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The Geologic Strata of the Law School Curriculum

*Robert W. Gordon**

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* Chancellor Kent Professor of Law and Legal History, Yale University. Thanks to Nicole LeFrancois and Eric Tam for exceptionally helpful research assistance.

INTRODUCTION

The modest aim of this piece is to supply some historical background to the other contributions to this Symposium. The modern American law school curriculum is the product of a few but critical choices of design, some of them over a century old. In this Article, I seek to (1) outline how the basic structure and content of the modern American law school curriculum came into being and what were the main competitors that curriculum displaced; (2) describe some of the ways in which the curriculum's basic structure and content have changed since its inception; and (3) point to some of the main sources and motors of change.

I. ORIGINS OF THE BASIC STRUCTURE AND CONTENT OF THE MODERN AMERICAN LAW SCHOOL CURRICULUM

The American law school—in the basic shape we recognize it today—originated with the model of legal education that President Charles W. Eliot and Dean Christopher Columbus Langdell established at Harvard in 1870. At first, Harvard's model seemed as if it might fail: the school had lost enrollments and had to make its way against rival models and hostile critics. By 1900, however, Harvard's success was assured. Its example—sometimes transmitted by Harvard's own former faculty as pro-consular deans, such as William Keener at Columbia and Joseph Beale at Chicago—spread to other leading law schools between 1895 and 1925; and between 1925 and 1950 virtually every full-time university-based law school in the country had adopted the Harvard model's basic elements. This story of convergence on a uniform model is all the more remarkable when one considers that all of these law schools were preparing their students for a wide variety of roles and careers in the United States' highly stratified and segmented legal profession.

A. The Bedrock: The Harvard Template and Its Rivals

In the period of its adoption, Harvard's model was distinctive in both structure and content.¹

1. The best source on Harvard remains ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (providing a general history of law schools, and especially discussing the influence of Harvard Law School on the development of legal education). Much valuable additional material is in WILLIAM LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN LEGAL EDUCATION* (1994) (discussing the origins of modern American legal education, especially the influence of Christopher Columbus Langdell).

1. Structure

Harvard instituted a three-year curriculum of courses to be taken in a prescribed sequence, with all first-year and most second-year courses required, along with examinations in all courses and a high flunk-out rate for those who failed them. (This replaced the casual system in which students could casually drop in, attend a course of lectures, and then drop out.) Harvard also led the way to making law a post-graduate education by requiring (starting in 1895) a college B.A. as a precondition to admission. Finally, it replaced the usual cadre of law teachers of the time—part-time practitioners and retired judges—with full-time law professors. The professors were freed from the demands of practice—although some, such as James Barr Ames, had no practice experience to start with—and received salaries adequate to fund careers as scholars and teachers.

2. Content

Except for Criminal Law (a first-year required course) and Constitutional Law (a third-year elective), the Harvard curriculum was made up entirely of private-law subjects. From 1889 to 1890, for example, the required first-year curriculum consisted of Property, Contracts, Torts, Civil Procedure, and Criminal Law. During the second-year, students could choose five from among seven courses: Bills of Exchange and Promissory Notes, Quasi-Contracts, Evidence, Equity, Advanced Property, Sales, and Trusts. In the third-year, students could select five or six courses from among Agency, Constitutional Law, Equity Jurisdiction, Partnership and Corporations, Suretyship and Mortgages, Federal Jurisdiction, the Law of Persons, Conflicts, and Legal History.²

The Harvard brand eventually came to be largely identified with one of its innovations, the “case method”: Socratic inquiry directed at large classes of students primed with reading appellate cases, collected in “casebooks” edited by the faculty. Since Harvard aimed to be a national school, recruiting from and sending its graduates out to practice in every region, it taught (and by so doing hoped to help create) a generic “common law.” The cases were not confined to particular jurisdictions but drawn from many different states and the federal system, and in the early decades of casebook editions, most cases came from the “mother jurisdiction,” England.

2. HARVARD UNIVERSITY CATALOGUE, 1889-90: THE LAW SCHOOL, 191-92 (Cambridge, Charles W. Sever 1889). I have slightly altered the names of some courses to convey their content to the modern reader.

As the case method spread, it eventually displaced its chief rivals; namely, lecturing to students and calling upon them to “recite” their knowledge of passages from legal treatises. One of the reasons for the case method’s success (besides its evident pedagogic virtues—it encouraged active rather than passive learning, and it tested that learning through participation in dialogue as well as exams) was that published casebooks gave novice teachers a ready-made, off-the-rack set of teaching materials and method of instruction. Law professors rarely emerged from a background of scholarship; yet the casebooks ensured that they did not need to know their subject well—either to be learned in its literature or to be an expert in the principles underlying it—to make a successful start as a case law teacher. Another reason the case method succeeded was that it proved adaptable to many different approaches to law. Langdell himself wanted to use cases to illustrate the small number of basic “principles” underlying fields of doctrine: the casebooks would reveal the historical processes by which those principles had evolved to their modern forms and would also provide students the primary examples (“specimens”) through which they could induce the basic principles for themselves. But Langdell’s successors as case method teachers, even his own colleagues, rapidly abandoned the aims of using cases either to illustrate doctrinal history or to extrapolate principles, and instead treated the cases simply as means of exercising mental muscles and teaching legal reasoning—how to “think like a lawyer.”

By the 1920s and 1930s, Legal Realist law teachers used cases largely as storehouses of facts about disputes and treated the actual opinions (except for those of a handful of judge-heroes) as examples of unsatisfactory formalist analysis, prompting the students to craft context- and policy-based rationales that would provide better bases for decisions. This use of cases continues today.

B. The Chief Rivals of the Harvard School

The diffusion of casebooks and case method teaching also indirectly contributed to the triumph of the “pure law” private-law curriculum over the public-law, interdisciplinary, and theoretical approaches of Harvard’s chief rivals. These alternative curricula all resembled one another, in that their aims were to educate publicly minded lawyers as well as private practitioners—lawyer-statesmen and public civil servants capable of large-minded reasoning about issues of constitutional structure and legal policy, viewed in comparative and historical perspective. They all recognized the obvious fact that, in America, people trained as lawyers had tended to dominate high legislative and executive as well as judicial offices and

had played leading roles in civic affairs. The alternatives came in several varieties, with differing sources and content.

1. Education in Statesmanship

The first generation of American public-law curricula combined two models attractive to founding-era lawyer-statesmen and their immediate successors. The first model was designed for the lawyer as policy scientist, who modernizes the law to bring it into harmony with the needs of a liberal commercial society. This model was brilliantly developed in the eighteenth-century Scottish School of Jurisprudence, Moral Philosophy and Political Economy of Adam Smith, David Hume, and their colleagues, who called it the Science of the Legislator, or Science of Legislation.³ The second model was designed for a kindred but more ancient spirit: the liberal-humanist ideal of the Ciceronian orator-statesman, the fearlessly independent spokesman for republican liberty.⁴

Both models called for education in political economy, American and comparative constitutional government, the Law of Nature and of Nations, comparative law, and Roman law and legal history, as well as education in common law, equity, and pleading. Thomas Jefferson's notes on teaching law at Virginia, for example, proposed a curriculum of the "common and statute law, that of the chancery, the laws feudal, civil, mercatorial, maritime and of nature and nations; and also the principles of government and political economy."⁵ Although there was not much student demand for broad liberal legal education,⁶ over time its proponents produced a distinguished public-law literature, including the treatises of

3. See KNUD HAAKONSSON, *THE SCIENCE OF A LEGISLATOR* (1981) (analyzing Adam Smith's ideas about legal criticism and natural jurisprudence); DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* (1989) (discussing the history of the increasing importance of the law jurists' writing on common law and legislative policy in eighteenth-century Britain).

4. See Stephen Botein, *Cicero as a Role-Model for Early American Lawyers*, 73 *CLASSICAL J.* 313 (1978) (discussing Cicero's influence on New England lawyers during the Revolutionary period and after).

5. *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 231 (Richard Hofstadter & Wilson Smith eds., 1961).

6. Columbia's experience was typical: its original 1857 plan for a Jurisprudence curriculum included Modern History, Political Economy, Natural and International Law, and Civil and Common Law. By the following year it was clear that in order to attract any students the course would have to be pruned back to "those branches of Municipal Law, usually and appropriately pursued for obtaining a license to practice," with the hope that occasional lectures in the "kindred branches" or "superadded Studies" might be offered as an extra sweetener once the students had been drawn in. JULIUS GOEBEL, JR. ET AL., *A HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY* 28 (1955).

DuPonceau, St. George Tucker, Story, Sedgwick, Cooley, Dillon, Pomeroy, and Tiedemann, among others.

2. Law as Policy Science

Later in the century, innovators at American schools continued to look to Europe for curricular inspiration. The models were largely German (and sometimes French) schools of public administration. When Woodrow Wilson was asked to design a new law school for Princeton in 1890, he rejected the Harvard template, wanting

not a duplicate of those [law schools] already in full blast all over the country, but an institutional law school, so to speak, in which law shall be taught in its historical and philosophical aspects, critically rather than technically, and as if it had a literature besides a court record, close institutional connections as well as litigious niceties,—as it is taught in the better European universities.⁷

The Princeton school's first chair was to be in public law, which included Constitutional Law, Administrative Law, International Law, General Jurisprudence, History of Law, History of Legal Philosophy, Public Corporations, and Conflict of Laws.

The Princeton school never materialized, but its planned content was not unique. At Columbia, Francis Lieber and his successor John Burgess, both German-educated, also aimed to integrate the study of private law with public law and political science. Burgess founded the School of Political Science at Columbia in 1880, designed to train graduates for professional public service. He hoped to recruit law students to his program because he believed "*the lawyers are the rulers of the country.*"⁸ This plan failed when Deans Theodore Dwight and his successor, the Harvard-trained William Keener, refused to add courses like Administrative Law and Comparative Law to the regular law school curriculum; they insisted that they had to be either optional electives or part of a graduate program. Burgess's school became a graduate program for academics rather than a professional school, though many law students eventually cross-registered in its courses.⁹

7. Letter from Woodrow Wilson to Albert Shaw (Nov. 3, 1890), in *THE PAPERS OF WOODROW WILSON, 1890-1892*, at 63 (Arthur S. Link ed., 1969).

8. Alexa S. Bator, *Public Law and Legal Education in the Nineteenth Century: The Founding of Burgess' School of Political Economy at Columbia* (Fall 1996) (unpublished student paper, on file with the Yale Law Library) (emphasis in original).

9. On Columbia, see GOEBEL ET AL., *supra* note 6, at 85-89, 95-97, 167-68, for a discussion of the school's attempts to integrate non-traditional courses into the law student's curriculum. See also the illuminating paper by Bator, *supra* note 8.

3. "Social" Law and Progressive Economics

Burgess and Wilson turned out to be transitional figures. After 1900, the content of the alternative public-law curriculum was further transformed by new powerful intellectual currents and by legal changes on the ground. The most influential new ideas came from the "social law" movement. In Duncan Kennedy's excellent summary:

The inventors of the "social" include Jhering, Ehrlich, Gierke, Geny, Saleilles, Duguit, Lambert, Josserand, Gounot, Gurvitch, Pound, and Cardozo. They had in common with the Marxists that they interpreted the actual regime of the will theory [the individualist basis of "formalist" or "Classical" legal thought, that private law is designed to help individuals realize their freely-willed ends] as an epiphenomenon in relation to a "base," in the case of the Marxists, the capitalist economy, and in the case of the social, "society" conceived as an organism. The idea of both was that the will theory in some sense "suited" the socio-economic conditions of the first half of the nineteenth century. But the social people were anti-Marxist, just as much as they were anti-laissez faire. Their goal was to save Liberalism from itself.

Their basic idea was that the conditions of late nineteenth-century life represented a social transformation, consisting of urbanization, industrialization, organizational society, globalization of markets, all summarized in the idea of "interdependence." Because the will theory was individualist, it ignored interdependence and endorsed particular legal rules that permitted anti-social behavior of many kinds. The crises of the modern factory (industrial accidents) and the urban slum (pauperization), and later the crisis of the financial markets, all derived from the failure of coherently individualist law to respond to the coherently social needs of modern conditions of interdependence.

From this "is" analysis, they derived the "ought" of a reform program, one that was astonishingly successful and globalized even more effectively than classical legal thought, through many of the same mechanisms, but also because the social became the ideology of many third-world nationalist elites. There was labor legislation, the regulation of urban areas through landlord/tenant, sanitary, and zoning regimes, the regulation of financial markets, and the development of new institutions of international law. . . . Many advocates of the social argued that various groups within the emerging interdependent society, including, for example, merchant communities and labor unions, were developing new norms to fit the new "social needs." These norms, regarded as "valid" "living law," rather than deduction from individualist postulates, should, and also would, in this "legal pluralist" view, be the basis for legislative, administrative and judicial elaboration of new rules of state law.¹⁰

Another was the closely-related parallel development of a new Law and Economics rooted in the historical and comparative study of institutions. "Historical" or "institutional" legal-economists, most of them German, undertook to rationalize legal forms and institutions such as property, contracts, torts, and varieties of labor servitude, by reference to their economic functions and purposes, which varied over time and across societies. Like the "social" lawyers, they also had a

10. Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1034-35 (2004) (footnotes omitted).

normative program, which was the reform of dysfunctional or archaic law and its modernization to suit the needs of industrial society. Generally they thought this goal best accomplished by a mandarin of economically trained specialists—expert administrators or economically sophisticated judges. In the United States their ideas were taken up by an influential group of economists, such as Thorstein Veblen, John Commons, Richard T. Ely, and Walton H. Hamilton,¹¹ who supplied intellectual inspiration to the Progressive movement and whose ideas influenced reform-minded lawyers and law teachers.

Most important, as Kennedy notes, Progressive reformers—often educated in the new currents of European ideas and having observed or studied European experiments—were beginning to initiate statutory reforms in the service of social law visions: factory inspection, food and drug regulation, maximum hours labor laws, workers' compensation systems, railroad rate regulation, child labor abolition, resource conservation planning, public health regimes, "purity" crusades against the polluting effects of vice, alcohol and obscenity, progressive taxation of income, and many more. These reform efforts involved enacting new statutes, setting up new administrative agencies to administer them, and litigating to repel Constitutional challenges to the new statutes and judicial evisceration of regulatory regimes.

All these new intellectual approaches and concrete reform activities created large bodies of new law outside the Harvard canon of traditional subjects and raised questions of how or whether law schools, which for prestige reasons were one after another converting to the Harvard model, would be prepared to take them on board. Early signs were not promising. Probably the best-known story is that of the new University of Chicago, where the great German-born scholar Ernst Freund, the author of pioneering treatises on Legislation, Administrative Law and the Police Power,¹² had set up courses in Legislation, Administrative Law, Relation of State to Industry, Labor and Capital, and Railroad Regulation. In a famous episode, Harvard

11. The best work I have come across on the German historical school is HEATH PEARSON, *ORIGINS OF LAW AND ECONOMICS: THE ECONOMISTS' NEW SCIENCE OF LAW, 1830-1930* (1997) (analyzing the centrality of law in the literature of nineteenth-century historical and institutional economics). For the Americanized versions of their ideas, see Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 *STAN. L. REV.* 993 (1990).

12. ERNST FREUND, *STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS* (1917) (critiquing the way statutes are made); ERNST FREUND ET. AL., *THE GROWTH OF AMERICAN ADMINISTRATIVE LAW* (1923) (presenting a historical survey of American administrative law); ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904) (discussing the interplay between the police power and individual rights).

Dean Ames refused to allow his colleague Joseph H. Beale to go to Chicago as its new dean unless the school were purged of the “polluting presence” of Freund’s public law and policy courses, and until he had Chicago’s assurance that only “pure law” would be taught in the school.¹³ At the same time, Dean Ames strenuously resisted President Eliot’s attempts to create a track at Harvard’s own law school for students preparing for diplomatic or civil service careers, insisting that such courses belonged in a separate school of political science.¹⁴

Ironically then, just as Progressivism was beginning to provide careers and motivation for “social” lawyers, and as an ancillary discipline in institutional economics was starting to give their work intellectual content, the law schools were seized by internal reform movements that sought to expel or exclude all of those ideas as irrelevant to the study of “pure law.” By 1920, policy studies in law schools were even more peripheral than they had been in 1870, having been driven out by the Langdellian private-law case method curriculum. For as the Harvard model proliferated, it exiled or marginalized both the traditional and the newer (Progressive) alternative curricula, sending them off to separate departments or confining them to the law schools’ graduate programs. What the Harvard model tended to drive out was not only almost anything that smacked of public law (legislation or administration, law as part of a framework of government, international law), but also legal theory and jurisprudence, as well as anything that provided overviews, perspectives, or comparisons *about* law—courses in the “elements of law,” Roman law, comparative law, legal history, or the sociology of legal institutions or law-in-action. Looking back on this period, Karl Llewellyn recalled that when

[William A.] Keener was called to Columbia in 1890 to put that law school on a footing worthy of a great University he brought with him two policies: (1) “The” case – system . . . (2) All that noise which is not “law” must go out; a “law” curriculum must cast out Ishmael. . . . Columbia had therefore to amputate from any official “law”-connection what became the Department of Political Science. Thus the Roman Law Perspective of a Munroe Smith, the scholarship and vision of a [Frank J.] Goodnow [along with Freund one of the pioneers of American administrative law scholarship], the power and range of our greatest international lawyer, John Bassett Moore, flourished not within the law curriculum, nor for it, but across the barbarian border. . . . In 1915, when, already our foremost jurist, [Roscoe Pound] became Dean at Harvard Law School, he deliberately took his own Jurisprudence course *out of the undergraduate* [law

13. On this episode, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 47-59 (1982). On Freund’s work at Chicago generally, see Paul Carrington, *The Missionary Diocese of Chicago*, 44 J. LEGAL EDUC. 467 (1994).

14. Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise: 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 75 (Gerald Geison ed., 1983).

school] *curriculum*. He kept it out, lest the bulk of graduates be distracted – or contaminated.¹⁵

The single-minded reductionism of the Harvard missionaries needs some explanation, and the explanation is not what might appear to be the obvious one, that these proponents of the Harvard School were parochial and anti-intellectual philistines who thought anything that was not black-letter law must be bunk. They were certainly not this, but neither were they conservatives defending classical-individualist-private-law will theory from Progressive social lawyers. Indeed, the founding generation of Harvard scholars were among the most cosmopolitan and interdisciplinary scholars in America. The canonical curriculum and its casebooks—Contracts, Property, Torts, Civil Procedure—were the product of a transatlantic collaboration with English analytical jurists (William Anson, A.V. Dicey, Frederick Pollock, William Markby, T.E. Holland) who were determined to construct from the ruins of the collapsing forms of action a coherent science of substantive principles. This enterprise in turn borrowed heavily from European legal scholarship, using the categories of modernized Roman Law jurisprudence.¹⁶ Harvard professors including Ames, James Bradley Thayer, John Chipman Gray, Oliver Wendell Holmes, Jr., and Roscoe Pound all did pioneering work in legal history and theory. Gray's *Nature and Sources of the Law* (1909)¹⁷ is often credited with being one of the forerunners of the Legal Realist movement, and Pound was one of the luminaries of the "social law" movement, the prophet of "sociological jurisprudence," and the promoter of empirical "law-in-action" studies. In politics they were mostly Mugwumps or moderate Progressives, not laissez-faire constitutionalists; indeed Thayer and Holmes were the two foremost critics of aggressive judicial striking-down of statutes.

Part 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. The study of public law inevitably adulterated pure law with political science, economics, and history, and was thus to be avoided. Also, the public law subjects were politically controversial—professors could be fired for taking positions on railroad regulation, the "trust" problem,

15. KARL LLEWELLYN, *The Study of Law as a Liberal Art*, in JURISPRUDENCE 375, 377-78 (1962) (emphasis in original).

16. The best recent treatment of the English side of this enterprise is NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 185-283 (2004).

17. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909) (publishing a series of lectures given at Columbia University in the spring of 1908).

labor relations, or progressive taxation—issues the alumni and trustees thought too left-wing.

But mostly, I think, 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. The case method was just not suited to teaching about statutes or administrative agency actions (except as these might appear piecemeal in a case), or about the economics of rate-making or antitrust regulation, or about courts in relation to other governmental institutions, or empirical studies of law-in-action, or comparative, historical or theoretical perspectives on law.

II. STABILITY AND CHANGE WITHIN THE CORE: ADDITIONS AND INTERNAL TRANSFORMATIONS

A survey of catalogues over the twentieth century from six law schools¹⁸ confirms that, at least in its outward skeletal form, the Harvard-ized core curriculum has remained remarkably stable. The basic structure is the same: a three-year post-graduate course with regular examinations that is taught by a full time faculty and that uses the case method as the primary means of instruction.¹⁹ The required first-year courses are largely the same today as in 1871, except that beginning in the 1970s and 1980s many schools reduced them from full-year to one-term courses.

The Harvard curriculum has undergone two major kinds of change in the twentieth century. The first and most conspicuous change is in the proliferation of electives—and the elimination of most requirements—in the second and third years. The second and less obvious, but more profound, changes have taken place in the content of the canonical subjects.

18. The following generalizations about changes in course offerings are based on sampling of law school catalogues in four private (Harvard, Stanford, Vanderbilt, Yale) and two public (Michigan, Texas) university law schools at ten year intervals from 1890 to 1990. We (my research assistants and I) went through the samples looking for first appearances of new courses and for the appearance and disappearance of required courses. Had we had more time, we would have liked to sample a much wider range of schools, including more non-elite schools and the more experimental schools such as Chicago, Northeastern, Wisconsin, Buffalo, Antioch, and George Mason.

19. This needs some qualification, since virtually every law school now relies on a brigade of part-time adjuncts to do much of its teaching, especially in trial practice and the more specialized aspects of commercial practice.

A. Addition of Electives

Many of the public-law courses that had earlier been banished from the standard law school curriculum in the early years of Harvard's imperial spread found their way back into law school course catalogues in the form of elective course offerings. These subjects gradually crept back in to the law school curriculum, first as graduate courses, then as third-year electives. Courses in regulated industries—Insurance, Public Corporations, Railroad Law, etc. are prominent among these. After the New Deal, some of the statutory courses, such as Taxation, were promoted to the second-year and achieved the status of semi-required subjects. Constitutional Law also moved out of the third-year-elective outland to become a required subject in the second or even the first year. Some of the more experimental schools—frustrated with the continued privileging of common law in a legal system dominated by statutes and agencies—eventually moved public-law courses in Legislation, Administrative Law, or Statutory Analysis into the heartland of the required first-year. The earliest to do so were Yale and Columbia, which taught regulated industries courses (“Public Control of Business,” Yale called it) to first-year students in the 1930s, at the height of the New Deal. Despite the presence of Felix Frankfurter and James M. Landis, the leading Administrative Law scholars in the country, Harvard only moved its Administrative Law course out of the graduate program and into the undergraduate program after 1930. At the height of the New Deal Harvard added courses in Legislation, Taxation, Antitrust, and Regulatory Law; otherwise, its settled, and almost entirely required curriculum, was substantially unaffected by changing times. It was not until much later, in the 1980s, that several other schools, including Stanford, Georgetown, and Columbia (in a renewal), brought statutory-administrative courses into the required first-year curriculum.

Our six-school overview tells us (approximately²⁰) what types of new courses were added to the curriculum and when.²¹

1890: Insurance

1900: Regulated industries (public utilities, common carriers, public corporations, etc.)

1920: Administrative Law (at Harvard, still a graduate course until the 1930s)

1930: New Deal subjects: Anti-Trust, Federal Tax, Securities

1940: Labor Law, Family Law

1950: International Legal Studies, Comparative Law (e.g. Soviet Law), Legal Process

1960 (late): Poverty Law, Urban Law

1970: Clinics; Law & Economics; Race & Law; Women & Law; Free Speech, Civil Rights (as distinct courses); Environmental Law; Crime and Society

1980: Legal history; law-and-other-social sciences (anthropology, etc.); Children and the Law; Alternative Dispute Resolution

The patterns of change here are obvious enough. Most of the additions through the 1940s track the proliferation of regulatory statutes and agencies. The post-World War II curriculum also records the new interest in international law and institutions and other (especially rival) legal systems. The Warren Court, Rights Revolution, and Great Society bring with them bodies of law on civil rights of blacks and women, and poverty, cities and crime control. The New Social Regulation brings the Clean Air and Clean Water Act and environmental regulation generally.

20. As one might expect, there is some variation among the schools sampled. This summarizes the general pattern. The tables of data on which the summaries are based are on file with the Vanderbilt Law Review.

21. Some subjects dropped out of the curriculum: Equity (as a separate subject, though it reappears in general courses on Remedies), Quasi-Contract (which is folded into the general Contracts and Remedies courses), Mortgages, Suretyship, Bailments, Agency, and the Law of Persons (whose most important components were split off into Corporations and Family Law).

For the most, law schools seamlessly integrated these additions into dominant methods of teaching. Law schools taught the public-law subjects of the Progressive period, New Deal, and beyond as case method subjects. Legislation was a course in judicial interpretation of statutes. Administrative Law was a course in judicial review of administrative action. Even Federal Taxation was taught from books consisting mostly of appellate cases. The Legal Realists' attempt to import other social sciences into law ended up as a sort of temporary guest-worker program: Some social scientists were invited in, asked to perform modest ancillary tasks, then sent back home.²² "Cases on . . ." became "Cases and Materials on . . ." with the materials consisting of snippets of non-case descriptive matter.

Some of the added offerings, however, constituted genuine innovations. The most important additions were clinical programs, initially funded starting in 1968 by liberal grants from the Ford Foundation. After their expulsion early in the century, courses giving an overview of legal institutions and their functions also crept back into the curriculum. The most famous of these courses was Harvard's Legal Process course, which at the peak of its influence (1958-68) was taught in at least forty-six law schools across the country,²³ and whose ideas—in part perhaps because at the time the course was the *only* source of general reflections on the legal system anywhere in the law school classroom—had a pervasive effect on the law teachers, lawyers and judges exposed to it.

The 1970s marked a new beginning (after the truncated Realist experiments of the 1920s and 1930s) of the opening to other disciplines—what Richard Posner has called "the decline of law as an autonomous discipline"²⁴—especially to economics. This in turn led to a significant further "academicizing" of the law teaching profession, signaled by the elite schools' growing preference for new faculty with Ph.D.s in other fields as well as law degrees, and their discounting of practice experience.²⁵

22. The classic accounts of the truncated Realist experiments with integrating social sciences in the 1920s and 1930s are LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986) (describing the theories behind legal realism and the justifications given by its proponents during the legal realist movements at Yale and Columbia) and JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

23. William N. Eskridge, Jr. & Philip P. Frickey, *Historical and Critical Introduction*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* xi, cxiv n.284 (1994, republishing the 1958 Tentative Edition).

24. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761, 761 (1987).

25. For recent data on the backgrounds of law school hires, see, e.g., Lawrence Solum, *Legal Theory Blog*, May 17, 2006, http://lsolum.blogspot.com/archives/2006_05_01_lsolum_archive.html#114129865560132000.

B. Internal Transformations

As we might expect of a common-law-oriented system, curricular change has occurred largely through changes in the content of courses bearing the same names. To convey examples of how this has worked, I have tracked the evolution of two such courses—Constitutional Law and Torts—by examining some of the major casebooks in those fields.

1. Constitutional Law

Let us start with the first important book: Thayer's *Cases on Constitutional Law* (1895).²⁶ Thayer sets what will thereafter be the almost unvarying pattern by making the principal materials of his book cases decided by the U.S. Supreme Court. No better example of the distortions in emphasis caused by the case method could be imagined than one reducing the study of constitutions to the judicial branch, and to the work of one court at that. Still, to give him credit, Thayer begins with a section on constitutional structure, with emphasis on the emergence of the special role of the judiciary within that structure.²⁷ This section, called "Written Constitutions in the United States" begins with English background materials on colonial charters, includes passages from Locke and jurists' commentary as well as cases, and consists largely of early state cases on the scope and functions of judicial review. What follows is a section on "Making and Changing Written Constitutions," which deals extensively with state constitutions (including excerpts therefrom) as well as the federal constitution.²⁸ So far as I know, Thayer's is the last, as well as the first, Constitutional Law casebook to deal at any length with state constitutions and state-level judicial review.

Thayer's first substantive law section deals with Civil Rights and Citizenship.²⁹ Thayer (1831-1902) had lived through the Civil War, and the issues raised by slavery, secession and Reconstruction were still foremost in his mind. The section contains some of the major slavery cases, *State v. Mann*,³⁰ *Prigg v. Pennsylvania*,³¹ *Scott v.*

26. JAMES BRADLEY THAYER, *CASES ON CONSTITUTIONAL LAW: WITH NOTES* (1895).

27. *Id.* at 48. Two years earlier Thayer had published his path-breaking article on judicial review, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

28. THAYER, *supra* note 26, at 207.

29. *Id.* at 449.

30. *State v. Mann*, 13 N.C. (1 Dev.) 263 (1829).

31. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

Sandford,³² *Lemmon v. People*³³ (an 1860 New York case on a petition seeking to free slaves in transit through New York).³⁴ It also includes a prosecution under the Civil Rights Act of 1866 (*United States v. Rhodes*),³⁵ the *Slaughter-house Cases*,³⁶ *Bartemeyer v. Iowa* (an 1873 case claiming prosecution under state liquor law violated defendant's privileges and immunities),³⁷ *Strauder v. West Virginia*,³⁸ the *Civil Rights Cases*,³⁹ *People v. King* (an 1888 New York case upholding as valid exercise of the police power, against a Fourteenth Amendment challenge, state law prohibiting racial discrimination in places of public amusement),⁴⁰ and *Lehew v. Brummell*⁴¹ (an 1890 Missouri case upholding as valid exercise of police power state law requiring segregation by race in schools).⁴² It also contains several cases on the citizenship of aliens and Indians, *Hurtado v. California* (discussing the "due process" clause as protecting general rule-of-law values, and not precluding novel legislative experiments such as substitution of indictment by information for grand jury),⁴³ and a handful of cases in which businesses challenged regulations on Fourteenth Amendment grounds.⁴⁴ Thayer further includes sections on the major powers of government (the police power, eminent domain and taxation),⁴⁵ on restrictions on state government power (ex post facto laws, laws impairing contract, etc.),⁴⁶ a 500-page section on federal and state commerce powers,⁴⁷ and finally, sections on money and weights and measures, and powers to deal with war and insurrection.⁴⁸

For contrast, look at a casebook published twenty-two years later: Emlin McClain, *A Selection of Cases on Constitutional Law* (2d ed. 1909).⁴⁹ It contains large sections on what will become the primary topics of the field until the 1960s—federal taxation and commerce

32. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

33. *Lemmon v. People*, 20 N.Y. 562 (1860).

34. THAYER, *supra* note 26, at 473-96.

35. *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866).

36. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

37. *Bartemeyer v. Iowa*, 85 U.S. 129 (18 Wall.) (1873).

38. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

39. *Civil Rights Cases*, 109 U.S. 3 (1883).

40. *People v. King*, 18 N.E. 245 (N.Y. 1888).

41. *Lehew v. Brummell*, 15 S.W. 765 (Mo. 1891).

42. THAYER, *supra* note 26, at 406-574.

43. *Hurtado v. California*, 110 U.S. 516 (1884).

44. THAYER, *supra* note 26, at 575-620.

45. *Id.* at 693-1431.

46. *Id.* at 1433-1782.

47. *Id.* at 1783-2191.

48. *Id.* at 2192-2420.

49. EMLIN MCCLAIN, *A SELECTION OF CASES ON CONSTITUTIONAL LAW* (2d ed. 1909).

powers, as well as a big section on federal jurisdiction (later to be spun off into a separate course on Federal Jurisdiction or Federal Courts). To a modern reader's eye what is striking is that McClain includes nothing on slavery except *Robertson v. Baldwin* (an 1897 case regarding involuntary servitude of sailors).⁵⁰ Though *Lochner* has been decided, it only appears in the Appendix at the end.⁵¹ Under the "equal protection" heading, there is only one case (*Yick Wo v. Hopkins*, involving discrimination against the Chinese);⁵² on voting rights, also but one case (*Minor v. Happersett*, involving women's right to vote);⁵³ under the Fourteenth Amendment, no race cases at all save *United States v. Cruikshank*,⁵⁴ though the *Civil Rights Cases* make a cameo appearance in a footnote.⁵⁵ The great constitutional struggles that tore the nation apart and their aftermath in Reconstruction seem in this casebook to have dropped out of legal consciousness. Similarly, James Parker Hall's treatise, *Constitutional Law* (1923), gives one page each to the Thirteenth and Fifteenth Amendments.⁵⁶

The Harvard scholars, however, preserved some memory of the Good Old Cause. Eugene Wambaugh's *Selection of Cases on Constitutional Law* (four volumes, 1914-15)⁵⁷ is a successor to Thayer's book compiled by a Harvard colleague.⁵⁸ The longest section is on the Commerce Clause in Volume 4 (about 200 pages),⁵⁹ but Volume 2, though mostly about the Contracts Clause and Ex Post Facto Laws, has a twenty-page section on the Bill of Rights.⁶⁰ Volume 3 is almost entirely about the Fourteenth and Fifteenth Amendments, and it does include some slavery cases: *Scott v. Sandford*,⁶¹ then *Osborn v. Nicholson* (an 1872 case on postwar validity of note in consideration of sale of a slave),⁶² and *Robertson v. Baldwin*.⁶³ It also contains a 1905 peonage case, *Hodges v. United States* (discussing a white gang that prevents black laborers from reporting to work; no federal remedy).⁶⁴

50. *Id.* at 782; *Robertson v. Baldwin*, 165 U.S. 275 (1897).

51. MCCLAIN, *supra* note 49, at 1260; *Lochner v. New York*, 198 U.S. 45 (1905).

52. MCCLAIN, *supra* note 49, at 917; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

53. MCCLAIN, *supra* note 49, at 974; *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

54. MCCLAIN, *supra* note 49, at 35; *United States v. Cruikshank*, 92 U.S. 542 (1875).

55. MCCLAIN, *supra* note 49, at 37 n.1; *Civil Rights Cases*, 109 U.S. 3 (1883).

56. JAMES PARKER HALL, *CONSTITUTIONAL LAW* 56-57, 66 (1923).

57. EUGENE WAMBAUGH, *A SELECTION OF CASES ON CONSTITUTIONAL LAW VOLS. 1-4* (1914-15).

58. THAYER, *supra* note 26.

59. WAMBAUGH, *supra* note 57, at 83-282.

60. *Id.* at 206-26.

61. WAMBAUGH, *supra* note 57, at 491; *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

62. WAMBAUGH, *supra* note 57, at 506; *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872).

63. WAMBAUGH, *supra* note 57, at 509; *Robertson v. Baldwin*, 165 U.S. 275 (1897).

64. WAMBAUGH, *supra* note 57, at 516; *Hodges v. United States*, 203 U.S. 1 (1906).

Further, Volume 3 includes *Bailey v. Alabama* (criminalizing contract breach violates the Thirteenth Amendment);⁶⁵ as well as a few equal-protection cases: *Bradwell v. Illinois* (holding that women are not constitutionally entitled to admission to legal profession),⁶⁶ *Minor v. Happersett*,⁶⁷ *McReady v. Virginia* (holding that Indians not naturalized are not citizens),⁶⁸ *Presser v. Illinois* (a non-incorporated Second Amendment case),⁶⁹ a few due process cases, including *Hurtado v. California*⁷⁰ and *Twining v. New Jersey* (finding that privilege against self-incrimination is not so vital as to be essential element of constitutional due process).⁷¹ Wambaugh also includes a small section specifically on the Fourteenth Amendment and race discrimination: *United States v. Cruikshank*,⁷² *Strauder v. West Virginia*,⁷³ *Ex Parte Virginia*,⁷⁴ the *Civil Rights Cases*,⁷⁵ *Plessy v. Ferguson*,⁷⁶ but that is all. There is a separate section on the Fifteenth Amendment, but it only contains one case (*United States v. Reese*).⁷⁷

In the middle of what a later generation of lawyers was to call “the *Lochner* Era,” *Lochner* and cases like it—limiting state exercises of the police power—are actually given a very low profile in Wambaugh’s casebook.⁷⁸ By this time Fourteenth Amendment limits on the police power had earned their own section, but one whose cases seem chosen more to illustrate that legislatures have broad discretion to regulate and classify than that courts may stand in their way; for example, the section includes *Bartemeyer v. Iowa*⁷⁹ (again), *Barbier v. Connolly* (upholding fire regulations affecting laundries),⁸⁰ *Yick Wo v. Hopkins* (striking down discriminatory regulations of Chinese laundries),⁸¹ *Mugler v. Kansas* (upholding state destruction of distillers’ property),⁸² *Powell v. Pennsylvania* (upholding regulation of

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65. WAMBAUGH, *supra* note 57, at 520; *Bailey v. Alabama*, 219 U.S. 219 (1911).
 66. WAMBAUGH, *supra* note 57, at 537; *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).
 67. WAMBAUGH, *supra* note 57, at 541; *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).
 68. WAMBAUGH, *supra* note 57, at 547; *McCready v. Virginia*, 94 U.S. 391 (1877).
 69. WAMBAUGH, *supra* note 57, at 556; *Presser v. Illinois*, 116 U.S. 252 (1886).
 70. WAMBAUGH, *supra* note 57, at 587; *Hurtado v. California*, 110 U.S. 516 (1884).
 71. WAMBAUGH, *supra* note 57, at 608; *Twining v. New Jersey*, 211 U.S. 78 (1908).
 72. WAMBAUGH, *supra* note 57, at 617; *United States v. Cruikshank*, 92 U.S. 542 (1875).
 73. WAMBAUGH, *supra* note 57, at 623; *Strauder v. West Virginia*, 100 U.S. 303 (1879).
 74. WAMBAUGH, *supra* note 57, at 630; *Ex Parte Virginia*, 100 U.S. 339 (1880).
 75. WAMBAUGH, *supra* note 57, at 634; *Civil Rights Cases*, 109 U.S. 3 (1883).
 76. WAMBAUGH, *supra* note 57, at 645; *Plessy v. Ferguson*, 163 U.S. 537 (1896).
 77. WAMBAUGH, *supra* note 57, at 788; *United States v. Reese*, 92 U.S. 214 (1875).
 78. WAMBAUGH, *supra* note 57, at 701; *Lochner v. New York*, 198 U.S. 45 (1905).
 79. WAMBAUGH, *supra* note 57, at 651; *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873).
 80. WAMBAUGH, *supra* note 57, at 656; *Barbier v. Connolly*, 113 U.S. 27 (1884).
 81. WAMBAUGH, *supra* note 57, at 659; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
 82. WAMBAUGH, *supra* note 57, at 665; *Mugler v. Kansas*, 123 U.S. 623 (1887).

margarine),⁸³ some miscellaneous business regulation cases, *Holden v. Hardy* (upholding maximum hours for miners),⁸⁴ *Jacobson v. Massachusetts* (upholding compulsory vaccinations);⁸⁵ *Lochner v. New York* (striking down maximum hours for bakers),⁸⁶ but without the dissent by Justice Holmes that later becomes famous; *Noble State Bank v. Haskell* (holding that it is not a violation of due process for state to mandate that banks must contribute to a deposit insurance fund),⁸⁷ and *Jeffrey Manufacturing Co. v. Blagg* (holding that it is not a violation of due process for state to take away defense of contributory negligence in setting up workers' compensation system).⁸⁸ Finally, Wambaugh's Volume 4 consists entirely of federal tax and commerce power cases.⁸⁹

Noel T. Dowling, *Cases on American Constitutional Law* (1937), records a marked shift of emphasis at the height of the New Dealers' struggle with the Supreme Court over the constitutionality of their legislative initiatives. Dowling announces his intent to "build a course in American Constitutional Law on the major, but by no means exclusive, theme of the regulatory power of government, national and state; to make the course reflect particularly the re-examination of prior doctrines in the cases of recent years"⁹⁰ This book consists almost entirely of commerce and tax cases. The organization is as follows:

1. **Powers Delegated to the National Government** (regulation of commerce, taxing powers, dispose of property of the United States, treaties)⁹¹
2. **Powers of States** (over health, safety and security; commerce and revenue; discrimination against interstate commerce)⁹²
3. **Limitations on Powers:**⁹³
 - a. Due process
 - b. Procedure

83. WAMBAUGH, *supra* note 57, at 672; *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

84. WAMBAUGH, *supra* note 57, at 686; *Holden v. Hardy*, 169 U.S. 366 (1898).

85. WAMBAUGH, *supra* note 57, at 694; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

86. WAMBAUGH, *supra* note 57, at 701; *Lochner v. New York*, 198 U.S. 45 (1905).

87. WAMBAUGH, *supra* note 57, at 707; *Noble State Bank v. Haskell*, 219 U.S. 104 (1911).

88. WAMBAUGH, *supra* note 57, at 730; *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571 (1915).

89. WAMBAUGH, *supra* note 57.

90. NOEL T. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* vii (1937).

91. *Id.* at 116-392.

92. *Id.* at 393-588.

93. *Id.* at 589-1096.

- c. Substance—includes *Allgeyer v. Louisiana*,⁹⁴ *Coppage v. Kansas*,⁹⁵ *Meyer v. Nebraska*,⁹⁶ *Pierce v. Society of the Sisters*,⁹⁷ *West Coast Hotel Co. v. Parrish*⁹⁸
- d. Contracts clause
- e. Equal Protection Clause—includes *Strauder v. West Virginia*,⁹⁹ *Yick Wo v. Hopkins*,¹⁰⁰ *Civil Rights Cases*,¹⁰¹ miscellaneous business cases, and *Truax v. Corrigan*¹⁰²

What is left out, as usual, is as interesting as what is included. Slavery dropped out as a topic, as did most of the Reconstruction race cases. There are three free speech cases (*Gitlow v. New York*,¹⁰³ *De Jonge v. Oregon*¹⁰⁴ and *Near v. Minnesota*¹⁰⁵), but not the great Holmes dissent in *Abrams v. United States*¹⁰⁶ nor the Brandeis concurrence in *Whitney v. California*¹⁰⁷ that inspired the libertarian cases of the future. The Eighteenth Amendment and the whole Noble Experiment of Prohibition have left no traces here save a short note.¹⁰⁸ *Lochner v. New York*¹⁰⁹ and *Adkins v. Children's Hospital*,¹¹⁰ the maximum-hours and minimum-wage cases that most excited Progressive indignation, are missing altogether. The federal spending power, on which much of the New Deal's key legislation rested, is missing too.

By the time we reach Freund, Sutherland, Howe & Brown, *Constitutional Law, Cases and Other Materials* (2 vols., 1954), we see some major changes in the canon.¹¹¹ The book begins much like Thayer's, with a brief historical approach to judicial review and

94. *Id.* at 730; *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

95. DOWLING, *supra* note 90, at 736; *Coppage v. Kansas*, 236 U.S. 1 (1915).

96. DOWLING, *supra* note 90, at 790; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

97. DOWLING, *supra* note 90, at 798; *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).

98. DOWLING, *supra* note 90, at 752; *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

99. DOWLING, *supra* note 90, at 1039; *Strauder v. West Virginia*, 100 U.S. 303 (1879).

100. DOWLING, *supra* note 90, at 1053; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

101. DOWLING, *supra* note 90, at 589; *Civil Rights Cases*, 109 U.S. 3 (1883).

102. DOWLING, *supra* note 90, at 1039; *Truax v. Corrigan*, 257 U.S. 312 (1921) (holding that a state statute prohibiting an injunction against labor picketers deprived employer of his only substantial remedy to protect his property).

103. *Id.* at 799; *Gitlow v. New York*, 268 U.S. 652 (1925).

104. DOWLING, *supra* note 90, at 811; *De Jonge v. Oregon*, 299 U.S. 353 (1937).

105. DOWLING, *supra* note 90, at 817; *Near v. Minnesota*, 283 U.S. 697 (1931).

106. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

107. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J. concurring).

108. DOWLING, *supra* note 90, at 19 n.2.

109. *Lochner v. New York*, 198 U.S. 45 (1905).

110. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

111. PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK DEWOLFE HOWE & ERNEST J. BROWN, *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS VOLS. 1-2* (1954).

federalism.¹¹² The following section concerns distribution of power between the federal government and the states.¹¹³ This section, "National Power over the Economy," leads us from *United States v. E.C. Knight Co.* (finding there is no national power to apply antitrust laws to manufacturing)¹¹⁴ through the cases striking down New Deal legislation (*United States v. Butler*,¹¹⁵ *Carter v. Carter Coal Co.*¹¹⁶) to *Wickard v. Filburn*.¹¹⁷ Then follows a very long (250-page) section on state taxing powers.¹¹⁸ Volume 2 opens with "Liberty and Property."¹¹⁹ This volume includes substantial sections on the Civil War Amendments, civil rights,¹²⁰ and equal protection,¹²¹ which the decision in *Brown v. Board of Education*¹²² had brought into new prominence; on freedom of speech and religion (170 pages);¹²³ and on constitutionalized fair procedure, especially in criminal cases, but also including cases on legislative investigations, which had become salient in the Cold War Red Scare.¹²⁴ The final part deals with International and Military Relations.¹²⁵

Stone, Seidman, Sunstein & Tushnet's *Constitutional Law* (1986) registers the familiar canon of the present day.¹²⁶ Like Thayer and his successors, the book begins with "The Role of the Supreme Court in the Constitutional Scheme,"¹²⁷ *Marbury v. Madison*¹²⁸ and *McCulloch v. Maryland*,¹²⁹ and an overview section on the powers of the national Congress,¹³⁰ which takes us from the Marshall Court's nationalizing decisions through *United States v. E.C. Knight*¹³¹ and

112. *Id.* at 3-198.

113. *Id.* at 199-292.

114. *Id.* at 199; *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

115. FRUEND ET AL., *supra* note 111, at 233; *United States v. Butler*, 297 U.S. 1 (1936).

116. FRUEND ET AL., *supra* note 111, at 220; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

117. FRUEND ET AL., *supra* note 111, at 276; *Wickard v. Filburn*, 317 U.S. 111 (1942).

118. FRUEND ET AL., *supra* note 111, at 488-726. This section is a special interest of Professor Ernest Brown of Harvard, one of the casebook editors.

119. *Id.* at 729-1551.

120. *Id.* at 779-922.

121. *Id.* at 1470-1510.

122. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

123. FRUEND ET AL., *supra* note 111, at 1253-1469.

124. *Id.* at 924-1142. These cases were a special interest of Mark deWolfe Howe, another of the casebook's editors.

125. *Id.* at 1553-1750.

126. GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* (1986).

127. *Id.* at 1-114.

128. *Id.* at 18; *Marbury v. Madison*, 5 U.S. 137 (1803).

129. STONE ET AL., *supra* note 126, at 48; *McCulloch v. Maryland*, 17 U.S. 316 (1819).

130. STONE ET AL., *supra* note 126, at 115-248.

131. *Id.* at 139; *United States v. E.C. Knight*, 156 U.S. 1 (1895).

the great cases of the New Deal constitutional confrontation, to the post-Civil Rights Act cases expanding the commerce power to regulate discrimination by private actors (*Heart of Atlanta Motel v. United States*,¹³² etc.). The next part involves the traditional federal v. state powers over commerce cases, but is now only eight-six pages long.¹³³ There is then a new topic—"Distribution of National Powers" between the legislative and executive branches—with cases on the administrative state and foreign affairs.¹³⁴ A huge (255-page) part follows on Equality: the law of racial inequality from slavery through Reconstruction and Jim Crow to Brown to Northern desegregation cases; a large section on gender inequality; then another on alienage, and wealth.¹³⁵ The next part, entitled "Implied Fundamental Rights,"¹³⁶ connects the substantive due process cases of (what is now becoming generally known as) the "Lochner Era" with modern substantive due process cases from *Skinner v. Oklahoma*¹³⁷ through *Roe v. Wade*.¹³⁸ The next section dramatically illustrates how large a topic the First Amendment's speech and religion clauses has become: it consumes 500 pages.¹³⁹ The book concludes with a part on the Contracts and Takings Clauses.¹⁴⁰

Our final exhibit is Brest, Levinson, Balkin & Amar's *Processes of Constitutional Decisionmaking* (4th ed., 2000).¹⁴¹ All the books we have examined from Thayer onwards contained introductory historical sections, but this book moves history from the prelude to the center of the story: it thoroughly historicizes the subject. The editors are explicit about why they do this: they wish to relativize the present by showing that "notions of what constitutes a good or persuasive constitutional argument have changed and will continue to change over time," as have methods of interpretation such as textualism and originalism; they want to teach that changes in constitutional law are "deeply connected to changes in political and social life;" and they seek to make a moral point, that the acceptability of an argument or position to the legal establishment of an age does not certify its moral

132. STONE ET AL., *supra* note 126, at 187; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

133. STONE ET AL., *supra* note 126, at 249-338.

134. *Id.* at 339-434.

135. *Id.* at 435-690.

136. *Id.* at 691-924.

137. *Id.* at 751; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

138. STONE ET AL., *supra* note 126, at 854; *Roe v. Wade*, 410 U.S. 113 (1973).

139. STONE ET AL., *supra* note 126, at 925-1426.

140. *Id.* at 1427-66.

141. PAUL BREST, STANFORD LEVINSON, J.M.BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (4th ed. 2000).

worth or dispense with the need for independent critical judgment, as is illustrated by generations of well-trained and conscientious lawyers' participation in a system of laws upholding slavery.¹⁴² True to its promise, the book opens with a 400-page historical section. This section contains chapters on the Bank of the United States (as a case study), the Marshall Court, the Taney Court and the Civil War, and Reconstruction to the New Deal (which is split evenly between the law of race relations and the "Heyday of Judicial Activism" in the regulation of economic activity—of which *Lochner v. New York*¹⁴³ is the leading illustration).¹⁴⁴ The book then moves on to "Constitutional Adjudication in the Modern World."¹⁴⁵ It opens with a (now rather short) chapter on economic regulation and the commerce clause. The large chapters here are "The Burden of History: The Constitutional Treatment of Race—Brown in the Light of Reconstruction," Gender Equality (which now has a chapter of its own), Implied Fundamental Rights, and The Constitution and the Welfare State (dealing largely with new-property rights and the constitutionality of conditions on spending).

Interestingly, some topics have disappeared. The constitutional law of free speech and religion, of criminal procedure, and of federal jurisdiction have become topics so large as to have been broken off and made into separate courses. The Takings Clause is mostly covered these days in Property courses. As for the wheelhorses of the old-style, pre-1970s Constitutional Law course—the large volume of cases on state taxing powers and the commerce clause—they seem to have vanished into the void.

2. Torts

Tracing changes in the Torts canon takes up much less space, because the primary lines of the story are linear and easily summarized. The first casebooks, like James Barr Ames, *Select Cases on Torts* (1874), are entirely devoted to intentional torts: assault, battery, imprisonment, trespass to real and personal property, trespass on servants (actions like those for enticing away an employee, or alienating a wife's affections), justifications or excuses for trespasses, conversion and defamation.¹⁴⁶ Ames's cases are almost all English. Twenty-odd years after he published the first edition of his

142. *Id.* at xxxi-xxxii.

143. *Id.* at 337; *Lochner v. New York*, 198 U.S. 45 (1905).

144. BREST ET AL., *supra* note 141, at 1-400.

145. *Id.* at 401-1604.

146. JAMES BARR AMES, *SELECT CASES ON TORTS* (1874).

text, Ames re-worked the casebook with his colleague Jeremiah Smith to form *A Selection of Cases on the Law of Torts* (2d ed., two vols. 1893-1900).¹⁴⁷ Volume 1 is much the same as the first edition, though it adds a new intentional tort—malicious prosecution.¹⁴⁸ The innovation comes in Volume 2, which introduces both a section on negligence—standards of care, legal cause, contributory negligence—and a section including a small category of strict liability torts (extra-hazardous occupations, liability of animal owners, etc.).¹⁴⁹ It also adds chapters on the torts of deceit and wrongful death, on private damage from public nuisance, on immunities of certain officers, and on joint and several liability.¹⁵⁰ The cases are still predominantly English, but with a healthy mixture of recent American state cases.

From then on the pattern of evolution is clear. Negligence rapidly expands (to 374 pages in Pound's 1919 Torts casebook;¹⁵¹ to almost 400 pages in Bohlen's of 1925¹⁵²), while the intentional torts shrink (to 146 pages in Bohlen;¹⁵³ a mere twenty-seven pages in Pound¹⁵⁴); meanwhile the strict liability ("liability without fault," or "unintended non-negligent interference") category becomes a significant separate topic (100 pages in Pound;¹⁵⁵ eight-six pages in Bohlen).¹⁵⁶ The torts of deceit, malicious prosecution, defamation, and interference with contractual relations, still take up half of these books.¹⁵⁷ By the time we reach Shulman & James (1952),¹⁵⁸ negligence is the primary topic,¹⁵⁹ misrepresentation,¹⁶⁰ defamation¹⁶¹ and assault and battery¹⁶² have been moved to the back of the book, and there is a new category, "Suppliers of Goods and Remote Contracts"¹⁶³ that will, of course, become products liability. Shulman and James' other

147. JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* VOLS. 1-2 (2d ed. 1893-1900).

148. *Id.* at 550-594.

149. *Id.* at 139-433.

150. *Id.* at 434-570, 581-727.

151. ROSCOE POUND, *A SELECTION OF CASES ON THE LAW OF TORTS* 38-412 (1919).

152. FRANCIS H. BOHLEN, *CASES ON THE LAW OF TORTS* 190-347, 531-619 (2d ed. 1925).

153. *Id.* at 33-172.

154. POUND, *supra* note 151, at 10-27.

155. *Id.* at 413-512.

156. BOHLEN, *supra* note 152, at 620-706.

157. *Id.* at 707-1128; POUND, *supra* note 151, at 530-1022.

158. HARRY SHULMAN & FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS* (2d ed. 1952).

159. *Id.* at 1-451.

160. *Id.* at 824-97.

161. *Id.* at 898-1035.

162. *Id.* at 1036-84.

163. *Id.* at 718-823.

innovations include a section on damages (property, personal injury, death, loss of “relative rights”)¹⁶⁴ and—a reflection of the Yale authors’ immersion in legal realism and its institutional and empirical studies—a chapter called “Motor Vehicles—The Quest for a Financially Responsible Defendant,”¹⁶⁵ which, as the name suggests, is a discussion of policy alternatives to the tort system for automobile accidents.

Franklin & Rabin continue and expand on these tendencies in their revealingly titled *Tort Law and Alternatives* (1996 edition),¹⁶⁶ which again starts with negligence¹⁶⁷, leaves intentional torts to the back of the book, contains separate sections on strict liability¹⁶⁸ and products liability¹⁶⁹, and has two institutional chapters: one on damages and insurance¹⁷⁰, the other a survey of alternatives to the tort system¹⁷¹ (notably workers’ compensation and no-fault auto accident schemes). The book also has a twenty-page section on the economics of torts.¹⁷²

Two outliers whose schemata do not quite fit the regular pattern are worth an extra comment here, as they illustrate some roads not taken. The first is the great Evidence scholar John Henry Wigmore’s Torts casebook of 1912.¹⁷³ Wigmore’s book starts out by dividing duties into voluntary and involuntary; thence into “recusable” duties (contracts) and “irrecusable” duties (torts, quasi-contract); and comments on the “chariness” of the Anglo-American tradition in imposing irrecusable duties.¹⁷⁴ It organizes the subject of duties into three “elements:” (1) the “damage element”, (2) the “responsibility element”, and (3) excuses and justifications.¹⁷⁵ The “damage element” turns out not to be about damages as such, though it does have sections on pain and suffering, non-economic damage, wrongful death, loss of consortium, and so forth; rather, it is about the varieties of harms against which tort law provides a cause of action, and the types of interests it protects.¹⁷⁶ (Note that it anticipates by some twenty-five

164. *Id.* at 452-519.

165. *Id.* at 654-98.

166. MARC FRANKLIN & ROBERT RABIN, *TORT LAW AND ALTERNATIVES* (6th ed. 1996).

167. *Id.* at 31-505.

168. *Id.* at 506-49.

169. *Id.* at 550-668.

170. *Id.* at 698-806.

171. *Id.* at 807-83.

172. *Id.* at 529-49.

173. JOHN HENRY WIGMORE, *SELECT CASES ON THE LAW OF TORTS: WITH NOTES, AND A SUMMARY OF PRINCIPLES* VOLS. 1-2 (1912).

174. *Id.* at 6-7.

175. *Id.* at 8-10.

176. *Id.* at 8-9.

years Lon Fuller's famous re-analysis of contract law as protecting distinct types of interests—expectation, reliance, restitution—through its remedies in damages.¹⁷⁷) Wigmore here analyzes statutory as well as common law actions. Under the second element, responsibility, Wigmore covers the theory that justifies holding the defendant liable for the harm by including in this section both causation and the culpability of defendant's conduct (intentional, negligent, or acting "at peril").¹⁷⁸ The third element of excuse and justification classifies defenses, excuses and privileges into such types as excuses based on the plaintiff's own conduct (e.g. self-defense, contributory negligence, defense, consent, plaintiff a law-breaker)¹⁷⁹ and various general policies—"excuses based on paramount community interests necessitating the plaintiff's sacrifice,"¹⁸⁰ "policies seeking justification in the necessities for . . . economic improvements . . . [for] free social rivalries . . . [for] equality of opportunity in the acquisition of a tradal reputation . . . [for] free discussion and criticism of character and conduct . . . ,"¹⁸¹ [and for] "free resort to courts by parties for the vindication of rights"; etc."¹⁸² Most striking about this book is its explicitly theoretical plan of organization, its extensive use of non-case materials (many excerpts from such writers as Machiavelli, Herbert Spencer, Burke, Brougham, Lieber, Bentham, Macaulay, Tocqueville), its attention to comparative law, and its treatment of statutory materials as on par with common law as a proper subject of legal theory. Wigmore, in short, organizes the field by generalizing the broad policies served by the rules. Legal education, I think, would have developed very differently had it evolved along the paths blazed by Wigmore.¹⁸³

The other outlier is Leon Green's casebook of 1939: *The Judicial Process in Tort Cases*.¹⁸⁴ Green was a leading legal realist who believed that general doctrinal concepts (such as "due care,"

177. Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936) (discussing the purpose of awarding contract damages, especially the reliance interest).

178. WIGMORE, *supra* note 173, at 9.

179. *Id.* at 2-186.

180. *Id.* at 255-93.

181. *Id.* at 294-547.

182. *Id.* at 548-613.

183. In a remarkably prescient and comprehensive review of the curriculum in 1916, Wigmore identified six important processes of thought to be learned from the study of law and concluded that the case-method curriculum imparted only one of them, the "analytic" mode. The other processes, to which he urged more attention in a fundamental revision of the curriculum, were: the "historical," the "legislative," the "synthetic" (i.e., systematic legal theory), the "comparative," and the "operative" (the study of law-in-action). John H. Wigmore, *Novus Methodus Discendae Docendaeque Jurisprudentiae*, 30 HARV. L. REV. 812, 822-27 (1916).

184. LEON GREEN, *THE JUDICIAL PROCESS IN TORT CASES* (2d. ed. 1939).

“proximate cause,” and the like) were useless for describing actual results of cases. Results were likely to vary with particularities of context; for example, tort law for railroads was not the same as tort law for hospitals. After a brief introductory chapter on general concepts, Green breaks the field down into contexts and relations: “Threats, Insults, Blows, etc.,” “Physicians, Surgeons, Hospitals;” “Occupancy and Ownership of Land;” “Public Service Companies;” “Counties, Towns, Cities, Boards;” “Manufacturers, Dealers;” “Traffic and Transport [subdivided in turn into Railway, Auto, Passengers, etc.]”.¹⁸⁵ This approach had the great virtue of encouraging the reader-student to appreciate the importance of social context to applications of law. But unlike Wigmore, it did not give the student the resources to make comparisons of policies across contexts or to identify larger background factors at work.

III. REFLECTIONS: THE MOTORS OF CURRICULAR CHANGE

What can we learn from this story of additions and internal transformations about what causes curricular change? It is obvious that topicality—the salience of a field of law in the world outside the school, the legal system (especially the courts) and the profession, politics and the press—is going to force curricular planners and casebook writers to pay attention to some subjects, and the lack of topicality will doom other topics to extinction. Look at the list of additions above: clearly it tracks pretty closely the changes in the social world that at the time were thought important and which attracted a great deal of attention. Thus, poverty law and urban law became big topics in the 1960s and 1970s. Poor people and cities are hardly less important now than then, nor their situations less dire; but they are no longer in fashion. In 1895, Thayer was still thinking about slavery, the Civil War, and the plight of the Negro. By the early twentieth century, when lynching, Jim Crow, and disenfranchisement effectively maintained a racial caste system, the authors of Constitutional Law books paid no attention to what was happening under their noses. Their attention revived of course when the NAACP legal activists, the courts, and the civil rights movements of the Second Reconstruction changed the rules of the game. The Warren Court and Civil Rights statutes not only brought civil rights back into the curriculum, but refocused attention on its pre-history: slavery, the Reconstruction amendments and legislation, and Redemption. For example, *Plessy v. Ferguson*, an entirely unremarkable case at the time of its decision, became a centerpiece of the canon once *Brown v.*

185. *Id.* at 5-1154.

Board of Education overruled it. Similarly, *Lochner v. New York*, apparently not much of a landmark to the law teachers who lived through it, came to symbolize to the generations of post-Progressive-New Deal lawyers the paradigm case of an era of judicial overreaching. It is quite clear that Constitutional Law casebooks, in their next editions, will contain large sections on Executive Powers in emergencies and wartime, while Labor Law is likely to continue its long slide into oblivion. All courses, one hopes and expects, will be larded with healthy international components as transactions and their regulation are globalized.

Simple topicality, however, is not enough to explain how a subject gets into the canon. Topicality is always naturally filtered through the perceptual lenses and conceptual preoccupations and agendas of legal academics. These, it is hardly necessary to point out, do not always track very closely those of the practicing profession. In 1900, for example, tort law was undergoing what one would not exaggerate to call a revolution; the massive toll of death and injury from industrial, railroad, and street railroad accidents met up with an immigrant bar of plaintiff's lawyers, and the result was the explosion on state court dockets of personal-injury accident suits.¹⁸⁶ As we have seen, these made virtually no impression at the time on Ames & Smith, who had other fish to fry, and plenty of English cases on intentional torts with which to fry them. Even after accident law muscled its way into torts books under the conceptual rubric of negligence, it left out entire fields employing many practitioners—Federal Employer Liability Act lawsuits and workers' compensation, to mention only two. For all tort lawyers and their clients—defendants as well as plaintiffs—the components and calculation of damage awards is a matter of brute survival, but this topic hardly registers in torts books until recent years, because there is not enough theory about damages to make it interesting. It becomes interesting when economic thinking infiltrates legal thinking, because economics reorients the whole field around the bottom line as the touchstone of efficient liability rules.

186. On the rise of personal-injury law, see RANDOLPH BERGSTROM, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910* (1992) (discussing turn-of-the-century Americans' changing response to the danger of accidental injury as an indicator of how society governs itself); EDWARD A. PURCELL JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992) (analyzing the sociolegal process of disputing, settling and litigating claims involving disputes between individual plaintiffs and national corporations); JOHN WITT, *THE ACCIDENTAL REPUBLIC* 59-63 (2004); and Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351 (analyzing personal injury actions in the Superior Court of Alameda County, California, and from the federal district court for Northern California from 1880 to 1900).

So internal intellectual change—changes in theory—must account for a good deal of curricular change, though I would guess for more of the internal transformations than the additions. (Many of the additions, I can testify from personal experience, come in because of student pressure to have them taught.) Internal change of course is not independent of external influence: consider the money the Ford Foundation spent on clinics and the much larger sums the Olin Foundation poured into hiring Law & Economics teachers.¹⁸⁷

The main entry point for theoretical change, however, is law teachers' receptivity to outside disciplines, and even more important, their ability to assimilate them into conventional ways of legal thinking. Nineteenth-century jurists successfully re-organized the common law subjects into substantive-law categories imported from the modernized Roman Law of the continent. Twentieth-century jurists in turn converted classical private-law into instrumental policy analysis by assimilating the approaches of the "social law" movements. The Realists' attempt to integrate law and empirical social science, as Schlegel has shown, were less successful, though they left permanent traces in the marginalia—the "Materials," notes, and back-of-the-book chapters—of casebooks. Of the modern interdisciplinary movements, Law and Economics has made the most impact, partly I think because much of its style of thinking was already latent, albeit in much less rigorous form, in the types of policy analysis bequeathed by social law and legal realism; it gave lawyers a more rigorous method of doing what they did already. Once it secured a beachhead, economic theory has marched on to reorganize entire fields, especially corporate law.¹⁸⁸ History has yet to have the scope and depth of impact of economics, but in some fields, notably Constitutional Law as we have seen, its influence has been pervasive and profound.

Interdisciplinary approaches have, however, affected scholarship more than teaching, because traditional teaching materials, and especially the case method, continue to act as a brake on innovation. One can see the braking effect in the brief survey, above, of casebooks in two fields. To be sure, the choice of Torts and Constitutional Law as examples probably somewhat underestimates changes in teaching methods and approaches. Torts remains wedded

187. Robert Cooter, Address at the Vanderbilt University Law School Symposium: What is Law and Economics? Why did it Succeed? (Apr. 28-29, 2006). Other examples would be the funding of international legal studies by the government and Ford Foundation in the 1950s and of Law & Society studies by the Russell Sage Foundation in the 1950s.

188. Roberta Romano has recently told at length the fascinating story of how the insights of economists and lawyer economists have colonized and reorganized Corporations as a legal field. See Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342 (2005).

to cases and the case method partly because its status as a required first-year course, in a curriculum committed to using the first year to teach common law thinking. Constitutional Law, as we have seen, early chose as its subject the cases decided by the Supreme Court. In other subjects like Evidence and Business Transactions, where cases have always been a clumsy method of teaching legal fields whose practice is far removed from the appellate bench, "problem" methods and "planning" methods have for some time been displacing the cases in instructional materials.

Moreover, even the more traditional courses are showing signs of restlessness with their case law origins. The tendencies in torts books to include more materials on statutory changes and alternative institutional forms is likely to gather steam as "tort reform" shifts more business out of courts. The new scholarship on "the Constitution outside the courts," stressing the role of social movements, interest groups, ideological change, and political alliances in making constitutional law, is likely to favor the Brest, Levinson et al. book's example of bringing in more historical and extra-legal context. The proliferation of books in the *Law Stories* series (building on earlier work of Richard Danzig and A.W. Brian Simpson¹⁸⁹) providing context and background to leading cases is a move in the same direction.

Still, I expect that the case method will continue to dominate our teaching and teaching materials for some time to come. It works pretty well within its limited range; students are very attached to it and tend to grumble and revolt if teachers stray too far from it; only clinical instruction, with its thrilling combination of real-world clients and close supervision and guidance, seems to engage students more. Curricular innovators likely then must focus their attention on developing casebooks with new kinds of cases, more like the Harvard Business School cases, situating lawyers and clients and decision makers in the broader social and institutional contexts of their work.

A final note: one factor in curricular change that is invisible to the reader of catalogues and casebooks, but nonetheless of paramount importance, is the presence on a law faculty of a critical cabal who are willing to band together and take the time to rethink traditional subjects and prepare new course materials. This was the indispensable condition for what still looks like the most ambitious curricular innovations since the initial Harvard reforms: the Legal Realists' Columbia experiments of the 1920s and the Yale experiments

189. See RICHARD DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES* (1978); A.W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* (1995).

of the 1930s.¹⁹⁰ It also helps to explain why some of the boldest experiments tend to be transitory: the pioneers lose energy and interest, or are diverted to other things (as the Yale faculty, for example, were by the New Deal). The reforms that Dean Edward L. Rubin and his colleagues are planning for Vanderbilt, which sound both sensible and highly imaginative, will in the last instance rise or fall on the faculty's energy and commitment, as well as on factors beyond anyone's control, such as whether they will take among students, alumni, practitioners and the wider world beyond. I hope they succeed.

190. On these, see KALMAN and SCHLEGEL, *supra* note 22.