Brahmin Connections: A Note on the Vocation of the Law Professor

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Essay

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CAROL WEISBROD

The early modern Harvard Law School is known for its significance as a model for legal education in the United States. This model is understood to include the case method and a very narrow curriculum, focused on pure law. It is often noted that important figures on the law school faculty were part of the Brahmin Culture of Boston. They were members of a caste which valued a broad and serious engagement with intellectual life. This Article focuses on several individuals—Charles Eliot, James Bradley Thayer, and John Chipman Gray—to illustrate that engagement and suggests that it provided a frame which tempered a narrow law school curriculum.
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Brahmin Connections: A Note on the Vocation of the Law Professor

CAROL WEISBROD *

“[W]hat I learned from him was perhaps chiefly things which explicitly he never taught, but which I imbibed from the spirit and background of his teaching . . . .”

- George Santayana on William James

In 2006, the University of Connecticut School of Law created a chair named for the poet Wallace Stevens. The chair rewards writing “marked by subtlety and elegance,” and Richard Kay was named to that chair.

At one level, Stevens is a model of a lawyer whose literary work is kept entirely separate from his professional work. But Stevens’s work has spoken deeply to lawyers: Robert Cover used three lines of a Stevens poem as an epigram to Nomos and Narrative. Another Stevens poem, The Well Dressed Man With A Beard, could refer to many people. For present purposes, that well-dressed man could be, for example, on the faculty of the Harvard Law School as pictured in The Centennial History of Harvard Law.

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* Carol Weisbrod, Professor Emerita, University of Connecticut School of Law. I would like to thank Robert Gordon, Mark Janis, and Aviam Soifer for their comments on drafts. Thanks are due also to Richard Kay, with whom the questions treated here have been discussed over many years. Finally, I would like to acknowledge the assistance of the library staff of the University of Connecticut School of Law.


2 Professorships & Scholars 4 (Dec. 28, 2017) (on file with the University of Connecticut School of Law Thomas J. Meskill Law Library Archives and Special Collections).

3 Id.

4 Stevens described himself as a lawyer, though he worked as an insurance executive. Letter from Wallace Stevens to Gilbert Seldes (May 5, 1922), in LETTERS OF WALLACE STEVENS 227 (Holly Stevens ed., 1996) [hereinafter Letter from Wallace Stevens].


Law School published in 1918. But the poem could also describe anyone who is concerned with fundamental questions of order and meaning, someone who recognizes something in the last line of the poem: “It can never be satisfied, the mind, never.”

In his scholarship, Richard Kay has been continually preoccupied with basic questions of legality and order. He asks these questions: what are the foundations of law, and particularly of constitutions, how do they change, and what is the source of the authority of the changed regime? The answer he gives is that whatever the source of the authority, it cannot be law itself, since the constitution is definitionally illegal. Often that illegality is acknowledged by the framers of the new order as they make a revolution. It is the break with the past that is important for them. But that may not always be true. Recently, Kay published a book which considered the problem against the background of a group of revolutionaries who insisted that their enterprise was lawful, properly understood. Their concern with disorder—they were people who had recently lived through the overthrow of a king—led them to arguments of continuity and legitimacy under the existing law.

The two Harvard Law School teachers who are the focus of this Essay—James Bradley Thayer and John Chipman Gray—were long gone by the time Richard Kay got to Harvard Law School. In many respects, however, Richard Kay represents a continuation of their approach. Thayer and Gray were intellectual scholars and generalists apart from their contributions to particular areas of law and the severely practical private law curriculum of the late nineteenth century Harvard Law School. The tradition which Thayer and Gray represent is as different from that as it is remote from the hessian trainer approach to the classroom, associated with Charles Kingsfield of The Paper Chase. While their opposition to Langdell is discussed, sometimes with an emphasis on the case method, it will be urged here that the differences between these men and the general

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8 Letter from Wallace Stevens, supra note 4, at 247.
10 See id. at 58 (“The Constitution is binding law, but not because it was created under the authority of some higher instance of positive law. The source of the legal quality of the Constitution—and therefore, the source of the legal quality of all valid law—must be found in some phenomenon other than law.”).
11 See Richard S. Kay, The Glorious Revolution and the Continuity of Law I (2014) (“[The men of the Revolution of 1688–89] were, to the core, men of the law. Their objections to the regime of James II were, in significant measure, premised on their regard for law, a law that they believed the king had subverted.”).
12 See John Jay Osborn, Jr., The Paper Chase 2–9, 92–94 (2003) (discussing Professor Kingsfield’s harsh classroom methods, his work ethic, and his scholarship).
approach to law teaching represented by Charles Eliot and Langdell goes deeper than that and reaches the relationships between law and intellectual life more broadly.

Among the various criticisms of the writing on American legal education, there is one which stresses the absence of individuals in the historical account. It is clear that there are writings, institutions, hierarchies, buildings, and a good deal of self-congratulation. But where are the people?

This Essay deals with some people.

INTRODUCTION

James Barr Ames’s 1900 essay, *The Vocation of the Law Professor*, describing and defending the idea of the full-time law professor, sees the contribution of the law professor as three-fold—teaching, scholarship, and public service to the profession, especially as experts in the area of legislation. Though there is room for historical studies, the basic focus is on “pure law.”

This Essay adds to the list of the functions of the professor the role of model. The legal historian Robert Gordon identified this role when he said recently that Harvard professor Mark De Wolfe Howe was the law professor he would have liked most to be like. Law professors are models to future lawyers and law professors.

This discussion tries to introduce some points about one model based on the connections between the Brahmin culture of Boston and the faculty of the late nineteenth century Harvard Law School. It focuses on the connection between law and letters, often described as close in the period before the civil law and much less close after. The standard history of Harvard Law School in 1870, stressing “pure law,” leads one to suspect that is a subject about which there is not much to say. And possibly there is

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14 See *Id.*


17 Robert W. Gordon & David Sugarman, *Robert W. Gordon in Conversation with David Sugarman*, LAW & HIST. REV. 1, 6 (2018). For more discussion on Howe, see *infra* notes 117, 118, and 137, which stress Howe’s own range of interests and link to Thayer.

18 See ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 57–58, 87–89 (1984) (exploring how Thomas Jefferson and other leaders used the “[l]aw . . . as such a creative source of expression” during the revolutionary era, but also highlighting the subsequent tension that developed between law and letters in the early 1800s).

not much to say, which would not be considered trivial and at best marginal. The major occupations of most of the faculty and students at the law school of Eliot’s university were not literary, finally.\textsuperscript{20} Still, the connections between law and literature are visible, and were visible then—public and even well known to students and colleagues—and those connections which evoke the lawyer humanist are not unimportant if we are considering teachers as models.

The figure modeled on Charles Kingsfield,\textsuperscript{21} which for some time dominated the idea of the law professor, did not characterize the law professors of Harvard Law School of the late nineteenth century faculty. They are described as kind, concerned “fine gentlemen of the old school.”\textsuperscript{22} The environment was civilized and even something which could be described as “intimate.”\textsuperscript{23} It was not identified with aggression. One student, Alexander Percy, remembered that from Professor Samuel Williston, he learned “that one can be proved a fool so quietly and inexorably that the fool will harbor neither anger nor resentment.”\textsuperscript{24} The model that the students saw in the classroom was only part of what students knew of the teachers. Through family associations, students who shared a Brahmin background with the faculty may have known more of the tradition from which the teachers spoke, as well as the specifics of the teachers’ life and associations. The Brahmin families were connected in a variety of ways and had been connected through many generations. Students, faculty, and Harvard’s President Charles Eliot often shared a culture that did not have to be discussed.\textsuperscript{25}

\textsuperscript{20} An account of student life in the Harvard Centennial Book, after reporting that students work hard, comments that while law is often studied without consideration of its consequences, in some student discussions either in school or out of it, students considered the relevance of economics and sociology for example. \textit{Harvard Law Sch. Ass’n, supra} note 7, at 128ff. As to literature specifically, see the discussion of Thayer’s advice to students below. \textit{See infra} notes 101–31 and accompanying text.

\textsuperscript{21} \textit{Osborn Jr., supra} note 12, at 3.

\textsuperscript{22} \textsc{Daniel R. Coquillette \\& Bruce A. Kimball, On the Battlefield of Merit: Harvard Law School, the First Century} 360, 375 (2015); \textsc{Bruce A. Kimball, Before the Paper Chase: Student Culture at Harvard Law School, 1895–1915}, 61 J. Legal Educ. 31, 42 (2011) (“[T]he paternalism of . . . senior professors . . . Ames, James B. Thayer, James C. Gray, and Jeremiah Smith . . . set the tone on the . . . faculty.” (using two reconstructed class discussions to illustrate Langdell’s “early case method” and its evolution from “exposition by lectures to [the full and formal] case method”)).

\textsuperscript{23} See Ezra Ripley Thayer, \textit{John Chipman Gray}, 28 HARV. L. REV. 539, 542 (1915), reprinted in \textit{Roland Gray, John Chipman Gray} 57, 63 (1917) (“The daily intimacy of the classroom, under a system which keeps the instructor under fire and exhibits him in action, leaves nothing unrevealed.”).

\textsuperscript{24} \textit{William Alexander Percy, Lanterns on the Levee: Recollections of a Planter’s Son} 121 (1941).

\textsuperscript{25} \textit{See infra} notes 36–101 and accompanying text. As individuals, they may have been very different, but they knew who they were. For a discussion of Brahmin culture and attitudes towards money and public service, see \textit{A Brief History of the Boston Brahmin}, NEW ENG. HIST. SOC’Y (2020), https://www.thecrimson.com/article/1967/3/1/mark-de-wolfe-howe-dies-lawyer/ (“There’s more to
The story of American legal education is in large part a story of the work done at the Harvard Law School and the emulation of that work by faculty at other schools.\textsuperscript{26} The image of the work itself was shaped by observations like that of Felix Frankfurter concerning the “glorious inheritance” of Harvard Law School.\textsuperscript{27} The twin ideas of inheritance and greatness have roots in Brahmin culture, though this aspect of the underpinning of Harvard Law School under Eliot tends to be dealt with under references to “elites.”\textsuperscript{28} Sometimes the assumption is that the dominant value here is money, though this tends to ignore the possibility of Brahmin values under conditions of reversal of fortune, a condition which is evident in Charles Eliot and John Chipman Gray, presumably among others.\textsuperscript{29} It also minimizes the conflict in values between Old and New Money which was a part of the late nineteenth century conversation.\textsuperscript{30}

It is difficult to even discuss certain aspects of this question today. We identify class with money, and as R.H. Tawney noted: “The word ‘class’ is fraught with unpleasant associations, so that to linger upon it is apt to be interpreted as the symptom of a perverted mind and a jaundiced spirit.”\textsuperscript{31} But there is no way to tell the history of Harvard without ideas of social distinction, from its earliest years in which class standing was officially ranked, to the later manifestations in club life. And the idea continues to be visible in telling the history of Harvard. Thus, in his book on legal education in America, Robert Stevens wrote: “In the fifty years from 1870 to 1920, one school was intellectually, structurally, professionally, financially, socially, and numerically to overwhelm all the others.”\textsuperscript{32} It provided a model based on a narrow private law curriculum and other pieces of the model which might be noted.

Robert Gordon notes that “the founding generation of Harvard scholars were among the most cosmopolitan and interdisciplinary scholars in being a Boston Brahmin than simply having an early Puritan ancestor, graduating from Harvard and living on Beacon Hill.”\textsuperscript{26}

\textsuperscript{26} Gordon, supra note 16, at 340.
\textsuperscript{27} When Felix Frankfurter (Harvard Law School, 1906) wrote his tribute to Joseph Beale in 1943, he described the Harvard Law School as he originally found it: “When my generation arrived at Austin Hall, we entered into a glorious inheritance. . . . [I]t was the time before the School had become a leviathan—when greatness unembarrassed by bigness was the exclusive ambition of the School.” Felix Frankfurter, \textit{Joseph Henry Beale}, 56 HARV. L. REV. 701, 701–02 (1943).
\textsuperscript{28} Meaning the select piece of a larger (non-elite) group. The group itself can be constituted in different ways.
\textsuperscript{29} See infra notes 72, 149–52 and accompanying text.
\textsuperscript{30} See infra notes 36–38 and accompanying text.
\textsuperscript{31} \textsc{Paul Fussell}, \textsc{Class: A Guide Through the American Status System} 15 (1983) (quoting R. H. Tawney, \textsc{Equality} (1931)).
\textsuperscript{32} \textsc{Robert Stevens}, \textsc{Law School: Legal Education in America from the 1850s to the 1980s}, at 41 (1987). It is also of note that Stevens used the word “Celtic” to describe Langdell: “President Eliot smiled on Langdell’s Celtic wisdom in having invented the financially attractive case-method system.” \textit{Id.} at 63.
America.”

It is this point which raises the question considered here. How did the cosmopolitanism and interest in things beyond “pure law”—extending to history, jurisprudence, and comparative law, for examples—show themselves within the rigidity of the Harvard Law School curriculum associated with Langdell and Eliot? Gordon suggests that “[p]art of the reason for their single-mindedness about curriculum was that, in an age of specialization, they were trying to establish law as a distinctive discipline and autonomous technical subject that was different from everything else in the academy.”

His conclusion is that “Harvard’s missionaries and epigones pushed for their constricted curriculum simply because they had become fanatically committed to the case method of teaching law students as a uniquely rigorous and effective method, one they were convinced took a full three years to master successfully.” Another possibility here is that there was a framing structure of Brahmin culture, which limited the impact of the narrowness of the curriculum.

I. BRAHMINS

Spoken or unspoken, the ideas of the Brahmins are central to an understanding of the values of nineteenth century Boston and of Harvard. The term Brahmin is often now used in a straightforward way: the people with money who valued family. But this sort of description conceals a great many things. First, money was assumed rather than discussed, and a well-known class war existed between Old and New Money. Then to reinforce the importance of family is probably not sufficiently precise, since family can be valued among groups that are not elite. The value for the Brahmins was not only on family, but also on lineage. And this, in Boston and at Harvard, was of immense importance, certainly to the Brahmins who defined their social set and possibly to others who were excluded.

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33 Gordon, supra note 16, at 348.
34 Id.
35 Id. at 349.
36 See NELSON W. ALDRICH, JR., OLD MONEY: THE MYTHOLOGY OF WEALTH IN AMERICA 31, 104–05 (1996) (noting that wealth was not actually necessary to be a part of the Old Money circles, as long as it once existed, and identifying the tensions between Old and New Money).
37 See, e.g., Oliver Wendell Holmes, Address Delivered Before the Massachusetts Historical Society (Mar. 12, 1915), in Gray, supra note 23, at 48.
38 Accounts of exclusion can be found in the work of Arthur Train, a New Yorker; the southerner Alexander Percy; and sometimes even in the critical comments of Brahmins themselves, such as John Jay Chapman. See, e.g., M.A. DEWOLFE HOWE, JOHN JAY CHAPMAN AND HIS LETTERS 195 (1937) (Howe quotes Chapman’s description of Boston: “a genial hum of interlocked families . . . with their . . . passwords . . . and licensed characters”); see also Percy, supra note 24, at 117 (giving an account of cutting—snubbing—and referring to “Mayflower princeling[s]”); ARTHUR TRAIN, YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT 42 (1945) [hereinafter YANKEE LAWYER] (discussing the “private Darwinian Theory” in Brahmin culture).
The issue was of concern to Charles Eliot. In a series of lectures related to higher education administration, Eliot’s discussion of student clubs and fraternities refers to a variety of social institutions which students might have joined in the early nineteenth century, some without reference to social standing.\textsuperscript{39} But as to other kinds of clubs, he refers to the principle “birds of a feather.”\textsuperscript{40} While noting that some of these have difficulties—with “luxurious, or even vicious”\textsuperscript{41} tendencies—he is on the whole comfortable with them: “The small social clubs generally illustrate the principle that ‘birds of a feather flock together,’”—a principle which obtains in all human as well as bird society, and which democracy cannot eradicate, and need not wish to.”\textsuperscript{42}

In 1999, the Harvard Crimson published an article on the Final Clubs at Harvard College which indicated that Charles Eliot was a member of Porcellian. Certainly, this could have been true. But in fact, while Porcellian approached him, the overture was “discouraged.” Eliot joined a club more specifically focused on intellectual issues.\textsuperscript{43} Eliot seems to have contacted John Chipman Gray, another member of Porcellian.\textsuperscript{44} Gray was less benign than Eliot, remembering his unhappiness as an undergraduate on this score, because of trivial “féminine” social distinctions.\textsuperscript{45} The issue of social identity survived and it was strong enough that Franklin Roosevelt apparently considered his rejection by Porcellian the greatest disappointment of his life.\textsuperscript{46}

\textsuperscript{39} Charles W. Eliot, University Administration 220–22 (1908).
\textsuperscript{40} Id. at 222–23.
\textsuperscript{41} Id. at 223.
\textsuperscript{42} Id.
\textsuperscript{43} Eliot ‘discouraged’ the attempt made by a purely social club. 1 Henry James, Charles W. Eliot, President of Harvard University, 1869–1909, at 42 (1930); see also Hugh Hawkins, Between Harvard and America: Educational Leadership of Charles W. Eliot 12 (1972). As noted above, Eliot considered moral laxity a problem in some of the clubs. It may be that that ‘dissipation’ was among Eliot’s reasons for not choosing Porcellian. See Hawkins, supra, at 12.
\textsuperscript{44} For a discussion of the undergraduate clubs and the law school clubs, in the early 20th century, see Coquillette & Kimball, supra note 22, at 585 (referring to the “distinctions of college life” and the “continuing importance of social and college ties in gaining admission to the ‘best’ law clubs”). Quoting a 1906 Harvard B.A., “the better clubs only take fellows who are fit in every way and gentlemen.” The B.A. noted that the club took “four Harvard men, one Princeton, two Yale, and one Williams man” every year. Coquillette and Kimball suggest that the importance of social distinctions here “alleviated academic pressure, guilt, and attendant anxiety for Law School students outside the Harvard, Yale, and Princeton ‘clans.’” Id. at 586. The authors further note that, “[t]hough they might resent the social invidium, they simply had no prospect of entering the self-proclaimed ‘best’ law clubs and no sense of failure.” Id.
\textsuperscript{45} See Laurence R. Veysey, The Emergence of the American University 289–90 (1965) ("[T]he worst feature of student life has been the solemn feminine importance attached to twopenny social distinctions.” (quoting Letter from J.C. Gray to C.W. Eliot (Dec. 25, 1891))).
\textsuperscript{46} Frances Richardson Keller, Fictions of U.S. History 116 (2002).
Presumably many at Harvard were barely aware of the social system and may have not fully understood their own place in it\(^{47}\) (and possibly this “position” or lack of it had no importance to them). But for those at the top, the sense of social identity was a strong part of individual identity. This identity co-existed with their titles and professional achievements. For example, Nelson Aldrich tells us that Oliver Wendell Holmes was the Porcellian’s representative on the Supreme Court.\(^{48}\) Stevens’s use of the word “socially” has a long history.\(^{49}\)

As often noted, the term Brahmin is associated with O.W. Holmes, Sr. in his novel *Elsie Venner*.\(^{50}\) Less often noted is his description of the contrast between the Brahmin boy and the country boy.

If you will look carefully at any class of students in one of our colleges, you will have no difficulty in selecting specimens of two different aspects of youthful manhood. Of course I shall choose extreme cases to illustrate the contrast between them. In the first, the [common country-boy] is perhaps robust, but often otherwise,—inelegant, partly from careless attitudes, partly from ill-dressing,—the face is uncouth in feature, or at least common,—the mouth coarse and unformed,—the eye unsympathetic, even if bright,—the movements of the face are clumsy, like those of the limbs,—the voice is unmusical,—and the enunciation as if the words were coarse castings, instead of fine carvings.\(^{51}\)

Holmes, Sr. offers, as the contrasting type, the son of the Brahmins: “The youth of the other aspect is commonly slender,—his face is smooth, and apt to be pallid,—his features are regular and of a certain delicacy,—his eye is bright and quick,—his lips play over the thought he utters as a pianist’s fingers dance over their music . . . .”\(^{52}\)

\(^{47}\) ALDRICH, supra note 36, at 41 (discussing Norman Podoretz’s misunderstanding—in *Making It*—of the way the system worked).

\(^{48}\) ALDRICH, supra note 36, at 102.

\(^{49}\) The word “social” today has meanings which evoke somewhat contradictory images: knowing someone “socially” means without reference to business or professional contexts. (Though this is, in a broad sense, often to some degree untrue. The social context creates paths for other contexts.) The “social question” means the problem of poverty. The “placing” of students by the assumed social or financial status of the student’s parents was a practice that was discontinued in the mid-eighteenth century, not for reasons of democratic values, but because of the difficulty of making the status determination. SAMUEL ELIOT MORISON, THREE CENTURIES OF HARVARD 1636-1936, at 104–05 (1936).

\(^{50}\) E.g., OLIVER WENDELL HOLMES, ELSIE VENNER: A ROMANCE OF DESTINY 13 (1861) (titling the first chapter “The Brahmin Caste of New England”).

\(^{51}\) Id. at 15–16.

\(^{52}\) Id. at 16.
The country boy is of a race that has “been bred to bodily labor.”53 In this boy, “[t]he finer instincts are latent and must be developed. A youth of this kind is raw material in its first stage of elaboration. You must not expect too much of any such.”54 It is true, Dr. Holmes said, that “[m]any of them have force of will and character, and become distinguished in practical life; but very few of them ever become great scholars. A scholar is, in a large proportion of cases, the son of scholars or scholars or scholarly persons.”55

His generalized description of the Brahmin is that the boy is part of the “harmless, inoffensive, untitled aristocracy—races of scholars among us, in which aptitude for learning, and all these marks of it I have spoken of, are congenital and hereditary.”56

We can see the emphasis on lineage in what Dr. Holmes’s son, Oliver Wendell Holmes, Jr., said of John Chipman Gray: “He came of a family in which scholarship was in the blood; and I think that perhaps the first thought that would occur to me would be that he was a scholar born.”57

A quite different definition of the Brahmin caste was offered by Arthur Train, a lawyer turned writer, who is best remembered as the creator of Ephraim Tutt.58 Boston, Train wrote, was “dominated by a group of wealthy families whose members intermarry and leave their money to each other, and who have a private Darwinian Theory of their own.”59

Some of the values of the Brahmin world and its sense of hierarchy linked to particular qualifications are clearly outlined in the mottos of a major biography of Charles Eliot:

The presence of minds highly and vigorously developed is the most powerful aid to popular education. A class of strong thinkers is the palladium of democracy. They are the natural enemies of ignorant, ostentatious, and aggressive wealth. The

53 Id.
54 Id.
55 Id. at 16–17.
56 Id. at 17. See GELEASON L. ARCHER, THE EDUCATIONAL OCTOPUS: A FEARLESS PORTRAYAL OF MEN AND EVENTS IN THE OLD BAY STATE, 1906–1915, at 18, 64 (1915) (describing how the institutional form of Harvard/Brahmin power was evident at times).
57 Holmes, supra note 37, at 48.
58 See MOLLY GUPTILL MANNING, THE MYTH OF EPRAIM TUTT: ARTHUR TRAIN AND HIS GREAT LITERARY HOAX 17, 20–21 (2012) (describing Tutt as Train’s most “beloved character” and discussing how he “became so ingrained in the culture of the nation that he became a symbol of America”).
59 YANKEE LAWYER, supra note 38, at 42. See also ARTHUR TRAIN, MY DAY IN COURT 343–47 (1939) (discussing a similar high “Society” in New York and the personal costs sacrificed “in the competition for money and social position”). Train’s reference to Darwinism suggests that the emphasis on “blood” and “stock” had something to do with qualities beyond the social. See also Holmes, supra note 37, at 48 and accompanying text (noting that certain traits are inherited through one’s “blood”).
vastest aggregate of average intelligence can do nothing to supply their place.\textsuperscript{60}

A certain amount of the writing on the early days of modern legal education in the United States seems to have been written under the influence of a line of Ralph Waldo Emerson’s essay, \textit{Self-Reliance}.\textsuperscript{61} Institutions, he said, were “the lengthened shadow of one man.”\textsuperscript{62} In law school, historians commonly take that one man to have been Christopher Columbus Langdell.\textsuperscript{63} It is sometimes noted that Charles William Eliot, the President of Harvard who appointed Langdell as Dean of Harvard Law School in 1870, was also immensely important to the law school.\textsuperscript{64} Eliot served Harvard as President for forty years and wanted to be remembered for the bricks he put into the structure of Harvard.\textsuperscript{65} A summary of the facts of the timeline would look like this: Eliot arrived, aged thirty-five, to assume the presidency of Harvard University in 1869.\textsuperscript{66} He named Langdell as Dean of the Law School in 1870.\textsuperscript{67} Langdell served in that role until 1895 and was succeeded by Ames.\textsuperscript{68} Eliot remained in the presidency until 1909 and was succeeded by Lowell.\textsuperscript{69} Through the early twentieth century, Harvard was a Brahmin institution in whose schools and departments the sons of Brahmin families were heavily represented as students and faculty, some less wealthy than others. Eliot was one of the less or not wealthy.\textsuperscript{70} His father had lost the

\begin{thebibliography}{99}
\item 60 {\textsc{James, supra}} note 43 (quoting Francis Parkman, \textit{Materialism and Excessive Self-Confidence, in Values in American Culture: Statements from Colonial Times to the Present} 76, 77 (Thomas Elliott Berry ed., 1966)).
\item 61 Ralph Waldo Emerson, \textit{Self-Reliance, in Ralph Waldo Emerson: Selected Essays, Lectures, and Poems} 150, 159 (Robert D. Richardson, Jr. ed., 2007).
\item 62 \textit{Id.} at 159. John Jay Chapman wrote: “It is unnecessary to go, one by one, through the familiar essays and lectures which Emerson published between 1838 and 1875. They are in everybody’s hands and in everybody’s thoughts.” John Jay Chapman, \textit{Emerson and Other Essays} 26 (new & rev. ed. 1909).
\item 64 See, e.g., \textit{Id.} at 15 (noting “Eliot’s crucial role as the ultimate arbiter” during Harvard’s early struggles).
\item 65 Coquillette & Kimball, \textit{supra} note 22, at 217. See also 2 James, \textit{supra} note 43, at 303 (1930) (“The kind of biography that I should prefer is a record drawn from my reports and other official documents of the number and quality of the bricks that I built into the walls of Harvard University.”).
\item 66 Lapiana, \textit{supra} note 63, at 8.
\item 67 \textit{Id.} at 10.
\item 68 Coquillette & Kimball, \textit{supra} note 22, at 556.
\item 69 \textit{Id.} at 217.
\item 70 1 James, \textit{supra} note 43.
\end{thebibliography}
family money. But, first, being a Brahmin is not centrally about wealth, though money is good to have—it is about ancestry and a state of mind. Second, Eliot had enough family money to spend critical time in Germany.

Eliot would have naturally retained this sense of Brahmin-non-Brahmin as to Langdell: “Cut off in youth and manhood from the amusements and relaxations of most educated men, [Langdell] took pleasure in the careful investment of his savings, as soon as he could make any. I was one of the few persons with whom he sometimes discussed investments . . . .”

In his forty years as President of Harvard University, he built an institution—which was in many ways regional when he took it over—to a school which became preeminent, actually and internationally. His various reforms are often described. Two are of importance here: his systems of electives and commitment to specialization, and his work with Langdell, at Harvard Law School.

It was Eliot who said that the professional schools must be part of the University and it was Eliot, the autocrat of the University as a whole, who did much of the hiring, including at Harvard Law School. It is clear, and sometimes noted, that Eliot’s influence (and not merely his influence in choosing Langdell) must be considered as foundational.

This is not to say that Eliot as an individual was universally admired. To say “Eliot’s Kingdom,” and even more “the cloud of Eliot,” is to say something which is not neutral. Here, we have first the idea of Eliot as an

72 See ALDRICH, supra note 36, at 31 (“Of course, there has to have been wealth . . . . But once the wealth has been there, for perception, it needn’t go on being there.”).
73 1 JAMES, supra note 43, at 137. He received an inheritance, which he understood as compensation in effect for a facial disfigurement. Id. at 13.
74 See MORISON, supra note 49, at 324 (“The foundation for a great university was there; but another twenty years of presidential promises and failures would make Harvard seem merely quaint. More than at any age in our history, a leader was wanted. The leader was ready and waiting. He was thirty-five years old, and his name was Charles William Eliot.”).
75 Id. at 341–47.
76 Id. at 337–38.
77 See COQUILLETTE & KIMBALL, supra note 22, at 386 (“[Eliot] exercised significant control over faculty hiring, which followed a customary process at the Law School between 1870 and 1900.”).
78 On this point, see STEVENS, supra note 32, at 36; see also LAPIANA, supra note 63, at 15–16 (exploring Eliot’s “crucial role as the ultimate arbiter” related to the Law School reforms).
79 MCCORMICK, supra note 1, at 98.
80 Id. at 96.
autocrat,82 and then as a man who ruled. The character of his rule, from point of view of legal historians, has been judged by his appointment of Langdell as Dean of Harvard Law School and his interest in the development of Harvard as a research university. Others have been more interested in the system of electives which he instituted. Van Wyck Brooks noting Eliot de-emphasized the classics and thought in terms of the training of specialists,83 Concluded with strong criticism, “It is a hard saying, but Mr. Eliot, more than any other man, is responsible for the greatest educational crime of the century against American youth,—depriving him of his classical heritage.”84

“Eliot had something of the strong man’s limitation.”85 Perry wrote, “He was repelled by moral laxity and by unhealthy or neurotic mentality, and this blinded him to the great qualities with which these defects are sometimes associated.”86 “There was,” Perry wrote, “a touch of the banal, of shallowness, of externality, in his ways of thinking, as there was of hardness in his ways of acting.”87 His mind, Perry said, worked in the indicative and not the subjunctive.88 John Jay Chapman described Eliot as “a gigantic schoolmaster and thought in schedules and regulations. He had not the temperament, interests, or passions of a scholar.”89

At least one of Perry’s descriptions of Eliot finds an echo in one of the ways that John Chipman Gray described a tendency among the Brahmins. Perry wrote of Eliot: “He was sane and upright to a degree, and with a consistency, that was almost appalling.”90 Gray used the word “angular” to describe a type of New Englander. He contrasted Boston and Philadelphia

83 See Van Wyck Brooks, New England: Indian Summer 1865–1915, at 105 (1940) (“The first step at Harvard was to throw the classics overboard and promote the ‘specialist’ system the age demanded. Thus died the old American college; the European model was discarded; the American university came into being.”).
84 Id. (quoting Morison, supra note 49, at 389–90).
85 Perry, supra note 82, at 13.
86 Id.
87 Id. at 29.
89 Perry, supra note 82, at 7. Gray’s son, Roland, spoke similarly of a kind of New Englander (not his father), who exhibited a “perversion” of the quality of conscientiousness. Roland Gray, Memoir of John Chipman Gray, 49 PROC. MASS. HIST. SOC’Y 387, 409 (1916), reprinted in Gray, supra note 23, at 3, 40. A comment usually (though apparently incorrectly) attributed to Eliot may be used to illustrate. Eliot is said to have been opposed to the curve ball in baseball because it involved the encouragement of deception. Richard Hershberger, “With a Deliberate Attempt to Deceive:” Correcting a Quotation Misattributed to Charles Eliot, President of Harvard, 46 SOC’Y FOR AM. BASEBALL RES. 65, 65–69 (2017), https://sabr.org/research/deliberate-attempt-deceive-correcting-quotatio-misattributed-charles-eliot-president.
on a related idea. In a comment on Thayer, Gray noted that in Boston, everything that was not right was considered wrong, where in Philadelphia, everything that was not wrong was considered right.\textsuperscript{91} Thayer took the Philadelphia approach. As there were Brahmins and others, there were at least two tendencies within the Brahmin environment.\textsuperscript{92}

Eliot had specific ideas about law schools:

It is very different in the faculty of law, which in American universities devotes itself chiefly to court-made law and the training of practitioners. There every teacher will know a great deal about the work of every other teacher in the faculty, and have a good understanding of every other teacher’s method and mode of thought. In that faculty it is possible for one professor to teach in the course of twenty-five years nearly all the subjects taught in the school; and it is feasible for a professor well advanced in life to change his subjects completely, abandoning all the subjects he has taught for twenty years or more, and taking up a new set. A faculty of law therefore resembles what is called a department in the faculty of arts and sciences; for in the latter faculty the members of any given department are usually acquainted with the whole field of the department, and with the work of each member of it. The faculty of law will have very slight connection with any other faculty, unless, indeed, like a European law faculty, it takes up the general subject of jurisprudence, and such topics as Roman law, constitutional law, and international law, which are appropriate also to the faculty of arts and sciences.\textsuperscript{93}

When he gave these lectures under the title \textit{University Administration}, Eliot was in the final year of his forty-year presidency of Harvard.\textsuperscript{94} He quoted extensively from work published thirty-nine years before at his inauguration as president.\textsuperscript{95} He noted that he still found the remarks

\textsuperscript{91} Samuel Williston, \textit{John Chipman Gray}, 28 HARV. L. REV. 543, 547 (1915), \textit{reprinted in GRAY, supra note 23}, at 70–71. Thayer was “the best type of a New Englander without the creaking of the joints that sometimes mars that estimable person.” \textit{Id.} at 71. Roland Gray notes that his father tried, in general, not to judge. Gray, \textit{supra} note 90, at 409.

\textsuperscript{92} See Williston, \textit{supra} note 91, at 547 (noting that this description of Thayer applied to Gray).

\textsuperscript{93} E\textsc{i}l\textsc{i}o\textsc{t}, \textit{supra} note 39, at 83–84.

\textsuperscript{94} As part of the N.W. Harris Lectures, Eliot published \textit{University Administration} in 1908, a year prior to his resignation from Harvard. See generally E\textsc{i}l\textsc{i}o\textsc{t}, \textit{supra} note 39 (collecting the N.W. Harris Lectures).

\textsuperscript{95} \textit{Id.} at 239–41.
correct, though he recognized apparently, “the changing conditions of the professions which the university supplies.”

In general, he saw the law faculty as standing on its own, except in those instances in which it took up courses which were also taught in other faculties (e.g., jurisprudence or constitutional law). Clearly, Eliot perceived these courses as optional in a law school, and it seems not to have been part of his thinking that these courses might be taught differently in law schools and in other departments of the University.

Eliot’s approach supported a narrow, specialized conception of legal education. In American universities, he said, the law schools taught court-made law and chiefly trained practitioners. He does not suggest any problem with this limitation of the educational program to judicial (rather than legislative or administrative) material and does not consider the various roles that lawyers might play which would not be fairly contained within definitions of the word “practitioner.”

But we should not take Eliot’s vision of the law school as fully describing Harvard Law School. Eliot was a Brahmin, but the tradition was complex enough to contain a number of different versions of intellectual excellence. And while Langdell was unquestionably important others were also.

II. JAMES BRADLEY THAYER

The Harvard Centennial Book, in its entry on Thayer, notes that “[h]is success with his students was not that of the magnetic teacher whose very personality inspires enthusiasm in the work.” Rather, “[i]t lay in the admiration and respect of many successive classes for his mastery of what he taught, for the power and accuracy of his thinking, and for the modesty and fineness of the man.”

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96 Id. at 239–41. His essay on Emerson, however, contrasts his understanding as a young man—when he found little in Emerson—to his later view. See generally CHARLES W. ELIOT, FOUR AMERICAN LEADERS (Am. Unitarian Ass’n 1906).

97 Id. at 240.

98 Id. at 83–84.

99 Did Charles Gross, for example, work with people in the law school? Charles Gross, hired by Eliot, taught medieval legal history in the history department. See BENJAMIN ALDES WURGAFT, JEWS AT WILLIAMS 13 (2013) (noting that Gross established Harvard as the “premier institution for medieval studies in North America”).

100 ELIOT, supra note 39, at 83.

101 Id.

102 HARVARD LAW SCH. ASS’N, supra note 7, at 280.

103 Id. This comment also notes that Thayer did not try to develop “from his own mind a perfectly logical or entirely consistent body of legal doctrine.” Id. at 281. This approach was associated with Langdell and was opposed by both Thayer and Gray. See GERALD PAUL MORAN, JOHN CHIPMAN GRAY: THE HARVARD BRAHMIN OF PROPERTY LAW 129–31 (2010) (discussing Thayer and Gray’s
We cannot know with precision the impact of a teacher, particularly if we are looking for impact beyond testable knowledge or skill. But perhaps we can see some fictional accounts that suggest the impact of their teaching. We can go back to Arthur Train’s Mr. Tutt. Mr. Tutt’s sense of the law is complicated and as is regularly noted, he skirts regularly at the edges of ethics and good practice. The skepticism of the narratives regarding the police, the lawyers, and the law is notable.

In Yankee Lawyer, we see early on the tension between what law schools teach and what real lawyers know. We have an old lawyer named Caleb Tuckerman who offers the young Ephraim Tutt a philosophy of law:

In the law there’s always a way out either by intention or otherwise. There is no so-called doctrine to which there’s not an exception, and no exception to which there is not some further exception. . . .

They tell you out at the Law School that the law is a wonderful science—the perfection of reason. Wonderful fiddle-sticks! ’Tis in fact a hodge-podge of Roman law, Bible texts, writings of the Christian Fathers, Germanic customs, myths, canon law, superstitions, scraps of feudalism, crazy fictions, and long dead statutes. Your professors try to bring order out of chaos and make sense where the devil himself couldn’t find any. They turn you into metaphysicians instead of lawyers. . . . The law is nothing but a vast series of individual stratagems. Usually it has neither rhyme nor reason, having grown up nobody knows how or why and continuing to exist out of sheer inertia—a mass of contradictions and inconsistencies by means of which lawyers make a living and politicians accomplish their evil purposes.

The character called Tuckerman rejects the view of law as a science or indeed as anything intelligible in a way which might, we could say, represents extreme legal realism, or even a kind of anarchism. The orientation is put in the mouth of a man who was, we are told, born in the presidency of John Adams, when George Washington was still alive.
The book is of course fiction. There was no actual Tuckerman. But was there anything at Harvard, in the age of Langdell, which might resonate with what Tuckerman was saying? There might have been various sources, but one of them is likely to have been the teaching of James Bradley Thayer, who was deeply interested in the historical evolution of law. Arthur Train was clearly impressed with Thayer's treatise on evidence, and Thayer's perspective on the law of evidence and its incomprehensibility shows up at various points in the Tutt stories. Thayer is largely remembered today for his 1893 article on judicial review, which argued for judicial restraint as a fundamental principle of American constitutional law.

In the field of evidence, his work is also recalled, and he is discussed as one of the major reformers in the field. It is his work in evidence which is cited by Train, and which in its general approach gives rise to the possibility that it is one source of both the historical approach which marked much of Thayer's writing, and also the sense of law as not only evolved from past materials but evolved in uneven and in sometimes mysterious ways.

Thayer was also a model for the literary man as lawyer. Eliot at one point offered Thayer a position at Harvard as teacher of literature.

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109 Id. at 34.
110 One writer suggests the influence of Holmes’s The Path of the Law was “the event most crucial to Train’s development during law school.” Francis M. Nevins, Mr. Tutt’s Jurisprudential Journey: The Stories of Arthur Train, 19 LEGAL STUD. F. 57, 59, 89 (1995).
111 See DAVID M. RABBAN, LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSatlantic TURN TO HISTORY 10, 14 (2013) (discussing Thayer’s emphasis on the study of legal history to understand “legal scholarship, legal education, and practical law reform”).
112 It is the Tutt stories which are best remembered, though Train wrote much more. See John H. Wigmore, Introduction to Arthur Train, The Prisoner at the Bar: Sidelights on the Administration of Criminal Justice, at xv–xvi (Charles Scribner's Sons ed., 1922) (calling Mr. Train’s book “an entertaining and vivid picture of the criminal procedure of to-day, and a repertory of practical experience and serious discussion of present-day problems in the administration of justice”).
113 James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 144 (1893) (“That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.”). It is this article, used in the 1950s by Frankfurter and others, which can be seen as the reason that Thayer’s name is remembered. Jay G. Hook, Thayer, James Bradley, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 541 (Roger K. Newman ed., 2009) [hereinafter Hook, Thayer, James Bradley]. Hook’s article on Thayer refers to him as a model for his students. Jay Hook, Brief Life of James Bradley Thayer, 88 NW. U. L. REV. 1, 8 (1993).
115 Hook, Thayer, James Bradley, supra note 113, at 540–41. For Brahmin political culture and the variations in Brahmin legal scientists, see G. Edward White, Revisiting James Bradley Thayer, 88 NW. U. L. REV. 48, 58–63 (1993). White notes that Thayer’s writings connect law and literature, in effect a qualification of Robert Ferguson’s suggestion that those connections were very weak after the Civil
Thayer’s background was in literature and journalism and he wrote on a wide variety of subjects.\textsuperscript{116}

Students could easily have known of Thayer’s early career as a writer and his non-legal writing while a law professor. They might also have recalled his comments in his first law lecture.\textsuperscript{117} Certainly, Thayer wanted students to read deeply in law. At the same time, Thayer’s early lecture to students suggests a different approach. The position taken by Thayer in the lectures draws a clear line to the humanities.\textsuperscript{118} And, as Coquillette and Kimball indicate, even later his position as to outside reading was something like “subordination, not extirpation.”\textsuperscript{119}

Further, students could easily have known of Thayer’s connection, through his wife—“a niece of Ralph Waldo Emerson”—to the great “Sage of Concord.”\textsuperscript{120}

The lineage of James Bradley Thayer can be offered in two ways: first, the standard modern biography which refers to his place of birth (Haverhill is not Boston) and the occupation of his father, the editor of a country newspaper.\textsuperscript{121} A second version could draw on the biography of his son, Ezra Thayer. Ezra Thayer’s genealogy reached back to the early families of

\textsuperscript{116} See Hook, \textit{Thayer, James Bradley}, supra note 113, at 540 (discussing Thayer’s work with a news service and propaganda engine and literary criticism).

\textsuperscript{117} Prior to Langdell’s tenure as dean, it was a common practice for a faculty member to give an opening lecture of “paternal and professional introductory advice” to the incoming law students. \textit{Coquillette & Kimball}, supra note 22, at 440–41. This practice was eventually discouraged by Dean Langdell, but Thayer did continue to offer a short, “less personal” lecture in the first class of his Criminal Law and Criminal Procedure course. \textit{Id.} at 441.

Mark De Wolfe Howe reprinted the Thayer lecture in the \textit{Journal of Legal Education} in 1949. Mark De Wolfe Howe, \textit{First Law School Lecture of James Bradley Thayer}, 2 J. LEGAL EDUC. 1, 10 (1949) (“Let me say further that while a student must steadily remember that his main business here is to work hard at mastering the principles of the law, he must not omit to acquaint himself in some measure with the literature of the law and to make references for future use to such books in this department as may attract his attention.”). Howe himself carried on the Brahmin tradition in various ways: in his lineage, the range of his interests, and his commitment to public service. See L. Kinvin Wroth, Howe, Mark De Wolfe, in \textit{THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW}, supra note 113, at 276 (discussing Howe’s military service and commitment to civil rights, as well as his teachings in legal history, constitutional law, and admiralty). For information on Howe’s work with the Lawyers Constitutional Defense Committee, see Alvin J. Bronstein & Henry Schwarzschild, \textit{Mark Howe “in Real Life”}, 2 HARV. L. REV. 171, 171 (1967).

\textsuperscript{118} See Howe, supra note 117, at 10 (“Pay respect therefore to the natural desires of your minds, and do not altogether give up your interest in literature, or the ancient classics, or natural science, or politics, or art, or poetry, or philology, or the philosophy of the human mind, or whatever other investigation or pursuit there be towards which as another object of study you are drawn. It is well to keep the interest alive.”).

\textsuperscript{119} \textit{Coquillette & Kimball}, supra note 22, at 442.

\textsuperscript{120} Hook, \textit{Thayer, James Bradley}, supra note 113, at 540.

\textsuperscript{121} \textit{Id.}
Massachusetts, on both maternal and paternal sides—his mother descended from Governor Bradford, his father from John Alden.\textsuperscript{122}

Thayer’s wife, Sophie, was also a descendent of Alden’s.\textsuperscript{123} Thayer was part of the "Concord social circle"—a man who travelled with Emerson, and as Hook tells us, bought his cigars, and drew his will.\textsuperscript{124} The connection to Emerson was public.

Matthew Arnold had said, a year after Emerson’s death, that Emerson was not a “great” writer.\textsuperscript{125}

“This brought about a considerable reaction in Boston, which counted Emerson high on their list of their claim to cultural standing,”\textsuperscript{126} Thayer said. Thayer’s comments not only show his background but also his tact: responding to an article highly critical of Arnold, Thayer defends Emerson without attacking Arnold.\textsuperscript{127} The last paragraph of the Thayer letter shows the approach.\textsuperscript{128} Thayer conceded that Emerson was not, in fact, “a great literary artist,”\textsuperscript{129} and was not a “great maker of philosophy.”\textsuperscript{130} He was, however, “a seer, a prophet, a great recorder of spiritual truth, a great teacher and ‘friend and helper of those who would live in the spirit,’—comparable, indeed, only with the greatest names.”\textsuperscript{131}

Thayer’s letter is perhaps likely to have been known to his students and his connection with Emerson might also have been known. His letter shows not only the tact which Gray so much admired, but also an ability to divide questions with a subtlety which we associate with lawyers. He looks for the best in what Matthew Arnold had said, while commenting on the ways in which Arnold does not appreciate Emerson—“shall one wait till he can assent to all that another says before he admires and applauds?”\textsuperscript{132} Arnold had provided a criticism, which was “inadequate, . . . [but] in its main lines sound and good.”\textsuperscript{133}

\textsuperscript{122}Harvard Law Sch. Ass’n, supra note 7, at 267. The difference here may reflect the point that the Centennial History was the work of many people through the Harvard Law School Association and their concerns with the issue of lineage may well not have been the same.


\textsuperscript{124}Hook, Thayer, James Bradley, supra note 113, at 540.

\textsuperscript{125}Matthew Arnold was on a lecture tour. One lecture discussed Emerson. Thayer’s comment was published in a newspaper and then reprinted in a book. James Bradley Thayer, A Western Journey with Mr. Emerson 124 (1884).

\textsuperscript{126}That standing was, however, a claim that some found comical. See, e.g., Oscar Wilde, The Canterville Ghost § II (1906), http://www.gutenberg.org/files/14522/14522-h/14522-h.htm (offering a pointed treatment of “ordinary” Boston dinner conversation).

\textsuperscript{127}Thayer, supra note 125, at 140–41.

\textsuperscript{128}Id.

\textsuperscript{129}Id. at 140.

\textsuperscript{130}Id.

\textsuperscript{131}Id. at 141.

\textsuperscript{132}Id. at 140.

\textsuperscript{133}Id.
Oliver Wendell Holmes spoke to undergraduates at Harvard in a 1886 speech entitled The Profession of the Law and concluded with some comments on law and the soul. He imagined that students might have felt that the study of law would have nothing to do with his soul, his spiritual possibilities: “How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers’ arts, the mannerless conflicts over often sordid interests, make out a life?” Holmes urged that it did make out a life, and that one could “live as greatly in the law as elsewhere . . . .” But somewhat in passing, he made another point: “Of course,” he said, “the law is not the place for the artist or the poet. The law is the calling of thinkers.” This distinction should not be seen as universally accepted, however. Thayer was both a lawyer and a literary man.

III. JOHN CHIPMAN GRAY

John Chipman Gray was a “model” of a different kind. He is described as an enigma. He is remembered as an author of a treatise on the Rule Against Perpetuities and also a book on jurisprudence. He went through his papers before his death and presumably destroyed many. What he left behind is evidenced by his work, recollections of him by his friends and colleagues, and correspondence known to researchers but unknown to his students, for example.

Still, students could have known something. Francis Biddle describes Gray’s approach to what Holmes needed in a clerk: a young man who could do his checkbook and to listen to his stories.
Here, then, the evidence is not so much the work—two specialties, it would seem—as the life and the character.\textsuperscript{140}

Gray’s life has been discussed several times, notably by his biographer Gerald Moran\textsuperscript{141} and by Stephen Siegel in law review articles which discuss Gray’s life.\textsuperscript{142} Both conclude that the man is, as an individual, in sense, unknowable.\textsuperscript{143} He went through his papers—and presumably destroyed some—before his death and so those papers, whatever they might have been, are not available.\textsuperscript{144}

Gray used the case method but was critical of other aspects of Langdell’s method:\textsuperscript{145} Williston quotes Gray’s comment on:

\begin{quote}
[T]hat method of legal reasoning which perhaps some of his colleagues may have been guilty of,—a method which takes the decision of a case as settling the actual point involved by the reported facts, but carefully puts the decision on new reasons and explains it as meaning something entirely different from what the judges who decided it thought it did,—Gray said: “This method of legal reasoning puts the decisions of the court on a par with the utterances of Balaam’s ass,—divinely inspired, but presupposing no conscious intelligence on the part of the creature from whom they proceed.\textsuperscript{146}
\end{quote}

The most obvious thing about John Chipman Gray is, as Ezra Thayer indicated, that he was a man of parts.\textsuperscript{147} He is remembered as both the museum. \textit{Id.} Did Gray meet any of her associates and if so, what did he make of them? For more on Gardner, see generally DOUGLASS SHAND-TUCCI, THE ART OF SCANDAL: THE LIFE AND TIMES OF ISABELLA STEWART GARDNER (1997). Is this one of the areas in which Gray’s reluctance to judge showed itself?


\textsuperscript{141} See generally MORAN, supra note 138 (detailing Gray’s life).


\textsuperscript{143} \textit{Id.} at 1577; MORAN, supra note 138, at 275.

\textsuperscript{144} MORAN, supra note 138, at 275 (suggesting Gray may have destroyed items of very personal nature before his death).

\textsuperscript{145} See \textit{id.} at 131 (“Langdell’s intellectual arrogance and contempt is astounding.”). Was it easier for Gray to write this way to Eliot because they were, as Eliot once put it, “birds of a feather?” See \textit{supra} text accompanying notes 42–57 (noting Eliot and Gray’s shared Porcellian status). Similarly, was it easier for Eliot to rebuke Gray in the way he did on the question of an ambassadorship? MORAN, supra note 138, at 136–37.


\textsuperscript{147} Thayer, supra note 23, at 59 (“Mr. Gray’s life had many sides.”).
author of a treatise on the Rule Against Perpetuities and the author, late in his life, of a work on jurisprudence, *The Nature and Sources of the Law*. Gray was born into a wealthy Brahmin family, but life changed when Gray’s father lost his money. Gray was eight when his father filed for bankruptcy. His half-brother Horace Gray (later a justice on the United States Supreme Court) was, at the time, on the grand tour of Europe and learned of the financial reverses there. Eliot was, in this respect, similar.

But enigma or not, Gray’s own language suggests, from time to time, the sorts of things he might have thought about. In one letter, Gray wrote that fifty years earlier, he had decided to “write a book on the rule against perpetuities, . . . and . . . something on analytical jurisprudence. . . .” He then offered a summary of his life: “Of course, the cares of the world and the deceitfulness of riches and the lust of other things have choked the ‘word,’ but they have not entirely destroyed it. I may say that I have pursued at eve what I pursued at morn.”

This complexity was made possible, as some noted, by his character and his gifts. One might add his stamina and his ability to control his time. Williston, in his tribute, noted that Gray said that until his seventies, he basically acted, slept, and smoked entirely as he liked. His biographer, Gerald Moran, wondered how much time Gray spent with his family. His colleagues did not know much about his military career—someone was surprised to learn that he held the rank of major—though in his son’s memoir and on his gravestone (whose decision?) his record in the Civil War is addressed at length. On the gravestone, at Mount Auburn Cemetery, there is no reference to Robes & Gray, the law firm of which he was a founder and with which he was associated to the end of his life.

Gray was interested in human beings: having no interest in sports, he went to a game to watch the expressions of the people. Still, Gray is described as this way by Roland Gray: “Mr. Gray’s interests apart from his

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149 See Moran, *supra* note 138, at 7–9, 31–35 (discussing Gray’s family connections to the Boston Brahmins and his father’s poor financial investments).
150 Id. at 36.
151 Id. at 54.
152 Id. at 36.
154 Id.
155 Id. at 69.
156 Moran, *supra* note 138, at 94.
work were mainly intellectual.”

He once told students that “there is ‘no surer and more unfailing source of happiness than the disinterested love of knowledge.”

Gray was familiar with a wide range of literature in several modern languages, with history, especially military and ecclesiastical, with books of travel, and with theology, particularly old controversial, casuistical, and ceremonial works. He also took an interest in many branches of science. In vacation his favorite recreations were mathematics and botany.

Gray’s library was substantial and cataloged by his children.

Gray’s writing is literary, and as one memorialist wrote, the prefaces to his books might be classified as literature. Some of his political positions also come through. Thus,

[the] foundation of that system of law and morals was justice . . . . Every one was free to make such agreements as he thought fit with his fellow creatures, no one could oblige any man to make any agreement that he did not wish, but if a man made an agreement, the whole force of the State was brought to bear to compel its performance. . . . Now things are changed. There is a strong and increasing feeling, and a feeling which has already led to many practical results, that a main object of law is not to secure liberty of contract, but to restrain it, in the interest, or supposed interest, of the weaker, or supposed weaker, portion of the community.

His basic attack was on the spendthrift trust.

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161 Gray, Memoir of John Chipman Gray, supra note 90, reprinted in GRAY, supra note 23, at 38.
162 Id. See also HARV. L. SCH. ASS’N, supra note 7, at 61 (indicating that Roland taught his father’s property class when he was too frail to do it).
163 Gray, Memoir of John Chipman Gray, supra note 90, reprinted in GRAY, supra note 23, at 38.
164 See id. (“[H]is library contained a nearly complete collection of the classical authors, including many little known works.”).
165 See Eugene Wambaugh, Article in Harvard Graduates’ Magazine, June, 1915, in GRAY, supra note 23, at 76, 81 (“[A]ny one, whether lawyer or layman, who will give himself the pleasure of reading Gray’s prefaces will see clearly on which side of the line between literature and non-literature Gray’s writing falls.”). His writing was sometimes aphoristic. See, e.g., J. C. Gray, Judicial Precedents—A Short Study in Comparative Jurisprudence, 9 HARV. L. REV. 27, 32–34 (1896) (noting that the German treatise writers announced their perspectives as though they were laws of nature).
166 For a discussion of Gray’s approach to the Rule Against Perpetuities and later developments, see MORAN, supra note 138, at 227, 275.
167 JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY, at viii–ix (2d ed. 1895).
To a frame of mind and a state of public sentiment like this, spendthrift trusts are most congenial. If we are all to be cared for, and have our wants supplied, without regard to our mental and moral failings, in the socialistic Utopia, there is little reason why in the mean time, while waiting for that day, a father should not do for his son what the State is then to do for us all.168

Joseph Bangs Warner, in his tribute, commented on Gray’s character in a way which stressed his reserve and even inaccessibility. His erudition, says Warner, might “have made conversation . . . if he had not been silent . . . .”169 He commented on Gray’s opinions and “even unreasonable prejudices” with which Gray played, “for he would fall back upon what he did or did not like about people, politics or opinions, refusing to bother himself further with them.”170 Later, Warner wrote that “one admits with grief that his comments were not produced readily to every one who would have liked to hear them. He was, in fact, not always easy to reach, and did not easily disclose himself even to friends.”171 Warner saw in Gray “a horror of self-exhibition and every form of publicity,” and “an instinct for guarding as most sacred what was most intimate.”172

Where Thayer is notable for his connection to Emerson, Gray is remembered for his association with the James family.173 In studies of Henry James, we often find discussion of the letters from Minnie Temple, a young cousin who died young and is taken as a model for some of James’s heroines.174 Minnie Temple’s letters were to John Gray when he was a young man.175 He apparently considered destroying Minnie Temple’s letters but in the end, the elderly John Gray kept the letters and brought them to the James family.176

He is quoted by Alice James (widow of William James) as saying:

168 Id. at ix.
170 Id. at 109.
171 Id. at 110.
172 Id.

173 Here it is hard to say what students could have known of this. Brahmin students might have heard from their parents of the courting customs (as Moran puts it) of the older generation, and might have known of Gray’s association with the James family and conceivably about Minnie Temple.
174 See, e.g., MORAN, supra note 138, at 90 (“Mary [Minnie] was provocatively direct in conversations with men. No one intimidated her. Henry Jr. captured aspects of her glorious freedom, love of life, beauty, and unfortunate early death. He projected these composites into a number of his fictional characters.”).
175 See id. at 91–92 (describing the relationship between Temple and Gray).
All my life my work has been my joy and if anyone had told me that a time would come when I could work no more, use my eyes no more, not even able to walk from this chair to the door without aid I should have said on such terms life was intolerable. Instead of this I find in the quiet, in the emptiness all sorts of kind and lovely affections flow in and I can be happy for as long or as short a time as I have to stay.\textsuperscript{177}

It is Alice Gray’s account of Gray’s visit to return the letters, which leaves us with a powerful sense of what Gray’s interior life might have been like. In an earlier letter to William James, Gray refers to Minnie Temple: the “only just woman” he has ever known.\textsuperscript{178} Henry James used the letters as the last chapter of Notes of a Son and Brother.\textsuperscript{179} Gray wrote to Henry James—and James responded.\textsuperscript{180} (Gray had earlier read A Small Boy).\textsuperscript{181}

There are ways in which Gray seems recognizable, as a strong-minded individual who reflected on his work and his life and who had a plan, which on the whole he followed. He was a listener and an observer as much as a communicator. Gray was a man of strong opinions which were often unvoiced, but sometimes his written responses included displays of anger—against Langdell, in one famous letter to Eliot,\textsuperscript{182} and in the preface to work attacking the spendthrift trust,\textsuperscript{183} and also strong feeling of affection and gratitude, in, for example, his final letter to his students.\textsuperscript{184}

It seems impossible that the students he taught for the long time that he was on the Harvard faculty should have been unaware of the dimensions of the man, or that they would have classified him simply as a Property Man. They would also have known that he selected the clerks for Oliver Wendell Holmes (before the job was taken on by Felix Frankfurter) and they would have known that the Boston firm, Ropes & Gray, became the home of many from the Harvard Law School because of Gray.\textsuperscript{185} The model he presented, of an intellectual lawyer involved in the world of the university,

\footnotesize{\textsuperscript{177} Lyndall Gordon, A Private Life of Henry James: Two Women and His Art 355 (1999).}
\footnotesize{\textsuperscript{178} Id. at 350.}
\footnotesize{\textsuperscript{179} Habegger, supra note 176, at 159–61.}
\footnotesize{\textsuperscript{180} For a fictional account, see Colm Tóibín, The Master (2004). The letters were sent to Alice James, the widow of William James, who sent them to Henry James. Though James destroyed the originals after working with them, a copy had been made. Habegger, supra note 176, at 160–61.}
\footnotesize{\textsuperscript{181} Gordon, supra note 177, at 350.}
\footnotesize{\textsuperscript{182} Moran, supra note 138, at 130–31. This is the letter referring to Landell’s intellectual arrogance.}
\footnotesize{\textsuperscript{183} See Gray, supra note 167, at ix (seeing the device as one which permitted unworthy young sons to not pay their debts).}
\footnotesize{\textsuperscript{184} Moran, supra note 138, at 293–94.}
\footnotesize{\textsuperscript{185} Id. at 146–47.}
the bar, and the Harvard Law School, would have been familiar to them. Gray was in some ways a representative of his class, but a self-critical and self-aware representative, and one who appreciated the character of others.

There are references to memories in the existing published material from Gray which suggest that memory, and his own memories, had a serious place in his mind. Minnie Temple and Frederick Maitland are people who live in his memory. He turned down judgeships and apparently did not want to be considered for an ambassadorship. Possibly these would have interfered with his practice. Possibly they involved too much presentation of a public persona.

For present purposes the significant point was made by Samuel Williston:

> When Gray died there passed from among us a man whose type has always been rare and is growing rarer. It is so difficult to achieve excellence even in one department that the old ideal of a rounded life and a broad intellectual outlook has been almost surrendered by men of serious purpose, as inconsistent with any plan for real accomplishment. Gray, however, found no inconsistency. He was at once a specialist in a narrow and difficult branch of the law, a lawyer in general practice, a man of affairs, a teacher, a writer, a well-read scholar in various fields with cultivated interests in letters and art and a man of the world.

The model was of a type which was unusual and, as Williston said, becoming more unusual. But it did exist at the Harvard Law School which “set the style,” as Robert Stevens put it, and was well known. Where Thayer can stand for a link between literature, Gray can represent the tradition of the generalist.

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186 The students were often as much part of the Brahmin culture as the faculty.
187 See John C. Gray, In Memoriam: Frederic William Maitland, 23 LAW Q. REV. 137, 138 (1907) (“It is impossible for me to write or think of Maitland without recalling his personal charm. How great that was! I never saw him but once. But to have broken bread at his house among the Cotswold Hills will always be one of the happiest of my memories. If I said what I felt you would understand it, but to one who had not known him it would seem extravagant.”).
188 See MORAN, supra note 138, at 108–09, 136–372 (speculating as to why Gray declined positions as a judge or ambassador).
189 See id. at 107–09 (discussing Gray’s hesitance to give up his practice when this was proposed as part of his agreement to work at Harvard).
190 See id. at 109 (speculating that a fear of criticism of his opinions, for example, by a higher court overturning his decisions, caused Gray to forgo the bench).
191 Williston, supra note 91, at 66.
192 STEVENS, supra note 32, at 56.
By the end of the century, the Brahmin world was no longer the only standard visible in Boston. It was seriously challenged by the ideas of specialization and commercialization, which would come to be dominant as Boston was challenged by New York. But it is important that generations of students at Harvard Law School were taught by people who reflected that earlier tradition. John Gray’s students had to have seen the way the man integrated his practice and his work at Harvard Law School. They might have gotten a sense of the intellectual integration when they heard, as they likely did at some point, that the relationship of Radcliffe to Harvard was shaped by Gray’s realization that the idea of the “visitor,” which he had encountered in a case involving religious property litigation, might be useful in the Harvard context. Thayer’s early lecture to students was reprinted by Mark De Wolfe Howe in the mid-twentieth century.

CONCLUSION

This Essay has focused on the way in which there was a second tradition at Harvard Law school, from the time of Langdell and Eliot, one which can be traced in the later history of the school through people like Mark De Wolfe Howe and Harold Berman. It might be found in faculty like Thayer and Gray, and in students (not typical, but present and well known) like John Jay Chapman. Chapman was a New England Brahmin who was dissatisfied with law school:

193 For a novel describing a late phase of Brahmin culture, see generally John P. Marquand, The Late George Apley: A Novel in the Form of a Memoir (1938).
194 See Moran, supra note 138, at 107–09, 146 (2010) (discussing Gray’s refusal to give up his private practice while teaching and his efforts in helping many students secure employment opportunities at Ropes & Gray).
195 In 1902, Gray gave remarks at the commencement for Radcliffe College, which was conferring, for the first time, “the degree of Doctor of Philosophy . . . [] on candidates recommended for that degree . . . with the approval of the Faculty of Arts and Science of Harvard University.” Mary Coes, Radcliffe College, Harv. Graduates Mag., Sept. 1902, at 69, 71. As many readers might know, Radcliffe College was an all-women’s institution of higher education with classes taught by Harvard faculty, but in its early years, it did not have the power to confer degrees. Id. at 72. In Gray’s address, titled A Short History of Radcliffe Degrees, he explained that he heard through his wife (who heard from Mrs. Agassiz) about this issue and, because Harvard College would not “absorb” Radcliffe, Gray pondered the dilemma—“How [could Radcliffe] be independent of Harvard University and yet have her degrees as valuable as those of the University?” Id. at 73. The answer came to him because he “had happened to be counsel for a famous school of learning in a case” involving the functions of “visitors.” Id. As a result, Gray’s idea to solve Radcliffe’s degree problem centered around the following question—“Why should not Harvard University be the Visitor of Radcliffe College?” Id. Under this arrangement, Radcliffe maintained its independence, but Harvard “countersigned” Radcliffe degrees after determining whether “the [Radcliffe] candidates have reached a standard of attainment equal at least to that required for corresponding degrees in Harvard University.” Id. at 74.
196 Howe, supra note 117, at 1.
... O these law books—how I used to hate ‘em. They used to be like the gate to Dante’s Inferno. I saw the inscription written in invisible ink on every title page—all hope abandon ye who enter here. They contained nightmares of insoluble problems that must be solved, labyrinths that led nowhere and must be threaded, sphinxes on all sides—unseen and threatening hierarchies of power that must be overcome and checkmated. Pshaw – they are nothing. They are counters. They are mere pawns and useful formulas that will demonstrate anything. Set ‘em up one way you have a sword. Set ‘em up another way you have a shield. This is the whole law—and the prophets are in a different department.\textsuperscript{197}

Chapman’s criticism is a version of the idea that if students were interested in justice, they should go to the Divinity School.\textsuperscript{198}

As noted, Eliot wrote that “[t]he faculty of law will have very slight connection with any other faculty.”\textsuperscript{199} But this comment can only be true if one is thinking in structural or institutional terms. It is unlikely to ever have been true of law schools if one thought in human terms. In the Brahmin world, it would have been obvious that law faculty would have known faculty in other fields. Beyond Harvard, the intellectual dimensions of the study of law would have made it likely that faculty in different universities would have had contact with each other.

The sons of the Brahmins went to Harvard, and for a long time. Ultimately, this close association between Harvard and a certain type of person would be reduced, so that an Auchincloss character would say in effect, what has all this to do with Harvard?\textsuperscript{200} There were different aspects of the Brahmin influence. Eliot had built a structure which lasted, but his understanding of Brahmin tradition was practical and, in some ways, limited. But other approaches were carried forward by other people. Joseph Story had said: “[A]t present, we must seek the means to live, we are obliged reluctantly to quit classic walks for the toils of business.”\textsuperscript{201} Thus,

\textsuperscript{197} Letter from John Jay Chapman to Minna Timmins Chapman (July 1890), in Howe, supra note 38, at 83. Some students would also very likely have been aware of the encounter between Chapman and Lowell, in which Chapman burned his hand. Carol Bundy, A Century Later: Celebrating the Life of Percival Lowell, Lowell Observatory (Oct. 15, 2016), https://lowell.edu/celebratingpercivallowell.

\textsuperscript{198} See Harold J. Berman, Faith and Order: The Reconciliation of Law and Religion 336 (1993) (referring to this comment and indicating that while Langdell did believe in justice, it just “had nothing to do with contracts”).

\textsuperscript{199} Eliot, supra note 39, at 83.

\textsuperscript{200} Louis Auchincloss, Powers of Attorney 43–44 (1963) (illustrating a fictional scene where an attorney, after receiving an offer to become a partner at a prestigious law firm, asked whether another colleague did not receive a similar offer because he did not go to Harvard).

\textsuperscript{201} Letter from Joseph Story to William Scott (Jan. 14, 1819), in 1 Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University 318, 320 (William W. Story ed., 1851).
much later Karl Llewellyn described the severely practical law school curriculum as the product of Story and Langdell. But the second tradition survived.

The connections between the world of the Brahmins and the world of Harvard were close. The elite world had something to do with money—and thus our descriptions may stress money and connections and leave it at that—but money was often old money supplemented by gentlemanly professions. And sometimes, when the old money had disappeared somehow, the practice of the professions might become more urgent. But the Brahmin culture also had a great deal to do with achievement and service. It had a rich sense of individuality, responsibility, self-examination, which were all evident in the lives of Thayer and Gray. Their tradition of a broad understanding of legal education—contrary to Langdell—was evident after their deaths. From Karl Llewellyn’s writing and social science decades later, the various law and enterprises can be seen as continuations of the Brahmin intellectual curiosity, and willingness to pursue questions sometimes without the training which specialization and professionalization in the academy would come to emphasize.

The poet Archibald Macleish once said that insofar as he had a liberal education at all, he “owe[d] it to the Harvard Law School.” This discussion has attempted to suggest some reasons why he might have thought that.

202 Karl N. Llewellyn, Jurisprudence, Realism in Theory and Practice 375–79 (1962); see also Charles A. Reich, Toward the Humanistic Study of Law, 74 Yale L.J. 1402, 1402 (1965) (“Many of the ills of legal education are symptomatic of the fact that it is primarily professional in orientation, although it should also be preparing students for lives of public service and scholarship.”).

203 See Llewellyn, supra note 202 and accompanying text.