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The author uses John Chipman Gray's classic treatise, The Rule Against Perpetuities, *as the focal point of an analysis of legal formalism. With the advent of legal formalism, pertpetuities law was reduced to a single rule that courts applied mechanically and with little deference to policy and individualized justice. Exploring the jurisprudence of formalism, the author concludes that current change in the perpetuities doctrine is based on a rejection of the Rule's formalist underpinnings.*

I. INTRODUCTION

Perpetuities law is commonly regarded as ancient, static, and certainly unaffected by developments in legal philosophy.[1] Yet this article's thesis is that contemporary perpetuities law dates from the late nineteenth century, when the inherited tradition for handling perpetuity problems was revised extensively to reflect and exemplify legal formalism[2]—the style of jurisprudence then coming into vogue. Moreover, perpetuities law is currently rife with controversy that can be understood only as a renewed jurisprudential conflict.

John Chipman Gray's classic treatise, *The Rule Against Perpetuities*,[3] was the catalyst of the nineteenth-century transforma-

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1. Perpetuities law is concerned with marking the extent to which current property holders can impose their control of wealth on future generations. *See* RESTATEMENT (SECOND) OF PROPERTY §§ 9-13 (Tent. Draft No. 2, 1979); L. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955) [hereinafter cited as L. SIMES, PUBLIC POLICY].

2. For a description of formalism, see *infra* text accompanying notes 42-45.

3. J. GRAY, THE RULE AGAINST PERPETUITIES (1st ed. 1886) [hereinafter cited as J. GRAY,

tion of perpetuities law. Few works of legal scholarship have had the impact and longevity of this treatise. Even the English judiciary immediately treated it as authoritative, a status rarely accorded to the work of a living, let alone American, author.[4] Although nearly a century old, and not updated since 1942,[5] the treatise continues to be cited frequently as authority for current law.[6] Gray's work still dominates its field. The import of this article is that Gray's anticipation and exemplification of formalism accounts for his treatise's positive reception and that the rejection of Gray's formalist jurisprudence underlies the present movement to reform perpetuities law.

A historical perspective is necessary to support these contentions. Accordingly, Part II of this article examines perpetuities law before the late nineteenth century, while Part III discusses the changes that Gray introduced. Part IV elucidates current controversies in perpetuities law and the interpretation of dispositive instruments[7] as a struggle between formalism and more modern notions of jurisprudence. This section also suggests a revision of generally accepted ideas of the overall history of property law, and of the nature of legal formalism.

II. PERPETUITIES BEFORE GRAY—THE RULES AGAINST PERPETUITIES

Before the late nineteenth century, the legal profession regarded perpetuities law as a significant part of the policy favoring free alienability of property.[8] Elizabethan lawyers introduced the

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PERPETUITIES]. Gray's classic formulation of the Rule Against Perpetuities ("the Rule") is: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906).

4. *See* 5 AMERICAN LAW OF PROPERTY 3-4, 12 (A. Casner ed. 1952); 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 215 (1926).

5. The fourth edition, edited by Roland Gray, added case citations to existing notes. J. GRAY, THE RULE AGAINST PERPETUITIES (R. Gray 4th ed. 1942). The text remained virtually unchanged from the first edition.

6. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 10, 43, 104; L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 253, 263 (1966) [hereinafter cited as L. SIMES, FUTURE INTERESTS]. The use of Gray's work as authority contrasts with citations to H. STEPHEN, HISTORY OF THE CRIMINAL LAW (1883), and other older treatises, which are used to illustrate the development of the law.

7. Dispositive instruments include deeds and wills.

8. This is one of the oldest and most important social policies embraced by Anglo-American law. 7 W. HOLDSWORTH, *supra* note 4, at 193-94; Bordwell, *Alienability and Perpetuities* (pt. 1), 22 IOWA L. REV. 437, 437-41 (1937); FOX, *The Criticism of Cases*, 6 HARV. L. REV. 195, 195-97 (1892); Haskins, *Extending the Grasp of the Dead Hand: Reflections on*

term "perpetuity" during the sixteenth century to describe one recently arisen form of restraint—the use of future interests[9] to control the devolution of wealth, usually in an attempt to keep it within the family indefinitely.[10] Although desired by landowners, the English courts thought that perpetuities were harmful to the economic, social, and political life of the realm.[11] The judiciary thought that perpetuities interfered with commerce, fostered discipline problems by assuring the youth their inheritance, and allowed traitors' wealth to pass to their families rather than to be forfeited to the crown.[12] Perpetuities, they said, "f[ought] against God, for pretend[ing] to such a stability in human affairs, as the nature of them admits not of."[13]

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the Origins of the Rule Against Perpetuities, 126 U. PA. L. REV. 19, 27-34 (1977).

Some contemporary commentators also recognize the link between perpetuities law and the policy favoring the free alienability of property. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 10 (citing Gray); L. SIMES, FUTURE INTERESTS, *supra* note 6, at 237; *see also* J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13-18 (1956) (examining reasons for the continued existence of the Rule); Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 VAND. L. REV. 1061, 1078-82, 1086-87 (1979) (review of Rule's principal problems).

9. L. SIMES, FUTURE INTERESTS, *supra* note 6, at 2, states: "[T]he essence of a future interest is that (1) it involves the privilege of possession or enjoyment in the future, and (2) it is looked upon as a portion of the total ownership of the land or other thing which is its subject matter." *See also* C. MOYNIHAN, INTRODUCTION TO THE LAW OF PROPERTY 93 n.1 (1962) ("Future interests may also exist in personal property and in equitable interests in both real and personal property.").

10. 7 W. HOLDSWORTH, *supra* note 4, at 197-98; Bordwell, *supra* note 8, at 437-38.

Before the sixteenth century, landowners rarely used future interests to control the devolution of property because they could control their wealth more easily by conveying fee tails and uses. But Taltarum's Case, Y.B. Mich. 12 Edw. 4, f. 19, pl. 25 (1472), which allowed a tenant in tail to convey a fee simple by suffering a common recovery, and the Statute of Uses, 1535, 27 Hen. 8, ch. 10, which turned uses into legal estates, destroyed the usefulness of these devices. Conveyancers then turned to future interests as a means of controlling their land. *See* 7 W. HOLDSWORTH, *supra* note 4, at 82-83; Haskins, *supra* note 8, at 27-32. Not surprisingly, Elizabethan judges disliked perpetuities because they caused the problems that the judges previously had encountered with fee tails. *See, e.g.*, 7 W. HOLDSWORTH, *supra* note 4, at 194-96, 198-202; 3 THE WORKS OF FRANCIS BACON 247, 260 (B. Montagu ed. 1859).

11. 7 W. HOLDSWORTH, *supra* note 4, at 200-09.

12. *See, e.g.*, Duke of Marlborough v. Godolphin, 1 Eden 404, 409-10, 415-17, 28 Eng. Rep. 741, 743, 745-46 (Ch. 1859); Pills v. Brown, Palmer 131, 138, 81 Eng. Rep. 1012, 1016 (K.B. 1620) (Dodderidge, J., dissenting) (also cited as Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620)), *translated in* J. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 241 (2d ed. 1979); *see also* 7 W. HOLDSWORTH, *supra* note 4, at 198-222; W. LEWIS, THE LAW OF PERPETUITY 49 (Am. ed. 1846); 3 THE WORKS OF FRANCIS BACON, *supra* note 10, at 260.

13. The Duke of Norfolk's Case, 3 Ch. Cas. 1, 32, 22 Eng. Rep. 931, 949 (1682). Although the quote is from Chancellor Nottingham, the idea seems to date from Elizabethan times. *See* Pills v. Brown, Palmer 131, 81 Eng. Rep. 1012 (K.B. 1620) (Dodderidge, J., dissenting), *translated in* J. BAKER, *supra* note 12, at 29.

Over the centuries, the judicial response to these perceived evils varied.[14] But until the late nineteenth century, the judiciary never attempted to address perpetuities with a single rule. Rather, groups of unsystematically related rules developed, each directed to some aspect of the problem.[15] For example, one set of rules focused on entailed estates.[16] Since the fifteenth century, the judiciary had allowed the present occupant of a fee tail to convey freely a fee simple by using the complex system of common recovery.[17] Using common recoveries, the present occupant destroyed all future interests expectant on his estate. By judicial fiat, the occupant was given complete power of alienation.

Still, use of the common recovery as a means of "unfettering" entailed estates was not sufficient to end these perpetuities. In the sixteenth century, property holders began devising a variety of arrangements aimed at preventing the present occupant of an entailed estate from "suffering" a common recovery.[18] Articulating a number of rules consistent with their opposition to the fee tail, the courts rejected these attempts to circumvent their policy against inalienable freeholds.[19] It was only due to the doctrine of common

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14. Haskins, *supra* note 8, at 37-46; *see* 7 W. HOLDSWORTH, *supra* note 4, at 201-14 (contrasting "older rules" with "modern rule" against perpetuities).

15. This article is limited to those rules still recognized by the modern lawyer. Parts of the complete mosaic of rules constituting the original perpetuity doctrine are too obsolete and complex to be fully studied in this article. For a discussion of some of these rules, see *infra* notes 17, 19, 21, 23-24, 31 & 75.

16. An entailed estate was a grant to a person and his lineal descendants. The Statute *De Donis Conditionalibus*, 1285, 13 Edw. 1, ch. 1, permitted the present occupant of a fee tail to convey his property for his life only. The property thus would descend from generation to generation. *See* S. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 144-46 (1969); C. MOYNIHAN, *supra* note 9, at 37-40. Because the Statute *Quia Emptores Terrarum*, 1290, 18 Edw. 1, ch. 1, did not apply to entails, the full panoply of common-law future interests, as well as executory interests, could also follow the estate tail. This further controlled the devolution of property. *See* 3 W. HOLDSWORTH, *supra* note 4, at 86; C. MOYNIHAN, *supra* note 9, at 23.

17. A common recovery was a lawsuit between fictious parties that circumvented the entail, thereby defeating the perpetuity. In the nineteenth century, the courts allowed disentailing by an appropriate conveyance. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 620-23 (5th ed. 1956); A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 115-29 (1961).

18. *See* 7 W. HOLDSWORTH, *supra* note 4, at 99-100, 205-09. For example, in Mary Portington's Case, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (K.B. 1614), the testator devised a fee tail determinable upon the tenant's doing any act that prevented the property from remaining entailed.

19. For example, one rule created by the courts was that a devise of leasehold in tail transfers the devisor's entire interest. *See* Bennett v. Lewknor, 1 Rolle 357, 81 Eng. Rep. 531 (K.B. 1616), *described in* J. GRAY, PERPETUITIES, *supra* note 3, § 154; Leventhorp v. Ashbie, 1 Rolle Ab. device L. pl. 1 (1635), *described in* 7 W. HOLDSWORTH, *supra* note 4, at

recovery and these protective rules that English law and equity, as Lord Keeper Northington observed, "admitted no perpetuities by way of entail."[20]

Another constellation of rules focused on remainders.[21] Beginning in the late sixteenth century, the English judiciary developed the distinction between vested and contingent remainders[22] into rules designed to control perpetuities.[23] The principal means of

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208, 219-20.

The subterfuge in these cases relied on the precedent that common recoveries could be brought only by a present occupant with seisin, and leaseholders have no seisin. Thus, by devising a term of 200 years in tail, the devisor denied the present tenant seisin and disabled him from commencing a recovery. The court's rule, however, gave the tenant in tail the whole interest, which was then freely alienable. *See also* Mildmay's Case, 6 Co. Rep. 40a, 41a, 77 Eng. Rep. 311, 314 (K.B. 1606) (ability of tenant in tail to convey fee simple through common recovery is "inseparable incident" of fee tail); 7 W. HOLDSWORTH, *supra* note 4, at 99-100, 205-09, 219-22.

20. Duke of Marlborough v. Godolphin, 1 Eden 404, 28 Eng. Rep. 741 (Ch. 1759); *see also* 7 W. HOLDSWORTH, *supra* note 4, at 207.

21. A remainder is "a future interest created in a transferee that can become a possessory estate only on the expiration of a prior estate created in favor of another transferee by the same instrument." C. MOYNIHAN, *supra* note 9, at 110. The discussion of remainders in this article is limited to the rules settled on by the English courts. The English courts, however, used and subsequently abandoned a number of other rules. For example, there is evidence that the English courts initially controlled the perpetuities problems inherent in remainders by allowing a life tenant, like a tenant in tail, to convey a fee simple by using a common recovery. Midsixteenth-century statutes foreclosed this practice and the courts formulated other doctrines to effectuate their policy. *See* T. PLUCKNETT, *supra* note 17, at 620; Bordwell, *Alienability and Perpetuities* (pts. 3, 4 & 6), 24 IOWA L. REV. 1, 57-58, 636 (1938), 25 IOWA L. REV. 707, 712 (1940). One consequence of this change was the development of the rule against "double possibilities" to control remainders. *See infra* note 75.

22. A contingent remainder is a present interest in an estate that is to be enjoyed in the future or upon the happening of a necessary event. Contingent remainders are subject to the contemporary Rule Against Perpetuities. The English courts considered the contingent remainder unalienable because it represented only a possibility of acquiring an estate in land. Today, the policy is to permit contingent remainders to be alienable like other future interests. Contingent remainders are inheritable and devisable. C. MOYNIHAN, *supra* note 9, at 123-28.

A vested remainder is an estate that is "limited to a person in existence and ascertained" and not subject to any condition precedent other than the natural expiration of the preceding estate. *Id.* at 116. Vested remainders are not subject to the Rule Against Perpetuities. If not defeated, the vested remainder then becomes a possessory interest at the end of the preceding estate. Vested remainders are alienable, devisable, and descendible. *Id.*

23. Prior to the midsixteenth century, conveyancers rarely used contingent remainders. Thus the principal cases and primary concerns shaping the rules governing contingent remainders are decisions of the early modern, not medieval, era. The feudal concept of seisin may have influenced, but did not dictate, the development of remainder rules. Rather, the pervasive impact of the early modern perpetuities rules helped fashion the concepts of vested and contingent remainders. *See* 7 W. HOLDSWORTH, *supra* note 4, at 82-101; S. MILSON, *supra* note 16, at 163-68, 200-01 (discussing rationale for, and origin of, remainders); T. PLUCKNETT, *supra* note 17, at 590-92; Schuyler, *Should the Rule Against Perpetuities Discard its Vest?* (pt. 2), 56 MICH. L. REV. 887, 888-96 (1958).

control was voiding contingent remainders that failed to vest at or before the termination of the estate upon which they were expectant.[24] The destructibility of contingent remainders, coupled with the contingent character of any remainder granted to an unborn person,[25] meant that property subject to remainders was freely alienable if the present occupant and the living remaindermen consented. Thus, the fee was subject to the wishes of the living, not the past, generation.[26]

English property owners objected to these judicial attempts to promote the alienability of their property, and devised methods to circumvent the consequences of the doctrine of destructibility. This attempt was partially successful; the eighteenth-century judiciary held that the insertion of a clause "to trustees to preserve contingent remainders" between the last vested estate and the expectant contingent remainder protected the contingent remainder from willful destruction.[27] The introduction of this provision augmented property holders' control over the transferability of their land, subject to two qualifications. First, courts would not permit the "trustee" clause to preserve contingent remainders destroyed by the natural termination of the preceding vested estate.[28] Second, the settlor's reach was limited by the rule, fashioned in the struggle against unbarrable entails but now brought into new prominence, that no limitations were valid after a remainder to an unborn person.[29] Together, these limitations permitted property

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24. This doctrine is known as the destructibility of contingent remainders. Under the destructibility doctrine, courts allowed willful (i.e., artificial) destruction by voiding contingent remainders if conditions precedent failed to occur before the terminating act. The destructibility of contingent remainders is discussed in 7 W. HOLDSWORTH, *supra* note 4, at 104-16; C. MOYNIHAN, *supra* note 9, at 128-33. Today, many states have abolished the doctrine of destructibility of contingent remainders.

25. 7 W. HOLDSWORTH, *supra* note 4, at 111-14.

26. A. SIMPSON, *supra* note 17, at 215.

27. The landholders' use of trustees to preserve contingent remainders is discussed in 7 W. HOLDSWORTH, *supra* note 4, at 111-14; R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 194-95 (4th ed. 1975); C. MOYNIHAN, *supra* note 9, at 133-34; L. SIMES, FUTURE INTERESTS, *supra* note 1, at 39-40. An example of this device is a grant to *B* for life, with remainder to trustees *X*, *Y*, and *Z* for the life of *B* in trust for *B* and to preserve contingent remainders, with remainder to *B*'s eldest male child. Assuming *B* has no children, the remainder to the trustees is vested and able to support the expectant contingent remainder. Dormer v. Packhurst, 6 Brown 351, 2 Eng. Rep. 1127 (1740).

28. This followed from giving the trustees a life estate *pur autre vie* (for the life of the holder of the previous vested estate). Thus, the trustee's estate terminated upon the beneficiary's death. *See* example *supra* note 27; R. MEGARRY & H. WADE, *supra* note 27, at 195.

29. The rule is illustrated by a disposition to *B* for life, then to *B*'s eldest child for life, then to *B*'s eldest grandchild and his heirs. If *B* had no children at the time of the grant, then the limitation to the grandchild is void *ab initio*. This interpretation first appeared in

holders to use remainders to control the devolution and alienability of property no further than the end of the present generation and the actual minority, if any, of the next.[30]

The English courts also formulated additional rules to prevent perpetuities created by executory interests.[31] One rule required that any interest created by use or devise, which otherwise conformed to the definition of a remainder, be treated as a remainder,[32] and thus subject to the previously discussed doctrines

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Perrot's Case, Moore K.B. 368, 72 Eng. Rep. 634 (K.B. 1594), and may be traced back to 1487; it is known as the Rule in Whitby v. Mitchell, 42 Ch. D. 494 (1889). 7 W. HOLDSWORTH, *supra* note 4, at 91-92, 209-14; R. MEGARRY & H. WADE, *supra* note 27, at 200-07; Sweet, *The Rule in* Whitby v. Mitchell, 25 L.Q. REV. 385, 388-96 (1909). The English courts often ignored the Rule in *Whitby v. Mitchell* until its rise to prominence in Duke of Marlborough v. Godolphin, 1 Eden 404, 28 Eng. Rep. 741 (Ch. 1759). *See* 7 W. HOLDSWORTH, *supra* note 4, at 209-14; Sweet, *supra*, at 396-97.

30. To illustrate that this follows from the above rules, consider the typical grant to *B* for life, then to trustees, then to *B*'s eldest male child. If *B* has no male child living at his death, then the remainder to that child fails and the property reverts to the grantor's estate. If there is a male child, then he takes, but is not able to alienate freely until reaching his majority. *Cf.* R. MEGARRY & H. WADE, *supra* note 27, at 207 (modern rule against perpetuities "modelled upon the period for which the power of alienation could normally be restrained in settlements operating at common law"); A. SIMPSON, *supra* note 17, at 215.

31. An executory interest is a contingent future interest that: 1) cannot qualify as a remainder; 2) is always in favor of the conveyee; and 3) takes effect when the contingency happens as a springing or shifting use under the Statute of Uses, 1535, 27 Hen. 8, ch. 10, or the Statute of Wills, 1548, 32 Hen. 8, ch. 2. *See* C. MOYNIHAN, *supra* note 9, at 192-96; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 25-28. As with the rules concerning remainders, *see supra* note 21-23, this article discusses only those executory interests rules finally settled on by the English courts. At first, the courts met the perpetuities problems arising from executory interests by subjecting these interests to the destructibility rules governing remainders. *See* Chudleigh's Case, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (K.B. 1595); 7 W. HOLDSWORTH, *supra* note 4, at 123-25; Haskins, *supra* note 8, at 31. But when the Court of the Exchequer began protecting the beneficiaries of executory interests, the law courts relented and held these interests indestructible. *See* Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620); Manning's Case, 8 Co. Rep. 946, 77 Eng. Rep. 618 (K.B. 1609); 7 W. HOLDSWORTH, *supra* note 4, at 137-41; T. PLUCKNETT, *supra* note 17, at 594-95.

Nevertheless, the law courts effectively circumscribed the length of time that executory interests could postpone alienability to the end of the presently living generation. For example, in a devise to *A* of a term of years, the court viewed a limitation to *A* and his heirs of body as a relinquishment of the devisor's entire interest even though the gift to *A* was defeasible if *A* died without leaving issue. *See* Child v. Baylie, Cro. Jac. 459, 79 Eng. Rep. 393 (K.B. 1618); *see also* The Duke of Norfolk's Case, 3 Ch. Cas. 1, 19-20, 22, 35-37, 22 Eng. Rep. 931, 942-43, 944, 952-53 (1682); 7 W. HOLDSWORTH, *supra* note 4, at 219-20; Haskins, *supra* note 8, at 41. Chancellor Nottingham intervened in 1682. In contravention of the opinion of the law judges, but with the approval of the House of Lords, he revoked these limits in The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). *See* Barry, *The Duke of Norfolk's Case*, 23 VA. L. REV. 538, 557-61 (1937); Haskins, *supra* note 8, at 38-45.

32. This limitation on perpetuities is known as the Rule in Purefoy v. Rogers, 2 Wms. Saund. 380, 85 Eng. Rep. 1181 (K.B. 1670), and dates back to Chudleigh's Case, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (K.B. 1595). *See* 7 W. HOLDSWORTH, *supra* note 4, at 127-28; C. MOYNIHAN, *supra* note 9, at 200-03; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 36.

designed to prevent perpetuities.[33] Another rule was known as the rule against remote vesting. This rule governed perpetuity problems involving executory interests that could not be turned into common-law remainders. Its net effect was to allow property holders to suspend the alienability of property for up to twenty-one years beyond the lives of the present generation.[34]

In summary, until the late nineteenth century, English courts addressed perpetuity problems by using a mosaic of rules with no overall systematic relationship, either in logic or result. The lack of a perceived system[35] of general principles and a technique for applying them proved inconsequential because rules of law were not expected to be logically interconnected.[36] Rather than doctrinal consistency, various institutions developed and elaborated upon perpetuities law with a concern for policy and certainty.[37] The law's complex pattern followed from the varying influence and contributions of different sources: law courts, Chancery, the House of Lords (acting as the court of last resort), and Parliament.[38] These institutions influenced the complexity of the developing perpetuities law as notions of where to draw the line between living and dead hand control changed over time.[39] The rules' satisfactory balance of conflicting values was the basis of their acceptance.

III. PERPETUITIES AFTER GRAY—THE RULE AGAINST PERPETUITIES

In the nineteenth century, two successive revolutions in jurisprudential thought transformed Anglo-American law. First, in the early part of the century, jurists accepted the view that law should

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33. *See supra* notes 16-32 and accompanying text.

34. Haskins, *supra* note 8, at 21, 46. The rule against remote vesting is the most generous to "dead hand" control. At its origin, the rule was known as the rule *of* perpetuities because it increased the extent of the landowner's control over the devolution of his property.

35. "System" refers to the modern notion of rules structurally related to each other as inferences from a few basic premises. *See* Siegel, *The Aristotelian Basis of English Law 1450-1800*, 56 N.Y.U. L. REV. 18, 18-19 (1981).

36. Before 1800, jurists conceived of the law as a system in which legal rules related to one another in an intricate mosaic, as in the relationship among the various rules against perpetuities. *Id.* at 20-21.

37. *See infra* text accompanying notes 156-62.

38. For the contribution of the Chancery Court to the development of the perpetuities laws, see *supra* note 31. For a discussion of the role of the House of Lords, see *supra* notes 27 & 31. For Parliament's contribution, see Act of 1699, 10 & 11 Wil. 3, ch. 16, confirming Reeve v. Long, 3 Lev. 408, 83 Eng. Rep. 754 (1695), *discussed in* 7 W. HOLDSWORTH, *supra* note 4, at 106-07, 115 and *supra* note 21.

39. *See* Haskins, *supra* note 8, at 20-22, 45-46.

be systematic.[40] Lawyers began to subscribe to the view that each area of the law ultimately consists of a few basic principles and conceptions derived from notions of "natural justice and enlightened public policy."[41] Judicial elaboration of these principles and concepts established the innumerable rules of each area of the law. This suggested that the myriad of rules composing a substantive legal area had a logical unity and, therefore, should not be viewed as a substantially unrelated mosaic.

Second, in the latter third of the nineteenth century, jurists insisted that law was not only systematic, but also formal.[42] By the term formal, they meant that the law was an objective and apolitical science. With the advent of formalism and its subsequent domination of jurisprudential thought, areas of law could no longer be understood as grounded in the subjective value and policy choices inherent in the notion of natural justice and enlightened public policy. Jurists believed that they no longer needed to go beyond the boundaries of a substantive legal field to explain its underlying principles.[43] Rather than devise legal concepts, such as consideration in contract, intent in torts, and lease in property, as functional means to achieve debatable value and policy choices, formalists viewed these notions as self-sufficient ends found solely in the study of each legal area.[44] This suggested that the law's innumerable rules were logical and mechanical deductions from autonomous legal principles and conceptions that legal scholars had discerned in past cases.[45]

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40. *See supra* notes 35-36.

41. Norway Plains Co. v. Boston & Maine R.R., 67 Mass. (1 Gray) 263, 267-68 (1854); *see* Siegel, *supra* note 35, at 59. *See generally* Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J.L. & ECON. 621 (1976).

42. On the rise of formalism in America, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 530-48 (1973); G. GILMORE, THE AGES OF AMERICAN LAW 41-67 (1977) [hereinafter cited as G. GILMORE, AGES]; M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 253-66 (1977); G. WHITE, TORT LAW IN AMERICA 20-37 (1980) [hereinafter cited as G. WHITE, TORT]; Nelson, *Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). For a discussion of formalism in England, see P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 345-58, 388-97, 660-71 (1979) [hereinafter cited as P. ATIYAH, CONTRACT]. Formalism in Europe is discussed in J. MERRYMAN, THE CIVIL LAW TRADITION 65-72 (1969).

43. *See, e.g.*, Bordwell, *supra* note 21, at 734-36; Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); authorities cited *supra* note 42.

44. *See, e.g.*, C. LANGDELL, CASES ON CONTRACTS vi-vii (1871); authorities cited *supra* note 42.

45. The difference between early and later nineteenth century approaches to systemization is illustrated by Langdell's treatment of the "mailbox rule" in contract law. After deducing from his legal conception of contract that an acceptance is effective upon delivery and not upon dispatch, Langdell dismissed opposing arguments based on justice and utility

Like other areas of the law,[46] perpetuities law reflects both the rise of systemization and the shift in its ultimate basis from policy to legal conceptions. The earlier style of systemization appeared in the perpetuities field with the publication of William Lewis's *Law of Perpetuity* in 1846.[47] Lewis wrote, although more tentatively than his successors, of a "harmony of principles" and "symmetry," and of a "rule," not rules, against perpetuities.[48] Yet the author, reflecting the jurisprudence of his time, based the rule on policy rather than legal principle. For example, Lewis opened with an explanation of both the need to allow and to regulate private property, and the need to empower and to control the dead hand;[49] he described the law's objective as

> preserving harmony between the diversified elements which constitute the sources of national prosperity, at a point at which they are most likely to clash, by securing the necessary freedom of commerce in the *alienation* and *pledge* of every species of property, on the one hand, and the proper and reasonable regard to private and family purposes in the *settlement* of property, on the other.[50]

Despite Lewis's many intricate technical legal discussions, he emphasizes that in the final analysis, the Rule Against Perpetuities is "a system serving an important end of public policy."[51]

Lewis's work, however, had little impact. Thus, perpetuities law was not transformed until 1886 with the publication and subsequent widespread acceptance of John Chipman Gray's treatise, *The Rule Against Perpetuities*.[52] Analytically, Gray's treatise con-

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as "irrelevant." C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACT 15-21 (2d ed. 1880).

46. For a discussion of formalism in other fields of law, see G. GILMORE, THE DEATH OF CONTRACT 5-53 (1974) [hereinafter cited as G. GILMORE, CONTRACT]; G. WHITE, TORT, *supra* note 42, at 20-62.

47. W. LEWIS, *supra* note 12.

48. *Id.* at 48-49, 138 n.1, 357; Bordwell, *supra* note 8, at 439. Scholars preceding Lewis believed that the English view of perpetuities required the application of a variety of rules. *See* H. RANDELL, AN ESSAY ON THE LAW OF PERPETUITY AND ON TRUSTS OF ACCUMULATION 59, 63-65, 103 (1822).

49. W. LEWIS, *supra* note 12, at 47-49.

50. *Id.* at 48.

51. *Id.* at 138 n.1. For other references to policy, see *id.* at 118, 138-39, 289; H. RANDELL, *supra* note 48, at 68, 88, 94, 103.

52. J. GRAY, PERPETUITIES, *supra* note 3. On Gray's acceptance and influence, see *supra* text accompanying notes 4-6; *infra* notes 106-12. R. MARSDEN, THE RULE AGAINST PERPETUITIES 166-67 (1883), published in England three years before Gray's treatise, greatly anticipated Gray's transformation of perpetuities law. Marsden's work, however, was not as rigorously systematic and formal, and was certainly less influential than Gray's treatise. The contemporaneous appearance of Marsden's and Gray's work demonstrates that formalism

sists of three parts. The first portion details a history of future interests and perpetuities law.[53] A comparatively brief section follows stating the Rule and its most important supporting doctrines.[54] The final part, constituting more than one-half of the text, argues for and explores the Rule's universal application.[55] But despite the divisions, the work is an organic whole, designed to systematize and formalize perpetuities law by reducing it to a single rule, based on, and interpreted in terms of, legal conceptions and legal history.

In general, Gray systematizes perpetuities law by depicting its reduction to a single rule as the triumph of truth over error. He stigmatizes the handling of perpetuities by diverse rules as the judiciary's original and confused attempt to control remote limitations.[56] The Rule, in contrast, emerges from a "slow recognition" of the "true form" of the law.[57] Gray constantly dismisses the continued adherence to the old rules as intellectual malingering.[58]

Gray formalizes perpetuities by treating it as a settled body of doctrine whose content is grounded in, and deduced from, legal conceptions. In his *Preface*, Gray explains:

> In many legal discussions there is, in the last resort, nothing to say but that one judge or writer thinks one way, and another writer or judge thinks another way. There is no exact standard to which appeal can be made. In questions of [perpetuities] this is not so; there is for them a definite recognized rule: if a decision agrees with it, it is right; if it does not agree with it, it is wrong. In no part of the law is the reasoning so mathematical in its character; none has so small a human element.[59]

Gray introduces his treatise without mentioning a policy reason for the law's proscription of remote limitations. Instead, he divorces perpetuities law from its then-accepted purpose of promoting alienability; the supposed relation, he claims, is one of the original

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was becoming popular among late nineteenth-century jurists.

53. J. GRAY, PERPETUITIES, *supra* note 3, §§ 5-200; *see also* W. LEWIS, *supra* note 12, at 50-138 (history of future interests).

54. J. GRAY, PERPETUITIES, *supra* note 3, §§ 201-267. For a statement of the Rule, see *supra* note 3.

55. *Id.* §§ 268-679.

56. *See, e.g., id.* §§ 140, 159, 168. Gray views the development of perpetuities law as exemplifying the normal process of common-law development. *See infra* note 168. For an alternative view of the early history of perpetuities law, explaining its development in terms of shifts in policy, see 7 W. HOLDSWORTH, *supra* note 4, at 93-114; Haskins, *supra* note 8.

57. J. GRAY, PERPETUITIES, *supra* note 3, §§ 159, 201.

58. *See, e.g., infra* text accompanying notes 75-91.

59. J. GRAY, PERPETUITIES, *supra* note 3, at ix.

"misconception[s]"[60] that "has led to grave practical errors."[61] Later in the treatise, Gray does state the "true" policy of perpetuities law: protecting the market value of present estates.[62] Not only is this policy less compelling than the policy previously attributed to perpetuities law,[63] but it is lost among discussion, analysis, and argument drawn from and about legal history, doctrine, precedent, and conception.[64] In other words, in part by reducing the underlying policy's intrinsic significance, but more significantly by denying it a role in legal analysis and argument, Gray sets the stage for its being overlooked entirely.[65] Consequently, perpetuities law emerges as nothing more than "do[ing] . . . sums correctly"[66]—a logic in which legal conception, rather than policy, determines the disposition of legal conflicts.

The mathematical design of Gray's conception of perpetuities law is specifically and saliently illustrated by the central theme of his work: the Rule's universal applicability. This was a novel proposition. Prior to Gray, the preponderance of judicial and scholarly authority[67] viewed the Rule as inapplicable to interests such as contingent remainders, rights of entry, possibilities of reverter, many limitations after entailed estates, and some executory interests.[68] Nonetheless, Gray argues for the Rule's application, interest by interest.[69]

Gray first discusses the rules controlling contingent remainders.[70] Before Gray, eminent authorities including Fearne, Butler, Preston, Sugden, Williams, Sweet, Leake, and the only case on the subject, *Cole v. Sewell*,[71] all expressed the opinion that contingent

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60. *Id.* § 2.

61. *Id.* § 3.

62. *Id.* § 269.

63. *See supra* note 9.

64. For a discussion of Gray's analysis and argument, see *infra* text accompanying notes 70-97.

65. *See* Bordwell, *supra* note 21, at 734-36.

66. J. GRAY, PERPETUITIES, *supra* note 3, at ix.

67. *See, e.g.*, H. CHALLIS, THE LAW OF REAL PROPERTY 139-40, 146-48 (1887); 7 W. HOLDSWORTH, *supra* note 4, at 231-38; Sweet, *Perpetuities*, 15 L.Q. REV. 71, 79-85 (1899); cases cited by J. GRAY, PERPETUITIES, *supra* note 3, §§ 287, 305-311. Only W. LEWIS, *supra* note 12, and R. MARSDEN, *supra* note 52, held views similar to Gray's.

68. Certain executory limitations after entailed estates are exempt from the Rule. *See infra* text accompanying notes 94-97.

69. *See* J. GRAY, PERPETUITIES, *supra* note 3, §§ 268-628; *infra* text accompanying notes 73-97.

70. J. GRAY, PERPETUITIES, *supra* note 3, § 284.

71. 4 Dr. & War. 1, 28, 32 (Ir. Ch. 1843), *aff'd*, 2 H.L.C. 186, 9 Eng. Rep. 1062 (1848). *But cf.* W. LEWIS, *supra* note 12, at 80-85 (Supp. 1849) (narrowly construing the holding in

remainders were outside the scope of the Rule.[72] Yet Gray asserts simply, "As the Rule governs all contingent equitable limitations of real estate, and all contingent limitations, legal and equitable, of personal property, whether in the form of remainders or not, it is very desirable that legal contingent remainders . . . should be subjected to the Rule also."[73] Thus, by assuming systemization, Gray places on others the burden of producing sufficient reasons to create exceptions to the Rule.

Gray then turns to rebutting specifically his opponents' arguments against the Rule's universal application. First, in the context of contingent remainders, Gray's opponents contended that the rule against limitations after the first limitation to an unborn person sufficiently controlled perpetuities without the assistance of the Rule.[74] Gray refutes this contention by arguing that the "unborn person" rule no longer exists. Drawing from his history section, he shows that an earlier rule barring "double possibilities" spawned the "unborn person" rule.[75] Developed in the 1590's, this rule was one of the earliest judicial rules aimed at perpetuities and subsequently was criticized and rejected as overly broad for voiding many future interests that the judiciary wished to allow.[76] Gray reasons that the prohibition against limitations after a limitation to an unborn person, as a derivative of a discarded rule, must itself fall.[77]

Second, those who opposed the universal application of the Rule contended that it did not govern contingent remainders because their common-law origins predated the development of the Rule.[78] The application of the Rule to contingent remainders therefore would be judicial usurpation of the legislature's preroga-

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Cole).

72. *See* Sweet, *supra* note 67, at 82-86.

73. J. GRAY, THE RULE AGAINST PERPETUITIES § 284 (2d ed. 1906).

74. *Id.* § 287. For a discussion of this rule, see *supra* note 29 and accompanying text.

75. J. GRAY, PERPETUITIES, *supra* note 3, §§ 287-293. The rule also is referred to as the rule against a possibility upon a possibility. It required judges to distinguish between degrees of unlikelihood of occurrence. *See* 7 W. HOLDSWORTH, *supra* note 4, at 93-98; Bordwell, *Alienability and Perpetuities* (pt. 5), 25 IOWA L. REV. 1, 9-15 (1939).

76. Holdsworth, Bordwell, and Sweet dispute Gray's contention that the rule against double possibilities gave rise to the rule against limitations after a limitation to unborn issue. They derive the "unborn person" rule from the long struggle to keep entailed estates barrable. *See* 7 W. HOLDSWORTH, *supra* note 4, at 209-14; Bordwell, *supra* at 14-22; Sweet, *Contingent Remainders and Other Possibilities*, 27 YALE L.J. 977, 981-85 (1918); *supra* text accompanying notes 16-17.

77. J. GRAY, PERPETUITIES, *supra* note 3, § 290.

78. *Id.* § 296; *see* 2 T. JARMAN, TREATISE ON WILLS 734 (1845).

tive to alter established law. But Gray again draws from his history section to demonstrate that the Rule not only undoubtedly applies to devises of leasehold estates, but that these are the very interests the Rule was first formulated to control.[79] He reasons that the devise of leasehold estates is sanctioned by common law, and not the Statute of Wills, because these estates are conceptually chattel and not real interests. Thus, Gray concludes, the Rule is obviously applicable to common-law interests.[80]

Gray uses similar reasoning to extend the Rule's application to rights of entry.[81] As these rights are "common-law interests," they "are within the Rule."[82] Gray reviews[83] and minimizes the dozens of American precedents upholding remotely vesting rights of entry[84] and declares them illogical, arbitrary exceptions to the Rule Against Perpetuities.[85]

Possibilities of reverter[86] presented Gray with more difficulty. Indeed, his opinion as to the Rule's extension to possibilities of reverter wavered over time. In the first edition, this future interest is subject to the Rule, like any other nonvested common-law interest.[87] In subsequent editions of the *Rule Against Perpetuities*, Gray views possibilities of reverter as vested and, therefore, not voided by the Rule. The immunity of possibilities of reverter, he

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79. J. GRAY, PERPETUITIES, *supra* note 3, § 296.

80. *Id.* §§ 297-298. Gray reminds us in his later work that the courts have the power to change the law. J. GRAY, THE RULE AGAINST PERPETUITIES, *supra* note 73, § 296(a).

81. A right of entry is defined as "[t]he right of taking or resuming possession of land by entering on it in a peaceable manner." BLACK'S LAW DICTIONARY 1190 (5th ed. 1979).

82. J. GRAY, PERPETUITIES, *supra* note 3, § 300.

83. *Id.* § 305-309.

84. Despite current usage that refuses to apply the Rule to rights of entry because they are deemed "vested" for purposes of the Rule, *see infra* text accompanying note 109, it was clear to Gray and his contemporaries that rights of entry were not vested interests. The word vested derives from the Latin word *vestire*, meaning to clothe; a vested interest is clothed with seisin. By legal conceptions, a right of entry had no seisin until breach of its condition. Therefore, it is not a vested interest until breach. *See* J. GRAY, PERPETUITIES, *supra* note 3, §§ 100, 114, 118 ("originally the word vestire meant . . . to deliver the seisin"); 12 THE OXFORD ENGLISH DICTIONARY 159 (1933); *cf.* French v. Old South Soc'y, 106 Mass. 479 (1871) (court does not question the nonvested character of rights of entry); *In re* Hollis Hosp., 2 Ch. D. 540 (1899). For a fuller, more detailed analysis of rights of entry, see 7 W. HOLDSWORTH, *supra* note 4, at 23-81.

85. J. GRAY, PERPETUITIES, *supra* note 3, § 310.

86. A possibility of reverter is a future interest left in the transferor or his successor in fee simple determinable or in fee simple conditional. The special limitation which characterizes a determinable fee is commonly introduced by words like "until" or "so long as"; but a mere statement of purpose is not sufficient to create a determinable fee.

L. SIMES, FUTURE INTERESTS, *supra* note 6, at 28-29.

87. J. GRAY, PERPETUITIES, *supra* note 3, § 312.

decided, was a necessary consequence of the concept of determinable fees.[88] Hence, the importance of Gray's insistence through all of his editions that the Statute *Quia Emptores*[89] barred fee simple determinable estates and their attendant possibilities of reverter.[90] Thus, the uncertainty surrounding the treatment of possibilities of reverter is moot; their very existence is conceivable, Gray observes, only by the maxim "*communis error facit jus.*"[91]

Although Gray's treatment of possibilities of reverter had considerable support among treatise writers,[92] two dozen English and American cases seemed to disagree. Reviewing the cases at length in his history section, Gray reduces all but one of them to no more than "dicta," and dismisses the remaining case as incorrect.[93]

Finally, Gray acknowledges and approves of the Rule's inapplicability to future interests after entailed estates that vested before or at the termination of the entailed estate.[94] Gray explains, however, that conceptually, these future interests are present estates[95] because they are completely destructible through a common recovery brought by the present occupant.[96] Thus, rather than confound the Rule's universal application, Gray trumpets its exception as illustrative of the Rule's concern for "the substance rather than . . . the form of future limitations."[97]

Given the unprecedented nature of many of Gray's specific conclusions, the evident weakness of his supporting arguments,[98]

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88. J. GRAY, THE RULE AGAINST PERPETUITIES, *supra* note 73, § 312. If the Rule eliminated possibilities of reverter, then determinable fees would lose their effectiveness because the sanction of termination of the estate would be unavailable.

After Gray concluded that the Rule does not govern possibilities of reverter, he needed to explain why a right of entry, which is the necessary consequence of a fee simple subject to a condition subsequent, is not similarly exempt. The distinction, Gray says, is that a right of entry divests the preceding estate, as an executory interest does, while a possibility of reverter does not. *Id.* § 312 n.1.

89. 1290, 18 Edw. 1, ch. 1. The House of Lords enacted this statute to grant feudal subtenants free alienation of their fee estates.

90. J. GRAY, PERPETUITIES, *supra* note 3, §§ 31-41.

91. *Id.* § 312. This Latin phrase means a "common error, repeated many times, makes law." BLACK'S LAW DICTIONARY, *supra* note 81, at 254.

92. J. GRAY, PERPETUITIES, *supra* note 3, § 36. For a list of proponents and opponents, see Powell, *Determinable Fees*, 23 COLUM. L. REV. 207, 210-11 (1923).

93. J. GRAY, PERPETUITIES, *supra* note 3, §§ 33-38.

94. *Id.* §§ 203, 443-447.

95. *Id.* § 443. According to Gray, future interests after entailed estates that vest with the termination of the entailed estate are "not regarded as an interest at all." *Id.* § 203.

96. *See id.*

97. *Id.* § 203.

98. *See, e.g.*, 7 W. HOLDSWORTH, *supra* note 4, at 233. One weakness is offered by Powell, who suggests that Gray's attempt to explain the Rule's treatment of possibilities of re-

and the novelty of his general conception, it is understandable that some of his eminent contemporaries responded critically. Charles Sweet published a defense of the rule against limitations after a limitation to an unborn person;[99] Richard Powell argued for the post-*Quia Emptores* validity of possibilities of reverter;[100] William Holdsworth disputed much of Gray's history;[101] Jabez Fox suggested that Gray's separation of perpetuities law from the policy favoring alienability exemplified a jurisprudence that substituted "principles . . . the writer would be glad to see recognized . . . [for those] which the courts have seen fit to adopt."[102]

Despite the controversy and criticism of his work, Gray's treatise was, and continues to be, popular and influential.[103] Yet Gray's influence has not been in terms of substantive result. For example, after the treatise's publication, English courts firmly reasserted the rule against limitations after a limitation to unborn persons.[104] Further, American courts persisted in upholding and exempting possibilities of reverter and rights of entry from the Rule.[105]

Gray's real influence has been in terms of his overall approach, methodology, and conception of perpetuities law. With Gray, the image of perpetuities law became systematic and formal. His one-sentence Rule became the "classical statement,"[106] "the focal point about which to organize . . . thinking,"[107] and his mathematical

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verter using the Statute *Quia Emptores*, 1290, 18 Edw. 1, ch. 1, is meaningless because the statute's intent remains intact regardless of the ultimate disposition of these future interests. Powell, *supra* note 92, at 211.

99. Sweet, *supra* note 67, at 71; *see* Firth, *Legal Remainders and Perpetuities*, 14 L.Q. REV. 133 (1898). *But see* Vaizey, *Remoteness and Perpetuity*, 6 L.Q. REV. 410 (1890); Williams, *Contingent Remainders*, 14 L.Q. REV. 234 (1898) (supporting Gray).

100. Powell, *supra* note 92. H. TIFFANY, THE LAW OF REAL PROPERTY 93 (2d ed. 1920), also criticized Gray's treatise. *But see* A. KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS 302 (1920).

101. 7 W. HOLDSWORTH, *supra* note 4, at 210 n.11, 211, 232-34. Although Holdsworth disagrees with Gray on the history of the "older" rules, he is highly complimentary of Gray's treatment of the rise of the rule against remote vesting and relies on him extensively. *Id.* at 215.

102. FOX, *supra* note 8, at 200. Gray responded to FOX in Gray, *Remoteness of Charitable Gifts*, 7 HARV. L. REV. 406 (1894) [hereinafter cited as Gray, *Remoteness*].

103. *See supra* notes 4-6 and accompanying text.

104. *See, e.g.*, Whitby v. Mitchell, 44 Ch. D. 85 (1890) (the case for which the rule is named). Parliament abolished the rule in the Law of Property Act, 1925, 15 Geo. 5, ch. 20, § 161.

105. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 68, 94-96; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 264. England, however, followed Gray. *See In re* Hollis Hosp., 2 Ch. D. 540, 552 (1899) (citing Gray as a "learned American author").

106. T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 183 (1966).

107. L. SIMES, FUTURE INTERESTS, *supra* note 6, at 264.

style of elaboration the norm. The American refusal to apply the Rule to rights of entry and possibilities of reverter now is conceptualized and tolerated as an "historical anomaly," rather than explained as a debatable policy choice.[108] Often, it is masked entirely by terming these future interests "vested."[109] When remembered at all, the rule against limitations after a limitation to an unborn person is explained as a transitional doctrine—an imperfect formulation reflecting movement away from the absurd "double possibility" principle towards the current rule.[110] The conventional wisdom envisions Gray as restoring, not reordering, perpetuities law.[111] Few, if any, commentators share Professor Bordwell's insight that Gray took "a great field of property law like Perpetuities and confin[ed] it to a narrow, mechanistic rule against remoteness of vesting [that] he came to exalt as if it were an end in itself . . . ."[112]

IV. GRAY'S JURISPRUDENCE AND CURRENT CONTROVERSIES IN PERPETUITIES AND PROPERTY LAW

The preceding analysis of the history of perpetuities law illuminates a number of contemporary issues in property law. Most immediately, it exposes the current controversy over the reform of perpetuities law, placing it in a larger perspective. For over thirty years, the movement to reform the Rule,[113] although achieving some notable successes,[114] has met with substantial resistance and

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108. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 95; T. BERGIN & P. HASKELL, *supra* note 106, at 209; 5 R. POWELL, THE LAW OF REAL PROPERTY ¶ 769[2] (1977); L. SIMES, FUTURE INTERESTS, *supra* note 6, at 280-81.

109. RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 94; *see also* 5 R. POWELL, *supra* note 108, ¶ 769[1] n.2; E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 119 (Supp. 1981); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 647 (1938). This completely drains the term of any meaning. Compare the American conception of vested rights with Gray's formulation, *supra* note 84.

110. 5 R. POWELL, *supra* note 108, ¶ 763. Gray specifically refutes this theory. *See* J. GRAY, THE RULE AGAINST PERPETUITIES, *supra* note 73, § 298(h). For the correct history of the rule against limitations after a limitation to an unborn person, see Sweet, *supra* note 29, at 387-99.

111. *See* T. BERGIN & P. HASKELL, *supra* note 106, at 183.

112. Bordwell, *supra* note 21, at 734-35 (footnote omitted); *see also* Bordwell, *Alienability and Perpetuities* (pt. 1), IOWA L. REV. 437, 439-40 (1937).

113. The movement is conventionally dated from 1947 when Pennsylvania enacted reform legislation. *See* 20 PA. CONS. STAT. ANN. § 6104 (Purdon 1975). For a review of the various reform proposals, see 5 R. POWELL, *supra* note 108, ¶¶ 827A-827F; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 260-61, 269-79; Schuyler, *The Statute Concerning Perpetuities*, 65 NW. U.L. REV. 3, 18-28 (1970).

114. Both England and the *Restatement (Second) of Property* have adopted major re-

remains a minority position.[115] Several books, commentaries,[116] and over one hundred law review articles have heatedly debated Gray's Rule and his critics' counterproposals.[117] Yet traditionalists and reformers[118] generally agree on the goal that perpetuities law does and should pursue:[119] a measured restraint on alienability[120] that concomitantly respects the desire of past, present, and future generations to do what they wish with the wealth they enjoy.[121] Consistent with this objective, traditionalists and reformers alike believe that there must be some ultimate limit to dead hand control.[122]

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forms. For a discussion of England's Perpetuities and Accumulations Act, 1964 ch. 55, see Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486 (1964); *see also* Lynn, *Perpetuities Reform: An Analysis of Developments in England and the United States*, 113 U. PA. L. REV. 508 (1965) (examining a "wait and see" version of the Rule); Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 SANTA CLARA L. REV. 1063, 1066-81 (1979) (discussing RESTATEMENT (SECOND) OF PROPERTY §§ 1.4-.5 (Tent. Draft No. 2, 1979)).

115. For a survey of jurisdictions modifying the classic Rule, see RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 87-92, 118-22; 5 R. POWELL, *supra* note 108, ¶¶ 808-827; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 273-79; *see also* RESTATEMENT (SECOND) OF PROPERTY 127-54 (Tent. Draft No. 1, 1978) (Professor Powell's critical analysis of *Restatement (Second)*'s Reporter's claims regarding reform's acceptance).

116. For a bibliography on recent perpetuities reform, see 5 R. POWELL, *supra* note 108, ¶ 827G. The *Restatement (Second) of Property* and Comment, *supra* note 114, should be added to this list. The leading material cited in 5 R. POWELL, *supra* note 108, urging reform is by Professor Leach; the leading material opposing reform is by Professors Mechem and Simes. *See also* RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, §§ 1.4.-.5 (Professor Casner's remarks as Reporter); 5 R. POWELL, *supra* note 108, ¶ 827F[3] (Professor Rohan's opposing analysis).

117. *See, e.g.*, 5 R. POWELL, *supra* note 108, ¶ 827F. *See generally* Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1124-26, 1152-54 (1960) (arguing for codification of a rule against perpetuities) [hereinafter cited as Leach, *Perpetuities Legislation*].

118. In this article, those scholars who advocate substantial preservation of Gray's formulation of the Rule are denominated "traditionalists," while those who advocate substantial reform are called "reformers."

119. *See generally* Fetters, *Perpetuities: The Wait-and-See Disaster—A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 CORNELL L. REV. 380, 381-87, 407-14 (1975) (review of policy reasons supporting Rule).

120. *See, e.g.*, J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13-18 (1956); L. SIMES, PUBLIC POLICY, *supra* note 1, at 32-71; Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965, 966-69 (1959); Schuyler, *Should the Rule Against Perpetuities Discard its Vest?* (pt. 1), 56 MICH. L. REV. 683, 688-93 (1958).

121. *See* authorities cited *supra* note 114; 5 R. POWELL, *supra* note 108, ¶ 762; Leach, *supra* note 117, at 1142. L. SIMES, PUBLIC POLICY, *supra* note 1, at 58, first examined the Rule's limited effect on the transferability of wealth. For a lone dissent from this view, see Fetters, *supra* note 119, at 407-14.

122. The reformed Rule does tend to allow somewhat more dead hand control than the original formulation. *See* Comment, *supra* note 114, at 1079-80.

Agreement ceases, however, when the legal scholars turn from the analysis of proper ends of perpetuities law to the selection of means to those ends. The reformers' central indictment of Gray's formulation is that because perpetuities only marginally promotes an important policy, and because only unskilled attorneys run their clients afoul of the Rule's strictures, the current law too quickly and harshly overrides donor's intentions.[123] It would be better, they suggest, not to upset a disposition unless it in fact vests too remotely,[124] and then limit the damage by reforming the disposition to reflect the donor's intent as closely as possible while complying with the law.[125] Traditionalists, however, object to the judicial discretion and the uncertainty that these reforms engender, and see no need to encourage sloppy draftsmanship.[126] Instead, they urge specific statutory proscription of the few unacceptable conclusions reached by the Rule's remorseless "any possibilities" logic.[127] These amendments, they argue, will fashion a rule that is nondiscretionary and predictable, yet devoid of absurd application.

Although couched in terms of policy, the debate between traditionalists and reformers concerns matters of technique, rather than the goals of perpetuities law. Nevertheless, the argument is impassioned and interminable because the different methods of interpreting the Rule reflect irreconcilable jurisprudential notions of how law should be structured and operated. The struggle, in effect, focuses on the extent to which perpetuities law should shed its formalist past.

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123. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, at 93-94; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); Schuyler, *supra* note 120, at 693-708.

124. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, § 1.4; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 270-75; Leach, *Perpetuities Legislation, supra* note 117, at 1138-40; Schuyler, *supra* note 120, at 720-22. This is known as the "wait-and-see" approach.

125. *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, § 1.5; L. SIMES, FUTURE INTERESTS, *supra* note 6, at 275-77; Leach, *Perpetuities Legislation, supra* note 117, at 1149-51; Schuyler, *supra* note 120, at 722-25. This is known as the "cy pres" approach. Another proposal, developed by Professor Schuyler but generally overlooked by others, is to reform the requirement of vesting. *See* L. SIMES, PUBLIC POLICY, *supra* note 1, at 80-83.

126. *See, e.g.*, 5 R. POWELL, *supra* note 108, ¶ 827F[3](c)-(h); Mechem, *supra* note 120, at 980-83.

127. *See, e.g.*, Bordwell, *Perpetuities From the Point of View of the Draughtsman*, 11 RUTGERS L. REV. 429, 435 (1956); Fetters, *supra* note 119, at 399; Mechem, *supra* note 120, at 983. Examples of the rules condemned by the traditionalists include the "fertile octogenarian," the "unborn widow," and the "magic gravel pit." *See, e.g.*, RESTATEMENT (SECOND) OF PROPERTY, *supra* note 1, § 1.4 comments e, f & k; 5 R. POWELL, *supra* note 108, ¶ 827E; Schuyler, *supra* note 120, at 698-701.

One of the essential features of formalism, if not all nineteenth-century jurisprudence, is the resolution of controversies by the remorseless application of general principles, conceptions, or rules.[128] Jurists recognized the problems inherent in this approach: the application of rules to cases in which their underlying reasons only faintly apply, the disregard of factual detail, and the all-or-nothing quality of the result reached.[129] But the problems were thought to be outweighed by the rules' long-term benefits, not the least of which was that predictable rules foster self-government.[130] Contemporary jurisprudence stands in contrast.[131] It uses doctrines, such as "reasonableness" and "best interests of the child," that emphasize facts and allow judicial flexibility. The focus is on pragmatic, individualized justice.[132]

The reformers' doctrines—for example, "wait-and-see"[133] and "cy pres"[134]—reflect, draw from, and are sustained by, this contemporary jurisprudential current just as Gray was by formalism. Even the traditionalists concede the force of contemporary jurisprudence by joining the reformers and condemning the "fertile octogernarian" and certain other conclusions of the classic Rule.[135] To some extent they too have departed from the nineteenth-century's vision of perpetuities law, and to some extent they are reformers. But although the traditionalists' condemnation of a few of the Rule's absurd conclusions is inconsistent with a strictly formal

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128. *See* P. ATIYAH, CONTRACT, *supra* note 42, at 345-58, 398-405; P. ATIYAH, FROM PRINCIPLES TO PRAGMATISM 5-26 (1978) [hereinafter cited as P. ATIYAH, PRINCIPLES]; G. GILMORE, CONTRACT, *supra* note 46, at 14-22.

129. P. ATIYAH, PRINCIPLES, *supra* note 128, at 14-17; G. GILMORE, CONTRACT, *supra* note 46, at 14-47.

130. P. ATIYAH, CONTRACT, *supra* note 42, at 346-58; P. ATIYAH, PRINCIPLES, *supra* note 128, at 18-21, 24-25; *cf.* G. GILMORE, AGES, *supra* note 42, at 64-67 (briefly exploring birth and impact of laissez-faire government); M. HORWITZ, *supra* note 42, at 266 (briefly exploring the forces moving American law towards formalism).

131. Contemporary jurisprudence has a variety of strands, including "realism," "reasoned elaboration," and "consensus thought." For general surveys of the modes of twentieth-century jurisprudence, see G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 97-163 (1978); G. WHITE, TORT, *supra* note 42; Ackerman, Book Review, 103 DAEDALUS 119 (1974). Despite their marked differences, the strands are sufficiently similar when compared to formalism to allow their grouping in this article. *See infra* note 132. Professor Gilmore has spotted a recent trend—a group of "neo-conceptualist" philosophies, chiefly in the law and economics school—that may be exceptions to this generalization. *See* G. GILMORE, AGES, *supra* note 42, at 107-18.

132. *See* P. ATIYAH, CONTRACT, *supra* note 42, at 649-59, 678-80; P. ATIYAH, PRINCIPLES, *supra* note 128, at 12, 14, 30; G. GILMORE, CONTRACT, *supra* note 46, at 78-81.

133. *See supra* note 124 and accompanying text.

134. *See supra* note 125 and accompanying text.

135. *See supra* note 127 and accompanying text.

view, it insufficiently resolves the dichotomy between rule-based and individualized justice that distinguishes contemporary and traditional doctrines.

An example advanced by Professor Mechem illustrates the traditionalists' position. He suggests that after eliminating the Rule's few unacceptable conclusions, it resembles the formalities required for a valid will, one of many rules "limiting the effectiveness of human activity because of supposed considerations of public policy."[136] The invalidation of an improperly witnessed or signed will does not bother Mechem. Nevertheless, many people object to the intended beneficiaries' losing in just such a case, especially when the fault lay with the testator's lawyer, who could and should have done better.[137]

The point is not that the reformers are correct because their proposals coincide with "contemporary" jurisprudence. Modern jurisprudence has its problematic facets, including lack of certainty, which the reform measures doubtlessly share.[138] Further, as a policy matter, the reform proposals unfortunately tend to extend an already generous amount of dead hand control.[139] Rather, the point is that the reformers' appeal is based on the congruence between their ideas and contemporary jurisprudence. This conformity is the force that, despite the reform proposals' defects, is overwhelming the classic Rule, and may overwhelm the traditionalists' counterproposals as well.

Gray's influence on property law also extends beyond perpetuities to the interpretation of dispositive instruments, especially dispositions involving perpetuities or remainders. Part of Gray's influence is gained by negative inference; he generally does not discuss the interpretation of dispositions in his treatise and criticizes previous works for having done so.[140]

Gray considered interpretation of instruments a separate legal science distinct from perpetuities law; "[t]herefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be re-

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136. Mechem, *supra* note 120, at 967.

137. The contemporary view is reaffirmed when a court holds that the Rule is so complex that the offending attorney is not guilty of malpractice. *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

138. *See* P. ATIYAH, PRINCIPLES, *supra* note 128, at 29-32; *supra* note 126.

139. *See* Comment, *supra* note 114, at 1079-80; *see also* Bordwell, *supra* note 127, at 434-35.

140. J. GRAY, PERPETUITIES, *supra* note 3, at iv.

morselessly applied."[141] As this passage from the *Rule Against Perpetuities* indicates, Gray favored an inflexible, mechanistic technique for interpreting dispositive instruments; his formalist methodology denies the legitimacy of construing limitations in light of a pragmatic look at the consequences of their interpretation.[142] The continued quotation, citation, and use of this passage evidences its influence.[143]

Ironically, most of Gray's influence in this area is due to one of his few departures from his refusal to consider questions of interpretation. In his analysis of the distinction between vested and contingent remainders, he writes:

> Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.[144]

This rule, which seems to confine the search for the draftsman's intent to a debate over word sequence, is certainly mechanistic.[145] The rule is also immensely influential, as evidenced by its frequent use by courts[146] and commentators.[147]

Arguably, Gray's influence on interpretive technique is not confined to perpetuities law and the construction of remainders. By serving as a paradigm of correct technique, his formalist ap-

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141. *Id.* § 629.

142. Compare Gray's approach to the interpretation of dispositions with RESTATEMENT (FIRST) OF PROPERTY §§ 241-243 comment n (1936) (illustrating and legitimatizing approach that Gray finds unacceptable).

143. *See, e.g,* First Ala. Bank v. Adams, 382 So. 2d 1104, 1107 (Ala. 1980); Bell v. Harrison, 10 Or. App. 113, 115, 498 P.2d 397, 398 (1972); Hagemann v. National Bank & Trust Co., 218 Va. 333, 342, 237 S.E.2d 388, 393 (1977).

144. J. GRAY, PERPETUITIES, *supra* note 3, § 108.

145. *Compare* T. BERGIN & P. HASKELL, *supra* 106, at 75 *with* RESTATEMENT (FIRST) OF PROPERTY §§ 241-243 (1936) (rules regulating possessory and future interests). Gray's test seems a "dispute over word sequence" because it causes lawyers to minimize word choice as a factor in interpretation. Compare Edwards v. Hammond, 3 Lev. 131, 83 Eng. Rep. 614 (K.B. 1683) (ambiguity in dispositive instrument caused by choice of words resolved by determining testator's probable intent) with the treatment of *Edwards* by C. MOYNIHAN, *supra* note 9, at 121-23 (resolution of ambiguity seems determined by form and placement of words).

146. *See, e.g.*, Zimmerman v. First Nat'l Bank, 348 So. 2d 1359, 1364 (Ala. 1977); Second Nat'l Bank v. Harris Trust & Savs. Bank, 29 Conn. Supp. 275, 281, 283 A.2d 226, 229-30 (Super Ct. 1971); Loeb v. Loeb, 261 Ind. 193, 198-99, 301 N.E.2d 349, 353 (1973); *In re* Estate of Unitt, 197 Neb. 713, 716, 250 N.W.2d 644, 647 (1977).

147. *See, e.g.*, T. BERGIN & P. HASKELL, *supra* note 106, at 75; C. MOYNIHAN, *supra* note 9, at 121-22.

proach to interpretation may have a more pervasive influence.[148] Gray himself argued in another highly regarded work, *The Nature and Sources of the Law*,[149] that mechanistic interpretation was uniquely suited to property dispositions regardless of whether perpetuities or remainders were involved.[150]

Despite Gray's direct or indirect influence, his views certainly reflect and support the present conventional approach to construing dispositive instruments. In contrast to other areas of law,[151] the search for the draftsman's intent in property dispositions is still frequently seen as appropriately accomplished through heavy reliance on formal and mechanistic rules.[152] This view is so dominant today that many commentators are at a loss to explain the disposition of cases that are neither determined by, nor predicated on, Gray's rules except by resorting to vulgar legal realism. The rules, they say, are meaningless and incoherent, serving as a convenient method for rationalizing decisions that are based on other, unarticulated grounds.[153]

Yet there are some scholars (and some cases) whose approach to questions of construction illustrate a flexible and pragmatic search for the draftsman's intent.[154] In short, like perpetuities law, the construction of property dispositions currently involves a struggle between formalism and contemporary notions of jurisprudence.

Finally, this study of Gray's influence demonstrates that the

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148. It seems to have an effect on the author's students and colleagues.

149. J. GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1921) [hereinafter cited as J. GRAY, NATURE]. This treatise influenced at least one contemporary commentator's discussion of the interpretation of property dispositions. *See* A. KALES, LAW OF REAL PROPERTY 90-109 (1913).

150. J. GRAY, NATURE, *supra* note 149, at 173-78.

151. Examples include the interpretation of contracts and statutes.

152. *See, e.g.*, Werling v. Grosse, 76 Ill. App. 3d 834, 839-40, 395 N.E.2d 629, 633-34 (1979); Page v. Nissen, 254 A.2d 592, 595 (Me. 1969); Hagerman v. Board of Educ., 112 N.J. Super. 221, 223, 270 A.2d 736, 737 (Ch. Div. 1970); First Nat'l Bank v. Townsend, 27 Or. App. 103, 107, 555 P.2d 477, 479 (1976).

153. *See* T. BERGIN & P. HASKELL, *supra* note 106, at v-x, 75; Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. CHI L. REV. 215, 216-17 (1953).

154. *See, e.g.*, Oldfield v. Stoeco Homes, Inc., 26 N.J. 246, 139 A.2d 291 (1958); Browning v. Sacrison, 267 Or. 645, 518 P.2d 656 (1974); Grayson v. Holloway, 203 Tenn. 464, 313 S.W.2d 555 (1948); RESTATEMENT (FIRST) OF PROPERTY §§ 241-248 (1936); RABIN, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467 (1965); Schuyler, *The Art of Interpretation in Future Interest Cases*, 17 VAND. L. REV. 1407 (1964). The *Restatement of Property* has directly attacked Gray's refusal to construe limitations without regard to the Rule Against Perpetuities's application. *See* RESTATEMENT (FIRST) OF PROPERTY § 243 comment n (1936).

dominant concept of property law as being heavily rooted in medieval jurisprudence—a notion summed up by Justice Holmes's oft-repeated aphorism that property law "is a matter of history that has not forgotten Lord Coke"[155]—is in need of substantial revision. Certainly current perpetuities law, Gray's classic Rule, is not founded on the jurisprudence of Coke's time, but on the jurisprudence of Gray, Holmes,[156] Tiffany,[157] and other formalist jurists. The judiciary of Coke's time based the rules of perpetuities on policy goals. They often discussed policy in their analysis, and created, used, strained, or overruled various doctrines as the desired result seemed to require.[158] This concern for policy was in accord with the then-dominant style of jurisprudence that regarded the "wise" result as the end of the law.[159] Around 1700, well after Coke's time, common-law jurisprudence turned away from the pursuit of wisdom and towards the goal of certainty.[160] Although this change, which was fully reflected in perpetuities law, involved a mechanistic legal method, it substantially differed from the mechanistic thought and technique that characterized late nineteenth-century formalism. This earlier era sought certainty through rigid adherence to its inherited mosaic of rules; courts adhered to authority of any sort, even dicta, regardless of whether it was correct.[161] Formalism, in contrast, sought certainty by inducing a few

155. Gardiner v. Butler & Co., 245 U.S. 603, 605 (1918).

156. Holmes is conventionally regarded as a pragmatic realist jurisprudent. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). But Professor Gilmore, focusing on Holmes's earlier work, O.W. HOLMES, THE COMMON LAW (1881), sees him as a formalist. *See* G. GILMORE, CONTRACT, *supra* note 46. Professor Horwitz, in his unpublished 1981 Rosenthal Lectures at Northwestern University Law School, expressed similar views. *See also* Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 721-31 (1982) (Holmes's early scholarship exhibited diverse tendencies).

157. *See* H. TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY (1912).

158. *See, e.g.*, Child v. Baylie, Cro. Jac. 459, 461-62, 79 Eng. Rep. 393, 394-95 (K.B. 1791); Ramsey v. Bradford, Palmer 336, 336, 81 Eng. Rep. 1111, 1111 (K.B. 1623); Pills v. Brown, Palmer 131, 138, 81 Eng. Rep. 1012, 1016 (K.B. 1620) (Dodderidge, J., dissenting); Chudleigh's Case, 1 Co. Rep. 120a, 124a-25a, 138b-39b, 76 Eng. Rep. 270, 283-86, 321-22 (K.B. 1595); 7 W. HOLDSWORTH, *supra* note 4, at 82-83, 121-24, 130-34, 197-202, 205-12, 219; Haskins, *supra* note 8. This is especially clear in the case generally cited as the origin of the Rule, The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682), in which Chancellor Nottingham overruled *Child v. Baylie* and imposed as a limit to dead hand control the antithesis of a formalist rule: his estimation of "inconvenience" and "mischief." *Id.* at 953. For a late example of this approach, see Reeve v. Long, 3 Lev. 408, 83 Eng. Rep. 754 (H.L. 1695), *discussed in* 7 W. HOLDSWORTH, *supra* note 4, at 106-07.

159. *See* Siegel, *supra* note 35, at 50-53.

160. *Id.* at 51-53, 55-58.

161. *See id.* at 56-58. In the perpetuities area, all four of the most important precedents of this period establish rules to achieve absolute certainty. *See* Cadell v. Palmer, 1 Clark &

principles or rules from its inherited mosaic, and rigidly applying them regardless of precedent.[162] As Samuel Williston, a leading formalist jurisprudent, observed: "*Stare decisis*, or follow the precedents was the old legal maxim. For this in effect [formalists] substituted *stare principiis*, follow the principles, even if they overthrow some decisions."[163]

V. CONCLUSION

This article clarifies some current ideas on the nature of legal formalism. By examining the jurisprudential basis of Gray's work and its popularity, this article parallels Professor Gilmore's work on the impact of formalist legal scholarship on American law.[164] Like Gilmore's work, this article demonstrates that late nineteenth-century legal scholars creatively drew the preexisting disparate elements of law into objective, abstract, and theoretical schemas.[165] But Gilmore's conclusion that formalist revisions of law involved obvious misstatements of precedent[166] is not supported here. Gray's revision did not suffer from this infirmity.

Gray conceived of law as a progressive science.[167] He acknowl-

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Fin. 372, 6 Eng. Rep. 956 (H.L. 1833) (period of permissible remoteness includes twenty-one years as term in gross); Dormer v. Packhurst, 6 Brown 351, 2 Eng. Rep. 1127 (H.L. 1740) (remainder to trustees to preserve contingent remainders vested); Leake v. Robinson, 3 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817) (limitations to class valid or void as unity; if class member offends Rule, entire class takes nothing); Jee v. Audley, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787) (any possibility of remote vesting, no matter how unreasonable, voids the interest). Critical scholarship generally concludes that at least three of these cases, *Cadell, Leake*, and *Dormer*, gave greater weight to generally accepted but unsubstantiated professional opinion than to doctrinal consistency and correctness. *See* J. GRAY, PERPETUITIES, *supra* note 3, §§ 1186-1187; 7 W. HOLDSWORTH, *supra* note 4, at 111-14; A. SIMPSON, *supra* note 17, at 215; Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329, 1332-46 (1938).

162. G. GILMORE, CONTRACT, *supra* note 46, at 23-34; Gray, *Remoteness*, *supra* note 102. This is what Gray did in much of his treatise on perpetuities. *See supra* text accompanying notes 71-91.

163. S. WILLISTON, LIFE AND LAW 205 (1940). Williston concludes, "When we were seeking the answer to a problem in my student days the words 'on principle' were often on our lips. Years later the phrase became anathema to another school of legal thinkers who were disposed to question logical categories." *Id.* Not surprisingly, Williston describes Gray as someone who "believed in the fundamental correctness" of the *stare principiis* approach. *Id.* at 204.

164. G. GILMORE, CONTRACT, *supra* note 46.

165. Gilmore's thesis is generalized in his subsequent work, G. GILMORE, AGES, *supra* note 42. Gilmore's proposition is exemplified in the work of Langdell, Holmes, and Williston, who transformed the various areas of bills, notes, and building and employment agreements into a single law of contract. *See* G. GILMORE, CONTRACT, *supra* note 46, at 5-34.

166. G. GILMORE, CONTRACT, *supra* note 46, at 23-34.

167. *See* J. GRAY, NATURE, *supra* note 149, at 136-38, 141-44, 224, 231, 236-40, 308-09;

edged that perpetuities law differed in the past, yet conceptualized it as continuously evolving towards his views.[168] Like Newton in physics,[169] Gray saw himself as building on the studies of others to induce the final, "true form" of the law.[170] He structured and executed his treatise accordingly. The "errors" Gray found in the work of others, however, flowed from their different jurisprudential premises.[171] Gray may be faulted for assuming, and not debating, the philosophical framework that underlay his treatise.[172] But once one is cognizant of Gray's interpretive framework, his work on perpetuities openly and fully reveals the tradition from which he departed. In other words, contemporary scholars may discern "misstatements" in the conclusions of formalist scholars only because they accept yet another jurisprudential viewpoint.

Gray, *Remoteness*, *supra* note 102, at 407-08.

168. J. GRAY, PERPETUITIES, *supra* note 3, §§ 142, 154, 159, 201; Gray, *Remoteness*, *supra* note 102, at 407-08.

169. Gray explicitly refers to the physical and mathematical sciences in general, and Newton's work in particular, to describe the work of a legal scientist. *See* J. GRAY, NATURE, *supra* note 149, at 101, 225; J. GRAY, PERPETUITIES, *supra* note 3, at v.

170. J. GRAY, PERPETUITIES, *supra* note 3, at vi. Commenting on his achievements, Newton noted: "If I have seen further . . . it is by standing upon shoulders of Giants." Letter from Isaac Newton to Robert Hooke (Feb. 5, c. 1675), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 379 (14th ed. 1968).

Despite Gray's perception of the law as evolutionary, he viewed perpetuities and property law as unique areas that already had completely evolved. *See* J. GRAY, NATURE, *supra* note 149, at 173-76; J. GRAY, PERPETUITIES, *supra* note 3, at v.

171. *See supra* text accompanying notes 35-39, 158-61.

172. Gray later discussed his jurisprudence in J. GRAY, NATURE, *supra* note 149, and Gray, *Remoteness*, *supra* note 102. This article's treatment of Gray as a formalist contrasts with scholarship that views him as one of the first legal pragmatists or realists. *See, e.g.*, E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 76, 159 (1973); MacCormick, *A Political Frontier of Jurisprudence: John Chipman Gray on the State*, 66 CORNELL L. REV. 973 (1981); Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 865, 876-77 (1981). These other scholars base their views on Gray's later work. Perhaps Gray's attitude changed over time. Yet even in his later work, Gray treated property law formally, not pragmatically. *See* Gray, *Release and Discharge of Powers*, 24 HARV. L. REV. 511 (1911). Additionally, Samuel Williston, one of Gray's students in the earlier period, remembers him as a formalist. S. WILLISTON, *supra* note 163, at 204-05; *see* Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 681, 681 (1916).