

# MODERN CRITIQUES OF JUDICIAL EMPATHY: A REVISED INTELLECTUAL HISTORY

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## ABSTRACT

*The role of “empathy” haunts recent debates about how judges make decisions. Remarkably, however, the intellectual origins of scholarly resistance to empathic judging remain poorly understood. This Article fills that gap. Through historical and theoretical study, it reveals the ways in which the modern anti-emphatic consensus can be seen as a mutated descendent of late-nineteenth century formalism. This Article also marks an irony with significant implications for the empathy debate: Although the anti-emphatic view was born of formalism, it has drifted from its source such that it would almost certainly be condemned by the very formalist scholars from whom it is descended. Modern critiques of judicial empathy liberate themselves from an important limitation imposed by those prior theories—they believe that their proposed methods can be applicable beyond the realm of private law, and into public law—but if this is impossible, then these theories have nothing to say about the area in which they are so often employed: constitutional interpretation.*

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## I. INTRODUCTION

Supreme Court confirmation hearings have sparked a renewed interest in the “proper role” of a judge and of adjudication generally. The topic took on an exaggerated place in the Roberts and Sotomayor hearings, and is likely to be center stage in those coming up in the near future.<sup>1</sup> While this debate has always pervaded both public and theoretical discussions, many have noticed that recent instantiations seem skewed in favor of one side—one vision of adjudication has emerged as appropriate and acceptable, with its purported opposite disfavored and maligned by all but liberal legal academics. The publicly acceptable view is that of a judge who uses reason alone to reach a decision, and who plays by the established rules (which are themselves easy to discern). The alternative, now seemingly anathema, is the judge who supplements reason with experience and affective (i.e., non-cognitive, emotional) capacities—especially empathy. This new climate of opinion has been called “the anti-empathic turn.”<sup>2</sup>

In response, recent scholarship seeks to situate this shift within the larger trends that have taken place in legal theory over the past century. Specifically, Robin West argues that the anti-empathic turn is the intellectual progeny of an element of thinking advanced by the “Legal Realists”:

The paradigm shift I’ll describe represents a culmination, or vindication, of Justice Holmes’s audacious claim . . . near the beginning of the century just closed, that the common-law lawyer and common-law judge of the future—that would be us, now—would be the masters of economics,

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1. See generally Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

2. Robin West, *The Anti-Empathic Turn*, in NOMOS LIII: PASSIONS AND EMOTIONS 243-88 (James E. Fleming ed., 2013).

statistics, and the slide rule, rather than the masters of Blackstone or black-letter law.<sup>3</sup>

Adjudication based on social science was objective, replacing the moralizing of prior theories—this, of course, leaves no room for empathy or any similarly “subjective” considerations. As West writes,

[I]t’s worth identifying just three of the “signposts along the road” originating either in law or sister disciplines. The first was a development in American legal theory . . . .

In the first three decades of the past century, “legal realists” famously rebelled against the then traditional paradigm of moralistic judging, as well as the “brooding omnipresence in the sky” that informed it, by which they meant the common law in general and Langdellian pretenses of the common law’s autonomy and “completeness” in particular.<sup>4</sup>

Investigating the intellectual genealogy of the anti-empathic consensus is a useful endeavor, and helps us to better understand its theoretical foundations. Still, we should look back further than Legal Realism if we want to see the ultimate progenitor of the anti-empathy theory—back to what we now call classical legal orthodoxy. West points us to the movement that rebelled against this “Langdellian” orthodoxy, but it is the orthodoxy itself that provides a firmer basis for comparison. Because both Langdellianism and the anti-empathic consensus posit that the law is complete, determinate, autonomous, apolitical, and derivable and applicable through formal reason, it is accurate to describe the anti-empathic consensus as *neo-orthodox* legal thought. However, this neo-orthodoxy abandons or ignores an important limitation of its ancestor: It aspires to be applicable to the realm of public law, an area where Langdell and his followers thought that scientific adjudication was impossible. Thus, the genealogy must be supplemented, but admittedly, this supplementation cannot account for everything.

Part II will briefly describe the debate about judicial empathy, with Part III laying out the reconstructed (and supplemented) argument against it. Part IV will do the same with classical legal orthodoxy, and Part V will compare and contrast the two intellectual movements. Overall, I conclude that the anti-empathy position is best described as *neo-orthodoxy*, but that its salient difference—the focus on public law—makes it a mutation that would be unrecognizable and unacceptable to the older orthodox theory. Because the debate

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3. *Id.* at 249.

4. *Id.* at 274.

about the role of empathy in adjudication is likely to resurface very soon in the impending confirmation hearings of any new Supreme Court justice, we would do well to recall the intellectual progenitors of each opposing camp, and take note of long recognized weaknesses (or strengths) in any older theories. To understand the debate, we should understand its context.

## II. BACKGROUND & CLARIFICATION

Because there has been a great deal written on the judicial empathy debate, I will not revisit its history in great detail. Suffice it to say, statements made by President Obama regarding Supreme Court nominations led to the issue of “empathy” taking on symbolic importance during confirmation hearings, with nominees espousing views of proper adjudication and the public weighing in.<sup>5</sup> However, what emerged in *response* was somewhat of a consensus: The judges themselves, the senators, and the public all turned against empathic judging, and looked instead towards the “umpire” model advanced by Chief Justice Roberts.<sup>6</sup> Various intellectuals also engaged in the debate, siding with this popular consensus. These groups defined empathy as an emotional connection with certain types of people or ideas; it was what others call “sympathy” or “selective empathy.”<sup>7</sup>

In response, the legal academy developed its own, but opposite consensus: Empathic judging is neither deleterious nor is it some new “liberal” innovation. Instead, the nature of adjudication makes it such that empathy is both necessary and salutary (for various reasons),<sup>8</sup> and empathy properly understood is an affective faculty

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5. For an excellent summary of the entire saga, see Colby, *supra* note 1, at 1945-58.

6. *Id.* at 1947-49.

7. See John Hasnas, *The ‘Unseen’ Deserve Empathy, Too*, WALL ST. J., May 29, 2009, at A15. The terms “selective empathy” and “sympathy” are usually employed by pro-empathy thinkers hoping to differentiate their claims from these other concepts (that are the source of Hasnas’s worries). See, e.g., West, *supra* note 2, at 248-49.

8. Although articles like this proliferate, the most notable and rigorous are the following: Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1 (2011); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133 (2009); Colby, *supra* note 1; Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); West, *supra* note 2. These thinkers show (persuasively) that many legal doctrines clearly require that the adjudicator imagine what the litigant’s position must be like, and that this produces more just outcomes. Empathic adjudication is thus descriptively true as an account of the type of adjudication that the law demands, but is also normatively valuable.

that enables one to better understand *any* other person, idea, or position.<sup>9</sup> Thus, this faculty is not spring-loaded in favor of any one litigant, but is neutral. One influential formulation of this type of empathy—and the definition that will be applied throughout this paper—is put forward by Lynne Henderson: Empathy is “understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other.”<sup>10</sup>

Comparing this avowedly neutral definition with the “sympathy” conception utilized by empathy-detractors, we might think that this entire debate is but a definitional misunderstanding. Some have suggested this,<sup>11</sup> but I find that this too easily dodges the central question at issue. Even if we take the broader, more neutral definition of empathy, the anti-empathic thinkers discussed below would still reject it. For them, proper adjudication cannot admit of *any* affective influences, even when acting as supplements or complements to the cognitive faculties, and even when purportedly neutral. For the anti-empathic thinkers, the affective—the emotional—*inherently* skews decision-making. For them, neutral, nonselective empathy is impossible. Because of this, we cannot so easily escape the dichotomy posed by the debate; it must be confronted head on, as a fundamental disagreement about the legitimacy of utilizing affective faculties in adjudication.

### III. THE ANTI-EMPATHY ARGUMENT

I will begin by constructing and supplementing the argument against judicial empathy. In doing so, I draw on a variety of sources. These include opinion pieces from prominent thinkers, as well as some law review articles and older books. While it may be that those who oppose empathy do not have one monolithic view, there is generally a strong similarity, and an amalgamation will be substantially faithful to each individual. It is helpful to state up front the conclusion that will eventually be reached by this explication: Adjudication *ought* only involve the application of *cognitive* faculties (especially reason, logic, etc.), and the implementation of *affective* faculties in the endeavor is illicit. How does one arrive here? As we will see, the conclusion flows from higher order

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9. See generally Hasnas, *supra* note 7.

10. Henderson, *supra* note 8, at 1579.

11. See, e.g., Bandes, *Empathetic Judging and the Rule of Law*, *supra* note 8.

commitments about the function of law (and politics), as well as the “rule of law” and the advantages it is expected to bring.

### A. Law and Politics

The anti-empathic turn begins with the notion that the *function* or point of law itself is social stability, settlement, and predictability. The idea goes something like this: Without authority (and its instrument or manifestation, law) cooperative living is impossible. We need predetermined rules so that we can coordinate our actions, settle on certain basic terms or arrangements, and minimize the costs of nonlegal forms of social ordering.

This deeper justification is most fully addressed in anti-empathic thinking by Judge J. Harvie Wilkinson.<sup>12</sup> “[Law] aims to avoid and to settle disagreements through pre-determined procedures. At its most basic level,” Wilkinson observes, “law is supposed to provide stability and predictability to society.”<sup>13</sup> Elsewhere he says that law is “society’s roadmap for resolving disputes,” and that it “establish[es] . . . rules of the game.”<sup>14</sup> In saying this, this theory echoes themes running throughout the Legal Process school and branches of contemporary analytic jurisprudence.<sup>15</sup>

After staking out a claim regarding the function of law, the next step is invariably an invocation of the need for the “rule of law.” If law is instituted so as to provide a stable and predictable framework for social life, then the authority that creates and promulgates the law must itself abide by certain procedural limitations or requirements. Otherwise, the “function” of law would be negated by the manner in which it is drawn up or implemented. Philosophers of law agree that the rule of law consists of a constellation of ideal process characteristics that all legal codes should strive to attain—these are

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12. See generally J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663 (2010).

13. *Id.* at 1682.

14. *Id.* at 1683; see also *id.* (“Law is intended to set the standards by which people behave, business is conducted, and disputes are resolved.”).

15. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (representing analytic natural law’s account of law as solution to coordination problems); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2001) (representing legal process view of law as dispute settler); SCOTT J. SHAPIRO, *LEGALITY* (2011) (representing analytic positivism’s account of law as social planner).

best understood as limitations upon the State.<sup>16</sup> Fuller famously lists these “desiderata” as eight: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence (between *de jure* and *de facto*).<sup>17</sup> Matthew Kramer fleshes them out helpfully:

1. [Law] operates through general norms;
2. its norms are promulgated to the people whose conduct is to be authoritatively assessed by reference to them;
3. its norms are prospective rather than retrospective;
4. the authoritative formulations of its norms are understandable (at least by people with juristic expertise) rather than opaquely unintelligible;
5. its norms are logically consistent with one another, and the obligations imposed by those norms can be jointly fulfilled;
6. its norms do not require things that are starkly beyond the capabilities of the people who are subject to the norms;
7. the contents of its norms, instead of being transformed sweepingly and very frequently, remain mostly unchanged for periods of time long enough to induce familiarity; and
8. its norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice).<sup>18</sup>

These desiderata are expected to aid in the maximization of law’s coordinating function—they help set up a stable and predictable framework for social life.<sup>19</sup> In the end, they are also supposed to advance the higher order value of freedom.<sup>20</sup>

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16. Finnis writes that the rule of law is the “name commonly given to the state of affairs in which a legal system is legally in good shape.” FINNIS, *supra* note 15, at 270. Raz helps to clarify the object of this “rule”: While it is certainly true that the plain meaning of “rule of law” suggests that it concerns itself with individual conduct, “in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.” JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212 (1979). What we are talking about, then, is some sort of desirable manner in which the *creation and application* of law is undertaken. *Id.* at 213 (“As we shall see, what the doctrine requires is the subjection of particular laws to general, open, and stable ones. It is one of the important principles of the doctrine that *the making of particular laws should be guided by open and relatively stable general rules.*”).

17. LON L. FULLER, *THE MORALITY OF LAW* 38-39 (rev. ed. 1969).

18. MATTHEW H. KRAMER, *OBJECTIVITY AND THE RULE OF LAW* 104 (2007).

19. RAZ, *supra* note 16, at 214-15.

20. *Id.* at 220-21; FINNIS, *supra* note 15, at 273 (“The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation.”); FRIEDRICH A. HAYEK, *THE*

The phrase “rule of law” occurs quite frequently in the anti-empathy writings, and it is usually linked with freedom. For example, a prominent opinion piece written by Professor Steven Calabresi ends ominously: “Nothing less than the very idea of liberty and the rule of law are at stake in this election. We should not let Mr. Obama replace justice with empathy in our nation’s courtrooms.”<sup>21</sup> Similarly, in Herbert Wechsler’s famous article on “neutral principles,” he quotes approvingly from Justice Jackson’s *The Supreme Court in the American System of Government*: “Liberty is not the mere absence of restraint, it is not a spontaneous product of majority rule . . . . It is achieved only by a rule of law.”<sup>22</sup>

Working within the parameters set down by the rule of law, it is expected that *representative democracy* (which is itself valuable) will flourish precisely because of those limits. Law facilitates politics and ensures its survival, while politics beneficially softens the rigidity of law. Wilkinson writes, “Diversity of experience comes from aggregating people’s backgrounds democratically,”<sup>23</sup> and “America does not need jurists of a modern cast of mind to be a modern nation. The great tides of democratic change will see to that.”<sup>24</sup> Edward Whelan, too, believes that any constitutional theory should aim at “protecting the democratic decisionmaking authority that the Constitution provides.”<sup>25</sup> While “[o]ur legislators will be sure to mess up plenty . . . at least citizens will have the ability to influence them—and replace them.”<sup>26</sup> Robert Bork, too, argues that the choice between a judicial oligarchy and an omnipotent democracy is a “false statement of alternatives” and that proper

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ROAD TO SERFDOM 72 (1944) (“Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”).

21. Steven G. Calabresi, *Obama’s ‘Redistribution’ Constitution*, WALL ST. J. (Oct. 28, 2008), <http://www.wsj.com/articles/SB122515067227674187> [<https://perma.cc/8M79-98SN>].

22. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959) (quoting J. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 76 (1955)).

23. Wilkinson, *supra* note 12, at 1679.

24. *Id.* at 1685.

25. Edward Whelan, *Obama’s Constitution: The Rhetoric and the Reality*, THE WEEKLY STANDARD (Mar. 17, 2008), <http://www.weeklystandard.com/print/obamas-constitution/article/15945> [<https://perma.cc/8LJG-QA2H>].

26. *Id.*



constitutional theory can allow for judicially enforced legal limitations to coexist with a representative system.<sup>27</sup>

While law and politics seem to exist in mutualistic symbiosis, this symbiosis paradoxically demands complete separation. Only by isolating law from politics are both able to survive without one subsuming the other. This antinomy is a constant refrain of the anti-empathic turn. Wechsler presents them in the starkest contrast: "Is there not, in short, a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts?"<sup>28</sup> Principles are "instrumental" tools in politics, and Wechsler accepts this as a reality.<sup>29</sup> However, he demands that at least in law, principles are intrinsic features.<sup>30</sup> "[P]rinciples," he writes, "are largely instrumental as they are employed in politics, instrumental in relation to results that a controlling sentiment demands at any given time," but courts must decide in a manner that is "genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."<sup>31</sup> Bork agrees, stating that "[t]he Court can act as a legal rather than a political institution only if it is neutral," and that law, unlike politics, "has a meaning independent of our own desires."<sup>32</sup> A decidedly *non-orthodox* legal thinker, Roberto Unger, sums up the position best:

Doctrine can exist, according to the formalist view, because of a contrast between the more determinate rationality of legal analysis and the less determinate rationality of ideological contests.

This thesis can be restated as the belief that lawmaking, guided only by the looser and more inconclusive arguments suited to ideological disputes, differs fundamentally from law application.<sup>33</sup>

Thus, from the standpoint of the judiciary in the context of a representative democracy, *authority* and *legitimacy* are only granted to the adjudicative endeavor when it is apolitical, or purely "legal."

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27. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 160 (1990).

28. Wechsler, *supra* note 22, at 16.

29. *Id.* at 14.

30. *Id.* at 15.

31. *Id.* at 14-15.

32. BORK, *supra* note 27, at 143, 146.

33. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 2 (1986).

Judges are only authorized to act in a way that is not in some sense in direct competition with democracy—in competition with politics—and this is accomplished by acting only in a logical and rational manner. As Fiss writes, “[T]he authority of the judiciary is linked to [its] substantive rationality.”<sup>34</sup> Wilkinson agrees: “The judge is imbued with authority precisely because he is not an aesthete, with the idiosyncratic creativity and talent the term implies.”<sup>35</sup>

## B. Proper Adjudication

All of these higher order commitments of course have implications for adjudication. If law has a function that necessitates the procedural limits of the rule of law, then the judge must act in such a way that these are not undermined or destroyed.

The element of the rule of law that is most concerned with adjudication is *congruence*<sup>36</sup>—that which the legal source specifies must actually be made to happen.<sup>37</sup> “[T]hose people who have authority to make, administer, and apply the rules in an official capacity,” Finnis states, “do actually administer the law consistently and in accordance with its tenor.”<sup>38</sup> Or, as Kramer writes, the “laws on the books” must align with the “laws in practice,” and if this happens then identical cases will have identical results.<sup>39</sup> Because the law must also be general in applicability and constant over time, though, congruence also results in *uniformity*. It is this uniformity-aspect of congruence that is most central to the debate about adjudication.<sup>40</sup> The law “on the books” should be applied

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34. Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 791 (1990).

35. Wilkinson, *supra* note 12, at 1684.

36. Most of the desiderata involve legislatures. “Consistency” is not about consistent application, but consistency or coherence within the code. “Constancy” also applies mostly to legislatures, and would only be judicially implicated if a court often changed the rules it created. “Congruence” more fully captures the essence of the debate about uniform adjudication than do these two, as it deals with application.

37. See KRAMER, *supra* note 18, at 104 (“[I]ts norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice).”).

38. FINNIS, *supra* note 15, at 270-71.

39. KRAMER, *supra* note 18, at 104.

40. Violations of congruence can take place in a variety of ways, but they all have this same basic feature. First, it could be the case that a judiciary wholly refuses to give effect to an authoritative norm, thus creating no uniformity problem but nevertheless eliminating congruence. Beyond this, judges might apply the norm

consistently across cases, litigants, time periods, and no matter who the judicial officer is.<sup>41</sup>

Once it is posited that a requirement of the rule of law is uniform adjudication across all axes, the process of adjudication becomes further constrained. Preliminarily, even before “adjudication” begins, it becomes necessary to limit the sources to which the judge can look—he must appeal only to those that are the same for all people all of the time.<sup>42</sup> There must be some fixed source, and for the anti-empathic thinkers this is provided by statutory, constitutional, or administrative text, supplemented by judicial precedent.

Here we are at the stage of what Bork calls the “derivation” of the principle or rule, and he insists that this must itself be “neutral.”<sup>43</sup> Derivation, then, must come from (1) the rule’s text and (2) its original public meaning. As Wilkinson writes, “A judge has no sanction to decide other than what a particular text means and whether it applies to the situation under consideration.”<sup>44</sup> Bork provides further elaboration: “[T]he meaning of a rule that judges should not change . . . is the meaning understood at the time of the law’s enactment.”<sup>45</sup> Judges are bound by fixed texts, and the meaning of these texts is also fixed. Orin Kerr suggests that even in hard cases, the solution is to “read more cases, or read the briefs again.”<sup>46</sup> Nothing beyond these specific legal sources can provide a ground for a given outcome—appeals to sources of authority beyond text and precedent are examples of what Bork calls illicit “political judging,” where the judge “make[s] unguided value judgments.”<sup>47</sup>

After deriving a law, a judge must interpret it and apply it. This is where the judge must take the authoritative legal source and see how it fits with the real world; facts of cases enter, and so too do the qualities of individual litigants and issues. Anti-empathy thinkers are

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at one time or another, but not always. Finally, we might imagine that there are individual judges who themselves are the outliers. The first is a systemic congruence problem, which is not at issue in the empathy judging debate.

41. KRAMER, *supra* note 18, at 104.

42. BORK, *supra* note 27, at 146.

43. *Id.*

44. Wilkinson, *supra* note 12, at 1680; *see also id.* at 1677 (describing “the form and structure legal texts provide”).

45. BORK, *supra* note 27, at 144.

46. Orin Kerr, *Legal Ambiguity, Empathy, and the Role of Judicial Power*, THE VOLOKH CONSPIRACY (May 13, 2009), <http://volokh.com/2009/05/13/legal-ambiguity-empathy-and-the-role-of-judicial-power/> [<https://perma.cc/8U89-HJ92>].

47. BORK, *supra* note 27, at 146.

*rationalists*: They believe that legal sources must be interpreted and applied solely using the cognitive faculties of logic and reason.<sup>48</sup> Kerr alludes to this when he describes how “careful judicial weighing” of the legally relevant sources will determine an outcome,<sup>49</sup> as does Wechsler with his “emphasis upon the role of reason.”<sup>50</sup> Similarly, Wilkinson admonishes judges to look to “reason” and “tradition,” and “structure and logic.”<sup>51</sup> This is what Bork means when he demands “neutrality in the application” of law: “[R]easoning and verbal formulations” determine results, and adherence to this method is a matter of “*intellectual integrity*.”<sup>52</sup> Owen Fiss describes this as “Reason in All its Splendor”:

Given its deliberate character, the judicial decision may be seen as the paragon of all rational decisions . . . .

In calling this process rationalistic, I mean to underscore its discursive nature: The justices listen to arguments . . . [and] evaluate the strengths and weaknesses of the arguments. Thinking itself is an interiorization of the discursive process, a continuation of the argument but now wholly within the individual [judge].<sup>53</sup>

Formal reason and logic alone control the interpretation and application.

The demand for rationalism follows from the underlying aim of the larger theory—rationalism creates uniform and consistent adjudication so as to advance the rule of law and law’s stabilizing function. Rational interpretation and application advance uniformity because reason is assumed to be *transitive* across and amongst individuals. Reason is the same for everyone, and produces the same outcomes or reaches the same results no matter the individual employing it. Reason is “objective” in this sense, and completely “rational” judges would never disagree about anything. If adjudication is purely rational, it is expected to be purely uniform.

The transitivity of rationality is, of course, an assumption, but it is crucial to the anti-empathic argument. So too are other assumptions. At the most basic level, it must be assumed that people are rational more generally (i.e., that human beings *are* rational beings). Furthermore, even if humans are rational and rationality is

48. Fiss, *supra* note 34, at 789-90.

49. Kerr, *supra* note 46.

50. Wechsler, *supra* note 22, at 16. Of course, he also looks to “principles,” but these are themselves rationally derived, no doubt. *Id.*

51. Wilkinson, *supra* note 12, at 1665, 1675.

52. BORK, *supra* note 27, at 151 (emphasis added).

53. Fiss, *supra* note 34, at 790.

transitive across all individuals, it is still necessary to posit that the sources upon which the cognitive faculty of reason must act in adjudication are definite or constraining enough to provide reason with a clear guide for a uniform outcome. That is, the sources themselves must be amenable to rational analysis—they must be *determinate*, or the application of the cognitive faculty will be of no avail.

This is certainly not uncontroversial: The determinacy of law has been a source of heated debate in legal theory, but the anti-empathy thinkers have no such doubts. As Kerr puts it, “[even in the hard cases, there is usually one side that emerges as slightly stronger than the other.”<sup>54</sup> Others, like Wilkinson, have faith that traditional tools of interpretation can facilitate the endeavor.<sup>55</sup> “But even as to an ambiguous text,” he writes, “the judge must use maxims of statutory interpretation to determine what others meant. *Inclusio unius exclusio omnes*, for example, ties the hands of a judge both as to included and omitted terms.”<sup>56</sup> Bork laments not the futility of such an endeavor (he finds it both possible and valuable), but instead that some “political” judges would deliberately and dishonestly refuse to act based on the answers that “legal doctrine” provides: “[I]t is not true that all judges choose their results and reason backward. But it is true for some judges.”<sup>57</sup> And, as he later says, “[L]aw is [not] so indeterminate that these results can be reached without straining the fabric of legal logic.”<sup>58</sup> There is an extant fabric—the problem is merely that some adjudicators ignore it.<sup>59</sup>

By now, a complete picture of the positive argument of the anti-empathic consensus has emerged. Law’s function is to create predictability, in turn making freedom and social life possible

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54. Kerr, *supra* note 46.

55. Wilkinson, *supra* note 12, at 1680.

56. *Id.*

57. BORK, *supra* note 27, at 70-71.

58. *Id.* at 70.

59. *Id.* It is unclear where Wechsler fits in here, though. He, too, has faith in determinacy, although for him this comes not solely from the text and precedent, but also his “principles”: “[T]he relative compulsion of the language of the Constitution, of history and precedent” can in certain cases (many?) “combine to make an answer clear,” and “where they do not,” the “special values” that the Bill of Rights provisions “embody” can step in. Wechsler, *supra* note 22, at 17, 19. Still, there are limits to texts. *Id.* at 19 (“I argue that we should prefer to see the other clauses of the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law . . .”). Here, he somewhat departs from his co-thinkers.

simultaneously. This function requires that the law-making/executing/adjudicating body (the “State”) obey certain procedural limitations—the “rule of law”—one aspect of which demands that adjudication result in an efficacy that is congruent with the legal system’s actually prescribed norms, and, given the generality of these norms, it demands *uniform* results in like cases. Uniform adjudication is only possible, though, if the judges are required to derive the law from fixed sources, namely, text and precedent. Moreover, uniformity is only possible if the interpretation and application of those fixed sources is in turn accomplished by some stable or predictable human faculty: reason. This keeps the judge within the realm of “law” and not “politics.”<sup>60</sup>

### C. Improper Adjudication

As its name suggests, the *anti-empathic* turn consists of more than a positive argument. The flipside of the demand for cognitive adjudication is a prohibition on the employment of *affective* faculties, including empathy.

Consider what we described as the first step in adjudication: what Bork calls the “derivation” of the legal source.<sup>61</sup> In the anti-empathic argument, this is expected to be the text and its original public meaning—something universal, something fixed.<sup>62</sup> With empathy, though, a new source of “law” is added: the judge’s own body of personal experiences and the conscience that is a product of that. The problem with this is that it is neither universal nor fixed; it is a source of law that varies according to *who the judge is*, and is not shared by others with different experiences. This introduction of an individualistic and protean legal source is seen as threatening uniformity and predictability. Outcomes are now influenced by judicial personality or individuality.

Kerr warns that, in hard cases, empathy introduces “whatever normative vision of the law that the judge happens to like,” and that proponents of this method accept that “[the judge] can and should pick the side by looking in his heart.”<sup>63</sup> The “heart” becomes an alternate source of law. Bork argues that the law “has a meaning independent of our own desires,” and that the judge may not “make

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60. BORK, *supra* note 27, at 146. “The Court can act as a legal rather than a political institution only if it is neutral,” he writes. *Id.*

61. *See id.*

62. *See id.*

63. Kerr, *supra* note 46.

unguided value judgments of his own”—this would be “rule by judges according to their own desires,” and not Constitutionalism.<sup>64</sup> Bork’s fears are spoken of in the language of the affective and nonrational: *Desire* supplants law. Whelan speaks of more of the same, decrying Obama’s statement that the “critical ingredient” of judging in hard cases is what’s in the “judge’s heart”: “No clearer prescription for lawless judicial activism is possible.”<sup>65</sup> Wechsler agrees, writing, “the Court has been decreeing value choices in a way that makes it quite impossible to speak of principled determinations.”<sup>66</sup>

Wilkinson also talks in terms of the emotions as a source of law, and not just as a faculty—emotions are *creative*, and creation is nonjudicial. “[J]udges who rely on singular emotion or distinctive experience in rendering decisions are planting the seeds of artistic creation in terrain where they do not belong,” he argues.<sup>67</sup> “In the interest of empathy, evolving decency, ethnic identity, or numerous whatevers, [judges] exhibit from the bench those striking brushstrokes of personal vision,” he writes, “[But] Judges are not ‘dictators of the case,’ entitled to impose judgment based on their impressions or self-expressive concepts of what the outcome should be.”<sup>68</sup> Emotions are *personal*, and reflect only the *self*.

Wilkinson—more than others—describes why this private individuality of emotions is such a bad thing. First, there is the familiar counter-majoritarian refrain: Judges are insular “elitist” professionals who know little of the life of everyman.<sup>69</sup> “The individual perspective from the bench is all too often idiosyncratic, reflecting a particular upbringing or identity, and the democratic process is intended to submerge precisely that.”<sup>70</sup> Therefore, “to assert that empathy, self-expression, or subjectivity” should be employed in judicial decision-making “requires a certain chutzpah, whether conscious or not.”<sup>71</sup> Beyond this, Wilkinson seems to argue that the *authority* of the judicial office is inherently anti-empathic or anti-affective—something probably flowing from the law–politics divide: “If a judge . . . views the law as a field for artistic license,

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64. BORK, *supra* note 27, at 143, 146, 160.

65. Whelan, *supra* note 25.

66. Wechsler, *supra* note 22, at 20.

67. Wilkinson, *supra* note 12, at 1678.

68. *Id.* at 1685.

69. *Id.* at 1678.

70. *Id.* at 1679.

71. *Id.* at 1678.

that individual has abdicated the very power that makes him a judge.”<sup>72</sup> Fiss, by the way, would agree, writing that “[q]ualifying the judiciary’s commitment to reason undermines its authority.”<sup>73</sup>

Finally, there comes the central argument—emotions will lead to inconsistency and non-uniformity:

[I]t is inappropriate to institutionalize the emotions of judges . . . . Law is supposed to . . . provide a stable foundation upon which society can build new structures in accordance with democratic will . . . . Law is useless as a stabilizing force if it varies from day to day and from judge to judge. Judicial decision making that relies on the artistic virtues comes dangerously close to negating law’s distinctive reason for being . . . .<sup>74</sup>

These are all the results of allowing adjudicators to appeal to affective faculties; these faculties take on the aspects of a new “source” of law, and anchoring the legal source to the individual judge means that outcomes will not be the same for litigants across like cases. The crucial variable becomes the judge himself.

The anti-empathic movement also believes that empathy (and other emotions) can play a pernicious role after the “derivation” stage—they can skew the interpretation and application. Even if the legal source is not corrupted by an appeal to the judge’s heart, the adjudication is still illicit if that heart enters in to interpret and apply what is otherwise a clear textual mandate. Here, the outcomes will change based on the vagaries of the individual case—there will only be consistency with respect to the variables that are determinative for the judge’s empathy. Thus, Sotomayor will always vote in favor of Latinos, Scalia would always vote in favor of protecting morals legislation, etc.—even if the legal source dictates an opposite result. Litigants, case type, etc.: All go into what is ultimately a *results-based* adjudication.

This argument comes up most often in anti-empathic writings as a plea for “blind justice.” “To the traditional view of justice as a blindfolded person weighing legal claims fairly on a scale, [Obama] wants to tear the blindfold off, so the judge can rule for the party he empathizes with most,” Calabresi writes.<sup>75</sup> Wilkinson echoes this: “[T]here is an implicit understanding, classically evinced by the image of blind justice, that judges are trusted to wield the sword of justice dispassionately.”<sup>76</sup> In reacting to Obama’s call for empathy,

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72. *Id.* at 1685.

73. Fiss, *supra* note 34, at 804.

74. Wilkinson, *supra* note 12, at 1683-84.

75. Calabresi, *supra* note 21.

76. Wilkinson, *supra* note 12, at 1684-85.



Whelan writes, “[s]o much for the judicial virtue of *dispassion*.”<sup>77</sup> Empathy allows for application and interpretation to be influenced or determined based on litigant status, and therefore is adjudication by “passion.” Empathic adjudication that is also dispassionate is ignored as an impossibility or a contradiction in terms. Thus Bork collapses empathy into sympathy: “[The Judge] must apply [the law] consistently and without regard to his sympathy or lack of sympathy with the parties before him,” and it cannot be that “any particular group or political position is always entitled to win.”<sup>78</sup> Wechsler, before all the others, decries results-based adjudication as anti-judicial and rooted in unprincipled emotional<sup>79</sup> biases. In constructing his argument for neutral principles, he immediately dismisses those who, “vouching no philosophy to warranty, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support.”<sup>80</sup> Often this is tied to the type of litigant, which is itself an emotional attachment:

If he may know he disapproves of a decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist—he acquiesces in the proposition that a man of different *sympathy* but equal information may no less properly conclude that he approves.<sup>81</sup>

If this is allowed, though, adjudicators are not courts of law, but are “naked power organ[s].”<sup>82</sup>

The anti-empathic thinkers do not do so well at explicating precisely why this type of “ad hoc”<sup>83</sup> adjudication is antithetical to the proper role of a court of law; they think it obvious. What must be implied is our familiar consistency or uniformity demand of the rule of law. Recall Wilkinson’s plea: “Law is useless as a stabilizing force if it varies from day to day and from judge to judge.”<sup>84</sup>

This central critique of empathic judging—at the derivation, interpretation, and application stages—like the anti-empathic thinkers’ positive argument, relies on certain implicit assumptions. For one, it must be assumed that the “traditional” or textual legal

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77. Whelan, *supra* note 25.

78. BORK, *supra* note 27, at 151, 146.

79. The cause might also be ideological attachment.

80. Wechsler, *supra* note 22, at 11.

81. *Id.* at 12 (emphasis added).

82. *Id.*

83. *See id.*

84. Wilkinson, *supra* note 12, at 1684.

source must not itself explicitly call for empathy-like adjudication. If a statute clearly commanded that it be interpreted and applied according to a judge's "sound discretion" or "in the interests of justice," say, then it would be hard to argue that the rule of law is subverted by particularistic, empathic adjudication in that instance.

More importantly, though, just as the positive argument for rational adjudication depends upon what we called the "transitive" quality of reason (it is possessed by all judges and produces like results in like cases), so too does the critique necessitate a *non-transitive* understanding of empathy and affective faculties. It is assumed that empathy will not create like results in like cases when employed by different judges, probably because of the diversity of experiences that the individual judges will have. Thus, Fiss strongly criticizes the particularistic bent of the affective faculties: "Often, but not always, our passions seem directed toward, or attached to, particulars . . . . [Passion] invites a certain partisanship . . . to favor one individual or another for purely arbitrary reasons."<sup>85</sup> He also thinks that the affective faculties have dark sides—another problem that is not shared by rationality: "[J]udges are complicated human beings who harbor not only feelings of sympathy, but also feelings of fear, contempt and even hate" and an "acknowledgment of the multiplicity of passions" means recognition of the fact that "while some passions are good, others are quite bad."<sup>86</sup> All this is of course problematic, as a court "must concern itself with the fate of millions of people."<sup>87</sup> A court's perspective "must be systematic, not anecdotal."<sup>88</sup>

#### D. Conclusion

In sum, the anti-empathic turn combines both a positive depiction of appropriate adjudication and a critique of emotional, empathic influences in the same process. If *any* affective faculties are allowed to enter in, this makes the adjudicator's "heart" a new source from which law is derived. This brings in unauthorized, democratically illegitimate, and particularistic—often elitist—considerations into law, which ought to be common and generally

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85. Fiss, *supra* note 34, at 799, 801.

86. *Id.* at 800. Of course, the pro-empathy thinkers do not advocate any and all emotive responses; Fiss's concern does go to the larger fear of the anti-empaths, though, that emotions cannot be controlled no matter what their nature.

87. *Id.* at 802.

88. *Id.* at 803.

shared. Of course, this also brings in a potential for inconsistency, given that judges' experiences and affects will be different. Moreover, even in cases where the legal source is unambiguously textual or traditional, injecting empathy into the methodology of the interpretation and application of that source will still be problematic. Here, the particularities of the case, whether they be the nature of the issue or of the litigants, will appeal to the judge's emotional attachments and lead to results-based adjudication. Again, non-uniformity looms over the endeavor. The congruence feature of the rule of law is thus undermined by empathic adjudication, as like cases will not have similar outcomes—at least not from the point of view of the legal system as a whole. Ultimately, this impairs the very *raison d'être* of law itself, which is to create a stable and predictable landscape for social living.

The crux of the anti-empathic consensus, then, seems to be the non-transitivity of affects: *All* empathy is “selective empathy.” The affective capacities are categorically incapable of providing a uniform or consistent manner of ascertaining legal meaning, and of applying it to real life. Because of this, empathic adjudication *inevitably* destabilizes the rule of law by defeating uniformity.

The non-transitivity of affects, though, is also juxtaposed alongside the observation that affective faculties often have a certain bias or tilt. This explains why much of anti-empathic thinking emphasizes that adjudication incorporating empathy will be inherently skewed towards weaker parties. Calabresi attributes the following to Obama: “Empathy, not justice, ought to be the mission of the federal courts, and the redistribution of wealth should be their mantra.”<sup>89</sup> He believes that Obama wants judges “to decide cases in light of the empathy they ought to feel for the little guy in any lawsuit.”<sup>90</sup> Bork, quoting a famous law professor, encapsulates the purported motto of the Warren court pithily: “[T]he less favored in life will be the more favored in law.”<sup>91</sup>

Thus, empathy is inherently *political* in its selectivity and variability: It simply chooses a resultant outcome based on value choices and instrumentalizes the principles to achieve this result. Kerr writes that “emphasizing the need for ‘empathy’ is an invitation to replace law with politics,” and Whelan criticizes Obama's philosophy as abandoning “a craft of judging that is distinct from

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89. Calabresi, *supra* note 21.

90. *Id.*

91. BORK, *supra* note 27, at 70 (citation omitted).

politics.”<sup>92</sup> As is often the case, those who disagree with this claim restate it most clearly and succinctly:

First, empathy is a species of passion or emotion; it is subjective, variable, impervious to evaluation, and too unreliable to be permitted to intrude into judicial decision-making. Second, empathy is a quality that singles out the powerless and disenfranchised, and is therefore inconsistent with the norms of blind, evenhanded justice, which prohibit the singling out of particular groups.<sup>93</sup>

Or, as Nussbaum summarizes, “[t]he calculating intellect claims to be impartial and capable of strict numerical justice, while emotions, it alleges, are prejudiced, unduly partial to the close at hand.”<sup>94</sup> At bottom, then, the anti-empathic argument rests on two *psychological* claims: The affective faculties are (1) non-transitive and (2) biased.

#### IV. CLASSICAL LEGAL ORTHODOXY

The anti-empathic consensus is embedded in the contemporary intellectual landscape—but where did it come from? As with any theory or system of thought, its creation is surely not *ex nihilo*, and it is useful and enlightening to inquire into how similar to or different it may be from theories that precede it. The thesis of this Article is that the anti-empathic turn is a descendant of Langdellian orthodoxy—what some today call “Formalism.” Before a complete comparison can be made, the presentation of the progeny must be supplemented by that of its progenitor. However, because the earlier theory has been discussed and written about exhaustively for almost a century, its description will be far shorter than that of the somewhat new anti-empathic movement.

The following Part will describe the central features of Langdellianism—what we will call “classical legal orthodoxy.” I say “ism,” as this theory will admittedly be an amalgamation, and

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92. Kerr, *supra* note 46; Whelan, *supra* note 25. Some anti-empathic thinkers are more nuanced and accept the realist thesis that emotions *will* play a role in adjudication, but that they *ought not* to. See Fiss, *supra* note 34, at 797.

93. Bandes, *Moral Imagination in Judging*, *supra* note 8, at 8.

94. MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 67 (1995); see also *id.* at 57-58 (“But people in the grip of emotions, because they place important elements of their good outside themselves, will change with the gusts of fortune and are just as little to be relied upon as the world itself is. . . . [T]hey lack the stability and solidity of the wise person. . . . Emotions, this objector charges, focus on the person’s actual ties or attachments, especially to concrete objects or people close to the self.”).

perhaps even somewhat of a departure from how Langdell himself actually understood law. We are interested not so much in creating an accurate intellectual history as in sketching out the generally accepted picture of that period. After all, it cannot be Langdell, but only Langdellianism that is at work in contemporary times—and this incorporates not merely Langdell's own thoughts, but also the gloss put on them by both his disciples and his critics over many years. Even caricatures have influence.

The central idea of classical legal orthodoxy, of this “ism,” is that *law is a science*. The rest of this Part will be an explication of that one proposition.

### A. Background and Law as Science

Classical legal orthodoxy is most associated with its primary founder: C.C. Langdell.<sup>95</sup> Langdell was Dean of Harvard Law School for many decades (starting in 1870), and his tenure there allowed him to have a lasting impact on both legal education and legal theory.<sup>96</sup> He brought the “case method” of teaching law into vogue, and aimed to create a science of law by bringing law schools back into the fold of modern research universities.<sup>97</sup> Because of his influence, he has come to represent the entire era of legal orthodoxy: The Legal Realists would focus their attacks on him, and he “has long been taken as a symbol of the [orthodox] age.”<sup>98</sup>

As said above, classical legal orthodoxy understands law to be a science. “Law, considered as a science,” Langdell famously writes, “consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.”<sup>99</sup> The idea of law as science is “the heart” of classical legal orthodoxy, and “Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of

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95. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42 (1977).

96. *Id.*

97. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 168-70* (1993).

98. GILMORE, *supra* note 95, at 42 (“A better symbol could hardly be found; if Langdell had not existed, we would have had to invent him.”).

99. C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at viii (2d ed. 1879).

the scholar-scientist like himself to discover.”<sup>100</sup> The creation of this idea took place during a time of larger debates about the meaning and importance of science to society more generally.<sup>101</sup> This science was not purely theoretical, like mathematics or logic, but was not purely empirical, either, as with biology.<sup>102</sup> To understand this, we must discuss each step of the “scientific” endeavor in turn.

## B. Induction

Classical legal orthodoxy begins its “scientific” method by inducing higher-order concepts from “empirical” phenomena: reported common law cases.<sup>103</sup> As Langdell writes, “[the Law] is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.”<sup>104</sup> Thus, he spoke with conviction when identifying the “laboratories . . . [of] the chemists and physicists” with “the library” of the law students and

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100. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

101. Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 LAW & HIST. REV. 421, 457 (1999) (“Thus when Langdell looked for inspiration to natural science, he was presented with two competing models. One, the remnants of the system of Protestant Baconianism, claimed relevance for all areas of human study and reflected the thinking that had prevailed when Langdell received his education. The other, the specialized science of Asa Gray, took place within a closed community that had little to say to outsiders. It is by no means obvious, though, that the ‘science’ in Langdell’s legal science was drawn from one side or the other in the divide between old and new ways of thinking, nor that it might not embody elements of both.”).

102. See Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 594-95 (2010); see also KRONMAN, *supra* note 97, at 170-71.

103. Grey, *supra* note 100, at 19, 20; see also THOMAS C. GREY, FORMALISM AND PRAGMATISM IN AMERICAN LAW 65 (2014) (“For them, the fundamental principles of the common law were discerned by induction from cases . . . .”); Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 632-33 (2007) (“Thus, a second aspect of the legal science was that it was empirical; as Anthony Sebok points out, legal principles were to be discerned by inductive, not deductive reasoning.”); Schweber, *supra* note 101, at 458 (“In fact, Langdell’s method was analogous to an experimental method, but it was the method that looked to the taxonomical characterization of natural objects, not that of Gray’s theoretical science. Cases, in Arthur Sutherland’s words, were ‘specimens’ for classification.”).

104. LANGDELL, *supra* note 99, at vi.

professors<sup>105</sup>—after all, “law is a science, and . . . all the available materials of that science are contained in printed books.”<sup>106</sup>

This is a strange view of empirical study, though, as Langdell thinks that the legal scholar need not induce from *all* relevant data—rather, he should cherry pick the “exceedingly small” number of “useful and necessary” cases, as the “vast majority [of cases] are useless and worse than useless for any purpose of systematic study.”<sup>107</sup> For this reason, some scholars doubt that the method of classical legal orthodoxy is “empirical” at all.<sup>108</sup> As Gilmore remarks, “the Langdellians . . . performed major surgery on [the law],” and “[t]he lack of correspondence between the explicit holdings of judicial decisions and the ‘real rules’ that in his view justified the results in those cases was one of the most remarkable features of Langdell’s doctrinal writing.”<sup>109</sup> For our purposes, it is simply worth noting that there is at least *some* empiricism, in that the higher order concepts and rules are not merely abstracted from the minds of the theorizer.

It is also worth noting that there is a negative implication in Langdell’s statements: *Only* precedential legal sources may be consulted in discerning what the law is, and anything else is irrelevant. For example, in criticizing the “mailbox rule” from contract law, Langdell admits that it advances “the purposes of substantial justice, and the interests of contracting parties as understood by themselves,” but concludes that these considerations are “irrelevant.”<sup>110</sup> This can be called the *autonomy* of legal reasoning—it admits of no supplementation.

### C. Concepts and Rules, and Their Properties

The expected result of the inductive process is the discovery or ascertainment of general legal concepts. As quoted above, Langdell describes the science of law as “consist[ing] of certain principles or

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105. Christopher Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123, 124 (1887).

106. *Id.*

107. LANGDELL, *supra* note 99, at vi.

108. Dennis Patterson, *Langdell’s Legacy*, 90 NW. U. L. REV. 196, 198-99 (1995) (doubting that the method can be called “experimental” if the doctrine trumps the cases); Wells, *supra* note 102, at 594 (disagreeing with this characterization because Langdell wanted a freestanding theory).

109. GILMORE, *supra* note 95, at 48; Grey, *supra* note 100, at 11 n.35.

110. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 20-21 (2d ed. 1880).

doctrines” and notes that there are a finite and discernable number of “fundamental legal doctrines.”<sup>111</sup> An example of a “concept” or a “doctrine” is that of *consideration* in contract law. Importantly, the law contains doctrines and not their justifications (say, efficiency or fairness).<sup>112</sup> After the concepts are derived, these then produce lower-order “rules” to be applied in actual cases.<sup>113</sup> Thus, the concept of consideration in contracts leads to the demand for actual communication between the parties, thereby foreclosing the validity of the mailbox rule.<sup>114</sup>

Implicit in classical legal orthodoxy is that the concepts of the law have an *order* to them. Professor Grey describes this well: “A legal system is conceptually ordered . . . [when] a small number of relatively abstract principles and concepts . . . form a coherent system.”<sup>115</sup> Beyond this, the concepts must cover all potential fact patterns—the conceptual order must be *complete*, providing “a uniquely correct solution—a ‘right answer’—for every case that can arise under it.”<sup>116</sup> Gilmore puts it eloquently: The Langdellians sought to “reduce an unruly diversity to a manageable unity.”<sup>117</sup> Classical legal orthodoxy thus aspired to both conceptual order and completeness.<sup>118</sup>

#### D. Deduction

Once the legal scientist has completed the “upward” movement of induction, the next process similarly mimics natural science—“downward” deductive application of the rules to actual cases, using the tools of logic and reason.<sup>119</sup> Scholars now call this a “formal”

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111. LANGDELL, *supra* note 99, at viii.

112. Wells, *supra* note 102, at 553. Langdell invented “the modern notion of legal doctrine.” *Id.*

113. *See id.*

114. Grey, *supra* note 100, at 12. “[R]ules of law were then derived from principles conceptually . . .” *Id.* at 19.

115. *Id.* at 8.

116. *Id.* at 7.

117. GILMORE, *supra* note 95, at 43.

118. This meant that there were “[a] few basic top-level categories and principles form[ing] a conceptually ordered system above a large number of bottom-level rules.” Grey, *supra* note 100, at 11.

119. For the classical legal orthodox thinkers, “[t]he system was doubly formal. First, the specific rules were framed in such terms that decisions followed from them uncontroversially when they were applied to readily ascertainable facts . . . . Second, at the next level up one could derive the rules themselves analytically from the principles.” *Id.* at 11-12; *see also* Richard H. Pildes, *Forms of Formalism*,



method: “A legal system is *formal* to the extent that its outcomes are dictated by demonstrative (rationally compelling) reasoning.”<sup>120</sup> Describing Langdellianism, Anthony Kronman writes, “[o]nce the basic premises of a particular branch of law have been established, the remaining task is one of ratiocination only.”<sup>121</sup> This, of course, means that anyone with reason and logic could do it, without any experience to draw upon: “[C]learheadedness is essential and much time and patience are required, but experience is equally irrelevant.”<sup>122</sup> The eminent legal historian Morton Horwitz writes that this was an “intellectual system which gave common law rules the appearance of being self-contained, apolitical, and inexorable.”<sup>123</sup> Faith in this methodology led Holmes to retort (in his famous critique of Langdell), “The life of the law has not been logic: it has been experience.”<sup>124</sup>

### E. Implications

The scientific method of law has certain concrete upshots for adjudication. The first is *determinacy*, which flows from the conceptual completeness and formalism of the method: If the limited number of legal concepts logically produce rules that in turn logically apply to all conceivable sets of facts, then there will be no hard cases. Every outcome will be dictated from the very beginning: “[L]aw meant . . . a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system.”<sup>125</sup> Thus arises the caricature of Langdellian orthodoxy as “mechanical jurisprudence,”<sup>126</sup> and more modern critiques describing it as

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66 U. CHI. L. REV. 607, 608 (1999) (“Rules for specific cases were then to be the autonomous, worked-out logical entailments of those fundamental principles.”).

120. Grey, *supra* note 100, at 8.

121. KRONMAN, *supra* note 97, at 173.

122. *Id.* at 173-74.

123. Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 252 (1975).

124. Oliver Wendell Holmes, *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES (1879)).

125. Pildes, *supra* note 119, at 608.

126. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908).

“inexorable” or “inevitab[le].”<sup>127</sup> As Grey writes, this is the “promise of universal formality—‘every case an easy case.’ The legal system was to be so arranged that it resolved hard disputes by indubitable (even if complex) reasoning.”<sup>128</sup> Even in cases of first impression, the methodology is not stymied: These cases merely call for the application of the same deduction to classify the case and infer an appropriate rule. “When a new case arose to which no existing rule applied,” Grey notes, “it could be categorized and the correct rule for it could be inferred by use of the general concepts and principles; the rule could then be applied to the facts to dictate the unique correct decision in the case.”<sup>129</sup>

The flipside of this determinacy results in the second major implication of classical legal orthodoxy: Cases can be objectively wrong. Judges who reason incorrectly or who are too dimwitted to follow the logic to its conclusion will produce results at odds with the “real” law. Recall Langdell’s assertion that “[t]he vast majority [of cases] are useless and worse than useless for any purpose of systematic study.”<sup>130</sup> It is the legal scholar’s concepts that are the “real” law, and cases either hit or miss that mark. As Grant Gilmore writes, “[t]he doctrine tests the cases, not the other way around.”<sup>131</sup>

Other implications of the scientific method of classical legal orthodoxy are supra-legal. First, it is presumed that such an adjudicative theory insulates judging and law from “politics”; by anchoring law in pure conceptual order and rational deduction, it is separated from the melee of political conflict entirely and is imbued with legitimacy and authority. As Grey writes, “the classical scientists drew a sharp line between neutral law and partisan politics, placing the fundamentals and many of the details of the market and private property system on the legal rather than the political side of the line.”<sup>132</sup> Reason provided its own legitimization of judicial authority—reason was objective and apolitical, and “[b]y denying

127. Horwitz, *supra* note 123, at 252.

128. Grey, *supra* note 100, at 32.

129. *Id.* at 11; *see also* KRONMAN, *supra* note 97, at 174 (“Thus even in cases of first impression, Langdell’s method offers a procedure for determining what the law is and hence how the case should be decided . . .”).

130. LANGDELL, *supra* note 99, at vi.

131. GILMORE, *supra* note 95, at 47; *see also* KRONMAN, *supra* note 97, at 182; Patterson, *supra* note 108, at 201 (“Correct legal principles are discovered not in the plethora of decided cases, but in the realm of (ideal) theory. Cases are illustrative, not instructive. Cases stand in need of explanation. Doctrine—explanatory principles—is the (hidden) true legal order.”).

132. Grey, *supra* note 100, at 35.

the status of law to any decision that could not be independently derived by reason alone, Langdell limited the authority of what is actual in the law to what is rational in it.”<sup>133</sup> Horwitz too notes that scientific legal orthodoxy had this legitimizing effect, but attributes it to pro-capitalist motivations: “[T]he paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law.”<sup>134</sup> Professor Rubin sees Langdell’s “mythology” as attractive to its climate of opinion because, in the absence of a divine or natural law sanction behind adjudication, the common law could take on this objective and transcendent justificatory role.<sup>135</sup> Reason had these properties; one does not need a god if a rational judge is a sufficient replacement.

A second supra-legal implication of the scientific method is its expected stabilizing effect of the legal system, in turn allowing for more personal freedom. Langdellianism’s appeal, Grey writes, was that “[t]he system would be predictable; people could know in which circumstances they would get the aid and in which they would face the opposition of state power. Further, people would be free from public force exerted for the arbitrary personal ends of its guardians.”<sup>136</sup> He, like Horwitz, also notes the especial affinity that commercial interests have for these values—a fact emphasized by the Legal Realists’ later critiques.<sup>137</sup>

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133. KRONMAN, *supra* note 97, at 182.

134. Horwitz, *supra* note 123, at 264; *see also id.* at 255 (“The new and defensive emphasis in orthodox legal theory on the ‘scientific’ nature of the law arose simultaneously as a reaction to the claim of the radical codifiers that the common law was political.”).

135. Rubin, *supra* note 103, at 623-24 (“Apart from its philosophical appeal, this belief about the common law served the important purpose of political justification. Why should judges possess the authority to articulate legal rules that the legislature has not enacted? . . . [T]he justification was that underlying principles were the essence of the common law, and, that common law judges, in reaching their decisions, derived both their authority and their decisional constraints from the principles themselves. . . . Common law was thus regarded as containing embedded principles reflecting the inherited wisdom of a nation’s legal culture.”).

136. Grey, *supra* note 100, at 32.

137. *Id.* at 33.

## F. Limits

One final qualification of classical orthodoxy is required: It envisions itself as only applicable in the realm of *judge-made, private law*. As Rubin writes, “Langdell believed that the only real law—the only law that merited study as a science—was common law.”<sup>138</sup> Public law adjudication is really statutory interpretation, and is therefore not amenable to induction of concepts. Statutes are but the ad hoc emanations of the legislative body, subject to all of its whims and caprices, and bearing no factual pattern for analysis nor any opinion rationalizing its mandates. “The legal scientists,” Grey states, “were . . . not much attracted to the problems of statutory interpretation; they believed that the haphazard law laid down in the statute books did not lend itself to conceptual ordering.”<sup>139</sup> One famous Langdellian, Joseph Henry Beale, laments that the “haphazard legislation by a legislature [is] chosen not primarily for wisdom . . . [and] is not wise enough to foresee its effects other than the particular injustice in mind.”<sup>140</sup> More to the point, Langdell himself simply states that “law” and “legislation” are not coterminous.<sup>141</sup>

Constitutional law is especially resistant to the scientific approach, given its broad language and vague commands. Thus, prominent Langdellians resisted the creation of the University of Chicago Law School, which had proposed to teach public law as a major component of the curriculum.<sup>142</sup> As Grey summarizes,

Constitutional law was unscientific, because hopelessly vague, as typified by the police power doctrine; the question whether a statute was

138. Rubin, *supra* note 103, at 633.

139. Grey, *supra* note 100, at 34; *see id.* at 34-35 (“When they did confront statutory problems they did not tend to rely on the canon about statutes in derogation of the common law. Their formalism rather pointed them toward literal readings that avoided both narrowing and expansive purposive interpretation.”).

140. *Notes by Robert Lee Hale from Jurisprudence Lectures Given by Joseph Henry Beale, Harvard Law School, 1909*, 29 U. MIAMI L. REV. 281, 300-01 (1975).

141. C.C. Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period*, 19 HARV. L. REV. 151, 151 (1906).

142. Grey, *supra* note 100, at 34 (“The classicists did not regard public law, including constitutional law, as amendable to scientific study at all. Thus, Langdell’s Harvard colleagues and disciples Beale and Ames threatened to withdraw their offer to help the new University of Chicago Law School get started, because its organizers proposed to teach a substantial number of public law courses, thus violating the Harvard curricular dogma that students must be exposed only to scientific ‘pure law’ courses.”).

“reasonably related to safety, health or morals” could not be treated formally. To the legal science mentality such *open-ended questions* were political, not legal, and the courts abandoned any scientific role in trying to answer them.<sup>143</sup>

Either vagueness or incoherence in a law or legal code makes it an intractable subject for classical legal analysis—it makes the task of adjudication simply another iteration of the typical political back and forth. As Grey writes, Langdellians saw public law “as the peripheral and anomalous hybrid of law and politics.”<sup>144</sup> Without conceptual order that is amenable to formal deduction, legal science is a fool’s errand—or so the classical legal thinkers believed.

### G. Summary

Classical legal orthodoxy begins with the central notion that law is science. This means that quasi-empirical analysis leads to induction of core concepts (themselves coherently ordered and covering the complete universe of possible scenarios), which in turn produce lower level rules through deduction. These rules are then applied to actual cases, and produce a “correct” outcome every time. Induction, deduction, and application are formal: Only logic and reason are employed, and these dictate the result autonomously (no non-legal sources are needed). This method is expected to result in a law that is determinate—outcomes are constrained and pre-ordained by reason, and this determinacy enables “law” to be separate from “politics,” which in turn ensures the legitimacy of the judiciary and the preservation of the rule of law. All this, it is hoped, results in greater personal freedom in that it creates a stable framework for social living. Finally, because such a theory of adjudication requires that it act upon legal sources that are themselves conceptually ordered, it cannot work in the area of public law, where sources are nothing more than the ad hoc emanations of a legislature.

### V. ANTI-EMPATHIC TURN AS NEO-ORTHODOXY

Having completed a survey of both the anti-empathic turn and classical legal orthodoxy, their substantial similarities seem striking. Overall, this reaction to judicial empathy in the 2000s can and should be seen as the intellectual descendant of the mode of thinking that

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143. *Id.* (emphasis added).

144. *Id.* at 48.

dominated Harvard around 1900—except for the expected area of application.

### A. Comparison

First, both the anti-empathic turn and classical legal orthodoxy seem to agree on the deeper justifications of their adjudicative methods: The function of law is to engender stability and predictability so that social living and liberty might coexist in a complex polity, and the process limitations of the “rule of law” are essential to this aspiration. Recall Wilkinson’s discussion of law as a “roadmap” and a stabilizing force, along with the frequent invocations of the rule of law in anti-empathic writings.<sup>145</sup> These can be juxtaposed alongside the goals (whether they be cover for ulterior motivations or not) of classical legal orthodoxy: The new industrial economy needed predictability, but so too do all societies.

Next, both intellectual movements insist that for the rule of law to create its desired effects, “law” must be hermetically sealed from “politics.” The anti-empathic thinkers lament the rise of “activist” or “political” judging, and believe that only “neutral,” purely rational adjudication can preserve space for a robust democracy: The counter-majoritarian difficulty is thus solved by rationalism. Separation is also needed to protect the rational, neutral law from the value conflicts of politics—the dual isolation is mutually beneficial, necessary for the survival of each. Similarly, classical legal thinkers endeavored to prove that law could be “scientific” and apolitical; their method would be so determinate and autonomous that no one could challenge the correctness of the outcomes. The anti-empathic writers decried “political” judging, while Langdell argued that “justice” was irrelevant to adjudication. For both, neutral, “scientific” judging grants legitimacy and authority to the judiciary.

The anti-empathic consensus and classical legal orthodoxy also substantially agree with respect to the manner in which the “derivation” of the legal source must take place. Both posit that only traditional legal sources may provide the start and end points for legal reasoning (legal reasoning is *autonomous*). Thus, Bork emphasizes the text of the law and its original meaning, while the orthodox thinkers look solely to the isolated world of common law precedent. Both theories also seem to think that this relevant universe of legal sources can provide answers for any case that might arise—

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145. Wilkinson, *supra* note 12, at 1683.

law has *completeness*. Kerr writes that the solution to hard cases is to read the briefs again and think some more, while the Langdellians thought that their induced concepts could cover any possible set of facts that might arise.

For both the anti-empathic thinkers and classical legal orthodoxy, the law that is derived in such a manner is then interpreted and applied *formally*: Pure logic and rationality dictate the process and outcomes. This is perhaps their strongest similarity. Reason and logic apply the rules to cases, and the result will be the same in like circumstances so long as the methodology is accurately employed. Fiss demands “intellectual integrity” through “rationalism,”<sup>146</sup> while, as Kronman articulates, the orthodox thinkers expected to employ “ratiocination *only*.”<sup>147</sup> Bork and Wechsler demand “neutral” application of principles, no matter the result, while Langdell attacks the mailbox rule despite its substantive justice because justice is “irrelevant”—both mean that cold reason should determine application and interpretation.<sup>148</sup> Of course, empathy or any other affective faculty is totally out of place in the endeavor.

Many of the implications of each theory of adjudication are also points of similarity. For example, both believe in the near absolute *determinacy* of the law. Kerr thinks that a “50/50” case will be vanishingly rare, and Langdell would deny the possibility at all. Determinacy leads to another implication that is shared by both: the objective correctness (or not) of case outcomes. Langdellians dismissed the “vast majority” of the contracts cases as wrong, while Bork and Wechsler lamented “unprincipled” adjudication in *Brown* and *Shelley*—all of these are simply *wrong*, and even consistent high court holdings on an issue do not settle it as correctly “the law” (say, the mailbox rule for Langdell, or affirmative action for Bork).

In sum, the central lineaments of both the anti-empathic turn and classical legal orthodoxy are substantially similar, and the anti-empathic turn can be accurately described as *neo-orthodox* legal thought. Thus, West’s diagnosis of the roots of the anti-empathic consensus requires supplementation. While she sees one “signpost along the way”<sup>149</sup> as Legal Realism—especially the Holmesian aspiration of adjudication guided by modern social science—it may be fruitful to also think of the anti-empathic turn as a modern species

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146. See Fiss, *supra* note 34, at 790.

147. See KRONMAN, *supra* note 97, at 173.

148. See BORK, *supra* note 27, at 146; Wechsler, *supra* note 22, at 16.

149. West, *supra* note 2, at 277.

of precisely that which Legal Realism *opposed*: classical legal orthodoxy.<sup>150</sup> Legal Realists argued that the indeterminacy and incompleteness of judicial precedent meant that objective adjudication could only be based on some external “science,” and thus they turned to the methods of the social sciences, and today, economics.<sup>151</sup> They sought to replace what they saw as fraudulent “legal science” with *actual science*. I agree that modern anti-empathic thinkers hearken back to an adjudicative “scientism,” but I find that their “science” seems far more like that of Langdell than that of Holmes, Llewellyn, or Posner.<sup>152</sup>

## B. Contrast, Implications

One major consideration makes the anti-empathic thinkers seem like neither Realists nor Langdellians, though: their obsession with public law, especially constitutional law. Think of the central battlegrounds (and birthplaces) of the anti-empathic consensus—they were the confirmation hearings of Supreme Court justices, specifically discussing constitutional interpretation. Moreover, Fiss, Bork, Wechsler, Whelan, and Calabresi all seem exclusively concerned with constitutional adjudication. Recall, though, that the classical legal thinkers wanted nothing to do with this area of law; the vague and general standards left too much room for judicial

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150. For West’s genealogy, see *id.* at 274 (“A full history of the emergent paradigm of scientific judging is obviously beyond the scope of this discussion, but it’s worth identifying just three of the ‘signposts along the road’ originating either in law or sister disciplines. The first was a development in American legal theory . . . In the first three decades of the past century, ‘legal realists’ famously rebelled against the then-traditional paradigm of moralistic judging, as well as the ‘brooding omnipresence in the sky’ that informed it, by which they meant the common law in general, and Langdellian pretenses of the common law’s autonomy and ‘completeness’ in particular.”).

151. *Id.* at 275. (“If the common law is not only unduly protective of capital but also incomplete and at best an indeterminate guide for decision making in any event, then what? To what *should* courts, judges, and lawyers turn when filling the interstitial gaps in the law, if not from general principles drawn from prior cases? First Holmes and then the realists had an imperfect answer to that question, but they did have an answer: judges should turn to the then-nascent social sciences. The lawyer and judge of the future, again, would be the man of the slide rule and economics, not the man of Blackstone, precedent, and the past.”).

152. Of course, this is not to say that the new movement does not have elements of both of these prior theories, or that these prior theories were diametrically opposed in every respect, as they were clearly not. The history of ideas and their development is unlikely to preserve something entirely, nor likely to re-create exact replicas.



invention, and smacked more of politics than of “scientific” law. The same is mostly true of the modern “law and economics” movement West highlights—these scholars and judges rarely aspire to extend their analysis beyond the realms of contract, property, and tort (traditional private law subjects), and leave the constitutional lawyers to their own devices.

This ties in to a more minor point of contrast: The newer thinkers do not cherry-pick cases in the same strange way that Langdell does, nor is it clear that they believe that law has *conceptual order* in the same rigorous and uniform way. They probably believe in higher level “concepts” (say, Wechsler’s “neutral principles,” or the idea of “separation of powers”), but they might be speaking only at the level of “rules,” and these may or may not have coherence with other concepts or rules. This is an important difference, and, after all, how *could* they demand or expect conceptual order given what was just mentioned—their area of interest is public law.

Because of these differences, while West’s juxtaposition of Realism, Law & Economics, and the anti-empathic turn seems incomplete, so too does our own comparison with classical legal orthodoxy. The anti-empathic turn is essentially a neo-orthodox movement, but it has transplanted that thought from its expected field of application into another one entirely—and one that its originators avoided not lazily, but deliberately. The anti-empathic turn is *public law Langdellianism*: something that surely would have scandalized the man himself as a contradiction in terms. The source of public law (the legislature or the people, and not the judiciary) makes it either too haphazard and incoherent, or too vague, to admit of formal conceptual order. Thus, public law cannot be determinate, and no right or wrong legal answers will flow from a neutral or scientific rationalism. With all of this lost, this type of “adjudication” (if it can be called that at all) is but another form of politics—no necessary right and wrong, just winners and losers. Thus, while the anti-empathic thinkers strenuously insist on a separation of law and politics, legal science—as understood on its own terms—cannot preserve the law and politics divide when applied to the area of most interest to them: public law. The anti-empathic consensus demands logical-formal reasoning (like classical legal orthodoxy), but unlike its progenitor the new theory allows for this reasoning to act upon a “law” that has no conceptual order (something orthodoxy would have thought was a necessary first principle).

The task of this Article was a historical one, and therefore I go no further in assessing the possibility or coherence of the anti-empathic project. John Hasnas writes, “[a]ttributing a naive legal formalism to the opponents of judicial empathy and then proceeding to demonstrate that legal formalism is untenable tells us nothing about the desirability of judicial empathy.”<sup>153</sup> This is true, but modern critics of judicial empathy should be aware of the intellectual history of their theory, and should explain further how their theory can synthesize Langdellianism with the adjudication of public law cases.

### CONCLUSION

The public, politicians, and judges have aligned in opposition to judicial empathy. This “anti-empathic turn” has deep intellectual roots, and the excavation of those roots is a worthwhile task. While some scholars understand the anti-empathy position to be the descendant of law and economics, and ultimately Holmesian realism, an earlier theory can better explain the source of the current consensus. This is classical legal orthodoxy. Both classical legal orthodoxy and modern critics of judicial empathy see the ultimate function of adjudication to be the preservation of the “rule of law,” and accordingly demand a sharp separation of “law” and “politics.” Legal sources must be derived, interpreted, and applied employing reason and logic alone, and therefore the emotive faculty of empathy has no place. For both theories, this adjudicative “science” is expected to provide determinacy, and there should never be a hard case. Still, the anti-empathy position and classical legal orthodoxy differ in one major respect: The latter never expected its “scientific” method to be applied to public law (indeed, they saw this as not “law” at all), while the former almost exclusively focuses on this area (normally constitutional law).

The anti-empathic consensus, then, is a product of classical legal orthodoxy but also a mutation—one that the older theory would not have approved. The new consensus takes the formalistic method of its progenitor, but, unlike that older theory, does not demand that the body of law upon which the method acts be conceptual ordered.

Given that this debate is likely to resurface very soon in the impending confirmation hearings of any new Supreme Court justice,

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153. John Hasnas, *Is Moral Imagination the Cure for Misapplied Judicial Empathy? Banes, Bastiat, and the Quest for Justice*, 51 WASHBURN L.J. 25, 35 (2011).

we would do well to think of the intellectual pedigree of each position, taking note of weaknesses long recognized in older theories, thereby approaching any categorical approval or disapproval with the requisite awareness. To understand the debate, we should understand its context.