SPECIAL CONTRIBUTION
THE CARL VINSON LECTURE

Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years

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I. THE BEGINNINGS OF UNIVERSITY LAW TEACHING IN AMERICA, 1779-1819

A. Jefferson's Idea

University legal education in America was initiated by Thomas Jefferson. As Governor of Virginia in 1779, he caused the board of trustees of the College of William and Mary to create a professorship of law and politics.1 He also caused the board to appoint to that professorship his own law teacher, George Wythe.

Jefferson's stated purpose was to teach law as a means of moral education. The aim was to inculcate republican virtue, those traits needed by

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1. The story is told in Adams, The College of William and Mary 37 (1887).
public men to evoke public trust in public institutions. That aim had been defined as the primary problem of republican governance by Montesquieu in his work, *The Spirit of Laws*, which was the most influential book published in the eighteenth century, and the book most widely read by the generation of Americans that declared independence, fought the Revolutionary War, and drafted the Constitution of the United States. Montesquieu had supposed that this educational task was one to be performed by the republican family; Jefferson instead proposed that it be performed by the institutions of higher education. Jefferson was fully aware that most of the colleges in America, few and small as they were, had been founded to develop a class of men from whom a native clergy might be selected. It was his plan to use these institutions to develop a secular clergy.

Jefferson did not think that higher learning was necessary or desirable as a tool of trade. Neither for that matter did he believe in the apprenticeship system. He favored a substantially open bar, and recommended to young persons that they prepare to deliver legal services by means of a sustained period of private reading, and by travel.

Jefferson also had no interest in academic law as a purely intellectual pursuit. He had himself worked very hard at law study, and had even taught himself Anglo-Saxon in order to study early Saxon law. But he thought academic philosophy to be useless, and his approach to law was pragmatic and instrumentalist.

Jefferson's aim therefore was to establish university legal education as a public service, as a means of securing the integrity of public institutions.

**B. Law Teaching at William & Mary**

George Wythe was certainly the right man for the job. A person of great learning and intelligence, he was also a man of exceptional integrity,

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2. *L'Esprit Des Lois* was published in France in 1848, and in England as *The Spirit of Laws* in 1750 (T. Nugent trans.). A recent compendium has been edited by D. Carrithers in 1977.

3. See generally P. Spurlin, *Montesquieu in America*, 1760-1801 (2d ed. 1969). Jefferson wrote to one of his many law student correspondents that *The Spirit of Laws* was the best book on the science of government: "It contains, indeed a great number of political truths but also an equal number of heresies: so that the reader must be constantly on his guard." 3 *Writings of Thomas Jefferson* 45 (to T. M. Randolph, May 30, 1790). For decades, Jefferson urged that there be an American revision of *The Spirit of Laws*.


5. "It is lost time to attend lectures on moral philosophy. State a moral case to a ploughman or a professor. The former will decide it as well and often better than the latter, because he has not been led astray by artificial rules." Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787) 12 *Papers Of Thomas Jefferson* 14 (J. Boyd ed. 1955).
known especially for his ability to make disinterested decisions in his capacity as a judge. Wythe had already taught law to some young men as apprentices in his office. He taught at William & Mary for eleven years, and he taught a few more young men in his judicial chambers in Richmond in the last years of his life.

Jefferson had been among his first students. John Marshall was in his first class at William & Mary. Henry Clay was among his last students, studying in Wythe's chambers in Richmond. Jefferson and Clay, particularly, were deeply influenced by Wythe. To estimate the importance to America of the careers of these three students is not possible; it is simply unimaginable that America could have survived its first century without them. Indeed, the country would today be a materially lessened place had it been without the services of any one of them.

Wythe's teaching at William & Mary was, as Jefferson planned, preparation for public life. His lectures encompassed the topics also covered in Blackstone's Commentaries, but attended especially to the Virginia Constitution and led his students as well into the literature of the field then known as Political Economy. The program also featured regular moot courts and regular fortnightly meetings of a moot legislature, all presided over by Professor Wythe. The public issues of the day were regularly debated with and among the students of these moot legislative sessions. Wythe was himself well known to his students as a partisan of emancipation. Wythe's students were not passive vessels, but were required to participate actively in the proceedings. They were, moreover, encouraged to expand their intellectual horizons as broadly as possible, especially in the classics. Wythe himself was much given to citing Horace.

When Wythe left William & Mary in 1790, he was succeeded by St. George Tucker, who bore many resemblances to Wythe. It was Tucker who edited the Americanized version of Blackstone that became the basic book of American law practice for several decades. He, too, engaged his students in public affairs, and developed a plan for the gradual abolition of slavery in Virginia that was published in 1797. Tucker, like Wythe, was himself a very able and disciplined judge.

The program at William & Mary was maintained very much in the form established by Wythe. Every professor of law at the college until 1851 was a sitting judge with an excellent reputation for personal integrity and disinterestedness in his judicial conduct.

The college was not alone in teaching law to prepare young men for the role of republican leadership. Other institutions that made contempora-

7. The story is told most fully in *Brown, American Aristides* 205 (1981); *see generally 2 Beveridge, Life of John Marshall* (1919).
neous efforts animated by the same idea included Brown, Yale, Dartmouth, Middlebury, Vermont, Columbia, Princeton, Pennsylvania, Maryland, Virginia, Transylvania, North Carolina, South Carolina, and Georgia. This included almost every institution of higher learning in America before 1812, with the one notable exception of Harvard. But until about 1820, the program at William & Mary was the most successful program, and it was an important institution until the college closed in 1860 on account of the Civil War.

C. The General State of American Higher Education in Law, 1779-1860

In truth, however, little success was enjoyed by higher education in America prior to the Civil War. There were few students, and these tended to be very young, immature, and unruly. Law teaching was among the many activities that most colleges were not doing very well.

But Jefferson's idea survived. True, by 1820, few Americans read Montesquieu, and funds for any educational purpose were very scarce. Nevertheless, the impulse of many American institutions of higher learning to provide intellectual and moral nurture for future leaders of the republic remained.

The teaching of public law continued to be the means of responding to the impulse to serve public institutions. As Thomas Paine had foretold, law had indeed become the American king, and the elite of the legal profession its nobility. Institutions aspiring to importance in this culture had reason not to distance themselves from the hierarchies of the law.

In addition, the rise of public education, and particularly of public universities, gave additional impetus to the teaching of law, for these public educational institutions were obliged to justify their existences with demonstrable service to the public. Public support for these efforts came, if at all, in the form of an exemption from licensing examinations or other requirements of admission to the bar for those persons who had studied in a university program in law.

There was but one program of higher education in law that enjoyed genuine success in the antebellum years. That program was an intellec-


11. See generally A. Reed, Training for the Public Profession of the Law (1976). Reed describes this “diploma privilege” as a form of political favoritism. This it was, but it was not an irrational or corrupt favoritism, but a manifestation of a legislative judgment that university law teaching had a benign effect on important public institutions. Id. at 246-53.
tual offspring of William & Mary, the law department of Transylvania University in Lexington, Kentucky.

II. THE BEGINNINGS, 1799-1818

A. Founding of the University

At the time of the Revolution, Kentucky was a sparsely settled county of Virginia. Efforts were being made to promote settlement, and the Transylvania Company had been chartered for that purpose. The company was led by a former student of George Wythe, John Breckenridge, who was later a Senator and an Attorney General of the United States in the Jefferson administration.

In 1780 the Commonwealth of Virginia gave a charter to the Transylvania Company to establish a university and granted as an endowment some 20,000 acres of land. The land had been acquired by escheat, the former owner having fought for the Crown in the Revolution. Other claimants to the land disputed the claim for some years.

A majority of the first trustees of the University were Presbyterian, and were ambitious to give the institution a Presbyterian aspect similar to that of Princeton. Others intended the institution to be public, and indeed often referred to it as “Kentucky University.” The struggle between these factions was to be a persistent difficulty. But despite this obstacle, and the absence of finds, the university opened in 1790. Statehood came two years later.

The university was established in Lexington, a town settled as recently as 1775. The first general store in Lexington opened in 1784. But in 1790, it had a population of 1700 living in over 300 houses, making it by far the largest town west of the Appalachians. The blue grass country was then, as now, a fine setting for horses and cattle and the native Indian population had withdrawn to the west, leaving the area secure for settlers. The tobacco industry was being developed. A hemp industry was emerging. The strong pulse of economic growth had commenced its march across the continent and was for the time centered there. Lexington was already acclaimed, not without cause, as the “Athens of the West.”

The college grew steadily, attracting students from all the western states, such as Ohio and Tennessee. As the midwestern states populated, they began to produce a small but growing number of students who found their way to the only western college. Soon a medical department was

14. It is said to have been settled by a group of men who happened to be camped there when they learned of the Battle of Lexington fought in April 1775.
added to the college, and in 1799, a law department.

B. Professor George Nicholas

George Nicholas was the obvious choice to be the first professor of law and politics at Transylvania. A law alumnus of William & Mary, he had served both as a combat soldier and in the Virginia House of Burgesses during the Revolution. In the latter role he served generally as an ally and friend of the Governor, Thomas Jefferson.\(^{15}\) He had participated in the Virginia Ratification Convention in 1783, where he earned the reputation of being the one man in Virginia feared by Patrick Henry. This was not on account of his speaking style, which was earthbound and even plodding, but because his cool reasoning frequently chilled the passions aroused by the fiery Henry.\(^{16}\)

In 1784, Nicholas moved to Kentucky. Almost at once he became the pre-eminent lawyer in the county. As the senior of the group in age, he was a leader of a “junto” of William & Mary alumni who settled in Lexington after 1785; a group that included John Breckenridge,\(^{17}\) James Brown,\(^{18}\) John Brown,\(^{19}\) and Buckner Thruston.\(^{20}\)

At the Kentucky Constitutional Convention of 1792, Nicholas played the draftsman’s role of Madison.\(^{21}\) He had already trained a number of lawyers in his office prior to 1799, perhaps most of those who had been trained in Kentucky.\(^{22}\) In 1798, he led the effort to secure adoption by the legislature of the Kentucky Resolution protesting the Alien and Sedition Act, approving Jefferson’s claim to the state’s right to resist its enforcement, and calling for the support of other legislatures. He also published a spirited defense of the Resolution, affirming the loyalty of Kentucky,

\(^{15}\) Nicholas was, however, with John Marshall, author of a bill to replace Jefferson’s enactment of 1777 that had provided for the trial of suits in equity before a jury. Kerr, Transylvania University’s Law Department, 31 Americana 3, 10 (1937).

\(^{16}\) Id. at 10.

\(^{17}\) Senator from Kentucky, 1801-05; Attorney General of the United States, 1805-06. John Breckenridge died while in office at the age of 46. While in the Senate, he was the author of the proposed Judiciary Repeal Act of 1802, which would have abolished the lower federal courts, and to establish that “this pretended power of the courts to annul the laws of Congress cannot possibly exist.” Kerr, supra note 15, at 19.

\(^{18}\) Senator from Louisiana, 1813-17, 1819-23; United States Minister to France, 1823-29.

\(^{19}\) Senator from Kentucky, 1792-1805, older brother of James Brown. John Brown was a William & Mary graduate prior to the establishment of Wythe’s professorship; he had “read law” in the offices of Thomas Jefferson. He failed re-election in 1806 because of his outspoken opposition to slavery.

\(^{20}\) Senator from Kentucky, 1805-09; United States Circuit Judge for the District of Columbia, 1809-45.

\(^{21}\) Kerr, supra note 15, at 5.

\(^{22}\) Wilson, George Robertson, Great American Lawyers 363-406 (Lewis ed. 1908).
assailing the "usurpations" of the Adams administration, and suggesting the case for judicial review of legislation. The death of Nicholas in the same year as his appointment was a substantial setback to the development of the law program at Transylvania.

C. Professor James Brown

Within a few months of the death of Nicholas, however, James Brown was designated his successor, and it was Brown who organized the program of law, apparently as a replica of the William & Mary program of Wythe. Brown had led a company in the Indian Wars during the Revolution, prior to his study with Wythe. By the time of his academic appointment, although only thirty-three, he had already served as the first Secretary of State of Kentucky. He was described as "handsome, towering and majestic," well-read and well-mannered, "a Jeffersonian democrat who often confounded frontiersmen with his knowledge of French, German, and Spanish; . . ." and as a man viewed by some as arrogant.

James Brown's brother John was, at the time, a United States Senator from Kentucky, also a student of Wythe's, and widely known for his ardent opposition to slavery. This position would, in due course, cause him to fail in re-election.

We know little of James Brown's curriculum, but it was advertised as a course in Law and Politics and appears to have included Political Economy and International Law as well as a study of the constitutions of Kentucky and the United States, and a review of Blackstone. The university invested $500 to start the law library. Among the authors studied by Nicholas, and available in the library for use by law students, were Bacon, Coke on Littleton, Comyn, and Kames. After 1803, it is certain that Tucker's Blackstone was in use. There is later evidence of moot courts and moot legislatures, conducted presumably in the manner of Wythe, and it is not unlikely that Brown initiated these methods of instruction at Transylvania.

Brown was compensated with the tuition paid by his students. The tuition was $20 a year. He soon attracted a small number of students, in-

24. Mayo, supra note 8, at 92.
25. Id.
26. Id. at 92-93.
27. Id. at 93.
31. Kames, Principles of Equity (1760).
cluding several destined for public careers of note. Richard M. Johnson
(class of 1802) was a Kentucky Jacksonian, who served eight terms in the
United States House of Representatives and two terms in the Senate, and
concluded his public service as vice president under President Martin
Van Buren. He differed with his mentor, Brown, in being a lifelong oppo-
nent of judicial review of legislation. Another Brown student, Josiah
Stoddard Johnston, was a Whig, representing Louisiana in the Senate of
the United States for almost two full terms.

In 1805, not long after the Louisiana Purchase, and only five years after
his appointment as professor, Brown accepted a federal appointment in
the new territory and moved to New Orleans. There he soon became a
force in Louisiana politics and himself won election to the Senate of the
United States, although not in time to join his brother as a member of
that body.

D. Professor Henry Clay

On Brown’s resignation as professor of law, the trustees appointed
Henry Clay, then only twenty-seven years old, an immigrant from Vir-
ginia who had arrived in 1797. Clay, as it happens, had married the sister
of Brown’s wife, and had enjoyed Brown’s tutelage in the ways of Ken-
tucky. He was slight, red-headed, and impish in appearance, with almost
overpowering personal magnetism. As a protegé of George Wythe, he had
from the time of his arrival in Kentucky been taken under the wing of the
William & Mary junto.

Clay had attracted regional attention as a public speaker in 1798 when
he followed the cool Nicholas to a Lexington platform to deliver a flaming
assault on the Alien and Sedition Laws. He was also apparently widely
known as the author of a powerful and impassioned assault on slavery
published in the Kentucky Gazette in 1797 under a pen name,
“Scaevola.” This article was an attack on his own patrons, John Breck-

33. Id. at 25.
34. He was killed in 1833 in a steamboat explosion on the Red River, near Alexandria,
where he had settled after leaving Transylvania.
35. The speech is published in 1 The Papers of Henry Clay 1 (Hopkins ed. 1959). The
story is told in Mayo, supra note 8, at 73; see also M. Peterson, The Great Triumvirate 12
(1986).
36. Can any humane man be happy and contented when he sees near thirty thou-
sand of his fellow beings around him, deprived of all the rights which make life
desirable, transferred like cattle from the possession of one to the other; when he
sees the trembling slave, under the hammer, surrounded by a number of eager
purchasers, and feeling all the emotions which arise when one is uncertain into
whose tyrannic hands he must next fall; when he beholds the anguish and hears
the piercing cries of husbands separated from wives and children from parents;
when in a word, all the tender and endearing ties of nature are broken asunder
enridge and (indirectly) George Nicholas, whom he declared to be en-
mies of the Rights of Man, for their positions with respect to the provi-
sions of the Kentucky Constitution of 1797\textsuperscript{37} regarding slavery. In
addition to being a public figure in these respects, in 1804 Clay was al-
ready the most prosperous lawyer in Lexington,\textsuperscript{38} having inherited the
practice of Nicholas, Breckenridge,\textsuperscript{39} and Brown, and being married to a
daughter of the largest law client in Lexington.\textsuperscript{40}

Although not a linguist, he had been privately tutored by George
Wythe for four years in Richmond, and despite his occasional posturing
as a self-made man of the soil, he was widely read.\textsuperscript{41} Wythe started Clay
with Horace and Homer, and Clay at least skimmed through much of
Wythe's extensive library,\textsuperscript{42} often discussing his readings with his emi-
inent mentor. He read well enough that Wythe, a proven judge of talent,
proclaimed him ready for a "high destiny" and arranged for his legal
training in the office of the attorney general in lieu of his duties as a
page.\textsuperscript{43}

Wythe was unquestionably a major influence on Clay. Throughout his
long life, Clay's position on public issues reflected the teachings of Wythe.
Clay, like Jefferson, acknowledged a very great debt to Wythe,\textsuperscript{44} whom he
professed to "cherish with filial regard."\textsuperscript{45} In 1802, he named his first son
Theodore Wythe Clay. In 1806, he eulogized Wythe as a man "whose re-
publican virtues were unequalled even by the best of the worthies of an-
cient Greece and Rome."\textsuperscript{46} And, in 1851, near the end of his own life, Clay
wrote John Minor, the law professor at the University of Virginia: "Even
at this moment, after the lapse of more than half a century since I last

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1 PAPERS OF HENRY CLAY 5. This name was used by Clay on a number of occasions. Mayo, supra note 8, at 67 n.1.
38. Law practice in Kentucky at that time was highly remunerative owing to an appall-
ing condition of the land titles in the Commonwealth. Peterson, supra note 35, at 11.
39. See Memorandum, Breckenridge to Clay (February 3, 1800), 1 PAPERS OF HENRY
CLAY 22 (Hopkins ed. 1959).
40. Mayo, supra note 8, at 89-92.
41. Clay's time in Richmond is chronicled by Mayo, supra note 8, at 22-28.
42. Id. at 26-27. The verb is chosen carefully. It was ever Wythe's dictum never to skim,
and he dismissed bad lawyers as "mere skimmers." Given Clay's ebullient spirit, it seems
unlikely that Clay pondered the great works in the same way that Jefferson had earlier done
under the same tutelage. Id. at 27.
43. Id. at 41.
44. Id. at 28.
45. 2 PAPERS OF HENRY CLAY 551.
46. Mayo, supra note 8, at 209.
saw him, his image is distinctly engraved on my mind."

Clay was a formidable jury advocate, eloquent, although plainly spoken, exuberant and even irrepressible. Not only did he win many verdicts, but he enhanced his professional earnings in the evenings at the card table, there winning the fees earned earlier in the day by his adversaries. He then, would sometimes to their pleasure, "drink them under the table." Clay brought one memorable evening with his fellow circuit riders to a stunning close by executing a pas seul\(^48\) from head to foot of a sixty foot table "amidst the loud applause of his companions, and to a crashing accompaniment of shivered glass and china,' for which expensive music be paid the next morning, without demur, a bill of $120."\(^49\)

Clay was also apparently a capable property lawyer, conversant with the daunting complexities of Kentucky land law that made the state in its early years a nirvana for lawyers. He was also an appellate lawyer of quality. On one of his rare later appearances in the Supreme Court of the United States, Joseph Story rated him as among the very best appellate advocates of his day.\(^50\) He also proved himself effective as counsel to the Kentucky Insurance Company,\(^51\) and later as an aggressive mortgage-foreclosing attorney for the Bank of the United States for Kentucky and Ohio.\(^52\) Clay was thus a lawyer's lawyer as well as a public man.

Clay was the professor of law at Transylvania for two years, resigning in 1807 to take a seat in the United States Senate at the unconstitutionally tender age of twenty-nine. We know little of his teaching. Although Wythe's student, Clay, unlike Nicholas and Brown, had not attended William & Mary and had no experience as a student receiving formal instruction. Given his hyperkinetic temperament, it is not easy to imagine that he prepared elaborate lectures on the law. Yet lecture he did, and subsequent events confirm that he took the responsibility very seriously. The university became an institution of primary importance to Clay, one that he would continue to serve throughout his long career.

Clay was one of five professors in the university, which was then attended by about fifty to seventy students.\(^53\) One of the professors taught medicine, one law, and three the arts. Clay maintained his law practice while teaching and, indeed, during that time defended Aaron Burr on the serious misdemeanor charge of organizing a military expedition against

\(^{47}\) Clarkin, supra note 12, at 193.

\(^{48}\) Literally, a solo ballet.

\(^{49}\) Peterson, supra note 35, at 11 (quoting L. Little, Ben Hardin: His Times and Contemporaries 38-39 (1887)).

\(^{50}\) Life and Letters of Joseph Story 423 (W. Story ed. 1851).

\(^{51}\) Mayo, supra note 8, at 117.

\(^{52}\) Peterson, supra note 35, at 66-67.

\(^{53}\) Mayo, supra note 8, at 209.
Mexico. It appears that his students often attended him while on circuit. Students, we know, did not expect the lectures at Transylvania to serve as professional training, but generally sought additional apprenticeship training if they desired to practice law. Some may well have tried to attend the lecture course while studying in a law office, although the number of opportunities to do so in Lexington must have been limited.

Clay addressed his students by their first names, an exceptional practice for the time, and he appeared to have enjoyed warm relations with them. Clay later left some of his practice to one of his former students, Robert Wickliffe, who handled matters for Clay without fee, in apparent gratitude for his teaching. Also a friend for many years was Robert Todd, a Lexington lawyer, who would become the father-in-law of Abraham Lincoln. Robert Letcher, a Clay student, became Governor of Kentucky. Another Clay student, James Birney, from Alabama, became a leading abolitionist. Yet another, Matthew Jouett, with Clay's support, and over the vehement protest of his father, quit law for art, studied under Gilbert Stuart in Boston, and later painted the portraits of both Clay and Brown. James McChord studied with Clay and then followed yet another path, to the Presbyterian ministry and the presidency of Centre College. Another student who may have studied law with Clay was Stephen F. Austin, "the Father of Texas." George Robertson, later a professor of law at Transylvania and long an associate of Clay's, was a

54. *Id.* at 222-60. It may be recalled that Burr had served as Jefferson's first Vice President, but had been abandoned by the Jeffersonians after Burr killed Hamilton in a duel. It appears that Burr did indeed have in mind a fantastic vision of taking much or all of Mexico by military force and attracting the western states into a union over which he would preside. United States Attorney Daviess embarked on a premature prosecution in Kentucky which resulted in the grand jury not only refusing to indict but declaring Burr innocent of any wrongdoing. Clay represented Burr without fee in these matters, on the assurance of Burr that there was no factual basis for them, as there later in fact proved to be. Burr was soon thereafter prosecuted for treason in Virginia; he was acquitted, but the evidence of his activities was such as to bring his ailing public career to a full close. *Id.*

55. W. BIRNEY, JAMES G. BIRNEY AND HIS TIMES 29 (1890).

56. Josiah Johnston, for example, studied under William Barry, later a professor at Transylvania; others studied in Clay's office.

57. Mayo, supra note 8, at 212-13.

58. Wickliffe to Clay (January 9, 1811) 1 PAPERS 612.

59. Peterson, supra note 35, at 353.

60. Mayo, supra note 8, at 215.

61. Note, 2 PAPERS OF HENRY CLAY 248 (Hopkins ed. 1961). Jouett was not the only artist encouraged and supported by Clay; another was Joseph Bush, whom Clay took in 1811 to Philadelphia to train under Thomas Sully. See Letter, Bush to Clay (September 16, 1816). *Id.* at 230.

62. Mayo, supra note 8, at 214.
student during Clay’s time, but does not appear to have been his student.63

The social life of Transylvania students seemed rich to those who came in from the woods of the West. “They fought duels, . . . engaged in other licentious and unprofitable amusement, . . . and made life trying for Mrs. Beck, preceptress of the Lexington Female Academy.”64 The university and Mrs. Beck were doubtless symbiotic.65 We know that Clay’s student, Robert Todd, met Lincoln’s mother-in-law while she was studying with Mrs. Beck,66 besting Stephen F. Austin in the competition for her hand.67

E. Clay’s Successors

Clay’s place as professor was first filled by James Monroe, possibly a relation of the fifth president. The fee was raised to $30, and this may have reduced enrollment. In any case, Judge Monroe resigned his professorship after a year. The program appears to have been maintained headless for a number of years, with lectures provided by the lawyer-trustees, but not on a systematic basis. In 1814, the fee was reduced to $25 and Trustee John Pope assumed the responsibilities of the professorship. The university also supplemented the law library at that time.

Pope was described as having a “discontented and roving disposition.”68 After two years, he resigned, becoming an unreliable player on both sides of Kentucky political wars during the turmoil of the next decade, and concluding his career as Governor of Arkansas. Pope was followed as professor by a son of John Breckenridge, Joseph Cabell Breckenridge, who served until 1820.69

III. The Hay Days, 1818-1858

A. Trustee Henry Clay

When Clay left the university as professor, he was elected to the board of trustees.70 He served on the board for the rest of his life, for over forty

63. G. ROBERTSON, AN OUTLINE OF THE LIFE OF GEORGE ROBERTSON 28-30 (1876).
64. Letitia Clay and perhaps her sisters studied under Mrs. Beck, and Henry Clay was long a member of the Academy’s Board of Visitors. See Note, 3 PAPERS 265.
65. Mayo, supra note 8, at 214. It appears that the relationship between the law department and the Female Academy at Lexington resembled that of two similar and contemporaneous institutions then thriving in Litchfield, Connecticut. M. McKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 69-80 (1986).
67. Id. Austin went to Texas a bachelor.
69. Id.
70. Peters, supra note 13, at 52.
years, although not without interruption. Clay's effectiveness as a patron of the university and particularly of the law department was the result of his immense personal following. Abraham Lincoln described him as "the most loved, and the most implicitly followed by friends, and the most dreaded by his opponents, of all living American politicians." 71 From 1811, when he became Speaker of the House of Representatives, until his death in 1853, he was a dominant force in American public life. He served in Congress, in the Senate, and as Secretary of State standing three times for election to the presidency and playing a major role on every public issue for all that time.

As an exuberant youth, he led the War Hawks into the War of 1812. For some years he was alone in urging American support for Latin American revolutionaries, and it was he who hounded the Monroe administration to make its famous Proclamation. With the support of Daniel Webster and John Calhoun, he struggled to protect native Americans from the transgressions of those who killed them and took their lands; people led by Andrew Jackson and his political allies. Again with the support of Webster and Calhoun, he led the resistance to the Mexican War as an unjust aggression, an event that took the life of Henry Clay, Jr., who was killed at Buena Vista.

Clay was the author of the Whig program, generally described as "The American System," that employed the tariff to stimulate internal trade and economic development and to supply the funds for the construction of roads and canals opening the West, a policy that regularly evoked the opposition and hostility of regionalists in all sectors of the country. And of course he is best remembered as the author of the three compromises of 1820, 1833, and 1850 that held the nation together against powerful centrifugal forces that were breaking it apart. In each instance, many knowledgeable observers had despaired of preventing disunion when at last Clay found or created the adhesive to patch things over for a while.

His role as peacemaker earned him the hostility of the abolitionists. Clay was committed first to the union, and he saw no way to effect abolition within the union. In 1816, he became a national officer of the American Colonization Society, a group seeking to effect emancipation by purchase and voluntary relocation of slave families, and he remained active in that organization for several decades. 72 In 1834, he had breakfast with his former law student, James Birney, then the leading abolitionist lawyer of his time, and occasioned Birney's reproof. 73 In 1844, while

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71. Abraham Lincoln: His Speeches and Writings 268 (Bassler ed. 1946).
72. For a full statement of Clay's position on slavery, see his address to the Colonization Society of Kentucky, 9 Papers of Henry Clay 138.
73. Birney reported Clay's position to be that:

slavery in Kentucky was in so mitigated a form as not to deserve the consideration
campaigning, he told Indiana abolitionists that he would free his own slaves immediately if they would contribute an equal amount of wealth to provide for them. This speech caused Birney regretfully to denounce Clay as "of all our public men, the most dangerous." Simultaneous words were uttered by Southern secessionists in response to Clay’s impassioned arguments for emancipation. Clay responded to both, denouncing the abolitionists as well as the secessionists.

Prominent as he was, Clay deserved and commanded great attention. He rarely, if ever, missed an opportunity to use his power and influence to serve Transylvania. He was a significant, if not major, financial benefactor of the university. He helped to persuade his client, James Morrison, to make a major bequest, particularly in times of crisis, he stepped in to provide public relations assistance to its officers, he worried over campus architecture, and he was very active in recruitment of almost all

of a very great evil—that men’s property had been found to be an insurmountable barrier to gradual direct effort, and was to be left to the influence of liberal principles as they should pervade our land. He spoke of Mr. Robert Breckenridge having put himself down in popular estimation by his having advocated emancipation—and that he and John Green, two gentlemen of great worth had disqualified themselves for political usefulness for the part they had taken in reference to slavery . . . . The impression made upon me by the interview was that Mr. Clay had no conscience about the matter and therefore would swim with the popular current.

8 PAPERS OF HENRY CLAY 748.
74. 2 LETTERS OF JAMES BIRNEY 900 (Dunmond ed. 1938).
75. PETERSON, supra note 35, at 286-87.
76. The first record of a gift was in 1807 when Clay pledged to pay part of the salary of James Madison (not the fourth president) if Madison would become president of Transylvania University. 1 PAPERS 77; the papers are replete with records of other minor contributions.

77. Morrison was a hemp manufacturer, a federal revenue collector, and a bank president. His only son was killed in the Revolutionary War. Kerr, supra note 15, at 22. He is also said to have congratulated John Breckenridge on his strong stand in favor of the abolition of the federal judiciary in 1802. Id. at 19. The Morrison bequest was received in 1824. 3 PAPERS 849. Because the Morrison estate was not liquidated, the bequest of $20,000 could not be paid. To accommodate the college Clay, the executor, purchased the bequest from the college, borrowing the price from the college and commencing immediately to pay full interest. The purchase price as fully secured by a mortgage on Ashland, and much other property belonging to Clay. The debt was retired before the Morrison estate was closed. Nevertheless, Clay was accused of embezzling the bequest in the 1828 campaign for the presidency. PETERSON, supra note 35, at 163.
78. See, e.g., Trustee Statement of August 18, 1818, 2 PAPERS 591.
79. See, e.g., Letter, Clay to J. Hunt (May 9, 1812) 1 PAPERS 652. In 1818 he was chair of the trustee committee to build the refectory which still stands across the street from Morrison Hall. Report of July 1, 1818, 2 PAPERS 582. A plaque on Morrison Hall proclaims that Clay selected the architect and supervised the construction.
of the presidents of the university, even gathering letters of reference and interviewing candidates while he was also serving as Secretary of State of the United States. Although some were his political rivals, perhaps all of the law professors serving during Clay's lifetime were apparently his personal friends, and certainly all must have been selected with his assent, if not his approval. He helped to recruit other faculty, and even students. He was often engaged in writing letters of reference for Transylvania alumni, and even letters of introduction for Transylvania faculty.

B. President Horace Holley

In all his years as trustee, the most positive deed performed by Clay for the university was to select and recruit Horace Holley as President in 1818. Holley was a Unitarian minister from Massachusetts who undertook to bring the intellectual ferment then brewing in New England to the frontier of Kentucky. Holley's appointment was stoutly resisted by Presbyterians, who were offended by his religious views and who felt enti-

80. See, e.g., Letter, Clay to Holley (September 18, 1818) 2 PAPERS 594; Letter, Clay to Woods (May 16, 1828) 7 PAPERS 301; Letter, Lieber to Clay (November 8, 1834) 8 PAPERS 750.

81. E.g., Letter, Bolles to Clay (April 27, 1827) (re Alva Wood) 6 PAPERS OF HENRY CLAY 508 (Hargreaves & Hopkins eds. 1981); Letter, Sharp to Clay (May 1, 1827) 6 PAPERS 599; Letter, Ruggles to Clay (May 3, 1827) 6 PAPERS 516; Letter, Ridgely to Clay (June 9, 1827) (re Rev. McIlvaine) 6 PAPERS 662; Letter, Knight to Clay (August 21, 1827) (re Woods) 6 PAPERS 942; Letter, Clay to Bradford (evaluating recommendations) (August, 1827) 6 PAPERS 965; Letter, Kirkland to Clay (January 5, 1828) (re Woods) 7 PAPERS OF HENRY CLAY 11 (Seager ed. 1982).

82. Professor William T. Barry (1820-28) resigned to accept duties as postmaster general in the first Jackson administration. He had also served on the "New Court," and was opposed to the internal improvements and tariff program that was the key to Clay's career as a national leader. See Letter, Theodore Wythe Clay to Henry Clay, 7 PAPERS 38. Jesse Bledsoe (1823-29) was also appointed to the judiciary by Governor Desha, the author of the "New Court" and was esteemed by Clay "as the ablest advocate he ever opposed." Kerr, supra note 15, at 33.

83. E.g., Letter, Clay to Everett (April 14, 1824) (re Math professor search) 3 PAPERS 738; (July 3, 1824) 3 PAPERS 791.

84. E.g., Letter, Clay to Holley (May 6, 1819) 2 PAPERS 690.

85. E.g., Letter, Clay to Adams (February 23, 1819) (recommending George Robertson) 2 PAPERS 676; Letter, Clay to Austin (September 1822) 3 PAPERS 226 (1963); Letter, Clay to Adams (October 1822) 3 PAPERS OF HENRY CLAY 295. But see Letter, Scott to Clay (March 9, 1825) 4 PAPERS 98: "Please find something for Mr. Edmiston ['24] who will never have energy to do anything in a professional way." It does not appear that Clay "found anything" for Edmiston, who moved to Washington, Alabama, where he died in 1829.

86. Letter, Clay to James Kent (April 29, 1839) (re Professor Woolley) 9 PAPERS 310 (Seager ed. 1988).

87. See generally V. BROOKS, THE FLOWERING OF NEW ENGLAND (1941).
tled to special consideration in the management of Transylvania, for the reason that the institution did have some Presbyterian roots within the company organized to settle the area and found the university. This problem was never fully resolved, and the Presbyterians stayed on Holley’s case. Holley in fact preached little (although perhaps more than Clay advised), but he managed nevertheless to offend Calvinism even when preaching a memorial to the university benefactor, Morrison.

Despite this irritation, Holley was a stunning success as a promoter of higher education in the West. The City of Lexington, in its enthusiasm, enacted a tax on auctioneers, the proceeds to be paid to the university, thereby providing about $2,000 a year for Transylvania libraries.

Enrollment at the university increased to almost 400. In 1830, it momentarily passed Harvard to become the largest university in America. Law enrollment reached forty in 1822 and remained between thirty and seventy for the next three decades. The law class of 1824 included among it members Jefferson Davis of Mississippi and three other men also later to serve in the Senate of the United States; the number was atypical but not extraordinary, for many Transylvania law students were destined for public careers.

Holley took a special interest in the training of lawyers, expressing special concern for the development of public virtue and professional ethics. He enjoyed a good relationship with both law professors of the time, William Barry (a William & Mary alumnus) and Jesse Bledsoe. Although both were Jacksonians and thus rivals of Clay, each had served briefly as United States Senators prior to their appointments at Transyl-

88. The Presbyterians had gradually been eased out of control by the legislature’s participation in the appointment of the Trustees. Cossaboom, A Brief Sketch of Transylvania University’s Law Department 58-59 (Undated Supp. 1887).
89. See Letter, Clay to Holley (December 9, 1818) 2 Papers 613-14: “... you have come among us not in the character of a reformer, but to place yourself at the head of an institution of learning; that your object is not to propagate religious truth but to capacitate the mind for the acquisition of truth of all kinds ... ” [recommends that HH establish a church or preach very much].

if you could convert every trinitarian in Kentucky to the doctrines of unity ... what would it amount to? One single man redeemed from vice and made to practice virtue would be worth more than the whole achievement. What an immense space between such an object and that of being the father of a great university, which is to endure for ages, and which is to prepare the minds of millions of youths born and unborn ...

90. Wright Transylvania: Tutor to the West 103-04 (1975).
92. Wright, supra note 90, at 92.
93. S. W. Downs of Louisiana, Edward Hannegan of Indiana, and George Jones of Iowa.
94. Wright, supra note 90, at 90.
95. Id. at 91.
vania. Holley offered his own instruction in Constitutional Law, sometimes disagreeing strongly with the teachings of Barry, but apparently in good humor. The students were provided during this era, if not before, not only with a moot court program, but also with a moot legislative program of the sort initiated by Wythe, thus confirming the aim of the program to develop republican leadership.

Unfortunately, Holley and the university were caught in the heavy crossfires of state politics in 1824 and the years following. In 1823, the Kentucky Court of Appeals had held a debtor relief law unconstitutional. The Jacksonians gained control of the state government and, in a maneuver that prefigured the "court-packing" scheme of 1936, abolished the "Old Court" and established a "New Court" with Professor William Barry its chief. The incendiary effects at the law department can be easily imagined. To the conflagration were added such additional fuel as could be provided by the Presbyterians, still spoiling to get at Holley and reclaim Transylvania for the Calvinist faith.

Clay, at the time, was Secretary of State of the United States. He had friends on both sides of the court controversy, but opposed the New Court group as lawless. He therefore became a target of the New Court as well as the Jacksonians; and Holley, perceived to be, as he was, the close friend of Clay, was attacked by Governor Desha, who denounced

96. Holley taught from The Federalist, Vattel on International Law, and Say, A Treatise on Political Economy. Letter, Holley to Clay (April 18, 1825) 4 Papers 264. The latter was presumably the two-volume translation edited by Thomas Cooper and published in 1821. Cooper was interested in coming to Transylvania in 1815. See Letter, Cooper to Clay (October 1, 1815) 2 Papers 65. He may, indeed, have declined an offer. Peters, supra note 13, at 96.

97. Kerr, supra note 15, at 31-32. Holley said to the graduates:

The differences of opinion between one of the professors and myself in the explanation of our Federal Constitution has led to discussions which you are pleased to consider beneficial to yourselves, and which I have no doubt are so in reality. Accept of my thanks for the manner in which you have received my part of the controversy. The ability and eloquence on the other side have been long known and acknowledged.

Id. at 32. The good humor with Bledsoe may have diminished in 1925, about the time of Bledsoe's resignation. Holley thought Bledsoe sought a position on the "New Court." Letter, Holley to Clay (April 18, 1825) 4 Papers 264. Bledsoe, however, left the law to become a minister of the Disciples of Christ. Wright, supra note 90, at 90.

98. Id.


100. For a full account, see Stickles, The Critical Court Struggle in Kentucky, 1819-1829 (1929).

101. In 1825, the Presbyterians refused to take turns in providing a minister for Transylvania's chapel. 6 Papers 945. Centre College was founded in Danville to compete with Transylvania, offering a pure Calvinism to its students.

him as grossly overpaid. Desha also resisted the continuation of any state support for the university, which had been seeking an increase. The state, he protested, had: "lavished her money for the benefit of the rich to the exclusion of the poor; the only result is to add to the aristocracy of wealth the advantage of superior knowledge." This evoked a blistering response from Transylvania students in assembly at their university chapel. Holley resigned in 1825, agreed to withdraw the resignation, and then renewed it, but remained at the university through 1826-27, although the last year at reduced pay.

C. Professor John Boyle

The university was convalescent for a time. It continued to have regular crises in its relations with the Commonwealth of Kentucky, which did ultimately end in a rupture of the relationship. The law and politics program was, however, maintained by William Barry until his departure for Washington in 1828. John Pope again served for a year, before his departure to be Governor of Arkansas.

But in 1830, John Boyle, the leader of the Old Court and an eminent judge, was appointed as the dean of the department, and the program remained thereafter on a steady course for about twenty-five years. Although not a beneficiary of formal instruction, Boyle had mastered Greek and Latin as a boy. In addition to extended judicial service, he had served three terms in the United States House of Representatives. Boyle had been twice seriously considered for, and perhaps once offered, a seat on the Supreme Court of the United States. Singularly modest and unassuming, he wrote in a clear and unornamented prose. As the Chief Judge of the Court of Appeals of Kentucky, he had been fully vindicated by the voters of Kentucky when they rejected the New Court party in the elections of 1825 and 1826. To be the center of such controversy was,

103. Letter, Theodore Wythe Clay to Henry Clay (November 11, 1825) 4 Papers 818. Holly was paid $5,000 at a time when a federal judge was paid $1,500 and a member of the Kentucky Court of Appeals received $1,200.
104. Id.
105. Wright, supra note 90, at 111.
106. He left Kentucky to visit New Orleans, and then sailed to Europe for a vacation, but died at sea on July 31, 1827. Notes, 6 Papers 909.
107. Letter, Bradford to Clay (December 1827) 6 Papers 1016: "I despair of getting the University into operation again."
108. Kerr, supra note 15, at 34.
110. Durrell, John Boyle, Great American Lawyers 223, 232 (Lewis ed. 1908). Jefferson admired Boyle and may well have offered him a very high appointment. There seems to be no doubt that Madison in 1809 offered him the governorship of the Territory of Illinois. Robertson, Of the Honorable John Boyle, Scrap Book 216, 220 (1855).
however, very distasteful to Boyle, of whom it was said: "He never sought office; he never shrank from duty."111 In 1826, he resigned from the state court and accepted appointment as a United States District Judge, a position he held until his death in 1835.

The duties of the federal court were relatively light; indeed, Judge Boyle was said to have scruples about accepting the salary of $1,500 a year.112 Accordingly, he was able in 1830 to serve as the sole professor of law at Transylvania. The next year, however, he was joined on the faculty by Judge Daniel Mayes, who served until 1838, when he moved to Mississippi.113 Boyle, mild and private though he seemed, was a rigorous teacher who required his students daily to discuss assigned readings, including on occasion, judicial opinions.114 This “catachetical” method proved to be effective, and also popular, as enrollment rose to fifty in the law department. It appears to have been Boyle who developed the idea of a comprehensive examination to be taken at the end of his curriculum, the award of a degree to be dependent on a successful examination performance.

In 1834, George Robertson was appointed as the third professor of law, making Transylvania’s the largest law faculty in America. Mayes took responsibility for Civil Law (including comparative law), Boyle for Jurisprudence and International Law, and Robertson for Constitutional Law and Equity.115 While the curriculum thus extended a bit further into the private sphere than before, the program remained generally as it had begun, as training for law and politics, and assumed that those who were earnest about private practice would secure additional applied training.

D. Professor Thomas Marshall

On the death of Boyle in 1837, Thomas Marshall, yet another member of the Court of Appeals of Kentucky, was appointed as a professor of law.116 Marshall was a native of Kentucky. His mother taught him history, literature, and the classics before sending him to Yale.117 He returned to Kentucky to read law with his congressman. He played the violin and wrote poetry.118

111. Id. at 219.
112. DuRelle, supra note 110, at 258.
113. Kerr, supra note 15, at 35. Mayes later appears as a professor of law at the law department in New Orleans that became the Tulane University School of Law. See infra note 163.
114. Wright, supra note 90, at 139.
116. Wright, supra note 90, at 142.
118. Id. at 309.
Thomas Marshall's father, Humphrey, had been a Federalist and a United States Senator and perhaps best remembered as a duelist against Henry Clay. Thomas was, however, a Whig and lifelong supporter of Clay. He had himself served two terms in the Congress of the United States and had been appointed a justice of the state's court of appeals in the same year as his academic appointment.

It was said that Marshall was an able speaker who despised applause. As a judge, he seems to have been rather humorless, but nevertheless sensitive that litigants are "... not mere algebraic symbols, but men and women with human feelings." Despite a heavy caseload, he was known as one who would unfailingly respond to all arguments advanced against the position adopted by the court. Cautious in departing from settled law or in exercising the power of judicial review of legislation, he was nevertheless capable of independent thinking on the bench. Marshall taught regularly at Transylvania for thirteen years, all of them with his senior judicial colleague, Robertson.

E. Professor George Robertson

It was unquestionably Robertson who, from 1834 until 1858, was the dominant force in the department of law. His career as a university law teacher was the most important after Wythe's to be completed before the Civil War.

Known to the students as "Old Buster," he proved to be a natural and attractive teacher. Robertson was portly, even perhaps obese with age. Born in Kentucky in 1790, his father had been an antifederalist member of the Virginia House of Burgesses. His mother, attained the age of ninety-two, and lived with him until 1846. On her account, he was said to have turned down six federal appointments, including two opportunities on the Supreme Court of the United States. He did serve

119. Peterson, supra note 35, at 16. Marshall called Clay a liar. Clay was restrained by colleagues from assaulting Marshall on the Senate floor, and apologized for his loss of temper. Marshall rejected the apology as that of a "poltroon," whereupon Clay issued his challenge. Both men were wounded in the duel. Id.
121. Id. at 309.
122. Id. at 310.
123. Id. at 311.
124. Id. at 314.
125. Wright, supra note 90, at 141.
126. He weighed 126 at 19 when he married, 200 at 30, and 240 at 73. Robertson, supra note 63, at 70.
127. Wilson, supra note 22, at 369.
128. Id. at 370.
129. Id. at 371.
two terms in Congress, being first elected in 1816, before returning to Kentucky to serve in the legislature and then on the court of appeals, to which he was appointed in 1828, becoming almost immediately the chief justice.\textsuperscript{130} His career as a judge was distinguished, winning the respect of both Kent and Story.\textsuperscript{131}

Robertson, had been taught Latin and French as an adolescent,\textsuperscript{132} studied at Transylvania in 1805-1806, read law privately with some guidance from Judge Boyle,\textsuperscript{133} and had also trained as a Presbyterian minister.\textsuperscript{134} Like Clay, he was an excellent card player, and supplemented his earnings as a lawyer and legislator with regular winnings at the table.\textsuperscript{135} He was an expert fiddler, and on at least one occasion fiddled his way into the hearts of political constituents.\textsuperscript{136} He recognized himself as unsuited to jury advocacy,\textsuperscript{137} and his son perceived him “... not of a polemical disposition, and ... not fond of the practice of law.”\textsuperscript{138}

Like Judge Boyle, Robertson expected his students to prepare daily to undergo oral examinations on assigned material, which might on occasion include judicial opinions.\textsuperscript{139} Under his leadership, the faculty extended the course to two years and conducted a comprehensive examination at its end, which was the basis for awarding the degree. Judge Boyle had conducted a similar examination; but under Robertson, as few as ten of thirty examinees a year might be awarded a degree.\textsuperscript{140} This appears to have been the most demanding law program in the United States in the decades preceding the Civil War.

Robertson had a strong imagination, and his literary style was often florid, even perhaps nonjudicial.\textsuperscript{141} He was also a hopeless pedant; in this he was true to the tradition of George Wythe.\textsuperscript{142} In a few minutes of utterance, he could drop a dozen classical references, whether accurate or not it seems unlikely that his listeners could know, and certainly his contemporary readers cannot. His sensitive vanity was manifested in the ritual by which his lectures came to be published. Annually, students would be delegated by the class to request that Robertson provide them with a

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\textsuperscript{130} Id. at 385-87.
\textsuperscript{131} Id. at 393.
\textsuperscript{132} Robertson, supra note 63, at 24.
\textsuperscript{133} Id. at 28-29.
\textsuperscript{134} See supra, note 22 at 372.
\textsuperscript{135} Id. at 376.
\textsuperscript{136} Robertson, supra note 63, at 47.
\textsuperscript{137} Id. at 36.
\textsuperscript{138} Id. at 155.
\textsuperscript{139} Wright, supra note 90, at 142.
\textsuperscript{140} Kerr, supra note 15, at 34.
\textsuperscript{141} DuRelle, supra note 108, at 223.
\textsuperscript{142} Wirt, The Life of Patrick Henry 42 (1850).
copy of a lecture they had attended and, annually, he would submit to the request after assuring them in writing that the lecture was prepared only for their audition and not for publication. When the works were assembled as a volume, he insisted on a preface asserting that he had desired not to have his lectures published in his lifetime.

His florid style, pedantry, and vanity make his lectures sometimes ugly reading for the contemporary audience. Almost the whole of it could be dismissed as mere "commencement rhetoric." Yet his lectures give clear evidence of what George Robertson was so clearly striving to do, to serve Americans yet unborn by guiding his students to appropriate concepts of public service. Robertson, like Wythe, vibrated to Montesquieu.

What Robertson had to say to his students, if overborne to our ears, has nonetheless an authentically timeless ring. Hear, for example, his parting words on the Constitution:

... The stability and efficacy of the Constitution require that it should be uniform in its character and operation; and, consequently, it should always be construed with a fixed test as certain as the magnet. For want of such a test, or because it was neither carefully nor uniformly applied, the constitution has been made to assume different and inconsistent characters at different times, and under the controlling influence, not only of different men and parties, but of the same men and the same parties, at different times and on different occasions. This is a deplorable truth; and persistence in a procedure so fluctuating and liable to abuse, will afford an augury of dissolution and anarchy, or of despotism and centralism, at no very distant day. It would, sooner or later, inevitably unhinge the Constitution, and make it the sport of ambition ...

... There is therefore nothing consistent or maintainable in the distinctive apppellative "strict constructionist ...." And there is just as little in that of "States' rights." 

The Constitution of the United States should be construed in such a manner as will be most likely to fulfill the intent of those who made it. And the proper mode of attaining that end is to consider, in a liberal temper of candor and patriotism, the letter, the spirit, and the context; and, if any difficulty or doubt shall still exist, to explore the objects and history of its adoption and the analogies of judicial and practical expostions of it.

The American Revolution, unlike any that preceded it, was altogether a work of intelligence and virtue .... The Constitution has defects .... but ... it may do all that a form of government can do, and will last as

143. Robertson, Scrapbook on Law and Politics, Men and Times 160-281 (1855).
144. Id.
146. Robertson, supra note 143, at 248.
147. Id. at 253.
long as public virtue shall prevail. . . . Under its benign protection, not a drop of blood has been shed in civil war.\textsuperscript{148}

He proclaimed the necessity of public virtue:

It is political quackery to attempt to preserve republican institutions among a corrupt or ignorant people.\textsuperscript{149} . . . A people enlightened and virtuous will always govern themselves; those who are not so, never can, but will be governed by the superior intelligence, craft, or force of a few men or of a single man.\textsuperscript{150} . . . [T]he dazzling republics of the past—where are they? [T]hey all with one voice utter this great truth of inductive philosophy—that in republics, the people are not safe unless they are enlightened, virtuous, and vigilant.\textsuperscript{151}

Like Jefferson a pragmatist, “Old Buster” warned often against attachment to doctrine or abstract principle, urging intellectual humility:

Do not repose in confidence or presume too much on the elementary knowledge you have acquired whilst here. Though you have learned much, you are only initiated in the first principles and prepared for the successful study of legal science, which, for most of you is yet a terra incognita, far beyond the range of your circumscribed horizon. You may learn all your lives and the more you learn the more you will find to be learned.\textsuperscript{152} . . . [P]roneness to theories, and an eagerness for generalization have ever been common stumbling blocks in the way of science. Aristotelian abstractions and academic jargon reigned with mystic and fatal spell over the intellectual world for two thousand years. Cartesian reveries then had their day of pernicious authority . . . .\textsuperscript{153} The higher you ascend the topless mountain of knowledge, the clearer will be your horizon, but should you climb to where no mortal footstep has ever been, you will then be but the more sensible to the evidence of your own inferiority and ignorance when from your peerless eminence to you for the first time, the interminable wilderness of unexplored knowledge, indistinctly opened to your enlarged vision, will appear as a world, contrasted with a little spot which in a lifetime of toil you had belted and enclosed as your intellectual domain . . . .\textsuperscript{154} . . . [T]rue knowledge inspires humility as well as confidence. It teaches the mind to move in its appropriate sphere—to forbear enterprise beyond its power—to trust to its own light . . . to follow that light

\begin{thebibliography}{99}
\bibitem{148} Id. at 163.
\bibitem{149} Id. at 165.
\bibitem{150} Id. at 175.
\bibitem{151} Id. at 176.
\bibitem{152} Id. at 236.
\bibitem{153} Id. at 169.
\bibitem{154} Id. at 237.
\end{thebibliography}
wherever it leads, and when it goes out, to stand still."

So ardently did he urge his students into public life:

Shall Transylvania ever hear from you? And what shall she hear?\textsuperscript{155}
This valley of Hope [the West], exhibiting in its infancy, so much of moral interest and native moral power is, we think, destined, in its maturity, to be the best theater ever presented on earth, for the development of intellectual resource, and for the establishment of moral and political truth.\textsuperscript{156}

The law is the accustomed pathway to political influence and distinction. May those of you whose fortune it may be thus to rise deserve public confidence, always vindicate the law's just supremacy, and especially defend the rightful supremacy of the federal constitution and the union and harmony of the states. Any one, at all acquainted with the history and character of men must see that, if the existing Union should ever be destroyed by dissolution or consolidation, it will never be re-established. Even now the safety of the constitution and the integrity of the Union are, in the opinions of many wise and good men, menaced by the licentious spirit of disorganization and factious influence among selfish politicians.

May it be your lot, gentlemen, to be efficient and useful actors in the eventful scenes that are coming. May it be your fortune to share the honors and the blessings of a glorious triumph for our country and for mankind; and may you so act, here and hereafter, as to reflect honor on this institution, exalt the character of the west, and shed luster on American jurisprudence.\textsuperscript{157}

F. Others

In 1838 Judge Mayes was replaced by Aaron Woolley, also a judge and formerly a major.\textsuperscript{158} In 1839 the citizens of Lexington raised $22,000 to support the university libraries; $5,000 of this sum was spent on the law collection, and Woolley was sent east to procure the appropriate works.\textsuperscript{159} In 1850, a fourth professor was appointed in the person of Madison C. Johnson, later ranked by John Marshall Harlan of the Class of 1852 as an appellate lawyer equal to Daniel Webster and Rufus Choate.\textsuperscript{160}

G. The Trauma of Slavery

Holley, Boyle, Robertson, and Marshall were, like Wythe and Tucker at

\begin{footnotes}
\begin{enumerate}
\item 155. \textit{Id.} at 234.
\item 156. \textit{Id.} at 185.
\item 157. \textit{Id.} at 186.
\item 158. Kerr, supra note 15, at 38.
\item 159. \textit{Id.} at 36.
\item 160. \textit{Id.} at 39.
\end{enumerate}
\end{footnotes}
William & Mary, opposed to slavery. They shared the view of most law professors of the antebellum era that slavery was an evil second only to disunion. Their position was that established earlier by St. George Tucker and by Henry Clay, that slaves should be emancipated gradually, with compensation to slave owners for the forfeiture imposed.

George Robertson stated his own views thus:

[I] lament a curse imposed on our ancestors when in colonial subjection . . . . Domestic slavery cannot be suddenly abolished in all the states consistently with the welfare of either the black man or the white. A premature effort of inconsiderate humanity might be disastrous, and would certainly tend to defeat or retard the ultimate object of every good and wise man—universal emancipation . . . . Public policy and sentiment are "conspiring to extirpate the great household evil and will, in convenient time, and in some just and eligible way, satisfactory to all, banish it forever from our land."

As the antebellum period came to a close, the issue of slavery became acutely stressful for law teachers such as Robertson and Marshall. They were by profession committed to uphold a polity and a constitution that shielded a social system that they deplored. For all Americans, the choices were painful, even disastrous, but for many law teachers the pain was heightened by a keener awareness of what was happening, and what would be the appalling costs of war. This was particularly true for teachers at Transylvania and other colleges that served students from both slave and nonslave states.

Demonstrative of Robertson's preoccupation with the great issue of his time is the epitaph he wrote for himself: "Born in a slave state, he never disturbed his country's peace on the subject of slavery or uttered a sentiment or did an act tending to aggravate its evils or prolong its existence." 162

IV. Conclusion

Transylvania was then Mr. Jefferson's nursery of patriotism during the antebellum period. For sixty years, it employed the teaching services of eminent public men163 to inculcate in the rising generations of political

161. ROBERTSON, supra note 143, at 164.
162. Id. at 329.
163. To summarize, of the 13 professors appointed over the 60-year history of the department, two (Barry and Bledsoe) were United States Senators prior to their appointment, while two (Brown and Clay) went on to the Senate after teaching; three (Boyle, Marshall, Robertson) had legislative careers in Congress and four (Breckenridge, Nicholas, Pope, and Woolley) had served in the Kentucky legislature. Only Johnson and Mayes had no legislative experience when appointed. Moreover, seven were also judges, with the three major
leaders of the West a tradition of public virtue. While it produced very little published scholarship, the efforts of its faculty to confront with moral courage the issues of the day were abundantly reported as judicial decisions, rather than in scholarly journals or in the extended “Commentaries” that were the most esteemed legal literary art form of the time.

Alas, Transylvania University was never able to establish a solid financial base sufficient to sustain increasingly expensive and competitive professional education. The City of Lexington had extended itself, but was too small to make sufficient provision. The Commonwealth of Kentucky had lent modest support, but even this was withdrawn in the mid-1850s, as the issue of slavery became ever more intense, and the political character of state support more divisive. Even the issue of religious sectarianism remained a festering political sore.

Transylvania’s law department gave birth to institutional offspring in the ante-bellum years. Indiana University’s law department was established in 1842. The University of Louisville opened its program in 1846 with substantial financial support from the now much larger city of Louisville. The University of Louisiana, soon to become Tulane, opened in 1847. And in 1854, the University of Mississippi established its department of law and politics. These four institutions were established in the Wythe-Transylvania tradition, and in areas from which Transylvania had drawn its students.

Other programs in law, aiming more to offering training as a substitute for apprenticeship, also began to open in the West. These institutions, like Harvard and Yale, were primarily pursuing private aims, not the public ones identified by Jefferson and Wythe. The University of Cincinnati Law School was established in this mode in 1837. Cumberland University, established in the hills of eastern Tennessee in 1847, was destined to become for a time the largest law school in America. Despite their differing aims, these schools were competing with Transylvania for students.

Also of consequence to the fate of the law department was the death of Henry Clay in 1853. During the years of its success, he had always been available to resolve the festering conflicts, and he had been the magnet, the source of pride, that had drawn the diverse folk together. If Transyl-

\footnotesize{\begin{itemize}
  \item 164. Reed, supra note 11, at 424.
  \item 165. Id.
  \item 166. Id. at 451.
\end{itemize}}
vania could possibly have surmounted its difficulties, it could not hope to do so without him.

For all these reasons, the Transylvania department of law expired in 1858.\textsuperscript{167} George Robertson had by his count taught over 1200 students at Transylvania,\textsuperscript{168} and he would continue for some years to teach others in his home in Lexington.\textsuperscript{169} The lamp passed from Wythe to Robertson continued, however, to light the way at other times and other places, particularly in Ann Arbor and in Madison in the post-war era.

\textsuperscript{167} Peters, supra note 13.

\textsuperscript{168} Robertson, supra note 61, at 64:

\ldots [M]any of them have become distinguished jurists and statesmen, occupying high places at the bar, on the bench, and in the Legislative councils, State and National. For the labor and privation encountered in their tutelage I feel more than compensated by the assuring hope that the seed I sowed will, by its wholesome fructification, help to save our institutions and bless our posterity.

\textit{Id.}

\textsuperscript{169} Id. at 158.