts did, to classical Rome, was developed in new ways. A corporation, taken in meaning close to its Latin root, is a body, a unified thing, a whole. But since it was a political whole, its form of management was of intense interest to anyone who had standing to potentially be in charge, whether in the City or in the Church. Meanwhile the ideas of consent and due process were developing to solve political problems, and in due course were merged into the idea of corporation as means to understand and achieve fairness. Initially the idea of corporation was most closely associated with the Body of Christ, of the Church, but it was reflected into and co-developed in the secular political world. There it was initially associated with the ruling political entity, but in time became language by which any unified entity consisting of more than one person and office could be fairly managed for its unified end.

Now we can put together the image of the unified constitution or state out of which the more limited Enlightenment constitution emerged. It is a corporate body with particular forms for managing office, consent and due process, or justice. The corporate body was contextualized in the Aristotelian taxonomy of the state. By the end of the period, corporate/state governance was monarchical or aristocratic/oligarchic. It tended to absolutism, and the people as such had no voice except to the extent those in power took their responsibilities towards them seriously.

\(^5\) Tierney, Berman, Oakley, Pennington

\(^6\) Tierney, Berman, Oakley, Pennington

\(^7\)
The people had little to no power to consent, and little subjective right or dignity.\(^9^8\) The corporate bodies were of three types, church, state or private, and all of them emerged from either God or nature. Dignity, or legal right, inhered in the upper classes. From this context the individual as an entity with political status emerged.

b) **The Emergence of the Dignity of the Common Man**

In the 12\(^{th}\)-14\(^{th}\) centuries there was an intense debate about nature, about the created world. What, or where, was the origin of natural law? At the time natural law and what was later to become known as the laws of nature were not distinguished in any kind of relevant way. The problem was that if natural laws were inherent in nature itself, were Aristotelian essences, then what role did God play in the creation? If he did not have the power to change the laws as He willed, then how could He be all powerful?\(^9^9\) The voluntarist teaching that God’s will was the ongoing source of all law, including all natural law, won the day. What was important about this victory was that nature was stripped of content, of essence. There was no inner necessity or law, rather all law flowed from God, an external source. On this line of reasoning the status of man was ambiguous. He was animate like animals, but had reason, and on some accounts reason linked man to God.

That framing of nature later combined with another innovation, this one introduced by Protestant and Jansenist Catholic theologians on man’s reasoning powers. They concluded that man could not understand the laws governing his nature because of the Fall. The Fall degraded man’s ability to reason about man, to use reason to understand man’s end.\(^1^0^0\) In this innovation man was stripped of his own ends, his own essence. His essence was determined by God, and only knowable by God or His Grace.

These ideas, of a nature with no inherent purpose, and of reason powerless to see ends, are the core insights institutionalized in science.\(^1^0^1\) The scientific characterization of man remained

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\(^9^8\) Power, right and dignity are linked concepts during this period. Without power there was no right or dignity, and status or dignity, was the insignia of power and right. See discussion of consent in Part II.

\(^9^9\) Tierney, 98

\(^1^0^0\) MacIntyre, 52-4

\(^1^0^1\) Jansenists were also central in the development of the idea(s) of probability, as the authors of the very influential Port-Royal Logic, or Logique de Port-Royal (1662), Antoine Arnauld and Pierre Nicole, were Jansenists (as was Blaise Pasacal, who apparently wrote parts of it). Thomas M. Carr, Jr., Port-Royalists, French Language and Literature Papers, Paper 21 http://digitalcommons.unl.edu/modlangfrench/21 (1996); Ian Hacking, The Emergence of Probability: A Philosophical Study of Early Ideas About Probability, Induction and Statistical Inference 24-5 (Cambridge University Press 2nd ed. 1975/2006). Hacking is looking at probability, not the history of law/right/morality, and probably because of this, and because of the status of the literature when he wrote, seems unaware of how the problem of the scope of reason
The Unity Thesis: How Positivism Distorts Constitutional Argument

Problematic until the middle of the 19th century because, although the scientific characterization of man as Newtonian machine was widely accepted, Aristotelian explanations about living things were exceedingly difficult to overcome theoretically and empirically. The importance of Darwin was that he provided the theoretical mechanism by which living things could be brought under the physicalist, mechanist umbrella, and all of nature, animate and inanimate could neatly fit into the positivist ideologies.

MacIntyre explains, correctly I think, that it is with the theory of the person that the contemporary problems with law and morality begin. In the late middle ages man was understood to consist of three elements: an untutored nature that had the possibility of being better if it realized its intrinsic ends (telos); the rational precepts or ethics by which man could reach his telos; and the idea of man as he could be if he realized his telos. When man’s reason was reconceived in the Protestant Reformation as being incapable of seeing his ends, then the human vision of man was reduced to his untutored nature and the ethical precepts, separate and without a linking concept. Ethics were detached from that person we would become familiar with through Hobbes, the man whose life is “solitary, poor, nasty, brutish, and short.” MacIntyre argues our age is characterized by moral relativism because the ethical norms were unlinked from the untutored human nature by the removal of the idea of human ends. The unlinking results in two artifacts or fragments (the scientific and the prudential) that should be linked, man and ethics, and sets the stage for the dominance of legal positivism.

Recognized by the Jansenists also plays an ontological role in the development of science. For his story what was significant was that they limited the number and kind of authorities that could be depended on for truth, limiting it “only to scripture and the light of natural reason.” But if MacIntyre is right, what was significant was that the Jansenists accomplished this feat by redefining human nature such that natural reason could not understand its own end or telos, by emptying human nature of essence. So we see again, arguably, how the conceptual limitation of human reason/nature by religious thinkers solving an internal problem leads to the fragmentation of knowledge into a prudential and a [positivist] scientific part; and we see historians of both ethics and science converging on the same historical event as a birthplace of the new ethical and scientific orders. The history of the philosophy of science is thus a twin discipline to the history of ethics, and the literature in that field is vast. The earlier works of Hacking are a good introduction, but far from sufficient. Id. at. Hacking. The problem of understanding the philosophy of science is compounded by its widely accepted claim to have vanquished ethics and metaphysics, to its scientistic claims to define the valid contours of philosophy itself. Philosophy in its broadest sense is the natural space in which scientism can be reconciled with ethics and metaphysics, but the bitter and shrill claims of naturalist epistemology make this difficult, especially in Anglo-American philosophy. Legal philosophy, which should be synonymous with ethics and political philosophy, is dominated by positivism and does not clearly distinguish the problem.  


We see in the institutionalization of these ideas how the theory or vision of nature, science, the theory of the person, and legal theory are intimately linked. We can also argue it is these institutions that, once established, become the bedrock on which the individual and the age of ideology emerge. Since nature has no ends, no essence, and since ethical rules cannot be established in nature, the creative mind of man finds pretext in all explanations. The social sciences find false consciousness, class struggle, regimes of truth, the unconscious, and other quasi-scientific entities to explain why things are not what they seem to be, to fill the lacunae left from the stripping of meaning, of ends, from nature, to explain the prudential artifact that is drifting free from its metaphysical mooring.

Another consequence of the separation of the ethical from the human, from nature, is that the idea of justice becomes normative, and indeed that is the dominant way justice is understood today. My theory itself risks becoming merely another positivist expression of law’s instrumental nature if justice is understood as something uniquely normative. Justice as normative order underlies Hart’s arguments against natural law, as it is the normativity he depends on to establish that a law can be immoral. I follow Aristotle though, in understanding justice as descriptive of the legal system as a whole, as it is constituted. The constitution, oligarchy e.g., is an description of a system justice, of justice in and for that system. All the laws express that system of justice. It is not that the law is separate from justice, it is that the law is justice. Here we see how linguistic philosophy developed within a positivist worldview in English can be used to justify legal positivism. If law is understood as positive thing, then of course justice is separate. But if read the word “law” more broadly, we do not fall into that trap.

In this context, we can begin to understand how different the social contract theories of Hobbes and Locke were, and what features of the earlier model were abandoned or became philosophically reassigned in the 17th and 18th centuries. Hobbes and Locke manifested a broader theme in the development of the Western Tradition, that of science.

The root stock of science grew out of late medieval scholastic parsing of texts. This parsing was different because the investigators, or researchers, were looking to the text itself for the sources of authority and information, rather than appealing to abstract first principles. That empirical habit in time was turned towards nature more generally, but at the same time the idea
of nature was changing. Under the influence of Christian jurists nature was stripped of its essence, it became a kind of res nullius. This loss of essence is associated with the Protestant Reformation, and it was part of a larger project of rejecting Aristotelianism. Thus, at the same time the method of inquiry was changing, so was the thing of which inquiry was being made. This makes sense. The dominant metaphysics was changing as the young Western Tradition developed. It was changing in all the ways we define metaphysics: the ontology was changing, the epistemology was changing, and the ethics was changing. The description of the state set forth above was the entity out of which the Hobbesian vision emerged. If we compare those two political visions, we can identify the parts into which the unified vision was refracted.

Hobbes assimilated the scientific trend in the way he conceived of individuals and their relationship to the political. At the time he wrote the moral had yet to stripped from the political (although it had become separated from the individual), but he features strongly in the history of ideas that led to reassignment of the moral. He understands man as a creature with certain powers under the control of his reason. Because man fears death and desires to live well, reason dictates, Hobbes argues, that he enter into peace agreements with his fellow creatures, being content in the end with “so much liberty against other men, as he would allow other men against himself.”

What is significant is that man is now individuated and self-interested. He may need others in order to live peacefully, but he is not defined per se as being part and parcel of the group, as he was with Aristotle. In Aristotle there is no hypothetical beginning in which there are individuals. Aristole would show, rather, the logical nature of the state. After demonstrating that the village is comprised of family units, and the polis of

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108 HOBSES, 190. See generally, id. at, 183-201. Hobbes is generally known for his contribution to the idea of the secular state, with most citing, as I do, Part II of the Leviathan. However, Part III of the Leviathan is devoted to the Christian common-wealth. What we see in Hobbes, and in others, such as his contemporary Grotius, is an elaboration of a secular order with God tacked on as a kind of necessity, not necessarily in the management of secular order, but as an important, but distant, feature of the universe. See e.g., id. at, 609-626.

109 Compare the vision of Plato, in which he speaks of the human race, even when it has been reduced through disaster to the fewest possible number:

In the first place, men’s isolation prompted them to cherish and love one another. Second, their food supply was nothing they needed to quarrel about. Except for perhaps a very few people in the very early stages, there was no shortage of flocks and herds … ([God’s] intention was than whenever the human race was reduced to such a desperate condition it could still take root and develop.) Because of all this, they were not intolerably poor, nor driven by poverty to quarrel with each other; but presumably they did not grow rich either … Now the community in which neither wealth nor poverty exists will generally produce the finest characters, because tendencies to violence and crime, and feelings of jealousy and envy, simply do not arise. So these men were good … PLATO, The Laws 122 (679a-b). (Trevor J. Saunders trans., Penguin Books. 1970).
villages, and that the polis is natural because families and villages are natural, he tells us how we should understand the state, and why:

... the state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part; for example, if the whole body be destroyed, there will be foot or hand, except homonymously, as we might speak of a stone hand; for when destroyed the hand will be no better than that. ... The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole.110

In Aristotle’s vision there can be no individual in the sense of Hobbe’s man; or, we might more accurately say, in Hobbe’s vision there are no Aristotelian individuals, they are all beasts on Aristotle’s account:

... he who is unable to live in society, or who has no need because he sufficient for himself, must be either a beast or a god: he is not part of a state. ... For man ... when separated from law and justice ... is the worst of all ... he is the most unholy and the most savage of animals, and the most full of lust and gluttony.111

If the state is understood as nothing more than the agreement of self-interested individuals, then the state itself can be no more than self-interested, and indeed this philosophy of state reaches its apotheosis in the 19th century high age of state sovereignty.112

Locke’s vision of the human, articulated 50 years later (1698), while philosophically distinct shares some fundamentals. By law of nature, all men are equal and free. Political society comes into existence as a result of individuals consenting to transfer their inherent power to manage

111 Id. at, 1988 (1253a28-37). No doubt there may be some inconsistency in Aristotle’s account inasmuch as he recognizes man can exist outside the state, but in a Hobbesian condition. Hobbe’s argues that such man-beasts can come together and create the state, whereas Aristotle sees these Hobbesian men as incapable of being in a state because the state, including its parts, arises by nature, and by nature these Hobbesian creatures are not in the state. It is reasonable to think Aristotle had in mind something like Plato’s small communities that kept the race alive when he thought of the basic unit of the state; groups of humans joined by political friendship for the common good. See e.g., ARISTOTLE, Nicomachean Ethics Book viii (Terence Irwin trans., Hacket Publishing Company, Inc. 2 ed. 1999). Compare also Rawls’ account of the veil, in which he posits a kinder version of the Hobbesian man who creates the state through reason.
112 See Part 3 discussing the law of war in the 19th century.
their freedom and equality to a political entity.\footnote{JOHN LOCKE, 330-3 (Peter Laslett ed., Cambridge University Press. 1988).} Reason is the means by which man understands the laws of nature, including the duty to love one another and that "no one ought to harm another in his Life, Health, Liberty, or Possessions."\footnote{Id. at, 270-1. This foresees Kant, who holds our only knowledge of the other is through reason.} Locke’s held man was born \textit{tabula rasa}, which further emphasis the notion that man is not inherently connected to the political order.

The vision of man as an individual in the state of nature with full capacity to consent is part of the larger metaphysical transformation that we call the Enlightenment. The entire package includes not only the changed vision of nature or what was considered real, but changes in the way causation was understand, changes in the way time was understood, changes in the way valid and trustworthy knowledge was understood to be developed, and the introduction of the distinction between the objective and subjective. Prior to the detailing of nature, if you will, represented by the Enlightenment, man’s vision of things was more holistic. Man and state were identical in a fundamental way; God or reason was embodied and embedded in nature; there were final causes; and man’s capacity to understand nature was not inherently flawed by the subjective/objective puzzle.

c) \textbf{The Constitution’s Prudential Artifact(s); More on the Unity Thesis}

With regard to the US Constitution, the thing to pay attention to is the centrality of the Hobbesian individual. I do not draw as much attention to the Lockean individual for the following reason. As the individual became more important politically, states were faced with the problem of how to recognize, and therefore confer, increased political status on those persons who had heretofore not been part of the political process because of a lack of standing. Individuals \textit{per se} emerged into the political order as a result of, or in sync with, the works of Hobbes and his successors. The American and French Revolutions were two solutions to the problem of how to integrate the individual into political order. It is important to recall that prior to the 18th century, political power resided in persons of status, and although individuals without status had some rights, those rights did not extend into the management of the state.\footnote{“State” is derived from “status.” QUENTIN SKINNER, \textit{The State, in Political Innovation and Conceptual Change} 91 (Terence Ball, et al. eds., 1989).} Moreover, states came into and out of existence as a result of acts of high-status people, and when they came into existence it was into the hands of high-status people. The individuals who emerged in the 18th century onto the political stage had never had power, and states had not been formed for the purposes we associate with the American and French Revolutions. It is
also important to keep in mind that the locus of international law, and this is a discourse on international law, was among the European states and other political entities. The colonies were territories and ideas in which European political maneuvering was carried out.\(^{116}\)

Europe and America solved the problem of how to recognize and confer status on the newly identified political individuals differently. Conferring status meant conferring dignity. In Europe dignity holders were aristocrats and other high status people like bishops and monarchs, and there the solution was to recognize high-status dignity in the otherwise low-status person. The status of Everyman was elevated. In America, on the other hand, aristocracy and the privileges of office were looked down on, and dignity was conferred on Everyman by deeming the entire population, including all the otherwise high-status people, as having the same low rank or status. In Europe Everyman was made equal by elevating him; in American Everyman was made equal by lowering everyone else.\(^{117}\) I think the Lockean man more closely approximates the European solution inasmuch as Locke recognizes the importance of love, albeit subordinate to reason. Hobbes’ man is just self-interested, and at the end of the day that is the dominant political image of the American.

We are now in a position to tentatively identify the prudential or invisible parts of the Constitution.

The theory teaches that the legal thing, “state”, was split by the influence of the Enlightenment into two parts. One part, the scientific part, became constitutionalism and is how we understand the Constitution. The other, prudential part took on a life of its own, continuing to exist in the moral order in various ways and under various guises, but in no case identified with its scientific part. The Thesis holds that the unity of the legal thing is natural, and that the separation is unnatural, and that there is always some kind of gravitational attraction between the parts. We do not recognize the separation, nor the attraction, but we recognize a structural dissonance without ever really understanding it. The dissonance manifests as the relationship between ideology and critique. We ponder political things, and recognize that there is an element of untruth or misdirection in what we seek to understand, and then we call the structural element of the untruth ideology, and the unmasking critique. The Unity Thesis gives the underlying theory of ideology and critique.

\(^{116}\) See e.g., GREWE. Kant article in Law, Justice, and Power: Between Reason and Will (SINKWAN CHENG ed., 2004).

I must acknowledge Hegel, as he is the great counter-influence to the reductionist, analytic effects of the Enlightenment. Yet the power of the ideology of science was such that even Hegel claimed to be providing us with scientific philosophizing, even though his message was profoundly unscientific compared to the identity science would ultimately assume. Hegel is the great philosopher, after Aristotle, of the whole. In a sense then, my project could be described as some kind of Hegelianism, and I do not shirk that assessment, nor hide the debt I owe to Hegel. However, the phenomenon I speak of occurred before Hegel was born, and the specific jurisprudential thesis I seek to refute, the Separation Thesis, was enunciated long after his death. I recognize Hegel and his influence by positing that Hegelians do not suffer from the distortions in understanding I seek to correct; and by using Hegel to give contemporary voice to a unified vision of the state:

The state in and by itself is the ethical whole, the actualisation of freedom; and it is an absolute end of reason that freedom should be actual. … In considering freedom, the starting-point must be not individuality, the single self-consciousness, but only the essence of self-consciousness; for whether man knows it or not, this essence is externally realised as a self-subsistent power in which single individuals are only moments. … The basis of the state is the power of reason actualising itself as will. In considering the Idea of the state, we must not have our eyes on particular states or on particular institutions. Instead we must consider the Idea, this actual God, by itself. On some principle or other, any state may be shown to be bad, this or that defect may be found in it; and yet, at any rate if one of the mature states of our epoch is in question, it has in it the moments essential to the existence of the state. But since it is easier to find defects than to understand the affirmative, we may readily fall into the mistake of looking at isolated aspects of the state and so forgetting its inward organic life. The state is no ideal work of art; it stands on earth and so in the sphere of caprice, chance, and error, and bad behaviour may disfigure it in many respects. But the ugliest of men, or a criminal, or an invalid, or a cripple, is still always a living man. The affirmative, life, subsists despite his defects, and it is this affirmative factor which is our theme here.  

To avoid the high abstractions of Hegel and make the following discussion legible, I am going to reduce Hegel to some Aristotelian understandings. Part of human identity is the state, and it is only within a state can a human achieve fulfillment, or as Hegel has it, freedom. This sounds paradoxical, but only because we are indoctrinated with the vision of the Hobbesian individual who is theoretically free from birth, and only joins in a political association later by an act of consent or free will. The state is limitation, but only in the sense body is limitation; they are

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118 G.W.F. HEGEL, Philosophy of Right § 258 (T.M. Knox trans., Oxford University Press. 1942 (1820)).
vehicles through we are required to act, and since they define the scope of our actions, they define the scope of our freedoms. The kind of freedom posited by the great social contract theorists, Hobbes, Locke, Rousseau, Kant, Rawls, does not and cannot exist.\textsuperscript{119}

The prudential part I want to focus on is the correlative to the scientific idea of the individual whose freedom includes, among other things, the freedom to enter into a social contract. When that idea, the scientific artifact, achieved prominence in intellectual and political space it spawned a family of ideologies and counter-ideologies. Some were general and achieved incredible influence, such as Marxism. Marx directly approached the dichotomy I am describing, but in a reactionary way. He recognized the distortions brought on by the Hobbesian individual institutionalized and described in the economic order, and his vision of the dangers and cruelties of capitalism were incredibly acute, but because he reduced the state to economic order political solutions in his name were inapt and his utopia unworkable. Marx too claimed the purity of science, and although he was not to know the extreme reductionism science would come to manifest, he was one of the fathers of the social sciences, an entire epistemological enterprise to describe the prudential artifact of the state.

We could conclude that the Constitution is also ideological, and say that what I am doing is critique of constitutionalism. But that would be unsatisfactory in the way all critique is, because critique cannot overcome the duality or dialectic. The Unity Thesis however seeks to overcome the dialectic in such a way as to short circuit, as it were, the ideology/critique process. It seeks to identify and then unify the artifacts that characterize the Age of Science, perhaps in the process bringing its end closer to the present. But there is also something special about a state/constitution, in the unified sense. It is something no ideological thing can be, it is an absolute source of norms, of a system of justice and virtue. It is special because it is the political body of the human being. When we unify the state/constitution, we at the same time reconstrue the human being, rejecting the Hobbesian vision for the Aristotelian/Hegelian.\textsuperscript{120}

\textsuperscript{119} See e.g., \textsc{Martha Nussbaum}, Frontiers of Justice: Disability, Nationality, Species Membership xx-xxx (Belknap Press. 2006).

\textsuperscript{120} This conclusion directly raises one of the most difficult issues in constitutional theory, the relationship between the state and the international order. The international order must in time prevail, if current demographic trends continue, and to the extent the Charter of the United Nations was understood to be, and drafted as, a constitution, and to the extent most states recognize international law as above state law, the normative structure is already in place. See e.g., \textsc{Bardo Fassbender}, \textit{The United Nations Charter As Constitution of the International Community}, 36 Columbia Journal of Transnational Law 529 (1998). ; but see e.g., \textsc{Curtis A. Bradley \& Jack L. Goldsmith}, \textit{The Current Illegitimacy of International Human Rights Litigation}, 66 Fordham Law Review 319(1997).
d) The Constitution of the American

The Constitutional ideologies confuse both the contemporary liberal and conservative. We see ourselves through a veil of myths. The liberal invokes an aspirational past (i.e., utopia) in which the state was run for the benefit of everyone. She is thinking of the heyday of the post WW2 years, in which there was a chicken in every pot, refrigerators and washing machines in all of the new homes owned by the burgeoning middle class. That period culminated in the great social welfare acts: the Medicare Act, the EPA, HEW, and so on. The Great Society cared for itself. But then came Reagan, and an ideological push-back that has culminated in the current hyperbole and hysteria. The conservatives think any attempt to even comply with the Great Society norms is anti-American. Who is right?

The Unity Thesis unfortunately suggests that the real American political vision is that of the conservative, but not in the aspirational sense bruited by the tea party and other fear mongers. The Thesis suggests that as a fact on the ground the conservatives have always controlled American political power, and managed the American state conservatively, as an oligarchy. There is no danger from the liberal establishment because it has no power.

There have been several great liberal “successes” that bear some explanation: the emancipation of the slaves; the labor movement; the Social Security Act; Medicare; and perhaps the Affordable Care Act; and two periods of the growth of middle class prosperity, in the Progressive Era and in the period after WW2.

We begin by noting that the Constitution did not recognize formal or substantial equality of Americans. Similar to Classical Rome, only white males had the full emoluments of citizenship; slaves were only 3/5’s of a person; and women had no power. The outlawing of slavery after the Civil War was not the great clarion freedom it could have been. Chattel slavery continued unabated, it was “separate but equal” until Brown v. Board, and black Americans continue to suffer economically and physically from their lower status.  

The Progressive Era and Post-WW2 growth of the middle classes was the result of a strongly growing economy, run by the wealthy, but in times when there was room to grow, both geographically and socio-politically. It was not as much as that the oligarchs were concerned with strengthening the middle class, it was that society as a whole was growing, and opportunities were not limited to the oligarchs. In the Progressive Era labor unions had to overcome appalling conditions, and there is no question the ruling class in the aftermath of WW2 was very careful to insure it did not lose control over the engines of growth.\footnote{See e.g., M. HOGAN, A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954 (1998).}

Social Security and Medicare, social benefits for the elderly, were “won” after intense political battles, and in the case of Medicare immediately instrumentalized for by physicians for their own economic gain.\footnote{PAUL STARR, The Social Transformation of American Medicine (Basic Books. 1982).} These continue to be good welfarist programs, but they seem to be the exception rather than the rule. As far as the conservatives are concerned, the Affordable Care Act is socialism pure and simple. It will in the long run strengthen the oligarchic power of the largest insurance providers.

The wealth disparities that are now in place have never been starker. While in the Progressive Era and the Post-WW2 era it could be argued a rising tide brings up all boats, there was in those periods incredible opportunity in the territory of the United States. Since the Reagan administration and its theorists the opportunities in the US, for US citizens, have shrunk because of globalization, among other things. Many argue it is the success of the neoliberal project that resulted in the loss of opportunity and the wealth disparity.\footnote{WALLERSTEIN. NOAM CHOMSKY, The Great Charter, Its Fate, and Ours TomDispatch.com at http://www.tomdispatch.com/blog/175571/tomgram%3A_noam_chomsky%2C_the_great_charter%2C_its_fate%2C_and_ours/. July 22, 2012} The liberals are in no position to change the power structure, and will not be for the foreseeable future.

The liberal intent has always been to overcome this trend, but the conservative force controls government, and because of that we can conclude that is our common identity, it is our constitutional identity.

The idea we are all free and equal individuals, as taught by Hobbes in contradistinction to Aristotle, leads to a series of problems in the American state that manifest in the intense disagreement about who we as Americans are. When we solved the problem of equality by lowering the status of elites, we lost touch with a natural feature of political life (part of the
scientific artifact) that the few exist and that they control, and have always controlled, most of the wealth and political power.\textsuperscript{125} When we abandoned that, we lost touch with the idea it is a virtue of the privileged to feel a duty towards the less privileged, we lost the idea that the government is a good thing. Rather, everyone is equal in self-interest, and the best government is the one that governs least, because we are all free and equal to begin with, and maintaining that freedom and equality is the highest good. That means we are Hobbesian state. We were a colony that threw off its colonial oppressors, and we said we would be a society of equals. However, we did not create a constitutional form that instituted formal or substantive equality. Rather, our constitutional form lends itself to control by the privileged. Since we pretend we do not have privileged citizens who actually run the state, in the same way all states have always been run, then we erected a veil between the citizen without power and the citizen with power.\textsuperscript{126}

The Thesis predicts the ideologies that allow oligarchy to go virtually unrecognized, or if it is recognized, it is either as something that is new and we should open our eyes to it, or we mention tepidly, as though we are violating some unspoken rule by identifying it in public.\textsuperscript{127} The Constitutional ideologies with which we hide our oligarchic identity are:

- We are a democracy;
- we are individuals entirely separate from others;
- we are of equal dignity;
- our institutional arrangements protect equality through the vote;
- the checks and balances establish democratic justice;
- that government is always opposed to the interests of the individual;
- that church and state are separate;
- that we are morally better than others;
- the Constitution is alive;
- the Constitution as written is the only real Constitution; and

\textsuperscript{125} See e.g., Jeffrey Winters, Oligarchy and Democracy, The American Interest (2011). (Neither the shift in wealth away from landed estates nor the achievement of universal suffrage has disrupted the fundamental nexus between money and power).
\textsuperscript{126} McCormick, Parenti, Winters.
\textsuperscript{127} See e.g., Winters. (Through its impersonal system of laws, the armed modern state converted individual oligarchic property claims into secure societal property rights. ... This new formula for political economy had several major consequences. One was that it created the mistaken impression that there were no longer any oligarchs, only wealthy people with no shared political motivation.)
that our identity comes from the Constitution.

The Unity Thesis permits us to see a structural feature of our state that is invisible when the positivist artifacts are kept separate: that we are an oligarchy and not a democracy is not simply an assessment from political theory, it is a legal assessment, in all that the word “legal” implies. Our Constitutional order, including all federal and state laws, are for the sake of the oligarchy. Our system of justice is for the sake of the oligarchy. As assessed by its use of the legal system, our oligarchy is not entirely mean-spirited, but it tends strongly in that direction. Citizen’s United is only one of the most recent vivid examples of how our state serves the oligarchy. I intend here only to rough out the picture.128

I am deeply opposed to that vision of political life, yet I am an American. I think we would be better off admitting that we have a ruling class, and that they tend to be interested in preserving and increasing their wealth. If we continue in denial about our nature, then we cannot change it, because we are never looking at or dealing with anything that is real. We have always been an oligarchic state, regardless of our self-image. We cannot change this either in the sense of transforming it into an aristocracy or through some kind of revolution into a polity unless we see it for what it is, and see ourselves for who we are. We must not only peer through the haze of our myths, we must allow ourselves to construct a holistic idea of our system of justice, our constitution in the Aristotelian sense, focusing on a common good. The Unity Thesis, the idea of jurisprudential unity, is not only a principle of juridical interpretation, it has a kind of therapeutic function. It helps us understand the truth about our state. It is only from the truth that we can see our options: 1) live with the status quo; 2) to reject the ideologies of democracy and rights as divisive, and focus on the common good; or 3) overthrow the oligarchy through forceful redistribution of wealth and power.

6. Conclusion: the Unity Thesis, Democracy and the Common Good

… to secure gentle treatment for the poor is not an easy thing, since a ruling class is not always humane. Aristotle, Politica, 1297b9.

128 Chomsky draws a slightly more detailed portrait, but even he seems to have the lurking utopianism associated with the idea we were once a democracy, or something like that. CHOMSKY. See too, JEREMY NEILL, Aristotle and the American Oligarchy: A Study in Political Influence, in On Oligarchy: Ancient Lessons for Global Politics 24, (David Tabachnick & Toivo Koivukoski eds., 2011).
"We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both."

Louis Brandeis

I have argued that the Enlightenment changed how we understand legal things. Under the influence of scientism they were split into two parts, a scientific part and a prudential or moral part. Since the separation is not natural it results in distortions in how we understand not only the thing that had been divided, but the two parts as well. The invisible connection between the two parts gives rise to the phenomenon of ideology and critique.

I applied the Thesis to the Constitution and concluded it is fundamentally oligarchic. But with the application of the Thesis the concept of the Constitution changed because it is a legal thing that was re-constituted, as it were, into a whole thing. To speak of the Constitution is to speak of the peoples of America, to speak of their identity. I want to explore in closing some implications of the idea we are an oligarchic peoples.

The 18th century not only brought constitutionalism, it brought a complicated group of split legal things we call democracy and rights. These prudential things are disconnected from at least one prudential idea, that of power. When we speak of democracy we are speaking of a version of popular rule; the new idea in political theory was that the people are the ultimate source of state legitimacy inasmuch as they have the power to consent to their forms of government. In European countries that idea meant something different than in America.  

129 Democracy per se was not linked to popular sovereignty until the early years of the new republic. HANSON, 68, 78, (I discussed consent in Part 2xx. This kind of Lockean consent is political ideology at its finest. In order to consent, a person has to have substantially complete and correct knowledge about the alternatives they are deciding about. Apart from the fact Locke says people can give their consent without knowing it (implicit consent), the majority of the many do not have either the capacity to understand the political decisions they are being asked to consent to, nor do they have enough real power for their decision to have much political effect. Both the few and the many must rely on experts for their decisions, as today’s informational environment is so complex few have the capacity to consent in any meaningful sense without trusting secondary sources of information. The experts are an elite that mediate between the few and the many, and in most cases they use science and the rhetoric of science to lend authority and legitimacy to their opinions and analyses. This introduces a secondary layer of ideological meaning because science itself is an ideological tool of the oligarchy. Wallerstein argues that there have been three universalisms that the few have used to exploit the many: colonialism, orientalism and science. WALLERSTEIN. Colonialism extended a universal political will/law over the other; and orientalism did the same, but rather than territorial the universalism was cultural. The universalism of science is the truth; science traffics in the true. Therefore, those who control science control the truth, and the truth applies everywhere all the time. The West controls science; and since science now is so costly, science is controlled by those who control vast
France, e.g., when it adopted popular sovereignty, it was sovereignty over an existing political entity. The creation of the United States was different inasmuch as it was a new territory and a new state (putting aside the subjugation of the people who lived in the territory before the arrival of the European). That difference meant that the new ideologies was more powerfully adopted in America, since it itself was new.\footnote{130}

Popular sovereignty in America was mistrusted by the Founders and Framers so they built many mechanisms into the Constitution to insure the elite and wealthy could maintain control over the state.\footnote{131} America was a democracy in name, and an oligarchic republic in practice. Winters describes the relationship between the democracy and oligarchy by saying that the American democracy “contains” the oligarchy.\footnote{132} Others just identify it as an oligarchy, and I agree with them.\footnote{133} However, I also agree the Constitution is a mixed constitution because it does contain democratic elements, such as, now, universal suffrage. It also contains a Bill of Rights. The best example of how meaningless the Constitutional structure renders both suffrage and civil rights is embodied in \textit{Citizens United}.\footnote{134} It uses a 1\textsuperscript{st} Amendment civil rights argument to permit the wealthy to dominate the electoral process, rendering both rights and suffrage, the fundamentals of US “democracy,” meaningless. \textit{Citizens United} should not be read as some kind of aberration, it is merely the latest structural protection extended to the oligarchy.\footnote{135} The Constitution is an oligarchy containing nominal elements of a democracy, enough to enable an ideology of democratic values, consistent with the Unity Thesis’s prediction that the split legal thing gives rise to ideology.

The American state, considered as a whole, can be understood to look outward, into the international level, and to look inward towards its own peoples.\footnote{136} From an oligarchic perspective the exportation of liberalism is remarkably successful, both in the sense of having converted European and other oligarchs, and in gaining control over international economic pools of money, such as the national security apparatus and the oligarchs. See e.g., Hogan. (discussing the origins of contemporary science in the post-WW2 national security state). The deep relationship between all the Enlightenment meanings of science and the individualist liberal state cannot be avoided.\footnote{130} Commager.\footnote{131} Winters, McCormick, Parenti … electoral college, the upper house, no women voters, and slaves only 3/5s of human beings\footnote{132}\footnote{133}\footnote{134}\footnote{135} Supreme Court, Inc. article.\footnote{136} I mentioned the fundamental constitutional problem of the reception of international law above. Another way of talking about it is in terms of hierarchies of law. See e.g., Martti Koskenniemi, \textit{Hierarchy in International Law: A Sketch}, 8 EJIL 566(1997). See also, note 144 (citing Fassbender).
arrangements through the WTO and related treaties, standards and international organizations. American oligarchy is now anchored in the international, which means the Constitution is now instrumentalized more than ever by the international level, by transnational corporations. The ideological distortions surrounding this fact-on-the-ground are so powerful that the majority block of the SCOTUS can fiercely attack international law, and at the same time permit virtually unchecked international economic influence in America.

I am talking about an oligarchic state, functioning in an oligarchic environment. Oligarchy means the rich control the poor for the benefit of the rich; the few rule for the benefit of the few. I argue this is how things are, and yet the domestic and international environment is awash with the ideology of democracy, with the conviction that democratic values are the most important and civilized values. American exports democracy! How can we understand this?

Oligarchy has since at least Aristotle’s analysis been understood to be a degraded form of government when measured in terms of the common good. What does the common good mean, and why is it so important? Recall that we are talking about America as a unified whole, and in this context to speak of something that is common would mean that it applies to the whole. A common good for America would be something that benefits everyone, or almost everyone, without regard to status. It does not mean some kind of numerical equality, rather a proportional equality, in which the good is distributed such that equals get equal shares. The important thing is that the idea of the good is extended to everyone, not simply to one group or another. If money is the good, then in an oligarchy the state is managed to make the good available to one group, but not others. That is why it is considered a less virtuous or just form of government, because what is good only flows to the few.

Regardless of the correctness of Aristotle’s arguments about the common good and the degraded nature of oligarchy, the dominant political rhetoric today announces that democracy and human rights, i.e., ideological common goods, are valid measures of justice, and that they should be implemented to alleviate the widespread suffering of the poor. The oligarchic entity has a dependent part that is suffering, the poor. What is the right thing for the oligarchy to do with regard to that part of the whole that is suffering? Do the few have a duty to the many, if the many are suffering? Or, do the few have a duty to those poor whose suffering can be causally linked to the acts of the few in maintaining the increasing their wealth?

137 References to justice
138 1 billion people hungry every day, e.g.
If the Hobbesian vision of human life is correct, then the oligarchy has a basis for arguing that each person is responsible for their own problems. If the Aristotelian vision of human life is correct, that we live in political wholes, then the few have reason to consider the well-being of the many, not because they experience it, but because it is their well-being too by virtue of their political life.\textsuperscript{139} The Unity Thesis argues the scientific, Hobbesian description of the human is incomplete, and that argument is supported by the sciences themselves. The reductionist sciences (the life sciences) teach that well-being is determined by biological factors, and both the reductionist sciences and the social sciences teach that well-being is also determined by external factors such as wealth, education, environmental exposures, status and other factors. If the well-being of the many is determined by socio-political factors, and the few control those, then the few directly control the well-being of the many. Wealth, education, etc. are common goods that benefit everyone that receives them; and therefore they benefit the whole as well. On this line of reasoning if the few help the many achieve common goods, then they themselves are benefited. Democracy and right are prudential parts that were split off, according to the Thesis, and are incomplete and flawed parts of the legal thing, which in this case is the common good.\textsuperscript{140} They are also rhetorical tools that pit the few against the many. The Unity Thesis suggests we should retire the ideas of democracy and human rights, and look instead to the common good as the way forward into a better world for everyone, not just the few or the many.

Readers with comments may address them to:

John Lunstroth
University of Houston Law School
lunstroth@uh.edu

\textsuperscript{139} There is evidence that in fact the rich do not have as much empathy as others. MICHAEL KRAUS, et al., Social Class, Contextualism, and Empathic Accuracy, 21 Psychological Science 1716(2010).

\textsuperscript{140} The common good is legal because it is the measure of justice, and therefore of right.
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