John Chipman Gray and the Moral Basis of Classical Legal Thought

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I. INTRODUCTION

Between the 1870s and the 1930s, American law was dominated by a jurisprudential style variously described as "mechanical jurisprudence," "legal formalism," and "classical legal thought." Though classical orthodoxy has been analyzed from a multiplicity of perspectives, our understanding of it remains fundamentally flawed. The root of the problem is an unfortunate tendency to focus analyses of classicism on the writings of the Harvard Law School faculty and, in particular, its Dean, Christopher Columbus Langdell.

The focus on the Harvard Law School may seem justified. Harvard housed the most prestigious law faculty of the era. Its professors produced many of the most celebrated artifacts of classical legal culture: magisterial treatises on discrete legal topics, austere casebooks for instruction through Socratic dialogue, and various restatements of the law for the American Law Institute. Nevertheless, agreement among judges, lawyers, and scholars about matters of analytic technique masked substantial disagreement about that technique's fundamental tenets and extra-legal justification. The

1. I will use the term "classical legal thought" to describe this jurisprudential style. Classical legal thought, and my reasons for choosing this name, are discussed infra text accompanying notes 26-62.

2. See, e.g., material cited infra note 40 (listing writings on classical orthodoxy).


5. See, e.g., JAMES Ames, SELECT CASES ON TORTS (1874) [hereinafter Ames, TORTS]; 1-6 JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888-1992) [hereinafter GRAY, PROPERTY]; CHRISTOPHER LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d ed. 1879) [hereinafter LANGDELL, SELECTION OF CASES]; see also WILLIAM LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 24 (1994) [hereinafter LAPIANA, LOGIC] (discussing casebook instruction as an aspect of classical orthodoxy). I describe the casebooks as austere because they tended to present cases without any notes or commentary.

6. Samuel Williston and Joseph Beale were the reporters, respectively, for the Restatement of Contracts and Restatement of Conflict of Laws. See GRANT GILMORE, THE AGES OF AMERICAN LAW 72-74 (1977) [hereinafter GILMORE, AGES] (discussing the Restatements as examples of classical orthodoxy); GRANT GILMORE, THE DEATH OF CONTRACT 59-76 (1974) [hereinafter GILMORE, DEATH] (discussing the Restatement (First) of Contracts).

7. See Stephen A. Siegel, Joel Bishop's Orthodoxy, 13 L. & HIST. REV. 215, 251 (1995) [hereinafter Siegel, Bishop] (discussing differences among classical scholars); see also Stephen A.
Harvard faculty formulated a distinctly secular understanding of classical orthodoxy. In contrast, many judges, lawyers, and scholars outside Harvard formulated, practiced, and understood classical legal science as a theistically informed jurisprudence. Given the slow pace at which American culture secularized in the late nineteenth and early-twentieth centuries, classical legal thought never would have come to dominate American law in the Gilded Age and Progressive Era had Harvard's secular version been its sole expression.

Modern scholars' focus on the writings of Christopher Columbus Langdell may seem justified. Langdell was the law school's leader. He brought Harvard President Charles Eliot's insistence on secular, scientific explanations and methods to the Law School. He reformed the school's curriculum and pedagogy. He hired faculty who generally shared his academic and jurisprudential vision.

Yet, this article argues that the focus on Langdell can impede full understanding even of Harvard's secular strand of classical orthodoxy. Langdell was a typical and influential classical legal scholar in many ways. However, in other fundamental ways he was atypical and uninfluential. Among the atypical aspects of Langdell's orthodoxy was his approach to the role of morals and public policy in legal science. Langdell divorced law

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9. Langdell studies are practically a cottage industry. See e.g., Paul Carrington, Hunt! Langdell!, 20 LAW & SOC. INQUIRY 691 (1995); Grey, Orthodoxy, supra note 3; Bruce Kimball, "Warn Students that I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870-1893, 17 L. & HIS. REV. 57 (1999); Marda Speziale, Langdell's Concept of Law as Science, 5 VT. L. REV. 1 (1930) [hereinafter Speziale, Concept of Law]; see also extended discussions of Langdell in books, such as Friedman, supra note 3, at 532-36; STEVENS, supra note 9, at 35-72 (same).

10. A search of the Westlaw JLR database on April 6, 2000 for articles with "Langdell" in their title written since 1983 produced eighteen hits.

11. See, e.g., LAPLANE, LOGIC, supra note 5, at 22-28 (discussing Eliot's time at Harvard).

12. See, e.g., LAPLANE, LOGIC, supra note 5, at 17-22 (recounting faculty hiring controversies).

13. Generally, I will use the term morals to include public policy. This is how the term was used in the Gilded Age. See, e.g., infra text accompanying note 166 (discussing Gra's use of the term morality in his works).

14. Although Langdell introduced casebook instruction at Harvard, his practice of it was somewhat atypical. See, e.g., Memoir of James Barr Ames, in LECTURES ON LEGAL HISTORY 3 (1913) (crediting Ames with setting the mainstream style of Socratic teaching); John Chipman Gray, Methods of Legal Education, 1 YALE L.J. 159 (1892) [hereinafter Gray, Methods] (stating that
from morals far more thoroughly than most of his fellow classicists. In a prior article, I showed that Langdell divorced law from morals far more thoroughly than the theistically-informed classical scholars, lawyers, and judges who were not associated with the Harvard Law School faculty. The thesis of this Article is that the same is true when Langdell’s orthodoxy is compared to the jurisprudence of his Harvard colleagues. Even at Harvard, Langdell’s position on the relation between law and morals was unusual.

Langdell is, in fact, a curious choice for the paragon of classical scholars, especially if we concentrate on his work as a scholar rather than on his role in reforming legal education. While Langdell edited the first casebook and initiated the move to Socratic teaching, he never wrote that most emblematic of classical books: the massive treatise synthesizing and explicating a body of law as an expression of classical jurisprudential precepts. Langdell wrote a handbook of contract law that well illustrates many facets of classical thought. However, that slim volume, which organizes and integrates its topics by the pre-classical principle of alphabetical order, is decidedly not a canonic textual treatment of contract law. That had to await the works of Samuel Williston.

I also point out, anticipating my particular focus on the relation of law and morality, that Langdell’s position on that relation was criticized by no less an acolyte of his than James Barr Ames. Unlike Langdell, most classical legal scholars, even most of the faculty at the Harvard Law School, where secularly-informed jurisprudence reigned unchallenged, thought that law reflected the society in which it was embedded and was intimately connected with morals.

Perhaps it was classicism’s enemies who made Langdell the paragon of

different Harvard professors used casebooks in different ways); Kimball, supra note 9, at 58-61 (discussing views of Langdell’s teaching style).

15. See Siegel, Bishop, supra note 7, at 253-59 (discussing Langdell’s influence at Harvard). This thesis has received support from LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN 44-72 (1999) [hereinafter PRZYBYSZEWSKI, REPUBLIC]; Przybyszewski, Brewer, supra note 8, at passim. The thesis is also implicit in Stephen A. Siegel, Historism in Late Nineteenth Century Constitutional Thought, 1990 Wis. L. Rev. 1431 [hereinafter Siegel, Historism] (discussing leading Gilded Age constitutional commentators who also wrote on private law).

16. Grey observes that “Langdell’s pedagogic innovations [and] his jurisprudence . . . were independent.” Grey, Orthodoxy, supra note 3, at 2 n.3.

17. LANGDELL, SELECTION OF CASES, supra note 5.

18. Simpson, supra note 4, at 670-74 (discussing the massive treatise as the paradigmatic production of the time).

19. CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (Boston, Little, Brown & Co., 2d ed. 1890) [hereinafter LANGDELL, SUMMARY].

20. WILLISTON, CONTRACTS, supra note 4; SAMUEL WILLISTON, LAW GOVERNING SALES OF GOODS AT COMMON LAW (1909).

21. See infra text accompanying notes 519-38 (discussing Ames). Ames was a student of Langdell’s just after Langdell introduced the casebook method. Shortly after graduating, at Langdell’s insistence, Ames became the first person to be appointed to the Harvard faculty with little or no experience in practice. At Langdell’s retirement, Ames became Dean of the school. See FRIEDMAN, supra note 3, at 533 (discussing Ames at Harvard).
legal orthodoxy. What made Langdell unusual also made him an easy target. After all, a legal system substantially divorced from social life, mores, and morals is easy to lampoon. I will not discuss when, how, and why Langdell was moved to classical orthodoxy's center stage. I only point out that Langdell originally shared that stage with others whose work differed significantly from his. A study of Langdell's Harvard colleagues reveals aspects of classicism that a focus on Langdell masks.

Recovering the strong connection that Harvard's classical scholars forged between law and moral concerns is important for several reasons. It helps us understand that the theistically-grounded scholars outside Harvard were classical scholars rather than belated advocates of some antebellum, pre-classical approach to law. More importantly, realizing that even the Harvard strand of classicism embedded law in morals helps us understand how classical legal thought bridged the transition in American culture from religious to secular foundations. Classicism's moral basis helped smooth the law's momentous transition from a static and theistic, to an evolutionary and secular, undertaking. Had Harvard not provided a morally-informed secular version of classical legal science, the law's transition from religious to secular premises would have been a far more controversial and delayed passage.

For similar reasons, recovering the strong connection Harvard's classical scholars forged between law and morals helps account for the Harvard style's eventual popularity and dominance. I doubt that the legal profession was ready, in the late-nineteenth and early-twentieth centuries, for a jurisprudence bereft of moral foundations. It was only because Harvard offered a secular, but morally informed, jurisprudence that it gained dominance as religious modes of explanation lost their suzerainty.

Recovering the moral basis of classical legal science also helps us better understand what was gained and what was lost in the shift from classicism to realism and other more modern schools of jurisprudence. Unmasking the realists' caricature of classicism helps us understand that the realist attack on formalism was as much an argument over the substance of the law as it was over its method. It is, after all, far easier to criticize a jurisprudence for having no basis in social mores and morals than it is to criticize it for basing itself in the wrong mores and morals.

22. See, e.g., FRIEDMAN, supra note 3, at 535 (discussing criticism of Langdell's case method of teaching); GILMORE, AGES, supra note 6, at 42-43 (discussing Langdell's methodology).

23. See, e.g., infra text accompanying notes 72, 137 (describing Holmes's and Gray's lampoons of Langdell); see also infra note 76 (discussing Von Inhering's comments on German Pandectists).

24. Compare OWEN FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 12, 19, 21 (1993) (arguing that people should appreciate the Lochner Court for having a moral vision, even though it was the wrong vision, and not support visionless approaches to the Constitution), with Morton Horwitz, History and Theory, 96 YALE L.J. 1825, 1829 (1987) [hereinafter Horwitz, History] (criticizing the New Deal court for arguing that it was restoring the Constitution to Justice Marshall's vision.
Finally, with the recent upsurge of interest in formal approaches to law in American jurisprudence, it is increasingly important to understand the formalism of early twentieth-century law. This article argues that Gilded Age and Progressive Era advocates of legal formalism did not concern themselves only with the law's form. Rather it asserts that the classical era lawyers who conceived law as a nondiscretionary science were concerned with the law's moral worth. They were proud of, and ready to defend, the law's substance as well as its form.

Thus, to understand classical orthodoxy's rise, widespread acceptance, and longevity, it is important to establish that Langdell's view of the relation between law and social norms, while not entirely unique, was fairly rare even among the secular classical jurists on his own preeminent faculty. In Part II of this Article I describe classical legal thought and explicate Langdell's approach to it. In Parts III and IV, I make my argument through an extended analysis of John Chipman Gray's jurisprudential and doctrinal writing. Gray was among Langdell's most eminent colleagues. His doctrinal writings have long been accepted as masterpieces of classical legal science. Through my analysis of Gray, I show how a jurist could be secular, embed law in social norms, and still be classical. Gray not only explained the law's abstract principles in terms of social mores, morals, and policy, but he drew on them to argue for particular bottom-level rules. After developing Gray's version of classical orthodoxy, I will, in Part V, briefly consider whether Gray or Langdell typified Harvard's approach to classical legal thought.

II. CLASSICAL LEGAL THOUGHT AND LANGDELL'S ORTHODOXY

Christopher Columbus Langdell was among the late-nineteenth century law professors who "took the view that law was a science seriously and carried it out programmatically in a way that had no precedent in the common law world." There were many reasons for this turn in common law thought: the prestige of science, the developing national economy's need for uniform and predictable law, the rise of university-based legal education and full-time law professors, the shift in legal practice from the courtroom to the

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28. See, e.g., Gordon, Legal Thought, supra note 27, at 70; Grey, Orthodoxy, supra note 3, at 32 (discussing the commercial need for legal predictability).
29. See, e.g., FRIEDMAN, supra note 3, at 536-37 (discussing the rise of "national" law schools).
office, the ideology of self-government and apolitical law, and the sense of social cohesion which it fostered. But whatever the motives, the impulse gave rise to a mode of legal analysis that Roscoe Pound called "mechanical jurisprudence" and Karl Llewellyn deemed the "formal style." Today, it has become known as "classical legal thought" or "classical orthodoxy." Originating in the 1850s, classical legal thought distinctly influenced American law from the 1870s to the 1930s.

A. CLASSICAL LEGAL THOUGHT

Classical legal scholars, lawyers, and judges were certainly not the first to conceive law as a science. Jurists in Republican Rome did so, as did late-medieval, Renaissance, and early modern English lawyers and judges. American lawyers had been discussing law as a science since shortly after the Revolution. Nonetheless, the "law as science" movement in the second half of the nineteenth century was distinct, in part, for its rigor and, in part, for its updated notion of science. Roman and early English lawyers had modeled law on science conceived according to the premises of Aristotelian epistemology. Lawyers in the early American republic had modeled law on science conceived according to the terms of Protestant-Baconianism. Lawyers in the latter part of the nineteenth century modeled law on science conceived as a more rigorously experimental and observational enterprise than their predecessors.

Classical legal scholars believed natural scientists sought knowledge

30. See, e.g., Gordon, Legal Thought, supra note 27, at 73-74 (discussing a new and ambitious "legal elite" of the late nineteenth century).
31. See, e.g., id. at 93-97 (discussing the moral and political dimensions of liberalism); Grey, Orthodoxy, supra note 3, at 33-34 (discussing political forces of the era).
32. See, e.g., FRIEDMAN, supra note 3, at 555 (discussing the prestige of a legal education); Gordon, Legal Thought, supra note 27, at 76-78 (discussing the homogeneity of leading corporate lawyers of the time).
34. KARL LLEWELLYN, THE COMMON LAW TRADITION 35-45 (1960); see also GILMORE, AGES, supra note 6, at 41-67 (discussing the "age of faith").
35. See, e.g., Grey, Orthodoxy, supra note 3, at 2 (describing the legal thought of Langdell and his colleagues as "classical orthodoxy"); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 RES. IN L. & SOC. 3 (1980).
36. For convenience, I will refer to this group simply as classical legal scholars.
39. Although I disagree with his comments on Langdell, Schweber, supra note 28, at 455-66, nicely captures the subtle shift from ante- to post-bellum scientific thought. In general, as compared to post-bellum inductive scientific theory, Protestant-Baconianism was a more simplistic and naïve assertion of the possibility and procedures of experimental method.
about the natural world through the process of (1) empirical observation of natural phenomena, (2) induction of the principles governing them, and (3) logical elaboration of these principles to predict future events. Legal scientists, therefore, should (1) observe legal controversies, (2) induce the principles that govern them, and (3) logically elaborate the principles into rules for deciding future controversies.

Classical legal scholars primarily studied disputes that reached appellate courts and were decided by judicial opinion published in court reports. Consequently, classical scholars believed not only "that law is a science," but "that all the available materials of that science are contained in printed books." Law libraries were to classical jurists what "laboratories . . . [were] to the chemists and the physicists, the museum of natural history to the zoologists, the botanical garden to the botanists." Substantively, classical legal scholars believed that natural scientists, by applying the empirical and inductive method, had shown that the world's natural phenomena were governed by a small number of abstract principles. Newton, for example, had shown that the fall of an apple, the rise and fall of the tides, and the orbit of the plants were all aspects of the principle of gravitation; Charles Lyell had shown that Earth's diverse landscapes were the product of a relatively small number of geologic forces. Likewise, classical legal scholars

40. I draw my understanding of classical legal science from FRIEDMAN, supra note 3, at 530-38; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 9-63 (1992) [hereinafter HORWITZ, TRANSFORMATION]; FREDERICK POLLOCK, The Science of Case Law, in ESSAYS IN JURISPRUDENCE AND ETHICS 237-60 (repl. ed 1985); Chase, supra note 10; Grey, Orthodoxy, supra note 3; Michael Hoeflich, Law & Geometry: Legal Science from Leibniz to Langdell, 30 AM. J. LEGAL HIST. 95, 95-96, 119-21 (1986); Kennedy, supra note 35; Pound, Mechanical Jurisprudence, supra note 33, at 608; Speziale, Concept of Law, supra note 9.


42. Langdell, Harvard Celebration, supra note 41, at 124. Some classical scholars, among whom Langdell and his Harvard colleagues were preeminent, shaped legal education on this premise and taught law by assigning and discussing decided cases with their students. Other classical scholars, such as Joel Bishop, Francis Wharton and Christopher Tiedeman, dissented from this approach, preferring to continue teaching by the lecture and textual treatise approach. See LAPIANA, LOGIC, supra note 5, at 99, 132-34; JOHN BASSETT MOORE, A BRIEF SKETCH OF THE LIFE OF FRANCIS WHARTON 3 (1891) (stating that the Boston University Law School, as Lapiana discusses, had been set up in protest against case-method teaching); Joel Bishop, The Common Law as a System of Reasoning, 22 AM. L. REV. 1 (1888). This difference, however, was a dispute over pedagogy, the proper technique for imparting legal knowledge to uninformed students. Whatever their teaching preference, they all agreed that for the practitioner and legal scholar, appellate cases and their study determined the entire content of the law.

43. Isaac Newton's discovery of the principle of gravitation served as the paradigm of scientific achievement prior to Albert Einstein's enunciation of relativity theory. On Newton, see RICHARD WESTFALL, LIFE OF ISAAC NEWTON (1993).

44. Charles Lyell (1797-1875), author of the celebrated three-volume Principles of Geology (1830-1833) established the "uniformitarian" hypothesis, which taught that natural forces acting on the earth were constant. His geological science was opposed to the traditional
believed that observing appellate controversies and inducing the principles that governed their resolution would show that "Law ... consists of certain principles or doctrines" and that "the number of fundamental legal doctrines is much less than is commonly supposed." There was, for example, a law of contract, applicable to all agreements not under seal, that turned on the principle of consideration; and a law of tort, applicable to all forms of injury to person and property, that turned on the principle of negligence. Law, like physics and chemistry, had a geometric shape: the many rules of law were the elaboration of a few fundamental principles, principles which were discoverable through observation of, and induction from, reported decisions.

Law, to classical scholars, was an ordered system in which most legal disputes had "right" answers dictated by a small number of relatively abstract principles. "Right" answers meant answers that were logically consistent with legal precedent and legal principle. Law was, to use Thomas Grey's schema for analyzing legal theories, comprehensive, complete, formal, and conceptually ordered. Law was comprehensive because it provided a mechanism for the resolution of every case, a mechanism without procedural gaps or overlaps. Law was complete because its fundamental substantive principles provided "a uniquely correct solution ... for every case that [could] arise under it." Law was formal because the "uniquely correct solution" for every case was "dictated by demonstrative (rationally compelling) reasoning" from fundamental principles. It was conceptually ordered because its "bottom-level" substantive rules were derived from a small number of relative abstract principles and concepts, which themselves formed a coherent system. Classical scholars did not assert that legal

"catastrophism," which taught that the earth was subject to sudden, large-scale changes, possible through divine intervention. Not all classical legal scholars accepted geologic uniformitarianism. See Siegel, Three Tenors, supra note 7, at 26 n.26 (stating Francis Wharton believed in divinely wrought catastrophic change).

45. LANGDELL, SELECTION OF CASES, supra note 5, at vi; see also Book Notice, 6 Am. L. Rev. 353 (1871) (reviewing CHRISTOPHER LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)).

46. Grey, Orthodoxy, supra note 3, at 6-13 (outlining the analytic framework of classical orthodoxy).

47. Id. at 6-7 (describing a "comprehensive" legal system); see also infra text accompanying note 68 (discussing "acceptability" as Grey's fifth criteria for assessing legal theories).


49. Id. at 8. But see id. at 12 & n.37 (preferring to use the term "derived analytically").

50. Id. at 8-10. In other words,

the heart of classical theory was its aspiration that the legal system be made complete through universal formality, and universally formal through conceptual order. A few basic top-level categories and principles formed a conceptually ordered system above a large number of bottom-level rules. The rules themselves were, ideally, the holdings of established precedents, which upon analysis could be seen to be derivable from the principles.
science bore a perfect resemblance to natural science. Legal science had to be comprehensive to provide an answer for every question as it arose. Natural science could demur if it was not then ready to provide a response. Law was also not as perfectly formal and conceptually ordered as natural science. That is, unlike a mature body of natural science, a mature body of legal science was not necessarily perfectly geometric. Law's logical symmetry was frequently marred by its respect for incorrectly decided precedent.

According to the common law principle of stare decisis, past precedent has authoritative force and should generally be adhered to whether or not the precedent is thought to be consistent with fundamental principle (i.e., decided correctly). Classical scholars agreed that a few incorrectly decided cases might properly be set aside as "mistaken," especially if they were recent. But a case that had not been subject to question for a substantial period of time, or a line of precedent, established settled and binding law which classical scholars had to respect. Unlike natural science, in classical legal science "error, if persisted in, at some point became truth." As that "point" was not subject to a clear rule, stare decisis introduced into the legal system not only departures from geometric symmetry but also an uncontrolled note of judicial discretion. How courts would treat "incorrect" precedent—extend it, confine it, ignore it, or even overrule it—forever "compromised[ed] the classical... aspiration toward universally formal conceptual order" and substantially broke the analogy between legal and natural science.

Finally, for many classical scholars, legal and natural science differed because legal principles evolved while natural principles did not. Some classical scholars never accepted the notion that legal principles changed over time. For them, changes in law reflected humankind's ever closer approximation of eternally "true" legal principles. For other classical

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51. See Grey, Orthodoxy, supra note 3, at 25 (differentiating between natural and legal science). Nonetheless, in theory, in the fullness of time, natural science should be able to provide a response or establish the question as beyond the domain of science.
52. See, e.g., id. at 25-26 (discussing relation of precedent and symmetry); Siegel, Bishop, supra note 7, at 257 (same); infra text accompanying note 372 (same).
53. See, e.g., Grey, Orthodoxy, supra note 3, at 25-26 (discussing stare decisis).
54. See, e.g., id. (discussing errors in case law). The civil law lacks a principle of stare decisis and tends to be more geometrically structured.
55. Id. at 26.
56. Id.
57. Many nineteenth-century natural scientists accepted the idea that physical phenomena evolved, that is, changed their appearance over time. In the nebular hypothesis, the stars did not always exist but condensed from stellar gases. In uniformitarian geology, mountain ranges rose and eroded away. In Darwinian biology, even the species changed over time. But these changes were due to the constant application over eons of time of permanent, unchanging physical laws. The physical laws themselves never changed.
58. 1 JOEL BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION xix
scholars, legal principles did change over time. However, this change was responsive to changes in the law's surrounding physical and cultural context; it was governed and limited by deeper permanent principles immanent in each of the world's distinct races and nations. For these classical scholars, legal evolution was like stellar or geologic change. Stellar and geologic phenomena change, but they do so according to the constant application of uniform, unchanging physical law. For some classical scholars, however, legal change was real. The law of feudal England, for instance, was fundamentally different from the law of nineteenth-century commercial England, and there were no known principles that controlled when, where, or how this change occurred. With these caveats aside, classical orthodoxy is well understood by its modeling of law on the substance and method of natural science as it was understood in the second half of the nineteenth century. Crucial to this endeavor was the belief that jurists could systematically induce the law's small body of governing principles from an empirical study of decided cases. Equally crucial was the classical jurists' belief that they could analytically elaborate law's governing principles into concrete rules that would decide actual cases. For classical jurists, general propositions could decide concrete cases.

B. CHRISTOPHER COLUMBUS LANGDELL

Not all late-nineteenth or early-twentieth century jurists accepted these tenets, but many did. Christopher Columbus Langdell, Dean of the
Harvard Law School, was certainly one of the latter. Inspired by this vision, he composed the first casebook, wrote a short summary of contract law, authored many law review articles, and reformed legal education.65 There were, however, two facets of Langdell's legal thought that I argue were rather unique to him; facets that, because of the focus on Langdell in classical legal studies, have improperly been taken as typical, even defining criteria, of classical orthodoxy.

The first was Langdell's tendency to establish law's geometric symmetry and logical coherence by cavalierly dismissing judges' own explanations of their decisions and, in Holmes' view, substituting "explanations and reconciliations of the cases [that] would have astonished the judges who decided them."66 The second facet of Langdell's legal thought was his position on the relation between law and social mores, morals, and public policy. Langdell is notorious for declaring that considerations of "substantial justice and the interest of the parties" were "irrelevant" to legal analysis.67

To again use Thomas Grey's terminology for analyzing legal theories, Langdell did not believe that law had to be "acceptable." According to Grey, law is "acceptable to the extent that it fulfills the ideals and desires of those under its jurisdiction."68 No sooner had Langdell published his remark on the irrelevance of justice and policy to doctrinal analysis, a remark that was really only an aside in his analysis of the "mailbox" rule in contract law,69 than Holmes quoted it as an illustrative expression of "the weak point of Mr. Langdell's habit of mind."70 That "weak point" was "a mode of thought" that was concerned only with "the elegantia juris, or logical integrity of the system as a system" and not with the law's connection to "human needs" and "felt necessities."71 It was Langdell's solicitude for the law's "consistency" rather than the desirability of its "postulates" that led Holmes to lampoon Langdell as "the greatest living legal theologian" and compose that mantra article or opinion—reflects these tenets is a classical jurist.

65. See, e.g., FRIEDMAN, supra note 3, at 550-58 (discussing Langdell's accomplishments and writings); STEVENS, supra note 9, at 35-72 (same).
66. 1 HOLMES-POLLOCK LETTERS 17 (Mark Howe ed., 1941) [hereinafter HOLMES-POLLOCK]; see also Holmes, Book Notice, 14 AM. L. REV. 233, 234 (1880) [hereinafter Holmes, Book Notice] (reviewing LANGDELL, SELECTION OF CASES, supra note 5).
67. LANGDELL, SUMMARY, supra note 19, at 20-21.
68. Grey, Orthodoxy, supra note 3, at 10.
69. LANGDELL, SUMMARY, supra note 19, at 15-22.
70. Holmes, Book Notice, supra note 66, at 234 (reviewing Langdell's Law of Contracts) (admitting Langdell's remark was "only incidental" but saying "it reveals a mode of thought which becomes conspicuous to a careful student"). Both Langdell's remarks and Holmes's comments were published in 1880.
71. Holmes, Book Notice, supra note 66, at 234 (reviewing Langdell's Law of Contracts); see also HOLMES-POLLOCK, supra note 66, at 17 (discussing Langdell).
of legal modernity—"[t]he life of the law has not been logic: it has been experience."72

Ever since Holmes' sobriquet, Langdell's view on the irrelevance of justice and policy to doctrinal analysis has not only "been taken to express the wretched essence of his kind of legal thinking"73 but also the essence of classical legal thought in general. Not only Langdell, but all classical legal thought, has been lampooned as "mechanical jurisprudence"74 and "transcendental nonsense"75 derived from a "heaven of juristic conceptions" that any contact with earthly air would destroy.76

It is true that Thomas Grey developed his five-part schema for analyzing legal theories, which I have used here, as part of his effort to revise the conventional wisdom on Langdell's views about the relevance of justice and public policy to legal analysis. Appeals to justice and policy, Grey notes, do occur in Langdell's writings.77 The law adopts fictions, Langdell wrote, "only . . . to promote justice, i.e., in order to prevent some injustice or some inconvenience which would otherwise arise."78 Certain legal presumptions concerning contractural offers are made "only for purposes of justice and convenience."79 Indeed, as Grey points out, in Langdell's view the entire reason why the State creates a legal system is due to "motives of policy" and a concern for "justice."80 Nevertheless, all Thomas Grey concludes is that for Langdell, considerations of justice and policy were relevant to legal analysis if they were already "embodied" in legal principles.81 In Grey's analysis,
Langdell thought justice and policy concerns had to be irrelevant in fashioning bottom-level rules or individual decisions because “[t]o let considerations of acceptability directly justify a bottom-level rule or individual decision would violate the requirement of conceptual order, on which the universal formality and completeness of the system depended.” And in any event, Grey admits that

[i]t is fair to say that these arguments of justice and policy do not bulk large in the Langdellian corpus. Langdell’s most common form of doctrinal discourse was simple dogmatic pronouncement, and when he went beyond, his more usual appeal was to authority or to “principle” (that is, doctrinal coherence). Not once did Langdell enter into a sustained explication or defense of a “general principle” in terms of policy rather than legal logic or legal history. Policy analysis, even of abstract legal principles, would, as Thomas Grey observes, “strain[] the spirit” of Langdell’s orthodoxy.

In my reading, Langdell’s rare arguments from justice and policy are casual make-weights and after-the-fact justifications that lend support but rarely, if ever, explicitly determine the existence, shape, or scope of a legal principle, let alone a bottom-level rule or case decision. Even with Thomas Grey’s insightful emendation, Langdell’s orthodoxy remains one in which considerations of “acceptability” have a distinctly low priority. Langdell’s orthodoxy remains a jurisprudence marked by a baffling disconnect between law and social norms.

Thus, to understand classical orthodoxy’s rise, widespread acceptance and longevity, it remains important to establish that Langdell’s view of the relation between law and social norms, while not entirely unique, was fairly rare even among classical jurists. I have previously argued that in contrast to Langdell, many classical legal scholars thought their jurisprudence

82. Id.
83. Id. at 14.
84. Id. at 32 (discussing Brandeis’s derivation of the right of privacy).
85. More recently, Professor Bruce Kimball has attempted to soften Langdell’s image by arguing that he was not a dogmatic conceptualist. See Kimball, supra note 9, at 61-62, 124-25. Kimball may well succeed, at least for what he calls Langdell’s early period. Kimball concedes that after the onset of Langdell’s blindness, in the mid-1880s, he retreated into teaching by dogmatic assertion. But Kimball’s images of a Langdell who laughed, changed his mind, asserted opinions that he conceded were not the law, and asserted opinions tentatively are all consistent with classical orthodoxy. See infra text accompanying notes 331-50 (describing Thomas Grey’s analysis). The issue is whether Langdell drew his legal principles from social practices or thought they had any general connection with justice and policy. Kimball only touches on these concerns when he shows that Langdell thought partnership law should be drawn from business practices. But, as Kimball notes, it was a traditional aspect of the common law to draw mercantile law from the practice of merchants. Id. at 70 n.1. In addition, Langdell taught this branch rarely and devoted no scholarly attention to it. William LaPlana, Langdell Laughs, 17 L. & Hist. Rev. 141, 142 (1999).
instantiated sound, even divinely appointed, morals and public policy.\(^5\) However, these theistically informed scholars, though typical of many Gilded Age lawyers, judges, and scholars, were not associated with the Harvard Law School and its more secular approach to law. The burden of this article is that even at Harvard, Langdell's view was quite isolated. It argues that, by and large, Langdell's distinguished colleagues adhered to the view that law was deeply embedded in sound social mores and morals.

I now turn to fleshing out this argument through an extended analysis of John Chipman Gray's jurisprudential and doctrinal writing. Gray is the most appropriate subject for this study because he was more attentive to, and wrote more about, jurisprudence than any other Harvard professor of his time.\(^8\) After developing Gray's version of classical orthodoxy, I will briefly consider whether Gray or Langdell typified the Harvard branch of classical legal thought.

III. JOHN CHIPMAN GRAY

A. A BRIEF BIOGRAPHY

John Chipman Gray was born in 1839 and died in 1915. He was born into an elite Boston family.\(^8\) Gray's paternal grandfather, William Gray, was the second largest ship owner on the Atlantic seaboard and Lieutenant-Governor of Massachusetts shortly after the Revolution.\(^8\) John's older half-brother was Supreme Court Justice Horace Gray,\(^9\) who lived from 1828 to 1902 and served on the Court from 1881 until he died. John Chipman Gray attended the Boston Latin School, graduated Harvard College in 1859, and Harvard Law School in 1861.\(^9\) He joined the bar in 1862. For the next three years, he served as an officer in the Union army.\(^9\) After the war, he founded the still prominent Boston law firm of Ropes & Gray.\(^9\) In 1866, with his partner John Ropes, Gray founded the American Law Review, which rapidly

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86. Siegel, Bishop, supra note 7, at 246; Siegel, Historism, supra note 15, at 1451; Siegel, Three Tenors, supra note 7, at 3-7.
87. Gray did not write that much about jurisprudence. See infra text accompanying note 101 (discussing Gray's writing). The point is that Gray's Harvard colleagues wrote even less. It is startling how inattentive the Gilded Age Harvard faculty was to explicating its jurisprudence. Among Langdell, Ames, Beale, and Williston, all of whom are discussed infra text accompanying notes 502-39, only Beale taught and wrote about jurisprudence.
88. Gray, John Chipman, in 16 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 206 (1918) [hereinafter NATIONAL CYCLOPAEDIA].
89. Id.
91. Id.
92. NATIONAL CYCLOPAEDIA, supra note 88, at 206.
93. Id.
became one of the legal profession's most prestigious journals. Ropes and Gray edited the journal until 1870, when they passed the editorship on to Gray's close friend Oliver Wendell Holmes (two years his junior) and Arthur Sedgwick. In 1873 he married Anna Lyman Mason, daughter of Charles Mason, rector of Boston's Grace Church, and granddaughter of the famous New England attorney Jeremiah Mason.

In 1869, Gray joined the Harvard Law School faculty as a lecturer, becoming a chaired Professor in 1875. Over the years, his teaching responsibilities generally included Property (at times as a three-year sequence of courses) and a shifting complement of courses that included Agency, Conflicts, Constitutional Law, Evidence, Jurisprudence, and Wills. When he retired in 1913, he had served for a record setting forty-four years, and had taught every member of the then current faculty. Despite Eliot and Langdell's preference that Harvard professors be full-time academics, Gray continued to practice at his firm throughout his years on the Harvard faculty. Gray was very involved in university, alumni, and bar affairs, and assumed leadership roles in their various organizations. Furthermore, he served as trustee or officer of many Boston cultural and civic institutions and administered myriad private estates of vast wealth. Several times he was offered and declined a seat on the Massachusetts Supreme Judicial Court, even a seat as its Chief Justice.

As compared to other late-nineteenth century legal scholars, Gray published very little: one edition of his study of jurisprudence, The Nature and Sources of Law, two editions of his six-volume casebook, Select Cases and Other Authorities on the Law of Property, two editions of the treatise Restraints on the Alienation of Property, three editions of The Rule Against Perpetuities.
and about a dozen law review articles. But what he wrote was very well received. His doctrinal treatises were the first, and the first great, treatises published by Harvard faculty during the school’s classical phase. In both England and America, Gray’s perpetuities treatise was instantly regarded as a masterpiece. Although not updated since 1942, it is still the subject’s leading treatise.

B. JOHN CHIPMAN GRAY: A CLASSICAL LEGAL SCHOLAR

At present, scholarly opinion is divided over whether John Chipman Gray was a paradigmatic classical legal scholar or whether he had escaped those confines to become a progenitor of legal realism. Scholars who focus on Gray’s doctrinal treatises treat him as a formalist; scholars who focus on his jurisprudential writing treat him as a proto-realist. In my analysis, Gray was typical of those classical scholars who drew their jurisprudence from a secular worldview. Admittedly, there are facets of his thought which tend towards more modern stances, and, if viewed apart from the whole, make

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104. Material cited supra note 4. A fourth edition was published by Gray’s son after his death.

105. For a comprehensive bibliography of John Chipman Gray’s publications, see ROLAND GRAY, JOHN CHIPMAN GRAY 141-43 (1917) (hereinafter GRAY, JOHN CHIPMAN GRAY) (listing Gray’s publications).

106. Prior to 1883, the Harvard law faculty, under Langdell’s deanship, had published casebooks and one “handbook” on contract law. See, e.g., AMES, TORTS, supra note 5; LANGDELL, SUMMARY, supra note 19.

107. See 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 215 (1926) (describing Gray as the preeminent scholar of the modern Rule Against Perpetuities).


109. The modern use of Gray’s work as authority contrasts with citations to other old treatises, which are now used to illustrate the development of the law. See, e.g., 1 RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS 9, § 1.2, at 31, § 1.2, at 33 (1983); L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 253, 263 (1966).


112. Many, if not most, classical scholars drew their jurisprudence from theistic worldviews. See, e.g., PRZYBYSZEWSKI, REPUBLIC, supra note 15, at 44-72; Przybyszewski, Brewer, supra note 8, at 24-25 (discussing Justice Brewer); Siegel, Bishop, supra note 7, at 252-33 (discussing Bishop); Siegel, Three Tenors, supra note 7, at 7-45 (discussing Bishop and Wharton).
him appear more modern than he was. This is a commonplace occurrence in intellectual history.\[113\]

Suffice it to say at this point that Gray, like all classical scholars, taught his students that law "is a science, a truth to be discovered."\[114\] With due allowance being made for their distinct subject matters, Gray believed that legal science was generally analogous to physical science. "The Common Law judge," Gray said, "is like an experimenter in chemistry, who is always testing his theory by new and varied experiments,"\[115\] and legal scholars should "extract and develop the principles of the law in systematic treatises, as... able men extract and develop in systematic treatises the principles of chemistry or mathematics."\[116\]

Imbued with these precepts, Gray wrote two major doctrinal works, *The Rule Against Perpetuities* and *Restraints on Alienation*, as well as a six-volume Property casebook, that are undoubtedly classical. If Gray's doctrinal writings are not examples of classical scholarship, then little is. They have long been understood as treatises that present property law as geometrically structured, deductively elaborated, and conceptualistic.\[117\] Gray's treatise on perpetuities law addresses the extent to which the current generation of property holders can impose their control of wealth on future generations.\[118\] In his treatise, Gray surveyed the entire body of Anglo-American cases on perpetuities problems to conclude that all perpetuities law consisted of a single rule of universal application. This rule, that no interest is good unless it must vest within a life in being plus twenty-one years, was properly applied through remorseless logical deduction. Perpetuities law, according to Gray, involved "a definite recognized rule: if a decision agrees with it, it is right; if it does not agree with it, it is wrong." In

114. Property I Class Notes of Thomas Reed Powell 1 (1901-02) (The Harvard Law School Library, Hollis # A)J800/mss). The pages are not numbered, but this comment appears on the first page. Gray made this comment as part of a lecture that generally describes his "sources of law" theory of law. See *infra* text accompanying notes 170-76 (discussing Gray's theory of law). So although Gray taught Property I that year with Assistant Professor Hens Westengard, it is likely Gray who was at the podium that day.
116. John Chipman Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888) [hereinafter Gray, *Cases*]; see also *GRAY, RULE* (2d ed.), supra note 4, at vii (discussing the need to study general principles of law). Accordingly, teaching law by the case method was "the best because it is most in accordance with the constitution of the human mind; because the only way to learn how to do a thing is to do it.... No man ever learned chemistry except by retort and crucible. No man ever learned mathematics without paper and pencil." Gray, *Cases*, supra, at 763.
118. The remarks in Gray's perpetuities treatise are drawn from Siegel, *Legal Formalism*, supra note 110, at 449-55.
Gray's view, perpetuities law was like "do[ing] . . . sums correctly."\(^{119}\)

In composing his treatise, Gray confronted a central difficulty. At the time he wrote, common-law precedent addressed perpetuities not through a single rule but through a mass of rules that had no systematic relationship, each of which was directed at a distinct aspect of the perpetuities problem. Moreover, the various rules allowed differing amounts of "dead hand" control. Gray, however, depicted these multifarious rules as anachronistic remnants of the judiciary's original and confused attempts to control remote limitations. He claimed the single rule for which he contended was the slowly emerging "true form" of the law;\(^{123}\) and he dismissed continued adherence to the unsystematic precedents as intellectual malingering.

Gray's analysis in *Restraints on Alienation* is similar.\(^{121}\) As noted by Gregory Alexander, early nineteenth-century lawyers did not conceive property law as a harmonious elaboration of fundamental principles. Rather, they saw property law as an inconsistent amalgam of medieval rules spawned by the feudal system and "an elaborate system of expedients, very artificial and ingenious, devised in the course of ages . . . for the express purpose of evading the [feudal] rules."\(^{122}\) Nonetheless, in *Restraints*, Gray surveyed "the whole history and present condition of the law governing restraints on the transfer of property"\(^{123}\) to argue that the law in this area had largely been reduced to a "system"\(^{124}\) of "settled"\(^{125}\) rules. Over time, Gray believed that common-law judges had formulated a systematic and consistent approach premised, on the one hand, upon whether the restraint was a forfeiture or a disabling restraint, and, on the other hand, upon the quantum of ownership interest involved in the estate.\(^{126}\) "Such errors as have arisen in discussing restraints on alienation," Gray claimed,

are largely due to the subject having been dealt with disconnectedly. If the restraint was in the form of a condition, it was treated with conditions. If it was in the form of a direction to a trustee, it was treated with trusts. Involuntary alienation, or liability

119. GRAY, RULE (2d ed.), *supra* note 4, at ix.
120. GRAY, RULE, *supra* note 4, at 144.
123. GRAY, REREACTIONts (2d ed.), *supra* note 103, at xiii (reproducing the Preface of the first edition).
124. *Id.* at 2 (describing restraint law as a "system of rules").
125. *Id.* at xiii; *see also* GRAY, RULE (2d ed.), *supra* note 4, at 2 (describing rules of property law as a "system of rules").
for debts, has been considered without reference to voluntary transfers.\textsuperscript{127}

Indeed, in Gray's view, the contemporaneous spread of spendthrift trusts once again threatened to "mar[]" doctrinal "development... by too exclusive an attention to particular aspects."\textsuperscript{128}

\section*{C. \textit{GRAY'S ORTHODOXY AS DEVELOPED IN HIS JURISPRUDENTIAL WRITING AND TEACHING}}

As classical scholars and colleagues who taught in the late-nineteenth century Harvard Law School, Gray and Langdell agreed on many aspects of jurisprudence. Both Gray and Langdell were devoted to systematic studies premised upon comprehensive examinations of "special topics, chosen with a view... to their place and importance in the general system of the law."\textsuperscript{129} Both believed that every fundamental legal doctrine represented a "growth, extending in many cases through centuries."\textsuperscript{130} Also, both believed that "logical symmetry" in legal doctrine promoted legal certainty; and that legal certainty was an important social norm because it allowed law to function "as a guide to conduct" that fostered self-government.\textsuperscript{131} Although Gray first doubted the value of Langdell's reform of legal education, he eventually became a committed advocate of Socratic teaching.\textsuperscript{132}

Nonetheless, Gray's orthodoxy differed from Langdell's in two fundamental regards. First, Gray was appalled by the cavalier way Langdell (and some other classical scholars)\textsuperscript{133} dismissed the judges' own

\footnotesize{\begin{itemize}
\item \textsuperscript{127} \textit{GRAY, RESTRAINTS} (2d ed.), \textit{supra} note 103, at 4-5. Among the sources of confusion was the failure to realize that restraints on alienation and perpetuities law were separate topics. \textit{See id.} at 5; \textit{GRAY, RULE} (2d ed.), \textit{supra} note 4, at viii-ix, 1-2.
\item \textsuperscript{128} \textit{GRAY, RESTRAINTS} (2d ed.), \textit{supra} note 103, at xiii. Differences in public policy also accounted for this. \textit{See infra} text accompanying note 274 (discussing restraints). The threat triumphed over Gray's concerns. \textit{See GRAY, RESTRAINTS} (2d ed.), \textit{supra} note 103, at iii-v (observing that case law was not developing as Gray thought it should).
\item \textsuperscript{129} \textit{GRAY, RULE} (2d ed.), \textit{supra} note 4, at vii.
\item \textsuperscript{130} \textit{LANGDELL, SELECTION OF CASES}, \textit{supra} note 5, at vi. \textit{See GRAY, RESTRAINTS} (2d ed.), \textit{supra} note 103, at 2; John Chipman Gray, \textit{Remoteness of Charitable Gifts}, 7 HARV. L. REV. 406, 407-08 (1894) [hereinafter Gray, \textit{Remoteness}] (discussing the development of legal doctrine). Consider Gray's remarks commending casebook teaching: "It accustoms the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only logical interdependence, but as a living thing, with a continuous history, sloughing off the old, taking on the new." \textit{Gray, Methods, supra} note 14 at 159.
\item \textsuperscript{131} \textit{GRAY, RULE} (2d ed.), \textit{supra} note 4, at vii. On Langdell, see Grey, \textit{Orthodoxy, supra} note 3, at 32-33 (discussing Langdell's commitment to self-government).
\item \textsuperscript{132} \textit{See Gray, Methods, supra} note 14 (defending Harvard's educational reforms). On Gray's initial distance from Langdell's reforms and subsequent conversion, see \textit{LAPIANA, LOGIC, supra} note 5, at 25-26, 101-03 (discussing Gray's adoption of Socratic teaching).
\item \textsuperscript{133} Joel Bishop was another classical scholar who dismissed the judges' own reasoning, preferring to focus on the pattern of their decisions. \textit{See Siegel, Bishop, supra} note 7, at 231 (discussing Bishop's jurisprudence).
\end{itemize}}
explanations for their decisions. Holmes, it will be recalled, thought it was among Langdell's chief vices that "his explanations and reconciliations of the cases would have astonished the judges who decided them."\textsuperscript{134} Similarly, in 1883 Gray wrote a despairing letter to Harvard's President Eliot protesting the many ways Langdell's direction of the law school "flouted the opinion of the profession at large."\textsuperscript{135} Central to Gray's concern was a deep distrust of aspects of Langdell's approach to the law. "In law," Gray wrote,

the opinions of judges and lawyers as to what the law is, are the law, and it is in any true sense of the word as unscientific to turn from them, as Mr. Langdell does, with contempt because they are "low and unscientific," as for a scientific man to decline to take cognizance of oxygen or gravitation because it was low or unscientific. Whether they be low or not, they are the basis of legal science.

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\ldots Langdell's intellectual arrogance and contempt is astounding. One may forgive it in him or Ames, but in an ordinary man it would be detestable. The idols of the cave which a school bred lawyer is sure to substitute for the facts, may be much better material for intellectual gymnastics than the facts themselves and may call forth more enthusiasm in the pupils, but a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil.\textsuperscript{136}

And as Samuel Williston, who was Gray's student in the late 1880s, reminisced at Gray's memorial service:

On [one] occasion, when he was expressing a little distaste for that method of legal reasoning which perhaps some of his colleagues may have been guilty of,—a method which takes the decision of a case as settling the actual point involved by the reported facts, but carefully puts the decision on new reasons and explains it as meaning something entirely different from what judges who decided it thought it did,—Gray said: "This method of legal reasoning puts the decisions of the court on a par with the utterances of Balaam's ass,—divinely inspired, but presupposing no

\textsuperscript{134} See supra text accompanying note 66 (quoting Holmes).

\textsuperscript{135} LAPIANA, LOGIC, supra note 5, at 18-19.

\textsuperscript{136} Letter from John Chipman Gray to Charles Eliot (Jan. 3, 1883), in President's Papers: Charles W. Eliot, Box 71, Folder 1883 (G-L) (Harvard University Archives).
conscious intelligence on the part of the creature from whom they proceed."

Indeed, Gray was so concerned with the issue that in May 1882, Edmund Parker records Gray as closing his year-long Jurisprudence course with the admonition: "Look out that training at Harvard Law School do [sic] not make you too regardless of dicta and the reasons on which decisions rest." To Gray then, as for Holmes, Langdell was "the greatest living legal theologian."

Gray's objection stemmed from his view that Langdell too stringently modeled law on the natural sciences. In natural science, "truths ... are independent of opinion." In law, however, truths were opinion. "The Law of the State," Gray insisted, "is not an ideal, but something which actually exists." It "is composed of the rules which the courts ... lay down for the determination of legal rights and duties." The difference between natural and legal science meant, as Gray was fond of saying, that

[a] mistake by Sir Isaac [Newton] in calculating the orbit of the earth would not send it spinning round the sun with an increased velocity; his answer to the problem would simply be wrong; while if the judges, in investigating the reasons on which the Law should be based, come to a wrong result, and give forth a rule which is

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137. Remarks of Samuel Williston at Proceedings of the Bar of the City of Boston and the Supreme Judicial Court of the Commonwealth of Massachusetts, October 23, 1915, in ROLAND GRAY, JOHN CHIPMAN GRAY 116 (1917) [hereinafter Williston, Remarks]; see also Gray, Remoteness, supra note 130, at 406 (same analogy without implied reference to Langdell).

138. Jurisprudence Class Notes of Edmund Morley Parker 127 (1881-1882) (The Harvard Law School Library, Hollis # AJY9206/mss) [hereinafter Parker, Jurisprudence Notes]. This is the last entry in Parker's notes; it is highlighted with a drawing, in the margin, of a hand with index finger pointing at the sentence.

Parker, who later taught jurisprudence and constitutional law at some Boston area school, was the son of Joel Parker, Professor at Harvard Law School from 1848 to 1868. I thank Bruce Kimball for this information.

139. See supra text accompanying note 72 (quoting Holmes). Like late-nineteenth century theologians, Langdell tended to explore a transcendent subject through dogmatic disputation.


141. See supra text accompanying note 136 (quoting Gray); GRAY, NATURE (2d ed.), supra note 101, at 101, 225, 236 (differentiating between law and science and describing law as opinion). Or as Gray said in his letter to President Eliot: "Such a force will have such an effect whether the man who applies it thinks it will or not, that is, the opinions of practising [sic] chemists and engineers are not the object of study in a scientific school, but the facts of chemistry and science are what ought to be studied." See material cited supra note 136 (quoting Gray).

142. GRAY, NATURE (2d ed.), supra note 101, at 94. Gray continues: "It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is." Id.

143. Id. at 84.
discordant with the eternal verities, it is none the less Law.\textsuperscript{144}

In Gray's view, Langdell's cavalier treatment of the judges' actual reasoning was simply an unrealistic method of analyzing the meaning of cases and predicting their future application.\textsuperscript{145} To Gray, Langdell was "too concerned to draw distinctions and reconcile cases on grounds that existed only in his own mind."\textsuperscript{146} It is true that some of Gray's contemporaries viewed Gray as he viewed Langdell.\textsuperscript{147} When one of Gray's contemporaries, Jabez Fox, criticized Gray's transformation of perpetuities law for substituting "principles... [Gray] would be glad to see recognized... [for those]... which the courts have seen fit to adopt,"\textsuperscript{148} Gray's response was revealing. Gray responded that he "agree[d] with... [Fox's] condemnation of such a method,"\textsuperscript{149} that he similarly "condemn[ed]... the substitution of one's \textit{a priori} conceptions for the decisions of the courts,"\textsuperscript{150} and that "if I have sinned, I say Amen to my learned friend's anathema."\textsuperscript{151}

However, Gray argued in a general defense of his work that the law's progressive development placed legal commentators in a delicate position.\textsuperscript{152} "[T]he normal development of a doctrine," Gray explained, is that "it first emerges in the judicial consciousness in a vague and somewhat formless condition, and when it begins to take shape its limits are now too narrow and now too broad."\textsuperscript{153} Only "gradually" does a doctrine "acquire[] a defined outline."\textsuperscript{154} Gray advised that in studying a topic in the law which has passed through a history like this... [a

\textsuperscript{144} Id. at 101. Gray continues: "The planet can safely neglect Sir Isaac Newton, but the inhabitants thereof have got to obey the... rules which the courts are laying down, or they will be handed over to the sheriff."


\textsuperscript{146} LAPIANA, LOGIC, supra note 5, at 121 (speaking of Holmes's view of Langdell).

\textsuperscript{147} Intriguingly, Holmes was not immune from these charges either. See WILLISTON, REWARDS, supra note 137, at 116 (discussing Gray's treatment of some of Holmes's analyses of agency law); infra material cited note 148 (setting forth criticisms of Holmes).

\textsuperscript{148} Jabez Fox, The Criticism of Cases, 6 HARV. L. REV. 193, 200 (1892) (attacking Oliver Wendell Holmes in this regard also).

\textsuperscript{149} Gray, Remoteness, supra note 130, at 406

\textsuperscript{150} Id. at 408.

\textsuperscript{151} Id. at 406. As Gray added, "I sincerely approve of my learned friend Mr. Fox's general criticism; that I do not think his illustration a happy one, is perhaps natural enough. To applaud a sermon, but to believe that one's neighbors need it rather than one's self, is nothing new." Id. at 414; see also Letter from John Chipman Gray to Charles Eliot (Jan. 3, 1853), in President's Papers: Charles W. Eliot, Box 71, Folder 1883 (G-L) (Harvard University Archives) (admitting that "[i]t is the tendency of every professor of law to substitute his view of what the law ought to be for that which actually obtains. I have constantly to be on guard against it").

\textsuperscript{152} Gray also submitted a specific defense of his treatment of the particular doctrines for which Fox had criticized him. Gray, Remoteness, supra note 130, at 409-12.

\textsuperscript{153} Id. at 407.

\textsuperscript{154} Id.
legal scholar] should not form an a priori theory of how the law ought to have developed; but if he finds that the law has developed in a particular way, he should not be deterred from saying so because judges . . . have not been gifted with piercing prophetic vision, and have used expressions which cannot be made to square with the matured doctrine . . . .

Legal scholars, in Gray's view, had the difficult task of inferring from the historic record the "true doctrine" towards which the law was moving as "successive generations of lawyers and judges deal with it." To Gray, law was an evolving phenomena; it constantly, but slowly changed. Recognizing the law's mix of stability and instability, and that "it [was] neither possible nor desirable that the development should not go on in the future," Gray thought the doctrinal writer's task was "to take account of stock, to consider and analyze Law in the stage of development which it has reached."

In other words, for Gray, the analogy between natural and legal science had some bite. Both natural and legal scientists observe phenomena and induce their governing principles. However, because of the difference in the phenomena observed, natural scientists discover principles that have always existed whereas legal scholars discover principles that were emergent. In addition, natural phenomena necessarily had explanations and governing principles that were perfectly systematic. The explanations and governing principles of legal phenomena, however, were never perfectly systematic. The extent of law's "logical symmetry" varied from topic to topic. The doctrinal writer's obligation was to faithfully present the law as it was at any one moment in time, a presentation that permissibly anticipated what it was

155. Id. at 408.
156. Id. at 414.
159. Id. at 4; see also id. at 7 ("[T]he one certain prophecy that the legal writer can make is that the classification which approves itself to him at the beginning of the twentieth century will surely not be the one which will prevail at its end.") (emphasis removed).
160. Other differences were that the judges' opinions made law in a way that scientific opinion did not. See supra text accompanying note 144 (discussing Newton). Judges were also far more hesitant than scientists to admit that previous "experiments" were in error. Gray, Nature (2d ed.), supra note 101, at 273; infra text accompanying note 210 (stating that overruling precedent is "inexpedient").
162. For this and the remaining comments in this paragraph, see infra text accompanying notes 217, 290 (stating that not all areas of law are logically consistent). One way of capturing the difference between Langdell's and Gray's view of the law's logical symmetry is that for Langdell, the law's logical integrity was "the end of all his striving." One may be pardoned for thinking that he thought it existed in, and was required by, the nature of things. For Gray, the law's logical elaboration was instrumental; it increased the law's "value as a guide to conduct." Gray, Rule (2d ed.), supra note 4, at vii.
tending to become. Legal treatises should be systematic presentations of data that were not entirely, or at times even mildly, ordered systematically.

Professor LaPiana's summary of Holmes's attitude towards Langdell captures Gray's stance as well: Langdell "was working with the right sources; he knew how to do legal science, he simply did it badly." What the legal scholar required to make accurate inductions was a sensitive reading of the sources coupled with a firm grounding "in the reality of history, human nature, and ways of the world." The second fundamental disagreement Gray had with Langdell was in the role morals played in law and legal development. As previously mentioned, Langdell rather rigorously excluded moral and policy considerations from legal analysis. Morality bulked larger in John Chipman Gray's jurisprudence. The role of morality, which Gray said included considerations of public policy, followed from three fundamental tenets of his legal philosophy. The first two have already been mentioned: First, judges made rather than discovered law, and second, law consists solely of the rules which courts lay down for the determination of cases that come before them. As Gray summarized his position in *The Nature and Sources of Law*:

Thus far we have seen that the Law is made up of the rules for

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163. Lapiana, Logic, supra note 5, at 121 (speaking of Holmes's view of Langdell).

164. Id. (speaking of Holmes's view of himself). I believe Gray thought of himself this way, as he was a worldly, experienced practitioner as well as a scholar.

For Gray, inducing legal principles was not, as it had been for Bishop, simply a matter of connecting the dots according to some external truth (which humans would then recognize); it was a matter of connecting the dots as the humans who currently administered them did (or would recognize they did).

A consequence of Gray's different attitude was his belief, that perhaps Bishop and Langdell did not share, that not all areas of law were suitable for "classical" treatment. "In many legal discussions," Gray said, "there is, in the last resort, nothing to say but that one judge or writer thinks one way, and another writer or judge thinks another way. There is no exact standard to which appeal can be made." See Gray, Rule (2d ed.), supra note 4, at v. The doctrine of stare decisis was an example of a legal topic subject to only the most discretionary standards. See Gray, Nature (2d ed.), supra note 101, at 216-17 (discussing stare decisis). Also, constitutional law was more politics than law. See Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 Harv. L. Rev. 683 (1916) (relating that after a "brief trial" teaching constitutional law, Gray "gave it up in despair on the ground that constitutional law was not law at all, but politics").

165. See supra text accompanying notes 67-85 (discussing Langdell's view of morals and law).

166. See Gray, Nature (2d ed.), supra note 101, at 124, 303 (discussing the role of public policy and morality in jurisprudence); see also John Chipman Gray, *Definitions and Questions in Jurisprudence*, 6 Harv. L. Rev. 21, 30 (1892) [hereinafter Gray, Definitions] (discussing how a judge should decide a case).


decision which the courts lay down; that all such rules are Law; that rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity “The Law” apart from these rules; and that the judges are rather the creators than the discoverers of the Law.\textsuperscript{169}

Gray’s third tenet was that judges “seek the rules which they follow not in their own whims, but they derive them from sources often of the most general and permanent character to which they are directed, by the [State] \ldots to which they belong.”\textsuperscript{170} In the Western tradition, these sources are statutes, judicial precedents, the opinion of legal experts (such as treatise writers) and morality.\textsuperscript{171}

In Gray’s view then, statutes, judicial precedents, customs, expert opinion, and morals, which other jurists often spoke of as the law, were merely “sources of law.”\textsuperscript{172} Gray regarded the failure to distinguish between Law\textsuperscript{173} and “the sources of the Law”\textsuperscript{174} as “one of the main difficulties and causes of confusion in Jurisprudence.”\textsuperscript{175} Gray regarded distinguishing law from its sources to be his most important contribution to legal philosophy. It was a perspective that he discussed at length.\textsuperscript{176} Customs, for example, were

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\item \textsuperscript{169} GRAY, NATURE (2d ed.), supra note 101, at 121. Despite what has been written about classical jurists, Gray, at least, did not believe in a “heaven of jurisprudential concepts.” Law was entirely a matter of human convention. An intriguing example of Gray’s failure to appreciate law as a “brooding omnipresence” is that he was an early, and articulate, critic of Swift v. Tyson. See id. at 251-56, 259 n.2 (criticizing Swift).
\item \textsuperscript{170} GRAY, NATURE (2d ed.), supra note 101, at 84-85; see also id. at 290 (stating “the motive of a judge’s opinion may be almost anything,—a bribe, a woman’s blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence; but these are not sources which Jurisprudence can recognize as legitimate.”) Apparently, in Gray’s view, jurisprudence deals only with “legitimate motives, which are sources of law from which the society’s sovereign power has directed its judges to obtain Law.” Id. at 125. This view accounts for some of the lack of realism in Gray’s analysis, at least as compared to the realist movement that some jurists trace to him. See, e.g., DUXBURY, supra note 111, at 33, 55, 70, 77, 122-23.
\item \textsuperscript{171} GRAY, NATURE (2d ed.), supra note 101, at 123-24, 152-309 (discussing sources of law).
\item \textsuperscript{172} See, e.g., id. at 123-24, 152, 308 (discussing “sources of law” and their relation to judge-made “law”).
\item \textsuperscript{173} This was “the rules for decision that courts lay down.” Id. at 121.
\item \textsuperscript{174} Id. at 308.
\item \textsuperscript{175} GRAY, NATURE (2d ed.), supra note 101, at 308. In general, Gray “ma[d]e no claim to originality,” id. at viii, and he may well have derived even this aspect of his jurisprudence from Holmes, who discussed this issue in Book Notice, 6 AS. L. REV. 723, 724 (1872) [hereinafter Holmes, Book Notice (1872)] (reviewing The Law Magazine and Review), and quite possibly in his 1872 Harvard Law School lectures on jurisprudence. See HOWE, PROVING YEARS, supra note 145, at 71 (attributing this unsigned Book Notice to Holmes and speculating on its relation to his lectures). Gray first referred to statutes, precedents, customs, opinions, and morals as “sources of the law” in Gray, Definitions, supra note 166, at 30. See infra note 196 for another important contribution Holmes made to Gray’s legal thought.
\item \textsuperscript{176} See GRAY, NATURE (2d ed.), supra note 101, at 123-24, 152-309 (discussing and examining the sources of law and their roles in jurisprudence).
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an important factor judges frequently considered when fashioning rules for society. Yet as important as custom was as a source of law, most law could not have its basis in popular customs because most law, especially procedural law, is totally unknown by a nation's citizens and quite removed from their practices. Customs, Gray argued, become law through judicial adoption, and judges adopt customs "not simply because they [are] the customs of the community, but because they commend themselves to the judges' own sense of right or policy." In Gray's view, throughout history "rules laid down by judges have... generated custom, rather than custom generated the rules." The true relation between law and custom is generally just the opposite of the position taken by the proponents of the view that custom is law. At bottom, Gray simply could not accept the historical jurists' claim that custom is peculiarly central to law because custom is the best expression of the nation's "Volksgeist," or national spirit. The historical jurists' claim, Gray said,

rests on a fiction. There is no such thing in rerum natura as a Volksgeist having real consciousness and convictions. The fact is that certain individuals, exercising their separate wills, repeatedly do certain acts, and judges may consider with favor these modes of action and apply them as rules; but the matter is not made easier by saying that such repeated acts are the means of knowing the necessary convictions of a non-existent entity.

Gray was too much of a Realist to ground law in such a metaphysical belief.

Judicial precedent, too, was a potent source of judicial rules. Gray believed precedent was the most frequent source of law because of "the force of habit." "[T]he feeling that a rule is morally right, Gray wrote, "often aris[es] from the fact that it has long been followed as a rule." In addition, Gray observed that "[j]udges are everywhere largely influenced by what has been done by themselves or their predecessors." Nonetheless, precedents are not themselves the law. Precedents are not absolutely binding; they "have great weight but... not irresistible weight; decisions can, according to the theory of [the common] Law, be overruled or not followed." Moreover, the criteria for deciding whether or not to apply

177. Gray, Nature (2d ed.), supra note 101, at 291 (explaining all procedural law); id. at 294 (stating much substantive law and giving the Rule in Shelley's Case as an example).
178. Id. at 300.
179. Id. at 297.
180. Id. at 299-300.
182. Id. at 198.
183. Id.
184. Id. at 199.
185. Id. at 216. But see id. at 217 (glossing over the House of Lords doctrine that it would
stare decisis have never been reduced to rule; they are an amalgam of discretionary standards.\textsuperscript{186} To Gray,

\[\text{[t]he fact that precedents... are to be generally but not always followed, and that no rules have been, or apparently ever can be, laid down to determine the matter precisely, shows how largely the Law... is the creation of the judges, for they not only make precedents, but determine when the precedents shall be departed from.}\textsuperscript{187}

In other words, judges have power over precedent because stare decisis is a counsel of reason, not an unyielding command. Because the doctrine's application is a matter of weighing ambiguous factors and not applying a mechanical rule, judges, rather than precedent, determine current law.\textsuperscript{188}

Even statutes are no more than grist for the judicial mill. Statutes, Gray admitted, are enacted by legislatures as peremptory commands,\textsuperscript{189} judges who habitually and egregiously ignored relevant statutes would find themselves subject to sanction.\textsuperscript{190} Ultimately, judicial power over statutes was limited by the power of the "real rulers of the state."\textsuperscript{191} Nonetheless, Gray maintained "[t]rue though it be, that, of all the sources from which the courts draw the Law, statutes are the most stringent and precise, yet the power of the judges over the statutes is very great"\textsuperscript{192} because statutes require judicial interpretation and application.\textsuperscript{193} Addressing the view that statutes are more than sources of law because they bind the courts and are paramount to all other sources,\textsuperscript{194} Gray responded: if statutes interpreted not overrule its own decisions). In this passage, Gray is speaking of English law, but the observation is even truer with regard to American law where precedents are accorded even less weight. See id. at 242. Also, in this passage, Gray is discussing precedent in the same court or a coordinate court. Lower courts, he says, are bound by higher court precedent unless the higher court made an "obvious blunder." Id. at 217, 243.

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  \item \textsuperscript{186} See Gray, Nature (2d ed.), supra note 101, at 216 (referring to James Ram, The Science of Legal Judgment (U.S. ed. 1871) (Eng. ed. 1884), as "the best statement of the circumstances which add to or diminish the weight of precedents"). Ram seems to favor adherence to a "fixed line of authority" or "settled law" rather than a single case, but his analysis turns on a great variety of factors. I think Gray's awareness of the inherent ambiguity of the binding quality of precedent is a major departure from, or impediment to, legal science as conceived by Langdell. See Grey, Orthodoxy, supra note 3, at 24-28 (discussing stare decisis as the bedrock of Langdell's system).
  \item \textsuperscript{187} Id. at 217, 243.
  \item \textsuperscript{188} See id. at 124 (acknowledging the ambiguous limits on judicial power over precedent).
  \item \textsuperscript{189} See id. (discussing statutes as sources of law).
  \item \textsuperscript{190} See id. at 121-25 (stating the "real rulers" of the state would ignore their decisions).
  \item \textsuperscript{191} Id. at 121, 124-25; see also Neil MacCormick, A Political Frontier of Jurisprudence: John Chipom Gray on the State, 66 CORNELL L. REV. 973, 977-80 (1981) (discussing Gray's theory of the state).
  \item \textsuperscript{192} See id. at 170.
  \item \textsuperscript{193} See id. at 125 (discussing the interpretive role of courts).
  \item \textsuperscript{194} See id. at 124, 170 (describing the interpretive role of courts).
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themselves, this would be true; but "statutes do not interpret themselves;
their meaning is declared by the courts, and it is with the meaning declared by
the courts, and with no other meaning, that they are imposed upon the community as
Law." No wonder he was fond of quoting Bishop Hoadly's dictum that
"[w]hoever hath an absolute authority to interpret any written or spoken
laws, it is he who is truly the Law-giver to all intents and purposes, and not
the person who first wrote or spoke them."195

Of course, common-law judges' power over statutes was not absolute.
"[U]ndoubtedly there are limits upon their power to interpret legislative
acts," Gray observed, "but these limits are almost as undefined as those
which govern them in their dealing with the other sources [of law]."197 Thus,
although

the command that legislative acts must be followed by the courts is
precise and peremptory, the fact is that this . . . rule, in its working,
is almost as indefinite as those which are imposed on the courts
with reference to the other sources; for after all, it is only words
that the legislature utters; it is for the courts to say what those
words mean.198

In effect, Gray concludes, "[a]s between the legislative and judicial
organs of a society, it is the judicial which has the last say as to what is and
what is not Law in a community."199 In sum, Gray's view was that "the Law is
made up of the rules for decision which the courts lay down; . . . that there is
no mysterious entity 'The Law' apart from these rules; . . . that the judges are
rather the creators than the discoverers of the Law,"200 and that judges
fashion the law by considering "sources" such as statute, precedent, custom,
expert opinion, and morality. I have dwelt on these tenets not because Gray
took great pride, and spent great time and care, in elaborating this
argument, but because it is necessary to understand the role of morality in
Gray's system.

195. Id. at 170.
196. Id. at 172 (noting this was the "third time" he was quoting Hoadley's remarks); see also
id. at 102, 125 (other examples). Gray also uses this quotation and thanks Holmes for bringing
it to his (Gray's) attention in Gray, Definitions, supra note 166, at 33 n.1.

Hoadley's remarks are from his SERMON PREACHED BEFORE KING GEORGE I, at 12
(1717). They expressed the basis of his latitudinarian views in opposition to the High Church
faction of the Anglican communion. See GORDON RUPP, RELIGION IN ENGLAND: 1688-1791, at 88-
197. GRAY, NATURE (2d ed.), supra note 101, at 125.
198. Id.
199. Id. at 171-72.
200. Id. at 121. As this remark indicates, despite what has been written about classical
jurists, Gray, at least, did not believe in a "heaven of jurisprudential concepts." Law was entirely
a matter of human convention. An intriguing example of Gray's failure to appreciate law as a
"brooding omnipresence" was his early and articulate criticism of Swift v. Tyson. See id. at 231-36,
259 n.2 (criticizing Swift).
From a formal perspective, morality played a marginal role in law. According to Gray, the multifarious sources of law were related in a hierarchical fashion. In deciding a case, Gray described the conscientious judge as first consulting statutes, and only if he could not fashion an answer from that source should he consider precedent, learned opinion, custom, and morality in that order. Formally then, morality is the source of last resort; judges should turn to it only when all other sources fail to provide an answer. For Gray, however, the formal system inaccurately captures the important role that morality actually plays in the legal system. In form, morality was the judges' source of last resort. In fact, morality was the "source" from which

a great amount of our Law is drawn. In fact it is the way in which most new Law is now brought in . . . and it should be observed that this source not only works alone when the others fail, but that when the others are in operation, this mingles with them and largely influences their direction and effect. Whether a statute shall be interpreted one way or another is often determined by the moral character which the one or the other interpretation will give to it; and there are few judicial precedents or professional opinions or customs whose position as sources of Law is not strengthened or weakened by the fact of their agreeing or disagreeing with sound ethical principles.

"Legal and moral duty may not be the same," Gray told his students. Nevertheless, "[l]aw is founded on morality," and the "growth and change of the law . . . [are largely due to] principles of ethics."

It is important not to allow this sketch of Gray's jurisprudence to

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202. Id. at 303. In Gray's view, the role of morality is a consequence of the recognition that law is not the elaboration of immutable principles. See id. at 141.
203. Parker, Jurisprudence Notes, supra note 138, at 109 (stating also "[f]or a judge Law is superior to Morality").
204. Id. at 107 (“Positive Morality is a source of law in that it is taken up in the opinions of the judges through their sense of Positive Morality which is generally that of the community.”).
205. Gray, Nature (2d ed.), supra note 101, at 309. With this observation, Gray concludes his book on jurisprudence. See id. at 143-44 (“[S]ince the doctrines of morality are largely . . . a most important source from which the judges draw and ought to draw the rules which make the Law, the true theory of morals comes properly within the purview of Jurisprudence.”); Gray, Definitions, supra note 166, at 33 (“The formative elements, then, of the law are mainly legislation and the opinion of judges on matters of ethics and public policy . . . but, to say nothing of former times, a great part of the law of this century is due to the opinions of individual judges on ethical questions.”).

Consider also that Gray opens the first edition of Nature and Sources of the Law with a discussion of the propriety, importance, benefits, and dangers of judges “approach[ing] the Law from the side of the public welfare and seek[ing] to adapt it to the promotion of the common good.” Gray, Nature (1st ed.), supra note 101 at 1, 3-4.
overstate Gray's modernity and the extent to which he thought moral considerations properly influenced judicial decision-making. The role of ethics in Gray's legal thought was cabined by a variety of staple nineteenth-century presuppositions, chief among which was a particular distinction between jurisprudence and legislation. Gray, legislation was the science of what the law of a community ought to be; jurisprudence was the science of what the law was. Gray adopted an advanced position on the scope of jurisprudence in that he included within jurisprudence more than a catalogue of those rules courts already had adopted. He included within jurisprudence a discussion of "what rules ought to be adopted in those cases which do not come within the established rules." Jurisprudence was constrained lawmaking, lawmaking constrained by previous precedent and settled rules.

Gray certainly acknowledged the power of courts of last resort to overrule their prior decisions, but he described the power's exercise as "inexpedient." Though he never says so, perhaps Gray considered judicial overruling, other than in cases of clear mistake, as legislation rather than jurisprudence. If so, jurisprudence is not the science of what courts do, it is the science of what courts do most of the time. In any event, there is in Gray's jurisprudential writing a tension between a positivist description of what courts do and an exemplary description of what the conscientious judge does. Gray, in an unmodern stance, continually conflates the two in his description of judicial decision-making. When it comes to judicial decision-making, Gray assumes little divergence between the ideal and the actual.

206. The role of ethics in Gray's jurisprudence was also cabined by his personal conservatism (i.e., he tended to agree with the basic principles of the late-nineteenth century common law so he was generally content to elaborate settled law), and his skepticism (i.e., his belief that judges did not particularly know what was best for society). For his blend of conservatism and skepticism, see Gray, Nature (1st ed.), supra note 101, at 9-5.

207. Gray, Nature (2d ed.), supra note 101, at 139-44, 304-05. Or, as was frequently said, jurisprudence was a positive science, legislation a deontological science.

208. See id. at 140. See generally id. at 139-43 (describing the limits of jurisprudence).

209. See id. at 273 (stating that the common law would be entirely scientific "were it not that it gives an artificial weight to prior decisions by assuming them to be correct" and comparing a judge to a chemistry experimenter "who is not ready enough to admit that the record of former experiments may be wrong"); see also id. at 200 (presenting an example of precedent too strong for judges to change); Gray, Restraints (2d ed.), supra note 103, at 90 (suggesting that a legal doctrine resulting in undesirable consequences should be changed by legislation and not illogical legal explication).


211. Clear mistake might even authorize a lower court to disregard the decision of a higher court. Id. at 217-18.

212. See, e.g., id. at 290 (refusing to consider "blandishments" and other passing influences on a judge); id. at 288-90 (describing the decision-making process of a conscientious judge and conflating "how a judge's mind works, and ought to work"); Gray, Definitions, supra note 166, at 30 (conflating how a judge "should" and "does" decide a case).
In addition, Gray's jurisprudence has an antique cast due to his being attentive only to those sources of law which have "the most general and permanent character." Gray recognizes that "the motive of a judge's opinion may be almost anything,—a bribe, a woman's blandishments, the desire to favor the administration or his political party, or to gain popular favor or influence." But he never analyzed cases as turning on such motives, saying simply that "these are not sources which Jurisprudence can recognize as legitimate."

In other words, Gray took legal doctrine less seriously than Langdell, but more seriously than twentieth-century legal realists. On the one hand, unlike Langdell, Gray did not believe legal doctrine always determined legal disputes; he disparaged the judiciary's "habit... of speaking as if their sole function was to construct syllogisms." Although Gray believed that "the determination [of the rules that courts follow] will be found in the consideration of the Sources to which the judges look," he also believed that "sometimes this consideration will result in a demonstration, sometimes it will give you nothing at all, generally something between the two." On those frequent occasions when precedent, principle and doctrine left "room for [a] difference of opinion, it becomes plain how much of the law is due to the notions of morality and policy held by particular courts."

On the other hand, unlike the realists, Gray believed that doctrine did (and should) frequently determine disputes and constrain judicial decision-making. His view that judges' moral views influenced decisions did not lead him to the view that case exegesis and doctrinal formulation were a sham undertaking that masked the "real" bases of decisions made on psychological, political, or even more tawdry grounds. Precedent, principle, and legal doctrine had real, but not exclusive or totally determinative bite. Judges certainly were men of their time; their understanding and development of precedent was "swayed" by contemporary beliefs. But Gray

213. GRAY, NATURE (2d ed.), supra note 101, at 84-85.
214. Id. at 290.
215. Id. It would have been plausible for Gray to dismiss these "motives" as "sources of law" for the same reason that Holmes did: "singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered." Holmes, Book Notice (1872), supra note 175, at 724. Thus, it is significant that Gray, well aware of Holmes's argument, used a normative argument phrased in "legitimacy." I think, it exemplifies Gray's antique blend of description and prescription.
216. GRAY, Definitions, supra note 166, at 33.
217. Letter from John Chipman Gray to Justice Oliver Wendell Holmes (n.d.), microformed on The Oliver Wendell Holmes, Jr. Papers, Reel 24 (Univ. Publications of Am. Microfilm). From circumstantial evidence, I date this letter in 1914. See also GRAY, RULE (2d ed.), supra note 4, at ix (noting that not all areas of law are as "mathematical" as perpetuities law).
218. GRAY, Definitions, supra note 166, at 33 (setting forth issues in constitutional law, torts, and spendthrift trusts).
219. GRAY, NATURE (1st ed.), supra note 101, at 4. Frequently, the beliefs were shared by the community in which they lived. Id; see also GRAY, NATURE (2d ed.), supra note 101, at 287 (saying
believed judges were cautious and circumspect in doing this. Legal change generally was unconscious and glacially paced, most frequently the result of incremental differences in applying law to facts.\footnote{223} As we will see when we review Gray's doctrinal writing, respect for precedent and settled law was not to be gainsaid.\footnote{221} Gray believed that words had meaning,\footnote{222} cases had holdings, there was "settled law," and jurisprudence involved "the consideration of Law as it ought to be" only "within . . . limits."\footnote{223}

Perhaps Ezra Thayer, in an article praised by Gray for its discussion of "[t]he processes of inferential and analogical reasoning by which the courts evolve new principles from old cases,"\footnote{224} captured an essential aspect of Gray's view when he wrote:

The characteristic method of the common law is . . . to work along from case to case, dealing with each one as it arises, and disclaiming any intention of framing a general rule. . . . By the slow course of decision just so much law is developed as society requires, and no more; and later generations are left free to fill the gaps in accordance with their own notions, as little hampered as may be by those of an earlier age. In the process of reconciling and adjusting the authorities, and extracting from them the principle for which they stand, there is a constant tendency to mould it into a form which corresponds with the later conceptions of justice and expediency, and which, though consistent with the actual result of the earlier cases, may be quite foreign to the ideas of those who decided them. The growth of the law, as it is sometimes said, is rational rather than logical.\footnote{225}

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\item judges share the values of their community; Parker, Jurisprudence Notes, \textit{supra} note 138, at 107 (same).
\item \textit{Gray, Nature} (1st ed.), \textit{supra} note 101, at 5. I draw some of this observation from Ezra Thayer's article, cited \textit{infra} note 223, which Gray praises for its discussion of "[t]he processes of inferential and analogical reasoning by which the courts evolve new principles from old cases." Gray, \textit{Definitions}, \textit{supra} note 166, at 29.
\item \textit{See infra} text accompanying notes 320, 369-73 (discussing and illustrating Gray's respect for precedent).
\item For examples of Gray's sensitivity to word meaning, outside the legal context, see Letter from John Chipman Gray to Charles Eliot (Feb. 21, 1908), \textit{in} President's Papers: Charles W. Eliot, Box 215 (1903-1909) (Harvard University Archives) (discussing correct usage of the word "Associates"); Letter from John Chipman Gray to Jerome Green (Nov. 16, 1906), \textit{in} President's Papers: Charles W. Eliot, Box 215 (1903-1909) (Harvard University Archives) (discussing correct usage of the word "program"); Letter from John Chipman Gray to Robert Grant (June 9, 1900) (Houghton Library, Harvard University, bMS Am. 1115 (317)) (discussing correct usage of the word "chapel" when "applied to an independent building"). All letters are on file with the author.
\item \textit{Gray, Nature} (2d ed.), \textit{supra} note 101, at 143.
\item \textit{Gray, Definitions}, \textit{supra} note 166, at 29.
\item Ezra Thayer, \textit{Judicial Legislation}, 5 \textit{Harv. L. Rev.} 172, 190 n.3 (1892); \textit{see also} id. at 199-201 (providing rationale for "judicial legislation"). I provide evidence that Gray subscribed to
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Whether or not Thayer's essay captures something of Gray's understanding of the tension between the common law's respect for precedent, settled law, and flexible development in tune with society's changing needs, the fact is that even with Gray's respect for precedent properly highlighted, his classicism still is fundamentally responsive to contemporary moral considerations.

At bottom, Gray thought of law as evolutionary, "as a living thing, with a continuous history, sloughing off the old, taking on the new." This growth and development, he said, "is not a mere weaving of spider webs out of the bowels of the present rules of Law." Rather, law and legal development pervasively, though not solely, reflect "the opinions of the judges on questions of morality." Judges may be bound by "settled law," but it was "necessary to consider the beneficial or injurious character of an established doctrine of Law, in order to determine whether [settled law] should be extended." To Gray, the "welfare of the persons subject to a system of law" was more important than "the logical coherency of the system itself." For "a Common Law lawyer," Gray said, "the end of the Law is to work out the happiness of the community, and not to establish a system however elegant and logical."
D. GRAY’S ORTHODOXY AS ILLUSTRATED IN HIS DOCTRINAL WRITING AND TEACHING

That Gray thought law was embedded in social mores and morals may seem a surprising position to attribute to the author of Restraints on Alienation and The Rule Against Perpetuities. Gray’s treatises were the very first magisterial treatises to be published during Langdell’s reign. They have long been understood to be among the purest expressions of classical legal science conceived as the systematic elaboration of arcane legal conceptions.

The disparity between Gray’s doctrinal treatises, first published in 1883 and 1886, and his jurisprudence book, first published in 1909, raises the possibility that over time Gray changed his views. There is, however, much persuasive evidence against a “Gray changed his views” thesis. On the one hand, Gray developed the corpus of ideas elaborated in The Nature and Sources of the Law well before that book’s publication. In Nature and Sources, Gray says he had been reflecting on the subject for “fifty years” and had “put my ideas into substantially their present shape a dozen years ago.” That would be 1895, just before he began offering a course of lectures on Comparative Jurisprudence at Harvard. In addition, we can see the core ideas discussed in Nature and Sources, chiefly the role of judges in making law and the influence of moral considerations on them, fully stated in a law journal article he published in 1892. His letter criticizing Langdell’s practice of classical legal science was written in 1883.

Edmund Parker's
notes for Gray's Jurisprudence course records Gray telling the class during the 1881 academic year that judicial views of morality are among the important sources of law. 240

On the other hand, Gray not only published Restraints on Alienation in 1883 and The Rule Against Perpetuities in 1886, but published a second edition of Restraints in 1895, and second and third editions of The Rule in 1906 and 1915, without any hint of distancing himself from their implicit approach to law. 241 I think it a safe conclusion that probably by the mid-1880s, and certainly by the early 1890s, Gray subscribed to the views expressed in Nature and Sources and thought them entirely consistent with the jurisprudence exemplified by his doctrinal treatises.

To explain this disparity, I suggest that neither of Gray's doctrinal treatises are as Langdellian as we have assumed. In both treatises, Gray not only connects the law to public policy but also grants public policy a prominent, even driving, role in the analysis of open issues.

1. Gray's Restraints on Alienation

In the opening pages of Restraints on Alienation, Gray establishes that in the Anglo-American tradition, restraints on the free alienation of property have, with rare exception, been imposed by private persons rather than by "public policy." 242 Consequently, Gray declares: "[i]t is the purpose of this essay to consider how far such restraints can be lawfully imposed; in other words, with what limitations, if any, does the law say, 'It is against public policy to allow restraints to be put upon transfers which public policy does not forbid.'" 243 In the remainder of his essay, Gray repeatedly offers arguments that expressly rely on the policy basis of the restraint doctrine. To Gray, the esoteric notions and distinctions that comprise the restraint doctrine were the expression and effectuation of public policy, not autonomous, arbitrary legal abstractions.

Gray's reliance on restraint law's policy rationale throughout his treatise may be illustrated by reviewing his analysis of five salient restraint law issues. This review shows that, at times:

(1) Gray preferred policy arguments, rather than historical or conceptual arguments, to explain facets of restraint law:

In discussing why restraint doctrine inflexibly prohibits unqualified forfeiture restraints on fee simple estates, for example, Gray mentions that the "reason sometimes given for this . . . is that the statute of Quia Emptores,

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240. Parker, Jurisprudence Notes, supra note 138, at 107; see also id. at 127 (stating, in embryonic form, Gray's "sources of law" approach to law).
241. See GRAY, JOHN CHIPMAN GRAY, supra note 105, at 141 (providing a bibliography of John Chipman Gray's works).
243. Id.
by putting an end to sub-infeudation, did away with reversionary interests after a fee simple.” Yet Gray criticizes this technical reason and concludes “[i]n truth, the rule seems not to allow nor call for any reason except public policy.”

(2) Gray preferred to confront conceptual arguments he disagreed with not with other conceptual arguments, but with policy concerns:

An 1882 Virginia case, decided too late for inclusion in the first edition of Restraints, upheld an unqualified restraint on a fee simple estate on the grounds that the restraint was a conditional limitation rather than a condition. In discussing the case in his second edition, Gray denigrated the court’s reliance on the esoteric difference between the two types of defeasing conditions, saying “in a question depending upon public policy, the technical form of putting an end to a fee simple upon alienation must be immaterial.” In Gray’s view, then, abstract, arcane legal distinctions did not trump the systematic application of public policy.

(3) Gray disparaged conceptual arguments to such an extent that his analysis had a distinctly modern cast:

In Gray’s analysis, nineteenth-century American courts had recently created a rule voiding “a gift over on the failure of a devise to dispose of land either in his lifetime or on his death.” Although by the time Gray wrote Restraints most American courts adhered to this rule, it was opposed by long-standing English precedent. Gray also opposed the new American rule, but not on the grounds of legal principle or stare decisis. Rather, Gray’s argument was that courts should not “invent a new rule, not called for by any considerations of public policy, for the purpose of thwarting the intentions of the parties.” In Gray’s view “[t]he process of civilization
consists in the courts endeavoring more and more to carry out the intentions of the parties or restraining them only by rules which have their reason for existence in considerations of public policy." Furthermore, the rule voiding gifts for failure to alienate them during one's lifetime or at death had no policy basis. As Gray said:

A. gives a piece of land to B. and his heirs, and says, "You may do with this just as you please, in life or by will, but it you do not part with it, and do not devise it, it shall go to C." This gift to C. is bad. Why? What are the reasons given? They are, First, that the gift over is repugnant; Second, that the passage of a fee simple on death of the tenant intestate to the heirs is a necessary incident of the estate; Third, that an executory devise contingent upon a circumstance which it is in the power of the first taker to prevent happening is void. The first is the reason originally given; the second is the reason given by Fry, J., in Shaw v. Ford; the third is Chancellor Kent's. But these are only words. They merely mean that the courts have set up a certain rule, and that the proposed provision is inconsistent with it; but why that rule should be set up, what interests are forwarded by it, how it helps the well-being, moral or material, of the community, the courts never show, and, to do them justice, never attempt to show. In the hundreds of pages in the reports on this subject, there is no suggestion that this rule tends to promote any good object.  

Gray's analysis here sounds like a 1930s antiformalist, realist critique; yet he wrote it in 1883.

(4) Gray used policy arguments to resolve issues when precedent and legal principle failed to provide closure:

Gray's review of restraints on fee estates that were "qualified as to sacred character. The process of civilization consists in the courts endeavoring more and more to carry out the intentions of the parties or restraining them only by rules which have their reason for existence in considerations of public policy. There are some old rules whose vitality has proved too strong to be dealt with by the courts and which have to await the hand of the Legislature,—such, for instance, as the Rule in Shelley's Case; but for the courts to invent a new rule, not called for by any considerations of public policy, for the purpose of thwarting the intentions of parties, is unusual at the present time; but such a case we have here.

Id.  

252. GRAY, RESTRAINTS (2d ed.), supra note 103, at 66. Gray acknowledged that certain old, established rules, like the Rule in Shelley's Case, "whose vitality has proved too strong to be dealt with by the courts," might have to await corrective legislation. Id.; see also id. at 90 (discussing technique of giving long-term leases to circumvent certain common law rules.) But in this case, the rule was new, and the issue was whether it should have been established in the first place.

253. Id. at 66-67.
persons" concluded that precedent suggested two different rules limiting such restraints. One rule was that "a condition is good if it allows . . . alienation to all the world with the exception of selected individuals or classes; but is bad if it allows of alienation only to selected individuals or classes." The other rule was that a condition limiting alienation to qualified persons was "bad only when all alienation is substantially restricted." Neither of these rules had the weight of precedent on its side, nor was there any principle of restraint law that helped courts choose between them. Consequently, Gray suggested a preference for the first rule because, as the "stricter rule," it would more completely control the "evil" that flows from fetters on alienability.

(5) Gray suggested legislative intervention in areas where logical application of restraint law's concepts resulted in outcomes that were undesirable on policy grounds:

Under precedent going back to Henry VI, forfeiture restraints on leasehold estates were valid. Because the reversion after a leasehold is a vested interest, leasehold forfeiture conditions did not violate the Rule Against Perpetuities. The interaction between restraint and perpetuities law meant that anyone wishing to restrain the alienation of property beyond generally permissible time limits merely had to convert their titles to long-term leases. Feeling that this was undesirable, Gray said this was "an eminently fit case for the intervention of legislation," and instanced an

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254. Restraints "qualified as to persons" are restraints that allow (or disallow) alienation only to certain individuals or a small class of individuals.


256. *Id.* at 31; *see also id.* at 30.

257. *See id.* at 30 (stating "[t]he authorities, it will be seen, are in hopeless conflict").

258. In other words, Gray did not see restraint law as "complete," that is, as having a "uniquely correct solution . . . for every case that can arise under it." *Gray, Orthodoxy, supra* note 3, at 7; *see also supra* text accompanying note 48. As a consequence, despite Gray's suggestion as to the proper, policy-based resolution, *see infra* text accompanying note 259, he summarized this facet of restraint law with an element of ambiguity that is not characteristic of classical orthodoxy. *See Gray, Restraints* (2d ed.), *supra* note 103, at 278 (explaining "how far" a restraint may be qualified as to persons "is doubtful").

For another example of a part of restraint law which had no uniquely correct answer, *see id.* at 85-89, 279 (discussing settling property on oneself subject to restraints on voluntary alienation). For an issue without closure in perpetuities law, *see infra* text accompanying note 360 (discussing the interface between spendthrift trusts and perpetuities law).

259. *Gray, Restraints* (2d ed.), *supra* note 103, at 32.

260. *Id.* at 30.

261. *See id.* at 30, 32 (emphasizing the greater importance of the strict rule in American law where conditions, i.e., rights of entry, are not subject to the Rule Against Perpetuities); *infra* text accompanying notes 367-72 (discussing the Rule Against Perpetuities and rights of entry).

For another example of Gray's use of policy to resolve an issue left open by legal principle and precedent, *see Gray, Restraints* (2d ed.), *supra* note 103, at 85-89 (discussing self-imposed restraints).
Alabama statute limiting leasehold estates to twenty years.  

Most telling, however, is the degree to which Gray drew from policy throughout his discussion of the treatise’s “most important” issue: the American courts’ recent trend upholding spendthrift trusts. Spendthrift trusts are estate planning devices designed to keep improvident heirs from dissipating family wealth. Spendthrift trusts allow trust beneficiaries to enjoy income from trust property while prohibiting creditors from levying against trust corpus for payment of the beneficiaries’ debts. When spendthrift trusts first appeared in the early-nineteenth century they were immediately voided by English and American courts as impermissible restraints on alienation. Toward the end of the century, however, American courts began to validate these devices, arguing that spendthrift trusts countenanced no fraud upon the unpaid creditors.

Gray’s entire treatise was an extended and impassioned essay against the judicial trend validating spendthrift trusts. In his Preface and throughout the text, he railed against the recent case law as an unwarranted departure from traditional, and still sound, public policy. In one typical comment, he argued that defrauding creditors was not the only basis for restraint doctrine. “The true ground,” Gray wrote is that... it is against public policy that a man should have an estate to live on, but not an estate to pay his debts with, ... and should have the benefits of wealth without the responsibilities. The common law has recognized certain classes of persons who may be kept in pupilage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves,—that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly.

In another discussion he argued against the view that there is “something American” about spendthrift trusts. “Unless the payments of debts be considered un-American,” Gray said, it is hard to see the Americanism of spendthrift trusts. That...

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262. GRAY, RESTRAINTS (2d ed.), supra note 103, at 90. The permissible perpetuities period is a life in being plus twenty-one years. See infra text accompanying note 364 (discussing the perpetuities period).
263. GRAY, RESTRAINTS (2d ed.), supra note 103, at xi.
265. GRAY, RESTRAINTS (2d ed.), supra note 103, at 141-52.
266. See id. at iii-xiv, 241-42, 248 (discussing court decisions in Massachusetts and Pennsylvania).
267. See id. at xiii (describing judicial acceptance of spendthrift trusts as a “surprise”).
268. Id. at 242-43 (internal quotation marks removed).
men not paying their debts should live in luxury on inherited
wealth, are doctrines as undemocratic as can well be conceived.
They are suited to the times in which... the law was administered
in the interest of rich and powerful families. The general
introduction of spendthrift trusts would be to form a privileged
class, who could indulge in every speculation, could practise every
fraud, and yet, provided they kept on the safe side of the criminal
law, could roll in wealth. They would be an aristocracy, though
certainly the most contemptible aristocracy with which a country
was ever cursed.269

At bottom, in Gray's view, the common law's opposition to spendthrift
trusts "is wholesome doctrine, fit to produce a manly race, based on sound
morality and wise philosophy."270 The new trend, Gray says, draws from a
"different view[] of morality and policy," a view Gray traces to America's
increasing tolerance of "paternalism."271

In other words, Gray's analysis of spendthrift trusts in Restraints on
Alienation is fundamentally and thoroughly grounded in discussions of both
case law and public policy. Common-law principle is important; it sets the
baseline favoring Gray's position, putting the burden of persuasion on the
judges arguing for the validity of spendthrift trusts. The weight of common-
law precedent allows Gray to conclude his argument with classic
understatement: "the ethics and policy [favoring spendthrift trusts] are not
so clearly preferable as to require a departure from that
authority."272 We
should not be misled by Gray's studied understatement. In Gray's view,
divergent notions of public policy created the controversy over spendthrift
trusts, and he understands that ultimately, the dominant view of public

269. Id. at 246-47; see also id. at vi

One of the worst results of spendthrift trusts... is the encouragement it gives to a
plutocracy, and to the accumulation of a great fortune in a single hand, through
the power it affords to rich men to assure the undisturbed possession of wealth to
their children, however weak or wicked they may be.

270. Gray, Restraints (2d ed.), supra note 103, at 243; see also id. at v ("I still believe, as I
said in the first edition, that the old doctrine was a wholesome one, fit to produce a manly race,
based on sound morality and wise philosophy; and that the new doctrine is contrary thereto.").

271. Id. at 248 (discussing the two views).

272. Id. at ix

If we are all to be cared for and have our wants supplied, without regard to our
mental and moral failings, in the socialistic Utopia, there is little reason why in the
mean time, while waiting for that day, a father should not do for his son what the
State is then to do for us all.

Id.; see also id. at iii (discussing other reasons such as America's historic "shortcomings in... matter[s] of commercial honesty").

273. Id. at 249.
policy will settle the matter.\textsuperscript{274} Gray's position on the issue is supported, but not dictated, by common-law precedent.\textsuperscript{275} It flows from his abiding agreement with the "system of . . . morals" which underlies the common law, a "system in which there [is] no place for privileges,—privileges for rank, or wealth, or moral weakness."\textsuperscript{276}

Gray knows, however, that his position, and the common law that instantiates it, are neither eternal nor transcendent. Social mores change, and not necessarily for the best.\textsuperscript{277} "Spendthrift trusts," he wearily concludes, have no place in the system of the Common Law. But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic.\textsuperscript{278}

In sum, Gray's treatment of spendthrift trusts in \textit{Restraints} perfectly reflects the jurisprudence he elaborates in \textit{Nature and Sources of Law}. In Gray's view, spendthrift trusts are a recent device attempting to accomplish something "against . . . which the law has contended for centuries."\textsuperscript{279} While common law principle and multifarious analogies condemn them, direct precedent does not.\textsuperscript{280} Whether common law principle should be extended to prohibit spendthrift trusts ultimately turns on the judges' view of morality. The legal system's consistency is a value, but it is not one upon which Gray places much reliance in \textit{Restraints}. As Gray knows, what harmonizes with a system changes as the system evolves. Morals, not logical elaboration of precedent, are the motor force of legal development.

\begin{footnotes}
\footnotetext{274}{See id. at x (stating that a resolution to the judicial debate over spendthrift trusts be resolved by legislatures).}
\footnotetext{275}{Because the exact question had arisen only recently, there was no direct precedent in most jurisdictions, only common principle and analogy. See Gray, \textit{Restraints} (2d ed.), supra note 103, at 141-45, 169 (discussing a few English cases and court decisions on restraints in the United States). In 1883, when Gray's first edition was published, there were decisions on point in England and eleven states. Only two states had upheld spendthrift trusts. In 1895, when the second edition was published, sixteen states had decisions on point, and half had upheld them. \textit{Id.} at 169-70.}
\footnotetext{276}{\textit{Id.} at viii. It was a system in which "[e]very one was free to make such agreements as he thought fit... no one could oblige any man to make any agreement... but if a man made an agreement, the whole force of the State was brought to bear to compel its performance." \textit{Id.} Accordingly, "If there is one sentiment... which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one's promises and paying one's debts." \textit{Id.} at iii.}
\footnotetext{277}{See id. at ix-x (stating that "things are changed... judges who have aided in the introduction of spendthrift trusts have been secret socialists").}
\footnotetext{278}{\textit{Id.} at x.}
\footnotetext{279}{\textit{Id.} at 140.}
\footnotetext{280}{See supra text accompanying note 275 (discussing Gray's view of the current law).}
\end{footnotes}
2. Gray's The Rule Against Perpetuities

Gray's second treatise, the more famous and successful281 The Rule Against Perpetuities,282 also exudes a concern for, and grounding in, public policy, though less obviously so. Two related reasons account for this. First, in Gray's view, perpetuities law addresses a different and less crucial policy concern than the law of restraints on alienation. Deviations from the Rule's wise counsel are less troubling, calling forth less impassioned challenges.283 Second, no current dispute in perpetuities law approached the importance of the controversy over spendthrift trusts in restraint law, a controversy centered on preserving society's moral fiber. The comparison between the two treatises, therefore, reflects the fact that, for Gray, writing The Rule was a less emotionally charged endeavor than writing Restraints.284 Gray's treatise on perpetuities law models his approach to legal scholarship in an area without a controversy as searing as the spendthrift trust problem of restraint law.285 With this in mind, it is fair to say that Gray's magisterial and paradigmatically classical masterwork, The Rule Against Perpetuities, fully conforms to the jurisprudence set forth in The Nature and Sources of Law.

In The Rule Against Perpetuities, Gray presents modern perpetuities law as a judicial construct designed and elaborated according to the judges' conception of good public policy. The treatise also perfectly illustrates Gray's classical conception of jurisprudence as constrained lawmaking that is respectful of precedent yet attuned to the judges' current moral views. Gray's perpetuities treatise is justly famous for presenting modern perpetuities law as the remorselessly logical application of a single rule largely drawn from legal history, legal conceptions, and legal precedent. Gray states in his Preface, "In no part of the law is the reasoning so mathematical in its character; none has so small a human element."286 But in Gray's view, there is nothing transcendent about this. "[T]he Rule against Perpetuities," Grays says, "is a doctrine of purely judicial origin."287 The Rule Against Perpetuities has a "true theory" only "so far as any artificial rule can

281. It is successful in the sense that courts generally adopted the law set forth in the perpetuities treatise, see Siegel, Legal Formalism, supra note 110, at 440, 454-55, while refusing to follow his argument in Restraints, see GRAY, RESTRAINTS (2d ed.), supra note 103, at 249 n.1. Also consider that Gray published more editions of The Rule in his lifetime and it was posthumously updated by his son in 1942. See GRAY, RULE (4th ed.), supra note 4. On the success of Gray's perpetuities treatise, see Siegel, Legal Formalism, supra note 110, at 439-40.
282. GRAY, RULE (2d ed.), supra note 4.
283. See infra text accompanying notes 299-305 (discussing the Rule's policy).
284. See GRAY, RESTRAINTS (2d ed.), supra note 103, at iv ("I have written other things, for one motive or another, but this essay wrote itself. While I was musing, the fire burned. Vc mihi si non evangelisiavero.").
285. See supra text accompanying notes 267-79 (discussing spendthrift trusts).
286. GRAY, RULE (2d ed.), supra note 4, at ix.
287. Id. at 594.
be said to have a theory."288 Modern perpetuities law is formed into a single, mathematically elaborated rule only because that is the "consensus" of English-speaking judges on the subject.289 As Gray says at the beginning of his remarks on the Rule's remorselessly logical and mathematical character:

In many legal discussions there is, in the last resort, nothing to say but that one judge or writer thinks one way, and another writer or judge thinks another way. There is no exact standard to which appeal can be made. In questions of [perpetuities] this is not so; there is for them a definite recognized rule.290

That "definite recognized rule" is the outgrowth of a "process of adjudication [that] has been a process of clearing and simplification," a process that has resulted in "a well established, simple, and clear rule," a rule that was formed, and is sustained, by the agreement of common-law judges.291 Without that agreement, perpetuities law would be far less geometrically shaped and logically coherent.292

As a judicial construct, the Rule Against Perpetuities serves human purposes. As previously stated, Gray's elaboration of the Rule Against Perpetuities largely draws from legal history, legal conceptions, and legal precedent. However, "largely" is not "entirely." In explicating perpetuities law, Gray is attentive to the Rule's public policy basis, and he constantly draws from public policy in discussing perpetuities law's open issues.293

At the outset of his treatise, Gray describes "[t]he system of rules disallowing restraints on alienation, and the Rule against Perpetuities" as "two modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote."294 Perpetuities law and restraint law "have... the same ultimate end, but they serve that end by different means."295 Restraint law works by making present estates alienable; perpetuities law works by voiding future interests that "take effect at too remote a period."296 The Rule Against Perpetuities really is "the Rule against

288. Id. at 154. The same limited understanding of the word "true" should be read into each of Gray's use of the word in relation to the Rule. See, e.g., GRAY, RULE, supra note 4, at 144 ("true form of the Rule"); GRAY, RULE (2d ed.), supra note 4, at 98 ("true theory"); see also Gray, Remoteness, supra note 130, at 407 ("true principles" and "true ground at... the present day").
289. GRAY, RULE (2d ed.), supra note 4, at 594.
290. Id. at ix.
291. Id. at 594.
292. Restraint law, for example, may be stated systematically, but it consists in a number of rules that are not logically derived from others. See GRAY, RESTRAINTS (2d ed.), supra note 103, at 278-81 (giving a summary of restraint law).
293. Gray tends to rely on precedent, not policy, when discussing settled issues not presently open to question.
294. GRAY, RULE (2d ed.), supra note 4, at 2. These remarks are not contained in the first edition, which, though equally focused on policy concerns, does not articulate them as fully.
295. Id.
296. Id. at 1; see also id. at 2-3 ("The Rule against Perpetuities is the law limiting the time
Remoteness,” and Gray says that is what it “would have been better” called.297

Later, when it is necessary to his discussion of an open issue of perpetuities law, Gray returns to the distinction in the “means” by which restraint and perpetuities law aid “the circulation of property” in order to flesh out, with greater specificity, four public policy benefits of the Rule’s focus on ensuring “that future interests must arise within a certain time.”298

First, proscribing future interests that arise on remote contingencies protects property’s market value. “If there is a gift over of an estate on a remote contingency,” Gray says,

the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little, or, in other words, the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest.”299

Second, it encourages property’s efficient use because “when the ownership in property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man’s own....”300

Third, it remedies the bilateral

within which future interests can be created”); id. at 240 (stating perpetuities law is directed at proscribing “remote contingenc[ies”); id. at 451 (“the Rule against Perpetuities is not directed at preventing the alienation of present interests, but against the creation of remote future interests”); id. at 456 (noting that the Rule Against Perpetuities focuses on ensuring “that future interests must arise within a certain time”)

Gray admits that by proscribing remote future interests, the Rule “loosely” (read “indirectly”) promotes the alienability of property. But, this is because it makes property more “marketable.” Id. at 1; infra text accompanying note 299. Restraint law guards property’s alienability de jure, while perpetuities law does so de facto. Gray’s point is that in terms of legal analysis, whether an interest is alienable or inalienable has everything to do with whether it is proscribed by restraint law and nothing to do with whether it is proscribed by perpetuities law.

297. GRAY, RULE (2d ed.), supra note 4, at 2; see also id. at ix, 251, 451-52, 452 n.1. Gray makes this point in his preface, introduction, and text because he regards separating restraint and perpetuities law as the key to resolving much of the “confusion” and most of the “practical errors” in perpetuities law. Id. at ix. 2. Gray writes that he did not appreciate this distinction when he began researching his treatise, id. at ix n.3, and suggests “[I]f this book has any merit, it is in the more or less successful attempt to free the subject from this source of confusion and mistake.” Id. at ix.

298. Id. at 456.

299. Id. at 240; see also id. at 1 (noting that the Rule makes property more “marketable”); Gray, Remoteeness, supra note 130, at 410 (asking rhetorically “[i]s a remote future interest objectionable only because for too long a period there may be no one who can give a good title; or is it objectionable also because the policy of the law does not allow interests so uncertain in value to hamper a present interest”).

300. GRAY, RULE (2d ed.), supra note 4, at 458; see also id. at 241 (remarking on “the belief that... the activity of the owner will be increased and the public benefited, so it is against public policy to allow such activity to be diminished by the fear of losing the property on a future contingency”)
monopoly relationship between present and future interest holders.\(^{301}\) In Gray's words, "if the owner of the present interest wishes to convey an absolute fee, the holder of the executory gift can extort from him a price which greatly exceeds what it ought to be, if based on the chance of his succeeding to the property."\(^{302}\) Finally, it promotes these objectives while still allowing "each generation [to] have the power of providing for those who come immediately after it in the way it thinks best . . . ."\(^{303}\) In Gray's view, the Rule Against Perpetuities' focus on "the time within which future interests can be created"\(^{304}\) is intended to balance society's interest in promoting property's value and efficient use, addressing bilateral monopolies, and permitting owner sovereignty to extend past death. The Rule "is the line which the law has laid down so as to give . . . these desirable objects a reasonable field without encroaching on [each] other."\(^{305}\)

The two open questions of perpetuities law that give rise to Gray's fullest discussions of the Rule's policy basis are whether the Rule voids remote future interests (1) even when they are alienable, and (2) when they take property from one charity and give it to another. Gray's discussions of these issues, if not typical, are still telling examples of his approach to legal analysis.

With regard to whether the Rule voids remote, but alienable, future interests, the case law in Gray's day was somewhat confused. Holdings, analogies, judicial dicta, and scholarly commentary abounded on both sides of the question.\(^{306}\) In arguing that the Rule condemns remote interests even when they are alienable, Gray drew from legal history, parsed cases at length, argued from analogies, and elaborated the Rule's policy goals.

In his argument, Gray conceded that in the sixteenth century, when judges first began to control future interests as "perpetuities," all that concerned them was whether or not the interests were alienable.\(^{307}\) It would be consistent with perpetuities law's original purpose, Gray admits, to exempt alienable contingent future interests from the Rule. But Gray's historical analysis is dedicated to showing that over the course of the seventeenth and eighteenth centuries, courts shifted their focus to a concern with the future interest's "remoteness."\(^{308}\) By doing so, the courts

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301. A bilateral monopoly arises when "two parties are locked into dealing with each other." JESSE DUKE MINIER & JAMES KRIER, PROPERTY 137 n.17 (3d ed. 1993). In these situations, the usual competitive pressures that ensure that bargaining has an efficient outcome are absent.

302. GRAY, RULE (2d ed.), supra note 4, at 240.

303. Id.

304. Id. at 2-3.

305. Id. at 241.

306. Id. at 241-51 (discussing English cases on the Rule Against Perpetuities).

307. GRAY, RULE (2d ed.), supra note 4, at 240 (discussing judges' concerns with the alienability of estates); see also id. at 113-27 (discussing historical development of perpetuities law).

308. Id. at 240.
established the modern Rule Against Perpetuities. Gray argues the Rule "has been extended to cover all future interests whether alienable or not." This extension is "not a logically necessary consequence of the establishment of the rule . . . ." But Gray's analogical reasoning and case parsing is dedicated to showing that the Rule's extension is "now well settled." His elaborate policy analysis, which was reviewed above, is dedicated to defending it as "a reasonable extension." Apparently, Gray felt his extended analysis required both precedent and policy to be complete.

With regard to whether the Rule proscribes remote future interests when they move property from one charity to another, the case law in Gray's day was quite clear, if thin: the Rule Against Perpetuities did not void a remote gift to a charity when the present interest holder was also a charity. A case in England in 1848, and a Connecticut case in 1854, had so held. Two other American cases had "spoken with approval" of these decisions. Furthermore, all text-writers had adopted this position. Gray's opinion was that the leading English decision "has stood so long unquestioned that it is

309. See id. (outlining development of the Rule Against Perpetuities); see also id. at 127-36 (discussing "Slow Judicial Recognition of Remoteness as the Essential Point in Judging Future Limitations"); Gray, Remoteness, supra note 130, at 410 (stating "under many circumstances, whichever principle was applied judgment would be the same; but, finally, cases arose which required a decision of [the] question," and crediting Gray v. Montague, 28 Eng. Rep. 876 (Ch. 1764), and Brattle Square Church v. Grant, 69 Mass. (3 Gray) 142 (1853), as being the first cases in England and America respectively to adjudicate the precise point). [Gray has an incorrect page cite for the Montague case in his article — ed.]

310. GRAY, RULE (2d ed.), supra note 4, at 136-38 (discussing establishment of modern rule). The historical development also portrays development of law as a typical instance of legal development, countenancing confusing and contradictory statements in precedent. It was the shift in perpetuities policy from a concern with alienability, to a concern with remoteness, that Gray discussed as his classic instance of common-law development in Gray, Remoteness, supra note 130, at 407-08, 409-13, and in supra text accompanying note 155.

311. GRAY, RULE (2d ed.), supra note 4, at 240.

312. Id. at 250.

313. Id. at 240; see also id. at 250 ("extension is well settled"). Gray seems to be making an advocate's overstatement, given the extent of contemporary controversy over the point. See id. at 240-52, 450-59 (discussing differing viewpoints); Gray, Remoteness, supra note 130 (discussing Jabez Fox's objections to Gray's position and rehashing the authorities on which Fox relies); Fox, supra note 148, at 195 (criticizing Gray).

314. See GRAY, RULE (2d ed.), supra note 4, at 454 (discussing cases involving charities).


317. Jones v. Habershon, 107 U.S. 174, 185 (1882); GRAY, RULE (2d ed.), supra note 4, at 454 (citing Oddell v. Oddell, 92 Mass. (10 Allen) 1, 8, 9 (1865)). Gray references two other American cases in his notes. GRAY, RULE (2d ed.), supra note 4, at 454.

318. GRAY, RULE (2d ed.), supra note 4, at 454 (acknowledging general approval of these cases).
likely to be followed.” Yet Gray did question it, saying “in any jurisdiction where the matter is not closed by authority the correctness of the [English] decision . . . deserves careful consideration.”

In vetting the issue, Gray argued from analogy, principle, and policy. Gray began his criticism of the current trend of authority by observing that the rule permitting remote successive gifts to charities was premised on the view that the Rule Against Perpetuities’ purpose is to keep property alienable and in commerce. Charitable donations were a well-recognized exception to the law’s proscription of restraints on alienation. Therefore, moving property from one charity to another should be permitted because, whether property was held by one charity or another, “[t]he property is neither more nor less alienable on that account.”

To Gray, this argument failed because it was premised on the original, but now surpassed, rationale for the Rule that failed to distinguish the goal of perpetuities law from the goal of restraint law. The argument also failed because it was inconsistent with certain closely analogous rules of modern perpetuities law, such as the universally-established rule that a remote future interest to an individual was void when it took property from a charity. “If a remote limitation from one charity to another charity is good,” Gray observed,

it is hard to see why a remote limitation from a charity to an individual should be void. In the latter case the property is no more taken out of commerce than in the first case; on the contrary, when the gift over is to an individual there is a chance that the property will at some time come into commerce.

The argument also failed because it established a rule that a skilled conveyancer could employ to help his client “make a perpetual provision for his family.” All a conveyancer had to do, Gray suggested, is donate money

319. Id.
320. Id. at 454-55.
321. Id. at 455 (describing the objective of the Rule Against Perpetuities).
322. Id. at 450-52 (stating “the nature of charitable trusts makes them inalienable”); see also id. at 627 (discussing advowsons); GRAY, RESTRAINTS (2d ed.), supra note 103, at 98 (discussing advowsons). But see GRAY, RESTRAINTS (2d ed.), supra note 103, at 123 (discussing “married women” as the “one exception to the invalidity of restraints on alienation of fees or absolute interests”).
323. GRAY, RULE (2d ed.), supra note 4, at 455 (quoting Christ Hospital v. Grainger, supra note 315).
324. Id.; see also supra text accompanying notes 295-97, 308-13 (discussing the development of perpetuities law).
325. GRAY, RULE (2d ed.), supra note 4, at 457-58. The other analogies are discussed id. at 455-57.
326. Id. at 457; see also Gray, Remoteness, supra note 130, at 414 (stating when the “device” Gray is going to describe “is generally known, many a rich man will seek an assurance of perpetual wealth for his descendants by attaching such a conditional limitation to a charitable
or land to a charity "on the condition that if . . . [it] does not pay a certain amount to those persons who shall then be the heirs of the donor, the land or fund shall go to [another charity]." Thus, a proper exception to restraint law, combined with an improper exception to perpetuities law, would countenance a subversion of the goal of both bodies of law.

Nonetheless, Gray thought the argument failed because it did not take into account all the purposes of modern perpetuities law. "[T]he wish to keep land or personal property in commerce," Gray wrote,

is not the sole raison d'être of the Rule against Perpetuities. This reason certainly has no great force in the case of a trust where the trustees have full power to change investments, or to a case where there is a person in existence who can transfer or release a remote future interest, and yet in both these cases the rule is applied. Is it not another reason that when the ownership in property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man's own?

These considerations apply with full force to charities. Property is devised to a University to establish a Medical School. It will greatly diminish the motives to establish and conduct such a school, to found professorships and build laboratories, if all the money necessary to pay the professors and maintain the laboratories is to be taken from the University on a contingency, especially on a contingency over which it may have no control.


328. Drawing on his expertise and professional knowledge of current estate planning, estate planners, and their clients, Gray wrote in a law review article on the subject that "such a scheme is not fanciful." Gray, Remoteness, supra note 130, at 413. In the article, he also wrote that "dangerous possibilities disclosed" by the developing case law suggested his conveyancing scheme "may be more doubtful." And in light of the plausible conveyancing scheme and the developing case law supporting it, Gray also wrote:

If I had conceived of the ingenious structure which a clever conveyancer has since raised . . . I should have had a stronger argument against the correctness of that opinion than any I employed. A better illustration of the danger of throwing over a principle because its application to the facts is not immediately obvious, has seldom occurred.

Id. at 413.

329. Gray, Rule (2d ed.), supra note 4, at 458; see also Gray, Remoteness, supra note 130, at 412 (stating that "Cessante ratione, cessat ipsa lex, may be a sound maxim, but there is sometimes more than one reason for a rule. [The Court's] error [in the leading English case] was, I humbly conceive, this: [It] saw that a reason for applying the Rule against Perpetuities did not exist in that case, and he assumed too hastily that the rule had no other reason.")
With this trenchant policy analysis, Gray closes his extended discussion of whether the Rule voids a successive, but remote, future interest to a charity.\textsuperscript{330}

Although these two discussions are the only analyses in which Gray substantially develops the policies that underlie perpetuities law, they are not the only ones in which he significantly relies on policy considerations. Discussions of the Rule's effect on possibilities of reverter, contingent remainders, and spendthrift trusts, which are more typical of Gray's analysis of open issues, are also tellingly illustrative.

Possibilities of reverter, the future interest that follows a fee simple determinable estate, gave Gray much trouble. In his first edition, Gray mistakenly argued that remote possibilities of reverter violated the Rule because they were conditions that might take effect centuries after their creation.\textsuperscript{331} In the second and later editions, Gray recognized that possibilities of reverter were true reversionary interests, and not conditions, because they await the preceding estates' natural termination. As reversionary interests, possibilities of reverter are fully vested estates from the moment of their inception.\textsuperscript{332} Since the Rule Against Perpetuities voids only remotely vesting interests, possibilities of reverter do not offend the Rule.

Hence the importance of Gray's insistence in all the editions of \textit{The Rule Against Perpetuities} that the Statute \textit{Quia Emptores},\textsuperscript{333} by "put[ting] an end to tenure between the feoffor of an estate in fee simple and the feoffee," put an end to fee simple determinable estates and their attendant possibilities of reverter.\textsuperscript{334} In taking this position, Gray had the support of some nineteenth-century commentators, but other commentators and more than two dozen English and American cases seemed to disagree.\textsuperscript{335} In a lengthy analysis, Gray investigated every case, reducing all but three to dicta.\textsuperscript{336} These three cases, in Gray's view, relied on insufficient or simply incorrect reasoning, or

\begin{itemize}
  \item \textsuperscript{330} See Gray, \textit{Rule} (2d ed.), \textit{supra} note 4, at 458 (considering the Rule Against Perpetuities in reference to charities).
  \item \textsuperscript{331} See Gray, \textit{Rule}, \textit{supra} note 4, at 224 (discussing possibilities of reverter and the Rule Against Perpetuities). As Gray said in his treatise's preface: "That I have done all my own sums correctly, I do not venture to hope. There is something in the subject which seems to facilitate error." \textit{Id.} at vii; Gray, \textit{Rule} (2d ed.), \textit{supra} note 4, at ix-x.
  \item \textsuperscript{332} See Gray, \textit{Rule} (2d ed.), \textit{supra} note 4, at 76-77, 85 (discussing reversions as vested interests). Reversionary interests, including possibilities of reverter, are vested because "they are always ready to take effect in possession whenever and however the preceding estates determine." \textit{Id.} at 85. Conditions are not vested because they "cut short" the preceding estate rather than await its natural expiration. \textit{Id.} at 284 n.1.
  \item \textsuperscript{333} 18 Edw. 1, c. 1 (1290).
  \item \textsuperscript{334} Gray, \textit{Rule} (2d ed.), \textit{supra} note 4, at 24; \textit{see also id.} at 15 (stating the statute "put an end to sub-infeudation").
  \item \textsuperscript{335} \textit{Id.} at 24-42, 556-63 (discussing a variety of English and American cases).
  \item \textsuperscript{336} \textit{Id.}; \textit{see also id.} at 283 (summarizing his early conclusions).
\end{itemize}
were explainable on other grounds. Nonetheless, as decisions of courts of last resort in their respective jurisdictions, Gray accepts them as settling the law in Georgia, New York, and Massachusetts, but nowhere else.

In discussing the Rule's application to possibilities of reverter, the denouement of Gray's analysis in the text occurs when, after eighteen pages of close case parsing, he admits:

> [t]he question may naturally arise, Why inquire so curiously as to the validity of a common-law possibility of reverter, since by a shifting use or an executory devise to the grantor the same result can be reached? The answer is: Shifting uses and executory devises are, past a doubt, subject to the Rule against Perpetuities; but possibilities of reverter are not . . . . Therefore, if determinable fees are valid, interests may, by means of them, be created in a grantor and his heirs, which may not come into possession for centuries. It is submitted that theory and policy alike agree in denying the existence at the present day of possibilities of reverter.

The denouement of Gray's analysis in his appendix occurs when, in the midst of eight closely-reasoned pages responding to recent scholarship criticizing his position and to additional contrary English precedent, Gray outlines the way he would apply *Quia Emptores* to determinable fees. In light of the fact that for six hundred years after the Statute there was only one case in England, *Poole v. Needham*, decided in 1608, that actually involved a possibility of reverter, and only a smattering of casual remarks on the subject from the bench and bar, none earlier than 1467, Gray argues:

> When we say that the Statute *Quia Emptores* did or did not put an end to determinable fees, we are not inquiring into the truth of an alleged physical fact, as, for instance, whether in the year 1289 John Stiles killed Robin A'Green. What is meant is that the Court would or would not after the Statute have allowed such determinable fees. Of this we know nothing, and very likely never shall know anything. The real question we are considering is not, however, an historical

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337. *Id.* at 35-37, 39, 42, 283; see also *Gray, Rule, supra* note 4, at 4 (explaining rationale of the early cases).
338. See *Gray, Rule* (2d ed.), *supra* note 4, at 283 (discussing cases involving possibilities of reverter). Compare *infra* text accompanying note 372 which discusses rights of entry.
341. See *Gray, Rule* (2d ed.), *supra* note 4, at 26, 29 (discussing *Poole v. Needham, supra* note 340). In *Poole*, in Gray's view, the ruling on possibilities of reverter was dicta. *Id.* at 26.
342. See *id.* at 25-30 (discussing such cases as *Liford's Case*, *77 Eng. Rep. 1296* (K.B. 1614), and *Attorney-General v. Pyle*, *26 Eng. Rep. 278* (Ch. 1738)); see also *id.* at 558 (stating that "for over six hundred years" the issue of the effect of the Statute on possibilities of reverter had not "been a burning question, either practically or theoretically" because conveyancers had so rarely used the device).
one, but it is what is the way in which courts do and ought to
decide this matter at the present day; and I submit the proper way
to approach it is this:

Future contingent remote limitations are universally disapproved
at the present day; courts and legislatures alike condemn them.

There is an alleged exception in the case of possibilities of
reverter after determinable fees.

There is no rational distinction in this respect between
possibilities of reverter and other contingent remote limitations.

By the theory of the common law, decisions of the courts made
in earlier times and since followed, will be respected, even
although they would not now be made, or even although they
introduce anomalies into the law.

There have been no such decisions as to determinable fees.

It is practicable to give a reasonable construction to the Statute
Quia Emptores which will do away with the supposed objectionable
exception.

A court is justified in adopting this construction, although it may
not feel sure that the judges of the thirteenth century would have
done so. Being fortunate in not being hampered with an antique
and narrow precedent they ought to use their freedom
intelligently, and not impose irrational and arbitrary exceptions
which they can avoid.  

In other words, when direct precedent in a court of last resort does not bar
the way, contemporary policy concerns properly enter into, and should
substantially influence, judicial decision-making.

The application of the Rule Against Perpetuities to contingent
remainders was equally troubling to Gray. At the time Gray published his
treatise, the weight of scholarly commentary, and the only case on the

343. Id. at 559-60; see also id. at 269, discussed infra text accompanying note 357, where
Gray goes further and suggests, for a particular open issue, even when "[i]t is likely" that earlier
courts would have made a certain (undesirable) decision had the issue been presented, the fact
that the issue was not presented leaves contemporary courts to make a different (desirable)
decision.

344. Perhaps Gray would recognize the binding quality of a consensus among common law
jurisdictions in a jurisdiction that had not yet adjudicated the point. See Gray, Rule (2d ed.),
supra note 4, at 594 (discussing general and particular intent).

The quoted material also shows that Gray did not approach statutory construction as
an originalist, at least when construing ancient statutes, infra text accompanying note 372
(discussing rights of entry).
subject, *Cole v. Sewell*, decided by the House of Lords in 1848, expressed the opinion that contingent remainders were outside the scope of the Rule. As summarized by Gray, three reasons were given for this position: (1) contingent remainders were recognized, and the law for them settled, hundreds of years before the Rule Against Perpetuities was formulated; (2) contingent remainders were destructible and, therefore, did not interfere with the present estate's alienation, use, or value; and (3) any potential perpetuity problems of contingent remainders were sufficiently controlled by an ancient common-law rule barring limitations after a limitation to an unborn person.

Gray responded to these arguments in the treatise's text and in a subsequent law review article. Legal history, legal precedent, and public policy figure prominently in these responses. As for the argument that the law of contingent remainders predated the Rule, Gray observed that the Rule's first applications were to future interests in leasehold devises. As future interests in leasehold devises were common-law interests, the fact that contingent remainders were common-law interests did not automatically exempt them. But more generally, Gray drew from the early applications of the Rule to assert the following: "[t]he Rule against Perpetuities is, comparatively speaking, a modern rule .... When formed, it was applied to common-law and statutory interests, ... it was created to effect a general end

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348. *See* id. at 256-69 (discussing contingent remainders); John Chipman Gray, Whitby v. Mitchell *Once More*, 29 L.Q. REV. 26 (1913) [hereinafter Gray, Whitby] (discussing the *Whitby v. Mitchell* case, in which it was held that a contingent remainder could not be given to the child of an unborn person).
349. *See* Gray, *Rule* (2d ed.), *supra* note 4, at 262-63 (discussing arguments that the Rule Against Perpetuities does not apply to remainders); Siegel, *Legal Formalism*, *supra* note 110, at 451 (same). The burden of Gray's seventy-page summary of the historical development of future interest law is that the Rule applies to both statutory and common-law future interests. Gray, *Rule* (2d ed.), *supra* note 4, at 70-75.

Gray also turns this observation into a positive point for his ultimate conclusion that the Rule applies to contingent remainders when he writes, at the outset of the entire discussion of contingent remainders: "[a]s the Rule governs all contingent equitable limitations of real estate, and all contingent limitations, legal and equitable, of personal property, whether in the form of remainders or not, it is very desirable that legal contingent remainders of real estate should be subjected to the Rule also." *Id.* at 256. This is an implicit policy argument because of Gray's instrumental view of the benefits of a symmetrical, logical legal system. Such a system promoted self-governance because citizens, by logically elaborating legal principles, would know what the law required of them. Legal requirements did not turn upon a guess about the exercise of judicial discretion. *See id.* at vii (discussing Gray's intent in clarifying the Rule Against Perpetuities).
of public policy, and there is no reason in history or policy why all future interests should not fall within it."\textsuperscript{350}

Gray responded to the argument that the destructibility of contingent remainders made the Rule's application to them unnecessary with a counter-argument drawn from history and policy (although the policy argument was implicit). It was, Gray said, "needless to discuss this theory... [because] both in England and America contingent remainders have by statute ceased to be destructible. If they were exempt from the operation of the Rule against Perpetuities, because they could be destroyed, now that they have become indestructible they must fall within it."\textsuperscript{351} In Gray's view, public policy required that the Rule evolve to keep abreast with legislative changes in future interest law.

Finally, Gray employed an historical argument coupled with case parsing to rebut the argument that the perpetuity problems of contingent remainders were sufficiently controlled by an ancient common-law rule barring limitations after a limitation to an unborn person. The thrust of his analysis is that there was no such rule.\textsuperscript{352} "The substitute offered to take the place of the Rule against Perpetuities as to remainders," Gray argued, "is a nonexistent rule based on an exploded theory."\textsuperscript{353} Two aspects of Gray's discussion are appropriate to note here. The first is that Gray was totally unfazed by the fact that between the publication of the first and second editions of The Rule, an English chancery decision held that the "unborn person" rule was a traditional part of the common law.\textsuperscript{354} To Gray, this meant that, perhaps, contingent remainders would be subject to both the "unborn person" rule and the Rule Against Perpetuities.\textsuperscript{355} But he still complained, in an article written two decades later, "[n]o one I am aware of claims that public policy calls for the [unborn person rule], nor that such policy requires contingent remainders to be subjected to a fetter which is not imposed upon other future interests."\textsuperscript{356}

\begin{itemize}
\item \textsuperscript{350} GRAY, RULE (2d ed.), supra note 4, at 264.
\item \textsuperscript{351} Id. at 257; see also id. at 256-57 (discussing why the device of trustees to prevent destruction of contingent remainders, which had been in use since the eighteenth century, affects the issue).
\item \textsuperscript{352} See id. at 257-69 (discussing early cases on contingent remainders); see also Gray, Whiby, supra note 348 (same).
\item \textsuperscript{353} GRAY, RULE (3d ed.), supra note 4, at 260. The "exploded theory" was the "notion that there could not be a possibility upon a possibility," id. at 259, which Gray described as "a conceit introduced by Chief Justice Popham in 1598 and rejected as early as twenty years later by Chief Justice Coke." Id.; see also Siegel, Legal Formalism, supra note 110, at 451 (discussing Gray's rebuttal to arguments about the Rule Against Perpetuities' universal application).
\item \textsuperscript{354} Whiby v. Mitchell, 44 Ch. D. 85 (1890).
\item \textsuperscript{355} GRAY, RULE (2d ed.), supra note 4, at 266 (discussing remainders to unborn persons).
\item \textsuperscript{356} Gray, Whiby, supra note 348, at 31 (stating that the rule in Whiby "is maintained only as an alleged relic of antiquity which many eminent men have believed to be genuine"). Gray included the main points of this article in the appendix to GRAY, RULE (3d ed.), supra note 4, at 643-51. The quoted material is found id. at 651.
\end{itemize}
The other aspect of Gray's discussion is his concession that before the Rule Against Perpetuities' formulation, if there had been a case involving two successive remainders to unborn people, the courts would have "invented" some scholastic rule, similar to the "unborn person" conceit, to void the second remainder. But, as Gray later wrote, "fortunately the case did not come before the Courts" until well after the Rule Against Perpetuities' development. This fortuity left contemporary courts free to decide the issue by modern norms.

A final telling instance of Gray's concern for policy in explicating and developing perpetuities law is Gray's anticipation of the interface between perpetuities law and the recent spendthrift trust decisions. To Gray, the recent decisions upholding spendthrift trusts introduced a novel idea into the law, that of the inalienability of absolute interests, just as the Court of King's Bench in Pells v. Brown introduced a novel idea into the law, that of the indestructibility of future interests. And as the Rule against Perpetuities had to be invented to control the indestructible future interests created by Pells v. Brown, so some rule must be invented to control the inalienable interests created by [the spendthrift trust cases]. It is perhaps likely that the same period as that prescribed by the Rule against Perpetuities will be taken, although it would seem quite open to the Court to adopt some other period, if found more convenient.

In Gray's perpetuities treatise, as in his jurisprudential writing, policy-driven judicial creativity constrained only by direct precedent or broad judicial consensus is a factor not only in the law's past growth, but a prerogative of modern courts as well.

Of course, we must not overstate the role of policy in Gray's treatment of perpetuities law. The role of courts in modern perpetuities law is jurisprudence, not legislation. Courts are constrained lawmakers. In perpetuities law, a legal topic unaffected by popular customs and subject to very few statutes, constraint chiefly takes the form of judicial precedent and

357. See GRAY, RULE (2d ed.), supra note 4, at 269 (discussing the issue of a remainder to an unborn person's child); GRAY, RULE (3d ed.), supra note 4, at 651 (same); Gray, Wiltz, supra note 348, at 32 (same).

358. See GRAY, RULE (2d ed.), supra note 4, at 269 (discussing the origins of the Rule Against Perpetuities); GRAY, RULE (3d ed.), supra note 4, at 651 (same); Gray, Wiltz, supra note 348, at 32 (same).

359. On spendthrift trusts and Gray's attitude towards them, see supra text accompanying notes 257-78 (discussing Gray's views on spendthrift trusts).

360. GRAY, RULE (2d ed.), supra note 4, at 99-100.

361. See supra text accompanying note 206 (discussing the distinction between jurisprudence and legislation).
In Gray's view, precedent in a particular jurisdiction settles the law for that jurisdiction; a consensus of courts settles the matter for the common law. The course of judicial precedent settles the law even when it deviates from fundamental principle or "mars its logical symmetry." This is true for ancient precedent, and it is true for modern developments. For example, according to Gray, the fact that the permissible perpetuities period includes a gross term of twenty-one years after lives in being is not to be justified on principle. It came about through "a curious and illogical" course of judicial decisions spanning the seventeenth to nineteenth centuries. Yet, the doctrine "has met with acceptance everywhere" in both England and America, and it is an undoubted part of the Rule.

On these same grounds, Gray accepted the recent American precedents exempting common-law rights of entry from the Rule's proscriptions. A common-law right of entry is the future interest that follows a fee simple estate when that estate is subject to a condition subsequent. A right of entry is undoubtedly unvested because it takes effect by cutting short the present estate should the present estate's condition be broken. As an unvested future interest, a right of entry violates the Rule Against Perpetuities' proscription of remotely vesting future interests. English case law subjected rights of entry to the Rule and English commentators agreed with these decisions.

Gray agreed with the English decisions and commentators. He thought rights of entry were "within both the letter and the spirit of the Rule against Perpetuities; . . . there is nothing in the history of the Rule to exempt them...

362. Gray mentions that the few statutes affecting perpetuities law tend to "increase its stringency." GRAY, RULE (2d ed.), supra note 4, at viii; see also id. at 594. Gray also states that the statutes may confuse the Rule's clarity, id. at 594-95.

363. Id. at vii.

364. See id. at 191 (discussing limitations of an estate for life).

365. Id. at 190. In large measure, it is due to the "unlearned peers [in the House of Lords] overruling the sages of the law" in a late-seventeenth century case. Id. at 155; see also id. at 144-45, 153. But this is not the only problem in the law's development of this facet of the Rule.

366. Id. at 190.

367. See GRAY, RULE (2d ed.), supra note 4, at 6, 76-77, 269 (discussing rights of entry); see also THOMAS BERGIN & PAUL HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 66 (1966) (calling the interest a "power of termination"); CORNELIUS MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 112 (2d ed. 1988) (discussing rights of entry for conditions broken).

368. GRAY, RULE (2d ed.), supra note 4, at 271-73. But see id. at 270 (quoting England's Real Property Commissioners stating that the Rule does not apply to rights of entry, but agreeing that "they clearly are within its policy"). In defense of American developments, which are discussed infra text accompanying notes 371-72, the question seems not to have arisen in England until the nineteenth century.
from its operation." He also thought "the practical inconvenience of excluding [rights of entry from the Rule] is very great; ... [and] this inconvenience is especially great in America, where the heirs from whom a release must be sought may, and often do, multiply enormously with every succeeding generation."

Nonetheless, Gray accepted the plethora of American cases upholding rights of entry that violated the Rule. Even though in almost every case the "objection of remoteness" did not occur to either court or counsel, Gray accepted that "[t]his great consensus of authority, although without any consideration of the question involved, may perhaps be held to settle the law for the United States, and to create in this country an exception, arbitrary though it be, to the Rule against Perpetuities." In other words, in Gray's perpetuities treatise, policy drives precedent, but the course of precedent settles the law. Yet the course of precedent has this power only because it reflects the apparent settled opinion of the judges. Stability in the law is a public good. Not every shift in judicial views about the moral worth of a particular rule is sufficient to alter the rule. But should judicial opinion about the moral worth of a particular rule shift dramatically enough, even decisions that have long gone unquestioned may not be followed.

In sum, Gray's *The Rule Against Perpetuities* reflects the jurisprudence of his *The Nature and Sources of Law* in two ways. First, it presents a policy-driven analysis of law cabined by a respect for precedent. Policy is especially evident in the discussion of open questions. Unlike Langdell, Gray draws from policy in the discussion of abstract principles and in their elaboration into "bottom level" rules. Second, it presents the Rule as entirely a product of judicial views of what the social good requires. Perhaps this is to be expected of a doctrine that is entirely of judicial origin in which legislatures have taken little interest. But the point here is that Gray sees the Rule, which is perchance the single most perfectly classical legal doctrine in the entire

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370. Id.
371. Id.
372. Id. at 279-80 (emphasis in original). Gray's acceptance of the American approach to rights of entry is somewhat more telling than his acceptance of the unprincipled "term in gross" facet of the Rule. One might excuse the "term in gross" rule because it was (1) the product of ancient, long-settled precedent and (2) Gray thought that having a gross term is "highly convenient" as a policy matter even if it was unsupported by principle.
373. See Gray, Restraints (2d ed.), supra note 103, at 200, 211-17 (discussing Maryland's cases voiding interests that do not vest remotely).
374. See Gray, Rule (2d ed.), supra note 4, at 594 (discussing the Rule Against Perpetuities as being purely of judicial origin).
corpus of the common law, as entirely a human construct. The Rule is so geometric only because this is the "consensus of the English speaking world on this subject."\textsuperscript{375} There is nothing transcendent about the Rule's general conformity to classical norms.

Undoubtedly, Gray agrees with the Rule's policy. Unlike restraint law,\textsuperscript{376} there is not a single instance in which Gray objects to the logical elaboration of perpetuities law's fundamental conceptions. Nevertheless, if there is a hint that the Rule is ineffably wise, it is only in Gray's comment about "the danger of throwing over a principle because its application to the facts is not immediately obvious."\textsuperscript{377} In general, Gray says he is "no blind admirer of the Rule."\textsuperscript{378} He never attributes the Rule's origins to some sublime judicial intuition.\textsuperscript{379} And he speaks of the Rule's fundamental focus on remoteness, rather than alienability, as only "reasonable" and not "necessary."\textsuperscript{380}

Furthermore, Gray is pleased that the modern Rule is "concatenated with almost mathematical precision"\textsuperscript{381} and, if anything, wishes it were more so. However, Gray's reason for seeking to dispel the continuing confusion about the Rule's modern policy goal and clarify the many mistakes in the Rule's past and present application is not because there is something in the nature of things requiring that perpetuities law be geometrical. Gray's interest in perfecting perpetuities law's logical consistency is that doing so will increase the Rule's "value as a guide to conduct."\textsuperscript{382} In other words, that the Rule Against Perpetuities generally conforms to classical norms is a matter of happenstance. There is nothing in the nature of things that makes the Rule conform to classical norms; there is nothing transcendent about the fact that it does. The Rule Against Perpetuities is entirely a human construct. For good, or for ill, it grew from, is maintained by, and reflects a judicial consensus about social policy and how to effectuate it.

E. JOHN CHIPMAN GRAY: CLASSICAL LEGAL SCHOLAR—RENVOI

Can someone who refused to think of law as "a brooding omnipresence
in the sky;\footnote{383}{S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified"). Holmes's remark was made in criticism of the federal common-law regime of \\
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Gray was an early and strong critic of Swift. See Gray, Nature (2d ed.), supra note 101, at 231-36 (criticizing Swift).} thought that law contained no immutable principles;\footnote{354}{taught that judges dissembled when "speaking as if their sole function was to construct syllogisms;"\footnote{355}{praised casebook teaching for "accustoming the student to consider the law not merely as a series of propositions having, like a succession of problems in geometry, only a logical interdependence;"\footnote{356}{and asserted that the chief engine of legal development was "the opinion of judges on matters of ethics and public policy," but a classical legal scholar?} Certainly, there are many aspects of Gray's legal thought that tend toward, and indeed were a step toward, post-classical approaches to law.\footnote{353}{For Gray, however, every modern stance ultimately was cabined by countervailing beliefs that kept his jurisprudence solidly within the classical fold.} Gray firmly believed that "[l]egal conceptions are constantly changing."\footnote{359}{Yet he also believed that "their change is often exceedingly slow."\footnote{359}{Moreover, in modern times, though there has been an explosive growth in legal detail, the effect of this growth has been to clarify and "more firmly settle" the post-feudal common law's fundamental principles.\footnote{354}{Gray understood the legal development of his century as "the completion" of the centuries-long process of feudalism's displacement by liberal, industrial, and commercial states.\footnote{392}{Gray firmly believed that "a great part of the law . . . is

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383. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified"). Holmes's remark was made in criticism of the federal common-law regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Gray was an early and strong critic of Swift. See Gray, Nature (2d ed.), supra note 101, at 231-36 (criticizing Swift).

384. See Gray, Nature (1st ed.), supra note 101, at 4 ("legal conceptions are constantly changing"); id. at 7 ("But although our attempts at classifications are necessarily provisional and temporary, although the one certain prophecy that the legal writer can make is that the classification which approves itself to him at the beginning of the twentieth century will surely not be the one which will prevail at its end.").

385. Gray, Definitions, supra note 166, at 33.

386. Gray, Methods, supra note 14, at 159.

387. Gray, Definitions, supra note 166, at 33.

388. By "post-classical approaches to law," I mean such theories as sociological jurisprudence and legal realism that value law's logical consistency less than its ability to promote appropriate social policy. See Herget, supra note 63, at 147-227 (1980) (discussing the nature of sociological jurisprudence and the conditions of social life); Julius Stone, The Province and Function of Law 391-785 (1946) (discussing the Poundian paradigm); G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, in Patterns of American Legal Thought 99-135 (1978) (describing the interaction of events with ideas and the production of ideologies).


390. Id. at 5 (stating further that "many of them go back as far as we have clear knowledge of human affairs, and show to our eyes no signs of decay").

391. Gray, Cases, supra note 116, at 760; see also Gray, Restraints (2d ed.), supra note 103, at viii (discussing development of restraint law).

due to the opinions of individual judges on ethical questions." Gray also believed that judges turned to their own moral views only when there were no "[s]tatutes on the subject" or "precedents binding him, which, either directly or by necessary reasoning or controlling analogy, involve the determination of the case." Judges, Gray believed, conscientiously behaved as classical legal science dictated they should. "Grant intellectual honesty to the Devil," Gray wrote, and for matters for which there were governing statutes and precedents "the Devil . . . would make an excellent judge." One way that Gray's jurisprudence remained pre-Realist was by blending the "is" and the "ought" of judicial behavior.

Gray also firmly believed "[n]othing would be more to be desired than that judges and jurists should mould and guide the Law to make it correspond to the needs of society," but he also added the caveat:

if they know what the needs of society are. But this is a tremendous if; they probably do not know; there is little in their calling and life to have given them that knowledge. Judges and jurists are men of their time; they are swayed, like the rest of us, by the Zeitgeist, and it is well that they are; but that they should consciously set about developing the Law, say in a socialistic or anti-socialistic manner, is not well.

Unlike Holmes, Gray did not advocate the historical study of law as an important "first step . . . toward a deliberate reconsideration of the worth of [its] rules." That judges might consciously remodel the law was an aspect of Holmes's modernism. For Gray, historical studies were a first step
toward clarifying and systematizing the teachings of tradition, traditions that it was best for judges to refashion only interstitially and insensibly. 402

Finally, Gray firmly believed that not all areas of the law were as mathematically "concatenated" as the Rule Against Perpetuities, or so well settled as the system of restraints upon alienation. Yet he also believed that the clarity and organization of all areas of the law would be improved by the blend of "historical," "analytic," and "deontological" study that was the hallmark of classical legal science. 404 Moreover, Gray believed that for every legal topic, "if we look back along the history of the Law, we shall very likely find one simple doctrine running through it all, but distorted here, and perverted there, and misunderstood in a third place, whence have arisen anomalies and exceptions." 405 The legal scholar's delicate and demanding task was to determine, through historical study of the law's development, "which [precedents] represent legitimate lines of growth, and which are bastards, to be recognized only as exceptions." 406 Determining the precedents that "represent[,] the main principle," 407 and which represent false starts, anomalies, exceptions or remnants, provides the legal scholar with a structure for the law's systematic presentation, a presentation that, duly informed by traditional and contemporary ethical standards, includes the extension of "the true doctrine" 408 to open or newly arisen questions. 409

402. As support for his opposition to wholesale judicial refashioning of law, Gray was somewhat skeptical of the general level of the judicial intellect, especially as the judiciary and the law's corpus expanded in the nineteenth century. Gray, Nature (2d ed.), supra note 101, at 84; Gray, Cases, supra note 116, at 757-58.

403. Gray, Rule (2d ed.), supra note 4, at 594-95 (discussing the dangers of remodeling the Rule Against Perpetuities); see also id. at ix (discussing the mathematical precision of the Rule Against Perpetuities); Gray, Restraints (2d ed.), supra note 103, at iii-iv (same).

404. Gray, Nature (1st ed.), supra note 101, at 1. Each of these three styles of studying law had strengths and weaknesses. The strengths were as follows: for historical study—deriving an accurate knowledge of its content, especially in separating its mainstream development from its survivals, anomalies and exceptions; for analytical study—clarifying and systematizing the contents; for deontological study—developing law fit for the society's current needs. The weaknesses were as follows: for historical study—tending to result in literary rather than practical results and hindering focus on the present law; for analytical study—tending to result in acceptance of all facets of the present law as part of its proper content; for deontological study—tending to treat jurisprudence as legislation and overstating judges' abilities to determine appropriate content of law.

405. Id. at 3 ("[w]e learn to recognize as anomalies and exceptions, but whose anomalous and exceptional character we do not discover when we are simply face to face with the present system").

406. Gray, Remoteness, supra note 130, at 408.

407. Id. at 414.

408. Id. at 408 (noting "the matured doctrine of today").

409. See Gray, Nature (1st ed.), supra note 101, at 1-7 (describing the strengths and weaknesses of historical, analytical and deontological study of law); see also id. (2d ed.) at 141-43 (discussing the importance of ethics in jurisprudence); Gray, Definitions, supra note 166, at 27-28 (describing the science of jurisprudence).
In other words, culling the "matured doctrine of to-day" from the "mare's nest" of precedent involved a process of insight, inference, and argumentation, not demonstration. It could be done well or badly. A particular challenge was to avoid "the substitution of one's a priori conceptions for the decisions of the courts." But once done, Gray evidently believed that the general propositions thus established generally could decide concrete cases. This is one of the most essential facets of Gray's classicism. Perhaps the most significant divide between realist and classical jurists is their different stance on the possibility of deriving legal rules or case decisions from abstract legal principles. Thomas Grey has contrasted Langdell's classicism with Holmes's nascent modernism:

For Langdell, the fundamental principles of the common law, once extracted by induction from the cases, had the status of axiomatic general truths; they were the law, and individual decisions shown to conflict with them were thereby shown to have been wrongly decided. Holmes, by contrast, considered the same general principles to be guidelines, rules of thumb, instruments of inquiry designed as practical aids to making decisions. They were not like mathematical axioms; the very generality of their terms guaranteed that their application would give rise to difficult or borderline cases, in which judges would have to exercise "the sovereign prerogative of choice." In exercising that prerogative, judges would be guided, consciously or not, by "views of public policy" and "considerations of social advantage." And this was as it should be, for the principles were meant only as intermediate premises designed to guide judges toward decisions in the public interest.

410. Gray, Remoteness, supra note 130, at 408.
411. Id. at 414. A "mare's nest" is "a place, condition, or situation of great disorder or confusion." MERRIAM-WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 517 (1971).
412. See Gray, Remoteness, supra note 130, at 409-14 (illustrating Gray's technique by arguing for his different notion of perpetuities law's fundamental principles with Jabez Fox).
413. See Gray, Remoteness, supra note 130 (discussing Gray and Fox's views of perpetuities law); supra text accompanying note 163 (discussing Langdell).
414. Gray, Remoteness, supra note 130, at 408.
415. Compare Holmes's comment in Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), that "general propositions do not decide concrete cases." This comment has axiomatic status in modern legal theory.

Gray wrote that after consulting the sources of the law, judges usually do not have a demonstration of their decision. See supra text accompanying note 217 (quoting Gray). I suggest this commentary referred to the establishment of fundamental principles of the law, not their application once established.

416. Grey, Legal Pragmatism, supra note 68, at 819 (internal citations omitted); see also Grey, Orthodoxy, supra note 3, at 44 (describing Holmes's views on how judges decide cases). For another instance in which Gray approaches but falls short of Holmes's modernism, see infra notes 488-92 (discussing the differences between Gray and Holmes's prediction theory of law).
Legal realists moved even further from Holmes's nascent modernism and more thoroughly denied the value of the conceptual study of law and the logical elaboration of legal rules.\footnote{417} On this point, Gray stood between Langdell and Holmes, but on Langdell's side of the divide. Not in every area of law,\footnote{418} but certainly in the "mature" areas that Gray wrote about, established conceptions and principles were more than "guidelines" and "rules of thumb"—they were premises for fairly rigorous analytical elaboration.\footnote{419} Not for every question, but for almost all questions of restraint and perpetuities law, Gray had determinate answers analytically derivable from the law's fundamental principles. Gray never indicated that other "mature" bodies of law would not be as determinate. Law may be constantly evolving, but at any one time it had a generally determinate content.

At bottom, Gray's modernist tendencies were cabined by his pre-modern views on the pace of social change, the extent of social homogeneity, and the integrity of reason. He may have believed that humans constructed their society and its laws, but he also believed that humans could faithfully depict what had been constructed.\footnote{420} Once constructed, the legal system was as much a fact as the natural world and equally discoverable.

Of course, once constructed, the principles of the legal universe, unlike the principles of the physical universe, were subject to change. Even with all judges actually behaving as they should, Gray found that the legal system had an undeniable ability to deviate from its underlying logic because of (1) honest blunders,\footnote{421} (2) unconscious and insensible alteration of principle through its application to new questions, application in altered contexts, or

\footnote{417} See Grey, Orthodoxy, supra note 3, at 45-47 (discussing the realists' critique of classical orthodoxy).

\footnote{418} See Gray, Nature (2d ed.), supra note 101, at 239-40, 259 (discussing the influence of individual judges on the common law, particularly Justice Story's role in the development of federal common law); Gray, Rule (2d ed.), supra note 4, at ix (describing the Rule Against Perpetuities as an area of the law characterized by mathematical precision); Gray, Definitions, supra note 166, at 33 (discussing Marshall's role in early nineteenth-century constitutional law); see also Frankfurter, supra note 164, at 683 (discussing Gray's decision not to continue teaching constitutional law).

\footnote{419} I state "analytical elaboration," rather than "deductive" or "logical" elaboration to avoid, as Thomas Grey suggests, any "connotation of purely formal inference." See Grey, Orthodoxy, supra note 3, at 12 n.37 (describing "analytical elaboration").

\footnote{420} Gray was not so modern, or really post-modern, as to believe that the observer inevitably constructs the observed. See 2 Elizabeth Flower & Murray Murphy, A History of Philosophy in America 639-61 (1977) [hereinafter Flower & Murphy, Philosophy in America] (discussing the constructivist aspects of pragmatism); Gordon, Holmes' Common Law, supra note 63, at 2 (discussing pragmatism's objection to treat[ing] the world as a hard object).

\footnote{421} See supra text accompanying notes 314-20 (discussing judicial errors in applying the Rule Against Perpetuities to remote gifts to charities); supra text accompanying note 155 (discussing the normal development of the law).
simply, through application by different generations of judges who could not help but understand it differently, and (3) the power of courts of last resort to consciously overrule or depart from precedent.

It was the business of the legal scholar to indicate when these deviations occurred and integrate them into a systematic discussion. But it was beyond the legal scholar's ken to foment or predict them. The legal scholar's task, in his doctrinal writing, was to mirror legal reality. Through historical, analytical, and ethical study, scholars were to identify the principles that underlay the course of precedent. Having identified and clarified the relevant principles, scholars were to explicate the law through a systematic presentation that revealed how the precedents reflected the principles' logic and lapsed from their logic, reflected their policy and lapsed from their policy. If for Langdell, law was logic, and for Holmes, law was experience, for Gray, law was both logic and experience. Gray conceived a classical jurisprudence whose content was embedded in social mores and morals.

IV. ACCOUNTING FOR JOHN CHIPMAN GRAY'S ORTHODOXY

In 1869, John Chipman Gray renewed an intimate correspondence with Mary Temple, a James family cousin. Frequently confined to bed, but

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422. See supra text accompanying note 225 (discussing unconscious changes in precedent); supra text accompanying notes 343-44 (discussing the proper way to apply Quia Emptores to open questions).
423. See supra text accompanying note 210 (discussing judicial power to overrule precedent).
424. Over time, the accumulation of deviations might result in a substantially different system. See, e.g., Gray, Definitions, supra note 166, at 21 (indicating that contract, tort and other legal terms were defined differently in the past); supra text accompanying notes 307-11 (stating that perpetuities law was not based on remoteness before the late-seventeenth century). Even jurisprudence was properly defined differently in the past. Gray, NATURE (2d ed.), supra note 101, at 141. In general, Gray believes that "[s]o long as the object of knowledge is alive, there can be no final definitions." Gray, Definitions, supra note 166, at 21.
425. The legal scholar might suggest legislative surgical strikes to correct deviant precedent or interdict the logical elaboration of legal principle when such logical elaboration results in undesirable social consequences. See supra text accompanying note 262 (Gray's suggesting legislative improvement of a point of restraint law).
426. There is an obvious affinity between Gray's jurisprudence and Holmes's prediction theory of law. See infra text accompanying notes 479-82, 488-92 (discussing the similarities and differences between Holmes's and Gray's prediction theories of law).
427. The correspondence consists of twenty-seven letters preserved in Harvard's Houghton library, written between January 7, 1869 and January 27, 1870. Mary Temple died of consumption, at the age of twenty-four, in early 1870. Gray returned her letters to the family shortly after her death. Gray's letters are not part of the collection. See Letters from Mary Temple to John Chipman Gray (1869-1870) (on file at Houghton Library, Harvard University, bMS Am. 1099.12). That Gray renewed a prior correspondence that had been broken off earlier is evident from the first letter in the collection, Letter from Mary Temple to John Chipman Gray (Jan. 7, 1869).
apparently unaware she was dying of tuberculosis, Ms. Temple appreciated her exchanges with "Mr. Gray," as she called him, because unlike her other friends and relations, he provided a sympathetic and interested ear to her thoughts on serious questions. At times, however, she expressed frustration at her limited knowledge of him. "You are so unegotistic," she wrote, and "talk so little about yourself, that it is hard to know the things which really do interest you most deeply." She knew his views "about the middle things of life . . . Law, Politics, etc." that "you speak of," she chided. Despite invitations to address them, Mary Temple's interest in Gray's fundamental beliefs was never satisfied. Our similar interest also may remain unrequited.

John Chipman Gray was a reticent and circumspect man, a keen observer of the passing scene, and a trusted counselor with a reputation for listening more than he spoke. He resisted Mary Temple's importuning to give voice to his deepest thoughts. Perhaps not by coincidence, Gray's papers do not survive. Only to a limited extent can we glean his deepest thoughts from the record we have. With these constraints in mind, I suggest that an understanding of Gray's legal thought must take the following three factors into account: (1) his religious and ethical skepticism, (2) his "old conservative" convictions, and (3) his nascent pragmatism.

A. GRAY'S RELIGIOUS AND ETHICAL SKEPTICISM

Gray lived at the time when elite thought in America substantially shifted its grounding and modes of explanation from religious to secular assumptions. He was part of that transition. In the late-nineteenth century, most judges, lawyers, and legal scholars maintained traditional religious convictions in their daily lives and generally grounded their jurisprudence in them. The Harvard Law faculty of Gray's day broke from this conventional

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428. Mary Temple was one of the models for Milly Theale, the consumptive heroine of Henry James's novel The Wings of the Dove. See JEAN STROUSE, ALICE JAMES: A BIOGRAPHY 101 (1980) (stating that "Minny" was Mary's nickname).

429. She wrote frequently about her religious faith, philosophy of life, literature, and assertive (read unfeminine) behavior.

430. Letter from Mary Temple to John Chipman Gray (Dec. 12, 1869), supra note 427.

431. Id.; see also Letter from Mary Temple to John Chipman Gray (June 27, 1869), supra note 427.

432. See, e.g., Letter from Mary Temple to John Chipman Gray (Jan. 7, 1869), supra note 427 (responding to Gray's renewed correspondence, Temple says "You must write to me and tell me something that your are sure is true. I don't care much what it is, & I will take your word for it").


434. See, e.g., PRZYBYSZEWSKI, REPUBLIC, supra note 15, at 44-72 (discussing John Marshall Harlan's religious involvement); Przybyszewski, Brewer, supra note 8; Siegel, Bishop, supra note
Gray and his colleagues did not mix theology with their doctrinal and jurisprudential writing. The secular jurisprudence of most of Gray's colleagues contrasts with their continued religious faith and their continued involvement in religious activities and institutions. Langdell, for example, was a senior warden and "devoted worker" in Cambridge's Episcopal Grace Church. Thayer and Ames were active in the Unitarian Church. However, Gray's secular jurisprudence reflects the total absence of piety and religious involvement in his daily life.

Gray's Civil War correspondence with John Ropes, his close friend and eventual law partner, shows a broad, but critical and skeptical, familiarity with religious literature and theological disputes. That Gray specifically asked Ropes not to reveal Gray's opinions to the Gray family, who adhered to the Calvinist branch of Congregationalism, suggests Gray's movement

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7; Siegel, Historism, supra note 15; Siegel, Three Tenors, supra note 7. Professor Przybyszewski tells us, for example, that John Marshall Harlan, United States Supreme Court Justice from 1877 until his death in 1911, taught Sunday school Bible classes from around the time of his marriage, which was in 1856, until his death. He also taught a constitutional law class at Columbia University which emphasized God's providential plan for America. PRZYBYSZEWSKI, REPUBLIC, supra note 15, at 46-48.

435. The Law School's drift reflects the larger University's movement under President Charles Eliot, whose ideal was a secular and scientific university that, nonetheless, was not harmful to religion. See Hugh Hawkins, Between Harvard and America: The Educational Leadership of Charles W. Eliot 120-38 (1972); Chase, supra note 10 (discussing Eliot's role in the reform of the Law School).

436. See, e.g., Horwitz, Transformation, supra note 40, at 177, 199; Siegel, Bishop, supra note 7, at 253.

437. Dean Langdell regularly attended Christ Church, an Episcopal church, near Harvard Square. He served as a Senior Warden, and there now is a plaque of him in the Church's historic structure. Langdell's wife was the daughter of an Episcopal minister. A typescript history of the Church describes the Langdells as "devoted workers" in the Church. Gardiner Day, The Biography of a Church: A Brief History of Christ Church, Cambridge 85 (1951); see also Samuel Batchelder, Bits of Harvard History 321-22 (1924); Telephone Conversation with Richard Whittington, Christ Church Parish Administrator (Aug. 30, 2000).

438. Professor James Bradley Thayer was active in the Unitarian Church. See Tribute of the Colonial Society of Massachusetts to James Bradley Thayer 20 (1902) (noting Thayer's involvement in the Unitarian Church); Will of Sophia Bradley Thayer, 1912, JBT Papers, File 25-4 (bequeathing a substantial sum to the Unitarian Church of Bar Harbor, Maine "in living memory of my husband who was so much interested in its welfare"). I thank Professor Bruce Kimball for these citations.

On Ames, see Memoir of James Barr Ames, supra note 14, at 3, 7, 26 (crediting Ames with setting the mainstream style of Socratic teaching).

439. See John Chipman Gray & John C. Ropes, War Letters, 1862-1865 at 32, 200-01, 221, 492, 504 (1927) [hereinafter GRAY & ROPES, WAR LETTERS] (referring to a variety of religious topics Gray and Ropes discussed in correspondence); see also Gray, John Chipman Gray, supra note 105, at 19 (mentioning theology among the topics which Gray read during the war years). Gray's letters show him inviting discussion of theological topics, but I suspect this may have been due to his affection for Ropes, who was more religiously involved. See infra note 443 (discussing Ropes).
towards a religious stance they would not find acceptable.449

Whatever the religious leanings of the young Gray, the fact is that there are no references to God or divine matters in any of his professional writings. The religious references in his personal writings seem due more to the interest of his interlocutor than his own. To Gray, the Bible was a "trite" book;441 Socrates, not Jesus, was "[t]he greatest teacher the world has ever known."442 In the plethora of eulogies and memoirs of Gray's life, there is not a single mention of any connection with any religious institution or comment indicating Gray had any involvement with religion.443 This is startling, given Gray's prominence in the Boston community and his Brahmin connections. He was active in innumerable societies and trustee of many institutions. None of them were religious institutions.444 Religion does not seem to have been a factor in Gray's belief system. 445

440. GRAY & ROPES, WAR LETTERS, supra note 439, at 38, 173-76 (referring to Gray's own perceptions that his views would "shock" others as "heretical opinions"). Gray's half-brother, Supreme Court Justice Horace Gray, was a practicing Episcopalian and a member of Trinity Church in Boston. See Samuel Williston, Horace Gray, in GREAT AMERICAN LAWYERS 139, 164 (William Draper Lewis ed., 1909).

If Gray had any favorable view of organized religion, it would be a religion that appealed to the intellect rather than the emotions. See Letter from Mary Temple to John Chipman Gray (Dec. 12, 1869) (Houghton Library, Harvard University, bMS Am.1692.12) (indicating that Gray does not care for Philip Brooks's preaching because "it is all feeling & no reason," and that Gray trusts "the conclusions arrived at by . . . Intellect").

441. Letter from William James to Harry and Alice James (Oct. 14, 1888), quoted in RALPH PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES: BRIEFER VERSION 174 (1948) ("[Holmes has] just been reading the Bible through, and as John Gray says, it's a great thing to have a virgin mind turned on to so trite a book").

442. Gray, Cases, supra note 116, at 763. The article says the "greatest teacher the world has ever known was fond of comparing himself to a midwife." Id. That was Socrates. See PLATO, THEAETETUS 149-51 (noting Socrates's comparison of himself to a midwife). By coincidence, Gray made this remark in an article on legal education responding to an earlier article written by Joel Prentiss Bishop.

Gray's secular attitude is also illustrated by the reputation he had for working seven days a week, even on Christmas, at either Harvard or his firm. See CARL BRAUER, ROPES & GRAY 1865-1990, at 2 (1991) [hereinafter BRAUER, ROPES & GRAY] (discussing Gray's work habits).

443. In contrast, Gray's friend and partner, John Ropes, was interested in religious controversy, was an active Episcopalian, and held various offices in the Trinity Church in Boston. See BOYDEN, ROPES-GRAY, supra note 433, at 140-41; BRAUER, ROPES & GRAY, supra note 442, at 12, 38, 56, 129, 173-76, 221, 224, 235, 325, 396, 386-87, 399, 498. Gray's wife was the daughter of Charles Mason, Rector of Grace Church, an Episcopal Church in Boston. NATIONAL CYCLOPAEDIA, supra note 88, at 206.

444. See supra text accompanying notes 99-100 (discussing Gray's community involvement), Gray had religious institutions, such as St. Paul's Church and Trinity Church, among his many clients. Gray, John Chipman Gray, supra note 105, at 25.

445. Consider that Gray, suffering from his last illness, recited grammar conjugations and declensions, not catechisms, to get to sleep. See Letter from John Chipman Gray to Mary (Williams) Winslow (n.d.) (Houghton Library, Harvard University, Autograph file). Contextual evidence leads me to date this letter to 1914, as did the Houghton staff, which penciled 1914 on the letter.
Concomitant with the absence of religion in Gray's belief system was his skepticism that humans had any insight into moral reality. Gray did not deny or affirm the existence of moral reality. Given his position on the importance of morals to legal development, Gray believed that "the true theory of morals comes within Jurisprudence." Indeed, he believed "the test selected for determining the morality of a course of conduct, and therefore, the propriety of a decision, is theoretically of the first importance." Nonetheless, Gray always demurred from selecting the "true test of morality" from the contending utilitarian, moral sense, Kantian, theistic, and naturalistic schools. "The conscious adoption of one test rather than another by a judge," he said, is not of so much practical consequence as might at first be supposed, for, by a familiar principle of human nature, when a man thinks that a thing ought to be done, he will not find it difficult to make it stand all the tests of morality that may be applied, and he will come to the conclusion that the greatest happiness of the greatest number, the dictates of conscience, the will of God, the Freedom of the Will, and Nature, unite in demanding it.

In other words, and of extraordinary significance in the history of legal thought, when Gray said that on open questions, judges follow their own notions of morality, he meant just that. Judicial notions of morality were not the prompting of a divinely implanted mental faculty of moral sense, as they were for such non-Harvard classical scholars as Joel Bishop and Francis

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If Gray maintained any religious convictions, it was a religion of intellect, not emotion. See supra note 440 (describing Gray's views on religion).

446. GRAY, NATURE (2d ed.), supra note 101, at 144; see also id. ("[O]n the definition of 'Jurisprudence,' which appears the sounder one, the true grounds of morality seem a proper subject of contemplation."); id. at 306 ("It is obvious that ... [the true test of morality] is very important for the theory of the Law").

As a positivist jurist, Gray wanted to purge legal terms, such as the word "right," of their misleadingly moral connotations and separate law from morality. See, e.g., id. at 12-13; Letter from John Chipman Gray to Justice Oliver Wendell Holmes (n.d.), microformed on The Oliver Wendell Holmes, Jr. Papers, Reel 24 (Univ. Publications of Am. Microfilm) ("I am sensible to the danger of the implication or suggestion of an ethical element in the terms Legal Rights and Duties"); Parker, Jurisprudence Notes, supra note 138, at 107 ("One of Austin's great services was showing difference between Law and Morality. For a judge Law is superior to Morality").

447. GRAY, NATURE (2d ed.), supra note 101, at 306.

448. Id. at 7, 306. Gray did point to utilitarianism as "all important in working out the details." Id. at 307. But, he immediately cut back on this endorsement by pointing to the host of unresolved ambiguities involved in pursuing utilitarian principles. Ultimately, in Gray's view, "[t]he science of ethics, whatever it may do in the future, has as yet made trifling progress in settling any practical rules for decision . . . ." Id.

449. Id. at 306-07.
Neither were they expressions of a divinely fabricated "ethnic spirit," as they were for such other non-Harvard scholars as John Norton Pomeroy, William Hammond, and Thomas McIntyre Cooley.\(^{451}\) In Gray's view, the judges' preferences on questions of morality and good policy often reflected the views of their contemporaries. But whether they did or not, the judges' views were mundane: they neither came from nor necessarily reflected a transcendent moral order.

Despite his skepticism, Gray was not a post-modern ethical relativist. His arguments against spendthrift trusts were too passionate, and his belief in the then current legal order was too strong. Given his indifference to religion and skepticism toward ethical systems, where did his strongly held views come from and what belief structure justified them? I suggest Gray's strongly held views came from his "old conservative" values and nascent pragmatism.

**B. GRAY'S "OLD CONSERVATIVE" CONVICTIONS**

Morton Horwitz has suggested that "Classical Legal Thought was rooted in . . . an 'old conservative' world view, one that presumed the existence of decentralized political and economic institutions as the primary reason why America had managed to preserve its freedom."\(^{452}\) In Horwitz's view, part of the explanation for the progressive and realist jurists' break with classical orthodoxy was their realization that the modern economy was typified by large-scale, market dominating enterprises, their acceptance of these new economic arrangements, and, consequently, their wish to reform the new political, social, and economic order to redress the country's growing material, social, and political inequalities.\(^{453}\)

Gray's classicism illustrates Horwitz's insight. Gray's "old conservative" political, social, and economic views helped turn his jurisprudence's seemingly modernist insights to classical ends. Gray saw the "law and the social morality" of the first three-quarters of the nineteenth century as "the

\(^{450}\) See Siegel, Bishop, supra note 7, at 238-48 (discussing Bishop); Siegel, Three Tenors, supra note 7, at 8, 23 (discussing Bishop and Wharton).

\(^{451}\) William L. LaPiana, Jurisprudence of History and Truth, 23 Rutgers L.J. 519, 537-34 (1992) (also discussing Philemon Bliss, Edward Phelps, John F. Fillon, and James C. Carter); Siegel, Historism, supra note 15, at 1456-51, 1460-64 (discussing John Norton Pomeroy); see also supra text accompanying note 180 (discussing Volksgeist).

\(^{452}\) Horwitz, Transformation, supra note 40, at 4. Horwitz's notion of "old conservatives" is meant to contrast with "new conservatives," who appreciated the newly arisen centralized economy typified by large-scale, market-dominating enterprise. Id. at 66, 77, 79.

Thomas Grey suggests thinking of Gray as a "Manchester Liberal" to emphasize that there was a cosmopolitan, trans-Atlantic culture that shared these beliefs. E-mail from Thomas Grey to Stephen Siegel (on file with author).

\(^{453}\) Horwitz, Transformation, supra note 40, at 4 (discussing the eighteenth-century conception of law); id. at 140 (discussing the relationship between the bar and commercial interests).
completion” of feudalism’s displacement by liberalism.\textsuperscript{454} To Gray,

[the foundation of that system of law and morals was justice, the idea of human equality and of human liberty. Every one was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make any agreement that he did not wish, but if a man made an agreement, the whole force of the State was brought to bear to compel its performance. It was a system in which there was no place for privileges,—privileges for rank, or wealth, or moral weakness.\textsuperscript{455}

Accordingly, Gray opposed laws favoring the wealthy as much as he opposed laws favoring labor.\textsuperscript{456} He preferred governance by well-educated, traditional elites rather than newly rich entrepreneurs or politicians catering to immigrants.\textsuperscript{457} He lived by a traditional moral code.\textsuperscript{458}

It might be that Gray’s abstract jurisprudence, focused as it was on legal development through judicial concern for morality and policy, comports with a legal system in which judges consciously refashion the law. But in practice, Gray argued that judges should not consciously remodel the inherited law. Gray’s “old conservative” social and economic views

\textsuperscript{454} GRAY, RESTRAINTS (2d ed.), \textit{supra} note 103, at viii.
\textsuperscript{455} \textit{Id.}
\textsuperscript{456} \textit{Id.} at ix.
\textsuperscript{457} Gray’s political and social stance was similar to that of Gilded Age Mugwumps. I have chosen not to describe Gray as a Mugwump given how uninvolved he was in political affairs. But, his political and social tendencies were redolent with Mugwump tendencies. Typically drawn from the old-line, well-educated, New York and New England elite, Mugwumps were gentlemen reformers. Particularly common in Boston and New York City, Mugwumps were interested in good government issues, such as civil service reform. They favored a sound currency (to the dismay of farmers) and tariff reform (to the dismay of industrialists). Generally, they equated activist government with political favoritism and corruption. They preferred, and worked for a return to, the old days when traditional elites (the better sort), rather than the new entrepreneurs, political bosses, and immigrants, ruled. Accordingly, Mugwumps were not much interested in refashioning the law to redress social and economic inequalities.

Like many Mugwumps, Gray was a scion of Boston’s wealthy and highly educated elite. He was a life-long Republican who crossed party lines to vote for Grover Cleveland rather than James G. Blaine. Though not active in politics, Gray helped lead a variety of civic institutions. There is evidence that he disliked and distrusted the new wealthy entrepreneurs of the day. In an industrializing world, Gray preferred the old ways and lived by a traditional moral code.

\textsuperscript{458} Consider that at the outbreak of World War I, Gray gave as his reason for favoring the British and French, that in 1871, he had witnessed a German officer’s ungentlemanly behavior at a French railroad station after Germany’s victory in the Franco-Prussian War. “On the [railroad] platform was a German officer walking up and down,” Gray recounted. “You would say that a man in such a position in a conquered country would have shown himself double [sic] considerate,—as did the Black Prince standing behind the French King John’s chair, but this fellow’s air was of concentrated insolence. I have always had a feeling against the German soldiers since 

Letter from John Chipman Gray to Mary (Williams) Winslow (Sept. 15, 1914) (Houghton Library, Harvard University, Autograph file), \textit{supra} note 427.
predisposed him to view the scholars' role as clarifying and systematizing, and not as amending, the law. Gray's satisfaction with the status quo and the traditional moral beliefs of his day led him to appreciate settled law. To some extent, then, Gray's conservative social and economic views helped keep the modernist tendencies of his jurisprudence within the classical fold.

C. Gray's Nascent Pragmatism

Gray's conservatism may establish his affinity for classical legal thought but it did not validate it as an intellectual system. Had Gray ever discussed his most fundamental intellectual tenets, surely they would have drawn from, and uniquely mixed, a variety of sources, schools, and traditions. The extent to which Gray's jurisprudence reflects the pragmatic philosophy that was just then germinating not only in the Cambridge of his time, but among his friends and colleagues, is striking. Gray's mind set seems a blend of pragmatic and pre-pragmatic tenets. It is plausible to suggest that Gray drew some of the ground norms of his classical jurisprudence from the tenets of early pragmatism. They were very much a part of the milieu in which he moved.

It is unclear whether Gray participated in the "Metaphysical Club" that gathered at Harvard in the 1870s and in which Chauncey Wright, Charles Sanders Peirce, William James, Oliver Wendell Holmes, Nicholas St. Jean Green and others first elaborated pragmatism as a distinctive philosophy of method, knowledge, and truth. He certainly belonged to other dining and discussion clubs with these people. He was a life-long, intimate friend of William James and Oliver Wendell Holmes. Undoubtedly, he was conversant with the direction and tenor of their thought.

459. Perhaps the root of the many distinctions between Gray's classical and Pound's sociological jurisprudence was the extent to which judges should consciously refashion legal principles. See GRAY, NATURE (2d ed.), supra note 101, at 139 n.1. Holmes may have been as conservative as Gray, but his jurisprudence was more modern because he thought judges should consciously develop law and that the law's historical development did not have any normative claims. My observation here is that Gray's conservatism only predisposed him to applying his jurisprudence as a formalist, rather than as a modernist.

460. On the genesis of pragmatism, see WIENER, supra note 63. That the early pragmatists included Gray's close friends is substantiated infra. I say "colleagues" in deference to the fact that a surprising number of early pragmatists were lawyers. Id. at 26. Among them were Oliver Wendell Holmes and Nicholas St. Jean Green, who taught for short stints at Harvard Law School.

461. Id. at 172-73.

462. Max Fisch names Gray as a participant Fisch, supra note 433, at 88. Yet, Philip Wiener says Fisch was mistaken. WIENER, supra note 63, at 249 n.5.

463. See WIENER, supra note 63, at 249 n.5.

464. On Gray, Holmes, and James, see Howe, Justice Oliver Wendell Holmes: The Shaping Years 197, 251-52 (1957).

465. Consider that Gray and John Ropes, the founders of the American Law Review, were still its editors when it published what is regarded as the first pragmatic analysis of a legal topic.
from their beliefs is another, and open, question. There are, however, striking parallels between Gray's legal thinking and basic pragmatist principles.

Early pragmatists conceived of themselves as rigorous empiricists who judged what was true not by the elegance of the intellectual system that sustained it, but by whether it worked or not; that is, by "the sum total of its possible effects on observable objects," or its "cash value." Long considered the earliest expression of pragmatism's fundamental maxim is Peirce's injunction to "consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." William James put the point more memorably when, using Biblical language to emphasize that pragmatism was "a new name for some old ways of thinking," he said: "In the end it had to come to our empiricist criterion: By their fruits ye shall know them, not by their roots.

The early pragmatists' focus on the real world effect of ideas was part of their attempt to dissolve traditional philosophical disputes by transcending them. The early pragmatists were not opposed to fashioning rigorous intellectual systems. What they opposed were intellectual systems premised on metaphysical, rather than empirical, beliefs. Metaphysical beliefs, they

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466. CHARLES S. PEIRCE, SELECTED WRITINGS 113 (Philip Wiener ed., 1958) [hereinafter PEIRCE, WRITINGS].

467. WILLIAM JAMES, *PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING* 51 (1907) [hereinafter JAMES, *PRAGMATISM*]; see also FLOWER & MURPHEY, PHILOSOPHY IN AMERICA, supra note 420, at 673-88 (discussing James's theory of truth).


469. JAMES, *PRAGMATISM*, supra note 467.

470. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 21 (Mod. Lib. ed., 1936). The phrase comes from Matthew 7:20; see also *id.* at 7:16. It became something of a stock pragmatist saying. See JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 156 (1920) (using this phrase); KARL LLEWELLYN, THE BRAMBLE BUSH 91 (1930). Although Professor Speziale does not quote anyone who uses the phrase, her recognition of its stock quality is evident from the title of her article: Marcia Speziale, *By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law*, 9 MINIOTA L.J. 29 (1978).

471. See, e.g., JAMES, *PRAGMATISM*, supra note 467, at 43-126 (noting an exemplary pragmatist analysis of metaphysical problems); John Dewey, *The Flex Arc Concept in Psychology*, in 5 JOHN DEWEY: THE EARLY WORKS, 1882-1898, at 96 (JoAnn Boydston ed., 1972) (explaining that knowledge involves interaction between subject and object). As Peirce wrote: "Thus we come down to what is tangible and practical as the root of every real distinction of thought, no matter how subtle [sic] it may be; and there is no distinction of meaning so fine as to consist in anything but a possible difference in practice." PEIRCE, WRITINGS, supra note 466, at 123.
held, were beliefs that were not subject to empirical testing; beliefs were
metaphysical when adhering to the opposite belief would not affect anything
in the real world. Early pragmatism was dedicated to transcending
philosophy's long-standing, endless metaphysical disputes by associating
truth with testable observation.

Gray conceived his jurisprudence as satisfying these pragmatist tenets.
There is a decidedly antimetaphysical, empirical cast to Gray's thought. He
defined law as "the rules of conduct laid down and applied by the courts" to
present law as an existent fact rather than a metaphysical entity. Despite
the obviously large role of historical analysis in his jurisprudence, he
derided Savigny's historical school of jurisprudence for premising itself on
belief in a "Volksgeist." The "Volksgeist," Gray complained, rests on a
fiction. "There is no such thing in rerum natura as a Volksgeist having real
consciousness and convictions . . . [it is] a non-existent entity." Gray
presented himself as a teacher who appreciated educational systems not for
their elegance but because of their success in training students. "Not by their
systems but by their fruits shall ye know them" he wrote when defending
Harvard's "case system" of legal instruction.

Gray's jurisprudence also has a pragmatic cast because it is a theory for
the professional lawyer, a theory for counsel arguing cases and advising
clients. In large measure, Gray's jurisprudence is a "prediction theory" of
law. Scholars commonly regard Holmes's assertion that "[t]he prophecies of
what courts will do in fact . . . are what I mean by the law" as the first
sustained expression of legal pragmatism. There is an obvious affinity

472. GRAY, NATURE (2d ed.), supra note 101, at 102; supra text accompanying notes 136, 168 (discussing Gray's definition of law).
473. See, e.g., GRAY, NATURE (2d ed.), supra note 101, at 94 ("[T]he Law of a State . . . is not an ideal, but something which actually exists . . . it is not that which ought to be, but that which is.").
474. Indeed, I argue that Gray was among the last historical jurists. See infra text accompanying notes 499-500 (discussing "historist" jurists).
475. See GRAY, NATURE (2d ed.), supra note 101, at 89-91, 299-300.
476. Id. at 299-300.
477. Gray, Methods, supra note 14, at 161.
478. See Gray, Definitions, supra note 166, at 26-27 (discussing the importance of jurisprudence); Grey, Legal Pragmatism, supra note 63, at 826-27, 835-36 (discussing the pragmatic cast of Holmes's jurisprudence). Harvard's students seem to have recognized Gray's professional approach to law and his focus on law as an existent fact rather than as a metaphysical system. As a popular turn-of-the-century student ditty ran:

If you want to know what the law used to be, ask Langdell; if you want to know what it is going to be, ask Beale; if you want to know what it ought to be, ask Ames; but if you want to know what the law is, ask Gray.

BOYDEN, ROPES-GRAY, supra note 433, at 153.
479. Holmes, Path, supra note 400, at 461.
480. See supra text accompanying note 468 (quoting Peirce's maxim); see also Fisch, supra note 433, at 94 (discussing the prediction theory of Holmes); Grey, Legal Pragmatism, supra note
between Gray's jurisprudence and Holmes's views, especially given what Holmes wrote in 1872 when he first stated his ideas. "The only question for the lawyer," Holmes wrote,

is how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered.\footnote{481}

Holmes's short essay suggests both Gray's judge-centered notion of law and his belief in separating law from its sources. At least one scholar has described Gray's \textit{The Nature and Sources of Law} as the "definitive\ldots\ldots elaboration" of Holmes's insight.\footnote{482} Pragmatic assumptions may also account for the central role Gray accorded widespread judicial agreement in settling law and his preference for the common law's current crop of substantive

\footnotetext[481]{Holmes, \textit{Book Notice} (1872), \textit{ supra} note 175, at 724.}

\footnotetext[482]{Fisch, \textit{ supra} note 433, at 94-95. Gray's elaboration of Holmes's insight may have been an instance of unconscious parallelism. Despite their intimacy, Gray seems not to have been aware of Holmes's "prediction theory" of law until 1914. See Letter from John Chipman Gray to Oliver Wendell Holmes (n.d.), \textit{microformed on THE OLIVER WENDELL HOLMES, JR. PAPERS, Reel 24 (Univ. Publications of Am. Microfilm). Although the letter is not dated, circumstantial evidence, such as handwriting and other letters, clearly dates the letter as written in 1914. More likely, Gray had earlier been well aware of Holmes's theory, not only because Holmes wrote about it in 1872 and 1897, see \textit{ supra} text accompanying note 479, but also because he mentioned it in a letter to Gray in 1909. See Letter from Oliver Wendell Holmes to John Chipman Gray (Nov. 3, 1909), \textit{microformed on THE OLIVER WENDELL HOLMES, JR. PAPERS, Reel 24 (Univ. Publications of Am. Microfilm). Perhaps, by 1914, illness had taken its toll on Gray's memory, and he was merely asking for a reminder of where Holmes had addressed the subject. Nonetheless, the affinity between Holmes's view and Gray's is such that when Gray's attention was drawn to the theory, when he belatedly read the \textit{Path of the Law} speech in 1914, he wrote Holmes:

what you say\ldots disposes me to define the Law of a community as the general rules, which its judicial department \textit{will} lay down for the establishment of rights and duties and say that the determination of this will be found in the consideration of the Sources to which the judges look\ldots .
principles. Had Gray ever discussed the normative basis for these facets of his jurisprudence, he might well have tied them to the early pragmatists’ tendency to define truth as “[t]he opinion which is fated to be ultimately agreed to by all who investigate” the relevant subject matter; and to value ideas that had proven their worth in the Darwinian struggle for survival and preeminence not only within but between cultures. Nineteenth-century Anglo-American culture was, in Gray’s mind, the best and most successful culture humans had yet produced. Surely the principles which the common-law judges—who constituted the relevant community of informed inquirers—had over time agreed upon were partially responsible for its worth and success. Arguably, these tenets of early pragmatism formed the normative substratum for both Gray’s respect for precedent and his “old conservative” values.

This is not to say that John Chipman Gray was a pragmatist. That his jurisprudence reflected pragmatic tenets does not mean he was sufficiently influenced by them to place him in that philosophical camp. Gray’s pragmatism was cabined by a host of nonpragmatic assumptions. Among them, as has been discussed, was Gray’s assumption that general propositions frequently could decide concrete cases. Due to this assumption, in his doctrinal writing Gray usually approached legal questions by reasoning from broad principles and not by balancing anew the contending interests. The more philosophically pragmatic Holmes thought general propositions were guides to correct decisions that facilitated, but did not supplant, the continual need for judges to make discretionary choices among competing ends. However, Gray treated general propositions as more determinate. Accordingly, Gray’s doctrinal writing had a traditionally deductive, rather than a modern, interest-balancing cast.

Gray’s pragmatism also was cabined by the traditional sources upon which he relied in making his predictions about the judicial resolution of cases. Gray drew his predictions of judicial behavior from a limited group of sources, most of which were internal to the legal enterprise: statutes, precedent, customs, expert opinion, and judicial conceptions of morality. Holmes also confined his predictions to these sources, and for this reason,

483. *Peirce, Writings*, supra note 466, at 133; *see also* Hantzis, *supra* note 468, at 583 (discussing Holmes’s views of community); Note, *supra* note 480, at 1130, 1133 (discussing Holmes’s views of public standards).


485. *Gray, Restraints* (2d ed.), *supra* note 103, at v, viii-x (praising common law principles as fit for a “manly race”).

486. *See* supra text accompanying note 415 (discussing Gray’s use of general propositions).


488. *See* supra text accompanying note 172 (discussing Gray’s view on the sources of law).
his legal thought is not as modern as that of his intellectual heirs, the legal
realists, who argued that case outcomes turned on a broad variety of extra-
legal determinants.489 Still, Gray, as compared to Holmes, is particularly pre-
pragmatic because of the reason he gave for excluding these other sources.
Holmes refused to consider other sources because their infrequent and
random occurrence made it impossible to predict their influence on
judges.490 Gray’s explanation was different: they “are not sources which
Jurisprudence can recognize as legitimate.”491 That is, they are sources bereft
of legal and ethical sanction. Gray’s refusal to consider extra-legal sources
drew from his nineteenth-century Brahmin sense of moral appropriateness.
It was another example of the way Gray’s supposedly positive approach to
law ultimately involved a pre-modern blend of descriptive and prescriptive
accounts of judicial behavior.492

Finally, Gray’s pragmatism was cabined by his meager notion of
the constructed nature of reality. Gray believed that law was a human construct,
but he had a limited understanding of that insight. To Gray, the facts of the
world were external entities discoverable by scientific investigation. Gray
never seems to have accepted that fundamental pragmatist perception, so

489. See, e.g., FRANK, supra note 3, at 202, 249 (discussing implications of Freudian
psychology); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE
(1995) (discussing implications of social science); Grey, Orthodoxy, supra note 3, at 45-47
(discussing legal realism).
490. See supra text accompanying note 481 (discussing influences on judges).
491. GRAY, NATURE (2d ed.), supra note 101, at 290.
492. In other words, although Holmes’s “prediction theory” of law is taken as an early
expression of legal pragmatism, not all “prediction theories” are pragmatic.

All “prediction theories” of law are somewhat pragmatic because they have a concern
for the needs of legal professionals and their clients, but they are not, for that reason, examples
of the philosophy of pragmatism. Whether a prediction theory of law is philosophically
pragmatic depends on the set of assumptions of which it is part. Even if it works, a
jurisprudence that predicts judicial behavior by reading sheep entrails is not philosophically
pragmatic.

More to the point, in the 1850s, Joel Bishop elaborated a prediction theory of law
which he intended to guide practitioners in arguing cases and advising clients. See Siegel, Bishop,
supra note 7, at 225-26. Conceiving himself to be a modern positivist, Bishop drew his
predictions of future judicial pronouncements exclusively from traditional legal materials,
primarily statutes and decided cases. Nevertheless, Bishop was not a pragmatic jurist because of
the world view and philosophical system within which his positivism and prediction theory
functioned. Among his essentially nonpragmatic assumptions were the beliefs that (1) there was
a divinely ordained, eternally unchanging correct rule of law for every case; (2) judges had a
divinely implanted moral sense capable of recognizing that rule; and (3) when Bishop, through
empirical study of decided cases, discovered that rule, all judges would henceforth recognize
and apply it. Id.

Gray’s “prediction theory” approach to law was far more informed by pragmatic
assumption than Bishop’s. It was, for example, rigorously secular and evolutionary. See WIENER,
supra note 63 (discussing Pragmatism’s relation to Darwinism). Still, as argued here, the
pragmatic tendencies of Gray’s “prediction theory” were constrained by a host of pre-pragmatic
assumptions.
popularized by his friend William James, that even the facts of the world are human constructs. Gray's thinking does not reflect William James's view that reality presents itself to the human mind as a "stream of consciousness" and the mind makes choices, i.e., pays attention, to that stream based upon its purposes, interests, and needs.\footnote{See Flower & Murphey, Philosophy in America, supra note 420, at 648-52 (discussing James's views on subjective consciousness); William James, The Principles of Psychology 223-90 (Dover Publications 1950) (1890) (discussing theories on cognition and discernment).}

Gray argued that law was a human artifact, but, for example, he never went as far as his contemporary, Nicholas St. Jean Green (who was perhaps the seminal pragmatist legal scholar\footnote{On Green, see Wiener, supra note 63, at 152-71, 231-34; Fisch, supra note 433, at 89, 91-92.}) to argue that legal conceptions are variable notions whose definition and application depend upon the reason for asking. Gray may have been modern enough, as co-founder and co-editor of the American Law Review, to publish Green's article arguing that causation in law "is not a fixed and constant" and varies "according to what is the subject-matter of the inquiry."\footnote{On Green, see Wiener, supra note 63, at 152-71, 231-34; Fisch, supra note 433, at 89, 91-92.} Nonetheless, Gray's own writing never intimated such nonclassical ideas. The closest he came was in acknowledging that the term "vested interest" meant different things in constitutional law and in property. But "vested interest" had one constant meaning throughout property law's capacious domain.\footnote{Gray, Rule (2d ed.), supra note 4, at 91 n.1. And Gray never suggested varying the definition or its application even when doing so would circumvent other incorrect precedents. Two wrongs, in Gray's view, would not be a right.} Most importantly, he never suggested that he was constructing, rather than clarifying, the legal doctrines he examined in his treatises.\footnote{Gray, Rule (2d ed.), supra note 4, at 91 n.1. And Gray never suggested varying the definition or its application even when doing so would circumvent other incorrect precedents. Two wrongs, in Gray's view, would not be a right.}

Gray's jurisprudence involves, in large measure, a blend of pre-pragmatic and pragmatic tenets. There is no hard evidence that in fashioning his jurisprudence, Gray drew from the early pragmatists' view that the community of informed inquirers were the arbiters of what is true in physical and moral science. Historians must be circumspect in arguing for a particular conclusion in the absence of affirmative evidence.\footnote{Gray, Rule (2d ed.), supra note 4, at 91 n.1. And Gray never suggested varying the definition or its application even when doing so would circumvent other incorrect precedents. Two wrongs, in Gray's view, would not be a right.} It is a suggestion, however, that gives coherence to Gray's legal thought.

Whatever Gray's reasons, it is clear that Gray believed the principles and rules he culled from legal history had normative, not just positive, force. Gray was one of the last generation of what, in another paper, I have called

\footnote{See Fisch, Historians' Fallacies 47-48 (1970) (discussing the fallacy of sustaining a factual proposition with "negative evidence"); see also id. at 62-63 (discussing the need for historians to provide "affirmative" and not "negative" evidence).}
"historist" jurists. By "historist" I mean jurists who in the nineteenth century pursued historical studies as a pseudo-science capable of determining objective moral values for each of the world's particular cultures. Gray may have distanced himself from the nineteenth-century's historical school of jurisprudence because he could not accept the assumptions it made about God's role in history, the existence of a "Volksgeist," and the identification of law with custom. Ultimately, however, Gray, like the historical jurists he criticized, studied legal history not as a descriptive, but as a normative, enterprise. Gray's classical jurisprudence illustrates historical jurisprudence's last, and most secular, instantiation before it collapsed into modernity. For Gray, wisdom lay in the clarification and systemization of the traditional principles of Anglo-American law. For most post-classical jurists, wisdom lay in their renovation.

V. WAS GRAY'S VIEW OF THE MORAL BASIS OF CLASSICAL LEGAL THOUGHT SHARED BY HIS HARVARD COLLEAGUES?

Between 1870 and 1900, the Harvard Law School faculty was composed of a small group of men. In 1880, for example, the teaching staff consisted of four professors, and in 1890, there were six professors and three instructors. By 1900, the faculty had expanded to eleven professors and four instructors. Not all of the faculty were equally consequential. Some, like Oliver Wendell Holmes, Jr., taught for only a short period of time. Others, like Eugene Waumbaugh, achieved no lasting fame. Between 1870 and 1890, James Barr Ames, John Chipman Gray, Christopher Columbus Langdell, and James Bradley Thayer composed the core faculty. Between 1890 and 1900, Samuel Williston and Joseph Beale joined this elite group of educators whose names have achieved lasting currency as dominant scholars of their era and as exemplars of classical legal science. How many of this group of six were like Langdell and rather rigorously disassociated law from social mores and morals? How many, like Gray, believed that law was both classical yet premised upon, and elaborated according to, judicial views of appropriate morals and policy?


500. *See id.* at 1437-51 (describing "historism").

501. *See supra* text accompanying notes 476-77 (discussing Gray's views on the historical school).

502. *See* THE HARVARD UNIVERSITY CATALOGUE 1880-1881, at 123 (1880) (listing faculty); THE HARVARD UNIVERSITY CATALOGUE 1890-1891, at 246 (1890) (listing faculty).

503. *See* THE LAW SCHOOL OF HARVARD UNIVERSITY: ANNOUNCEMENTS, 1900-1901, at 3 (1900) (listing faculty).

504. *See, e.g., material cited supra* note 502 (listing faculty).

505. *See, e.g., material cited supra* note 503 (noting the first appearance of Williston and Beale in faculty list).
Williston was like Langdell. His writings are wholly bereft of policy
discussion. Williston's discussion of the doctrine of consideration, for
example, never concerns itself with whether there is or should be any policy
justification for what is the central doctrine of the common law of
contract. His autobiography is almost entirely devoid of jurisprudential
concerns. But no one else was so rigorously a Langdellian legal scientist.

Thomas Grey has suggested that Thayer should be considered a
pragmatist rather than a classicist. This may be an overstatement when
one considers that Thayer's ambitious lifework was cut short by premature
death. It is true that Thayer produced no work presenting a legal topic as a
geometric construct in which abstract principles were analytically elaborated
into concrete rules. He described the common law of evidence, the private
law topic with which he is most identified, as "full of good sense" but, at
present, "a piece of illogical, but by no means irrational, patchwork, not at
all to be admired, nor easily to be found intelligible, except as a product of
the jury system." Thayer's classical leanings were limited to hoping that in
the future evidence would be "taken in hand by the jurist, and illumined,
simplified, and invigorated by a reference to general principles." Unfortunately, Thayer died before he could accomplish that task. Clearly,
Thayer thought the law of evidence was a mass of practical rulings on the
problem of controlling "courts where ordinary, untrained citizens are acting
as judges of fact" and "[i]n any other aspect largely irrational."

Beale, a student of both Langdell and Gray, seems more influenced by
Gray. Beale thought "[t]he law of a given time must be taken to be the body
of principles which is accepted by the legal profession, whatever that
profession may be; and it will be agreed that the judges have a
preponderating share in fixing the opinion of the profession." He also
held that "[p]robably one of the most important [sources of law] is the
current idea of right—the moral conception of lawyers.... The judge is
constrained primarily by his idea of justice or right." A student's notes in

506. See, e.g., GILMORE, DEATH, supra note 6, at 13-17 (discussing Langdell and Holmes), id.
at 32-33 (discussing Williston), id. at 43-44 (same); WILLISTON, CONTRACTS, supra note 4, at 141-
44, 191-200 (discussing the mailbox rule and consideration); Grey, Orthodoxy, supra note 3, at 11
n.36 (indicating Williston was very insistent on objectivity and formality); id. at 12 n.39 (mentioning
Williston's objection to the Realists' use of narrow categories).
507. WILLISTON, CONTRACTS, supra note 4, at 141-44, 191-200 (discussing consideration).
508. SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY (1940).
509. Grey, Orthodoxy, supra note 3, at 34 (discussing Thayer's role in classical orthodoxy).
(1898).
511. Id.
512. Id.
513. BEALE, supra note 4, at 40.
Beale’s 1909 Jurisprudence course states:

A greater factor than ... [precedent], Beale thinks, is the current ethical thought of the time. It is much easier to go counter to a previous decision of the court, than to go counter to what the whole mass of the people think right. The court would probably not overrule expressly the former decision, but restate it in such a way as to get away from it. 515

For Beale, the common law was “an ideal system, the fountainhead from which the law of each common law country is derived.” 516 He came as close as anyone to understanding the common law as composed of principles that transcended the actual principles upon which any particular common law jurisdiction premised its decisions. 517 Yet these transcendent principles grew from “an effort of the people to express its idea of right.” 518 Beale described a law that was both rigorously systematic, remorselessly classical, yet grounded in social mores and morals.

Even James Barr Ames, who was, in many ways, Langdell’s foremost protege, dissented from his mentor’s view of the relation of law and morals. Ames’s contemporaries, those who knew him best, spoke of him as afflicted with the Langdellian habit of accounting for cases with principles of which “the judges had been profoundly unconscious.” 519 But in Ames many thought this an endearing quality because it was an expression of his “insistence on the ethical aspect of the law” and on “mak[ing] legal principles produce just results.” 520 Ames, they said, “never allowed his reverence for the doctrine that had been long established to blind him to the nature of the moral principle that lay behind the doctrine.” 521

When asked by Harvard Law School students to write the lead article for the inaugural volume of their student-edited law review, Ames responded with an article accounting for the intricacies of “Purchase for Value Without Notice” with the principle that “a court of equity will compel the surrender

515. Id. at 268 (quoting Hale’s notes); see also Joseph Beale, The Development of Jurisprudence During the Past Century, 18 HARV. L. REV. 271, 272 (1905) [hereinafter Beale, Development] (“The spirit of the time molds and shapes its law, and shapes its manner of thought and the whole of its life. For law is the effort of a people to express its idea of right; and while right itself cannot change, man’s conception of right changes from age to age, as his knowledge grows.”).

516. Samuels, supra note 514, at 263.

517. Note that I do not describe these principles as “transcendent principles” in order to avoid the suggestion that Beale attributed them to a divine source.

518. Beale, Development, supra note 515, at 272. Given that Beale taught and wrote into the 1930s, and lived until 1943, I understand him as perhaps the last “historist” jurist. See Siegel, Historism, supra note 15 (discussing historism).

519. Memoir of James Barr Ames, in LECTURES ON LEGAL HISTORY 3, 17 (1913) (crediting Ames with setting the mainstream style of Socratic teaching).

520. Id.

521. Id. at 12 (quoting George Kirchway, James Barr Ames, 10 COLUM. L. REV. 185, 188 (1910)); see also Kirchway, supra, at 188 (stating that Ames considered law as “it ought to be”).
of an advantage by a defendant whenever, but only whenever, upon ground of obvious justice, it is unconscientious for him to retain it at another's expense.\textsuperscript{522} Giving voice to the moral code of a Yankee gentleman, Ames observed:

If [a purchaser] acquired the title with notice of another's equity his acquisition was dishonest, and he must, of course, surrender it. If he gave no value, though his acquisition was honest, his retention of the title, after knowledge of the equity, is plainly dishonest. If he gave value, and had no notice of the equity, it is eminently just for him to keep what he has got.\textsuperscript{523}

In a later article, Ames specifically disagreed with Langdell's views about "consideration" in contract law. Accepting Langdell's theory that consideration required only a detriment to the promisee, Ames argued "detriment" should be given "its widest interpretation" and include "any act or forbearance or promise, by one person given in exchange for the promise of another."\textsuperscript{524} Langdell, Williston, and many others did not accept this view. They thought, for example, that promises to perform a pre-existing contractual duty did not amount to a legal detriment.\textsuperscript{525} Ames met their objection by arguing, first, from authority: "these writers seem not to have considered the early decisions adverse to their doctrine, that there is not a vestige of authority in its support prior to 1828, and that there is no English decision in its favor since that date."\textsuperscript{526} But then he turned to a long policy analysis of the rationale of the Langdell-Williston position. The reason for their position was that promising to do something one is already bound to do "can in contemplation of law produce no fresh...detriment."\textsuperscript{527} Ames argued at length that courts could not pretend to measure or value the "adequacy of a consideration," and concluded the article by saying:

It is clear that this innovation of the nineteenth century, by which the courts assume to determine the value of an act irrespective of the value set upon it by the parties, is not a success. It breaks up reasonable bargains, and cumbers the law with unreasonable distinctions. It is not yet too late to abandon this modern invention and to return to the simple doctrine of the fathers, who found a consideration in the mere fact of a bargain, in other words, in any

\textsuperscript{522} James Barr Ames, Purchase for Value Without Notice, in Lectures on Legal History 253, 255 (1913).
\textsuperscript{523} Id.
\textsuperscript{524} James Barr Ames, Two Theories of Consideration, in Lectures on Legal History 323, 323 (1913).
\textsuperscript{525} See id. (discussing theories of legal detriment), id. at 348 (same), id. at 350 (discussing Langdell and Williston's positions on case law involving consideration).
\textsuperscript{526} Id. at 350.
\textsuperscript{527} Id.
act or forbearance given in exchange for a promise. This rule gives
the formality needed as a safeguard against thoughtless gratuitous
promises, meets the requirements of business men, and frees the
law of consideration from subtleties that serve no useful purpose.*

Late in life, Ames generalized the approach implicit in his writings in an
article entitled "Law and Morals."† Composed just two years before Ames' 
death and given as a speech for the Cincinnati Law School's seventy-fifth
anniversary celebration, "Law and Morals" reads as Ames's reflective, last
testament to his scholarly life. Ames acknowledged that the early law was
"formal and unmoral."‡ After giving copious illustrations of the point,
Ames averred that "the unmoral character of the early common law exhibit
that law in its worst aspect, as an instrument of injustice."§ With this, he
turned to "consider how these defects in the law were cured"∥ and
thereafter reviewed many illustrations of ameliorating doctrines brought
about by the infusion of ethical considerations and good public policy into
the law. He concluded the article with the affirmation:

It is obvious that the spirit of reform which during the last six
hundred years has been bringing our system of law more and more
into harmony with moral principles has not yet achieved its perfect
work. It is worthwhile to realize the great ethical advance of the
English law in the past, if only as an encouragement to effort for
future improvement. In this work of the future there is an
admirable field for the law professor. The professor has, while the
judge and practicing lawyers have not, the time for systematic and
comprehensive study and for becoming familiar with the decisions
and legislation of other countries. This systematic study and the
knowledge of what is going on in other countries are indispensable
if we would make our system of law the best possible instrument of
justice. The training of students must always be the chief object of

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528. Id. at 353. Note that here Ames gives a policy basis for the doctrine of consideration,
one that anticipates Professor Fuller's analysis in Lon Fuller, Consideration and Form, 41 COLUM.
L. REV. 799, 814-24 (1941). Langdell and Williston were content to attribute the consideration
doctrine to the happenstance of legal history and presented it as bereft of grounding in policy.
See LANGDELL, SUMMARY, supra note 19, at 59-61 (discussing the origin of the consideration
doctrine); WILLISTON, CONTRACTS, supra note 4, at 191-94 (same).

529. For other articles where Ames attributes legal development to ethical and policy
considerations, see James Barr Ames, The Origin of Uses, in Lectures on Legal History, supra
note 14, at 233 (discussing the moral basis of the development of uses in English law); James
Barr Ames, Can a Murderer Acquire Title and Keep It?, in Lectures on Legal History, supra note
14, at 310 (reprinting 45 AM. L. REG. 225 (1897)).

530. Id. at 435.

531. Id. at 441.

532. Id.
the law school, but this work should be supplemented by solid
contributions of their professors to the improvement of the law.533

Clearly, by “improvement of the law” Ames meant something more than its
systematization, though he prized that quality as well. By “improvement,”
Ames meant the law’s moral uplift.534

Ames’s contemporaries were correct to eulogize him as someone whose
mind had a conservative cast, a reverence for precedent, a passion for the
law’s systematization, and an ability to reconcile cases according to
principles unrealized by the judges who decided them.535 But central to the
many reasons why Ames’s contemporaries revered him was the fact that the
principles Ames discerned in the common law tended to have a moral
timbre. “The truth,” said George Kirchway, “is that to [Ames] law and justice
were one and the same and that... this mental attitude sometimes led him
to lift... legal doctrine to the height of his own morality.”536 Although Ames
“was not a law reformer, if by law reform is meant a marked departure from
the course traced by previous legal development,”537 he “never allowed his
reverence for the doctrine that had been long established to blind him to
the nature of the moral principle that lay behind the doctrine.”538 Like all
classical legal scholars, Ames believed in the separation of law and morals.
But for Ames, a rational system of law required a moral basis as well as a
logical form.

In sum, the Harvard Law School faculty of 1870 to 1900, much of its
“golden age” by some accounts,539 was composed of a small group of brilliant
legal scholars with diverse views on many issues. Not all, but the majority,
and certainly the core, of the faculty shared the tenets of classical legal
science, which they developed in disparate ways. That law was not identical
with morals, they all agreed, but on the rigor and completeness of the
separation, there was a range of opinion.

In many ways, John Chipman Gray had a unique understanding of
classical legal science. He placed emphasis on certain shared tenets that
other classical scholars downplayed and elaborated them in a manner that
was his own. But on the separation of law from social mores and morals, and
the role of morals in legal analysis and legal development, there is good
evidence that far more Harvard faculty stood on Gray’s side of the issue than
Langdell’s. Unlike Langdell, most Harvard faculty conceived law as a moral,

533. Id. at 451-52.
534. As always, morals include good policy.
536. Kirchway, supra note 521, at 188, quoted in LECTURES ON LEGAL HISTORY, supra note 14, at 12.
537. Id.
538. Id.
539. Memoir of James Barr Ames, in LECTURES ON LEGAL HISTORY, supra note 14, at 3, 8.
as well as a formal, science.

VI. CONCLUSION

John Chipman Gray's jurisprudence was a blend of classical and post-classical elements. Gray, it is fair to say, took classical orthodoxy to the verge of modernism. But, in the end, Gray sufficiently cabined his modernism with a host of pre-modern assumptions so that, ultimately, his legal philosophy stayed within the classical fold. As a result, his doctrinal treatises, which exemplify his jurisprudence, are masterpieces of classical legal culture.

Admittedly, the unique mixture of elements in Gray's legal thought did not, in all regards, typify Harvard's strand of classicism. Personally, Gray was less religious than his colleagues and more engaged in active legal practice. Jurisprudentially, he was more judge-centered, more insistent on describing the law as it was rather than as it should be, and more willing to acknowledge that not all areas of the law met the norms of classical legal science. In other ways, he was much like his compeers. His moderately conservative social and political stance and his desire that law be a predictable "guide to conduct" that promoted self-governance were typical. So, too, was his belief that legal scholars should study appellate cases to systematize the law, to induce its fundamental principles, and to logically elaborate the principles into a myriad of bottom-level rules.

Among the beliefs Gray shared with most of his Harvard colleagues was the belief that law grew from, and reflected, social mores and morals, and that law was both formal and moral. Moral considerations and policy arguments were among the ways that John Chipman Gray and most of the late-nineteenth century Harvard faculty elaborated legal principle into bottom-level rules. For Gray and most Harvard faculty, the law's established policies and moral preferences were a vital part of what gave the law its geometric structure and determinate content.

Understanding that most Harvard Law School scholars during the classical era thought law was intimately connected with morals sheds new light on what they meant when they insisted that law and morals were separate. They meant that law and morals were not entirely consonant, and that practical constraints on the law made it diverge from sound ethics. The law, they thought, was not "the art of what is good and equitable;" it was not an idealist pursuit. In separating law from ethics, the Harvard faculty meant that law was a "fact" waiting to be discovered and that jurisprudence

540. See supra text accompanying notes 437-45 (discussing the Harvard faculty's religious involvement).
541. See supra text accompanying notes 217, 513, 519 and supra note 478 (comparing the Harvard faculty's jurisprudence).
542. See, e.g., Gordon, Legal Thought, supra note 27 (discussing classicists' desire for certainty in the law).
was a positive science. They also believed that when the law used terms which came from moral discourse (terms like negligence or fraud), legal scholars should turn to judicial precedents for the terms' definitions and not to treatises on moral science. But, in separating law from morals, most Harvard faculty did not mean to deny that moral and policy considerations had long been and still were vital determinants of legal principles and bottom-level rules. As the examples I have given from Gray's (and Ames's) doctrinal writings show, moral and policy arguments were frequently necessary to demonstrate the "true" application of the law's abstract concepts.

That Harvard's strand of classical legal thought embedded law in moral concerns also helps explain why Harvard came to typify classical orthodoxy. Harvard's approach to classical legal science was unique in that it was wholly secular. In 1869, Harvard's new President, Charles Eliot, set the University on a secular course, a course focused on replacing religious with scientific explanations of the universe and its diverse phenomena. Langdell's reforms at the Law School were part and parcel of Eliot's secular university.

Outside Harvard, secularization proceeded at a slower pace. Realizing the extent to which Harvard's secular strand of classical orthodoxy suffused law with morals allows us to understand two related things. First, the numerous lawyers, judges, and scholars outside Harvard who still premised their fundamental beliefs on a religious world view were classical jurists despite their theistically-grounded approaches to law. Whether a legal scholar is classical depends on his views about the legal system's comprehensiveness, completeness, formality and conceptual order.

Almost all classical scholars thought law should also be "acceptable" to the society it governed; that is, that law should be grounded in, and elaborated according to, moral considerations. It did not matter whether that morality was premised on secular or religious means of explanation.

Second, part of the explanation of classical legal science's long-standing appeal is that its analytic technique was shared by scholars with vastly differing preconceptions and fundamental tenets. Theistically-informed lawyers, judges, and scholars shared the same general jurisprudential views

544. Indeed, the common view was that the law in the past was more concerned with the observance of forms and less with morality than modern law. See James Barr Ames, Law and Morals, supra note 529, at 435, 439-41 (making this claim).


547. See material cited supra note 15 (discussing religiously-grounded classical scholars).

548. See supra text accompanying note 46 (noting Thomas Gray's analysis of classical jurisprudence).

549. See supra text accompanying note 58 (discussing the views of non-Harvard classical scholars).
and analytic technique with their secularly-informed colleagues. As America secularized, the relative populations of these two groups shifted. Classical legal thought's longevity drew from its ability to bridge the transition in American social thought from religious to secular premises. Eventually Harvard came to typify classical orthodoxy because Harvard always had been identified with its secular understanding. That Harvard grounded classical jurisprudence in secularly-informed morals not only smoothed the transition but probably allowed it to occur so seamlessly.

If the moral basis of classical legal thought sheds new light on that jurisprudence's origins and popularity, it also sheds new light on its demise. Progressive and realist jurists justified their break with classical orthodoxy by painting a caricature of that jurisprudential style. Antiformalist jurists depicted classicism as premised on a view of law as a "brooding omnipresence in the sky" and as rigorously separating law from social mores and morals. Perhaps classical lawyers, judges, and scholars should be criticized for drawing their moral principles from an agricultural, small-scale, homogeneous past that was "fading beyond retrieval." But criticizing the law for having the wrong substantive commitments is a more difficult argument, and more overtly political argument, than criticizing it for having no substantive commitments. Legal discourse has been impoverished to the extent that progressive and realist scholars masked their substantive disagreements with a methodological critique.

It was not until the second half of the twentieth century that jurisprudential movements flourished while claiming neutrality among competing substantive ends. As lawyers, judges, and scholars turn from these supposedly substantively neutral jurisprudences, or unmask their hidden political biases, it may be important to realize exactly how recently it was that law lost its concern for its moral and policy bases. Classical orthodoxy conceived law as having both an objective moral basis and a geometric form. As the belief that morals are objective decayed into a belief that morals are conventional, classicism decayed into mere formalism and was abandoned in favor of more modern jurisprudences.


551. See Horwitz, History, supra note 24, at 1829 (criticizing the New Deal Court for arguing that it was restoring the Constitution to Justice Marshall's vision rather than changing it).


553. For example, the rise of sociological jurisprudence and legal realism may be understood as reflecting the transition from a conception of law as premised on objective
Owen Fiss has recently written to praise the Lochner-era Court for having a substantive vision of constitutional law, while still condemning that vision’s content. Perhaps we should generalize Fiss’s acknowledgment. Most classical legal lawyers, judges, and scholars were well aware that their jurisprudence embodied a substantive vision. They preferred that substantive vision to all others. Indeed, classical jurists had a passion for both the form and substance of their country’s law. Ultimately, American jurists came to believe that a concern for the law’s substance conflicted with a concern for its geometric form and logical determinacy (that is, its Rule of Law-like qualities). Perhaps classical jurists did not experience this conflict because they came from a relatively homogeneous social milieu and had relatively homogeneous moral judgments and policy preferences. As a group, they tended to apply traditional, and relatively simple, moral judgments and policy preferences to an increasingly complex and culturally diverse world. Initially, the classical jurists’ ability to draw from traditional moral judgments and policy preferences was part of their strength. Eventually, it was part of their undoing. History is full of such ironies.

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morality to an understanding of law as premised upon conventional morality.

554. Fiss, supra note 24, at 12, 19, 21 (discussing the Lochner era).