ONE LAW: THE ROLE OF LEGAL EDUCATION IN THE OPENING OF THE LEGAL PROFESSION SINCE 1776

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I. INTRODUCTION

The American legal profession has been substantially diversified. Thousands of Americans will enter the legal profession in 1993 who for reasons of gender or race would not have done so had they confronted the world as it existed in 1893. As many as two thousand are now teaching law who for reasons of gender or race could not have done so a century ago. These data embody enormous social change, a change that has occurred over a period of more than two centuries.

The change is, in recent years, the result of the efforts of individual women and members of minorities who have overcome not only the usual impediments faced in varying measures by all individuals seeking to achieve the competence and opportunity for service associated with professional status, but also special impediments resulting from their gender or race. The change is also in some part the result of efforts of persons facing such special impediments to help one another. But the change was also the result of deliberate efforts of countless white males, mostly of northern European extraction. More than a few of those white males were law teachers who played roles, generally small ones, in the development of the American legal profession since 1776. Those now finding the barriers of race and gender to be lowered (and they are much lower than they were only a few decades ago), owe at least a small debt to those who over time opened the profession and to those who nurtured in those persons certain notions about their rights and duties as Americans.

It is not my purpose in this article to deny past injustices of class, of region, of race, of national origin, of gender, and of other kinds as well. It is merely to correct what I perceive to be a serious intellectual and moral blunder imbedded in the ideology of the “politically correct.” It is now seemingly fashionable to observe past events without regard for context or sequence, to judge the nineteenth century, for example, as if it should have come after rather than before the twentieth century, measuring the conduct of persons living a century and more ago by the moral values to which we may hope that our children will aspire. It is nonsense so to judge the moralities of our forebears without regard for the moral values transmitted to them by theirs,
or in the words of an estimable antebellum law teacher, Francis Lieber, to "judge Moses by the standards of the Spartan Constitution." I write to protest such intergenerational chauvinism. I say, give the American past credit for some of what is right about the American present! I write to be read on the Fourth of July.

The American legal profession has since 1776 tended to be inclusive. The most important reason has been that openness has been characteristic of the culture of which American law is a part. While xenophobia was a regrettable feature of the large subculture that dominated our southeastern states until recent decades, the openness of America has otherwise been legend in much of the world. Doubtless this relative openness was the product of numerous influences, including isolation from the rest of the world, relative underpopulation, and frontier conditions.

Whatever its deeper causes, Americans at the time of the Revolution recognized the political importance of maintaining an open society. Indeed, they perceived that a republic such as they hoped to create could not be maintained in a society riven by divisions of class or otherwise. On this account, the Declaration of Independence proclaimed the obligation of government to secure the rights of each individual to equal status in law. As Hugh Henry Brackenridge, a widely read author of that generation, put it, "We the people," admits of no exclusion. Inclusiveness was thus not merely a humanist ideal or an aspect of "liberal individualism," but a practical policy favored by those concerned for the stability of the social order and for its capacity to protect the individual rights the Revolutionaries hoped to confirm.

Thus, at least since 1776, there has been a connection between the main themes of American government and movements against slavery,


3. Brackenridge, supra note 1, at 638.

for civil rights, and for the equal status of women. The distinctive national preference for inclusion, not exclusion, was recognized as a deeply-seated American trait by Martin Luther King, Jr., who did as much as any person can to reinforce and extend it. No separatist, King invoked the shared public morality expressed in the evolution of American society as the basis for his campaign to include and integrate; he employed a rhetoric that resonated with principles that most Americans regarded as the best aspirations of their nation. The historical depth and power of that morality has been cogently observed by Leon Higginbotham, the most distinguished black legal historian of our time, who said of the Declaration of Independence:

[T]he unsophisticated might argue that [it] had no ultimate impact or significance in eradicating slavery or diminishing racial discrimination. Yet in the corridors of history, there is a direct nexus between the egalitarian words uttered, even if not yet meant, and many of the changes that later took place.

The irony of the unfulfilled American dream of equality is that of all those in the long line of dreamers who have sought the ultimately just society, none had to seek out alien sources for moral authority. They had only to say to the American people: fulfill the largest promise in your first statement as a nation.

The principles that King and Higginbotham observed were long recognized as having special application to the legal profession. Perhaps the essence of the Declaration of Independence was a legal idea, that government exists to serve people and has duties to its citizens. In its most elementary meaning, “equal protection of the law” as celebrated in the Declaration and proclaimed in the Fifth Amendment, requires that the governing law be the same for all, i.e., that


6. This was the essential theme of non-violence as practiced by Gandhi against the British in India. See Martin Luther King, Jr., Stride Toward Freedom (1958), in Testament of Hope, supra note 5, at 417, 481-90.

there can be only one law. If there can be but one law, and it must be interpreted and administered as evenly as possible, the judges and lawyers must inform their understandings with values that are shared within the profession and consonant with the moral conventions of the people to be served and governed. Thus, if there is to be but one law, there can be but one legal profession, and that profession cannot be a preserve for any group or class. If the society to be served is inclusive, the legal profession needs to be so as well.

A consequence of the Revolution and of the Constitution was that many young men aspiring to serve the new republic were attracted to the legal profession. Lawyers were found everywhere in public life. On this account, Tocqueville declared the profession to be an aristocracy. This was hyperbole and falsely suggested traditional characteristics of oligarchies, especially intergenerational continuity and exclusivity. By the time of Tocqueville’s writing, America had long since recognized the need to prevent the legal profession from becoming a preserve of any part of the society it served, having laid aside most of the barriers to entry to that profession. American law was an open aristocracy, if that is not an oxymoron.

At the same time, however, there was widespread recognition from the nation’s beginning that the elevated role of the American legal profession made special demands on the professional discipline of its members. To have one law for all requires one legal profession to interpret and administer it. And for the legal profession to be one, there needs be an acknowledged common core of shared public values informing the professional work of its members. For this reason, from the beginning of legal education in America in 1779, there was an effort to inculcate in novitiates a shared discipline to be employed in interpreting and administering the nation’s law, especially its public law as set forth in the Constitution and other legal texts legitimated by it. That discipline was not unlike the traditional discipline of professional lawyers, but was made more demanding because of the extension of law into the sphere of politics.

Legal professionalism had emerged in Roman times as an art requiring the practitioner to subordinate personal traits and values in

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8. Alexis de Tocqueville, Democracy in America 297ff (Francis Bowen, ed. & Henry Reeve trans., New York, The Century Co. 1896). For an American assessment corresponding to that of Tocqueville, see Brackenridge, supra note 1, at 401 (“There is a natural alliance between liberty and letters.”). Brackenridge was a Justice of the Supreme Court of Pennsylvania from 1799 to 1816.

making professional judgments that would coincide with those of other professionals, thereby lending constancy to the meanings of legal texts and equality in their enforcement. Piero Calamandrei, a modern Roman, described the difficulty faced by the judge or advocate or counselor in a matter of private law:

It is difficult for the judge to check his private life outside the door before entering the courtroom, and it is especially difficult for him to distinguish within himself the personal prejudices and preconceived sympathies that seek to disguise themselves under a cloak of impartiality. . . . [Yet] the judge [must] free himself from the net of personal ties in which his affections and private interests envelop him, particularly since it is often difficult for him to recognize them as selfish interests. While deciding the case he must forget that he is a husband or father; he must cease to think of his own economic straits or the illness that saps his strength. The heroism of the judge can be measured by his degree of success in escaping from the prison of his private life. 10

Difficult as that escape is, it is even more difficult for a judge or advocate or counselor to check his public life and his political impulses at the door before entering the courtroom. Yet that is what the American constitutional scheme asked American lawyers and judges to try to do when it subjected our political arrangements to novel legal restraints. And it was this moral discipline derived from the Constitution that early American law teachers sought to nurture in those who would become public lawyers. 11

There is an apparent tension between this traditional aim of American law teaching and the purpose of including in the legal profession persons representative of many elements of the society to be served and governed. It is perhaps ironic that those entering the profession to diversify it must, if they are to be effective as public lawyers, surrender some part of the characteristics that made them diverse, at least when performing professional work. Yet that must inevitably be the case, if there is to be but one corpus of public law for both male or female citizens, and but one for citizens of different color or ethnic origin, as the ideal of equal protection requires.

10. Piero Calamandrei, Procedure and Democracy 38, 37 (John C. Adams & Helen Adams trans., 1956). Apologies are due for the frequent use of male pronouns; I tried taking liberties to gender Professor Calamandrei’s text, but they seemed to defeat his art.


A. The Era of Open Admissions: 1779-1870

1. The Early American Bar

There was no national American bar in the eighteenth century, but instead legal professions in each colony or state. At the time of the Revolution, in all colonies, young men choosing to become lawyers needed preceptors in the bar. The apprenticeship system in fashion was an adaptation of that for training English solicitors and tended to shelter the elitist and protectionist impulses of the colonial bar. There was some judicial control over bar admissions, but control in most states was decentralized. An educational requirement for admission to the bar was rare, yet many lawyers were well-read, some had attended college, and some had studied in England.

An exclusive bar was for reasons stated above, notably unsuited to the circumstances of America in the decades following the Revolution. Conditions prevailing in North Carolina in the late eighteenth century resembled conditions in much of the nation through the first half of the nineteenth century: not only were “want and penury” ubiquitous, but so were “ignorance and prejudice and a wild spirit of lawlessness.” A Scotswoman who visited her kin in 1775 found the women of North Carolina to be the source of the meager civility and the menfolk reduced to barbarism:

12. For an account, see ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 35-41 (1921).
13. Id. at 68-70.
14. Suffolk County, Massachusetts may have been the only exception. GERALD W. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840, at 131 (1979).
15. REED, supra note 12, at 76. The South Carolina Bar included an elite who had travelled to England to secure training that set them apart from the commoners amongst whom they lived and worked. Of the 26 American colonists who were admitted to practice in the Middle Temple in England, 35 were from Charleston. A reason for this is to be found in the colonial laws that entitled English licensees to be admitted in South Carolina without apprenticeship, upon passing an oral examination. Id. at 245. However, higher education was generally opposed in the state: “Learning . . . would become too cheap and too common, and every man would be for giving his son an education.” JAMES H. EASTERBY, A HISTORY OF THE COLLEGE OF CHARLESTON, FOUNDED 1770, at 10 (1933).
As the father found the labours of his boys necessary to him, he led them . . . to the woods, and taught the sturdy lad to glory in the stroke he could give with his Ax . . . . But a few generations this way lost every art or science, which their fathers might have brought out, and tho' necessity no longer prescribed these severe occupations, custom has established it as still necessary for the men to spend their time abroad in the fields; and to be a good marksman is the highest ambition of the youth, while to those enervated by age or infirmity drinking grog remained a last consolation.  

An early business of democratic legislatures was to overthrow the self-perpetuating privileged class wherever it existed. By the era of Jacksonian populism in the 1820s, control over bar admission had all but disappeared in many states. Particularly in the states west of the Alleghenies, almost any male citizen could become a lawyer virtually by declaring himself to be one; the practice of law was primeval:

Those were jolly times. Imagine thirty or forty young men collected together in a new county, armed with fresh licenses which they had got gratuitously, and a plentiful stock of brass which they got in the natural way; and standing ready to supply any distressed citizen who wanted law, with their wares counterfeiting the article. I must confess it looked to me something like a swindle. . . . There was one consolation: the clients were generally as sham as the counsellors. For

17. JANET SCHAW, JOURNAL OF A LADY OF QUALITY 155 (Evangeline W. Andrews & Charles M. Andrews eds., 1939). For a comparable view of upstate New York by the President of Yale, see TIMOTHY DWIGHT, TRAVELS IN NEW ENGLAND AND NEW YORK (New Haven, T. Dwight 1821-1822). To observations of poverty, Dwight added derision of those enjoying a bit of prosperity:

Together with a collection of discreet and virtuous people, there is sometimes [in upstate New York] an unhappy proportion of loose, lazy, shiftless, and unprincipled inhabitants . . . [t]oo ignorant . . . to discern in what the real respectability . . . consists, and too vicious willingly to adopt what is excellent . . . they employ themselves in copying the fashions, follies, and vices of cities. To be first, and excessive in fashions; to make a parade in the midst of poverty; to be pert; to gamble; to haunt taverns; to drink; to swear; to read newspapers; to talk on political subjects; to manage the affairs of the nation and neglect their own; to profess themselves infidels; to seem to know everything and plainly to care nothing about religion; to array themselves against its ministers, its friends, and its interests and to be wiser in their own conceit than seven men who can render a reason are strong features of the character of such men.

4 DWIGHT, supra, at 3-4. The quoted letter was written in 1804.

18. MAXWELL H. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 32-38 (1976); REED, supra note 12, at 75-77.
the most part, they were either broke or in rapid decline. They usually paid us the complement of retaining us, but they usually retained the fee too, a double retainer we did not much fancy... The most that we made was experience. We learned before long, how every possible sort of case could be successfully lost; there was no way of getting out of court that we had not tested.\textsuperscript{19}

The extremity of deregulation was achieved in the Indiana Constitution of 1851 which provided: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."\textsuperscript{20}

To attract frontier or rural clients, it helped to have a copy of Blackstone's \textit{Commentaries}\textsuperscript{21} at hand, and maybe a form book, and to be a fluent speaker, with a reserve of anecdotes perhaps drawn from the Bible or Shakespeare. But clients were not always assured even of literacy. While this extreme openness of the profession was disapproved by many,\textsuperscript{22} it was an accommodation of the spirit of equality expressed in 1776, and followed from the close relationship between law practice and politics in the antebellum era.\textsuperscript{23}

Jacksonian deregulation seems actually to have had little effect on the economic circumstance of the urban elite of the bar, those "Philadelphia lawyers," for they continued to prosper.\textsuperscript{24} Indeed, the openness of the bar may have contributed to the fact that most people prominent in public life were lawyers. All but two presidents elected before 1868 were lawyers.\textsuperscript{25}

Nevertheless, some later observers regarded the era of Jacksonian populism as one of degradation for the profession.\textsuperscript{26} In broad economic

\begin{itemize}
\item \textsuperscript{20} \textit{Ind. Const. of 1851}, art. VII, § 21. A draftsman of this constitution was Daniel Read, professor of constitutional law at Indiana University. See \textit{generally} James J. Robinson, \textit{Admission to the Bar as Provided for in the Indiana Constitutional Convention of 1850-51}, 1 Ind. L.J. 299 (1926).
\item \textsuperscript{21} The most widely circulated edition was that edited by St. George Tucker and published in four volumes in 1803. After 1826, Blackstone was gradually replaced by James Kent, \textit{Commentaries on American Law} (4 vols., New York, O. Halsted 1826-32).
\item \textsuperscript{22} \textit{E.g., The Study and Practice of the Law}, 14 U.S. Democratic Rev. 345 (1844).
\item \textsuperscript{24} Lawyer incomes in Maryland seemed to have been particularly high. Dennis R. Nolan, \textit{The Effect of the Revolution on the Bar: The Maryland Experience}, 62 Va. L. Rev. 909, 975-76 (1976).
\item \textsuperscript{25} Presidents Harrison and Taylor won recognition as generals.
\item \textsuperscript{26} \textit{E.g., Roscoe Pound, The Lawyer From Antiquity to Modern Times, With
terms, the era was one of depression for most of those who designated themselves as lawyers. Few lawyers were as prosperous as shopkeepers. Thus, a Texas lawyer proved no rare exception when he turned his law office into a barber shop and advertised that his clients would be “clipped and shaved to their hearts [sic] content.”27 Academic credentials had seemingly little or no benefit in securing professional legal employment. Hence, academic training in law had little or no market value.

2. The Institutions of Higher Education

Early American colleges were in no position to practice exclusive admissions, as they had but a small group of candidates from which to choose. The population of all thirteen colonies at the time of the Revolution was less than three million. This population was spread thinly along the coast, with most of the adults engaged in the grinding tasks of agriculture and childbearing. In 1776, no American city had a population of more than 25,000. Transport and communications were execrable; the most accessible location for a meeting of Americans from all thirteen colonies was London.28 Elementary education was sparse throughout the colonies. Literacy, the basic tool of lawyers, was abundant nowhere. Women were, of course, not candidates for higher learning even if literate. Their exclusion resulted at least in part because they were deemed necessary to sustain the enormous birth rate which doubled the native population every other decade. This growth continued despite the daunting death rate caused by frequent epidemics that kept life expectancy at birth to only slightly more than 40.

Foreign travelers were amazed by the vast number of children in America:

Children swarmed everywhere: “like ants” or “like broods of ducks in a pond.” In the size of families, it was observed, even “Irishmen are nothing to the Yankeys and Buckskins in that Way,” although it was thought that the Yankees’ custom of bundling gave them an advantage over the less resourceful Irish. Even the beauties of Virginia were found

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to be "great Breeders." . . . "The good people are marrying one another as if they had not a day to live," [warned one Englishman in 1768, and] "I alledge [sic] it to be a plot against the State . . . [for] the ladies (who are all politicians in America) are determined to raise young Rebels to fight against old England."29

Only with great effort could such a society produce here and there a handful of candidates for higher education.

From the Revolution to the Civil War, such college or university training in law as existed was therefore generally available to any American male not of African descent who had a few dollars to pay the tuition. Tuition was everywhere modest by contemporary standards, reflecting a barter economy in which little specie circulated.30 Still, few people elected to pay tuition not only because cash was scarce, but also because academic training was not necessary; such training was generally perceived as a luxury, perhaps on the level of violin lessons.

The University of Pennsylvania, for example, although the only college in the largest city in the second most populous state, was in 1790 admitting students at the age of thirteen, and still found difficulty in assembling as many as two dozen.31 Georgetown University, the only Catholic institution, was admitting its students at the age of eight in order to scrape together a few young believers.32 Because these students were immature, they were often difficult. Princeton, for example, expelled 126 of its nearly 200 students during a rebellion in 1807.33 Behavior was scarcely better at most other colleges.34 Physical

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30. At Transylvania University Law Department, perhaps the most important antebellum law school, tuition may never have exceeded $30 for the one-year program. Charles Kerr, Transylvania University's Law Department, 31 Americana 3, 24-25 (1937) (photo reprint). That was, of course, a sum that was not insignificant; frontier land was sold for a dollar an acre in the early decades of the nineteenth century. But the tuition was within reach for an unskilled laborer, at least if he was not supporting a family.
32. John M. Daly, Georgetown University: Origin and Early Years 69 (1957).
33. Mark A. Noll, Princeton and the Republic, 1768-1822, at 215, 229 (1959). In 1827, President Cooper expelled about 75 students of 130 in consequence of a riot over the quality of the food served in the dining hall at South Carolina. 1 Daniel W. Hollis, University of South Carolina 90-91 (1951).
34. Student disorders of impressive dimensions confronted Willard during most of his twenty-four years at Harvard's helm. The disorders included the throwing of knives and stones
strength and foot speed enabled college teachers to cope with riotous youth. 35 Coarse conduct was everywhere the rule; in 1840, the Trustees of Miami University directed the president to brick up the windows of the dormitory if the students did not cease urinating out of them. 36 While growth in the number of students corresponded to the rapid growth in population, apparently no college could attract as many as 1000 students at any time before the Civil War. 37

Law was generally taught as part of the undergraduate curriculum, as training for public life. Law teaching emphasized Constitutional Law, International Law, Corporative Law, and the closely related discipline of Political Economy, all generally taught under the rubric of Moral Philosophy.

In the late antebellum decades, a few university law schools or departments provided some additional training, offered at least partly as preparation for private law practice, including notably: Cincinnati, Cumberland (in Tennessee), Harvard, Indiana, Louisiana (later Tulane), North Carolina, Pennsylvania, Transylvania (in Kentucky), Virginia, and Yale. 38 None of these schools, however, maintained academic admissions requirements and only a few bothered to examine students on what they had learned. 39 Transylvania and Virginia were among the few who did examine students: they administered rigorous general examinations that one had to pass in order to receive the bachelor of laws degree, and they failed many examinees — although

at faculty members, and threats to burn Willard’s house, with the most serious disorder occurring in 1791 when the university threatened the students with examinations. SAMUEL E. MORISON, THREE CENTURIES OF HARVARD 1636-1936, at 175-77 (1936).

35. Joseph Caldwell, the first President of the University of North Carolina, was admired for these qualities. 1 BATTLE, supra note 16, at 221. Caldwell also was capable of strong language; thus his words in an open letter to the legislature when it failed to appropriate funds for his institution: “Be assured,” he said to the University’s critics, that

the stupidity of your politics shall be known. . . . The grave may open to you a

retreat from public anger and contempt, [but] you shall still live [as] notorious

monuments of that vileness, into which a sinister, a malignant and insidious warfare

against the good of the country must very shortly descend.

1 BATTLE, supra note 16, at 146-47.


37. Oberlin, apparently the largest college in the 1850s, may have reached that number. 1 ROBERT S. FLETCHER, A HISTORY OF OBERLIN COLLEGE: FROM ITS FOUNDATIONS THROUGH THE CIVIL WAR 431 (1943).

38. For a complete list and some enrollment data, see REED, supra note 12, at 451.

39. Examinations were first introduced at the Harvard Law School in 1871 by Dean Langdell. ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 171 (1967).
only after the students had safely completed their payment of tuition. Failure on the examination was, however, no personal calamity, the degree being merely ornamental. In such feeble circumstances, no university or law teacher had any influence whatever on the demography of the profession.

3. Legal Education for African-Americans

No person of color or apparent African descent would have been admitted to a college in a slave state. Although a significant number were allowed to become literate, African-Americans were denied any formal educational opportunity in the South before the Civil War. There was of course very little public education in the South in those decades, even for whites. But in some states, it was a crime to teach a slave lest he use his knowledge to stage an uprising.

Even African-Americans in the north were only "quasi-free." By 1860, half of the five hundred thousand free African-Americans lived in the urban north. A number who were manumitted gathered in Baltimore. Although Baltimore was in a slave state, the city was in transition as a prosperous port of entry to the West, and the free African-American population of the city reached 26,000 by 1860. The situation faced by free African-Americans in Baltimore was not atypical: almost all were in penury observed by some to be worse than

40. This system seems to have been invented by Professor Boyle at Transylvania. John D. Wright, Jr., Transylvania: Tutor to the West 139 (1975). But it was most highly developed by Professor Minor at Virginia; only 59 of 654 students completing his course between 1845 and 1855 passed their exam and obtained their degrees. Holly B. Fitzsimmons, John Barbee Minor, in Legal Education in Virginia 1779-1979: A Biographical Approach 417, 425 (W. Hamilton Byson ed., 1982) [hereinafter Legal Education in Virginia].

41. John H. Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of Negro Americans 126 (6th ed. 1988). This was a crime not infrequently committed. Id. at 122-27. Notwithstanding this, "Negro schools" are known to have existed in several Southern cities at the time. Id. at 126.

42. Id. at 132-54.

43. Id. at 137.

44. Maryland alone among the slave states had almost as many free African-Americans as it had slaves. Robert J. Brugger, Maryland: A Middle Temperament 1634-1980, at 211, 268 (1988).


46. By no means all. Many owned homes. By 1821, there was a Benevolent Society of African-Americans, and by 1835, there were several dozen organizations of a social and cultural nature. Franklin & Moss, supra note 41, at 140-46.
slavery, though many were striving to escape from that condition.47 While they had been allowed to vote in the years following the Revolution, they were denied that right after 1810.48 Their unhappy circumstance was the object of concern of The Protection Society of Maryland, which sought, among other things, to prepare freemen for life in Baltimore.49 A leader of this group was David Hoffman, a professor of law at the University of Maryland.50 The plight of Baltimore African-Americans also was an object of attention of the American Colonization Society, which was organized to bring an end to slavery.51 Generally defeated elsewhere, the Society enjoyed in Maryland some success in its program of emancipation and relocation of African-Americans to Liberia.52 Baltimore also had an active group of abolitionists; nevertheless, it was a Baltimore jury that convicted the abolitionist William Lloyd Garrison of criminal libel for his description of a Maryland slave trader as a murderer.53 It seems generally to have been true that "Marylanders could neither suppress the slavery issue nor agree on it."54 Or as one Baltimore African-American observed: "The frogs, mice and flies of Egypt did not haunt Pharoah's palace more than the Negro haunts, perplexes, and maddens the councils of the people of this country."55

The racial problem between African-Americans and whites was, however, only a part of a larger pattern of factional violence in Baltimore. The city was the place of origin of the Know-Nothing movement among Democrats which aimed to put "foreign ungrateful refugees" in their proper place.56 Irish and German groups in Baltimore were

47. There were over 200 African-Americans taking instruction in literacy in Baltimore in 1820. By 1850, the number reached 1400. Id. at 148-49.
48. Id. at 141.
49. Its constitution is published at 1 Md. Hist. Mag. 358 (1905).
50. ELIZABETH K. BAUER, COMMENTARIES ON THE CONSTITUTION 112 (1952).
51. The Society was organized to achieve emancipation and voluntary relocation of freemen, not necessarily in Africa, but perhaps in Central America, the Caribbean, Nebraska, or Oregon. Henry Clay and James Madison were among its founders. Their program was resisted by abolitionists who opposed compensation of slaveowners, and by slaveowners who resisted even a compensated alteration in their lifestyles. Only private contributions were obtained, sufficient to bear the costs of helping some freemen return to Liberia. For a brief account, see FRANKLIN & MOSS, supra note 41, at 154-57.
52. BRUGGER, supra note 44, at 213.
53. Id. at 215.
54. Id.
55. GRAHAM, supra note 45, at 258.
56. The group was also known as The Order of the Star Spangled Banner. BRUGGER, supra note 44, at 260, 262.
said to practice arson against one another.57 In 1854, anti-Catholic sentiment exploded over a proposal to use public funds to support parochial schools. In a series of race riots amongst white citizens, fifteen were killed and hundreds injured before the militia restored order.

The situation in Baltimore reflected conditions and attitudes that were extant throughout America and, indeed, throughout much of the world in the nineteenth century. Not only in America, but in many other places, peoples of vastly different cultures were experiencing sustained contact for the first time. Racism was nothing new; indeed it was deeply rooted in the traditions of most tribal societies, many of whom were prepared to practice a little genocide now and then.58 For all of the cruelties perpetrated against Native Americans, many tribes gave as good as they got until they were overwhelmed by numbers.59 Indeed, slavery in America was itself a product of African tribal racism that rationalized the capture and sale of members of rival tribes.60 Xenophobia is perhaps a universal human impulse, and racism has everywhere served as a convenient rationalization of that fear. Racism had declined in the West under the influence of such temporizing institutions as the Roman Empire (but let us not forget what Rome did to Carthage) and the Catholic Church (nor should we forget the Inquisition), and was in general disfavor with the generation of Protestant American Revolutionaries.61 But racism experienced a considerable revival in the mid-nineteenth century in Europe as well as America. Thus, one English scholar went so far as to observe in a lecture at Cambridge University that “the welfare of the Teutonic race is the welfare of the world.”62 And another that the “dark races”

57. Id. at 260. Similar events occurred in Philadelphia. BLOOMFIELD, supra note 18, at 191-234.
60. FRANKLIN & MOSS, supra note 41, at 27-30.
of the earth are "[d]estined by the nature of their race to run, like all other animals, a certain limited course of existence, it matters little how their extinction is brought about."  

This thinking reflected a wave of biological determinism that found an audience because it served to rationalize not only slavery, but also colonialism and territorial aggression by emerging nation-states; it was, Condorcet said, a means to "make nature herself an accomplice in the crime of political inequality." 64  Respected scientists of the mid-nineteenth century, such as Harvard's Louis Agassiz, an outspoken abolitionist, were lionized for their advocacy of the science of polygeny. Polygeny provided a pseudo-intellectual basis for racism and justified, in the mind of Agassiz, withholding higher education from African-Americans whom he believed to be unfit to benefit from it. 65  During the Civil War, Agassiz argued for the creation of an African-American state in the South to which northern African-Americans should be removed, in recognition of the supposed scientific reality that they could not be assimilated. 66  In 1839, Samuel George Morton, another widely respected American scientist, published a very ambitious work based on empirical measurements of skulls, which concluded that Native Americans were doomed by insufficient brain size. 67  Similar work was conducted in Europe by French and German scientists seeking to demonstrate the superiority of their nations over one another. 68  All of this "science" has long since been exploded, 69  but it served at the time to capture the thinking of such wise humanists as Emerson 70  and Whitman. 71  The state of American law and education should be viewed in light of this contagion of racism encircling the globe.

65. Cf. Louis Agassiz, The Diversity of Origin of the Human Races, CHRISTIAN EXAMINER, July 1850, at 110, 144 (maintaining that education of the "colored races" should be tailored to their unique characteristics).
66. GOULD, supra note 64, at 47-48.
68. GOULD, supra note 64, at 82-92.
69. Id.
70. RALPH WALDO EMERSON, ENGLISH TRAITS 75 (Howard M. Jones ed., 1966) (1856).
71. Cf. WALT WHITMAN, BROOKLYN DAILY EAGLE, July 7, 1846 in 1 THE GATHERING OF THE FORCES 241 (Cleveland Rodgers & John Black eds., 1920) (asking "What has miserable, inefficient Mexico . . . to do with the great mission of peopling the New World with a noble race?").
Despite such "science," it is not clear that a literate freeman would have been denied admission at many colleges outside the slave states. The matter was seldom put to the test for so few African-Americans were able to acquire elementary education before the Civil War. Nonetheless, there were African-American students at Lafayette\textsuperscript{72} and Ohio,\textsuperscript{73} and it is likely that there were a few others elsewhere. In the last antebellum decade, there were numerous African-Americans studying at Oberlin,\textsuperscript{74} including at least two who prepared themselves for careers in law.\textsuperscript{75}

4. Law Teachers and Slavery

Although there was little teaching of law to African-Americans in antebellum times, law teachers were not indifferent to the African-Americans' unfortunate plight. Training African-American lawyers was an activity that would have to follow, not precede, emancipation. Slavery and its relation to the Constitution was inevitably the overriding concern of those teaching public law. The involvement of these teachers confirms the continuing vitality of Independence Day in the thinking of most preoccupied with the Constitution.

Almost all those teaching law in colleges and universities before the Civil War shared a common public mission, whether they were political adherents of Jefferson or Hamilton,\textsuperscript{76} of Clay or Jackson.\textsuperscript{77} To some extent, that mission derived from the same impulse as the Constitution itself. The Constitution was a response to a widely shared

\textsuperscript{72} 1 David B. Skillman, The Biography of a College: Being the History of the First Century of the Life of Lafayette College 66 (1932).

\textsuperscript{73} The first African-American graduated from Ohio University in 1828. Thomas N. Hoover, The History of Ohio University 50 (1954). The next year, the Ohio legislature voted to exclude African-Americans from public schools. Franklin & Moss, supra note 41, at 147.

\textsuperscript{74} For a description of the Oberlin experience, see 2 Fletcher, supra note 37, at 516-27.

\textsuperscript{75} One of these, John Langston, reported that he had been denied admission to the University of Cincinnati Law School on grounds of race. See Bloomfield, supra note 18, at 302-39. It is pertinent to recall that at the time of Langston's application, it was unlawful to admit a negro student to a public school in Ohio. Although not governed by the statute, the law school was part of a public institution and was entirely dependent on tuition revenue for its fragile existence.

George Vashon '44 practiced law for many years at Syracuse. 2 Fletcher, supra note 37, at 533. John M. Langston '49 was admitted to the Ohio Bar in 1854, did some teaching at Oberlin, served in the 55th Massachusetts Regiment in the Civil War, and was the founding dean of the law school at Howard. See Bloomfield, supra note 18, at 315-39. Langston's autobiography is John M. Langston, From the Virginia Plantation to the National Capitol; or, the First and Only Negro Representative in Congress from the Old Dominion (Hartford, American Publishing Co. 1894).
fear that republican government was inherently unstable, being prone to collapse in factionalism, then chaos, and finally despotism. Thus, the Constitution responded to that concern by its attempt to cabin the popular voice, dividing and thus constraining the exercise of political power. Law teachers responded to the same concern by attempting to provide the public with democratic leaders trained to resist faction and to practice classical republican virtue, or patriotism as it came to be known.

Law teachers were thus by their employment committed to the Constitution of the United States and to an inclusive approach capable of transcending divisions and factions. Many were seemingly selected for teaching positions because they had manifested such a commitment


77. BENJAMIN F. BUTLER, Report of the Committee Upon the Subject of a Professorship in the University of the City of New York, reprinted in THE LAW SCHOOL PAPERS OF BENJAMIN F. BUTLER: NEW YORK UNIVERSITY, SCHOOL OF LAW 5 (Ronald L. Brown, ed., 1987) [hereinafter LAW SCHOOL PAPERS]. In 1835, Benjamin F. Butler, then President Jackson's Attorney General of the United States and a Barnburner Democrat, was invited to propose a plan for the establishment of a Faculty of Law at recently established New York University. Butler's plan was approved and he accepted an appointment to commence in 1837. Id. The University was modeled on the new institution in London, and was accordingly much influenced by Bentham. Benjamin F. Butler, Plan for the Organization of a Law Faculty and for a System of Instruction in Legal Science in the University of the City of New York (1835), reprinted in LAW SCHOOL PAPERS, supra at 111-36. Butler was, with his friend and political colleague, David Dudley Field, an adherent of Bentham's proposals for codification of the common law. He also advocated the popular election of Supreme Court Justices, an idea generally accepted by state constitutional conventions dominated by Jacksonians. Despite his populism, Butler's ambition as an educator was to advance the development of a legal profession that would serve as a political elite, who would practice the public morality necessary to sustain the trust of the people in popular institutions. See Benjamin F. Butler, Inaugural Address, reprinted in LAW SCHOOL PAPERS, supra, at 168.

78. This had been the prognosis of Montesquieu. Cf. MONTEESQUIEU, supra note 2, bk. V, ch. 2-4, at 29-31 (expounding the need for laws establishing frugality and equality in a republic). He was the most widely read political writer at the time of the Revolution. See generally PAUL M. SPURLIN, MONTEESQUIEU IN AMERICA 1760-1801 (2d ed., 1969) (discussing Montesquieu's impact on the framers of the Constitution). The history of earlier republics tended to support Montesquieu's prognosis, as Americans were aware. Perhaps most ardent in his concern was John Adams. See generally JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (Da Capo Press 1971) (1788).

in public careers. Their commitment was in any case reinforced by cognitive dissonance, the emotional need to reconcile one's moral credo with one's employment.80 Law teachers were thus, save a few exceptions in the South, ardent nationalists — the secular ministers of a constitutional faith.81 While few, if any, could visualize racial integration in antebellum times, their efforts were bent in the direction of national harmony and the orderly resolution of strident differences.

Alas, the Constitution they taught had within it a deep dissonance. "On the one hand, in many of its provisions, it confirmed values expressed in the Declaration of Independence. The guarantee of a republican form of government and those rights enumerated in the Bill of Rights exemplify these values. On the other hand, the Constitution protected slavery. In this regard, the Constitution had been a necessary pact with the devil. The dilemma was stated in a widely circulated text published in 1837 by Timothy Walker, the founding professor of the University of Cincinnati Law School:

[L]iberty is the natural right of every human being. It also forms one of the fundamental conditions of our social compact. In our various declarations of rights, it is asserted to be the natural, inherent, and unalienable right of all men without exception. Hence it follows that slavery can be justified upon no principle, but that of uncontrollable necessity. If, therefore, it had not been deeply rooted in this country at the time of framing the federal constitution, there is no doubt that it would have been absolutely and for ever prohibited in the strongest language. But at this epoch, a traffic in African slaves, as lucrative as it was inhuman, was carried on by all civilized nations. Efforts had been repeatedly made by the colonies to prevent their introduction here, but they were universally frustrated by the British King. The consequence was, that before our independence, the labor of several of the colonies was chiefly performed by slaves, who constituted a considerable portion of the property of their owners; and the number continued to increase up to the moment of framing the constitution. To abolish slavery, therefore, by this instrument, was out of the question. Upon such a condition, the Union could not have been formed. On the contrary, its toleration, so far as the federal government was concerned, was a matter of absolute necessity.82

This pact with the devil became increasingly difficult to maintain as the antebellum decades unfolded.  

Opposition to slavery long antedated the Declaration of Independence, having generally rested on moral and religious grounds. But the Declaration proceeded from premises that further reinforced that opposition with sound long-term political objections to the institution. These political objections reflected the advice of political writers that a republic could be maintained only in an egalitarian society capable of mutual trust. Thus, slavery was deemed inherently incompatible with republican government because the resulting inequalities would lead to faction and its ruinous sequels.

On the other hand, as Timothy Walker implied, the reasons for making the pact with the devil remained. There was no clear path to emancipation, especially after the emergence of the cotton plantation in the first few years of the nineteenth century had enhanced the profits of slave ownership and caused the creation of a distinct slavery-dependent cotton culture that acquired a vitality of its own. Disunion or war were the omnipresent alternatives, and neither assured an early end to slavery in the cotton patch.

However, from the beginning, there was seldom cause to doubt the anti-slavery sentiments of most of those who taught law. When the law of the Commonwealth of Virginia was amended in 1782 to allow manumission, George Wythe, the first and then the only law professor in America, promptly freed the slaves in his family, save those too old to fend for themselves. He had by his personal efforts educated several of them, including one young man with whom he read some of the same classical works on which he had been trained by his Quaker mother and on which he had trained Jefferson.

A few years after Wythe commenced teaching at William and Mary, Jefferson wrote to a celebrated English abolitionist, Rev. Richard Price, predicting that slavery would be abolished in Virginia and Mary-


85. "In democracies...slavery is contrary to the spirit of the constitution..." Montesquieu, supra note 2, at bk. XV, ch. 1, at 176.


88. Id.
land in the not too distant future, and urging that the Reverend Price write Wythe's law students at William and Mary to enlist their support for his cause:

[It] is the place where are collected together all the young men of Virginia, under preparation for public life. They are there under the direction (most of them) of a Mr. Wythe, one of the most virtuous of characters, and whose sentiments on the subject of slavery are unequivocal. I am satisfied, if you could resolve to address an exhortation to those young men, with all that eloquence of which you are master, that its influence on the future decision of this important question would be great, perhaps decisive.89

Similar anti-slavery teaching was underway elsewhere. At Yale, President Ezra Stiles, another Jeffersonian, had studied law and commenced to teach Constitutional Law as a major component of the senior year curriculum devoted to Moral Philosophy.90 His purpose was to prepare Yale men for public life in the American republic.91 He taught students, including James Kent, from such works as *The Spirit of Laws* and *The Federalist*.92 Although Stiles was a latecomer to the cause,93 in 1790 he became the first president of the Connecticut Abolition Society, which worked to secure emancipation legislation in that state.94

At Princeton, President Samuel Stanhope Smith was engaged in an effort parallel to that of Stiles. Although not formally trained as a lawyer, and a loyal Federalist who opposed Jefferson, Smith taught


90. In the eighteenth century, in English universities as well as American, law and economics were both regarded as branches of Moral Philosophy. Adam Smith and William Blackstone were contemporaries at Oxford, both studying in that same field. See John Rae, Life of Adam Smith (London, New York, MacMillan 1856); Lewis C. Warden, The Life of Blackstone 30-61 (1938).


93. Stiles had in fact purchased a slave, whom he later admitted to full communion in his Congregationalist faith and then manumitted in 1778, as he left his church to assume his presidential duties. Edmund S. Morgan, The Gentle Puritan: A Life of Ezra Stiles 1727-1795, at 309-10 (1962).

94. Legislation was enacted in 1794. Davis, supra note 84, at 29.
Constitutional Law to Princeton seniors (again as part of Moral Philosophy), in order to prepare them for public life, presumably as political competitors to the students of Wythe and Stiles.\textsuperscript{96} Among his pedagogical techniques was to require students to recite the Constitution. His lectures confirm Smith's opposition to slavery. He also published a book on race in 1787 which for his time definitively established that all men of whatever color are descendants from a common genetic source.\textsuperscript{96} He gave thought to the problem of establishing gainful employment for freemen, and was in league with his friend William Paterson, a Federalist lawyer and a force on the governing board of Princeton, who led the campaign to secure emancipation legislation in New Jersey.\textsuperscript{97}

In Pennsylvania, the emancipation movement was led by Benjamin Rush, a medical doctor and another Jeffersonian, who was a signer of the Declaration.\textsuperscript{98} Rush observed to a French correspondent that "it would be useless for us to denounce the servitude to which the Parliament of Great Britain wishes to reduce us, while we continue to keep our fellow creatures in slavery just because their color is different from ours."\textsuperscript{99} Rush also was the founder of Dickinson College, which he hoped to establish as a "temple of justice" in which young men would study public law to prepare for their roles in republican

\textsuperscript{95} Samuel S. Smith, The Lectures, Corrected and Improved, Which Have Been Delivered for a Series of Years, in the College of New Jersey; on the Subjects of Moral and Political Philosophy (Trenton, D. Fenton 1812).

\textsuperscript{96} Samuel S. Smith, An Essay on the Causes of the Variety of Complexion and Figure of the Human Species (Winthrop D. Jordan ed., Belknap Press, 1965) (1810). This work was badly treated by the pseudo-science of race emerging a few years later. Horsman, supra note 61, at 116-17. Smith's most severe critic was Dr. Charles Caldwell. \textit{Id}.

\textsuperscript{97} Legislation was adopted in 1804 for gradual emancipation. Davis, supra note 84, at 31.

\textsuperscript{98} Benjamin Rush graduated from Princeton in 1760. He was then fourteen. He studied medicine in Philadelphia and Edinburgh for six years, and taught and practiced medicine in Philadelphia for another fifty. In 1770, he published the first American book on Chemistry. He was a pioneer in experimental physiology and wrote important scientific papers on cholera, yellow fever, dental infections, and diseases of the mind. During the yellow fever scourge that struck Philadelphia in 1793 and 1798, depleting the city of a sixth of its population, Rush risked his life for many hours a day to give comfort to the sick whom he had no means to treat. His presence in the city made Philadelphia the first center of medicine in America. Rush had been active in protesting the slave trade in colonial times. Benjamin Rush, An Address to the Inhabitants of the British Settlements in America, Upon Slave-Keeping (Philadelphia, John Dunlap 1773).

\textsuperscript{99} Letter from Benjamin Rush to Jacques Barbeu Dubourg (1769), in Davis, supra note 84, at 274.
life. Rush was supported in his efforts to secure emancipation by Justice James Wilson, the first law professor at the University of Pennsylvania, and an important contributor to the Constitutional Convention of 1787. In the year of that Convention, the Continental Congress enacted the Northwest Ordinance, which prohibited slavery in the states north of the Ohio River. The draftsman and first proponent of the anti-slavery provision was Nathan Dane, a member from Massachusetts and a Federalist. Dane was later a judge, a legal scholar, the author of a massive digest, and the patron of the Harvard Law School. Dane financed Harvard's acquisition of the services of his friend and colleague at the bar, Justice Joseph Story. Another important advocate in the Congress of Dane's antislavery provision was David Howell. Howell also was a Federalist and the leading champion of constitutional ratification in Rhode Island. Later, Howell held an appointment as professor of law at the College of Rhode Island (later Brown) for two decades.

When George Wythe left William and Mary in 1790 to assume his duties as Chancellor in Richmond, he was succeeded by St. George Tucker, one of his former students. Judge Tucker, a native of Bermuda, had been a naval blockade runner during the Revolution.

100. JAMES H. MORGAN, DICKINSON COLLEGE: THE HISTORY OF ONE HUNDRED AND FIFTY YEARS 1783-1933, at 41 (1933). Rush was deeply disappointed when the person he selected as the first president of his college, Charles Nisbet, a distinguished minister who had immigrated from Scotland, turned out to favor slavery. Nisbet found himself "a pelican in the wilderness." He disapproved of the absence of an aristocracy and he disapproved of elections, but approved of slavery. Of the election of Jefferson, he said: "God grant us patience to endure [his] tyranny." Id. at 68.

101. Wilson, although recognized in Pennsylvania as strongly antislavery, was the author of the three-fifths compromise regarding the representation of the slave states in Congress. On his return from the Constitutional Convention, he assured Pennsylvanians that the agreed abolition of the slave trade in 1808 would lead to the emancipation of all slaves. DAVIS, supra note 84, at 324-25.

102. Dane regarded this achievement as "the crowning glory" of his career. 1 WARREN, supra note 91, at 413. He was apparently surprised by his success at the time. DAVIS, supra note 84, at 154.

103. NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW (Boston, Cummings, Hilliard & Co. 1823-29).

104. See 1 WARREN, supra note 91, at 415-18; SUTHERLAND, supra note 39, at 92-100.

105. DAVIS, supra note 84, at 153 n.74.

106. 5 DICTIONARY OF AMERICAN BIOGRAPHY, pt. 1, at 301 (Dumas Malone ed., 1961).

107. Election of St. George Tucker as Professor of Law, 18 WM. & MARY QTLY. 220 (1910).

Tucker also had been prominent in Virginia politics and would remain so while serving as judge and teacher.\textsuperscript{109} Not only was Tucker a respected judge and political leader, but he was also a poet of parts; his poems include at least one celebrating the brotherhood of African-American men with white.\textsuperscript{110} Tucker, like Wythe, was a political as well as an intellectual force in the Commonwealth of Virginia. He lectured on Blackstone, \textit{The Federalist}, and primary materials on the governments of the United States and of Virginia.\textsuperscript{111} He also lectured regularly on the abolition of slavery, which was his "dearest wish."\textsuperscript{112}

In 1796, Tucker published an argument and an elaborate plan for the gradual abolition of slavery in the Commonwealth.\textsuperscript{113} He proposed to emancipate every female slave born after the date of his plan's enactment, together with all her descendants. Each emancipated female would serve her owners until the age of twenty-eight as compensation for emancipation, whereupon she would receive $20 (a more than trivial sum equivalent to a year's tuition) and suitable clothing and bedding.\textsuperscript{114} By denying African-Americans the right to hold public office in Virginia, Tucker aimed to encourage their migration to unsettled areas in the west.\textsuperscript{115} Tucker's plan was debated in the legislature of the Commonwealth, but of course was not enacted.\textsuperscript{116}

Tucker's plan was too gradual for twentieth-century tastes, and the disfranchising of African-American citizens which the plan required seems totally unacceptable today. Yet his plan was at least as considerate of the welfare of the slaves as plans developed in northern states.

\textsuperscript{109} For a full biography, see \textit{Maury H. Coleman, St. George Tucker, Citizen of No Mean City} (1988).

\textsuperscript{110} For example:

I dreamed last night, the debt of nature paid, I, cheek by jowl, was by a Negro laid; Provoked at such a neighborhood, I cried, "Rascal! begone. Rot farther from my side." "Rascal!" said he, with arrogance extreme, "Thou are the only rascal here, I deem; Know fallen tyrant, I'm no more thy slave! Quaco's a monarch's equal, in the grave."


\textsuperscript{111} 2 \textit{Samuel Miller, A Brief Retrospect of the Eighteenth Century} 503 (New York, T. & J. Swords 1803).

\textsuperscript{112} See \textit{Davis, supra note 84, at 335-36.}

\textsuperscript{113} \textit{St. George Tucker, A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia} (Philadelphia, M. Carey 1796).

\textsuperscript{114} \textit{Id.} at 89.

\textsuperscript{115} \textit{Id.} at 91-94.

\textsuperscript{116} Charles T. Cullen, \textit{St. George Tucker, in Legal Education in Virginia, supra note} 40, at 657, 676-77.
at the same time, plans which in due course resulted in an end to slavery in those states, but for many northern slaves, merely resulted in their being “sold South.” Tucker’s plan was for its time and place an aggressive one, designed to achieve emancipation as soon as possible without arousing armed resistance from those whose “property” would have to be taken, or from taxpayers unable or unwilling to pay for that “property.” Tucker’s antislavery politics, it should be noted, were limited to the confines of his Commonwealth; he was not advocating a nationalist policy. Tucker’s renowned antislavery sentiments did not preclude his appointment to the Virginia Supreme Court in 1804. Nor, it must be noted, did his personal sentiments prevent him, as a member of that court, from holding in 1806 that emancipation was not required by the Virginia Constitution’s Bill of Rights, which he reluctantly held to be inapplicable to Americans of African origin.

Antislavery sentiment also found its way to Kentucky in the late eighteenth century. The Transylvania Company that organized the settlement of Kentucky was led by David Rice, a Presbyterian minister and educator, and John Breckenridge, a lawyer and former student of Wythe. In 1790, Rice founded Transylvania University at Lexington. When statehood came to Kentucky in 1792, he strenuously advocated a constitutional prohibition on slavery comparable to the prohibition north of the Ohio River imposed by the Northwest Ordinance. There were few slaves in Kentucky at the time, and it appears

117. Claudia Goldin, *The Economics of Emancipation*, 33 J. ECON. HIST. 70 (1978). New Jersey’s plan was so gradual that there were still slaves there in 1861. DAVIS, supra note 84, at 89.

118. See Cullen, supra note 116, at 685.

119. Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134 (1806). The Bill of Rights, Tucker explained, was “meant to embrace the case of free citizens, or aliens only; and not to be a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from impetuous circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no concern, agency or interest.” Id. at 141. See generally COVER, supra note 83, at 50-55 (explaining that while Judge Tucker was personally opposed to slavery, his holding in Hudgins was based on the belief that only the legislature, and not the judiciary, could effectively incorporate an emancipation scheme).

120. Rice was a 1761 Princeton graduate, a minister in Bedford County, Virginia from 1769 to 1783 and a co-founder, with Samuel Stanhope Smith (President of Princeton, 1786-1812) of Hampden-Sidney College. See Walter L. Lingle, 8 *Dictionary of American Biography*, pt. 1, 537 (Dumas Malone ed., 1963) (discussing the founding of Hampden-Sidney College).

121. See DAVID RICE, SLAVERY INCONSISTENT WITH JUSTICE AND GOOD POLICY (Lexington, Ky., J. Bradford 1792).

122. See supra text accompanying note 102.
that Rice might well have had his way but for the opposition of George Nicholas, another recent immigrant from Virginia and a powerful lawyer who dominated the state Constitutional Convention of 1792. Nicholas drafted an article protecting slave property and secured its adoption by a narrow vote of the Convention.

The issue of slavery was revisited when a new and more permanent constitution for Kentucky was adopted in 1799. Again, the chief proponent of slavery was Nicholas, supported this time by Breckenridge, who would shortly be elected to the United States Senate and would complete his career as Jefferson’s Attorney General. Nicholas and Breckenridge were opposed on the issue by Henry Clay, James Brown, and Senator John Brown. These five men, all of

123. An alumnus of William and Mary, Nicholas had served both as a combat soldier and in the Virginia House of Burgesses during the Revolution. In the latter role, Nicholas was generally an ally and friend of the Governor, Thomas Jefferson, at least until he moved to investigate Jefferson’s flight from the invading British army. Joan W. Coward, Kentucky in the New Republic: The Process of Constitution Making 12-13 (1979). Nicholas had participated in the Virginia Ratification Convention in 1788 as a leader of the Constitutionalists. 1 Albert J. Beveridge, The Life of John Marshall 374 (1916). There, Nicholas earned the reputation of being the one man in Virginia feared by Patrick Henry, not on account of his speaking style, which was earthbound and even plodding, but because his cool reason frequently chilled the passions roused by the fiery Henry. Id.

124. John M. Brown, The Political Beginnings of Kentucky 228-31 (Louisville, J.P. Morton & Co. 1889). “Had [Nicholas] not been a member of the convention a Constitution omitting the ninth article relative to slavery would have been promulgated.” Id. at 231.

125. Breckenridge had not resided in Kentucky in 1792, but relocated there the next year. 2 Richard H. Collins, History of Kentucky 98 (1924).


127. James Brown had led a company in the Indian Wars during the Revolution, and then studied law with George 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. Mayo, supra note 126, at 92-93 (citation omitted). He was married to the sister of Henry Clay’s wife. Id. at 92. Seeing the Louisiana Purchase as a personal opportunity, he left Lexington for New Orleans in 1803. Id. at 94. He represented Louisiana in the United States Senate in 1813-17 and 1819-23. 2 Dictionary of American Biography, supra note 126, at pt. 1, 126.

128. John Brown was the older brother of James. He apprenticed with Jefferson, who later, as architect, designed Brown’s home in Frankfurt. With Nicholas, he had served in the Virginia Ratification Convention, and had voted with Patrick Henry in opposition to ratification. He
them former students of George Wythe, constituted the "William and Mary juncto" who led the Kentucky bar and who together organized the Transylvania University Law Department in 1799, the same year Kentucky's constitution was adopted. Nicholas was the senior member of the juncto and Clay the junior.

Nicholas, the proponent of slavery, was selected as the first law professor, but died before he met the first class. He was replaced by James Brown, who had opposed him on the slavery issue. Brown served as the law professor until 1804, and was succeeded by Clay, another antislavery advocate. While Brown and Clay inaugurated a tradition of nationalism and restrained opposition to slavery by Transylvania law teachers, no one was thereafter successful in obtaining serious consideration of emancipation legislation in Kentucky.

While post-Revolutionary efforts to achieve emancipation by political action may have come close to success in Kentucky, they had little chance in Maryland and Virginia, and none at all in the Carolinas or Georgia. Indeed, the political achievement did not come easy even in a state like New Hampshire where there were scarcely any slaves. This was likely because slave owners could vote and slaves could not, an obstacle that was not faced by the British Parliament when it emancipated the slaves of colonial subjects who were as disfranchised as the American revolutionaries had been.

represented the Kentucky area in Congress prior to its severance from Virginia as a separate state. 2 DICTIONARY OF AMERICAN BIOGRAPHY, supra note 126, at pt. 1, 130-31.

129. Another member of the group was Buckner Thruston, Senator from Kentucky, 1805-09, and United States Circuit Judge for the District of Columbia, 1809-45. 2 WILLIAM E. CONNELLY & ELLIS M. COULTER, HISTORY OF KENTUCKY 1697 (Charles Kerr ed., 1922).

130. Nicholas had already trained a number of lawyers in his office prior to 1799. Perhaps numbered among his apprentices were most of those who had been trained in Kentucky. Kerr, supra note 30. In 1798, Nicholas had 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. 1 CONNELLY & COULTER, supra note 129, at 410. He also published a spirited defense of the Resolution, affirming the loyalty of Kentucky, assailing the usurpations of the Adams administration, and suggesting the case for judicial review of the constitutionality of such legislative enactments as the Alien and Sedition Act. GEORGE NICHOLAS, A LETTER FROM GEORGE NICHOLAS, OF KENTUCKY, TO HIS FRIEND, IN VIRGINIA (Lexington, Ky., John Bradford 1798).

132. DAVIS, supra note 84, at 197-207.
133. Id. at 87.
134. Id. at 548.
There was no opposition when in 1809 Congress abolished the slave trade on the first day that this could be done under the terms of the Constitution. But that event may have been the high water mark for the emancipation movement. Further progress became increasingly difficult as the antebellum decades progressed. In addition to the economic considerations that grew as the decades passed, the cotton culture became more aggressive in its claims on its members. A web of ideas, habits, values, and relationships, such as those of the cotton culture, always exercises a powerful hold on those who are caught in it, especially those who prosper. Moreover, as recent experience with hundreds of embattled subcultures has abundantly demonstrated, many cultures are tenacious, having a life force that drives their members to protect and transmit the cultural values if they can, sometimes with desperation. The sources of that cultural force seem to lie deep in the human psyche and know no bounds of race or gender.

It is therefore unsurprising that in time some Southern law teachers were found who favored the cause of the slave culture. Thomas Cooper, Jefferson's first choice as a law professor for Virginia, a sometime law teacher at Dickinson and South Carolina, presided over the latter institution from 1821 to 1835, and during that time abandoned the violent opposition to slavery he had expressed as a youth in England, and became the intellectual champion of slavery. A second was Nathaniel Beverley Tucker, the prodigal younger son of St. George, who held the chair at William and Mary earlier held by his antislavery father. Yet another proslavery advocate was

135. Too much can be made of this enactment; one of its effects was to enhance the value of slaves already in America. It was for this reason that opposition was slight among slaveowners. See id. at 232-24. Most Southern states had previously abolished the trade. Id. at 226.

136. See generally DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 72-73 (1985) (explaining that when ethnic groups are threatened with differentiation or assimilation they emphasize their separation).


139. MALONE, supra note 137, at 284-86. Daniel Webster's famed second reply to Hayne, 5 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 3 (J. McIntyre ed., 1903), is in significant measure a reply to Cooper. MALONE, supra note 137, at 261-24.

140. See generally ROBERT J. BRUGGER, BEVERLEY TUCKER: HEART OVER HEAD IN THE OLD SOUTH (1978); ROBERT J. BRUGGER, NATHANIEL BEVERLEY TUCKER, in LEGAL EDUCATION IN VIRGINIA, supra note 40, at 643, 645-55. The older son, Henry St. George Tucker, was also a law professor for a time at the University of Virginia. See generally W. Hamilton Bryson & E.W. Marshall Tucker, Henry St. George Tucker, in LEGAL EDUCATION IN VIRGINIA, supra
James P. Holcombe of the University of Virginia. In 1855, Holcombe was selected by John Barbee Minor as a Lecturer to assist him; as feelings rose in the 1850s, Minor apparently deemed it provident to stick to the teaching of private law, and assigned Holcombe to teach Constitutional Law. Minor’s low profile contrasted with the openly antislavery and nationalist views of his older brother Lucian, who was appointed to the chair at William and Mary. Perhaps as a consequence of Holcombe’s proslavery politics, the law department at Virginia continued to prosper while that at William and Mary was forced to close, perhaps partly due to the public reaction to Lucian’s antislavery politics.

Meanwhile, in 1854, the University of Mississippi created a law department so that its youth could be trained for correct political leadership in an environment less conducive to open-mindedness than that available in Lexington’s or Charlottesville’s dens of nationalism. But the aggression of Southern culture against moral self-doubt was perhaps most clearly manifested in an 1840 ruling of the governing board of the University of Alabama forbidding the teaching of Constitutional Law in that institution. So far had the members of that governing body come that they regarded the Constitution as a pact with the devil of antislavery!

note 40, at 601. In the main, although his views matured over time, Henry shared the antislavery views of his father, but also like his father advocated a localist interpretation of the Constitution likely to prevent any national program of emancipation. See Henry St. George Tucker, Lectures on Constitutional Law, for the Use of the Law Class at the University of Virginia (Richmond, Shepherd & Colin 1843).

141. Holcombe resigned in 1861 to seek election to the Confederate Congress. E. Lee Shepard, James Philemon Holcombe, in Legal Education in Virginia, supra note 40, at 291, 293. A curious fact is that Holcombe’s parents were abolitionists. Probably Quaker, they emancipated their own slaves and refused an inheritance of slaves. They moved to Indiana to avoid raising children accustomed to slavery. John Ritchie, The First Hundred Years 37-38 (1978).

142. Minor had been appointed the professor of law in 1846. See generally Fitzsimmons, supra note 40, at 419.

143. More than his younger brother, Lucian was a classicist and a man of letters, who wrote on a wide variety of matters, and was for a brief time the editor of a Whig newspaper in Charlottesville. He was a thoroughly committed unionist who strove to bridge sectional differences, and was no apologist for slavery. Aubrey J. Rosser, Jr., Lucian Minor, in Legal Education in Virginia, supra note 40, at 435, 435-42.


145. Basil Manly, who had studied with Thomas Cooper at South Carolina, became the
Despite these defections, most law teachers remained nationalists to the end in 1860. The movement’s central figure was Clay, the onetime law teacher, who advocated for the four decades that he was at the center of the national stage a program resembling that set forth in 1792 by St. George Tucker, one featuring compensation for slave owners, support for freemen, and encouragement of voluntary relocation. Clay’s primary objective at all times was first to save the union. Emancipation was secondary, in part because Clay and his adherents believed that the union was the only means available to effect emancipation. Although severely criticized by abolitionists for his willingness to sacrifice important concerns on such matters as the rights of fugitives, Clay enjoyed the general support of five second president of the University of Alabama in 1837. 1 JAMES B. SELLERS, HISTORY OF THE UNIVERSITY OF ALABAMA 67 (1933). Shortly after his appointment, the Trustees decided that the Constitution of the United States shall not be any “part or portion of the course of studies prescribed.” Id. at 149.

146. 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, serving in Congress, in the Senate, as Secretary of State, standing three times for election to the Presidency and playing a major role on every public issue. Lincoln described him as “the most loved, and most implicitly followed by his friends, and the most dreaded by his opponents, of all living American politicians.” ABRAHAM LINCOLN, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 287 (Roy P. Basler ed., 1946).

147. See supra text accompanying notes 113-16.

148. The program was that of the American Colonization Society. For a full statement of Clay’s position on slavery, see Henry Clay, Address to the Colonization Society of Kentucky (Dec. 17, 1829) in 8 HENRY CLAY, THE PAPERS OF HENRY CLAY 138-58 (Robert Seager II ed., 1984).


150. Clay professed to believe that emancipation without adequate support for freemen would be a disaster worse than the continued existence of slavery. He forecast that the freemen would be unprepared to cope with the world they would face, would be shamefully exploited, and would in due course drift into towns and cities, ultimately even those in the north, where they would form an underclass even more dangerous to the republic and even less sheltered and nurtured than slaves. 8 CLAY, supra note 148, at 151-58. When an audience of Indiana Quakers questioned how an opponent of slavery could own slaves, he dramatically offered to free all of his slaves at once if the audience would contribute equal value to provide for their training and housing, an offer that was predictably not acted upon. The event, widely heralded at the time, is authoritatively told in Charles Coffin & William Coffin, Henry Clay at Richmond, 4 IND. MAG. HIST. 117, 123 (1908).

151. Among his severest critics was James Birney, a former student of Clay’s at Transylvania. Birney appears to have regarded Clay’s insistence on compensation for slave owners and funds for freemen as a device to prevent emancipation by making its cost prohibitive, and indeed
notable law teachers who published significant antebellum writing on constitutional law: Joseph Story, James Kent, Timothy

the idea was increasingly impracticable for that very reason. In 1834, after a memorable breakfast with his former teacher, Birney reported Clay’s position on slavery to be that:

[S]lavery in Ky. was in so mitigated a form as not to deserve the consideration of a very great evil — that men’s interest in property had been found to be an insurmountable barrier to gradual emancipation then, in ’99 — that now, they were more formidable — the case was hopeless by any 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 Mr. John Green, two gentlemen of great worth had disqualified themselves for political usefulness by the part they had taken in reference to slavery. . . . The impression made upon me, by this interview was that Mr. C had no conscience about the matter, and therefore, that he would swim with the popular current.

8 CLAY, supra note 148, at 748. When Clay made his response to the Indiana Quakers, Birney regretfully denounced his former law teacher as “of all our public men, the most dangerous. . . .” 2 JAMES G. BIRNEY, LETTER OF JAMES GILLESPIE BIRNEY 898 (Dwight L. Dumond ed., 1938). In 1835, Birney declined appointment as professor of law at Oberlin. 1 FLETCHER, supra note 37, at 194. Edward Wade, a Cleveland lawyer, filled that chair for a decade, and presumably supported Birney’s hostility towards Clay. In 1844, Birney was the Liberty Party candidate for President and received enough votes in New York to deny Clay the state and thus the election.

152. James Wilson also wrote an important work on constitutional law that was decidedly nationalist in its theme. It was published in 1804, before Clay’s appearance on the national scene. See 2 JAMES WILSON, THE WORKS OF JAMES WILSON 34 (James D.W. Andrews ed., Chicago, Callaghan & Co. 1896). Also significant and nationalist was PETER S. DU PONTOURCAU, A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES (Philadelphia, E.G. Dorsey 1834). DuPonceau conducted a law academy in Philadelphia for some years. An exception is the work of Tucker, whose edition of Blackstone took a localist view. 1 WILLIAM BLACKSTONE, BLACKSTONE’S COMMENTARIES 140-377, app. note D (Philadelphia, William Y. Birch & Abraham Small 1803). This work was updated in 1845 by Tucker’s elder son, Henry St. George. See supra note 140.

153. Story was a Massachusetts supporter of Jefferson, a rare bird indeed. William Schofield, Joseph Story, in 3 GREAT AMERICAN LAWYERS 123, 132 (William D. Lewis ed., 1908). In 1811, at the age of 32, he was appointed to the Supreme Court by President Madison. He was also appointed Dane Professor of Law at Harvard in 1829, at the behest of Dane. See SUTHERLAND, supra note 98, at 92-100. Story’s Commentaries on the Constitution were published in January 1833 in three volumes. Story’s strident antislavery views are set forth in 1 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 335-59 (William W. Story ed., Boston, C.C. Little & J. Brown 1851). For a full biography, see generally R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1988).

154. Kent concluded a distinguished judicial career in New York with a second term as professor of law at Columbia, when he wrote his Commentaries on American Law. The first volume, which appeared in 1826, was devoted to international and constitutional law. This volume was widely used as a student text. Although a Federalist and primarily interested in private law, Kent was a nationalist in his view of the Constitution, and a former student of Ezra Stiles. I find, however, no expression of Kent’s opinion of slavery. See KENT, supra note 21.
Walker, Nathaniel Chipman, and Francis Lieber. This list includes all those having a wide readership. Clay also was supported, of course, by most of his colleagues at Transylvania, with whom he maintained a close relation. Especially notable among the Clay Whigs were Robert Hamilton Bishop, the founding president of Miami University, David Hoffman of the University of Maryland, and David Lowry Swain, a former Whig Governor of North Carolina who taught Constitutional Law at the College in Chapel Hill for several decades. Abraham Lincoln, although not a law teacher, also regarded Clay as his "beau ideal of a statesman."

Francis Lieber maintained an antislavery position even while teaching at South Carolina, where he succeeded the apostate Cooper.

155. See Walker, supra note 82, § 65, at 162-63.
156. Sometime United States Senator, and long the Chief Justice of Vermont, Chipman was professor of law at Middlebury from 1816 to 1843. His principal work was Nathaniel Chipman, Principles of Government (Burlington, Vt., E. Smith 1833), written partly in response to the constitutional crisis of that year. It was said that he and John C. Calhoun were "the north pole and the south pole of the political sphere." Bauer, supra note 50, at 123 (quoting William C. Bradley) (citation omitted).
161. Swain was appointed President and Professor of National and Constitutional Law in 1835. Swain was then but 32, but had been in public life almost constantly since completing his law study at the age of 19. A rival for the office observed that: "The people of North Carolina have given Governor Swain all the offices they have to bestow and now have sent him to the university to be educated." His support of Clay was known to his students. Vance, The Life and Character of Hon. David L. Swain, N.C.U. Magazine, May 1878, at 76-77. He taught until 1868.
He was sufficiently daunted by the convictions of his students, neighbors, and trustees that he did not openly contend for a national program of emancipation until he moved to New York in 1857. Prior to 1857, he had only acknowledged that the Constitution left the issue wholly to the states. Yet none doubted his convictions on the matter. Although writing in a time antedating the advent of academic tenure, he addressed a series of letters to his senator, John C. Calhoun, in an effort to educate Calhoun to the need to save the union by ending the practice of slavery. Lieber’s letters concluded: “It is not the North that is against you. It is mankind, it is the world, it is civilization, it is history, it is reason, it is God, that is against slavery.”

In 1851, shortly before his death, Clay was joined in the Senate by another sometime law teacher, Charles Sumner, a favorite student of Joseph Story who had taught at Harvard in Story’s occasional absence. Sumner had been disappointed in his expectation to succeed Story on the latter’s death in 1845, reportedly because Sumner “had become an outrageous Philanthropist — neglecting his Law to patch up the world — to reform prisoners and convicts — put down soldiers and wars — and keep the solar system in harmonious action.”

It was true that Sumner had engaged in prison reform and in opposition to the War with Mexico (a position he shared with Clay), and had demonstrated a capacity for brassy vituperation that was poorly received on Beacon Hill. It also was the case that his outspoken pacifism had called into question the soundness of his judgment. He severely chastised Congressman Winthrop, who had vigorously opposed the war, for voting to supply the troops. On July 4, 1845, he delivered an address prefiguring utterances of the Viet Nam era that concluded: “[I]n our age there can be no peace that is not honorable: there can be no war that is not dishonorable.” His mentor, Story, responded unhappily: “In my judgment war is under some . . . circumstances not only justifiable, but an indispensable part of public Duty. . . . In the extent, to which you press your doctrines, they are

163.  LIEBER, supra note 157, at 225.
165.  Id. at 129.
166.  Id. at 143-44. It added to Winthrop’s fury at this attack that it was uttered anonymously shortly after Sumner had been Winthrop’s guest. Id. at 144.
167.  Id. at 108-09.
not in my judgment defensible." 168 When Webster supported Clay's
Compromise of 1850, Sumner argued against the sacrifice of "one jot
or tittle of our principles" even to save the union, and compared
Webster to Judas Iscariot and Benedict Arnold. 169 He then secured
election as Webster's junior senator, to Webster's considerable dismay,
and became the leader of the Free Soil Party.

Sumner's initial years in the Senate did not go well and he seemed
destined to be replaced until, in 1856, he was martyred by being
beaten nearly to death on the Senate floor by Senator Brooks of South
Carolina. 170 After recuperating, Sumner returned to the affray with
the representatives of slavery, his long-standing antislavery views
intensified. 171 Although not a Garrisonian 172 willing to denounce the
Constitution, 173 his often and vigorously expressed conviction that
slaveowners were guilty of sin 174 left no place for the schemes of
compensation favored by Clay and his supporters and made him "the
most perfect impersonation of what the South wanted to secede from." 175 A separatist, he avowed willingness to accept secession by
the slave states but disbelieved their threats to do so, and was appar-
etly surprised when secession came in 1860. 176 Although still a pacifist,
he nevertheless continued to disfavor any compromise, 177 favoring ac-
ceptance of secession in the apparent belief that a slave insurrection
would soon force the secessionists back into the union on his terms. 178
Despite his longstanding commitment to pacifism, when war came,
Sumner became ardent in support of its vigorous prosecution.

Sumner and the Free Soil Party were generally supported by the
two Harvard Law Professors, Joel Parker and Theophilus Parsons.

168. Id. at 113.
169. Id. at 184.
170. Id. at 289-309.
171. Sumner shared the antislavery views of his father and even opposed racial discrimi-
nation. Id. at 120-31. He served as counsel in an early school desegregation case. Id. at 180-81.
describing the Garrison branch of the abolition movement.
173. Donald, supra note 164, at 132.
174. Id. at 134.
175. 1 Carl Sandburg, Abraham Lincoln: The War Years 104 (1939).
176. Donald, supra note 164, at 366.
177. Id. at 370.
178. Id. at 367.
Both were active in the Free Soil movement that sought to prevent the introduction of slavery to Kansas. One student reported:

I at once enlisted in the cause, and was so encouraged in it by the Professors, that when I proposed to go to the front in Kansas, the Faculty immediately said to me, "Yes, go, and we will take care of you here . . . and in due time we will send your diploma to you." This promise was kept, and the document was forwarded to me in the summer of 1857, when my class graduated. This act shows how the big hearts of these dignified and conservative Professors and learned judges respond to freedom's call. 179

Sumner correctly ascertained that the Fugitive Slave Law as revised in 1850 worsened an already despicable law. One did not need to read Harriet Beecher Stowe's rendering account 180 to know that the moral cost of returning fugitives was incalculable. The only means available in 1850 to terminate these odious laws and practices was to challenge the South to leave the union. It was certainly not wrong to condemn a law that imposed the costs of union on the poor fugitives who, of all, were least able to bear them. And while giving academic credit for guerilla warfare now seems surprising, 181 there can be no argument about the merit of the Free Soil struggle in Kansas.

Although Sumner opposed Clay's nationalist policy, the policy was critical to the event of emancipation as it in fact occurred in 1863. Clay's final achievement was the Compromise of 1850 which Sumner so sharply attacked. The Compromise was opposed with equal vigor by Jefferson Davis, who perceived that the Southern opportunity for peaceful secession was passing. The nation was at the time of the Compromise so close to disunion that many knowledgeable people thought it inevitable. The Compromise was a complex and ingenious maneuver, designed to be approved in eight separate bills to enable Senators and Representatives to vote only for those provisions not disastrously distasteful to their constituencies. 182 By this means, Clay induced a moment of reconciliation and postponed disunion, as he had twice before, in 1820 and 1833.

179. 2 Warren, supra note 91, at 208-09.
180. Harriet Beecher Stowe, Uncle Tom's Cabin; or, Life Among the Lowly (Boston, John P. Jewett & Co. 1852).
181. My father received a similar dispensation from final examinations at the Harvard Law School when he and other classmates volunteered for military service in 1917.
182. The story is briefly told by Peterson, supra note 102, at 455-62.
Had the South seceded in 1820, at the time of Clay’s first saving ploy, there could have been no military resistance from the North. As late as 1832, John Marshall expressed amazement that the nation had lasted as long as it had.\textsuperscript{183} New England followed the West in its flirtation with disunion.\textsuperscript{184} Those with Clay who had wrought the Compromise of 1850 were thus faced at the time with the reality that failure would have resulted in a disunion that none would forcibly resist.\textsuperscript{185} There would have been two nations, one slave and one free, approximately equal in wealth and population.\textsuperscript{186}

Clay was also right that the main chance to abolish slavery in 1850 still required citizens to save the union. Disunion would have rid the remaining northern federation of the moral burden so keenly felt by Sumner, the Garrisonians, and many others, but there is little reason to believe that it would have brought slavery to its knees. Perhaps to the contrary, it would have resulted in exposing the nation along a 2500-mile border to contact with an unrestrained, militaristic, and oligarchic slave power bent on expansion.

Even in 1861, after the North had become a much wealthier and more populous area than the South, successful disunion was a very near thing. Here and there, for want of a nail, the southern cotton-slavery culture lost its war for survival. If disunion had come in 1850, the [North’s] will and capacity to resist would have been less and the outcome could easily have been otherwise. Thus, Clay’s Compromise of 1850 may have been pivotal not only in saving the union for another decade, but saving it at all, and in bringing slavery to an end.\textsuperscript{187}

In hindsight, Clay and his followers had the virtuous answer to the issue of their age, however imperfect it may have been. The cost of the Civil War was colossal. A million young men were killed or maimed in a nation having the population of present-day California or Tokyo, but with a median age of eleven; the loss constituted perhaps as many as one fourth of the young men of military age.\textsuperscript{188} By any reckoning, any Southern slaveowner would have been better off to


\textsuperscript{184} Carrington, supra note 79, at 760-61.

\textsuperscript{185} \textit{Id.} at 761.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.} (footnotes omitted).

\textsuperscript{188} The relative severity of the Civil War is confirmed in the following table.
### AMERICAN WARS: CASUALTY RATES

<table>
<thead>
<tr>
<th>War</th>
<th>Pop. (000)</th>
<th>Males 15-24 (000)</th>
<th>Men in Arms (000)</th>
<th>Dead (000)</th>
<th>Wounded (000)</th>
<th>Total City % of Men in Arms</th>
<th>City % of Men 15-24</th>
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<tbody>
<tr>
<td>Revolution 1776-1783</td>
<td>3200</td>
<td>190</td>
<td>200</td>
<td>25</td>
<td>8</td>
<td>33</td>
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<tr>
<td>1790 Pop:</td>
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<tr>
<td>War of 1812 1812-1815</td>
<td>7200</td>
<td>540</td>
<td>287</td>
<td>9</td>
<td>4</td>
<td>13</td>
<td>4</td>
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<td>1810 Pop:</td>
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<tr>
<td>War with Mexico 1846-1848</td>
<td>19800</td>
<td>3350</td>
<td>79</td>
<td>13</td>
<td>4</td>
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<td>22</td>
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<td>1850 Pop:</td>
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<tr>
<td>Civil War 1861-1865</td>
<td>21500</td>
<td>3000</td>
<td>2400</td>
<td>350</td>
<td>272</td>
<td>622</td>
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<tr>
<td>Civil War 1861-1865</td>
<td>7000</td>
<td>1000</td>
<td>1200</td>
<td>250</td>
<td>200</td>
<td>460</td>
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<td>1860 Confed:</td>
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<tr>
<td>War with Spain 1898</td>
<td>19000</td>
<td>7250</td>
<td>307</td>
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<td>1900 Pop:</td>
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<td>World War I 1917-1918</td>
<td>105000</td>
<td>10200</td>
<td>4743</td>
<td>117</td>
<td>204</td>
<td>321</td>
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<td>1920 Pop:</td>
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<td>World War II 1941-1945</td>
<td>132000</td>
<td>11750</td>
<td>16354</td>
<td>407</td>
<td>671</td>
<td>1078</td>
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<td>Korean War 1950-1953</td>
<td>147000</td>
<td>10850</td>
<td>5764</td>
<td>54</td>
<td>108</td>
<td>157</td>
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<tr>
<td>Viet Nam War 1954-1973</td>
<td>203000</td>
<td>17500</td>
<td>8744</td>
<td>58</td>
<td>153</td>
<td>211</td>
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<tr>
<td>1970 Pop:</td>
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Carrington, supra note 79, at 773-74 n.182.
keep his sons, save his other property from destruction by the Union army, and sell his slaves to the Federal government, or even simply to emancipate them without compensation. And those citizens of the Confederacy who were not the primary beneficiaries of the cotton culture paid a dreadful price for a vain and unworthy cause.

Similarly, war was an atrocious solution for the North. The financial cost of the Civil War to the North alone exceeded the total value of slave property in America plus the cost of providing each slave family with 100 acres and a draft animal. Thus, by paying compensation to both masters and slaves, the North could have at no cost saved the lives of 360,000 thousand of its young men and prevented the maiming of another 200,000. And this takes no account of the cost of caring for the many who were maimed.

Sound judgment was defeated by two realities making avoidance of war an impossible dream. One reality was the intransigence of Southern slavemasters under the narcotic influence of their tenacious culture. The second reality was the political impossibility in antebellum times of using the taxing power to secure the means of giving slaveowners full, prompt compensation. The public fisc could be extended to fight a war, but not merely to avoid one. There was also, as a lesser factor, the intransigence of people sharing the views of Sumner, behaving no less stubbornly perhaps than the slavemasters, while sternly opposing any delay of the end of slavery, or any payment to the vile slavemasters, but willing to join those same slavemasters in their wish for disunion.

For these reasons, the unionist-compensated emancipation program had almost no chance. Clay and those numerous law teachers who supported him were calling for peace where in the end there could be no peace. On the other hand, the efforts of those law teachers may have had consequence. Like the Civil War itself, the Compromise of 1850 was a very near thing, regarded at the time as an almost miraculous achievement of the aging Clay. We will never know how to measure the role played by law teachers at Transylvania in nurturing the commitment to American law and institutions of those numerous Transylvania alumni who supported Clay's miracle. But the old school tie

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189. Slaveowners were not generally attracted to compensation schemes such as those advanced by Clay. Indeed, in 1862, a year before the Emancipation Proclamation, President Lincoln was still unable to persuade Kentucky slaveowners to accept compensation. James M. McPherson, Battle Cry of Freedom: The Civil War Era 488-89 (1988).

190. Carrington, supra note 79, at 761-62 (footnote omitted).
may have been a piece of Clay's magic, for there were numerous Transylvania alumni sitting in the Senate in 1850.\textsuperscript{191} Those Senators were, in part, the intellectual descendants of George Wythe. Moreover, the decision of Kentucky to remain in the union was yet another very near thing, as well as a crucial one,\textsuperscript{192} and may reasonably be attributed to the posthumous influence of Clay and his supporters at Transylvania.\textsuperscript{193}

5. Native Americans

Only one domestic issue seriously competed with slavery for the attention of Americans in the decades between the Revolution and the Civil War: relations with the native peoples. There is little reason to believe that a literate Indian would have been denied access to education in antebellum times on grounds of race. Dartmouth\textsuperscript{194} and Hamilton,\textsuperscript{195} for example, were founded as Indian missions and were at all times eager to redeem their founding purpose by educating Native Americans. Miami University was pleased to receive as students in Ohio a group of young Osage braves from Arkansas.\textsuperscript{196} These three colleges alone trained many young men in public law, and there were doubtless other colleges who would have welcomed Native American students. Thomas Jefferson,\textsuperscript{197} John Calhoun,\textsuperscript{198} Henry Clay,\textsuperscript{199}

\textsuperscript{191} Transylvanians among the 50 senators voting on the Compromise of 1850 were David R. Atchison of Missouri, Jeremiah Clemens of Alabama, Jefferson Davis of Mississippi, Solomon W. Downs of Louisiana, George W. Jones of Iowa, Joseph R. Underwood of Kentucky, and James Whitcomb of Indiana. As a result of the Compromise, this group was joined during the term by yet another, William H. Gwin of California.

\textsuperscript{192} McPherson, supra note 186, at 229-35.

\textsuperscript{193} Id.; see also Edward A. Pollard, Southern History of the War 610 n. (New York, C.B. Richardson 1885).

\textsuperscript{194} Leon B. Richardson, History of Dartmouth College 13-23 (1832).

\textsuperscript{195} C. Alison, A Historical Sketch of Hamilton College 15-20 (1889).

\textsuperscript{196} Havighurst, supra note 36, at 51.

\textsuperscript{197} In his one published book, Jefferson expressed admiration for Native Americans. See Thomas Jefferson, Notes on the State of Virginia 99-113 (Philadelphia, Prichard & Hall 1788). He urged the Indians to give up their nomadic hunting in favor of agriculture: “You will become one people with us. . . .” Horsman, supra note 61, at 108 (quoting Jefferson’s 1808 remarks to Indian chiefs).

\textsuperscript{198} Calhoun, a strenuous exponent of slavery, was also a champion of the rights of the Cherokee who had, as Jefferson had urged, settled into a peaceful agricultural life style in the Southeast. Peterson, supra note 162, at 90-92.

\textsuperscript{199} Although a Kentuckian, Clay frequently opposed the barbarous treatment of Indians, but he came to recognize that most of them would resist assimilation to the death. Horsman,
and Daniel Webster were all among the advocates of the interests of Native Americans, and they were supported by many thoughtful citizens. Their views, though widely shared, did not prevail against those of the supporters of General Andrew Jackson, who had won his initial fame as an Indian fighter.200

The Jacksonian view of Native Americans was prevalent everywhere, but nowhere more than in Clay's state of Kentucky. Thus, a professor of medicine at Transylvania University in Clay's town of Lexington, a phrenologist and adherent of Morton, argued that civilization was destined to "exterminate them, in common with wild animals."201 This academic utterance corresponded with views of many fellow Kentuckians redolent of contemporary Yugoslavia:

The people of Kentucky will carry on private expeditions against the Indians and kill them wherever they meet them, and I do not believe there is a jury in all Kentucky that will punish them for it . . . the thirst of war is the dearest inheritance an Indian receives from his parents, and vengeance that of the Kentuckians, hostility must result on both sides.202

These militant views did not go unresisted, even in Kentucky. Hear the teaching of George Robertson, the elected Chief Justice of Kentucky and ardent supporter of Clay, who was for a quarter century at Transylvania the premier teacher of Constitutional Law west of the Alleghenies:203

\[\text{supra note 61, at 198; see infra note 204. The Shawnee, who were the most powerful tribe in the Ohio Valley, were indeed unwilling to accept an agricultural lifestyle, believing their own to be far superior. Gilbert, supra note 59, at 14-20. One reason was that they yielded to no one in their racism, believing themselves to have been made from the heart of God, as compared to Americans made from His hands. Id. at 37.}

\[\text{200. See generally Francis Paul Prucha, American Indian Policy in the Formative Years 213-49 (1962).}

\[\text{201. Charles Caldwell, Thoughts on the Original Unity of the Human Race 141-42 (1830).}


\[\text{203. For a brief account of his career, see Carrington, supra note 158, at 692-96.}
[We owe] a sacred debt of justice and magnanimity to the aboriginal Red Men, whose homes we occupy, and whose council fires we have extinguished. Helpless, hopeless, and forlorn, a miserable remnant only remains of the once powerful lords of this continent. And shall the last melancholy relics of those vast tribes also perish? The honor of our country forbids it. 204

The author of those words, it seems, would not, on account of a native ancestry, have turned away a person desiring to study law. It thus seems likely that more than a few Americans of mixed Indian ancestry, and perhaps even some of "full blood," were taught law, but racial records were not kept, and I have discovered no traces of such students. Given the strong missionary impulses of most American educators, it is reasonable to suppose that literate Asian-Americans, Latinos, or Polynesians, had such minorities existed in antebellum times, would also have been admitted at Transylvania or most other colleges.

6. Gender

Women were a different matter. 205 It is true that Gustave Le Bon, a French craniologist of repute, drew an obvious if profoundly erroneous inference from the measurably smaller sizes of female brains, and was appalled by singular proposals originating in America for higher education of women. 206 But there was very little of this sort of thinking that characterized the relation between men and women in antebellum America. Most American women were as literate or more literate than the spouses with whom they shared bed and board. George Wythe, like Abraham Lincoln and many others, was educated by his mother, a Quaker widow who taught him Greek and Latin and duty. 207 There were a few female seminaries in antebellum times that might have

204. GEROGE ROBERTSON, SCRAPBOOK ON LAW AND POLITICS, MEN AND TIMES 164 (Lexington, Ky., A.W. Elden 1855). Cf. Letter of Clay to Colonization Society of Kentucky (Dec. 17, 1829), 8 CLAY, supra note 148, at 139 ("[W]e are enjoined by every duty of religion, humanity and magnanimity to treat them with kindness and justice. . . . The United States stand charged with the fate of these poor children of the woods in the face of their common Maker. . . .").


206. GOULD, supra note 64, at 165.

207. JOYCE BLACKBURN, GEORGE WYTHE OF WILLIAMSBURG 6-8 (1976).
provided some advanced training for women, even in the South. However, the education of very few women extended beyond the secondary level.

Many men were intensely interested in the education of their daughters, for the reason stated by Jefferson:

The plan of reading which I have formed for [my daughter] is considerably different from what I think would be most proper for her sex in any other country than America. I am obliged in it to extend my views beyond herself, and consider her as possibly the head of a little family of her own. The chance that in marriage she will draw a blockhead I calculate at about fourteen to one, and of course that the education of her family will probably rest on her own ideas and direction without assistance. With the best poets and prose writers I shall therefore combine a certain extent of reading in the graver sciences.

Henry Clay had a similar interest, as did many others.

This interest in the education of women extended as well to the legal status of married women. While the slavery and Indian issues made miniatures of all others in antebellum times, many of the men teaching law acknowledged and proclaimed the law's injustice to women with respect to the property rights of married women. English law on this subject had been shaped by the interests of the gentry seeking to hold their estates together through generations. Law made was not only unkind to the siblings of the first born, but was unsuitable to protect widows in the different cultural circumstances that obtained in America. Timothy Walker of Cincinnati and John Hiram Lathrop of Hamilton were especially concerned with correcting this source of injustice, and they were supported by others.

208. For example, see the description of Wesleyan College in Macon, Georgia in Mary C. White, The Portal of Wonderland: The Life-Story of Alice Culler Cobb 25, 33 (1925).


210. Clay was a founding member of the board of the Lexington Female Academy founded in 1823. 3 Clay, supra note 149, at 265 n. It was said of Clay that if women had had the vote, he would have won every presidential election from 1824 to 1848. There is no evidence that his great attraction to women was associated with womanizing on his part; it seems rather have been the combination of his impressive personal power and energy combined with a genuine deference of demeanor and an interest in the ideas and reactions of women. Peterson, supra note 162, at 379-80.


212. 5 National Cyclopaedia of American Biography 178-79 (1907).
Gender roles were nevertheless the major force in the lives of American women in the nineteenth century not merely because they had been important to women since the beginning of time, and continued to be important everywhere else on the planet, but also because they were highly functional in a preindustrial society. Mary Wollstonecraft, the apostle of equal rights for women, was carefully read by men such as Kent and Lieber, as well as by many women, but her message was out of sorts with the times and on that account had no discernible influence. Kent was instrumental in the Americanization of property law, while Lieber, although convinced of the wisdom of gender roles, championed the education of women.

Ferdinand Braudel has made a powerful demonstration of the dominant relation of agriculture to culture. High fertility rates are perhaps everywhere a characteristic of agrarian life styles, especially in preindustrial societies. This effect was nowhere more evident than on the family farm, on which most Americans lived and worked all their lives. Life was short and hard on the tractorless farm. At the time of the Revolution, median life expectancy at birth was less than four decades and it increased at no more than a glacial rate in the nineteenth century. To raise three children to adulthood required

213. MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (Boston, Peter Edes 1792).
215. 2 LIEBER, supra note 1, at 135.
216. Volumes 3 and 4 of his COMMENTARIES ON AMERICAN LAW, supra note 21, were published in 1828 and 1830. For a contemporary assessment of their impact, see JOHN DUER, A DISCOURSE ON THE LIFE, CHARACTER, AND PUBLIC SERVICE OF JAMES KENT, LATE CHANCELLOR OF THE STATE OF NEW YORK (New York, D. Appleton & Co. 1846).
217. 2 LIEBER, supra note 1, at 108ff.
218. His definitive work is FERDINAND BRAUDEL, THE STRUCTURES OF EVERYDAY LIFE (2d ed., Reynolds trans. 1981) (1967) (calling attention to fundamental cultural differences shared by cultures according to whether rice, wheat, or corn was the staple crop).
220. In Massachusetts in 1850, the life expectancy at birth had risen to 38 for men and 40.5 for women. U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 37 (1975) [hereinafter HISTORICAL STATISTICS].
221. By 1900, life expectancy at birth had reached an average of 47 for men and 49 for women. HISTORICAL STATISTICS, supra note 220, at 55.
222. In 1850 in Massachusetts, 13% of children died before their first birthday. HISTORICAL STATISTICS, supra note 220, at 57.
many pregnancies.\textsuperscript{223} Faced with enormous uncertainties of life, most mothers, with the encouragement of their parents as well as their spouses, wanted a few extra children, not only to assure family continuity, but to provide care for the aged who survived the many hazards likely to shorten life. The burden of child care fully occupied most adult women,\textsuperscript{224} for many had only enough time to raise their children.

While the lot of American mothers was onerous, few could complain that their mates had easier or more interesting lives. Mothers raised their sons to be providers and protectors, and their roles often entailed heavy lifting or grave personal risk. Few women would have exchanged crib duty for breaking the sod and harvesting the crops. If there was killing or dying to do, it was generally the men who were called upon.

As in almost every culture, moral training and most other education was the responsibility of mothers,\textsuperscript{225} and most mothers trained their daughters in the arts of motherhood, their sons to the duties of paternity. In the days before public education, the automobile, and the media, motherhood was indeed a high calling because of the nearly total influence of mothers on future generations.

As one Englishman observed, early American mothers were not generally apolitical; most were ardent patriots and mindful that they had a continent to populate;\textsuperscript{226} accordingly the birth rate remained high well into this century. But to seek office or even to hear a speech generally required significant travel; travel in most areas was arduous and dangerous and accommodations were so spare that travelers often slept two or three to a bed.\textsuperscript{227} For a woman to ride circuit with other lawyers, sharing accommodations as they did, would have been unthinkable. Moreover, there was often substantial violence associated with the practice of law; duels were not infrequently the results of

\textsuperscript{223} By 1900, the average number of live births per married female was five. \textit{Historical Statistics}, \textit{supra} note 220, at 54. For African-American women, the average was seven. \textit{Id.} The numbers were surely higher in the early decades of the century.

\textsuperscript{224} As late as 1900, their were 1,342 children under the age of 5 for every 1,000 women aged 20-44. \textit{Historical Statistics}, \textit{supra} note 220, at 57.

\textsuperscript{225} \textit{2 Tocqueville, supra} note 8, bk. 3, ch. 9, at 241 ("No free communities ever existed without morals; and . . . morals are the work of woman."); \textit{see also} \textit{2 Lieber, supra} note 1, at 120-40; \textit{Montesquieu, supra} note 2, bk. VII, ch. 8-17, at 75-80.

\textsuperscript{226} \textit{See supra} text accompanying note 29.

\textsuperscript{227} The opening chapters of \textit{Herman Melville, Moby Dick} (New York, Dutton 1907) (1852) provide a useful perspective.
bitterly contested trials; one lawyer was said to be effective because of his skill at throwing rocks at adversaries; and it was therefore generally important to any mid-nineteenth-century lawyer that "he shoot straight and that both his colleagues and the people know it." Thus, until recent times, a number of practical reasons dictated that most women stay home and send their sons and husbands to listen to speeches or to vote. Many American farm women would have been more than a little surprised to learn that they were being oppressed by their companion behind the mule or horse, and could scarcely think of practicing law or politics as a more attractive or honorific activity than the one in which they were engaged.

Nevertheless, there was for the reasons stated by Jefferson a continuing and growing interest in the education of women. Tocqueville observed: "In the United States, the doctrines of Protestantism are combined with great political liberty and a most democratic state of society; and nowhere are young women surrendered so early or so completely to their own guidance." As early as 1835, Oberlin became the world's first coeducational college. The opposition to the idea was not entrenched nor long-enduring, but there was concern for protecting the chastity of women in such an environment. That concern was reassured at Oberlin by strictly enforced rules against reading novels or dancing. Decisive in favor of coeducation elsewhere in America was the observable improvement in the demeanor of male students wrought by the presence of females; the call to brick up the windows was never suggested at Oberlin.

But even at Oberlin, gender roles were emphasized; its "attitude was that women's high calling was to be the mothers of the race, and that they should stay within their special sphere in order that future generations should not suffer want of devoted and undistracted mother care." Oberlin students were all required to perform manual labor.

229. 2 TOCQUEVILLE, supra note 8, bk. 3, ch. 9, at 241.
230. 1 FLETCHER, supra note 37, at 376.
231. 2 FLETCHER, supra note 37, at 675.
232. 1 FLETCHER, supra note 37, at 308.
233. 2 FLETCHER, supra note 37, at 675.
234. 1 FLETCHER, supra note 37, at 291.
for the college, but for the women the work assigned was to clean the rooms of Oberlin men, and a leading member of the faculty proclaimed that for a woman to hold public office was “too unnatural to be dreamed of.” In such a culture, the question of legal training for women seldom arose, and male chauvinism or exclusiveness was among the least of the reasons that this was so.

Oberlin women seemed generally to understand the cultural context, even when they disapproved of its application to themselves. What but admiration can one have for the self-awareness and maturity of those wonderful young Oberlin women who in the 1850s debated: “resolved, that women shall have the right to sing bass?”

Many of those same women became Garrisonians and more contributed to the moral fervor expressed by Sumner in his denunciations of slaveholders. But it also bears emphasis, as men like Lieber would have affirmed, that the moralities producing the Civil War were acquired chiefly from mothers. Thus, while young men (not yet patriarchs) did the dying, many women on both sides had vigorously urged them on. The men marched to Julia Ward Howe’s Hymn, to

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235. Id. at 382.
236. 2 Fletcher, supra note 37, at 770.
237. 1 Fletcher, supra note 37, at 265:
Oberlin and Garrison had nothing in common but their consecration to the freeing of the slave. Garrison was destructive, “ultra,” and impractical; Oberlin was in comparison, constructive, conservative, cautious and practical. Though Garrison was a “perfectionist” there was very little similarity between his brand of that doctrine and Oberlin Perfectionism or “Sanctification.” His “come-outism” was antipathetic to all that Oberlin held dear. . . . “The Constitution,” he declared, “is a covenant with death and an agreement with Hell.” The Oberlinites said it was a great anti-slavery document which had been misinterpreted by corrupt judges. Garrison was a radical non-resistant (at least until the Civil War); Oberlin’s leaders believed that force was righteous when used for a righteous cause. Garrison favored the complete equality of women with men; Oberlin opposed the general participation of women in public exercises and attempted to keep them “in their place.” It is a significant fact that not a single one of the male leaders of the Oberlin community or alumni was a Garrisonian, whereas all of the outstanding women abolitionists educated at Oberlin supported him.

Id.

238. Lieber emphasized his mother’s role in encouraging him to volunteer to fight Napoleon: “[If] she had 20 sons, she would have sent them all!” Lieber, supra note 157, at 7.
239. “As He died to make men holy, let us die to make men free.” Julia Ward Howe, Battle Hymn of the Republic, stanza 5 (1862). By “men,” we can have no doubt, Mrs. Howe meant to include women; but by “us,” there is also no doubt, she meant “you men.” Therefore her thought can be expressed more accurately, but less effectively, thus: “As Christ died to make us holy, let men die to make us free.”
correct the injustices of which Harriet Beecher Stowe wrote, or to protect their homes from fearsome and rapine Yankees seemingly striving to destroy their families’ traditions and expectations.

The Civil War had strong bearing on these matters as on all else. The shock of the enormous loss of life radiated throughout the culture. At such times, if ever, it is unsurprising that a society would elevate the status of motherhood as a means to renewal and stability, momentarily setting back the cause of public participation by women. Yet, as I will shortly report, the projected role of women in American public life remained generally on an upward course.

B. The Era of Minimum Credentials, 1870-1960

1. Emergence of Law Schools

American higher education emerged gradually from the aftermath of war to take a form more nearly resembling what we know in 1993. The autonomous professional law school in the Harvard model began to emerge within universities after 1870, responding to the literally global impulse to technocracy and professionalization of many forms of work. Among the new professions established were many bridging the entry of American women into public and professional life, including education, nursing, social work, and public librarianship.

However, despite the very powerful stimulus of this impulse to technocracy, the institutions remained for some time small, fragile, and under-utilized. The big universities, as they were in 1890, Harvard and Yale, served as few students as today’s Wesleyan and Williams. As late as that same year, the two largest law schools, Michigan and Columbia, served fewer than five hundred students and had faculties no larger than five or six. As recently perhaps as 1900, a majority of American lawyers had never entered college.

240. See Stowe, supra note 180. Legend has it that Lincoln, upon meeting Stowe remarked: “So you’re the little woman who wrote the book that made this great war.” Stephen Oates, With Malice Toward None 339 (1977).

241. For a poigniant description see Mary B.M. Chestnut, Mary Chestnut’s Civil War (C. Vann Woodward ed., 1981).

242. It may not be an unrelated event that despite the availability of birth control, more than one out of ten women serving for a few months in the Persian Gulf in 1991 returned pregnant. Barbara Kantrowitz et al., The Right to Fight, Newsweek, Aug. 5, 1991, at 22, 23.


244. Reed, supra note 12, at 182, 452 tbl. B.
A long boom in higher education commenced about 1890 and has since resulted in making education a major American industry. But until this century, most lawyers were trained only in law offices, with no exposure to higher education. The available law schools continued to have no choice but to take the students that came. Nevertheless, after 1890 law schools did begin to influence, if only negligibly at first, the demography of the profession as licensing requirements were re imposed and educational standards for the bar were slowly elevated.

2. African-American Law Students

As recently as 1900, the life expectancy of an African-American male baby at birth was 33.245 Most of those babies were born in the South to families residing in extreme rural poverty. Public education and health care were nominal at best. Emancipation had enabled very few African-Americans indeed to achieve even modest educational aims.246 Because the bleeding nation had lacked the political will to complete an effective Reconstruction, any chance to integrate the freemen into the national society was for the time lost.

There were virtually no African-American lawyers in the South. Most young African-Americans could therefore scarcely imagine becoming lawyers. The steps required to precede the development of significant African-American membership in the legal profession included relocation by a substantial part of the minority population away from the defeated, impoverished, backward and intransigent South, and then the development of a population of educated African-American citizens from whom embryonic lawyers could be drawn in numbers. The large-scale upheaval of minority population that was at last induced by World War II and the invention of mechanical cotton pickers were the necessary preconditions to the creation of a significant “pool” of African-American students with the elementary training and the special ambition to be lawyers.

The emergent law schools or universities outside the South accepted African-American applicants on equal terms with white. At Michigan, for example, African-American students were admitted in 1871, without public notice or discussion, when they showed up and

245. Historical Statistics, supra note 220, at 55. This compared to 47 for white male babies. The comparable projected numbers for 1990 are 67 and 73.

246. Access to education remained very limited for those African-American remaining in the cotton culture. It was still the case as late as 1933 that 97% of the African-American students receiving college instruction were in Jim Crow colleges in the South. Franklin & Moss, supra note 41, at 363.
paid the small fee. A steady trickle of African-American lawyers emerged from such schools as Michigan and Harvard despite impediments of prejudice which even graduates of such institutions faced in obtaining employment.

Social darwinism was prevalent in the late nineteenth century and surely penetrated the thinking of some law teachers. John William Burgess, a native of Tennessee, who taught at Columbia from 1876 to 1914 was a bigot. "He glorified race as a factor in the evaluation of individuals and nations." But whether more given to racial prejudice than most of his contemporaries may be questioned. We can be sure that many of his students were more given to racism than he, and that there were many instances of racist behavior toward the few African-American law students, not only in his school but in most others as well. Yet many of those who survived the academic rigors seem to have left their schools with about the same feelings that white alumni had. Some African-American students acquired supportive mentors; thus, Charles Hamilton Houston acquired Roscoe Pound as his mentor.

There were, of course, individual African-American Southerners with the initiative to extricate themselves from the Southern situation. Some of these who had found their way into northern law schools would later provide leadership in the long struggle for equality for those of African descent. But this was a very long trail to follow, and not many had the tenacity needed to pursue it on their own initiative.

Although Oberlin had shown that something could be done under the impulse of the abolition movement, even Oberlin was unable to maintain an effective effort to recruit and train African-American students. It would have required imagination and energy of heroic proportions even for a school relatively well-endowed, such as Harvard Col-

248. My own scrutiny of Who Was Who in America (Chicago, Marquis 1963), made some years ago, revealed that a high proportion of the small number of African-American Michigan Law alumni were to be found listed in that work. My records were left at Michigan, and are now lost. But a recalled signal of the times was that one Michigan Law alumnus was reported in that volume to hold in the Taft administration the highest office held by an African-American in the federal government: he was Registrar of Deeds for the District of Columbia. Admission to the Bar was not open to African-Americans in many southern states.
lege, to reach out for even a few children of unlettered Mississippi sharecroppers. But there was no law school or university equipped with the resources to embark on such an endeavor, even had one found the imagination and energy.

A special beginning of African-American participation in the legal profession was attempted by the federal government in establishing the law school at Howard University, an institution founded in 1867 by John Langston, a African-American Oberlin alumnus. Langston found it necessary to provide remedial instruction in reading and arithmetic before starting his first students on legal material. By the turn of the century, however, there were still only 728 African-American lawyers. The other black antebellum Oberlin alumnus, John Vashon, practiced in Syracuse. Others gathered in Boston. This was a small number indeed, although even that presence reflected a very substantial cultural change from the preceding decades.

These early African-American lawyers must have been courageous people, for in many areas, they were at personal risk, and even securing access to the law library could be a problem. But their number continued to increase, and working conditions gradually improved somewhat. The National Bar Association was organized in Des Moines in 1924. By 1930, there were over 1000 African-American lawyers, but most were in the North. Thus, the minority of the African-American population residing in some parts of the nation may have had access to lawyers of their own, just as many non-racial minorities residing in urban America had lawyers of their own.

An increasing number of these lawyers, led by Charles Hamilton Houston, commenced systematic resistance in the courts to segregation and other institutions of oppression. As early as 1933, Houston’s partner, William Hastie, initiated an action against the University of North Carolina on behalf of a qualified student seeking admission to the Pharmacy School. These lawyers were not without moral support.

252. See Bloomfield, supra note 18, at 328-39.
253. Id. at 329.
255. Bloomfield, supra note 18, at 312.
257. Id. at 654.
259. See generally McNeil, supra note 251, at 57-127.
260. The story is told in Ware, supra note 250, at 46-52.
from law teachers and students at Duke and the University of North Carolina. In 1937, William Hastie became the first African-American appointed to the federal judiciary, but he was appointed to the bench in the Virgin Islands. Only in 1949, after World War II, was it possible for President Truman to appoint Judge Hastie to the United States Court of Appeals.

3. Women Law Students

Despite the national malaise that followed the Civil War, many public institutions of higher education had admitted women before 1880. Among private northeastern law schools, New York University and Cornell led the way in the late 1880s. The newer universities, such as the University of Chicago (1902), Duke (1904) and Stanford (1899) were from their beginnings open to women. While there were certainly attributes of those schools that were not encouraging to women students, life within them was not for women an unbroken series of injustices inflicted by uncaring pedants. For example, it is reported that on one occasion, Dean Wigmore was to preside over an event being given jointly by Northwestern and Chicago Law students; when he was informed that it was to be a stag affair, he demurred, insisting that he would not preside over an event from which women students were excluded.

This development was, of course, linked to the suffrage movement that finally achieved the adoption of the Nineteenth Amendment to the Constitution of the United States in 1920. By that year, 102 of the 129 law schools were admitting women. Women were soon there-

261. _Id._ at 85-84.
262. _Id._ at 228-41.
263. See generally Robert H. Wiebe, _The Search for Order_ 1-10 (1967).
264. The exceptions were, unsurprisingly, in the southeast. Isabella M. Pettus, _The Legal Education of Women_, 38 J. Soc. Sci. 294 (1900).
265. _See id._ at 240.
267. Then the Trinity College Law Department. Women were admitted to Trinity College in 1884. Nora E. Chaffin, _Trinity College, 1839-1892: The Beginnings of Duke University_ 240-41 (1959).
268. _See Orrin L. Elliot, Stanford University 87-92 (1937)._ 
after admitted by all law schools except those affiliated with universities that did not admit women. In 1885, Dean Wayland admitted a woman to the law school at Yale; she was allowed to graduate, but the governing board forbade him to admit others. The Harvard Law faculty voted to admit women students in 1899, but they were defeated by vote of the Corporation. James Bradley Thayer spoke for a majority of the faculty in saying that "he should regret the presence of a woman in his classes, because he feared it might affect the excellence of the work of the men; but he could not deny the inherent justice of the claim." When the corporation turned the idea down again in 1915, Harvard Law Professor Joseph Beale, no radical, opened a law school for women in Cambridge, announcing that it would be "as nearly as possible a replica of the Harvard Law School." One concern expressed by some men during the early years of women lawyers was that their sexual charms would give them an unfair advantage with juries, which in many states were composed of men. Indeed, this concern was made the basis for argument in defending the action of the directors of Hastings College of Law in 1879 excluding two women from their first class. The argument lost, to the satisfaction of Dean Hastings and Professor Pomeroy. There were already two law schools in Boston that were open to women: the Boston University School of Law and the Portia Law School, which was open to female high school graduates and was by the 1920s preparing a significant number of women lawyers.

271. Although not without a fight, professional education in law was available to women in most public university law schools by 1880. See, e.g., Thomas G. Barnes, Hastings College of the Law: The First Century 47-57 (1978); Barbara A. Babcock, Clara Shortridge Foltz: "First Woman", 30 Ariz. L. Rev. 673, 701-05 (1988). The resistance, however, seldom came from teachers. A rare exception occurred in 1888, when the law faculty at George Washington resisted the admission of women. Robert Stevens, Law School: Legal Education in America from the 1850s to the 1880s, at 88 (1982).

272. Frederick C. Hicks, Yale Law School: 1869-1894, Including the County Court House Period 74 (1937).


274. Id.


276. Stevens, supra note 271, at 84. The school failed, in part for want of demand, and in part because Beale's daughter married and gave up law. Id. at 84 n.87.

277. Hicks, supra note 272, at 72.


279. Stevens, supra note 271, at 83.
opened a program for women only in which the first year’s teaching was done entirely by women lawyers. That experiment, too, seems to have failed.

Undeniably, those few women who attended law school faced dim prospects. Notwithstanding the decision of the Supreme Court in Bradwell v. Illinois, the legal constraints on women in law practice had largely disappeared in most of the country by 1880. Yet, the career opportunities for women were strongly influenced by traditional gender roles favoring motherhood, and there were an insufficient number of women interested in breaking the molds to effect that result.

Women lawyers faced the major obstacle of the absence of legal work for women lawyers in a universe in which most lawyers practiced alone. Women lawyers often depended on their lawyer-husbands’ or lawyer-fathers’ willingness to employ them. The radical Clarence Darrow sympathetically suggested that women lawyers take up the uncompensated defense of people charged with crime. The market bias against women lawyers only began to recede after World War II, even though the number of women lawyers began a fairly steady increase that gained momentum throughout the twentieth century. If there were those who considered recruiting women into law school, they would sensibly have abandoned the idea in face of market conditions.

4. Credential Requirements and the Effects of Human Capitalism on Women and African-Americans

Both women and African-Americans contemplating careers after 1890 were looking at a different prospect than were those of an earlier

281. 83 U.S. (16 Wall.) 130 (1872).
283. This seems to have been true for African-American women as well as white. Gertrude Rush, for example, was trained by her husband, passed the Iowa bar exam in 1918, and practiced in Des Moines for about 40 years. See Smith, supra note 256, at 689.
285. See CHESTER, supra note 270, at 82.
time, and in one important respect, their prospects may have seemed even less attractive. Occasioned by the rise of technocratic professionalism that commenced in 1870, a steep elevation of academic standards for the legal profession occurred in the early decades of this century. This increase followed a pattern set in almost all professions, especially in the field of medicine. The new credentials requirements directly effected an increase in the time and foregone income which a person had to invest in higher education prior to entering into the professions.

In purely economic, human-capitalist terms, law school was for a person of any race or either gender a poor investment yielding a low rate of return until at least as late as 1960. There were no summer law jobs to speak of, and little part-time employment in law. Hence, full-time students essentially faced a full three years of foregone income; for this reason, many, and in some places most, students pursued law study in the evenings on a part-time basis. Professional salaries were incredibly low by present standards. If a graduate were one of the select few to find a salaried law job on graduation in 1920, the salary was unlikely to exceed one hundred dollars a month. By 1955, there were somewhat more jobs, but the top Wall Street salary was merely four thousand dollars a year. People securing such positions were assigned work reflecting the low price and economic value of their services and included many duties now likely to be performed by paralegals. On the other hand, a diligent and loyal hand was very likely to achieve partnership and a working relationship that would endure for a career.

The alternative, of course, was probably solo practice. In the cities, this was often grinding work, financially and morally, a far cry indeed from the uplifting experience shared by the partners of the legendary contemporary firm of McKenzie, Brackman. Small town practice had its charm, but seldom was it remunerative, especially for beginners. More than one good lawyer practicing in the first half of

287. Alfred Z. Reed, Present-Day Law Schools in the United States and Canada 287-316 (1926) (providing a compendium of the various evening school opportunities then existing).
289. The mythical firm featured on L.A. Law (NBC Television).
290. See generally Joel P. Handler, The Lawyer and His Community: The Practicing Bar in a Middle-Sized City 30, tbl. 2.8 (1967).
this century has confided to me that for as long as a decade, he made
more money playing cards than practicing law. Thus, prior to 1960,
very few chose law school for the reasons that animate most law
students in 1993.

The rising credentials requirements were, at least in law, in some
measure the product of an exclusionary impulse residing within the
American Bar Association (then still as much club as professional
organization) and directed at immigrants (mostly Catholic) and Jews.
To the extent that exclusion was in fact the aim of the credentials
requirements, they were a total failure. More than a few immigrant
sons entered the academic competition of law school and proved them-

291 selves superior to the offspring of the overprivileged, sometimes
perhaps gaining professional opportunities that would not have been
opened to them but for the meritocratic selection associated with that
competition. Catholics created their own law schools in many cities,
and entered the bar in large numbers. It is certainly possible that
some Catholic and some Jewish students were excluded from some
law schools, particularly in the area of New York City, where the
immigrant xenophobia seems to have been centered. Columbia and
Yale were most suspect because they may have been in a strong
enough financial position to be able to afford to turn a few students
away.

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291. The stated, and there is no reason to doubt the predominant, reason for the elevation
of academic standards in this century was to enhance the status of the legal profession as well
as its utility to the public. Resistance to the elevation of standards was sufficient to keep legal
education, if not professional opportunity in law, open to a substantial degree. See STEVENS,
supra note 271, at 172-80 for a brief account. As Stevens notes, there was at the same time
an effort being made to elevate standards in most professions resulting in attrition of women;
thus, the number of women doctors in America declined from 9015 in 1910 (6%) to 6825 in 1930
(4%). Id. at 51 n.50. There appears to be no evidence that these elevations of standards were
intended to exclude women. For an overborne description of the evidence of the racism involved,
see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN
AMERICA 192-29 (1976). Less overborne, but also, it seems to me, distorted is the account
provided in the otherwise excellent work of RICHARD L. ABEL, AMERICAN LAWYERS 40-73
(1989). Abel demonstrates abundant awareness that events in the American legal profession
were symptomatic of world-wide trends in all professions everywhere, and that the sporadic
efforts to sustain class exclusivity during the early decades of this century were largely ineffect-
ive. Yet he tends to the conspiratorial view. Id.


293. HOW WE LIVED: A DOCUMENTARY HISTORY OF IMMIGRANT JEWS IN AMERICA,
1880-1930 (Irving Howe & Kenneth Libo eds., 1977); see AUERBACH, supra note 291, at 99-100.
An additional change from former times relating to credentialing was the institution of the final examination. Now that schools were for most students essential to the pursuit of professional goals, they could and did hold students to academic standards. In some measure at least, this development was dictated by the development of licensing examinations in the early years of the twentieth century. The academic failure rate rose to significant levels. Additionally, law firms which were not a significant factor in professional opportunity in law before 1920, began to grow and began to take an interest in academic standing as a surrogate for social class and on-the-job evaluation. Thus, for those seeking employment in such institutions, grades mattered as they never had before. Consequently, law study became a more competitive activity and the risk of failure and disappointment increased.

It seems likely that these circumstances operated differentially. The newly imposed standards were most likely more discouraging to women than to men, because men were more likely to reap rewards in the market place and were under greater social pressure to provide for others. Richard Abel attributes a slight increase in the number of women law students which occurred during World War I to an effort by law schools to replace the men students who had gone to war. Yet, there is no evidence of such an effort and it would have been extraordinary at that time for any professional school to recruit students of any kind. It is more likely that the blip resulted from the effect that war had on women’s perceptions regarding career and marriage opportunities.

Similar dynamics may have effected the self-selection of African-American students. The elevation of academic standards altered the ratio of cost of legal education to prospective reward, and this may have made it less likely that African-American students, as compared to white students, would be attracted to make the necessary investment in themselves. Most likely, those lacking family experience with

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294. Examinations were established at Harvard early in the deanship of Langdell in 1870. SUTHERLAND, supra note 39, at 140, 162.
295. On the early history of bar examinations, see REED, supra note 12, at 92-103.
296. SUTHERLAND, supra note 39, at 221-23, 248-50.
297. OTTO E. KOEGEL, A COLLECTOR OF YOUNG MASTERS 38-81 (1953).
298. ABEL, supra note 291, at 91.
299. The financial returns for African-American lawyers were even less favorable than they were for others whose likely practices were urban solo practice. See Edward J. Littlejohn & Donald L. Hobson, Black Lawyers, Law Practice, and Bar Associations — 1844 to 1970: A Michigan History, 33 WAYNE L. REV. 1625, 1634 (1987).
successful human capitalism would be more risk averse as human capitalists than those whose families were replete with examples of such success.

On the other hand, the academic failure rate in part reflected the continuing openness of admissions to those having minimal credentials. Tuitions remained very low by contemporary standards through the first half of the twentieth century. Thus, tuition was in reach for students working at part-time and summer jobs (generally outside the legal profession) who were willing to live Spartan lives. No one had to beg grants-in-aid or acquire large debts to go to college, or to become a lawyer. Law students were, it is true, expected to be self-starting and self-reliant, as indeed, were other adults in the culture of that time. Those who thought themselves better suited to politics and argument than to farming or retailing might come to law school if they were so inclined, and might thereafter practice law. But it was no one’s business to recruit law students, and almost no one had any money with which to help or encourage those who were in doubt as to whether they should undertake the burden and hazard.

5. Fall of the Remaining Exclusions

The problem of Jim Crow was at last addressed effectively after World War II and the accompanying holocaust, two events that invigorated efforts to reduce racism in America and elsewhere in the world. It also was important to the elimination of Jim Crow laws that the African-American population had commenced a major migration out of the South. The Association of American Law Schools joined in the efforts of the National Association for the Advancement of Colored People to effect the removal of Jim Crow. *Sweatt v. Painter* was, among more important things, a victory for the Association.

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300. See the annual Review of Legal Education commenced in 1928 by the Carnegie Foundation for the Advancement of Teaching and continued since 1925 by the American Bar Association for a report on available facilities and tuitions. Low tuition, of course, assured a relatively low quality of services and, especially in law schools, very high teaching ratios. Stevens, supra note 271, at 63.

301. The effort commenced before the War. Cf. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (holding that the state was obliged by the Fourteenth Amendment to provide negro citizens with legal education in the state).


As one of the distinguished authors of the Association's brief acknowledged, the Association's leadership was not an act of great moral courage, for the culture was ready for the change\textsuperscript{305} and few law teachers opposed it, even where they resided in Southern pockets of resistance.\textsuperscript{306} Some law faculties found occasional opportunities to take group action of some consequence to this effort.\textsuperscript{307} The impulse to

the basis of the Court's opinion. \textit{Id.} The brief was published in Thomas I. Emerson et al., \textit{Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education}, 34 MINN. L. REV. 289 (1950). Among the authors of that brief still extant are John Frank (then at Yale University), Erwin Griswold (then the dean at Harvard) and Edward Levi (then of the University of Chicago).

306. In 1968, I interviewed Page Keeton, Richard Maxwell, Millard Ruud, Joseph Sneed, and Jerre Williams (all members of the Texas law faculty at that time) in an effort to reconstruct the attitude of Texas law teachers in the late 1940s. It was their shared belief that only Professors Stayton and Bailey were resistant to the admission of Sweatt. Charles McCormick (who, I should disclose, was my maternal aunt's husband) was the dean of the Law School at the time of the controversy and hence ex officio the dean of the "separate but equal" law school created by the Regents of the University, none of whom was willing to favor the admission of an African-American law student; he therefore testified as a defense witness at the trial regarding the characteristics of his Jim Crow law school, which had the same dean and faculty as the whites-only law school of which he was also the dean.

I have no doubt that this experience was painful to McCormick and was a contributing cause of his resignation as dean shortly before the Supreme Court rendered its decision, although there were, to be sure, other factors that may have been even more important. I was at the time an undergraduate at the University of Texas and was accustomed to sharing a meal with the McCormicks a couple of times a year. We never discussed his role in the case, but we did discuss my own very small role in helping in 1949 to circulate a petition in support of Sweatt's admission, and McCormick left no doubt in my mind that he approved of my efforts. It is also pertinent that McCormick privately supported Henry Wallace, the leftist Progressive Party candidate for President of the United States in the 1948 election. McCormick was apparently on amiable terms with Sweatt as a student in the law school, but, so far as I have been able to determine, he never publicly proclaimed his personal views on Sweatt's admission. It may have been a factor that the McCormicks were long-time friends of the Painters; Theophilus Painter was the acting President of the University, and the embattled defendant in the litigation. I leave it to others to judge whether under all the circumstances my uncle should have been more forthcoming, but again offering the caution against judging Moses by the standards of Sparta.

provide African-Americans with open access to legal education was by 1960 widespread.308

Meanwhile, in 1950, Harvard became the last Ivy League school to admit women.309 The last American law schools to admit women as law students were Notre Dame and Washington and Lee, who did not admit women until 1966 and 1972, respectively.310 It has thus been two decades since anyone was denied admission to an American law school for a reason of race or gender.

Thus, by 1960 most law schools were open to all applicants who met the minimum credentials requirement.311 At a place such as Michigan or Columbia, a B average might be expected, and by 1960 some students were excluded from a few such law schools because of a very low score on the new Law School Admissions Test (LSAT).312 But for most schools, it was the student who was selecting the school and not the other way around.

Thus, the small number of women and minorities of color that could be found in American law schools in 1960 was not in any sense of the word the result of “exclusion.” It was in the first instance a matter of personal choice on the part of many women and minority students who met admissions requirements at most law schools to do something other than study law. Their choices were not irrational. Law school was a long grind, jobs were few, and pay was low. Moreover, solo practice was perhaps particularly unattractive to women who had to overcome gender roles to attract clients, and perhaps unattractive even to minorities of color, for whom a regular job was an even more remote prospect than for a white male graduate.313

309. EPSTEIN, supra note 282, at 50.
311. For example, at Wyoming, where I taught that spring, any student with three years of college and a C average, or “the equivalent” was admitted. At Indiana, where I taught that fall, any college graduate was admitted unless he or she had failed out of another law school.
313. As late as the mid-sixties, it was still true that few minority students seriously considered any form of graduate or professional education. JOHN BEERTON, STATE UNIVERSITIES AND BLACK AMERICANS (1969).
In addition, there were surely other reasons lying more deeply in the culture that influenced the choices being made. We can be sure that Malcolm X was not alone in being directed away from the legal profession by a friendly teacher.314 Undoubtedly, more than a few women were directed to motherhood or one of the stereotypical feminine professions by well-intentioned parental advice or other counseling that differed from that generally given to males, on whom different duties were imposed.

Whatever the mix of causes, there were, nevertheless, minority students attending law schools in the first six decades of this century, and the number of African-American lawyers continued to grow, albeit at a glacial rate. Some African-American law students compiled excellent academic records, and some played major roles in the movement for equal rights for African-Americans;315 but they were not numerous. Nor were the women. Despite the almost complete, and by then long-standing openness of law schools to women applicants, the number of women choosing to study law in 1960 was less than two percent of the total enrollment.316

C. The Era of Selection: Since 1960

1965 was the year of radical change in law school demography, but close observers could have seen it coming a few years before. Two forces coalesced: The first was the rising market power of law schools. The second was comprised of the special admissions policies sparked by the Civil Rights Movement.

315. Charles H. Houston, Harvard ’22 and William H. Hastie ’29, are premier examples. Both won positions on the Harvard Law Review. They practiced law together in Washington, and also for a time, while practicing, conducted the law school at Howard, each serving briefly as the dean. Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality 125-31, 2271 (1976). Kluger’s book is replete with descriptions of their joint and separate roles in effecting the end of racial segregation. Joining in their enterprise were Leon A. Ransom, who led his class at Ohio State, and James Nabrit who had an excellent academic record at Northwestern. Although Houston and Hastie devoted some years to teaching at Howard, we do not know that either preferred a regular appointment at another school. It seems unlikely that such appointments were tendered, but we do not know. Hastie took a position in the Interior Department in 1933, served as a federal judge in the Virgin Islands, then served in the War Department, and was appointed to the United States Court of Appeals in 1949. Franklin & Moss, supra note 41, at 274, 415.
316. For the decade 1935-65, not more than 2800 women graduated from 108 AALS law schools, about two per graduating class. James J. White, Women in the Law, 65 Mich. L. Rev. 1051, 1053 n.5 and accompanying text (1967).
1. Market Power

The first force resulted from a gradual increase in admissions applications, leading to a rise in academic standards for admission and to an enhancement of some law schools’ power to select among applicants. While law schools had been performing a general gatekeeping function since the establishment of credentials requirements in the late-nineteenth century, they were increasingly performing a more specific function in evaluating and shaping the prospects of individuals.

The new market power of law schools was largely the consequence of the growth of law firms, a nationwide development that stimulated the growing demand for law graduates. There were even reasonably good jobs in smaller cities with more bucolic lifestyles than the biggest cities, which seemed increasingly threatening and unattractive in the wake of suburbanization and urban riots. For a brief time, Wall Street could not hire.

And so in 1965, there was an eruption of lawyers’ starting salaries that continued apace for at least a quarter century. This had visible demographic effects, as each year the pool of law school admissions applicants became more competitive, the students attracted increasingly by the promise of large incomes upon graduation. Increased salaries also incidentally enabled law schools to increase tuition prices at a superinflationary rate; in this, they were greatly assisted by government loan programs steadily increasing in their generosity. As a result, increasingly able students have borrowed ever larger sums to pay steadily rising real prices for an academic program increasingly decorated with frills having diminishing connection with the professional work of lawyers.

Law schools experienced some puzzlement as to how to perform their new role of selecting students. The very first law school admissions officer had been appointed as recently as 1946, and there was little experience to draw upon. The LSAT had been devised in 1950 as a counseling tool, to help those students destined to fail out of law school avoid that misfortune. Admissions officers grasped this device

318. Current starting salaries with large firms are about $50,000 a year, with significant local variations. Emily Couric et al., What Lawyers Earn, NAT’L L.J., Mar. 27, 1989, at 31.
319. Ironically, the more we have invested in this form of human capital, the more the training program has entailed program costs that can only be described as consumption. I have in mind the investment in reducing teaching ratios. This investment makes for a more amiable environment, but has no visible effect on the competence or fitness for public service of law alumni.
as a means of selection from among applicants having quite diverse and often incomparable records of undergraduate study. At best, the LSAT was a weak predictor of a student’s performance on first year law school examinations. Admissions officers loosely reasoned that examinees scoring high on the LSAT, and thus having little chance of failure on their examinations, would have more success in their academic work, and hence be more valuable as law students and as lawyers. However, it was soon discovered that the LSAT tended to identify minority applicants as among those less likely to prevail in law school academic competition, resulting in a reduction in the small number of African-American students at the most elite and competitive schools.320

2. Civil Rights

The second force to surface in 1965 was the offspring of the Civil Rights Movement. Law teachers had been writing and speaking about the rights of African-Americans in the South for decades, with only marginal effects, save perhaps for their collective participation in Sweatt v. Painter.321 A few individual law teachers participated in other litigation, perhaps with some effect, and a very few actually rode with Freedom Riders and marched on Washington. Additionally, some law teachers were recruited from among those who had previously engaged in those activities.

When the Civil Rights Act was adopted in 1964,322 it had no application to any law school, yet there was a widely-shared sense of unfulfilled duty or opportunity to participate in what seemed to almost all of us a special moment in American history. This sense of duty was enlarged by the traditional awareness of the relation in the American scheme of governance between public law and public duties of citizenship. Moreover, the Movement added emphasis to the awareness that there were too few African-American lawyers to carry the bur-

320. This fact led to the extended debate over the alleged racial bias of the LSAT. See Charles E. Consalus, The Law School Admission Test and the Minority Student, 1970 U. TOL. L. REV. 501; Eulius Simien, The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action, 12 T. MARSHALL L. REV. 359 (1987). The utility and effectiveness of the LSAT has been increasingly questioned in recent years, but its racial bias has never been satisfactorily demonstrated. For an assessment of some of its limitations, see ANDREW J. STRENO, THE TESTING TRAP (1981).
321. 339 U.S. 629 (1950); see supra note 304.
dens of African-American clients seeking to enforce newly created rights. This concern was magnified by the fact that the selection process seemed to be actually reducing the relative number of African-American students in some of the more elite schools.

3. Special Admissions

Out of these sentiments came the first "special admissions" programs,224 which appeared in 1965,225 their like were soon in place at many law schools. Building on the tradition of many of the older elite colleges of giving some preference in admissions to the offspring of their alumni,226 most schools with competitive admissions began to prefer African-American applicants. By 1968, these schools were sending "a parade of recruiters to a small number of black colleges."227

While there had been disturbances at Berkeley as early as 1964, the student disorders evoked by the Viet Nam War first achieved national significance at Columbia in 1968.228 Minority students also demonstrated,229 and won concessions at a few elite universities to substantially increase the size of minority admissions programs previously established. Other universities increased their programs without such duress, although some may have been influenced to avoid disorder.230

With increasing sophistication, these programs were made to work. Intensive preparatory programs were attempted, but found to have limited effect.231 Programs to encourage undergraduates to study law

228. For a contemporary account of the Columbia strike, see JENNY L. AVORN, UP AGAINST THE IVY WALL: A HISTORY OF THE COLUMBIA CRISIS (1968).
were tested. The most critical feature was the infusion of financial aid funds needed to eliminate the financial risk associated with an investment in their own "human capital" that many qualified minority students seemed reluctant to make.

One problem recognized at the outset was not solved. As Clyde Summers observed in 1970, preferential admissions tended to move minority students upscale in the academic competition, thereby making it more difficult for them to excel. This seemed to be unavoidable; it was the more competitive schools that had financial aid resources and placement opportunities which reassured risk-averse minority students. If minority admissions had been left as a task to be performed only by the less competitive schools, the effort would almost surely have failed. Yet putting competent minority students in academic competition with supercompetent classmates had a unforeseen negative consequence when it came time to recruit and select law teachers from among the minority cohort. Institutions that evaluated a minority graduate's qualifications against those of a regularly admitted student ordinarily offered teaching positions to those non-minority students with higher qualifications. This problem was increasingly magnified by the rising admissions standards at many law schools: Minority students who would have been regularly admitted to their schools in 1960 were in 1980 facing a significant deficit in academic qualifications as compared to those of their regularly admitted classmates.

333. Id. at 696-697.
334. Cf. Egerton, supra note 313. The caution of African-American students in practicing human capitalism has been in some measure justified by the somewhat higher attrition rate for African-American students, and by the larger portion of African-American law graduates who seek and find careers in the less highly remunerated parts of the profession. In 1983, a survey of 28,700 African-American law graduates revealed:

<table>
<thead>
<tr>
<th>Kind of Practice</th>
<th>All Grad.</th>
<th>Afr.-Amer.</th>
</tr>
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<tbody>
<tr>
<td>Private</td>
<td>58.9%</td>
<td>32.4%</td>
</tr>
<tr>
<td>Business</td>
<td>10.5</td>
<td>10.7</td>
</tr>
<tr>
<td>Government</td>
<td>11.4</td>
<td>23.3</td>
</tr>
<tr>
<td>Public Interest</td>
<td>3.0</td>
<td>8.2</td>
</tr>
<tr>
<td>Unaccounted</td>
<td>16.2</td>
<td>25.4</td>
</tr>
</tbody>
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335. Summers, supra note 327, at 384-85.
As Professor (later Dean) Summers observed, the national program thereby inevitably reinforced for many minority students a self-expectation of academic underachievement. This occurrence seems to be attested to by the existence at the present time of racial quotas within some elite law schools for the honorific selection of student law review editors. The minority set-aside has found its way into some law reviews in order to assure minority participation. Such programs would not have been considered had minority students been found in proportionate numbers among those selected by meritocratic methods.

Perhaps as a consequence of one or both of the events of 1965, another trend becoming visible at about that time was a rapid decline in the academic attrition rate. Once admitted, high starting salaries influenced students to continue the study of law, and high academic qualification reduced the number of truly deficient examination papers. To protect against concerns of favoritism for students specially admitted, most schools adopted some form of blind grading. But an unintended effect of blind grading may have been a decline in law school grading standards, reflecting a sometimes unconscious effort to protect minority students who were seen as likely to be overmatched in the academic competition. For whatever reason, many law teachers, by less rigorous grading in the decade of the 1970s, forsook the screening role performed in the first six decades or so of the century.

In addition to these practical concerns about "special admissions," there also remained an abiding sense of unease about the fairness of preferential admissions based exclusively on race. Law students, more than law professors, retained a concern that such preferences brought "individualism into conflict with egalitarianism." Although generally "liberal" in political orientation, and almost universally

336. Id. at 397; see also Paul G. Haskell, Legal Education on the Academic Plantation, 60 A.B.A. J. 203 (1974).
338. An effect of this retreat by law school professors was to transfer more of the screening function to the bar examinations, which sometimes fail a disproportionate number of minority students. This may be in some respects an unfortunate waste. However, it can be said on behalf of law schools with lower minority bar examination pass rates that they have given opportunities to minority students and that they are maintaining a long-entrenched practice of assuring access to the profession of law and politics.
340. Id. at 1238.
favoring integration, even the professors generally opposed absolute preferences, firm goals, timetables, and quotas. In this, they reflected the traditional values of the law and also the overwhelming opinion of the American people.342

The affront to qualified students asked to yield their places in elite programs led to constitutional challenge. The Association of American Law Schools, together with the National Association for the Advancement of Colored People, joined in supporting the University of California’s effort to defend the special admission program of its medical school, even though that program was essentially a minority set-aside.343 The defense was only partially successful.

Despite the difficulties, the system developed by the law schools to enlarge the number of African-American lawyers achieved notable results. Because racial identification was for long generally regarded as inapposite by many Americans, data on the number of African-American lawyers prior to 1965 is sparse.344 But as recently as 1970, only 3,400 African-Americans were licensed to practice law;345 in 1987, the number exceeded 24,000.346 This growth resulted from a steady flow of about 2,000 African-American students a year entering law school from 1973 through 1986, increasing to 2,628 in the fall of 1989.347

Many of these students received significant financial aid without regard for financial need, strictly on account of their minority status. Well-qualified African-American students are sometimes the object of a bidding contest between schools. As a result of this steady flow of African-American graduates, the proportion of African-Americans348 who are licensed lawyers increased almost five fold from an appalling

346. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 388 (109th ed. 1989). This number appears to include a significant number of lawyers who are not engaged in legal work. This would explain the difference with the 1988 Bureau of Labor Statistics data. See infra note 353.
1 in 6558 to a relatively unremarkable 1 in 1262. At the present rate of growth, the ratio will be about 1 to 800 at the end of the century. This is a significant social and political event.

In 1980, the American Bar Association amended its accreditation standards to require law schools to practice affirmative action in the admission of minority students (but not in the granting of financial aid), and began to require annual reports on affirmative action efforts. At the time the change was made, I confidently predicted to the appropriate officers of that Association that no applicants would gain admission to law school as a result of this action. The reason for my confidence in that prediction was knowledge, based on data circulated by the Law School Admission Council, that law schools were in fact already admitting just about every applicant who was a member of a disadvantaged minority who appeared to have a significant prospect of passing a bar examination. That circumstance continues to exist as special standards of admission are applied to minority applicants that assure all with plausible hope of success a good opportunity to test their chances in a career in law.

Another aspect of special admissions has been the career expectations and experience of minority students who have been attracted to law schools since 1965. As might be predicted on the basis of the kind of data used by law school admissions officers, the academic attrition rate among African-American students, although low, is somewhat higher than the norm. It also appears that African-American lawyers are somewhat less likely to become and remain employed in professional legal roles than are their classmates. On the other hand the

349. This ratio is still high for America. Among the 50 states, the highest ratio is West Virginia's at 689 to 1. American Bar Foundation, Statistical Report: The U.S. Legal Profession in 1985, in 1990 Statistical Abstract, supra note 348, at 182.


351. Except for minority students who will only attend a particular law school, 85% of minority applicants standing in the top 90% of their undergraduate classes and scoring in the top 70% among those sitting for the LSAT are admitted. See Robert L. Clayton, Law School Enrollment of African Americans: A Crisis in Recruitment and Retention, 4 NBA MAG., Feb. 1990, at 13, 19-20, 27.

352. About 75% of the African-American students graduate, compared to 85% for the total population of law students. American Bar Association, supra note 347, at 66-67.

data of the National Association of Law Placement suggest that African-American graduates get their share of remunerative first jobs. Yet, perhaps because of superior opportunities for lateral movement out of the legal profession, somewhat fewer minority graduates choose to enter and remain in the legal profession.\footnote{354}

Partly for these reasons, African-American lawyers have increased as a percentage of the licensed bar, only from 1\% to 3.4\%, but this comparison does not reflect the large absolute growth in the size of the bar resulting in large measure from the arrival of non-minority women in very large numbers. Had the overall size of the bar remained constant during the last two decades, the increased number of African-American lawyers would be more impressive, for their present number would constitute 6\% of the licensed bar.\footnote{355}

The more important datum is that law and the legal profession is a much more important factor in African-American subculture than it was when law schools took the initiative to enhance it a quarter century ago. The progress made in developing a cadre of African-American lawyers, judges, and law professors, while far from complete, has been at least as substantial as anyone could reasonably have predicted a quarter century ago when the affirmative action effort first commenced in earnest. To say, as some do,\footnote{356} that affirmative action in law has failed, is simply false. Among the legal institutions contributing to this achievement, the law schools appear to have played the largest role.

As noted, the steep growth in the African-American presence in law school student bodies in the early 1970s did level off for most of the decade of the 1980s, until a very recent growth spurt. The levelling off and the spurt appear to reflect the number of African-Americans graduating from college and the rate at which college graduates, white

\footnote{354} National Research Council, \textit{supra} note 334, at 247-48.
\footnote{355} 24,000 in approximately 400,000.
\footnote{356} Anthony J. Scanlon, \textit{The History and Culture of Affirmative Action}, 1988 B.Y.U. L. Rev. 343 declares that “[a]ffirmative action at American law schools has been a failure.” Such an appraisal seems to rest upon an unrealistic assessment of the possibilities. Cf. Leo M. Romero, \textit{An Assessment of Affirmative Action in Law School Admissions After Fifteen Years: A Need for Recommitment}, 34 J. Legal Educ. 430 (1984) (finding that the percentage of minority lawyers is far lower than the percentage of minorities in the U.S. population). Both these assessments seem to rest on an assumption that the percentage of lawyers identifiable as members of a minority group should be the same as the relation between their group and the total population. This assumption is often made, but never, so far as I know, defended. For further discussion, see \textit{infra} text accompanying notes 474-76.
or black, elect to attend law school. The number of graduates, in turn, reflects college admissions. Given the existing credentialing requirements, there is little that can be done to increase further the number of African-American law students except by increasing the number of African-American applicants for undergraduate colleges.

We should not disparage the nation’s achievement with respect to the number of African-American college graduates, or for that matter, the achievement of our African-American population. The number of African-American college graduates is now over two million, roughly a seven-fold increase since 1960, and a number exceeding the number of college graduates in all but a few other countries. The African-American high school drop out rate is now only eighteen percent, compared to fourteen percent for whites, a difference that is significant, but not substantial.

I have no doubt that much could be done to effect further improvements. The disappointments in the achievements of disadvantaged minority children in our schools is not inevitable, but is a product of many visible factors. These factors include the poor state of our urban schools, where many minority children are concentrated, the absence of decent child health care and prenatal care, the failure of our economy to provide suitable employment for fathers of poor children and poor young males generally, a welfare system that discourages family stability among the poor, and a bankrupt policy toward the illegal drugs industry (and the culture of violence that it nurtures) that has absorbed or destroyed too many of the youth of our disadvantaged minorities. Unfortunately, none of these factors are amenable to influence by any decisions that law schools could make as institutions. One could reasonably wish for more involvement on the part of law teachers in seeking to gain public attention for these problems and in providing manageable remedies, but that is quite another matter having only marginal relation, if any, to the contemporary demand for greater racial diversity.

Meanwhile, law schools, as institutions performing a civic responsibility, are entitled to declare a modest victory in the effort to integrate African-Americans into the legal profession. We still have many

357. Clayton, supra note 351, at 19. Actually, the number of African-American males graduating from college is declining. Id.
359. See generally NATIONAL RESEARCH COUNCIL, supra note 334.
miles to travel, but the chief obstacles are behind and not ahead of 
us. And law schools seem to be ahead of most others engaged in the 
same endeavor. Only the military, so far as I can tell, has achieved 
significantly greater success in the integration of a profession. The 
law schools' modest success at integration would come as no surprise 
to most people outside the academy who have borne witness to the 
transition of American society over the past quarter century.

In 1978, it was observed that "talented and educated blacks" were 
"experiencing unprecedented job opportunities that . . . [were] at least 
comparable to those of whites with equivalent qualifications." Racist 
attitudes, insofar as these can be measured, have steadily declined in 
America since World War II, and, despite an occasional misadven-
ture such as occurred at Yale in 1990, there is little evidence that 
the decline in racism is less so in any American law school. It appears 
that mature African-Americans, for example, generally recognize a 
very substantial improvement in their relationships with American

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360. There were 454 African-American members of the American Institute of Architecture 
in 1987, constituting 1% of the total. VETTER & BARCO, supra note 353, at 76. In 1986, there 
were 11,387 African-Americans among the 588,000 people employed professionally by major 
accounting firms. Sharon L. Donahue, Minority Recruitment and Equal Opportunity Committee 
Report, 1981-1986, in id. at 77. About 4000 African-Americans have been among the 100,000 
students completing engineering degrees in recent years. See id. at 190. In 1988, 1210 African-
Americans enrolled as first-year medical students; this constitutes 7% of the total, about the 
same as in 1971. Id. at 212. There were 36 African-Americans enrolled in Pharmacy, slightly 
less than 2% of the total. Id. at 36. 369 African-Americans were studying Preventive Medicine 
or Community Health, about 5% of the total. Id. at 37. African-Americans constituted 4% of 
the dentistry graduates in 1984-88. Id. at 218. And 65 African-Americans were enrolled as first 
year veterinary students in 1988; this was 3% of the total. Id. at 219. In total, these numbers are 
significant, and a material advance over the last quarter century, but none are impressive 
in comparison to what has happened in Law.

361. WATENBERG, supra note 358, at 63.


363. See generally HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS 
AND INTERPRETATIONS (1986). "By the early 1970s . . . support for overt discrimination in 
employment had nearly vanished. . . ." Id. at 195. All the data "show the same basic upward 
trend" toward racial tolerance. Id. at 194. "America is not much more color-blind today than it 
ever was. . . ." Id. at 201. But "today the dominant belief is that blacks deserve the same 
treatment and respect as whites, and that some degree of racial integration is a desirable thing." 
Id. at 202.

364. In September 1990, several African-American students received a racist letter signed 
by "Yale Students for Racism." See Ken Myers, Racist Letter to Yale Students Spurs Strong 
institutions in recent decades. At least until the beating of Rodney King by the Los Angeles police, a majority of African-Americans, we were told, rated the conditions for black people in America to be “excellent or good,” presumably in comparison to what they were a generation ago. What has been achieved is the creation of a African-American middle class; what has not been achieved has been interruption of the cycle of poverty in which many African-Americans, as well as others, are ensnared. Although it must be emphasized that the law schools have been far from alone in the endeavor, a fair appraisal is that they have been more effective in pursuing the goal of opening their profession to minorities of color than could have been expected in 1960 and more effective than any comparable academic institutions.

4. Women at Last

The arrival of women in American law schools parallels the arrival of minorities, but has been even more dramatic in dimension. The proportion of women students overcoming the cultural obstacle to come to law school has increased mightily over the last quarter century. This phenomenon was stimulated by the increasing financial attractiveness of law careers, as firms eager to hire more talents were soon willing to find them in women as well as in men. It was also associated with a general cultural change seemingly caused by the widespread recognition that by mid-century, middle-class American males were in large numbers performing work that was not dangerous and required no heavy lifting, and that could be done as well or better by women. The phenomenon may also have been associated with the recognition by mid-century American mothers that large families were no longer needed, that life was longer for them than for their grandmothers, that much of the work in the home could be delegated to a machine, and that women could, if need be, manage without men to provide and protect.

365. "But in the last quarter of the twentieth century, there could be little doubt that a Negro middle class was growing in both size and influence." FRANKLIN & MOSS, supra note 41, at 468.


367. See generally NATIONAL RESEARCH COUNCIL, supra note 334. This enduring problem is one to which law schools as institutions can make little contribution.
Thus, in 1970, women constituted 7.8% of first year law school classes; by 1976, the figure had increased to 28.4%, and has increased a little every year since. There are, one need not doubt, problems of "gender justice" in America. Some of these may be acute problems, although some are also the result of uncertainty or division among women regarding the extent to which some sense of gender roles should be preserved in a post-agricultural society equipped with a bewildering array of birth-causing and birth-preventing options. But few women in America have encountered problems of access to legal training, or, with few exceptions, to the best imaginable first jobs on completion of that training. Some women do, it must be acknowledged, find law schools to be un congenial environments, but some empirical evidence indicates that there is little or no difference between men and women law students in the frequencies of alienation or hostility. The difference may be that women are more disposed to attribute their dissatisfactions to gender issues. There are, of course, known incidents of sexual harassment, but these do not seem to occur with statistically significant frequency, perhaps because the relation between law teachers and their students tends to be distant and/or because the power of law teachers over individual students is seldom great.

For the most part, the increase of women in law school occurred with little if any resort to preferential admissions or reallocation of financial aid resources. In truth, law schools are entitled to meager credit for the radical change that has occurred with respect to the inclusion of women, for their role was much smaller than in the creation of a cadre of African-American lawyers. Nonetheless, the occurrence of the gender revolution in law speaks strongly to the question of whether law faculties are partners in a patriarchal conspiracy to sub-

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368. Elyce H. Zenoff & Kathryn V. Lorio, What We Know, What We Think We Know, and What We Don't Know About Women Law Professors, 25 Ariz. L. Rev. 869, 870 (1983).
369. But the evidence in one state indicates that the problems of gender justice within the legal profession are not substantial. Women in Minnesota are marginally less satisfied with their careers than men, and are somewhat more prone to attribute their disappointments to discrimination. Paul W. Mattessich & Cheryl W. Heilman, The Career Paths of Minnesota Law School Graduates: Does Gender Make a Difference?, 9 Law & Inequality 59 (1990).
371. It was widely believed by law teachers that women, having the same cultural backgrounds as their male classmates, required no preference. Auerbach, supra note 339, at 1268.
ordinate women. For at least the past quarter century, the gender revolution refutes that claim.

III. SELECTION AND RETENTION OF LAW TEACHERS

George Wythe, the first American law teacher, was a white male, as were all others who taught law in American colleges and universities for the first 144 years after his appointment in 1779, excepting those at Howard. The appearance of exclusion notwithstanding, there was little culpable discrimination practiced by those who selected all those white males, for there was very little choice with respect to the gender or race of teachers. While some discrimination has occurred in this century, in 214 years there have been few transgressions against the principles of equality embodied in Title VII of the Civil Rights Act of 1964.\footnote{72}

To the extent that opportunities have been presented to employ women or minority law teachers, law schools have generally been somewhat ahead of the culture of which they are a part in seeking to include rather than exclude. In this respect, law schools have reflected, as Judge Higginbotham observed, a professionally inculturated predisposition to acknowledge the values expressed in the Declaration of Independence. As with student admissions, law schools have in the last quarter century preferred as appointees women or members of minority of color, especially African-Americans.

A. 1779-1870

Wythe was selected as a law teacher by the governing board of the College of William and Mary at the suggestion of Governor Thomas Jefferson, a person whom Wythe had tutored for five years and to whom he was a "second father."\footnote{73} The appointment was made despite Wythe's complete lack of academic credentials. Not only was there the appearance of nepotism and a lack of technical qualification, but there was also an appearance of political cronyism, for Wythe was in his politics a close ally as well as mentor of the Governor. He was, moreover, committed to the ideology set forth in the Declaration of Independence, an instrument that he signed at grave personal risk, and which reflected his teaching of its author.

\footnote{73}{The term was coined at the eulogy of Jefferson at the capitol. See Imogene E. Brown, American Aristides 76-79 (1981).}
The political connection was not merely incidental, for Jefferson was acutely interested in the politics of law teachers. Forty years after Wythe’s appointment, Jefferson took personal responsibility for the selection of the law professor at “his” University of Virginia. Like many other people given the opportunity to make an employment decision, Jefferson sought to hire in his own image. He wanted as law professor a person who, as he saw himself, “took all knowledge as his province.” He also wanted a person whose politics were, to employ the contemporary term, Correct. Thus, he wrote his fellow trustee, James Madison in 1826:

In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke on Littleton was the universal elementary book of law students, and a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all whigs. But when his black-letter text and uncouth but cunning learning got out of fashion, and the homied Mansfieldism of Blackstone became the student’s hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed, to be whigs because they no longer know what whigism or republicanism means. It is in our seminary that the vestal flame is to be kept alive; it is thence to spread anew over our own and the sister States.

While one might conclude for all these reasons that the appointment of Wythe was at least faintly corrupt, there can be little doubt that Jefferson made the right appointment. Wythe was in fact the person in Virginia best suited to perform the mission assigned.

In addition to the classical training which his Quaker mother provided him, Wythe had educated himself in the literature of England, France, Germany, and Italy, before performing the usual desultory apprenticeship in law, and he also had made himself an unsurpassed

374. Jefferson was subject to criticism as “a martyr to the disease of omniscience.” *Henry Adams, The Formative Years* 76 (Herbert Agar ed., 1947). On the intellectual breadth of early American law teaching, see McManis, *supra* note 76.

master of Roman Law. As an exemplar of the highest professional ethics, he was also without peer in the Commonwealth: it was said that no "dirty coin . . . ever reached the bottom of the pocket of the Virginian, George Wythe." He was also known as a courageous and unqualifiedly impartial judge, one whom Professor Calamandrei would have saluted as a hero. He thus earned the sobriquet, "the American Aristides." For his political judgment, he was selected to represent Virginia at the Constitutional Convention of 1787, an honor he forewent to attend his ailing wife.

Wythe was both a natural and a dedicated teacher. In the end, it could be said that he had the most consequential teaching career since Socrates. Not only had he tutored young Jefferson, but among his first students at William and Mary was John Marshall. After he left the professorship, Wythe tutored Henry Clay, much as he had earlier tutored Jefferson. As noted, a group of his former students that included Clay established the Transylvania University Law Department in Lexington, modelled on his teaching. That institution played a significant role in training leaders for the antebellum West, both North and South, and served as one of the adhesives holding the nation together during the long decades of stress. Others of the 150 or so students he taught also served in high office. Through his students, Wythe indirectly influenced American politics through the first half of the nineteenth century. Like Socrates, Wythe is known to us almost wholly through those students, for his literary legacy is slight. Yet an unfulfilled task since his retirement in 1790 has been finding his equal as a teacher.


379. See supra text accompanying note 10.

380. See Brown, supra note 373, at 36.

381. Carrington, supra note 79, at 762.

382. Id.

383. Id.

384. Id.

385. See generally Carrington, supra note 158.

386. For example, William Wirt and John Breckenridge served as Attorneys General of the United States.

387. George Wythe, Decisions of Cases in Virginia, By the High Court of Chancery, With Remarks Upon Decrees By the Court of Appeals, Reversing Some of Those Decisions (1785).
The role that Wythe played as the first law teacher was informed by his politics, but his public and professional morality transcended faction. This was indeed precisely what Jefferson intended. Although not himself removed from factional politics, Jefferson affirmed the need for "a nursery" of republican leadership, and he hoped that his law schools would satisfy that need.\textsuperscript{388} It was generally understood that to do so would require leaders with sufficient classical civic virtue to resist the factional impulses of the people.\textsuperscript{389}

Jefferson shared the idea of teaching republican virtue with many others, some of whom were his partisan supporters, but the group also included Alexander Hamilton, who led the initiation of a similar effort at Columbia in 1784.\textsuperscript{390} This purpose of moral education shared by Jeffersonian Republicans and Hamiltonian Federalists endured and was shared in later antebellum years by Clay Whigs and Jacksonian Democrats.\textsuperscript{391} This sharing of purpose across deep partisan divides was possible, of course, in part because of the platitudinous aspect of the idea of republican virtue. Yet, this shared purpose nevertheless reflected a strengthening bond between diverse factions, the emerging sense of nationhood that triumphed in the Civil War.

In 1837-38, Francis Lieber, then a professor at the College of South Carolina, published three volumes prepared for use by students of law and politics that embodied the primary lessons of public morality that most law teachers in American colleges and universities sought to share with their students.\textsuperscript{392} Lieber's books were hailed by the leading members of the law academy, including James Kent\textsuperscript{393} and Joseph Story,\textsuperscript{394} and were posthumously revised in 1880 by Theodore Woolsey, the president and teacher of public law at Yale.\textsuperscript{395} Francis Lieber was an ardent supporter of Henry Clay,\textsuperscript{396} just as Wythe was

\textsuperscript{388} Carrington, supra note 9, at 527-29.
\textsuperscript{389} Id. at 529 n.14.
\textsuperscript{390} Columbia College was reopened in 1784 under its present name and under the aegis of the State of New York. An ambitious committee of whom Alexander Hamilton was a member planned a reconstituted program: there were to be three members of the Faculty of Law. JOHN H. VAN AMRIN GE, A HISTORY OF COLUMBIA UNIVERSITY, 1754-1909, at 63-64 (Matthews et al. eds., 1904); FON W. BOARDMAN, COLUMBIA, AN AMERICAN UNIVERSITY IN PEACE AND WAR 5 (1944).
\textsuperscript{391} See supra note 77.
\textsuperscript{392} Carrington, supra note 11, at 361.
\textsuperscript{393} Theodore D. Woolsey, Preface to the Second Edition, in 1 LIEBER, supra note 1, at 3.
\textsuperscript{394} Id.
\textsuperscript{395} Id. at 3-5.
\textsuperscript{396} The admiration was reciprocated. See LIEBER, supra note 157, at 126-28.
of Jefferson, but his conception of public morality, like that of Wythe, transcended his partisanship. "I absolutely belong to no party when I am teaching," he was prone to say, and his books imposed a similar public duty on judges and, in modified form, on other public officers. In Lieber's time, republican virtue had acquired the new name of patriotism, but his standards closely resembled those expressed by Calamandrei, doubtless because they were drawn from the same classical sources that influenced the twentieth century Italian.

The purpose of teaching republican virtue or patriotism appropriately shaped the standards by which antebellum law teachers were selected. Qualifications were moral, seldom technocratic. It was useful, but not essential that the teacher of law be a lawyer, but given the haphazard nature of professional training in the nineteenth century, that qualification was not essential. Also, given the very small size of college faculties (many had only one professor-president and a few tutors), there were almost no full-time law teachers. Most were part-time, but some were college presidents teaching public law as a major part of the course in Moral Philosophy that traditionally occupied the senior year. The topic flowed quite logically from a consideration of classical authors whose works provided the reading assigned to most antebellum students and also of the authors of The Federalist.

Where part-time law teachers were employed, they were almost without exception mature people with substantial records of public service and established politics. While most early college governing boards often shared concern for the public morals of law teachers, they adhered to Jefferson's view that the faculty should be selected with an eye to the correctness of the professors' political, and even religious, views that would presumably be transmitted to students as a result of their indoctrination. Most colleges were sectarian, many

397. FRANCIS LIEBER, THE ANCIENT AND THE MODERN TEACHER OF POLITICS 12 (New York, Board of Trustees of Columbia College 1860); see also Letter to Oscar Lieber (Nov. 1860), in LIEBER supra note 157, at 331.


399. Asahel Stearns, John Ashmun, and Simon Greenleaf at Harvard might have qualified. SUTHERLAND, supra note 39, at 62-78, 122-23. Perhaps also Samuel Hitchcock at Yale, David Hoffman at Maryland, Francis Lieber at South Carolina, John Barbee Minor at Virginia, Lucian Minor and Beverley Tucker at William and Mary, and Timothy Walker at Cincinnati. There could not have been many others.

400. For example, Stiles and Woolsey at Yale, Smith at Princeton, Nisbet at Dickinson, Holley at Transylvania, Wayland at Brown, Swain at North Carolina, Cooper at South Carolina and Bishop at Miami.
intensely so. Even those few holding charters as public institutions were often penetrated and controlled by Presbyterians, whose clergy comprised by far the most learned group in America.401

This sectarianism led to occasional cries for the appointment of people holding other religious views. Yet, when the Methodists demanded affirmative action at Indiana University in 1834, a Presbyterian legislator responded that “there was not one Methodist in America with sufficient learning to fill a professor’s chair if it were tendered to him.”402 These sectarian disputes were, however, resolved in due course by the establishment of sectarian colleges, such as DePauw for the Methodists in Indiana, and later by more secularization of public institutions, such as Indiana University.403 At the same time, these institutions may have learned that the sustained influence of college teaching on sectarian religious notions or political ideology is at most marginal.404

In such environments, it is unsurprising that most of the people appointed to teach law in colleges and universities were sitting judges. The list of such people includes Wythe,405 Tucker,406 Kent,407 Story,408 Sharswood,409 and the trio who made the Transylvania University Law Department a distinguished institution in the antebellum era: John Boyle,410 Thomas Marshall,411 and George Robertson,412 as well as

401. This happened in North Carolina, Kentucky, Tennessee, Indiana, and Ohio. See generally WILLIAM W. SWEET, INDIANA ASBURY-DEPAUW UNIVERSITY (1937).
402. 1 JAMES A. WOODBURN, HISTORY OF INDIANA UNIVERSITY 115 (1940).
403. The institution was founded as Indiana Asbury University. The story is told in SWEET, supra note 401, at 25-41. There was a law department functioning there in antebellum times under the leadership of Professor John Matson. Id. at 67.
404. This is not to say that colleges were without influence. Moral education can be, and doubtless was, brought to bear on nineteenth century college students.
406. Id. at 540. Supreme Court of Appeals of Virginia, 1803-11; United States District Court for Virginia, 1813-1827.
407. Id. at 282. Chief Justice of the New York Supreme Court, 1804-14; Chancellor of New York, 1814-23.
408. Id. at 511. Supreme Court of the United States, 1811-45.
409. Id. at 477. Presiding Judge, District Court of Philadelphia, 1848-67; Associate Justice, Supreme Court of Pennsylvania, 1868-78; Chief Justice, Supreme Court of Pennsylvania, 1879-82.
410. Id. at 68. Kentucky Court of Appeals, 1899-38; United States District Judge, 1838-95.
411. Id. at 385. Kentucky Court of Appeals, 1835-55, 1865-97.
412. Id. at 447. Kentucky Court of Appeals, 1829-34; Court of Appeals for Second District of Kentucky 1864-71.
numerous others. 413 Many were people of attainment in the profession or, more likely, in public affairs. One exception was Clay, appointed the Professor of Law at Transylvania in 1805 at the age of twenty-seven,414 before he went to Washington for his long and consequential career.

Given the nature of the enterprise and given the culture in which the enterprise was conducted, it was not possible to appoint a African-American or female law teacher. Until such people were engaged in politics, or at least in religious leadership, there were none available for appointment to teach law. In contemporary terms, there was literally no “pool” of qualified African-American or female people from which a selection could have been made.

This is, of course, not to say that there were no blacks or women in antebellum America who might have possessed some or all of the traits that made George Wythe an appropriate model for what a law teacher should have been. Oberlin had begun to perform the necessary preliminary steps to develop a pool of African-Americans and of women,415 but it would be some time before even one such person could “fill a professor’s chair if it were tendered to him [or her].”

B. 1870-1940

About 1870, as we have seen, there was a substantial shift in the aims of legal education, and therefore in the standards by which law teachers were selected. By 1890, the boom in professional education caused a substantial increase in the number of law schools and teachers.416 The demand for teachers was magnified by the extension of the curriculum to occupy two and then three years of study. The number of law teachers thus increased steadily, although not dramatically.

These developments, naturally enough, affected the selection of law teachers. The same social forces that dictated the rise of credentialism also played a role in the selection of law teachers. After 1890, law teachers were increasingly expected to be technicians, inculcating

413. Several Connecticut judges served on the Yale faculty. A Chief Justice of New Jersey served as a professor of law at Princeton. Pennsylvania was served by Justice Wilson and later by members of the state judiciary, including Judge Sharswood. Other examples can be found at Indiana, Lafayette, Dickinson, Mississippi, and Louisiana.

414. For an account of Clay’s teaching career, see Carrington, supra note 158, at 680.

415. Fletcher, supra note 37; see also supra text accompanying notes 74 & 220.

competence as well as virtue in their students. If academic credentials were to be required of those admitted as students in law schools, still higher academic credentials had to be required of those who taught in them.

The rise of professional credentialing was accompanied by declining concern with the political commitments of those appointed. The Civil Service Act of 1883 was a product of the same impulse to remove law teaching from politics. Given the commitment of President Eliot and Dean Langdell to the development of a modern and apolitical science of law, it is unsurprising that Harvard led the way in changing the standard of law faculty selection away from political maturity to a high level of professional competence. Harvard even went so far in 1873 as to appoint an absolute professional novice, James Barr Ames, who had a fine record on Dean Langdell's newly instituted final examinations and had manifested a taste for and skill in classroom discourse.

Notwithstanding the Ames appointment, few people were appointed to teach law in the decades following the rise of professional credentialing who were not experienced in professional legal work as well. If the number of judges appointed to teach rapidly declined, those appointed were generally people who had proven themselves to be able lawyers who could bring experience and judgment to bear on the moral and political issues confronted in their teaching. The requirement of experience was generally imposed in addition to the requirement of excellent academic credentials.

Universities also weighed personal characteristics. One may not infer from the Ames appointment, that Harvard was no longer interested in the moral qualifications of its law teachers. Ames was a man of exemplary conduct, as his subsequent career confirmed.

417. On the tensions, see Carrington, supra note 79, at 778-93.
420. To relieve any odium felt by colleagues who share Ames' innocence of practical affairs, I disclose that my own experience outside the cloister was very limited.
421. Austin Scott, a student of Ames, told the author and others in 1954 that he had not felt the need for a course in Legal Ethics because he had known James Barr Ames. Arthur Sutherland described him as "a man of generous kindness and quick moral sensitivity." Sutherland, supra note 39, at 225.
Ames only lacked political maturity and judgment; over the course of his career, he repeatedly demonstrated poor judgment on public issues arising in the fields of his academic competence.\textsuperscript{422} The ability to conduct a large class was essential for a law professor. This consideration, at least in part, was dictated by the economics of law teaching. For reasons that are not entirely clear,\textsuperscript{423} law teaching was conducted with exceptionally high teaching ratios, often as high as 100 to 1 in the nineteenth century, and still often as high as 40 to 1 as recently as 1960.\textsuperscript{424} On this basis, as Erwin Griswold was later facetiously to say: "[n]inety percent of the qualities of a good law teacher is having a strong, clear voice. If for the other ten percent, he has some brains, that helps."\textsuperscript{425} Despite the substantial growth in the number of law teachers resulting from the 1890s boom in higher education, there were in 1940 still fewer than 1000 law teachers distributed among the 92 schools that were members of the Association of American Law Schools.\textsuperscript{426} Many faculties were almost as intimate as families, and this, too, may have had some bearing on the selection process.

Subcultural factors also played a role in the selection of law teachers, at least until 1940 or so. In considering subcultural bias from the perspective of 1990, one is obliged to concede that at least those subcultural factors rooted in geography were in some sense functional. Most law teachers were expected, far more than today, to have a relationship with the local or state bar and judiciary. Substantial differences existed among these professional constituencies in 1900, and those differences were diminishing only slowly until 1940. A young man seeking in 1920 to make a career in law teaching at a place distant from his own subcultural roots faced, perhaps more acutely, many of the same problems that women and minority teachers report today: they were often outsiders until they proved otherwise. For these reasons, it was rare between 1860 and 1940 to find a Yankee teaching

\textsuperscript{422} Carrington, \textit{supra} note 79, at 787-88.
\textsuperscript{423} But see Stevens, \textit{supra} note 271, at 63, 118, 268 (1983) (relating high teaching ratios to the case method).
\textsuperscript{424} See id. at 181-82 n.13. On efforts of accreditation groups to lower the ratios, see id. at 173, 179, 207.
\textsuperscript{426} I have not found a precise count for that year. There were 991 law professors at 111 ABA-approved law schools in 1947. 1947 \textit{REV. LEGAL EDUC.} In 1950, the number of law professors in relation to the national population was roughly the same as the number of African-American law teachers in relation to the African-American population in 1990.
in a Southern law school, or vice versa. As late as 1940, only Harvard could lay genuine claim to being a national institution. 427

For similar reasons, Catholic law teachers were found in Catholic law schools, and only occasionally elsewhere. The Catholic schools had been established partly in response to discrimination, but also to shelter the faithful from secular influences. 428 Their isolation was substantially self-imposed. This subcultural segregation tended to carry through to the organization of private law practice, with lawyers representing clients with whom they shared an ethnic tie. As long as lawyers were practicing solo and serving individual clients, as a great percentage still did as late as 1960, business came chiefly from those with whom one shared a church or a club. 429

"Subculturalism" had obvious exclusionary consequences, especially for Jewish graduates. Given the very strong reinforcement in Jewish culture for academic work and for an interest in law, it must be supposed that Jewish men were numerous among those with strong academic records in the law schools of the early decades of this century. Indeed, to the extent that the elevation of academic requirements for the study of law and admission to the bar were animated by a desire to preclude these "immigrants," 430 it would be harder to imagine a program less well suited to its objective. Yet, despite the academic tendencies so widely shared among Jewish Americans, they were seldom hired to teach. Felix Frankfurter seems to have been the first Jewish appointment at Harvard in 1914, 431 apparently sponsored by Professor Edward Warren, the redoubtable "Bull" known to contemporary readers as Professor Kingsfield of The Paper Chase. 432 Frankfurter had, however, divested himself of much of his Jewish

427. Duke was perhaps another, in the sense that its students and faculty were drawn from across the Continent, but in 1940 the school was very small and very new. For an account of the school at that time, see generally Robert F. Durden, The Rebuilding of Duke University's School of Law, 1925-1947, 66 N.C. HIST. REV. 321 (1989).


429. For an account of the hardships of solo practice in an urban setting, see CARLIN, supra note 288.

430. STEVENS, supra note 271, at 100-01.

431. For an account of the appointment, see SUTHERLAND, supra note 39, at 240.

432. Warren's classroom manner was legend; most of the events involving Professor Kingsfield in Osborne's 1973 novel were Warren's classroom manner in thin disguise. Warren's memoir is EDWARD H. WARREN, SPARTAN EDUCATION (1942).
cultural identity, having become passionately patriotic.\footnote{See Robert A. Burt, Two Jewish Justices: Outcasts in the Promised Land 38-40 (1988).} Thomas Swan, who became the dean at Yale in 1916, was said to be antisemitic,\footnote{See Stevens, supra note 271, at 101. In response to the “Jewish problem” at Yale Law School, Swan argued against using grades because such a development would admit students of “foreign” rather than “old American” parentage, and Yale would become a school with an “inferior student body ethically and socially” as a result. Id.} but Jewish Professor Edwin Borchard was appointed to the Yale faculty the next year. Chesterfield Oppenheim was believed to be the first Jewish appointment at Michigan in 1950.\footnote{Elizabeth G. Brown, Legal Education at Michigan 1859-1959, at 470, 474 (1959).}

The visible antisemitism was sometimes explained and partially reinforced by the consideration of geographic difference: a law school in the corn patch was unlikely to suppose that a “nice Jewish kid” from the East Side of Manhattan could stand in front of 150 young men of agrarian origins and be an effective teacher. Only in recent decades have we come to recognize that such differences may even help education, but our present views of such matters may be related to the reality that such subcultural differences are a slender shadow of what they were in 1920, before the advent of jet travel and telecommunications.

On the other hand, with the possible exception of the Ivy League law schools, there is no evidence that class background had a significant role to play in faculty selection, and no visible reason to believe that it did, except insofar as disadvantage may have revealed itself in some other form, such as crudities of manner or dress.\footnote{For a biographical sketch on Langston, see Bloomfield, supra note 18, at 302-39.} Most law teachers, like most Americans before 1940, grew up on farms or in small towns.\footnote{See generally McNeil, supra note 251, at 63-86 (explaining the positive impact of Houston’s presence at Howard).}

Unlike the antebellum period, there were in early twentieth century some able African-Americans who were academically and professionally eligible to teach law. John Langston, the founding dean at Howard,\footnote{See id. at 31-34, 46-56. Houston was a Phi Beta Kappa at Amherst, an editor of the Harvard Law Review in 1922, and a graduate degree in law. Id.} could have been regarded as qualified to teach elsewhere. Charles Hamilton Houston, who taught for a number of years at Howard,\footnote{Wake, supra note 250, at 12-34. Hastie was a Phi Beta Kappa at Amherst and an editor of the Harvard Law Review in 1930. Id.} was certainly qualified.\footnote{Wake, supra note 250, at 12-34. Hastie was a Phi Beta Kappa at Amherst and an editor of the Harvard Law Review in 1930. Id.} So was William Hastie,\footnote{Wake, supra note 250, at 12-34. Hastie was a Phi Beta Kappa at Amherst and an editor of the Harvard Law Review in 1930. Id.} also an
excellent teacher and Howard dean. And there were others. But
the number was still very, very small. As far as can now be detected,
law schools never considered the appropriateness of appointing an
African-American to a law faculty other than at Howard or another
segregated school before World War II. For most schools in 1930 to
appoint even Charles Hamilton Houston required more imagination
or more moral courage than they could muster. Whether Houston
would have aspired to such an appointment is not known: From our
vantage point, it is hard to imagine how Houston or Hastie would
have fared before an audience of, say, 150 Michigan Law students for
the task would have been much more daunting than the one faced by
Jackie Robinson in 1950. Given the isolation of subcultures still pre-
dominant in America, and given the great need for African-American
lawyers, it perhaps made some sense that an African-American school
should have the services of talented African-American teachers, much
as the Catholic schools monopolized the talents of Catholic law
teachers. When Charles Quick, another African-American, graduated
from Harvard in 1938, he was retained to work on the Restatement
of Torts, and encouraged by his Harvard mentors to teach. But it
seems that his mentors were anticipating his appointment at Howard
or one of the new “Jim Crow” schools in the South.

In passing over the very few qualified African-American law pro-
fessors, such as Houston, Hastie and Quick, one can find racial discrimi-
ination in law faculty hiring in the first half of this century. Nevertheless,
this discrimination was distinctly small potatoes, except for the genuine
and substantial discrimination against Jewish men. The story with respect to women is little different. Gender discrimi-
nation existed in the appointment of law teachers in the first half of
this century, but as with racial discrimination, gender discrimination
was slight because of the very small size of the available pool. Barbara

441. *Id.* at 115-57.

442. For an account of Robinson’s experience as the man who desegregated baseball, see JULES TYGIEL, BASEBALL’S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY (1983).

443. See John E. Cribbett et al., In Memoriam, Charles Quick, 1989 U. ILL. L.F. 363. Quick was a graduate of Boston Latin and Talledega. His mentors at Harvard were Warren Seavey and James Maciehan. *Id.* He taught at North Carolina Central before the war, and Howard after. *Id.* He acquired an LL.M at New York University in 1955-56 and published his first article in volume 3 of the Wayne Law Review, thereby winning an appointment on the faculty of that school. *Id.* at 363. He continued to publish and moved to Illinois in 1966. *Id.*
Armstrong became the first woman law professor when she was appointed at the University of California in 1923. While she may have been unfairly treated for some years, she was long before 1940 a revered member of the Berkeley law faculty.  

For what it was worth, and it may have been worth a lot to those affected, over half of the law school librarians in 1940 were women, though few taught.  

There were also a number of female clinic directors and other administrators. Soia Mentschikoff taught at Harvard before Harvard had admitted women as students and was invited to remain. However, in 1950, only five of the 1239 classroom law teachers were women. James White is surely correct that the law schools could have done more to seek out women law professors from among their few women students, especially during the first half of this century, when it might have made some difference in opening the profession. While few women achieved visibility in the way that Charles Hamilton Houston and William Hastie did, there were surely a number of women academically qualified for law teaching appointments. Many of those would have encountered obstacles in acquiring appropriate professional experience and they were subject to considerable moral suasion to limit their professional roles, but it is very likely that more could have been coaxed to try law teaching.


446. Nell McNamaras, for example, was director of the legal aid clinic at Northwestern from 1928 to 1954, but seems never to have held professorial rank. DAVID W. ROBERTSON & ROBIN MEYER, THE CORRESPONDENCE BETWEEN LEON GREEN AND CHARLES MCCORMICK 1927-1962, at 83 n.72 (1988). But then few such directors held professorial rank.  

447. 1974 AALS DIRECTORY OF LAW TEACHERS 496. Mentschikoff graduated from Hunter and Columbia Law School, practiced in New York for a decade, and worked with her husband (as he became), Karl Llewelyn, on the Uniform Commercial Code. Id. She was a Visiting Professor at Harvard in 1947-49, and was invited to remain, but joined her husband in moving to the University of Chicago. Id. She was entitled Professorial Lecturer in Law from 1951 to 1962, and was promoted to Professor in the latter year. Id. She was not a prolific writer. Id. She served as President of the Association of American Law Schools, and concluded her career as Dean at the University of Miami Law School. Id.  

448. The percentage of women in the legal profession had then reached 3.5%, but very few were in elevated positions. Fossum, supra note 445, at 904-05.  

449. See White, supra note 316, at 1112 (explaining that it would have helped erase some misconceptions about women lawyers if more male students had been exposed to "hard-minded and able female law teachers").
To have done so, however, would have required the schools of 1920-40 to manifest moral courage comparable to that required to hire Charles Hamilton Houston. There would have been little or no applause for the effort even from most women, and for many of those who might have been coaxed, the relationship with students could have been painful. More importantly perhaps, law faculties were not then seen, nor did they see themselves, as having the opportunity or the prerogative to alter the culture with respect to gender roles. And women professors, like African-American professors, would have had to have considerable moral courage. Barbara Armstrong must have been an exceptionally strong person, at least as tough as Jackie Robinson. 450

Still, the small number of women law professors in 1950 was roughly aligned with the proportion of women in elevated positions in American public life. 451 Yet, the proportion in generally elevated positions was somewhat lower than the portion of women partners in substantial law firms. 452

C. 1940-1990

1. Racial “Tokenism”

As noted, World War II was a culture-transforming event that unified the nation geographically and materially elevated American respect for the potential, but theretofore gravely underutilized, talents of African-Americans and other racial minorities. For this reason, it was no coincidence that William R. Ming soon thereafter became the first African-American to teach law in a school not limited to black students; he was appointed at the University of Chicago in 1947. 453

Yet, as late as 1965, there were still fewer than ten African-American law teachers, 454 excepting those teaching at the “primarily black”


451. See also CHESTER, supra note 270, at 7-17; Epstein, supra note 444, at 79-95. See generally CATHERINE FILENE, CAREERS FOR WOMEN (1920).

452. White, supra note 316, at 1112 n.107.

453. 1954 AALS DIRECTORY OF LAW TEACHERS 249. Ming was a 1933 graduate of the University of Chicago Law School. Id. He taught for a number of years at Howard. Id. He was promoted to full professor with tenure in 1950, but resigned in 1953 to devote more time to civil rights work. Id.

By that time, the Civil Rights movement was in full swing, and there was a large and growing population of "second generation" non-Southern African-Americans. This second generation was the offspring of people who had two or three decades earlier migrated from the cotton patches to the cities and thereby liberated their progeny from direct experience with the vestiges of slavery which the Civil Rights movement fought to eradicate. There was, we noted, as a result of law schools' participation in that movement, a rapid increase in the number of African-American law students. Thus, the pool of available African-American candidates for legal professorial appointments increased. And the disincentive to employ African-American professors existing in the 1930s had been reversed by the 1970s. In 1972, the Civil Rights Act was amended to make Title VII applicable to universities, but so far as I know, no failure of a law school to comply with that law has yet been demonstrated.

By 1981, there were over 100 African-American law professors exclusive of those in black-controlled schools, and the number was to double again in the 1980s. Thus, in a quarter century, the number has increased twenty-one-fold to at least 210. While that number is not large, and has been dismissed as tokenism by critics, the critics do not point to qualified African-American candidates who have not been offered appointments. As with other academic professions, qual-

455. The reference is to the former "Jim Crow" schools: North Carolina Central, Southern, and Texas Southern. Id.
456. See supra text accompanying note 347.
458. But see Christine G. Cooper, Title VII in the Academy: Barriers to Equality for Faculty Women, 16 U.C. DAVIS L. REV. 975 (1983).
460. The American Bar Association counted 451 full-time "minority" teachers, including Hispanics, Asian-Americans, and teachers in "minority schools." American Bar Association, 1989 REV. LEGAL EDUC 2, 66. The latter group is not included in my estimate of 210. Members of those faculties play a very important role in keeping the doors of the profession open, but I accept SALT's premise that they should not be counted in assessing the performance of American law schools on matters of race. SALT counted 149 African-American professors in less than all law schools in 1986, and their number was growing at a rate of about 11 a year. Chused, supra note 459, at 556. Also consulted in this calculation was a Directory of minority law professors published in 1988 by the AALS Section on Minority Affairs.
ified African-American law teaching candidates are not easy to find and retain. That able African-American law professors are in special demand among law schools is demonstrated by the fact that they have more opportunities to move to other schools early in their careers than do their white peers. It also appears that able African-American lawyers are in greater demand outside the academy than are their white peers with comparable qualifications, and so are harder to retain in the academic profession.

Despite these difficulties, the number of African-American law teachers continues to grow steadily if not dramatically. By 1989, as Table 1 reveals, a striking portion of the African-Americans engaged in professional work in law teaching in law schools.

<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Afr.-Amer.</th>
<th>Wh./Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyers&lt;sup&gt;466&lt;/sup&gt;</td>
<td>147,000&lt;sup&gt;467&lt;/sup&gt;</td>
<td>17,400&lt;sup&gt;468&lt;/sup&gt;</td>
<td>581,000</td>
</tr>
<tr>
<td>Teachers&lt;sup&gt;469&lt;/sup&gt;</td>
<td>1,237</td>
<td>210</td>
<td>3,514</td>
</tr>
<tr>
<td>Ratio</td>
<td>119</td>
<td>83</td>
<td>163</td>
</tr>
</tbody>
</table>

462. But Chused describes "the rate of change in minority hiring revealed by" the SALT study as making "all deliberate speed" seem like the speed of light." Chused, supra note 469, at 555. His study, however, studiously avoids any consideration of the number and qualifications of people available for appointment. Much data bearing on that dimension of the issue is available in the form of the annual AALS summary review of its Register, and of the applications circulated to all member schools.

463. In 1981-86, 16.1% of non-tenured African-American law teachers moved to another school; the comparable figure for whites was 8%. Chused, supra note 469, at 563. Not all of these moves were promotions, but it is a safe bet that most were.

464. Of the 8 tenured African-American law teachers leaving their positions in 1981-86, 4 went to other schools and 4 left teaching. Id.

465. The SALT total was increasing by about 11 a year. Id.

466. According to the Bureau of Labor Statistics, there were 757,000 Americans employed in 1988 as judges or lawyers, of whom 19.5% are women, 2.3% African-American, and 1.9% Hispanic. 1980 Statistical Abstract, supra note 348, at 182. The number of non-minority law teachers is reported in American Bar Association, supra note 460, at 86.

467. This number may be somewhat too high. The American Bar Foundation, supra note 349, records 86,542 women and 569,649 men employed in the law in that year.

468. 17,922 as reported in Bureau of Labor Statistics, Employment and Earnings, in Vetter & Babco, supra note 353, at 99. This number may be somewhat too low. The survey reported supra note 334 indicates that there were about 18,000 African-Americans employed as lawyers in 1988. In 1989, the Census Bureau counted only 707,000 licensed lawyers, but listed 3.4% as African-American, indicating a licensed population of about 24,000. For some more recent data, see Robert J. Borthwick & Jordan R. Schau, Gatekeepers to the Profession: An Empirical Profile of the Nation's Law Professors, 25 U. Mich. J.L. Ref. 191 (1991).
The comparison presented in that table suggests a substantial differential in the standards of selection for each group of candidates. To the extent that academic performance in law school is the standard for selection, this differential must exist for the reason previously noted: that minority students have been systematically placed in law schools in which the predictors of academic performance forecast middling performances for most. The late dean Charles Meyers of Stanford gathered some data tending to confirm the existence of a differential standard with respect to academic performance in law school. His data, gathered for a six-year period, 1976-82, measured the number of African-Americans, Asian-Americans, Hispanics, Native Americans, and Pacific Islanders in the top decile in academic standing at twenty law schools. In selecting the twenty law schools, Meyers drew on published work that reported that almost all the law teachers in all member schools were graduates either of the school at which they were teaching or of one of the twenty schools. He confirmed that there were scarcely any minorities at all in the pool so defined; the national totals for each year were generally measured by a single digit, but with improvement at a glacial rate over that period. There is no magic, of course, in the lines drawn by Dean Meyers; his data are offered only to confirm that the concern expressed by Dean Summers in 1970 was justified, and that the predictors were in the main about as accurate as one might expect. Thus, there are not a large number of minority candidates for faculty appointments with conventional academic qualifications.

This increase in African-American law teachers is impressive when compared to the apparent level of participation by other non-disadvantaged ethnic groups in the law-teaching profession. Although data do not seem to be available, it is likely that African-Americans exceed some important white ethnic groups in their proportional representation in the legal profession and in the legal academy. The number of

469. Full time in non-minority schools only, as reported in the American Bar Association, supra note 460, at 66. The report states that of 5202 full-time law teachers, there were 451 full-time minority teachers and 1237 full-time women teachers. Id. Chused, supra note 459, at 569, identifies 210 as African-Americans teaching in "non-minority" schools.
470. See supra text accompanying note 335.
471. The 1983 update of this data was assembled by the author at the request of Dean Meyers, and is on file with the author.
473. See supra text accompanying note 335.
African-American law teachers in relation to the total African-American population is roughly the same as was the relation of all law professors to the population of the United States in 1950.⁴⁷⁴ The increase in African-American law teachers is also impressive in relation to the increase of African-American participation in most other academic professions.⁴⁷⁵ Few graduate and other professional schools are more effective at producing minority professors than are law schools.

There seem to be strong influences within subcultures to produce very substantial differences among these subcultures with respect to the likelihood that their members will pursue a particular career or academic discipline. This appears to be a global phenomenon: perhaps everywhere that there are subcultures, there are radically different distributions of group members in different lines of work.⁴⁷⁶ For whatever reason, law is receiving proportionately more African-American college students than other fields receive; and law schools receive proportionately more African-American academics as well. It is possible that America has in fact gone farther to effect the redistribution of elite careers among subcultural groups than any country ever has.

A comparison of law schools to other legal employers merits consideration. It appears that law faculties are more successful than law firms at hiring and retaining African-Americans. I have recently read an unchallenged public allegation that big law firms as a rule discriminate to the degree that whereas a white male graduate need be only in the top sixty percent of his class in a good school to secure employment with a major firm, an African-American student has to rank in the top decile.⁴⁷⁷ If so, many law firms are in clear violation of federal law. However, those familiar with law firm practices can be heard to report that the opposite is more nearly true, and it is my impression that most students participating in the placement process so believe. The data of the National Association for Law Placement indicate that the disadvantage of pigmentation is not present in the initial hiring of lawyers.⁴⁷⁸

⁴⁷⁴. The ratio for both is about 1 to 150,000.
⁴⁷⁸. See supra text accompanying note 354.
In any case, it seems clear that among legal institutions, law teaching is securing at least its share of the available African-Americans lawyers. It appears that law schools select African-American teachers at a higher rate than judges select African-American law clerks. 479 Some parts of the public sector may do better than law schools. One might almost hope that this would be so if the aim of the schools is to assure minority participation in public affairs.

There is thus no evidence that the cause of “tokenism” in the staffing of American law faculties is due to any resistance on the part of white law professors to hiring teachers of color. The source of the frustration of minority law students and faculty about the numbers of African-American law teachers seems apparent. 480 In hiring law teachers, law faculties are at the end of a long supply line over which they have no control. We cannot have a substantial number of qualified African-American law professors before we have a larger number of African-American students proving themselves in their law studies, who have an appetite for academic careers. This, in turn, as previously noted, cannot be until there is a still larger number of minority students excelling in undergraduate studies and entering law schools. In turn, that cannot happen until there are many more minority students applying for admission to college with records of good performance in secondary schools, etc. There is no quick fix to get us around these seeming inevitabilities. 481 By appointing a disproportionate number of African-American lawyers as law teachers and retaining them, law schools have done about as much as they can do to influence the social process that must produce a genuine solution to the problem of tokenism.

479. For data on judges, see Barbara L. Graham, Judicial Recruitment and Racial Diversity on State Courts: An Overview, 74 JUDICATURE 28, 30 tbl. 1 (1990) (reporting that 293 of 8432 state judges on major courts are African-Americans). For comment on the record of Justice Brennan in this regard, see Randall Kennedy, Justice Brennan: Why No Black Law Clerks?, 1 RECONSTRUCTION, No. 3, at 63 (1991). Because judgeships are conferred on people of more mature years, it is reasonable to hope that the effects of law school admission policies in the last quarter century have not yet had their real impact.

480. See Randall Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745, 1768 (1989) (pointing out that law professors have called for more minority students).

2. Feminization

As we have seen, the number of women choosing to study law during most of the years before 1965 was very small. The steep increase in women law professors began in the early 1960s as the number of female law students began to rise, producing a significant pool from which candidates could be selected. Unlike the situation with respect to minorities, there was already a large, almost proportional, pool of women who were graduating from college, so that all that was necessary to create a pool of candidates for law teaching appointments was to watch them enroll in law school.

By 1967, there were 39 women teaching law among a corps of 2341, reflecting the slow growth in the number of women students during the previous decade. In that year, Executive Order 11,375 ordered federal contractors to cease discrimination against women. In that year, also, the American Bar Association resolved that law schools should recruit more women law professors. And in that year, the number of women attending law school began to grow with increasing speed.

In 1970, women constituted 7.8% of the first year classes; by 1976, the figure had increased to 28.4%. By 1979, there were 516 women law professors, a thirteen-fold increase in a dozen years. In 1979, when women law teachers were 10% of the teaching force, up from 1.7% in 1967, one pessimistic woman, manifesting the belief that sexist male law teachers had surely witnessed as much feminization as they could stand, doubted that further increases in the proportion would be forthcoming; another proclaimed the need for a quota to

482. See White, supra note 316, at 1058-69, exhibits 3, 4. In the sizeable White sample for 1956-65, 4.8% of the women graduates and 1.5% of the men went directly to jobs at law schools. Id. At the end of the decade, 5.2% of the women and 2.4% of the men were employed at law schools. Id. These numbers presumably include law librarians and assistant deans, but the number of such positions was considerably smaller in 1965 than in 1990. Id. Many law schools had one professional librarian who was also a faculty member; many had only one assistant dean. Id. At that time, there was little admissions, financial aid, or placement work, and very little alumni or development activity. Id.
483. Possum, supra note 445, at 905.
484. Executive Order No. 11,375, 32 F.R. 14,303 (1967).
486. Zienoff & Loria, supra note 368, at 870.
487. Possum, supra note 445, at 906, tbl. 2.
488. Id. at 904-05.
489. Id. at 914.
assure adequate hiring of women by presumably sexist law teachers. Yet without any such duress the percentage grew to 13.7 in 1981, to 20 in 1986, and to 25 in 1990. By 1986, the portion of junior faculty had reached 33%, roughly tracking the proportion of women studying law in the early-1980s. And it was still rising. In 1989, there were 1237 women who devoted full-time to law teaching. This number presents a favorable ratio to the number of employed women lawyers in the United States, suggesting the possibility that the standards of selection and retention for women law teachers may be, if anything, less demanding than for men. While the proportion of lawyers to teachers for white males is about double that for African-Americans, that for women is about half way in between. In addition to the full-time teachers, law schools also employed 609 women as administrators (45% of the total of 1229) and 732 as professional librarians (67% of the total of 1117).

At least until very recently, women have indicated an interest in law teaching somewhat less frequently than men with comparable qualifications. One possible reason, not resulting from any discrimination, is that women have chosen to be less mobile with respect to geography than men. It is also possible that women in numbers may be more strongly attracted to careers less driven or less contentious than law teaching.

491. Chused, supra note 459, at 557, tbl.
492. In 1980, 1338 of the 5336 teachers in approved law schools were women. American Bar Association, supra note 347, at 66.
493. Chused, supra note 459, at 557.
494. See American Bar Association, supra note 460, at 66.
495. Id.
496. They have been consistently under-represented in the AALS Register of law-teaching candidates.
497. Gerald Marwell et al., Geographic Constraints on Women’s Careers in Academia, 205 Science 1225 (1979) (noting that women marry older men already settled in their careers, and generally have a strong preference for big cities).
498. Presumably, more women than men are attracted to law teaching by the seemingly favorable hours. See Marina Angel, Women in Legal Education: What Its Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temp. L. Rev. 709, 838 (1988); Epstein, supra note 282, at 219. However, women teachers may encounter greater hostility from their student audiences than their male counterparts. Assuming this hostility might be allayed by more or better preparation, women teachers may on this account devote more time to class preparation than do men. They also may devote more time to student counseling. Epstein, supra note 282, at 233. Such considerations may make law teaching, despite the apparent flexibility of hours, less attractive to women than some suppose.
However, despite these obstacles, the number of women being appointed to faculties taken as a whole has been marginally higher than one could expect on the basis of the relative proportion of the “pool” that is feminine. This supports my own observation that women, and to a greater extent minorities of color, have for the last quarter century enjoyed a preference in the market in which law teachers are employed.

D. Academization and Retention

Beneath these changes in the demographic characteristics of the law teaching profession has been another, perhaps more subtle change. The boom in higher education that started in 1890 gave rise to a new meta-profession of university professors. The American Association of University Professors was founded in 1915, fifteen years after the founding of the Association of American Law Schools. Its organizing principle was expressed in an influential 1925 Conference Statement on Academic Freedom and Tenure. This organizational effort was a manifestation of a growing self-awareness on the part of the academic profession. For some decades, law teachers remained apart, and regarded themselves as much more a part of the legal profession than of the academy. This had begun to change as early as 1920, but by

Women teachers face other obstacles as well. For example, few law schools have adequately addressed pregnancy and child care issues. See Richard H. Chused, Faculty Parenthood: Law School Treatment of Pregnancy and Child Care, 35 J. LEGAL EDUC. 568, 570 (1985). Most schools do not provide day care. Id. In addition, it is often more difficult to obtain a leave of absence or reduced teaching load for child care than for other reasons. Id. Although sometimes lacking rules on the subject, most law schools have, I believe, found ways to accommodate pregnancy and periods of baby care for maternal law teachers, if not paternal ones. See id. Accordingly, the endemic stress for most law teachers is probably somewhat greater for many women. This may be a reason that some women look elsewhere in the law for their careers. See Lillian R. Bevier, As Law Professor: The Practically Perfect Job, in WOMEN LAWYERS: PERSPECTIVES ON SUCCESS 217 (Emily Cooie ed., 1984). See generally Bernice R. Sandler & Robert M. Hall, The Campus Climate Revisited (1985).


1970, law teachers were increasingly deriving their personal aims from
the academy. With diminishing zeal to transmit virtue or competence,
there was a tendency to embrace the academic search for truth as
the paramount purpose of a law teaching career.

This effected another shift in appointment criteria. Professional
attainments in law diminished as significant criteria, and mastery of
another academic discipline rose in importance. A growing number of
appointees came to law teaching with little or no professional experi-
ence in law, but with a Ph.D. degree. Even without such credentials,
one seeking to achieve high status in law teaching has been expected
to be inter-disciplinary, even multi-disciplinary in their scholarship.
As Francis Allen has put it, some law schools have become “colonial
outposts of the university graduate school.”502 This is most apparent
among the most elite law faculties. Thus, Dean Harry Wellington at
Yale could say a few years ago:

To get a grip on the limits of law, an academic must work in
political philosophy; so, too, if he is interested in distribu-
tive justice. Nor can he fail to know economics, and he is
delinquent if he ignores history. The demands, then, on the
academic lawyer are truly prodigious. But the challenge is
being met and Yale has assumed a leadership role.503

It seems doubtful that contemporary law teachers are much brighter
or work much harder than those of the past, but Dean Wellington
was surely correct in characterizing the elevated level of intellectual
ambition that is presently fashionable, especially at the most elite
institutions. To excel in responding to that kind of challenge, or even
one considerably less ambitious, requires an enormous and sustained
investment of time as well as emotional and intellectual energy.

This growth of “truly prodigious” demands seems linked to chang-
ing faculty retention practices. As recently as 1960, a law faculty
appointment, even without tenure, was often essentially a lifetime
appointment unless one was run off by the students. The granting of
tenure in most instances was a non-event. This meant that newly-ap-
pointed law teachers were generally treated as full peers from the
moment of their first arrival to teach. Whether this greater job secu-

502. See Francis A. Allen, The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments
on Legal Scholarship, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF
rity resulted in reduced effort by law teachers seems at best uncertain; certainly there were many law teachers acquiring tenure easily who nevertheless responded to the “truly prodigious” demands, if for no other reason than to win respect from colleagues or themselves.

Perhaps partly influenced by developments within universities, law schools have steadily raised their tenure standards since 1965. The consequences are not all benign, even without regard for the effects on women and minorities.\textsuperscript{504} Thus, tenure rigor in law has produced a new genre of literature, the tenure article, which is characteristically an exhaustion of a legal issue with countless citations to marginally pertinent material used to demonstrate that the tenure candidate has indeed read just about everything that any critic might think it useful to read. When one or two tenure articles have been produced by a candidate, they are now often sent out for review by a faceless jury of peers. Of declining importance is the possible usefulness of a teacher’s writing to judges or lawyers or others engaged in public service. The primary aim of such literature is necessarily to create the right impression on academic readers.

One problem with this kind of elevation of academic standards may be more acute in law schools than elsewhere; the problem is its chilling of political ideas. It is often regrettable to difficult to evaluate the art of legal scholarship without considering the merits or fashionability of its political premises or ideology. The judgment sometimes called for in a tenure decision entails an assessment of the quality and significance of one or a few disputable ideas.\textsuperscript{505} Tenure candidates whose principal writings are on what they perceive to be intellectual frontiers are at risk of being judged by others as having crossed those frontiers into the never, never land. The candidate seems therefore to be judged to be creative, but then again, perhaps not too creative. Law teachers among all professionals ought to be able to rise above any offense taken from a work in judging its worth, but, alas, few of us

\textsuperscript{504} See Kenneth Lasson, Scholarship Amok: Excesses in the Pursuit of Truth and Tenure, 103 HARV. L. REV. 926, 928, 942-43 (1990) (suggesting that legal writing has become homogeneously overlong, pretentious, unintelligible, and humorless).

\textsuperscript{505} Stephen Carter has made an impressive attempt to state the standards for tenure by borrowing thoughts from the law of patents. Stephen L. Carter, Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law, 100 Yale L.J. 2065 (1991). He would require his colleagues to demonstrate mastery of a literature and an addition to it in the form of an idea that is novel and lacks obviousness. It strikes me that his standard may be one that few if any candidates for tenure on a law faculty could meet, given the scarcity of genuinely new ideas in law. There is also the problem that much that is novel is also unsound.
are so professional that we are always able to do that. This is not to admit that unjustified prejudice often dominates tenure decisions; many more tenure candidates have been unfavorably judged for the insignificance or even the absence of ideas than for the political unsoundness of their ideas. I endorse the finding of Stephen Carter that there are no "white male standards," that there is "no such animal as the 'majoritarian perspective.'" But the risk of misjudgment for ideological reasons cannot be denied. And it would in no way be reduced by greater recognition that some candidates for tenure think of themselves as voices for particular factions or constituencies rather than for shared interest of the community as a whole.

The tenure process also makes law teaching a more isolating experience than it used to be. The process of external review magnifies the distance between the tenured and untenured. Given the increasingly impersonal character resulting from the larger size of law faculties, novice law teachers receive much less emotional support from colleagues than many of their predecessors might have expected. Moreover, because the tenure candidate is made to seek approval from and avoid criticism by a faceless audience, there is less reason for the novice teacher to be interested in relations with older colleagues, or in sharing effectively in the governance of their schools, or in providing unprogrammed counseling for students.

Alienation is also magnified by the long period of tenure anxiety. Often associated with tenure anxiety (or other forms of insecurity in employment) are alienation from work and hostility toward the people expected to make the critical decision. Even those granted tenure may tend to be enduringly alienated as a result of the normal operation of the emotional defense mechanism that tells us not to care too much for something that others may withhold. For those denied tenure, few are without substantial emotional hurt, and a frequent result is a suspicion of illicit reasons, sometimes reinforced by the reassurances of well-meaning friends that a negative decision was not merited.

506. Other irrationalities can also intrude. See Perry A. Zirkel, Personality as a Criterion for Faculty Tenure: The Enemy It Is Us, 33 CLEV. ST. L. REV. 223, 223-24 (1984).
507. Carter, supra note 505, at 2075.
508. For an argument that such recognition might matter, see Alex M. Johnson, Jr., The New Voice of Color, 100 YALE L.J. 2007 (1991). Professor Johnson reviews the literature on the issue. Contract with Johnson’s factionalism the holding of John Hope Franklin that any person should be entitled to study any subject and be held to account for the merits of her work without regard for her race or gender. The Dilemma of the American Negro Scholar in Race and History: Selected Essays, 1933-1988, at 195 (1989).
509. See Eleanor Swift, Becoming a Plaintiff, 4 BERKELEY WOMEN’S L.J. 245 (1989-90).
To be sure, universities are by no means alone in developing such formal review procedures and rigorous standards. Similar change has often come to a wide variety of work relationships in America, including those at law firms. In the name of professionalism, there is now an increasing tendency to provide systematic qualitative review on a continuing basis even after the initial grant of job security.

But tenure anxiety may well be higher in law faculties than in most other academic groups, for the reason that few of those hired to teach law bring to the task a proven capacity for scholarship. Except for the small minority who have Ph.D. degrees, few law graduates have designed and sustained a significant piece of scholarly writing of the dimension often required of those granted tenure. Professional education in law is not designed as preparation for an academic career in the way that graduate education is.

It is a special misfortune that academization has proceeded at the same time that the number of women and minority faculty has increased. Certainly, the alienation caused by academization has seriously impeded the ability of law faculties to assimilate younger colleagues who think of themselves as being different. The problems of tenure anxiety, and the chilling effect of tenure review, may also be heavier burdens for women and minorities than for men.

Thus, although it was in a 1975 discussion with a dozen white male assistant professors that I first observed how serious tenure anxiety can be, the anxiety may bear with added weight on those who have been the beneficiaries of preferential appointments. Such people may be rationally concerned about what even-handed application of "tenure standards" to themselves might entail.

The disincentive to engage in counseling of students caused by academization may also be a special burden for women and minorities,

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510. I suspect that this development is not unrelated to the level of job dissatisfaction among highly compensated lawyers. See Stephanie B. Goldberg, One in Five Lawyers Dissatisfied, 76 A.B.A. J., Oct. 1990, at 36.

511. There is now serious talk, reflecting practices in other fields of professional endeavor, of developing formal post-tenure review procedures to keep us has-beens on our toes, but incidentally extending and magnifying the constraining effects of the tenure process. Dean George Schatzki and I were asked at the 1990 Annual Meeting of the Association to discuss the idea. We each independently concluded that such a review process could be benign, provided it were to avoid the death of the person subjected to it. See 1990 AALS PROC. 9.

512. Few if any schools have openly considered the problem of differential standards for regular hires and affirmative action hires. The SALT study data can be read to suggest that some faculties are more generous in granting tenure to women than to men. See Chused, supra note 459, at 559 tbl. 18.
because they may have somewhat more demands made upon them for counseling services. This point can be overborne, but it may be entitled to some special weight with respect to professors who are mothers of young children and must generally ration their professional time more carefully than others.

The chilling effect on political ideas may also bear more heavily on minority or women law teachers. It would not be gender or race discrimination, even when it would be unsound, to discount the worth of an idea that is held by more women than men, or by more members of a minority, or that bears on the condition of women or minorities. Teachers who advocate entitlements for women or minorities do not receive immunity from adverse professional judgment about the quality or soundness of their advocacy. It is not hard to imagine a negative decision earnestly made by more conservative colleagues that from the perspective of, say, a radical feminist might look much like gender discrimination. Whatever the decision may properly be called, however, it is not discriminatory if it results from an earnest effort to evaluate the quality of professional work, even in the face of endorsements by the political allies of the candidate. A comparable hazard is faced by those writing unfashionable pieces such as this one, which could fall on hard times if presented as a tenure article to a faculty adhering strictly to the doctrines of Political Correctness. Denied tenure after writing this, I could hardly claim that the denial reflected discrimination against white males.513

To take another kind of example, there is in current fashion a form of legal literature that is autobiographical narrative.514 It is possible that this mode of writing is especially popular among women and minorities. So far, most such writing has been done by women or

513. For a worthy analysis of the problems of evaluating "legal narratives," see Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993). The authors review the extensive recent literature on the aims of legal scholarship. See especially Geoffrey Stone, Controversial Scholarship and Faculty Appointments: A Dean's View, 77 Iowa L. Rev. 73 (1991); Edward L. Rubin, On Beyond Truth: A Theory for Evaluating Legal Scholarship, 80 Cal. L. Rev. 889 (1992). The very bulk of that literature is testimony to the absence of clearly established norms for the evaluation of such scholarship. It is not within the compass of this already lengthy article to join issue with competing views on how scholarship should be evaluated for purposes of tenure. Much of what has been written on that subject is good, and some of it provocative, but the issues are too tangential to the point of this article to merit full attention here.

minorities.\textsuperscript{515} It would not be groundless for a skeptic to believe that such writing is less demanding than more conventional forms of legal scholarship.\textsuperscript{516} Would it be race or gender discrimination to adhere to the resulting view that this kind of writing does not alone justify a tenure appointment to a law faculty? Or would it be discrimination to conclude that a particular narrative lacked significance or that it was a distortion of reality?

Moreover, the elevated risk of failure faced by novice law teachers may operate with differential effect on women and minorities. This would be so if people in either or both of these categories are professionally more risk averse than white males. It is plausible that our culture tends to give more reinforcement to white males, and this may make them less risk averse and more willing to do what the academized process requires. If so, this would be a non-invidious reason why there may be somewhat fewer women and minorities on the faculties of the most academized law schools.\textsuperscript{517}

Academization may have the above-described effects in greater measure in the more pretentious faculties, where a very large commitment of energy is required of most teachers in order to produce scholarship of quality and quantity sufficiently creditable to assure one's professional self-respect. While in most American law schools, tenure is now based on scholarship that is creditable to an external academic audience, the competition among law teachers for peer approval often seems to be based on little else than external repute providing reflected glory to colleagues. Institutions distributing respect and other benefits on that basis may be more daunting environments for women and minorities. Especially, it should not be totally surprising if a smaller proportion of women (perhaps because more of them are sensible and have other and better things to do with their energy) respond to the kind of "truly prodigious" challenge posed by Dean Wellington.\textsuperscript{518}


\textsuperscript{516} See remarks attributed to Gerald Torres in Ian Haney-Lopez, Community Ties, Race and Faculty Hiring: The Case for Professors Who Don't Think White, 1 Reconstruction, No. 3, at 46, 61 (1991).

\textsuperscript{517} This is the apparent reason for the appointment in 1989 of an AALS special committee to study the tenure problem. 1989 AALS Proc. 193.

\textsuperscript{518} An analogy might be drawn to competitive swimming or other sports requiring total commitment. Young women are attracted to swimming and excel in it, but many of the best opt out in late adolescence, preferring a more balanced life style to the relentless and even fanatical training that young males seem more prone to accept in adulthood.
In all these respects, the academization of law schools has disserved the goal of increasing the number of women and minorities in law teaching. Academization is, of course, but a parallel within the academic branch of the profession to the general elevation in educational requirements for admission to the bar, which more generally disserved the need to increase the number of women and minorities in the profession. But it is true of both of these developments that they are incidental, seemingly wholly incidental, to the aspirations of the legal profession and also of the academic legal profession to compete with other professional groups in their status within the hierarchy of status rankings.

E. 1993

Nevertheless, in light of all these circumstances, the data set forth in Table 2 indicate a tendency on the part of law faculties in making tenure decisions to compensate for the disadvantages of younger minority and female colleagues who may have been appointed as a result of affirmative action, or who may face more than their share of resistance in the classroom, or who may be expected to do more than their share of counseling. In assessing these essentially equal

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<thead>
<tr>
<th></th>
<th>Granted</th>
<th>Denied</th>
<th>Percent</th>
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<tr>
<td>Men</td>
<td>437</td>
<td>96</td>
<td>82</td>
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<tr>
<td>Women</td>
<td>144</td>
<td>26</td>
<td>85\textsuperscript{520}</td>
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<tr>
<td>African-Americans</td>
<td>28</td>
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<td>82</td>
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retention rates, one may bear in mind the reasonable contentions of many women and minorities that the job of law teaching and scholarship is harder for them than for white males,\textsuperscript{521} and also that there

\textsuperscript{519} Chused, supra note 459, seems to have been reluctant to report these totals. Instead of doing so, he divides the men and women into separate tables for those in schools having more than 12% women among the tenured faculty and those having less. Id. at 569 tbl. 18.

\textsuperscript{520} The slightly higher rate of tenure grants for women is more than offset by the higher rate of voluntary departures from teaching by tenure track women. Id.

have been at least some hiring preferences afforded to women and minorities. Together, these facts suggest that women and minority candidates for tenure, taken as a whole, may have benefitted from the application of a somewhat more lenient standard for tenure than have their white male colleagues.

One certainly cannot attribute all the restiveness of women and minority law teachers to the increasing rigor of tenure standards. Nevertheless, for the reasons stated, it may be doubtful that the rising tenure standard is in 1993 a net benefit to law faculties or to the students and public they serve, and it very likely burdens women or minority law teachers more than it burdens white males, even if the retention rates for each of these groups is about the same.

Yet at this time, there appears to be no sentiment to return to the practice of just a few decades ago, when tenure decisions were made after two or three years, on the basis of a very brief sampling of the candidate's work. While there were demerits to the system that university administrators were not wrong to call to the attention of law schools, the costs of extending the non-tenure period and raising the standards are now visible, and they seem especially high in law schools on account of the political nature of law teaching.

IV. Conclusion

There is little in the history of American legal education to suggest that coercive regulation of law school admissions or faculty appointments is necessary or desirable, or that such could even be effective to increase the participation of women and minorities in the legal profession beyond those increases already in motion. One step that might have positive consequences for women or minorities would be to lighten up on tenure standards, but I do not here urge such a change and leave it to others to make a more careful cost-benefit analysis than I have attempted.

Since 1779, American law teaching has reflected, sometimes brightly and sometimes less so, the values expressed in the Declaration

522. These averages conceal the fact that most schools, having only a few cases, will be very far from the overall averages for all schools. Thus, Professor Chused correctly affirms that "some schools are denying tenure to women at disproportionate rates." See Chused, supra note 489, at 539. This is, however, inevitable. To state an average for 160 schools is to put 80 schools below the average. The chances of life will dictate that some schools have fewer successful women than some others. It cannot be reasonably inferred on the basis of a small number of tenure denials, as Professor Chused seems to, that a school is discriminating against women or minorities.
of Independence. This tendency has been chiefly a product of American culture. Individual teachers are entitled to but limited credit for the result, and are subject to but limited blame for the shortfalls. Nevertheless it may be affirmed that the inclusion resulting over time has generally been in accord with the shared beliefs of many law teachers, most of whom have supposed, with other Americans, that the enduring health of our democratic legal institutions depended on sharing the legal profession as broadly as possible. At the same time, cognizant of the insight of Professor Calamandrei, they have been generally right in insisting that those who share the profession should recognize the unity of the common professional enterprise: one law, one profession whose work is informed by common values, with a shared duty to one public. In these respects, our past is, on the whole, neither a discredit nor a disadvantage to our future.