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Engaging Willard Hurst: A Symposium

***97 LAW, CAPITALISM, AND THE LIBERAL STATE: THE HISTORICAL SOCIOLOGY OF JAMES WILLARD HURST**

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Novak

The knowledge to which his life is consecrated is of things which it concerns the world to know.

--Oliver Wendell Holmes, Jr.

Two legacies vie to take the measure of the work of Willard Hurst. The first understands Hurst primarily in his formal role as the "founding father" of an academic sub-specialty known as "American legal history"--the author of a canonical text *Law and the Conditions of Freedom*, and the coiner of interpretive phrases like "legal instrumentalism" and "the release of energy" that established the boundaries of disciplinary debate for two generations of acolytes and dissenters. The second legacy flows from the substantive range of Hurst's research and writing as a whole--the depth and breadth of an intellectual project that tears at and transcends the very disciplinary borders being constructed by his texts and phrases. [FN1] In this essay, I will ignore the first perspective, which tends to dominate hagiographic and commemorative commentaries. But I will take the second very seriously, *98 that is, the notion that there is something substantively unique and lasting in the scale and scope of Hurst's work, in his capacious and self-reflexive conception of his project and his field of inquiry. In this essay, I will talk about Hurst's work as "historical sociology," not "American legal history." Historical sociology offers a fresh context against which to measure Hurst's largest intellectual contributions while simultaneously freeing the substance of his writings from the disciplinary canonization that so often inhibits new perspectives and future research and writing. [FN2]

What is historical sociology? The combination of a historical concern for the broad compass of time together with a sociological ambition to understand the vast complexity of society as a whole exudes a certain "bigness." And indeed Theda Skocpol identifies historical sociologists in the first instance by their ability "to ask bigger questions than most social scientists ever dream of posing." Historical sociology has as its lofty objective nothing less than the holistic understanding of the interrelationship of individual action, large-scale social structures, and fundamental processes of historical change. [FN3] It attempts to encompass both past and present, events and processes, action and structure, and the individual and the collective via a method that merges conceptual development, comparative generalization, and in-depth empirical exploration. [FN4] Such full-scale, trans-disciplinary attempts to grasp the totality of socio-historical change are not for the faint of heart as indicated by the short list of historical sociologists, old (Montesquieu, Tocqueville, Marx, Weber, Durkheim) and new (Marc Bloch, Barrington Moore, Karl Polanyi, E. P. Thompson, and Immanuel Wallerstein).

The work of Willard Hurst crosses the threshold of historical sociology. His questions and methods were certainly "big." Hurst worked and talked in books and long-term projects envisioned as written for subsequent generations. He often repeated Robert Lynd's probing question, "Knowledge *99 for What?" as he attempted to move legal scholarship toward a broader conceptualization. Hurst attacked the "parochialism" of extant legal writing for its "inattentiveness to the study of large processes and end values." [FN5] "Want of philosophy" is the fundamental defect, he argued. "Legal research has moved within very limited borders, relative to its proper field, because it has not been grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present." What were the ideas adequate to illuminate the "proper field" for legal inquiry? For Hurst they were history and sociology--"the living interplay of law and social growth." As he put it, "Only a broad concern with law's operational ties to other components of social order will lead to the contributions the study of legal history should make to an illuminating sociology of law." [FN6]

This is the most appropriate context within which to weigh Hurst's intellectual achievement--not as the forebear of a band of American legal history specialists nor as the founder of a distinctive "school" of legal sociology--but as a broad-gauged socio-legal thinker of the first order, writing in the tradition of Tocqueville, Weber, Holmes, and Pound. [FN7] Hurst's *100 project is less interesting for its contribution to local historiographical debates about formalism vs. instrumentalism, classicism vs. realism, consensus vs. conflict, continuity vs. change, or functionalism vs. critical legal theory [FN8] than for its broader synthesis--its total (theoretical, empirical, and normative) attempt to sketch the whole set of interrelationships between law and society. Hurst consciously strove to underwrite his work with a systematic and elaborate conceptual framework designed to link his close empirical investigations of nineteenth-century American law to perennial questions about the "general course of social experience." [FN9] This essay is a preliminary attempt to map and summarize that remarkably consistent Hurstian system.

At the center of Hurst's system was the particular study of American law and civilization and the changing roles of market and state from the nineteenth to the twentieth century, that is, the story of law, capitalism, and the American liberal state. But just as important were the more general analytical categories generated by Hurst's investigation of law and society *101 highlighted throughout this article: sequence, context, structure, function, value, power, and drift. Hurst's work was a never-ending dialogue between the most particular and the most general--between facts and values-- between the Wisconsin log-labor lien and social theory (between the trees and the forest). [FN10] As Oliver Wendell Holmes, Jr., once counseled, "All that life offers any man from which to start his thinking or striving is a fact.... Your business as thinkers is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe." [FN11] Many thinkers and scholars have assorted facts. Willard Hurst was one of the few to take the next step--to try to twist the tail of the cosmos.

I. Hurst's Method: Sequence, Context, and Structural Complexity

Hurst's historical sociology was so extensive and multifaceted that to some extent it defies compression and concise summary. This article thus makes two formal concessions to the task at hand. First, for the most part, it is a sympathetic re-presentation of Hurst's intellectual project. It attempts to reconstruct those aspects of Hurst's synthesis most deserving renewed scholarly attention. In the notes and in the conclusion, I hint at some important criticisms (some very old, some quite recent) of Hurst's work; but this article is overwhelmingly a constructive re-engagement with rather than a critique of Hurst's historical sociology. Secondly, at the risk of pulling things apart that Hurst wove together, I have divided this reassessment into two parts. Part I is devoted to the underlying concepts of Hurst's historical-*102 sociological method: sequence, context, structure, and complexity. These were the analytical

foundations upon which Hurst erected his more elaborate legal histories. Part II then takes up the Hurstian legal-historical narrative itself--the story of modern American legal evolution from the early nineteenth through the early twentieth century. Once again, however, emphasis is placed on the generalized interpretive constructs with which Hurst told that story, most importantly: function, value, power, and drift.

From Constitutional History to Historical Sociology

It is comforting to know that despite his prodigious intellectual skills, Willard Hurst could develop a historical sociology only with time and effort. Hurst's first serious research and writing effort was his collaboration with Felix Frankfurter on *The Commerce Clause under Marshall, Taney, and Waite* (1937). [FN12] That volume was as traditional methodologically as its focus on constitutional doctrine and judicial personalities implies. Frankfurter and Hurst defended a simple concentration on chief judges and Supreme Court opinions: "The reduction of history to the efforts of a very few personalities is an expression of the ineradicable romantic element in man. We want to dramatize life, and also to simplify it." Scattered throughout their narrative were truisms about the relationship of history and law like Maitland's, "To-day we study the day before yesterday, in order that yesterday may not paralyse to-day, and to-day may not paralyse to-morrow." [FN13] When he arrived at Wisconsin, Hurst's first approach to the teaching of legal history followed a similar orientation. In 1939 and 1940 he taught "An Historical Inquiry into the Development of the Process of Judicial Review," a course that relied on classic cases (*Marbury v. Madison*, *Gibbons v. Ogden*, *Fletcher v. Peck*, *Dartmouth College v. Woodward*) and classic readings (the AALS's Selected Essays on Constitutional Law) to *103 explore the formal origins of American constitutional doctrine: commerce clause, contract clause, judicial review, and due process. As Hurst noted simply in his opening lecture, the nature of this historical inquiry was "to explore the familiar ... to see and tell what happened." Special emphasis was placed on the usefulness of historical knowledge to get at courtroom "evaluation and prediction"--to explain "what motives may move judges." Hurst even spent time on the individual court reporters, Dallas, Cranch, Wheaton, Peters, Howard, Black, and Wallace, as if to bear out Frankfurter's observation about the "influence of personalities." [FN14]

Hurst's future career was nothing if not an explicit repudiation of this doctrinal, constitutional, and biographical approach to legal history. One of the more interesting things about his own first work *The Growth of American Law* (1950), which he subtitled "The Law Makers," is that there were no people in it. [FN15] By 1960, Hurst's critique of a legal history made up of a "recital of Great Cases" was growing indignant: "I confess to some irritation that the writing of legal history tends to take the cream off the top of the bottle and let the nutritious skimmed stuff flow down the drain because it is bulky to handle and not so pleasing to taste." [FN16] He cited Oliver Wendell Holmes on the need to get at the harder questions of underlying causation, more general trends, and deeper social and historical processes: "I have no belief in panaceas and almost none in sudden ruin. I believe with Montesquieu that if the chance of a battle--I may add, the passage of a law-- has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or a law." [FN17] Hurst was moving, in other words, away from constitutional history toward historical sociology.

Later renderings of Willard Hurst's legal history course at Wisconsin reflected the attempt to get beyond the established interpretive frameworks of constitutional historiography--beyond Roscoe Pound's taught legal tradition, beyond Edward Corwin's neo-whiggish story of liberty and higher law, beyond Charles Beard's discovery of economic interest, and beyond Felix Frankfurter's preoccupation with public doctrine and legal personality. [*104 FN18] Simple stories of doctrinal necessity, idealistic teleology, economic interestedness, or biographical efficacy no longer fully explained for Hurst. Like Talcott Parsons, he grasped for a more comprehensive sociological and historical schema that took account of the whole, that attempted to wrestle with human agency as well as structural restraints, public values as well

as private interests, legal doctrine as well as nonlegal social forces, the market as well as the state, short-term events as well as long-term historical processes. [FN19] Socio-historical explanation was not a simple matter--it was fraught with an overwhelming complexity and the inherent tensions and dualisms that pervaded Hurst's more mature scholarship: Drift and Direction, Initiative and Response, Leverage and Support, Force and Fruition. [FN20] As he frequently argued, "There can be no single point of view from which all United States legal history falls into a coherent sequence. Rather, the subject must be turned this way and that, to catch different but relevant aspects of a complex reality." [FN21]

This complexity revolved especially around that fundamental conundrum at the heart of historical sociology: the relationship of human agency and social structure. Philip Abrams neatly summarized this constantly recurring, ever-evasive theme of social theory as:

The problem of finding a way of accounting for human experience which recognizes simultaneously and in equal measure that history and society are made by constant and more or less purposeful individual action and that individual action, however purposeful, is made by history and society. How do *105 we, as active subjects make a world of objects which then, as it were, become subjects making us their objects? It is the problem of individual and society, consciousness and being, action and structure.... It is easily and endlessly formulated but, it seems, stupifyingly difficult to resolve. People make their own history--but only under definite circumstances and conditions; we act through a world of rules which our action creates, breaks and renews--we are creatures of rules, the rules are our own creations: we make our own world--the world confronts us as an implacable and autonomous system of social facts. [FN22]

This problem--the relationship of the creative energies of active, self-conscious, independent individuals and the webs of associations, institutions, and processes that limited them--became Willard Hurst's problem. Captured best in that artful, tension-filled phrase "The Conditions of Freedom" that graced Hurst's most popular book, the coincidence of individual possibility and social limitation was the ground on which Hurst constructed his new legal history. [FN23] He tried to grasp simultaneously growth and scarcity--human beings' seemingly infinite "capacity to make new meanings in social experience" amidst constant evidence of their ultimate finitude. [FN24] Hurst realized that any adequate appreciation of the complicated, constantly changing relationship of agency and structure could only come about through a method both historical and sociological, diachronic and synchronic--a method that undertook to explain agency and structure in time as mutually interdependent (as a dialectical process) as well as in their complex relations with other phenomena. [FN25] Hurst's historical sociology would require many definitional and analytical categories, but his first conceptual concern was the two categories he dubbed ""sequence" and "context."

Sequence (The Historical). Sequence represented Hurst's attempt to deal overtly with history and time in his analysis--"to define the dimensions of experience which the perspective of time reveals." As Hurst put the question: "What is 'the law,' the life of which we would study?" For one steeped in history, there existed "no timeless, placeless, essential legal order; on the record, law has been man-made, or at least has grown out of men's social experience." [FN26] Building on the contributions of sociological *106 jurisprudence and legal realism, Hurst demanded a thoroughgoing historicist approach to law as "a living" rather than a revealed or a natural order. [FN27] The legal order was suffused with dimensions in time that determined "its character, impact, and direction." From the rather simple observation that "items in experience follow one another in a sequence," Hurst charted the way in which time influenced social experience by generating perceptions of change or continuity, tradition or revolution, stasis or accumulation. [FN28] Hurst analogized sequence to length (compared to breadth for context) and offered up Oliver Wendell Holmes (compared to Louis Brandeis for context) as the legal scholar who in *The Common Law* best illustrated the force of time, the weight of history, the momentum of the past on law. [FN29] Hurst opened his legal history course at Wisconsin with an annotated time line to drive home the point that the contemporary American legal system was a remarkably recent achievement shot through with the sequential influences of a 2500-

year prehistory. [FN30] That was why any comprehensive *107 appraisal of the complex forces involved in the legal process had to entail a significant element of legal history.

Context (The Sociological). Context was Hurst's attempt to identify the notion that we not only experience situations or issues or events sequentially, linearly, and in time, but we also experience them concurrently as coexisting with different, interrelated situations, issues, or events. Context referred to the "whole event as it exist[ed] by the convergence of many factors." As Hurst summarized, "The content and energy which patterns of behavior and ideas, feelings, and events impart to men's lives are conditioned by the fact that these elements do not exist as isolated entities. They coexist and interact." Law could not be studied as an isolated and autonomous science precisely because of its multiple relations "to the life outside of and around and about the law." [FN31] That is what Hurst meant by "the need for a social history of law"-- contextual history--a realistic legal history "pursuing law into whatever relations it has had to the whole course of the society." [FN32] The study of law not only had to be historical to account for the sequential pressures of 2500 years of previous development, it also had to be what Roscoe Pound called a sociological jurisprudence "which might put law into realistic context with other institutions." As Hurst commanded simply, "Significant legal research must relate to the society at large." [FN33] Though Louis Brandeis best exemplified this kind of sociological, contextual legal research agenda for Hurst, Oliver Wendell Holmes contributed the clarion call for context when he argued, "To be master of any branch of knowledge, you must master those which lie next to it.... If your subject is law, the roads are plain to anthropology, the sciences of man, to political economy, the theory of legislation, ethics." [FN34]

Since Robert Gordon's pioneering historiographical articles, it has become common for legal historians to illustrate this point about studying law in context, law in society, through a simple diagram charting the interdependent relationship of the black box of law with the rest of socio-economic life. [FN35] Willard Hurst's class notes contained just such a diagram (see Figure 1).

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Hurst's box reflected his desire to understand law "not as a self-contained system but as a part of the life of its society." Law was a product of the *108 larger social, economic, and political forces around it. True to form, Hurst subdivided those multiple forces into three different kinds of societal pressure: focused pressure (the balance of power among different centers of will and competing interests), functional pressure (the involvement of law in "the functional integrity and efficiency of certain social institutions and processes"), and inertia (unconscious drift, indifference, habit, custom, and ignorance). [FN36]

The most important thing to notice about Hurst's visual representation of the relationship of law and society was how little of what went into law was the product of conscious, intentional, or "focused" action (roughly 20 percent). As Hurst noted, "Our minds and energies are not equal to grasping the whole sequence or context of experience. The manifest evidence of our shortcomings is the extent to which grounds of public policy remain *109 inarticulate at any given time." The great mass of the accumulated accretion of social experience weighing upon law at any given moment was overwhelmingly unconscious, unwilled, and unarticulated in Hurst's analysis-- the product of inertia or unquestioned values or the hidden "structure and processes" of the underlying, half-defined "patterns of behavior we call institutions." [FN37]

This is where it becomes easy to misinterpret Hurst's ideas about consensus. When Hurst talked about shared values and institutions, he was not talking about the absence of conscious and willed contest and struggle--much to the contrary, conflicting interests and competing centers of power played crucial roles in his analysis. Rather, Hurst's point was that the whole realm of intentional wills or interests (whether in conflict or not) was but a small fraction of the overwhelming social pressure impacting on law that it was incumbent upon scholars to explain.

Hurst was interested in the more substantial, if less explored, subterranean story of general causes--of the deeper, hidden functional, inertial, institutional, and environmental forces impinging upon law below the level of conscious intent or interest on the part of historical actors. There was no conflict over these forces, not because Americans were a particularly tolerant, nonideological people, but because no one actually realized such forces were operating. In Hurst's diagram, inertia and function account for almost 80 percent of the context of legal change. In his opinion, traditional constitutional historians focusing on judges and personalities and conscious economic interests were only accounting for 20 percent of the story of law's sequence and context.

Of course, formally defining or diagramming sequence and context was a much easier task than substantively accounting for their innumerable interrelationships in any given legal history. For that purpose, Hurst relied on another heuristic device (and one of my favorites), the list. In a manuscript on "Technology and the Law: The Automobile" (1949), Hurst conveyed some sense of the range and complexity of the sequential and contextual pressures on law by means of a marvelously thorough list of 119 "Derivative Effects of the Auto Upon the Law" including:

4. Legal devices for private economic planning--contract, franchise, parent-subsidiary corporation relationships--became important for ordering an industry that draws together diverse sources of supply.

6. The industrial accident hazard is increased; workmen's compensation imposed by law, and contract systems of plant insurance and company health plans become important.

*110 12. The demand for semi- or unskilled labor promoted more migration of labor, with attendant problems in community adjustment regarding schools, racial, religious, and rural-urban attitudes.

39. Conservation problems developed in connection with the oil industry.

50. It affected the extent and types of extra-legal sex relations through the privacy and mobility it afforded.

51. Autos themselves became prime objects of criminal activity: car thefts and traffic violations added up to impressive totals in the total bulk of offenses handled by law.

59. Health problems grew out of the readier means for carrying human disease about.

68. The hotel business, with new forms such as the tourist cabin grew, giving new importance to the law of innkeepers.

69. Discrimination on racial, national, or religious grounds, in serving the traveling public, became a greater problem.

75. A new unit of urban living--the metropolitan area--grew out of the new mobility, unmatched by older local government organization.

84. Mass use brought traffic problems--not only police regulation, but zoning, street and highway construction, and community planning.

88. Motor car uses provided a whole new field for government revenue, with accompanying growth in taxes, creation of administering authorities.

92. There was new interest in resort to law to preserve the natural beauty along the roads from invasion by roadside advertising and business.

102. Insurance regulation had to be extended to cover auto casualty insurance.

105. Accidents to persons and property growing out of the operation of autos grew to alarming proportions as the use of the motor car spread, and from this came a great diversity of demands upon law: licensing of drivers, testing of equipment, requirement of safe equipment (e.g., safety glass), stipulations for financial responsibility of drivers or owners, traffic regulation, adjustment of court structures and procedures to cope with the flood of litigation, the handling of out-of-court settlements (involving relations of lawyer and client, insured and insurer, injured party and insurance adjuster), development in legal doctrine regarding negligence, causation, joint tortfeasors, etc. [FN38]

*111 As if this were not enough to demonstrate his point, Hurst went on to list 148 penal offenses growing out of the rise of the automobile in Illinois.

Sequence and context were two essential categories to begin thinking about a historical sociology of American law. But as the detail of such lists suggest, the actual writing of a work of legal-historical sociology required more than abstract conceptualization. It depended upon exhaustive and wide-ranging substantive research. The prerequisite for such an empirical investigation of law was the basic identification and operation of what Hurst originally called in his own first book of legal history, "The Principal Agencies of Law in the United States." [FN39]

Structure: The Principal Agencies of American Law

Through the ideas of sequence and context, Hurst attempted to outline a historical and sociological approach to the rule of law that would avoid the mistakes of earlier schools and methods. Law was not an Idea; it was not about the unfolding of a priori ultimates. "The reality is always finite and contingent," he noted, "even when it shows trend or pattern." Like Oliver Wendell Holmes, Hurst believed that the only kind of principles worth investigating "were existing notions of public policy." Law was also not an organism or a mechanism. Society and jurisprudence were not living bodies nor did they reflect "the inexorable and impersonal laws of social mechanics." Rather, the interaction of factors--the "contextual influences in legal history"--were "subject to contingencies of men's wills, minds, and emotions." [FN40] Law was, and had to be studied as, a particular historical institution. That required a certain double vision in legal studies lacking in previous models. Legal scholarship needed to take account of law itself as an institution "with its own built-in inertias and its own interests derived from the momentum of its own operations" while simultaneously acknowledging***112** the tight "interplay of law with other social institutions--market, family, private associations." [FN41]

The intellectual sources of Hurst's historical, sociological, and institutional approach to law were many and diverse, and they have been treated at length in historiographical essays in this volume and elsewhere. [FN42] They included the sociological jurisprudence of Roscoe Pound and Eugen Ehrlich; [FN43] the legal methodologies of Holmes and Brandeis; the social theory of Max Weber, Emile Durkheim, Talcott Parsons, and Robert Merton; [FN44] and the legal realism that dominated the jurisprudential landscape when he "first came into this business in 1937." [FN45] But his library was also full of somewhat odd books that seemed to influence the development of his own particular system. Hurst's copy of H. Stuart Hughes, *Consciousness and Society*, for example, contained an elaborate series of notes working out Hurst's ideas on Inertia, Process, and Values. [FN46] From such diverse sources, ***113** Hurst fashioned an original perspective. Beyond sequence and context, its next two features were particularity and complexity.

Particularity. Given the central significance of sequence and context in Hurst's analysis, it was impossible to study or talk about "The Law" in general. Law could only be understood in a particular historical context. "To one who perceives the time dimensions of legal order," Hurst noted, "the question will always be one of studying a particular legal order, or comparing particular legal orders." [FN47] In contrast to claims of universal elements in law, Hurst proposed the study of one specific legal order--that of the United States. Citing Alexis de Tocqueville, Hurst noted that the United States was a peculiarly legalistic society--a society in which law was deeply woven "into a wide range of living." Americans were "a law-minded, law-using people, whose affairs were touched by legal processes at many points." American legal history was thus a prime venue for a study of law's contextual relationship to society, as well as an alternative way to study the sequential and "general history of the country's character and development." [FN48] But writing a particular history of law in the United States was no easy feat. The American legal system understood in sequence and context was an extremely complex social institution. Hurst's project simultaneously attempted to come to terms with two different kinds of institutional complexity: structural complexity and functional complexity.

Structural Complexity. Structural institutional complexity was the starting point for Hurst's own empirical research into the principal agencies of law in the United States, the project that became *The Growth of American Law*. Hurst envisioned *Growth* as something like an introductory text or, as he termed it, a work for "purely practical, journeyman's purposes." When Hurst began his own researches, he was appalled at the lack of basic information on the central institutions of American law. [FN49] *Growth* was an *114 attempt to survey in a single volume the different institutional structures that composed the American legal order: the legislature, the courts, constitutional conventions, the bar, and the executive. This was a first-order requirement of any legal history--a simple accounting of the independent institutional factors that structured legal decision making. It mattered profoundly whether an issue or dispute was taken up by a constitutional convention or a state assembly or a county court or an administrative agency. And all were law makers. Legal historians had to wrestle with the different implications of the different institutional pressures on law. That was the origin of one of Hurst's most often-repeated injunctions--that legal history must go well beyond a history of courts and judges and formal doctrine. [FN50] For Hurst, the proper subject of legal history was coterminous with the whole history of governance, broadly construed--formal and informal, local and central, public and private, jural, legislative, and administrative. As Hurst put it best:

In deciding what to include as "law" I do not find it profitable to distinguish "law" from "government" or from "policy." The heart of the matter is that we formed organizations for collective action characterized by their own distinctive bases of legitimacy.... In order to see law in its relations to society as a whole, one must appraise all formal and informal aspects of political organized power--observe the functions of all legal agencies (legislative, executive, administrative, or judicial) and take account of the interplay of such agencies with voters and nonvoters, lobbyists and interest groups, politicians and political parties. This definition overruns traditional boundaries dividing study of law from study of political history, political science, and sociology. [FN51]

This structural institutional complexity of law as governmental practice was precisely why Hurst so prized his own legal history of the lumber industry in Wisconsin. It was the only example of a historical study that attempted to simultaneously investigate the interaction of all the relevant legal agencies (every piece of official paper) surrounding the changes in a given public policy over time.

*115 Functional Complexity. Though many have credited Hurst for his pioneering research into the institutional complexity of the modern American legal order, he has often been accused of oversimplifying another key element in his legal-historical sociology--the socio-economic functions of law in the United States. But in Hurst's system, even more significant than his regard for institutional complexity was his general acknowledgment of law's functional complexity. Indeed, it was precisely Hurst's emphasis upon law's complex functions in society over time that most separated his brand of legal history from its whiggish, constitutionalist, progressive, and institutionalist predecessors. Hurst's focus on the multiple roles of law in society was key to his historical sociology and the point at which his work gets most interesting. In contrast to interpretive critiques that reduced Hurst's conception of law's function to a simple economic instrumentalism or middle-class values consensus, Hurst explicitly and repeatedly recognized (and called for further research into) four broad and salient combinations of value and function that marked "the distinctive roles of law in United States history": violence/force, liberal constitutionalism, procedural rationality, and resource allocation. [FN52] Those four roles were the basis of Hurst's historical-sociological definition of law: "Law has meant organization for making and implementing choices among scarce sources of human satisfaction--organization marked (1) by successful assertion of a legitimate monopoly of violence, (2) by constitutionally ordered power, (3) by procedures which emphasize adherence to legitimated form and to continual cross-check of generals and particulars, and (4) by its regular use to allocate resources to affect conditions of life in society."

[FN53]

One should not be deceived by the simplicity of Hurst's enumeration, for it was the cornerstone of a sophisticated sociology of law. The first thing to notice about this list is that, despite his reputation for emphasizing law's functional relationship to the economy and the market, Hurst began like Max Weber (and later Robert Cover) by headlining law's principal role as force and as official, monopolized violence in society. By this Hurst meant not only the direct legal powers of the state, but also the second-order "surveillance of all other forms of compulsion." To law was assigned the "ultimate scrutiny of the legitimacy of all forms of secular power developed within the society--that is, of all means by which some men may exercise power over the will of other men." Far from underplaying the role of force, coercion, or power in law, Hurst understood it as the first function. [FN54] By *116 way of contrast, resource allocation--law's role as the "principal means to affect allocations of manpower and material means among competing objects of use"--was its fourth function. Though much of Hurst's substantive research and writing was preoccupied with the role of law in "shaping the general course of economic development," that was not the only (indeed, perhaps not even the most significant) function of law in society. [FN55] Though the rest of this article will again privilege Hurst's understanding of law's relationship to capitalism and the market economy, Hurst's own legal-sociological conceptualization highlighted other concerns, including liberal values and procedural rationality.

That is the second important thing to notice about this list of law's roles in society--the degree to which Hurst's understanding of function (which usually has a static and systemic quality) was deeply intertwined with the more open-ended and dynamic problem of value. Like all the best works of legal sociology (again Weber and Cover as well as Jurgen Habermas [FN56] are good illustrations), Hurst's project attempted to come to terms with both system and action, objectivity and subjectivity, utility and justice. As Hurst translated this constant dualism, legal history had to adequately deal with "both the instrumental and the constitutional character of law." The functional and instrumental problem of the legal distribution of political powers and economic resources in society was intimately bound up with the normative and constitutional issue of legitimacy. The second and third roles of law in American society, according to Hurst's schema, centered on the moral problem of political and economic legitimation--liberal constitutionalism and procedural rationalization. For Hurst, liberal constitutionalism was primarily a question of value. It entailed a wide spectrum of attitudes, usages, and norms focused on the constitutional ideal that "there should be no center of secular power which was not in some way subject to review by another center of such power." [FN57] While Hurst elaborated the ideal of liberal constitutionalism at length in his substantive writings, he unfortunately *117 left the ideal of procedural rationality rather undeveloped. Though he acknowledged a pivotal role for law in "providing rational and acceptable forms for finding facts and making choices among scarce satisfactions"--a procedural role that he ranked with "industrial technology and organized science as a major means for enlarging the scope of rationalized behavior"--Hurst's analysis of "procedural regularity" never quite reached the provocative dimensions of the work of Weber, Habermas, Niklas Luhmann, and Gunther Teubner on the role of "legal rationalization" or "juridification" in modern societies. [FN58]

Thus Hurst's conception of the roles of law in modern society, far from being reducible to any narrow legal instrumentalism or economism, actually revolved around the perennial historical sociological tensions between structure and agency, fact and norm, function and value. Synchronically, function and value (or in Hurst's legal frame, instrumentalism and constitutionalism) were two alternative perspectives from which to examine the same phenomenon. But through the addition of a time dimension (the historical, diachronic perspective), Hurst was able to throw his analytical system into motion--to create a narrative, a

story, a legal history. Instead of understanding the relationship of structure and agency, collective and individual, system and lifeworld as distinct and static conceptual categories, the addition of a sequential narrative allowed Hurst to view function and value and power and rationality as intertwined phenomena unfolding in time as historical processes.

II. Hurst's Narrative: Function, Value, and Power

The second part of this article is devoted to Hurst's particular historical narrative about the growth of law in the United States. It continues to adhere *118 to a conceptual outline that emphasizes three of Hurst's primary synchronic categories for understanding law in society:

A. FUNCTION--RESOURCE ALLOCATION--CAPITALISM--LEGAL INSTRUMENTALISM: Hurst's understanding of the relationship of law to the functional requirements of a market economy.

B. VALUE--LEGITIMACY--LIBERALISM--RULE OF LAW: Hurst's understanding of the relationship of law to that amorphous realm of articulated norms in society.

C. POWER--VIOLENCE--STATE--CONSTITUTIONALISM: Hurst's understanding of the relationship of law to public (and sometimes private) force.

Through these basic categories, Hurst explored the interaction of law with (a) economy, (b) society, and (c) polity. They supplied the basic characters in Hurst's legal history: (a) capitalism, (b) liberalism, and (c) the American state. But set in motion, they also provided a diachronic narrative structure for Hurst's histories. Almost all of Hurst's substantive books--*Law and the Conditions of Freedom* (1956), *Law and Economic Growth* (1964), *The Legitimacy of the Business Corporation* (1970), *Law and Markets* (1982)--employed the same braided metanarrative interweaving a chronological progression from the early nineteenth to the early twentieth century with a three-part movement from a focus on market functions to value conflicts to political controls. Hurst's basic outline of law's history in America moved from an early nineteenth-century story featuring law's role in the release of creative economic energies; to a mid-century preoccupation with the competing values of individual rights vs. community well-being; to a late nineteenth- and early twentieth-century tale of the rise of a modern administrative state. As Hurst charted this legal policy progression in *Law and the Conditions of Freedom*:

A. 1800-1870 Communications, credit, and national markets as frame for
release of private individual and group energies.

B. 1820-1877 Sectional balance in federalism.

1840-1900 Humanitarianism and conservation of human resources.

C. 1870-1900 Balance of power: for wider sharing of freedom of choice.

Community strength and security, by rationalization of social

processes. [FN59]

*119 As indicated, the exact dates sometimes shifted and frequently overlapped. And Hurst certainly recognized that function, value, and power (capitalism, liberalism, and statecraft) played important roles in each

historical period. Nevertheless, Hurst's overarching narratives generally utilized the same shifting tripartite emphases: from the release of energy to the control of the environment to the balance of power in the general history; from property and contract to police power to general planning in the lumber story; from general utility to legitimacy and responsibility to institutional policymaking in the legal history of the corporation; and from the market to commonwealth vs. individual values to bargained public policy in the story of the market. [FN60] By merging sequence and context, diachronic narrative and synchronic analysis, history and sociology, Hurst produced the first comprehensive overview of law in modern American history.

Function: Market Capitalism

The starting point for Hurst's synthesis was the economy. Over the past twenty-five years, issues like economic growth, development, resources, and the proper relationship of market and state have taken a backseat to social and cultural history in both academic and public discourse. But in Hurst's formative years, the 1930s through the 1960s, political economy was a universal topic--the lingua franca--of discussion, research, and writing. Fittingly, Hurst's library was replete with the economic writings of economists and public intellectuals like John Commons, Walton Hamilton, Thurman Arnold, Joseph Schumpeter, W. W. Rostow, John Kenneth Galbraith, and Robert Heilbroner as well as ubiquitous economic histories of industries, corporations, robber barons, and state policymaking. Without question, political economy was the crucial frame of reference for Hurst's intellectual project. "Always in the background," he argued, was the constant, immovable, and economic "fact of scarcity." [FN61] Hurst was matter-of-fact: "It's hard not to be an economic determinist. People have to find means to eat." [FN62] He explicitly endorsed the older, nonspecialized *120 perspective of "political economy" for exploring big historical-sociological questions: "The larger the questions, the more alike are the modes of analysis of economists and lawmen." In the history of the United States, particularly, "legal process was woven closely into the general growth of the economy." [FN63] Indeed, American law's solicitousness toward the serviceability of the economic institution of the market was for Hurst the leading example of law's functionalism, that is, the idea that legal power should be justified and legitimated by "being useful-- efficient, if you will--for socially acceptable and humanly desirable ends." [FN64] Such concerns led Hurst to begin his history of law in the United States not with the old political story of vested rights and ancient constitutional limitations but with the formative, functional, and instrumental relationship of modern American law to the emergence of a market economy.

The Market. For Hurst, the market was unequivocally the dominant institution in nineteenth-century American life. This was a century that "put all the energy and attention it could into economic interests." The market-- "the activity of private operators in producing and distributing goods and services for private profit"--was particularly valued as the institution "for achieving economic efficiency"--"the most output for the least input." [FN65] Though public controls and state regulations were present (especially in the latter part of the century), the overwhelming emphasis of nineteenth-century approaches to the problem of the allocation of scarce resources was "to promote expansion rather than to regulate expressions of private energies of will." This was a society, according to Hurst that "preferred immediately visible productivity above formal order"--"dispersion and delegation put the greater weight of decision in market processes rather than in political processes." [FN66]

In Hurst's analysis, the market came first and consequently had a decisive and determining effect on the rest of nineteenth-century American social and political life. "We favored large scope for private invention and elaboration of organizational techniques for increasing control over material or social

environment," Hurst argued. "Thus we assigned the market a role substantially equal to that of political process in shaping social order." *121 Indeed, for the past one hundred and fifty years, Hurst contended, the private market was "central to ideas and styles of action which have determined the location and character of prevailing political power in the country." Law reflected that prioritization. Indeed, "with its emphasis on the law of contract and fee simple title to land," the early American legal order was something of a symbol of that "prime reliance on the market" for producing and distributing resources. For much of the nineteenth century, Americans demanded through and conceded in law "a wide scope for the initiative of private will in the market." [FN67]

Hurst was certainly not uncritical of the overriding influence of the market as a simple fact of nineteenth-century American life. As he put it, "The century was so market-focused as to be politically naive." Like many mid-twentieth-century liberal humanists (for instance, Richard Hofstadter and Louis Hartz), Hurst did not take unambiguous pride in a market system that generated effects like the rapid deforestation of Wisconsin. [FN68] In particular, Hurst decried three noxious consequences of market dominance: the monetization of value, the privileging of short-term over long-term goals, and the masking of socio-economic power. [FN69] One central concomitant of a reliance on the market to distribute scarce resources was the assignment of value to achievements through a simple tally of measurable inputs and outputs, for instance, "the number of men or dollars." And while there were obvious benefits to a money calculus of costs and benefits like speed, impersonality, and comparability, Hurst, like Holmes, found a certain "crudity or grossness in the country's regard for private economic power." He felt that alternative sources of worth better dealt with significant areas of life such as "the worth of a secure family unity, or the opportunity asset represented by a natural resource subject to irreversible depletion." So, too, the market was often "superficial or neglectful in matters of deep public concern," owing to its short-term, practical judgments as opposed to deeper analyses of underlying causes and consequences. The market released the creative energies and expressions of a myriad of interested individuals, but it also yielded "vast, unforeseen, unchosen social consequences out of unplanned, uncontrolled accumulations of fragmented *122 decisions." Finally, Hurst was also critical of the obvious power element at the heart of market assessments of the appropriate distribution of scarce goods: "The market offered men leverage through skill, fortune, and energy to acquire practical powers of compulsion over other men." Despite such criticisms, however, the market loomed as an irrefutably large fact and force in nineteenth-century American life. It demanded close examination in legal history. [FN70]

Legal Instrumentalism. But what exactly was law's relationship to this powerful and sometimes problematic institution called the market? In contrast to some of the economic assertions of the critical legal studies movement (and the insights of sociological jurists like Morris Cohen and Robert Hale), Hurst did not believe that the market was fundamentally a creation of law. "The private market--sustained patterns of private trading for profit," he argued, "was primarily the product of goals set and means fashioned by industrialists, merchants, bankers, lenders and borrowers, employers and employees, and ultimate consumers." Though Hurst shared Legal Realism's recognition of the public powers that undergirded private rights like property and contract, he worried about overstating formal law's constitutive role vis-a-vis other socio-economic institutions. "Relative to the whole play of factors that produced the market," Hurst contended, "the law was marginal." [FN71]

Rather than creating or constituting the market, Hurst envisioned law as primarily an enabling and supplementing institution for allocating scarce human resources. In the United States, people made "heavy and pervasive demands on the market and the law" to cope with the problem of scarcity. "In a society which believed that in economic creativity it held the means to fashion new standards of human dignity," Hurst noted, this "interplay of law and market has expressed a good deal of our way of life" [FN72] In the *123

early nineteenth century, this interplay was primarily a functional one. Law provided "the means for assembling and channeling resources" and "the processes for resolving conflicts" derived from scarcity or the "absence of life's satisfactions." [FN73] Hurst dubbed this economic functional relationship of law and market (law and resource allocation) in the antebellum United States "legal instrumentalism"--a pragmatic, improvising, rule-of-thumb attitude that considered law a tool rather than a rule, a means rather than an end. As Hurst put it, Americans "believed that law existed to serve men, and not men to serve the law." Law functioned primarily as a mechanism of resource allocation that channeled and dispersed "economic decision making into private hands through the market, implemented through the law of property and contract." [FN74]

As Lawrence Friedman, Harry Scheiber, Stanley Kutler, and others have made clear, Hurst's functional understanding of law's instrumental role in the "market revolution" was an exhilarating achievement and the basis for a new research agenda in American legal history. [FN75] In place of traditional constitutional stories of judicial review, vested rights, and due process, Hurst's functional approach integrated legal change into the general story of American socio-economic development. In place of a relatively internalist, technical, and limited story of doctrine and judges, Hurst opened the doors to an externalist story with topics and themes as broad as history and sociology themselves. Hurst urged legal scholars to replace ubiquitous studies of natural law and constitutional clauses with topics like the ways "we used the public lands to fashion a family-farm economy in the Mississippi Valley, to underwrite the growth of the private banking which serviced this farm economy, and to subsidize the development of roads, canals, and railroads *124 which brought its products to market" or the ways "we used federal fiscal powers to give tariff protection to foster industry, and to provide central banking facilities and regulation to promote nationwide business expansion" or the "ways in which the law of private property, contract, and tort gave legally protected scope for exercising private initiative of decision to allocate scarce economic resources, free of arbitrary intrusions either of public or of private power." With such instrumentalist topic suggestions, Hurst coaxed into being the original agenda of a new legal history. [FN76]

Three things are important to note about Hurst's conception of legal instrumentalism. First, like his ideas about the limitations of the market, Hurst could be quite critical about the early American tendency to use law "in a narrowly practical way"--"more as an instrument for desired immediate results than as a statement of carefully legitimated, long-range values." The "pragmatic insistence on using law" as "a handy tool" could too easily be perverted into the narrow calculus of short-term interests that Hurst later criticized as "bastard pragmatism." [FN77] Second, legal instrumentalism was intimately linked to another underlying theme in Hurst's work--the marginality of law. As Hurst suggested, "Typically law worked only to exert limited but critical leverage upon situations; its effectiveness in this culture not only depended upon but consisted in its playing a limited part." In his work on the business corporation, Hurst made the most explicit case for the relationship of instrumentality and marginality: "Corporation law has always been an instrument of wants and energies derived from sources outside the law; it has not been a prime mover. However, ... the kind of structure, procedures, and privileges which corporation law made available significantly channeled the expression of men's wants and energies and significantly affected the responses which other interests made to these drives." Hurst's instrumentalist perspective thus carried a distinct warning about overstating law's role in the development of a market economy: "We must not exaggerate the influence of men of law compared with the inventions and energies of promoters, financiers, managers, marketing men, trade union leaders, and a host of others. In the whole course of affairs lawyers produced only marginal effect." But though marginal relative to the vast array of human factors contributing to "the market," law provided critical leverage and cumulative effects that had a decisive influence upon the balance of other factors shaping American capitalism. [FN78]

Finally, and most significantly, law's instrumental role in the allocation of scarce resources in nineteenth-century America should never be confused *125 with a negative or passive or laissez-faire approach to the relationship of government and the economy. On this point Hurst was unequivocal: "A simple regulatory, prohibitory, narrowly policeman-role concept has not adequately described our legal order." Legal instrumentalism was Hurst's attempt to portray the active, dynamic, positive, and powerful function of law as governance in the most crucial public policy matter facing the new American nation--the creation and distribution of product and wealth. The legal tools exploited in this process included some of the most potent of sovereign authorities: taxation, public expenditure, eminent domain, nuisance, police power, even military mobilization. The Wisconsin lumber industry, for example, was almost completely dependent upon original state-created conditions for market exchange: land grants of 35,000,000 publicly controlled acres, public internal improvements like navigable streams and railroads, and sovereign grants of public privileges like corporate status, special licenses and franchises, and the power of eminent domain. [FN79] Legal instrumentalism was not about a simple governmental acquiescence to the private market. It involved the positive and public deployment of legal power. Indeed, as the nineteenth century progressed, according to Hurst, the legitimacy of the market as a central mechanism of resource allocation was increasingly challenged. By the late nineteenth and early twentieth century, the same legal and governmental powers of the state that bolstered and supplemented economic decision making came to be deployed as antagonistic checks on the excesses of market allocations of scarce goods. The public utility and the administrative agency signaled a fundamental realignment of economic and political power in American history. [FN80] The economic functions of law came into increasing conflict with *126 the values and violence that also constituted a legal order. Legal instrumentalism acceded to liberal constitutionalism.

Value: American Liberalism

Legal instrumentalism, law's functional relationship to early nineteenth-century market imperatives, was but one of law's important roles in American history. Equally significant was law's relationship to the problem of value. Hurst's historical sociology attempted to wrestle simultaneously with the problem of meaning as well as material life, law's normative as well as its positive implications. Law's sweeping power in American society was linked not only to its factual and sociological function as a distributor of resources and power (in legal realist terms, its "is-ness") but also to its intellectual and moral force as a primary source of notions of rightness and validity (its "ought-ness"). For Hurst, law not only reflected the economic demands surrounding scarce resources, it was one of the principal embodiments of the full range of articulated values in a society at any given time. "For all its frailties and fictions," Hurst noted, "law operated with a force not matched by any other major institution of social order to press men to define ends and means"--"nowhere else did men undertake so much to explain themselves." Constitutions, statutes, judicial opinions, and administrative rules constituted "the largest single body of articulated values and value-oriented contrivances in society." [FN81] This enormous deposit of value evidence extended well beyond issues of economic function, utility, efficiency, or the satisfaction of wants. Rather, a "deeper, more demanding" and more elusive criterion operated around this problem of value--a criterion Hurst sometimes dubbed "justice." By "justice" Hurst attempted to capture very simply something that more complicated social theories allude to with neologisms like "species-being" and "lifeworld," that is, "the humanistic demand that life should have rewarding content, that life should be made more real as an end in itself." The organized powers, administrative systems, and economic functions of modern societies were always subject to the higher stricture that institutions should enlarge rather than diminish "the humane quality of individual life for all individuals." Admittedly, this normative concept of law as justice was somewhat slippery, but Hurst was precise about its two primary valences. "On the one hand, we should structure society so that people

find humane satisfaction in living *127 in it," Hurst argued. "And, secondly, organized power in society should offer substantially equal terms of life opportunities for all." Justice for Hurst entailed that interweaving of humanism and egalitarianism, individualism and collectivism, embodied in the due process and equal protection clauses of the Fourteenth Amendment. [FN82] Indeed, law as values in American society frequently revolved around the competing demands for individual liberty vs. democratic freedom, or as Hurst understood it, the release of energy vs. the balance of power. In Hurst's synthesis, this tension was at the root of the American legal tradition of liberal constitutionalism.

Though values were often shared in Hurst's analysis, they were never simple or one-dimensional. Liberty and order, freedom and control, were the two faces of liberal constitutionalism, and they reflected Hurst's conviction that the human condition involved the fundamental contradiction of possibility and limitation, growth and scarcity, infinity and finitude. From Louis Brandeis he inherited an optimistic, progressive, and reformist faith in the possibility of growth "toward realizing the creative potential that resides in individuals and their society." From Reinhold Niebuhr he learned about "the tragic element, not just in life but in human history, the sense of limitations of energy, courage, imagination, vitality that adhere in being a human being." [FN83] The patterns of values Hurst detected in American law and society often broke down around this bifurcation between the release of individual creative energy and the collective limitations of the balance of power. Hurst demarcated four values especially salient in nineteenth-century law that gave "character to the society" and that helped determine the "main currents of public and private policy in the growth of the country": (a) a deference to individual life; (b) an activist, manipulative bias; (c) pragmatism; and (d) a concern for social context--a commonwealth--whose primary constitutional requirement was a broad dispersion *128 of decision-making power. [FN84] The last, multifaceted value involves Hurst's definition of constitutionalism, limitations, and the "balance of power." It will be discussed in the next section on power and the constitutional state. The first three values were central to Hurst's rendering of the possibilities of nineteenth-century liberalism, or what he dubbed the "release of individual creative energy."

The Release of Energy. Hurst rooted the release of energy in a reformed and enlightened Judeo-Christian tradition not unlike Max Weber's "protestant ethic and the spirit of capitalism." Its first feature was a high individualism. For Hurst it was simply apparent that American law and public policy were dominated by a first-order concern "to foster the creative potential and dignity of individual life." In the nineteenth century, this objective was primarily reflected in law's deference toward individual market decisions, that is, "in the strong support for freedom of contract and in the emphasis on moving public lands into private, fee-simple ownership." While twentieth-century American law largely abandoned this knee-jerk market solicitude, it "continued to focus attention on the position of the individual" but in new ways, for example, civil rights and the protection of minorities. Throughout, American legal culture "put a premium on individualism." Though like any progressive, Hurst admitted that "individuals realize their humanity only in society," he also contended that "they realize their individuality only in self-awareness, which consists in some sense of separateness." [FN85] Like John Stuart Mill, Hurst placed an irreducible residual concern for the individual at the center of American law and at the core of his definition of liberalism. The energy to be released was at bottom individual.

But like John Dewey, the individualism that Hurst found in the history of legal liberalism was not the static, passive, or negative liberty of the vested rights school of American constitutional development--Dewey's "old liberalism." Rather, the second liberal value reflected in law was "the prizing of active will to shape social experience." The energy to be released, in other words, was active and creative, indeed at times creatively destructive. Liberal freedom implied not simply the removal of oppressive constraints, but the positive promotion of the ability of

individuals to act and to create, to work and to manipulate--to continually and freely express their creative wills. "Not the jealous limitation of the power of the state," Hurst made clear, "but the release of individual creative energy was the dominant value" of nineteenth-century American law. "Where legal regulation or compulsion might promote the greater release of individual or group *129 energies," Americans did not hesitate to make "affirmative use of law." [FN86] As this call to creative action and energy was something like a secular faith, Oliver Wendell Holmes was something like its high priest pontificating, "Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it is the one end that justifies itself." "I know of no true measure of men except the total of human energy which they embody," Holmes argued, "from Nansen's power to digest blubber or to resist cold, up to his courage, or to Wordsworth's power to express the unutterable, or to Kant's speculative reach." The bold and free-wheeling adventurousness of an Arctic explorer was exactly the kind of energy that Hurst witnessed as valued in nineteenth-century law. It was a legalism and a liberalism that "measured the content and quality of life by the amount and skill of manipulation which men addressed to their relations to the material world and to each other." [FN87] It was thus a legalism and a liberalism constantly in motion and in flux. Like the "creative destruction" that Joseph Schumpeter identified as a central feature of capitalism, Hurst's legal liberalism was constantly revolutionizing itself--incessantly destroying old legal rights and political duties and creating new ones in their stead. [FN88] Just as Hurst's understanding of shared values had little to do with consensus, his notion of the release of creative energy was fundamentally about change, not continuity. Indeed, it was precisely Hurst's emphasis on law's dynamic role in the economic and political revolutions of the nineteenth century that opened the doors to a new legal historiography.

But just as individualism was qualified by an emphasis on activism (in addition to the competing commonwealth and constitutional values to be discussed below), the powerful value of active will in Hurst's analysis was further qualified by a third value--pragmatism. Hurst described pragmatism as a sobering and limiting value that reined in the potential excesses of an unqualified promotion of individualism, activism, and manipulation. Pragmatism in law meant that action and judgments should be "disciplined and moderated by reasoned calculation and by a cautious sense of man's *130 limitation." Hurst again cited Holmes on the pragmatic tendency: "Certitude is not the test of certainty. We have been cock-sure of many things that were not so." The pragmatic strain that Hurst detected in nineteenth-century law and society was irreverent and decidedly anti-absolutist. It was the hallmark American philosophy--"the idea that truth lies in operation, that truth is learned by behavior, and appears in fulfilled effort." In its most valuable, positive form, this pragmatism operated as a kind of "skeptical moderation" prodding reason to operate with "a saving skepticism" and cultivating the "capacities of mind and will to act" upon one's situation. But as implied in the discussion of legal instrumentalism, Hurst also warned about the ease with which this pragmatic tendency could be perverted into the more menacing "bias toward exalting the immediately practical--in the sense of knowledge which can be translated into immediate operation--at the expense of understanding larger causes and more remote chains of effects." "A superficial concern with immediacies" and mere "busyness" and "satisfaction with opportunistic gains" were the negative byproducts of an overly narrow version of pragmatism in American law. Hurst's conclusion that "a valid pragmatism is constantly at war with an illegitimate pragmatism in our way of life" very much mirrored his divided perspective on the possibilities and limits of "the release of energy." [FN89]

Hurst sometimes combined the values of individualism, activism, and pragmatism into something he called the "middle-class outlook" of nineteenth-century American life. But much like Tocqueville, his assessment of its

achievements was decidedly mixed: "The middle-class outlook which was significant in the roles of law in United States history was morally ambiguous, marked by positive strength and by capacity for waste and wrong." Like most liberals, he praised the ideals of individuality, free expression, creative action, skeptical moderation, and tolerance as the highest social and moral ambitions. But he took no delight in the practices of unfreedom whereby "a rich, unexploited continent gave scope for self-righteous or amoral individualism" or whereby the high ambition of a protestant ethic "easily fell away into a lower kind, satisfied with mere increase in quantity of creature life." [FN90] Hurst's critique and his fear of the degradation of the liberal release of energy echoed Tocqueville's depressing vision of "an innumerable multitude of men, alike and equal, constantly circling *131 around in pursuit of the petty and banal pleasures with which they glut their souls." In 1971, Hurst argued, it was hard "to push Tocqueville aside": "People will settle for beer and television, in Tocqueville's estimate.... Their insistence on equally shared, immediate, material enjoyment would make them increasingly ready to accept the domination of the mass and of mass opinion, and increasingly willing to accept strong political direction, if it would only assure them the beer and the television." [FN91]

So, even if completely and consensually shared, the values of individualism, activism, and pragmatism combined in the middle-class outlook and legal practices of "the release of energy" brought the attendant dangers of a Tocquevillian democratic despotism. Still, the values "shared by a politically effective segment of the population" were but a small part of the full story of nineteenth-century law. It would be a serious error to overemphasize the role of "the release of energy" in Hurst's total vision of law in American history and society. We have already mentioned law's functional role in the allocation of scarce resources as well as the powerful impact of "unplanned and unchosen" drift and inertia in societal and legal affairs. In addition to these factors, we still need to reckon with the fourth dominant value that Hurst identified in nineteenth-century law--constitutionalism, or the tendency to disperse decision-making authority and balance competing centers of power. As implied, this last legal value was much more about conflict and division than consensus and shared feeling. "The country's turbulent growth spawned a great diversity of goals and ambitions," Hurst was fond of pointing out. Thus, law and public policy was "much concerned with handling conflicts of interests." Hurst especially noted the "deep divisions of interest centered on wealth or income, race, and sex as criteria for allocating the gains and costs of life in society." [FN92] Indeed, this last set of values surrounding the legitimate balance of conflicting powers and interests in society leads away from the emphasis on function and value in American law and toward one of the most intriguing and important (if comparatively underdeveloped) of Hurst's themes: the role of legitimate force and violence in law's underwriting of the American constitutional state.

Power: The Constitutional State

Though questions of instrumental market functions and shared liberal values dominated Hurst's characterization of early American legal change, *132 questions of conflict, interest, power, force, and state-monopolized violence increasingly prevailed in his account of the creation of a modern polity and economy in the late nineteenth and early twentieth century. A victim of his own success at redirecting attention to the "formative era" of American private law and economic growth, Hurst's underlying preoccupation with modern corporate capitalism, the administrative state, and what he called "the dominant problems in law of our time" is easy to forget. [FN93] In Hurst's original 1942 research program for legal history, he underscored the importance of the "new liberal" problematic of "the security and values of individual personality in a world increasingly marked by centralized, large-scale power arrangements." Hurst recommended an array of legal-historical topics for investigation that departed markedly from a simple release of economic energy agenda: civil liberties, the administration of modern criminal law, the law of insurance, civil rights and antidiscrimination law, labor law,

collective bargaining, antitrust, economic planning, public housing, and consumer security. [FN94] Issues of control--of balance, police, regulation, and planning--were increasingly featured in this latter part of Hurst's legal history. Indeed, here law's role as legitimized violence and force in society-- as coercive governing power--was most visible and apparent. Hurst demarcated two interrelated ways that law intersected with the issue of power: first, the value problem surrounding law's legitimate role in resolving conflict among competing interest groups and power centers--constitutionalism; and second, the political problem of law's role in the creation of an entirely new center of public power--the modern administrative state.

The Balance of Power. Constitutionalism for Hurst was not about judges or courts or judicial review. Rather, it was about the structure of power in society and the values that informed that structure. In the United States, constitutionalism comprised the accountability and dispersal of power, broadly construed. Hurst often repeated a straightforward definition of constitutionalism as the proposition that "any kind of organized power ought to be measured against criteria of ends and means which are not defined or enforced by the immediate power holders themselves. It is as simple as that: We don't want to trust any group of power holders to be their own judges upon the ends for which they use the power or the ways in which they use it." As profound a value in nineteenth-century American law as the concern for the release of individual energy was the constitutional proviso that "all forms of organized power over men's wills should in some way be accountable to serve ends of broader concern than the purpose of the power holders." Though nineteenth-century Americans were *133 eager to put power in the hands of individuals for creative, economic, and socially useful purposes, the countervailing value of constitutionalism demanded "external checks on the ends and the means of this power." [FN95] Again, growth and limitation, possibility and restraint, and freedom and control--for Hurst this pervading tension (as opposed to either one of its alternative dimensions) was the story of nineteenth-century American law.

The sources of constitutionalism were many and deep, from the classical political notion that power should serve the public welfare to protestant reform ideas about natural and church law serving the "proper claims of human spirit" to early modern common law restraints on prerogative. Through the American revolutionary experience, these ideals coalesced into a strong American legal predisposition "to correct arbitrary or oppressive public or private power"--"to make all public and private power accountable to serve men's welfare according to criteria not in the sole determination of particular power holders." This temper manifested itself in myriad examples of constitutional checks on and balances of organized power and interests from the separation and dispersion of sanctioned centers of power to demands for the publicity of decision making to elaborate hierarchical rules for the proper use of power: for example, constitutions, statutes, charters, ordinances, and administrative orders. Constitutionalism for Hurst was nothing short of the American definition of "the rule of law" and all of the nonfunctional, anti-instrumental, relatively autonomous values suggested by that pregnant phrase. As Hurst put it, constitutionalism as "the practicing belief that law power should be accountable to serve life outside the formal power structure itself-- meant that observance of law and belief in law were themselves ingredients of a way of life." [FN96] Constitutionalism was an exceedingly broad mandate to order, balance, and control power in society--applicable to matters of private as well as public law. This rule of law was often in conflict with the functional demands of a market economy and competing social values like the release of individual energy. But in the end, constitutional scrutiny of organized power persisted as an overriding American legal value. As Hurst concluded, "There was no pattern of social organization whose significance could be appraised without taking into account the demands which an ideal of constitutional order either did in fact make on it, or should make on it." [FN97]

*134 Two of the most important aspects of Hurst's vision of the constitutional ideal were its recognition of the significance of group and associational life (as opposed to the individualistic focus of the release of energy) and, relatedly, its solicitousness for what Hurst called "commonwealth values" or the public interest. While Hurst repeatedly labeled American culture "individualistic," he almost always immediately noted the opposing conclusion that "this culture also put a premium on values which could be realized only by an increasing range and complexity of group action, and hence organization." Human beings in Hurst's analysis were decidedly social and associational animals whose being consisted in a peculiar "fusion of awareness of self as apart from and yet in relation to other persons and things." The American legal order reflected this social and group orientation in its constant concern for the whole range of productive associational activities "from the most intimate to the most impersonal ties, and from unqualified options to the most imperative demands, from the tender of public service without fee to the imposition of taxes, to the conscription of men's lives." Hurst again cited Holmes on the idea that "no theme was more important in legal history than law's involvement in man's organization of relations to his fellows--the means by which mankind has worked and fought its way from savage isolation to organic social life." Indeed, one of the most important (if often overlooked) of Hurst's discoveries about nineteenth-century American law was the extensive use of regulatory powers that imposed "substantial burdens upon individuals for the sake of group interests." [FN98]

This last point is absolutely crucial for a full appreciation of Hurst's understanding of constitutionalism. Given the discussion of market functions and individual energies above, it might seem that Hurst's nineteenth-century America came perilously close to dissolving in "a whirl of private schemes and transactions." But as Hurst made explicit, "we never exalted laissez-faire into a governing dogma." Rather, the challenges of economic growth, sectional diversity, and institutional development "required a collective effort" and a public policy that "paid considerable attention to ... commonwealth values." Public land programs, public utility franchises, the development of public resources and public works were but the most conspicuous examples of a prevailing concern for public values in nineteenth-century law. As Hurst pointed out, "This care for the common interest showed even in contract law--that key support of the private market--where courts carefully maintained their authority to refuse to enforce private agreements which threatened anti-social results." This "sensitivity to commonwealth interests" broadened and deepened after 1900 as an interdependent *135 and interconnected society and polity wrestled with the increasing ability of relatively few individuals and actions to generate effects on and wield power over many. [FN99]

Thus nineteenth-century American constitutionalism for Hurst was not confined to courts, it was not restricted to matters of public law or public power, and, finally, it was not primarily a negative power. Hurst often derided the tendency of some classic political texts and authorities to think of the issue of constitutionalism "as a series of Thou Shalt Nots addressed to power holders." That was a mistake, a limited understanding of constitutionalism that overlooked the more positive and active "insistence that law serve the commonwealth, the general or public interest." Though Hurst admitted that these were "vague terms, subject to twisting to gloss over pleas of special interest," still they reflected the fundamental constitutional principle that "individual life depends on some health of social context for its quality and sustainment. Law's legitimacy required that it maintain constructive, living relation to the course of life in society outside the law." Examples of this powerful positive constitutional tendency in nineteenth-century America included public schools, public works, and, most significantly, the broad endowment of governmental powers (taxing, spending, commerce, defense) that "the Constitution gave to the Congress of the United States, and in the steady expansion of those powers by legislative practice and judicial sanction." [FN100] As Hurst

recognized in his earliest work on nineteenth-century commerce clause jurisprudence, this more positive aspect of constitutionalism was intimately related to the process of state building in the United States. In his latest works, he turned more attention to the early twentieth century and the transmutation of this positive constitutional ideal into one of the clearest examples of the links between law and power and official force--the rise of a modern administrative, regulatory, and welfare state.

The Administrative State. Constitutional notions of the balance of power and commonwealth values promoting public welfare were not simply abstract ideas or detached popular attitudes in Hurst's analysis. They were legal and governmental practices embedded in the official decisions and potent public policies of the American state. The most continual practical manifestation of the principle that "the good order of social relationships was a legitimate objective of law" in Hurst's legal history was the development and exertion of the constitutional state regulatory authority known as "the police power." In Hurst's capacious definition, the police power held "that government may act reasonably to promote or protect the functional ***136** integrity of important social relations, or to foster a balance of power among competing interests on terms acceptable to the community's durable concepts of what constitutes a good life." The police power functioned in nineteenth-century American law as an open-ended and coercive state regulatory power that extended "to all the great public needs." [FN101] For Hurst, the police power was the clearest representation of law's role as power, force, and legitimate state-sanctioned violence. Drawing on Weber, Hurst noted, "In our system we assigned to law the legitimate monopoly of violence; the accepted possession of successful force was a constituent of legal order." The point was obvious for Hurst and cautioned against any simplistic reading of "the release of energy": "No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them and marches them, with bayonets to their rear, to death. It runs highways and railroads through old family places in spite of the owner's protest.... The public force stood in the background every time government acted to lay and collect taxes, to require a manto give up his land for a public use." Hurst cited Holmes's classic critique of Mill to suggest the limits of old renderings of liberalism: "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not." [FN102] For Hurst, law was fundamentally about "the application of politically organized compulsion upon men's wills." The nineteenth-century history of the police power was just one illustration that "this legal order possessed the legitimate monopoly of violence and demonstrated a considerable capacity to police types of power created by other than political means." [FN103]

But the nineteenth-century regulatory story of the police power was but a warm-up for what Hurst understood as a "significant watershed" and ***137** transformation in the history and nature of American law, public policy-making, and statecraft--the rise of the modern administrative state. After 1870, Hurst noted, "Social change produced a country which by the nineteenth-twenties bore little resemblance to its forbear.... Public policy took on a content that was distinctive to the twentieth century." [FN104] Regulation, administration, and organization became hallmarks of a polity increasingly committed to controlling energy, interest, and environment. The administrative, regulatory, and welfare revolution of the late nineteenth and early twentieth centuries brought substantial changes in the structure, function, values and powers of the American legal order and demanded a different legal history. Though Hurst did not write this twentieth-century history of the legal problems of "our time," he did provide an outline of its central features.

First, the governmental revolution of the early twentieth century entailed a

fundamental shift in the structure of the American polity. The principal agencies of law (the lawmakers) in the United States changed. Substantial structural changes in the executive and administrative establishments came via legislation "with the proliferation of offices ... as national and state governments enlarged their service and regulatory roles." Especially notable for Hurst was the creative decade from 1905 to 1915 that witnessed "the rapid rise of independent administrative agencies--notably a strengthened Interstate Commerce Commission and the new Federal Reserve system and Federal Trade Commission on the national scene and new state agencies concerned with factory safety, workmen's compensation, and public utility regulation." [FN105] Second, the functional relationship of law and the market economy was fundamentally revised in the same period by a rising tide of corporate consolidation, market failure, and general "discontent with the legitimacy of the market on grounds of utility." The market no longer proved "sufficiently serviceable to allow it the central place as a resource allocator which public policy was prepared to give it between 1750 and 1890." Antitrust law, public utilities regulation, and environmental protection reflected the new priorities of national legal and administrative reform efforts to check market forces and police corporate power. As Hurst summarized, "Public policy insisted that these new forms of organized power, characterized by great aggregations of capital and great capacity to affect life, should be legitimized by the criterion of utility and that this criterion should be enforced more and more by the law, and less and less by the market." [FN106] Third, and as indicated by these structural and functional changes, *138 the balance of values in law shifted more toward social, constitutional, and commonwealth ideals. As Hurst put it, "Since the 1880s social developments have fostered a society of increasing interlock of processes and relations. Demands on public policy regarding the good order of social relations have tended to mount." The administrative and regulatory revolution was a new expression of the constitutional requirements that "the creative currents of our life ran toward better organization of relations," that there should be a "healthy offset among centers of power," and that the public interests should be jealously guarded. [FN107] Finally, the regulatory and administrative changes of the early twentieth century marked a substantial realignment in official, organized power and force in society. From the 1880s, Hurst argued, "The regulatory component of statute law became much more prominent and ... the focus changed from enabling organized action to injecting more public management or supervision of affairs and providing more sustained, specialized means of defining and enforcing public policy." Such transformations of the American state marked a decided shift in the roles of law and governance in society. But even through this second great transformation in political economy, law retained its force as a central structural, functional, value-laden, and power-wielding institution in modern American life. As Hurst concluded, "Public policy took the firm position that law holds the ultimate monopoly of force, and as a *139 corollary holds the ultimate right to pass judgment on all forms of organized power in the society, private as well as public." [FN108]

Conclusion

Function, value, and power were three principal sociological and contextual categories of analysis through which Hurst told his story of the sequential evolution of American law from an early nineteenth-century legal instrumentalism releasing the individual creative energies of market actors to the early twentieth-century emergence of an administrative and regulatory polity bent on controlling new organized forms of industrial, social, and political power. Hurst's sequential stories often overlapped (for instance, the development of the police power in both time periods) and his categories were frequently conflicted within themselves (for instance, the competing values of "the release of energy" and "the balance of power"). Additionally, in his earliest work, Hurst introduced the scholarly necessity of reckoning fully with the significance and historical impact of the complicated organizational structures of diverse and changing legal institutions. In his latest work, he turned to the most difficult historical phenomena to explain--

inertia and drift. He tackled head-on the impossible task of historically explaining how "most of what has happened to men has happened without their wanting it or striving for it or opposing it or--more important--without their being aware of the meaning of trends until patterns of structure and force have developed past points of revoking." [FN109] Like Richard Hofstadter, one of Hurst's major intellectual achievements was to confront the cartoonish constructions of whig and progressive historiography (and whatever new one-dimensional theories and stories that might rise up in their place) with the inescapable complexity of socio-legal change and historical explanation. [FN110]

***140** Indeed, Hurst's overarching interpretive framework was so complex and inclusive in principle that to imagine a historical sociology of American law that directly refutes (rather than revises or embellishes) Hurst is difficult. Still there are some critical routes beyond Hurst that invite serious attention. One popular strategy has been to ignore him and his questions, or more specifically, to emphasize those aspects of American legal history that Hurst ignored or left out. [FN111] This approach has led to a proliferation of exciting new legal historical scholarship from (a) the revival of interest in doctrine among critical legal historians; to (b) the new social histories of American law focused on race, class, and gender relations; to (c) burgeoning attention to "new" fields like slave law, native American law, family law, and immigration law; to (d) the continuous calls (with too little response) for new scholarship on the terminally neglected colonial period of American legal history. But the spirit of this article has not been about moving away from Hurst. Rather, despite the illuminating innovations of recent specialties and new historiographies, this article has argued for the continued importance and vitality of Hurst's method and questions. Historical sociology is still the most compelling framework within which to place the American legal past. Hurst's questions about law and modern society and political economy--the questions of Tocqueville, Marx, Weber, Durkheim, and Holmes--remain questions of utmost importance. After three decades of historical work on social and cultural history, and as we leave a twentieth century notable for the continued expansion of global corporate capitalism, the internationalization of American legal and economic forms, and the continued resonance of liberal constitutionalism, it is past time for a comprehensive reassessment of the relationship of American law, statecraft, and modern capitalism. The question then becomes not so much one of what Hurst left out, but how to best critically, dialectically, and constructively re-engage and extend his method, his questions, and his themes. Unfortunately, an adequate response to that question (as Hurst always knew) ultimately eludes short programmatic articles and must await ***141** the full-scale empirical investigations that could actually recenter such issues. Nonetheless, one can sketch a few suggestions for moving legal-historical sociology beyond the Hurstian synthesis.

The first requirement of any attempt to constructively and dynamically engage Hurst is a simple caution to keep Hurst's own legal-historical project in proper perspective and context. That means not only accounting for the full range of Hurst's actual historical sociology, but also discounting exaggerated claims of the novelty and invention of his own work. In contrast to ubiquitous testaments to the canonical "first-ness" of his American legal history, Hurst's project is best understood as an important extension of and dialogue with several well-established textual traditions and intellectual frameworks for examining legal-historical change: for example, the historical jurisprudence of Savigny, Jhering, Maine, and Bryce; the sociological jurisprudence of Ehrlich, Pound, and Brandeis; the new political economy of Commons and Ely; the new liberalism of Dewey and Lippmann; the new political science of Merriam, Hart, and Beard; the legal realism of Holmes, Llewellyn, and Arnold; the endless historical governmental monographs flowing from Johns Hopkins and Columbia University; and the endless legal-historical entries in the first Encyclopedia of Social Sciences--the crowning achievement of an early twentieth-century professional social science into which Hurst's perspective on American law and economy fits only too well. Hurst was not alone. He was involved in an immense and rich trans-generational and trans-

Atlantic scholarly dialogue about history, modernity, capitalism, liberalism, the state, and the law that remains very much alive today.

As Hurst candidly assessed the interpretive possibilities and limits of his own predecessors and peers, we can best keep this conversation going by critically confronting Hurst's historical sociology along three axes: (a) a critique of his notion of the marginality of law; (b) a substantial revision of his concepts of liberalism and the American state; and (c) a concerted effort to take up the unfinished history of twentieth-century law and political economy.

One of the weakest links in Hurst's synthesis is his residual skepticism about the significance of law in society, or as he put it, "the proper and effective marginal incidence of law in social affairs." Relying on an irreducible conceptual separation of law from other social institutions (as well as his notion of the influence of inertia and drift), Hurst held that "the shared values and sustained patterns of conduct that help make a society are largely the products of institutions other than law," for example, "the market, the family, the church, the school, and organized philanthropy." [FN112] Taken to the extreme, Hurst's continuous emphasis on the power of external societal ***142** factors and his comparative understatement of the creative, formative role of law in society came close to a crude instrumentalism, that is, the idea that law simply mirrored or reflected pressures and values originating outside of law. Of course, that perspective was belied by other parts of Hurst's legal-historical sociology. As he admitted on several occasions, "We should not lose sight of the distinctive character which law displayed in the flow of affairs. For the law itself grew to be a massive and complex institution. As such it tended to generate out of its sequential experience its own values and ranking of values." [FN113] In addition to constitutionalism, one of the most important relatively autonomous values and functions of law was procedural rationality. In Hurst's all too brief comments on the nature of twentieth-century legal history, he seemed to acknowledge a powerful rationalizing role for law in modern society à la Weber and Durkheim: "The pressure of scientific and technical rationalization of social processes increased the scale and intricacy of social organization, the demands made in the name of organizational integrity and efficiency, and the inertia created by organizational mass. Legal procedures in part had served and would continue to serve to provide a framework of reasonably assured expectation, backed by the force of the state, within which a complex social division of labor could work." [FN114] Despite such qualifications, however, Hurst's sweeping statements about functionalism, instrumentalism, marginality, inertia, and the separation of law and society leave much room for an improved understanding of law's creative, constructive, and constitutive power in modern societies. The social theories that suggest the possibilities for such a revision have already been written, from Jurgen Habermas's notion of the "juridification of social life" to Gunther Teubner's conception of "autopoietic law" to Michel Foucault's understanding of "governmentality." [FN115] What remains missing are the legal histories that would give such conceptualizations life and authority.

Similarly, Hurst's conceptions and sequential stories of liberalism and the American state also await reconstructive and revisionist historical work. The elaborate effort of historical sociologists to "bring the state back in" as an important agent of historical change should allow for a better understanding ***143** of the roles of nationalism and state building in the legal and economic transformations at the heart of Hurst's story. [FN116] The recent flood of work on liberalism--from the liberalism-republicanism debate in American history to a deluge of new works on liberal political theory--seriously calls into question the "thinness" of Hurst's depiction of nineteenth-century liberalism. Though "the release of energy" and "the balance of power" do nicely capture the problem and two faces of nineteenth-century liberalism, that is, individual autonomy vs. popular self-government, Hurst's relative overemphasis of the individual, practical, and market-oriented character of early American social life warrants correction. [FN117]

Finally, and more sympathetically, historians should take up Hurst's challenge to write a new twentieth-century legal history of modern political economy. As Hurst himself implied, the structural, functional, and normative framework that he employed to make sense of the relationship of law, governance, and the market in early nineteenth-century America was inadequate to the task of sorting through the complex interrelationships of a modern state, society, and corporate economy. As Hurst suggested in 1982, "Legal historians have only lately begun to come abreast of the last hundred years' development of law made by the national government." [FN118] The transitional period of 1870 to 1920 essentially ushered in a new socio-economic world of interdependence that demanded new methods of legal and social control. Hurst demarcated four areas for special attention: (a) the new economy with its demands for new legal interventions in market dealing, such as public utility regulation, collective bargaining, consumer protections, fiscal policy, and state planning; (b) the new scarcity generated by population increases, crowded conditions, and resource demands calling for "greater attention to conserving human and natural resources;" (c) the new security--physical, social, emotional, and consumer--apparent in such diverse policies as criminal law, welfare and insurance law, antidiscrimination law, and quality control; and (d) the new science and technology requiring a public policy more attuned to issues of education, private research foundations, and communications. One can think of many *144 other areas for research, but Hurst provided ample starting points for twentieth-century legal history. [FN119]

Hurst himself would probably fully endorse such a legal-historical revision. The notion of revision was at the heart of Hurst's own historicist understanding of sequential change as well as his notion of the inherent limits of any single perspective or explanation. The relentless tensions and complexities that overflowed Hurst's work spoke to his fundamental lack of faith in absolute truths, ultimate solutions, or final resolutions. As a pragmatist, Hurst would perhaps agree with Richard Rorty that ultimately "to accept the contingency of our starting-points is to accept our inheritance from, and our conversation with, our fellow-humans as our only source of guidance.... Our glory is in our participation in fallible and transitory human projects, not in our obedience to permanent nonhuman constraints." [FN120] Given human limits, the best a pragmatic, liberal scholar could do was to go forward--to act and create and will anew--to study, to inquire, to disagree about "things which it concerns the world to know"--without the illusion of getting it right once and for all. Hurst was all too willing to cede to the possibility, indeed the necessity, of revision, change, and renewal. His memorial service benediction quoted Andre Gide: "Death is no more than permission granted to other life.... The possible is striving to come into being." As Hurst himself noted, "We should take heart amid challenge and controversy over the ends and means of institutions. It would be fatal for the best we have hoped for from law, if we did not experience recurrent public questioning of the legitimacy of private and public power." For Hurst, open contest, constant questioning, and periodic revision were hallmarks of the American liberal legal tradition. They went to the heart of Hurst's understanding of constitutional legitimacy. And as he noted, "If we are going to keep this society in any workable degree compatible with a decent, individual, humane way of life, we must hold to and build further on this inherited ideal of legitimacy." [FN121]

To secure "a decent, individual, humane way of life"--a fairly modest ambition. A vision that on first glance pales next to the romantic reveries of that other great legal historian Oliver Wendell Holmes, Jr. Hurst concluded his volume on Justice Holmes on Legal History with Holmes's encomium to the future:

I do not pin my dreams for the future to my country or even to my race. I *145 think it probable that civilization somehow will last as long as I care to look ahead--perhaps with smaller numbers, but perhaps also bred to greatness and splendor by science. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is

to be--that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace. [FN122]

Compared to Holmes's rapture about cosmic destinies, Hurst's ambitions for humanity and legal history seem rather grounded. As he skeptically counseled, "We should study history to learn more about realizing life's possibilities" without holding to the "naive faith that men readily learn from history." Nonetheless, there was something distinctly Holmesian in Hurst's painstaking research and writing in American legal history, in his intricate and complex historical sociology, in his impossible pursuit of the whole: of social context and historical sequence, of structures and functions and values and interests and power and violence and drift and direction. Hurst is evidence that one may indeed "live greatly" in law and history, that there "he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable." [FN123] There was something decidedly heroic and humanistically romantic in Hurst's conception of the writing and reading of history as "kinds of activity which constitute man's distinctive being, which consist in his response to and rebellion against the challenges of an impersonal universe." [FN124] Here, Hurst and Holmes were in complete synchrony on the ennobling calling of "unadvertised" and broadgauged intellectual labor. Holmes's highest recognition went to those "halfobscure" "originators of transforming thought" whose ambition he termed the "most subtle," the "most far-reaching," and the "most ideal." "Not the least god-like of man's activities" was "the large survey of causes," Holmes maintained: "To see so far as one may, and to feel, the great forces that are behind every detail--that makes all the difference between philosophy and gossip, between great action and small." [FN125] James Willard Hurst was first and foremost just such a philosopher. He envisioned the field of American legal history as a bridge to the most important and persistent issues--questions of the biggest sort--the same questions that inspired Montesquieu and Tocqueville; Maine, Maitland, and Bryce; Marx, Weber, and Durkheim; Pound and Holmes. Ultimately that is the real Hurstian legacy. That is the Hurstian challenge to all future legal historians.

[FN1]. **William J. Novak** is an associate professor of history at the University of Chicago. The author wishes to thank Andrew Abbott, Howard Erlanger, Daniel Ernst, Robert Gordon, Morton Keller, Steven Pincus, Christopher Tomlins, Barbara Welke, Michael Willrich, and the University of Wisconsin law faculty for their advice, commentary, and support.

[FN1]. Moishe Postone notes a similar tension between the formal/political and substantive/intellectual legacies of the work of Karl Marx. See Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge: Cambridge University Press, 1993).

[FN2]. The best discussion of the dialectical need to create room for innovation in the face of great, canonical texts or authors (even to the extent of requiring conscious misinterpretation if necessary) is, of course, Harold Bloom, *The Anxiety of Influence: A Theory of Poetry* (New York: Oxford University Press, 1973). One of the greatest dangers of a closed, disciplinary canonization is that a new generation of scholars anxious to make their own innovations in a field will simply ignore rather than dialectically engage the thoroughly pigeonholed foundational text or author. Indeed, the strongest avant-garde tendency in American legal history over the last fifteen years has been a flight from Hurst's typecast concerns to those things missing or silenced in the (supposedly his) dominant narrative.

[FN3]. Theda Skocpol, "Sociology's Historical Imagination," in *Vision and Method in Historical Sociology*, ed. Theda Skocpol (Cambridge: Cambridge University Press, 1984), 1-21, 8, 4.

[FN4]. Dennis Smith, *The Rise of Historical Sociology* (Philadelphia: Temple University Press, 1991), 3.

[FN5]. Hurst was very critical of the opportunistic intellectual busyness that he felt preoccupied routine legal scholarship (what Thomas Kuhn called "normal science"). "[A] satisfaction with busyness," he intoned, "stays with us, as a limitation upon significant achievements. It is easier to be busy than to think. It is easier to be busy, because it typically leads one to the product that he can see in the next hour or the next day; it is harder to invest time and energies in enterprises which may not show returns for 10 years, or which perhaps will yield their product only past the lives of their begetters." James Willard Hurst, "Perspectives Upon Research Into Legal Order," *Wisconsin Law Review* 1961: 356-67, 360, 366. For other testaments to Hurst's preference for large projects with long payoffs, see Hendrik Hartog, "Snakes in Ireland: A Conversation with Willard Hurst," *Law and History Review* 12 (1994): 370-90; and Daniel R. Ernst, "Willard Hurst and the Administrative State: From Williams to Wisconsin," *Law and History Review* 18 (2000): 1-36.

[FN6]. James Willard Hurst, "The Law in United States History," *Proceedings of the American Philosophical Society* 104 (1960): 518-26, 521 (emphasis added). This crucial paragraph about a "want of philosophy" in legal scholarship is left out of the popular reprint of this article in Lawrence M. Friedman and Harry N. Scheiber, eds., *American Law and the Constitutional Order: Historical Perspectives* (Cambridge, Mass.: Harvard University Press, 1978), 3-12. See also Hurst, "Perspectives Upon Research," 360; James Willard Hurst, "The State of Legal History," *Reviews in American History* 10, no. 4 (1982): 292-305, 294.

[FN7]. Hurst's seeming distaste for conferences, honorifics, placements, and other formal badges of academic distinction bespeaks a rather rare sense of intellectual mission. He seems to have inculcated the solitary, strenuous work ethic endorsed by Oliver Wendell Holmes in a well-annotated copy of Holmes's speeches that J. S. Haviland presented to Hurst before he entered Harvard Law School. Holmes prodded, "No result is easy which is worth having.... To think great thoughts you must be heroes as well as idealists. Only when you have worked alone,--when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,--then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought,--the subtle rapture of postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do,--can say that you have lived, and be ready for the end." Oliver Wendell Holmes, Jr., *Speeches* (Boston: Little, Brown, 1918), 24.

[FN8]. One or more of these perspectives underlies most of the major reconsiderations of Hurst's work thus far. On formalism and instrumentalism, see Lawrence M. Friedman, "Some Problems and Possibilities of American Legal History," in *The State of American History*, ed. Herbert J. Bass (Chicago: Quadrangle Books, 1970), 3-21; and Harry N. Scheiber, "At the Borderland of Law and Economic History: The Contributions of Willard Hurst," *American Historical Review* 75 (1970): 744-56. On legal realism, see Stephen Diamond, "Legal Realism and Historical Method: J. Willard Hurst and American Legal History," *Michigan Law Review* 77 (1979): 784-94. On conflict and consensus, see Mark Tushnet, "Lumber and the Legal Process," *Wisconsin Law Review* 1972:114-32; and Aviam Soifer, "In Retrospect: Willard Hurst, Consensus History, and The Growth of American Law," *Reviews in American History* 20, no. 1 (1992): 124-44. On critical legal theory, see Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10, no. 1 (1975): 9-55; and Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57-125.

[FN9]. Those skeptical of the powerful role of theory and conceptualization in Hurst's vision of the field might consult his devastating critique of the

empiricism of the Institute of Law at Johns Hopkins: "Here are impressive collections and collations of facts.... They are books which added up to relatively little impact, because they represented on the whole a naive empiricism.... They worked hard as if they believed that wisdom might be had from accumulation of facts; if you piled up a big enough stack of facts, somehow the juice of new understanding would squeeze out the bottom from the sheer weight of the pile. We have learned a little more sophistication in this, but faith in the seeming self-evident virtue of data collection is still a very lively source of danger." Hurst, "Perspectives Upon Research," 365.

[FN10]. Hurst was adamant on this point: "Legal history needs philosophy of history." James Willard Hurst, *Law and Social Process in United States History* (Ann Arbor: University of Michigan Press, 1960), 2. The whole point of university life for Hurst was "to study the particular for the sake of the general.... Our own ignorance justifies us in studying broader questions than those which seem to be pressing towards immediate issue." James Willard Hurst, "Legal History: A Research Program," *Wisconsin Law Review* 1942: 323-33, 324. His magnum opus on law and the Wisconsin lumber industry was motivated by just such a desire to merge the most particular and empirical with the most general and theoretical. As he noted in his preface, "The study tries to make its primary concern with the interaction of legal and economic institutions yield a product relevant to broader social theory.... The particular story of law and lumber in Wisconsin is matter only of secondary interest in this book; of prime concern is to learn, from trying to tell this particular story, how better to tell the story of the distinctive parts which law has played in the general course of social experience." James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, 2d ed. (Madison: University of Wisconsin Press, 1984), xx.

[FN11]. Holmes, *Speeches*, 23.

[FN12]. Felix Frankfurter, *The Commerce Clause under Marshall, Taney, and Waite* (Chapel Hill: University of North Carolina Press, 1937). For a fuller discussion of Hurst's role in this volume along the lines of James Landis's collaboration with Frankfurter on the still impressive *The Business of the Supreme Court* (New York: Macmillan, 1927), see Hartog, "Snakes in Ireland"; and Ernst, "Hurst and the Administrative State." One could make an argument that Hurst's first serious research and writing effort was the publication of his Williams College senior essay "Holland, Switzerland, and Belgium and the English Gold Crisis of 1931," *The Journal of Political Economy* 40 (1932): 638-60.

[FN13]. Frankfurter, *Commerce Clause*, 3, 5-6. In an interview with Hendrik Hartog, Hurst noted that his first impulse toward history was constitutional and biographical, citing the influence of Albert Beveridge's classic volumes on John Marshall. Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Boston: Houghton, Mifflin, 1916-1919); Hartog, "Snakes in Ireland," 371-72.

[FN14]. James Willard Hurst, "An Historical Inquiry into the Development of the Process of Judicial Review," unpublished course notes (Madison: University of Wisconsin Law School, 1939, 1940); Association of American Law Schools, ed., *Selected Essays on Constitutional Law*, 5 vols. (Chicago: The Foundation Press, 1938); Frankfurter, *Commerce Clause*, 4.

[FN15]. James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, 1950).

[FN16]. Hurst, *Law and Social Process*, 18-19. As Hurst commented, "I didn't want to wind up knowing nothing except all the gossip about the judges. This didn't seem to be that important." Hartog, "Snakes in Ireland," 377.

[FN17]. James Willard Hurst, *Justice Holmes on Legal History* (New York: Macmillan, 1964), 23-24; Hurst, *The Growth of American Law*, 209.

[FN18]. See for example: Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938); Edward S. Corwin, *The "HigherLaw" Background of American Constitutional Law* (Ithaca: Cornell University Press, 1955); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1919). A full explication of these historiographical traditions and Hurst's relationship to them would take another article. For some of my own summary views, see William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 21-24. Also see the more complete historiographies in the articles cited above in note 8.

[FN19]. Talcott Parsons, *The Structure of Social Action* (Glencoe: Free Press, 1949); Parsons, *The Social System* (Glencoe: Free Press, 1951). The most useful commentaries on Parsons's work that also resonate for Hurst's project are Alvin W. Gouldner, *The Coming Crisis of Western Sociology* (New York: Basic Books, 1970); William Buxton, *Talcott Parsons and the Capitalist Nation-State: Political Sociology as a Strategic Vocation* (Toronto: University of Toronto Press, 1985). For an example of the recognition of Hurst's work by Parsons, see Talcott Parsons, *The Evolution of Societies*, ed. Jackson Toby (Englewood Cliffs: Prentice-Hall, 1977).

[FN20]. These are the individual lecture titles in Hurst's *Thomas M. Cooley Lectures at the University of Michigan Law School in 1959*. Hurst, *Law and Social Process*.

[FN21]. James Willard Hurst, *Law and Social Order in the United States* (Ithaca: Cornell University Press, 1977), 25.

[FN22]. Philip Abrams, *Historical Sociology* (Ithaca: Cornell University Press, 1982), xiii-xiv.

[FN23]. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

[FN24]. "What man experiences as scarcity and change is his finitude. What he experiences as growth is his capacity to make new meanings in his experience." Hurst, *Holmes on Legal History*, 8.

[FN25]. For the best contemporary attempt to wrestle with this problem, see the work of Anthony Giddens, especially his *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (Berkeley: University of California Press, 1979).

[FN26]. Hurst, *Holmes on Legal History*, 4, 11.

[FN27]. The essentials are Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897): 457-78; Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454-87; Pound, "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review* 24 (1911): 591-619; 25 (1912): 140-68, 489-516; Morris R. Cohen, "Property and Sovereignty," *Cornell Law Quarterly* 13 (1927): 8-30; Robert Lee Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 470-94; Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion," *Columbia Law Review* 35 (1935): 149-201; Felix Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809-49.

[FN28]. As Hurst elaborated, "The effects of sequence in events, ideas, and attitudes may be felt through cumulation (the creation of a trend), change (differing balances between continuity and discontinuity ...), and commitment (the occurrence of what is irrevocable, or substantially irrevocable)." Sequence revealed "ideas, attitudes, or events which exist or have impetus only through successions which outreach present action, and often exceed the

lifetimes of generations." Hurst, *Holmes on Legal History*, 11-13, 16.

[FN29]. "It was the sequence (and especially the trend) aspects of time which most engaged Holmes's imagination. But it was time as context (that is, the functional and balance-of-power aspects of time) which from the outset of his public career chiefly engaged Brandeis's interests." *Ibid.*, 11, 34. Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881); Louis D. Brandeis and Josephine Goldmark, *Women in Industry* (1908; New York: Arno Press/Reprint, 1969).

[FN30]. Hurst, "Modern American Legal History," unpublished course notes (Madison: University of Wisconsin Law School, 1969, 1970), "first meeting." As Hurst sketched the 2500-year-old origins of the western legal tradition: "The demand for legitimacy of power begins with the Greek city-states, in concern for the welfare of the commonwealth. With the Roman republic the demand for legitimacy asks that law respect the citizen as a political individual. The idea takes on new dimensions through the medieval church, with its additional concern for the individual as an entity of will and emotion, to be respected for the creative dignity resident in him. The English Parliamentary Revolution brings growth of ideas about weaving these values together to create a responsive, responsible legal order which will ultimately serve the individuals who live within it. For us, the drive for the legitimacy of power develops into a constitutional tradition symbolized in the creation of the Federal Constitution." James Willard Hurst, "Problems of Legitimacy in the Contemporary Legal Order," *Oklahoma Law Review* 24 (1971): 224-38, 225.

[FN31]. Hurst, *Holmes on Legal History*, 13, 16, 55; Hurst, *Law and Social Process*, 9.

[FN32]. Hurst, *Law and Social Order*, 42.

[FN33]. Hurst, "The State of Legal History," 293; Hurst, "Perspectives Upon Research," 367.

[FN34]. Holmes, *Speeches*, 23.

[FN35]. Gordon, "Hurst and the Common Law Tradition," 10.

[FN36]. Hurst, "Modern American Legal History," "first meeting." Hurst, *Holmes on Legal History*, 55, 89.

[FN37]. "We must search out the grounds of choice which men so often leave undefined." Hurst, *Holmes on Legal History*, 16, 24-25.

[FN38]. Willard Hurst, "Chapter Eight: Technology and the Law: The Automobile," unpublished manuscript (Madison: University of Wisconsin Law School, 1949), 720-30. This manuscript seems to be one of a projected set of chapters (never published) conceived of as something of a supplement to Hurst's *Growth of American Law*. Hurst hoped to add to his institutional analysis some explicit examples of law-in-action: (a) the automobile as an example of the relationship of law, science, and technology; (b) the law of voluntary associations and antitrust as case studies in the relationship of law and the balance of power; (c) civil liberties as a concrete example of the relationship of law and the flow of information and ideas; and (d) taxation as an illustration of law itself as a major determinant of action in society. James Willard Hurst to Felix Frankfurter, 12 Jan. 1949, Reel 42, Felix Frankfurter Papers, Library of Congress. I owe this citation and hypothesis to conversations with Daniel Ernst.

[FN39]. James Willard Hurst, "A History of the Principal Agencies of Law in the United States," unpublished manuscript, 2 vols. (Madison: University of Wisconsin Law School, 1948). This is the earliest incarnation of Hurst's *Growth of American Law*.

[FN40]. Hurst, *Holmes on Legal History*, 61-62.

[FN41]. Hurst, "Perspectives Upon Research," 363-64; Hurst, "Problems of Legitimacy," 224.

[FN42]. In addition to the other articles in this volume, see the essays cited above in note 8. Also see two other tributes to Hurst's work in *Law and Society Review* 10, nos. 1-2 (1975-76) and *Wisconsin Law Review* 1997.

[FN43]. Pound, "The Scope and Purpose of Sociological Jurisprudence"; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (Cambridge: Harvard University Press, 1936).

[FN44]. The works most frequently cited in Hurst included Max Weber, *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946); Weber, *General Economic History*, trans. Frank H. Knight (New York: Greenberg, 1927); Weber, *Max Weber on Law in Economy and Society*, trans. Edward Shils and Max Rheinstein (Cambridge: Harvard University Press, 1954); Emile Durkheim, *The Rules of Sociological Method*, trans. Sarah A. Solovay and John H. Mueller (Glencoe, Ill.: Free Press, 1950, c1938); Parsons, *The Structure of Social Action and The Social System*; Robert K. Merton, *Social Theory and Social Structure* (Glencoe, Ill.: Free Press, 1957).

[FN45]. As Hurst summed up his debt to legal realism: "We have learned to be uneasy with studying law as if it were a self-contained system. We have learned to be uneasy with work which accepts at face value the logical pattern which we can make out of the formal expressions of law. We are uneasy until we have pushed beyond this to ask how things really work, what are the real interests which seek expression or support in formal doctrine." But labeling Hurst a legal realist obscures as much as it explains. His critique of the realists could be biting: "The stir seems to have come to so much less than it promised. There have been brilliant exceptions, but the total lasting product of the realist movement seems small, compared to the total investment of mind and spirit that went into it.... What the realists did was mainly nihilistic. They were penetrating, clever, amusing, literate and adroit destroyers. On the whole, they were not builders." Hurst, "Perspectives Upon Research," 364-65. See the works cited above in note 27. Also see Karl N. Llewellyn, "A Realistic Jurisprudence--The Next Step," *Columbia Law Review* 30 (1930): 431-65; Llewellyn, "Some Realism About Realism," *Harvard Law Review* 44 (1931): 1222-64; Jerome Frank, *Law and the Modern Mind* (New York: Brentano's Publishers, 1930); Thurman W. Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937).

[FN46]. H. Stuart Hughes, *Consciousness and Society: The Reorientation of European Social Thought, 1890-1930* (New York: Alfred A. Knopf, 1958). Other examples include: Thomas Beer, *The Mauve Decade: American Life at the End of the Nineteenth Century* (New York: Alfred A. Knopf, 1926); John R. Commons, *Myself* (New York: Macmillan, 1934); and Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper and Brothers, 1942).

[FN47]. Hurst, *Holmes on Legal History*, 4.

[FN48]. Hurst, *Law and Social Process*, 6; Hurst, *Law and Social Order*, 23.

[FN49]. A wonderful indication of how Hurst envisioned his project as never complete is his concluding *The Growth of American Law* with a "Prospectus for Legal History." In other words, the entire volume was understood simply as an institutional "introduction" to the substantive theme of law as mediator of interest-group conflict in the twentieth century. Hurst, *Growth of American Law*, 439, 446. As Hurst explained in a letter to Hugo L. Black, "I put the book together with the prime thought of putting some perspective on a number of matters on which I wish that I might have had some reading matter when I began the study of law. I wished also to make available some materials for graduate students in the social sciences who might be curious to bridge the

gap between themselves and our mysteries." Willard Hurst to Hugo L. Black, 11 July 1950, Box 33, Hugo L. Black Papers, Manuscript Division, Library of Congress. I am again indebted to Daniel Ernst for this reference.

[FN50]. Hurst's own admonitions were ubiquitous: "Historians have exaggerated the work of courts and legal activity immediately related to litigation.... Judicial law-making was never as exclusively important as the concentration of legal writing might seem to show." Hurst, "Law in United States History," 520-21. "Legal history needs beware the subtle bias which arbitrarily truncates its proper subject matter by identifying it simply with the products of courts and lawsuits." Hurst, *Holmes on Legal History*, 93. See also Hurst, *Law and Social Process*, 1, 18; Hurst, *Law and Social Order*, 26.

[FN51]. Hurst, *Law and Social Order*, 25. As Hendrik Hartog put it, for Hurst there was always the sense that "legal history isn't about law as a distinct body of knowledge; it is about the practice of government, broadly conceived." Hartog, "Snakes in Ireland," 372.

[FN52]. Hurst, *Holmes on Legal History*, 5-6.

[FN53]. Hurst, *Law and Social Process*, 5. These same four functions were a constant in Hurst's more programmatic statements. See also Hurst, "Law in United States History," 518-19.

[FN54]. Hurst, *Holmes on Legal History*, 5-6; Hurst, "Law in United States History," 518. For Weber's classic definitions of the modern state and law as involving force and coercion, see Max Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 1:56; and Weber, *Law in Economy and Society*, 13. Robert M. Cover's classic opening statement was "Legal interpretation takes place in a field of pain and death." See Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601-29, 1601.

[FN55]. Hurst, *Holmes on Legal History*, 5-6; Hurst, "Law in United States History," 519.

[FN56]. Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996).

[FN57]. Hurst, *Law and Social Process*, 8 (emphasis added); Hurst, "Law in United States History," 518. Also see Hurst's more elaborate definition of constitutionalism: "The ideal that there should be no center of public or private power not subject to some check from outside itself, to the end that the power be used consistent with the welfare of individuals or the common welfare, according to criteria not finally determined by the power holders." Hurst, *Holmes on Legal History*, 5-6.

[FN58]. Hurst, *Holmes on Legal History*, 5-6. "Because this legal order emphasized procedural regularity--providing diverse organized means for bringing choices to definition and mustering evidence and reasoned argument for their resolution--law entered significantly into the process by which men created social goals and mobilized energies of mind and feeling to move toward their goals." Hurst, "Law in United States History," 519. For the best statements of Habermas, Luhmann, and Teubner on legal rationalization, see Jurgen Habermas, *The Theory of Communicative Action*, vol. 2, *Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy (Boston: Beacon Press, 1987); Niklas Luhmann, *A Sociological Theory of Law*, trans. Elizabeth King and Martin Albrow (London: Routledge, 1985); Gunther Teubner, *Law as an Autopoietic System*, trans. Anne Bankowska and Ruth Adler (Oxford: Blackwell Publishers, 1993); Teubner, ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin: Walter de Gruyter, 1987).

[FN59]. Hurst's chronological history also accounted for a pre-nineteenth-century political story in law focused on constitution making and property

law. His periodical chart in *Law and the Conditions of Freedom* discussed the years 1620-1750, 1750-1776, and 1776-1800 as primarily involving legal public policies dealing with "community strength and security," "political organization," and "constitution making," respectively. Hurst, *Conditions of Freedom*, 40.

[FN60]. Hurst, *Conditions of Freedom*; Hurst, *Growth of American Law*; Hurst, *Law and Markets in United States History: Different Modes of Bargaining among Interests* (Madison: University of Wisconsin Press, 1982); Hurst, *The Legitimacy of the Business Corporation* (Charlottesville: University Press of Virginia, 1970).

[FN61]. Hurst, *Holmes on Legal History*, 64.

[FN62]. Hartog, "Snakes in Ireland," 388. Hurst might have been thinking here of Oliver Wendell Holmes's own similar comment on the underlying importance of scarcity and economy: "As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute." Hurst, *Holmes on Legal History*, 64.

[FN63]. Hurst, "Law in United States History," 520. "Uses of law and disputes over uses of law were so woven into economic growth in the United States that legal and economic history cannot be separated." Hurst, *Law and Social Process*, 5, 8.

[FN64]. Hurst, "Problems of Legitimacy," 225.

[FN65]. Hurst, *Conditions of Freedom*, 29; Hurst, *Law and Markets*, 3.

[FN66]. Hurst, *Holmes on Legal History*, 42.

[FN67]. *Ibid.*; Hurst, "The State of Legal History," 293; Hurst, "Problems of Legitimacy," 225.

[FN68]. Hurst, *Conditions of Freedom*, 32. Richard Hofstadter, *The American Political Tradition* (New York: Alfred A. Knopf, 1948); Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (New York: Harcourt, Brace and World, 1955).

[FN69]. Hurst's criticism of classical nineteenth-century market liberalism was very much in sync with John Dewey's immanent critique of "old liberalism" in *Individualism, Old and New* (1929) and *Liberalism and Social Action* (1935). See John Dewey, *The Later Works, 1925-1953*, ed. Jo Ann Boydston, vols. 5 and 11 (Carbondale: Southern Illinois University Press, 1984, 1987).

[FN70]. Hurst, *Holmes on Legal History*, 46-48, 116-17.

[FN71]. Hurst, *Law and Markets*, 3, 9. For the CLS and realist contention that law played a major constitutive role in creating the market, see Duncan Kennedy, "The Role of Law in Economic Thought: Essays on the Fetishism of Commodities," *American University Law Review* 34 (1985): 939-1001; Cohen, "Property and Sovereignty"; Hale, "Coercion and Distribution"; Hale, "Force and the State." Hurst's denial of a fundamentally "creative" role for law was categorical: "Trading among private persons for profit was not a creation of law." As argued in the conclusion to this article, Hurst's ideas on the marginality of law are particularly vulnerable to critique. My own work on nineteenth-century economic regulation takes issue with Hurst on just this point. William J. Novak, "Public Economy and the Well-Ordered Market: Law and Economic Regulation in Nineteenth-Century America," *Law and Social Inquiry* 18 (1993): 1-32. Also see Robert J. Steinfeld, "The Philadelphia Cordwainers' Case of 1806: The Struggle over Alternative Legal Constructions of a Free Market in Labor," in *Labor Law in America: Historical and Critical Essays*, ed. Christopher L. Tomlins and Andrew J. King (Baltimore: Johns Hopkins University

Press, 1992): 20-43.

[FN72]. Hurst, *Law and Markets*, 3; Hurst, "Law in United States History," 519; Hurst, *Law and Social Process*, 5.

[FN73]. James Willard Hurst, "Consensus and Conflict in Twentieth-Century Public Policy," *Daedalus: Journal of the American Academy of Arts and Sciences* 105, no. 4 (1976): 89-101, 89.

[FN74]. Hurst, *Law and Social Process*, 15; Hurst, *Holmes on Legal History*, 43. Hurst, "Law in United States History," 519.

[FN75]. Lawrence M. Friedman, *A History of American Law*, 2d ed. (New York: Simon and Schuster, 1985), 114-15; Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820-1861* (Athens: Ohio University Press, 1968), 93; Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (New York: W. W. Norton, 1978), 67-68. Also see William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1930* (Cambridge: Harvard University Press, 1975); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977). For the continued vitality of the legal instrumentalism argument in socio-economic histories of the early nineteenth century, see Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (New York: Oxford University Press, 1991); Stuart Bruchey, *Enterprise: The Dynamic Economy of a Free People* (Cambridge: Harvard University Press, 1990); Melvyn Stokes and Stephen Conway, eds., *The Market Revolution in America: Social, Political, and Religious Expressions, 1800-1880* (Charlottesville: University Press of Virginia, 1996).

[FN76]. Hurst, *Holmes on Legal History*, 43, 77.

[FN77]. Hurst, *Law and Social Order*, 23; Hurst, *Law and Social Process*, 15.

[FN78]. Hurst, *Law and Social Process*, 17; Hurst, *Legitimacy of the Business Corporation*, 10-11.

[FN79]. Hurst, *Law and Social Process*, 5; Hurst, *Law and Economic Growth*. This is why Hurst can be appropriately grouped with Oscar and Mary Handlin, Louis Hartz, and others as a "commonwealth historian." The commonwealth studies effectively demolished the notion of a nineteenth-century *laissez-faire* America devoid of positive state action and established the constructive role of law and state governments in affirmatively creating the conditions for an emerging market economy. Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1860* (New York: New York University Press, 1947); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge: Harvard University Press, 1948). For a more complete listing and analytical overview of the commonwealth studies, see Robert A. Lively, "The American System: A Review Article," *Business History Review* 29 (1955): 91-96; Harry N. Scheiber, "Government and the Economy: Studies of the 'Commonwealth' Policy in Nineteenth-Century America," *Journal of Interdisciplinary History* 3 (1972): 135-51. For an excellent recent assessment, see Richard R. John, "Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787-1835," *Studies in American Political Development* 11 (1997): 347-80.

[FN80]. Hurst, "Problems of Legitimacy," 225-26.

[FN81]. Hurst, *Law and Social Process*, 12-13. "Because the law emphasizes procedure, legal processes provide an unusual body of evidence for what these values are; it forces us to become aware of them and to define them in the process of its deliberations and decision-making." Hurst, "Consensus and Conflict," 89.

[FN82]. As Hurst indicated by citing an Office of Education survey on the attitudes of American, Scandinavian, Japanese, and Indian school children on the issue of what is a fair rule of conduct, the values he associated with "justice" were far from exclusively American: "With remarkable unanimity--children said three things similar to the 14th Amendment: a) 'everybody ought to be equal under the rule'; b) 'there ought to be a good reason for the rule', i.e., not arbitrary--reason outside of power; c) 'we ought to have something to say about it'--democratic. Plainly, there is something in these ideas broader than the special terms of our law--something that challenges deep human desires and runs wide in modern civilization." Hurst, "Problems of Legitimacy," 226-27.

[FN83]. Hurst, *Holmes on Legal History*, 17. As he explained this Niebuhrian perspective to Hendrik Hartog, "We all live within our own oxygen belt so to speak, that there are limits beyond which we can't live and limits beyond which indeed we can't think or imagine." Hartog, "Snakes in Ireland," 376. Hurst first heard Niebuhr at Williams College and continued to recommend Niebuhr's *The Irony of American History* throughout his professional life. Reinhold Niebuhr, *The Irony of American History* (New York: Charles Scribner's Sons, 1952).

[FN84]. Hurst, *Holmes on Legal History*, 26-27, 46; Hurst, "Consensus and Conflict," 89.

[FN85]. Hurst, "Consensus and Conflict," 90; Hurst, *Holmes on Legal History*, 15.

[FN86]. Hurst, *Conditions of Freedom*, 7.

[FN87]. Hurst, *Holmes on Legal History*, 27-28; Hurst, "Consensus and Conflict," 92. Paeans to "action" are a sometimes overlooked staple of liberal arguments. For a classic statement, see John Stuart Mill's critique of the idea of the "good despot" on grounds of its production of a "passive" citizenry: "What development can either their thinking or their active faculties attain under it? ... Wherever the sphere of action of human beings is artificially circumscribed, their sentiments are narrowed and dwarfed in the same proportion. The food of feeling is action." John Stuart Mill, *Considerations on Representative Government* (Amherst: Prometheus Books, 1991), 56-58. See also John Dewey, *Individualism, Old and New*; and Dewey, *Liberalism and Social Action*.

[FN88]. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 2d ed. (New York: Harper and Brothers, 1947), 81-86.

[FN89]. Hurst, *Holmes on Legal History*, 28-29; Hurst, "Perspectives Upon Research," 359-60; Hurst, "Law in United States History," 525. Of course, our historical understanding of American pragmatism has since moved well beyond Hurst's preliminary thoughts. For the best comprehensive analysis, see James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920* (New York: Oxford, 1986).

[FN90]. Hurst, *Holmes on Legal History*, 26-27, 47, 50-51.

[FN91]. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence (New York: Harper and Row, 1969), 691-92; Hurst, "Problems of Legitimacy," 235- 36.

[FN92]. Hurst, "Consensus and Conflict," 89.

[FN93]. The notion of a "formative era of American law," of course, originated with Roscoe Pound, *The Formative Era of American Law*.

[FN94]. Hurst, "Legal History: A Research Program," 331-32.

[FN95]. Hurst, "Problems of Legitimacy," 225; Hurst, *Holmes on Legal History*, 29, 31.

[FN96]. Hurst, *Holmes on Legal History*, 29, 32; Hurst, *Law and Social Process*, 3, 15.

[FN97]. Hurst, "Problems of Legitimacy," 227. As Hurst related, "In the classic expressions of the demand for legitimacy in the 17th and 18th centuries--as in Locke, or in the *Federalist Papers*--concern focuses primarily on the political state. But, even then we were building a law of torts, a law of crimes, a law of public nuisance, expressing the idea that private arbitrary power wasn't acceptable either." Hurst, "Law in United States History," 519.

[FN98]. Hurst, *Holmes on Legal History*, 15, 71-72.

[FN99]. Hurst, "Consensus and Conflict," 91-92.

[FN100]. Hurst, "Problems of Legitimacy," 228; Hurst, *Law and Social Process*, 7.

[FN101]. Hurst, *Holmes on Legal History*, 66-67. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan and Company, 1904).

[FN102]. Hurst, *Holmes on Legal History*, 73, 102-4. Mill's famous rendering of this liberal principle was: "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." John Stuart Mill, *On Liberty*, ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), 13. Holmes's rejoinder came in *Lochner v. New York*, 198 U.S. 45 (1905), 65. Mill and Holmes are basically addressing the maxim sic utere tuo ut alienum non laedas (use your own so as not to injure another). This ancient common law principle was the heart of the law of the Anglo-American law of nuisance, what Ernst Freund dubbed "the common law of the police power." Ernst Freund, *Standards of American Legislation*, 2d ed. (Chicago: University of Chicago Press, 1965), 66.

[FN103]. Hurst, *Holmes on Legal History*, 109; *Law and Social Process*, 11-12.

[FN104]. Hurst, "Consensus and Conflict," 89.

[FN105]. Hurst, *Law and Social Order*, 33.

[FN106]. Hurst, "Problems of Legitimacy," 225-26, 234-35. As Hurst also noted, "From the 1880s on, the growth of markets of sectional or national reach under the protection of the federal system gave impetus to expanded roles of national law, ranging into quite different realms of policy from those embraced within the bounds of pre-1860 state common law or state statute law of corporations and private franchises." Hurst, "The State of Legal History," 292.

[FN107]. Hurst, "The State of Legal History," 294; Hurst, "Problems of Legitimacy," 233; Hurst, *Holmes on Legal History*, 43. One of Hurst's favorite examples of the renewed positive emphasis on public welfare in the twentieth century was the development since the 1930s of the presumption of the constitutionality of legislation. This presumption suggested "that legislatures--state as well as national--are entitled to make reasonable judgements on how to make affirmative as well as regulatory use of public power for public service; what a legislature does shall not be upset in court unless the legislative action can be shown to be clearly without rational justification. Again, the emphasis is on the positive thrust of public organized power, and not just on restrictive regulation." But as Hurst also

notes (and much too briefly at that), twentieth-century American law also reflected a striking expansion in notions of individual rights just as "organized public and private power began to weigh more heavily on the individual in an increasingly interlocked society." In response, Hurst noted, "judicial decisions have elaborated the protections which procedural due process of law holds out to those accused of crime; constitutional, statutory, and judge-made (i.e., common) law has developed some protection for individual privacy against official and private intrusion and has recognized that individuals need protection as wage or salary earners rather than as entrepreneurs. Accordingly, legislation has been developed to foster and protect the individual's right to organize trade unions and to engage in collective bargaining and has been extended to protect consumers against fraud and threats to health and safety." Hurst, "Problems of Legitimacy," 229.

[FN108]. Hurst, *Law and Social Order*, 36; Hurst, "Problems of Legitimacy," 233.

[FN109]. Hurst, "Law in United States History," 521, 523-24. "Both sharing and conflict were further influenced by large, undirected currents of change, especially growth and concentration of population, science-based technology, shifts in cultural patterns, and institutional imperfections in the legal order. To an even greater extent in the twentieth than in the nineteenth century, the country's life was largely shaped by influences chosen neither by the people at large nor by specific interests. Policy-makers have confronted no greater challenge than that of using legal processes to combat the massive forces of social inertia." Hurst, "Consensus and Conflict," 90.

[FN110]. See Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (New York: Alfred A. Knopf, 1968).

[FN111]. One should not jump too quickly to conclusions about those things that Hurst left out. For a good example, see some of his intriguing comments about Vietnam, marijuana, and civil rights in Hurst, "Problems of Legitimacy." On civil rights Hurst emphasized the need for law and government to act positively on social issues, noting that a "major defect of the law's handling of race has been to neglect the positive element in the Constitutional tradition. We need to return to the proposition that government holds authority to take affirmative action for the general good." *Ibid.*, 232. Hurst was well aware of the need for legal history to move on to new topics and concentrations (beyond the law and the market themes that dominated his own career), as he noted in a "state of the field" report in 1982: "Social reality requires that legal historians pay more attention to the interplay of law and the family and sex roles, the bearing of law on the church, on tensions between conventional morality and individuality, on education, and on the course of change in scientific and technological knowledge." Hurst, "The State of Legal History," 293-94.

[FN112]. Hurst, *Law and Social Process*, 17; Hurst, "Consensus and Conflict," 89, 91.

[FN113]. Hurst, *Holmes on Legal History*, 89.

[FN114]. Hurst, *Law and Social Order*, 42; Hurst, "Law in United States History," 520. Emile Durkheim, *The Division of Labor in Society*, trans. W. D. Walls (New York: Macmillan, 1984).

[FN115]. See for example, Habermas, *The Theory of Communicative Action*, 2:301-31; Teubner, *Law as an Autopoietic System*; Graham Burchell, Colin Gordon, and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991); Andrew Berry, Thomas Osborne, and Nikolas Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism, and Rationalities of Government* (Chicago: University of Chicago Press, 1996).

[FN116]. This literature is voluminous. For a sampling, consult the essays in

Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (New York: Cambridge University Press, 1985); Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930-1980* (Princeton: Princeton University Press, 1989); and Michael J. Lacey and Mary O. Furner, eds., *The State and Social Investigation in Britain and the United States* (Cambridge: Cambridge University Press, 1993).

[FN117]. This literature is even more voluminous. For a wonderfully balanced recent assessment, see James T. Kloppenberg, *The Virtues of Liberalism* (New York: Oxford University Press, 1998).

[FN118]. Hurst, "The State of Legal History," 292; Hurst, "Law in United States History," 523-24.

[FN119]. Hurst, "Consensus and Conflict," 92; Hurst, "Legal History: A Research Program," 331-32.

[FN120]. Richard Rorty, *Consequences of Pragmatism: Essays, 1972-1980* (Minneapolis: University of Minnesota Press, 1982).

[FN121]. Hurst, "Problems of Legitimacy," 237-38.

[FN122]. Hurst, *Holmes on Legal History*, 129.

[FN123]. *Holmes, Speeches*, 22.

[FN124]. Hurst, "Law in United States History," 526.

[FN125]. All of these Holmes quotes are from Hurst's annotated edition of *Holmes, Speeches*, 22, 43, 90, 96.

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