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From Premodern to Modern American Jurisprudence: The Onset of Positivism

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From Premodern to Modern American Jurisprudence: The Onset of Positivism

*Stephen M. Feldman**

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I. INTRODUCTION

What distinguished premodern from modern American jurisprudence? Whereas most commentators agree that the transition from premodernism to modernism occurred around the Civil War,¹

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1. See Stephen M. Feldman, *From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court*, in Bernard Schwartz, ed., *The Warren Court: A Retrospective* 324, 329 (Oxford U., 1996) (stating C.C. Langdell's appointment as Harvard's first dean in 1870 marks the beginning of legal modernism). The following sources provide helpful historical accounts of American jurisprudence, the legal profession, and legal education. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford U., 1976); Edgar Bodenheimer, *Jurisprudence* (Harvard U., 1974); Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon, 1995); Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2d ed. 1985); Grant Gilmore, *The Ages of American Law* (Yale U., 1977); Kermit L. Hall, *The Magic Mirror* (Oxford U., 1989); James E. Herget, *American Jurisprudence, 1870-1970: A History* (Rice U., 1990); Morton J. Horwitz, *The Transformation of American Law 1780-1860*

recent writings reveal dissension regarding the nature of antebellum and postbellum jurisprudence. In a wonderfully detailed study of Christopher Columbus Langdell, his jurisprudence, and his case method of teaching, William P. LaPiana argues that a defining feature of Langdell's postbellum legal science was a positivism that contrasted with a natural law orientation characteristic of the earlier antebellum jurisprudence.² In a provocative critical essay, Robert W. Gordon argues to the contrary: LaPiana's emphasis on natural law during the antebellum period is exaggerated and misleading, while his stress on the positivism of postbellum legal science is "incomplete and overbroad."³

Gordon does not maintain that LaPiana totally misses the mark; rather, LaPiana's mistake is one of degree. Gordon acknowledges that Langdellian legal science was positivist and that antebellum jurists often were natural law theorists. Nevertheless, to Gordon, postbellum positivism and antebellum natural law were not features central to understanding the respective eras. Rather, Gordon finds that the postbellum period was most strongly defined by "generalizing ambitions to produce . . . a 'philosophically arranged' body of law, a rational scheme or system of abstract categories for organizing legal knowledge."⁴ The antebellum period was distin-

(Harvard U., 1977) ("Horwitz I"); Morton J. Horwitz, *The Transformation of American Law 1870-1960* (Oxford U., 1992) ("Horwitz II"); Laura Kalman, *Legal Realism at Yale, 1927-1960* (U. of North Carolina, 1986); J.M. Kelly, *A Short History of Western Legal Theory* (Clarendon, 1992); Robert G. McCloskey, *The American Supreme Court* (U. of Chicago, 1960); Perry Miller, *The Life of the Mind in America* (Harcourt, Brace & World, 1965); Edward A. Purcell, Jr., *The Crisis of Democratic Theory* (U. of Kentucky, 1973); Bernard Schwartz, *A History of the Supreme Court* (Oxford U., 1993); Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (U. of North Carolina, 1983); G. Edward White, *The Marshall Court and Cultural Change 1815-35* (Macmillan, 1988); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in Gerald L. Geison, ed., *Professions and Professional Ideologies in America* 70 (U. of North Carolina, 1983); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787 (1989); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983); M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 Am. J. Legal Hist. 95 (1986); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness*, in Rita J. Simon and Steven Spitzer, eds., 3 Research in Law & Sociology 3 (JAI, 1980); Eben Moglen, *Holmes's Legacy and the New Constitutional History*, 108 Harv. L. Rev. 2027 (1995) (reviewing Owen M. Fiss, 8 *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910* (Macmillan, 1993)); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 Harv. L. Rev. 513 (1974); Robert Stevens, *Two Cheers for 1870: The American Law School*, 5 Perspectives in Am. Hist. 405 (1971).

2. William P. LaPiana, *Logic and Experience* 5 (Oxford U., 1994).

3. Robert W. Gordon, *The Case For (and Against) Harvard*, 93 Mich. L. Rev. 1231, 1236 (1995) (reviewing LaPiana, *Logic and Experience* (cited in note 2)).

4. Gordon, 93 Mich. L. Rev. at 1236 (cited in note 3) (quoting Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of Law*, 5 Am. L. Rev. 1, 2 (1870)).

guished by jurisprudential "considerations of policy or 'convenience,' the functional needs of a commercial society."⁵ LaPiana, too, recognizes the formalistic conceptualism of the postbellum era and the policy-oriented judicial decision making of the antebellum era, but he subordinates these factors to positivism and natural law during each respective period.

In this Article, I explain and resolve the disagreement between Gordon's and LaPiana's narratives of premodern and modern nineteenth-century American jurisprudence. To do so, however, the crucial differences between premodernism and modernism in general need be set forth.⁶ A distinctive feature of premodernism was an abiding faith in nature or God as a stable and foundational source of meaning and value. Individuals and societies seemed to belong to, rather than exist separately from, nature and God. Because of this metaphysical unity, human access to meaning and value always remained immanent in ourselves and in the world. Hence, humans

5. Id. at 1252. See Gilmore, *The Ages of American Law* at 19-40 (cited in note 1) (describing the general advancement of American law in the antebellum era); Horwitz I at 2 (cited in note 1) (noting that judges began to frame legal arguments in terms of "the importance of the present decision to the commercial character of our country" and the importance to "our commercial code").

6. Some sources that helpfully discuss the transitions from premodernism to modernism include the following: Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (U. of Pennsylvania, 1983); Louis Dupré, *Passage to Modernity* (Yale U., 1983); Karl Löwith, *Meaning in History* (U. of Chicago, 1949); Richard H. Popkin, *The History of Scepticism From Erasmus to Spinoza* (U. of California, 1979); Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton U., 1979); Richard Tarnas, *The Passion of the Western Mind* (Harmony, 1991); Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (Macmillan, 1990); Eric Voegelin, *The New Science of Politics* (U. of Chicago, 1952); Stephen A. McKnight, *Voegelin's New Science of History*, in Ellis Sandoz, ed., *Eric Voegelin's Significance for the Modern Mind* 46 (Louisiana State U., 1991).

One can distinguish premodernity from premodernism, modernity from modernism, and postmodernity from postmodernism. See, for example, Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 6 (cited in note 6) (distinguishing modernity from modernism). Such a distinction, for example, can be based on the association of modernism with culture, and the association of modernity with social, political, and economic arrangements. Such distinctions, however, often collapse as cultural and social practices conjoin. Compare Steven Connor, *Postmodernist Culture* 43-50 (Basil Blackwell, 1989) (focusing on postmodernity and postmodernism); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 Nw. U. L. Rev. 1046, 1046 n.2 (1994) (discussing postmodernity and postmodernism); David A. Hollinger, *The Knower and the Artificer, with Postscript 1993*, in Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870-1930*, at 26 (Johns Hopkins U., 1994) (focusing on the ambiguity of the term modernism); Dorothy Ross, *Modernism Reconsidered*, in Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870-1930* at 1 (Johns Hopkins U., 1994) (offering distinctions between different forms of modernism and modernity).

seemed capable of directly accessing and knowing eternal and universal principles that arose from or within nature or God.⁷ The supposed existence of these principles led to distinctive conceptualizations of the temporal, so that time or history had to harmonize with the idea of the eternal and universal. In a first stage of premodernism, time was understood to be cyclical. Civilizations would rise and fall, but the eternal and universal principles remained intact; societal history amounted to recurrence.⁸ The notion that humans and societies might progress endlessly was foreign to premodern thought. In a second stage of premodernism, though, history became eschatological, progressing toward a goal.⁹ The concept of premodern progress, however, was limited and not completely within human control. Progress was understood as a movement toward the perfect realization of the eter-

7. Louis Dupré writes:

The modern question—whether intelligibility is grounded in the structure of the real or imposed by the mind—could not occur to early Greek thinkers, since both mind and reality participated in the same intelligibility. Contrary to later idealism, intelligibility resides primarily in the *kosmos*; the mind only participates in it.

Dupré, *Passage to Modernity* at 23 (cited in note 6). See Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 67-68 (cited in note 6) (suggesting that the rational order of nature revealed and reinforced the rational order of human society).

8. See generally Stow Persons, *The Cyclical Theory of History in Eighteenth Century America*, 6 *Am. Q.* 147 (1954) (focusing on the cyclical theory of history in late eighteenth-century America). Barbara Adam writes that, in this premodern conception, "nothing new enters the cycles of endless transformations." Barbara Adam, *Time and Social Theory* 85 (Temple U., 1990). Karl Löwith explains:

According to the Greek view of life and the world, everything moves in recurrences, like the eternal recurrence of sunrise and sunset, of summer and winter, of generation and corruption. This view was satisfactory to them because it is a rational and natural understanding of the universe, combining a recognition of temperal changes with periodic regularity, constancy, and immutability. The immutable, as visible in the fixed order of the heavenly bodies, had a higher interest and value to them than any progressive and radical change.

Löwith, *Meaning in History* at 4 (cited in note 6). See Robert Scoon, *The Rise and Impact of Evolutionary Ideas*, in Stow Persons, ed., *Evolutionary Thought in America* 4, 7-8 (Yale U., 1956) (explaining how Platonism and Aristotelianism were in tension with an evolutionary approach).

This cyclical view of history was evident in Thucydides's account of the Peloponnesian War: But if he who desires to have before his eyes a true picture of the events which have happened, and of the like events which may be expected to happen hereafter in the order of human things, shall pronounce what I have written to be useful, then I shall be satisfied. My history is an everlasting possession, not a prize composition which is heard and forgotten.

Thucydides, *The Peloponnesian War* (Benjamin Jowett, trans.), in Francis R.B. Godolphin, ed., 1 *The Greek Historians* 567, 576 (Random House, 1942).

9. On the development of an eschatological view of history, see Löwith, *Meaning in History* at 1-19, 60-61 (cited in note 6); Voegelin, *The New Science of Politics* at 107-32 (cited in note 6); McKnight, *Voegelin's New Science of History*, in Sandoz, ed., *Eric Voegelin's Significance for the Modern Mind* at 59, 66 (cited in note 6).

nal and universal (natural or religious) principles in an otherwise changing and unstable world.¹⁰

When premodernism gave way to modernism, the commitment to foundationalism remained intact: Modernists believed, and still believe, that knowledge ought to, and indeed must, be firmly grounded on an objective foundation. A crucial distinction between modernism and premodernism, however, lay in their respective ideas of foundations. Whereas premodernists readily accepted God and nature as foundational sources for value and knowledge, modernists rejected religious, natural, and other traditional footings and thus searched for some alternative foundation or Archimedean point.¹¹ Indeed, modernism shattered the metaphysical unity of the premodern world and replaced the unity with a duality: An autonomous and independent subject or self suddenly stood apart from an objective world.¹² Epistemological problems therefore became central to modernist philosophy and thought. Knowledge was no longer immanent in ourselves and in the world. Instead, in order to gain knowledge, the

10. G. Edward White refers to this premodern conception of progress as reflecting a "prehistoricist sensibility." White, *The Marshall Court and Cultural Change 1815-35*, at 360 (cited in note 1). For an outstanding discussion of the transformation of the concept of history from premodernism to modernism, see Löwith, *Meaning in History* at 1-19, 60-61, 207 (cited in note 6).

11. See Bernstein, *Beyond Objectivism and Relativism* at 16-17 (cited in note 6) (noting that it is the modern "philosopher's quest to search for an Archimedean point upon which we can ground our knowledge"); Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 325-29 (cited in note 1). Compare Max Weber, *Science as a Vocation*, in H.H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* 129, 139 (Oxford U., 1946) (relating the growing disenchantment of the Western world with its increasing rationalization); Stephen M. Feldman, *An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law*, 16 L. & Soc. Inquiry 205, 208 (1991) (discussing Weber's views). Nonetheless, some early modernists, such as Descartes and Newton, still saw their insights as related to religion. See Popkin, *The History of Scepticism from Erasmus to Spinoza* at 189-91 (cited in note 6) (describing Descartes's continuing belief in God); Tarnas, *The Passion of the Western Mind* at 269-90 (cited in note 6) (describing Newton's impact on theology and philosophy). Broad transitions, such as from premodernism to modernism, are often due as much to political, cultural, and religious developments as to purely intellectual concepts. For example, there is a complex relation between religion and the development of modernism. In particular, the Reformation helped generate the modernist view that tradition can and should be questioned since the Reformers attacked the traditional authority of the Catholic Church. See *id.* at 233-47 (discussing the impact of the Reformation on Europe). See generally Roger Cotterrell, *The Politics of Jurisprudence* (U. of Pennsylvania, 1989) (arguing that jurisprudential theory should be understood within its historical, political, and social contexts); Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* (cited in note 6) (emphasizing the historical and political context in telling the story of the development of modernist philosophy).

12. On the emergence of an independent reality or nature, see Dupré, *Passage to Modernity* at 178 (cited in note 6).

subject needed somehow to bridge the gap between itself and the objective world. Traditional beliefs appeared as obstacles on this bridge and thus were persistently doubted—denigrated as mere prejudices—and often had to be discarded before truth could shine.¹³ Transitions among different stages in modernism emerged as modernist thinkers struggled in various ways to overcome the central epistemological difficulties. For example, during the first stage—rationalism—pure reason or logic seemed to yield knowledge, while during the second stage—empiricism—sense experience seemed to yield knowledge.¹⁴

Partly on account of the metaphysical differences between premodernism and modernism, the concept of progress drastically changed. During the second stage of premodernism, the concept of progress developed within a metaphysically unified world: Progress denoted movement toward the perfect realization of eternal and universal principles. In the context of the metaphysical duality of the modernist world, though, progress became limitless and a matter of human ingenuity. The modernist self asserted an ostensible power to control the external world and social organization. With the modernist repudiation of religious and traditional beliefs, the social order no longer appeared predetermined or immanent. As Zygmunt Bauman observes, modernist society was like a garden: Humans rationally designed and cultivated it, nurturing some plants while eliminating others (the weeds).¹⁵ Thus, a "historicist sensibility" emerged: Be-

13. See generally Bernstein, *Beyond Objectivism and Relativism* at 127-30 (cited in note 6); Popkin, *The History of Scepticism from Erasmus to Spinoza* at 172-248 (cited in note 6); Rorty, *Philosophy and the Mirror of Nature* at 42-43 (cited in note 6); Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 91, 178-89 (cited in note 6). Thomas Grey eloquently summarizes the epistemological problem of modernism:

[H]uman knowledge of an objective, material and external world must somehow be built up from subjective and immaterial impressions and ideas occurring in an internal and intangible mental medium. How this is to be done is the "problem of knowledge," to be solved by the special philosophical sub-discipline of "epistemology"; epistemology in turn is built upon an ontology that divides the world into mind and matter . . .

Grey, 41 *Stan. L. Rev.* at 796 (cited in note 1) (citation omitted).

14. Elsewhere, I identify, in addition, third and fourth stages in modernism. The third stage is transcendentalism, when the specification of the various conditions or processes necessary for our experiences and institutions seems to yield knowledge. I call the fourth stage late crisis—when rationalism, empiricism, and transcendentalism all seem to fail, then anxiety, anger, despair, and an increased degree of creative complexity result. See Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 325-29 (cited in note 1).

15. Zygmunt Bauman, *Modernity and the Holocaust* 65, 70, 73, 91-92, 113-14 (Cornell U., 1989). Modernism, perhaps presumptuously, "boasts the unprecedented ability to improve human conditions by reorganizing human affairs on a rational basis." *Id.* at 65. Bauman adds that "the modern world [is] distinguished by its ambition to self-control and self-administration." *Id.* J.M. Kelly writes of the Enlightenment, in particular, that "the dominant note was one of

cause of human willpower and creativity, the world could continually improve.¹⁶

These general conceptions of premodernism and modernism facilitate an understanding of the transition from premodern to modern American jurisprudence. In American legal thought, the crucial distinction between the antebellum (premodern) and postbellum (modern) periods was the opposition between natural law and positivism.¹⁷ Nevertheless, natural law and positivism were not the definitive components of the respective eras. In other words, Gordon correctly asserts that before the Civil War, a practical policy-oriented approach to decision making was at least as important as natural law, and that after the Civil War, formalistic conceptualism was at least as important as positivism. Nonetheless, as LaPiana suggests, the most basic and significant dissimilarity between the two eras lay in the difference between natural law and positivism. Most important for my purposes, the opposition between natural law and positivism marks the respective periods as premodern and modern. Antebellum legal science was premodern because it retained a faith in natural law principles as the foundation of the common law system and the ultimate source of legal knowledge. Postbellum Langdellian legal scientists repudiated this premodern faith and instead began the characteristically modernist quest for an Archimedean point, a new ground for legal knowledge.

profound scepticism towards traditional systems of authority or orthodoxy (especially those of religion), and a strong faith in the power of the human reason and intelligence to make unlimited advances in the sciences and techniques conducive to human welfare." Kelly, *A Short History of Western Legal Theory* at 249-50 (cited in note 1). Compare Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 67-69 (cited in note 6) (discussing the significance of natural and social order in understanding premodernity and modernity); Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 326 (cited in note 1) (discussing the emergence of the modernist idea of human control over society); McKnight, *Voegelin's New Science of History*, in Sandoz, ed., *Eric Voegelin's Significance for the Modern Mind* at 57-61 (cited in note 6) (discussing Voegelin's critique of the self-representation of modernism, including the human control over destiny).

16. See White, *The Marshall Court and Cultural Change 1815-35* at 6 (cited in note 1) (noting the "lack of a historicist sensibility" during the 1820s). White writes that historicism is "a stance which assumes that qualitative change is a given in the course of nations." *Id.* at 374. Dorothy Ross suggests that a historicist attitude or sensibility views history as "a realm of human construction, propelled ever forward in time by the cumulative effects of human action, and taking new qualitative forms." Dorothy Ross, *The Origins of American Social Science* 3 (Cambridge U., 1991).

17. Helpful accounts of natural law include the following: Charles G. Haines, *The Revival of Natural Law Concepts* (Harvard U., 1930); Benjamin F. Wright, Jr., *American Interpretations of Natural Law* (Harvard U., 1931).

Part II of this Article explores the premodern legal science of the first part of the nineteenth century, while Part III focuses on the modernist jurisprudence of the Langdellians in the years after the Civil War. The Conclusion briefly contrasts the jurisprudence of Langdell with that of Oliver Wendell Holmes, Jr., a contemporary of Langdell. Two points should be clarified at the outset. First, this Article focuses on the mandarins of American legal thought. I discuss jurisprudential leaders such as James Kent, Joseph Story, Langdell, and Holmes, not the daily practice of law by the average attorney. And certainly, the fully developed jurisprudential musings of someone such as Story, a Harvard professor and Supreme Court Justice, differed significantly from the average attorney's notion of law. At the same time, it is worth noting that many of the jurisprudential elite of the nineteenth century, including Kent, Story, and Holmes, were scholars and judges, so their conceptions of law were at least informed by their practical experiences in deciding cases. Second, my conceptualizations of premodernism, modernism, and the various stages within those respective eras should not be taken to represent categorical distinctions or rigid demarcations in the history of American jurisprudence. Rather, I propose a narrative of nineteenth-century jurisprudence that, I believe, offers the most fruitful and persuasive manner for explicating and understanding that period.¹⁸

II. PREMODERN LEGAL SCIENCE

One of the definitive features of premodern American legal science during the late eighteenth and early nineteenth centuries was a faith in the existence of natural law principles as the foundation for the common law. In one of the first efforts to articulate an American conception of law, James Wilson in 1790 explained:

Nature, or, to speak more properly, the Author of nature, has done much for us; but it is his gracious appointment and will, that we should also do much for ourselves. What we do, indeed, must be founded on what [He] has done; and the deficiencies of our laws must be supplied by the perfections of His.

18. In other words, my conceptualization of the different stages of premodernism and modernism should not be understood as suggesting historical or structural necessities that had to occur. Rather, the stages are heuristic devices somewhat akin to Weberian "ideal types." See Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 326 (cited in note 1).

Human law must rest its authority, ultimately, upon the authority of that law, which is divine.¹⁹

The American faith in natural law was, to a great extent, inherited from William Blackstone, who first published his *Commentaries on the Laws of England* from 1765 to 1769.²⁰ Wilson and other American jurists freely relied on the *Commentaries*: George Wythe, the first American law professor, based his lectures at William and Mary on Blackstone; the curriculum of the first American law school, at Litchfield, Connecticut, was structured around the *Commentaries*; and throughout Joseph Story's tenure as a professor at Harvard, he used Blackstone as a text. Many ordinary lawyers who learned the law by reading either on their own or in law offices did little more than read the *Commentaries*.²¹ As Nathaniel Chipman bluntly stated in 1793: "[Blackstone's] *Commentaries* are the *only* treatise of law, to which the law students, in these states, have access."²² Furthermore, not only was Blackstone published in many American editions, but the earliest treatises to focus on American law,

19. James Wilson, 1 *The Works of James Wilson* 124 (Belknap, 1967). See Miller, *The Life of the Mind in America* at 164-65 (cited in note 1) (discussing the contributions of Blackstone, Wilson, and Chipman to the philosophical underpinnings of positive law). See generally Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L. J. 907 (1993) (discussing the conceptions of natural rights and natural law during the framers' generation). Wilson's *Lectures on Law* were delivered in 1790 but not published until after his death in 1804. Miller, *The Life of the Mind in America* at 141 (cited in note 1). Other leading works of early nineteenth-century American jurisprudence that I discuss in this Part include the following: James Gould, *A Treatise on the Principles of Pleading, in Civil Actions* (B & S Collins, 2d ed. 1836); Francis Hilliard, *The Elements of Law* (Hilliard, Gray, 1835) (1972 reprint); David Hoffman, *A Course of Legal Study* (Joseph Neal, 2d ed. 1836) (1st ed. published 1817); James Kent, *Commentaries on American Law* (J. Van Norden, 5th ed. 1844); Joseph Story, *Commentaries on the Constitution of the United States* (Carolina Academic Press, 1987) (reprint of Story's own 1833 one-volume abridgment of the original three-volume 1833 ed.); William W. Story, ed., *Miscellaneous Writings of Joseph Story* (Little, Brown, 1852) (1972 reprint).

20. William Blackstone, *Commentaries on the Laws of England* (Clarendon, 1765-69) (1979 reprint). See Miller, *The Life of the Mind in America* at 164-65 (cited in note 1) (discussing the influence of Blackstone's natural law orientation in America). For a helpful discussion of Blackstone's influence in America, see Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731 (1976).

21. See Miller, *The Life of the Mind in America* at 134 (cited in note 1); Nolan, *Sir William Blackstone and the New American Republic* at 761-67 (cited in note 20) (noting importance of the *Commentaries* to attorneys, especially in the frontier states). See, for example, Wilson, 1 *The Works of James Wilson* at 100, 614-16 (cited in note 19) (citing the *Commentaries* for their influence on the development of criminal jurisprudence in America).

22. Nathaniel Chipman, *Sketches of the Principles of Government* (1793), reprinted in Perry Miller, ed., *The Legal Mind in America* 19, 29 (Anchor, 1962) (emphasis added).

published during the first half of the nineteenth century, followed in the Blackstonian mold.²³

Blackstone initially wrote the *Commentaries* to promote legal education in a university setting. In so doing, he presented law as a science, a "rational science,"²⁴ that included an extensive discussion of natural law.²⁵ To Blackstone, the principles of natural law are universal and superior to positive law, including the common law. In those fields where natural law is "indifferent"—a field such "as exporting wool into foreign countries"—humans can make positive law to command or prohibit any conduct whatsoever.²⁶ But in those areas where the law of nature is "not indifferent, human laws are only declaratory of, and act in subordination to[,] [natural law principles]."²⁷

Natural law, according to Blackstone, is either revealed by God or discoverable through human reason.²⁸ For example, Blackstone asserted that the right of property originated in Scripture. The Bible declares that God gave humankind dominion over the Earth and all things upon it. Then, from the law of nature and reason, the use, possession, and occupancy of land and objects generated the concept of property.²⁹ Blackstone concluded:

Property, both in land and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of

23. See, for example, Story, *Miscellaneous Writings* at 74-75 (cited in note 19) (celebrating Blackstone). For an American edition of Blackstone, see William Blackstone, *Commentaries on the Laws of England* (William E. Dean, 1832). See Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2054, 2086-87 (1995) (discussing the influence of Blackstone on the nineteenth-century American treatise tradition). Dennis Nolan notes that the St. George Tucker edition of Blackstone "fixed the Blackstone tradition in this country." Nolan, *Sir William Blackstone and the New American Republic* at 761 (cited in note 20).

24. Blackstone, 2 *Commentaries on the Laws of England* at 2 (cited in note 20). See Nolan, *Sir William Blackstone and the New American Republic* at 735, 760-61 (cited in note 20) (discussing Blackstone's belief in law as a science).

25. Blackstone, 1 *Commentaries on the Laws of England* at 41 (cited in note 20). Blackstone states:

This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Id.

26. Id. at 42-43.

27. Id. at 42.

28. At times, Blackstone wrote of both God's revealed law and law discoverable through reason as the law of nature. Other times, Blackstone suggested that revealed law is, in effect, a higher form of natural law. See id. at 40-44.

29. Blackstone, 2 *Commentaries on the Laws of England* at 2-9 (cited in note 20).

universal law, till such time as he does some other act which shews an intention te abandon it³⁰

As previously stated, American jurists readily accepted Blackstone's natural law orientation. For example, James Kent, in his *Commentaries on American Law*, repeatedly referred to natural and universal justice, natural and unalienable rights, natural jurisprudence, and divine revelation.³¹ At least three factors characteristic of the American context contributed to this easy reception of Blackstone's natural law.³² First, natural law provided a convenient and useful justification for the adoption of the English common law in the various states of the burgeoning nation. Especially in the decades following soon after the Revolutionary War, if the common law had been understood merely as an English institution distinctive to Britain itself, then an American reliance on the common law would have seemed impolitic or even treasonous.³³ If, however, the common law arose from universal principles of the law of nature, which were revealed by God or discovered through human reason, then the common law would be legitimate everywhere, including in America.³⁴

30. Id. at 9. Perry Miller writes:

William Blackstone was a man of his century and therefore constructed his organization of the Common Law upon a premise which his age took so much for granted that he hardly needed to state it: all positive law is an endeavor to enact universal natural law. As to precisely how the Common Law, in its heterogeneity, managed to incarnate the homogeneous law of nature has been, for students of Blackstone, a subject of debate. For readers in America, however, he seemed entirely straightforward, and simply confirmed their own uncomplicated axiom.

Miller, *The Life of the Mind in America* at 164 (cited in note 1).

31. See Kent, 1 *Commentaries on American Law* at 2 (cited in note 19) (discussing natural jurisprudence and divine revelation); id. at 470 (discussing natural justice); Kent, 2 *Commentaries on American Law* at 1, 11-13 (cited in note 19) (discussing natural rights); id. at 477 (mentioning universal justice).

32. See Wright, *American Interpretations of Natural Law* at 10-12 (cited in note 17) (describing Blackstone's *Commentaries* as admirably suited to American political doctrine at the time of the Revolution). Charles G. Haines notes that a commitment to natural law lasted longer in the United States than in Europe. See Haines, *The Revival of Natural Law Concepts* at 67-71 (cited in note 17). For discussions of different conceptions of natural law, see id. at 24-27; Wright, *American Interpretations of Natural Law* at 3-4, 331-41 (cited in note 17).

33. Perry Miller, *Introduction*, in Perry Miller, ed., *The Legal Mind in America* 15, 17 (Anchor, 1962) (stating that, following the Revolution, patriots identified British common law with tyranny).

34. See Horwitz I at 4-7 (cited in note 1) (discussing the American adoption of English common law principles); LaPiana, *Legis and Experience* at 36-37 (cited in note 2) (discussing judicial use of common law concepts to decide cases); Miller, *The Life of the Mind in America* at 129 (cited in note 1) (discussing the intellectual acceptance of the common law in America). For a contemporary discussion of whether the new nation should adopt the English common law, see generally Chipman, *Sketches of the Principles of Government*, reprinted in Miller, ed., *The Legal*

Second, the idea that the common law was based on natural principles fit within the American social context of the first half of the nineteenth century. Many observers at that time still assumed that societies were naturally stratified and ordered. In the United States, despite tremendous economic changes and the spread of democracy and legal equality during this period, distinct social hierarchies remained conspicuously ingrained.³⁵ Consequently, many Americans readily accepted the notion that the common law imposed social obligations that arose naturally or customarily from one's status within society.³⁶

Third, most Americans were so deeply committed to Protestant Christianity that they were particularly receptive to invocations of natural law.³⁷ During the eighteenth century, the North American colonies and then the states (after the American Revolution) embraced either the governmental establishment of Christianity or, at a minimum, the de facto establishment of Christianity throughout civil society.³⁸ American culture was so pervasively Protestant that govern-

Mind in America (cited in note 22). Stephen N. Subrin notes: "Soon after it convened in 1774, the Continental Congress resolved 'that the respective colonies are entitled to the common law of England' After 1776, several states passed reception statutes that adopted the 'common law.'" Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 928 (1987).

35. See Douglas T. Miller, *The Birth of Modern America 1820-1850* 117-25 (Bobbs-Merrill, 1970) ("Recognizable class distinctions existed in all sections of the country and were recognized by all ranks of society."); White, *The Marshall Court and Cultural Change 1815-1835* at 19 (cited in note 1). Compare Gordon S. Wood, *The Radicalism of the American Revolution* 6-7 (Alfred A. Knopf, 1991) (emphasizing the spread of democracy).

36. See Gordon, *Legal Thought and Legal Practice*, in Geison, ed., *Professions and Professional Ideologies in America* at 84-85 (cited in note 1) ("[T]he whole society was visualized as a network of interlaced fiduciary relationships preserving hierarchies within a republican framework."). Joseph William Singer writes:

In the preclassical period during the first half of the nineteenth century, almost all of law was incorporated into the contractual model. But freedom of contract was a dim dream; rather, the market was heavily regulated by custom and law. All private relationships included implicit obligations that were enforceable by the state. These obligations varied depending on the kind of relationship involved. Almost everyone appeared to occupy a status most of the time, as master or servant, as attorney or client, as bailor or bailee, as husband or wife, as landlord or tenant. One could voluntarily enter one of the regulated relationships, but once one entered the relationship, the terms and obligations accompanying it were substantially predefined by the state through the common law. The parties had little or no power to alter the terms of the relationship by contract. In this sense, no aspect of life was conceptualized as free from state control.

The legal rules governing each of these stereotypical relationships imposed normative ideas of fairness.

Joseph William Singer, *Legal Realism Now*, 76 Cal. L. Rev. 465, 477 (1988) (reviewing Laura Kalman, *Legal Realism at Yale, 1927-1960* (U. of North Carolina, 1986)).

37. Miller, *The Life of the Mind in America* at 164-65, 206 (cited in note 1).

38. See Stephen M. Feldman, *Please Don't Wish Me a Merry Christmas: A Critical History of the Separation of Church and State* 119-74 (New York U., 1997). Theodore Dwight Bozeman,

mental church establishment was almost beside the point—it made so little difference. Even so, the Second Great Awakening, which swept across America during the first part of the nineteenth century, strengthened the Protestant pulse running through American society.³⁹ Nathan Hatch argues that the “wave of popular religious movements that broke upon the United States in the half-century after independence did more to Christianize American society than anything before or since.”⁴⁰

Jurisprudents and jurists typically considered Christianity and the common law to be closely intertwined: Christianity was a component of the common law, and the common law was based partly on Christian morality. David Hoffman, professor of law at the University of Maryland, published his first *Course of Legal Study* in 1817 and prepared a second edition in 1836.⁴¹ The *Course* was intended primarily to shepherd students through the available primary and secondary works on the law; the second edition was expanded to serve also as a resource for attorneys, judges, and statesmen.⁴² Hoffman not only underscored the importance of natural law and revelation in his definition of law,⁴³ but he also began his *Course* by focusing on the Bible. Hoffman taught:

The purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every christian nation.

Protestants in an Age of Science 46-47 (U. of North Carolina, 1977) (discussing the repudiation of religious skepticism in nineteenth-century America).

39. Feldman, *Please Don't Wish Me a Merry Christmas* at 178-79 (cited in note 38).

40. Nathan O. Hatch, *The Democratization of American Christianity* 3 (Yale U., 1989). Between 1800 and 1835, church membership nearly doubled, and if one accounts for the Americans who were church-goers but not official members, then fully 75% percent of the population attended church. See Winthrop S. Hudson and John Corrigan, *Religion in America* 129-30 (Scribner, 5th ed. 1992). See also Martin E. Marty, *Protestantism in the United States: Righteous Empire* 169 (Dial, 2d ed. 1986).

41. See Perry Miller, *David Hoffman*, in Perry Miller, ed., *The Legal Mind in America* 83 (Anchor, 1962) (noting that Hoffman became a professor in 1816). The second edition actually was not published until 1846. See Hoffman, 1 *A Course of Legal Study* at i (cited in note 19).

42. See Hoffman, 1 *A Course of Legal Study* at xi-xii (cited in note 19). Each chapter or title contained an extensive list of recommended readings as well as Hoffman's guiding notes on many of those readings.

43. Hoffman wrote:

Law, as applied to *human* conduct generally, signifies that body of rules established for the regulation of human economy, whether *national* or *individual*; dictated to us by the light of nature, or by revelation; or prescribed by human superiors for individual observance; or ordained by the consent, express or implied, of sovereign states, for the guidance of international conduct; and to which those respectively, to whom the rules are directed, are obliged to make their actions conformable.

Id. at 55.

The Christian religion is a part of the law of the land, and, as such, should certainly receive no inconsiderable portion of the lawyer's attention.⁴⁴

Unsurprisingly, state courts consistently enforced the Christian sabbath of Sunday and upheld prohibitions of blasphemy against Christianity.⁴⁵ In the New York case of *People v. Ruggles*, decided in 1811, the state's highest court upheld the constitutionality of a common law criminal conviction of Ruggles for committing blasphemy. Ruggles had said that "Jesus Christ was a bastard, and his mother must be a whore." James Kent, writing the opinion in the case, maintained "that we are a christian people, and the morality of the country is deeply ingrafted upon christianity."⁴⁶ Thus, with regard to the common law in general, LaPiana correctly observes: "[T]here was widespread agreement that the principles of private law were congruent with and dictated by the absolutely true requirements of Christian morality. Law was principles, and properly decided cases reflected those principles, which themselves, in the end, were God's plan for governing the nation."⁴⁷

The American jurists of the early nineteenth century not only followed Blackstone by relying on natural law, but they also followed him by presenting law as science. Hoffman, Kent, Francis Hilliard, and Joseph Story all consistently referred to the science of jurisprudence or legal science.⁴⁸ The specific parameters of the early nineteenth-century conception of legal science were derived from at least two sources: the writings of Francis Bacon and the forms of action unique to common law pleading.

Although Bacon had written his most important works in the early seventeenth century, he replaced Locke as the most prestigious English philosopher in America at the outset of the nineteenth century.⁴⁹ American legal scholars repeatedly cited and quoted from "Lord Bacon," celebrating, in Story's words, "the profoundness of his

44. Id. at 65.

45. See Feldman, *Please Don't Wish Me a Merry Christmas* at 187-89 (cited in note 38); Miller, *The Life of the Mind in America* at 192-95 (cited in note 1). Miller also notes that some jurists denied that Christianity was part of the common law. See id. at 195-96.

46. *People v. Ruggles*, 8 Johns. R. 290 (N.Y. 1811), reprinted in Philip B. Kurland and Ralph Lerner, eds., 5 *The Founders' Constitution* 101, 101 (U. of Chicago, 1987). Kent reasoned that the state could punish blasphemy against Christ without similarly punishing blasphemies under other religions. Feldman, *Please Don't Wish Me a Merry Christmas* at 188 (cited in note 38).

47. William P. LaPiana, *Honor Laugdell*, 20 Law & Soc. Inquiry 761, 762-63 (1995).

48. See, for example, Hilliard, *The Elements of Law* at iv (cited in note 19); Hoffman, 1 *A Course of Legal Study* at 23 (cited in note 19); Story, *Miscellaneous Writings* at 69-71, 73, 79 (cited in note 19).

49. Bozeman, *Protestants in an Age of Science* at 23-30 (cited in note 38).

genius, and . . . the wisdom and comprehensiveness of his views.”⁵⁰ The nineteenth-century American understanding of Baconian science (not only legal science) was characterized by observation, generalization, and classification. A Baconian perspective was grounded on faith in human sense experience so that careful observation could reveal truth. Then, from multiple observations of the relevant phenomena, humans could generalize and induce ultimate principles of nature. Finally, those principles could be classified and ordered into a rational system.⁵¹ Significantly, Baconian science became Christianized in nineteenth-century America: Christianity and science were understood not to be opposed to each other, but rather to be complementary and mutually supportive. As Theodore Bozeman observes: “‘Truth,’ in fact, pointed to an important mode of religious experience in antebellum America. To know the truth of things was to taste ‘majesty and glory,’ for the massive panorama of nature was almost everywhere understood as an unfolding of Divine creativity.”⁵²

In legal science, James Wilson explained the applicability of Baconianism to jurisprudence.

In legal science, says my Lord Bacon, they are the soundest, that keep close to particulars. . . . In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment. . . . Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the most diversified and disjointed appearances.⁵³

In the early nineteenth-century treatises, the Baconian roots were manifested in at least three important ways. First, although the treatises emphasized natural law and were organized loosely around broad principles, such as the protection of property, liberty, and per-

50. Story, *Miscellaneous Writings* at 203 (cited in note 19). See, for example, Hoffman 1 *A Course of Legal Study* at 20, 22, 36 (cited in note 19); Kent, 1 *Commentaries on American Law* at v, 47, 475, 478, 505, 510 (cited in note 19). Story stated in 1826: “Where shall we find the true logic of physical science so admirably stated, as in the *Novum Organum* of him, who more than two centuries ago saw, as in a vision, and foretold, as in prophecy, the sublime discoveries of these latter days?” Bozeman, *Protestants in an Age of Science* at 29 (cited in note 38) (quoting Joseph Story, *Characteristics of the Age* 428).

51. See Bozeman, *Protestants in an Age of Science* at 3-10, 56, 62-63 (cited in note 38) (discussing the development of a “Baconian Philosophy”). LaPiana, *Logic and Experience* at 29 (cited in note 2) (stating that the definition of law as a scientific system of principles originated with Bacon). Bozeman acknowledges that competing views of science also existed at this time. See Bozeman, *Protestants in an Age of Science* at 75, 86-96 (cited in note 38).

52. Bozeman, *Protestants in an Age of Science* at 60 (cited in note 38). See *id.* at 44-45.

53. Wilson, 1 *The Works of James Wilson* at 356 (cited in note 19).

sonal security, the authors tended to display a faithful acceptance of case decisions and a bottom-up style characteristic of inductive reasoning.⁵⁴ They paid close attention to detail, often filling the treatises with specific low-level rules and copious footnotes that cited and discussed numerous cases.⁵⁵ Theophilus Parsons's *The Law of Contracts*, for instance, cited over 6,000 cases.⁵⁶ Treatise sections and subsections often reflected rather narrow factual situations in which cases repeatedly arose. In Kent's *Commentaries*, the lecture on contracts included a section on "passing the title by delivery," with subsections on, among other things, payment and tender, earnest and part payment, conditions attached to delivery, delivery to agent, symbolic delivery, and place of delivery.⁵⁷ In Kent's part on real property, the lecture on incorporeal hereditaments included a section on easements and aquatic rights, which was further subdivided as follows: of ways, riparian rights, highways, party-walls, division fences, and easements acquired and lost by proscription. This last subsection was again divided into the categories of water, light, and air.⁵⁸

Second, Baconianism was apparent in the attention that the treatise writers gave to classifying and systematizing American law. To American jurisprudents, law was a science because, above all, law was a rational system of principles.⁵⁹ Hoffman belittled the idea that law is "a mere collection of positive rules and institutions."⁶⁰ Instead, "[i]f law be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason."⁶¹ The lawyer, therefore, "must have entered into the principles, discovered the harmonies, and arranged with method and curiosity the innumerable topicks of the science."⁶²

Third, despite the American jurisprudents' penchant for focusing on cases and low-level rules, they believed that legal principles, including natural law principles, existed apart from their manifesta-

54. For discussions of the broad natural rights of property, security, and liberty, see Hilliard, *The Elements of Law* at 9 (cited in note 19); Kent, 2 *Commentaries on American Law* at 1 (cited in note 19).

55. See, for example, Kent, *Commentaries on American Law* (cited in note 19).

56. See Theophilus Parsons, *The Law of Contracts* (Little, Brown, 1857). See also Theophilus Parsons, *The Law of Contracts* xiii-xiv (Little, Brown, 5th ed. 1866) (preface to 1st ed.) (stressing Parsons's effort to provide a "complete library" on the subject).

57. See Kent, 2 *Commentaries on American Law* at 492-509 (cited in note 19).

58. See Kent, 3 *Commentaries on American Law* at 401-48 (cited in note 19).

59. See Miller, *The Life of the Mind in America* at 117-21 (cited in note 1).

60. Hoffman, 1 *A Course of Legal Study* at 25 (cited in note 19).

61. Id. (quoting William Jones, *Essay on Bailments*).

62. David Hoffman, *A Lecture, Introductory to a Course of Lectures* (1823), reprinted in Perry Miller, ed., *The Legal Mind in America* 83, 85 (Anchor, 1962).

tions in the decided cases. Baconianism never supported any form of nominalism,⁶³ which would have suggested that nothing existed but the individual case decisions. Perhaps, the best way to understand the metaphysical relationship between the cases and the principles in early nineteenth-century legal science may be to compare, at the risk of mixing philosophical metaphors, American (Baconian) jurisprudence with Plato's philosophy—specifically, Plato's theory of Ideas (or Forms).⁶⁴ "The essence of the theory of Ideas," according to David Ross, "lay in the conscious recognition of the fact that there is a class of entities, for which the best name is probably 'universals', that are entirely different from sensible things."⁶⁵ For Plato, the Ideas or Forms are real or objective entities that exist separately and distinctly from sensible things. Each sensible thing or particular instance of an object partakes of, or shares in, an Idea, but no particular instance perfectly exemplifies any Idea. The Ideas are universal, unchanging, and stable, while sensible things are ephemeral and in flux. For example, Plato distinguished between the many objects that are beautiful and the Idea of beauty. The myriad objects manifest or are imperfect copies of the Idea, but they are not the same as the Idea—"absolute beauty."⁶⁶

The Platonic relationship between Ideas and particulars illuminates the relation between case decisions and legal principles in

63. Nominalism "is usually associated with the thought that everything that exists is a particular individual, and therefore there are no such things as universals." Simon Blackburn, *The Oxford Dictionary of Philosophy* 264 (Oxford U., 1994).

64. Plato developed his theory of Ideas in *The Republic* and *The Phaedo*. See Plato, *The Republic*, reprinted in Benjamin Jowett, trans., *The Republic and Other Works* 7 (Anchor, 1973) ("Republic"); Plato, *Phaedo*, reprinted in Benjamin Jowett, trans., *The Republic and Other Works* 487 (Anchor, 1973) ("Phaedo"). Helpful secondary sources on Plato include the following: Joseph Owens, *A History of Ancient Western Philosophy* (Appleton, Century, Crofts, 1959); David Ross, *Plato's Theory of Ideas* (Oxford U., 2d ed. 1953).

65. Ross, *Plato's Theory of Ideas* at 225 (cited in note 64).

66. *Phaedo* at 534 (cited in note 64). See *Republic* at 169, 173 (cited in note 64); *Phaedo* at 505-12, 534-35 (cited in note 64). See also Owens, *A History of Ancient Western Philosophy* at 197-229 (cited in note 64). Ross discusses the possibility of interpreting Plato's theory of Ideas in some other manner:

It may be doubted whether Plato thus 'separated' the universal from its particulars. To distinguish the universal from its particulars is in a sense to separate it. It is to think of it as a *distinct* entity. Whether Plato also thought of it as a *separately existing* entity, it is hard to say. Much of his language lends itself to the charge, but it is possible that he may only be putting in an emphatic and picturesque way the doctrine that particulars always imply a universal. Yet it is hard to suppose that Aristotle could have so thoroughly misinterpreted a master with whom he was presumably for years in constant contact, as to take for a fundamental difference of view what was really only a difference of emphasis and expression.

David Ross, *Aristotle* 158 (Methuen, 5th ed. 1949).

early nineteenth-century legal science. While in Plato's theory the Ideas or universals supposedly exist separately from the many sensible things, in jurisprudential theory, legal principles supposedly exist separately from the countless cases. The cases manifest the principles, but the cases themselves are not equivalent to the principles. Francis Hilliard perfectly captured this relationship between the principles and the cases in his *Elements of Law*:

[I]n law, as in other sciences, there are certain broad and fixed principles, which embody the essence of the system, and remain unchanged amidst the fluctuations of successive ages. . . . [T]he increase of the law arises, not from any change in them, but from that infinite variety of facts and circumstances, to which the transactions of mankind give rise.⁶⁷

Thus, the few legal principles are universal, unchanging, and stable, while the many cases imperfectly exemplify them. In the words of Joseph Story, "the decisions of Courts . . . are, at most, only evidence of what the laws are; and are not of themselves law."⁶⁸

This Platonic understanding of the relationship between legal principles and cases also helps reconcile the seemingly opposed views of LaPiana and Gordon on antebellum legal science. LaPiana (consistently with G. Edward White) characterizes antebellum legal science as primarily animated by natural law principles,⁶⁹ while Gordon (consistently with Morton Horwitz, Karl Llewellyn, and Grant Gilmore) argues that it is instead largely defined by a pragmatic, policy-oriented approach to judicial decision making.⁷⁰ As discussed

67. Hilliard, *The Elements of Law* at v (cited in note 19) (emphasis omitted). Hilliard's reliance on natural law is especially significant because he claimed to design *The Elements of Law* "as a cheap manual for popular use." *Id.* at 8. As such, according to Hilliard, the book "carefully abstains from all criticism, speculation, or history; and confines itself to a plain, brief statement of principles now in force, with occasional illustrations." *Id.* at iv. If even in such a practically oriented work, the author relied in part on natural law, a reliance on natural law apparently was widespread.

68. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), overruled by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

69. See LaPiana, *Logic and Experience* at 34 (cited in note 2). See also White, *The Marshall Court and Cultural Change 1815-1835* at 129, 135, 153-54 (cited in note 1) (arguing that Americans were "bound by those common law rules that seemed consistent with the principles of natural justice"). LaPiana does not cite White on this point.

70. Gordon, 93 Mich. L. Rev. at 1252-53 (cited in note 3). See also Gilmore, *The Ages of American Law* at 19-40 (cited in note 1) (describing the development of antebellum jurisprudence); Horwitz I at 1-30 (cited in note 1); Karl N. Llewellyn, *The Common Law Tradition* 36, 64-72 (Little, Brown, 1960) (discussing and giving examples of applying policy and principles to cases). Gordon expressly cites Horwitz and Llewellyn, among others, but does not cite Gilmore on this point. See Gordon, 93 Mich. L. Rev. at 1253 n.66 (cited in note 3). To be clear, Gordon does not deny that legal writers during this period referred to "revealed truth and natural law," but he nonetheless maintains that the part played by natural law was "relatively

earlier, a strong commitment to natural law did indeed mark the first part of the nineteenth century, but nonetheless, as I will explain, a pragmatic or instrumental approach simultaneously characterized this period, especially from approximately 1820 onward.

America experienced an enormous economic transformation during the first decades of the nineteenth century.⁷¹ Spurred in part by the exigencies of the War of 1812, the United States began to metamorphose, changing from a largely agricultural country into an industrial society and economy.⁷² As the Industrial Revolution came to America, particularly to the Northeast, the transition in the American economy was startling: In 1800, eighty-three percent of the labor force was in agriculture, but by 1860, only fifty-three percent remained similarly occupied.⁷³ Many Americans became obsessed with a commitment to commerce and the rapid accumulation of personal wealth. In response to these economic transitions, the American notion of science also changed, becoming more practical and utilitarian. Scientists became preoccupied with the pursuit of useful and profitable inventions such as the steamboat and the telegraph.⁷⁴

small." Id. at 1251. Instead, according to Gordon, "arguments about 'convenience' or 'policy' . . . usually trumped the considerations of morality that LaPiana emphasizes." Id. at 1253. Horwitz, more strongly than Gordon, accentuates a *transition* from a natural law approach to an instrumental approach in the early nineteenth century. Horwitz writes:

By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. . . . Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.

Horwitz I at 30 (cited in note 1).

71. See Miller, *The Birth of Modern America 1820-1850*, at 19-41 (cited in note 35) (describing and explaining America's expansion following the War of 1812).

72. Because of America's own restrictive trade policies and British blockades, the War of 1812 forced Americans to begin producing goods that previously had been imported. Id. at 28-29. See Miller, *The Life of the Mind in America* at 126-27, 292, 297 (cited in note 1) (noting the economic and legal reorientation wrought by the War of 1812).

73. See Wood, *The Radicalism of the American Revolution* at 325-47 (cited in note 35) (chronicling the "celebration of commerce" in post-revolutionary America); Stephan A. Thernstrom, 1 *A History of the American People* 238 (Harcourt, Brace, 2d ed. 1989) (providing statistics).

74. Miller, *The Life of the Mind in America* at 291-92, 297 (cited in note 1). See Miller, *The Birth of Modern America 1820-1850*, at 26-28 (cited in note 35) (describing technological improvements such as grain-handling machines and the steamboat). See also Feldman, *Please Don't Wish Me a Merry Christmas* at 176 (cited in note 38) (discussing economic changes). In 1835, Francis Hilliard declared that, "all knowledge is held to be *practical*." Hilliard, *The*

As the general concept of science altered, so did the specific conception of legal science, as it too became increasingly focused on pragmatic concerns and the instrumental promotion of commerce. The revered Lord Mansfield further inspired this transition in jurisprudence. In the eighteenth century, Mansfield had demonstrated the practical advantages of an instrumental approach to judicial decision making by, in effect, creating the commercial law of Britain.⁷⁵ In America, Kent asserted that the question of whether to follow a rule from an earlier case "very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it."⁷⁶ Similarly, Francis Hilliard stated that, in common law decision making, "[g]eneral expediency,—public policy,—is often the highest measure of right."⁷⁷ The state and federal courts thus developed policies in the form of common law rules that tended to spark commercial activity and economic development. For instance, during the first part of the nineteenth century, the courts transformed the common law concept of property: Whereas the earlier conception of property allowed an owner to prevent others from injuring his or her property, the later conception allowed an owner to do with his or her property whatever was desired, regardless of the effects on others. The courts, in other words, developed rules that protected property owners from potential liabilities for damages caused by efforts to develop their property for commercial purposes.⁷⁸ Property became, in effect, an "institution of growth."⁷⁹ In another example, in *Swift v. Tyson*, decided in 1842, the Supreme Court held that the federal courts should decide commercial cases based on a general federal

Elements of Law at viii (cited in note 19). Louis Dupré notes that a Baconian view also endorsed a view of knowledge as practical. Dupré, *Passage to Modernity* at 72-73 (cited in note 6).

75. See Story, *Miscellaneous Writings* at 275 (cited in note 19) (discussing Mansfield's role with regard to the commercial law of Britain). For celebrations of Mansfield's greatness, see Hilliard, *The Elements of Law* at 8 (cited in note 19); Kent, 1 *Commentaries on American Law* at 477 (cited in note 19); Kent, 2 *Commentaries on American Law* at 322 (cited in note 19). Story wrote: "[T]he name of Lord Mansfield will be held in reverence by the good and the wise, by the honest merchant, the enlightened lawyer, the just statesman, and the conscientious judge." Story, *Miscellaneous Writings* at 205 (cited in note 19).

76. Kent, 1 *Commentaries on American Law* at 477 (cited in note 19).

77. Hilliard, *The Elements of Law* at vi (cited in note 19).

78. See Horwitz I at 99-102, 211-52 (cited in note 1) (discussing heightening of common law negligence standard and the development of insurance law).

79. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* 28 (U. of Wisconsin, 1956).

common law that implicitly would be directed toward promoting economic activity.⁸⁰

Hence, antebellum legal scientists did indeed become committed to a practical and instrumental approach to judicial decision making early in the nineteenth century. Nonetheless, this pragmatic approach was understood to be entirely consistent with the concurrent natural law orientation. As Story explained, when praising Lord Mansfield's decisions in maritime and commercial law, "the general consistency with principle is as distinguishable[] as their practical importance."⁸¹ Kent declared that the right of property not only arises from the law of nature and revelation but also spurs humanity to social and commercial progress:

The sense of property is graciously bestowed on mankind, for the purpose of rousing them from sloth, and stimulating them to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement.⁸²

But how, precisely, could a commitment to principles, particularly natural law principles, be consistent with an instrumental approach to judicial decision making? The answer lay in the Platonic relationship between the principles and the cases. According to Plato, the Ideas exist separately from the particular instances. The Ideas are universal and unchanging, while the particular instances vary, manifesting but never perfectly exemplifying the Ideas. As suggested above, antebellum jurisprudents understood the relation between legal principles and cases in a similar fashion: Legal principles are universal and separate from the cases, which represent imperfect manifestations of the principles. From this perspective, natural law principles provided a metaphysical foundation for the American legal system, including the common law. Yet, in concrete judicial disputes,

80. 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R Co. v. Tompkins*, 304 U.S. 64 (1938). See Gilmore, *The Ages of American Law* at 30-36 (cited in note 1) (discussing *Swift*); Horwitz I at 245-52 (cited in note 1) (arguing that *Swift* can be seen as an attempt to impose a pro-commercial national legal order on unwilling state courts).

81. Story, *Miscellaneous Writings* at 69 (cited in note 19).

82. Kent, 2 *Commentaries on American Law* at 319 (cited in note 19). Kent continued: "It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." *Id.* See *id.* at 318-19 (discussing the fundamental nature of acquiring and owning property).

the principles needed to be specifically interpreted and applied and as judges did so, the judges were to be practical and instrumental. Indeed, as Thomas Grey has noted, jurists and jurisprudents of this time did not assume, for the most part, that they could reason deductively downward from the general principles to mechanically ascertain lower-level legal rules or the correct outcomes in concrete disputes. A knowledge of the principles might guide but could not dictate a judge's determination in any specific case.⁸³ In an 1854 opinion, Lemuel Shaw captured the Platonic relation between the universal principles of natural law and his instrumental decision making in particular cases:

It is one of the great merits and advantages of the common law, that, instead of a series of detailed practical rules . . . the common law consists of a few broad and comprehensive principles founded on reason, natural justice, and enlightened public policy modified and adapted to the circumstances of all the particular cases which fall within it. [While the common law] has its foundations in the principles of equity, natural justice, and that general convenience which is public policy; although these general considerations would be too vague and uncertain for practical purposes, in the various and complicated cases, of daily occurrence, in the business of an active community; yet the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent.⁸⁴

Because of the instrumental approach to judicial decision making, the natural law principles faded into the juridical background in most instances. Yet, although the principles only rarely would be referred to in specific cases, the principles always remained significant as a foundation for the legal system—a foundation of principles that could fade into the background only because so many American judges, lawyers, and jurisprudents willingly agreed upon and accepted the idea of broad natural law principles. Moreover, such a stable foundation was important as a means for justifying instrumental decision making in the courts. Hilliard argued, for example, that judges

83. See Grey, 45 U. Pitt. L. Rev. at 8-9 n.27 (cited in note 1) (discussing "the Grand Style" of jurisprudence which characterized American decisions before the Civil War).

84. *Norway Plains Co. v. Boston & Main R.R. Co.*, 67 Mass. 263, 267 (1854). Judge Shaw went on to hold that railroads, though recently invented, fit within the concept of a common carrier under the common law. See *id.* at 269-70. Perry Miller cautions that the freedom of judges during this period to instrumentally shape the law should not be overstated. Miller, *The Life of the Mind in America* at 128 (cited in note 1).

should be guided by "the universal law of reason and justice" when they had to make law.⁸⁵

As the instrumental approach took hold of American jurisprudence in the first decades of the nineteenth century, legal science moved from the first to the second stage of premodernism. Americans who participated in the Revolution and the constitutional framing were, to a significant extent, still first-stage premodernists. For the most part, they retained a cyclical view of history. Hence, the constitutional framers had been concerned especially with the fragility of the new democratic republic. From the first-stage premodernist standpoint, civilizations rise and fall,⁸⁶ so the goal of the Framers, in particular, was to construct a governmental scheme that could preserve the republic as long as possible. The Framers thus sought to construct a constitutional government that would strain toward civic republican principles of virtue and the common good, but simultaneously would protect against the self-interested political machinations of factional groups. The purpose of the Constitution, in other words, became the structuring of a stable government that would act for the public good despite the inherent fragility of the republic.⁸⁷

85. Hilliard, *The Elements of Law* at 3 (cited in note 19). Hilliard's complete statement is as follows:

[U]pon many judicial questions, the aid of authority, of analogous decided cases, is wholly wanting. It then becomes the duty of a judge, not indeed to pass an arbitrary edict, but, taking for his guide *the universal law of reason and justice*, to invest that law with the sanction and the imperative force of a distinct judgment, and thereby make it the law of the land, no longer open to argument and dispute.

Id. (emphasis added). The significance of natural law principles as a foundation for instrumental decision making is elucidated if the premodern nineteenth century is compared with the modernist twentieth century. Specifically, during the 1930s, the American legal realists also advocated an instrumental approach to decision making. By that time, however, the foundations for American values and goals were open to serious debate at the deepest levels. Charges of ethical relativism were aimed at the realists, who were then castigated for supposedly supporting a manipulative legal system bereft of morality and akin to fascism. See Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 333-34 (cited in note 1). See, for example, Francis Lucey, *Natural Law and American Legal Realism*, 30 Geo. L. J. 493 (1942). I do not mean to suggest, however, that realism died because of these attacks. Laura Kalman argues that Yale remained a hotbed of realism in the years after World War II. See Kalman, *Legal Realism at Yale 1927-1960*, at 145-87 (cited in note 1).

86. Miller, *The Birth of Modern America 1820-1850*, at 35-36 (cited in note 35). See Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 William & Mary Q. 3, 6-7, 17-19 (1967) (describing the historical origins of the framers' belief in a cyclical theory of history and how this affected the Revolution).

87. Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 170-73 (cited in note 1). See J.G.A. Pocock, *The*

By the time that James Monroe left the presidency in 1825, however, a new generation of Americans had risen to power.⁸⁸ The new generation, inspired in part by the ongoing economic transformation of the nation, was composed largely of second-stage premodernists. As the idea of progress took hold, science, in particular, was seen as the instrument by which America could push forward. Jurisprudents were fully aware of this momentous transition in America.⁸⁹

Significantly, though, progress was understood as the movement toward the realization of eternal and universal principles—principles derived from nature and Protestant Christianity.⁹⁰

Machiavellian Moment 462-552 (Princeton U., 1975) (describing the American Revolution's position as "the last act of the civic Renaissance"); Gordon S. Wood, *The Creation of the American Republic 1776-1787* (U. of North Carolina, 1969). See, for example, *Federalist No. 10* (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 77 (Mentor, 1961) (arguing that the republican form of government is more stable than a traditional form of democracy); *Federalist No. 51* (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 320, 322 (Mentor, 1961) ("Ambition must be made to counteract ambition."). Madison wrote: "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." *Federalist No. 10* (Madison) in Rossiter, ed., *The Federalist Papers* 77, 80 (cited in note 87).

Dorothy Ross writes:

It has been common to recognize that Europeans in the early nineteenth century began to apprehend time in a historicist mode. Whether seen through German idealism or the positivism of Spencer and Comte, history was understood as a creative process: culture, society and human nature itself were seen to change fundamentally over the course of secular time. The timelessness of American thought during the same period has also been recognized, but Pocock links this characteristic to the prehistoricist logic of the republican tradition. Believing in the Providential guidance and millennial mission of the American republic, Americans sought utopian conditions that would stave off the corruption of historical change and keep secular time frozen in its original and predetermined course.

Dorothy Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in John Higham and Paul K. Conkin, eds., *New Directions in American Intellectual History* 116, 121 (Johns Hopkins U., 1979) (citation omitted).

88. See Miller, *The Birth of Modern America 1820-1850*, at 50 (cited in note 35).

89. *Id.* at 21. At the constitutional convention of New York State in 1821, Kent proclaimed: We stand at this moment on the brink of fate, on the very edge of the precipice . . . We are no longer to remain plain and simple republics of farmers, like New-England colonists, or the Dutch settlements on the Hudson. We are fast becoming a great nation, with great commerce, manufactures, population, wealth, luxuries, and with the vices and miseries that they engender.

Id.

90. See LaPiana, *Logic and Experience* at 34 (cited in note 2) (explaining the lack of a theory about legal evolution in antebellum legal thought); Miller, *The Life of the Mind in America* at 165-66 (cited in note 1) (discussing how America's early eighteenth-century wisdom was in the process of transformation into an instrument of American expansion by the early nineteenth century). G. Edward White writes: "[T]he generation of the early nineteenth century had largely abandoned a cyclical theory of change, in which the history of nations inexorably passed from birth to maturity to decay, but had not yet embraced historicism, a stance which assumes that qualitative change is a given in the course of nations." White, *The Marshall Court and Cultural Change 1815-1835*, at 374 (cited in note 1). I do not mean to suggest that the first-stage premod-

American jurisprudence, thus, became instrumental and pragmatic in its quest for progress, but it nevertheless remained premodern, still grounded on principles of natural law.⁹¹ Kent, for example, proclaimed that the most recently decided cases presumably contain "the most correct exposition of the law, and the most judicious application of abstract and eternal principles."⁹² The common law, in other words, progresses as it moves increasingly closer to a perfect realization of its foundational principles.

In addition to the Baconian view of science, the other significant source of the early nineteenth-century conception of legal science was the forms of action unique to common law pleading. Although today many legal commentators sharply distinguish legal procedure from the substance of the law, the nineteenth-century jurists rarely did so.⁹³ To the contrary, the writs and forms of action were entwined with the substantive rules of the common law. The links between procedure and substance were evident in Blackstone's *Commentaries*, the model for the later American treatises. When

ern jurists had no conception of progress. See, for example, Wilson, 1 *The Works of James Wilson* at 146-47 (cited in note 19) (discussing progress as the perfection or realization of immutable principles). For the most part, though, any notion of progress during first-stage promodernism related to the preservation of the republic in the face of inherent instability.

91. In discussing Joseph Story, in particular, White writes:

We have previously seen that a defining characteristic of the intellectual ethos of Story and his contemporaries was a distinctive attitude toward time and change. Story's generation was perhaps the last in American history to retain a prehistoricist sensibility, that is, to conceive of change as the progressive unfolding of first principles rather than as a continuous, dynamic process. While the past had meaning for the present and future, it was a selected meaning. Connections between past and future events were drawn by a backwards ("Whiggish") reading of history: the meaning of the past was found to reside in a series of general principles, embodied in past events, which were then applied as moral guidelines to the present and future. This technique required a characterization of the nature of change which seems alien to modern observers. Change, for Story's generation, was the equivalent of progress only because it represented a perfection and restoration of first principles. In times of stress brought about by the motion of American civilization, the remedy was to review and reassert the lessons of the past, so that American society could be seen as progressing in accordance with certain moral principles. The technique by which the past was studied and its core principles extracted and reasserted was labeled "scientific" by Story and his contemporaries.

White, *The Marshall Court and Cultural Change 1815-1835*, at 360-61 (cited in note 1).

92. Kent, 1 *Commentaries on American Law* at 479 (cited in note 19).

93. See John J. Cound, Jack H. Friedenthal, and Arthur R. Miller, *Civil Procedure* 317, 329-33 (West, 2d ed. 1974) (discussing common law writs and forms of action); Fleming James, Jr., and Geoffrey C. Hazard, Jr., *Civil Procedure* § 1.3 (Little, Brown, 3rd ed. 1985) (tracing the historical development of writs). Compare Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) (arguing from a critical perspective that form and substance in the law are linked in ways that are often overlooked).

discussing the rights of persons at common law, Blackstone wrote: "I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury: and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts."⁹⁴ In other words, to Blackstone, discussions of rights, remedies, and the forms of action were inextricably intertwined: They could not be coherently understood separately and independently. For example, when discussing express contracts, Blackstone wrote:

Express contracts include three distinct species, debts, covenants, and promises. 1. The legal acceptation of *debt* is, a sum of money due by certain and express agreement. As, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and unalterable, and does not depend upon any after-calculation to settle it. The non-payment of these is an injury, for which the proper remedy is by action of *debt*, to compel the performance of the contract and recover the specific sum due. . . . The form of the writ of *debt* is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only: that is, the writ states, either that the defendant owes and unjustly detains the debt or thing in question, or only that he unjustly detains it. . . .⁹⁵

Blackstone never clearly explained what came first: the conceptualization of an injury or a right, or, the writ and form of action at common law. The key point, however, was the close interconnection between the substantive law and the forms of action. As Blackstone

94. Blackstone, 3 *Commentaries on the Laws of England* at 115 (cited in note 20).

95. *Id.* at 153-57. Blackstone continued:

2. A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by writ of *covenant*: which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or [show] good cause to the contrary. . . .

Id. Elsewhere, Blackstone wrote similarly:

Deprivation of possession may also be by an unjust detainer of another's goods, though the original taking was lawful. As if I distrein another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them: in which he shall recover damages only for the detention and not for the caption, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking, and the regular method for me to recover possession is by action of *detinue*.

Id. at 150-51.

stated, "wherever the common law gives a right or prohibits an injury, it also gives a remedy by action."⁹⁶

American jurists closely followed this Blackstonian understanding of the common law. In particular, the forms of action provided many of the concepts for the classification of the common law; the legal processes gave shape to the substance of the law.⁹⁷ For example, in David Hoffman's *Course of Legal Study*, the third title offered recommended readings on personal rights and remedies. Several sections from Bacon's *Abridgment* were suggested, including those on action of account, debt, covenant, detinue, trover, replevin, and so on.⁹⁸ Likewise, in Francis Hilliard's *The Elements of Law*, the part on private wrongs included a chapter on injuries to personal property in possession, which included sections on replevin, trespass, trespass on the case, and trover.⁹⁹ Most clearly, perhaps, James Gould and Tapping Reeve explicitly organized the curriculum of the Litchfield Law School into forty-eight titles that represented Gould and Reeve's categorization and understanding of the whole of jurisprudence. The titles, reflecting the importance of the forms of action for classifying the common law, included the following: action for covenant broken, action for debt, action for detinue, action of account, and assumpsit.¹⁰⁰

Significantly, then, common law pleading was understood to be neither arbitrary nor irrational. To the contrary, pleading itself seemed to fit neatly within the early nineteenth-century conception of legal science as a rational system. Gould's comments on pleading, in his *Treatise on the Principles of Pleading*, illuminated the place of pleading in premodern legal science. Gould deemed pleading "to be the most instructive, and therefore the most important *single* title in the law."¹⁰¹ Pleading is based on principles that are integrally related to the substantive law. In Gould's words, pleading owes its preemi-

96. *Id.* at 123.

97. See G. Edward White, *Tort Law in America* 8-12 (Oxford U., 1980) (stating that the writ system served as "a surrogate for doctrinal classification").

98. Hoffman, 1 *A Course of Legal Study* at 289 (cited in note 19). Hoffman emphasized the importance of understanding pleading for understanding the law in general. *Id.* at 348-49.

99. Hilliard, *The Elements of Law* at 240-44 (cited in note 19).

100. See *Advertisement for the Litchfield Law School, Jan. 1, 1828*, reprinted in Dennis R. Nolan, *Readings in the History of the American Legal Profession* 204 (Michie, 1980); Samuel H. Fisher, *The Litchfield Law School 1775-1833*, at 1-11, reprinted in Dennis R. Nolan, *Readings in the History of the American Legal Profession* 205 (Michie, 1980).

101. See Gould, *A Treatise on the Principles of Pleading, in Civil Actions* at vi-vii (cited in note 19).

nence "not solely to the intrinsic value of its own exact and logical principles, but also, and in no small degree, to the fact, that the principles of pleading are necessarily and closely *interwoven*, both in theory and practice, *with those of every other title of the law*."¹⁰² Gould unequivocally depicted pleading as a "science."¹⁰³ Consequently, he explained the purpose of his book in terms familiar to legal scientists of the early nineteenth century: His aim was to present the doctrines of pleading "as a system of *consistent and rational principles*, adapted, with the utmost precision, to the administration of justice."¹⁰⁴

In sum, antebellum jurists understood the common law as a science, a rational system of principles grounded in natural law. From this premodern perspective, legal principles are universal yet separate from the cases themselves. The whole of jurisprudence can be rationally classified into a system that includes not only the natural law principles but also a multitude of low-level legal rules that reflect the common law forms of action and pragmatic considerations, especially those related to the promotion of commerce.

The writings of Joseph Story provide a befitting final illustration of the components of premodern legal science. To Story, the science of law demanded systematization, "a scientific arrangement and harmony of principles."¹⁰⁵ Story also described the science of jurisprudence as ultimately based in natural law: "[T]he law of nature. . . lies at the foundation of all other laws, and constitutes the first step in the science of jurisprudence."¹⁰⁶ Thus, in discussing contracts, for instance, Story noted: "Nor is this obligatory force [of contracts] so much the result of the positive declarations of the municipal law, as of the general principles of natural, or, (as it is

102. Id. at vii. See id. at 14-15.

103. See, for example, id. at vi, 14 (referring to pleading as a science).

104. Id. at viii. See LaPiana, *Logic and Experience* at 42-44 (cited in note 2) (discussing the importance of pleading to antebellum legal science).

105. Story, *Miscellaneous Writings* at 69 (cited in note 19). See id. at 79 (declaring that law is composed of "regular systems, built up with general symmetry of parts").

106. Id. at 533. See id. at 504 (discussing the science of jurisprudence). Story then explained how the foundation of natural law is built upon:

In this manner it is that the law of nature involves a consideration of the nature, faculties, and responsibilities of man. . . . It considers him as a solitary being, as a member of a family, as a parent, and lastly, as a member of the commonwealth.

The consideration of this last relation introduces us at once to the most interesting and important topics; the nature, objects, and end of government; the institution of marriage; the origin of the rights of property; the nature and limits of social liberty; the structure of civil and political rights; the authority and policy of laws; and, indeed, all those institutions which form the defence and the ornament of civilized society.

Id. at 535.

sometimes called) universal law."¹⁰⁷ Finally, consistent with the dominant nineteenth-century American Protestant culture, Story linked natural law and Christianity.¹⁰⁸

While Story believed in natural law as the foundation of jurisprudence, he simultaneously emphasized an instrumental and pragmatic approach to the law. The common law, in particular, must respond to the practical and commercial needs of the nation, "constantly expanding," in Story's words, "with the exigencies of society."¹⁰⁹ For Story, then, the principles of natural law exist separately from their imperfect exemplifications in the low-level legal rules and judicial decisions. The principles are universal, eternal, and foundational, while the rules and decisions are pragmatic and progressive. As G. Edward White suggests, Story conceived of historical "change as the progressive unfolding of first principles."¹¹⁰ Because the universal principles must be applied in a multitude of concrete contexts—in different climates, different geographies, and different economic situations—low-level legal rules and judicial decisions necessarily vary from place to place.¹¹¹ Whereas in commercial law, according to Story, concerns shared throughout the world ought to lead to a high

107. Story, *Commentaries on the Constitution* at 501 (cited in note 19). Story continued: "In a state of nature, independent of the obligations of positive law, contracts may be formed, and their obligatory force be complete." *Id.* at 501-02.

108. Story, *Miscellaneous Writings* at 534-35 (cited in note 19). Story says:

With us, indeed, who form a part of the Christian community of nations, the law of nature has a higher sanction, as it stands supported and illustrated by revelation. Christianity, while with many minds it acquires authority from its coincidences with the law of nature, as deduced from reason, has added strength and dignity to the latter by its positive declarations. . . . Thus, Christianity becomes, not merely an auxiliary, but a guide, to the law of nature; establishing its conclusions, removing its doubts, and elevating its precepts.

Id. Story also wrote: "[Jurisprudence] searches into and expounds the elements of morals and ethics, and the eternal law of nature, illustrated and supported by the eternal law of revelation." *Id.* at 504. Additionally, Story linked Christianity and the common law: "Christianity is a part of the common law There never has been a period in which the common law did not recognize Christianity as lying at its foundations." *Id.* at 517.

109. Story, *Miscellaneous Writings* at 526 (cited in note 19). Story stated:

[T]he common law, as a science, must be forever in progress; and no limits can be assigned to its principles or improvements. In this respect it resembles the natural sciences, where new discoveries continually lead the way to new, and sometimes to astonishing, results. To say, therefore, that the common law is never learned, is almost to utter a truism. It is no more than a declaration, that the human mind cannot compass all human transactions. It is its true glory, that it is flexible, and constantly expanding with the exigencies of society

Id.

110. White, *The Marshall Court and Cultural Change 1815-35*, at 360 (cited in note 1).

111. LaPiana, *Logic and Experience* at 33 (cited in note 2).

degree of legal uniformity on an international scale, in various other subjects, disparate interests and concerns retard uniformity, even looking at America alone.¹¹² The common law can be rationally systematized, but its specific rules remain forever imperfect because of "the boundless circumstances of life."¹¹³ As Story succinctly summarized: "[The common law] is a system having its foundations in natu-

112. See Story, *Miscellaneous Writings* at 214-16, 223-25 (cited in note 19) (noting the high degree of uniformity in commercial law, but stating that American jurisprudence can "never acquire a homogenous character").

113. *Id.* at 70 (emphasis omitted). Story was, in one respect, inconsistent in his depiction of the relation between natural law and positive law. While Story believed in natural law as the foundation of jurisprudence, he also maintained that the people remain sovereign. Story noted: "[O]ur government is emphatically a government of the people, in all its departments. It purports to be a government of laws, and not of men . . ." *Id.* at 511. See Story, *Commentaries on the Constitution* at 714 (cited in note 19) ("[Constitutions] are ordained by the will of the people; and can be changed only by the sovereign command of the people."). The implication of this position is that positive law trumps natural law. Thus, for example, Story argued that although the obligatory force of contracts arises from natural law, any remedy for a breach necessarily is found in positive law. See *id.* at 501-03. Yet, when discussing the right of property, Story expressly declared that the sovereignty of the people should be limited: "A government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property should be held sacred." *Id.* at 511.

In an 1837 report to the Governor of Massachusetts on the possibility of codifying the common law, Story and four other Commissioners discussed the proper method for deciding a case not governed by statute.

[T]he first question is, whether there is any clear and unequivocal principle of the common law, which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law, which, by analogy, or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted, and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law, and the only relief, which remains, is by some new legislation, by statute, to operate upon future cases of the like nature.

Story, *Miscellaneous Writings* at 702-03 (cited in note 19).

According to this passage, natural law principles play two roles in common law decision making. First, natural justice (or the principles of natural law) "constitute the basis" of the common law. *Id.* at 702. That is, from this perspective, natural law provides a foundation for the common law, but it is a foundation that is rarely explicitly referred to. Second, in rare cases, the natural law principles provide the specific source for deciding a case. These situations arise only if the common law does not already provide a source for a decision. Story and the Commissioners gave several examples. First, if one requests and has work done for him, "a dictate of natural justice," suggests that one should pay the value of the work done. *Id.* at 703. From this, the Commissioners argued, an elaborate set of common law rules and pleadings follow. Second, if one borrows money, "the common law, upon principles of natural justice, holds him liable to repay it." *Id.* at 704.

ral reason; but, at the same time, built up and perfected by artificial doctrines, adapted and moulded to the artificial structure of society."¹¹⁴

III. MODERN LEGAL SCIENCE

The American abandonment of natural law occurred around the time of the Civil War for a variety of reasons. One factor contributing to this change was a growing disjunction between science and religion, spurred greatly by the publication of Darwin's *Origin of Species* in 1859.¹¹⁵ In jurisprudence, explicit invocations of natural law based on revelation began to seem unscientific. In a similar vein, Darwin's evolutionary theory facilitated the emergence of a historicist sensibility, suggesting that society could evolve or progress endlessly instead of merely seeking to realize preexisting natural principles.¹¹⁶

Another factor contributing to the demise of natural law was that for years, even decades, before the Civil War, positivism had been increasing in prestige and popularity. Regardless of the antebellum belief in natural law, Americans since the time of the Revolution had been firmly committed to the idea of the sovereignty of the people.¹¹⁷ As Joseph Story declared in 1829: "Our government is emphatically a government of the people, in all its departments. It purports to be a

114. Id. at 524. Likewise, Story stated that "the end of all true logic [is] the just application of principles to the actual concerns of human life." Id. at 508-09. With regard to common law pleading, Story wrote a treatise on pleading. Joseph Story, *A Selection of Pleadings in Civil Actions, Subsequent to the Declaration* (Macanulty, 1805). He also linked an understanding of pleading with an understanding of principles. Story, *Miscellaneous Writings* at 83-84 (cited in note 19) ("[P]leading has a most salutary effect in disciplining the mind for an accurate investigation of principles.").

115. Charles Darwin, *The Origin of Species* (Mentor, 1958) (first published in 1859); Stow Persons, *Evolution and Theology in America*, in Stow Persons, ed., *Evolutionary Thought in America* 422, 425-26 (Anchor, 1968). See Bozeman, *Protestants in an Age of Science* at 164, 168-69 (cited in note 38) (noting that one orthodox Presbyterian leader considered evolution "tantamount to atheism").

116. See LaPiana, *Logic and Experience* at 34 (cited in note 2) ("Belief in a law of principles which transcends human attempts to discover and elucidate those principles explains the oft-repeated statement that cases are the mere evidence of the law and not law itself"); White, *The Marshall Court and Cultural Change 1815-35*, at 6, 374 (cited in note 1) (noting that Marshall and his contemporaries "conceived of the past as a source of lessons, embodied in the form of first principles"); Dorothy Ross, *Modernist Social Science in the Land of the New/Old*, in Dorothy Ross, ed., *Modernist Impulses in the Human Sciences, 1870-1930*, at 171 (Johns Hopkins U., 1994). Dorothy Ross writes: "The development of historicist thinking in the nineteenth century is important because a shift in historical consciousness may well be the underlying ground for the major intellectual changes that occurred in American social thought between the 1880s and 1920." Id. at 125.

117. See generally Edmund S. Morgan, *Inventing the People* (W.W. Norton, 1988).

government of laws, and not of men"¹¹⁸ Most important, the thrust of the idea of the sovereignty of the people—namely, that the people are the ultimate political power and thus make the law—is partially in tension with natural law.¹¹⁹ This tension occasionally bubbled to the surface, especially within the crucible of slavery. For example, judges sometimes upheld the legality of slavery by declaring that law and morality are separate: Even if slavery is contrary to morality and natural law, they reasoned, the positive law of the state must be supreme.¹²⁰

The advance of the idea that the people are sovereign was aided indirectly by the instrumental approach to judicial decision making characteristic of the early to mid-nineteenth century. In particular, despite its widespread acceptance, the instrumental approach eventually sparked some opposition as critics accused judges of acting without constraint in common law cases. One concrete reaction flowing from this criticism was a political campaign to codify the common law. The point of the proposed codes was that, consistent with the idea of the sovereignty of the people, legislatures and not judges should make the law. The codification movement started in the 1820s and received its most complete consideration at the New York State constitutional convention of 1846. In the end, New York resisted the pressure to codify its legal system *in toto*. However, in 1848, under the leadership of David Dudley Field, the state replaced the common law writs and forms of action with a code that mandated pleading the facts giving rise to a cause of action. Over the next few decades, similar codes of procedure were implemented in many other states.¹²¹

118. Story, *Miscellaneous Writings* at 511 (cited in note 19). Francis Hilliard added that constitutions are the supreme law in the United States, and federal and state statutes stand superior to the common law. Hilliard, *The Elements of Law* at 4-6 (cited in note 19).

119. Of course, one could assert that in theory, positivism and natural law are completely inconsistent. The social reality of antebellum America, however, showed that natural law and positivism could exist side by side, so long as their spheres were each sufficiently narrowed. For example, antebellum legal science was oriented toward natural law, but Americans simultaneously believed that legislatures could make positive law.

120. See Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 119-23 (Yale U., 1975) (discussing and giving examples of such reasoning); White, *The Marshall Court and Cultural Change 1815-35*, at 681-82 (cited in note 1) (noting the Marshall Court decided legal issues to the detriment of slaves by using positive law to limit natural law). See, for example, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); *State v. Post*, 20 N.J.L. 368 (1845).

121. See Cound, Friedenthal, and Miller, *Civil Procedure* at 362-65 (cited in note 93) (discussing mid-nineteenth century New York commission effort to reform the mode of pleading); Horwitz I at 17-20, 257-58 (cited in note 1) (linking the codification movement to the increased number of treatises written to state the "black letter" law); James and Hazard, *Civil Procedure* § 1.6 (cited in note 93) (noting that, by 1900, 27 states, particularly those west of the Mississippi, had adopted codes of procedure); LaPiana, *Logic and Experience* at 71-72 (cited in note 2)

The Protestant revivalism of the Second Great Awakening also was intertwined with the idea of the sovereignty of the people. Before the Second Great Awakening, many American Protestants remained committed to the Calvinist doctrine of predestination under which God has pre-selected a chosen few for salvation. During the nineteenth-century Awakening, though, countless Protestants rejected the concept of predestination and instead accepted the belief that the ordinary individual was capable of *choosing* salvation. The populist ideology of this theological transition was unmistakable: The people were empowered to choose.¹²² Hence, this religious metamorphosis both supported and was reinforced by the growing American political commitment to the democratic idea of the sovereign people. Moreover, these religious and political changes resonated with the increasingly compelling theories of economics and political economy that stressed the importance of the autonomous individual willfully selecting products in a free market.¹²³

Besides the heightening power of the idea of the sovereign people, another factor fueling the growing significance of positivism was the work of the English jurist, John Austin.¹²⁴ A disciple of Jeremy Bentham, Austin first published *The Province of Jurisprudence Determined* in 1832, but his work became influential only in the 1860s when it was republished posthumously.¹²⁵ The

(describing the abolition of equity courts and the implementation of a single "civil action" in New York); Miller, *The Life of the Mind in America* at 239-65 (cited in note 1) (discussing generally the development and debate concerning codification); Subrin, 135 U. Pa. L. Rev. at 932-39 (cited in note 34) (describing Field's Code); *An Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of this State*, 1848 N.Y. Laws 379, §§ 118, 120. By 1897, 27 states had adopted the Field Code and additional states had pleading systems that closely resembled the Code. Subrin, 135 U. Pa. L. Rev. at 939 (cited in note 34). For a discussion of the influence of Jeremy Bentham on the American codification movement, see Miller, *The Life of the Mind in America* at 243-54 (cited in note 1).

122. See Feldman, *Please Don't Wish Me a Merry Christmas* at 178-83 (cited in note 38) (discussing the relation between democracy and the Second Great Awakening); Persons, *Evolution and Theology in America*, in Persons, ed., *Evolutionary Thought in America* at 423-24 (cited in note 115) (describing America's increasing resistance to predestination).

123. See LaPiana, *Logic and Experience* at 76 (cited in note 2) ("[A]t least some of the legal doctrine coming from this era should reflect the influence of the classical theories of economics and political economy."); White, *The Marshall Court and Cultural Change 1815-35* at 50-51 (cited in note 1) (noting the emergence of a belief that "self-fulfillment could best be encouraged by allowing individuals to pursue their economic . . . self-interests").

124. John Austin in Wilfrid E. Rumble, ed., *John Austin, The Province of Jurisprudence Determined* (Cambridge U., 1995). For a brief introduction to Austin, see Wilfred E. Rumble, ed., *John Austin, The Province of Jurisprudence Determined* viii-xxiv (Cambridge U., 1995).

125. Rumble, ed., *John Austin, The Province of Jurisprudence Determined* at vii, xi-xii (cited in note 124); Grey, 41 Stan. L. Rev. at 794 (cited in note 1) (noting that Austin's theory "became the orthodoxy of English analytical jurisprudence when Holmes was a law student").

progenitor of analytical jurisprudence,¹²⁶ Austin explicitly and vigorously attacked Blackstone's conception of natural law, which had been so important in early nineteenth-century America. Austin wrote:

Sir William Blackstone . . . says in his 'Commentaries,' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original. . . .

Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals.¹²⁷

Austin thus set forth his classic statement of legal positivism: the command theory of law. "[A] law," according to Austin, "is a command which obliges a person or persons to a course of conduct."¹²⁸ In the postbellum years, Austin's writings strongly influenced American legal scientists as they came to grips with positivism.¹²⁹

By the time of the Civil War, then, several factors were weakening the hold of natural law and increasing the sway of legal positivism in American jurisprudence. But, as a general matter, prominent transitions in intellectual thought often seem to follow momentous

126. "Analytical jurisprudence is concerned with the logical analysis of the basic concepts that arise in law—e.g., duty, responsibility, excuse, negligence, and the concept of law itself." Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law* 1 (Westview, 1990).

127. Austin in Rumble, ed., *John Austin, The Province of Jurisprudence Determined* at 157-58 (cited in note 124). See Haines, *The Revival of Natural Law Concepts* at 71 (cited in note 17) (stating Austin's belief that only laws made by the state were binding laws); Sebok, 93 Mich. L. Rev. at 2062-63, 2086-87 (cited in note 23) (discussing further Austin's and Bentham's argument against Blackstone). Austin, though, defended utilitarianism by arguing, in part, that utilitarianism corresponded with the law of God. Austin in Rumble, ed., *John Austin, The Province of Jurisprudence Determined* at 41-44 (cited in note 124). On this point, Austin departed from the teaching of Bentham. Rumble, ed., *John Austin, The Province of Jurisprudence Determined* at xv (cited in note 124).

128. Austin in Rumble, ed., *John Austin, The Province of Jurisprudence Determined* at 29 (cited in note 124) (emphasis omitted). Austin wrote:

Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme. In other words, it is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a stato of subjection to its author.

Id. at 285. See Sebok, 93 Mich. L. Rev. at 2064 (cited in note 2) (discussing the command theory of law from Bentham and Austin).

129. See LaPiana, *Logic and Experience* at 76-78, 116-18 (cited in note 2) (discussing Austin's ideas); Sebok, 93 Mich. L. Rev. at 2056-57 (cited in note 23) (describing the development of positivism). For a discussion of the earlier development of positivism in European thought (before Austin), see Kelly, *A Short History of Western Legal Theory* at 271-77 (cited in note 1).

social upheavals.¹³⁰ Unsurprisingly, the Civil War itself proved to be the cataclysmic event that finally precipitated a distinct transition to positivism.¹³¹ Perry Miller suggests that, with the Civil War, "an era in the history of American law, as well as an era in the history of the American mind, was brought to an abrupt and violent conclusion."¹³² Most basically, the eradication of slavery and the death or maiming of one-fourth of the young male population profoundly transformed the social fabric of America.¹³³ Other factors, such as continuing industrialization, urbanization, and immigration, bolstered the transformation of American social structures.¹³⁴

Thus, jurisprudence was just one of many areas in which the country was being reshaped after the Civil War. In jurisprudence, moreover, the crisis of the War helped mold the evolving shape of legal thought. Specifically, the antebellum dispute over slavery contributed to the disavowal of natural law. Both abolitionists and pro-slavery advocates had invoked natural law arguments in support of their causes. Indeed, Benjamin F. Wright argues (perhaps overzealously)

130. See, for example, Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 334-37 (cited in note 1) (discussing the rise of totalitarianism and World War II in relation to American legal thought). See Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 156-57 (cited in note 6) (arguing that a sense of a need to start "from scratch" prompted the rise of philosophical modernity in seventeenth-century Europe and the rise of modernism in the arts during the 1920s and 1930s).

131. John G. Gunnell notes that America's most influential political thinker of the mid-nineteenth century, Francis Lieber, explicitly focused on the natural origins of the state as late as 1858. John G. Gunnell, *The Descent of Political Theory* 30-31 (U. of Chicago, 1993).

132. Miller, *The Life of the Mind in America* at 206 (cited in note 1). Arthur Bestor writes: "Into the prodigious vortex of crisis and war every current of American life had ultimately been drawn." Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 *Am. Hist. Rev.* 327, 327 (1964). Helpful accounts of the Civil War include the following: William R. Brock, *Conflict and Transformation* (Penguin, 1973); Bruce Catton, *The Civil War* (Houghton-Mifflin, 1985); Peter J. Parish, *The American Civil War* (Holmes & Meier, 1975).

133. Peter J. Parish calls the Civil War "the central event of American history." Parish, *The American Civil War* at 13 (cited in note 132). Bruce Catton adds: "[The War] had destroyed one of the two American ways of life forever, and it had changed the other almost beyond recognition." Catton, *The Civil War* at 263 (cited in note 132). See Paul D. Carrington, *Hail! Langdell!*, 20 *Law & Soc. Inquiry* 691, 702 (1995) (tracing the moral decline and political corruption of the late nineteenth century to the tragedy of the Civil War). For an extended discussion of whether the Civil War either caused or only symbolized the changes that the nation underwent, see Parish, *The American Civil War* at 625-52 (cited in note 132).

134. For example, during the middle and later decades of the nineteenth century, the growing significance of manufacturing combined with advances in transportation and communication to change how Northerners viewed the nation. They increasingly saw (and treated) the nation as a single marketplace, rather than as a group of discrete geographical and cultural regions. See Parish, *The American Civil War* at 27-28 (cited in note 132) (noting that the spread of northern enterprises "reduced state boundaries almost to irrelevance"). In fact, in the 1850s, for a time, immigration seemed equally important and equally divisive as slavery. *Id.* at 25-26.

that, from 1831 onward, almost all arguments for *and* against slavery were based on natural law.¹³⁵ While natural rights can be understood as a component of natural law, natural rights and natural law also can be analytically separated to some degree, and in the middle decades of the nineteenth century, such a separation had become significant.¹³⁶ In the antebellum years, natural rights arguments often had been invoked to argue against slavery: A natural right of individual liberty, it was asserted, contravened the legal institution of slavery.¹³⁷ At the same time, though, natural law arguments often had been invoked in favor of slavery: Natural law, according to some, supported a particular ordering of society, with slaves supposedly entrenched in their proper role at the bottom of the social hierarchy.¹³⁸

135. See Wright, *American Interpretations of Natural Law* at 211 (cited in note 17). See generally William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Cornell U., 1977) (explaining the variety of antislavery arguments that were made prior to 1848).

136. See Haines, *The Revival of Natural Law Concepts* at 21-27; 52-53 (cited in note 17) (distinguishing natural rights and natural law); Wright, *American Interpretations of Natural Law* at 4-12 (cited in note 17) (stating that natural law was "rarely made to be the source of a body of rights which individuals hold even as against the state."). For a historical discussion of the emergence of natural rights in relation to prior natural law concepts, with an emphasis on seventeenth-century European philosophy, see Kelly, *A Short History of Western Legal Theory* at 227-29, 268-70 (cited in note 1).

137. See Wright, *American Interpretations of Natural Law* at 211-25 (cited in note 17). See also Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848*, at 259-61 (cited in note 135) (explaining the natural law arguments of radical antislavery constitutionalists). For example, the Declaration of Sentiments of the American Anti-Slavery Convention which met in Philadelphia in December 1833, stated:

The right to enjoy liberty is inalienable. To invade it is to usurp the prerogative of Jehovah. Every man has a right to his own body—to the products of his own labor—to the protection of law—and to the common advantages of society. That all those laws which are now in force, admitting the right of slavery, are therefore, before God, utterly null and void; being an usurpation of the Divine prerogative, a daring infringement on the law of nature, a base overthrow of the very foundations of the social compact. . . and therefore they ought instantly to be abrogated.

Wright, *American Interpretations of Natural Law* at 212 (cited in note 17).

138. See Wright, *American Interpretations of Natural Law* at 229-39 (cited in note 17). See also Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848*, at 138, 186 (cited in note 135) (giving illustrations of natural law arguments on the proslavery side). For example, Alexander H. Stephens of Georgia, the Vice President of the Confederacy, said in his "cornerstone speech," delivered at Savannah in 1861:

The new constitution [of the Confederacy] has put at rest, *forever*, all the agitating questions relating to our peculiar institution—African slavery as it exists amongst us—the proper *status* of the negro in our form of civilization. This was the immediate cause of the late rupture and present revolution. . . . The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was . . . wrong in *principle*, socially, morally, and politically. . . . This was an error. . . .

....

These contrasting arguments contributed to the demise of natural law after the Civil War. Insofar as the victors take the spoils of war, the Union's victory, in a sense, repudiated the Southern invocations of natural law (though the Northern invocations of natural rights were not necessarily undermined in a similar fashion).¹³⁹ Not

Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the groat truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.

....

This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.

Alexander Stephens, *Cornerstone Speech* (Mar. 21, 1861), reprinted in Henry Cleveland, *Alexander H. Stephens, In Public and Private* 721 (National, 1866). See Wright, *American Interpretations of Natural Law* at 233-34 (cited in note 17) (summarizing John C. Calhoun's proslavery natural law argument); Brock, *Conflict and Transformation* at 14 (cited in note 132) (explaining why slave-owners accepted Calhoun's argument that slavery was necessary to a groat culture). But see Nelson, 87 Harv. L. Rev. at 538-47 (cited in note 1) (arguing that proslavery forces used instrumental arguments). For a discussion of the factors that led Southern politicians to develop increasingly elaborate and aggressive defenses of slavery, see Parish, *The American Civil War* at 28-31 (cited in note 132).

139. Wright notes that "the concept of natural law was generally discarded, and frequently explicitly repudiated, by American political theorists after the Civil War," Wright, *American Interpretations of Natural Law* at 276 (cited in note 17), but natural rights, according to Wright, continued to be significant in judicial decision making. *Id.* at 293, 298-99. Compare Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986) (suggesting reasons for the survival of natural rights arguments after the Civil War). Other scholars sharply disagree, however, about whether natural rights reasoning was explicit or even implicit in some of the Supreme Court's substantive due process cases from the late nineteenth century. Compare Moglen, 108 Harv. L. Rev. at 2032-33 (cited in note 1) (arguing that the Supreme Court used natural rights reasoning) and Nelson, 87 Harv. L. Rev. at 552-57 (cited in note 1) (same) with Horwitz II at 156-59 (cited in note 1) (arguing that Progressives in the early twentieth century mistakenly characterized the late nineteenth-century Supreme Court as following natural rights) and Robert W. Gordon, *The Elusive Transformation*, 6 Yale J. L. & Human. 137, 154 (1994) (reviewing Horwitz II (cited in note 1) (agreeing with Horwitz on this point)) and Stephen A. Siegel, *Historism in Late Nineteenth-century Constitutional Thought*, 1990 Wis. L. Rev. 1431, 1542-43 (arguing that constitutional theorists of the postbellum era were historicist and not natural law oriented). It is worth noting, at this point, that in a study of the law of slavery, Robert Cover characterized the early nineteenth century as positivistic. See generally Cover, *Justice Accused: Antislavery and the Judicial Process* (cited in note 120). But focusing exclusively on the slavery controversy, Cover failed to account for the strong natural law strains of nineteenth-century legal thought. Moreover, Cover did not adequately distinguish between nineteenth-century arguments based on natural rights and arguments based on natural law. Compare White, *The Marshall Court and Cultural Change 1815-35*, at 129 n.190 (cited in note 1) (criticizing Cover's characterization of the early nineteenth century as positivist); Sebok, 93 Mich. L. Rev. at 2081 n.112 (cited in note 23) (criticizing Cover's characterization of late nineteenth-century formalism as natural law oriented).

Yet, while I disagree with Cover's ultimate characterization of the early nineteenth century, I maintain that the slavery debates and the Civil War strongly contributed to the transition from natural law to positivism in American jurisprudence. Moreover, I agree with Cover insofar as he suggested that, in America, the sovereignty of the people often was held out as above the natural law. See note 120 and accompanying text (noting that judges upheld slavery by distinguishing law and morality); note 113 (discussing Story's inconsistent messages concerning the relation

incidentally, Lincoln and other Republican politicians, while not averse to invoking natural rights, most often emphasized the sovereignty of the people—"government of the people, by the people, for the people"—which resonated, of course, with a positivist view of the law.¹⁴⁰ Furthermore, the "all-or-nothing character" of natural law and natural rights arguments, and the likelihood that such positions could not be resolved peacefully eroded the belief in natural law.¹⁴¹ In the context of the slavery dispute before the War, natural law arguments, according to Peter J. Parish, had "put orthodox practical politics in jeopardy."¹⁴² In a nation becoming increasingly focused on the democratic idea of the sovereign people, such counter-political arguments were problematic, to say the least.

The demise of natural law in postbellum America had two intertwined consequences of enormous importance to legal thought. First, with natural law reasoning in disrepute, legal positivism freely ascended to supremacy in jurisprudential theory.¹⁴³ Thus, positivism had helped to weaken the position of natural law in the years before the Civil War, and then after the War, with natural law largely disavowed, positivism predominated (though, judges arguably continued

between the sovereignty of the people and natural law). See, for example, Kent, 2 *Commentaries on American Law* at 1 (cited in note 19) (suggesting that the protection of natural rights depended on laws enacted by the representatives of the people). Compare Morgan, *Inventing the People* 55-93 (cited in note 117) (explaining the creation of the concept of the sovereign people in England and America).

140. Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863), reprinted in Henry Steele Commager and Allan Nevins, eds., *The Heritage of America* 764, 765 (Little, Brown, 1949). See Wright, *American Interpretations of Natural Law* at 175-76, 180 (cited in note 17) (stating that Lincoln found no need to justify his tenets of democracy by an "appeal to the laws of nature"); Alexander H. Stephens, *Speech on the Territorial Bill* (Aug. 7, 1848), reprinted in Henry Cleveland, *Alexander H. Stephens, In Public and Private* 346-47 (National, 1866).

141. Moglen, 108 Harv. L. Rev. at 2045 (cited in note 1). See LaPiana, *Logic and Experience* at 75-76 (cited in note 2) (noting that the moral discord created by the arguments of abolitionists and their opponents undermined the belief in a widely held set of moral values). According to Peter J. Parish, "[slavery] blew to pieces the party system, and the normal pattern of bargain and compromise." Parish, *The American Civil War* at 26 (cited in note 132). To some extent, these problems that emerged in natural law corresponded to certain criticisms of Platonic philosophy. In particular, Plato was criticized for not adequately explaining both how we come to know Ideas or Forms and how particular instances participate in the Ideas. See, for example, Owens, *A History of Ancient Western Philosophy* at 227-28 (cited in note 64). These criticisms of Platonic philosophy seem to relate to the standard skeptical critique of natural law: Natural law apparently can be invoked for any position because we cannot truly know either whether there is such a thing as natural law or, even if there is, what principles are contained in natural law. See John H. Ely, *Democracy and Distrust* 50 (Harvard U., 1980) (stating that natural law can be invoked "to support anything"). Part of the problem for natural law in the Civil War context was that natural law was being invoked to support entirely inconsistent positions.

142. Parish, *The American Civil War* at 27 (cited in note 132). See id. at 49 (describing the invocation of natural law arguments in congressional debates as a "dangerous precedent").

143. For an excellent analysis of the idea of positivism, see Sebok, 93 Mich. L. Rev. at 2063-65 (cited in note 23).

to use natural rights reasoning in some cases).¹⁴⁴ Second, the interrelated decline of natural law and rise of positivism generated a prototypical modernist epistemological problem: the problem of foundations. Before the Civil War, the principles of natural law had provided a theoretical foundation for the American legal system, but this foundation had suddenly dissolved. What could serve as a new foundation? To be sure, the people were sovereign, and this fact justified legislative law making. If, however, legislation rested on the ground that it supposedly represented the sovereign will of the people, what about judicial decisions at common law? At a time when the common law remained the most pervasive feature of the American legal landscape,¹⁴⁵ what was the foundational source that guided and constrained common law judges? This metaphysical and epistemological problem provided the agenda for American legal modernism: For at least the next one hundred years, jurists struggled to identify an objective foundation for judicial decision making.¹⁴⁶

144. See note 139 and accompanying text.

145. Compare Bruce A. Ackerman, *Reconstructing American Law* (Harvard U., 1984) (discussing the transition of American legal landscape in the twentieth century so that legislation dominated over the common law).

146. See Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 329-52 (cited in note 1) (explaining the four stages of modernism as exploring different possible objective grounds for the rule of law). In a review of Neil Duxbury's *Patterns of American Jurisprudence*, Gordon writes: "[If one characterizes] the main job of modern jurisprudence . . . as a series of successive attempts to re-establish more or less objective foundations for legal reasoning—in an intellectual environment that has been irrevocably altered by skeptical attacks on such foundations—one will have found a tolerably effective way of organizing the history of the last hundred years of legal thought." Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 Geo. L. J. 2215, 2218 (1996) (reviewing Duxbury, *Patterns of American Jurisprudence* (cited in note 1)).

I disagree with Thomas C. Grey insofar as he implicitly suggests that Langdellian legal science is premodern. In his otherwise excellent study of Langdell, Grey refers to Langdellian legal science as the "classical orthodoxy" that serves as "the indispensable foil" for "modern legal thought." Grey, 45 U. Pitt. L. Rev. at 3 (cited in note 1). I agree that Langdellian legal science serves as a foil for much of what follows in American jurisprudence, but it is not classical in the sense of being premodern. Hence, despite serving as a foil, Langdellian legal science is also modern, and it therefore shares much in common with the other forms of modernist jurisprudence that followed it. Compare LaPiana, *Logic and Experience* at 59, 187 n.11 (cited in note 2) (questioning whether Langdell's writing on contract law should be called classical or orthodox). Previously, I too have used the term "classical orthodoxy." See, for example, Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Retrospective* at 329 (cited in note 1). While the term usefully underscores the importance of Langdellian legal science to American jurisprudence—as the standard or long dominant approach to law—I now believe that the word "classical" can be misleading (as it suggests premodern). In a more recent article, Grey himself characterizes Langdellian legal science as modern. Thomas C. Grey, *Modern American Legal Thought*, 106 Yale L. J. 493, 494 (1996) (reviewing Duxbury, *Patterns of American Jurisprudence* (cited in note 1)).

In this context, Langdellian legal science developed. Langdell and his colleagues were the first American jurists who attempted to understand and legitimate the common law system in a positivist world.¹⁴⁷ Although Langdell did not often explicitly discuss positivism as a theory, Langdellians clearly were committed positivists. Joseph Beale, a second-generation disciple of Langdell, maintained that "no principle of natural law can be regarded as law . . . until it is established as a principle of some actually living and working system of positive law."¹⁴⁸ At times, Langdell himself uttered purely positivist statements. For example, he said that "[a]ll duties originate in commands of the State,"¹⁴⁹ and that the word "law", as commonly used by attorneys, "means law as administered by courts of justice in suits between litigating parties."¹⁵⁰ Moreover, Langdellians repudiated the natural law notions that legal principles are universal and eternal. Instead, generally consistent with a positivist outlook and a historicist (and hence modernist) sensibility, Langdellians understood legal principles as developing or evolving over time.¹⁵¹ In the *Preface* to his first casebook on contracts, published in 1871, Langdell underscored the "growth, development, [and] establishment" of legal

147. I rely largely on the following works by Langdell: C.C. Langdell, *A Selection of Cases on the Law of Contracts* (Little, Brown, 2d ed. 1879) ("Langdell, Casebook"); C.C. Langdell, *A Summary of the Law of Contracts* (Little, Brown, 2d ed. 1880) ("Langdell, Summary"); C.C. Langdell, *Preface to the First Edition*, in *A Selection of Cases on the Law of Contracts* (Little, Brown, 2d ed. 1879) ("Langdell, Preface"); C.C. Langdell, *Teaching Law as a Science*, 21 Am. L. Rev. 123 (1887); C.C. Langdell, *Classification of Rights and Wrongs (Part I)*, 13 Harv. L. Rev. 537 (1900); C.C. Langdell, *Classification of Rights and Wrongs (Part II)*, 13 Harv. L. Rev. 659 (1900); C.C. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 Harv. L. Rev. 496 (1901); C.C. Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation*, 19 Harv. L. Rev. 151 (1906). I also rely on Joseph H. Beale, 1 *A Treatise on the Conflict of Laws* (Baker, Voorhis, 1916); Samuel Williston, *The Law of Contracts* (Baker, Voorhis, 1920); William A. Keener, *A Selection of Cases on the Law of Quasi-Contracts* iii (Baker, Voorhis, 1888) ("Keener, Quasi-Contracts"); William A. Keener, *Methods of Legal Education (Part II)*, 1 Yale L. J. 143 (1892). For a colloquy on Langdell, see 20 Law & Soc. Inquiry 691 (1995).

148. Beale, 1 *A Treatise on the Conflict of Laws* at 143 (cited in note 147).

149. Langdell, 13 Harv. L. Rev. at 542 (cited in note 147). Langdell, however, clearly denied legislation the status of being true law. See Langdell, 19 Harv. L. Rev. at 153 (cited in note 147).

150. Langdell, 19 Harv. L. Rev. at 151 (cited in note 147). See LaPiana, *Logic and Experience* at 122-24 (cited in note 2) (discussing evidence of Langdell's positivism). See also *id.* at 124-31, 136 (discussing other Langdellian positivists).

151. William A. Keener writes: "To say that the study of cases is only the study of isolated propositions is to deny that the law has been *developed* through the cases." Keener, 1 Yale L. J. at 146 (cited in note 147) (emphasis added). See Grey, 45 U. Pitt. L. Rev. at 28-29 & n.99 (cited in note 1) (discussing the Langdellians' rejection of natural law and acceptance of an idea of legal development). Compare Sebok, 93 Mich. L. Rev. at 2079-81 (cited in note 23) (arguing that although Langdell sometimes is mistakenly characterized as a natural law theorist, he was actually a positivist).

Later, I argue that although the Langdellians believed in progress in a modernist sense, they did not completely display a historicist attitude. See text accompanying note 205.

principles—a slow growth “extending in many cases through centuries.”¹⁵²

152. Langdell, *Preface* at viii-ix (cited in note 147). See Beale, 1 *A Treatise on the Conflict of Laws* at 149-50 (cited in note 147) (arguing that the common law progresses).

The significance of the so-called historical school of jurisprudence in America and its relationship to Langdellian legal science are problematic. The leading proponents of the historical school were Friedrich Carl von Savigny, a German who published in the first part of the nineteenth century, and Henry Maine, an Englishman who published his most famous work, *Ancient Law*, in 1861. Henry Maine, *Ancient Law* (U. of Arizona, 1986). See Bodenheimer, *Jurisprudence* at 70-83 (cited in note 1) (discussing Savigny and the development of the historical school). According to the views of the historical school, law develops slowly as part of a national culture. Savigny wrote:

In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin. . . .

....

But this organic connection of law with the being and character of the people, is also manifested in the progress of the times; and here, again, it may be compared with language. For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality. . . .

Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abram Hayward, trans.) (1831), reprinted in Clarence Morris, ed., *The Great Legal Philosophers* 290, 290 (U. of Pennsylvania, 1959).

In America, the clearest proponent of the historical school was James Coolidge Carter. Carter was a prominent New York attorney and leader of the bar who strongly opposed the continuing efforts to codify the law in New York in the latter nineteenth century. Consequently, except for one book published posthumously, his writing was largely “partisan and polemical” and published as “speeches or reports in pamphlets to bar associations.” Herget, *American Jurisprudence, 1870-1970: A History* at 120 (cited in note 1). See Horwitz II at 118-21 (cited in note 1) (discussing Carter’s opposition to codification). See, for example, James Coolidge Carter, *Law: Its Origin, Growth, and Function* (G.P. Putnam’s Sons, 1907). In fact, Savigny himself had drawn upon his historical approach to oppose codification in Germany earlier in the century. See Bodenheimer, *Jurisprudence* at 71-73 (cited in note 1) (explaining that Savigny opposed codification and believed that the true sources of law included the “common consciousness of the people”). In any event, Carter’s writings have had little long-term influence in American jurisprudence. See Herget, *American Jurisprudence, 1870-1970: A History* at 120-30 (cited in note 1) (discussing Carter’s ideas). I do not mean to suggest that the historical school was inconsequential in America, but rather that it was of secondary importance. The historical school’s greatest significance may have been its support of the general trend in late nineteenth-century jurisprudence toward a more historicist approach. See *id.* at 22 (stating that the historical school “played not a dominant but a main supporting role in American legal philosophy”). Compare Duxbury, *Patterns of American Jurisprudence* at 34 (cited in note 1) (noting that Holmes drew upon the historical jurisprudence of Maine and Savigny, but otherwise failing to discuss the historical school); Horwitz II at 121 (cited in note 1) (describing Carter as “pedestrian”); Grey, 45 U. Pitt. L. Rev. at 30 (cited in note 1) (noting links between Langdellian legal science and the historical school but also emphasizing differences); Hoeflich, 30 Am. J. Leg.

Most important, though, the positivist approach of Langdellian legal scientists was exemplified in their emphasis on the decided cases. To Langdell, the cases (or the books containing the cases) were "the ultimate sources of all legal knowledge."¹⁵³ By studying cases, the legal scientist then could inductively discover objective legal principles or doctrines.¹⁵⁴ Langdell's concept of legal science, thus, closely correlated with his case method of teaching.¹⁵⁵ The case method, which he introduced, entailed a penetrating analysis of a series of cases: Through a process of Socratic questioning, the professor led the students to recognize the legal principles immanent in the cases. The case method contrasted with the typical antebellum approach of presenting abstract principles and rules through lectures.¹⁵⁶ According to Langdell's *Preface* to his casebook, the case method was the best approach to teaching because the cases themselves were the "original sources."¹⁵⁷ The law professor was qualified to teach the students because, as a legal scientist, he or she was experienced not in the

Hist. at 119-21 (cited in note 1) (discussing similarities between Langdellian legal science and historical jurisprudence). Carter may have undermined his own long-term influence in American jurisprudence by expanding his opposition to codification into a general antagonism toward legislation, arguing that legislation was actually inconsistent with democracy. See Horwitz II at 119-20 (cited in note 1) (discussing Carter's opposition to legislation). Compare Bodenheimer, *Jurisprudence* at 73 (cited in note 1) (observing that Savigny opposed most forms of legislation also). This viewpoint obviously ran against the grain of the trend of American political thought with its ever-increasing emphasis on the sovereignty of the people.

153. Langdell, 21 Am. L. Rev. at 124 (cited in note 147).

154. See Beale, 1 *A Treatise on the Conflict of Laws* at 148-49 (cited in note 147) (arguing that common law judges discover and do not make the law). Grey writes:

Progress occurred when the scholar (or the great judge or lawyer) discovered a previously unrecognized principle, one that provided a simple and satisfying explanation for existing decisions, and that at the same time reflected the slowly changing needs and conditions of society. Such a principle, because immanent in decided cases, was already the law, so that its articulation was an act of discovery, not one of illegitimate legislation.

Grey, 45 U. Pitt. L. Rev. at 31 (cited in note 1).

155. Throughout Keener's essay on *Methods of Legal Education*, he integrates legal science with the case method of teaching; one seems to justify the other. Keener, 1 Yale L. J. at 143 (cited in note 147). Compare LaPiana, *Logic and Experience* at 78 (cited in note 2) (discussing the connection between the case method of teaching and Langdellian legal science).

156. See LaPiana, *Logic and Experience* at 29-54 (cited in note 2) (describing antebellum legal education); Charles Warren, *History of the Harvard Law School* 372-74 (Da Capo, 1970) (reprint of 1908 ed.) (describing the hostility that Langdell encountered when he introduced his case method).

157. Langdell, *Preface* at ix (cited in note 147). Keener wrote similarly: "The case system then proceeds on the theory that law is a science and, as a science, should be studied in the original sources, and that the original sources are the adjudged cases . . ." Keener, 1 Yale L. J. at 144 (cited in note 147).

practice of law but rather in the learning of law—in the discovery of the principles from the cases.¹⁵⁸

Hence, two central features of Langdellian legal science were a positivist focus on the decided cases and the use of inductive reason to discover legal principles. Yet, the most salient feature of the postbellum approach was its commitment to deductive reason or logic. Indeed, Langdell's practice of legal science was remarkably Cartesian in style. Whereas the antebellum legal scientists rather faithfully accepted the multitude of cases, the Langdellian scientist applied a method of doubt or skepticism reminiscent of Descartes.¹⁵⁹ Langdell explicitly turned his skeptical gaze on case precedents: "[T]he cases which are useful and necessary for [the purpose of legal study] at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study."¹⁶⁰ Langdell and his colleagues then applied deductive reason with the dogged ferocity of a Cartesian in a

158. Langdell wrote:

[I]f printed books are the ultimate sources of all legal knowledge, if every student who would obtain any mastery of law as a science must resort to these ultimate sources, and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have traveled the same road before him,—then a university, and a university alone, can afford every possible facility for teaching and learning law. I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often traveled it before. What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law

Langdell, 21 Am. L. Rev. at 123-24 (cited in note 147). Keener suggested that the virtue of the case method of teaching lay more in the fact that it supposedly forced students to do what attorneys do in the practice of law. Keener, *Preface* at iv (cited in note 147). Of course, Langdell's and Keener's respective views of the advantages of the case method were not inconsistent. One could easily argue that the case method taught students what they would need to do as attorneys, and as attorneys they would need to learn the law from the cases.

159. See Rene Descartes, *Meditations* (1641) (John Veitch, trans.), reprinted in *The Rationalists* 97, 112-27 (Anchor, 1974) (describing and using the method of doubt). Descartes expected to locate the fundamental and indubitable truths, the foundations of human knowledge, within the mind, buried or hidden under the debris of prejudices and opinions. He expected to locate these by the very process of doubting By doubting and negating, these opinious and beliefs that, at present, blind us, he said, could be removed so that truth would shine forth.

Popkin, *The History of Scepticism from Erasmus to Spinoza* at 182-83 (cited in note 6).

160. Langdell, *Preface* at viii (cited in note 147). See Beale, 1 *A Treatise on the Conflict of Laws* at 148-49 (cited in note 147) (explaining that many cases are wrongly decided and therefore not truly law). Some of Langdell's disciples did not display quite the same enthusiasm as Langdell himself for repudiating large numbers of cases. See Duxbury, *Patterns of American Jurisprudence* at 21-23 (cited in note 1) (discussing changes made to the Langdellian approach by Williston, Keener, and Ames).

quest to conceptualize a logically coherent and (hopefully) elegant system of legal principles and rules. "Law, considered as a science, consists of certain principles or doctrines," Langdell declared.¹⁶¹ "Moreover, the number of fundamental legal [principles or] doctrines is much less than is commonly supposed If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number."¹⁶² Stephen Toulmin tersely comments that, for Descartes, "abstract axioms were in, concrete diversity was out."¹⁶³ The same could be said of Langdell. Legal principles were analogous to the axioms of Euclidian geometry:¹⁶⁴ They were few in number, they could be classified and arranged into a formal system, and they served as the fountainhead for the logical deduction of all other legal rules. Langdellians neatly and rationally ordered the entire legal system into a conceptual framework resembling a pyramid, with the few axiomatic and abstract principles at the apex of the pyramid and more precise and numerous rules at the base.¹⁶⁵ Those case precedents that did not fit neatly into the formal and conceptual framework were deemed wrong and therefore irrelevant.

161. Langdell, *Preface* at viii (cited in note 147). See Beale, 1 *A Treatise on the Conflict of Laws* at 135 (cited in note 147) (noting that law "is not a mere collection of arbitrary rules, but a body of scientific principle").

162. Langdell, *Preface* at viii-ix (cited in note 147). In a similar vein, Langdell added: It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

Id. at ix.

163. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity* at 33 (cited in note 6) (emphasis omitted).

164. Friedman, *A History of American Law* at 617-18 (cited in note 1); Grey, 45 U. Pitt. L. Rev. at 16-20 (cited in note 1) (discussing the analogy between legal science and geometry). LaPiana notes, however, that at one point, Langdell said that legal science was not like mathematics. See LaPiana, *Logic and Experience* at 56-57 (cited in note 2). Regardless of this statement by Langdell, in order to elucidate postbellum legal science, it is usefully analogized to Euclidean geometry.

165. Grey has suggested that the Langdellian legal system was comprehensive, complete, formal, and conceptually ordered. Grey, 45 U. Pitt. L. Rev. at 6-10 (cited in note 1). A legal system is comprehensive if it has no procedural gaps and every case gets decided. It is complete if it has no substantive gaps and every case has a preexisting substantively correct answer. It is formal if the result in every case is indubitably deduced through unquestionable or at least compelling reasoning. It is conceptually ordered if "its substantive bottom-level rules can be derived from a small number of relatively abstract principles and concepts, which themselves form a coherent system." *Id.* at 8. Lasswell and McDougal described Langdellianism as having "beautifully terraced unified statements, geometrically laid out with no overlapping, erosion or gaps." Harold D. Lasswell and Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L. J. 203, 237 (1943).

The Langdellians' commitment to logic and deductive reasoning produced two interrelated consequences. First, analytical or logical soundness was the sole criterion for proper legal reasoning; a judge, therefore, was not to consider the justice or injustice likely to flow from a decision. Second, the overt pragmatic and instrumental judicial decision making characteristic of the first part of the nineteenth century was repudiated; practical (or policy) considerations supposedly would infect the logical purity that distinguished valid legal reasoning.¹⁶⁶ These two consequences are well illustrated by Langdell's discussion of the mailbox rule—which specifies whether a posted acceptance of an offer for a bilateral contract is effective upon dispatch or receipt. In his *Summary of the Law of Contracts*, Langdell explained that an acceptance of an offer for a bilateral contract contains an implicit counter-offer.¹⁶⁷ By analytical definition, any counter-offer must be communicated because “communication to the offeree is of the essence of every offer.”¹⁶⁸ Therefore, as a matter of deductive logic, an acceptance (as a counter-offer) that is mailed through the post cannot become effective until it is communicated or, in other words, received.¹⁶⁹ Having concluded his syllogistic proof that a posted acceptance must be effective only upon receipt, Langdell proceeded to refute the common arguments in favor of deeming the acceptance effective upon dispatch.¹⁷⁰ The final such argument confronted by Langdell was that his recommended rule—that acceptance be effective only upon receipt—would lead to injustice and practical absurdities. His response was striking: “The true answer to this argument is, that it is irrelevant.”¹⁷¹

166. Joseph Beale wrote: “Purity of doctrine may be lost through wrong decisions of courts, thus warping legal principle by bad precedent; but wrong decisions are after all uncommon, and the law is not seriously affected by them.” Beale, 1 *A Treatise on the Conflict of Laws* at 135 (cited in note 147).

167. Langdell, *Summary* at 15 (cited in note 147). Langdell explained that the conceptualization of an acceptance of a bilateral contract as containing a counter-offer is implied, but he did not explain clearly why such an implication must follow. See *id.* at 14. Holmes criticized Langdell on exactly this point. See Oliver Wendell Holmes, Jr., *The Common Law* 305-06 (Little, Brown, 1991).

168. Langdell, *Summary* at 15 (cited in note 147).

169. *Id.* Langdell then explained that in all but three cases, the discussions of the mailbox rule had been dicta. *Id.* at 16-18.

170. *Id.* at 18-21.

171. *Id.* at 21. After this assertion, Langdell continued his discussion of justice: “[B]ut, assuming it to be relevant, it may be turned against those who use it without losing any of its strength.” *Id.* He then argued that deeming an acceptance to be effective upon dispatch would lead to greater injustice. Because of this more practical argument, Thomas Grey has suggested that Langdell's initial response—that a focus on justice was irrelevant—was “an intentional

To the Langdellian legal scientist, in short, legal problems were to be resolved by carefully attending to the precise analytical definitions of principles and rules and the logical consequences flowing ineluctably from those principles and rules. Although the axiomatic principles initially had to be induced from the cases, once inferred, the principles themselves were the substance of the law. As William A. Keener, one of Langdell's leading disciples, stated: "[T]he case is simply material from which a principle is to be extracted."¹⁷² In post-bellum legal science, then, the principles and deductive logic stood preeminent.¹⁷³

Unsurprisingly, Langdellian legal science did not display the same bottom-up style of reasoning typical of antebellum legal science.

jurisprudential flourish." Grey, 45 U. Pitt. L. Rev. at 4 n.11 (cited in note 1). I believe that Langdell's express language suggests that Grey has overstated this point. First, when deeming justice to be irrelevant, Langdell declared that this was the "true answer." Second, when beginning his discussion of justice and practical concerns, Langdell suggested that he was offering these thoughts merely as an "even if" type of argument: Even if you do not accept my first argument (which is the true answer), you might be convinced by this additional argument. Hence, Langdell initiated his discussion of justice by saying, "but, assuming it to be relevant." Langdell, *Summary* at 21 (cited in note 147).

Langdell structured his discussion of the revocation of an offer for a unilateral contract in a similar fashion. He first argued that, because the performance of the consideration turns an offer for unilateral contract into a binding promise, up to "the moment when the performance of the consideration is completed . . . the offer may either be revoked, or be destroyed by the death of the offeror, and the offeree thus be deprived of any compensation for what he has done." *Id.* at 3. In other words, until the offeree has completely performed, the offeror can revoke the offer, and the offeree has no remedy. After making this analytical argument, Langdell (as in the mailbox rule discussion) then turned to considerations of justice. He added that because "this may cause great hardship and practical injustice," some commentators have argued that the offer should become irrevocable once performance has begun. Langdell rejects this argument by maintaining that "such a view seems to have no *principle* to rest upon." *Id.* at 4 (emphasis added). That is, to Langdell, justice itself is not a principle that can ground legal argument. He then continued by offering another "even if" argument revolving around practical concerns and justice: "*Besides*, there may be hardship on the other side as well." *Id.* at 4 (emphasis added).

172. LaPiana, *Logic and Experience* at 135 (cited in note 2) (quoting William A. Keener, *The Inductive Method in Legal Education*, 17 Am. Bar Assoc. Rpts. 473, 484 (1994)). LaPiana identifies Keener and James Barr Ames as Langdell's main disciples. See *id.* at 3.

173. Grey's comparison of Langdellian legal science with Euclidean geometry elucidates the significance of deductive reasoning:

To capture the parallel between classical legal science and geometry, we must lay aside the modern school-taught view that Euclidean geometry, like other mathematical theories, is simply an uninterpreted formal system of terms and inference rules. We must go back to the view people held for over two thousand years, and which all of us who are not specialists in relativity theory or philosophers of mathematics still intuitively accept. We believe that Euclid's axioms are not merely human constructs, but rather obvious and indubitable physical truths about the structure of space, from which nonobvious truths (like the Pythagorean theorem) can be proved by sequences of indubitable deductive steps. It is the breathtaking nature of this movement from truisms to new knowledge about the world through pure thought that has made Euclidean geometry the great paradigm of the power of reason throughout the history of the West.

Grey, 45 U. Pitt. L. Rev. at 17-18 (cited in note 1).

As discussed earlier, antebellum treatises usually reflected the narrow factual situations in which cases repeatedly arose as well as the minutiae of the writs or forms of action. In contrast, postbellum legal scientists tended to display a top-down style of reasoning. As mentioned, code pleading already had replaced the common law forms of action in many states (including New York, where Langdell had practiced). Consequently, whereas antebellum legal scientists had viewed the forms of action as shaping the classification of the common law, Langdellians had freedom to move to higher levels of abstraction in their classificatory systems. Indeed, Langdellians were compelled to search the cases for other organizational themes.¹⁷⁴ The new organizational themes that emerged were the high-level axiomatic principles such as consideration and mutual consent (offer and acceptance) in contract law. The centrality of these principles was evident in Langdellian casebooks and treatises.¹⁷⁵ For example, in Samuel Williston's treatise, *The Law of Contracts*, the principles no longer merely provided a loose organizational scheme; rather they were the core of the entire project—the substantive fountainhead for the logical derivation of each chapter and section.¹⁷⁶ Langdell's own *Summary of the Law of Contracts*, a short treatise-like work, focused on the analysis of contract principles; it contained remarkably few citations and discussions of cases.¹⁷⁷ Indeed, in their articles and treatises, the Langdellian legal scientists tended to eschew discussing actual cases, especially avoiding factual details. Instead, to illustrate their main

174. See LaPiana, *Logic and Experience* at 4, 58, 104 (cited in note 2) (discussing the importance of the repudiation of the common law forms of action).

175. See, for example, Joseph H. Beale, Jr., *A Selection of Cases and Other Authorities Upon Criminal Law* (Harvard U., 1894); William A. Keener, *A Selection of Cases on the Law of Contracts* (Baker, Voorhis, 1898); Keener, *Quasi-Contracts* (cited in note 147); Langdell, *Casebook* (cited in note 147).

176. See Williston, *The Law of Contracts* (cited in note 147) (containing, for example, chapters on acceptance, consideration, and capacity).

177. See Langdell, *Summary* (cited in note 147); LaPiana, *Logic and Experience* at 59-60 (cited in note 2) (discussing differences between Langdell's *Summary* and antebellum treatises on contract law). To some extent, Langdell's failure to extensively cite and discuss cases might be explained by the nature of his *Summary*. It was first published as a supplement to the second edition of his casebook on contracts, and hence was intended to be used in conjunction with the casebook. Langdell, *Summary* at iii (cited in note 147). The casebook, though, actually contained very few cases when compared with an antebellum treatise. See Langdell, *Casebook* (cited in note 147). Moreover, Langdell's articles demonstrated an unwavering commitment to focusing on abstract principles and logic at the expense of extensive discussions of cases. See, for example, Langdell, 14 Harv. L. Rev. at 496 (cited in note 147). Some Langdellians, though, did fill their treatises with footnotes full of case cites. See, for example, Williston, *The Law of Contracts* (cited in note 147).

points, the Langdellians constructed hypothetical situations purified of irrelevant factual distractions and populated by depersonalized legal actors called A, B, and C.¹⁷⁸

If, as I suggest, the Langdellians were the first American jurists to confront the metaphysical and epistemological problems of legal modernism, then their proffered solutions seem, at least on first glance, to be riddled with conundrums. The Langdellians' strong commitment to formal deductive reasoning would appear to fit best within a natural law system, where judges could, in theory, reason deductively downward from the higher law principles to properly resolve particular cases. But the Langdellians repudiated natural law. In a positivist world, where law is the command of the sovereign, judges would seem to be able to make law. Yet most Langdellians denied that judges had such power. The axiomatic principles of the common law, according to the Langdellians, were to be initially discovered by reasoning inductively upward from the cases, but the correctness or incorrectness of the cases was to be determined by reasoning deductively downward from the principles. As Thomas Grey observes, the enterprise "seems to be circular."¹⁷⁹ Instead of successfully specifying the metaphysical and epistemological foundations that modernism demands, the Langdellians seemed to offer no more than a circular system floating in mid-air.

Despite appearances, though, these tensions within Langdellian legal science can be reconciled, to some degree. To be clear, I do not intend to justify or legitimate the Langdellian approach to jurisprudence. Rather, I wish to explain how it made sense, at least

178. See, for example, Williston, *The Law of Contracts* § 102a (cited in note 147); James Barr Ames, *Novation*, 6 Harv. L. Rev. 184, 192 (1892); Joseph H. Beale, Jr., *Gratuitous Undertakings*, 5 Harv. L. Rev. 222, 230 (1891). The Langdellians typically would cite to the real cases in footnotes.

Williston, for one, included at least a couple of sections ostensibly containing illustrations from cases. See, for example, Williston, *The Law of Contracts* §§ 74-75 (cited in note 147). Such sections, however, were extremely rare. Moreover, they were brief and avoided any detailed discussions of cases.

179. Grey, 45 U. Pitt. L. Rev. at 21 (cited in note 1). Grey writes: "Decisions are thought authoritative in orthodox legal theory because they follow from the rules and principles that constitute the law; but in the classical conception of legal science, the rules and principles constituting the common law are themselves inductively derived from the cases. The enterprise thus seems to be circular . . ." *Id.* Elsewhere, Grey added: "[Langdell's legal science] claims to be empirical and yet its practice is highly conceptual; it delivers normative judgments, yet proclaims the positivist autonomy of law from morals. This seems to be an incomprehensible jumble of induction with deduction and of norm with fact." *Id.* at 16. These apparent conundrums within Langdellian legal science led Anthony Sebok to claim that Langdell focused almost exclusively on inductive logic, not on deductive logic. See Sebok, 93 Mich. L. Rev. at 2083-84 (cited in note 23). As is clear from my interpretation of Langdellian legal science, I disagree with Sebok's argument on this point.

to Langdellians. My explanation emerges from an analogy: If antebellum legal scientists were fruitfully compared to Plato, then postbellum legal scientists can be usefully analogized to Aristotle.¹⁸⁰ Whereas Plato argued that the Ideas or Forms exist independently and separately from the particular instances, Aristotle argued that form differs from matter only in meaning. David Ross pinpoints the distinction between Plato and Aristotle: "Are universals, as Plato claimed in his ideal theory, self-subsistent substantial entities? . . . Aristotle answers with a firm negative."¹⁸¹ According to Aristotle, form and matter (or universals and particulars) are inseparable in fact: Form is immanent in and exists only through concrete particulars or manifestations.¹⁸² The true meaning of a thing is its form, but this meaning must be embodied in matter if it is to exist.¹⁸³ To be sure, the forms are "for Aristotle as real, as objective, as the individuals."¹⁸⁴ They are not, in other words, mere mental constructs, but at the same time, they exist only as manifested in or as characteristic of the particular instances. In short, one "must not posit a separate world of universals."¹⁸⁵ Hence, for example, the form of good or love does not exist apart from its particular manifestations, yet the meanings of these forms can be discussed and analyzed as universals or principles.¹⁸⁶

180. Years ago, (1984-85), I took a jurisprudence class from Thomas Grey. I remember that, in the midst of a class discussion of Langdell, another student (I do not remember the student's name) suggested, without elaboration, that Langdell was like Aristotle. Professor Grey responded, again without elaboration, that he too had thought of that analogy. I have no idea what they were specifically thinking about at the time. Their brief exchange may or may not have corresponded with the substance of my comparison of Langdellian legal science and Aristotelian philosophy (to follow in the text). In any event, my decision to use Aristotle to elucidate postbellum legal science probably somehow relates to my memory of that class. Helpful accounts of Aristotelian philosophy are in the following: Owens, *A History of Ancient Western Philosophy* (cited in note 64); Ross, *Aristotle* (cited in note 66).

Richard Posner has described Langdellian legal science as "a form of Platonism." Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 Harv. L. Rev. 761, 762 (1987). Although I believe that such an analogy is understandable, it is nonetheless misleading.

181. Ross, *Aristotle* at 157 (cited in note 66).

182. See Aristotle, *Natural Science*, reprinted in Philip Wheelwright, trans., *Aristotle* 3, 17-18, 23 (Odyssey, 1951). Compare Aristotle, *Nicomachean Ethics*, reprinted in Philip Wheelwright, trans., *Aristotle* 155, 162-66 (Odyssey, 1951) (rejecting Plato's theory of Ideas or Forms).

183. Aristotle, *Metaphysics*, reprinted in Philip Wheelwright, trans., *Aristotle* 65, 77-78 (Odyssey, 1951) ("Aristotle, *Metaphysics*"); Aristotle, *Psychology (De Anima)*, reprinted in Philip Wheelwright, trans., *Aristotle* 115, 120-21 (Odyssey, 1951) ("Aristotle, *Psychology*").

184. Ross, *Aristotle* at 158 (cited in note 66).

185. Id.

186. Aristotle, *Psychology* at 120-21 (cited in note 183); Ross, *Aristotle* at 191 (cited in note 66).

If the metaphysical foundation, in a sense, consists of form and matter together, then how does one come to knowledge?¹⁸⁷ How, that is, does one move from sense perception of matter (or particulars) to knowledge of forms (or universals)? Aristotle wrote: "[T]hese states of knowledge are neither innate in a determinate form, nor developed from other higher states of knowledge, but from sense-perception. It is like a rout in battle stopped by first one man making a stand and then another, until the original formation has been restored."¹⁸⁸ To Aristotle, in other words, one initially perceives or experiences a series of particulars and then reasons inductively upward to discover the forms. Yet, despite Aristotle's stress on experience and inductive logic, he also was renowned for his passion for hierarchical classificatory schemes relying heavily on deductive logic.¹⁸⁹ The highest principles or forms served as the premises (or fountainheads) for his deductively derived classificatory frameworks.¹⁹⁰ In addition, Aristotle's intricate hierarchical and logical systems necessarily centered on forms rather than matter; forms could be logically related to each other and arranged conceptually, while matter contained the particular variations that would foil such logical organization.¹⁹¹

The Aristotelian relationship between form and matter illuminates the relation between cases and principles in Langdellian legal

187. Aristotle did not clearly explain the exact metaphysical relationship between form and matter. See Antony Flew, *A Dictionary of Philosophy* 26-27 (St. Martins, 2d ed. 1984).

188. Owens, *A History of Ancient Western Philosophy* at 303 (cited in note 64) (quoting Aristotle). See Aristotle, *Metaphysics* at 68 (cited in note 183); Aristotle, *Zoology*, reprinted in Philip Wheelwright, trans., *Aristotle* 105, 109-10 (Odyssey, 1951) (Aristotle, *Zoology*); Ross, *Aristotle* at 54-55 (cited in note 66) (describing Aristotle's theory on the development from sense to knowledge). Compare Tarnas, *The Passion of the Western Mind* at 56 (cited in note 6) (discussing Aristotle's emphasis on perceptible qualities and its relation to his doctrine of categories).

189. See Bozeman, *Protestants in an Age of Science* at 7-8 (cited in note 38) (describing Bacon's attacks on Aristotelian orthodoxy); David W. Hamlyn, *A History of Western Philosophy* 60-62, 66-71 (Penguin, 1989); Tarnas, *The Passion of the Western Mind* at 62, 263, 273 (cited in note 6) (noting Bacon's criticism of Aristotle's reliance on deductive logic). Compare Ross, *Aristotle* at 54-55, 154 (cited in note 66) (discussing Aristotle's conception of how we move from sense perception to the highest forms of knowledge). Aristotle argued that "the ideal of a complete science [was] a set of truths [that were] represented as a sequence of consequences drawn from a few basic postulates or common principles." David Charles, *Aristotle*, in Ted Honderich, ed., *The Oxford Companion to Philosophy* 53, 54 (Oxford U., 1995). For a discussion of Aristotle's development of the concepts of deductive (or syllogistic) logic and inductive logic, see Ross, *Aristotle* at 20-61 (cited in note 66). Aristotle himself actually used the term "analytics" instead of "logic." *Id.* at 20.

190. See, for example, Aristotle, *Metaphysics* at 67-104 (cited in note 183); Aristotle, *Zoology* at 107-13 (cited in note 188). Compare Owens, *A History of Ancient Western Philosophy* at 303-04 (cited in note 64) (discussing the original premises for all demonstrative knowledge).

191. In the words of Ross: "[L]ogic is a study of thought, and that which the individual contains over and above its specific nature is due to the particular matter in which it is embodied, and thus eludes thought." Ross, *Aristotle* at 24 (cited in note 66).

science. In contrast to antebellum legal science, Langdellians did not posit the existence of principles as separate and independent from case decisions. Instead, the legal principles and the cases were understood as inseparable in fact. Just as Aristotle argued that form is immanent in and exists only through concrete particulars or manifestations, Langdellians argued that principles are immanent in and exist only through cases. Keener explicitly declared that law is "a science consisting of a body of *principles* to be *found* in the adjudged cases."¹⁹² Thus, for Langdellians, legal principles are real and objective—their meanings can be discussed and analyzed—but they nonetheless exist only as they are embodied or manifested in the cases.¹⁹³ When Keener explained the case method of teaching, he alluded to this metaphysical intermingling of cases and principles: By reading cases, "[i]nstead of reading principles [in treatises]," he said, the student "is studying and investigating the principles themselves."¹⁹⁴ The metaphysical foundation for the common law, in other words, consists of principles and cases together.

If so, then how did the legal scientist move from the cases to knowledge of the principles? Continuing with the analogy to Aristotelian philosophy, the legal scientist studied a series of cases and then reasoned inductively upward to discover the principles. Once discovered, however, these high-level principles served as the fountainhead for chains of deductive logic, reasoning downward to generate precisely classified and arranged formal systems. Thus, despite having its origins in the concrete cases, the intricate legal systems of the Langdellians revolved around abstract principles and rules. The epistemological foundation for the common law, then, was initially the cases, but primarily the axiomatic principles and deductive reason.¹⁹⁵

192. Keener, 1 Yale L. J. at 144 (cited in note 147) (emphasis added); accord Keener, *Quasi-Contracts* at iii-iv (cited in note 147).

193. Beale argued that the principles of the "Common Law" truly existed, but only insofar as they "came into existence" by their acceptance as the positive law (or "common law") of particular jurisdictions. See Beale, 1 *A Treatise on the Conflict of Laws* at 138-39, 144 (cited in note 147).

194. Keener, 1 Yale L. J. at 144 (cited in note 147).

195. The analogy between Aristotelian philosophy and Langdellian legal science reinforces the idea that Langdellianism also can be usefully compared to Euclidean geometry. See note 164 and accompanying text. Euclid lived a generation after Aristotle, but the elementary concepts of geometry already were known during Aristotle's time. Euclid then augmented those concepts. Aristotle's account of the logic and presuppositions of science corresponded closely with Euclid's eventual account of geometry. Ross, *Aristotle* at 44-45 (cited in note 66).

A couple of points are worth elaborating. First, as was also true of antebellum legal science, the postbellum legal scientists did not endorse any form of nominalism, which would have suggested that nothing existed but the individual case decisions. Despite the initial focus on cases—which spurred the case method of teaching—the Langdellians stressed the discovery of principles supposedly immanent in the cases. As Keener suggested, legal science does “not proceed on the theory that the law *consists* of an aggregation of cases.”¹⁹⁶

Second, in Aristotelian philosophy, a passion for deductive logic led to a focus on forms (or universals) rather than matter, and likewise, in Langdellian legal science, a passion for deductive logic led to a focus on principles and rules rather than cases. Taken one step further, the zealous commitment to deductive logic combined, in a sense, with the conception of legal principles as real and objective to legitimate (albeit perversely) a disregard for justice and practical considerations that otherwise might appear central to deciding cases. Langdellians perhaps realized implicitly that the relation between abstract propositions (rules and principles) and social reality (justice and practical concerns) was problematic in at least one important respect: To talk of a purely deductive logical relationship between rules and principles, on the one hand, and social reality, on the other, did not necessarily make sense. Yet, it did make sense to talk of a logical relationship between different abstract propositions, that is, between different rules and principles. Therefore, when Langdellians insisted that elements of social reality such as justice and practical concerns should be irrelevant to the law, their emphasis on logical order as pivotal to understanding the legal system at least became plausible. At a minimum, we can imagine a legal system based on abstract reason if it is unconnected to social reality.¹⁹⁷

196. Keener, 1 Yale L. J. at 144 (cited in note 147) (emphasis added). Precisely, when making this statement, Keener was focusing on the case method of teaching, but his comments were derived from his conception of legal science. Although the Langdellians did not believe that an initial focus on cases led to nominalism, one could reasonably argue that this focus on cases eventually led to the emergence of American legal realism in the early twentieth century. See, for example, Karl N. Llewellyn, *The Bramble Bush* 12 (Oceana, 1951) (arguing that the study of law requires focusing on many concrete instances). Furthermore, some critics of the realists accused them of being nominalists because of their insistence on focusing on individual cases. See, for example, Morris R. Cohen, *The Place of Logic in the Law*, 29 Harv. L. Rev. 622 (1916) (criticizing the use of so-called “eternal principles”).

197. Compare Andrei Marmor, *No Easy Cases?*, in Dennis M. Patterson, ed., *Wittgenstein and Legal Theory* 189, 193 (Westview, 1992) (rule-rule relations can be logical, but rule-world relations cannot be). Of course, the possibility of imagining such a legal system does not mean that we would want it to actually exist.

IV. CONCLUSION

The analogies of antebellum legal science to Platonic philosophy, on the one hand, and postbellum legal science to Aristotelian philosophy, on the other hand, help to elucidate some of the puzzling metaphysical and epistemological components of nineteenth-century American jurisprudence.¹⁹⁸ For the antebellum period, the framework of Platonic philosophy illuminates how jurists deemed eternal and universal natural law principles to be the foundation of the common law system, yet simultaneously advocated instrumental and pragmatic decision making, particularly to promote commerce. For the postbellum period, the framework of Aristotelian philosophy reveals how jurists believed legal science should start with a positivist focus on cases, but simultaneously emphasized axiomatic principles and deductive logic. Moreover, the distinction between Platonic and Aristotelian philosophies underscores that a central transition from antebellum to postbellum jurisprudence was the movement from a natural law to a positivist orientation.

To be sure, Langdellians did not consciously think of themselves as Aristotelians any more than the antebellum jurists thought of themselves as Platonists. And with regard to the postbellum period, despite the usefulness of analogizing to Aristotelianism, Langdellian jurisprudence clearly was not identical to Aristotelian philosophy; there were large and significant differences. Aristotle believed that nature was teleological and encompassed moral and aesthetic values,¹⁹⁹ while the Langdellians did not. Unsurprisingly,

198. In discussing the apparent circularity of Langdellian legal thought, Grey argues that some Langdellians suggested that *stare decisis* solved the problem of foundations in jurisprudence because it "provided an outside source of validity." Grey, 45 U. Pitt. L. Rev. at 26 (cited in note 1). Grey writes:

Under the classical view of precedent, a decision or two that is out of whack with 'principle' might be set aside as 'not good authority,' though never entirely dismissed from consideration until overruled. But an established line of precedent, however inconsistent with 'principle' in its inception, becomes binding law, and the seamless web of doctrine must somehow be rearranged to accommodate it.

Id. at 25-26. While this position seems to accurately describe the Langdellian belief in induction, it does not seem to explain or solve the problem of circularity. Instead, it merely represented a momentary privileging of induction over deduction in the Langdellian scheme. That is, *stare decisis* is based on the idea that decided cases become authoritative, and from the Langdellian world view, they therefore justified and necessitated whatever principles could be induced from them. As Grey acknowledges, though, this privileging of induction is in tension with the Langdellian commitment to axiomatic principles and deductive logic. See id. at 26-27.

199. Dupré, *Passage to Modernity* at 17-18 (cited in note 6). See Tarnas, *The Passion of the Western Mind* at 274 (cited in note 6) (stating Aristotle believed that "nature possessed teleologi-

then, Aristotle believed in natural law and justice,²⁰⁰ while of course, the Langdellians were positivists. Aristotle had faith in the veracity of appearances and our perceptions,²⁰¹ while Langdellians doubted and, in fact, explicitly repudiated many cases. In short, Aristotle was premodern, and the Langdellians were modern.

Yet, the important similarities between the modernist Langdellian legal science and the premodernist Aristotelian philosophy not only help elucidate the otherwise puzzling tensions within Langdellian jurisprudence, but also signal a resemblance between antebellum (premodern) and postbellum (modern) legal science.²⁰² For example, while Langdellians tended to avoid discussing actual cases in the text of their articles and treatises, they nonetheless sometimes filled their footnotes with citations, just as the antebellum treatise writers had done.²⁰³ Furthermore, legal scientists during both the antebellum and postbellum periods emphasized high-level principles, albeit different kinds of principles, as natural law principles gave way to inductively derived positivist axioms. Most important, regardless of the distinction between the respective types of principles, both antebellum and postbellum legal scientists conceived of the common law as a rational system of principles. James Gould's statement, uttered in 1822, could easily have been made by a Langdellian in 1880:

cal purposes and archetypal essences"). Compare Ross, *Aristotle* at 159 (cited in note 66) (noting that Aristotle believed that intelligence moved the planets). For example, Aristotle argued that the *telos*, or natural end of human life, is *eudaimonia*, or happiness, and that one achieves happiness by living a life in accordance with virtue. See Aristotle, *Nicomachean Ethics* (Philip Bywater, trans.), reprinted in J. Barnes, ed., *The Complete Works of Aristotle* 1729, at bk. I (Princeton U., 1984) ("Aristotle, *Ethics*"). Dupré aptly notes that Aristotle had a "normative concept of nature." Dupré, *The Passion of the Western Mind* at 28 (cited in note 6). Such a normative notion of nature became problematic in early Christendom and was outright rejected in the Calvinist Reformation. Nature then was completely separated from spirit so that nature became merely material. See Feldman, *Please Don't Wish Me a Merry Christmas* at 69-78 (cited in note 38).

200. See Aristotle, *Ethics* at bk. V, ch. 7 (cited in note 199). Compare Aristotle, *The Politics* (Carnes Lord, trans.) at bk. I, ch. 5 (U. of Chicago, 1984) (arguing that some individuals are by nature marked for subjection and others for ruling). J.M. Kelly argues that Aristotle weakly described natural law. See Kelly, *A Short History of Western Legal Theory* at 20-21 (cited in note 1).

201. See Dupré, *Passage to Modernity* at 26-27 (cited in note 6). Dupré writes:

[T]he modern [dismissal of appearance] stems from a loss of faith, not only in the trustworthiness of appearances but even in the very powers of knowledge. Rather than doubt them, Aristotle justifies appearances through themselves. He is a thorough empiricist, but his empiricism, unlike that of seventeenth-century philosophers, rather than being derived from doubt, is rooted in a total trust of the order of nature.

Id. at 27.

202. See Hoeflich, *Law and Geometry* at 108-21 (cited in note 1) (discussing the idea of legal science in antebellum and postbellum periods).

203. See, for example, Williston, *The Law of Contracts* § 102 n.13 (cited in note 147) (citing over 20 cases for the proposition that consideration must consist of a detriment or benefit).

The object in some measure peculiar to my plan of instruction, is to teach the law—the common law, especially—not as a collection of insulated positive rules . . . but as a system of connected, rational principles: for, such the common law unquestionably is, not only in its fundamental and more comprehensive doctrines; but also, generally speaking, in its subordinate, and more artificial provisions.²⁰⁴

The strong similarities between antebellum and postbellum legal science suggest that the Langdellians, as the first modernist American jurists, failed in some ways to fully grasp the significance of the movement away from premodernism. While the Langdellians believed in progress in a modernist sense—the common law, they argued, slowly evolved—they did not completely incorporate a historicist attitude.²⁰⁵ From the Langdellian perspective, after all, judges could not just instrumentally make the law for the utility of society. In speaking of postbellum intellectual trends, in general, Dorothy Ross argues that “the mentality of the [1880s] was typically ‘utopian’ and in basic ways characteristic of the thought earlier in the nineteenth century.”²⁰⁶ This description of the postbellum period aptly fits the Langdellians: Although the Langdellians believed that the common law progresses, they seemed utopian in their efforts to conceive of the common law as a perfectly logical and conceptually ordered system. Perhaps, for that reason, some commentators mistakenly have assumed that the Langdellians were natural law theorists, since reasoning deductively downward from axiomatic principles seems implicitly to suggest a natural law orientation.²⁰⁷ But of course, the Langdellians were positivists: The tension between their positivism and their ostensible natural law orientation—the focus on principles and logic—is reconciled, at least in part, by

204. Miller, *The Life of the Mind in America* at 156 (cited in note 1) (quoting James Gould, *The Law School at Litchfield*, *United States Law Journal* (1822)) (emphasis omitted). Langdell's articles on the classification of rights and wrongs seemed to closely follow Blackstone's classificatory scheme at its highest levels. Compare Blackstone, *Commentaries* (cited in note 20) with Langdell, 13 *Harv. L. Rev.* 537 (cited in note 147) and Langdell, 13 *Harv. L. Rev.* 659 (cited in note 147).

205. For a discussion of the relationship between Langdellian legal science and the historical school of jurisprudence, see note 152.

206. Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in Higham and Conkin, eds., *New Directions in American Intellectual History* 116, 125 (cited in note 87). Ross continues: “[T]he Progressive intellectuals who followed are often seen to have adopted evolutionary and historicist insights, or to be centrally concerned with the problem of historical change.” *Id.*

207. See Sebok, 93 *Mich. L. Rev.* at 2081-83 (cited in note 23) (criticizing commentators who have considered Langdell to be a natural law theorist).

analogizing their jurisprudence to Aristotelian philosophy, as already explained. Moreover, it was exactly the crucial distinction between natural law and positivism that marked the antebellum period as premodern and the postbellum era as modern.

A brief look at the jurisprudence of Oliver Wendell Holmes, Jr., elucidates the historical position of Langdellian legal science. Holmes was Langdell's contemporary and often is considered his first great critic. Yet in many ways, the early Holmes was strongly aligned with his Langdellian contemporaries.²⁰⁸ Most important, perhaps, Holmes was a committed positivist. He declared that natural law jurists were "naïve,"²⁰⁹ and as early as 1872, when explicitly discussing Austin's positivist jurisprudence, Holmes wrote that "sovereignty is a form of power, and the will of the sovereign is law, because he has power to compel obedience or to punish disobedience, and for no other reason."²¹⁰ As a positivist, Holmes was fully engulfed in the modernist wave of postbellum jurisprudence. Hence, contrary to the antebellum faith in case precedents, Holmes (like Langdell) doubted and questioned cases, as revealed in the magnum opus of his early thought, *The Common Law*, where he attempted to reconceptualize the system of the common law. Holmes exhibited remarkable skepticism concerning judicial opinions, arguing that they often obscure or deny the actual bases for decision.²¹¹ Moreover, his effort to reconstruct the common law revealed a typical modernist quest to establish foundations. Indeed, Holmes claimed to rest the entire common law on one basic principle. At the beginning of his two chapters on torts, Holmes wrote: "[My] object . . . is to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground

208. See Duxbury, *Patterns of American Jurisprudence* at 46 & n.147 (cited in note 1) (discussing commentators who have considered Holmes a pure anti-formalist and thus opposed to Langdell). LaPiana writes: "[B]oth [Langdell and Holmes] were deeply situated in the intellectual life of their age, and their ideas about law were far more alike than different. The creation of a modern science of law was their common goal, and the separation of that science from every other science was their common method." LaPiana, *Logic and Experience* at 169 (cited in note 2).

209. Oliver Wendell Holmes, Jr., *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918).

210. Oliver Wendell Holmes, Jr., *Book Notice*, 6 Am. L. Rev. 723 (1872) (reviewing Frederick Pollock, *Law and Command*, *The Law Magazine and Review* 189 (Butterworths, 1872)), reprinted in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 21, 22 (Central, 1973). See also Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1, 4 (1870) (arguing that the question of who has sovereign power is a question of fact). Later in his career, Holmes clearly and sharply separated the study of law from morality. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459-62 (1897) ("I emphasize the difference between law and morals.").

211. See, for example, Holmes, *The Common Law* at 35-36, 78 (cited in note 167) (arguing that judges should openly acknowledge how they make law legislatively).

is. Supposing the attempt to succeed, it will reveal the general principle of civil liability at common law."²¹² Holmes believed that he successfully concluded his study by finding an ultimate foundational principle: a (supposedly) objective standard of reasonableness best exemplified by "the average man, the man of ordinary intelligence and reasonable prudence."²¹³ In a sense, then, *The Common Law* was deeply reductionistic—attempting to condense the entire common law into one principle—and for that reason, it was highly abstract, formal, and conceptual. In short, in many ways it strongly resembled a work of Langdellian jurisprudence. Indeed, elsewhere, Holmes acknowledged his admiration for writers, including Langdell, who brought logical and conceptual order to the common law.²¹⁴

Despite the similarities between Holmes and the Langdellians, Holmes sat uncomfortably within their group.²¹⁵ If the Langdellians, as mentioned, failed in some ways to grasp the complete importance of the movement away from premodernism, then perhaps Holmes more thoroughly understood this transition. Holmes might even be considered the first American jurisprudent to shift fully to a modern historicist sensibility, which he suggested in his most famous aphorism, "[t]he life of the law has not been logic: it has been experience."²¹⁶ He initially uttered this phrase in a critical review of Langdell's *Summary of Contracts* and then repeated it on the first page of *The Common Law*. Holmes continued in *The Common Law*:

212. Id. at 77.

213. Id. at 51. See id. at 111 (discussing the "ideal average prudent man").

214. See, for example, Oliver Wendell Holmes, Jr., *Book Notice*, 5 Am. L. Rev. 534 (1871) (reviewing A.V. Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (William Maxwell & Sons, 1870)) ("Holmes, Dicey"); Oliver Wendell Holmes, Jr., *Book Review*, 14 Am. L. Rev. 233 (1880) (reviewing C.C. Langdell, *A Selection of Cases on the Law of Contracts, with a Summary* (Little, Brown, 2d ed. 1880)).

Holmes, also like Langdell, recognized the significance of the transition from the common law forms of action to code-pleading in the classification of the law. See, for example, Holmes, 5 Am. L. Rev. at 13 (cited in note 210); Holmes, Dicey at 535 (cited in note 214).

215. Nicholas St. John Green, who was somewhat Holmesian in his jurisprudence, initially taught at Harvard under Langdell, but left in protest against the overly theoretical approach of the Langdellians. He went on to help start the law school at Boston University. See LaPiana, *Logic and Experience* at 110-22 (cited in note 2). See, for example, Nicholas St. John Green, *Slander and Libel*, 6 Am. L. Rev. 593 (1872) (reviewing John Townsend, *A Treatise on the Wrongs Called Slander and Libel, and On the Remedy by Civil Action for Those Wrongs* (Baker, Voorhis, 2d ed. 1872)).

216. Holmes, *The Common Law* at 1 (cited in note 167); Holmes, 14 Am. L. Rev. at 234 (cited in note 214). See Grey, 41 Stan. L. Rev. at 796-98 (cited in note 1) (discussing Holmes's historicist beliefs).

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.²¹⁷

Thus, consistent with a modern historicist attitude, Holmes believed that society progresses and that humans can control and direct societal change. While this modern attitude might be hubristic, it is not necessarily utopian. Unlike the Langdellians, Holmes never conceived of the common law as a perfectly logical and conceptually ordered system. "The truth is," Holmes asserted, "that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off."²¹⁸ In fact, Holmes, if anything, was more cynical than utopian and hopeful.²¹⁹

The importance of this historicist sensibility partly explains the distinctions between Langdellian and Holmesian jurisprudence. To Langdellians, on the one hand, once the axiomatic principles of the common law had been induced from the cases, the principles and deductive logic became preeminent as the legal scientist conceptualized a logically ordered system. To Holmes, on the other hand, while logic was important, it never overshadowed experience. In 1870, Holmes asserted that "although the general arrangement [of the common law] should be philosophical [or logical], compromises with practical convenience are highly proper."²²⁰ Thus, in contrast to Langdellian jurisprudence and most obviously echoing a historicist

217. Holmes, *The Common Law* at 1 (cited in note 167).

218. *Id.* at 36.

219. Later in his career, Holmes ruefully observed: "I believe that the world would be just as well off if it lived under laws that differed from ours in many ways, and . . . that the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle . . ." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1899).

220. Holmes, 5 Am. L. Rev. at 4 (cited in note 210) In *The Common Law*, Holmes declared: "[I]n substance the growth of the law is legislative. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned." Holmes, *The Common Law* at 35 (cited in note 167). In comparing Langdell and Holmes, LaPiana writes: "The system [Langdell] extracted from the cases was too logical, too concerned to draw distinctions and reconcile cases on grounds that existed only in his own mind. Holmes, in contrast, felt himself to be firmly grounded in the reality of history, human nature, and ways of the world." LaPiana, *Logic and Experience* at 121 (cited in note 2).

approach, Holmes recommended that judges openly acknowledge their law-making power and more consciously attempt to make law for the good of society.²²¹ In discussing the mailbox rule, for instance, while Langdell had focused on a syllogistic proof, Holmes emphasized practical convenience.²²²

In sum, Langdellians were committed first-stage modernists: They sought to ground the common law system by primarily focusing on axiomatic principles and deductive reason. Holmes, though, fit only uneasily in this first stage: He willingly considered principles and logic, but not at the expense of practical experience. Holmes, in effect, planted the seeds for the second stage of legal modernism, empiricism, when jurisprudents would focus primarily on experience as an objective source of knowledge. This second stage would not fully emerge until the early decades of the twentieth century when the American legal realist movement stepped to the forefront of jurisprudence.²²³ But even the realists shared much in common with

221. In *The Common Law*, Holmes wrote:

But hitherto this process [of judicial lawmaking] has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts, as just explained, it would be useful

Holmes, *The Common Law* at 36 (cited in note 167). In Holmes's later writing, he explicitly argued that judges have a "duty of weighing considerations of social advantage." Holmes, 10 Harv. L. Rev. at 467 (cited in note 210).

222. Langdell had argued, based on his syllogistic proof, that acceptance should be effective only upon receipt; practical considerations and justice were beside the point. Whenever Langdell did discuss such pragmatic concerns, he carefully circumscribed their importance, explaining that they were not principles that could legitimately ground judicial decisions. See note 171 and accompanying text (explaining Langdell's discussions of justice and practical considerations). In stark contrast to Langdell's argument, Holmes asserted that convenience alone could be determinative: "[In the mailbox situation] the doubt [is] whether the contract is complete at the moment when the return promise is put into the post, or at the moment when it is received. If convenience preponderates in favor of either view, that is a sufficient reason for its adoption." Holmes, *The Common Law* at 305 (cited in note 167). Holmes then, as an ancillary matter, added a logical argument in favor of deeming an acceptance effective upon dispatch, specifically criticizing Langdell's syllogistic reasoning. *Id.* at 305-07. Hence, Holmes's and Langdell's arguments were almost mirror images of each other: containing the same elements but in reverse order. Whereas Langdell emphasized logic and only secondarily mentioned justice and practical considerations (and only after deeming them irrelevant), Holmes emphasized justice and practical concerns and only added a logical argument as a subordinate justification for his position.

223. See Feldman, *From Modernism to Postmodernism in American Legal Thought*, in Schwartz, ed., *The Warren Court: A Restrospective* at 331-34 (cited in note 1). One can reasonably argue that the later Holmes more fully revealed second-stage modernism. See, for example, Holmes, 10 Harv. L. Rev. at 457 (cited in note 210). By the end of the nineteenth century, Holmes seemed to have relinquished the hope of conceptually reducing the common law to a single principle. He more thoroughly accepted an external view of the legal system.

the Langdellians, their modernist predecessors whom they overtly reviled. As modernists—the realists, the Langdellians, and the Holmesians—all rejected the antebellum premodernist commitment to natural law principles as the foundation of the common law. Consequently, they all joined in the modernist quest to identify a new objective foundation for American jurisprudence.