

# *How the Structure of Universities Determined the Fate of American Legal Education - A Tribute to Larry Ribstein*

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## ABSTRACT

*Prior to 1862, with insignificant exceptions, American colleges and universities were either strongly tied to a particular religious denomination or they reflected an elitist social consciousness that, like religion, helped define the “mission” of the schools. The non-profit status (usually a charitable trust) was perfectly consistent with this mission, as the last thing wanted by the founders was consumer sovereignty or a competitive market for higher education. There were no “departments” as we know them today and little intellectual specialization; philosophy, the classics and theology constituted the standard curricular fare. These schools were “vocational” only in the ancient sense of preparing students for the ministry or possibly elementary-level teaching. Other kinds of vocational training, such as for engineers, chemists, architects, lawyers, or doctors, was done overwhelmingly through either apprentice-type training (actually a form of proprietary education) or in proprietary institutions. There had to have been - very little is known about this - an enormous and thriving for-profit educational sector. All this changed with the establishment of the land-grant schools under the first Morrill Act in 1862 which eventually caused massive failures of both the private religious schools and the proprietary ones. The land-grant schools were highly vocational in their mission, but they retained the governing structure of their private not-for-profit predecessors, a structure consistent with the fact that no one in charge really wanted consumer sovereignty or a competitive market for students. Vocationalism, of course, mandated specialization, and the departmental system was born. Each department (or “school”, as in the cases of medicine and law) became a semi-autonomous “firm” competing outside their hallowed halls only for the most appropriate new colleagues, i.e. those who would fit most tranquilly - and ideologically - with the existing faculty. Since there were no proprietary interests and success could not be judged by profitability, a status hierarchy evolved among departments or schools. Attitudes and approaches adopted by the school at the top of the hierarchy would be filtered down the hierarchy because professors, aspiring to gain the next higher level in status (and, it so happens, money), would tend to reflect the positions prevailing in that next higher rung. Thus, at any given moment, a single ideology or methodology would tend to dominate throughout a particular field. In law, as in other fields with no constraining market to answer to, schools tend to reflect the intellectual and ideological preferences of the faculties at the standard-setting schools, and their quasi-governmental powers are rarely noted.*

## I. Background and Statement of the Problem

It is almost trite today to catalog the problems of modern legal education. The popular press and the internet have done a pretty good job of making the professional concerns of legal educators almost popular fare for casual readers and especially for prospective law students. But, just to hit the highlights, here is a list of the better-known grievances: high tuition, too many law schools, broken accreditation system, inappropriate training for modern practice of law, unneeded and esoteric courses, ideological bias in teaching, arbitrary admissions policies, undue reliance on standardized tests, underworked, overpaid and inaccessible faculty, “publish or perish” mentality instead of focus on quality of teaching, ideological hiring practices, lack of specialization and innovation, bloated administrative staffs, exorbitant administrative salaries, promotional materials misleading about prospective employment, inadequate preparation for the bar exam or conversely too much attention to the bar exam. The list could undoubtedly be elaborated or extended<sup>1</sup>, but, repetitive or contradictory as it may appear, the list is long enough to suggest an institution in crisis.

The ideas that have generally been advanced to correct these various problems have been largely ad hoc in nature (e.g. abolish tenure, dispense with ratings, jiggle the curriculum or redesign the LSAT), the very sort of correction one might anticipate from a failure of the reformers adequately to understand why the problems developed in the first place. A large dose of history and of economics is required to make the real problems of modern law schools in any way tractable, though neither subject is a strong point of modern education reformers. And, a *caveat* to the wise, though an

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<sup>1</sup> A rather comprehensive set of complaints can be found in the recent book BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

understanding how we got here is a necessary factor in improvement, it is not a sufficient one.

We start the task by noting that American law schools are today overwhelmingly administrative divisions of larger universities, both the private not-for-profit and the public institutions. But that was not always the case, and in the main this has only been true since the late-19th or early-20th Century. Prior to that time, formal law schools<sup>2</sup> were overwhelmingly free-standing, for-profit institutions. As a result, these schools were run as any ordinary profit-seeking enterprise and were generally outgrowths of law offices.<sup>3</sup> Probably any student who could pay the tuition was admitted; the faculty would have been entirely part time; the curriculum would have closely tracked the practice of most lawyers of the period (who certainly were not generally highly specialized). Local law would have been emphasized, and little if any time would have been spent on esoteric or extra-legal topics. There would have been almost no tuition scholarships and very little credit available for this expenditure. In the nascent national law schools in major universities, like Harvard and Yale, the student body would have been comprised largely of students from families who could afford the tuition, expenses and opportunity costs of that education. But for most 19th-Century law students the schooling was either part time or entirely in night classes so the students could work while they went to school. Prospective employers knew what they were getting, since the curriculum was tailored to their practice and generally established lawyers and judges were also the teachers in the schools.<sup>4</sup>

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<sup>2</sup> We are limiting this discussion to “formal” law schools and not, for the moment addressing the more common manner of training of 19th-Century lawyers, apprenticeships. A strong case can be made for the inclusion of apprenticeships within the category of “for-profit” education, though the convention has been to see them as separate educational forms. The first law school in the country, the famous Litchfield School, was simply an outgrowth of a practitioner's popularity as a mentor. See ROBERT STEVENS, *LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 3 (1983). It has been estimated that there were over 100 law schools in the United States in 1890, most of which were for-profit. See *id.* at 74-76.

<sup>3</sup> STEVENS, *supra*, at 3-4.

<sup>4</sup> The rapid growth of law firms starting in the first half of the 20th Century - and the business model these firms adopted - will not detain us here, though some of Larry Ribstein's most telling commentary on the profession involved criticism of this model and also the extent to which the law schools blithely ignored what the market seemed to be telling them. See Larry E. Ribstein, *The Death of Big Law*, 2010 Wis. L. REV. 749 (2010).

But the story of how we got from that picture to one where nearly all legal education - now quite different in character - is offered as part of the broader offerings of relatively large universities does not proceed in a straight line. There was no simple takeover of the for-profit law schools by aggressive, empire-building universities. For that matter the very development of the modern large universities occurs as part of the same process that includes the “academization” of law schools. Consequently we must know something about the early history of this larger and different part of the higher education industry in order to understand the position of the law schools.

## II. Pre-1862 Higher Education in America

Colonial America had nine colleges, and there were scatterings of various non-degree granting<sup>5</sup> schools in all the colonies and early states. All of these colleges, with only minor exception, were mainly what we would today term “liberal arts” schools, since large-scale vocational training (other than for the ministry) was still many years in the future. And though one or two of these early colonial colleges termed themselves “non-sectarian,” the more descriptive term, even for those schools, would have been “non-sectarian Christian,” for there was some religious affiliation in every single one of these schools. This general religious affiliation of schools was, of course, a continuation or copying of the English situation tailored to the special needs of a more diverse religious population in America. But, as we shall see, the non-profit model, basically inherited from England as part of the Common Law, was peculiarly appropriate for their purposes. Though the apprenticeship form of training for a profession or skill was quite common, there is little record of for-profit firms offering higher education in a market setting in the colonial or just-past colonial periods, though they did exist.

The next phase of American higher education history, 1800-1860, makes the religious aspects of higher education in America even more clear and oddly helps explain a lot about the governance of colleges of the period.

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<sup>5</sup> Academic degrees, following the English precedent, could only be granted by institutions empowered by the appropriate legislature to do so. See FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 3-5 (2d ed. 1990).

From Independence until the Civil War literally many hundreds of small denominational colleges were founded west of the Alleghenies (and some still in the East). Less than a handful of these were secular. For the most part these schools were founded by the ordained and lay leaders of small, local, religiously homogenous communities that needed schools to prepare ministers and often lower-grade teachers,<sup>6</sup> to guarantee that their future community leaders would be thoroughly indoctrinated religiously and, in some few cases of co-education (more likely juxtaposition), to provide a marriage market to assure that the children of the community married within the faith.

## A. Some Economics of Not-for-Profit Institutions

The fact that colleges in the United States before about 1890 were overwhelmingly both denominational and non-profit is neither accidental nor surprising. Religiosity characterized American society until well into the 19th Century to a degree almost unfathomable today. The only institutions of higher education the colonials were familiar with were Oxford and Cambridge, then appendages of the Church of England. The “classical” higher education they offered was not thought of as vocational preparation (except perhaps for the ministry) or as an investment for future wealth. And to the extent that some early American colleges, especially those nine colonial schools, were a bit more secular than their forebears, they were to a large extent merely substituting social distinction (“class status” in modern parlance) for religious training to determine the “mission” of their schools. One did not go to one of these colleges in order to establish social status; one went to college because one’s family’s social status demanded that. It was widely held that a community leader should have at least the rudiments of a classical education. As we shall see, the other hallmark of these schools, their not-for-profit status, is tied inextricably to

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<sup>6</sup> It should be noted here that the same period saw an expansion of so-called “normal” schools, i.e. those designed to train lower-grade schoolteachers. These were generally not religious schools but rather simply vocational training operations. These were frequently formed by local governments, but all forms of organizations were utilized. Overwhelmingly these schools were adopted into the rising universities later in the 19th Century, where they became departments or colleges of education. However, a few evolved into four-year colleges or universities. Apart from demonstrating the rapacious appetite of the newer universities for absorbing any and all academic programs, they have little to do with the thesis developed in this paper.

the religious or social goal, and the degree of religiosity seems to have had less influence on their governance characteristics than did their status as non-profit institutions.

There are several hallmarks of non-profit institutions that distinguish them analytically from for-profit firms, but the one that most interests us here is the appropriateness of the non-profit form when the founders<sup>7</sup> in effect are “purchasing” a good or service by their activities rather than investing for a profit.<sup>8</sup> The founders of almost every private American college prior to about 1890 were “purchasing” an augmentation of their religious interests. They were not really interested in creating eleemosynary educational institutions with no strings attached<sup>9</sup>, nor did they contemplate competing with other schools in a world of consumer sovereignty. Consumer sovereignty implies that the entrepreneur seeks to give the consumer whatever he or she prefers if it can be done profitably. To allow that degree of independence, either from ordained religious doctrine or, as might have been more true with the original Ivy League schools, from the educational norms of a social and wealth aristocracy, would have been unthinkable.

Only the not-for-profit form of enterprise will serve this purpose and that mainly because the property rights in the organization, or what would otherwise be called “ownership” interests, are non-transferable. Henry Hansmann has argued that it is the so-called nondistribution constraint that assures donors that their funds will be used for the stated purpose and thus motivates them to make contributions.<sup>10</sup> I think that this misstates the realities of what was happening with early American schools, and that argument seems more applicable to other kinds of so-called “charitable”

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<sup>7</sup> I would have no objection to calling them entrepreneurs, though that usage would sound foreign to most educators or religionists today

<sup>8</sup> The analogy can easily be made to Mid-Western grain farmers in the mid-19th Century who invested in railroads. Their main concern was not to secure a return on their investment but rather to secure transportation to get their grain to market. See, e.g., Leslie M. Scott, *The History of the Narrow Gauge Railroad in Willamette Valley*, 20 Q. ORE. HIST. SOC. 141, 143-44 (1919) (describing Oregon farmers who financed a railroad to move their crops more efficiently). This fact is what underlay many *ultra vires* cases in 19th Century American corporation law. See, e.g., *Thomas v. West Jersey R.R. Co.*, 101 U.S. 71, 76 (1879); *Ohio & M.R. Co. v. McCarthy*, 96 U.S. 258, 266-67 (1877); *Baltimore & O.R. Co. v. Harris*, 79 U.S. 65, 81-82 (1870).

<sup>9</sup> As might have been said, for instance, for the foundings of the modern University of Chicago in 1890 or Stanford University in 1891.

<sup>10</sup> Henry Hansmann, *The Evolving Economic Structure of Higher Education*, 79 U. CHI. L. REV. 159, 162 (2012).

institutions. Emphasis on the nondistribution constraint implies that the donors are actually giving something in a fundamentally altruistic fashion, while the early college donors were in reality simply buying a service (religion) that no ordinary commercial market provided. If the funds, or the assets purchased, could be transferred to another even quite charitable and similar purpose, as would be consistent with Hansmann's nondistribution emphasis, then the real intent of the donors could be easily frustrated.<sup>11</sup> While the nondistribution constraint obviously plays some role in all charitable giving, it would have been of even less concern in the case under discussion where the money was given into the hands of trusted religious officials.

## B. Implications for Governance of the Not-for-Profit Status of Organizations.

We do not have to do extensive empirical research to understand a lot about the governance of these institutions.<sup>12</sup> While they would certainly not have been as monastic in appearance and behavior as their Oxbridge predecessors, many indicia of religiosity would have been apparent, even in the early Ivies. Blasphemy in the classroom would certainly have been sufficient cause to fire a teacher or send a student home; teachers, many of them clerics, must have taken some sort of explicit or implicit oath to follow the tenets of the supporting denomination; faculty and top administrators would have been selected by the Board of Trustees; faculty would have very little say in the operation of the organization; students would be admitted mainly based on religion (or social status) even if they could not afford tuition; tuition would be below a market clearing price;<sup>13</sup> chief

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<sup>11</sup> Again comparison to the use of the *ultra vires* doctrine in mid-19th Century railroad cases is quite instructive, but even more revealing is a comparison of the *ultra vires* cases to judicial use of the *cy pres* doctrine. While the former were often decided on the basis that the shareholders really just wanted to make money, it would have been unthinkable to have used the *cy pres* doctrine, for example, to allow a fund for the training of Methodist ministers to be used for the training of mechanical engineers. In the American legal system, protecting religion has always held a more respected position than the protection of shareholders' contractual rights.

<sup>12</sup> See Richard Hofstadter, *The Revolution in Higher Education*, in *THE PATHS OF AMERICAN THOUGHT* 269 (Morton White and Arthur Schlesinger, Jr., ed., 1970),

<sup>13</sup> This is crucial. If the consumers had to pay a full market price, i.e. cover all costs, then the way would be opened for competition and consumer sovereignty, the very thing most to be avoided. The students, as it were, had to be subsidized "beneficiaries" and not "consumers" in the market sense. This same idea prevails in all not-for-profit or governmental services.

executives would frequently be clerics, but whether they were or not, they would be responsive to the Board of Trustees which would typically contain at least one or more members of the clergy; the trustees could be counted on to micromanage or at least actively participate in many aspects of their schools' program, including personnel actions and curriculum design; curriculum would focus heavily on theology and the humanities with the only vocations receiving consideration being the ministry or teaching, the two being seen as much the same thing. Given the somewhat Puritanical streak in most American Christian sects, we can probably assume that parietal rules for students and behavioral rules for the faculty were rather strict, though student rowdiness was not unknown. There was no tenure, no concept of academic freedom, no light teaching loads, no pressure to do research and publish, and probably very low wages.

### C. The First Morrill Act

With some very minor exceptions<sup>14</sup> the forgoing represents the generally accepted picture of governance in the great bulk of American institutions of higher education circa 1862. That was, of course, the year Lincoln signed the famous Morrill Act providing federal land to fund so-called land-grant schools in every state not in the Confederacy.<sup>15</sup> The Act required, in exchange for the federal land, that a state establish a college or reform an existing school to offer the required fields of agriculture, mechanics

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<sup>14</sup> There were small numbers of students in state universities in Virginia (University of Virginia, founded in 1819), Georgia (University of Georgia, founded 1789), South Carolina (University of South Carolina, founded in 1801), North Carolina (University of North Carolina, founded in 1789), as well as perhaps some municipal operations. The latter three state universities tended to look very much like their denominational counterparts, and Thomas Jefferson's experiment in Charlottesville had next to no influence on higher education elsewhere. There were, moreover, two military academies, each of which did produce numbers of civil engineers, a profession apparently not covered in any of the other not-for-profit schools with the exception of Rensselaer Polytechnic Institute, founded to produce engineers in 1824.

<sup>15</sup> In the Second Morrill Act in 1890 the largess was extended to the previously seceded southern states. It is interesting to note that the land-grant idea had been pushed for some years before 1861 but always blocked by the southern states. After their secession the idea was so popular in the Union states, especially among agricultural interests, that Lincoln signed off on this enormous giveaway - 17 million acres of federal lands - in the midst of the Civil War. However, the land was not easily converted into liquid funds needed to run a college, and it was another thirty years before the states, this time with considerable cash assistance from the federal government, really got serious about higher education.

(engineering) and military training.<sup>16</sup> This Agricultural College Act of 1862, only came into being after a contentious political history. Passed only after Southern delegations had left Congress during the Civil War, the Act exposed tensions between the more established eastern states and the younger western states over land policy. The divide arose over the land scripts which were given to the eastern states to sell western lands to raise the money for the colleges.<sup>17</sup> Reasons for the pre-Civil War opposition of the southern states is something of a mystery. But, be that as it may, the Act is generally hailed as one of, if not the most important single piece of social legislation in 19th Century American history and is generally credited with jump starting the entire massive enterprise of higher education that we experience today. But, as with all “great” legislation, there were to be considerable unforeseen consequences.

## 1. The For-Profit Sector prior to 1862

To complete the picture of American higher education prior to 1862, something must be said about the possibility of for-profit higher education, a subject woefully neglected by historians of American higher education.<sup>18</sup> This will require a bit of theorizing or inferring of some facts, since very little empirical research on the topic of for-profit higher education of that time exists. For starters, it must be realized that the United States in 1860 was by some measures either the richest or second richest country in the world.

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<sup>16</sup> It is interesting to note that there is nothing in the history of the Act to suggest that the country was experiencing a “shortage” of engineers. While agricultural interests had long pressed for inexpensive access to modern agricultural science, and the Civil War context might explain the Act’s requirement for military training, the reason for the requirement for “mechanics” is less obvious. A plausible Public Choice explanation, consistent with little known facts, is offered in the text below.

<sup>17</sup> John Simon, *Politics of the Morrill Act*, 37 *AGRICULTURAL HISTORY* 105 (1963).

<sup>18</sup> The standard histories of American higher education are simply appalling in their ignorance of or intentional ignoring of this topic. Even a well-known book explicitly on the topic deals only with business schools, though the author’s reason for this may have been his view that the only 19th Century for-profit schools to have had any lasting influence on later higher education were the business colleges. See KEVIN KINSER, *FROM MAIN STREET TO WALL STREET: THE TRANSFORMATION OF FOR-PROFIT HIGHER EDUCATION* 16-23 (2006). He does acknowledge that there were proprietary law and medical schools. A little better is RICHARD S. RUCH, *HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY* (2003). which actually spends two pages on the for-profit precursors of modern schools (pp. 55-57). Ruch does state explicitly, however, that there were many for-profit schools in fields like engineering, agriculture, geology and chemistry. Next to nothing is known about these schools. Ruch’s primary purpose, of course, was to trace the development of modern for-profit universities, and, as we shall see, there was a big disconnect between 19th and 20th Century for profits schools.

It contained over 30,000 miles of railroad tracks, a large canal system, sophisticated manufacturing, a complex financial network, substantial corporations, busy ports, bridges, banks and all the other indicia of a complex commercial and industrial nation. That raises a question our academic historians seem rarely to have noticed: who educated all the engineers, architects, chemists, metallurgists, financiers, accountants, lawyers and other specialists necessary to operate such a system? Only one thing is clear: they were *not* produced by the not-for-profit colleges of the day.

There were three possible sources for these services. One was immigration. Undoubtedly there was some. But why should there have been a brain drain in the direction of the United States when the German states and Great Britain were themselves even more industrialized than the United States? It is certainly unlikely that anything like the number of engineers needed to fuel America's economy came from Europe in this period, though undoubtedly many American engineers and scientists were trained in the European universities of the day. The second possibility is through apprenticeships or "on-the-job" training.<sup>19</sup> But here again we run into problems of accounting for the numbers of specialists needed. The apprenticeship system worked fine for craft work like jewelry making or printing, or law, and it seemed to make economic sense too for the building trades where certain basic skills like carpentry, plumbing, brick laying, could be learned very quickly "on the job" as it were.<sup>20</sup> It would seem highly unlikely that the apprenticeship system, though certainly in wide use, could feasibly have produced all the highly skilled specialists an industrial system the size of the United States in 1860 demanded. Nor is it likely that on-the-job training could be sophisticated enough to serve the purpose under discussion, though, again, it undoubtedly helped. Similarly it is extremely unlikely that the demands of an advanced industrial society could be

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<sup>19</sup> Here we want to be careful to note that we are following the convention of distinguishing apprenticeship-type training from organized for-profit schools, by all logic only a quantitative rather than qualitative difference.

<sup>20</sup> See SAMUEL C. FLORMAN, *THE CIVILIZED ENGINEER* 55-57 (1987) (describing how in 1825 the New York canal system had allowed for the hands-on-training of 30 engineers over eight years).

adequately met by foreign education of American students, though we know that too occurred.<sup>21</sup>

Even if these explanations are relevant to America's economic strength in 1860, but there is a very good chance that a highly significant element has been omitted from the usual story: a robust, but largely lost-to-history, for-profit industry in higher education. There are, of course, some well known examples of this institution. We have already mentioned the Litchfield School of Law, the progenitor of numerous for-profit law schools<sup>22</sup>. And Kevin Kinser, in his history of for-profit education<sup>23</sup> gives some sense of the considerable magnitude of for-profit business schools in the United States in the 19th Century. We do know that there were over 100 medical schools and possibly as many as 30 law schools in the United States prior to 1860, almost all for-profit ventures.<sup>24</sup> These certainly are suggestive of the fact that there was money to be made in higher education in other fields as well, and the odds are very high that these other for-profit institutions existed in adequate measure to supply the growing demand for such skills.<sup>25</sup>

## 2. The Morrill Act as Evidence that a Successful For-Profit Sector Existed

But there are reasons beyond the little actual data we have and the obvious need for skills for believing that such an education industry actually existed on a large scale. The evidence, strangely enough, comes from the passage of the Morrill Act, elaborated upon by a bit of arcane Public Choice theory and a little bit of subjective value theory.<sup>26</sup> Assuming that laws are adopted by politicians with an eye to satisfying their constituents'

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<sup>21</sup> These various alternative sources of engineers and other scientists are mentioned in Ruch, *supra* note 15, and that author generally agrees with the conclusions in the text.

<sup>22</sup> STEVENS, *supra* note 2, at 3.

<sup>23</sup> See KINSER, *supra* note 18, at 16-23.

<sup>24</sup> See STEVENS, *supra* note 2, at 20-21 (100 medical schools in 1880, 21 law schools in 1860); see also Herman Oliphant, *Parallels in the Development of Medical and Legal Education*, 156, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 151, 158 n.8 (1933) (74 for-profit medical schools by 1876).

<sup>25</sup> See RUCH, *supra* note 16, mentioning but not elaborating on how for-profit schools filled the gap in education for agricultural sciences, surveying, navigation, and other fields left by the "classical colleges".

<sup>26</sup> To my knowledge this idea, not analytically well developed in the Public Choice literature, was first advanced by Alan Wallis in a debate on welfare programs with James Tobin at the American Enterprise Institute in 1968. See generally JAMES TOBIN & W. ALLEN WALLIS, WELFARE PROGRAMS: AN ECONOMIC APPRAISAL (1968).

preferences, the more rewarding (or cost saving) an enactment is for voters, the more likely they are to favor it. If the private market is already providing individuals with a given service at a market price, those individuals who have elected to pay the market price will save that much by having the government provide that service at no direct cost to them. Thus they will often be the strongest advocates for such giveaways. Those not buying the service in the market value it at less than those who do pay, and obviously will not benefit as much from a government provision of the service. This is simply the notion of revealed preference. If very few people are buying a service, then there is little reason for politicians to offer that service “free.” In other words programs consistent with this analysis will often entail wealth redistribution from those previously not buying the service to those who were paying for it prior to the new law, generally a regressive redistribution. Another way of putting this is that government is most likely to offer a service to the public when the private sector is already satisfying the real demand for that service.

It is highly unlikely that Morrill and the others pushing for land-grant schools were inventing a new product that consumers had not previously demonstrated their desire for.<sup>27</sup> If there were enough of these tuition-paying voters, then a political entrepreneur could implicitly organize them into a voting bloc.<sup>28</sup> At some point there would be little opposition, since those not purchasing the service and who will bear the cost are a diffused and unidentifiable mass. It will be much cheaper to organize “politically” those already consuming the service. For this reason it does not seem unfair to assume that there was a robust and widespread private market in higher education that could partially at least explain the real impetus for the Morrill Act. Even though a few traditional universities were increasingly

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<sup>27</sup> This conclusion is based on two assumptions. First, politicians rarely enact welfare programs to provide services that the voters have not already indicated that they want. Politicians are not generally big risk takers or innovators. Second, the best indication that the voters want a given service is the success of private markets in offering these services, since that willingness of individuals to pay for this service is the best demonstration that they value it highly. Of course, there usually has to be some additional “pro” argument, or rationalization, like “everyone is entitled to good health care” or “everyone must start the game equally with a good education” or “farmers, the backbone of America, are entitled to the best scientific research on agriculture” in order to provide a cover for the real transfer of wealth that the politicians are actually engaged in. *See generally* ELLIS W. HAWLEY, *THE NEW DEAL AND PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (2d ed. 1995).

<sup>28</sup> *See* WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1st ed. 1962); Gordon Tullock, *Entry Barriers in Politics*, 55 *AM. ECON. REV.* 458 (1965).

opening their doors to engineers, there was still a thriving proprietary sector.<sup>29</sup> Thus, even though the standard rationale for the Morrill Act was to correct a market failure, there is no evidence presented that this was, in fact, the case.

### 3. German Scientism

Another factor, much harder to integrate into the theory being sketched, is well known to American social historians. The second half of the 19th Century marks the end of the period known to historians as the “Second Great Awakening”. This period of extreme religiosity was upended late in the 19th Century by a growing popular interest in and appreciation for science and scientific method, particularly as noted by the popular regard shown for the then celebrated German universities. Under this view secular schools were seen as a necessary antidote to the large number of denominational colleges that existed. This new attitude, which reflect a weakening of religious sentiment, also had a secondary impact on these denominational schools. As many trustees began to lose their strong sense of religious obligation because of the popularity of ideas about scientific rationality, their interest in supporting these denominational schools financially also declined, thus making the transition to a system of secular, government-supported schools much easier. It is difficult to compare the relative strengths of the Public Choice effect described above to this loss-of-religion argument, but both scenarios were certainly at work.

### III. The Second Morrill Act and Post-1890 Higher Education

The first Morrill Act largely failed in its original purpose of adequately funding new colleges. Six of the states obtained less than \$100,000 each, eleven others netted between \$100,000 and \$150,000. These monies were supposed to constitute a permanent college, endowment-type fund, with the states providing buildings and capital equipment. The original goal was for the land grant money to provide the land and a fund adequate to cover

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<sup>29</sup> See Terry S. Reynolds, *The Education of Engineers in America Before the Morrill Act of 1862*, 32 HISTORY OF EDUCATION QUARTERLY 459 (1992).

the operating expenses of the new institutions.<sup>30</sup> Despite the inadequate funding there was an explosion of newly established land-grant colleges. By 1885, eighteen separate state agricultural and mechanic arts colleges were beneficiaries of the land-grant endowment.

The inadequacy of the original bill led Morrill and others by 1872 to seek to expand the federal role in funding the colleges. The Hatch Act of 1887 may be said to be the beginning of modern federal funding of higher education from the general revenues of the Federal government., though it heavily emphasized agricultural research and required matching state funding. The Second Morrill Act of 1890 moved away from the limited federal role and provided more direct and explicit funding for the colleges. Every state or territory received \$15,000 per year, with an additional \$1,000 to be added each year until \$25,000 was reached, the grant to level off at that figure.<sup>31</sup>

It took over thirty years after the passage of the first Morrill Act for the states to take full advantage of the opportunity the Acts provided and to develop anything like the modern form of our universities. In fact by 1875 there were 75% more private colleges than there had been in 1860, and this growth would continue into the mid-1890s. Most of the new colleges were denominational, though we were beginning to see the formation as well of private, non-profit secular research universities modeled to some extent on the German prototypes. Nonetheless, the handwriting was on the wall, and during the next 20 years or so, there would be enormous changes in the face of American higher education. By 1910 it had become clear that the competition offered by the free or low-tuition land-grant schools for the smaller, private and denominational colleges, as well as for the for-profit schools, would be devastating for the latter two.

The newer state and private universities, and indeed for that matter a lot of the older reconstituted universities, offered a very different curricular product to the public than had been true in the middle of the 19th Century. No longer was theology an important part of higher education, and such subjects as the classics, philosophy and generally the liberal arts and

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<sup>30</sup> Gordon Lee, *The Morrill Act and Education*, 12 BRITISH JOURNAL OF EDUCATIONAL STUDIES 19 (1963)

<sup>31</sup> *Id.* at 31

humanities that had dominated the earlier curricula were very much deemphasized by the early 20th Century. As already noted, the Morrill Act required agricultural science and engineering (though it did not limit the liberal arts or humanities), clearly symptomatic of the increasing vocationalization of the college curriculum.

A variety of “soft” science academic fields like economics, political science, psychology, anthropology, etc. as well as foreign languages, literature and modern history reflected a new notion that the university should be a center for all scholarship and not a religious seminary or academic country club. The German-inspired idea that the university should be intellectually “universal” opened the schools to the addition of numerous fields - primarily vocational in nature - previously not thought to be the domain of universities at all.

## A. The Quest for a “Mission”

But the changes that are most relevant to the present inquiry relate to shifts in the personal interests of those involved in the governance of higher educational institutions. We have seen that almost all the mid-19th Century schools were ultimately controlled in all significant respects<sup>32</sup> by a board of trustees usually religious in attitude if not actual status. Religious (or social) interests in turn determined the stated and real mission of these schools. But if these feelings and associations were beginning to lose their hold on educational managers, and if religious doctrine was no longer to determine the offerings of a school or to guide its hiring and admissions policies, a new question presented itself: what would be substituted for that in defining the mission of the schools? In other words, since the form of the non-profit institution continued as before, something new was needed to guide its non-market, non-consumer-oriented behavior. A new “mission” had to be found. That mission was eventually found in the idea of the

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<sup>32</sup> University governance is defined here mainly to include control over who teaches, what they teach and who will be admitted to this subsidized education.

university as a community of disinterested scholars advancing knowledge for its own sake.<sup>33</sup>

Of course, this idea of the university as having a purely scholarly mission may have emerged more by a process of elimination and rationalization than for any proffered positive reason.<sup>34</sup> After all, there was already a substantial investment in the universities, both culturally and physically, and self preservation dictated that there had to be some convincing *raison d'être* for their continuation or for the founding of numerous new governmental institutions. The trustees could no longer define that in religious terms, and, though many thought that abstract ideas like “finding truth” or aiding progress or preserving Western Civilization could serve the purpose, these were weak reeds compared to the religious values and social class interests of the earlier schools, and these ideas, shibboleths even now, did not really carry the day.

Only one “big” idea, the one heavily imported from German universities, seemed to serve this social and political purpose better than any of the others, the idea that universities should be the exclusive centers of intellectual (including research and vocational) pursuits.<sup>35</sup> Several consequences flowed immediately from this notion. First, all topics covered in the earlier curricula could be co-opted into the newer version. Second, this idea did not imply any limit on the size or scope of universities. This idea also strongly implied that the faculty should be “smart” and the students bright. The concept or value of “intellectualism” thus was born out of necessity, as it were, but it was to be the bold banner of higher education for a long time after.<sup>36</sup>

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<sup>33</sup> This idea of a sense of “unity” within the academic community is very nicely elaborated by Russell Nieli in a Pope Center paper, *The Transformation of American Higher Education*, available at [http://www.popecenter.org/inquiry\\_papers/article.html?id=1884](http://www.popecenter.org/inquiry_papers/article.html?id=1884).

<sup>34</sup> This may be overstated because there were undoubtedly people who already envisioned something like the modern university. But it was certainly not a common idea. Perhaps something of the same scenario had unfolded a bit earlier in German universities after which many American schools of the period were said to be copied. To be sure there were those who saw the universities as engines for economic growth, both through education and research, but this tells us nothing about why the non-profit and governmental forms had to be used.

<sup>35</sup> See JAMES BOWEN, *A HISTORY OF WESTERN EDUCATION. VOL. III: THE MODERN WEST. EUROPE AND THE NEW WORLD* (1981).

<sup>36</sup> Query, however, whether it still survives in anything like its original form?

## B. Governance Implications of the New Mission for Universities

### 1. Faculties

This redefining of the universities' mission suited the professoriate very well. The growth in the number and size of universities meant that there was now considerable competition for their expertise, and, as a result, salaries began their steady growth. Further, if science and intellectualism were to be the key concepts for guiding the new universities, there would have to be a recognition of the need for intellectual specialization. As a result, the faculties rather than the trustees would have to be the ones who could make the decisions about who would be hired to teach and about curriculum design and about what they would teach in their courses. The argument was strong in the circumstances, but it is noticeably tinged with faculty self interest. The notion of academic freedom made its belated but not unexpected appearance along with the founding of the AAUP in 1910. And, true to the new ideal of intellectualism, the "better" or smarter students would be preferred to the old "gentlemanly C" types or to the members of a particular religious denomination or social class.<sup>37</sup> Undoubtedly many a religious, business or community leader, who in the earlier era took on the burden of trusteeship, was happy to turn these responsibilities over to the newly invested faculty, since there was really no longer any meaningful reward for serving.<sup>38</sup>

### 2. Administrators and Trustees

A word should be said here about the administrative arm of universities, i.e. the president, his staff and the entire bureaucratic apparatus required to

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<sup>37</sup> We can do little more than note here that over the years faculties' attitudes about who should be admitted to the subsidized benefits of higher education changed from one befitting intellectualism as a goal to one using the welfare of particularly favored groups as the preference function, probably a symptom of faculties' growing involvement in political issues but also possibly reflecting a shift of power from faculties to administrators.

<sup>38</sup> At least until positions on university boards came to represent significant social status, but even that motivation did nothing to make the trustees want to reclaim their old governance powers from the faculties. Having forsaken religious values and not having scientific expertise, trustees simply had no strong argument to counter the faculties' claim to dominance in running universities.

manage a university's non-purely academic affairs. In 19th Century schools the personal allegiance of the administration was very clear; it was to the trustees who clearly controlled governance issues in the interests of a particular church group. The president was in fact hired and fired by the board, and his job description was whatever they decreed. But in the turn-around world of the modern university the president is only nominally selected and retained by the board of trustees. The faculty have a virtual and in some cases explicit veto power over any appointment, and, as events of recent years clearly demonstrate, they can get rid of presidents almost at will.<sup>39</sup> As a result presidents run their institutions in a fashion to retain the good will and confidence of the faculty, and they rarely have to pay any serious attention to boards of trustees<sup>40</sup> or to students. Their real job description then becomes simple: one, raise money, and, two, manage the non-academic portions of the university's affairs so that it supports and does not interfere with the faculty's main concerns. A president has some residual power over academic matters via budgetary decisions and selection of a provost or academic vice president, but he or she is well advised to use this power sparingly and only after serious consultation with the faculty powers that be. University administrators have indeed become more powerful in their stated capacities in recent years as the amount of federal money available for non-teaching purposes has grown, but this administrative strengthening in the form of ever-larger bureaucracies is rarely at the expense of the faculty's control over academic governance.

## C. The Economics of Control and University Governance

How could such a revolutionary change of control in governance have occurred in an institution when its sale to a highest bidder could not take

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<sup>39</sup> This was demonstrated most commonly in the 1960s and 70s, when faculties discovered that they had the power to oust an unpopular president by engaging or threatening to engage the board of trustees in a public disputation for which most of the members had no stomach. Lawrence Summers' more recent experience at Harvard and possibly Teresa Sullivan's at the University of Virginia demonstrate that the power is still very much alive in faculties.

<sup>40</sup> Ironically, this may be less true of state universities than it is of the private ones. In the former group there is always the possibility of a political backlash which can, of course, be very serious for political appointees. Nothing of the sort exists in the case of private boards.

place and there was no democratic political process to rationalize the change? The answer is as simple as it is confounding for many observers. This was the necessary response of a not-for-profit institution to exogenous changes in its environment, here secularization and competitive market forces. The not-for-profit world, with its lack of any designation of real property interests and owners, cannot adjust in the flexible fashion of a private business offering a product no longer demanded in the marketplace. Changes in control in the not-for-profit world are frequently somewhat arbitrary or political in nature, since there is no ownership interest to be sold to the highest bidder and some form of internal politics must control the resolution of conflicts. So control goes to whatever group just happens to be best positioned to capture the benefits of control, regardless of whether they are the best qualified or the most efficient ones or the most deserving ones. In this case, where there was really no one else contending for quasi-ownership of physical assets, the faculties were almost guaranteed to emerge in charge of the institution. No one else really wanted it.<sup>41</sup>

The story is basically the same for the emerging government-supported state universities. In their case there was no transition from trustee to faculty control, since, from the beginning, the faculties were the only ones positioned to benefit personally from control, and the new schools generally followed the formal structure of the older schools in their governance.<sup>42</sup> So

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<sup>41</sup> Prospective students and their parents simply had no device by which they could assure their preferences in the matter. After all the not-for-profit is designed to circumvent consumer preference not to serve it. Profit seeking entrepreneurs might have liked to take over some schools, but there was generally no practical mechanism by which this could be accomplished. The administration, except in some very rare instances, was never a serious contender for this control function.

<sup>42</sup> In this regard it is appropriate to note the excellent work of Vance Fried, who points out that in all universities the not-for-profit status is something of an accounting sham. If any firm, for profit or not, survives, it must be realizing positive profits, see Armen A. Alchian, *Evolution, Uncertainty, and Economic Theory*, 58 J. POL. ECON. 211, 213-214 (1950). These, in the normal commercial venture, show up in income statements as an approximation of economic profits. However, in university accounting conventions, where there is no profit and loss statement, this "virtual profit" is used by the faculty to fund research work, light teaching loads, graduate research assistants, luxurious buildings, etc., etc., all generally accounted for as "costs" of running the operation. The faculty might, in its heart of hearts, prefer to take the cash and run, but, partly at least because of the non-distribution constraint on non-profits, this profit cannot be taken in an unacceptable fashion by the faculty. In other words, the real use of universities' profits (defined by Fried as the surplus of revenues from all sources over the real cost of basic undergraduate education) is concealed by being taken in various forms of in-kind compensation that are made to appear to be educationally desirable. See Vance H. Fried, *Federal Education Policy and the Profitable Non-Profits*, CATO Policy Analysis #678, available at <http://www.cato.org/pubs/pas/PA678.pdf>;

by around 1915<sup>43</sup> the typical American university, private non-profit or governmental, had come in its governance to resemble various forms of worker/management-type organizations, so beloved of leftist radicals for centuries.<sup>44</sup>

## IV. The Modern University and the Place of Law Schools

While the notion of scholarly universality might have justified it, it is not at all clear that the various professional schools would have been swept into the new universities' maws had there not been considerable outside pressure. The medical and legal professions took the opportunity to use university degrees as a device to lessen competition in their fields. The histories of the "credentializing" of law and medicine as a way of inhibiting competition is fairly well known.<sup>45</sup> But certainly nothing comparable explains the appearance of graduate schools of business. Business education, previously one of the most obvious private-market successes, was, however, easily absorbed into the mix. That may have resulted from empire building by academic bureaucrats, but the Public Choice explanation for public universities generally provides a more robust explanation. The business community was certainly not above seeking public funding for an educational task whose cost they previously had to bear. It was an easy sell all the way around, especially as private owners of business schools, the only potential resisters, discovered the desirability of selling out to a university. But it is the law schools which most dramatically illustrate the impact of the universities' not-for-profit structure on educational form and substance.

### A. 19th Century Law Schools

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*see also* ARMEN A. ALCHIAN & REUBEN A. KESSEL, *Competition, Monopoly and the Pursuit of Money, in ASPECTS OF LABOR ECONOMICS* (1962), available at <http://www.nber.org/chapters/c0605.pdf> (explaining a similar economic argument in a different context).

<sup>43</sup> The year, incidentally, that the American Association of Universities was founded.

<sup>44</sup> *See* JOHN S. BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION* 318-22, 374-75 (3d ed. 1976) (describing the AAUP's use of trade union tactics soon after its founding to further its goal of faculty-controlled hiring, promotion, and firing decisions. The AAUP's vision became fully realized after World War II.).

<sup>45</sup> *See* Alchian & Kessel, *supra* note 42, at 25; STEVENS, *supra* note 2, at 95-97.

Most of the law schools that existed before the end of the 19th Century were proprietary operations, and here it would not seem amiss to include as a subset those apprenticeships that were paid for in one fashion or another by the aspirant lawyer or his family. It is not hard to imagine the governance structure of 19th Century proprietary law schools. It would have been substantially identical to that of any business of comparable size and scope. Most of the faculty were certainly part timers, as the students wanted the value of practitioners' experience, and the curriculum was dictated largely by the standard legal practice of the day.<sup>46</sup> In this way it could be said that the consumers of legal services drove the curriculum of these schools. The students' undiluted interest in becoming proficient lawyers would preclude any faculty meanderings into esoterica, like economics or psychology, even if a teacher were so inclined. If a part-timer was not a satisfactory instructor or did not, for a variety of possible reasons, serve the interests of the students, the owner of the business would generally find a replacement. While case briefing was a skill necessarily taught, most courses were taught from straight-out texts little resembling the modern casebook. Writing these texts was not particularly a task of the part-time teachers, and most often the leading works were written by distinguished practitioners or judges whether they also taught or not. Political or ideological emphasis would have generally been absent from the classrooms as would any effort to evaluate laws.

## 1. Professional Law Teachers

As these schools came often to be absorbed into universities or as new university law schools were started, reliance on part time instructors was considerably lessened and the era of the professional law teacher began.<sup>47</sup> The reason for this is not hard to find, given the argument of this essay that the educational governance of the "new" universities was dominated by their faculties. It is not hard to understand how even some seasoned

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<sup>46</sup> A valuable exercise for those interested in legal as well as some aspects of social and economic history, first suggested by the late Karl Llewellyn, is to read a hundred or so consecutive pages of any state law reporter for any year between 1850 and 1890. Of course, this only reflects matters and disputes subject to litigation, but one is impressed with how inexpensive legal services must have been, as judged by the small sums often in dispute.

<sup>47</sup> Subsequently, of course, accreditation standards mandated a largely full-time faculty.

practitioners might opt for the almost libertine existence of a full-time professor over stressful practice, just as occurs today, and the two could often be profitably mixed. The arguments in favor of this change in educational staffing must have been very much like the arguments one hears today from accrediting agencies requiring that a certain percentage of a law school's faculty be full-time teachers and researchers. They would thereby become more proficient at teaching as well as having time and resources for research and writing. As other perks of full-time teaching became established, competition for these positions became and remains ferocious. Only the standards for selection have changed.

The history of the Association of American Law Schools, as reported in detail by Robert Stevens, bears out the control hypothesis of this paper. Even though that organization, founded in 1900, theoretically only has schools as members, its behavior bears much more resemblance to a worker-membership organization we might call a union. By limiting membership to individual schools, the accreditation technique could be used to police the various rules, here called standards, which look like they were designed more as cartel rules for the professors than as best-practice rules for good law schools.<sup>48</sup>

An individual membership organization like the AAUP could never have this kind of power.<sup>49</sup> But that still leaves the question of why legal education after the 1890s took the form of separate "schools" within larger universities rather than, as had been the practice since Colonial times, of having law be merely a part of the Liberal Arts curriculum. The answer is now clear. The forces of the ABA, seeking to protect lawyers from the competition provided by unlimited entry into the profession, and of the AALS, seeking to secure cartel rents for law professors, needed an effective enforcement mechanism. Accreditation of the greater university could never give this kind of pointed protection, since the issue of "standards" for law schools

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<sup>48</sup> Many of the earliest accreditation standards, both in the AALS and the ABA, related to faculty work hours, compensation, staffing requirements, job tenure, size of libraries, work conditions (quality of buildings for instance) and the like. Each of these is commonly seen today as part of the problem with law school accreditation, but in fact they are better seen as symptoms or evidence of a much more profound structural flaw in universities.

<sup>49</sup> This also explains why the AALS and the ABA are much stronger organizations than is the Association of Law School Deans, which can only enforce its preferences by persuasion.

would become diffused and even lost amidst squabbles about the funding and administration of the larger university. Only having distinctive schools, each of which had to be accredited by the governing agencies, would effectively serve each groups' purpose. This worked for the professors but not for the bar, as there was still no enforceable device, as there was for the medical doctors,<sup>50</sup> by which admissions to law schools could be limited.

So, it would appear that professional law teachers early on learned the lesson the American Medical Association had learned and exploited, namely that the accreditation process could be used to benefit the members of the profession. Contrary to some popular wisdom, the accreditation process is not aimed exclusively or primarily at preventing competition among the several schools, though to a limited extent it does have that effect,<sup>51</sup> rather it is aimed at securing economic rents for the individual members of the teaching profession. The members of the practicing bar never found a particularly profitable way to use the accreditation process in their own interest,<sup>52</sup> as did the medical doctors. But the law professors and, to a lesser extent, all professors did.

## 2. Behavioral Aspects of University Law Schools

In another article I have tried to describe the changes in behavior of faculty and other university participants when the property rights structure changes from one designed to maximize either profits or the interests of a particular religious denomination or social class to one that is controlled by nominal employees, the faculty.<sup>53</sup> There I looked at such well-known indicia of

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<sup>50</sup> See, for a classic elaboration - and proof - of this thesis Reuben A. Kessel, *Price Discrimination in Medicine*, 1 JNL. OF LAW AND ECON. 20 (1958)

<sup>51</sup> Manifestly there is competition among the various institutions of higher education, but it is attenuated because no one has a transferable right to any specific portion of the residual profits. Each individual institution is like a common pool whose assets will be exploited to an inefficient degree if left unregulated by some managing authority. This would explain why faculties have tolerated some degree of authority in administrators.

<sup>52</sup> This was mainly because they could not control the total number of graduates eligible to take the bar examinations, though it is often suspected that they do influence the pass rate on bar exams. They might have restricted the number of schools through the accreditation scheme, but that did not suffice to protect against schools' admitting ever more students, which they did do. The medical profession, through its certification control of hospitals where new MDs could intern, managed this restraint.

<sup>53</sup> HENRY G. MANNE, *The Political Economy of the Modern University*, in EDUCATION IN A FREE SOCIETY (Husted, ed. 1973).

inefficiency or low productivity in higher education as off-beat courses, bad teaching, ideological bias, light teaching loads, job security, useless publications, etc., etc. - the usual list. All of that, of course, applies to law schools, but there are peculiarities to the law school situation that probably do not obtain with other fields. The influence of the non-profit status of law schools may have had peculiarly pernicious influences on laws and government in general.

## i. Conformity in Law Schools

Perhaps the central political characteristic of modern universities is the conformity of viewpoint and technique in any given field and on any given topic. Thomas Kuhn made a great name for himself by describing how rare and how difficult it is to change any prevailing intellectual paradigm. However, he did not have a theory of why this should be particularly and intensely true in universities. At least a good part of the answer lies in the property rights structure already described. Professors do not sell their services to students; they are neither hired, fired nor significantly rated by the consumers of their services. Rather that task is exclusively the province of the faculties themselves.

That means that if a professor at a given school aspires to higher status and compensation, that person must make himself or herself known and wanted by the faculties at the higher ranked institutions, particularly the professors in the same substantive field of law.<sup>54</sup> This can only be done by writing and publishing work that is acceptable to the latter group. Since the ranking of schools takes a hierarchical form, the faculty at the pinnacle of the hierarchy<sup>55</sup>, who in turn will have been selected on a similar basis, in effect will determine the prevailing substantive paradigm for everyone in the lower tiers. Thus a built-in tendency to conformity exists in any given academic field. This goes a long way to explaining the frequently noted lack of ideological diversity on campuses, though it does not explain why the

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<sup>54</sup> Law, in this respect, informally follows the departmentalization now endemic in all modern universities. This in turn follows from the notion of specialization (and expertise) and in turn determines hiring patterns. So the process of ideological homogenization is probably amplified by the very specialization that, in normal markets, begets more competition and diversity.

<sup>55</sup> In practice this may be a small group of professors in the same field but from different schools, but this merely reinforces the pressures for conformity.

common ideology should be leftist.<sup>56</sup> It also suggests why exhortations for universities and law schools to diversify intellectually will only have marginal or occasional effect if any.

Law schools have long offered dramatic proof of the hypothesis offered here. Prior to about 1870, the time of Langdell's introduction of the Socratic and case method of teaching at Harvard, this hierarchy of schools had not yet been clearly established. There were still for-profit schools mainly aimed at preparing local lawyers for a general practice, and the prevailing approach to teaching was the lecture *cum* textbook. Few of the lawyer/part-time teachers in those schools aspired to join the august ranks of the Harvard Law School. After the American Bar Association succeeded in establishing accreditation as a device for limiting the number of schools, most of the pejoratively termed "bar-cram" schools ceased to exist, and the process of a determined conformity through the faculty-hiring mechanism could begin. And begin it did. Within a few years of the introduction of accreditation requirements, the case method, *cum* Socratic dialogue, nearly every law school in the country adopted this mode of law teaching. The process did not require or entail scientific evidence that it was a more efficient form of teaching, and indeed it is today considered somewhat *passe*. But it did not matter for its earlier selection whether the approach was optimal or not, since, if it was not adopted by a particular professor, his or her chances of advancement and influence were limited.

Exactly the same process helps explain the emergence and well-nigh universal acceptance today of the "Cases and Materials" course book. The original pure casebook, without the "materials", was perfectly consistent with the Langdellian view of cases as harboring legal truths only waiting to be ferreted out by the new legal scientists. The addition of "and Materials" to the titles of these books is, however, a more complicated story. But here, along with the dramatic shift generally in legal academic writing from case parsing to policy analysis, we get into another story about legal

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<sup>56</sup> Without the disciplining effect of competitive markets, any (and every?) social grouping falls into "tribal" thinking, or religiosity, and necessarily leans leftward. Only a private property, competitive market can provide the consumer sovereignty which religious groups do not tolerate. So it is as though the non-profit form of our universities forced the participants to select a new religion (a new "unity" principle in Nieli's words, *supra* note 33), and being secular, it could only be what we now term "liberal."

education, the effort to make it appear to be a true scholarly pursuit and not simply a vocational one.

## ii. Scholarly Law Professors - an Oxymoron?

After university law schools became the norm after the turn of the last century, it is not surprising to find law professors making common cause with academics from other fields, and some of these professors apparently began to feel somewhat insecure about the real role of a law school on a university campus.<sup>57</sup> Surely pure vocationalism was not a sufficient justification to require that the law schools be so placed; independent for-profit law schools had long performed that function satisfactorily. The universities did not have schools for plumbers or carpenters, so why have schools for mere wordsmiths? Undoubtedly inspired by the success of the more “scientific” social sciences in universities, the Legal Realists in academia began a search for how best to intellectualize and modernize legal education.<sup>58</sup> This would also serve to distinguish them from their less “intellectual” colleagues in the bar-cram schools and give some credence to their claim to belong among a community of elite scholars. These ideas swept the legal academy, and by mid-20th Century, it would have been difficult to find any law professor who did not consider himself a Legal Realist.

The Legal Realists tried combining law with almost every conceivably related field<sup>59</sup> and thus introduced the idea of studying law, not as a

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<sup>57</sup> This coincided with, and was certainly not unrelated to the rise of American Legal Realism’s position that the entire legal system was archaic and unscientific, and that legal education was vapid and vacuous. The movement also coincided with an academic reaction (embarrassment?) to the extreme specialization that was beginning to be apparent in universities and which for a while generated almost an obsession with the idea of inter-disciplinary studies. And while the quest for true interdisciplinary scholarship has been a holy grail of modern higher education, all the tendencies of the universities’ structure are against it, and there are few examples of its successful occurrence. Perhaps Law and Economics and Public Choice theory are the two main exceptions outside the hard sciences, though the “mathematicization” of numerous fields might also be considered an inter-disciplinary victory.

<sup>58</sup> There may also have been a hidden ideological agenda, but that is another story.

<sup>59</sup> Even economics, but with the wrong economists. The eventual emergence of what was later named Law and Economics at the University of Chicago in the late 1940s most certainly could not have taken place without the advance work of the Legal Realists. But ideology - and the fight to establish a new paradigm - was another story. See HENRY MANNE, *How Law and Economics Was Marketed in a Hostile World*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* (Parisi & Rowley eds., 2007).

vocational and non-intellectual subject, but rather as a field already heavily entwined with the realities of society. The academic subjects of sociology, anthropology, political science, social psychology and economics at the time were imbued with the growing idea that society could be engineered in a scientific fashion,<sup>60</sup> and perhaps it is not surprising that the Legal Realists reflected similar attitudes. In any event they carried the day, as law professors who were mainly amateurs and poseurs in various non-law fields, began to pontificate on the scientific basis for their preferred substantive rules of law. Obviously, the teaching materials and academic literature began to reflect this influence. Hence we arrived at books titled “Cases and Materials,” with the materials often being a hodgepodge of half-baked social science, personal ideology and cynical reflections on judicial opinions. Needless to say the law reviews published by the various university law schools began to reflect exactly this same brand of scholarship. The mere “parsing of cases” or, for that matter, strict vocational preparation of students for the everyday practice of law, became something beneath the dignity of an elite academe.

### iii. Curriculum

The same story can be told for curriculum. As no traditional market force or understood mission was there to constrain or give direction to their efforts, law faculties embarked on a transformation of legal education, which was, perhaps unsurprisingly, largely self serving. No longer would an emphasis be placed on the subject matter of most lawyers’ practice. Such an approach might well serve the interests of most law students and of the bar in general, but an emphasis on vocationalism would have precluded all the heady social engineering legal academe found itself increasingly attracted to. Even worse, such an emphasis might have dictated a closely required course of study with no great proliferation of elective offerings, perhaps the most dramatic symptom of the faculty’s use of its control of education in its own interest.<sup>61</sup>

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<sup>60</sup> See Richard T. Ely, *Municipal Ownership of Natural Monopolies*, 172 N. AM. REV. 445 (1901).

<sup>61</sup> Just as a typical example, taken at random, UCLA proudly boasts on its web site that it offers students over 200 different courses. Of course, to some extent this proliferation of courses results from the accreditation requirement of three years for a JD degree, itself a reflection of faculty self interest. Since the significant basics could undoubtedly be taught in two years or less, something has to be done to fill up the time required for accreditation, whether it benefits students or not.

The curriculum in the first year of law school, for the most part, retained some resemblance to the traditional approach, with coverage of the main areas of common law, procedure, constitutional law<sup>62</sup> and legal research. The second and third years offerings (with an ever-shrinking number of required courses) usually still includes all the basics like corporation law, income taxation, labor law, trusts and estates, but these “bread and butter” courses have almost been overwhelmed in some schools by a smorgasbord of offerings suited to the particular intellectual or ideological interests of members of the faculty,<sup>63</sup> and, *a fortiori*, ideological bias is readily integrated into even the most mundane of courses.

Courses proliferated in all directions, most leftward, regardless of how insignificant these fields were to the actual practice of anything but the most narrowly specialized areas of law. All manner of courses or seminars were offered in various aspects of critical legal studies, feminist law, black legal studies, gay and lesbian rights law, revisionist constitutional law, environmentalism, international human rights law and on and on. Law students, unless they had a discernible career path, which few do, could not know which of these many offerings might be valuable. The result is, therefore, a tendency to take what is most entertaining or ideologically comfortable in order to get through the required three years. Intellectual rigor has certainly suffered as a result.

## B. Legal Education as Policy Making

These radical changes in the style of legal education since university law schools became the norm have not been without their influence on the real world of substantive law. In many fields of law the direction and substantive content have largely been dictated, or at least heavily influenced, by the work product of modern legal academics. Perhaps the most dramatic illustration of this is carefully described in George Priest’s

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<sup>62</sup> Sixty years ago, Constitutional Law was hardly ever a first-year required course and often was not required at all. The upgrading of this field tracks the modern emphasis on Constitutional Law as the centerpiece of the civil rights struggle and later of the abortion and gay rights issues, all aided and abetted by a phalanx of law professors eager to remake the world.

<sup>63</sup> Over 130 law schools offer one or more courses in “animal rights law,” not an especially robust field in practice.

classic, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,”<sup>64</sup> the story of how, under the influence of a distinguished Yale law professor, Fleming James, the judiciary came to accept a radically new system of compensation for personal injuries. Or consider the profound debate between the strict constructionists and the living-constitution advocates in the area of Constitutional Law. Such a debate would have been almost unheard of in the first half of the last century, and almost all the intellectual impetus for the rationalization of a non-interpretivist view has come from legal academia. Interestingly, not all the change has been from the left part of the political spectrum. Antitrust law, under the relentless logic of the Chicago school of Law and Economics, was dramatically changed in both its legal outcomes and in its mode of analysis by the teachings of such legal academics as Aaron Director, Robert Bork, Phillip Areeda and Donald Turner. But for the most part the substantive changes in law emanating from academe are liberal in their orientation.

This development of what must be termed governmental powers in the hands of academics is hardly ever noticed. We have as a society bought into the notion that there is something almost divinely ordained about the sanctity of academic positions; they, after all, are the disinterested, scientific experts in their respective fields, the philosopher kings of our society. “Academic freedom” is often spoken of as a constitutional right. If law professors generally agree that absolute liability in product injuries is the better system, then we had better adopt their view. So here is an hitherto largely undetected system of basic law making that results from neither a democratic political process nor from market determinations.<sup>65</sup> It results from an accident of history that caused our higher educational industry to be not-for-profit or government-owned in its structure. These changes in law ultimately reflect the views of a small coterie of law professors who, because of the structure of the university system, enjoy almost an intellectual monopoly in their area of expertise, even though few of them are truly qualified or appropriately designated to be making policy decisions. Still, once a particular view of an area of law

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<sup>64</sup> 14 J. LEGAL STUD. 461 (1985).

<sup>65</sup> Academics will, of course, argue that some form of “truth” or optimal policy is hammered out in the arena of scholarly research and debate and that they merely influence policy makers by the force of their arguments. There is little empirical verification for this obviously self-serving claim, though it does have a certain superficial plausibility. It would be more persuasiveness if it did not come with such a heavy ideological bias in the usual results.

attains the status of received wisdom,<sup>66</sup> there are few avenues of intellectual resistance.

This is a very dangerous approach to law making, one that Frederick Hayek warned us about in his famous “The Fatal Conceit.” The hubris of many academics, their arrogance and lack of any real intellectual humility, may be commonly criticized, but few people have understood that these attitudes and behavioral characteristics, like so many of the problems with modern higher education, are in fact the logical results of the property rights structure of modern universities. Until the reformers realize that the real source of the problem rests with structure of our universities, we cannot expect much permanent improvement.

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<sup>66</sup> Note that this is not to say that there are not bitter and bona fide debates within academe about correct policies, but too often the final accepted paradigm is a politically correct one. Obviously much of what I have said in the text is not limited in its application to law schools, though its greatest political significance may appear there.