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SUMMARY TABLE OF CONTENTS

Introduction

I. Broader Historical Context
   A. General History
   B. Legal History

II. Legal Education During the First Phase
   A. Overview of Formal Legal Education Settings
      1. General Considerations
      2. Formal Legal Education Settings
         a. Apprenticeship Training
         b. Institutionalized Legal Education
            (1) Independent Law School Programs
            (2) College/University Law Programs
               (i) Early Law Programs
               (ii) Later Law Programs
            (3) Methods of Instruction
      3. Significant Legal Literature: Blackstone, Kent, and Story
   B. Prevailing Jurisprudence and Prevailing Professional Ideal
      1. Prevailing Jurisprudence
         a. General Nature of the Common Law Tradition
         b. Elements of Classical Common Law Thought

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(1) Nature of Common Law Reason in Classical Common Law Thought
(2) Three Central Notions of Classical Common Law Thought
c. Character of Associated Natural Law Thinking in Early American Legal Thought
d. The Emergence of an Instrumentalist Conception of Law
e. Early American Legal Science
f. Elements of the Prevailing Jurisprudence in Legal Education
2. Prevailing Professional Ideal
a. The Ideal of the Lawyer-Statesman
b. The Lawyer-Statesman Ideal and the Aristotelian Political Tradition
c. Activities and Achievements
d. Broader Perspective: Civic Republicanism and the Virtuous Elite
e. The Lawyer-Statesman Ideal in Legal Education
C. Curricular Analysis and Evaluation
1. Methodology Used: Basic Conceptual Framework and Empirical Bases
   a. Basic Conceptual Framework
   b. Empirical Bases
2. Curricular Analysis and Evaluation
   a. Comparative Analysis and Evaluation of Breadth of Coverage
      (1) Substantive and Structural Dimensions of Law
      (2) Practical Dimensions of Law
      (3) Social Dimensions of Law
      (4) Cultural and Transnational Dimensions of Law
         (i) Independent Law Schools
         (ii) Apprenticeship Training and College/University Law Programs
   b. Influence of Prevailing Jurisprudence and Prevailing Professional Ideal on Curricular Breadth
III. The First Phase in Perspective: Subsequent Developments and Implications for Lawyer Professionalism

INTRODUCTION
This article explores the first of four phases in the history of U.S. legal education, lasting from the founding of the Republic until the 1860s.1 There has been a considerable upsurge of

1. In recognition of the revolution in U.S. legal education initiated by Christopher Columbus Langdell during his twenty-five-year tenure as Dean at Harvard (from 1870 until 1895), it is tempting to call this first phase the pre-Langdellian phase (lasting from the time of the Revolution until the 1860s).
interest during the last few years in the history of U.S. legal education in general, and in the history of this first phase in particular. The present article is intended to contribute to this

The three remaining phases that I identify are: the phase of Langdellian legal science (lasting from the 1870s until the 1920s); the legal realist phase (lasting from the 1920s until the 1960s); and the postrealist and postmodernist phase (lasting from the 1960s until the present time). These three remaining phases are denominated by reference to the prevailing jurisprudence of the period in question, in recognition of the influence of the prevailing jurisprudence upon the shape and content of legal education. In keeping with this approach, the characterization of the first phase as "pre-Langdellian" can be understood as a reference to pre-Langdellian jurisprudence; an alternative designation might be: the natural law phase. There is little that is original in the above periodization. In particular, the identification of the different time periods, and the influence of the specified jurisprudential paradigms during the period in question, are well recognized.

2. The upsurge of interest in this first phase during the last few years will be evident from perusing the sources cited in Part II.A of the present article. For a very useful recent collection of articles (as well as other materials) on the history of U.S. legal education, including the history of this first phase, see THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES (Steve Sheppard ed., 1999) [hereinafter THE HISTORY OF LEGAL EDUCATION]. For an earlier useful collection of materials, see THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES (Michael Hoeflich ed., 1988) [hereinafter THE GLADSOME LIGHT].

The following is a list of books and articles that address (or, particularly in the case of some of the books, that contain passages that address) general developments in legal education or developments in particular aspects of legal education during this first phase. The books listed are those that are cited frequently in the present article. The articles listed are those articles cited from the Sheppard collection, whether or not they are cited frequently. In the case of these articles, the list gives citations to the original source if the article has been published elsewhere, as well as references to the pages in the Sheppard collection where the article may be found. When these articles are cited thereafter, the citation is to the relevant pages in the Sheppard collection.

Books frequently cited:

LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2d. ed. 1985).
ALFRED ZANTZIGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA (1921) [hereinafter REED I].
THE HISTORY OF LEGAL EDUCATION, supra.

Articles cited from Sheppard collection:
James Barr Ames, The Vocation of the Law Professor (1901), reprinted in 2 THE HISTORY OF LEGAL EDUCATION, supra, at 1000.
Robert Charles, Legal Education in the Late Nineteenth Century, Through the Eyes of Theodore Roosevelt, 37 AM. J. LEGAL HIST. 233 (1993),
growing body of literature in two main ways — first, by

reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra, at 349.


James Peden, The History of Law School Administration, in 2 THE HISTORY OF LEGAL EDUCATION, supra, at 1105.


Among the above sources the articles by Ames and Pound are interesting for the additional reason that they also briefly survey earlier developments in the history of legal education. Pound's article discusses the history of Roman, European, and English legal education, while Ames' article focuses on English legal education. Pound, supra, at 682-85; Ames, supra, at 1000-03. For further discussion of the history of Roman, European, and English legal education in Sheppard's collection, see David Hoffman, A Lecture, Introductory to a Course of Lectures, (1823) [hereinafter Introductory Lecture], reprinted in THE HISTORY OF LEGAL EDUCATION, supra, at 291-96, and Theodore Dwight, Inaugural Address: Our Municipal Law and the Best Mode of Acquiring a Knowledge of It [hereinafter Inaugural Address], reprinted in THE HISTORY OF LEGAL EDUCATION, at 339 n. 26. For a more extensive treatment addressing the history of European and English legal education, see REED I, supra, at 11-24, 107-10.
undertaking in Part II a study that considers and builds upon the results of much of the scholarship within the corpus, and that hopefully will be both of intrinsic historical interest and of use for a number of different purposes; and second, by suggesting in Part III how the results of this study can be used for one particular purpose — namely, to illuminate the curricular concerns and related professionalism concerns that are articulated there, and to support a call for the “liberalization” of legal education in an effort to address these concerns.

Part I of the article briefly summarizes some of the more important developments in the general history and legal history of the period in order to provide a broader historical context, and reference, for the subsequent discussion. Part II then undertakes the exploration of U.S. legal education itself. Section A provides an overview of the various settings — apprenticeship training, independent law school programs, and college/university law programs — in which a student could receive some type of formal legal education during this first phase. The overview first considers various general matters relevant to an understanding of these formal legal education settings, such as the extent to which acquisition of a formal legal education was (or was not) a requirement for the practice of law and the nature of the general college education that many students received before beginning their formal legal education. It then provides a general description of each of the formal legal education settings in turn, also discussing such matters as the types of curricula that were followed and the types of pedagogical methods that were used in these settings, and it addresses as well the significant legal literature of the period, in particular the works of Blackstone, Kent, and Story that were typically part of a formal legal education.

The shape and content of a formal legal education appear to have been influenced, at least in part, by various jurisprudential ideas and by a particular professional ideal. Section B of Part II first discusses the jurisprudential ideas that appear to have prevailed for most of the period, examining such elements as: the nature of the common law tradition; the nature of common law reason in classical common law thought; three related notions that represent some further ways in which the common law was conceptualized in classical common law thought; the character of associated natural law thinking; the emergence of a new, instrumentalist conception of law, particularly during the second part of the period; and, early American legal science. Section B then discusses the professional ideal — the ideal of the lawyer-statesman, with its emphasis upon the twin virtues of practical wisdom and devotion to the public good — that was closely associated with certain of these jurisprudential elements and that
also appears to have prevailed for much or most of the period. In particular, it examines the various claims made by Anthony Kronman and Robert Gordon regarding the nature of this ideal and its influence during the late eighteenth and early nineteenth centuries, and considers the extent to which these claims are consistent with claims made by other scholars writing about the prevailing political philosophy of the period. The discussion in Section B also considers how students would have been exposed to the prevailing jurisprudential ideas and the prevailing professional ideal during their formal legal education.

Drawing upon the discussion of formal legal education settings and significant legal literature in Section A, and the discussion of the prevailing jurisprudence and prevailing professional ideal in Section B, Section C of Part II undertakes a more detailed, and comparative, analysis and evaluation of the breadth of coverage provided by the curricula of studies followed in these various settings. In order to facilitate this comparative analysis and evaluation, the “subjects” within the curricula are organized into various categories, using for this purpose a taxonomic schema, developed in an earlier article, that identifies six sets of “fundamental dimensions of law”: the substantive dimensions of law, the structural dimensions of law, the practical dimensions of law, the social dimensions of law, the cultural dimensions of law, and the transnational dimensions of law. Section C finds that many of the curricula in the apprenticeship and college/university law program settings displayed a striking breadth of coverage, especially through their emphasis upon the cultural and transnational dimensions of law. Moreover, if the exposure received during a prior college education (or its equivalent) is also taken into account, there was a remarkable emphasis upon a broad education for lawyers (including an emphasis upon the social dimensions of law) in all formal legal education settings. Section C concludes that this emphasis upon a broad education for lawyers may have reflected, in particular, the influence of the natural law and legal science elements in the prevailing jurisprudence, as well as the influence of the prevailing professional ideal of the lawyer-statesman and the political philosophy of civic republicanism underpinning that ideal.

Following this exploration of the formal legal education of the period, Part III outlines a descriptive claim and a normative argument that will be developed further in subsequent articles. Descriptively, Part III contends that a general narrowing of the law school curriculum that occurred after this first phase resulted

in a marginalization within the mainstream law school curriculum of courses in the areas of legal history, jurisprudence, and comparative law, and of courses in the general subject areas of international/transnational/global legal studies—a marginalization of courses, in other words, that address the cultural and transnational dimensions of law. Normatively, Part III contends that this marginalization, which in fact continues today (although appearances may lead one to suppose otherwise), raises important professionalism concerns because it diminishes the ability of law school graduates to perform in an optimally competent, effective and responsible manner in the various types of roles they will perform both as practicing members of the legal profession and as leaders in society. The continued failure to ensure that all law students receive a basic minimum exposure to the general subject areas of legal history, jurisprudence, and comparative law, as well as to the general subject areas of international/transnational/global legal studies, should be redressed by restoring the cultural and transnational dimensions of law to a central place in the mainstream law school curriculum, just as they were accorded a central place in much of the legal education during the first phase. In effect, this represents a call for the "liberalization," or perhaps more accurately for the "reliberalization," of U.S. legal education.

With respect to matters of format, the article is heavily footnoted, particularly in Part II. This is because, consistent with my usual practice, secondary discussion elaborating on points in the text has been placed in the notes, so as not to distract unnecessarily those readers who are interested only in the main outlines of this account of the history of U.S. legal education during its first phase.

I. BROADER HISTORICAL CONTEXT

In order to provide a broader historical context and reference for the subsequent discussion, Section A of this first part of the article summarizes some of the more important and relevant developments in the general history (i.e., the political, economic and social history) of the period, and Section B does the same for the legal history of the period.
A. General History

The American Revolution lasted from April 1775 (when hostilities broke out with Britain) until September 1783 (when Britain and the United States signed the Treaty of Paris). One of the significant political events of the Revolution was, of course, the adoption of the Declaration of Independence on July 4, 1776. Another was the adoption of the Articles of Confederation, which somewhat strengthened the powers of the central Congress and came into effect in March 1781. During the next few years, the remaining weaknesses of the Confederation became evident. Delegates from all thirteen states met in Philadelphia in 1787, therefore, for the purpose of revising the Articles, but ended up producing an entirely new document, the United States Constitution, instead. The Constitution was ratified by the

4. In preparing this summary account of the general history of the period, I have relied upon three main sources: JOAN GUNDERSEN AND MARSHALL SMELSER, AMERICAN HISTORY AT A GLANCE 33-130 (5th ed. 1994); THE READER'S COMPANION TO AMERICAN HISTORY (Eric Foner and John Garraty eds., 1991); and, STEPHEN FELDMAN, AMERICAN LEGAL THOUGHT FROM PRE-MODERNISM TO POST-MODERNISM: AN INTELLECTUAL VOYAGE 57-74, 83-91 (2000).

For a useful summary of the main developments in the general history of the period, which was published after preparation of the present summary in this subsection, see the entry for "History of the United States" in THE NEW YORK TIMES GUIDE TO ESSENTIAL KNOWLEDGE 275-83 (John Wright ed., 2004) [hereinafter ESSENTIAL KNOWLEDGE]. See also id. at 258-60 (the American Revolution (1775-83)); id. at 261-65 (the American Civil War (1861-65)). For a useful summary of the main developments in the general history of the colonial period, see id. at 272-75. See also id. at 258 (the Seven Years War (1756-63)).


6. See GUNDERSEN AND SMELSER, supra note 4, at 28; THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 271-72. For the text of the Declaration of Independence, see GREAT DOCUMENTS, supra note 5, at 17-20.

7. See THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 53-55; see also GUNDERSEN AND SMELSER, supra note 4, at 32. For the text, and short analysis, of the Articles of Confederation, see GREAT DOCUMENTS, supra note 5, at 21-26.

8. See GUNDERSEN AND SMELSER, supra note 4, at 33-37, together with THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 831 (identifying foreign trade, currency issues, public finance, foreign relations, Indian relations, boundary disputes between states, and state restrictions on interstate commerce as problem areas)

9. See GUNDERSEN AND SMELSER, supra note 4, at 37-40; THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 831-33. For the text of the U.S. Constitution, see GREAT DOCUMENTS, supra note 5, at 36-44. For further discussion of the Constitution, see infra note 42 and accompanying
requisite number of states by mid-1788 but only after spirited
debate between the Antifederalists, who regarded the
centralization effected by the Constitution as a threat to American
liberty and the gains of the Revolution, and the Federalists, who
regarded the Constitution as essential to their preservation. A
Bill of Rights, in the form of the first ten Amendments to the
Constitution, was adopted in 1789-1791 to respond to one of the
major concerns of the Antifederalists as well as the
recommendations of several of the ratifying states.

Following ratification of the Constitution in 1788, the new
federal government was established. George Washington was
elected President in 1788, and again in 1792, each time
unanimously. During Washington's presidency, "the Federalist
consensus" behind him disintegrated, a process fueled initially
because Secretary of State Thomas Jefferson and Congressman
James Madison were opposed to Treasury Secretary Alexander
Hamilton's financial program for the new nation. This process
resulted in the emergence of two political parties—the
Jeffersonian Republicans, led by Jefferson and Madison, and the
Federalists, led by Hamilton and John Adams. The differences
between them were stark. Thus, "the Federalists preferred a
stronger national government focusing on stable finances and
aggressive commercial practices, while the Jeffersonian
Republicans favored state governmental power and agrarian
pursuits." Moreover, the Federalists' "civic republican elitism,"
founded on their belief in "[t]he superior political talents of a
natural aristocracy," stood in contrast to the Republicans' stress on
"a more democratic popular sovereignty" and the value of "common
virtue." The presidential election of 1796 was won by Adams, but

10. See THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at
912-14. See also id. at 39-40, 387, together with GUNDERSEN AND SMELSER,
supra note 4, at 40-42 (discussing further the Antifederalist and the Federalist
Papers urging ratification of the Constitution).

11. See THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at
97-99, 913-14; see also GUNDERSEN AND SMELSER, supra note 4, at 43-44. For
the text of the Bill of Rights, see GREAT DOCUMENTS, supra note 5, at 45-46.
For further discussion of the Bill of Rights, see infra note 43 and
accompanying text.

12. See GUNDERSEN AND SMELSER, supra note 4, at 43-44.

13. Id. at 43, 49.

14. See FELDMAN, supra note 4, at 68, together with GUNDERSEN AND
SMELSER, supra note 4, at 45, and THE READER'S COMPANION TO AMERICAN
HISTORY, supra note 4, at 388.

15. See FELDMAN, supra note 4, at 68, together with GUNDERSEN AND
SMELSER, supra note 4, at 45-47.

16. FELDMAN, supra note 4, at 68; see also GUNDERSEN AND SMELSER,
supra note 4, at 45.

17. See FELDMAN, supra note 4, at 68, together with GUNDERSEN AND
Jefferson defeated Adams in the election of 1800, ushering in a period of internal stability during which the Jeffersonian Republicans (known as the Democratic-Republicans by 1816) held the Presidency for twenty-five years (Jefferson himself being re-elected in 1804, Madison being elected in 1808 and 1812, and James Monroe in 1816 and 1820), with the Federalist Party fading away as an institution by 1820. During this time, too, democratic populism increased, and by 1825 all but three states had eliminated property requirements for voting, thereby extending the franchise to all adult white males.

Although all the major candidates in the presidential election of 1824, including Andrew Jackson, were nominally Democratic-Republicans, the election of John Quincy Adams represents a crucial turning point in the political history of the period. After the election, the Democratic-Republican Party divided into two factions: the National Republicans, led by Adams and Henry Clay, and the Democratic-Republicans, led by Jackson. Whereas Adams and Clay represented a continuation of Federalist economic and political thinking, Jackson’s impulses were profoundly democratic and populist. Supported by western farmers, southern planters and eastern laborers, Jackson won the next two presidential elections, in 1828 and 1832, and Martin Van Buren (Jackson’s Vice-President during his second term) won the election in 1836.

Widely seen as “a champion of the common man,” Jackson was the symbol of “a democratic upheaval,” a “second American Revolution,” that “was not only political but also social, intellectual, and humanitarian.” For example, the era of

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18. See GUNDERSEN AND SMELSER, supra note 4, at 49-53, 59-60, 62, 64, 68, together with FELDMAN, supra note 4, at 69.
19. FELDMAN, supra note 4, at 69-70; see also GUNDERSEN AND SMELSER, supra note 4, at 71; THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 1044-45. However, between 1790 and 1860, almost every state disenfranchised free blacks, and black male suffrage was recognized nationally only in 1870 with the adoption of the Fifteenth Amendment; women, also, were ineligible to vote, and indeed remained so until the Nineteenth Amendment was adopted in 1920. See id. at 1045-46; see also FELDMAN, supra note 4, at 71 (discussing the evolution of social hierarchies in America, particularly after the 1830s).
20. See GUNDERSEN AND SMELSER, supra note 4, at 70-72.
21. Id.
22. See id., together with THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 9-10 (Adams), id. at 190-91 (Clay), and id. at 581-82 (Jackson). As pointed out in THE READER’S COMPANION TO AMERICAN HISTORY, Jackson’s vision of democracy was nevertheless limited: it did not extend to black slaves or Native Americans. Id. at 580, 582. Nor, of course, did it extend to women.
23. See GUNDERSEN AND SMELSER, supra note 4, at 70, 72, 75-76.
24. See id. at 70, together with THE READER’S COMPANION TO AMERICAN
“Jacksonian Democracy” saw the development of mass politics, attacks on financial and business power and privilege, the beginnings of the labor movement, and the development of various social reform movements (such as the abolitionist, temperance, public education, feminist, and prison reform movements). With the election of William Henry Harrison in 1840, the Presidency passed from the Democrats (as Jackson’s Democratic Republicans had come to be called during his tenure as President) to the Whig Party (formed in 1834 from the National Republican opposition), although Harrison himself died in 1841 after taking office and was succeeded by Vice-President John Tyler. Following defeat of the Whig Party candidate Henry Clay by the Democratic candidate James Polk in the 1844 election, the Whig Party, which is difficult to characterize due to its heterogeneous nature, regained the Presidency in 1848 with the election of Zachary Taylor (Taylor being succeeded by Milton Fillmore following Taylor’s death in 1850), but lost it again to the Democrats in 1852 with the election of Franklin Pierce.

From the mid-1840s on, the issue of Southern slavery, in particular the issue of its extension into the western territories, became increasingly divisive and began to dominate national politics. The Missouri Compromise of 1820 had sought to resolve an earlier crisis over this issue, with respect to the land west of the Mississippi River that had been included in the 1803 Louisiana Purchase, by providing that, except for Missouri, any states created from the purchase land north of 36° 30’ must be free states (the Northwest Ordinance of 1787 had already prohibited slavery in the land east of the Mississippi River and north of the

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25. See GUNDERSEN AND SMELSER, supra note 4, at 74-76, 79-81, together with THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 580, 582-84; see also FELDMAN, supra note 4, at 70 (discussing mass politics and reporting that, “between 1824 and 1840, the population grew 57 percent, but the number of eligible voters casting a ballot in the presidential election in those years increased 700 percent”).


27. See GUNDERSEN AND SMELSER, supra note 4, at 93-94, 96-97, 99, together with THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 1146-47.

28. See GUNDERSEN AND SMELSER, supra note 4, at 55, 67-68. For an account of the Louisiana Purchase, in which France sold the United States most of the land lying between the Mississippi River and the Rocky Mountains, see id. at 55-57, and THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 681-82. For extracts from the text of the Louisiana Purchase, see GREAT DOCUMENTS, supra note 5, at 80-83. For the text of the Missouri Compromise, see id. at 90-91.
Ohio River that was part of the land acquired from Britain under the Treaty of Paris in 1783).\(^9\) Another compromise, in 1850, sought to resolve a second crisis over the issue, this time with respect to the land extending from Texas to California that had been won from Mexico in the 1846-47 Mexican War.\(^{30}\) The third crisis, precipitated in 1854 when Congress created two territories (Kansas and Nebraska) from land included in the Louisiana Purchase on terms that undid the Missouri Compromise, resulted in “the greatest partisan realignment in American history” as those Democrats and Whigs opposed to the further extension of slavery into the territories founded the Republican party, and those Democrats and Whigs more tolerant of such extension united as Democrats.\(^{31}\)

Against the background of this realignment and various other events connected to the slavery issue, the Democrats won the Presidency in 1856 with the election of James Buchanan, but lost it to the Republicans in 1860 with the election of Abraham Lincoln.\(^{32}\) Feeling their profound economic, social and philosophical differences with the northern states (which were also economically aligned with the northwestern states), and fearing a loss of political power and a threat to their way of life, the southern states seceded from the Union in 1861, precipitating the Civil War that lasted until 1865.\(^{33}\) Lincoln, who had been re-elected in the 1864 election as the candidate of the Union party (formed from the merger of the Republicans and “War Democrats”), was succeeded by Vice-President Andrew Johnson following his assassination a few days after the South surrendered.\(^{34}\) During Johnson’s presidency and the presidency of Republican Ulysses S. Grant (who was elected in 1868 and again in 1872), the South underwent a process of “reconstruction” by the North, and although reconstruction ended in 1877, it left a bitter legacy for future relations between the two sections.\(^{35}\)

The period was marked by several long-term trends, many of which are reflected in the preceding discussion. Along with the dramatic geographical expansion of United States territory, which extended from the Atlantic Ocean to the Pacific Ocean by the end of the period and from which twenty new states had been created

\(^{29}\) See THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 796, 823; see also GUNDERSEN AND SMELSER, supra note 4, at 34. For the text of the Northwest Ordinance, see GREAT DOCUMENTS, supra note 5, at 73-77.

\(^{30}\) See GUNDERSEN AND SMELSER, supra note 4, at 94-99.

\(^{31}\) Id. at 101-02.

\(^{32}\) See id. at 102-07.

\(^{33}\) See id. at 82-90, 108-15, together with THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 182-85.

\(^{34}\) GUNDERSEN AND SMELSER, supra note 4, at 115-16.

\(^{35}\) See id. at 119-29; THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 917-24.
by 1860, and twenty-four by 1870 (most after having passed through the stage of territorial self-government), there was also:

* a dramatic increase in population, from 5.3 million in 1800 to 31.4 million in 1860, and about 40 million by 1870 (some of that increase being due, particularly after 1820, to higher levels of immigration);

* a westward movement of population (resulting in conflict with, and the displacement of, American Indians);

* and the rapid growth of a transportation infrastructure (with the development of roads, steamboats, canals and railroads).

The economy also grew, correspondingly, with the expansion of trade and commerce, together with finance capitalism, and the development of a national market in which the North became increasingly centered on industrial manufacturing (especially textiles and iron), the South on plantation agriculture (especially cotton), and the West on various other types of agricultural production (especially grain and livestock). In addition, the resulting expansion of economic opportunity and the growth of political democracy (at least for white males), together with the renewal of Protestant Christianity in a more populist form following the Second Great Awakening in the late 1820s and 1830s (which was also linked with the various social reform movements), manifested a developing ethos of egalitarian individualism.

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36. See *The Reader's Companion to American History*, supra note 4, at 366, 368, and 1625-27, together with GUNDERSEN AND SMELSER, supra note 4, at 56 and 63 (for relevant maps and tables), and BROGAN, supra note 26, at 198 (discussing the different stages in the political organization of new territorial acquisitions).


38. See *The Reader's Companion to American History*, supra note 4, at 552-59, together with GUNDERSEN AND SMELSER, supra note 4, at 61, 92.

39. See GUNDERSEN AND SMELSER, supra note 4, at 61, 82-83; *The Reader's Companion to American History*, supra note 4, at 1084-85.

40. See *The Reader's Companion to American History*, supra note 4, at 19-20, 240-41, 560, 1085, together with GUNDERSEN AND SMELSER, supra note 4, at 83-86, and FELDMAN, supra note 4, at 67-68.

41. See FELDMAN, supra note 4, at 65-71, together with *The Reader's Companion to American History*, supra note 4, at 363, 928, 975.

Of particular interest for the subsequent exploration of the prevailing jurisprudence and the prevailing professional ideal of the period and their impact on legal education, undertaken in Part II.B of this article, is Feldman's explication of the complexity of the general historical situation as it bears on jurisprudential thought. Thus, Feldman contends that the kinds of "modernist forces" in the economic, political, and religious spheres identified in the preceding discussion of long-term trends were opposed both by certain economic and political forces that "seem[ed] to delay the advance of modernism," as well as by various political and religious factors that "seemed
B. Legal History

During this period, there were fundamental developments in the area of public law, such as: the adoption of the U.S. Constitution\textsuperscript{42} and the Bill of Rights;\textsuperscript{43} the creation of a federal court structure by the Judiciary Act of 1789;\textsuperscript{44} the landmark decisions of the U.S. Supreme Court under Chief Justice Marshall establishing the superior legal authority of the national government over the states and the principle of judicial review of to nurture persistent premodern views" and that, paradoxically, resulted from some of the same modernizing forces in those spheres. FELDMAN, supra note 4, at 71-74. Feldman considers that, as a result, American jurisprudential thought retained its premodern character until the Civil War era, in particular due to its continuing commitment to natural law thinking. Id. at 74.

The modernizing forces were sufficiently strong, however, to precipitate a change from a first, to a second stage of premodern jurisprudential thought by about 1820. Id. The first stage was characterized by the prevalence of a cyclical view of history in which change was generally seen as evidencing decay and deterioration; the second stage, by contrast, was characterized by an altered viewpoint in which change (such as the expansion of territory and population, and the improvements in transportation and communication brought about by science and technology) was seen as indicative of progress, but in which jurists understood progress in eschatological terms as "movement toward the realization of eternal and universal principles," this alteration in viewpoint being reflected in changes both in natural law thinking and in American conceptions of government. See id. at 58, 61-65, 74-75, 79-80; see also id. at 11-15 (discussing first and second stage premodern Western thought in general); infra notes 258-61 and accompanying text (discussing natural law thinking); infra notes 381-87 and accompanying text (discussing American conceptions of government).

\textsuperscript{42} The Constitution, of course, enumerates powers of the U.S. government, and distributes those powers among three distinct branches — the legislative branch (i.e., the Congress, consisting of a House of Representatives and a Senate), the executive branch (i.e., the President), and the judicial branch (i.e., the Supreme Court and any lower courts established by Congress) — in such a way that most of the powers of each branch are checked and balanced by powers granted to the other two branches. For a useful analysis of these and other features of the U.S. Constitution, see, for example, ESSENTIAL KNOWLEDGE, supra note 4, at 313-27. For a useful list of the main checks and balances among the three branches of the U.S. government, see KENNETH DAVIS, DON'T KNOW MUCH ABOUT HISTORY 118-19 (2003).

\textsuperscript{43} The Bill of Rights, of course, constrains the powers of the U.S. government and protects the liberties of the people in specific ways (the first eight Amendments), recognizes the potential existence of other non-enumerated rights of the people (the Ninth Amendment), and explicitly reserves to the states or to the people those powers not delegated to the United States or prohibited to the states by the Constitution (the Tenth Amendment). For a useful analysis of the Bill of Rights, see, for example, ESSENTIAL KNOWLEDGE, supra note 4, at 327-31.

\textsuperscript{44} See THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 607-08. For extracts from the text of the Judiciary Act of 1789, see GREAT DOCUMENTS, supra note 5, at 64-65; for the full text see JUDICIARY ACT OF 1789, ch. 20, 1 stat. 73.
acts of Congress; and the enactment of the Reconstruction Acts and adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. In addition, several other legal developments are relevant to the subsequent discussion.

E. Allan Farnsworth provides a very useful overview of several of the most important developments that will suffice for present purposes. Farnsworth explains that during the eighteenth century, prior to the Revolution, there had already been a considerable increase in the influence of English law, in the number of trained lawyers, and in the availability of English law books, including William Blackstone's *Commentaries on the Laws of England*. He then continues:

45. For a discussion of these and other important decisions of the Supreme Court under Chief Justice John Marshall (who held the position of Chief Justice from 1801 until 1835) see GUNDERSEN AND SMELSER, supra note 4, at 64-65, and THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 703-04, 1050-51. For a discussion of the Court under Chief Justice Roger Taney (1836-64), including a discussion of the notorious 1857 *Dred Scott* case (in which Taney ruled that even free blacks were not citizens, and that Congress lacked authority to prevent the expansion of slavery into the new territories), see THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 1051, 1058. For a discussion of the Court under Taney's successor Salmon Chase (1864-73), see id. at 648-49, 1051. For further discussion of the *Dred Scott* case, see id. at 295-96; GUNDERSEN AND SMELSER, supra note 4, at 105.

46. See GUNDERSEN AND SMELSER, supra note 4, at 121-23, together with THE READER'S COMPANION TO AMERICAN HISTORY, supra note 4, at 352, 919-20. For a useful analysis of the Fourteenth and Fifteenth Amendments (adopted in 1868 and 1870 respectively), see ESSENTIAL KNOWLEDGE, supra note 4, at 332-33. For a useful analysis of the Thirteenth Amendment abolishing slavery (adopted in 1865), see id. at 331-32. Lastly, for a useful analysis of the other Amendments adopted earlier during this period, the Eleventh Amendment (adopted in 1798) and the Twelfth Amendment (adopted in 1804), see id. at 331.

47. See E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 8-10 (3d ed. 1996).

48. Id. at 8. For Farnsworth's discussion of the situation during the early colonial period, before the eighteenth century, see id. at 6-8.

With respect to Blackstone's Commentaries, Farnsworth explains that the Commentaries were "widely read," and "it has been said that, by the time of the Revolution ... [they] had sold nearly as many copies in America as in England." Id. at 8. William Blackstone began lecturing on the common law at Oxford University in England in 1753, and was appointed to the newly created Vinerian professorship in English law in 1758; before Blackstone, no lectures on the common law (as opposed to the civil law) had ever been offered at an English university. See id. at 8 n.9, together with *Lecture Hall*, supra note 2, at 12. Blackstone put his lectures into publishable form and the resulting four-volume Commentaries on the Laws of England were published by the Clarendon Press at Oxford University between 1765 and 1769. *Lecture Hall*, supra note 2, at 12. Blackstone's Commentaries were first printed in America in 1771, although many Americans had already bought copies of English editions. See id. (referencing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Philadelphia, R. Bell 1771)). For further
By the time of the Revolution English law had come to be generally well regarded and each colony had a bar of trained, able, and respected professionals, capable of working with a refined and technical system. The colonial legal profession, especially in the cities, had achieved both social standing and economic success. It was also politically active: twenty-five of the fifty-six signers of the Declaration of Independence were lawyers.

Farnsworth explains further that the thirteen original states (and also the additional states subsequently created from the western territories) formally “received” English law into their legal systems as that law existed prior to a specified date, either by enactment (constitution or statute) or by judicial decision alone. However, a state is not bound by developments in English law occurring after the specified date of reception. Farnsworth then completes his discussion of the status of English law in the new states, and describes subsequent developments during our period, as follows:

The Revolution resulted in a setback to the influence of English law in some of the new states because of political antipathy. In a few, anti-British sentiment was implemented by statutes prohibiting the citation of English decisions handed down after independence. At the same time the quality of the practicing bar as a whole declined. There was not even an adequate body of American case law that could be used by those judges who had the ability and inclination to do so. Although reports of cases began to be published at the end of the eighteenth century, they were few in number. The opportunity for broadening the base of American law was considerable. There was some inclination to look to French and Roman law, and European writers were cited, particularly in the fields of commercial law and conflict of laws where English treatises were inadequate. But few judges were versed in modern foreign

discussion of Blackstone’s COMMENTARIES, see infra notes 53, 103, 175-86 and 191-93 and accompanying text.

49. FARNSWORTH, supra note 47, at 8.
50. Id. at 9.
51. Id.
52. Id. Farnsworth elaborates upon this point as follows:

Some lawyers, who had been loyalists, had left the country before the end of the war; others, seizing the opportunity for leadership, accepted political or judicial posts under the new government. The standards and repute of the remainder deteriorated in many communities. The era of the lay judge was not entirely over and during the early nineteenth century the state of Rhode Island had a farmer as chief justice and a blacksmith as a member of its highest court.

Id. For further discussion of the varying types and quality of judges and lawyers during our period, see, for example, FRIEDMAN, supra note 2, at 303-14, 633-48 (lawyers), and at 124-38, 371-81 (judges). In a comment that provides a useful perspective on the matters discussed in Part II.B.2 of this article (addressing the professional ideal that prevailed for much of the period), Friedman observes that “[t]he Eastern and Southern statesman-lawyer was a far cry from the dusty rider of the plains.” Id. at 310.
languages and, while English treatises and reports were available, the *Code Napoléon* did not appear until after the beginning of the nineteenth century. Blackstone's *Commentaries*, which was available in American editions throughout the nineteenth century, was particularly influential.53

During the first part of the nineteenth century, agriculture and trade dominated the economy as energies went into the westward expansion and the production of staples for European markets. Judges labored to shape English legal materials to fit the conditions of their particular jurisdictions. They examined the pre-Revolutionary English law to determine its applicability to American conditions and laid the foundations of such fields as contracts, torts, sale of goods, real property, and conflict of laws.

There was constant legislative intervention in such areas as procedure, criminal law, marriage and divorce, descent and distribution, wills and administration of estates.64 Sometimes the law grew out of local usages or needs . . . . 65 But it was also an era of great "national" treatises such as James Kent's *Commentaries on American Law*, published from 1826 to 1830,66 and nine works by

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53. For a discussion of these American editions, see Sheppard, *Lecture Hall*, supra note 2, at 12 ("Blackstone's own editions were not the sole basis for his enduring fame and influence on American legal education. For the next five decades [after 1771] scores of annotated COMMENTARIES poured forth. Various authors annotated Blackstone's original text with the newly written law of England and, more particularly, of the American courts"); id. at 12 n.56 ("Of the many American editions of Blackstone, three seem to have had the greatest academic influence: St. George Tucker's in 1803, Sharswood's in 1859, and Cooley's in 1870"). For discussion of Blackstone's original text, see supra note 48 and accompanying text and infra notes 178-84 and accompanying text. For further discussion of St. George Tucker's 1803 American edition of Blackstone's COMMENTARIES, see infra notes 103, 118, 185-86 and accompanying text. For further discussion of the legal literature of the period, see the references cited infra note 176.

54. FARNSWORTH, supra note 47, at 10. For an in-depth discussion of developments in all the different fields and areas of law during our period, see FRIEDMAN, supra note 2, at 107-56, 177-302, 391-605.

55. FARNSWORTH, supra note 47, at 10. Farnsworth elaborates upon this point as follows:

The customs of western farmers and gold miners formed the basis for water and mining law in some of the western states. Some of the prairie states where cattle-raising was the means of livelihood and wood for fences was scarce, changed the English rule that the owner of cattle is liable without fault for damage that they may cause to a neighboring crop-owner.

*Id.*

56. *Id.* Farnsworth includes the following biographical note on James Kent:

James Kent (1763-1847) became the first professor of law at Columbia College in 1793. He resigned in 1798 to go on the New York Supreme Court and was appointed Chancellor of the state in 1814. Upon his retirement in 1823 he returned to Columbia, and during this period he published his *Commentaries on American Law*, a collection of his lectures dealing with nearly all phases of contemporary substantive law.
Joseph Story published from 1832 to 1845.57 These treatises, which went through many revisions, played an important role in promoting uniformity by helping to counter the forces which contributed to diversity.58

Id. at 10 n.11; see JAMES KENT, COMMENTARIES ON AMERICAN LAW (Da Capo Press 1971) (1826-1830). For further discussion of Kent's COMMENTARIES, see infra notes 104, 120, 175-77, 187-93 and accompanying text. For further discussion of Kent's law program at Columbia, see infra notes 120, 125, 130-32 and accompanying text.

57. FARNSWORTH, supra note 47, at 10. Farnsworth includes the following biographical note on Joseph Story:
Joseph Story (1779-1845) was appointed to the United States Supreme Court in 1811. In 1829, while retaining his seat on the Court, he became a professor of law at the Harvard Law School, where he reorganized the curriculum and revitalized the school. His nine commentaries developed from his lectures on subjects ranging from the Constitution to conflict of laws.

Id. at n.12. Sheppard, Lecture Hall, supra note 2, at 17 n.157, gives the following citations for Story's nine Commentaries: COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION (Boston, Hilliard, Gray & Co., 1833); COMMENTARIES ON THE CONFLICTS OF LAWS, FOREIGN AND DOMESTIC: IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (Boston, Hilliard, Gray & Co., 1834); COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA (Boston, Hilliard, Gray & Co., 1836); COMMENTARIES ON EQUITY PLEADINGS, AND THE INCIDENTS THEREOF: ACCORDING TO THE PRACTICE OF COURTS OF EQUITY, OF ENGLAND AND AMERICA (Boston, Little & Brown, 1840); COMMENTARIES ON THE LAW OF AGENCY: AS A BRANCH OF COMMERCIAL & MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW (Boston, Little & Brown, 1839); COMMENTARIES ON THE LAW OF BAILMENTS: WITH ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW (Cambridge, Hilliard & Brown, 1832); COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE, FOREIGN AND INLAND, AS ADMINISTERED IN ENGLAND AND AMERICA: WITH OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE (Boston, Little & Brown, 1843); COMMENTARIES ON THE LAW OF PARTNERSHIP: AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW (Boston, Little & Brown, 1841); COMMENTARIES ON THE LAW OF PROMISSORY NOTES, AND GUARANTIES OF NOTES AND CHECKS ON BANKS AND BANKERS: WITH OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE (Boston, Little & Brown, 1845).

For further discussion of Story's series of treatises, see infra notes 175-77, 194-97 and accompanying text. For further discussion of the law programs at Harvard Law School under Story, see infra notes 144-57, 167-68 and accompanying text.

58. FARNSWORTH, supra note 47, at 10. Farnsworth concludes his overview of legal developments during the first half of the nineteenth century by observing that "[o]ut of the first half of the century came institutions and procedures that still survive. But the functions they now perform and the issues they now deal with often differ from those of the earlier formative period." Id. He then notes that "[t]he years of the Civil War, 1861 to 1865,
In the above passage, Farnsworth singles out Blackstone's *Commentaries*, Kent's *Commentaries*, and Story's series of treatises as being especially important within the legal literature of the period. Perhaps unsurprisingly then, as we shall see in Part II below, these works also played a central role in the legal education of the period.

II. LEGAL EDUCATION DURING THE FIRST PHASE

Before embarking upon our exploration of U.S. legal education during this first phase, it may be helpful to indicate how the various sections in this part relate to each other. Each section is intended to be of interest in its own right. However, the overview of formal legal education settings in Section A is also intended to provide a framework for the subsequent discussion in Section B, addressing the jurisprudential ideas and professional ideal that prevailed for much of the period; and both Section A and Section B are intended to provide a framework for the subsequent discussion in Section C, containing my own analysis and evaluation of the curricula of studies followed in the various formal legal education settings. A consequence of this organization is that the discussion of curricula which is part of the overview in Section A is in a sense only completed in Section C.

A. Overview of Formal Legal Education Settings

Subsection 1 will consider various general matters relevant to an understanding of formal legal education settings during this first phase, and Subsection 2 will examine the different formal legal education settings themselves. Subsection 3 will then address the significant legal literature of the period, focusing especially on those works by Blackstone, Kent, and Story that were typically part of a formal legal education.

1. General Considerations

During this first phase, there were a number of different settings in which it was possible to receive some type of formal professional legal education. The most common setting

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59. For a general discussion of these various settings, see STEVENS, supra note 2, at 3-34; FRIEDMAN, supra note 2, at 318-22, 606-12; Ames, supra note 2, at 1003-05; Martin Levine, Legal Education and Curriculum Innovation: Law and Aging as a New Field of Law, 65 MINN. L. REV. 267, 271-72 (1980); Brian Moline, Early American Legal Education, 42 WASHBURN L.J. 775 (2004); Pound, supra note 2, at 685-86; Sheppard, Lecture Hall, supra note 2, at 8-25. See also Mark Warren Bailey, Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science, 48 J. LEGAL EDUC.
throughout the entire period was an apprenticeship (or clerkship) in the office of a practicing lawyer. At the same time, the foundations were being laid for the institutionalization of legal education.

Despite the opportunities for a formal legal education, there was a significant decline, during the course of this period, in the number of jurisdictions requiring any formal training for entry into the profession. During the early part of this first phase, almost all of the thirteen original states seem to have required some period of formal apprenticeship training. Subsequently, however, partly or even largely as a result of the atmosphere created by Jacksonian Democracy in the 1830s and 40s, there was a significant decline in educational standards and requirements for admission to the bar. In 1840, a period of apprenticeship training was required in no more than 11 out of 30 jurisdictions; in 1860 it was required in only 9 out of 39 jurisdictions, and

311 (1998) (discussing the jurisprudential thought of American legal educators in the late eighteenth and early nineteenth centuries and the materials they used); Hoeflich, Theory and Practice, supra note 2, at 861-75 (discussing briefly the apprenticeship system of legal education, and also discussing the debate over the integration of theory and practice in university-based legal education, particularly during the first phase); Peden, supra note 2, at 1106-11 (discussing the apprenticeship system, the rise of formal instruction in law, and their relationship to state bar admission requirements); Sheppard, Final Exams, supra note 2, at 820-23 (describing the method of evaluation by examinations employed at Litchfield and at university law schools); Swygert and Bruce, supra note 2, at 966-76 (describing the various forms of legal education—treatises, law reports, and legal periodicals—during the first phase, prior to the publication of the first student-edited law review in 1875). For a detailed discussion of pertinent developments in one particular state, see Hunter, Institutionalization, supra note 2, at 406-46 (discussing developments in North Carolina).

For a survey of the methods of legal education during the colonial period, see Charles R. McManis, The History of First Century American Legal Education: A Revisionist Perspective, 59 WASH. U. L.Q. 597, 600-06 (1981) (identifying the three principal methods as “(1) study in England at the Inns of Court; (2) self-education by reading one or more books in law; or (3) apprenticeship with a member of the legal profession or in the clerk’s office of a court”). For further discussion, see FRIEDMAN, supra note 2, at 97-98; Davison M. Douglas, The Jeffersonian Vision of Legal Education, 51 J. LEGAL EDUC. 185, 188-92 (2001); Craig Evan Klafter, The Influence of Vocational Schools on the Origin of American Legal Thought 1779-1829, XXXVII AM. J. LEGAL HIST. 307, 310-13 (1993); Moline, supra, at 776-91.

60. The commentaries appear to vary in their understanding of the term “clerkship” (and the counterpart term “clerk”), some regarding it as synonymous with “apprenticeship” and others regarding it as an inferior form of apprenticeship.

61. See Stevens, supra note 2, at 3. The one exception was Virginia, which relied instead upon the bar examination to maintain the quality and educational qualifications of the bar. See STEVENS, supra note 2, at 3 & n.6; REED I, supra note 2, at 85, 96-97.

62. See Stevens, supra note 2, at 7-10, 25.
everywhere bar examinations were oral and usually casual. In addition, very few states required even a rudimentary general education, although many states did impose a minimum age requirement of twenty-one for admission to the bar. Consequently, it seems that, due to the absence in most jurisdictions of any meaningful requirements for admission to the bar, many of those practicing law during the latter part of the period may have received no formal legal education at all.

63. Id. at 7-8, 25 (citing REED I, supra note 2, at 86-87). For an indication of the length of the required period of apprenticeship in those jurisdictions requiring apprenticeship at some time during this first phase, see REED I, supra note 2, at 83-84 (listing fifteen states and the Northwest Territory requiring periods of preparation of three years or more at any time before the Civil War, and also indicating a reduction in the period, in some states, for college graduates). For discussion of the recognition, in some states, of work done at a local law school as a complete or partial substitute for a prescribed period of apprenticeship, see id. at 243-48 (discussing as well the possibility, in various states, of receiving credit for apprenticeship or law school work done out of state). For discussion of the exemption from Bar examinations, in some states, for graduates of certain law schools (the so-called "diploma privilege"), see id. at 248-53.

64. See REED I, supra note 2, at 314-15. For further details regarding requirements for admission to the bar, and their decline during the course of this period, see id. at 67-90.

65. Relying upon figures for the U.S. census, which was first completed in 1850, Reed gives statistics on the number of lawyers for three dates during our period: 1850: 23,939 (103 lawyers per 100,000 population); 1860: 34,839 (111 lawyers per 100,000 population); 1870: 40,736 (105 lawyers per 100,000 population). REED I, supra note 2, at 442 app. II, tbl.1 (noting, however, the considerable inaccuracy of the 1870 census, id. at 442 n.2). Reed also gives comparative figures for physicians and clergymen. Id. at 442 app. II, tbl. 2. Although Reed notes the difficulty of obtaining figures for years before 1850, he considers that the figures for the number of lawyers in the state of New York in 1818 suggest the same sort of ratio, i.e., 100 lawyers per 100,000 population. Id. at 442 n.2. Accord FRIEDMAN, supra note 2, at 304 (explaining that “after the Revolution... the number of lawyers grew fantastically” as illustrated by the situation in Massachusetts and Virginia, and giving figures for Massachusetts demonstrating the dramatic increase in the number of lawyers, both absolutely and in ratio to the population, across the years 1740, 1790, 1800, 1810, and 1840).

66. Perhaps the most famous example of a self-educated lawyer during this period is Abraham Lincoln, who studied law in the early 1830s, being admitted to the Illinois bar in 1836. See AMERICAN HERITAGE: THE PRESIDENTS 190-91 (Michael Beschloss ed. 2003). In 1858, Lincoln famously advised that “the cheapest, quickest and best way” to become a lawyer was to “read Blackstone’s COMMENTARIES, Chitty’s Pleadings, Greenleaf’s Evidence, Story’s Equity and Story’s Equity Pleading, get a license, and go to the practice and still keep reading” (as quoted in FRIEDMAN, supra note 2, at 606). Of greatest concern, perhaps, to those advocating the need for formal legal training were the so-called “pettifoggers,” who were defined by one observer in 1842 as follows:

Pettifoggers are those who without any preparatory study enter our lower courts with a few snatches of what they call law picked up at the Corners of Streets. These they rant & rave — quibble upon words —
As suggested above, and as we shall see in greater detail in Subsection 2 below, throughout the whole period most lawyers who did in fact receive some type of formal legal education received it in the form of an apprenticeship (or clerkship) rather than in the form of institutionalized legal education (and indeed continued to do so until the end of the century). Some of them combined the two. Many of them, moreover, spent a period of study at a college before beginning their formal legal education.

As far as college education itself is concerned, the number of colleges expanded from 9 on the eve of the Revolution to 46 by 1831, 119 by 1850, and 217 by 1860. Seven of the nine pre-Revolutionary colleges were denominational, as were many (perhaps most) of the colleges founded during our period. Although suffering a decline in rigor during the two generations preceding the Civil War, the standard college curriculum during the period has been described in the following terms:

Students were admitted whenever they acquired sufficient skills in Latin and Greek, and they went through four years of study as a unified class. The first two years were heavily devoted to Latin and Greek.

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LAPIANA, supra note 2, at 44-45 (quoting Aaron Barlow Olmstead, Diary of Aaron Barlow Olmstead, microformed on Misc. Microfilms, reel 14 (New York Historical Society)). On the other hand, the number of those who received some type of formal legal education may be significantly higher than might be suggested by the absence in most states of meaningful formal educational requirements for admission to the bar. This is because the continued existence of various visible and invisible barriers to beginning a successful law practice may have operated to favor those with a formal legal education over those who lacked such an education. See, e.g., LAPIANA, supra note 2, at 45-48 (identifying barriers in the form of: cooperation by the judiciary responsible for examining those without formal educational qualifications, professional ostracism, start-up costs, the role of family connections, domination of the bar by a few influential practitioners, and the importance of obtaining the goodwill of established practitioners, for example, through clerkship).

See Stevens, supra note 2, at 24 and 95; Friedman, supra note 2, at 322.

See FRIEDMAN, supra note 2, at 320, 606; REED I, supra note 2, at 243-48.

See FRIEDMAN, supra note 2, at 606; Bailey, supra note 59, at 312; see also infra notes 79, 96, 128, 168 and accompanying text.

In 1860, sixty percent of the colleges were in the Midwest or Southwest; and “most were small, impecunious, and faithful to the classical curriculum.” Id. at 322. Although more elitist in the East, college education was more popularly based nearer the frontier. Id. at 321-22. Estimates of attendance percentages during the antebellum period seem to vary. Compare id. at 316 (“5 percent of the population” during the antebellum period), with id. at 322 (“1 percent of white males” by 1860). For further discussion of the “classical curriculum,” see infra note 72 and accompanying text.

See THE READER’S COMPANION TO AMERICAN HISTORY, supra note 4, at 321-22.
Greek, and the third and fourth included a sampling of philosophy (metaphysics, ethics, logic), history, and natural science. The curriculum grew more secular over time with the inclusion of science, especially Newtonian mechanics. The chief practical emphasis was public speaking or oratory.\footnote{Id. at 320-21. For developments towards the very end of the period, see id. at 322 (explaining that “after the Civil War, the principal types of higher education took form: agricultural colleges, institutes of technology, colleges for women, and universities appeared. The old-time colleges became liberal arts colleges”). The reference to the appearance of universities in the quotation seems to be concerned with the modern university, possessing such characteristics as student choice among courses, new pedagogical methods, the encouragement of faculty scholarship, full-time faculty in professional schools, and the promotion of research and graduate education. Id. at 322. As will be seen in the remainder of this Section, the term “university” already had been used to refer to institutions of higher education before the Civil War. However, it seems that such institutions were still essentially colleges. See Stevens, supra note 2, at 35.}{1063}

2. Formal Legal Education Settings

Subsection a below will examine apprenticeship training, and Subsection b will then examine institutionalized legal education (independent law school programs, and college/university law programs, and methods of instruction).

a. Apprenticeship training

The usual method of apprenticeship training seems to have involved some combination of directed reading, conversation with one's mentor, observation of the practice, and the performance of routine office tasks, particularly the copying of legal documents.\footnote{For a general description of apprenticeship training, see FRIEDMAN, supra note 2, at 318-19; Bailey, supra note 59, at 312-13, 315-16, 319-22; Levine, supra note 59, at 271. A more concrete impression of the nature of apprenticeship training may be obtained by considering some individual apprenticeship experiences. For a description of James Kent's experience, see James Kent, Letter of October 6, 1828, reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 120; Langbein, supra note 2, at 210; Sheppard, Lecture Hall, supra note 2, at 10. For a description of Joseph Story's experience, see Sheppard, Lecture Hall, supra note 2, at 9-10; Joseph Story, Autobiography, reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 124, 127-28; William Story, Life and Letters of Joseph Story, reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 130-37. For a description of some other individual experiences, see Hunter, Institutionalization, supra note 2, at 408 (describing the apprenticeship experience of George Badger in North Carolina); id. at 417-19 (describing apprenticeship experiences under Badger himself); see also Stevens, supra note 2, at 3 n.5, 24 n.28, 24 n.33 (the latter references discuss experiences later in the nineteenth century).}{1063}
Reading the descriptions of individual apprenticeship experiences would suggest that apprenticeship training varied significantly in quality. It is very difficult to reach any firm conclusions about the general quality of apprenticeship training. In this regard, Robert Stevens observes that "[o]ne of the difficulties of analyzing the controversy about apprenticeship (or clerkship) is that there are relatively few descriptions about how the system worked in the nineteenth century that can be regarded as typical. Generally, atypical eulogies or blatant attacks have survived." It is possible, nevertheless, to articulate an operating ideal or model that different apprenticeship experiences may have approximated to a greater or lesser extent. Thus, Mark Warren Bailey considers that "the course of studies pursued in the first half of the nineteenth century" remained remarkably similar to the curriculum set by William Smith of New York in the mid-1750s, a curriculum that "accurately represented the humanistic ideal that underlay legal studies in the apprenticeship system." More specifically, Bailey explains that:

Smith's curriculum included general studies in English, Latin, and French; writing; mathematics, including geometry and accounting; history and geography; logic and rhetoric; divinity; and the law of nature and nations. In addition to reports of cases in common law and equity, precedents, and entries, Smith assigned to his students general treatises . . . [on the common law] . . . as well as works on natural and civil law . . . . This curriculum offered an ambitious course of study comprising a broad sampling of the arts and sciences (a requirement otherwise fulfilled by a Bachelor of Arts degree), an introduction to a general knowledge of law, and finally an in-depth study of both the theory and practice of law.

74. See supra note 73. For further discussion of the varying quality of apprenticeships, and of the criticisms leveled at the apprenticeship system, see, for example STEVENS, supra note 2, at 24, 25 & n.41; Bailey, supra note 59, at 314-15; Hoeflich, Theory and Practice, supra note 2, at 863; Hunter, Institutionalization, supra note 2, at 409, 418-19. For a discussion of the varying quality of apprenticeships during the earlier, colonial period, see FRIEDMAN, supra note 2, at 97-98. For a description of some individual apprenticeship experiences during the colonial period, see Hunter, George Wythe, supra note 2, at 140 (Wythe's experience); id. at 142-43 (Jefferson's experience under Wythe); Coquillette, supra note 2, at 76-80 (John Adams' apprenticeship experience and post-admission quasi-apprenticeship experience). See also Douglas, supra note 59, at 190-91 (focusing on negative descriptions during the colonial period).
75. Stevens, supra note 2, at 24 n. 28.
77. Id. The terms "precedents" and "entries" may require some explanation. The term "precedents" refers to collections of common-form instruments providing forms for use in pleading and conveyancing. See BLACK'S LAW DICTIONARY 1215 (8th. ed. 2004). The term "entries" refers to various kinds of record-keeping notations. See id. at 574.
Although apparently absent from the Smith curriculum in the 1750s, it seems that many apprenticeship experiences during our period included a specific consideration of political theory as a separate subject as well.\(^8\) As the passage above suggests, an apprentice may have received a college education before beginning his apprenticeship, in which case, presumably, the general studies in the arts and sciences would be unnecessary. Indeed, Bailey explains that “[l]egal education from the 1740s onward frequently consisted of a period of study at a college followed by a law-office apprenticeship” and that “[t]his pattern of education did not change markedly until the last quarter of the nineteenth century.”\(^7\)

b. Institutionalized legal education

Parallel to apprenticeship training, a number of different foundations were laid for the institutionalization of legal education

\(^7\) See Bailey, supra note 59, at 323. Such specific consideration of political theory presumably would have been in addition to whatever general treatment such matters received in various treatises on the law of nature or on the common law that mentors also assigned to their apprentices. For discussion of the treatment of matters of political theory in Blackstone's COMMENTARIES, see infra notes 184-86 and accompanying text.

Apart from the apparent absence of a specific consideration of political and governmental theory and of certain natural sciences, Smith's curriculum is also remarkably similar in breadth to the course of independent study that Thomas Jefferson continued to recommend for almost fifty years, from the early 1770s until the early 1820s. For a general discussion of Jefferson's recommendations, see Cohen, supra note 2, at 169-78. Douglas summarizes Jefferson's recommendations as follows:

When asked, as he frequently was, what an aspiring lawyer should read, Jefferson recommended basic legal texts such as treatises, statutes, and case reports, but also insisted that the aspiring lawyer engage in much broader study: languages (particularly French), mathematics, science (astronomy, physics, natural history, anatomy, botany and chemistry), political theory, ethics, and history. He also urged broad exposure to the theories of government — both ancient and modern.


It is perhaps telling that, rightly or wrongly, and despite his own positive apprenticeship experience under George Wythe, see supra note 74, infra note 102, Jefferson himself considered it preferable to pursue such a course of independent study rather than to train as an apprentice, because “the services expected in return are more than the instructions are worth.” Cohen, supra note 2, at 171-72. However, Jefferson was certainly not opposed to formal instruction in law. For discussion of Jefferson's ideas regarding institutionalized legal education, see infra notes 111, 158, 402 and accompanying text.

\(^7\) Bailey, supra note 59, at 312. For a description of the standard college curriculum, see supra note 72 and accompanying text.
during this first phase.

(1) Independent law school programs

To begin with, it was possible to study law at an independent, or proprietary, law school. In these independent law schools, which developed out of the apprenticeship system, a lawyer offered instruction to more students than could be taught in an office. Indeed, in some cases there may have been very little, if any, functional difference between an independent law school and a law office providing apprenticeship experiences to several apprentices simultaneously.

The first independent law school to be established, and probably the most well-known, was the Litchfield School of Tapping Reeve and James Gould, which is generally considered to have been founded by Judge Reeve in 1784, and which lasted until 1833. Litchfield’s graduates wielded considerable social and political influence. As Steve Sheppard explains, the Litchfield School “had over a thousand graduates, many of whom were drawn from the social elite and led the young republic, including three U.S. Supreme Court members, fifty-six state supreme court judges, twenty-eight Senators, one hundred and one Congressmen, fourteen governors, six U.S. Cabinet members, and eight

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80. See FARNSWORTH, supra note 47, at 16; Pound, supra note 2, at 686. For a description of the process whereby such a school might develop out of a law office providing apprenticeship experiences, see FRIEDMAN, supra note 2, at 319. For a general discussion of these independent law schools, see id. at 319-20; REED I, supra note 2, at 128-33; Klather, supra note 59, at 322-31; McManis, supra note 59, at 617-20. For more detailed discussion of the Litchfield School, see infra notes 82-83, 90-95 and accompanying text. For a detailed discussion of independent law schools in North Carolina during this period, see Hunter, Institutionalization, supra note 2, at 413-17, 424-25, 432-46.

81. See REED I, supra note 2, at 132; Hunter, supra note 2, at 415.

82. See REED I, supra note 2, at 128-30, 132. For descriptions of the Litchfield School, and its program of instruction, see id. at 130-32, 453-54; FRIEDMAN, supra note 2, at 319-20; STEVENS, supra note 2, at 3-4, 39 n.36; Ames, supra note 2, at 1004-05; Hunter, Institutionalization, supra note 2, at 412; Sheppard, Final Exams, supra note 2, at 820; Sheppard, Lecture Hall, supra note 2, at 13-14; Peden, supra note 2, at 1107-08; Andrew Siegel, “To Learn and Make Respectable Hereafter”: The Litchfield School in Cultural Context, 73 N.Y.U. L. REV. 1978 (1998). Gould became Reeve’s partner in 1798. REED I, supra, at 130. For Judge Gould’s own description of the aims and methods of the Litchfield program in 1822, see James Gould, Law School at Litchfield, 3 U.S. L. J. 400 (1823), reprinted in THE HISTORY OF LEGAL EDUCATION, supra note 2, at 187, 187-89. For documents related to the Litchfield School, see THE HISTORY OF LEGAL EDUCATION, supra, note 2, at 181-86 (reproducing an “Advertisement of the Litchfield School” from the school’s 1828 Catalog, the “Rules of the Debating Society of Law Students in Mr. Reeve’s Office 1794-98,” and the “Laws of the Office and Library Catalogue 1800-1810”); id. at 190-204 (reproducing several students’ “Letters Home from 1827-28”, and listing “Litchfield Law Students 1790-1830”).
professors, not counting educator Horace Mann. The Litchfield School served as a model for several other independent law schools in a number of states. Thus, Sheppard reports that "by 1835, there were, or had been, eighteen other law schools independent of a university, each offering programs of instruction resonant with Reeve's and Gould's" at Litchfield.

Although most independent law schools seem to have lasted for only a few years, such schools were a continuing phenomenon throughout the whole period. It seems that, as in the case of Litchfield, many of the graduates from other independent law schools also may have been drawn from the wealthy social elite who could afford to pay the expenses of such an education. Moreover, again as in the case of Litchfield, it also seems that a disproportionate number of these graduates subsequently "became the leaders of the American bar and held prominent political positions." By 1900, however, the Litchfield type of independent law school had virtually disappeared due to competition from the increasing number of university law schools.

In these independent law schools, the law school curriculum itself appears to have been rather narrow in scope. To take Litchfield as an example, although neither Reeve nor Gould published their lectures, various manuscript lecture notes convey some idea of the topics covered in the Litchfield curriculum, as well as the degree of emphasis given to each one. For instance, the topics covered in the Baldwin manuscript of 1813, and the number of manuscript pages devoted to those topics, are as follows: Introductory (50), Domestic Relations (194), Executors and Administrators (69), Sheriffs and Gaolers (41), Contracts with Its Actions (378), Torts (74), Evidence (72), Pleading (281), Practice

83. Sheppard, Lecture Hall, supra note 2, at 13 (citing MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL xvi, 175 (1986)). For statistics on attendance in selected years, see REED I, supra note 2, at 130, 450 app. II, tbl. II.
84. See REED I, supra note 2, at 132-33.
85. Sheppard, Lecture Hall, supra note 2, at 14. See also id. at 13 ("The Litchfield lectures established the framework for instruction in the professional law school.").
86. See REED I, supra note 2, at 132-33, 431-33 app. I.B (providing a state-by-state chronological listing of independent law schools); Klafter, supra note 59, at 323 n.83 (listing proprietary law schools founded before 1830).
87. See Klafter, supra note 59, at 324-25.
88. Id. at 330-31 (citing figures regarding the legal profession in the state of Connecticut between 1820 and 1830 as being suggestive of the influence of proprietary law schools in general).
89. See FRIEDMAN, supra note 2, at 606-07. The competitive advantage of university law schools derived not only from their prestige but also, and more especially, from their power to award degrees. See REED I, supra note 2, at 189.
90. See REED I, supra note 2, at 131.
(68), The Law Merchant (266), Equity (51), Criminal Law (64), Real Property with Its Actions (364).91 The curriculum also included optional moot courts and debating societies,92 and it seems to have required one year or fourteen months to complete (depending on whether or not the student intended to take Connecticut Practice).93 With respect to the apparently narrow focus of the curriculum, Steve Sheppard comments that “[t]he course was rooted in the practicalities of the common law governing private disputes, skipping public law topics of Constitutional government and politics, Roman civil law, and ‘stately lectures on the great principles of the Laws of Nature.’”94 Rather clearly, then, it appears to lack the breadth of the William Smith “model” curriculum in the apprenticeship setting.95 On the other hand, it seems that most students at the independent law schools about whom information exists had graduated from college and that, at least at some schools, those who had not attended college were given a brief course of general instruction before beginning their legal studies.96

91. See id. at 453 (also noting variations among different manuscripts). The curriculum was based on Blackstone, adapted to American conditions. See id. at 131, together with STEVENS, supra note 2, at 3.

92. REED I, supra note 2, at 131. It seems that the moot courts, although optional under Reeve, became required sometime after Gould joined him at Litchfield. See Siegel, supra note 82, at 2008.

93. REED I, supra note 2, at 131. This was based upon a daily lecture of seventy-five to ninety minutes and two vacations of four weeks each. Id.; see also id. at 453 (referring to Litchfield under Reeve as a “one-year school”).

94. Sheppard, Lecture Hall, supra note 2, at 13 (quoting MCKENNA, supra note 83, at xvi). For a description of other such independent law schools, and their programs of instruction, in North Carolina, see Hunter, supra note 2.

95. See supra notes 76-78 and accompanying text.

96. See Klafter, supra note 59, at 325. For a description of the standard college curriculum, see supra note 72 and accompanying text. With respect to the alternative brief course of general instruction, Klafter describes a plan for such a course, developed by Peter Van Schaak, “which suggested six categories of learning which law students would have frequent occasion to use in their study and practice of law,” namely: (1) English, Latin and French; (2) Writing, Arithmetic, Geometry, Surveying, Merchants Accounts or Bookkeeping; (3) Geography, Chronology, History; (4) Logic and Rhetoric; (5) Divinity (including Ethics); (6) Economics and Politics. Id. It will be noted that, with the exception of Economics and Politics, these subjects are virtually identical to the general studies subjects included in the William Smith curriculum in the apprenticeship setting. See supra note 77 and accompanying text. But see supra note 78 with regard to the study of political theory in many apprenticeship experiences. Van Schaak operated a proprietary law school at Kinderhook in New York between 1786 and 1828 or 1830. See REED I, supra note 2, at 431 app. I.B (1828); Klafter, supra, at 323 n. 83 (1830).
(2) College/University Law Programs

(i) Early Law Programs

It was also possible to study law at a college or university. During the early part of the period, however, professional law was taught only at a small number of colleges and universities,\(^9\) and the law program was part of the general curriculum.\(^8\) Chairs of law were established at the College of William and Mary (1779), the College of Philadelphia (1790) (which merged, shortly thereafter, with the University of Pennsylvania), Columbia College (1793), Transylvania University (1799), and the University of Maryland (1816).\(^9\) Some of the past incumbents are especially

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97. See REED I, supra note 2, at 423 app. I.A (providing a chronological listing of "institutions offering residential instruction in professional law"). The relevant entries in the present context are: William and Mary College (1779-1861, 1920—), University of Pennsylvania (College of Philadelphia) (1790-92, 1817-18, 1850—), Columbia University (1794-98, 1824-26, 1858—), Transylvania University (Kentucky University) (1799-1861, 1865-79, 1892-95, 1905-12), and, University of Maryland (1823-32, 1870—). Id. It should be noted that the dates given by Reed are the dates of actual operation rather than the date on which a Chair of Law was established, and that some of these dates occur beyond our time period.

98. See, e.g., FRIEDMAN, supra note 2, at 320-21; Sheppard, Lecture Hall, supra note 2, at 14-17.

99. See FRIEDMAN, supra note 2, at 320-21, together with Sheppard, Lecture Hall, supra note 2, at 14-17. It seems that, for Reed, these five law programs qualified to be on Reed's list of institutions offering "instruction in professional law," see supra note 97, because they included instruction in "municipal law," in particular the common law, and because they were all at least partly intended to help prepare students to become, and/or to help existing practitioners to become better, practicing members of the legal profession. See REED I, supra note 2, at 116 (apparently equating "professional law" with "municipal law"); id. at 120 (explaining that the term "municipal law" includes in particular the common law); id. at 134 (characterizing the programs or other initiatives at various New England and other colleges between the Revolutionary War and the War of 1812 as offering instruction in "[n]on-professional [l]aw" because they did not aim at educating lawyers but only at providing such instruction in subjects such as jurisprudence, politics, natural law and the law of nations as should be part of everyone's general education); id. at 116-18, 120-27 (describing the law programs at William and Mary, Transylvania, Columbia, Philadelphia, and Maryland).

Arguably, the law program at Harvard College, which began operation in 1816, also belongs on Reed's list because, as Reed explains elsewhere, the program included instruction in municipal law and was also intended to appeal to "prospective lawyers" as well as others. See id. at 137. Reed may have omitted it from his list, however, because the envisaged minimum of fifteen lectures was so manifestly inadequate, and because a separate professional law school was established at Harvard the following year, in 1817. See id. at 137-39. For further discussion of the law program at Harvard College, see infra note 122. For further discussion of the establishment and development of Harvard Law School, see infra notes 134, 144-56, 167-68 and
important figures in the history of U.S. legal education. Examples include Judge George Wythe and his successor Henry St. George Tucker at the College of William and Mary (1779-89, 1789-1804 respectively); Chancellor James Kent at Columbia College (1793-97, 1824-26); and David Hoffman at the University of Maryland (1816-32).  

Wythe’s importance stems in particular from the crucial role he played in forming the mind and character of his students, many of whom became important leaders in the young Republic. Among the most famous are Thomas Jefferson, who was Wythe’s apprentice in 1762-65; John Marshall, who was in Wythe’s first law class at William and Mary in 1780; and Henry Clay, whom Wythe tutored for four years beginning in 1793. The importance of Tucker, Kent, and Hoffman, on the other hand, resides more in their publication of important texts, which they developed in connection with their teaching activities and which then became influential in legal education. Tucker published an Americanized edition of Blackstone’s Commentaries in 1803; Kent published accompanying text.

100. See, e.g., FRIEDMAN, supra note 2, at 320-21; Sheppard, Lecture Hall, supra note 2, at 14-17; see also Paul D. Carrington, The Revolutionary Idea of Legal Education, 31 WM. & MARY L. REV. 527, at 533-38 (1990) (Wythe); id. at 538-40 (Tucker); id. at 552-54 (Kent); id. at 566-68 (Hoffman); Douglas, supra note 59, at 200-03, 206-07 (Wythe); id. at 203-06 (Tucker); id. at 207-08 (Kent). Of all these early law programs, Hoffman’s may have been the most segregated from the rest of the university and arguably, therefore, could also perhaps be considered together with the university law schools (and equivalent programs) established during the second part of the period, see infra notes 133-34 and accompanying text, particularly as Hoffman did not actually begin delivering lectures until 1823. See REED I, supra note 2, at 123-24. For a discussion of the precursors of these early law programs in colonial colleges, see id. at 112-14; Douglas, supra note 59, at 197-99.

101. See Hunter, George Wythe, supra note 2, at 151-54.

102. Id. at 142-43, 149, 160. As far as Wythe’s William and Mary students are concerned, Davison Douglas explains that they “assumed an extraordinary variety of executive, legislative, and judicial offices;” thus, one became secretary of state (John Marshall), another became attorney general and U.S. senator, seven others became U.S. senators, another became an associate justice on the U.S. Supreme Court (in addition to John Marshall who became Chief Justice), and many became members of the U.S. House of Representatives. In addition, of the forty-three judges who were members of the Virginia Court of Appeals before the Civil War, twenty-five received a legal education at William and Mary. Douglas, supra note 59, at 186 n.4 (citing Hunter, George Wythe, supra note 2, at 138, 151-53, 154 n.141). James Monroe may also have been one of Wythe’s William and Mary students for a brief period. Id. (citing Hunter, George Wythe, supra note 2, at 150). The list may be considerably longer because about ninety percent of Wythe’s students are still unknown. Hunter, supra note 2, at 154 n.141.

103. REED I, supra note 2, at 117; Carrington, supra note 100, at 540; Sheppard, Lecture Hall, supra note 2, at 14; see HENRY ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED
his own *Commentaries on American Law* in 1826-30, which went through six editions before his death in 1847 (the final, fourteenth edition of which appeared in 1896); and Hoffman published his comprehensive and exhaustive *A Course of Legal Study* in 1817, which served as a treatise as well as an organized collection of readings and references (with a revised, second edition in 1836).

There seems to be some question how far the purpose of these early college/university law programs was to help prepare students for legal practice, and how far it was to help prepare them for a career in public life as future leaders of the Republic.
Some appear to emphasize the purpose of preparing students for legal practice.\textsuperscript{107} Paul Carrington, however, emphasizes the purpose of training future political leaders.\textsuperscript{108} For Carrington, the law programs at William and Mary, Philadelphia, Columbia, Transylvania, and Maryland were part of a broader effort that was undertaken by law teachers in university/college law programs in general (and thus not only in those offering instruction in professional law), to inculcate public virtue in future leaders of the Republic.\textsuperscript{109} Others take a more balanced approach, emphasizing both purposes and recognizing variations among different programs in this respect.\textsuperscript{110} Insofar as the purpose was to inculcate public virtue in future leaders of the Republic, the effort has been seen, by Carrington and others, as involving an attempt to implement Thomas Jefferson's vision of legal education in the new Republic.\textsuperscript{111}

\textsuperscript{107} See, e.g., Currie, supra note 106, at 350-51, 356-57 (discussing the eighteenth-century professorships at William and Mary, Pennsylvania, Columbia, and Transylvania).

\textsuperscript{108} See generally Carrington, supra note 100; Carrington, Francis Lieber, supra note 106, at 339-41. See also Paul D. Carrington, \textit{Hail! Langdell!}, 20 LAW & SOC. INQUIRY 691, 695-96 & n.22 (1995) [hereinafter Carrington, \textit{Hail! Langdell!}].

\textsuperscript{109} For Carrington's detailed examination of the early college/university law programs (either planned or implemented, many of the latter continuing into and further developing during the second part of the period, in some cases after a period of interruption), together with his assessment of the extent to which their purpose was to inculcate public virtue in future leaders of the Republic, see generally the corpus of articles by Carrington cited supra notes 100 and 106. More specifically, with regard to individual programs, see Carrington, supra note 100, at 533-73 (College of William and Mary, Yale, Princeton, University of Pennsylvania, Brown University, Columbia University, the University of North Carolina, Transylvania University, Middlebury College, Dartmouth College, the University of Vermont, the University of Maryland, and Harvard College); Carrington, \textit{Transylvania University}, supra note 106, at 677-97 (in-depth examination and assessment of the program at Transylvania). For a summary overview of these early law programs, see Carrington, Francis Lieber, supra note 106, at 341-47 (discussing programs at the College of Charleston, the University of Georgia, Dickinson College, and South Carolina College as well).

\textsuperscript{110} See, e.g., Douglas, supra note 59, at 197-209; Klafter, supra note 59, at 313-22; McManis, supra note 59, at 609-17; see also REED I, supra note 2, at 116-27, 134-38.

\textsuperscript{111} For a discussion of Jefferson's vision of legal education as being concerned with the inculcation of public virtue in future leaders of the Republic, see, for example Carrington, supra note 100, at 527-33; Carrington, \textit{Transylvania University}, supra note 106, at 673-74; Douglas, supra note 59, at 185, 193-200 (discussing Jefferson's vision of public education as well); see also Currie, supra note 106, at 353-54 (discussing Jefferson's views regarding the relationship between legal education and general education, stressing that "law is treated as a branch of government" and that legal studies and other
Whatever the purpose, certainly the curricula followed in these early college/university law programs appear to have been broader than the Litchfield type of curriculum followed in the independent law school setting.\footnote{112} In this respect, therefore, they were closer to William Smith’s “model” curriculum in the university studies can be pursued concurrently); \textit{infra} notes 112, 129, 402, 412, 418 and accompanying text. Douglas appears to consider that Jefferson’s vision of legal education was also concerned with preparing students for the practice of law. \textit{See} Douglas, \textit{supra} note 59, at 198, 199, 211. Yet Carrington appears to consider that it was not. \textit{See} Carrington, \textit{supra} note 100, at 529-30; Carrington, \textit{Transylvania University, supra} note 106, at 674.

It is clear that Jefferson’s vision of legal education was directly and consciously implemented at the College of William and Mary under George Wythe and his successors. \textit{See} Carrington, \textit{Revolutionary Idea, supra} note 100, at 533-41; Douglas, \textit{supra} note 59, at 197, 200-07 (also explaining that in 1779 Jefferson, who was the Governor of Virginia at that time, reorganized the College and selected his old mentor, George Wythe, for the new chair in Law and Politics (i.e., law and government)); \textit{see also} Currie, \textit{supra} note 106, at 352, 358. It seems clear, too, that Jefferson’s vision of legal education was also directly and consciously implemented later, during the second part of the period, at the University of Virginia, which opened in 1825 and where law and politics were taught together by the same Professor of “Law and Politics.” \textit{See} Douglas, \textit{supra} note 59, at 210 (discussing Jefferson’s “second experiment with legal education”), together with Carrington, \textit{Francis Lieber, supra} note 106, at 346, and \textit{REED I, supra} note 2, at 118-19. \textit{See also infra} note 158 and accompanying text. Moreover, Wythe’s law program at William and Mary was the model for the program at Transylvania University. Carrington, \textit{supra} note 100, at 557-59; Carrington, \textit{Transylvania University, supra} note 106, at 677-97. It is perhaps not entirely clear, however, how far various other law programs (for example, those at Philadelphia under James Wilson, and Columbia under James Kent) were directly inspired by Jefferson’s vision of legal education or, alternatively, were inspired by similar views held independently by others. \textit{Compare} Douglas, \textit{supra} note 59, at 185-87, 207-09 (apparently taking the former position) \textit{with} Carrington, \textit{Francis Lieber, supra} note 106, at 341, 355 (apparently taking the latter position). \textit{See also} McManis, \textit{supra} note 59, at 612-15 (discussing the law programs at Philadelphia and Columbia and noting that Kent and Wilson were both Federalists).

For discussion of the nature of “public virtue” as involving the subordination of individual interests to the common good, see \textit{infra} notes 322, 362, 364-66 and accompanying text. Regarding the elitist element in Jefferson’s vision of legal education, see \textit{infra} note 402 and accompanying text. \footnote{112} For a discussion of the breadth of these programs, see, for example, Currie, \textit{supra} note 106, at 357-59; McManis, \textit{supra} note 59, at 609-17. Currie states that wherever the eighteenth-century professorships at William and Mary, Pennsylvania, Columbia and Transylvania had an influence on subsequent legal education, “positive professional values were attached to nontechnical elements of university training,” including a “Blackstonian element... [that] emphasized ethics, as a basis of natural law — a component of law and equity as applied in the courts,” and a “Jeffersonian element [that] emphasized political theory, the instrument of the legislator and the administrator.” \textit{Id.} at 357. For a discussion of the Litchfield curriculum, see \textit{supra} notes 90-95 and accompanying text.
apprenticeship setting. Once again it may be possible, as in the case of apprenticeship training, to identify an ideal curriculum that the different programs approximated to a greater or lesser extent. Although David Hoffman did not publish his *Syllabus of a Course of Lectures on Law* at the University of Maryland until 1821, its comprehensively broad approach may fairly be regarded as representing such an ideal curriculum. Except for the addition of Title XI, and the omission of sections on Political Economy, and the Constitution and Laws of the Several States, the scope of coverage in Hoffman's *Syllabus* seems to have been very similar to the scope of coverage in *A Course of Legal Study*, which he had published a few years earlier in 1817 and which Joseph Story described, in a review that same year, as "the most perfect system for the study of law which has ever been offered to the public."

Hoffman's *Syllabus* organized his course into eleven main titles: Title I: General and Introductory (including political philosophy, natural law, and certain other aspects of jurisprudence, as well as feudal law); Title II: Real Rights and Real Remedies; Title III: Personal Rights and Personal Remedies; Title IV: Equity; Title V: Crimes and Punishments; Title VI: Lex Mercatoria (including international trade); Title VII: Law of Nations; Title VIII: Maritime and Admiralty Law; Title IX: Civil or Roman Law; Title X: The Constitution and Laws of the United States of America; Title XI: Legal Biography and Bibliography; Professional Deportment (i.e., Legal Ethics). Several of these titles included specific coverage of the historical development of the area(s) of law in question. There was also coverage of procedure in Title II, and of procedure and evidence in Titles III, IV, and V. Pleading was also covered in various titles. In

113. See supra notes 76-78 and accompanying text.
114. Hoffman, *Syllabus*, supra note 106. Hoffman only began lecturing in 1823, however, and the law program at Maryland ended when he stopped lecturing in 1832. REED I, supra note 2, at 124-25, 423 app.
115. See REED I, supra note 2, at 124 (quoting from Story's review, originally published in the 1817 *North American Review*, as reprinted in JOSEPH STORY, *MISCELLANEOUS WRITINGS* 223 (1835)). Story estimated that Hoffman's *A Course of Legal Study* would take seven years to complete. *Id.* A revised, expanded and updated edition was published in 1836. REED I, supra note 2, at 125. See also supra note 105 and accompanying text. Hoffman's *Syllabus*, although designed for a two year course centered around a daily lecture of one hour, proved to be too ambitious for Hoffman to complete within this time period. REED I, supra note 2, at 124-25; see also infra note 126 and accompanying text. For further discussion of Hoffman's pioneering work in legal ethics, i.e., his *Resolutions in Regard to Professional Deportment*, published in the 1836, second edition of his *A Course of Legal Study*, see infra note 391 and accompanying text.
addition, Hoffman supplemented his lectures with moot court exercises, debating exercises, and writing competitions.\textsuperscript{117}

The curricula adopted in the law programs at William and Mary,\textsuperscript{118} Philadelphia,\textsuperscript{119} Columbia,\textsuperscript{120} and Transylvania\textsuperscript{121} varied in

\begin{itemize}
    \item It seems that, in addition to the common law (based in particular on Blackstone's \textit{COMMENTARIES}), the curriculum at William and Mary under George Wythe (1779-89) also included the study of the Virginia constitution and statutes, American constitutional law, political theory, and political economy, as well as a moot court and a moot legislature. See Carrington, supra note 100, at 535, together with Douglas, supra note 59, at 201-02. Wythe also emphasized the technique of historical inquiry in understanding the basis of the common law and evaluating the reasons why it may have been, or may need to be, revised in the United States. See Klafter, supra note 59, at 316-17, 319.
    \item Similarly, in addition to the common law (again based in particular on Blackstone's \textit{COMMENTARIES}), Wythe's successor at William and Mary, Henry St. George Tucker (1789-1804), continued the curricular emphasis on Virginia statutory law, constitutional law, and the science of government, as well as political theory. See Douglas, supra note 59, at 203-04. Such coverage was reflected also in Tucker's 1803 American edition of Blackstone's Commentaries. See infra notes 185-86 and accompanying text. Like Wythe, Tucker "engaged his students in debate on some of the leading political and legal issues of the day." \textit{Id.} at 204. It seems, however, that he did not continue Wythe's practice of holding moot courts and moot legislatures. See Carrington, supra note 100, at 539. Moreover, Tucker relied in particular on European natural law writers (in contrast to Wythe's emphasis on classical scholarship) in evaluating the suitability of foreign law for the United States. See Klafter, supra note 59, at 319.
    \item Those students at William and Mary who wanted to earn a law degree (which was probably already an option under Wythe) not only had to satisfy the requirements for the law degree itself, they also had to satisfy the requirements for the Bachelor of Arts degree as well. For the law degree itself a student had to be "well acquainted with civil history, both Ancient and Modern, and particularly with municipal law and policy." For the Bachelor of Arts degree, the student had to be "acquainted with [the various] branches of the Mathematics, both theoretical and practical... Natural Philosophy... Logic, the Belles Lettres, Rhetoric, Natural Law, Law of Nations,... Geography and of Ancient and Modern Languages." See Hunter, George Wythe, supra note 2, at 146-47 & n.73 (quoting from the college statutes and referencing Robert M. Hughes, \textit{William and Mary, The First American Law School}, WM. & MARY Q., 2d. Ser. II, 40, 42-43 (Jan. 1922)); Douglas, supra note 59, at 205; see also McManis, supra note 59, at 611 (discussing the requirements for two degrees and observing that the law program "appears to have been fairly rigorous" under "Tucker and his immediate successors"). Tucker was unsuccessful in his attempt to expand the requirements for the law degree to include knowledge of additional subjects such as ancient and modern constitutions, ethics, and legal procedure, as well as mastery of the skill of oral advocacy and the writing for publication of a thesis on some feature of American law. Douglas, supra note 59, at 205.
\end{itemize}
According to Carrington, the law program at William and Mary continued in much the same form as under Wythe and Tucker (although Carrington does not mention the degree requirements). Carrington, supra note 100, at 540-41; Carrington, Transylvania University, supra note 106, at 675. The program ceased operation in 1861, with the onset of the Civil War. Reed, supra note 2, at 44, 423 app I.A.

119. James Wilson began lecturing at the College of Philadelphia in 1790. Sheppard, Lecture Hall, supra note 2, at 15. Regarding the scope of Wilson's course, Sheppard states that:

His scope was essentially that set by Blackstone, beginning with a lecture on the study of law, and then moving to the general principles of law and obligation, the law of nature, the law of nations, municipal law, man as a member of a community and a state, and then the common law in general, evidence, corporations, judicial procedure, and property.

Id. The course included coverage of constitutional law, as part of the law of persons, as well as criminal law. See Reed, supra note 2, at 122, together with Carrington, supra note 100, at 549. And it emphasized the comparative and historical examination of law, moral philosophy, and political economy. Douglas, supra note 59, at 207.

Wilson stopped lecturing at the College two years later, in 1792, when it merged with the University of Pennsylvania, and his successor, Charles Hare, was not appointed until 1817. Sheppard, supra note 2, at 15. Although Hare devised a program as ambitious as Wilson's, he remained in the position for only a year. See id., together with Carrington, supra note 2, at 550. The law program at Pennsylvania only reopened in 1850, under the leadership of George Sharswood. Sheppard, supra note 2, at 15, 19.

120. James Kent lectured at Columbia College initially from 1794 until 1798. McManis, supra note 59, at 614. Kent gave an indication of the general scope of his planned course in his Introductory lecture, stating that the course was "intended to explain the principles of our constitutions, the reason and history of our laws, to illustrate them by a comparison with those of other nations, and to point out the relation they bear to the spirit of representative republics." Id. (quoting James Kent, Kent's Introductory Lecture, reprinted in 3 Colum. L. Rev. 330, 341 (1903)). More specifically, Kent explained elsewhere that the coverage included the history, nature, forms and just ends of government, the law of nations, the U.S. Constitution, federal criminal and civil law, state courts, and the New York Constitution and municipal law, in particular the rights of property and persons, and civil and criminal procedure. See Sheppard, Lecture Hall, supra note 2, at 15, in particular at 15 nn.105, 110 and accompanying text. Kent's Introductory lecture indicated that he also sought to cultivate the skills of close reasoning and public speaking and to familiarize his students with the doctrines of moral philosophy. See id. at 15; see also Reed, supra note 2, at 121 (discussing Kent's outline for the course, published in 1795, and indicating how it distributed his total of thirty-seven lectures over the various main heads of coverage).

Kent resigned his professorship in 1794 but returned to Columbia to revive the course in 1824. Id. Kent's Summary of the Course, published in 1824, included coverage of the law of nations, the government and constitutional jurisprudence of the United States, the sources of municipal law (including the Civil Law), and the law concerning personal and domestic rights, real property, and personal property and commercial contracts. See generally Kent, Summary, supra note 106. Kent stopped lecturing after a year and a half, using the time to prepare the first edition of his four-volume Commentaries on American Law, which were published between 1826 and
the degree to which, and the precise ways in which, they approximated the comprehensive breadth of David Hoffman's curriculum at Maryland. These early law programs also varied

1830 and were based on his lectures at Columbia. See REED I, supra note 2, at 121, together with McManis, supra, at 614; see also supra note 56 and accompanying text (also reproducing a biographical note on Kent). Although Kent retained his professorship until his death in 1847, he gave no more lectures, and the law program only reopened in earnest in 1858, under Theodore Dwight. REED I, supra note 2, at 121, 158, 423 app. I.A.

121. At Transylvania, the course in "Law and Politics" was modeled on George Wythe's program at William and Mary, and the first three incumbents, George Nicholas (1799-1800), James Brown (1800-1804), and Henry Clay (1804-1807), were all graduates of that program. See Carrington, supra note 100, at 557-58, together with Carrington, Transylvania University, supra note 106, at 678-84. For discussion of George Wythe's program at William and Mary, see supra note 118. It was Brown who organized the program, following Nicholas' death shortly after his appointment, with a curriculum that included Political Economy, International Law, a study of the U.S. and Kentucky constitutions, and a review of Blackstone. Carrington, Transylvania University, supra note 106, at 679. The moot courts and moot legislatures for which there is later evidence were probably initiated by Brown as well. Id. at 679, 689. Certainly by the 1830s the curriculum also included Civil Law (including Comparative Law), and Jurisprudence. See id. at 691. These subjects, too, presumably may have been initiated earlier. The law program at Transylvania continued until at least 1858. See id. at 684-99 (describing the history of the program after the first three incumbents). Compare id. at 699 (stating that the law department "expired in 1858") with REED I, supra note 2, at 118, 423 app. I.A (noting dates of operation during our period as 1799-1861 and 1865-79).

122. For discussion of Hoffman's curriculum at Maryland, see supra notes 114-17 and accompanying text. Although Hoffman published his Syllabus in 1821, he did not begin lecturing until 1823, and the law program at Maryland came to an end when he stopped lecturing in 1832, only reopening at the very end of our period, in 1870. REED I, supra note 2, at 124-25, 423 app. I.A.

At Harvard, in 1816 the Chief Justice of Massachusetts, Isaac Parker, was appointed to the Royall Professorship of Law (endowed with a 1781 bequest from Isaac Royall that had been allowed to accumulate until 1815). Id. at 136-37. Regarding Parker's program, Reed explains that:

[Parker] was required to deliver, primarily for the benefit of the senior class, a course of not less than fifteen lectures covering the constitution and government of the United States and Massachusetts, the history of Massachusetts jurisprudence, the common law as modified by usage, judicial decisions and statutes, "and, generally, those topics connected with law as a science which will best lead the minds of the students to such inquiries and researches as will qualify them to become useful and distinguished supporters of our free systems of government, as well as able and honorable advocates of the rights of the citizens."

Id. at 137. As already discussed, Reed may have omitted Parker's program from his list of institutions offering "instruction in professional law" because the envisaged minimum of fifteen lectures was so manifestly inadequate and because a separate professional school was established at Harvard the following year, in 1817. See supra note 99. For further discussion of the establishment and development of Harvard Law School, see infra notes 134, 144-56, 167-68 and accompanying text.
in their length, with a one year course being envisaged at William and Mary, Transylvania and Columbia, a two year course at Maryland, and a three year course at Philadelphia. In addition

123. REED I, supra note 2, at 170. It seems that Wythe lectured twice a week. See Hunter, George Wythe, supra note 2, at 145. Tucker gave lectures and held discussions daily. See Carrington, supra note 100, at 539. Wythe taught under two hundred students (a figure that includes students, such as Jefferson and Henry Clay, whom he taught privately as a tutor or mentor), and Tucker probably taught more than one hundred and fifty students just at the College. Carrington, supra note 100, at 537 (Wythe); id. at 539 (Tucker). For earlier discussion describing the program at William and Mary, see supra note 118 and accompanying text.

124. REED I, supra note 2, at 170. During the second part of the period the course was lengthened to two years. Carrington, Transylvania University, supra note 106, at 693. It seems that forty students were enrolled in the law program in 1822 and that enrollments varied between thirty and seventy during the next three decades. Id. at 688. For earlier discussion describing the program at Transylvania, see supra note 121 and accompanying text.

125. At Columbia, Kent also originally envisaged a one-year course. REED I, supra note 2, at 121 n.1; Carrington, supra note 100, at 553. However, it seems that, even by the end of the second year, Kent had addressed less than half of the planned coverage. See Sheppard, Lecture Hall, supra note 2, at 15 (noting that “[o]ver the two years, Kent had covered only federal and state constitutional law, the law of nations, and real property”). Kent had planned to give two one-hour lectures each week throughout the winter. Id. at 14. But in his first academic year in 1794-95 he delivered only twenty-six lectures. REED I, supra, at 121 n.1. His enrollment consisted of seven college students, together with thirty-six lawyers and students not belonging to the college. Id. The next year he gave thirty-one lectures to two students and his clerk. Id. He had no students at all the following year, and six or eight students the year after that. Id. As already noted, Kent resigned in 1794. See supra note 120. When he returned to Columbia in 1824, he offered fifty public lectures over one year together with two private lectures for enrolled students; he gave only private lectures the following year and then stopped lecturing altogether. Sheppard, Lecture Hall, supra note 2, at 16. For earlier discussion describing Kent’s program at Columbia, see supra note 120 and accompanying text.

126. REED I, supra note 2, at 170-71. Hoffman planned to cover his Syllabus in two years by lecturing daily for one hour during ten months each year. Id. at 124. Like Kent at Columbia, however, Hoffman greatly underestimated the time required to achieve the planned coverage. Thus, he was still lecturing on the third title at the beginning of the third year. Id. It seems that enrollment varied between twenty and forty students from different states during the several years in which Hoffman struggled with the course. See Sheppard, Lecture Hall, supra note 2, at 15-16. For earlier discussion describing Hoffman’s program at Maryland, see supra notes 114-117 and accompanying text.

127. REED I, supra note 2, at 122. This was based on three evening lectures a week together with “law exercises” on Saturdays. Id. Like Kent and Hoffman after him, Wilson underestimated the time required for his planned coverage. Thus, he spent the whole of the first year on introductory matters, including international law, and by the time he abandoned the course before the end of the second year he had only covered American constitutional law and some criminal law. See REED I, supra note 2, at 122, together with Carrington, supra note 100, at 548-49. It seems that Wilson may have abandoned the course, at least in part, because of lack of interest. See
to this exposure to a broad curriculum in their legal studies, it seems that many students had already received a general college education (or its equivalent) before beginning the law program.\textsuperscript{128} Sometimes, too, students were encouraged to attend other courses outside the law program itself.\textsuperscript{129}

Carrington, \textit{supra} note 100, at 549-50; Douglas, \textit{supra} note 59, at 207. For earlier discussion describing Wilson's program at Philadelphia, see \textit{supra} note 119 and accompanying text.

128. For example, at the College of William and Mary, in order to earn a law degree, a student not only had to satisfy the requirements for the law degree itself but had to satisfy the requirements for the Bachelor of Arts degree as well. \textit{See supra} note 118; \textit{see also} McManis, \textit{supra} note 59, at 611 (discussing the requirements for two degrees and observing that, consequently, "the instruction in law seems to have been a kind of graduate work, even though it was open to those who were not degree candidates"). Regarding attendance of the law program by students who were not seeking a law degree, see also \textit{id.} at 610 (noting that Wythe's lectures were "not limited to prospective practitioners" but were "open to undergraduates, aspiring attorneys, and civilians alike").

The law program at Transylvania University was also postgraduate in nature. \textit{See} Klafter, \textit{supra} note 59, at 315-16 (explaining that Transylvania "offered legal instruction on the post-graduated level, making it unnecessary for it to provide a liberal arts education and giving the law faculty the opportunity to focus on practical legal instruction"). Nevertheless, it seems there were significant reading lists for those who had not already studied at college. Andrew Siegel, \textit{Legal Education at Transylvania University: The Surprisingly Familiar Story of a Surprisingly Unfamiliar Law School}, Presentation at the Southeastern Association of Law Schools Annual Meeting (July 31, 2004).

With respect to the law program at Columbia, Carrington explains that "Kent . . . made clear that he expected his students to be well-read in Greek and Latin, to be masters of logic and mathematics, and to be well-grounded in moral philosophy." Carrington, \textit{supra} note 100, at 553. Although Kent's lectures were open to all, it seems that most of his students were already members of the bar who wanted help in organizing their legal knowledge. McManis, \textit{supra} note 59, at 613-14; \textit{see also supra} note 125.

In his examination of Hoffman's program at Maryland, Shaffer states that "[Hoffman's] lectures assumed that each of his students already had a liberal education." Shaffer, \textit{supra} note 117, at 133. Wilson at Philadelphia most likely held similar expectations regarding the educational background of his students. It seems that young apprentices comprised at least part of Wilson's audience at Philadelphia. \textit{See} Carrington, \textit{supra} note 100, at 549.

For a description of the standard college curriculum, see \textit{supra} note 72 and accompanying text.

129. At William and Mary, for example, students were encouraged, at least under Wythe, to attend other lectures at the college. Carrington, \textit{supra} note 100, at 535. This policy appears to reflect Jefferson's views regarding the relationship between legal education and general education. Thus, according to Brainerd Currie:

The Jeffersonian relation between legal and general education has two aspects: (1) law is treated as a branch of government, and the course of legal study embraces constitutional law, political economy, and legislation; (2) the curriculum is so organized that the study of law can be pursued, as the field of special interest, concurrently with other
Assessments of these early college/university law programs have varied. Some scholars, especially those writing in earlier decades, have tended to be quite dismissive of all these efforts. Other scholars have argued, however, that the programs at William and Mary and its offspring Transylvania in fact were quite successful, while recognizing that for various reasons the same cannot be said of the programs at Philadelphia, Columbia, and Maryland. Two related measures of comparative success are the level of enrollment in, and the duration of, the respective programs. In this regard, although enrollments were not particularly high at William and Mary or Transylvania, enrollments were especially low at Philadelphia, Columbia, and Maryland, and these latter programs were also of comparatively short duration.

(ii) Later law programs

Although the tradition of teaching law as part of the general curriculum continued during the latter part of the period, universities also established law schools (or equivalent law programs) that were separate from the rest of the university curriculum. This development began with the establishment of university studies.

Currie, supra note 106, at 353-54. As discussed earlier, Jefferson's vision of legal education was directly and consciously implemented at William and Mary. See supra note 111 and accompanying text.

130. For a brief survey of several of these dismissive assessments, see Douglas, supra note 59, at 186 n.3 (reviewing assessments by Charles Warren in 1911, Roscoe Pound in 1927, Robert Stevens in 1980, and Amy Colton in 1996).

131. See, e.g., McManis, supra note 59, at 609-17; Sheppard, Lecture Hall, supra note 2, at 14-16. On the characterization of the law program at William and Mary as successful, see Carrington, supra note 100, at 536, 537-38, 539-40; on the characterization of the law program at Transylvania as successful, see id. at 558-59. On the success of the program at William and Mary, see also ERWIN GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES 39 (1974) (quoted in Douglas, supra note 59, at 186 n.3); Douglas, supra note 59, at 202, 206. For an ambivalent assessment of the programs at William and Mary, and Transylvania, see Klafter, supra note 59, at 322. The discussions supra notes 125-27 are indicative of some of the difficulties encountered at Columbia, Maryland, and Philadelphia respectively.

132. For data regarding enrollments, see supra note 123 (William and Mary); supra note 124 (Transylvania); supra note 127 (Philadelphia); supra note 125 (Columbia); and, supra note 126 (Maryland). See also REED I, supra note 2, at 450-51 app. II, tbs.11 & 12 (providing statistics for selected schools and years). For information regarding the duration of these programs, see supra notes 123-127 and accompanying text. See also REED I, supra note 2, at 423 app. I.A (providing a chronological listing of "institutions offering residential instruction in professional law"); supra note 97 and accompanying text.

133. Regarding this development, see, for example, FRIEDMAN, supra note 2, at 321-22, 606-09; REED I, supra note 2, at 140-42, 151-55. See also REED I,
Harvard Law School in 1817. 134 These university law schools (and equivalent programs) expanded at an increasing rate towards the end of the period. Thus, Alfred Zantzinger Reed reports that by 1840, of the twelve law programs offering instruction in professional law started since the Revolution, seven were still in existence; by 1860, thirty such law programs had been started and twenty-one were still in existence; by 1870, the number of law programs started had risen to forty-one and those still in existence to thirty-one. 135 However, the total attendance at all of these schools was not particularly high. Reed gives rough estimates of 400 in 1850, 1200 in 1860, and a reported figure of 1,653 in 1870. 136 Some universities established their law schools by absorbing an already existing independent law school. 137 By 1840, the LL.B.

supra note 2, at 157-59, 324 (discussing some remaining connections between undergraduate college programs and separate law programs).

134. For a listing of relevant programs established during the second part of the period, see REED I, supra note 2, at 429-24 app.IA (providing a chronological listing of "institutions offering residential instruction in professional law"). The relevant entries in the present context are: Harvard University (1817—), Yale University (1824—), University of Virginia (1826—), George Washington University (1826-27, 1865—), Dickinson College (1834-50, 1862-82, 1890—), University of Cincinnati (1835-41, 1842—), New York University (1838-39, 1858—), Lafayette College (1841-52, 1875-84), Indiana University (1842-77, 1889—), St. Louis University (1842-47, 1908—), University of Georgia (1843-61, 1865—), University of North Carolina (1845-68, 1877—), University of Alabama (1845-46, 1873—), University of Louisville (1846—), Princeton University (1846-52), Tulane University (1847-62, 1865—), Cumberland University (1847-61, 1866—), Albany Law School (1851—), University of Nashville (1854-55, 1870-72), University of Mississippi (1854-61, 1867-70, 1871-74, 1877—), De Pauw University (1854-62, 1884-94), Hamilton College (1855-87), Baylor University (first location: 1857-59, 1865-72; second location: 1920—), Northwestern University (1859—), University of Michigan (1859—), McKendree College (first location: 1860-1901; second location: 1891-95), Iowa Law School (1865-68), Washington and Lee University (1866—), Washington University (1867—), University of South Carolina (1867-68, 1869-73, 1873-77, 1884—), Howard University (1868—), State University of Iowa (1868—), University of Wisconsin (1868—), Trinity College (first location: 1868-81; second location: 1890-94; third location: 1904—), University of Notre Dame (1869—), St. Lawrence University (1869-72). Id. It should be noted that the dates given by Reed are the dates of actual operation of the programs, and that some of these dates extend beyond our time period. See also supra notes 97 and 118-22 (for dates pertaining to the programs that continued at William and Mary, and Transylvania, and the later programs that began operation at Pennsylvania, Columbia and Maryland, during the second part of the period).


136. Id. at 442 app. II, tbl. 1. The figure for 1870 is as reported to the U.S. Commissioner of Education. Id. at 442 n.4.; see also id. at 450-51 app. II, tbls. 11-12 (giving attendance figures for individual schools). For Reed’s statistics on the number of lawyers in 1850, 1860, and 1870, see supra note 65.

137. STEVENS, supra note 2, at 5; see also supra note 134 (citing Reed’s chronological listing of institutions, which also indicates those institutions that established their law schools in this manner).
became the usual form of the first degree in law awarded by universities.\footnote{138} Once again, there seems to be disagreement regarding how far the purpose of these later law programs was to help prepare students for the practice of law and how far it was to train them for a career in public life as future leaders of the Republic.\footnote{139} As is

\footnote{138} For a discussion of this development, see REED I, supra note 2, at 160-69.

\footnote{139} For general discussion of these later university law school programs, see FRIEDMAN, supra note 2, at 606-12; REED I, supra note 2, at 118-19, 137-59, 453-56 app.III; STEVENS, supra note 2, at 21-22; Currie, supra note 106, at 359-67, 374-83; Levine, supra note 59, at 272; McManis, supra note 59, at 620-31; Moline, supra note 59, at 797-800; Sheppard, Lecture Hall, supra note 2, at 16-23. See also George A. Matile, Letter of October 26, 1863 to Professor Edouard Laboulaye, Concerning Law Schools in the United States (Brian Gill tr.), reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 319-27; Carrington, Francis Lieber, supra note 106, at 339-55; Carrington, Hail! Langdell!, supra note 108, at 695-701; Paul Carrington, Teaching Law in the Antebellum Northwest, 23 U. TOL. L. REV. 3, 10-30 (1991) [hereinafter Carrington, Antebellum Northwest]; Douglas, supra note 59, at 209-10; Sheppard, Final Exams, supra note 2, at 820-23. For a discussion of the situation in North Carolina, see Hunter, Institutionalization, supra note 2, at 422-32.

For materials relating to Harvard Law School's program under Story and Greenleaf, see Joseph Story, A Discourse Pronounced Upon The Inauguration of the Author, as Dane Professor of Law in Harvard University (Aug. 25, 1829), reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 297-316; Simon Greenleaf, A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University (Boston, Mass. 1834), reprinted in THE GLADSOME LIGHT, supra note 2, at 134-44.

For materials relating to the University of Virginia Law School, see Catalogue of the University of Virginia Law School, 1851 [hereinafter Virginia Catalogue of 1851], reprinted in Sheppard, supra note 2, at 317-18.

For materials relating to the law program at the College of William and Mary under Beverly Tucker, see Nathaniel Beverly Tucker, A Lecture on the Study of Law; Being an Introduction to a Course of Lectures on That Subject in the College of William and Mary, 1 SOUTHERN LITERARY MESSENGER 145-54 (1834), reprinted in THE GLADSOME LIGHT, supra note 2, at 118-33.

For materials relating to the law program at Transylvania University under Mayes, see Daniel Mayes, An Address to the Students of Law in Transylvania University (1834), reprinted in THE GLADSOME LIGHT, supra note 2, at 145-64.

For materials relating to Columbia Law School under Dwight, see Theodore Dwight, Our Municipal Law, and the Best Mode of Acquiring a Knowledge of It (1858) [hereinafter Dwight, Best Model], reprinted in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 328-44; Theodore Dwight, Municipal Law: Lecture Notes (1861-1871) [hereinafter Dwight, Lecture Notes], in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 345-48; Theodore Roosevelt, Lecture Notes (1880), in 1 THE HISTORY OF LEGAL EDUCATION, supra note 2, at 377-86 (Roosevelt was one of Dwight's students). For further discussion see Charles, supra note 2, at 349-76.
the case for the early part of the period, some appear to emphasize the purpose of preparing students for legal practice. Paul Carrington considers that most of these law programs represented a continuation of the more general effort to inculcate public virtue in future leaders of the Republic. Others take a more balanced position, emphasizing both purposes and recognizing variations among different programs in this respect.

In contrast to the early part of the period, however, there appear to be two competing curriculum models, one narrower (the

For materials relating to the University of Michigan Law School under Thomas Cooley, see Thomas Cooley, *Address: Hints to Young Lawyers* (March 24, 1870), in *1 THE HISTORY OF LEGAL EDUCATION*, supra note 2, at 387-97.

For materials relating to the University of California’s Hastings College of Law under John Pomeroy, see John Pomeroy, *Inaugural Address* (August 8, 1878), in *1 THE HISTORY OF LEGAL EDUCATION*, supra note 2, at 398-405.

For materials relating to Tulane University Law School, see Christian Roselius, *Introductory Lecture* (1854), in *THE GLADSOME LIGHT*, supra note 2, at 224-40.

For materials relating to Benjamin Butler’s plan to open a law school at New York University in the mid-1830s, see Benjamin Butler, *A Plan for the Organization of a Law School in the University of the City of New York* (1835), reprinted in *THE GLADSOME LIGHT*, supra note 2, at 165-82.

140. See supra notes 106-11 and accompanying text.

141. See, e.g., Currie, supra note 106, at 360-61, 375.

142. See, e.g., Carrington, *Hail! Langdell!*, supra note 108, at 699 (claiming that “[w]ith few exceptions, antebellum law students did not study law in universities to gain entry to a private profession, or to acquire credentials; if their purpose was serious, they came to prepare themselves for public life”). See also Carrington, *Francis Lieber*, supra note 106, at 339-41 (asserting as well that law programs “before 1870 often emphasized public law, frequently as a companion to political economy and political ethics, and generally included the law of nations as well as American constitutional law”).

For Carrington’s detailed examination of individual law programs (planned or implemented), together with his assessment of the extent to which their purpose was primarily to inculcate public virtue in future leaders of the Republic, see Carrington, *Antebellum Northwest*, supra note 139, at 10-30 (discussing law programs at Ohio University, Miami University, Indiana University, University of Cincinnati, Oberlin College, DePauw University, and Case Western Reserve University); Carrington, *Hail! Langdell!,* supra, at 697 (discussing the law program at Harvard under Joseph Story); id. at 699-701 (discussing the programs at Columbia Law School and the University of Michigan Law School). See also Carrington, *Francis Lieber*, supra note 108, at 344-46 (describing or listing programs at Hamilton, New York, Lafayette, Cumberland, Louisiana (later Tulane), Mississippi, South Carolina, and Virginia, in addition to the programs at Miami, Indiana, and Cincinnati); Carrington, *Transylvania University*, supra note 106, at 698 (further discussing the programs at Indiana, Louisiana, Mississippi, Cincinnati, and Cumberland).

143. See, e.g., Douglas, supra note 59, at 209-10; McManis, supra note 59, at 620-31; see also REED I, supra note 2, at 118-19, 137-59 (discussing the establishment of the law programs at Virginia, Harvard, and Yale, and the eventual spread of a standardized law program).
Harvard model) and one significantly broader (the Virginia model).
In the North, the typically narrower approach towards the law
school curriculum appears to reflect the great influence of Harvard
Law School after its reorganization by Joseph Story. With
respect to Story's general reorganization of Harvard during the
years following his appointment as Dane Professor in 1829, Reed
explains that Story demanded no particular level of prior
education for admission to the law school, developed a narrow
curriculum focusing on the common law and the Constitution, and
set the residence requirements for the degree at eighteen months
twelve months for those already admitted to the bar. Moreover, Harvard exercised great influence on other law schools
in these three respects. It seems that, despite a residence
requirement of only eighteen months, the entire course of studies
at Harvard in fact required two years to complete, and that Story

144. See REED I, supra note 2, at 148-49, 155, 156; Currie, supra note 106, at
361, 366, 374-75; McManis, supra note 59, at 621. For a biographical note on
Story, see supra note 57.

145. REED I, supra note 2, at 142-51, 173; accord Currie, supra note 106, at
361-67; McManis, supra note 59, at 628-31. To a great extent, in these
respects Story was reinforcing tendencies that already existed at Harvard.
For a discussion of the 1817 establishment of the Harvard Law School on the
initiative of Chief Justice Parker, and of its development and difficulties
(including low enrollments) under the direction of Asahel Stearns prior to the
resignation of Parker and Stearns and the appointment of Story, see REED I,
 supra note 2, at 137-40, together with McManis, supra note 2, at 626-27.
The professorship held by Story was endowed with a gift from Nathan
Dane, who made it a condition that Judge Story be the first incumbent. REED
I, supra note 2, at 142. Dane was the author of an Abridgment of American
Law, and in accordance with his central purpose of developing the law, he
stipulated expressly that Story be given time to publish as well as teach. Id.
at 142-43. John Hooker Ashmun joined Story at Harvard in 1829 to take care
of the more burdensome routine work. Id. Ashmun was succeeded by Simon
Greenleaf, and Story died in 1845; among the next generation of Harvard
professors, comprising Theophilus Parsons, Joel Parker, and Emory
Washburn, both Parsons and Washburn, like Greenleaf before them,
continued the Harvard tradition of scholarly publication begun by Story. See
id. at 142-43, 184 n.2, together with Sheppard, Lecture Hall, supra note 2, at
17-18. Moreover, Harvard was also very successful in terms of attendance,
with its enrollment exceeding that of Yale, Transylvania, and Virginia already
by the 1830s, and reaching the "enormous" figure of 163 in 1844, just before
Story died. REED I, supra note 2, at 143. Following Story's death in 1845,
however, there was "a quarter century of staleness" and a serious reduction in
attendance for a while, although enrollment rose again to 166 at the beginning
of the Civil War. Id. at 153, 186, 450-51 app. II, tibs.11 & 12.

146. See REED I, supra note 2, at 142-51. Currie notes that, particularly as a
result of Story's successful reorganization of Harvard Law School, "for the next
fifty years the necessity of university education as preparation for law study
was to be denied, and the scope of the university law curriculum was given a
narrowly professional definition which was to be controlling for more than a
century." Currie, supra note 106, at 361.
reconciled the two time periods by adopting a type of elective system.\textsuperscript{147} As far as the curriculum itself is concerned,\textsuperscript{148} the pertinent data given by Reed suggest that, by 1852, the Harvard curriculum included the following subjects (the undated subjects already being in the curriculum by 1835, and the other subjects being introduced at the dates indicated): Blackstone and Kent, Property, Equity, Contracts, Bailments, Corporations, Partnership, Agency, Shipping, Constitutional Law, Pleading, Evidence, Insurance, Sales, Conflicts, Bills (and, 1844, Notes), Criminal Law (1848), Wills (1848), Arbitration (1848), Domestic Relations (1848), Bankruptcy (1852).\textsuperscript{149} The curriculum did not expand again until Torts was added in 1870.\textsuperscript{150} These subjects were supplemented by moot court exercises.\textsuperscript{151} Interestingly, the development of a

\textsuperscript{147} See Reed I, supra note 2, at 173, 361-63, 307. For statistics on the pattern among law schools generally, regarding the length of the degree course, see id. at 171. Thus, before the Civil War most law schools were one-year schools. Of twenty-one schools in 1860, for example, twelve were one-year schools, two were eighteen-month schools, and only six were two-year schools (and one was unknown). Id. After the Civil War, however, the two-year standard became general. Of the thirty-one schools in 1870, for example, twelve were one-year schools, two were eighteen-month schools, and seventeen were two-year schools; and of the sixty-one schools in 1890, only eight were one-year schools and one an eighteen-month school, but forty-five were two-year schools and seven were three-year schools. Id. Reed cautions, however, that a comparison of law schools in terms of the length of their degree course in academic years is unreliable \textquotedblleft[as a basis for estimating the relative amount of training secured by the students in the several schools\textquotedblright due to considerable differences in the length of the academic year, as well as various other factors. Id. at 170, 172.

\textsuperscript{148} For data comparing the subjects included in the Harvard curriculum, and the number of year-hours allotted to those subjects (or to the \textquotedblleft teaching compartment(s)\textquotedblright in which some of them were combined with each other) at various selected dates, see Reed I, supra note 2, at 457-58 app. IV.A-B (1835-36, 1841-42, and 1859-60, as well as 1879-80, 1889-90, and 1916-17).

\textsuperscript{149} Id.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at 284, 457 app. IV.A. Reed deliberately omitted moot court work from his statistical data. Id. at 457-58 app. IV.A-B; supra notes 148-50. For a description of the Harvard law program (including the curriculum), presumably in 1863, see Matile, supra note 139, at 323-24. For data comparing the coverage in the Harvard curriculum at various times during this period with the coverage in Blackstone's \textit{Commentaries} and in David Hoffman's 1817 \textit{A Course of Legal Study}, as well as with the coverage in the curriculum of various other law schools (Litchfield, Virginia, and Columbia), see Reed I, supra note 2, at 453-56, app. III. It should be noted that, at Harvard at least, most of the subjects in the curriculum were electives (the elective principle having been introduced by Story to deal with the problem of compressing a two-year course of study into eighteen months). Id. at 307; see also supra note 147 and accompanying text. For a list of the required and elective courses in Harvard's curriculum during the years 1870-72, see Sheppard, \textit{Final Exams}, supra note 2, at 824 n.90 (giving a slightly
comparatively narrow curriculum under Story (who died in 1845\textsuperscript{153}) appears to be in tension with other indications given by him, in particular his inaugural address in 1829 stressing the value for lawyers of a broad legal education.\textsuperscript{153} Indeed, Brainerd Currie considers it “one of the paradoxes of the history of legal education” that Story, who had “a lively appreciation of the professional relevance of nontechnical studies” (for example, echoing Blackstone in his inaugural address and admiring Hoffman’s \textit{A Course of Legal Study}), should have been at least partly responsible for the narrowing of law school curricula and the lack of law school entrance requirements for the next fifty years.\textsuperscript{154}

On the other hand, from 1830 until 1869 the Harvard Law School catalogues continued to include a bibliography of recommended texts which apparently reflected the classification and breadth of coverage in Hoffman’s \textit{A Course of Legal Study}.\textsuperscript{155}

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152. \textit{See REED I, supra} note 2, at 143, 153.

153. Thus, Story indicated in his inaugural address in 1829 that he proposed, as Dane Professor, to give lectures on the Law of Nature, including political philosophy, and the Law of Nations, in addition to Maritime and Commercial Law, Equity Law and U.S. Constitutional Law. Story, \textit{supra} note 139, at 309-13. However, Story already stated in his address that he would speak only very briefly on many of the topics falling within the Law of Nature, in part because, in his view, these topics were sufficiently addressed in prelegal “elementary education.” Story, \textit{supra} note 139, at 310; accord Currie, \textit{supra} note 106, at 364-65. Moreover, although Story included International Law (i.e., the law of nations) and indeed Civil Law, as well as Criminal Law, in the first curriculum published in 1830, these additional subjects were dropped from the regular curriculum in 1832 and moved into an optional third year. See \textit{REED I, supra} note 2, at 146, together with Currie, \textit{supra} note 106, at 365-66.

In his inaugural address, Story also emphasized the value for lawyers of becoming liberalized through the study of philosophy, history, and literature, as well as the value of studying the art of rhetoric. Story, \textit{supra} note 139, at 306-08. However, as Reed points out, not only did Story fail to include these subjects in the law school curriculum; he also failed to insist upon college study as well. \textit{REED I, supra} note 2, at 146.

154. Currie, \textit{supra} note 106, at 361-62. \textit{See also supra} notes 48, 53, and 103 and accompanying text; \textit{infra} notes 175-86, 191-93 and accompanying text (discussing Blackstone’s \textit{COMMENTARIES}); \textit{supra} note 114-17 and accompanying text (discussing Hoffman’s \textit{Syllabus}, whose general scope of coverage was very similar to that of \textit{A COURSE OF LEGAL STUDY}, as well as Story’s characterization of Hoffman’s \textit{A COURSE OF LEGAL STUDY} as “the most perfect system for the study of law which has ever been offered to the public”). For identification of three central features of Story’s reorganization of Harvard Law School, including the development of a narrow curriculum and the lack of law school entrance requirements, see \textit{supra} note 145 and accompanying text. \textit{See also REED I, supra} note 2, at 144-50 (discussing Story’s pragmatic reasons for retreating, in his actual reorganization of Harvard, from the educational ideals he had expressed so eloquently in his inaugural address).

155. \textit{REED I, supra} note 2, at 454-56; \textit{see also} \textit{supra} notes 105, 115 and accompanying text (discussing Hoffman’s \textit{A COURSE OF LEGAL STUDY}).
It is another question, of course, what effect such a recommended reading list actually had. In addition, after Story's death in 1845 there were efforts to broaden the curriculum through the introduction of courses or lectures in other subjects, including International Law, Civil Law, and Parliamentary Law. It seems, however, that such additions to the curriculum were only occasional and temporary. A further question concerns the extent to which these two practices at Harvard — the provision of a recommended reading list and occasional temporary additions to the curriculum — were emulated by other law schools.

Several university law schools, particularly in the South, adopted a significantly broader approach towards legal education and thus represented something of a countetrend, at least for much of this period. These law schools were influenced in particular by the University of Virginia, which opened in 1825 and which implemented Jefferson's educational ideals. Virginia was similar to Harvard in that a prior college education was not a requirement for admission to the law school, and the entire course was originally intended to be completed in one year (compared to eighteen months at Harvard), which soon expanded to two years.

156. See REED I, supra note 2, at 354 n.3 ("After Story's death an effort to broaden the curriculum showed itself, among other ways, in the offering from time to time of courses or lectures in International Law, Civil Law, Parliamentary Law, Currency, etc., all ruthlessly eliminated by Langdell").

157. Comments by Reed, although not entirely unambiguous, suggest that the provision of a bibliography of recommended readings indeed may have been emulated by other law schools. See id. at 455 ("This list of recommended texts, perpetuating an unhappily illogical scheme of classification continued to be printed in the Harvard catalogues until 1869, and because of the custom of exchanging catalogues between school and school undoubtedly spread confusion throughout the country."). With respect to the confusion resulting from illogical schemes of classification during this period, which is instanced in this quote from Reed, see infra notes 471-72 and accompanying text.

158. See REED I, supra note 2, at 118-19, 154-56, 157, 324-26; McManis, supra note 59, at 621-26; Currie, supra note 106, at 353-55, 357-58, and 374-83 (discussing as well the broader approach that developed at Columbia towards the very end of the period and at Yale just after the end of the period). For further discussion of Jefferson's educational ideals, see supra notes 111-12, 129 and accompanying text, infra notes 402, 418 and accompanying text. See also Douglas, supra note 59, at 185-87, 199, 211 (discussing the liberalizing purpose of Jefferson in advocating a broad curriculum).

159. See REED I, supra note 2, at 144-45, 151; see also id. at 324-25, 326.

160. See id. at 170-71.

161. See McManis, supra note 59, at 625 (explaining that after 1830 the broader liberal subjects were grouped into the junior year and the technical subjects of "municipal law" were grouped into the senior year and that completion of both years was required for graduation). But see Currie, supra note 106, at 360-61 (stating that "the 'municipal law' studies were collected in the regular course and the broader ones were relegated to an optional year") (emphasis added).
It seems that, like the slightly later Harvard list of recommended texts, the original Virginia curriculum of 1825 also reflected the classification and breadth of coverage in David Hoffman’s *A Course of Legal Study*. Although the Virginia curriculum became narrower over the years, it remained significantly broader than the Harvard curriculum. For example, the following course of study, described in Virginia’s 1851 Law School Catalogue, indicates the breadth of the Virginia curriculum at that time: *Junior Class*: Vattel’s International Law, Lectures on Government, Federalist, Madison’s Report of 1799, Blackstone’s Commentaries; *Intermediate Class*: Stephen on Pleading, Barton’s Suit in Equity, Coke on Littleton, Smith’s Mercantile Law, Greenleaf’s Evidence, Holcombe’s Equity; *Senior Class*: Story’s Equity, Chitty on Contracts, Mitford’s Equity Pleadings, Lomax on Executors, etc., Byles on Bills and Notes, White and Tudor’s Leading Cases, Smith’s Leading Cases, Lectures on Civil Law. These subjects were supplemented by a comprehensive moot court program that included litigation and drafting exercises and thus required students “to perform most of the functions of a practicing lawyer.”

162. Thus, under the original curriculum plan, enacted by the Rectors and Visitors of the University in 1825, the curriculum to be covered by the Professor of Law and Politics included “the common and statute law, that of the Chancery, the laws Feudal, Civil, Mercatorial, Maritime, and of Nature and Nations; and also the principles of Government and Political Economy.” REED I, supra note 2, at 118 n.3. The subject of “Government” addressed federal and state constitutional law. Id. at 456. As indicated in the article text, it seems that this original curriculum closely followed Hoffman’s *A COURSE OF LEGAL STUDY*, and was just as comprehensive in its scope. Id. at 454-56. See supra note 105, 114-17 and accompanying text (discussing Hoffman’s *A COURSE OF LEGAL STUDY*, and Hoffman’s *Syllabus*). For further discussion of the influence of *A COURSE OF LEGAL STUDY* on the Harvard list of recommended texts, see supra note 155 and accompanying text.

163. Thus, by 1851, nontechnical subjects such as “political economy and history” had been crowded out of the curriculum; however, when the rapid growth of case law threatened the same fate for the subjects of “politics, and statutes, and international law,” the University appointed a second professor in that year to prevent this from occurring. REED I, supra note 2, at 119, 155; McManis, supra note 59, at 626. The term “politics,” in Reed’s enumeration, presumably refers to the subject of “Government,” addressing the area of federal and state constitutional law. See REED I, supra note 2, at 456.


165. *Virginia Catalogue of 1851*, supra note 139, at 317. Addressing the general nature of each of these three classes, the *Virginia Catalogue* explains that the Junior class is concerned with “studies... essential to the professional student, and forming a highly useful branch of general education;” the Intermediate class is concerned, “exclusively, with the theory and practice of law, as a profession;” and the Senior class involves “efforts... to impart a professional cultivation as liberal as the growing wants of the
Consistent with their broader approach towards the law school curriculum, several law schools influenced by the Virginia curriculum model also followed Virginia in encouraging their students to take parallel courses in other departments of the university simultaneously with their law school work.\textsuperscript{166} It seems that, from the beginning, there was considerably less opportunity to take such parallel courses at Harvard.\textsuperscript{167} However, many students at Harvard and elsewhere had already received a college education before attending law school.\textsuperscript{168}

(3) Methods of Instruction

The most common method of instruction at both the independent law schools and in the college/university law programs\textsuperscript{169} seems to have combined the reading of assigned texts with classroom lecture.\textsuperscript{170} Frequently, students were also required

\textsuperscript{166} See REED I, supra note 2, at 119, 324-26; Currie, supra note 106, at 375-76. Ultimately, Reed explains, this particular approach was not sustainable due to the increasing volume of technical law (although it seems to have been abandoned at Virginia itself at a somewhat earlier date, 1851, than was the case at many other southern law schools). REED I, supra note 2, at 325-26; accord Currie, supra, at 376-77. Once again, Virginia's approach in this respect would appear to reflect Jefferson's views regarding the relationship between legal education and general education. See supra note 129 and accompanying text. However, the emulation of Virginia's example by other southern law schools seems to have been supported on the basis of a different underlying theory. See Currie, supra note 2, at 376 (discussing the desire of these southern law schools "to preserve, as far as possible, the academic element in legal education").

\textsuperscript{167} See REED I, supra note 2, at 145, 157-58; accord Currie, supra note 106, at 363.

\textsuperscript{168} See, e.g., FRIEDMAN, supra note 2, at 606 ("No state made a law degree, or a college degree, absolutely necessary for admission to the bar, either in 1850 or 1900. Yet many lawyers, even in the 1850s, did go to college, and more and more students who could afford it chose law school as well."); REED I, supra note 2, at 146 n.1 (giving figures for the proportion of law students at Harvard with a prior college education, ranging from between usually two-thirds and three-quarters in the earlier years, to fifty-six percent in 1844 and forty-seven percent in 1869 and 1870). For a discussion of the standard college curriculum, see supra note 72 and accompanying text.

\textsuperscript{169} For discussion of the methods of instruction used in these various settings, see generally the references given in notes 80, 106, 139, many of which discuss the pedagogical methods used by law teachers in the independent law schools, the early college law programs, and the later university law schools, respectively.

\textsuperscript{170} For a generalized discussion of the lecture-textbook method, see, for example Levine, supra note 59, at 272 (noting that "[t]he first American law schools that grew up to supplement apprenticeship training provided their students with lectures and common law treatises or printed versions of the
to read law reports, and some teachers ensured the more active participation of students in the classroom by requiring student recitations or engaging in other dialogue. In many cases, this instruction was supplemented by moot court and certain other types of practical exercises. The law teachers at the independent law schools and in most of the college/university law programs were practitioners or judges, some of whom were retired but many of whom were still active; for the latter group, therefore, teaching was just one part of a busy professional life.

171. With respect to the assignment of cases for study, see, for example Sheppard, Lecture Hall, supra note 2, at 25 (noting that "[l]ecturers from Wythe to Dwight expected students to read cases from the reports and to link principles to cases" although "the cases were still secondary to the more general principles and logical relationships between them"). See also STEVENS, supra note 2, at 52 & n.14 (suggesting that the case method of instruction itself was not original to Langdell, and explaining that John Pomeroy used the case method at New York University in the 1860s); Levine, supra note 59, at 275 (same).

172. See, e.g., Sheppard, Lecture Hall, supra note 2, at 29 (observing, with respect to Langdell's pedagogy, that "[a]n interrogative approach to the classroom was certainly no innovation. Dwight and Hammond relied upon it, Parsons had experimented with it, and Greenleaf had exercised students with it"); Swygert and Bruce, supra note 59, at 979 n.299 (noting that although "[t]here was little, if any, dialogue, ... some teachers quizzed students about their rote memory of the assignment"); see also LAPIANA, supra note 2, at 48-49 (discussing the "classroom dialogue" employed at Harvard, including dialogue employed by Story and Parker); STEVENS, supra note 2, at 5 n.21, 53 n.18 (discussing other law teachers, such as Pearson, Lomax, and Dwight who used a "Socratic" method of teaching).

173. See, e.g., REED I, supra note 2, at 284 (referring to the type of "practical training which is represented by moot courts and by drill in the drafting of written instruments," and noting that "[f]rom the very beginning, all schools had included this feature in their curriculum, and several had included the second"); Hoeflich, Theory and Practice, supra note 2, at 861-75 (discussing the integration of theory and practice in antebellum legal education); Sheppard, Final Exams, supra note 2, at 832-33 (discussing moot courts as well as various kinds of student writing requirements and opportunities); see also Matile, supra note 139, at 324 (reproducing the Syllabus for the program offered at Harvard, presumably in 1863, and noting that the Syllabus (which also included Moot Court) "is a good illustration of what legal instruction in the United States is like").

174. See, e.g., REED I, supra note 2, at 132-33 (independent law schools); Sheppard, Lecture Hall, supra note 2, at 14-16 (briefly profiling many of the professors in the early college law programs); FRIEDMAN, supra note 2, at 609-
3. Significant Legal Literature: Blackstone, Kent, and Story

In the passage quoted earlier in Part I.B, Farnsworth singles out Blackstone's *Commentaries*, Kent's *Commentaries*, and Story's series of treatises as especially important within the legal literature of the period. Study of these and other works was typically part of a formal legal education (Blackstone during the early part of the period; and Blackstone, together with Kent and Story, during the latter part). Because of their importance in the legal education of the period, and in order to provide a reference for the subsequent discussion, it may be helpful here to elaborate upon certain central features of Blackstone's *Commentaries*, Kent's *Commentaries*, and Story's treatises.

With respect to the general character, structure, and content of Blackstone's *Commentaries*, Sheppard explains that:

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10; Reed I, supra note 2, at 182-84; Stevens, supra note 2, at 38 (later university law schools).

175. See supra notes 52-58 and accompanying text.

176. For a useful study of the types of English and American legal literature that were available during this period, focusing especially on the genre of the treatise, see generally A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981). See also Roscoe Pound, *The Formative Era of American Law* 138-72 (1938) (surveying the treatise genre); Swygert and Bruce, supra note 59, at 967-70 (surveying, briefly, the treatise genre).

For a survey focusing on the American legal literature of the period (including law reports and legal periodicals as well as treatises), see Friedman, supra note 2, at 322-33, 621-29. See also Swygert and Bruce, supra note 59, at 970-76 (law reports and legal periodicals); Sheppard, *Lecture Hall*, supra note 2, at 16-18 (treatises). Regarding the variable understanding of the term "treatise," see infra notes 191-93 and accompanying text.

For additional discussion of particular authors and their works, see Reed I, supra note 2, at 110-12 (Blackstone's *COMMENTARIES*); Langbein, supra note 2, especially at 211, 213-14, 219-23 (Kent's *COMMENTARIES*, and Blackstone's *COMMENTARIES*); Sheppard, *Lecture Hall*, supra note 2, at 10-13 (Coke's *The First Part of the Institutes of the Laws of England*, and Blackstone's *COMMENTARIES*). Blackstone's *COMMENTARIES*, Kent's *COMMENTARIES*, and Story's series of treatises are all examples of early legal science and are discussed further below. See infra notes 267-73 and accompanying text (discussing early American legal science).

177. See, e.g., Pound, supra note 176, 144, 163-64 (1938); Sheppard, *Lecture Hall*, supra note 2, at 16-17. See also Matile, supra note 139, at 324 (observing, still in 1863, that "Blackstone and Kent are the two pivots around which the studies of the young American turn"); Moline, supra note 59, at 791 ("Blackstone remained an essential component of legal training, in both academia and law offices, for a century and a half after its first publication"); id. at 794-95 ("Kent's Commentaries dominated legal thinking in this country for many years"); id. at 799 ("Story's Commentaries were a basic staple of legal education in America for many years"); Simpson, supra note 176, at 670 (explaining that "[f]rom Story's time, the production of treatises was associated with organized, systematic legal education").

178. For earlier general discussion of Blackstone's *COMMENTARIES*, see supra notes 48, 53 and accompanying text.
Blackstone's outline is derived in part from that of Matthew Hale's 1716 *The Analysis of the Law*, on which Blackstone had also modeled his syllabus. The *Commentaries* are organized into four interdependent books, considering the rights of persons, the rights of things, private wrongs, and public wrongs. The sections are broken into subheadings, each considering some particular subject in detail with surprisingly clear and readable prose. The sum of the work is so comprehensive that one might imagine there was little law left undescribed... Reading Blackstone in the late twentieth century is a bit like reading a current treatise; one is left with a reasonably, but not overly, detailed understanding of a host of related legal doctrines and their applications.\(^{179}\)

Blackstone's *Commentaries* were based on his lectures at Oxford,\(^{180}\) and the content and methodology of both are usefully summarized by Blackstone himself in the following statement advertising his proposed lectures:

> [I]t is proposed to lay down a general and comprehensive plan of the laws of England; to deduce their history; to enforce and illustrate their leading rules and fundamental principles; and to compare them with the laws of nature and of other nations; without entering into practical niceties or the minute distinctions of particular cases.\(^{181}\)

Half of Book I of the *Commentaries*, on the Law of Persons, deals with governmental functions, in particular the monarch, parliament, and executive powers.\(^{182}\) Moreover, Book I begins by addressing, in about 115 pages, various introductory general matters, including the study of law, the nature of laws in general, the grounds and foundations of the laws of England, and the countries subject to the laws of England.\(^{183}\) With regard to the first three topics, it should be noted that (a) Blackstone's treatment of the study of law includes a discussion of the history of legal education in England and the value of studying the common law at a university; (b) his jurisprudential treatment of the nature of laws in general includes a discussion of four main types of law: natural law, divine law, the law of nations, and municipal law (including certain matters of political theory, such as the origins, nature, and basis of civil society and of government, sovereignty, and forms of government); and (c) his treatment of the grounds and foundations of the laws of England includes a discussion of the

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180. Id.
181. Moline, *supra* note 59, at 789 (quoting Blackstone); see also 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 103, at 34-35 (to the same effect).
182. See Langbein, *supra* note 2, at 222.
183. Blackstone's own analytical tables for his *Commentaries* are reproduced in Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979). See id. at 224 (Book I); id. at 225 (Book II); id. at 228 (Book III); id. at 230 (Book IV).
nature of the two main sources of English law — the unwritten law (general customs or the common law, particular customs, civil law, and canon law) and the written or statute law — as well as the role of equity in supplementing or modifying these sources. Moreover, in accordance with his stated intent regarding content and methodology, Blackstone's treatment of substantive law throughout the remainder of the Commentaries explicitly identifies and discusses rules and principles originating in these different types and sources of law.

It should also be noted that Volume One of St. George Tucker's influential 1803 American edition of Blackstone is devoted to the first part of Book I of the Commentaries in which Blackstone addresses the various general introductory matters identified above, and that it also includes an extensive Appendix in which Tucker discusses at considerable length the matters of political theory briefly addressed by Blackstone in the first part of Book I, as well as the Virginia Constitution, the U.S. Constitution, and the status of English common law in America.

Turning now to Kent's Commentaries, Sheppard summarizes the general character, structure, and content of Kent's work as follows:

Kent's Commentaries were both an American version of Blackstone and more. Following a theme he developed in his lectures, he included significant sections on international law, as well as the history and government of the United States. There are six major sections: the law of nations, United States government, municipal law, personal rights, personal property, and real property. Part I was innovative, as there seems to be no earlier treatise of international law originally in the English language. Although Part II is largely a paraphrase of Supreme Court opinions, the remaining volumes are a clear narrative of commercial and property law, with a then-unusual emphasis on commercial transactions. The critical facet of the Commentaries was Kent's care to keep it updated in response to new opinions. He oversaw six editions between 1830 and his death in 1847, and each edition reflected state and federal opinions in each area up to that time.

184. See supra note 181 and accompanying text.
185. See supra note 183 and accompanying text. For earlier discussion of Tucker's 1803 American edition of Blackstone's Commentaries, see supra notes 53, 103, 118 and accompanying text.
186. The Appendix, which comprises more than three-quarters of Volume One (some 443 pages), also contains a short discussion of various matters relating to statutes in Virginia, including the status of British statutes. The other four volumes of Tucker's edition contain their own, albeit considerably shorter, appendices.
187. For earlier discussion of Kent's Commentaries, see supra notes 56, 104, 120 and accompanying text.
188. Sheppard, Lecture Hall, supra note 2, at 16-17.
It should also be noted that Kent’s treatment of the sources of municipal law in Part III of his Commentaries includes a discussion of the nature of statutes and the common law, as well as a discussion of legal literature and the civil law. In the Commentaries Kent was particularly concerned to adapt English common law to American conditions.

The reader will note that in the passage quoted in Part I.B Farnsworth uses the term “treatise” to describe Blackstone’s Commentaries and Kent’s Commentaries. John Langbein, however, considers that Blackstone’s Commentaries and Kent’s Commentaries are more appropriately viewed as “institutes of national law” rather than as legal treatises, the crucial distinction being that an institute deals with a broad range of subjects, and indeed seeks to be comprehensive, whereas a treatise examines one topic in much greater depth. In addition to being comprehensive, such institutional writing is systematic in a very particular way (adopting the basic persons-things-actions format of Justinian’s Institutes), and seeks to provide an introduction to the law as well as to help create and unify a national legal system.

The use of the term “treatise” to describe Joseph Story’s nine Commentaries is uncontroversial, given the limited scope and in-depth treatment of the area of law being addressed in each book.
The following passage by Sheppard will serve to summarize their general character and contents:

[Story's] series of treatises . . . ultimately included books on bailments, constitutional law, conflicts of law, equity principles, equity pleadings, agency, partnership, and bills and notes. These commentaries [were] produced at a furious rate while Story was also serving on the Court . . . . The commentaries are narrative, but with numerous arguments and illustrations derived from cases and their facts, although cases were usually cited merely, if copiously, as authority for specific points in the narrative. He argued for particular points, notably in the constitutional law treatise, on which there was no case law or prior commentary. While Story certainly echoed the form of the works before his, the comprehensiveness of his books and his uniformity of treatment across a host of subjects were unusual and seem to have solidified the form of the modern subject-area treatise. Most later treatises, even into the twentieth century, have very much followed the same course. 195

As several of the titles of Story's Commentaries themselves suggest, Story valued comparative inquiry, often examining solutions adopted under foreign law, and especially under the civil law. 196

B. Prevailing Jurisprudence and Prevailing Professional Ideal

In this section we explore the jurisprudential ideas and the professional ideal that appear to have prevailed for much or most of the period, and consider how law students would have been exposed to those ideas and that ideal as part of their formal legal education. Subsection 1 addresses the prevailing jurisprudential ideas, and Subsection 2 addresses the prevailing professional ideal.

1. Prevailing Jurisprudence

The prevailing jurisprudence of the period comprised several different elements with which early American lawyers would have been familiar. The first five subsections below elaborate on the nature of various of these jurisprudential elements. Subsection a addresses the nature of the common law tradition. Subsection b examines some central elements of classical common law thought: specifically, the nature of common law reason as understood in classical common law thought, and three related notions that represent some further ways in which the common law was conceptualized in that thought. Subsection c then discusses the character of associated natural law thinking in early American

195. Sheppard, Lecture Hall, supra note 2, at 17.
196. See supra note 57 (listing the titles of Story's COMMENTARIES).
legal thought. Subsection d considers the extent to which the three related notions of classical common law thought and the associated natural law thinking in early American legal thought may (or may not) have been displaced, particularly during the latter part of the period, by the emergence of a new, instrumentalist conception of law. Subsection e addresses the character of early American legal science. Following the discussion of these various jurisprudential elements, Subsection f discusses how students of the law would have become familiar with them during their legal education. Certain additional elements of the prevailing jurisprudence dealing with matters of political theory will not be discussed here, but will be addressed in Section B.2 below on the prevailing professional ideal, to which they are especially pertinent.

a. General Nature of the Common Law Tradition

Early American lawyers would have been familiar, of course, with the nature of the common law tradition in which they were the central participants. In her book *A Nation Under Lawyers* Mary Ann Glendon provides us with a brief, but useful and lively description of the common law tradition. Glendon claims that the historical development of the common law is “a textbook example” of a “living tradition” as defined by Alasdair MacIntyre. A living tradition, explains Glendon, is:

> [O]ne that is “historically extended” and “socially embodied,” whose development constantly points beyond itself. To be a traditionalist in such a tradition is not to be frozen in the past, or mired in the status quo, but rather to participate in an intense ongoing conversation about what it is that gives the tradition its point and purpose.

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198. Id. at 182. See also Mary Ann Glendon, Michael W. Gordon & Paulo G. Carozza, *Comparative Legal Traditions in a Nutshell* 14 (2d ed., 1999) (“The Anglo-American common law tradition and the Romano-Germanic civil law tradition are operating examples of philosopher Alasdair MacIntyre’s concept of a living tradition.”). MacIntyre provides the following definition of a “living tradition”: “A living tradition...is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations.” Alasdair MacIntyre, *After Virtue* 222 (2d ed., 1984); see also Glendon, supra note 197, at 179 (reproducing McIntyre’s definition of a “living tradition”); Glendon, Gordon & Carozza, supra, at 14 (same); Mary Ann Glendon, Michael W. Gordon and Christopher Osakwe, *Comparative Legal Traditions: Text, Materials and Cases* 17 (2d ed., 1994) (same); see also infra notes 313 (further discussing MacIntyre).
199. Glendon, supra note 197, at 182 (quoting MacIntyre, supra note 198).
In the following passage, Glendon elaborates upon the nature of the common law tradition and upon its distinctive mode of evolution, observing that “[t]he common law is an evolving body of principles built by accretion from judicial decisions, rendered in the context of countless individual disputes,” and that the key to common law evolution is “a distinctive set of habits and practices” shared by its participants:

The expression “common law tradition” refers to the type of law, and the mode of lawmaking, that historically distinguished the English legal system from the Romano-Germanic legal systems of continental Europe. The common law is an evolving body of principles built by accretion from judicial decisions rendered in the context of countless individual disputes. Because those principles are embedded in concrete cases, they are highly fact-sensitive, and not too general. Until relatively recent times, the common law and the craft techniques associated with it were transmitted from one generation to the next chiefly by practitioners . . . .

Over centuries that saw the rise and fall of feudalism, the expansion of commerce, and the transition to constitutional monarchy and representative government, judges and lawyers adapted English law to each new circumstance, neither erasing prior arrangements completely nor becoming captives of them . . . .

The key to the common law’s ability to change and grow while maintaining its coherence and continuity was a distinctive set of habits and practices which its participants learned through doing and by observing and imitating others. To try to describe those methods is a bit like trying to describe swimming or bicycle riding. But the conventional understanding goes something like this: the common law judge is supposed to be a virtuoso of practical reason, weaving together the threads of fact and law, striving not only for a fair disposition of the dispute at hand but to decide each case with reference to a principle that transcends the facts of that case — all with a view toward maintaining continuity with past decisions, deciding like cases alike, and providing guidance for other parties similarly situated; and all in the spirit of caring for the good of the legal order itself and the polity it serves.

In the above passage Glendon is addressing the general nature of the common law tradition and she identifies several specific features of that tradition. One way to approach the discussion of individual jurisprudential elements below is to regard that discussion as illuminating the particular forms taken by some of these features during our period. Thus, the nature of “practical

200. *Id.* at 179-81. Taking her cue from Karl Llewellyn’s in-depth analysis of appellate judging in his book *The Common Law Tradition: Deciding Appeals*, Glendon considers that “[t]he best times were those marked by what Llewellyn called the ‘Grand Style.’” *Id.* at 181 (discussing KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960)). For further discussion of Llewellyn’s account of Grand Style appellate judging, see *infra* note 253 and accompanying text.
reason” and common law “principles” are illuminated in Subsection b(1), the relationship between “coherence and continuity” and “change and grow[th]” in Subsection b(2), and “the good of the legal order . . . and the polity it serves” in Subsections c, d, and e. The transmission of the “common law and the craft techniques associated with it” from one generation to the next, chiefly by practitioners, is of course largely addressed in Section A above, which provides an overview of legal education settings.

b. Elements of Classical Common Law Thought

Early American lawyers would have been familiar with the central elements of classical common law thought. In particular, they would have been familiar with the nature of common law reason as understood in classical common law thought and with three related notions that represent some further ways in which the common law was conceptualized in that thought. The discussion of these elements of classical common law thought in this subsection, and especially the discussion of the three related notions in b(2), draws in large part upon Gerald Postema’s authoritative account of classical common law theory in his work on Jeremy Bentham and the common law tradition. Postema uses the term “classical common law theory” to refer to a jurisprudential theory about the nature of law that “begins to take distinctive shape with Coke” in the late sixteenth and early seventeenth centuries. This period marks the beginning of the


202. See Postema, supra note 201, at 3 n.1. Postema elaborates upon the origins of “classical common law theory” as follows:

Classical common law theory was born at a time when, emerging from feudalism, modern English society and the modern state were taking shape. Political power was increasingly centralized and the ideology of absolutism was making inroads not only on the continent of Europe, but also in England . . . Common Law theory arose, in part, in response to the threat of centralized power exercised by those who proposed to make law guided by nothing but their own assessments of the demands of justice, expediency, and the common good. Against the spreading ideology of political absolutism and rationalism, Common Law theory reasserted the medieval idea that law is not something made either by king, Parliament, or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them . . . But Common Law theory gave this medieval doctrine a distinctively historical twist. For the deeper reality manifested in the public statutes and judicial decisions was not a set of universal rational principles, but
great debate between classical common law theory and legal positivism, which has continued, in one form or another, until the present time. From this perspective, the confrontation between Coke and James I, and the confrontation between Hobbes and common lawyers such as Coke, as represented in Hobbes’ Dialogue, discussed in b(1) below, can be seen as early opening salvos in this continuing debate identified by Postema.

(1) Nature of Common Law Reason in Classical Common Law Thought

As Mary Ann Glendon explains in the passage above, the common law judge is considered to be “a virtuoso of practical reason.” Central to classical common law thought is the idea that the common law is “artificial reason.” This idea was famously articulated by Lord Coke in the early seventeenth century. In a memorable confrontation with King James I in 1608, concerning authority to decide the scope of ecclesiastical court jurisdiction, Coke (who was then Chief Justice of the Court of Common Pleas) expounded on the difference between “natural reason” and the “artificial reason” of the common law:

Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* [*"the king should not be under man but under God and the*]

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200. For an explanation of the term “classical common law theory,” see supra note 202 and accompanying text.

203. See *id.* at 3-4, 39-40, 60-61 (evidencing the debate between classical common law theory and legal positivism); see also *id.* at vii-ix (discussing the importance of understanding the debate).

204. See *infra* note 207 and accompanying text (discussing the confrontation between Coke and James I); *infra* notes 220-22 and accompanying text (discussing Hobbes’ DIALOGUE).

205. See *supra* note 200 and accompanying text.

206. For an explanation of the term “classical common law theory,” see *supra* note 202 and accompanying text.
Glendon elaborates further upon Coke's understanding of the "artificial reason" of the common law, linking it to the "habits and attitudes" (i.e., the "shared legal culture") of the participants in the common law tradition. Indeed, she seems to suggest that this "artificial reason" is the very expression of those habits and attitudes:

Practicing lawyers, as participants in that tradition, framed their instruments and arguments with such habits and attitudes in view. It was that shared legal culture that stood behind Lord Coke's famous insistence: "Reason is the life of the law; nay, the common law itself is nothing else but reason." To Coke, "reason" did not mean deductive logic, or self-interested calculation, or any activity of an individual mind in isolation. It was, rather, an extended collaborative dialogue, a group achievement, "an artificial perfection of reason gotten by long studie, observation and experience... fined and refined [over the ages] by an infinite number of grave and learned men."


It is also less a report of a law case, than an account of an ongoing dispute between the King and the common law judges, represented by Coke. The dispute began because the Archbishop of Canterbury greatly resented the writs of prohibition which were being issued by the common law courts to limit Church courts' jurisdiction. Ecclesiastical patronage was valuable to both Archbishop and the King, and the King, in his role as the Head of the Anglican Church, took the Archbishop's side. The King finally lost his patience with the common law judges, and sought to intervene directly in what he saw as a dispute between two branches of his "own" court system.

Id. at 315. When he inherited the English throne as Elizabeth I's closest heir, James I of England was already King James VI of Scotland and head of the House of Stuart. Id. at 311. Coming to the English throne with certain "inherent disadvantages," James I asserted his "famous 'Divine Right' theory, and his concept of the modern absolute monarchy as the cornerstone of the modern centralized state." Id. at 311-12.

As Coquillette also explains, the confrontation between Coke and James I recorded in Prohibitions del Roy "has become a symbol of the rule of law courageously defying totalitarianism, and was invoked by American revolutionaries and English parliamentarians alike." Id. at 316. Although the actual encounter may have gone rather differently, Coke was "the one who conveyed the report to posterity." Id. at 316-17; see also id. at 340 (recounting James I flying into a rage and Coke prostrating himself and begging forgiveness).

Gerald Postema provides further insights into the nature of common law reason in his work on Jeremy Bentham and the common law tradition. Postema explores the nature of common law reason in the context of his discussion of classical common law theory. He detects "two conceptions of reason (or reasoning) at work in this theory" — a "particularist" conception, which focuses on the concrete situations of particular cases, and in which "reasoning is analogical, arguing from particular case to particular case, reflecting 'upon the likenesses and dissimilarities of particular instances, either actual or hypothetical, particular to particular'"; and a broader conception, which focuses on "general justifying principles . . . instanced in, and illustrated by, particular decisions and settled rules," and in which reason is "reflective," capable of transforming the common law into a "rational science based on first principles." Addressing these two conceptions of reason, Roger Cotterell explains that because the first conception of reason "could . . . tolerate broad illogicalities arising out of particular analogical linkages of ideas or cases," while the second conception emphasizes "general and extensive principles," the common law "might permit illogicalities of detail within an overall framework of broad principle." Consequently, "[t]here is . . . no simple key to unlock the assumed rationality of the common law." Arguably, Glendon has both conceptions of reason in mind when she describes the common law as "an evolving body of principles" that are "highly fact sensitive, and not too general."
Similarly, Cotterell appears to understand the term “artificial reason” to include both conceptions of common law reason, while Postema may understand it to include only the first, particularist conception.

As suggested in the two passages above, “experience” plays a crucial role in common law reasoning in two main ways. First, a proper understanding of the “artificial reason” of the common law requires “long study and experience.” Second, the “artificial reason” of the common law is itself the result of the experience of an “infinite number of grave and learned men.” The crucial role of experience in the first sense, as well as of certain other factors, is emphasized by Anthony Kronman in an interesting comparison of the “artificial reason” of the common law tradition with the Aristotelian tradition of political thought. Kronman explains that these two traditions resemble each other in three main respects. Thus, they both emphasize the necessity of long experience (to acquire the relevant knowledge, which is complex and disorderly), the difficulty of attaining mathematical precision (with the result that there is always room for “reasonable disagreement”), and the importance of sound character (in particular, the virtue of prudence or practical wisdom) as well as intellectual acuity, in achieving true understanding.

More specifically, Kronman elaborates upon these three characteristics of “artificial reason” in the context of a discussion of Thomas Hobbes’ A Dialogue Between a Philosopher and a Student of the Common Law of England, in which the “philosopher,” who represents Hobbes himself, advocates the use of “natural reason” (i.e., “the universal powers of ratiocination that every human being possesses”) to resolve legal questions, while the “student,” who represents the common lawyers, in particular Coke, argues that such matters can only be rightly decided by the

215. See Cotterell, supra note 201, at 34 (explaining, immediately following the language quoted supra notes 212-13 and accompanying text, that “[i]n particular, there is no key which an untrained person could use . . . . According to common law thought, law is not natural reason but refined or artificial reason which, as Coke asserted, ‘requires long study and experience, before that a man can attain to the cognisance of it.’” Id. (quoting Prohibitions del Roy, 12 Coke Rep. 63, 65, 77 Eng. Rep. 1342, 1343).

216. Compare Postema, supra note 201, at 30, 33 (seeming to equate “artificial reason” with the first, “particularist” conception, the “reason . . . of the law,” as contrasted with the second, broader conception, or “reason in the law”) (emphasis in original), with id. at 36 (explaining that both types of reason are “traditional reason, that is, reason shaped by the tradition in which it is exercised” and therefore are to be “distinguished sharply from ‘natural reason’”).

217. See supra note 207-08 and accompanying text.


219. Id. (emphasis in original).
use of the common law's "artificial reason." The student explains that "the artificial reason of the professional lawyer must be acquired through experience" and professional training, because the common law consists of "a vast historical accumulation" of complex and disorderly precedents, evolving around concepts, many of which "have themselves been fortuitously determined by the historical circumstances in which they originally took shape." For the same reason, the precedents are "ambiguous," so that legal judgments "are necessarily inexact and therefore inherently controversial." Moreover, Kronman claims, various other texts from the same period as the Dialogue suggest that "sound character" is also necessary for good judgment in law.

(2) Three Central Notions of Classical Common Law Thought

Three related notions represent some further and central ways in which the common law was conceptualized in classical common law thought. For illustrative purposes, the discussion of each notion below will be followed by a note citing to some relevant passages, in Blackstone's Commentaries and Kent's Commentaries as well as other sources, manifesting recognition of that notion during this first phase in the history of U.S. legal education.

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220. Id. at 177 (citing THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAW OF ENGLAND (Joseph Cropsey ed., 1971)).

221. Id. at 177-78. Hobbes' preference for the use of "natural reason" over the use of the common law's "artificial reason" to resolve legal questions clearly implies his rejection of the doctrine of stare decisis as well. See id. at 179-80.

222. Id. at 178-79.

223. Id. at 179; see also POSTEMA, supra note 201, at 31-33 (discussing the importance of experience and prudence for Postema's first, or "particularist," conception of common law reason and reasoning, see supra note 211 and accompanying text).

Although Kronman does not appear to do so in clear, explicit terms, some scholars have advanced the claim that common law reasoning was directly influenced by Aristotelian modes of practical reasoning. See, e.g., Stephen A. Siegel, The Aristotelian Basis of English Law 1450-1800, 56 N.Y.U. L. REV. 18-59 (1981) (discussing how Aristotelian modes of thought, in particular Aristotelian epistemology in Aristotelian theoretical and practical science, undergirded premodern legal reasoning with respect to the various sources or grounds of English law (right reason or the law of nature, revelation, common law custom, and statute) and, during the course of that discussion, illuminating the influence of these Aristotelian modes of thought on the aspects of common law reason examined here and on the notions of classical common law theory examined below).

224. As suggested in the text, these citations are intended to be illustrative only. For a discussion of the central notions of classical common law theory as manifested in eighteenth-century American legal thought, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 7-9 (1977).
The first notion is that the common law is "common and immemorial custom," its rules and principles being accepted and used by an historical community extending through many generations out of a shared sense of their reasonableness, and representing, in some way, the "collective wisdom" of that community. Postema explains that it is this acceptance and use of common law rules and principles in the continuous practice of the historical community, out of a shared "tradition-shaped sense of [their] reasonableness," that gives these rules and principles their validity and authority. It should be emphasized that this first notion is not necessarily inconsistent with the idea of the common law as an evolving body of law. In this respect, Postema refers to the dominance of Hale's more dynamic view over Coke's more static view, explaining that, on the former view, even though "the law is in a constant process of change, adjustment, influence, development, decline, and rebirth," nevertheless "it is the same body of law" because "[t]he key is not identity of components but a steady continuity with the past.

The second notion is that the role of the judge, acting as the community's authoritative spokesman, is "not to make, but publicly to expound and declare, the law" of the historical community in accordance with common law reason and, having found the law, to apply that pre-existing law in deciding the case before the court. Cotterrell explains that, according to this declaratory theory of common law judging, "[t]he judge expresses a part of the total, immanent wisdom of the law which is assumed to

For further discussion of the general character, structure, and contents of Blackstone's COMMENTARIES (including the 1803 Tucker edition) and of Kent's COMMENTARIES, see supra notes 178-86 and accompanying text (Blackstone), notes 187-90 and accompanying text (Kent), notes 191-93 and accompanying text (Blackstone and Kent).

225. POSTEMA, supra note 201, at 4-9, 10, 60-80; accord COTTERRELL, supra note 201, at 22-25, 26-28.
226. POSTEMA, supra note 201, at 4-9, 10.
227. See supra note 200 and accompanying text.
228. POSTEMA, supra note 201, at 6; see also COTTERRELL, supra note 201, at 28-30 (discussing the dynamic nature of the common law and the problems with, and potential and actual historical responses to, viewing the common law as static). For a discussion of how classical common law theory sought to account for the phenomenon of legislation, see COTTERRELL, supra note 201, at 30-33, 35-36; POSTEMA, supra note 201, at 14-29.

For expression of this first notion by Blackstone, Kent, and Story, see, for example 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 103, at 5, 63-68, 73; 4 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 103, at 442; 1 KENT, supra note 56, at 439-40; Story, supra note 139, at 298, 305. For an additional expression of elements of this first notion by a leading American legal educator of the period, see Hoffman, Introductory Lecture, supra note 106, at 279.

be already existent before his decision." Moreover, although previous judicial decisions are entitled to great weight, in particular because they are "the best available evidence of the collective wisdom of the common law," nevertheless, as Hale stated clearly in the seventeenth century, they are not themselves law. Thus, classical common law theory "does not dictate a slavish adherence to precedent;" indeed, the doctrine of precedent in classical theory is "complex" and "also perhaps much more flexible than it is typically portrayed as being."

Cotterell and Postema elaborate upon the flexibility inherent in the doctrine of precedent. Thus, unjust or absurd decisions are not declaratory of the law; prior judicial formulations of a rule or principle may be mistaken and therefore may require correction through a reformulation of that rule or principle; and judges may need to deal with novel problems by fashioning new legal rules, albeit out of existing legal materials. The necessary flexibility in adjudication in this last respect was achieved, it seems, not only through the use of legal fictions, but also through the creative use of common law "general principles."

The final notion is that the common law itself demonstrates, and is declaratory of, natural law, because the norms of natural law are immanent within common law reason. In classical common law thought natural law is reflected in particular in the

230. COTTERELL, supra note 201, at 25.
231. Id. at 25-26; accord POSTEMA, supra note 201, at 9.
232. COTTERELL, supra note 201, at 26; accord POSTEMA, supra note 201, at 9-10.
234. See POSTEMA, supra note 201, at 9-11, 194-95; see also COTTERELL, supra note 201, at 26 (stating that common law judges are bound not by previous decisions, but "by the principles implicit or explicit in them").
235. See POSTEMA, supra note 201, at 11-13; COTTERELL, supra note 201, at 26.
236. POSTEMA, supra note 201, at 12.
237. Id. at 12-13, 34-35; COTTERELL, supra note 201, at 22-25. Compare KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 36-37, 431-37 (1960) (discussing the use of "principle" in Grand Style judging in general, and by Cardozo in particular). For further discussion of the different conceptions of "reason" (and reasoning) in classical common law theory, including the role of "general principles," see supra notes 209-16 and accompanying text.

For expression of this second notion by Blackstone, Kent, and Story, see, for example 1 TUCKER, BLACKSTONE'S COMMENTARIES, supra note 103, at 69-71; 1 KENT, supra note 56, at 440, 442-45, 456; Story, supra note 139, at 298. For an additional expression of this notion by a leading American legal educator during the latter part of our period, see, for example Dwight, Best Mode, supra note 139, at 333; Dwight, Lecture Notes, supra note 139, at 345. For discussion of the expression of this notion in judicial decisions, as well as in the works of legal authors, see LAPIANA, supra note 2, at 34-37.
238. See POSTEMA, supra note 201, at 33-37, 268-69; COTTERELL, supra note 201, at 36-37, 121-22.
“general justifying principles which are instanced in, and illustrated by, particular decisions and settled rules.”

Postema stresses the *immanence* of natural law norms within common law reason: “[T]he reason of general principles is not a priori, and historical, it is practical and historical; the ‘natural law’ involved is not external to the tradition, but implicit in it, not socially transcendent, but immanent.”

The general principles “are uncovered through reflection on the particular cases — through experience and the reflection of many on that experience,” so that “[g]eneral rules not yet confirmed by experience... must be treated as hypotheses, open-ended proposals, and not as firm and binding law.”

Thus, “[n]atural law... appears not as a ‘higher law’ standing in constant judgment on positive human law, but as the light of reason shining through that law,” and “[i]t is best discovered through evolutionary refinement.”

Postema goes on to observe that all this “reveals a deep ambiguity in Common Law theory” as to whether common law standards are regarded as “autonomous and self-justifying” or as “appealing[ing] ultimately to a transcendent source of validation.”

c. Character of Associated Natural Law Thinking in Early American Legal Thought

Consistent with the third notion of classical common law

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239. POSTEMA, supra note 201, at 33-35 (emphasis in original); see also supra notes 211-14 and accompanying text (discussing the second, broader concept of reason at work in classical common law theory).

240. POSTEMA, supra note 201, at 36.

241. Id. (emphasis in original).

242. Id. at 37.

243. Id. Cf. Simpson, supra note 176, at 648 (noting, with respect to common law maxims, the existence of the theory that “the principles were the basis of decided cases, not the reverse,” as well as “the idea that maxims needed proof by the authority of judicial decisions”).

For expression of this third notion by Blackstone, Kent, and Story, see, for example 1 TUCKER, BLACKSTONE’S COMMENTARIES, supra note 103, at 32, 38-43, 53-56 (general considerations); id. at 122-45 (natural or “absolute” rights and liberties, i.e., “the right of personal security, the right of personal liberty, and the right of private property”); 2 id. at 1-15 (property); 4 id. at 7-12 (punishment); 1 KENT, supra note 56, at 439, 446; Story, supra note 139, at 305, 309-10. For further discussion of the apparent acceptance of this particular notion by Blackstone, Kent, and Story, see RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 369-71 (4th ed., 2003) (Blackstone, Kent, and Story); Bailey, supra note 59, at 314, 323-24 (same); FELDMAN, supra note 4, at 49-50 (Blackstone); id. at 52, 78 (Kent); id. at 54-55, 75, 81-82 (Story); POUND, supra note 176, at 107, 147-48 (Kent and Story); Langbein, supra note 2, at 215 (Kent). For an additional expression of this notion by a leading American legal educator of the period, see Hoffman, Introductory Lecture, supra note 106, at 288. For discussion of the expression of this notion in judicial decisions, see, for example FELDMAN, supra, at 54-56, 78-79, 81-82; POUND, supra note 176, at 104-05, 109-10.
theory, the prevailing jurisprudence of the period seems to have included some variant of natural law theory as one of its central elements. Roscoe Pound, for example, noted the general acceptance of natural law thinking by members of the American legal profession for much of this period.\textsuperscript{244} There appear to be various views, however, regarding the precise form of natural law thinking involved. Some of the alternatives suggested include: Judaeo-Christian natural law, with its emphasis upon divine revelation and the use of human reason;\textsuperscript{245} a succession of varying forms, ranging from natural rights to idealized positive law

\textsuperscript{244} See POUND, \textit{supra} note 176, at 3, 12, 99 (noting the prevalence of natural law thinking among lawyers, judges, and law teachers for much of the “formative era of American law,” which lasted from the time of independence until the Civil War). Reflecting his own views regarding the type of natural law thinking involved, see \textit{infra} note 245 and accompanying text, Stephen Feldman suggests there were at least three reasons why “Americans readily received the Blacksonian faith in natural law as the foundation of the legal system, a faith they generally maintained until the Civil War era”: (1) natural law provided a “convenient and useful justification” legitimizing the adoption of English common law in America; (2) such thinking was consistent with the late eighteenth- and early nineteenth-century American social context, in which many considered society to be “naturally stratified or ordered,” and in which “distinct social hierarchies” continued to exist notwithstanding great economic changes and the progress of democracy and equality; and (3) “religiously rooted natural law” resonated readily with the deep commitment of many Americans to Protestant Christianity. FE\textit{LDMAN, \textit{supra} note 4, at 50-52.

\textsuperscript{245} See, e.g., FE\textit{LDMAN, \textit{supra} note 4, at 50 (explaining that “[n]atural law, according to Blackstone, is either revealed by God or discoverable through human reason.”); William LaPiana, \textit{Honor Langdell}, 20 \textit{LAW & SOC. INQUIRY} 761, 762 (1995) (observing that before the Civil War “there was widespread agreement that the principles of private law were congruent with and dictated by the absolutely true requirements of Christian morality. Law was principles, and properly decided cases reflected those principles, which themselves, in the end, were God’s plan for governing the nation”). See \textit{generally} MILLER, \textit{supra} note 201, at 186-206 (reviewing the many expressions of the view throughout the entire period that Christianity was part of American law, and noting some expressions of a contrary viewpoint); see also KIRK, \textit{supra} note 243, at 369-70 (noting the mingling in Blackstone of “two streams of ‘natural law’ thought . . . that of Cicero, the Schoolmen, and Richard Hooker, and that of the seventeenth-century scholars Grotius and Pufendorf and the eighteenth-century Swiss jurist Burlamaqui,” and commenting that “Blackstone himself, and the Americans whose legal concepts he helped to form, made few nice distinctions concerning the natural law”); Bailey, \textit{supra} note 59, at 316, 318-23, 325-28 (discussing the emphasis upon moral philosophy, natural law, and the Christian faith, as well as the centrality of works on natural law theory by such writers as Grotius, Pufendorf, and Burlamaqui to legal education in the antebellum college and apprenticeship settings).
(suggested by Pound himself); and a search for "the best reason a court can find" (according to Karl Llewellyn).

Given their apparent acceptance of natural law thinking, members of the legal profession would have been familiar, of course, with the natural law claim conditioning the validity and authority of human law upon its conformity with natural law norms. In an era before the Fourteenth Amendment to the Constitution, such ideas were invoked to attack successfully various state statutes in the state courts, especially during the first third of the nineteenth century. On the other hand, with respect to the common law, the belief that the common law is declaratory of natural law could potentially result, of course, in a certain

246. See Pound, supra note 176, at 17, 21-23, 104-08 (identifying a number of varying forms that were at work during the period, including natural rights, consensual natural law, moral precepts determined by reason, the nature of American institutions, of free institutions or of free government, principles of classical political economy, a universal commercial law set forth in Continental treatises, and idealized positive law (both Common and Civil Law)).

247. See Llewellyn, supra note 237, at 421-23 (characterizing the essence of the "Natural Law" thinking of the period as "a conscious and sustained quest for and accounting to the best reason a court can find... It is a technique, plus an attitude; and it is quite independent... of any philosophy as to the proper sources of 'Right Reason' which may be held by any 'Natural Law' philosopher"). Llewellyn suggests that an appellate judge's search for "the best reason" involves "careful and conscious responsibility to the going legal heritage of the society around him, and to its reckonable future ordering." Id. at 422. He also suggests that Pound, see supra notes 244, 246 and accompanying text, in fact has a similar understanding to his own regarding the "Natural Law" thinking of the period. Id. Llewellyn quotes with approval Levin Goldschmidt's identification of the appropriate task:

Every fact-pattern of common life, so far as the legal order can take it in, carries within itself its appropriate, natural rules, its right law. This is a natural law which is real, not imaginary; it is not a creature of mere reason, but rests on the solid foundation of what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.

Id. at 122 (quoting Levin Goldschmidt, Preface to Kritik des Entwurfs eines Handelsgesetzbuches, in 4 KRIT. ZEITSCHR. F.D. GES. RECHTSWISSENSCHAFT 289 (1857)).

248. Blackstone's views in this regard are expressed in the following famous and forceful statement:

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from the original.

1 Tucker, Blackstone's Commentaries, supra note 103, at 41.

249. See Pound, supra note 176, at 56-57 (providing examples from the Supreme Courts of Connecticut, Massachusetts, and Tennessee).
tendency towards conservatism, or even complacency, regarding existing common law. However, following Pound's account, any such belief that may have been held by American lawyers, judges, and doctrinal writers, such as Kent and Story, during this period certainly did not prevent them from using what Pound calls the "creative" side of natural law in order to adapt English common law, and other legal materials, to American conditions, and thereby to develop an indigenous American law, although another, "stabilizing" side of natural law also had an important influence, particularly after the creative work was completed. 

250. See, e.g., COTTERRELL, supra note 201, at 119. Bentham and Austin, Cotterrell explains, criticized Blackstone for his confusion of legal and moral analysis in the COMMENTARIES. To condition the validity and authority of human law upon its conformity with natural law norms is a double-edged sword. On the one hand, "[s]ince ethical views vary, the way is opened for anyone to claim the right to 'second guess' the authority of law and state." On the other hand: To confuse moral and legal authority allows reactionaries to claim 'this is the law; therefore, it must be right;' existing law is assumed to possess not only authority as law but also moral authority. Blackstone's primary failing in Bentham's eyes was, thus, his tendency to merge legal and moral authority, which went along with a complacency implying that English law as expounded in the COMMENTARIES was the best law of all for the best of all possible worlds.

Id. Cf. FELDMAN, supra note 4, at 55 (observing that "[m]ost American jurisprudents presumed that positive law generally comported with natural law").

251. See POUND, supra note 176, at 12-13, 16-18, 20-23, 26-27, 29-30 (general considerations); id. at 102-110 (adjudication in particular).

For further discussion of the role of general principles and associated natural law thinking in the work of early American textbook writers, see FELDMAN, supra note 4, at 52, 78 (Kent); id. at 54-55, 75, 81-82 (Story); Simpson, supra note 176, at 670-74 (legal writing generally); Swygert and Bruce, supra note 59, at 961 n.86 (same).

252. See generally HORWITZ, supra note 224. For a succinct discussion of the new, instrumentalist conception of law, focusing especially upon "[j]udicial instrumentalism," see COQUILLETTE, supra note 207, at 500-06. See also id. at 506-09 (discussing the associated instrumentalist codification movement in America).

253. On the Grand Style of appellate judging, see generally LLEWELLYN,
pragmatic, instrumentalist conception of law must certainly have displaced the three, perhaps rather mystical, classical common law notions and associated natural law thinking discussed above. Indeed, several scholars appear to have reached this conclusion. For example, in discussing Oliver Wendell Holmes’ late nineteenth-century and John Chapman Gray’s turn-of-the-century refutations of such notions as expressed by Blackstone, Paul Carrington suggests that, in fact, “[i]t is . . . unlikely that many of the antebellum law teachers . . . often lapsed into the delusion that American law was other than the embodiment of the practical moral judgment and experience of the men who expressed and enforced it.” Similarly, Morton Horwitz claims that by 1820 the conception of law as “an eternal set of principles expressed in custom and derived from natural law,” and as “a body of rules designed to achieve justice in the individual case,” had been displaced by an “instrumental conception of law” in which “judges

supra note 237. Llewellyn considers that the Grand Style prevailed in America during the first half of the nineteenth century (more specifically, “from Jefferson’s administration up roughly until Grant’s”) but was then displaced by what Llewellyn calls the “Formal Style” during the latter part of the nineteenth century, although there were clear signs at the time of writing that appellate adjudication was in the process of moving back in the direction of the earlier Grand Style. Id. at 5, 37, 40-41. Interestingly, and significantly, these periods correspond roughly to the first, second, and third phases in the history of U.S. legal education as identified in this article. See supra note 1 and accompanying text.

As far as the nature of the Grand Style of appellate judging is concerned, Llewellyn explains that the Grand Style “is a way of ongoing renovation of doctrine,” in which “the better and best law is to be built on and out of what the past can offer” through “a constant re-examination and reworking of a heritage,” with a view to “the on-going production and improvement of rules which make sense on their face.” LLEWELLYN, supra note 237, at 35-38. In this Grand Style, although precedents are “welcome and very persuasive,” a precedent is “test[ed] . . . almost always against three types of reason before it is accepted”: (1) “the reputation of the opinion-writing judge;” (2) “principle,” meaning “a broad generalization which must yield patent sense as well as order;” and (3) “policy,” meaning the “prospective consequences of the rule under consideration . . . and [of] its application.” Id. at 36; see also id. at 62-72 (reporting the results of his examination of the Grand Style at work in various state jurisdictions from the 1820s until the 1860s); R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 113 (1984) (equating Llewellyn’s “Grand Style” with “pragmatic instrumentalism”); supra note 237 (referencing Llewellyn’s discussion of the use of “principle” in Grand Style judging in general, and by Cardozo in particular).

254. See supra notes 224-43 and accompanying text (classical common law notions); supra notes 244-51 and accompanying text (natural law thinking). Such a pragmatic, instrumentalist conception of law clearly is not incompatible, however, with Llewellyn’s own account of the “natural law” thinking of the period as involving a search for “the best reason a court can find.” See supra note 247 and accompanying text.

came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct.\textsuperscript{256}

If scholars such as Carrington and Horwitz are correct in their assessment of the status of classical common law notions and associated natural law thinking following the emergence of pragmatic instrumentalism, it might tend to suggest that any continued expressions or espousal of such notions are likely to represent no more than lip service paid to ideas that were not taken seriously.\textsuperscript{257} On the other hand, it can be argued that the emergence of an instrumentalist conception of law is not necessarily incompatible with a continuing real influence of such ideas within American legal thought. For example, Stephen Feldman sees no incompatibility between instrumentalism and natural law theory during the second part of this period. Thus, although the "idea of progress... was most often manifested by an instrumental and pragmatic conception of law," legal thinkers "understood progress in premodernist or eschatological terms... as movement toward the realization of eternal and universal principles."\textsuperscript{258} He explains further:

\begin{quote}
[L]egal principles are universal and separate from the cases, which represent imperfect manifestations of the principles. From this perspective, natural law principles provided a metaphysical foundation for the American legal system, including the common law. Yet, the principles still had to be specifically interpreted and applied in concrete judicial disputes, and as judges did so, they were to be practical and instrumental.\textsuperscript{258b}
\end{quote}

\textsuperscript{256} HORWITZ, supra note 224, at 30.  
\textsuperscript{257} Indeed, Carrington seems to make this very suggestion, and even regards it as a possibility with regard to Blackstone himself. See Carrington, Hail! Langdell, supra note 108, at 733.  
\textsuperscript{258} FELDMAN, supra note 4, at 75; see also id. at 79-80 (to similar affect); id. at 75-78 (illustrating this combination of ideas in various contexts). In Feldman’s account, the "eternal and universal principles" are "principles derived from nature and Protestant Christianity." Id. at 75; see also supra note 245 and accompanying text. Cf. LAPIANA, supra note 2, at 34 (discussing Dorothy Ross’ exploration of nineteenth-century American "historical consciousness," and explaining that this historical consciousness was "static," emphasizing "long-standing and moral" processes, in particular due to its link with republicanism and Protestantism, "both of which helped invest America with millenial significance," consequently, "it is possible to see ante-bellum expression of belief in the progress of nations or peoples through various stages of development, culminating in the passage from a feudal to a modern, liberal, and commercial society, as compatible with a belief in universal principles and in a divine hand behind the historical process" (quoting Dorothy Ross, Historical Consciousness in Nineteenth-Century America, 89 AMERICAN HISTORICAL REVIEW 909, 911-20 (1985))). For further discussion of republicanism, see infra Part II.B.2.  
\textsuperscript{258b} FELDMAN, supra note 4, at 78. Feldman characterizes the relationship between the legal principles and the cases as "Platonic," explaining that,
Because of the instrumental approach to judicial decision making, the natural law principles faded into the juridical background in many and even most instances. Yet although in specific cases the principles would only rarely be referred to, they always remained significant as a foundation for the legal system — a foundation of principles that could fade into the background only because so many American judges, lawyers, and jurisprudents willingly agreed on and accepted the idea of broad natural law principles.260

Feldman's understanding261 is certainly consistent with 

"[a]ccording to Plato, the Ideas exist separately from the particular instances. The Ideas are universal and unchanging, while the particular instances vary, manifesting but never perfectly exemplifying the Ideas .... [P]remodern jurisprudents understood the relation between legal principles and cases in a similar fashion."  Id.; see also infra note 273 and accompanying text (discussing Feldman's account of the legal science of the period).

260. FELDMAN, supra note 4, at 79. Feldman also explains that, throughout the period, in addition to being the "metaphysical foundation" for the legal system, see supra note 259 and accompanying text, natural law principles also "provide[d] the specific source for deciding a case" in the absence of a common law precedent that was applicable directly or by analogy, and thus, during the second part of the period, helped to justify instrumental decision-making by the judiciary. Id. at 55, 79.

261. Feldman maintains, too, that the combination of instrumental decision-making by judges and an eschatological idea of progress was characteristic of a second stage in premodern jurisprudential thought. Thus, "second-stage premodern jurisprudents, like their first-stage predecessors, comprehended the common law as a science, a rational system of principles grounded in natural law." FELDMAN, supra note 4, at 79; see also infra note 273 and accompanying text. However:

[P]remodern jurisprudence moved from its first to its second stage when a different notion of time and history took hold early in the nineteenth century. First-stage jurisprudents had tended to dwell upon the rise and fall of civilizations and the potential decay of the American republic. Second-stage jurisprudents, though, fully embraced an idea of progress that assumed a human capability to constantly approach a more complete and perfect realization of the natural and universal principles. To achieve such progress, jurists and jurisprudents were to instrumentally apply the principles in a pragmatic fashion, paying particular attention to the promotion of commerce. FELDMAN, supra note 4, at 79-80; see also id. at 80-82 (illustrating second-stage premodern legal thought in the writings of Chipman and Story). This eschatological notion of progress, characteristic of second-stage premodern jurisprudential thought, not only contrasts with first-stage premodern jurisprudential thought, but also contrasts with "a modernist idea of progress, which would posit a human capability to advance endlessly. Instead, the eternal and universal principles provided, in a sense, a goal and a limit for progress." Id. at 75.

The movement from first to second-stage premodern jurisprudential thought was the result of various modernizing forces that were sufficiently opposed, however, by various countervailing forces and factors that the legal thought of the entire period retained its premodern character, in particular due to its continuing commitment to natural law thinking. See id. at 65-71 (modernizing forces); id. at 71-74 (countervailing forces and factors). Of particular importance in explaining the persistence of natural law thinking
Roscoe Pound’s observations regarding the general acceptance of natural law thinking by members of the legal profession for much of the “formative era of American law,” lasting from the time of independence until the Civil War, and regarding use of the “creative” side of natural law. It is also compatible, of course, with the third notion of classical common law thought, that the common law is declaratory of natural law. In addition, perhaps one can push the logic of Feldman’s argument further. Perhaps the first two notions of classical common law theory, or at least important elements of those notions, also continued to lurk “beneath the surface” as it were, although rarely articulated in the cases. This suggestion is bolstered by the consideration that there is a desire and felt need for stability, which frequently exist alongside, and in tension with, the desire and perceived need for change, and which may result, therefore, in a conscious or unconscious willingness to employ fictions and other devices that tend to promote such stability while at the same time accommodating change. Pound’s comments regarding the “stabilizing” side of natural law are certainly suggestive in this regard.

are religious factors. Thus, while the Second Great Awakening “transformed and spread American Protestantism and thus contributed to (and manifested) the growing individualist and populist ethos of the nineteenth century,” it also “simultaneously ... further Christianized American society and culture ... [and] seemed to strengthen the American resolve to follow religiously rooted natural law.” Id. at 72-73; see also supra notes 36-41 and accompanying text (discussing the general historical situation), infra notes 381-87 and accompanying text (discussing the persistence of premodern civic republican elitism).

262. POUND, supra note 176, at 3, 12, 99; see supra note 244 and accompanying text.

263. POUND, supra note 176, at 16-18, 22-23; see supra note 251 and accompanying text.

264. As we have already seen, Karl Llewellyn also recognized the existence of natural law thinking during the period. See supra note 247 and accompanying text. Apparently, however, he did not consider that it involved, as Feldman puts it, a movement toward “the realization of ... natural and universal principles.” FELDMAN, supra note 4, at 80; see also supra notes 258-61 and accompanying text.

265. Cf. Bailey, supra note 59, at 324 (“The belief that decided cases were observations upon the practical workings of natural laws was the tie that bound legal science to moral philosophy .... Cases were the material ‘from which the true theory is to be inferred .... ’ This understanding reflected the traditional view of common lawyers that judex est lex loquens — the judge is the mouthpiece of the law.”). Id. (quoting William G. Hammond, Preface, in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xviii (William G. Hammond ed., 1890)) (1765).

266. See POUND, supra note 243, at 16-18, 21-23, 104-07, 109-10, 117; see also supra note 251 and accompanying text.

Obviously, these three notions of classical common law thought were eventually transcended and transformed. As far as natural law thinking is
e. Early American Legal Science

A final element in the prevailing jurisprudence of the period with which early American lawyers would have been familiar is that of early American legal science. Writing in 1968, one scholar, Calvin Woodard, identified four different stages in the development of a rational, secularized "science of law," the first two of which are pertinent to this first pre-Langdellian phase in the historical development of U.S. legal education. During the first stage (from 1750 until 1800), Blackstone's Commentaries provided "the simplest and yet most fundamental scheme for classifying laws" and "put the chaos of the law into a semblance of order." This prepared the way for the second stage (from 1800 until 1870), during which some writers (such as St. George Tucker, Kent, and Sharswood) continued to produce works in the spirit of Blackstone, while others (such as Story) "undertook to systematize particular branches of law as Blackstone had done the whole," and "still others gave their attention to reforming the haphazard

Concerned, Feldman identifies a number of factors that "contributed to the demise of natural law and the ascension of positivism during and immediately after the Civil War," thereby helping to pave the way for Langdellian legal science in the 1870s. See Feldman, supra note 4, at 85-91 (noting the existence of various modernizing social and cultural forces, and identifying specifically several intellectual factors: a general "trend toward secularization" in intellectual matters; an "emerging historicist sensibility" among American intellectuals; the increased intellectual prestige of positivism following John Austin's attack on Blackstone's conception of natural law; and most especially, the deployment of mutually antagonistic and incompatible natural law-based arguments and natural rights-based arguments by southern defenders and northern attackers of the institution of slavery respectively); see also supra note 41 and accompanying text; infra note 386 and accompanying text.

As far as the first two notions of classical common law thought are concerned, it is interesting to observe that Langdell's conception of legal science bears a striking formal resemblance to these notions, even though the content is obviously different. Thus, as Kronman explains, the judge discovers and applies the "latent logic" of an historically evolving common law in the form of general principles that are to be induced from the cases and from which detailed rules can be logically derived by a process of geometrical reasoning. See Kronman, supra note 218, at 170-74. Langdellian legal science will be addressed in a subsequent article.

267. See Calvin Woodard, The Limits of Legal Realism: An Historical Perspective, 54 VA. L. REV. 689 (1968), reprinted in Herbert Packer & Thomas Ehrlich, New Directions in Legal Education 331-48 (1972). For Woodard's explication of the notion of "secularization" that has influenced the historical development of Anglo-American law, see id. at 333. By "secularization" Woodard means "a cluster of three interrelated propensities which, together, have become increasingly characteristic of western thought during the past four hundred years," namely "the growth of rationalism, the development of a scientific outlook, and the invention of new technology." Id.

268. Id. at 339. For further discussion of the general character and contents of Blackstone's Commentaries, see supra notes 178-84, 191-93 and accompanying text.
method of reporting cases," resulting in a "formidable body of systematic knowledge [being] amassed over the incredibly brief span of five to six decades."\textsuperscript{269}

Early American legal scientists, then, sought to classify and to systematize the law on the basis of its inherent principles.\textsuperscript{270} Some scholars consider that this early American legal science reflected natural law suppositions; others suggest a more eclectic character. These differing views appear to parallel the contrasting perceptions discussed in Subsection d immediately above.\textsuperscript{271} For example, after referring to Perry Miller's demonstration of "the dominance of the equation of law with science in all antebellum legal theorizing," Horwitz asserts that "[e]xcept for the identification of 'science' with systematization and classification . . . there is no coherent content or methodology to be found in these persistent claims to the scientific character of law."\textsuperscript{272} Feldman, on the other hand, claims that "premodern jurisprudents understood the common law as a science, a rational system of principles grounded in natural law . . . . The whole of jurisprudence could be rationally classified into a system that included not only the natural law principles but also a multitude of low-level legal rules that reflected the common law forms of action."\textsuperscript{273} The remaining stages in the development of a rational,

\textsuperscript{269} Woodard, supra note 267, at 339-41. For further discussion of the general character and contents of the Tucker edition of Blackstone's COMMENTARIES, Kent's COMMENTARIES, and Story's series of treatises, see supra notes 185-86 and accompanying text (Tucker edition of Blackstone); supra notes 187-93 and accompanying text (Kent); supra notes 194-96 and accompanying text (Story). See also supra note 53 and accompanying text (addressing various American editions of Blackstone).

\textsuperscript{270} See, e.g., Simpson, supra note 176, at 668-74; see also Sheppard, Lecture Hall, supra note 2, at 20 (seeming to suggest that early American legal science aimed to catalogue legal principles within a system of laws whose proper organization and classification would become evident once all the laws had been discovered).

\textsuperscript{271} See supra note 256 and accompanying text (Horwitz and the "instrumental conception of law"); supra notes 258-61 and accompanying text (Feldman and the continued influence of natural law principles).

\textsuperscript{272} HORWITZ, supra note 224, at 257 (citing MILLER, supra note 201, at 156-64).

\textsuperscript{273} FELDMAN, supra note 4, at 57; see also id. at 79 (similar language); id. at 52-57 (suggesting that this legal science combined a Baconian scientific methodology that emphasized inductive reasoning, generalization from particular instances, and classification and systematization, with recognition of a Platonic metaphysical relationship between universals and particulars); see also supra note 259 and accompanying text. For a very similar analysis, although one without express reference to Plato, see LAPIANA, supra note 2, at 29-37.

For a discussion of the emergence of modern scientific methodology, in particular an analytical-synthetical geometric method of deductive reasoning, and of its relationship to premodern Aristotelian modes of thought, within legal reasoning in the common law tradition, see Siegel, supra note 223, at 45-
secularized "science of law" as identified by Woodard lie beyond our time period and therefore beyond the scope of this article.²⁴

f. Elements of the Prevailing Jurisprudence in Legal Education

The discussion in the preceding five subsections has identified six main elements in the prevailing jurisprudence of the period. The first five elements concerned the general nature of the common law tradition; the nature of common law reason in

59. See also id. at 18-59 (discussing Aristotelian modes of thought in premodern legal reasoning); supra note 223 (referencing Siegel's discussion). For extended discussions of the legal science of various early nineteenth-century American legal scholars, including the varying sources from which they derived first principles, situated within the broader context of Anglo-American and Western legal science as a whole, see Hoeflich, Law and Geometry, supra note 2, at 589-605 (discussing the work of Legaré, Hoffman, and Mayes, and their adoption of the deductive "geometric paradigm" in law); Schweber, supra note 2, at 606-57 (discussing the work of Hoffman, Mayes, Field, Greenleaf, Beverly Tucker, and Sharswood, and the various features of their legal science, as well as the ways in which their legal science differed from that of writers such as Joseph Story). See also Woodard, supra note 267, at 342 n.24 (characterizing Story's legal science as "a deductive science" based on principles derived from truth, be it found in cases, Christianity, Judaism, Roman Law or wherever). For a discussion of the origins of Western legal science in the medieval jurists' application of the scholastic method of analysis and synthesis to the rediscovered texts of Justinian's Corpus Iuris Civilis, and to the canon laws of the Catholic Church during the late eleventh, twelfth, and thirteenth centuries, see HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 120-64 (1983). For Berman's account of some later central developments in the history of Western legal science, see HAROLD Berman, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATION ON THE WESTERN LEGAL TRADITION 100-30 (2003) (discussing the transformation of German legal science in the sixteenth century); id. at 270-305 (discussing the transformation of English legal science in the seventeenth century).

274. These remaining stages will be addressed, however, in a subsequent article. For present purposes, returning to Woodard's account of the development of the "science of law" will be helpful. See supra notes 267-69 and accompanying text. In Woodard's account, the second stage of this development, in which "a critical literature of law" created "a sizable body of factual and theoretical data about the law itself," was followed by a third stage (from 1870 until 1930) in which law became an "academic science," and "legal scientist-scholar(s)" such as Langdell identified "the principles underlying this data," and "the science of law [was] reconstructed on truly scientific foundations" using the inductive scientific method. Woodard, supra note 267, at 338, 342-46. The fourth stage (from 1930 until the time of writing, 1968) is more "pragmatic," involving an effort, by the American Legal Realists and their successors, to "make scientific knowledge useful" through the use of a "modern legal technology." Id. at 346-48. It should be noted that Woodard's third and fourth stages in the development of a "science of law" coincide with the second and third phases in the historical development of U.S. legal education (the phase of Langdellian legal science and the legal realist phase respectively) as identified in the present article. See supra note 1 and accompanying text.
classical common law thought; three related notions representing
some further ways in which the common law was conceptualized
in classical common law thought; the character of associated
natural law thinking; and the emergence of a new, instrumentalist
conception of law, particularly during the second part of the
period. Students of the law in all three formal legal education
settings discussed in Section A above — apprenticeship training,
independent law school programs, and college/university law
programs — would have become familiar with these five elements
by reading law reports of cases, as well as various commentaries
and treatises explicating the common law (including, of course, the
works of Blackstone, Kent and Story), that expressed or
otherwise manifested these elements. Many students would have
gained additional familiarity with these elements by observing the
practice of their mentors in apprenticeship training, in particular
court proceedings, or by participating in moot court exercises in
the independent law school and college/university law programs.
Familiarity with all five elements was doubtless reinforced

275. See supra notes 197-200 and accompanying text (nature of the common
law tradition); supra notes 205-23 and accompanying text (nature of common
law reason in classical common law thought); supra notes 224-43 and
accompanying text (three related notions in classical common law thought);
supra notes 244-51 and accompanying text (character of associated natural
law thinking); supra notes 252-66 and accompanying text (emergence of a new,
instrumentalist conception of law). The sixth element concerns the nature of
eyear American legal science. See supra notes 267-74 and accompanying text.
276. Students of the law would have read law reports routinely in
apprenticeship training, and frequently in the independent law school and
college/university law programs. See supra note 71 and accompanying text
(apprenticeship training); supra note 171 and accompanying text (independent
law school and college/university law programs).
277. With respect to the role of such commentaries and treatises in formal
legal education, see supra note 77 and accompanying text (apprenticeship
training); supra note 170 and accompanying text (independent law school and
college/university law programs); supra notes 176-77 and accompanying text
discussing all three settings). For further discussion of the general character
and content of Blackstone's COMMENTARIES, Kent's COMMENTARIES and
Story's series of treatises, see supra notes 178-86 and accompanying text
(Blackstone); supra notes 187-90 and accompanying text (Kent); supra notes
191-93 and accompanying text (Blackstone and Kent); supra notes 194-96 and
accompanying text (Story).
With respect to the third element — the three related notions in
classical common law thought — see supra notes 228, 237, 243 for citations to
passages, in Blackstone's COMMENTARIES and Kent's COMMENTARIES as well
as other sources, reflecting these three notions of classical common law
thought.
278. See supra note 73 and accompanying text (apprenticeship training);
supra note 173 and accompanying text (independent law school and
college/university law programs).
through interaction with a mentor in the former setting and through classroom teaching in the latter setting.\textsuperscript{279}

Although the law curriculum in apprenticeship training and in some of the college/university law programs may have placed greater additional emphasis upon formal instruction in the refinements of natural law thinking (i.e., the fourth element) than did the curriculum in the independent law school programs,\textsuperscript{280} it must be remembered that many students of the law in all these settings would have received a college education (or its equivalent) before beginning their professional legal education,\textsuperscript{281} and a college

\textsuperscript{279} See supra note 73 and accompanying text (interaction with a mentor in apprenticeship training); supra notes 169-72, 174 and accompanying text (classroom teaching methods in the independent law school and college/university law programs). Of relevance, too, is the influence of the prevailing professional ideal, the ideal of the lawyer-statesman, upon the legal education of the period. See infra notes 394-435 and accompanying text. The lawyer-statesman ideal emphasized in particular the twin character-virtues of practical wisdom and civic-mindedness. See generally infra notes 293-361 and accompanying text. Insofar as mentors in apprenticeship training and law teachers in the independent law school and college/university law programs sought to familiarize their students with the lawyer-statesman ideal and to cultivate in them its component character-virtues, presumably they would have placed additional emphasis upon those elements of the prevailing jurisprudence, such as the nature of common law reason and natural law theory, that were of particular relevance to the cultivation of those qualities. See infra notes 406-07, 411, 422 and accompanying text (college/university law programs); infra notes 413, 418-20 and accompanying text (apprenticeship training); infra notes 430-35 and accompanying text (independent law school programs).

\textsuperscript{280} For emphasis upon natural law thinking in apprenticeship training, see supra note 77 and accompanying text (William Smith curriculum). See also infra notes 418-20 and accompanying text.

For emphasis upon natural law thinking in the early college/university law programs, see supra notes 112, 116 and accompanying text (Currie assessment Hoffman Syllabus respectively). Regarding such emphasis in the later university law programs, see supra notes 149, 153-55 and accompanying text (Harvard curriculum model); supra notes 162-65 and accompanying text (Virginia curriculum model). In these later university programs, both the Harvard curriculum model and the Virginia curriculum model included coverage of Blackstone’s COMMENTARIES. Assuming that classroom teachers addressed the relevant portions of the COMMENTARIES in their lectures, see supra notes 181-84 and accompanying text, their coverage of Blackstone would have included at least some coverage of natural law thinking as well. Relevant coverage may also have been incorporated into lectures on other topics in the curriculum. See also infra notes 411, 422 and accompanying text.

For the apparent lack of emphasis upon natural law thinking in the independent law school programs, see supra notes 91, 94 and accompanying text (Litchfield curriculum and Sheppard assessment respectively). Again, however, the introductory component of the curriculum may have included some coverage of natural law theory, and relevant coverage may also have been incorporated into lectures on other topics in the curriculum. See also infra notes 431, 434 and accompanying text.

\textsuperscript{281} See supra note 79 and accompanying text (apprenticeship training);
education would have included the study of moral philosophy and natural law thinking.282

With respect to the sixth and final element in the prevailing jurisprudence — early American legal science283 — students of the law in all three settings would have become familiar with the legal science of Blackstone and (later on) the legal science of scholars such as Kent and Story through reading their written works.284

supra note 96 and accompanying text (independent law school programs); supra note 128 and accompanying text (early college/law school programs); supra note 168 and accompanying text (later university law programs). See also supra notes 129, 165-166 and accompanying text (regarding the ability, in some of the college/university law programs, to take parallel courses in other departments of the college/university).

282. See, for example, Bailey, supra note 59, at 322-23, where the author explains that:

In the antebellum colleges, the keystone of the curriculum was the course in moral philosophy taught during the senior year.... Generations of college students listened to lectures reconciling Protestant theology and the new sciences and demonstrating the unbreakable connections between individual character and happiness, the moral and material progress of civilization, and social stability and traditional and supposedly immutable moral values and ideas. At the core of this system of belief lay the fundamental assumption that there was a deity whose existence and attributes could be logically demonstrated; man was a created being ruled by divine and natural laws rather than a product of natural forces. Moral philosophers agreed that the faculty of reason bestowed upon man by the creator enabled man to know moral truth, the content of divine and natural law, either from direct, scriptural revelation or from the study of natural and moral philosophies conducted according to the scientific method.... Moral philosophy described the moral nature and necessities of man and was regarded both as an important support for Christian belief and as the foundation upon which civil society rested.

Id. Of relevance, too, is Bailey's observation that:

The parallels between the natural law commentators chosen by legal educators and the texts of the academic moral philosophers are less remarkable when one notes that the Scottish moral philosophers and their academic disciples in America drew extensively from the natural law theories of Grotius and Pufendorf. Pufendorf's works, in particular, were frequently used as course texts.

Id. at 325. For a general description of the standard college curriculum, see supra note 72 and accompanying text.

283. See supra notes 267-74 and accompanying text.

284. See supra notes 268-69 and accompanying text; references supra note 277. Legal science included works not only on the "science of principles" but also on the practical "science of pleading." See LAPIANA, supra note 2, at 40-42 (discussing works on pleading by Story, Chitty, and Gould, as well as the laudatory references by various legal scientists to the "science" of pleading). Indeed, James Gould, who based his treatise on pleading (first published in 1832) on his lectures at the Litchfield School, claimed that he was presenting the doctrines of pleading "not as a compilation of positive rules; but as a system of consistent and rational principles, adapted, with the utmost precision, to the administration of justice." FELDMAN, supra note 4, at 57 (quoting and discussing Gould); accord LAPIANA, supra note 2, at 30, 42. For
Moreover, through their reading of law reports, students of the law would also have seen the results of early American legal science reflected in a more methodical method of law reporting as the period progressed. Moreover, once again, students of the law may have acquired additional familiarity with this element of the prevailing jurisprudence by observing the practice of their mentors, in particular court proceedings, or by participating in moot court exercises. Their familiarity with legal science may also have been reinforced through interaction with a mentor or, to a greater extent, through classroom teaching.

One legal educator, writing in the mid-1830s, provides a succinct description of what was involved in the scientific study of law. Such study, he explained:

[U]sually commence[s] with the law of nature, as the foundation of all legal science . . . [followed by] the law of nations, and . . . the Political or Constitutional Law . . . [and only then] the subject of Municipal Law which comprises the great body of . . . civil and criminal jurisprudence . . . [T]reat[ment] of the Municipal Law . . . commonly begin[s] with the rights of persons and the relations of domestic life, which branches, as well as the whole law of property, real and personal, are all expounded, before the modes of applying the rules of law and of administering justice in pursuance of them, are taken up.

It seems that in general teachers in the college/university law programs aimed centrally and consistently at providing organized and systematic instruction in law as the science of principles, and frequently the same was true of teachers in the independent

further discussion of the scientific conception of law in early American legal thought as a rational system of principles low-level legal rules, reflecting the common law forms of action, see supra note 273 and accompanying text. For further discussion of James Gould and the Litchfield School, see supra notes 82-96 and accompanying text.

285. See supra note 269 and accompanying text.
286. See references supra note 278.
287. See references supra note 279.
288. Butler, supra note 139, at 171. See also LaPiana, supra note 2, at 52 (discussing Butler's views regarding the study of law); supra note 273 and accompanying text (discussing Feldman's view that the common law was understood by premodern jurisprudents as a science, a rational system of natural law principles and low-level legal rules reflecting the common law forms of action).
289. See LaPiana, supra note 2, at 29-32, 37-38, 44, 48 (discussing the views of several college/university law teachers who characterized law as a Baconian science of principles, including James Wilson at Philadelphia, Daniel Mayes at Transylvania, William Kent at the University of the City of New York, Joseph Story, Simon Greenleaf and Joel Parker at Harvard, and Theodore Dwight at Columbia; and explaining that antebellum legal educators provided "instruction in legal principles" and "tried to inculcate the science of law as best they could using the standard educational techniques of their day"). See also references to Hoeflich, Schweber, and Woodard cited supra note 273.
law school programs as well. While students of the law in apprenticeship training may not have been "exposed to systematic instruction in the science of principles" in the same way, nevertheless it seems that many mentors advertently exposed their students to legal science through directed reading.

2. Prevailing Professional Ideal

It appears also that a particular professional ideal — the ideal of the lawyer-statesman — may have prevailed for much or most of the period. Although various accounts of lawyers' original self-understanding during this period have been advanced in the scholarly literature, it will be apparent from the discussion in this subsection that there exists very strong support for the position that lawyers' original self-understanding indeed was that of the lawyer-statesman. The lawyer-statesman ideal was closely

290. See, e.g., REED I, supra note 2, at 131-33 (explaining that the Litchfield School, which was a model for other proprietary law schools, was "[c]oncerned with law as a science" and that it "offered a good narrow course in which the common law was taught as a system of connected rational principles rather than as a code of arbitrary, but authoritative, rules and dogmas") (internal quotation marks omitted); Klaffer, supra note 59, at 324-27 (explaining that in their effort to "present an organized system of American law where none had previously existed" and to teach law "as a science emphasizing the diverse reasons for its development" instead of promoting "mere memorization of rules and procedures," teachers in the proprietary law schools relied upon Blackstone's COMMENTARIES, in particular for their categorizations and much of their methodology).

291. See LAPIANA, supra note 2, at 38 ("The vast majority [of American lawyers] studied law only through apprenticeship and were never exposed to systematic instruction in the science of principles.").

292. For a good discussion of students' directed reading in apprenticeship training, see Bailey, supra note 59, at 315-16, 319-22, 323, noting the perhaps telling references to "legal science," at 316 and 318, and to the "intellectual system" of "legal science," at 319. The directed reading discussed by Bailey includes works not only on the "science of principles" but also works on the "science" of pleading. See also supra note 284. Study of the practical "science" of pleading was, of course, central to apprenticeship training. See LAPIANA, supra note 2, at 38-41.

With respect to students in all three formal legal education settings, it should be noted that the prevailing professional ideal of the period — the ideal of the lawyer-statesman — was also partly shaped by the conceptions of legal science. For discussion of the lawyer-statesman ideal in general, see infra Part II.B.2. For discussion of the influence of the conceptions of legal science upon the content of the lawyer-statesman ideal, see infra notes 335-339 and accompanying text. As in the case of various other elements of the prevailing jurisprudence, mentors in apprenticeship training, and law teachers in the independent law school and college/university law programs, may have tried advertently to expose their students to this element of the prevailing jurisprudence also as part of their effort to familiarize their students with the lawyer-statesman ideal. See supra note 279; see also infra note 395.

293. For a brief but useful survey of various positions that have been advanced in the scholarly literature regarding American lawyers' original self-
associated with certain of the jurisprudential elements explored in Subsection 1 above, in particular with the artificial reason of the common law, natural law theory, and early American legal science. As the term itself suggests, however, the lawyer-statesman ideal applied to politics as well as to law and thus was also partly rooted in considerations of fundamental political theory.

In his book *The Lost Lawyer: Failing Ideals of the Legal Profession*, Anthony Kronman provides a highly sophisticated account of the nature of the lawyer-statesman ideal and of its development from the founding of the Republic until the present day. Subsection a will consider Kronman's general account of the lawyer-statesman ideal and of its influence during this first phase in the history of U.S. legal education, and Subsection b will discuss the ways in which, in his analysis, Kronman associates the lawyer-statesman ideal with the Aristotelian political tradition. Because Kronman's account of the historical role of the lawyer-statesman is rather abstract and general, it will be supplemented in Subsection c by an examination of Robert Gordon's more concrete and detailed account of this historical role, focusing on particular types of activities and achievements of the lawyer-statesman. Subsection d will then seek to put Kronman's account and Gordon's account into a broader perspective by considering various claims made by other scholars who have written about the prevailing political philosophy of the period. Subsection e concludes this examination of the lawyer-statesman ideal by considering its role in the formal legal education of the period.

a. The Ideal of the Lawyer-Statesman

As far as this first phase in the history of U.S. legal education is concerned, Kronman explains that "for the early-nineteenth-century bar, whose leaders still viewed their work and social
function in classically republican terms, the idealized figure of the lawyer-statesman was the embodiment of professional excellence. The lawyer-statesman is "not just an accomplished technician" with "specialized professional knowledge," but "a distinctive and estimable type of human being—a person of practical wisdom." Kronman describes the lawyer-statesman in general terms as being "possessed of great practical wisdom and exceptional persuasive powers, devoted to the public good but keenly aware of the limitations of human beings and their political arrangements." Thus understood, the lawyer-statesman is "a stock figure in the hortatory literature of the early-nineteenth-century bar," and that literature indicates how lawyers of the time wished to see themselves. Kronman broadens his claims regarding the influence of the ideal beyond the early nineteenth-century, asserting that the ideal was widely accepted within the profession throughout the entire nineteenth-century. According to Kronman, the lawyer-statesman ideal continued to operate as an ideal of professional excellence even for those many lawyers who had only limited opportunities to instantiate, or who otherwise fell short of, the ideal in their own work, thereby "affirm[ing] the self-worth of lawyers as a group." The lawyer-

295. Id. at 12 (citing THE LEGAL MIND IN AMERICA FROM INDEPENDENCE TO THE CIVIL WAR (Perry Miller ed., 1962); FERGUSON, supra note 78; Robert W. Gordon, Lawyers as the 'American Aristocracy': A Nineteenth-Century Ideal That May Still Be Relevant, 20 STAN. LAWYER, Fall 1985, at 2-7, 79-82).
296. Id. at 15-16.
297. Id. at 12.
298. Id. (citing ADDRESSES AND ORATIONS OF RUFUS CHOATE 222-40 (6th ed. 1891); JEAN V. MATTHEWS, RUFUS CHOATE, THE LAW AND CIVIC VIRTUE (1980)). The Rufus Choate speech cited by Kronman was given upon the death of Daniel Webster in 1852, and is described by Kronman as "a good example of the genre" of such hortatory literature. Id. at 12 n.3.
299. Id. at 16.
300. Id. at 12, 16-17. With regard to the role of the lawyer-statesman ideal in "affirm[ing] the self-worth of lawyers as a group," Kronman situates the lawyer-statesman ideal in the broader context of the "culture of professionalism," which became very influential during the latter part of the nineteenth century, explaining that the "ideal of professionalism" was "a secular successor to the concept of salvation as a calling that appeared... in the writings of the great seventeenth-century divines." Id. at 370-72. The "ideal of professionalism" sought to "confer[ ] meaning on the whole of a person's life" through "some intrinsic feature of the work" in which the professional was engaged. Id. at 371. More particularly, the ideal stressed that a professional career offers meaningful "personal fulfillment" because, unlike non-professional work, professional work "engages a sufficiently broad range of human capabilities" to have a "transformative" and identity-shaping effect on the personality "by promoting the development of a distinctive professional character." Id. For further discussion of the meaning of "professionalism" and the historical development of that concept and of the professions, see generally WILLIAM SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA (2d. ed., 2005). For
The John Marshall Law Review

statesman ideal was, of course, instantiated (and indeed, presumably, largely constituted) by various “hero figures” who were its “living representatives.” In giving examples from our period, Kronman seems to endorse the identification and portrayal of “eight representative figures” by Chief Justice Rehnquist in a 1986 article entitled *The Lawyer-Statesman in American History*. These representative figures include Thomas Jefferson, Alexander Hamilton, James Madison, and John Marshall, from what the Chief Justice calls the “Founding Period,” and Abraham Lincoln, Stephen Douglas, Salmon Chase, and William Seward, from the “Civil War Period.” To this list Kronman adds the names of other advocates and judges of the period, including Webster, Choate, Ames, Pinkney, and Kent.

We have already noted Kronman’s very general description of the lawyer-statesman. He also provides a more detailed, albeit still fairly general, “provisional” description of the main elements of the ideal “in its classical nineteenth-century form,” emphasizing that “[t]he ideal of the lawyer-statesman was an ideal of character,” and explicating in particular the “character-virtues” of practical wisdom (i.e., prudence) and devotion to the public good.

Sullivan’s discussion of our period, see id. at 67-82.
301. See KRONMAN, supra note 218, at 12, 16.
302. See id. at 11-12.
304. KRONMAN, supra note 218, at 12. Kronman illustrates his concept of the lawyer-statesman further by giving additional examples from the twentieth-century, including Henry Stimson, Dean Acheson, John McCloy, Robert Jackson, and Earl Warren, as well as (more recently) Cyrus Vance, Paul Warnke, and Carla Hills. Id. at 3, 11-12. Other twentieth-century examples given by Kronman include Archibald Cox, Lloyd Garrison, William Rogers, Orville Schell, and Adlai Stevenson. Id. at 273, 283.

For a critique challenging Kronman’s reliance upon Rehnquist’s article and Rufus Choate’s 1852 speech, supra note 298, to support his claims regarding the content and influence of the lawyer-statesman ideal in the nineteenth century, see James Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031, 1047-51 (1994) (reviewing Kronman’s *Lost Lawyer*, supra note 218, and questioning the probative value of Choate’s speech in supporting Kronman’s claims as far as the area of law as opposed to politics is concerned, as well as the probative value of Rehnquist’s article in supporting those claims as far as both areas are concerned). Despite these reservations, Altman finds that other evidence, specifically various writings on lawyer ethics, suggests that antebellum litigators indeed may have sought to practice law in accordance with the nineteenth-century republican ideal of the lawyer-statesman, or at least may have sought to do so more than modern litigators. See id. at 1051-55; see also infra note 365 (for Altman’s articulation of the intellectual premises of the nineteenth-century republican lawyer-statesman ideal).
305. See supra notes 296-97 and accompanying text.
(i.e., civic-mindedness or public-spiritedness). As far as the virtue of civic-mindedness is concerned, Kronman emphasizes that the lawyer-statesman is a “devoted citizen [who] cares about the public good and is prepared to sacrifice his own well-being for it.”

This “spirit of citizenship” sets him apart from “those who use the law merely to advance their private ends,” and from the “purely self-interested practitioner of law.” Moreover, the lawyer-statesman is a “better citizen than most” not just because of his motives but also because of his “special talent for discovering where the public good lies, and for fashioning those arrangements needed to secure it.”

This last observation implicates the character-virtue of practical wisdom. Here, Kronman explains that “[w]hether acting as the representative of private interests or as a counselor in matters of state,” the lawyer-statesman does not just provide “instrumental” assistance but also displays “exceptional wisdom” in “offer[ing] advice about ends,” an “essential aspect of his work” being “to help those on whose behalf he is deliberating come to a better understanding of their own ambitions, interests, and ideals and to guide their choice among alternative goals.” Thus, in addition to his intellectual abilities, the lawyer-statesman is a “leader,” a person of “extraordinary deliberative power,” a “paragon of judgment” who “excels at the art of deliberation,” in particular because he possesses “certain temperamental qualities,” such as being “more calm and cautious than most people and better able to sympathize with a wide range of conflicting points of view,” thereby “show[ing]... a balanced sympathy toward the various concerns of which his situation (or the situation of his client) requires that he take account.”

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306. KRONMAN, supra note 218, at 14-17, 109, 154. Kronman understands “character” to mean “broadly speaking, an ensemble of settled dispositions — of habitual feelings and desires.” Id. at 15. Kronman does not appear to regard the virtue of practical wisdom and the virtue of civic-mindedness as “character-virtues” in the same sense. On the one hand, he refers to “the character-virtues of prudence and public-spiritedness.” Id. at 154. On the other hand, he states that “[d]eliberative wisdom is a virtue that people possess to different degrees, making the distinction between excellence and mediocrity unavoidably relevant to it. Devotion to the public good, by contrast, requires only an act of will that every citizen is in principle able to perform.” Id. at 367. For further discussion of Kronman’s understanding of practical wisdom as a virtue of “character,” see infra notes 310-11, 324-28, 330, 333 and accompanying text.

307. Id. at 14.

308. Id.

309. Id.

310. Id. at 15.

311. Id. at 15-16. Kronman claims that those nineteenth-century lawyers who held up the lawyer-statesman as a model for the profession portrayed him in just this way; they meant to praise his “character” and not just his “learned
In addition to such general description, Kronman undertakes an explicit, in-depth "philosophical" analysis of the lawyer-statesman ideal in the political and legal contexts. Although he recognizes that earlier defenders of the lawyer-statesman ideal did not consciously think in such terms because, "[b]eing confident about its worth, they were never moved to scrutinize their convictions in a philosophical light," nevertheless he appears to claim that his analysis accurately depicts the content of the ideal in the past. Thus, subsequent chapters of his book seek to demonstrate how the twin virtues of practical wisdom and civic-mindedness are displayed, in varying modes, in the political understanding," to praise "his virtue and not just his expertise." Id. (citing Maxwell Bloomfield, Law and Lawyers in American Popular Culture in LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 132-43 (Carl S. Smith et al. eds., 1983)).

312. The claim is explicit with regard to statesmanship in politics. See id. at 53-54 (asserting that the "essential meaning [of statesmanship] has remained the same from one political epoch to the next"). Moreover, the similarity between Kronman's "provisional" description of the main elements of the lawyer-statesman ideal "in its classical nineteenth-century form," see supra notes 306-11 and accompanying text, and his in-depth philosophical analysis strongly implies such a claim in the context of law as well. See also id. at 5-6 ("[W]hat is permanently valuable in [the ideal] must be identified more explicitly than before"); id. at 13-14 ("[W]e must ... articulat[e] [the ideal's] intellectual premises more deliberately" than did its earlier defenders).

313. Although Kronman does not explicitly make the link himself, his analysis of the twin virtues of practical wisdom and civic-mindedness in various contexts, see infra notes 314-16 and accompanying text, arguably can be seen as an analysis of what Alasdair MacIntyre describes as "internal goods" of a "practice," as opposed to "external goods" such as money, status, and power. See MACINTYRE, supra note 198, at 187-96. Here, of course, we are concerned with the practice of politics and the practice (or perhaps more accurately various "practices") of law. MacIntyre defines a "practice" in a special sense, as being:

Any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence and human conceptions of the ends and goods involved, are systematically extended.

Id. at 187. In MacIntyre's account, "practices" are "transmitted and reshaped" through "traditions." Id. at 221-23; see also id. at 193-94. For MacIntyre's definition of a "living tradition," see supra note 198 MacIntyre's account of a "practice," and his distinction between "internal goods" and "external goods" of a practice, is essentially Aristotelian. See id., at 197-99, 203. For further discussion, see infra note 392.

In Kronman's analysis of the twin virtues of practical wisdom and civic-mindedness in various contexts, these two virtues appear to be linked. Thus, deliberating in a particular way (with practical wisdom), procedurally, produces a particular good appropriate to the context in question substantively, and the disposition to deliberate in that way arises out of a civic-minded concern to achieve that substantive good.
context and in the legal context — in judging and in legal practice — as is recognized also in law teaching.

During the course of his “philosophical” analysis, Kronman also explores another character trait of the lawyer-statesman, namely a particular kind of political and legal conservatism. Specifically, in confronting the question of change, the lawyer-statesman prefers a strategy of “pragmatic gradualism” because, being “skeptic[al] about the power of abstract ideas,” he is “temperamentally inclined to see a value in the irregularities of the existing order and to proceed with caution in leveling them

314. See KRONMAN, supra note 198, at 53-62, 87-108 (analyzing the modes of practical wisdom (in particular, the capacity for “sympathetic detachment”) and civic-mindedness (in particular, the desire for, and the creation and preservation of, “the good of political fraternity” while advocating a particular course of action) in good political deliberation, and describing also a resulting conservatism of a particular kind); see also infra note 318 (discussing the conservatism of the lawyer-statesman). In his analysis, Kronman draws parallels between good political deliberation and good personal deliberation, which also requires practical wisdom (in particular, the capacity for sympathetic detachment) and results in the personal equivalent of the good of political fraternity, namely “the good of integrity [of the soul].” See KRONMAN, supra note 198, at 57-59, 62-87.

315. See KRONMAN, supra note 198, at 116-21, 122 (emphasizing that the capacity for sympathetic detachment and a civic-minded devotion to the “good of the community represented by the laws” are crucial for good deliberation when performing the “law job” of adjudication). In addition to a concern for “doctrinal coherence” and “the responsiveness of doctrine to social and economic circumstances,” a devotion to the good of the law also includes a concern for the preservation of political fraternity. Id. at 118, 138-39, 141-43, 158, 319; see also id. at 326-27 (discussing sympathetic detachment in adjudicative deliberation); id. at 339-45 (discussing the judge’s concern for political fraternity in the exercise of judicial statesmanship); id. at 210-25 (discussing Karl Lewellyn’s account of appellate judging).

316. See id. at 121-62 (building on the accounts of excellence in personal and political deliberation and on the account of judging, to analyze the various modes of practical wisdom (in particular, the capacity for sympathetic detachment) and civic-mindedness (in particular, devotion to the good of the law) in deliberation by the “good lawyer” when performing the “law jobs” of counseling and advocacy, and describing a particular kind of legal and political conservatism among lawyers). See also infra note 318 and accompanying text (on the conservatism of lawyers).

317. With respect to this recognition in law teaching, Kronman focuses on the cultivation of practical wisdom and civic-mindedness by the modern case method of teaching. See KRONMAN, supra note 198, at 109-35; see also id. at 266-67, 269 (discussing the traditional aims of law teachers using the case method). As far as our period is concerned, however, Kronman observes that in the early nineteenth century the lawyer-statesman ideal “drew its vitality from other sources.” Id. at 154. Addressing “the formal legal education of the early nineteenth-century bar,” Kronman states that “prudence and public-spiritedness were extolled as virtues for lawyers and instilled by a blend of apprenticeship and broad humanistic learning.” Id. In this regard Kronman refers to the disciplines of history and literature in particular. Id.
out;" he "sees more in these arrangements than others do and tends to be less optimistic about reform."

b. The Lawyer-Statesman Ideal and the Aristotelian Political Tradition

In Kronman's analysis the lawyer-statesman ideal is closely associated with the "Aristotelian political tradition." The type of association differs, however, as between politics and law. In politics the association appears to be one of direct inspiration, whereas in law it appears to be more an association by comparison. In the area of politics, Kronman explains that the lawyer-statesman ideal was "closely entwined" with the tradition and literature of "classical republicanism" or "civic humanism" that began with Aristotle and other ancient writers. Kronman appears to see at least two important links between the lawyer-statesman ideal and this tradition.

First, Kronman seems to suggest that the lawyer-statesman ideal placed an Aristotelian stress on the autonomy of politics. For Aristotle, Kronman explains, politics is autonomous "in its independence from the prepolitical domain of private needs," and it is autonomous also "in the freedom of its own deliberative processes, participation in which... is essential to the

318. Id. at 154-55, 161-62. Kronman explains that, according to Tocqueville, American lawyers are conservatives because of their close connection to the propertied class (leading them to oppose "the destabilization of property rights"), and because the ceremony of the law and "the discipline of legal reasoning" encourage not only "a love of intellectual regularity," but also "a contempt... for the unruly proceedings of democratic assemblies" and "a generalized hostility to popular political reform." Id. at 155. While conceding "the validity of Tocqueville's observations," Kronman prefers to "explain the conservatism of modern-day American lawyers" as resulting from "a certain skepticism regarding the power of abstract ideas" and a "moral cosmopolitanism" regarding "the irreconcilable diversity of human goods," and he maintains that these traits are shared by "the idealized figure of the lawyer-statesman," and are encouraged today by the case method of teaching. Id. at 155-61. See also id. at 106-08 (discussing the conservatism of the statesman in politics and explaining that because of the emphasis on the value of political fraternity, there is "a commitment to order and the status quo"). For further discussion of Tocqueville's views regarding lawyers in the early American Republic, see infra note 348 and accompanying text.

319. KRONMAN, supra note 198, at 27, 35-36. Regarding the development of the classical republican tradition and its reception in America, see infra note 362 and accompanying text.

320. In Kronman's analysis, these links between the lawyer-statesman ideal and the Aristotelian political tradition emerge somewhat indirectly as part of a comparison between the lawyer-statesman ideal and the recent movement in American public law scholarship, known as the "new republicanism," that is his main focus in the relevant discussion. See KRONMAN, supra note 198, at 26-50. Kronman describes the new republicans as "the most outspoken defenders of civic virtue within the legal profession today." Id. at 51.

321. See id. at 36, 49.
achievement of the self-rule that our fulfillment as human beings requires.\textsuperscript{322} For those in the Aristotelian tradition, then, the autonomy of politics means that the goal of political action is not always to "satisfy a prepolitical desire," an antecendent "social" interest, but sometimes to form or cultivate new preferences, new "political" interests, through deliberation; that at least some political contests are concerned with "determin[ing] the collective interest of everyone involved," with the content and requirements of the "public good," and not with the satisfaction of "private" political interests focused on the separate interests of each participant; and that political contests should be resolved through

\textsuperscript{322} \textit{Id.} at 37. In short, for Aristotle "politics is an independent activity with a special aim or object of its own," namely the "self-government of a community of equals by deliberative means." \textit{Id.} at 36. Stephen Feldman provides the following useful summary of some of the central elements in Aristotle's moral and political thought relevant in the present context:

To Aristotle, the universal nature and ends of human life determine the best form of political society. Most important, then, one must recognize that "man is by nature a political animal" and that the \textit{telos} or natural end of human life is \textit{eudaimonia}, or happiness. One achieves happiness by living in accordance with virtue, and one cannot live virtuously except by acting prudently and sagaciously \textit{within a polis} or political community. The good of the individual and the good of the political community are intertwined and inseparable. In "the best regime," Aristotle declared, "[the citizen] is one who is capable of and intentionally chooses being ruled and ruling with a view to the life in accordance with virtue." The government, regardless of its form or type — whether a government of the one, the few, or the many — should pursue the satisfaction of the common good and not mere private interests. For the individual, in short, virtuous participation in the political community was deemed the highest good.

\textbf{FELDMAN, supra} note 4, at 12 (citing ARISTOTLE, THE NICOMACHEAN ETHICS, bk. IV, ch. 1-3, \textit{in} 2 THE COMPLETE WORKS OF ARISTOTLE 1729 (Jonathan Barnes ed., 1984)); ARISTOTLE, THE POLITICS bk. I, ch. 2; \textit{id.} at bk. III, ch. 7, 9, 13, \textit{in} 2 THE COMPLETE WORKS OF ARISTOTLE 2121 (Jonathan Barnes ed., 1984)). As far as emphasis upon the common or public good is concerned, and as the above passage suggests, Aristotle famously divides constitutions (or forms of government) into two basic categories: those aiming at the common interest (good or right forms) and those aiming at the personal interest of the rulers (bad or wrong forms). \textit{See id.} at bk. III, ch. 7, 1279a25-1279b4. For a more detailed discussion of Aristotle's moral and political thought, see, for example, 1 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 332-58 (Image ed., 1993) (1946).

The Aristotelian moral and political tradition, with its emphasis upon virtue and the common good, was incorporated as a central element in the Judaeo-Christian natural law tradition, in particular as a result of the medieval synthesis achieved by St. Thomas Aquinas in the mid-thirteenth century. \textit{See supra} COPLESTON, \textit{supra}, at 398-434 (1948); J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 123-31, 134-37, 141-46 (1992). As discussed above in Subsections c and d of Part II.B.1, the Judaeo-Christian natural law tradition was a central element in the prevailing jurisprudence of the period. \textit{See supra} notes 244-45, 248, 250, 258-61, 273 and accompanying text; \textit{see also supra} note 282 and accompanying text.
persuasion, through free "deliberative debate" and agreement, and not through "the manipulative techniques of power politics." 323

Second, Kronman claims that the emphasis of the lawyer-statesman ideal on character and judgment has its source in Aristotle's account of political excellence, in his "character-based elitism." 324 As Kronman explains, "[a]ccording to Aristotle, politics is a deliberative activity calling for judgments about particular matters 'in which an indeterminate element is involved'." 325 The appropriate excellence when deliberating about political matters and participating in political self-rule (as also when deliberating about personal matters and engaging in personal self-rule) is the excellence of practical wisdom. 326 This is "a virtue of character, a dispositional habit shaped by training or education," and "because of their greater natural abilities and superior education," some have more practical wisdom — and hence a greater capacity for self-rule — than others, although practical wisdom, and therefore the capacity for self-rule, may increase as a person develops the requisite "character traits," which include traits such as "sobriety," "fair-mindedness," and "incorruptibility." 327

323. KRONMAN, supra note 218, at 31-34. Here, Kronman is actually discussing the tenets of the "new republicans." See supra note 320. As Kronman explains, however, the new republicans rely on the tradition of classical political thought, drawing heavily from the literature of classical republicanism. See KRONMAN, supra note 218, at 26-27, 35-36. It is a fair inference, therefore, that Kronman regards these three tenets as being representative of the Aristotelian political tradition generally.

As far as the lawyer-statesman ideal itself is concerned, it is a fair inference that these tenets are descriptive of that ideal as well because, as noted above, supra note 319 and accompanying text, the lawyer-statesman ideal was "closely entwined" with the tradition and literature of classical republicanism, and also because Kronman considers that the new republicans and the lawyer-statesman ideal are similar with respect to their emphasis upon the autonomy of politics. On this latter point, see KRONMAN, supra note 218, at 26-27, 35, 49.

When discussing the three tenets of the new republicans regarding the autonomy of politics, Kronman contrasts them with adherents of the "interest-group theory of politics," who hold opposing views on all these points. Id. at 28-31. In short, the interest-group theory implies that politics is not "autonomous," but "instrumental," being "in its essence an adjectival process with no internal ends or values of its own." Id. at 34.

324. Id. at 40, 42.
325. Id. at 40 (quoting ARISTOTLE, NICOIKEAETHICS, at 1112b)).
326. Id. at 41, 42-44.
327. Id. at 41.
328. Id. at 41, 42-44. Kronman concedes that, in addition to this "character-based elitism," Aristotle notoriously espoused a "biological elitism" that excluded groups such as the young, women, and "natural slaves" from political participation in the first place, on the grounds that they are naturally incapable of the necessary self-rule. Id. at 37, 42. This effectively restricted political participation to the adult male heads of households, who alone possessed the requisite capacity, and meant that the disenfranchised groups
The Aristotelian political tradition's emphasis upon the importance of judgment and character in politics was also addressed earlier when discussing Kronman's comparison of the Aristotelian political tradition with the artificial reason of the common law tradition. As was noted there, Kronman considers that the two traditions resemble each other in three main respects. Thus, they both emphasize the necessity of long experience (to acquire the necessary knowledge, which is "complex and disorderly"), the difficulty of attaining mathematical precision (with the result that there is always room for "reasonable disagreement"), and the importance of sound character (in particular, the virtue of "prudence or practical wisdom") as well as intellectual acuity, in achieving true understanding.

In the area of law, then, for Kronman the association of the lawyer-statesman ideal with the Aristotelian political tradition "had to be ruled despotically, outside the realm of politics, by others." Although Kronman does not explicitly address the point, it is likely that at least some adherents of the lawyer-statesman ideal during our period may have shared Aristotle's views in this regard as well. See infra note 386 and accompanying text.

The "new republicans," see supra notes 320 and 323, reject both biological elitism and character-based elitism. Kronman, supra note 218, at 37 (biological elitism); id. at 27, 35, 51, 367 (character-based elitism). This is because they combine their Aristotelian belief in the autonomy of politics, see supra notes 320-23 accompanying text, with a commitment to "the prevailing neo-Kantian consensus," justifying the principle of universal enfranchisement on the Kantian non-empirical grounds that, with certain very limited exceptions (such as "the very young" or "the severely handicapped"), every person has an equal capacity for self-rule (or "self-determination"), conceived as "the exercise of will" by "beings capable of action in accordance with the conception of a rule," and is therefore "equally qualified to participate in political deliberation." Kronman, supra note 218, at 37-39, 46-48. The particular form of egalitarianism entailed in this Kantian justification for the principle of universal enfranchisement also puts into question the whole notion of practical wisdom and "a differential order of excellence in politics." Id. at 44-46, 47-49, 51; see also id. at 27-28, 36, 367 (discussing further the new republicans' neglect of the virtue of practical wisdom due to their commitment to a Kantian will-based conception of equality). Consequently, the "new republicans" are in fact hostile to the lawyer-statesman ideal, omitting virtually any mention of three important components or features of that ideal, namely: "the claim that some citizens have a superior ability to discern the public good; the belief that this superiority is due to their excellence of judgment; and the assumption that good judgment is a trait of character and not simply an intellectual skill." Id. at 35, 49-50.

As Kronman makes clear, however, one can reject Aristotle's "biological elitism," yet still accept his "character-based elitism." Not only is it perhaps logically possible to combine a Kantian justification for the principle of universal enfranchisement with Aristotle's account of political excellence, it is also possible to justify that principle on non-Kantian, empirical grounds that clearly can be combined with Aristotle's account. Id. at 40, 48.

329. See supra notes 218-23 and accompanying text.
330. See supra notes 218-23 and accompanying text.
appears to be an association by comparison rather than an association by direct inspiration. As Kronman explains, "the lawyer-statesman ideal was "deeply rooted in the common law tradition," with its emphasis upon the "prudent resolution of individual cases." The ideal incorporated "this ancient common-law reverence for the virtue of practical wisdom," for the notion that disputes in hard cases required "a subtle and discriminating sense of how the (often conflicting) generalities of legal doctrine should be applied" in those disputes, and indeed amplified it by claiming more explicitly that "prudence is a trait of character and not just a cognitive skill." Moreover, although the lawyer-statesman ideal stressed the value for lawyers of a familiarity with various non-legal disciplines, those disciplines were "humane" disciplines such as history, literature, and rhetoric, which were case-centered, involving the "accidental and unique" (history and rhetoric), and/or which had a "character-shaping function" (history and literature).

However, the lawyer-statesman ideal was also "partly shaped by an Enlightenment enthusiasm for system and order." There was, therefore, a "tension" in the lawyer-statesman ideal's incorporation of the "ancient common-law reverence for the virtue of practical wisdom" alongside "an Enlightenment rationalism of more recent origin." On the one hand, "many of the great lawyers and judges of the classical period [were] systematizers... who believed in the value of organization and clarity, both in established fields (where the historically evolved elements of doctrine were often exceedingly tangled) and in the newer sphere

331. Of course, many lawyers also participated in politics. Insofar as the Aristotelian political tradition and the lawyer-statesman ideal influenced lawyers in the practice of politics (for example, by encouraging civic-mindedness and practical wisdom), and insofar as characteristics lawyers developed in politics "spilled over" into their legal practice, then to that extent the Aristotelian political tradition may have indirectly influenced the practice of law as well. Similarly, the Aristotelian political tradition may also have indirectly influenced the practice of law insofar as the legal education lawyers received was intended to prepare future leaders of the Republic and was itself conducted within that tradition. Moreover, as discussed earlier, the Aristotelian tradition in fact may have directly influenced the practice of law as well. See supra note 223 (Aristotelian modes of thought in premodern legal reasoning). See also supra note 331 and infra note 392 (understanding of legal practice within an Aristotelian account of "practices").

332. See KRONMAN, supra note 218, at 20-21.

333. Id. at 21.

334. Id. at 20-22. Thus, "throughout the legal literature of the period, one encounters... the widely shared belief that lawyers must know something about history, literature, and rhetoric as well as law if they are to do their jobs in a properly broad-minded way." Id. at 20.

335. Id. at 20-21.

336. Id. at 21.
of constitutional law as well.\footnote{337} Here Kronman mentions Joseph Story and John Marshall as examples,\footnote{338} and presumably has in mind the efforts made by various early American legal scientists discussed above.\footnote{339} On the other hand:

[The common-law tradition... historically had taken a more skeptical view of systematic legal reform and stressed the wisdom of proceeding on a case-by-case basis instead. The common lawyer instinctively mistrusts abstract speculation. He believes that general principles have a role to play in the law but doubts that most serious disputes can be decided by reference to them alone. In addition, he insists, hard cases require the exercise of practical wisdom...\footnote{340}]

In addition to this emphasis upon the character-virtue of practical wisdom, in the area of law the lawyer-statesman ideal also shared the Aristotelian political tradition's emphasis upon devotion to the public good.\footnote{341} Here Kronman appears to suggest that the lawyer's role was "to 'mediate' between the public order and its requirements, on the one hand, and the self-regarding desires of private individuals on the other" by tempering the "excesses of private ambition" and by seeking to improve the law when arguing great public cases and dealing with other concrete disputes.\footnote{342} This mediating role, then, is also central to Mary Ann

\footnote{337} Id. at 20.  
\footnote{338} Id.  
\footnote{339} See supra notes 267-74 and accompanying text. It is significant, in this regard, that at this point in the discussion Kronman is comparing and contrasting the lawyer-statesman ideal with a successor ideal, the ideal of scientific law reform, that gradually emerged from the lawyer-statesman ideal toward the end of the nineteenth century. See KRONMAN, supra note 218, at 17-23. For further discussion of the ideal of scientific law reform, see infra note 342 and accompanying text.  
\footnote{340} KRONMAN, supra note 218, at 21.  
\footnote{341} With respect to the Aristotelian political tradition's emphasis upon devotion to the public good, see supra notes 322-23 and accompanying text; infra notes 362-66 and accompanying text.  
\footnote{342} See KRONMAN, supra note 218, at 18-19 (citing Robert W. Gordon, The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers 1870-1900, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 53-74 (Gerald W. Gawalt ed., 1984)). These particular points about the lawyer-statesman ideal emerge, somewhat elliptically perhaps, during the same discussion comparing and contrasting the lawyer-statesman ideal with the ideal of scientific law reform referred to above. See supra note 339.  

In his comparison of the two ideals, Kronman explains that they both: shared a commitment to the public good and improvement of the legal order; valued a systematic approach to legal problems; and stressed the value of nonlegal disciplines for their solution. However, they also diverged with respect to these three points. Thus, adherents of the ideal of scientific law reform: (a) focused on "the structural arrangement of the legal order as a whole" as opposed to "the resolution of particular disputes;" (b) considered that the "special wisdom" needed for its "scientific reform" through the "application... of certain methodical and rigorous techniques" was "reducible
Glendon's "good of the legal order and the polity it serves."  

**c. Activities and Achievements**

Robert Gordon's work on the legal profession during the early nineteenth century provides further and very useful insights into the mediating role of lawyers. Like Kronman, Gordon emphasizes and explores the civic-mindedness or public-spiritedness of the elite lawyers of the period. Also, like Kronman, Gordon considers that these elite lawyers served as role models for the profession and that the ideal they represented continued to be influential during the nineteenth-century. However, whereas Kronman describes the historical mediating role of lawyers only in the most abstract and general terms, Gordon does so in much greater detail, and gives it a historical context.

Gordon's work is especially valuable because it focuses on the legal profession, whereas Kronman's focus is more on politics. Gordon's work is also more detailed and specific, whereas Kronman's is more general and abstract.

Gordon's work is also important because it helps to fill a gap in the historical record. Previous scholars have not given enough attention to the role of lawyers in the early nineteenth century, and Gordon's work helps to rectify this.

Gordon's work also helps to clarify the nature of the lawyer-statesman ideal. Gordon argues that lawyers had a unique opportunity to lead exemplary lives, to illustrate by their example the calling of the independent citizen, the uncorrupted just man of learning combined with practical wisdom. Lives of eminent lawyers were written up and circulated for schoolchildren and popular readers. As an inspiration to the younger bar, lawyers endlessly eulogized their dead brethren's disinterestedness and devotion to professional craft and public service, often at considerable sacrifice to income.


See also *supra* note 342 and accompanying text.

346. See *infra* note 361 and accompanying text.

347. See the references to Kronman's discussion of the lawyer-statesman ideal and the virtue of civic-mindedness in politics, *supra* note 314 (emphasizing the statesman's civic-minded devotion to the good of political fraternity); in judging, *supra* note 315 (emphasizing the judge's civic-minded devotion to the good of the law); and, in legal practice, *supra* note 316 (emphasizing the importance of a civic-minded devotion to the good of the law in counseling and advocacy). Regarding legal practice in particular, see also *supra* note 342 and accompanying text (discussing the role of lawyers in...
more concrete and detailed terms, focusing on particular types of activities and achievements.

Taking as his point of departure Alexis de Tocqueville’s famous mid-1830’s characterization of lawyers as the “American aristocracy,” Gordon explains that the elite lawyers, who were “metropolitan, college-trained, mostly Federalist-Whig in politics,” saw themselves as republican lawyer-statesmen with the “mediating” role of “harmoniz[ing] the pursuit of private interest with the universal interest of the whole.” In explicating the self-image or “professional ideology” of these elite lawyers, Gordon explains further that although they were “increasingly inclined to emphasize their passive role as a restraint on the excesses of Jacksonian democracy” in the mid-1830’s when de Tocqueville was writing, they were more self-confident and activist during previous decades — from about 1790 until 1830. Then they saw themselves as “uniquely situated and qualified to diffuse throughout society the culture of civic virtue upon which the success of capitalist democracy would essentially depend . . . [and as] a means for mediating the conflict between virtue and commerce, . . . a way of reconciling the particular with the universal, class and regional factionalism with the common good, utilitarian calculation with social morality.

In the following passage Gordon describes how the influence of lawyers imbued with this vision and professional ideology extended throughout society:

[C]onstitutional review by high court judges was only the tip of the iceberg, the institutional apex of a vast interlinked network of lawyers deployed throughout society: the collegium of appellate

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348. See Gordon, American Aristocracy, supra note 344, at 2 (quoting Tocqueville’s observation that “[i]n America there are neither nobles nor men of letters and the people distrust the wealthy. Therefore the lawyers form the political upper class and the most intellectual section of society . . . . It is at the bar or the bench that the American aristocracy is found.” Id (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 268 (J.P. Mayer ed., 1969)).

See also Gordon, Independence, supra note 344, at 14 (explaining that “[t]he leading . . . lawyers, nourished on Montesquieu . . . , in turn, influenced Tocqueville’s view of American lawyers as a substitute for the Montesquieuvian aristocracy”). The notion, of course, is that lawyers play the classical aristocratic role of a political balance wheel. See Gordon, American Aristocracy, supra note 344, at 3; Gordon, Independence, supra note 344, at 14. For further discussion of Tocqueville’s views regarding lawyers in the early American Republic, see supra note 318.


350. Id. at 4.

351. Id. at 4-5.
lawyers who advise the judges, the scholars and treatise writers; the lawyers elected to the legislatures and the legal policy intellectuals who suggest legislative initiatives; the lawyers in their professional practice roles, advising clients, addressing juries; and above all as shapers of both elite and popular opinion, as corporate directors, local notables, speakers before mercantile societies, Fourth of July orators, political stump speakers, using any and all occasions for public argument—appellate argument, jury speeches, judicial charges to grand juries, legislative debate—as a means of educating general audiences in the principles and duties of republican citizenship.\(^{353}\)

Gordon identifies three main sets of reasons why the elite lawyers held the vision of themselves as having such a “special stewardship.”\(^{353}\) First, because of social and historical circumstances, lawyers enjoyed political dominance (indeed, “almost all lawyers of that time sought elective office at one time or another”) as well as cultural dominance (“law was a branch of public letters . . . [and, i]n an age whose ideal of the man of letters was the classical-Ciceronian active citizen law could still be the literary man’s vocation”), and it would be “irresponsible” to waste such a position of leadership.\(^{354}\) Second, “the ordinary practice of law was filled with virtue-developing experiences,” cultivating the fundamental skill of public oratory and the “fiduciary muscles” as well as an “insider’s knowledge” of many different activities and positions in society together with the ability to assess that knowledge independently.\(^{355}\) Third, for reasons associated with the content of the law, and with the techniques, methods and education of lawyers, “the substance of Law itself. . . . was capable

\(^{352}\) Id. at 4; see also Gordon, Independence, supra note 344, at 14, where Gordon articulates the “negative and positive roles” of lawyers as follows:

The negative role is that of resolutely obstructing, out of their instinctive conservatism, any attempted domination of the legal apparatus by executive tyrants, populist mobs, or powerful private factions. Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism. Performing their positive functions entails the assumption of a special responsibility beyond that of ordinary citizens. They are to repair defects in the framework of legality, to serve as a policy intelligentsia, recommending improvements in the law to adapt it to changing conditions, and to use the authority and influence deriving from their public prominence and professional skill to create and disseminate, both within and without the context of advising clients, a culture of respect for and compliance with the purposes of the laws.

Id.

\(^{353}\) See Gordon, American Aristocracy, supra note 344, at 5 (for the expressions “special stewardship” and “legal stewardship”).

\(^{354}\) Id. at 5-6.

\(^{355}\) Id. at 6.
of forming the integrative paste... for binding the separate and particular activities of a business society into a political unity."

Gordon provides the following useful "short list" of what those lawyers who believed in this "Republican Vision" actually achieved, despite the inevitable gap between the vision and its realization:

(1) the triumph of the idea of the Constitution as law and acceptance of the institution of judicial review; (2) the whole nationalizing and vested-rights defining corpus of the Marshall Court, clearly the joint work-product of the justices and the small group of regulars at the Supreme Court Bar; (3) Webster's amazing success in promoting Law and the Constitution as culturally unifying symbols of nationhood; (4) the legal profession's continued domination, without serious rivals, of political officeholding; (5) by default, the assumption by state courts and their coteries of leading advocates of the major share of responsibility in defining and enforcing the ground-rules of property rights and exchange rules, and in supervising corporations; (6) a large body of law reports and treatises interpreting them; (7) a respectable start on modern legal education, with the revival of Harvard under Story and Greenleaf; and (8) retention of control—despite Jacksonian attacks on professional privilege and demolition of formal entry barriers—of access to the upper echelons of law practice and judicial office. 357

Nevertheless, Gordon concedes that the continued implementation of the elite lawyers' vision appeared to have "run into deep

356. Id. at 6-7. With respect to the reasons associated with the content of the law, and with the techniques, methods, and education of lawyers, Gordon explains that: (1) the common law contained "the basic principles of English liberty" at issue in the Revolution together with "a vast reservoir of experience" in dealing with conflicts arising in commercial societies; (2) skilled lawyers possessed various interpretive "conventional techniques" for resolving linguistic uncertainty as well as a method for inducing principles from cases and using them to deal with novel economic and social circumstances; and (3) "the ideal (if rarely realized) law curriculum of the period was a whole liberal education in itself," a course of reading exposing lawyers to the "universal laws of history," the "cosmopolitan practices of commercial nations," and the "great civilian writers on the law of nature and of nations," thereby equipping lawyers with a "trained sensibility" that enabled them to realize universal legal, historical and moral principles in "ordinary social practice." Id.

With respect to all three sets of reasons discussed notes 354-56 and accompanying text; see also Gordon, Independence, supra note 344, at 15:

[Lawyers] furnished a disproportionate share of Revolutionary statesmen, dominated high offices in the new governments and the organs of elite literary culture, had more occasions even than ministers for public oratory, and were the most facile and authoritative interpreters of the laws and constitutions, rapidly becoming the primary medium of America's public discourse and indeed its "civic religion."

Id. As noted above, supra note 345, "they [also] seemed to have exceptional opportunities to lead exemplary lives." Id. at 15.

357. Gordon, American Aristocracy, supra note 295, at 79.
trouble” by the mid-1830s. Moreover, “[t]he project continued to founder for a number of good historical reasons,” all of which “culminated in a virtual revolt by a large part of the bar against the Federalist-Whig vision of the lawyer’s role,” emphasizing instead the lawyer’s role in representing private interests rather than performing public duties. Gordon maintains, however, that

358. Id.
359. Id. Among the “good historical reasons” for the continued foundering of the project are “the less than lofty actualities of the conditions of law study and practice, a major split in the profession over the slavery issue, a decline in respect for oratory per se, the increasing profitability of private practice over public service, [and] growing ties between lawyers and the corporations.” Id.
360. Id. For an analysis focusing on factors other than those identified by Gordon that put pressure on the lawyer-statesman ideal before the Civil War, see Altman, supra note 304, at 1055-56:

Even before the Civil War, changes in intellectual life and American society were undermining the intellectual premises of the lawyer-statesman ideal. During the antebellum period, economic development aggravated regional and class differences and made it much more difficult to maintain a republican view of politics based upon a conception of the public good. As the result of that economic development, by the 1830s and 1840s the law had come to be thought of more instrumentally, as “facilitative of individual desires and as simply reflective of the existing organization of economical and political power.” The classical tradition in intellectual life collapsed around 1830 and an Enlightenment morality based upon rules replaced the Aristotelian moral tradition.

Id. (quoting HORWITZ, supra note 224, at 253). For Altman’s articulation of the intellectual premises of the nineteenth-century republican lawyer-statesman ideal, see infra note 365.

For discussion of the waning of the classical republican tradition, with its emphasis upon virtue and the public good, in favor of Lockean liberal individualism in American political thought, see infra notes 366-93 and accompanying text. For discussion of the emergence of an instrumentalist conception of law, see supra notes 252-66 and accompanying text. On the collapse of the classical tradition in intellectual life, see also FERGUSON, supra note 78, at 200-06 (emphasizing factors, including the collapse of the classical tradition in intellectual life, that diminished the value for lawyers of general learning and literary accomplishment, leading to the demise of “the ideal of the gentleman lawyer-writer” around 1840 or 1850, but recognizing “the strange and notable exception” of the South where that ideal continued to flourish throughout the nineteenth century). For discussion of the emphasis upon virtue and the common good in the Aristotelian moral and political tradition, see supra note 322. It should perhaps also be noted that Aristotle’s moral and political thought recognized the importance of rules as well as virtues. See, e.g., I COPLESTON, supra note 322, at 341-42 (discussing Aristotle’s understanding of “Justice”). So does the Judaeo-Christian natural law tradition, which, as discussed supra note 322, incorporated the Aristotelian moral and political tradition as a central element. See, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 164-65, 281-90 (1965).

Altman also observes that during the second half of the nineteenth century, and with the rise of corporate capitalism, “the corporate counselor supplanted the litigator” among elite lawyers, most of whom “hitched their star to corporate interests and defined loyalty to their clients as their sole
"[t]he vision had not in fact collapsed at all, but was on its way to becoming institutionalized in the professional culture of the late nineteenth century."

361

d. Broader Perspective: Civic Republicanism and the Virtuous Elite

The claims made by Kronman and Gordon regarding the historical influence of the lawyer-statesman ideal, with its emphasis upon the public good and civic virtue, appear to be broadly consistent with the views of contemporary historians and political theorists who emphasize the extent to which American political thought during the eighteenth and early nineteenth centuries derived from and continued the tradition of classical republicanism (which was associated with the natural law moral obligation.” See Altman, supra note 304, at 1056.

361. Gordon, American Aristocracy, supra note 295, at 79. More specifically, the vision was “resurrect[ed] in the vocations of the bureaucratic statesman and the counselor to corporate managements” as the “Progressive’ vision of public interest lawyering.” Id. For a useful explanation of how this “Progressive” vision modified the lawyer-statesman ideal, focusing on the views of Louis Brandeis, see Altman, supra note 304, at 1056-59. Altman also concludes that “by the turn of the century, the republican version of the lawyer-statesman ideal based upon an Aristotelian view of politics and moral virtues was no longer credible,” and that although “the lawyer-statesman ideal was still alive . . . in a transmuted form for corporate counselors” (but not for litigators), nevertheless “[e]ven this progressive version of the ideal was not prevalent.” Id. at 1059. In apparent contrast to Gordon and Altman, Kronman seems to consider that the republican version of the lawyer-statesman ideal was widely influential throughout the nineteenth century. KRONMAN, supra note 218, at 16. Moreover, according to Kronman, it remained highly influential for most of the twentieth century, only succumbing to various institutional pressures, and the associated emergence of competing professional ideals within academia, law firms, and courts, during the latter part of the twentieth century. See KRONMAN, supra note 218, at 1-7, 11-13 (general); id. at 17-51, 165-70 (academia); id. at 270-314 (law firms); id. at 315-52 (courts).

362. See, e.g., THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE 28-29 (1988) (identifying J. Pocock, Gordon Wood, and Joyce Appleby as scholars holding such views); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 550-51 & n.22, n.23 (1986) (identifying B. Bailyn, L. Banning, D. Howe, R. Ketcham, and Ross, in addition to Pocock and Wood, as scholars holding such views); id. at 574-75 & n.149 (identifying David Epstein, Jonathan Macey, and Cass Sunstein as scholars holding such views). Sherry identifies this last group with “the new republicans.” Id. at 575. As Anthony Kronman explains, the new republicans “trace their intellectual roots . . . to the federalist-republican culture of the early nineteenth century and its historical successors (progressivism in particular).” See KRONMAN, supra note 218, at 364. For further, specific discussion of these intellectual roots in the present article, see supra Subsection c of Part II.B.2 above. For further discussion of the new republicans in the present article, see supra notes 320, 323, 328 and
As Suzanna Sherry explains, according to these scholars, there were “three themes... derived from classical republicanism” that “dominated the thought of the neoclassical American republicans: the good of the commonwealth as a whole, the subordination of individual interests through the promotion of civic virtue, and citizen participation in a deliberative, value-selective form of government.” Moreover, these three themes were “integrally and necessarily related to one another”:

The good of the commonwealth requires that citizens subordinate their private interests, and the fostering of civic virtue is the mechanism by which they may be expected to do so. Neither private virtue nor public good, however, can be defined in a vacuum: in the republican vision, a primary function of government is to order values and to define virtue, and thereby educate its citizenry to be virtuous.

accompanying text; infra note 368 and accompanying text.

Regarding the development of the classical republican tradition and its reception in America, Pangle explains that, according to its contemporary proponents, “classical republicanism” was taken over into eighteenth-century American thought from the “Country” opposition in England and is “traceable in a pretty straight line, back through Cato's Letters, Bolingbroke, Sidney, and Harrington to Machiavelli and thence... to Savonarola, Aristotle, and the Spartan as well as the Roman and Venetian ideals of citizenship.” PANGLE, supra note 362, at 28 (emphasis in original). For other links in the chain of development, see, for example, Carrington, Francis Lieber, supra note 106, at 348-52 (identifying, in particular, Pericles and Montesquieu, in addition to Machiavelli).

Feldman emphasizes within this tradition the links to Aristotle and Machiavelli:

Civic republicanism could be traced back at least to Aristotelian political theory, which emphasized that individuals fulfill their natures only by living and participating in a political community. Thus, civic republicans generally stressed that virtuous citizens and leaders must deliberate about and pursue the public or common good so that, as Machiavelli had underscored, they might preserve their political community or republic as long as possible.

FELDMAN, supra note 4, at 58. For Feldman's summary of some of the central elements in Aristotle's political thought, see supra note 322. For Feldman's discussion of Machiavelli's political thought, see FELDMAN, supra note 4, at 14-15.

363. See supra notes 322, 362 and accompanying text; see also supra note 328 and accompanying text (discussing Aristotle's “character-based elitism” and “biological elitism”); infra note 386 and accompanying text (discussing the influence of Aristotle's biological elitism in Southern defenses of slavery).

364. Sherry, supra note 362, at 552.

365. Id.; see also id. at 552-57 (elaborating on the three themes and their relationship). Similarly, Pangle continues his discussion of the development of the classical republican tradition and its reception in America, as portrayed by the contemporary proponents of that tradition, see supra note 362, as follows:

The lynchpin of this “essentially anti-capitalist” grand “republican synthesis” of eighteenth-century American political thought is said to be the concept of virtue, understood as the notion that “furthering the
Although there appears to be considerable consensus among contemporary historians that classical republican thought was predominant in eighteenth-century America, there is considerable divergence of opinion regarding the time when, and the extent to which, Americans began departing from the framework of classical republicanism in favor of a Lockean liberalism embracing individualism and capitalism, which was associated with the public good — the exclusive purpose of republican government — required the constant sacrifice of individual interests to the greater needs of the whole, the people conceived as a homogenous body.”

PANGLE, supra note 362, at 28 (quoting Robert E. Shalhope, Republicanism and Early American Historiography, 39 WM. & MARY Q. 335 (1982) (emphasis by Pangle)). Similarly, too, in reviewing Kronman’s Lost Lawyer, supra note 218, Altman states:

Kronman’s ideal of the lawyer-statesman bears great resemblance to the nineteenth-century republican ideal of the lawyer-statesman. That republican ideal grew out of a set of three interconnected intellectual premises closely tied to the Aristotelian tradition: (1) the republican view of politics as deliberation about the public good; (2) the republican view of law as an expression of the moral sense of the community, with a substantive content concerning the proper goals of human conduct; and (3) a morality based upon virtues, specifically including practical wisdom and public spiritedness (often called “civic virtue”).

Altman, supra note 304, at 1048-49.

See also supra note 322 (reproducing Feldman’s summary of some of the central elements in Aristotle’s moral and political thought).

366. See PANGLE, supra note 362, at 28-29. For a good sense of the range of divergent views, see id.; Sherry, supra note 362, at 551. Sherry explains that the transformation involved “three essential disputes: (1) whether society was an organic whole or a collection of individuals; (2) whether man was irretrievably self-interested or potentially virtuous and community-minded; and (3) whether the function of government was to define and safeguard the common good or protect individual liberties.” Id. at 551 note 25. Stated thus, of course, the formulation of the third dispute may be somewhat misleading because Locke too embraced the long-standing notion that government should promote the common good, albeit understanding the common good as involving essentially the protection of natural rights. See, e.g., KELLY, supra note 322, at 217 (explaining that, for Locke, the sole function of government is to protect the subjects’ “property” in the broad sense of “their lives, liberties and estates” and that this function is “conferred on the ruler or rulers ... not absolutely and irrevocably, but by way of a trust for the public good.” Id. (quoting JOHN LOCKE, TWO TREATISES ON GOVERNMENT (1690)); see also 5 COPLESTON, supra note 322, at 139-40 (1959) (recognizing “Locke’s principle that the government ... has a trust to fulfil and that it exists to promote the common good,” but criticizing “Locke’s failure to give any thorough analysis of the concept of the common good” and his “tend[ency] to assume without more ado that the preservation of private property and the promotion of the common good are to all intents and purposes synonymous terms”).

Presumably, therefore, perhaps the third dispute is more accurately understood as a dispute over two competing visions of the common good: a Lockean liberal vision, focusing on the protection of natural rights; and an alternative, neo-classical republican vision that either conceives of the common good in terms that do not include the protection of individual rights as such or, possibly, that conceives of the common good as including their
natural rights tradition. Surveying various views, Sherry explains:

Once thought to be thoroughly individualist in its outlook, the Revolution has been reinterpreted by contemporary historians "not as a Lockean effort to protect property from taxation and regulation but as a Machiavellian effort to preserve the young republic's 'virtue' from the corrupt and corrupting forces of English politics." These historians thus find American revolutionary ideology in classical republicanism, primarily as envisioned by Machiavelli. Within a short time, however, that ideology began to undergo a major transformation. Perhaps as early as 1787, or as late as the aftermath of the Civil War, classical republicanism faded from the American political consciousness, to be replaced by the liberalism of Locke and Madison.

protection as such but limits their exercise in favor of other components of the common good. With respect to the latter type of alternative vision, compare FINNIS, supra note 360, at 210-18 (explicating how "the maintenance of human rights is a fundamental component of the common good," but that "most human rights are subject to or limited by each other and by other aspects of the common good . . . which are fittingly indicated . . . by expressions such as 'public morality,' 'public health,' 'public order.'" Id. at 218 (emphasis in original). For further discussion of how the neoclassical American republicans in fact may have conceived of the common good, see infra notes 399-400 and accompanying text.

367. See supra note 366 and accompanying text; see also, e.g., FELDMAN, supra note 4, at 67 (observing that a Lockean emphasis, by the constitutional framers themselves, upon "the protection of an individual right to accumulate property and wealth" had "set the stage" for the transition of the United States "from a largely agricultural to a commercial and eventually industrial economy").


As indicated in the above listing, Gordon Wood considers that 1787 was "the decisive turning point," he also “described the Anti-Federalists as the last
The situation is even more controversial because, as the above passage suggests, the scholars who make these various claims regarding the influence of the classical republican tradition upon early American political thought are themselves presenting a revisionist view of history. This revisionist view has been increasingly criticized by other scholars who are more aligned with the earlier, pre-revisionist view and who emphasize, therefore, the great extent to which even Revolutionary political thought was influenced by Lockean liberalism.

369. See also PANGLE, supra note 362, at 28. See also Sherry, supra note 362, at 555 (discussing “[t]he anti-federalist insistence that only a small, homogeneous republic could succeed”). For further exploration of the thesis that the Constitution is the pivotal event in the transformation replacing classical republicanism with modern liberalism, see id. at 557-62. Sherry concludes that:

Based on the “psychology of temptation and the politics of suspicion,” the Constitution of 1787, and especially the Bill of Rights of 1789, represent a triumph of modern liberalism over classical republicanism. Individualism had become the foundation of the Republic, whereas in 1776 it was anathema to it. Because the ancient republics had died and because it appeared that this new republic might also succumb to corruption, Americans adopted the individualism of Locke over the Republic of Machiavelli and Harrington.

Id. at 561-62 (quoting J. Diggins, supra, at 74 (1984)). With respect to the indigenous risk of “corruption,” Sherry explains that “[r]epublicanism was totally dependent on civic virtue to obligate citizens to the public good. In the years of the Articles of Confederation, the founders began to reject the ideals of republicanism because of a perceived licentiousness and lack of virtue among the people.” Id. at 557. The approach of the framers, therefore, was to ensure “a balance of powers to check the tendency toward tyranny and corruption,” and to “shift[ ] the purpose of government from perfecting human virtue to promoting individual desires.” Id. at 559; see also infra note 376 and accompanying text.

For further discussion of Banning’s view that “Jeffersonian republicanism represented in large measure a resurgence of the classical ideal,” see PANGLE, supra note 362, at 28-29. For a discussion of the view that the Constitution itself (also) embodies the classical republican heritage, see Sherry, supra note 362, at 574-75 (discussing the views of “new republicans” such as Sunstein, Epstein and Macey).

369. See also PANGLE, supra note 362, at 28 (explaining that post-sixties historical and political theorists “have become captivated by a romantic longing to discover, somewhere in the past, the roots of a prebourgeois and non-Lockean American ‘soul’”); Sherry, supra note 362, at 550 n.22 (referring to “the republican revisionists”).

370. See, e.g., Sherry, supra note 362, at 550 n.22 (discussing the views of John Diggins and Isaac Kramnick); see also PANGLE, supra note 362, at 36 (identifying Dworetz, Lerner, and Storing in addition to Diggins and Kramnick as scholars who are part of the “increasing criticism” of the revisionist view). While emphasizing the importance of Locke, Pangle is critical of both the revisionist scholars and their critics for their insufficient and/or insufficiently careful attention to the original sources within the classical republican tradition and the “atypical works” of some of the most important founders. Id. at 29, 35, 37.
These various disagreements regarding the character of American political thought during the eighteenth and early nineteenth centuries have important implications, potentially at least, for any evaluation of the claims made by Kronman and Gordon. Clearly, if the influence of classical republicanism upon American political thought during this period is relatively weak in intensity and/or duration or, indeed, if it is virtually non-existent, this might tend to suggest that the claims made by Kronman and Gordon regarding the historical influence of the lawyer-statesman ideal, with its emphasis upon the public good and civic virtue, also become correspondingly weak. It might also tend to suggest, just as with respect to the disagreements regarding the continuing influence of classical common law notions and associated natural law thinking following the emergence of a pragmatic instrumentalist conception of law, that any continued expression or espousal of classical republican notions by lawyers or others are likely to represent no more than lip service paid to ideas that were no longer taken seriously.\(^1\)

Once again, however, just as the emergence of an instrumentalist conception of law is not necessarily incompatible with a...
continuing real influence of classical common law notions and associated natural law thinking in early American legal thought, so the presence of Lockean liberal conceptions within early American political and legal thought is not necessarily incompatible with the continuing real influence of classical republican notions within that thought as well. To begin with, just as early American legal thinkers may have been able to reconcile pragmatic instrumentalism with classical common law notions and associated natural law thinking at the level of theory, subscribing to both types of thought at the same time, so legal and political thinkers may have been able to achieve, at least partially, a similar theoretical reconciliation between classical republicanism and Lockean liberalism. Arguably, the achievement of such a theoretical reconciliation within the minds of legal and political thinkers increases the likelihood that classical republican notions continued to be influential well into our period. Moreover, the existence of substantial scholarly disagreement (both between the revisionists and their critics, and among the revisionists themselves) regarding the relative influence of classical republicanism and Lockean liberalism during the eighteenth and early nineteenth centuries suggests complexity in the historical situation, and such complexity also increases the likelihood that classical republican notions continued to be influential well into our period.

Once again, too, we can derive assistance, on both these points, from Stephen Feldman’s recent account of premodern American legal thought. As far as a possible reconciliation of classical republicanism with Lockean liberalism at the level of theory is concerned, Feldman explains that democratic excesses in state governments during the years of the Articles of Confederation had shown that in general the ordinary people were too self-interested to produce and elect virtuous leaders committed to pursuit of the public good from within their own ranks. In light of this experience, the framers of the U.S. Constitution shifted away from the revolutionaries’ emphasis upon “a civic republican form of liberty that stressed citizen participation in government”

372. See supra notes 258-66 and accompanying text.
373. See supra notes 258-66 and accompanying text.
374. See supra notes 366-70 and accompanying text.
375. See FELDMAN, supra note 4, at 59-60, 63. Thus:

Americans had sought their governmental officials from among the ordinary people, with the hope that a cadre of virtuous elites would be electively chosen. Yet, from the perspective of the framers, the 1780s had unhappily revealed that too often self-interested citizens elected officials who themselves lacked a sufficiently virtuous commitment to the common good.

Id. at 60; see also Sherry, supra note 362, at 557 (referring to “a perceived licentiousness and lack of virtue among the people” (quoted supra note 368)).
and towards "a more Lockean vision [that] sought to protect preexisting individual rights from governmental infringement by limiting governmental power."  

However, the framers combined this Lockean vision with the retention of certain civic republican hopes and ideals. Thus, the framers considered that "governmental officials should virtuously deliberate about and pursue the common good" and they hoped that "the ordinary people would display sufficient judgment to elect those few elite individuals who possessed the requisite virtue to attain these republican ideals." Subsequently, moreover,

376. FELDMAN, supra note 4, at 61. Feldman explains that, compared to the revolutionaries, "the framers were more wary of potential democratic excesses and governmental corruptions . . . . Whereas the American revolutionaries had stressed individual liberty within the context of governmental participation, the constitutional framers tended to understand individual liberty as freedom from governmental interference." Id. Therefore, in order to secure this freedom and protect against governmental infringement of individual rights:

[T]he new Constitution shifted power away from the democratic republican state governments to the new national government, but then . . . attempted to limit the ability of the national government to exercise its potential power. Many of the structural provisions of the Constitution — separation of powers, checks and balances, bicameralism, federalism — tended to encumber the exercise of power by the national government.

Id. See also supra note 368 and accompanying text.

377. FELDMAN, supra note 4, at 60-61 (emphasis in original). Feldman considers that "it was perhaps the elitism of the framers and their Federalist colleagues that most sharply divided them from the Constitution's anti-Federalist opponents." Id. at 60. This "elitist vision of republicanism," id. at 64, is a dimension that Suzanna Sherry, for example, fails to address in her apparent endorsement of the view that the Constitution and the Bill of Rights "represent a triumph of modern liberalism over classical republicanism," and that "[i]ndividualism had become the foundation of the Republic." See Sherry, supra note 362, at 561-62; see also supra note 368 (quoting Sherry). Sherry does recognize the existence of other interpretations of the Constitution, however, and concedes that "[t]he framers, whether liberal or republican, were neither as monolithic nor as fundamentally antithetical as this description supposes." Id. at 551 n.25; see also id. at 561 n. 85, 575 n. 149 (referencing the views of the "new republicans").

Feldman expresses the combined Lockean-civic republican vision of the framers as follows:

Following in the Machiavellian republican tradition, then, the framers sought to construct a constitutional government that would strain toward the civic republican ideals of virtue and the common good but simultaneously would protect against the self-interested political machinations of ordinary people and factional groups. The framers hoped that, under the Constitution, the virtuous elite would be elected as often as possible to governmental offices. But in the likely event that lesser individuals were elected instead, the structures of the constitutional government would nonetheless thwart their self-interested partisanship. The purpose of the Constitution, in other words, became the structuring of a stable government that would act for
there were similar "expressions of republican elitism" by leading legal thinkers who "reasoned that the best means for securing virtuous governmental officials who would pursue the common good was to choose from a cadre of elite individuals." Underlying the elitist attitude of the framers and leading legal thinkers was a premodern concern, rooted in a cyclical view of history, that without such an adherence to republican principles by a virtuous elite the Republic would inevitably degenerate and decay.

At the level of theoretical reconciliation, then, it seems that in accordance with principles of Lockean liberalism, the ordinary people would be expected primarily to pursue their own self-interest and in doing so would be protected under the Constitution from inappropriate governmental interference. On the other hand, in accordance with principles of civic republicanism, the virtuous elite, whom hopefully the people would elect as their governmental leaders, would be expected primarily to pursue the public good and thereby help preserve the Republic.

Feldman's account is also helpful in assessing the complexity of the historical situation and the likelihood that, for this reason the public good despite the (supposed) ignobleness of human nature and the resultant fragility of the republic.

FELDMAN, supra note 4, at 60-61. Considering that the language "captured the framers' strained conjunction of hope and cynicism," Feldman then quotes Madison in The Federalist No. 57: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous while they continue to hold their public trust." Id. at 61 (quoting THE FEDERALIST No. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961). Feldman also cites a number of other Federalist papers evidencing "Publius's emphasis on the public or common good." Id. at 61 n.40 (citing THE FEDERALIST No. 1, at 33-35 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 1961)).

378. Id. at 64. In this context, Feldman discusses Nathaniel Chipman, Zephaniah Swift, and St. George Tucker as examples of "leading jurisprudents" holding such views. See id. at 63-64 (citing NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (1793); ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT (1795); TUCKER, BLACKSTONE'S COMMENTARIES, supra note 103). Chipman, Swift and Tucker were also leading legal educators. As discussed earlier, Tucker taught at the College of William and Mary from 1789 until 1804. See supra notes 100, 118, 123 and accompanying text. Chipman taught at Middlebury College from 1816 until 1843. Carrington, supra note 100, at 559. Swift conducted a proprietary school at Windham, Connecticut, from 1805 until 1823. Klafter, supra note 59, at 323 n.83; see also REED I, supra note 2, at 431. The element of republican elitism within legal education during the period is discussed further in Subsection e of Part II.B.2 below.

379. See FELDMAN, supra note 4, at 61-63, 64-65.

380. As to how the common good may have been conceived in American neoclassical republican thought, see supra note 366; infra notes 399-400 and accompanying text.
too, classical republican notions continued to be influential well into our period. Thus, Feldman seeks to show how, despite the existence of various modernizing forces in the political, economic, and religious spheres, forces that manifested a developing ethos of egalitarian individualism, a number of opposing forces within those same spheres resulted in the persistence of certain premodern notions during the period.\(^{381}\) In the present context, and focusing on forces in the political sphere, Feldman explains that although “the Federalists stressed a premodern civic republican elitism, while the Jeffersonian Republicans advocated a more democratic popular sovereignty,” even the Jeffersonians “still believed, to a great extent, in rule by a meritocratic elite — so long as the supposedly corrupt and aristocratic Federalists no longer held office.”\(^{382}\) Moreover, although the political controversies between the Federalists and the Jeffersonian Republicans during the 1790s “introduced certain modernist notions into government,” they also “simultaneously reinforced Machiavellian republican concerns about the health of the nation.”\(^{383}\) Even though these concerns “faded over the first decades of the nineteenth century and self-interested political partisanship, replete with political parties, became increasingly acceptable,” nevertheless “remnants of premodern elitism always persisted within the American governmental system.”\(^{384}\)

In addition to this general persistence of premodern elitist elements, civic republican elitist thinking may have been particularly persistent in the South. Thus, Feldman explains that various factors produced strong Southern defenses of slavery

\(^{381}\). For Feldman’s discussion of modernizing forces in the political, economic, and religious spheres that manifested a developing ethos of egalitarian individualism and that contributed to the decay of “the vestiges of premodern social roles and structures,” see id. at 65-71. See also supra note 41 and accompanying text (discussing the general historical situation).

For Feldman’s discussion of social and economic forces, such as plantation slavery, anti-immigrant prejudices, and various economic developments, that “seem[ed] to delay the advance of modernism” by giving rise to “new political and economic hierarchies . . ., starting particularly in the 1830s,” and of political and religious factors that “seemed to nurture persistent premodern views” (including especially natural law thinking) and that paradoxically resulted from some of the modernizing forces in the political and religious spheres, see FELDMAN, supra note 4, 71-74. See also supra note 261 and accompanying text (discussing the effect of opposing forces on natural law thinking).

\(^{382}\). FELDMAN, supra note 4, at 68, 72.

\(^{383}\). Id. at 72.

\(^{384}\). Id. The fading of these Machiavellian republican concerns was associated with the development of the eschatological idea of progress that was characteristic of second-stage premodern American jurisprudential thought. See id. at 58, 64-65, 74-75; see also supra notes 41, 261 and accompanying text.
during the decades leading up to the Civil War, and these defenses were rooted in an Aristotelian civic republicanism that represented a rejection of Lockean liberalism, of popular sovereignty and the developing modern ethos of egalitarian individualism, viewing society instead "as being naturally ordered with distinct elite and laboring classes."  

Although Feldman does not address the role of the legal profession specifically in any detail, his account of civic republican elitism and its persistence as an element within American political thought is certainly supportive of the claims made by Kronman and Gordon regarding the lawyer-statesman ideal and its influence in the area of politics during our period. Moreover, of special interest for their claims regarding the lawyer-statesman ideal and its influence in the area of law is Feldman’s point that, within the American governmental system, the “remnants” of civic republican elitism continued to persist in particular within the judiciary: “Judges seemed to assume the mantle of the virtuous umpire, standing above the marketplace of competing interests and rendering impartial and disinterested decisions.” The imposition of judicially interpreted law became, in a sense, a means for controlling the partisan maneuvering of politicians.

The work of another scholar, Russell Pearce, is also generally supportive of the claims made by Kronman and Gordon regarding the lawyer-statesman ideal and its influence both in the area of

385. See FELDMAN, supra note 4, at 86-87. These factors included: the increasing dependence of the Southern economy on cotton cultivation; the continuing geographical expansion of the nation, which produced conflict between slave states and free states regarding the status of new states and territories (the status of new states in particular being crucial for determining the balance of power in Congress); and the renewal during the 1830s of an abolitionist movement in the North, which led to conservative reactions in the North and the South. Id.

386. Id. at 88-89. As the quoted language suggests, the elitism of Aristotelian civic republicanism is based on a particular type of natural law thinking. Thus, “Southern proponents of slavery tended to argue that natural law imposed a natural order on society, with slaves supposedly entrenched in their proper role (at the bottom); the government, according to this view, therefore justifiably enforced through legal sanctions this natural or inherent social order.” Id. at 87. While Southerners employed the rhetoric of natural law to defend the institution of slavery, Northerners employed a competing rhetoric of natural rights to attack it. See id. at 87-88. In any evaluation of civic republican elitism in general, however, one should remember Kronman’s distinction between Aristotle’s “biological elitism” and his “character-based” elitism, and his admonition that rejection of the former does not necessitate rejection of the latter. See supra note 328 and accompanying text. The distinction was doubtless made by those who may have opposed slavery, yet stressed the importance of cultivating a virtuous elite to lead the nation.

politics and in the area of law. Pearce describes a “modified Republicanism” of the period in terms resonant with Feldman’s account of civic republican elitism. He goes beyond Feldman, however, in advancing the claim, explicitly and in some detail, that lawyers considered themselves to be the virtuous elite and “America’s governing class”:

The legal elite’s original and uniquely American understanding of the lawyer’s role was that lawyers were America’s governing class. Leading lawyers, judges and scholars, including the first American legal ethicists, sought to explain how the common good, minority rights and the rule of law could coexist with majority rule by an electorate largely composed of self-interested voters. They decided that the answer was a governing class of lawyers. With their dedication to the common good and their placement in the center of commerce and governance, lawyers were ideally suited for political leadership . . . This perspective did not exclude the lawyer’s role as

388. See, e.g., Pearce, supra note 293, at 381-95. As discussed supra note 293, Pearce surveys the various positions advanced in the scholarly literature regarding American lawyers’ original self-understanding of their role, explaining that scholars have described lawyers’ original self-understanding as that of the advocate (Monroe Freedman, David Luban), the gentleman (Thomas Shaffer), the guild member (Elliott Krause), the individual lawyer-statesman (Anthony Kronman, William Rehnquist), and a member of Tocqueville’s lawyer aristocracy (Mary Ann Glendon). Id. at 382 n.5. Stating his own position, Pearce writes that his article “argues that the historically dominant ideology of the legal elite was neither the hired gun, gentleman, guild, nor even the individual lawyer-statesman. The article identifies the dominant ideology as a governing class perspective grounded not in Tocqueville but in the political understandings of American lawyers.” Id.

Apparently, then, Pearce disavows a description of American lawyers’ original self-understanding of their role as being that of the individual lawyer-statesman, and thereby seeks to distinguish his position from that of Kronman and Rehnquist. However, his own description of the “original conception of the lawyer’s role” appears to be quite compatible with an original self-understanding of a lawyer’s role as lawyer-statesman, although Pearce does appear to explore in greater depth than Kronman or Rehnquist the philosophical foundation for the legal elite’s collective understanding of the lawyer’s role in American political thought. See id. at 382 n.5, 384-92.

389. See Pearce, supra note 293, at 384-87. In Pearce’s account this “modified Republicanism” was embodied in particular in the Constitution, whose framers “sought a virtuous political elite” in the landed gentry and the learned professions, and in Hamilton’s Federalist No. 35, which “went so far as to identify professionals as the most virtuous members of this emerging governing class” because, certainly unlike other businesses and unlike even the landed gentry, members of the learned professions were truly disinterested, neutral, and impartial, being ready to make decisions in the general interest. Id. at 386 (quoting THE FEDERALIST No. 35, at 257 (Alexander Hamilton) (Benjamin Wright ed., 1961)). In giving his account of “modified Republicanism” Pearce draws especially upon the work of Gordon Wood. See GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969) [hereinafter WOOD, AMERICAN REPUBLIC]; GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991) [hereinafter WOOD, AMERICAN REVOLUTION].
representative of clients. It included and bounded it.³⁹⁰

Regarding "the lawyer's role as representative of clients," Pearce explains further in the continuation of this passage:

One of the major components of the legal elite's conception of lawyering was that lawyers exert influence on their clients, in addition to the influence lawyers wielded through their political leadership and their function of interpreting the law for the public. When representing clients, advocacy and governance duties could often coexist but when they conflicted the legal elite believed that the governing class duty was paramount.³⁹¹

In sum, even though it may be possible to take issue with specific aspects of their arguments, in general the claims made by Kronman and Gordon regarding the content and influence of the lawyer-statesman ideal during the late eighteenth and early nineteenth centuries appear to be not only plausible but also likely well-founded.³⁹² As Kronman and Gordon suggest, to a large

³⁹⁰ Pearce, supra note 293, at 383; see also id. at 387-95 (elaborating upon the claim that lawyers considered themselves to be the virtuous elite and "America's governing class"). The "minority rights" to which reference is made in the quoted passage concerned property rights in particular. See id. at 385, 402.

³⁹¹ Id. at 383. Elaborating upon his reference to "the first American legal ethicists," Pearce demonstrates how the self-understanding of the legal elite as "America's governing class" was reflected in the pioneering works on legal ethics published by David Hoffman in 1836 and George Sharswood in 1854. See id. at 388-91 (citing David Hoffman, Resolutions in Regard to Professional Deportment in 2 Hoffmann (1836), supra note 105, at 752-75; George Sharswood, An Essay on Professional Ethics (5th ed., 1884)). Both Hoffman and Sharswood sought to explain how impartial and disinterested lawyers should pursue the public good and perform their mediating role when exerting influence on their clients in the attorney-client relationship and not just when holding public office, although in striking the balance between the public good and client interests "Sharswood blended the public good with client advocacy in a way that afforded more deference to client interests than Hoffman's Resolutions." Id.

As discussed earlier, David Hoffman taught at the University of Maryland from 1823 until 1832. See supra notes 100, 114-17, 122, 126 and accompanying text. Although Hoffman published his Resolutions in Regard to Professional Deportment in the second edition of his A Course of Legal Study in 1836, he had already included the topic of Professional Deportment in Title XI of the Syllabus for his course of lectures at Maryland, published in 1821. See supra notes 114-16 and accompanying text. As also discussed earlier, George Sharswood taught at the University of Pennsylvania, which reopened its law program under his leadership in 1850. See supra note 119. With respect to the reflection of the lawyer-statesman ideal in various writings on legal ethics during this period, see also supra note 304 (discussing the views of James Altman).

³⁹² For an example of a scholar whose account of the historical lawyer-statesman ideal differs in detail from the accounts given by Kronman and Gordon, but whose analysis generally supports their central claims regarding the content and influence of the ideal during our period, see Altman, supra
extent lawyers were the virtuous elite upon whom the future of the new nation depended; and America at this time indeed can be characterized as a "nomiocracy."\textsuperscript{393}

e. The Lawyer-Statesman Ideal in Legal Education

On the assumption, then, that in large part lawyers were the virtuous elite and that the claims made by Kronman and Gordon regarding the content and influence of the lawyer-statesman ideal during our period are likely well-founded, how far did the formal legal education discussed in Section A above seek to familiarize students of the law with the lawyer-statesman ideal and to cultivate in them its component character virtues of practical wisdom and civic-mindedness?\textsuperscript{394} Although it is perhaps difficult to

\begin{itemize}
\item note 304, at 1047-60. See also supra notes 360, 365.
\item It is submitted (especially to those who may question whether it is the case) that the claims made by Kronman and Gordon with respect to legal practice as well as politics are consistent, in the final analysis, with an Aristotelian account of "practices" such as that developed by Alasdair MacIntyre. This point will be explored further in a future article. See supra note 313 (MacIntyre's definition of a "practice"); MacIntyre, supra note 198, at 197-99, 203 (MacIntyre's characterization of his account of a "practice" as Aristotelian); see also supra note 198 (MacIntyre's definition of a "living tradition").
\item 393. For use of the term "nomiocracy," see PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 186-87 (1997) (discussing the Constitutional Convention in Philadelphia in 1787 and Hamilton's view that lawyers were "disinterested" and "therefore formed a natural ruling elite," and concluding that "though America's ruling elite, insofar as it still existed in the 1780s, intended for the new Constitution to provide rule by gentlemen, what it did in fact produce was rule by lawyers — a nomiocracy"). Id. at 187 (citing WOOD, AMERICAN REVOLUTION, supra note 389, at 254-56 (1992)). Compare Carrington, Transylvania University, supra note 106, at 676 (asserting that during the period 1779-1860 "[a]s Thomas Paine had foretold, law had indeed become the American king, and the elite of the legal profession its nobility" (citing THOMAS PAINE, COMMON SENSE 41 (Dolphin ed., 1960))).
\item 394. The extent to which students actually acquired these character virtues is, of course, a separate issue. It is one thing to attempt to inculcate a character ideal and its component character virtues, but another thing to succeed in that attempt. A definitive evaluation of this issue would require a determination of, first, the extent to which students of the law came to instantiate the ideal in their professional lives and, second, the extent to which any such instantiation may have been due to their formal legal education as opposed to other factors operating outside of their formal legal education. Although it is beyond the scope of the present article to attempt such an evaluation, certain aspects of the discussion earlier are suggestive on the first point. See supra notes 300-04, 345-46, 348-52, 357-61 and 387-91 and accompanying text. Carrington's speculations regarding the effectiveness of college/university law teaching in inculcating a morality of public conduct are suggestive on the second point, both for the college/university programs themselves and perhaps, to some extent, for formal legal education generally. See infra note 401.
\end{itemize}
answer this question with certainty, this subsection will consider various indications that would appear to be highly suggestive.

Of course, the very process of interacting with a mentor (in apprenticeship training) or a law teacher (in an independent law school or a college/university law program) who instantiated the lawyer-statesman ideal in his own life and work would have had some "modeling" effect. However, exposure to the ideal and cultivation of its component character virtues would have been more advertent to the extent a mentor or a law teacher regarded it as a purpose of the legal education he provided, and thus as his special responsibility, to help develop these qualities in his students.95

With respect to the college/university law programs, we saw earlier that Paul Carrington considers that most of the law teachers in these programs were particularly concerned to inculcate public virtue in future political leaders of the Republic.96 As Carrington explains, "[U]niversity law teaching was in antebellum times often done by judges . . . . The public morality that these teachers espoused was closely related to classical notions of civic virtue."97 These law teachers "were consciously engaged in moral education: they sought to prepare young men . . . for public life in a democracy. They taught law as an act of patriotism. What they sought was to inculcate standards of public

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395. See also supra note 279 (noting that, insofar as mentors in apprenticeship training, and law teachers in the independent law school and college/university law programs, sought to familiarize their students with the lawyer-statesman ideal and to cultivate in them its component character virtues of practical wisdom and civic-mindedness, presumably they would have placed additional emphasis upon those elements of the prevailing jurisprudence of the period, such as the nature of common law reason and natural law theory, that were of particular relevance to the cultivation of those qualities).

As discussed earlier, supra notes 335-40 and accompanying text, Kronman maintains that the lawyer-statesman ideal was also "partly shaped by an Enlightenment enthusiasm for system and order." KRONMAN, supra note 218, at 20-21. As noted there, in this regard Kronman appears to have in mind the legal science of the period. As also discussed earlier, supra note 292, legal educators in the various formal legal education settings may have tried advertently to expose their students to this element of the prevailing jurisprudence also as part of their effort to familiarize them with the lawyer-statesman ideal.

For discussion of these various elements in the prevailing jurisprudence of the period, see supra notes 205-23 and accompanying text (nature of common law reason); supra notes 244-51 and 258-64 and accompanying text (natural law theory); supra notes 267-74 and accompanying text (early American legal science). For further discussion of these (and other elements) of the prevailing jurisprudence in the formal legal education of the period, see supra notes 275-92 and accompanying text.

396. See supra notes 108-09, 111, 142 and accompanying text.

conduct appropriate to popular self-government subject to constitutional constraints." Equating the concept of public virtue with "disinterest," Carrington considers that "[t]hose standards of conduct, if they could be made to exist, were admittedly but dimly understood, and there were perhaps quite disparate views as to what they might be; for almost half a century there was no attempt at a full and coherent statement of them."

However, Carrington regards Francis Lieber's articulation of those standards in three works published in 1838 and 1839 "as an expression of the pedagogical aims of most of those who taught law in American colleges from the time of George Wythe's appointment at William and Mary in 1779 at least until the Civil War."

399. Id. at 340, 349.
400. Id. at 340 (citing Francis Lieber, Manual of Political Ethics (2 vols., 1838-39); Francis Lieber, Legal and Political Hermeneutics, enl. ed. (1839)); see also id. at 356-68 (discussing Lieber's life and works). A Prussian immigrant, Lieber taught first at the University of South Carolina (from 1835 until 1856) and then at Columbia University (from 1857 until 1872). Id. at 356-60, 367. When he died in 1872, Lieber was "the most renowned American law teacher." Id. at 356. He was also "the only person in antebellum times to devote a full career to law teaching." Carrington, Hail! Langdell!, supra note 108, at 697.

With respect to the general character of the standards of public conduct articulated by Lieber, Carrington explains that "[f]or Lieber, as perhaps for other Americans of his generation, public virtue was better termed 'patriotism,'" and that "Lieber's patriot... makes public decisions in the public interest as measured by public values and the public good," and also "presumes to make only those public decisions properly entrusted to him or her." Carrington, Francis Lieber, supra note 106, at 368, 383. In Carrington's view, Lieber's work represented "[h]is effort to coordinate individual rights with the duties of citizens and public officers in a constitutional democracy. He sought rationally to harmonize liberalism with republicanism, while recognizing the tension between them." Id. at 368. In this effort Lieber "was preoccupied chiefly with process, with the manner in which political and legal power is exercised and with the spirit in which public decisions are made. What he sought to provide was an intellectual process or a discipline for the consideration of public issues." Id. at 370.

Carrington provides a detailed explication of Lieber's "process values," explaining that Lieber advocated the exercise of wise and independent judgment by decision-makers who are familiar with their country's history, culture, and sources of public values found in that culture and its literary tradition as well as in properly interpreted and applied public instruments, and who are honest, realistic, intellectually courageous, self-aware, calm, self-restrained, and anti-dogmatic, being able and willing to understand others' viewpoint and to compromise in order to conserve the whole, as well as to accept responsibility for adverse consequences resulting from their decision-making. See id. at 372-86. For Carrington's identification of some of Lieber's expressed or implied "substantive" values, see id. at 371, 384 (identifying, for example, Lieber's opposition to slavery and a concern to improve the situation of disadvantaged groups, such as the urban poor, and to reduce excessive concentrations of wealth through limited redistribution); id. at 385-86, 388 (identifying a certain type of "intergenerational relativism" that recognized the
Moreover, Carrington rejects any suggestion that a project, such as Lieber's, aiming to inculcate public virtue in young college/university students, is infeasible or indeed even quixotic.\footnote{401}

Reinforced by the social background of their students, almost all of whom "were drawn from families who could support leisure for lessons," these college/university law teachers "would not have denied the existence of an elitist touch to their teaching of law" in that "[e]arly American law teachers were calling their students to an elevated sense of place. Without apology, the quality these teachers sought to nurture was what Tocqueville described as the ‘aristocratic’ aspect of American law."\footnote{402} Consistent with moral need to reform the law and legal institutions and thus to adapt precedent to contemporary circumstances).

Significantly for an assessment of the claims made by Kronman regarding the content and historical influence of the lawyer-statesman ideal during the period, Carrington considers that Kronman's account of republican statesmanship in the political sphere "strikingly resembles" Lieber's account. \textit{See} Carrington, \textit{Hail! Langdell}, supra note 108, at 697 n.35 (citing KRONMAN, \textit{supra} note 218, at 53-108). \textit{See also id.} at 695-96 (discussing the view shared by Jefferson and Hamilton, two political rivals, that "popular self-government could be sustained only if its leaders were morally constrained to respect opposing interests and seek common ground or political fraternity," and noting Kronman's use of that term); \textit{see also supra} note 314 and accompanying text (discussing Kronman's equation of civic-mindedness in the political sphere with the desire for, and the creation and maintenance of, political fraternity while advocating a particular course of action).

\footnote{401. Thus, in responding (at least provisionally) to the argument that Lieber's project was in fact a quixotic enterprise, Carrington emphasizes that Lieber's standards are in fact realistic, although they may be aspirational to some degree for those who may not be able to meet them in all respects. \textit{See} Carrington, \textit{Francis Lieber}, supra note 106, at 391-92. \textit{Cf.} KRONMAN, \textit{supra} note 218, at 12, 16-17 (discussing the positive value of the nineteenth-century lawyer-statesman ideal even for those who fell short of the ideal in their work); \textit{see also supra} note 300 and accompanying text (discussing Kronman's views). Moreover, Carrington concludes that "a morality of public conduct such as Lieber sought to nurture" can indeed be "transmitted and acquired" in a university environment, at least with some degree of success, and that such moral education is, in fact, more likely to occur at a university than in a family. \textit{Id.} at 393-95. Carrington gives several reasons for reaching this conclusion, namely: most people acquire professional moral standards that "are not necessarily connected to the private morality we acquire from family," and indeed do so after achieving adulthood and independence from parents; a "shared training" can create and enhance mutual expectations; there exists "some empirical evidence . . . that young adults can be trained to a higher willingness to sacrifice their individual interests to community needs;" and, "a university environment . . . provides suitable reinforcement for the self-discipline that the art of patriotism entails." \textit{Id.} This part of Carrington's response, of course, can be seen as addressing the second aspect of the issue identified \textit{supra} note 394 (the extent to which instantiation of the lawyer-statesman ideal may have been due to formal legal education as opposed to other, outside factors).

\footnote{402. Carrington, \textit{Francis Lieber}, \textit{supra} note 106, at 387. Although Carrington actually refers to "Lieber and his contemporaries" as being those}
Kronman's emphasis on the virtue of practical wisdom in his particular account of the lawyer-statesman ideal, Carrington seems to suggest that the college/university law teachers were concerned to cultivate this virtue in future leaders of the Republic in addition to a civic-minded devotion to the public good. The

"who would not have denied the existence of an elitist touch to their teaching of law," the subsequent language referring to "early American law teachers", and indeed the whole context of Carrington's discussion at this point, strongly suggest that this characterization is intended to be equally applicable to college/university law teachers throughout the period. See id. at 386-88; see also supra note 378 and accompanying text (discussing the expressions of republican elitism by Henry St. George Tucker, who taught at the College of William and Mary from 1789 until 1804, and by Nathaniel Chipman, who taught at Middlebury College from 1816 until 1843). For discussion of Tocqueville's characterization of lawyers as the "American aristocracy," see supra note 348 and accompanying text.

As discussed earlier, the effort by American law teachers to inculcate public virtue in future leaders of the Republic has been linked by Carrington and others (although perhaps to differing degrees) with Thomas Jefferson's vision of legal education. See supra note 111 and accompanying text. Carrington addresses the elitist element in Jefferson's vision in the following terms:

Although conceding to his fellow elite revolutionaries that most of their fellow citizens were not fit to govern one another, [Jefferson] believed...that the number of citizens sufficiently virtuous to participate in republican government might be enhanced adequately to sustain a large and effective federation of republican states. Thus, for Jefferson, university legal education was to be part of "the nursery" in which the political leadership of the republic could be nurtured, forming "the statesmen, legislators, and judges, on whom public prosperity and individual happiness" so much depended. To provide the political support for the leadership so propagated, Jefferson planned for universities to provide some legal training for all the intellectual elite in attendance.

Carrington, supra note 100, at 529 (citing for the first quote in the passage David P. Peeler, Thomas Jefferson's Nursery of Republican Patriots: The University of Virginia, 285 J. CHURCH & ST. 79 (1986)). Carrington is unclear regarding the citation for the second quotation in the passage. It appears to be from Jefferson himself, when addressing the purpose of higher education in connection with his plans for establishing the University of Virginia. See Currie, supra note 106, at 355 (citing HERBERT B. ADAMS, THOMAS JEFFERSON AND THE UNIVERSITY OF VIRGINIA 135 (1888)).

According to Carrington, Jefferson envisioned, for the American colleges in his day, that they would have the function of "creat[ing]...a secular clergy that would maintain the faith in republican institutions" as being "but a slight deflection...from their accustomed function of graduating a class of persons from whom the American Protestant clergy might be selected." Carrington, supra note 100, at 532; see also Carrington, Transylvania University, supra note 106, at 674 (to similar effect); see also supra note 382 and accompanying text (discussing Stephen Feldman's view that even the Jeffersonians "still believed, to a great extent, in rule by a meritocratic elite").

403. See supra notes 295-343 and accompanying text.

404. Thus, as discussed supra note 400, Carrington considers that Francis Lieber's articulation of the standards of public conduct expressed the
cultivation of practical wisdom and civic-mindedness with respect to politics in those attending the college/university law programs may have indirectly influenced them in their legal practice as well. However, to the extent that law teachers in the college/university law programs sought to prepare their students for legal practice as well as for political leadership, doubtless they would have sought to cultivate in their students the particular modes of practical wisdom and civic-mindedness appropriate to good judging and good lawyering (in particular as manifested in good legal reasoning).

pedagogical aims of most law teachers during our period; and according to Carrington, Lieber expressed a concern for “sound judgment” or “wisdom,” as well as “benign motive,” in public officers. See Carrington, Francis Lieber, supra note 106, at 377-78. In Carrington’s words:

Lieber would have agreed with the recent dictum of Frank Michelman that public virtue is not satisfied by benign motive and fortitude alone, but requires sound judgment in the application of public values to advance the public good. He affirmed that patriotism in public office requires wisdom in the exercise of independence, and imposes on officers a duty of dissent from ignorance.

Id. (citing 2 FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 274 (1838-39); Frank Michelman, The Supreme Court, 1985 Term — Foreword: Traces of Self-Government, 100 HARV. L. REV. 58 (1987)); see also id. at 381 (“[Public action can seldom be accommodated to theoretical or ideological purities;” consequently, “[i]t is not practical, and it is therefore neither virtuous nor patriotic in Lieber’s sense, to effect a decision that does not take appropriate account of the uncertainty of those unforeseen, perhaps remote, consequences of a handsome idea, especially if the idea is an abstraction of broad sweep”).

405. See also supra note 331.
406. See supra notes 107, 110 and accompanying text; supra notes 141, 143 and accompanying text.
407. Cf. Bailey, supra note 59, at 317. In discussing the early college law programs during the first part of the period, Bailey explains that “[p]atterning their efforts on Blackstone’s lectures as Vinerian professor of law at Oxford, American lecturers adopted the organization and style of his COMMENTARIES ON THE LAWS OF ENGLAND. Lectures primarily examined the history, development, and ideology of the common law.” Id.

It seems, however, that at least some of these early American law teachers may not have displayed the same reverence towards the existing English common law as did Blackstone. For example, Klafter explains that George Wythe’s teaching at the College of William and Mary sought to adapt Blackstone’s COMMENTARIES to American circumstances. See Klafter, supra note 59, at 315-18. Thus “[Wythe’s] technique of legal inquiry was designed to impart to his students an understanding of how the common law developed and how and why it had been revised in the United States.” Id. at 317. In addition to this adaptation of Blackstone’s COMMENTARIES to American circumstances, Wythe also conducted a mock legislature, through which his students could learn how to reform the common law (as well as be prepared for their participation in politics). Id. at 315, 317-18. Wythe’s successor at William and Mary, Henry St. George Tucker, went even further than Wythe, advocating reform of the law through judicial activism as well as through legislation. Id. at 318-21. Interestingly, however, whereas Wythe conducted a moot court as well as a mock legislature, Tucker, it seems, had no time for
We have noted earlier the breadth of the curriculum followed in the early college/university law programs and in many of the later university law school programs (and equivalent law programs). It seems that at least one of the purposes of a broad curriculum was precisely to expose students to ideas that would help cultivate the liberal frame of mind necessary in the virtuous elite. Carrington, for example, states that in pursuit of the general aim of preparing the future leaders of the Republic, "the law curriculum . . . often emphasized public law, frequently as a companion study to political economy and political ethics, and generally included the law of nations as well as American constitutional law." For reasons similar to those discussed below either. Carrington, supra note 100, at 535, 539. As discussed earlier, in 1803 Tucker published an important American edition of Blackstone's COMMENTARIES. See supra notes 53, 103, 185-86 and accompanying text. In his edition of Blackstone, Tucker adapted the COMMENTARIES to American circumstances. In the words of Davison Douglas, Tucker's five-volume edition contained "hundreds of pages of annotations and explanations to account for American departures from the English common law," together with "analysis of the constitution and laws of both the United States and Virginia." Douglas, supra note 59, at 204.

See also Carrington, Francis Lieber, supra note 106, at 362 (explaining generally that Francis Lieber's work on legal and political hermeneutics "explored the ethical responsibilities of judges and lawyers when dealing with legal texts, breaking new ground as the first substantial American work on legislation and on the doctrine of precedent"); id. at 383-85 (discussing Lieber's "interpretive morality" with regard to the interpretation and construction of legal texts in greater detail). As discussed earlier, Francis Lieber taught at the University of South Carolina from 1835 until 1856, and then at Columbia University from 1857 until 1872, and he wrote three works, published in 1838 and 1839, including his work on hermeneutics, which articulated standards of public conduct that Carrington regards as expressing the pedagogical aims of most American law teachers during our period. See supra note 400 and accompanying text.

408. See supra notes 112-22, 129 and accompanying text (discussing early college/university law programs, with special consideration of David Hoffman's "ideal curriculum" developed for the law program at the University of Maryland); supra notes 144-67 and accompanying text (later university law school programs and equivalent programs, with special consideration of the narrower curriculum model developed at Harvard Law School and the broader curriculum model developed at the University of Virginia).

409. There may have been other purposes, connected with the prevalence of natural law thinking and legal science as central elements in the prevailing jurisprudence of the period. See infra notes 546, 548-55 and accompanying text.

410. Carrington, Francis Lieber, supra note 106, at 341 (contending that the law curriculum of American colleges during our period often had the general aim of "train[ing] young men for a secular clergy, or (in Tocqueville's terminology) an 'aristocracy,' who would be morally and intellectually prepared for the political roles to which (their mentors hoped) they would be called by the people," and that "in pursuit of that general aim, the law curriculum . . . often emphasized public law, frequently as a companion study to political economy and political ethics, and generally included the law of
in connection with apprenticeship training, natural law, ancient law, and contemporary civil law also may have served the purpose of cultivating the necessary liberal frame of mind when included in the college/university law programs.\textsuperscript{41} Despite the subsequent narrowing of the Harvard Law School curriculum, Joseph Story's inaugural address is an eloquent and powerful expression of this liberalizing spirit.\textsuperscript{42}

Many mentors in apprenticeship training also may have tried consciously to help prepare their students to become part of the virtuous elite and may have sought, therefore, to help them develop the lawyer-statesman's character-virtues of practical wisdom and civic-mindedness, both for the practice of law and perhaps also for political leadership. The law curriculum in the apprenticeship setting included reports of cases, commentaries, and treatises, which presumably helped the student become familiar with the modes of practical wisdom and civic-mindedness manifested in good legal reasoning.\textsuperscript{43} Moreover, as we also noted earlier, the apprenticeship curriculum, like the curriculum in many of the college/university law programs, appears often to have been a broad curriculum.\textsuperscript{44} Like those curricula, then, a broad

\textsuperscript{41} See infra notes 416, 418-20 and accompanying text. It must be remembered, too, that many students in these programs would already be familiar with natural law thinking because they had received a general college education that exposed them to such thinking before beginning their professional legal education. See supra notes 281-82 and accompanying text.

\textsuperscript{42} See Story, supra note 139, at 306-13. As discussed supra notes 153-54 and accompanying text, Story stated in his inaugural address that he proposed to give lectures on the Law of Nature, including political philosophy, and the Law of Nations, in addition to Maritime and Commercial Law, Equity Law, and U.S. Constitutional Law. He also emphasized the value for lawyers of becoming liberalized through the study of philosophy, history, and literature, as well as the value of studying the art of rhetoric. As also discussed there, however, the regular Harvard curriculum in fact did not reflect the breadth of coverage suggested by these remarks.

For a discussion of the liberalizing purpose of specific legal educators in advocating a broad curriculum, see Douglas, supra note 59, at 185-87, 199, 211 (Jefferson's purpose); id. at 200-02 (Wythe's purpose); id. at 203-06 (Tucker's purpose); id. at 207 (Wilson's purpose); id. at 207-08 (Kent's purpose); see also Hoffman, Introductory Lecture, supra note 106, at 282-84 (Hoffman's purpose).

\textsuperscript{43} See, e.g., Bailey, supra note 59, at 315-16, 320 (discussing the inclusion of these materials on students' reading lists).

\textsuperscript{44} See supra notes 76-78 and accompanying text (discussing the curriculum of studies in apprenticeship training, with special consideration of William Smith's "model" curriculum); supra notes 112-13 and accompanying text (comparing the breadth of the Smith curriculum with that of the curriculum followed in the early college/university law programs); see also supra notes 162-66 and accompanying text (discussing the broader Virginia curriculum model among the later university law programs); supra note 95 and accompanying text (contrasting the broad Smith curriculum with the narrower Litchfield type of curriculum).
The John Marshall Law Review  

apprenticeship curriculum also may have had the purpose of cultivating the liberal frame of mind necessary in the virtuous elite. Indeed, for Mark Warren Bailey an examination of several such broad apprenticeship curricula suggests that:

[L]egal educators frequently went beyond merely utilitarian considerations in framing their students' curricula. The leading members of the American bar aspired to educational ideals similar to those of the antebellum colleges and therefore placed considerable emphasis on reading that would make their students ornaments of civilization and would anchor their legal knowledge in an appropriate religious and moral context. They aimed, then, at the inculcation of correct habits of thought and expression in a person of virtue, culture, and social worth.

In addition to noting that texts on political theory, such as Montesquieu's *Spirit of the Laws*, continued to be included on students' reading lists, Bailey emphasizes in particular the importance that was attached to the study of natural law theory in cultivating public virtue. Noting that “[t]he embodiment of the ideas of sociability and public virtue in natural law theory was recognized by moral philosophers and legal educators as an important support for society and government in a democratic republic,” Bailey explains:

Natural law texts remained prominent and important parts both of a well-rounded legal education and of intellectual discourse for precisely the same reason that Thomas Jefferson and George Wythe believed in the necessity of university law courses. They were necessary tools in providing moral education and traits of republican virtue.

Bailey also considers that the study of ancient law and contemporary civil law served much the same purpose through their illumination of natural law principles. The “well-read

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415. Once again, as in the case of the broad curricula in the college/university law programs, there may also have been other purposes, connected with the prevalence of natural law thinking and legal science as central elements in the prevailing jurisprudence of the period. See supra note 409 and accompanying text; infra notes 546 and 548-55 and accompanying text.

416. Bailey, supra note 59, at 322. Indeed, Bailey suggests that, for the purpose of “reveal[ing] the most about the intellectual aspect of legal education,” the interesting texts in law students' reading lists were not “the reports and form books of technical law,” but rather “those expressing the belief that the lawyer should be a cultured person possessed of a classical liberal education.” Id. at 316.

417. See id. at 323 (citing the 1748 English translation of Montesquieu's work).


419. Id. at 324-25; see also id. at 323, 328 (discussing further the illumination of natural law by “the civil law of antiquity and continental Europe”).
practitioner" was believed to be "uniquely qualified to uncover, publicize, and apply those fundamental laws in a nation where political institutions depended heavily on public virtue.\footnote{420} As suggested above,\footnote{421} presumably natural law, ancient law, and civil law had a similar relevance when studied in the college/university law programs as well.\footnote{422}

With regard to the breadth of the curriculum in apprenticeship training, it should be noted additionally that the apprenticeship curriculum frequently included study of the law of nations.\footnote{423} As in the case of many of the college/university law programs, inclusion of the law of nations in the apprenticeship curriculum also may have served the purpose of helping to cultivate the liberal frame of mind necessary for the virtuous elite.\footnote{424} Of relevance too are Kronman's claims that for the early nineteenth-century bar the lawyer-statesman's virtues of prudence and civic-mindedness were "instilled by a blend of apprenticeship and broad humanistic learning," in particular in the areas of history and literature, and that the legal literature of the period stressed the importance of lawyers becoming familiar with the disciplines of history and literature, as well as rhetoric, "if they [were] to do their jobs in a properly broad-minded way."\footnote{425} Although they are perhaps not usually considered in the present context, some (perhaps many) of the law teachers at the independent, or proprietary, law schools also may have sought to prepare their students to become part of the virtuous elite and thus to help them develop the lawyer-statesman's virtues of practical wisdom and civic-mindedness.\footnote{426} As in the case of the college/university law

\footnote{420} \textit{Id.} at 324-25 (listing Dane, Kent, and Story as examples of legal educators and writers holding this belief). Here again, it must also be remembered that many apprentices would already be familiar with natural thinking because they had received a general college education that exposed them to such thinking before beginning their professional legal education. \textit{See supra} notes 281-82 and accompanying text.

\footnote{421} \textit{See supra} note 411 and accompanying text.

\footnote{422} Indeed, Bailey seems to imply as much through his preceding references to the views of Dane, Kent, and Story. \textit{See supra} note 420.

\footnote{423} \textit{See supra} note 77 and accompanying text (noting inclusion of the law of nations in the William Smith "model" curriculum in the apprenticeship setting).

\footnote{424} \textit{See supra} notes 409-10 and accompanying text.

\footnote{425} \textit{KRONMAN, supra} note 218, at 154; \textit{id.} at 20; \textit{see also supra} note 317, 334 and accompanying text.

\footnote{426} Expressing the contrary view, at least with respect to politics, Douglas states:

These schools emphasized private law, as opposed to public law, and mastery of English and American common law. They paid far less attention to public law topics such as constitutional law that received greater emphasis in the colleges and universities. Their focus was more explicitly to equip students to practice law as opposed to training them both to practice law and to exercise political leadership.
programs, the background of many of the proprietors of these schools is certainly suggestive in this regard. Thus, in considering seventeen proprietors of schools founded before 1830, Craig Evan Klafter observes that “eight were judges of their respective state’s highest courts, one was a United States Senator, one a United States Congressman, one the chief judge of a state’s trial court and one was one of the nation’s most noted patent attorneys.”

Suggestive, too, is the fact that many of the students at the proprietary law schools came from the wealthy social elite and went on to become leaders of the American bar and hold

Douglas, supra note 59, at 209. Douglas also notes that Jefferson criticized the proprietary law schools because they focused on the narrow practical aspects of legal practice. See id. at 209 n.134. See also Carrington, Francis Lieber, supra note 106, at 346 (“Reeve’s program [at Litchfield] emphasized the study of private law and had little in common with the initiative of Jefferson, whom Reeve reviled”).

427. As discussed above, according to Carrington, the teachers in the college/university law programs were often judges who espoused a public morality that was “closely related to classical notions of civic virtue.” Carrington, Hail! Langdell, supra note 108, at 697; supra note 397 and accompanying text.

428. Klafter, supra note 59, at 324. Interestingly, one of these proprietors was Zephaniah Swift, who was Chief Justice of the Connecticut Supreme Court of Errors from 1806 until 1819. Id. at 324 n.86. As noted earlier, Swift conducted a proprietary law school at Windham, Connecticut, from 1805 until 1823 and is given by Feldman as an example of a leading legal thinker expressing sentiments of republican elitism. See supra note 378 and accompanying text.

Also interesting in the present context is the education received by the proprietors of three proprietary law schools founded after 1830 in North Carolina. Richard Pearson, who was first a judge on the superior court and then a judge (and later Chief Justice) on the state supreme court, conducted a proprietary law school for over forty years, first as Macksville (from about 1836 until 1846), and then at Richmond Hill (from 1846 until his death in 1878). See Hunter, Institutionalization, supra note 2, at 432-38. Hunter hazards the statement that Pearson’s proprietary school “was the most important institution for legal education within North Carolina over the entire course of the nineteenth century.” Id. at 432. John Bailey, who served on the superior court for twenty-six years, conducted a proprietary law school, first in Hillsborough (from 1845 until 1858), then at Black Mountain (from 1859 until some time before 1863), and finally at Asheville (for a decade after the end of the Civil War until the mid-1870s). Id. at 438-40. Superior court judge William Battle conducted a proprietary law school at Chapel Hill for two years (from 1843 until 1845), until the school became affiliated with the University of North Carolina. Id. at 423-25. Battle then remained on the faculty at the University’s law school until 1879, during which time he became a judge on the state supreme court. Id. at 425-27. Regarding the education received by Pearson, Bailey, and Battle, Carrington states that they all attended the University of North Carolina where their university training was “cast in Jefferson’s mold,” and subsequently “distinguished themselves during the mid-1800s as law teachers influenced in the tradition initiated by George Wythe.” Carrington, supra note 100, at 557.
prominent positions in politics.\textsuperscript{429} With respect to legal practice specifically, Klafter contends that "[p]roprietary law school teachers imparted to their students the belief that as lawyers it would be their job to constantly encourage the improvement of the law,"\textsuperscript{430} and that this was done in particular through the vehicle of the schools' moot courts.\textsuperscript{431}

As noted earlier, although the independent law school curriculum itself may have been narrow in comparison to many of the curricula followed in apprenticeships and college/university law programs,\textsuperscript{432} it must be remembered that most students were apparently college graduates, and that, at least at some schools,

\begin{itemize}
\item **\textsuperscript{429} See supra notes 83, 87 and accompanying text.**
\item **\textsuperscript{430} Klafter, supra note 59, at 328.**
\item **\textsuperscript{431} Id. at 328-29. Klafter gives the following account of the moot courts held at the Winchester Law School in Winchester, Virginia:**
\begin{quote}
A review of the records of the Winchester moot court reveals clear patterns of how students were to shape their legal arguments. Hypothetical cases were constructed to emphasize how unjust results could come from the application of legal principles to everyday disputes. Students were taught to approach a case by first determining, based on their own sense of right and wrong, what the proper result should be. Then they were to search through the law noting legal authorities which both supported and countered the result they sought. There were no limitations placed on what authorities could be used. The briefs indicate a wide breath [sic] of sources from law reports throughout the region to the works of European natural law writers including works by Blackstone, Montesquieu, Beccaria, Vattel, Burlamaqui and Matthew Bacon. Finally, the relevant authorities were compared and contrasted emphasizing the faults in those against the position being taken. The theme underlying all of the arguments was that it was the advocate's responsibility to seek modification of legal principles as new situations required.
\end{quote}
\item **\textsuperscript{432} See supra notes 94-95 and accompanying text; supra notes 112-13 and accompanying text (contrasting the Litchfield curriculum with the broader William Smith apprenticeship curriculum, and with the broader curricula in the early college/university law programs, respectively); see also supra notes 162-66 and accompanying text (discussing the broader Virginia curriculum among the later university law programs).**
\end{itemize}
those who had not attended college were given some general instruction before beginning their legal education. Consequently, students at the proprietary law schools also may have been exposed to a course of studies that helped cultivate the liberal frame of mind necessary in a virtuous elite. Indeed, Klafter claims that the reason for the proprietary schools' emphasis on the value of a prior liberal arts education was that "legal instruction, as presented in proprietary law schools, would no longer be based on mere memorization of rules and procedures. Instead, the law would be taught as a science emphasizing the diverse reasons for its development which could be best understood by inquiry from a liberally educated mind."

C. Curricular Analysis and Evaluation

Section A examined the various settings (apprenticeship training, independent law school programs, and college/university law programs) in which a student of the law could receive some type of formal legal education during this first phase in the history of U.S. legal education, and Section B examined the jurisprudential ideas and professional ideal that prevailed for most of this period. Subsection 2 of the present section undertakes a more detailed, and comparative, analysis and evaluation of the breadth of coverage provided by the curricula of studies followed in the various formal legal education settings, and also evaluates the role played by certain of the prevailing jurisprudential ideas and by the prevailing professional ideal in contributing to the existence of a remarkable emphasis upon a broad education for lawyers. Before doing so, however, it is first necessary to explain the methodology used in undertaking this curricular analysis and evaluation. Subsection 1 provides this explanation.

1. Methodology Used: Basic Conceptual Framework and Empirical Bases

Drawing on accounts given in an earlier article, Fundamental Dimensions of Law and Legal Education: A Theoretical Framework, Subsection a describes a basic conceptual frame-
work (and associated terminology) that can be used to categorize the courses addressing different types of subject matter within a curriculum, and Subsection b analyzes the possible empirical bases for reaching conclusions, within that basic framework, regarding the curricular treatment of this subject matter. The discussion also addresses the extent to which the basic framework and empirical bases are applicable with respect to this first phase in the history of U.S. legal education.

a. Basic Conceptual Framework

Adopting a contemporary perspective to begin with, present-day substantive law is traditionally divided into, and distributed among, many commonly accepted separate categories based upon perceived differences in the nature of the relevant subject matter. For example, the subject matter of contracts is seen as inherently different from the subject matter of torts or of property law. These categories are all regarded, however, as falling within a broader category of private law, and as inherently different from the subject matter of areas such as criminal law and administrative law that fall within a broader category of public law, or from the subject matter of areas such as civil or criminal procedure and evidence that fall within a broader category of procedure. The titles and content of courses in present-day law school curricula generally reflect these same categories. Something analogous can be said, of course, regarding the subject matter of fields of activity and inquiry that are associated with substantive law in various ways, for example because they concern certain practicalities of lawyering, or the relationship of law to various social realities, or the search for fundamental understandings about law.

The basic conceptual framework takes such categories and courses as given. What the framework does is to group and

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437. For one example of a conventional taxonomy classifying different areas of substantive law on such a basis, see FARNSWORTH, supra note 47, at 99-170. See also Jones, supra note 436, at 595 n.68 (summarizing Farnsworth's taxonomy).

438. Although the titles and content of courses in present-day law school curricula generally reflect these commonly accepted categories, it should be remembered that the main reason they are commonly accepted categories in the first place is due to the systematizing work of legal scholars in the past, both during this first phase and during subsequent phases in the history of U.S. legal education. For discussion of the efforts of legal scholars to systematize and rationalize the common law through the development of an appropriate "legal science," see supra notes 267-74 and accompanying text.

439. Conventional taxonomies of areas of substantive law, and of courses addressing those areas, are not necessarily uncontroversial. See, e.g., Daniel A. Farber and Philip P. Frickey, In the Shadow of the Legislature: The Common Law in the Age of the New Public Law, 89 Mich. L. Rev. 875, 885-87 (1991), reprinted in ROBERT HAYMAN, NANCY LEVIT & RICHARD DELGADO,
organize the various categories of subject matter, and the various
courses that address them, into six broader categories (and various
subcategories). It also uses a particular terminology. Thus, the
various categories of subject matter concern “dimensions of law”
and the six broader categories (and their subcategories) concern
six broader sets (and subsets) of “fundamental dimensions of law,”
based on perceived similarities and differences in sources of law.\footnote{440}

JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO
POSTMODERNISM 807, 808-09 (2d. ed., 2002) (discussing realist and postrealist
challenges to the private law/public law distinction); see also Roderick A.
Macdonald, Curricular Developments in the 1980s: A Perspective, 32 J. LEGAL
EDUC. 569, 575-78 (1982) (discussing the question whether the law school
curriculum should be structured on the basis of “factual subject-matter
coherence,” e.g., the Law of Beaches or the Law of Subdivisions, or on the basis
of “legal-concept coherence,” e.g., the law of property, torts, contracts,
commercial law, etc.).

440. Use of the term “dimensions” of law is intended to evoke a broad
concept of law that includes much more than “substantive law.” Such a broad
concept of law is entirely appropriate for some purposes, including our
purposes here, but may not be appropriate for certain other purposes, such as
for the purpose of legal reasoning. For further discussion, see Jones, supra
note 436, at 564-68 & n.28. Use of the term “fundamental” connotes the idea
that at least some dimensions within each set (and indeed within each subset)
of dimensions, and various aspects of those dimensions, are fundamental for
law and legal education. It also connotes the idea that the boundaries
separating the sets and the subsets can serve as the basis for a classificatory
system of law and legal education. For further discussion, see id. at 563-64.

As indicated in the article text, the taxonomic schema that results from
the grouping and organization of “dimensions of law” into six broader sets (and
subsets) of “fundamental dimensions of law” is based on perceived similarities
and differences in sources of law. Here the term “sources” is understood
broadly to include many different kinds of human influences that operate as
actual or potential causal factors in producing legal outcomes, as well as on
perceived similarities and differences in law-related sources that operate as
causal factors in producing nonlegal outcomes. For further discussion, see id.
at 594-601. The schema is intended to capture, and to help us in thinking
about, the complex “multicontextual” or “multidimensional” reality of law in a
modern legal system. The fundamental dimensions of law, indeed, are the
fundamental dimensions of a modern legal system. For further discussion, see
id. at 571-73. The schema thereby also captures, and helps us in thinking
about, the complex “multicontextual” or “multidimensional” reality of
lawyering in a modern legal system. The fundamental dimensions of law,
indeed, are also fundamental dimensions of lawyering. For further discussion,
see id. at 610; see also id. at 594-601 (discussing “sources” of law). Similarly,
the schema is intended to help us in thinking about legal education, because it
provides a corresponding framework for grouping and organizing courses in
the curriculum into six similar broad categories (and subcategories) that
concern the six broad sets (and subsets) of fundamental dimensions of law.
The fundamental dimensions of law, indeed, are fundamental dimensions of
legal education as well, although the curriculum does not always make the
complex “multicontextual” or “multidimensional” reality of law and lawyering
as clear as it could. This is, of course, how the schema is being used in the
present article. Moreover, arguably such an approach towards categorizing
courses in the curriculum as is suggested here makes explicit a latent
Turning to specific details, the framework identifies the following six sets of fundamental dimensions of law: the substantive dimensions of law; the structural dimensions of law; the practical dimensions of law; the social dimensions of law; the cultural dimensions of law; and the transnational dimensions of law. These six sets will now be briefly described. For illustrative purposes, the discussion of each set will be followed by a note listing a few courses whose primary emphasis is upon dimensions within that particular set. These notes will also indicate possible subsets of that set of fundamental dimensions.

The substantive dimensions of law concern, in particular, the substantive legal norms, laid down by the state, governing the relationship of individuals (and associations of individuals) with each other and with the state itself. The structural dimensions of law concern, in particular, the legal norms governing the various components of the “law machine” (legal institutions, legal actors, and legal processes), within which legal norms develop, and within which they are applied and enforced. The practical taxonomic order that already exists within the curriculum. For further discussion, see id. at 608-09, 611-12.

441. The six sets of fundamental dimensions of law are systemically pervasive (so that the fundamental dimensions are also dimensions of each other), and mutually interactive (so that changes in one or more dimensions can frequently produce changes in other dimensions). For further discussion, see id. at 571-73. Arguably, it is also possible to identify (perhaps somewhat playfully) the postmodern dimensions of law. For further discussion, see id. at 601-08.

442. Use of the expression “primary emphasis” implies, of course, that a course may also incorporate some emphasis on other dimensions, either within that particular set of fundamental dimensions or within another set of fundamental dimensions.

443. For a more complete description of the six sets of fundamental dimensions of law, and for a fuller listing of illustrative courses, see id. at 573-94.

444. Possible subsets of the substantive dimensions of law might be: private law dimensions, and public law dimensions. Illustrative courses include: Contracts, Torts, Property Law, Criminal Law, and various courses in the area of administrative law. For further discussion, see id. at 574-76.

445. Possible subsets of the structural dimensions of law might be: the legal institutions dimensions, the legal actors dimensions, and the legal processes dimensions; or, alternatively, the legislative dimensions, the adjudicative dimensions, the administrative dimensions, the legal profession dimensions, and the legal education dimensions. Illustrative courses include: Constitutional Law, Legislative Process, Civil Procedure, Criminal Procedure, Evidence, and Legal Professions (structure and roles aspect). For further discussion, see id. at 577-79.

Together, the substantive dimensions of law and the structural dimensions of law also comprise the doctrinal (or normative) dimensions of law, which are concerned with “substantive law.” See supra notes 437, 439 and accompanying text. To recognize the doctrinal dimensions as a separate set of dimensions within the taxonomic schema, however, would obscure the important distinction between the substantive dimensions and the structural
dimensions of law concern, in particular, the professional skills that lawyers need, and the professional values that should guide them, when performing their various roles and tasks within the legal system (especially as legal practitioners, but also as judges, law professors, legislators, etc.). The social dimensions of law concern, in particular, larger social realities, and those disciplines, such as political science and various other social sciences (economics, psychology, sociology, anthropology, etc.), through which those larger social realities are intellectualized. The cultural dimensions of law (the historical, jurisprudential, and comparative dimensions of law) concern, in particular, the very roots/foundations of law in the past, in profound speculation, and in the legal experience of other peoples. The transnational dimensions of law, which are a different order of dimensions from the dimensions in the preceding five sets, concern, in particular, a vast body of transnational law as well as the processes of
“transnationalizing” the national economic, social, and legal environments.\textsuperscript{449}

The above framework (and associated terminology) is equally serviceable in categorizing the subject matters that were studied in various curricula during the first phase in the history of U.S. legal education. However, it should be pointed out of course that this taxonomic schema, identifying six sets (and various subsets) of fundamental dimensions of law, is an intellectual interpretive construct, developed in the historical context of contemporary legal education,\textsuperscript{450} that is being superimposed upon the prior experience

\textsuperscript{449} Possible subsets of the transnational dimensions of law might be: transnational law dimensions (i.e., public international law dimensions, private international law dimensions (in a narrow sense, international conflict of laws, and in a broader sense, international business transactions), immigration law dimensions, regional integration dimensions, foreign law dimensions), and the transnationalization dimensions. Illustrative courses include: International Law, Human Rights Law, International Conflict of Laws, International Business Transactions, Immigration Law, and European Union Law. For further discussion, see \textit{id.} at 589-94. The transnational dimensions of law are a different order of dimensions because, from a strictly analytical point of view, in considering the preceding five sets of fundamental dimensions of law we are concerned with phenomena that occur solely within the national context. With the transnational dimensions of law, however, we are now concerned with phenomena that cross national frontiers, with external influences upon the national economic, social, and legal environments, and with various formal and informal linkages between the national legal system and external legal orders. For further discussion, see \textit{id.} at 589-94. Regarding the relationship of the transnational dimensions of law to the comparative dimensions of law and the lines of demarcation between them, see \textit{id.} at 589 n.59, 592-94 & n.65. Regarding the distinction between the foreign dimensions of law and the comparative dimensions of law, see \textit{id.} at 590 n.59.

\textsuperscript{450} The fundamental dimensions taxonomy builds upon, and seeks to extend, the work of earlier scholars who have analyzed the structure of legal education. For example, in his study of legal education published in 1921, Reed suggests that an ideal “professional legal education” would include “comprehensive training” under three separate heads: “practical training,” dealing with “skill or discipline”; “theoretical knowledge of the law,” dealing with “systematized legal doctrines” as well as “[certain subjects] of a relatively non-technical nature, such as jurisprudence and government”; and “general education,” dealing with “all such additional sciences or arts as . . . may be helpful to the prospective lawyer in any way.” \textit{REED I, supra} note 2, at 276-78; \textit{see also id.} at 299-300; \textit{ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA} 224-25 (1928) [hereinafter \textit{REED II}] (identifying legal history, legal philosophy or jurisprudence, comparative law, and international law as non-technical subjects included under the head of theoretical legal knowledge). Reed’s “theoretical knowledge of the law” component concerns the substantive and structural dimensions of law as well as the cultural and transnational dimensions; the “practical training” component concerns the practical dimensions of law; and, the “general education” component concerns the social dimensions of law and a few subjects relevant to the cultural dimensions, such as general history and philosophy.
of lawyers and legal educators who did not necessarily think in such terms (which is not to deny that they may have been receptive to such a construct).\textsuperscript{451}

b. Empirical Bases

Any truly scientific attempt to analyze, evaluate, and compare the degree to which an individual curriculum or the mainstream curriculum in a particular setting emphasized the six sets (and various subsets) of fundamental dimensions of law, and the degree to which students were exposed to those dimensions during their legal education, would have to proceed along lines similar to those described in my earlier article.\textsuperscript{452} Although the additional theoretical framework developed there for this purpose focuses on inquiries regarding a set (and subsets) of fundamental dimensions of law, it is equally applicable to inquiries regarding an individual dimension or any particular subject matter. Moreover, although that framework focuses on the law school curriculum, it applies analogously in other formal legal education settings as well, such as those with which we are concerned during this first phase in the history of U.S. legal education.

Four general considerations bear on the degree of curriculum emphasis and student exposure, including most importantly for

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The fundamental dimensions taxonomy also builds upon, and seeks to extend, the work of other scholars who have analyzed the nature of a legal system, such as Karl Llewellyn, H.L.A. Hart, and John Henry Merryman. For further discussion, see Jones, \textit{supra} note 436, at 565 n.28, 596 n.72 (Llewellyn); \textit{id.} at 549 n.4, 575 n.39, 577 n.41, 596 n.72, 600 n.79 (Hart); \textit{id.} at 549 n.4, 577 n.41, 578 n.42, 582-83 n.47, 584 n.48 (Merryman).

451. In this regard, two particular caveats should be noted. First, our present subject matter categories (and the titles and content of courses in present-day law school curricula) have evolved from, and have frequently transcended, classifications made during earlier periods in the historical development of English and American law, including classifications adopted from Roman Law (\textit{see supra} note 193 and accompanying text). Consequently, the various curricula during this first phase were not always divided up into the separate courses, and did not necessarily use the titles, with which we are familiar today. However, a process began during this first phase, whereby (at Harvard, for instance) "teaching compartments," often comprising several subjects that were dealt with successively, were gradually replaced by separate "subject courses" devoted to each subject. \textit{See Reed I, supra} note 2, at 363-68; \textit{Reed II, supra} note 450, at 257-60.

Second, the detailed classification of topics within certain subject areas in the curriculum reflected the ancient common law forms of action. \textit{See, e.g., Feldman, supra} note 4, at 56-57 (discussing \textit{inter alia} David Hoffman's \textit{A COURSE OF LEGAL STUDY} and the organization of the Litchfield curriculum under Gould and Reeve). These forms of action remained central to American common law until states adopted codes of civil procedure, beginning with New York's adoption of the Field Code in 1848. \textit{See Friedman, supra} note 2, at 391-98.

452. \textit{See Jones, supra} note 436, at 622-29.
present purposes the ways in which a course, and the ways in which a curriculum, can emphasize, and expose students to, a particular set (or subset) of fundamental dimensions of law.\footnote{453. The four general considerations are: (1) the extent to which the fundamental dimensions of law are studied in the relevant law school courses abstracted from context, or alternatively in context; (2) the organization of detailed knowledge within various types of knowledge structures; (3) the ways in which courses (and course materials) can emphasize, and expose students to, a particular set (or subset) of fundamental dimensions of law; and (4) the ways in which the curriculum can place special emphasis upon a particular set (or subset) of fundamental dimensions. See id. at 611-22.}

For present purposes, the third and fourth general considerations, but only these, require a little more explanation. Regarding the third general consideration, the most obvious way in which a particular course in the law school curriculum (and/or the materials for that course) can provide relevant coverage, and thereby emphasize and expose students to a particular set (or subset) of fundamental dimensions of law, is for the course to devote most of the coverage to (and hence to place primary emphasis upon) that particular set (or subset) of fundamental dimensions. Analytically, this obvious way resolves into two ways — the first being the provision of the relevant coverage in a general course, the second being the provision of the relevant coverage in a specialized course.

In addition to these obvious ways, there are two other, perhaps less obvious ways. Thus, some specific exposure to a set of fundamental dimensions can be incorporated into a course and/or course materials with a different primary emphasis (for example, when economics materials are incorporated into a course with a doctrinal emphasis). Also, some generalized exposure to certain types of dimensions can be incorporated into a course with a different primary emphasis when such a dimension is inherent in the materials used in that course, for example when studying cases and other texts in a doctrinal course also conveys a sense of the historical development of the law and a sense of the historical context, or when it conveys a sense of the jurisprudential paradigm within which the cases were decided. Some generalized exposure to certain types of dimensions can also be incorporated into a course with a different primary emphasis when such a dimension otherwise informs, and is reflected in, the general approach to teaching that course and/or the course materials, for example when a particular lawyering skill, say legal reasoning (which may, of course, itself reflect a particular jurisprudential paradigm), is developed throughout a doctrinal course.

As one proceeds through these different methods of emphasis and exposure there may be a (very rough) continuum in which the focus shifts from a more general and abstract treatment of the fundamental dimension(s) in question (more likely with the first two, more obvious methods), to application of the dimension(s) in various contexts (more likely with the last two, less obvious methods). See also id. at 618-19 & n.102 (discussing the third general consideration further and also discussing why the extent of coverage alone is not necessarily a completely accurate indication of emphasis and exposure within a course).

Regarding the fourth general consideration, a law school curriculum can place special curricular emphasis upon a particular set (or subset) of fundamental dimensions by including courses with such an emphasis (especially courses with a primary emphasis) within the "core curriculum," which comprises those courses that are required or at least generally recommended due to their perceived fundamental value and importance (in contrast to courses that are not so perceived and hence are "mere electives")
Having regard to these four general considerations, it is possible to identify seven factor-clusters that together will determine the degree to which an individual law school curriculum actually and effectively emphasizes, and actually and effectively exposes students to, a particular set (or subset) of fundamental dimensions of law.\footnote{44} In order to estimate with scientific accuracy the degree of relegated to the periphery of the curriculum). See also id. at 619-22 (discussing the fourth general consideration further).

454. See id. at 623-29. A truly scientific inquiry must seek to determine actual and effective curricular emphasis and student exposure, not just apparent emphasis and exposure. Thus, it would be highly misleading, for example, to base an evaluation of emphasis and exposure solely upon the number of courses in the curriculum with an emphasis on a particular set (or subset) of fundamental dimensions. Even if there are several or even many such courses, they may be "mere electives" that are not within the core curriculum, and they may have consistently low enrollments. Conversely, even if there is only one such course, it may be required, or at least generally recommended, and therefore (being within the core curriculum) it will be certain (if required) or highly likely (if generally recommended) to have consistently high enrollments. See id. at 623 n.108. The greater the number of relevant determining factors that are considered, the less risk there is of being misled by appearances.

In the following brief summary of determining factor-clusters, factor-clusters (1) to (3) concern actual emphasis and exposure, and factor-clusters (4) to (7) concern effective emphasis and exposure: (1) regarding courses with a primary emphasis on a particular set (or subset) of fundamental dimensions (i.e., the two obvious methods of emphasis and exposure discussed supra note 453), the number and status of, and enrollment in, such courses, see also infra notes 455-57 and accompanying text; (2) the same factors as cluster (1), but with regard to courses which incorporate some emphasis, but not a primary emphasis, on those dimensions (i.e., the two less obvious methods of emphasis and exposure discussed supra note 453); (3) the extent to which relevant exposure is assigned, addressed by professors in class, tested in examinations, etc., and addressed by students in preparation, review, and examinations; (4) consideration of the same matters as cluster (3), but with regard to the quality (not the quantity) of relevant exposure assigned and tested, and of time spent by professors and students in addressing it; (5) the extent to which the emphasis and exposure under (1), (2), and (3) is comprehensive, having regard to the range and diversity of specific dimensions (and/or aspects of those dimensions), and the range and diversity of their applications in various contexts, included in the exposure; (6) the extent to which the emphasis and exposure under (1), (2), and (3) is systematic and integrative both within and among the specific dimensions (or aspects of those dimensions), and within and among their applications in various contexts, included in the exposure; (7) the extent to which the emphasis and exposure under (1), (2), and (3) results in the acquisition of knowledge structures that are properly integrated with existing knowledge structures, and sufficiently forward-looking and flexible.

Factor-cluster (5) requires a little more explanation for present purposes. Factors relevant to the degree of comprehensiveness in the emphasis and exposure in question include (quantitatively) the proportionate relationship of the exposure to the total amount of exposure involved in, and (qualitatively) its relative importance within, a complete coverage of the full range of dimensions within the set (or subset) (in the case of specific dimensions/aspects of dimensions) and at least a representative coverage of
actual and effective curricular emphasis, and actual and effective student exposure, with respect to a particular set (or subset) of fundamental dimensions of law, it will be necessary, having identified all of the relevant determining factors, to obtain reliable data regarding those factors, and then to analyze and evaluate that data. If desired, the evaluated information can then be characterized more descriptively, using some terminology such as "extensive," "considerable," "significant," "not significant," where these terms correspond to different scores on an objective scale. The information and characterization for that set (or subset) of fundamental dimensions can be compared, of course, with the information and characterizations for other sets (and subsets) of fundamental dimensions, using as criteria of comparison the same criteria of analysis, evaluation, and characterization. The information and characterization regarding the treatment of a set (or subset) of fundamental dimensions within that particular curriculum can also be compared with counterpart information and characterizations generated for other curricula. In order to estimate accurately the degree of curricular emphasis and student exposure in the "mainstream" curriculum, it would be necessary to perform this latter exercise with regard to a sufficiently representative group of curricula.

Of the seven determining factor-clusters, the first factor-cluster appears to be the most readily quantifiable; arguably it is also the most important. Somewhat unsurprisingly, the first factor-cluster focuses upon courses with a primary emphasis upon a particular kind of subject matter (using our terminology, courses with a primary emphasis upon dimensions within a particular set (or subset) of the fundamental dimensions of law), and it comprises the following three factors: (a) the number of such courses in the curriculum and the number of credit hours devoted to those courses;\textsuperscript{455} (b) whether the courses are required, generally recommended, or are "mere electives";\textsuperscript{456} (c) the total number of the full range of applications in various contexts (in the case of applications). Here, one should remember that what would be regarded as, or what would be included within, a full range of dimensions within a set (or subset), or a full range of applications in various contexts, may evolve over time in accordance with changes in knowledge and/or changes in various other features of the historical context. Thus, for example, law in most, perhaps all, of its fundamental dimensions was much smaller in scale during the first phase in the history of U.S. legal education than during subsequent phases, and especially when compared with the situation today. For further discussion of the seven factor clusters, see \textit{id.} at 623-29.

\textsuperscript{455} For a discussion of the importance of not being misled by an exclusive focus on this factor, see \textit{supra} note 454; hence, it is crucial, where possible, to supplement data regarding this first factor with data regarding the following two factors.

\textsuperscript{456} For a discussion of these terms, see \textit{supra} note 453 (final paragraph and the reference given therein).
students enrolled in such courses, as well as the percentage of students who take such courses, and how many of them they take, (i.e., the percentage of students who take one such course, two such courses, three such courses, etc.). 457

Doubtless the quantifiability and the importance of this first factor-cluster help to explain why various curriculum surveys and studies that have been conducted at various times during the history of U.S. legal education have tended to focus on this factor-cluster. Indeed, there exist some very useful curriculum surveys and studies for later periods in the history of U.S. legal education in which the authors provide cumulated data regarding one or more of the factors in this factor-cluster (and in later surveys and studies, sometimes regarding all three factors) for all or most, and/or for certain groupings of U.S. law schools, on the basis of which they may also reach various general and systemic conclusions regarding the curricula of these law schools and even regarding the existence of a “standard” or a “core” curriculum. 458

The cumulated data is compiled, of course, from data regarding individual law school curricula, typically based on information provided by the law schools themselves. Unfortunately, these kinds of curriculum surveys and studies do not appear to exist for this first phase in the history of U.S. legal education. Instead, those who have attempted to reach general and systemic conclusions regarding the curricula of studies in the various settings with which we are concerned appear to have based those conclusions on available descriptions (of varying reliability) of a

457. For further discussion of the significance of enrollment data, in particular data regarding the kinds of percentages specified in the article text, see Jones, supra note 436, at 624 n.110.

limited number of individual curricula in the relevant setting.\footnote{459} Presumably, this is because it is difficult to find extensive and reliable curricular information regarding a period so far in the past. The general and systemic conclusions that have been drawn could nevertheless be correct, of course, if the available descriptions are in fact accurate and if the sampling is in fact representative of all or most curricula.

In these circumstances, my own approach in undertaking the curricular analysis and evaluation in Subsection 2 also focuses mainly on the first factor-cluster discussed above,\footnote{460} but is subject to various limitations. First, my analyses and general and systemic evaluations of curricular emphasis and student exposure are based on my review, and best assessment, of the data and conclusions contained in the pertinent sources cited in Part II.A for each setting.\footnote{461} In particular, the analyses and evaluations will draw on the discussions that examine the curricula of studies (and especially the "ideal" or "model" curriculum) in each setting and that are based on data contained in various of these sources.\footnote{462} In addition, the analyses and evaluations will refer to certain other data, and various conclusions regarding curricula reached by different commentators, that are also contained in these sources. Second, descriptions of the subject matter content of the various curricula in these sources have consisted mainly in a description of course or subject titles. In considering such descriptions, two basic assumptions are made. It is assumed that such course or subject titles are a reliable indicator of the nature of the subject matter studied, thereby enabling one to classify reliably the courses or subjects as related primarily to a particular set (or subset) of fundamental dimensions of law. It is also assumed that most, if not all, students following a particular curriculum of study in fact would have taken all of the courses or studied all of the subjects described. Hopefully these two assumptions, particularly the

\footnote{459} For one example relating to the college/university law programs and the program at Litchfield, see Reed I, supra note 2, at 460-63 app.V.B (identifying the sources of information regarding law schools relied upon by Reed in completing his study in 1921).

\footnote{460} See supra notes 455-57 and accompanying text. However, limited consideration will also be given to the second factor-cluster identified supra note 454. See infra notes 473, 478, 504-06, 512-13, 517, 526-28, 533 and accompanying text; see also infra notes 550-55, 559-60 and accompanying text (discussing various analogous or related points).

\footnote{461} See supra notes 73-74 (apprenticeship training); supra notes 80, 82 (independent law school programs); supra note 106 (early college/university law programs); supra note 139 (later university law school programs).

\footnote{462} See supra notes 76-78 and accompanying text (apprenticeship training); supra notes 91-94 and accompanying text (independent law school programs); supra notes 114-22, 129 and accompanying text (early college/university law programs); supra notes 148-67 and accompanying text (later university law school programs).
second, are not too heroic. Finally, my use of the descriptive evaluative terms "extensive," "considerable," "significant," "not significant" etc., is not based on a correspondence to points scored on some type of objective scale but, as indicated above, on my "best assessment" of the sources reviewed. Despite the limitations of this approach, it is believed that the evaluations, although necessarily tentative, are reasonably sound, and that they are in any event suggestive.

2. Curricular Analysis and Evaluation

Using the conceptual framework and various empirical bases described in Subsection 1 immediately above, we shall now undertake the actual analysis and evaluation of the curricula followed in the different formal legal education settings with which we are concerned: apprenticeship training, independent law school programs, and college/university law programs. Subsection a undertakes a comparative analysis and evaluation of the breadth of coverage provided by the curricula of studies in the different settings, and Subsection b seeks to demonstrate how the striking breadth of many of these curricula and the remarkable emphasis upon a broad education for lawyers may have reflected the influence of certain elements of the prevailing jurisprudence explored in Part II.B.1, in particular the elements of natural law and legal science, as well as the influence of the prevailing professional ideal of the lawyer-statesman and its underlying political philosophy of civic republicanism, explored in Part II.B.2.

a. Comparative Analysis and Evaluation of Breadth of Coverage

To facilitate discussion, the analysis and evaluation in this subsection is divided into four parts: substantive and structural

463. The first assumption appears to be a reasonably safe one to make. The second assumption may be more questionable, and its verification would require empirical analysis and evaluation of data regarding factors analogous to those discussed supra notes 456-57 and accompanying text.

464. In addition to the limitations discussed here, see also supra note 451 (discussing various caveats in using the basic framework of fundamental dimensions of law to categorize the subject matters that were studied in various curricula during this first phase in the history of U.S. legal education).

465. Interested readers are, of course, encouraged to review for themselves all of the sources cited in the relevant notes for each setting, see supra note 461, both those sources containing a generalized discussion of "the curriculum," as well as those sources containing more particular discussions of individual experiences and programs in those settings, in order to make their own assessment of the pertinent data.

Moreover, perhaps those with greater expertise in, and aptitude for, such matters will be inclined to undertake additional detailed research into the curricula of studies followed in these various settings, and to generate and tabulate, to the extent feasible for this period, the kind of statistical data that is available for later periods. See supra note 458 and accompanying text.
dimensions of law; practical dimensions of law; social dimensions of law; and cultural and transnational dimensions of law.

(1) Substantive and Structural Dimensions of Law

During this first phase in the history of U.S. legal education, the curriculum in all of the various settings appears to have placed extensive emphasis upon the substantive dimensions of law, and at least considerable emphasis upon the structural dimensions of law. These particular evaluations would not appear to be especially controversial and can be supported by a review of the "model" curricula in these settings. Here the reader's attention is directed to the earlier discussion of William Smith's curriculum in the apprenticeship setting, the Litchfield curriculum in the independent law school setting, David Hoffman's Syllabus in the early college/university setting, and the Harvard and Virginia curricula in the later university law school setting. In all these curricula the relevant coverage of substance and structural matters (including procedure) is readily apparent.

Four points should be noted regarding coverage of the substantive and structural dimensions of law in these various settings. First, the working classifications of the substantive law used for purposes of study and instruction were not based on a comprehensive and logical system of classification but instead reflected what had become an ad hoc, unsystematic, and even chaotic division of judge-made law into various standard titles.

These working classifications appear to have persisted despite the efforts by various pre-Langdellian "legal scientists" to organize various branches of the law in a systematic and rational manner.

466. For a description of these dimensions, see supra note 444 and accompanying text (substantive dimensions of law); supra note 445 and accompanying text (structural dimensions of law).

467. See supra notes 76-78 and accompanying text. See also, e.g., Bailey, supra note 59, at 312-13 (quoting Paul Hamlin's statement that the apprentice was "instructed in the principles, practices and procedures of the law"); id. at 319-20 (providing a general description of apprenticeship training); id. at 315-16 (discussing legal education in general)

468. See supra notes 91-94 and accompanying text.

469. See supra notes 114-17 and accompanying text. See also supra notes 118-22 and accompanying text (discussing the curricula at William and Mary, Philadelphia, Columbia, Transylvania, and Harvard).

470. See supra notes 148-51 and accompanying text (Harvard); supra notes 162-65 and accompanying text (Virginia).

471. See REED I, supra note 2, at 345-46.

472. See supra note 267-74 and accompanying text (discussing these efforts). Cf. Schweber, supra note 2, at 608 (noting a resistance to "legal science" even at some law schools). Reed seems to suggest that textbook writers, both legal educators and others, even contributed to the confusion because "[they] defined each for himself his field of study, and thus crystallized the law into units which subsequent text writers and subsequent law schools were
Second, in any given curriculum, matters of procedure, and possibly evidence as well, may have been addressed in connection with various substantive topics, such as Real Property, Contracts, and Criminal Law, quite apart from any specific treatment they may (or may not) have received as separate topics in their own right. This point was made explicit in the discussion of David Hoffman's program at Maryland and can be readily verified by consulting his Syllabus for that program, but it was doubtless equally true in many other cases as well.

Third, the area of Constitutional Law may have been virtually ignored in the independent law school setting, which certainly seems to have been the case at Litchfield. Conversely, the area of Constitutional Law may have received a greater emphasis than even in Hoffman's Syllabus among those college/university law programs following the Jeffersonian or similar model of legal education.

Fourth, there may have been additional coverage of the substantive and structural dimensions of law (including Constitutional Law) beyond that which is apparent from any listing of specific topics to the extent, for example, that the relevant parts of general institutional works, such as Blackstone's Commentaries and, later on, Kent's Commentaries were the subject of lectures and/or assigned readings.

(2) Practical Dimensions of Law

There seems to have been at least a considerable emphasis upon the practical dimensions of law in all of the formal legal education settings, with an additional emphasis (probably an extensive emphasis) upon those dimensions in the apprenticeship

compelled to recognize." REED I, supra note 2, at 348-49.

473. See Hoffman, Syllabus, supra note 106; see also supra note 116 and accompanying text (discussing Hoffman's Syllabus).

474. See supra notes 91-92 and accompanying text (discussing the Litchfield curriculum); see also, e.g., REED I, supra note 2, at 131, 453 app.III (surveying the Litchfield curriculum); Sheppard, Lecture Hall, supra note 2, at 13 (commenting on the Litchfield curriculum (quoted supra note 94 and accompanying text)).

475. See supra note 111 and accompanying text (identifying programs following the Jeffersonian-type model).

476. See, e.g., REED I, supra note 2, at 453-54 (comparing the curricula at Litchfield in 1794 and 1813, Harvard in 1835-38, and Columbia in 1858-75, and observing that "[s]everal of the topics not specifically mentioned at Harvard, for instance, were doubtless covered in the introductory course on Blackstone and Kent"). For discussion of the institutional character and contents of Blackstone's Commentaries and Kent's Commentaries, and of the central role of these and other works in the legal education of the period, see supra notes 175-93 and accompanying text.

477. For a description of the practical dimensions of law, see supra note 446 and accompanying text.
setting. These evaluations are based on three main considerations. First, with respect to professional skills, in all of the settings presumably the skill of legal reasoning would have been developed, to some extent at least, as students studied the cases dealing with particular subject matters.478 Second, with respect to professional values, we have seen in the previous Section how mentors in apprenticeship training, and law teachers in the college/university law programs and possibly even in the independent law schools, sought to cultivate in their students the character virtues and values of the lawyer-statesman ideal.479 Third, students in all three settings studied additional practical dimensions, particularly various types of skills, as separate topics or activities in their own right. The following analysis focuses on this third consideration in particular.

With respect to institutionalized legal education, i.e., legal education in the independent law school and college/university settings, the reader's attention is directed, once again, to the earlier discussion of the "model curricula" in these various settings.480 In the independent law school setting, the Litchfield curriculum included coverage of Pleading and Practice as well as optional moot courts and debating societies.481 In the early college/university setting, David Hoffman's Syllabus included coverage of pleading within various titles; Legal Biography and Bibliography, and Professional Deportment (i.e., Legal Ethics) were covered in a separate Title of their own; and lectures were supplemented with moot court exercises, debating exercises, and writing competitions.482 In the later university law school setting, the Harvard curriculum included coverage of Pleading, and again lectures were supplemented by moot court exercises.483 The Virginia curriculum, too, included coverage of Pleading, and a comprehensive moot court program included litigation and drafting exercises that required students to "perform most of the functions of the practicing lawyer."484 Many law teachers in these

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478. Regarding the study of cases in apprenticeship training, see supra note 77 and accompanying text (discussing the William Smith "model" curriculum). Regarding the study of cases in the independent law school and college/university law programs, see supra note 171 and accompanying text.
479. See Subsection e, Part II.B.2, supra notes 394-435 and accompanying text.
480. See also references cited supra note 173 (discussing methods of instruction as including moot court and other types of practical exercises).
481. See supra notes 91-92 and accompanying text.
482. See supra notes 116-17 and accompanying text; see also supra note 118 (noting the practice of holding moot courts and moot legislatures at William and Mary under Wythe); supra note 121 (noting a similar practice at Transylvania).
483. See supra notes 149-51 and accompanying text.
484. See supra notes 164-65 and accompanying text.
various programs, moreover, doubtless considered that their students should receive additional practical training, but that such additional practical training should be provided during a subsequent apprenticeship experience.485

With respect to apprenticeship training itself, Bailey's description of the William Smith curriculum notes generally that this "ambitious course of study" included "an in-depth study of both the theory and practice of law," and notes specifically the study of "precedents" and "entries" (i.e., forms and record-keeping).486 Moreover, one of the elements of apprenticeship training was the copying of legal documents.487 Bailey conveys a good sense of the extent to which this particular activity helped to familiarize the apprentice with forms and record-keeping, as well as various other types of documents:

In an age prior to the general availability of printed forms, the legal system's dependence on written records required endless copying of legal documents. This was a powerful incentive for an attorney to take in apprentices, who spent their days with pen in hand over the stream of writs, pleadings, and briefs flowing through the office. Copying also served a practical purpose for the apprentice, familiarizing him with the filing of writs, the preparation of pleas, and the notations in dockets and account books that were the basis of everyday practice.488

Another element of apprenticeship training was the apprentice's observation of the practice,489 and doubtless this would also have included observing the conduct of cases in court.

(3) Social Dimensions of Law490

With respect to the social dimensions of law, it may appear necessary to make a distinction between apprenticeship training and institutionalized legal education. In the apprenticeship setting, the William Smith curriculum included various subjects in the arts and sciences that are relevant to the social dimensions of law, resulting in a level of exposure to these dimensions that is at least considerable, and perhaps even extensive.491 By contrast, the

485. See, e.g., Hoeflich, Theory and Practice, supra note 2, at 864, 867-68 (discussing various law teachers, such as Joseph Story and Daniel Mayes, who appear to have expressed this viewpoint).
486. See supra note 77 and accompanying text.
487. See supra note 73 and accompanying text.
488. Bailey, supra note 59, at 313.
489. See supra note 73 and accompanying text.
490. For a description of the social dimensions of law, see supra note 447 and accompanying text.
491. See Bailey, supra note 59, at 320-21 (describing the Smith curriculum as including "a broad sampling of the arts and sciences" and listing various subjects in the general studies area); see also supra note 77 and accompanying text (quoting Bailey).
Litchfield curriculum in the independent law school setting does not appear to have included any emphasis upon the social dimensions of law.\textsuperscript{492} David Hoffman's \textit{Syllabus} in the early college/university setting also seems to have lacked such an emphasis,\textsuperscript{493} as do, in the later college/university law school setting, both the Harvard model curriculum\textsuperscript{494} and the Virginia model curriculum (at least as it developed over time).\textsuperscript{495}

It is important, however, to bear in mind two cautionary points in evaluating the apparent contrast between apprenticeship training and institutionalized legal education with respect to the exposure of students to the social dimensions of law. First, many apprentices had already received a general college education before beginning their apprenticeship training and presumably were not required to study again the various subjects in the arts and sciences they had already studied at college, but were expected to focus instead on the more specifically legal subjects.\textsuperscript{496} Similarly, many (perhaps most) of those attending the independent law school and college/university law programs also had received a prior college education,\textsuperscript{497} and those who had not done so were given a brief course of general instruction in the arts and sciences before beginning the law program (at least at some of the independent law schools),\textsuperscript{498} or were encouraged to take parallel courses outside the law program itself (at some of the colleges/universities).\textsuperscript{499} For those students with a prior college education (or some equivalent), then, there may have been little functional difference between apprenticeship training and institutionalized legal education as far as exposure to the social dimensions of law is concerned, because they all would have received such exposure, one way or another, as part of a \textit{general}

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\textsuperscript{492} See supra notes 91-95 and accompanying text.

\textsuperscript{493} See supra notes 114-17 and accompanying text.

\textsuperscript{494} See supra notes 148-54 and accompanying text.

\textsuperscript{495} See supra notes 162-65 and accompanying text. With respect to the narrowing of the Virginia curriculum over time so as to exclude subjects such as history and political economy, see supra note 163 and accompanying text.

\textsuperscript{496} See supra note 79 and accompanying text. For a description of the standard college curriculum, see supra note 72 and accompanying text.

\textsuperscript{497} See supra note 96 and accompanying text (independent law school programs); supra note 128 and accompanying text (early college/university law programs); supra note 168 and accompanying text (later university law school programs).

\textsuperscript{498} See supra note 96 and accompanying text.

\textsuperscript{499} See supra note 129 and accompanying text (early college/university law programs, specifically the law program at William and Mary, at least under Wythe); supra note 166 and accompanying text (law schools influenced by the Virginia curriculum model); see also note 167 and accompanying text (discussing more limited opportunities at Harvard to take parallel courses outside the law program).
education. Such exposure, moreover, may have been considerable or perhaps even extensive.\footnote{500}

The second cautionary point to bear in mind is that the economic dimensions of law are an important subset of the social dimensions of law,\footnote{501} and several of the college/university law programs do seem to have included specific coverage of Political Economy as part of the law program itself.\footnote{502}

(4) Cultural and Transnational Dimensions of Law\footnote{503}

It seems that students in each formal legal education setting — apprenticeship training, independent law school programs and college/university law programs — received some degree of exposure to the cultural dimensions of law during their legal education. Simply through their study of substantive law, students would have acquired a basic familiarity with the historical development of the common law tradition (including the historical development of American common law and American constitutional law), with the six main elements of the prevailing jurisprudence examined in Part II.B.1.,\footnote{504} and with comparative
law (specifically the civil law). A primary vehicle of such exposure would have been their study of substantive law in the works of Blackstone, Kent, and Story. Additionally, students would have been exposed to the general treatments of various historical, jurisprudential, and comparative topics that were contained in these works. In this regard, one should also

associated natural law thinking; the emergence of a new, instrumentalist conception of law (particularly during the second part of the period); and early American legal science.

505. Because this exposure occurs, and hence this familiarity is acquired, in a sense incidentally, simply through the study of substantive law, it is analogous to the two less obvious ways (and particularly to the second less obvious way) in which some exposure to a set of fundamental dimensions of law can be incorporated into a course and/or course materials with a different primary emphasis, say a primary emphasis upon the substantive and structural dimensions of law that focus on substantive law. For discussion of these two less obvious methods of exposure, see supra note 453 (discussing the third general consideration). See also supra note 454 (identifying the second factor-cluster). Regarding the concern of the substantive and structural dimensions of law with substantive law, see supra note 445 (noting also that together the substantive and structural dimensions comprise the doctrinal (or normative) dimensions of law).

506. For explicit reinforcement of this point, see, for example, supra notes 181, 184 and accompanying text (discussing Blackstone's methodology); supra notes 57, 196 and accompanying text (noting the references to comparative law illustrations in the titles of several of Story's treatises). There were, of course, several ways in which students may have been exposed incidentally to the cultural dimensions of law while focusing on substantive law. These are the same kinds of ways that were identified in Part II.B.1, subsection f, when considering how students' legal education would have familiarized them with the six main elements of the prevailing jurisprudence (which represent, of course, jurisprudential dimensions of law), but they apply to the other cultural dimensions as well. In addition to reading various commentaries and treatises explicating the common law (in particular Blackstone, Kent, and Story), these ways also include: reading law reports of cases; observing the practice of their mentors in apprenticeship training, in particular court proceedings, or participating in moot court exercises in the independent law school and college/university law programs; and interacting with a mentor in the former setting, and classroom teaching in the latter settings.

507. For discussion of the general character, structure, and content of Blackstone's COMMENTARIES, Kent's COMMENTARIES, and Story's series of treatises, see supra notes 178-86 and accompanying text (Blackstone); supra notes 187-90 (Kent); supra notes 191-93 and accompanying text (Blackstone and Kent); supra notes 194-96 and accompanying text (Story). Examples of such general treatments include: Blackstone's treatments of the history of legal education in England (historical dimensions), of natural law and divine law (jurisprudential dimensions), and of civil law (comparative dimensions), all in the first part of Book I of the COMMENTARIES; Kent's treatment of civil law (comparative dimensions) in Part III of his COMMENTARIES; and Story's treatment of colonial and state constitutional history (historical dimensions) in his COMMENTARIES On the Constitution of the United States. Once again, these general treatments also may have been addressed (or at least mentioned) in law reports, court proceedings or moot court exercises, and interaction with a mentor or classroom teaching.
remember that political philosophy comprises a further element in the prevailing jurisprudence (an element that was addressed when examining the prevailing professional ideal of the lawyer-statesman in Part II.B.2) and that, once again, students would have acquired a basic familiarity with this element by studying, for example, the general treatment of political theory in Blackstone’s *Commentaries*, especially in St. George Tucker's 1803 American edition. All of these various exposures to the historical, jurisprudential, and comparative dimensions of law may amount cumulatively to a level of exposure to the cultural dimensions of law that was at least significant, and perhaps even considerable.

Turning to the transnational dimensions of law, students in each formal legal education setting would have received a minimal exposure to the law of nations by studying Blackstone. Studying Kent’s *Commentaries* later on during the period would have provided a greater degree of exposure, and perhaps even a significant exposure.

Next we shall consider the extent to which there was any additional curricular emphasis upon, and student exposure to, the cultural and transnational dimensions of law beyond that described above. In this regard, there is an apparent contrast, not between apprenticeship training and institutionalized legal education (as in the case of the social dimensions of law), but between the independent law school setting on the one hand, and the apprenticeship training and college/university settings on the other.

(i) Independent Law Schools

Taking the Litchfield curriculum as our primary focus once again, we have already noted the apparent narrowness of the Litchfield curriculum and Steve Sheppard’s comment that “[t]he
course was rooted in the practicalities of the common law governing private disputes, skipping public law topics of Constitutional government and politics, Roman civil law, and 'stately lectures on the great principles of the Laws of Nature'.

One might perhaps conclude, therefore, that the independent law schools generally placed little or no additional emphasis upon the cultural and transnational dimensions of law beyond the basic level of exposure students received in the ways discussed above. In this regard, however, three cautionary points should be noted.

First, with respect to the transnational dimensions of law, lectures and/or readings on The Law Merchant also may have included some coverage of international trade. Second, before one could make a definitive evaluation regarding an independent law school such as Litchfield, it would be necessary to know more about the extent to which the cultural and transnational dimensions of law may have been addressed, perhaps even more than minimally, in the Introductory segment of the program.

Third, as discussed earlier with respect to the social dimensions of law, many of those attending the independent law school programs had already received a general college education, and (at least at some schools) those who had not done so were given a brief course of instruction in the arts and sciences before beginning the law program itself. As also discussed earlier, a general college education would have included some exposure to natural law theory. Moreover, such exposure also may have included at least some coverage of the law of nations, which was regarded as being founded, at least partly, on the law of nature. An exposure to natural law theory and the law of nations also may have been part of any substitute course of instruction taken by those without a college education.

511. Sheppard, Lecture Hall, supra note 2, at 13; see also supra note 94 (quoting Sheppard).
512. See supra notes 504-09 and accompanying text.
513. For one possible example, although slightly beyond our period, see Hunter, supra note 2, at 441-42 (discussing Judge Dick's "introductory lecture on the civil and common law systems" at the Dick and Dillard Law School in North Carolina in the late 1870s, which, when published, was described as 'an admirable historical as well as legal document' (quoting literary critic Archibald Henderson, but providing no citation)). Of course, at many schools the introductory segment doubtless was based, at least in part, on Blackstone or (later on during our period) on Blackstone and/or Kent.
514. See supra notes 497-98 and accompanying text.
515. See supra note 96 and accompanying text.
516. See supra note 282 and accompanying text.
517. For a contemporary discussion of the "foundations" of the law of nations, see, for example, 1 KENT, supra note 56, at 1-4 (identifying both "natural law" and "positive law" foundations).
518. For example, Peter Van Schaak's plan for such a preliminary course of general instruction also included coverage of Ethics. See supra note 96.
For many students at the independent law schools, then, their total cumulative level of exposure to the cultural and transnational dimensions of law respectively, or at least their cumulative level of exposure to natural law theory and the law of nations during their combined general college education and formal legal education, may have been considerable.\textsuperscript{519}

(ii) Apprenticeship Training and College/University Law Programs

In apparent contrast to the curricular treatment in the independent law school programs, the more specifically "legal" component of the curriculum in apprenticeship training, as well as the curricula in many of the college/university law school programs, appear themselves to have placed considerable additional emphasis upon the cultural and transnational dimensions of law. The combination of the resulting additional student exposure, together with the basic level of exposure received in the ways discussed earlier,\textsuperscript{520} may have resulted in a total level of exposure to these dimensions that was extensive.

In the apprenticeship training setting, this considerable additional curricular emphasis upon the cultural and transnational dimensions of law is apparent in the William Smith model curriculum. Although there is perhaps some degree of overlap with the "general education" component of the curriculum, the apprentice lawyer in the Smith curriculum studied history, as well as works on natural law and the civil law, and works on the law of nations.\textsuperscript{521} Although not explicit in the description of the Smith curriculum, it seems that many apprenticeship experiences also included a specific consideration of political theory as a separate subject in its own right.\textsuperscript{522} Moreover, any readings on the law of merchants may have included some coverage of international trade as well.

\textsuperscript{519} As in the case of the social dimensions of law, see supra note 500, there may also have been a category of students enrolled in the independent law school programs who lacked a prior general college education (or some equivalent), but who nevertheless received additional exposure to various cultural and transnational dimensions of law (including especially natural law and the law of nations) in an apprenticeship experience (or, of course, through their own independent study). See also infra notes 521-22 and accompanying text (discussing exposure to these dimensions in apprenticeship training).
\textsuperscript{520} See supra notes 504-09 and accompanying text.
\textsuperscript{521} See supra note 77 and accompanying text. See also Bailey, supra note 59, at 321, 323, 328 (discussing the texts on political theory, natural law, civil law, and the law of nations that were included in apprentices' reading lists during the late eighteenth century and the first half of the nineteenth century).
\textsuperscript{522} Bailey, supra note 59, at 323.
As in the case of apprenticeship training, it is clear from a review of model curricula in the college/university setting that the early college/university law programs also placed considerable additional emphasis upon the cultural and transnational dimensions of law, and that the same is true of several of the later university law school programs as well. Turning again, for the early college/university setting, to David Hoffman’s model curriculum at Maryland, Hoffman’s *Syllabus* included detailed coverage of government and political theory; legal history, jurisprudence (in particular, natural law), and civil/Roman law; and the law of nations, international trade, and maritime law. The early college/university law programs appear to have approximated this ideal to a greater or lesser extent by including specific coverage of government and political theory as well as some combination among legal history, natural law, civil law, and the law of nations.

In the later university law school setting, it is necessary to distinguish between the broader Virginia curriculum model and the narrower Harvard curriculum model. As far as the Virginia curriculum is concerned (at least through the early 1850s), the original Virginia curriculum of 1825 largely reflected the classification and breadth of coverage in David Hoffman’s 1817 *A Course of Legal Study*. And even the narrower Virginia curriculum of 1851 included Civil Law and International Law as separate subjects in their own right, together with coverage of ancient and constitutional history and political theory (as aspects of the study of The Federalist, Madison’s Report of 1799, and perhaps Government, i.e., Constitutional Law) and possibly also coverage of international trade and maritime law (as aspects of Mercantile Law).

In contrast to the Virginia curriculum (even in 1851), the Harvard curriculum as it developed under Story appears to be quite narrow. As in the case of the Litchfield curriculum, none of the subjects listed in the regular Harvard curriculum appears to address specifically the cultural or transnational dimensions of law. Once again, however, several cautionary points should be noted. First, Constitutional Law may have included some coverage of political theory as well. Second, international trade

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523. *See supra* note 116 and accompanying text.
524. *See supra* notes 118-22 and accompanying text (discussing the curricula in the early law programs at William and Mary, Philadelphia, Columbia, Transylvania, and Harvard respectively).
525. *See supra* note 162 and accompanying text.
526. *See supra* notes 163-64 and accompanying text.
527. *See supra* notes 148-54 and accompanying text. For discussion of the apparent failure of the Litchfield curriculum to address specifically the cultural and transnational dimensions of law, *see supra* notes 510-12 and accompanying text.
presumably was included in the coverage of Commercial and Maritime Law, a heading that seems to have comprised several specific subjects.\textsuperscript{528} Third, the inclusion in the Harvard Law School catalogues from 1830 until 1869 of a bibliography of recommended texts apparently reflecting the classification and breadth of coverage in Hoffman's \textit{A Course of Legal Study}\textsuperscript{529} would seem to reflect a judgment that, ideally at least, lawyers should receive a general exposure to the cultural and transnational dimensions of law as part of their formation, even if the regular Harvard curriculum necessarily fell short of that ideal. As we have seen, Story himself had certainly expressed such an ideal in his inaugural address.\textsuperscript{529} Arguably, moreover, the occasional and temporary efforts after Story's death in 1845 to broaden the curriculum through the introduction of courses or lectures in other subjects, including International Law, Civil Law, and Parliamentary Law,\textsuperscript{531} may reflect the same judgment regarding the ideal formation of a lawyer. Fourth, once again, many students enrolled in the law program at Harvard had already received a general college education before beginning their legal studies.\textsuperscript{532} As was noted in our discussion of the law program at Litchfield, a general college education would have included some exposure to natural law theory and also may have included at least some exposure to the law of nations.\textsuperscript{533} For many students at Harvard, then, their total cumulative level of exposure to the cultural and transnational dimensions of law respectively, or at least their cumulative level of exposure to natural law theory and the law of nations, during their combined general college education and formal legal education at Harvard, may have been considerable.

The fourth cautionary point, regarding exposure to natural law theory and the law of nations as part of a general college education, is of more general application because, as we have seen, many apprentices and many students enrolled in the college/university law programs (and not just at Harvard) had already received a general college education before beginning their

\begin{footnotes}
\footnote{528. See \textit{Reed I}, supra note 2, at 453 n.3 app.III, 455 app. III (identifying Shipping, Bills, Agency, Insurance, Bailments, and Partnership as subjects under the heading of Commercial and Maritime Law).}
\footnote{529. See supra note 155 and accompanying text.}
\footnote{530. See supra note 153 and accompanying text. As we have also noted, Story had pragmatic reasons for retreating, in his actual reorganization of Harvard Law School, from the educational ideals he had expressed so eloquently in his inaugural address. See supra note 154 (citing \textit{Reed I}, supra note 2, at 144-50).}
\footnote{531. See supra note 156 and accompanying text.}
\footnote{532. See supra note 168 and accompanying text.}
\footnote{533. See supra notes 516-17 and accompanying text.}
\end{footnotes}
formal legal education.\footnote{534. See supra note 79 and accompanying text (apprenticeship training); supra note 128 and accompanying text (early college/university law programs); supra note 168 and accompanying text (later university law school programs).} Moreover, in some college/university law programs (but perhaps not so commonly at Harvard) students without a prior college education may have received some exposure to these subjects in parallel courses they were encouraged to take outside the law program itself.\footnote{535. See supra note 129 and accompanying text (early college/university law programs, specifically the law program at William and Mary, at least under Wythe); supra note 166 and accompanying text (law schools influenced by the Virginia curriculum model); see also note 167 and accompanying text (discussing the more limited opportunities to take parallel courses at Harvard).} Any such prior or contemporaneous exposure to natural law theory and the law of nations presumably must be factored into a calculation of the total exposure to these subjects that students received by the time they completed their formal legal education, thereby enhancing even further what already may be an extensive level of exposure to the cultural and transnational dimensions of law.\footnote{536. As in the case of the social dimensions of law, see supra note 500, there may have been a category of students enrolled in the college/university law programs who lacked a prior general college education (or some equivalent), but who nevertheless received additional exposure to various cultural and transnational dimensions of law (including especially natural law and the law of nations) in an apprenticeship experience (or, of course, through their own independent study). See also supra note 519 (discussing the same point with respect to the independent law school programs); supra notes 521-22 and accompanying text (discussing exposure to these dimensions in apprenticeship training).}

b. Influence of Prevailing Jurisprudence and Prevailing Professional Ideal on Curricular Breadth

In Subsection a immediately above we found that, in all of the formal legal education settings with which we are concerned — apprenticeship training, independent law school programs, and college/university programs — the curriculum appears to have placed extensive emphasis upon the substantive dimensions of law, and at least a considerable emphasis upon the structural dimensions of law.\footnote{537. See supra notes 466-76 and accompanying text.} The curriculum also placed at least a considerable emphasis upon the practical dimensions of law, with the greatest emphasis, probably an extensive emphasis, upon those dimensions in the apprenticeship setting.\footnote{538. See supra notes 477-89 and accompanying text.} We also found that, although it might appear necessary to distinguish among the curricula in different settings with respect to their emphasis upon the social, cultural, and transnational dimensions of law, caution is warranted before reaching any definitive conclusions regarding
the extent to which students were exposed to these dimensions by the time they completed their formal legal education.

With respect to the social dimensions of law, the curriculum in apprenticeship training placed considerable, and perhaps extensive, emphasis upon these dimensions of law.\textsuperscript{539} In contrast, the curriculum in the independent law school programs and the curriculum in the college/university law programs appear to have placed little or no emphasis upon the social dimensions of law.\textsuperscript{540} The apparent contrast between apprenticeship training and institutionalized legal education tends to diminish, however, when the exposure received during a prior college education (or some equivalent) is factored into the calculation.\textsuperscript{541}

With respect to the cultural and transnational dimensions of law, the apparent distinction is drawn differently. Thus, students in all settings received a basic level of exposure to the cultural dimensions of law that was at least significant and perhaps even considerable, and a basic level of exposure to the transnational dimensions of law that may have been significant and not just minimal (at least later on during the period).\textsuperscript{542} Moreover, the more specifically "legal" component of the curriculum in apprenticeship training, as well as the curriculum in the early college/university law programs and the curriculum in the later university law school programs following the Virginia model, placed considerable additional emphasis upon the cultural and transnational dimensions, resulting in a total level of exposure that may have been extensive.\textsuperscript{543} In contrast, the curriculum in the independent law school programs and the curriculum in the later university law school programs following the Harvard model appear to have placed little or no additional emphasis upon the cultural and transnational dimensions.\textsuperscript{544} Once again, however, the apparent contrast between the settings tends to diminish when other considerations, in particular the exposure to certain subjects received during a prior college education (or some equivalent), are factored into the calculation.\textsuperscript{545}

It is interesting to consider what might account for this remarkable emphasis upon a broad education for lawyers during this first phase in the history of U.S. legal education. Several considerations suggest that, to a considerable extent at least, the emphasis upon the cultural and transnational dimensions of law that we find during this period may have reflected the influence of

\textsuperscript{539} See supra note 491 and accompanying text.
\textsuperscript{540} See supra notes 492-95, 502 and accompanying text.
\textsuperscript{541} See supra notes 496-500 and accompanying text.
\textsuperscript{542} See supra notes 503-09 and accompanying text.
\textsuperscript{543} See supra notes 520-26 and accompanying text.
\textsuperscript{544} See supra notes 510-12, 527 and accompanying text.
\textsuperscript{545} See supra notes 512-19, 527-36 and accompanying text.
the natural law and legal science elements in the prevailing jurisprudence,\textsuperscript{546} as well as the influence of the prevailing professional ideal of the lawyer-statesman and the political philosophy of civic republicanism underpinning that ideal.\textsuperscript{547} Moreover, the influence of the lawyer-statesman ideal may also help to account for the importance that was so often attached to lawyers receiving an exposure to subjects relevant to the social dimensions of law at some point before completing their formal legal education.

On the assumption that natural law was an important element in the prevailing jurisprudence and that it helped to mold the legal thought of the period,\textsuperscript{548} it is possible to discern several ways in which this natural law element may have contributed towards the emphasis upon a broad education for lawyers, and in particular towards an emphasis upon the cultural and transnational dimensions of law. First, and obviously, the prevailing natural law thinking would certainly help to explain the explicit emphasis on natural law theory in the standard college curriculum and in much of the formal legal education provided in the various settings discussed above.\textsuperscript{549} Second, it may also help to explain the emphasis on government and political theory. It seems that both legal science and politics were widely viewed as aspects of moral philosophy and as informed by natural law theory.\textsuperscript{550} That the subjects were naturally associated in this way could have provided at least one reason why it made sense for law students to study both of them. Third, the prevalence of natural law thinking during the period may help to explain the emphasis on legal history and the civil law. Thus, not only was the common law considered to reflect natural law norms, but the same views were held also with respect to contemporary civil law, and indeed with respect to "[t]he municipal law of every age and every nation."\textsuperscript{551} Consequently, study of the civil law, for example, was useful in illuminating the operation of natural law principles. Moreover, a comparison of civil law and common law demonstrating fundamental similarities between them, and hence a common foundation in natural law, also helped to ensure the reception of English common law in the new Republic.\textsuperscript{552} Finally,

\textsuperscript{546} See supra notes 244-51, 258-64, 267-74 and accompanying text.
\textsuperscript{547} See supra notes 293-393 and accompanying text.
\textsuperscript{548} See supra notes 244-66 and accompanying text.
\textsuperscript{549} Regarding this explicit emphasis, see also Bailey, supra note 59, at 323-25.
\textsuperscript{550} See id. at 318 (legal science); 326-28 (political theory); see also supra notes 273, 288 and accompanying text (legal science); supra notes 322, 360, 362-63, 366-67, 386 and accompanying text (political theory).
\textsuperscript{551} Bailey, supra note 59, at 323-25.
\textsuperscript{552} See Pound, supra note 176, at 107 (discussing the contributions toward the achievement of this result made by Kent and Story through their "skillful
the prevalence of natural law thinking during this period may also help to explain the emphasis on the law of nations, which was also importantly informed by natural law thinking.\textsuperscript{553}

The concept of legal science is another element in the prevailing jurisprudence of the period that may have contributed towards an emphasis upon the cultural and transnational dimensions of law, through its stress on the importance of a broad systematic understanding of law. We noted earlier how the scientific study of law usually began with the law of nature "as the foundation of all legal science," followed by the law of nations and constitutional law, before moving on to a study of municipal law.\textsuperscript{554} Such a broad understanding of law, then, included an understanding of positive law's deeper foundations in natural law. Thus, we noted earlier as well the following claim:

"Premodern jurisprudents understood the common law as a science, a rational system of principles grounded in natural law... The whole of jurisprudence could be rationally classified into a system that included not only the natural law principles but also a multitude of low-level legal rules that reflected the common law forms of action."\textsuperscript{555}

On the assumptions that the ideal of the lawyer-statesman, with its emphasis upon the twin virtues of practical wisdom and civic-mindedness and underpinned by the political philosophy of civic republicanism, was the prevailing professional ideal of the use of comparative law, seeming to show the identity of an ideal form of the common-law rule with an ideal form of the civil-law rule, and thus demonstrating the identity of each with a universally acknowledged law of nature). See also supra note 244 (discussing the role of natural law in providing a justification legitimizing the adoption of English common law in America). Of course, study of the civil law was also useful for at least three other, perhaps more immediately pragmatic reasons: the civil law heavily influenced the law of certain states, such as Louisiana; the civil law provided an essential resource for developing certain specialized branches of American law, such as the area of commercial law, in which common law materials were lacking during the early part of the period; and, within American law generally, the civil law furnished a useful resource for lawyers, judges, and doctrinal writers as they sought to fashion solutions to legal problems during the formative era of American law. For a discussion of this pragmatic influence of the civil law see, for example, POUND, supra note 176, at 145-51.

Canvassing more "critical" viewpoints, Bailey contends that:

American historians have tended to view the emphasis placed on civil law by law writers such as Nathan Dane, James Kent, and Joseph Story as an effort to maintain the social exclusivity of the legal profession, to cement its cultural and political status, and to give a patina of authority to their legal arguments.

Bailey, supra note 59, at 324.

553. Regarding the "foundations" of the law of nations, see supra note 517 and accompanying text.

554. See supra note 288 and accompanying text.

555. See supra note 273 and accompanying text.
period and that it helped to determine the pedagogical goals of legal educators, it is possible to discern two main ways in which the lawyer-statesman ideal may have contributed towards the emphasis on a broad education for lawyers, including an emphasis upon the social dimensions of law as well as an emphasis upon the cultural and transnational dimensions of law. First, legal educators considered that the cultivation of a liberal frame of mind was necessary for the formation of lawyers as members of the virtuous elite. Stress was placed, therefore, on the value of "broad humanistic learning," and in particular on the value of studying subjects such as literature, history, and rhetoric in shaping character and enabling lawyers "to do their jobs in a properly broad-minded way." For similar reasons legal educators also valued the study of natural law and such subjects as ancient law and contemporary civil law (both of which also served to illuminate natural law principles), as well as political economy, political theory, and the law of nations. Second, the lawyer-statesman ideal represented an ideal of excellence for lawyers, both when performing their leadership roles in republican politics as well as when performing their roles as legal practitioners. This duality of roles doubtless reinforced the value of a given subject, including those subjects that may have been less relevant for the achievement of excellence in one type of

556. See supra notes 293-393 and accompanying text.
557. See supra notes 394-435 and accompanying text.
558. See supra notes 409, 415-16, 434 and accompanying text.
559. KRONMAN, supra note 218, at 154; id. at 20; see also supra note 425 and accompanying text (quoting Kronman); supra notes 317, 334 and accompanying text (further discussing and quoting Kronman's views in this regard). See generally FERGUSON, supra note 78. Arguably, rhetoric is more appropriately considered as part of an exploration of the practical dimensions of law. See supra notes 446, 477-89 and accompanying text. There were important cultural dimensions to the art of rhetoric, however, that were reflected in the type of learning, in particular classical learning, possessed and utilized by the accomplished rhetorician. See FERGUSON, supra, at 66-84; ROBERT BELLAH ET AL., THE GOOD SOCIETY, 153, 158-59 (1991); see also supra notes 352, 354-56 and accompanying text (discussing the influence of elite lawyers throughout society and the main reasons why they held a vision of themselves as having a "special stewardship"). Regarding the systemically pervasive nature of the fundamental dimensions of law (in which the fundamental dimensions are dimensions of each other), see supra note 441 and accompanying text.
560. See supra notes 409-11 and accompanying text (college/university law programs); supra notes 414-24 and accompanying text (apprenticeship training); see also supra notes 430-35 and accompanying text (independent law schools). Regarding the illumination of natural law principles through a study of ancient law and contemporary civil law, see supra note 551 and accompanying text.
561. See the earlier discussion in Subsections a-c of Part II.B.2., supra notes 295-361 and accompanying text.
role than for the achievement of excellence in another type of role.562

III. THE FIRST PHASE IN PERSPECTIVE: SUBSEQUENT DEVELOPMENTS AND IMPLICATIONS FOR LAWYER PROFESSIONALISM

We have examined the breadth of coverage provided by the curricula of studies followed in the various settings—apprenticeship training, independent law school programs, and college/university law programs—in which it was possible to receive some type of formal legal education during this first phase in the history of U.S. legal education.563 We have seen that many of the curricula in the apprenticeship and college/university law programs settings displayed a striking breadth of coverage; moreover, if various other considerations are also taken into account, in particular the exposure to certain subjects that students received during a prior college education (or its equivalent), there was a remarkable emphasis upon a broad education for lawyers in all settings.564 We have also seen that this remarkable emphasis upon a broad education for lawyers likely reflected, to a considerable extent at least, the influence of the natural law and legal science elements in the prevailing jurisprudence as well as the influence of the prevailing professional ideal of the lawyer-statesman and the political philosophy of civic republicanism underpinning that ideal.565

After this first phase in its history, U.S. legal education gradually became centered in university law schools.566 The law

562. Examples of subjects with a disparate relevance might include political theory, political economy, and the law of nations, certain aspects of which at least may have been more relevant for the role of political leaders than the role of legal practitioners.

To keep matters in proper perspective, we should also remember that although the lawyer-statesman is “not just an accomplished technician” with “specialized professional knowledge,” he is certainly such a person, and that the achievement of excellence, therefore, presumably included a mastery of the substantive, structural, and practical dimensions of law as well as the social, cultural, and transnational dimensions of law. See KRONMAN, supra note 218, at 15-16 (emphasis added); see also supra note 296 and accompanying text (quoting Kronman). On the other hand, the lawyer-statesman ideal may have valued “general erudition” more highly than “technical expertise.” See FERGUSON, supra note 78, at 66 (maintaining that “[i]n the generations from Hamilton to Webster general erudition overrode technical expertise as the primary source of professional identity”).

563. See supra notes 465-536 and accompanying text.

564. See supra notes 537-45 and accompanying text.

565. See supra notes 546-62 and accompanying text.

566. For a good discussion of pertinent developments related to this process, see generally STEVENS, supra note 2. Stevens provides the following succinct summary of the main stages:
school curriculum itself was generally narrowed, beginning in the
1870s with Christopher Columbus Langdell's reforms of the
curriculum at Harvard Law School, which then became a model
for other law schools in this as well as in other respects.\footnote{567} Thus,
by the mid-1920s, although the mainstream law school curriculum
still placed extensive emphasis upon the substantive dimensions of
law and considerable emphasis upon the structural dimensions of
law, as well as a reduced (but still significant) emphasis upon the
practical dimensions of law, by that time it had come to place no
significant emphasis upon the social dimensions of law, no
significant emphasis upon the cultural dimensions of law (except
for certain limited aspects of legal history and jurisprudence), and
no significant emphasis upon the transnational dimensions of
law.\footnote{568} Although the situation has clearly improved during the
intervening years, the mainstream law school curriculum still has
not fully recovered from this narrowing. Moreover, any mitigation
of the narrowing of the law school curriculum that may have
resulted from students receiving a broad general college education
before coming to law school has diminished significantly during
the last few decades with a dramatic decline in the percentage of
law students possessing the once traditional background in the
liberal arts.\footnote{569}

My particular concern is with the treatment of the cultural
and transnational dimensions of law within the mainstream law
school curriculum. Although relevant subjects addressing these

\footnote{567} For a discussion of Langdell's reforms at Harvard Law School and their
influence on other law schools, see, for example, REED I, supra note 2, at 343-
45, 354-68, 369-88, 391-94; STEVENS, supra note 2, at 36-39, 61-64, 96 n.33.
\footnote{568} See REED II, supra note 2, at 252-56 (discussing the subjects included in
law school curricula in 1925-26). The limited exposure to certain aspects of
legal history and jurisprudence occurred in the second less obvious way of
providing exposure, that is, through the incorporation of some generalized
exposure to a dimension into a course with a different primary emphasis,
when that dimension is inherent in the materials used for, or otherwise
informs and is reflected in the teaching of, the course. See supra note 453;
intra note 571 (final paragraph).
\footnote{569} See, e.g., DAVID L. KIRP, HUMAN RESOURCES, MANAGEMENT, AND
PERSONNEL: SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE
MARKETING OF HIGHER EDUCATION 5, 53-54 (2003).}
dimensions were accorded a central place in much of the legal education during the first phase, they suffered from the general narrowing of the law school curriculum that occurred subsequently. Moreover, the cultural and transnational dimensions of law continue to be relatively neglected and marginalized within the current mainstream law school curriculum. And this is the case despite the development, and in recent years remarkable proliferation, of elective courses and seminars with a primary emphasis upon the areas of legal history, jurisprudence, and comparative law, and upon the general subject areas of international/transnational/global legal studies. It is the case also despite even more recent efforts to incorporate relevant exposure to such areas into courses with a primary emphasis upon other dimensions of law through the so-called “pervasive method.” Thus, although there are important signs that the

570. The development of the elective curriculum after the first phase in the history of U.S. legal education—an elective curriculum that became increasingly broader after the end of the second phase (the phase of Langdellian legal science lasting from the 1870s until the 1920s)—is documented in the curriculum surveys and studies cited supra note 458. The “remarkable proliferation” of elective courses and seminars relating to all six sets of fundamental dimensions of law in recent years, including those with a primary emphasis upon the areas of legal history, jurisprudence, and comparative law, and upon the general subject areas of international/transnational/global legal studies, is evident in the results of the two most recent curricular surveys cited supra note 458, the 1997 AALS Survey by Merritt and Cihon, and the 2004 ABA Survey.

As discussed earlier, it is important not to be misled into basing an evaluation of curricular emphasis and student exposure solely upon the number of courses in the curriculum with an emphasis upon a particular set (or subset) of fundamental dimensions of law. For example, even if there are several, or even many, such courses in the curriculum, they may be “mere electives” that are not within the core curriculum, and they may have consistently low enrollments. Other determining factors must be considered as well. See supra note 454 and accompanying text; see also infra note 571 and accompanying text.

Regarding the expression “international/transnational/global legal studies,” the terms “international,” “transnational,” and “global” may or may not be used synonymously, depending on whether they are being used in a narrow sense or a broad sense. See Jones, supra note 436, at 590 n.60 and 591 n.63. Regarding the relationship of the transnational dimensions of law to the comparative dimensions of law, and the lines of demarcation between them, see id. at 589 n.59, and 592-94 & n.65.

571. For discussion of the ways in which an exposure to a set of fundamental dimensions of law can be incorporated into courses with a different primary emphasis, see supra note 453. These more recent efforts employing the “pervasive method” are examples of the first less obvious way in which a course can expose students to a particular set (or subset) of fundamental dimensions of law, i.e., through the incorporation of some specific exposure to a set of fundamental dimensions into a course and/or course materials with a different primary emphasis. Although law schools were already using this approach (in particular with respect to the social dimensions of law, see supra
status of the cultural and transnational dimensions of law within the curriculum may be improving, there are also several ambiguities in the current situation and there still appears to be a

note 447 and accompanying text) as a result of the attempts by the American legal realists to mitigate the "Langdellian" narrowing of legal education, the more recent efforts employing the "pervasive method" (beginning, it seems, in the area of legal ethics) attempt to adopt this approach pervasively and systematically in many different courses throughout the curriculum. Once again, however, it is important not to be misled by the mere fact of incorporation of relevant material into a course or by the number of courses in the curriculum in which this occurs. Other relevant determining factors must be considered as well. See supra note 454.

For discussion, by way of illustration, of some of the efforts to incorporate relevant material in the areas of international and/or comparative law through use of the pervasive method, see, for example, Adelle Blackett, Globalization and Its Ambiguities: Implications for Law School Curricular Reform, 37 COLUM. J. TRANSNAT'L L. 57, 69-70 (1998); Nora Demleiter, A Response to Mathias Reimann: More, More But Real Comparative Law, 11 TUL. EUR. & CIV. L.F. 73 (1996); M.C. Mirow, Globalizing Property: Incorporating Comparative and International Law into First Year Property Classes, 54 J. LEGAL EDUC. 183 (2004); Mathias Reimann, The End of Comparative Law as an Autonomous Subject, 11 TUL. EUR. & CIV. L.F. 49, 61-72 (1996). For further discussion of the issues and challenges involved in using the "pervasive method" to expose students to material in the areas of international and/or comparative law, see, for example, Mirow, supra, especially at 183, 186-88, 200; Michael Waxman, The Comparative Legal Process Throughout the Law School Curriculum: A Modest Proposal for Culture and Competence in a Pluralistic Society, 74 MARQ. L. REV. 391 (1991); Michael Waxman, Teaching Comparative Law in the 21st Century: Beyond the Civil Law/Common Law Dichotomy, 51 J. LEGAL EDUC. 305, 306 n.2 (2001); Judith Wegner, The Curriculum: Patterns and Possibilities, 51 J. LEGAL EDUC. 431, 435, 436 (2001). Some of the challenges identified regarding use of the pervasive method to expose students to material in the areas of international and comparative law (such as concerns about the lack of faculty expertise in these areas or about yet another demand for curriculum space in an already crowded and pressured curriculum) are applicable, of course, to the use of the pervasive method in general, including any such use to incorporate relevant material in the areas of legal history and jurisprudence.

It should perhaps also be noted that, in addition to the attempts to incorporate some specific exposure to relevant materials in the areas of legal history and jurisprudence, throughout the history of U.S. legal education students have always received some limited exposure to the historical and jurisprudential dimensions of law in the second less obvious way in which a course can provide exposure to a particular set (or subset) of fundamental dimensions of law, that is, through the incorporation of some generalized exposure to a dimension into a course with a different primary emphasis, when that dimension is inherent in the materials used for, or otherwise informs and is reflected in the teaching of, the course. See supra note 453. This is because the study of cases and other texts in doctrinal courses incidentally and inevitably conveys a sense of historical context and of the jurisprudential paradigm within which the cases were decided, and does so, moreover, in a pervasive manner in many different courses throughout the curriculum.
considerable way to go before these dimensions are returned to a central place in mainstream legal education.\(^7\)

These descriptive claims about the subsequent historical development of the mainstream law school curriculum, and about the current treatment of the cultural and transnational dimensions of law within the mainstream curriculum, will be elaborated in much greater detail in one or more future articles exploring the subsequent historical development of U.S. legal education. That exploration will identify three later phases in this historical development — the phase of Langdellian legal science (lasting from the 1870s until the 1920s); the legal realist phase (lasting from the 1920s until the 1960s); and the postrealist and postmodernist phase (lasting from the 1960s until the present time) — and it will follow the model of analysis used in Part II of this article (i.e., an overview of legal education, prevailing jurisprudence and prevailing professional ideal(s), and curricular analysis and evaluation).

These descriptive claims are coupled with a normative argument. It is my strongly held conviction that all law students should receive a basic minimum exposure to the general subject areas of legal history, jurisprudence, and comparative law, as well as to the general subject areas of international/transnational/global legal studies; that there is a continued failure in mainstream legal education to ensure that law students receive such a minimum exposure; that this continued failure raises important professionalism concerns because it diminishes the ability of law school graduates to perform in an optimally competent, effective, and responsible manner in the various types of roles they will perform both as practicing members of the legal profession and as leaders in society;\(^5\)\(^7\) and that these

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\(^7\) With respect to the areas of international and comparative law, for example, it seems that despite the "remarkable proliferation" of elective courses and seminars with a primary emphasis in these areas in recent years, see supra note 570 and accompanying text, the great majority of law students graduate without having taken any courses in these areas. See, e.g., Carole Silver, Adventures in Comparative Legal Studies: Studying Singapore, 51 J. LEGAL EDUC. 75, 78 (2001) (citing John Barrett Jr., International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society, 12 AM. U.J. INT'L L. & POL'Y 975, 993 (1997)).

\(^5\) Clearly, I consider that law schools not only bear a responsibility to prepare their graduates to perform in a competent, effective, and responsible manner in their roles as practicing members of the legal profession, in particular in their roles as legal practitioners, as practicing members of the bar. In addition, in my view, they also bear a responsibility to help prepare their graduates to perform in a competent, effective, and responsible manner in their roles as leaders in the many different kinds of leadership positions, both in the private sector and in the realm of public affairs, to which they will gain access precisely because they are members of the legal profession even though they may not be acting as practicing members of the legal profession in
professionalism concerns must be met by restoring the cultural and transnational dimensions of law to a central place in the mainstream law school curriculum, just as they were accorded a central place in much of the legal education during the first phase.

Again, this normative argument will be elaborated in much greater detail in a later article or articles. The argument will draw in part on the 1992 ABA MacCrate Report and on the 1996 ABA Professionalism Committee Report. For present purposes, it suffices to make three basic points regarding the support these two Reports provide for the normative argument outlined above. First, the MacCrate Report, in its analysis of fundamental lawyering skills and fundamental values of the profession, specifically recognizes the importance of historical knowledge, legal theory and moral considerations, and sensitivity to cultural differences, for the proper development and exercise of particular lawyering skills and professional values. Moreover, the ABA Professionalism Committee Report, in seeking to address the perceived decline in lawyer professionalism since the 1980s, not

those leadership positions. I am obviously not alone in holding such views. See, e.g., Douglas, supra note 59; Michael Reisman, Designing Curricula: Making Legal Education Continuously Effective and Relevant for the 21st Century, 17 CUMB. L. REV. 831, 840-42 (1987); James Rowles, Toward Balancing the Goals of Legal Education, 31 J. LEGAL EDUC. 375, 391-92 (1981); see also KRONMAN, supra note 218, at 3-4 (implying strongly that law schools today bear this dual responsibility).

The distinction drawn here between lawyers performing roles as practicing members of the legal profession and lawyers performing roles as leaders in society does not preclude, of course, that lawyers may “exercise leadership” in the former types of roles as well, within the framework of the lawyer-client relationship. On this point, compare Kronman’s description of the classical nineteenth-century ideal of the lawyer-statesman as a “leader,” see supra notes 310-11 and accompanying text, and Pearce’s discussion of “America’s governing class” of lawyers when representing clients during this period, see supra note 391 and accompanying text.

574. See ABA SECTION ON LEGAL EDUCATION & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]; ABA SECTION ON LEGAL EDUCATION & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM, REPORT OF THE PROFESSIONALISM COMMITTEE (1996) [hereinafter PROFESSIONALISM COMMITTEE REPORT]. The argument will, of course, draw on other sources as well.

575. For the MacCrate Report’s analysis of fundamental lawyering skills and fundamental values of the profession, see MACCRATE REPORT, supra note 574, at 135-221. Although clearly recognizing the importance of substantive knowledge for lawyer competency, the MacCrate Report deliberately refrains from addressing questions regarding the substantive knowledge that lawyers should acquire in addition to these skills and values. Id. at 125.

576. The Committee identifies six prevalent themes articulated in the relevant literature relating to this perceived decline in lawyer professionalism: the loss of a sense of law practice as a “calling;” the loss of a sense of the ultimate purpose of lawyers as related to serving the public good by mediating
only appears to endorse the professional ideal of the lawyer-statesman (including Kronman's specific account of that ideal), but also includes among its specific recommendations aimed at “provid[ing] concrete ways to inspire and enhance a greater sense of professionalism in American lawyers,” a recommendation that law schools “develop[... additional perspective courses and seminars that focus on multiculturalism and diversity, the internationalization and globalization of law and law practice, jurisprudence [and] legal history....” Second, in addition to recognizing specifically the value for lawyers of a familiarity with the cultural and transnational dimensions of law, the MacCrate Report and the Professionalism Committee Report also apply, in any event, generally and mutatis mutandis, within the ever-expanding transnational context. Third, although these two reports are focused on the roles of lawyers as legal practitioners, many of the points they make or that may be made in connection with them (including the two preceding points) also apply analogously to the performance by lawyers of their roles as leaders.

My own concrete proposal for helping to “inspire and enhance a greater sense of professionalism in American lawyers” builds upon the ABA Professionalism Committee's recommendation for

between conflicting interests in society; various negative consequences resulting from the growing commercialization of law practice; perceived excesses of the adversarial process, including loss of civility; an undermining of the lawyer's independent role as counselor; and, concerns about lawyer competency and lawyer ethics. See PROFESSIONALISM COMMITTEE REPORT, supra note 574, at 3-4.

577. See id. at 5-7 & n.21, 8-9, 31. For a discussion of the lawyer-statesman ideal, see supra Part II.B.2. For Kronman's specific account of the lawyer-statesman ideal, see supra notes 294-343 and accompanying text.

Building upon Roscoe Pound's understanding of the essence of a profession as “pursuing a learned art as a common calling in the spirit of public service,” the Committee defines a professional lawyer as “an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.” Id. at 6. The Committee identifies six essential characteristics of the professional lawyer and twelve supportive elements. See id. at 6-7. The six essential characteristics are: “1. Learned Knowledge[,] 2. Skill in applying the applicable law to the factual context[,] 3. Thoroughness of preparation[,] 4. Practical and prudential wisdom[,] 5. Ethical conduct and integrity[,] 6. Dedication to justice and the public good.” Id. The Committee explains that “professional lawyers practice professionalism,” meaning that “they embrace the characteristics or traits of the professional lawyer” as defined by the Committee. Id. at 7.

578. Id. at 10. The Committee makes three sets of recommendations: dealing with pre-law education, law school training, and the practice of law. Id. For the detailed recommendations, see id. at 11-34.

579. Id. at 21.

580. See supra note 578 and accompanying text.
law school training described above. 581 Specifically, I propose that, with a view to ensuring the necessary minimum exposure to the cultural and transnational dimensions of law in the most effective, efficient, and realistic manner, law schools should include two required general and integrative courses within the core curriculum addressing the cultural and transnational dimensions of law respectively. This approach can be complemented by an appropriate exposure to these dimensions within other courses as well. 582

It will be clear by now that although the present article is designed to stand alone, it is also part of a larger project that consists of a series of several articles intended to address my central concerns about the law school curriculum and associated professionalism issues in considerable depth. The purpose of this larger project is to make the case for the "liberalization" of U.S. legal education, although perhaps the term "reliberalization" would be more accurate given the emphasis upon a broad education for lawyers during the first phase in the history of U.S. legal education. 583 Indeed, the experience of U.S. legal education

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581. See supra note 579 and accompanying text.
582. These general and integrative courses would integrate, within one overarching conceptual framework, the general subject areas of legal history, jurisprudence, and comparative law (in the general course on the cultural dimensions of law) and the general subject areas of international/transnational/global legal studies (in the general course on the transnational dimensions of law).

One very recent encouraging development in this direction with respect to the transnational dimensions of law is the bold and pioneering initiative taken by the University of Michigan Law School in requiring all law students (beginning with the class of 2004 entering law school in Fall 2001) to take the new general course in Transnational Law, introducing them to the areas of public international law and private international law (including European Union law). For discussion of the reasons for the adoption of such a requirement, as well as a description of Michigan’s new Transnational Law course, see Mathias Reimann, Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law, 46 LAW QUADRANGLE NOTES 54 (2003); Mathias Reimann, From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum, 22 PENN ST. INT’L L. REV. 397 (2004). For a description of the transnational dimensions of law, see supra note 449 and accompanying text.

583. The present article represents a change in my original plan for the project, which was to publish a series of three articles, each being designed to stand alone, while also relating to the other articles in the overall project. Thus, within the framework of the overall project, the first article puts the educational issues with which I am concerned into a broader theoretical perspective, and lays the conceptual foundation for the remainder of the project, by developing the fundamental dimensions taxonomic schema and the additional theoretical framework for curricular evaluation and comparison that are summarized in Part II.C.1 above. That article has already been published. See Jones, supra note 436.
during the first phase in its historical development is highly instructive.\(^{584}\) It highlights the importance of a broad-based legal education for lawyer professionalism, for the professionalism of lawyers as practicing members of the profession and for the professionalism of lawyers as leaders, and it points the way toward the completion of a process that surely has already begun — the integration, or more accurately, the reintegration, of all six sets of fundamental dimensions of law within the mainstream law school curriculum.\(^{585}\) Perhaps, then, we are witnessing the emergence of

Building on the conceptual foundation laid in the first article, the second article was to put the educational issues with which I am concerned into a broader historical perspective, and to lay an historical foundation for the remainder of the project, by tracing the historical development of U.S. legal education since the founding of the Republic until the present day, and by considering how the six sets of fundamental dimensions of law have in fact been treated within U.S. legal education during the several different phases in this historical development. The second article was also to examine the current treatment of the fundamental dimensions of law within the contemporary mainstream law school curriculum that has resulted from this historical development. For various reasons, however, it makes sense to publish this historical aspect of the project as more than one article, and the present article is the first result of that decision. The descriptive claims made above, supra notes 566-72 and accompanying text, will be elaborated in the later article(s) dealing with this historical aspect of the project.

Building on the conceptual and historical foundations laid in the first and second articles, the third article in the series was to develop the normative argument outlined above, supra notes 573-81 and accompanying text. The third article was also to describe the nature and content of the two proposed courses discussed supra note 582 and accompanying text. Once again, as in the case of the originally planned second article, it may make sense to publish this originally planned third article, on the normative aspect of the project, as more than one article.

\(^{584}\) For another, recent work that finds this first phase in the history of U.S. legal education descriptively and normatively illuminating for both professionalism and curricular concerns, and one that partly inspired the decision to publish the present article as a separate article, see Douglas, supra note 59.

\(^{585}\) Ensuring an appropriate degree of exposure to the substantive and structural dimensions of law so as to achieve their proper integration within the mainstream law school curriculum does not generally seem to be a significant issue. Instead, the more significant issues concern how to ensure an appropriate exposure to the practical, social, cultural, and transnational dimensions of law so as to achieve a proper (re)integration of these fundamental dimensions within the mainstream law school curriculum. Although the exponential development of the elective curriculum, and the recent efforts to incorporate relevant exposure to various dimensions into courses with a primary emphasis upon other dimensions of law, are central mechanisms in this process, these mechanisms are subject to certain inherent limitations. See supra notes 570-71 and accompanying text. Ensuring an appropriate exposure to the practical, social, cultural, and transnational dimensions of law so as to achieve their proper (re)integration within the mainstream law school curriculum, therefore, can probably only be fully achieved by requiring students to take courses with a primary emphasis on
a fifth phase — the (re)integrative phase — in the history of U.S. legal education, and it is when this phase fully arrives that U.S. legal education will have become appropriately reliberalized.

Receiving additional impetus from the MacCrate Report, see supra note 574, and the subsequent adoption of more demanding ABA Accreditation Standards in this respect, there has been a trend in recent years towards increasing such curricular requirements with respect to the practical dimensions of law. See Jones, supra note 436, at 552-57; ABA SURVEY, 1992-2002, supra note 458, at 15-16, 19-21, 25-29, 43-45. What is needed now is to adopt a similar, but appropriately tailored, approach with respect to the social, cultural, and transnational dimensions of law. In this regard, some law schools now require students to take “Perspectives” courses. See ABA SURVEY, 1992-2002, supra note 458, at 17, 44. However, in general, requiring students to take one or two courses from a block of “Perspectives” courses is almost tantamount, if not tantamount, to treating any one particular course within such a required block as a “mere elective” without any particular fundamental value and importance. For further discussion, see Jones, supra note 436, at 621 n.105; supra note 453 (final paragraph). Regarding the meaning of the term “mere elective,” see supra note 453. My own preferred approach with respect to the cultural and transnational dimensions of law has already been stated above. See supra note 582 and accompanying text. I consider that a similar approach may be appropriate with respect to the social dimensions of law as well.

Another dimension of integration, which is related to this dimension of curricular (re)integration, concerns the integration, within a broader paradigm of jurisprudential pluralism, of a number of different jurisprudential paradigms resulting from the jurisprudential developments occurring during the various phases in the historical development of U.S. legal education, see supra note 1 and accompanying text, and focusing on “the good of the legal order . . . and the polity it serves,” see GLENDON, supra note 197, at 181, around which different groups cohere and all of which compete for attention and sometimes conflict. See Jones, supra note 436, at 613 n.96 (discussing the concept of a jurisprudential “paradigm”); see also id. at 579 n.43, 583 n.48, 586 n.54, 601-08 (discussing various jurisprudential categories and movements). Such jurisprudential pluralism, it might be added, potentially facilitates and enriches the process of practical reasoning in the law. See, e.g., LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 225-41 (2003).