

Volume 100 Lead Piece

Back to the Future? Legal Scholarship in the Progressive Era and Today

Daniel A. Farber[†]

*"Forewords' are rightly subject to suspicion"*¹

It is a great honor to have the opportunity to introduce Volume 100 of the *Minnesota Law Review*. One time-tested approach on such occasions is to pontificate about the current state of legal scholarship. Another is to prognosticate about the future of legal scholarship. With depressing regularity, it turns out that the future of legal scholarship is very much like the prognosticator's own work. Taking a different tack, I decided to look back at the very first issue of the *Review*, to get a better sense of where it started in comparison to where it and other law reviews are today. It turned out to be an unexpectedly interesting exercise. Origins are often illuminating, and in the case of the *Minnesota Law Review*, there is much to be learned from the *Review's* first issue in 1917.²

[†] Sho Sato Professor, University of California, Berkeley. I want to express my appreciation for the *Minnesota Law Review's* invitation to write the Introduction to Volume 100. I would also like to thank Andrew Bradt, Dianne Farber, and Anne Joseph O'Connell for comments on an earlier draft, and Joan Howland, Michael Hannon, and Suzanne Thorpe of the University of Minnesota law library for their help in tracking down information about the *Review's* first editors. Copyright © 2015 by Daniel A. Farber.

1. William R. Vance, Book Note, 32 YALE L.J. 853, 853 (1923). As discussed in Part II, Vance was the second Dean of the University of Minnesota Law School and his tenure included the time when the law review was founded.

2. The reader may wonder how this could be Volume 100 when the founding was only ninety-eight years ago. Part of the answer is that Issue 1 came out in January, so its anniversary will not be until January 2016. And the numbering is always one year ahead of the elapsed time, because the first volume is numbered as one rather than as zero. Since the law review was zero

When I looked it up, Issue 1 turned out to be something of a surprise in several dimensions.³ Given the reputation of legal scholarship before the New Deal, I had expected dry doctrinal analysis of problems directly relating to legal practice, which means mostly about private law. What I found was something different. Much of what I read in Issue 1 was at odds with the standard lore about the evolution of American legal scholarship. To begin with, notably, while student-edited law journals are thought to be characteristic of American law schools, Issue 1 was a hybrid, with a faculty-edited article section and a student-edited notes section. The early twentieth century is often thought to be the heyday of formalism. Yet the *Foreword* by the editor-in-chief unabashedly refers to the need for law reform and for law to evolve as society itself changes.⁴ At least one of the articles, dealing with the need for improved child welfare laws, is almost exclusively policy oriented.⁵ And Issue 1's lead article was written by a political scientist, not a lawyer.⁶ Altogether, this made Issue 1 far more "modern" than I expected.

We are often told that law today is far more international than in the past, and also that law reviews no longer address the practical needs of lawyers and judges as they used to.⁷ The implications are that in the old days, the reviews gave little room to international or comparative law and focused only on

years old when the first issue appeared, the age of the *Review* is always a year behind the volume number.

3. Throughout this Article, "Issue 1" will refer exclusively to Issue 1 of Volume 1, although I will also discuss some articles in the first issue of Volume 100. The latter issue will be referred to as the "current issue" throughout.

4. See *infra* text accompanying notes 159–63.

5. See *infra* text accompanying notes 234–49.

6. See *infra* text accompanying note 293–310.

7. One of the best known such complaint in modern times came from Judge Harry Edwards, a former Michigan law professor:

[M]any "elite" law faculties in the United States now have significant contingents of "impractical" scholars, who are "disdainful of the practice of law." The "impractical" scholar—that is the term I will use—produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.

Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992). For more recent complaints in a similar vein from judges (including Chief Justice Roberts), see Adam Liptak, *The Lackluster Reviews That Lawyers Love To Hate*, N.Y. TIMES, Oct. 21, 2015, <http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html>.

problems that would arise in litigation. But only one of the four articles in Issue 1 could provide any direct assistance to lawyers (and that on a rather obscure subject), while two of the remaining three have international scope. The first article in the Issue discusses a recent case involving American neutrality on what proved to be the eve of World War I—the article itself, advocating stricter adherence to neutrality, appeared only weeks before German attacks on U.S. ships pushed America into the war.⁸ The second article is a comparative study of the law of negotiable instruments, with a view to deciding what approach should be incorporated in a future American codification (now Article 3 of the Uniform Commercial Code).⁹ The third article did have possible utility for practicing lawyers; it addressed property rights to underwater lands such as lake bottoms.¹⁰ The fourth article advocates new legislation dealing with child welfare and juvenile courts.¹¹ Admittedly, the student comments mostly deal with more workaday legal issues along with a couple of constitutional topics,¹² but the faculty-

8. See C. D. Allin, *The Case of the Appam*, 1 MINN. L. REV. 1 (1917).

9. See Ernest G. Lorenzen, *The Rules of the Conflict of Laws Applicable to Bills and Notes: A Study in Comparative Law*, 1 MINN. L. REV. 10 (1917). The Uniform Commercial Code does not appear to address this issue even today. Under § 3-305(a)(1)(i)–(ii), minority age and lack of capacity are defenses good against even a holder in due course, but the Code does not specify what law applies in determining capacity. See U.C.C. § 3-305(a)(1)(i)–(ii) (2002). Comment 3 to § 1-301 of the UCC now states a preference for application of the Code to transactions because of its “comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries.” U.C.C. § 1-301 cmt. 3 (2008).

10. See Oscar Hallam, *Rights in Soil and Minerals Under Water*, 1 MINN. L. REV. 34 (1917).

11. See Edward F. Waite, *New Laws for Minnesota Children*, 1 MINN. L. REV. 48 (1917).

12. A listing of the student notes is instructive:

A. Note, *Accident Insurance—Murder by Beneficiary—Accidental Death—Recovery by Estate*, 1 MINN. L. REV. 66 (1917).

B. Note, *Negotiability of a Bill of Lading Under the Federal Bills of Lading Act*, 1 MINN. L. REV. 68 (1917).

C. Note, *Carriers Liability to Bona Fide Holder of Order Bill of Lading Issued Without Actual Receipt of Goods*, 1 MINN. L. REV. 70 (1917).

D. Note, *Unconstitutionality of Legislative Fiat Defining Property—Right to Labor as Property—Injunction to Protect Personal Rights*, 1 MINN. L. REV. 71 (1917) [hereinafter *Property Rights Note*].

E. Note, *Breach of Statutory Duty as Negligence Per Se*, 1 MINN. L. REV. 76 (1917).

F. Note, *Liability of the Initial Carrier Under the Carmack Amendment for*

edited section seems focused on law reform or international issues.

Issue 1 also reminds us of how deeply legal scholarship is embedded in the concerns of its time, the article about American neutrality being the most striking example. In many respects, Issue 1 seems redolent of the Progressive Era, which was then—unknown to the participants—near its end. This is particularly apparent in the article on child welfare, which hits some strikingly modern notes in its general argument about society's responsibility to prevent abuse or neglect and particularly in its solicitude for children born outside of marriage. This view was fifty years ahead of the U.S. Supreme Court.¹³ Yet the article also shows the darker side of the Progressive movement, with a defense of eugenics and a passage showing what we might consider today to be striking racial insensitivity.

In general, Issue 1 is much more like today's legal scholarship than I expected. The historical era also had some strong resemblances to our own: progressives battling with champions of small government, accompanied by worries over America's role in the world. In contrast, law schools themselves were far different than today's institutions, in ways that were sometimes startling. And Issue 1 was strikingly different from current law reviews in one respect: it included four articles, seven student comments, and seventeen short case notes, plus a *Foreword*¹⁴ and a report from the state bar association¹⁵—all in

Losses Occurring on the Lines of Connecting Carriers, 1 MINN. L. REV. 79 (1917).

G. Note, *Husband and Wife—Action by Wife Against Husband—Personal Tort—Married Women's Act*, 1 MINN. L. REV. 82 (1917) [hereinafter *Husband and Wife*].

The last note is particularly interesting. It argues that married women should be allowed to sue their husbands for battery or negligent personal injury, although the author suggests that a legislative solution might be best given the important issue of public policy involved. *Husband and Wife*, *supra* note 12, at 84. It is intriguing to see this interest in issues of domestic violence at a time when women did not yet even have the right to vote.

These notes are followed by very brief discussions of seventeen recent cases. This degree of productivity is especially impressive considering the small size of the student staff (a total of fifteen, including three officers).

13. See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that denial of right of recovery because a person is a non-marital child of the deceased violates the Equal Protection Clause); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968) (overturning the Louisiana wrongful death statute barring recovery for damages to the parent of a non-marital child).

14. See Henry J. Fletcher, *Foreword*, 1 MINN. L. REV. 63, 63–66 (1917).

106 pages. The current issue of the *Review* also contains four articles, but many fewer student works, while still requiring many more pages. No reader of the modern law review will regard this as unusual; the only surprise may be that “twas not always thus.”

In this Article, I will put Issue 1 into context, or rather, into several contexts: the evolution of the American law school and the University of Minnesota Law School in particular, the origins of the student law review, and developments in legal thought at the turn of the previous century. I will then examine the articles in Issue 1 in terms of both their intellectual and institutional context and that of the major historical events that were happening outside of law school walls. By telling the story of Issue 1, I hope to illuminate issues about legal scholarship and its evolution more broadly.

The fascination that many people feel with genealogy seems to reflect the basic sense of the importance of knowing one’s origins. On the whole, the legal academy seems to be very unreflective about its own origins and development. There are relatively few serious scholarly works on the subject, and most students and legal academics have only a vague idea of how the modern law school came into existence and developed. This Article can be considered, then, an effort to help bring to light the genealogy of the world that we live in as students, legal academics, and lawyers.

I. THE LAW SCHOOL IN THE EARLY TWENTIETH CENTURY

Most law students probably assume that law schools have always been more or less like they are at the present: three-year post-graduate programs undertaken by nearly all aspiring lawyers and taught by full-time faculty. But law schools were very different places in the early twentieth century. The outlines of the modern law school were beginning to emerge, but the differences seem almost as great as the similarities. Law reviews are an unquestioned feature of the law school landscape today, but they too have changed over time, as has the scholarship they publish. Part I provides a brief introduction to the history of law schools, law reviews, and legal scholarship. Part II will then turn specifically to a case study and describe

15. See Stiles W. Burr, *The Minnesota State Bar Association*, 1 MINN. L. REV. 98, 98–104 (1917).

how the process of evolution played out at the University of Minnesota Law School.

A. FROM THE ORIGINS TO LANGDELL

In the nineteenth century, states did not require a law degree or even a college degree to become a lawyer.¹⁶ Many lawyers joined the bar after clerking as apprentices in an attorney's office and with no other legal training.¹⁷ The apprentice system involved studying some standard primers, copying the contents into notebooks, and learning from a lawyer in the workplace.¹⁸ In the earlier part of the nineteenth century, law schools encountered hard times—Harvard had dwindled to a single student in 1829 and was resuscitated that year only by a combination of fortuities: the merger of an existing proprietary law school into Harvard and the hiring of Justice Story as a lecturer.¹⁹ Law school tuition at Harvard during this early period was set at \$100, the same fee lawyers charged for studying law in their offices.²⁰ In that setting, it is not clear how law schools managed to attract students. But perhaps the motivation, both at the university law schools and the proprietary ones, was the “middle-class urge to get ahead through structured education” as opposed to the chaotic setting of law office education.²¹

Nevertheless, academic law schools seemed to lead a tenuous existence. Yale Law School also came close to disappearing in 1845 and again in 1869.²² Each time it was kept alive by help from local lawyers in the New Haven area.²³ Part-time lecturers were the norm among law school teachers; it was not until 1904

16. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 463 (3d ed. 2005).

17. *Id.*

18. See John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School*, in *HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES* 19 (Anthony T. Kronman ed., 2004) [hereinafter Langbein, *Blackstone*].

19. *Id.* at 23.

20. Christopher C. Langdell, *The Harvard Law School, 1869–1894*, 2 *HARV. GRADUATES' MAG.* 490 (1894), reprinted in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 518 (Steve Sheppard ed., 1999).

21. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 22 (1983).

22. Langbein, *Blackstone*, *supra* note 18, at 36.

23. John H. Langbein, *Law School in a University: Yale's Distinctive Path in the Later Nineteenth Century*, in *HISTORY OF THE YALE LAW SCHOOL*, *supra* note 18, at 59 [hereinafter Langbein, *University*].

that Yale had its first full-time faculty member, renowned Contracts expert Arthur Corbin.²⁴ Until the 1870s, Yale Law School occupied only a single smelly room in a downtown building over a storefront.²⁵ It then made a deal with the local bar, which arranged to get the school free space on the third floor of a new county courthouse, in return for allowing local lawyers to have access to Yale's law library.²⁶ In short, it survived on handouts from the lawyers nearby.

Slowly the tide began to turn. Aspiring lawyers, at least in the East, were frustrated by the apprentice system because access to the best positions was controlled by the elite at the top firms. Moreover, by 1900 lawyers no longer needed apprentices to act as "copyists, gophers, and drones," because of the advent of professional stenographers and typists.²⁷ Law schools began to take off. The number of law schools rose from 15 in 1850 to 102 in 1900; from 1870 to 1894, the student population rose from 1600 to 7600.²⁸ Most university law schools had to be self-supporting, and it was an innovation when Michigan began to pay faculty out of university funds.²⁹

Today, entering law students expect to read judicial opinions in "casebooks" and to be called on in class to tell the facts and holding. But this form of legal education was not always so. In general, according to legal historian Lawrence Friedman, law schools were dedicated to formalism and abstraction in the days before the case method, focusing dogmatically on internal logic of the law, with the basic aim of cramming students with rote learning.³⁰

The case method now familiar to every American law student was introduced at Harvard in the later nineteenth century by Christopher Columbus Langdell, whom Professor Grant Gilmore unkindly describes as "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius."³¹ Gilmore's sarcasm was misplaced. Langdell had led a difficult life, having lost his mother when he was seven, worked in the mills, and worked

24. *Id.* at 60.

25. *Id.* at 61.

26. *Id.*

27. FRIEDMAN, *supra* note 16, at 464.

28. *Id.*

29. *Id.* at 465.

30. *Id.* at 467.

31. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 38 (2d ed. 2014).

his way through high school and college with help from two sisters, who also worked in the mills to help support him.³² By the time he was a law student himself, his eyes were so bad that other students had to read the materials to him.³³

From 1870 to 1895, Langdell served as Dean of Harvard Law School, where he introduced the use of cases as the material studied by students.³⁴ Langdell's approach to legal education was based on the premise that the law was a science, with the law library as its laboratory;³⁵ his championship of the importance of the law library should make him the patron saint of law librarians. Langdell was a conceptualist who "believed that the very fact that law was scientific meant that it could be reduced to a few fundamental rules and principles."³⁶

Langdell also began a new approach to faculty hiring. He maintained that "[w]hat qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law."³⁷ Today's criticisms about the gap between law practice and current legal education and about the deficient practical experience of law professors,³⁸ apparently go back to the origin of the modern law school.

Langdell is identified with the Socratic method but it is not clear how much or how successfully he used that approach. Langdell himself often conducted his classes as lengthy mono-

32. See THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917 223-25 (1918) [hereinafter CENTENNIAL HISTORY].

33. *Id.* at 226.

34. SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY 76 (1940). According to Williston, at the outset

[t]he case method was primarily a method of study rather than of class-room instruction, involving as it did references to the original sources of the law, but Ames especially, followed by Keener and to some extent by the other teachers used the cases for class-room discussion in which the students took a large part.

Id.

35. LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 11 (1986).

36. *Id.* Kalman suggests that his approach to law was an offshoot of his amateur interest in botany, with both focusing on taxonomy and classification. *Id.*

37. JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 37 (1978).

38. For example, consider Judge Edwards' lament that "[t]he simple truth is that there is no coherent bridge between legal education and the practice of law." Harry T. Edwards, *Reflections (on Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2005 (2002).

logues; apparently his eyesight was so impaired that he had difficulty calling on students.³⁹ When he did, his efforts at questioning were apparently not well received. One day, there was a “hurricane of derisive clapping and stamping” when a student turned the tables and began asking him a series of pointed questions.⁴⁰ Langdell himself was not a popular teacher; students called him an “old crank.”⁴¹ When he began to use the case method at Harvard, his class dwindled to seven students.⁴² It was really his disciple (and successor as Dean), James Ames, who successfully established the use of the Socratic method in the law schools. Ames was a classic Socratic teacher who “questioned much” and “answered little.”⁴³ The Socratic method meant teaching students to extract the fundamental principle from each case for themselves.⁴⁴ It was this aspect of active learning that led the President of Harvard to compare this approach with the one used in Montessori schools.⁴⁵

Sometimes this process might seem to the student like a badgering cross-examination of a hostile witness,⁴⁶ but the goal was to lead the student on a path of intellectual discovery. A biographer’s description of the law school teaching of Harlan Fiske Stone, later Chief Justice of the U.S. Supreme Court, at Columbia shows at least what the method aspired to. Stone would use a series of questions and answers, “kindly but firmly,” until the “the student was made to see for himself the point the teacher was trying to bring out.”⁴⁷ The goal, in Stone’s view, was “leading of the entire class, step by step, through the intel-

39. CENTENNIAL HISTORY, *supra* note 32, at 232–33.

40. SELIGMAN, *supra* note 37, at 35.

41. KALMAN, *supra* note 35, at 12.

42. FRIEDMAN, *supra* note 16, at 470.

43. CENTENNIAL HISTORY, *supra* note 32, at 177–78.

44. KALMAN, *supra* note 35, at 12. The hope, in any event, was that having to work out the meaning of the cases themselves would not only develop the analytic skills of the students but would also result in greater retention of the substance. See JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 29 (1914).

45. Charles W. Eliot, *Langdell and the Law School*, 9 HARV. L. REV. 518 (1895), in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES*, *supra* note 20, at 512.

46. This image is found in popular depictions such as the movie, *THE PAPER CHASE* (Twentieth Century Fox 1973).

47. ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 90 (1956).

lectual processes by which the cases are analyzed and compared and their true legal significance developed."⁴⁸

As Stone's biographer admitted, this approach was not always appreciated by students, who would have preferred a more direct explanation of the law.⁴⁹ This type of Socratic teaching still survives today, especially in first year classes, but generally only in diluted form. Unlike its original use, it is no longer associated with the idea that existing doctrines need little change and "should be applied 'with constant facility and certainty to the ever-tangled skein of human affairs.'"⁵⁰

Besides the bar's unhappiness with the new-style teachers and their lack of practice experience, there was also controversy about their methods.⁵¹ One criticism was that the case method seemed designed to produce litigators rather than lawyers who knew the rules and could steer clients away from any danger spots.⁵² The new-style teachers were also criticized for leading students to think of themselves as "hired gladiators" able to take either side of a dispute on behalf of a client.⁵³

Yale was a long-time holdout from the case method, following the text-and-recitation method, where students read textbooks describing the law rather than cases and then answered questions about them in class.⁵⁴ Nevertheless, the case method soon caught on. By 1902, twelve law schools had switched entirely to the case method and another forty-eight used it in part.⁵⁵ Langdell also pioneered other features of the modern law school: requirement of a college degree for entrance; a three-year program (which was accepted only slowly); and a systematic ordering of the curriculum, with introductory courses designated for the first year, rather than allowing students to take whatever courses they wanted in whatever order.⁵⁶

48. *Id.*

49. *Id.*

50. SELIGMAN, *supra* note 37, at 36.

51. As one indication, Boston University Law School was founded due to unhappiness with the Harvard approach. *Id.* at 35. Unhappiness with the case method lingers today. Ralph Nader's introduction to Seligman's book lambasts the case method, which he called "a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage." *Id.* at xv.

52. STEVENS, *supra* note 21, at 57.

53. *Id.* at 59.

54. Langbein, *University*, *supra* note 23, at 55.

55. FRIEDMAN, *supra* note 16, at 471.

56. SELIGMAN, *supra* note 37, at 38-42. The portion of the Langdell agenda that took the longest to be adopted by other schools was the requirement of

These developments at Harvard had national impact, but it was not overnight. For example, as we will see, Minnesota lagged behind in establishing a law school at all and then in adopting the Harvard case method. But first we need to consider how another familiar feature of the modern law school, the student law review, came into existence.

B. THE ORIGIN OF THE STUDENT LAW REVIEW

Law reviews are now a fixture of law school life. It is something of a surprise to learn that they were a somewhat late arrival, and one that did not instantly take hold. Minnesota and some other schools initially involved students only in a subsidiary role, with the faculty running the show.

To say that law reviews are a relatively recent arrival is not to say that there were no legal publications until then. Commercial law reviews addressing the national market emerged around the time of the Civil War.⁵⁷ One of these early reviews, the *American Law Register*, eventually evolved into the *University of Pennsylvania Law Review*, but it did not have student editors until later.⁵⁸ Another review, the *American Law Review*—perhaps the leading law journal of the nineteenth century—included “scholarly lead articles, honestly critical book reviews, news of legal events having regional and national interest, and contributions from the best available legal minds.”⁵⁹ The first student law reviews, then, were not entering an untapped market. Student journals did not arrive until the late nineteenth century.

Despite some short-lived precursors, first at Albany,⁶⁰ and then at Columbia, the first enduring student law review was

a college degree; no other school followed Harvard’s lead until 1916. *Id.* at 44.

57. See Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 31–32 (1996).

58. *Id.* at 32. The review was founded in 1852 by two leading Philadelphia lawyers, Asa I. Fish and Henry Wharton, and then run by an editorial board (containing such legal luminaries as Thomas Cooley and J.F. Dillon), but reverted to two other Philadelphia lawyers in 1891, one of whom brought the journal with him when he became dean of the University of Pennsylvania Law School. Joseph P. Flanagan, Jr., *Volume 100*, 100 U. PA. L. REV. 69, 69 (1951).

59. Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739, 758 (1985).

60. The *Albany Law School Journal* was published only for a single year, sometime around 1875. Nina Rose, *Student-Edited Law Journals: A Brief History, a Long Legacy*, L.J. EDS. (Sept. 23, 2013), <https://ljeds.wordpress.com/2013/09/23/history-student-edited-law-journals> (containing a photo of an ad-

launched at Harvard on April 15, 1887.⁶¹ It had becomingly modest ambitions:

Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the REVIEW may be serviceable to the profession at large.⁶²

The Harvard students were apparently inspired by the short-lived effort at Columbia.⁶³ At the time, law clubs consisting of eight students were an important feature of Harvard Law School; the clubs were primarily devoted to arguing mock cases, and the faculty ensured that any interested student could join one of these clubs.⁶⁴ The Harvard publication emerged from a group of eight students who called themselves the Langdell Club, dedicated to discussion of legal topics, writing essays, and conducting mock trials.⁶⁵ The original plan was to read the essays to each other at meetings, but this idea "soon gave way . . . because 'it was felt that the . . . writers deserved a wider circulation than was originally proposed and the founding of the *Harvard Law Review* was the result.'"⁶⁶ A strong supporter on the faculty (and later Dean), James Barr Ames,⁶⁷ sug-

vertisement for a saloon in the *Journal*, boasting "the best and coolest lager in the city").

61. FRIEDMAN, *supra* note 16, at 481. Yale followed suit in 1891 and Columbia in 1900. *Id.*

62. *Notes*, 1 HARV. L. REV. 35, 35 (1887).

63. Closen & Dzielak, *supra* note 57, at 34.

64. WILLISTON, *supra* note 34, at 76-77.

65. Closen & Dzielak, *supra* note 57, at 35.

66. Swygert & Bruce, *supra* note 59, at 770. Williston also says that "[o]ne or two of the earlier essays seemed to them [the students] good enough to deserve publication, and from this thought the project took the shape of founding a law review." WILLISTON, *supra* note 34, at 83. The students were also apparently inspired by rousing speeches at the 250th anniversary of Harvard University:

Wigmore, later discussing the birth of the journal, bluntly stated that the celebration of the 250th anniversary "put pride into our hearts, and the conviction that the Harvard Law School had a message for the professional world."

Swygert & Bruce, *supra* note 59, at 772.

67. *Id.* at 770-71.

Ames was a likely consultant because his general availability for counseling made him the students' "best friend" during this period. As Joseph Beale, a student founder and later a Harvard law professor, recounted: "Ames approved [the idea for the review] without reserve, wrote the first leading article, and became the chief advisor and helper of the editors throughout his life."

gested that they turn to alumni for funding, and the president of the alumni association, one Louis D. Brandeis, helped organize funding.⁶⁸

Other law reviews followed in due course. At Columbia, what became the permanent law review also had grown out of a student society organized to promote legal study.⁶⁹ The students had proposed to set up an informal seminar to discuss current judicial opinions with the hope of starting a law journal on Harvard's model.⁷⁰ Michigan presented a different model in 1901. Although instigated by a suggestion from a student, it was edited by the faculty and designed primarily as an outlet for faculty work; each faculty member was expected to contribute an article every other year.⁷¹

C. DEVELOPMENT OF LEGAL SCHOLARSHIP

The content of the early law reviews was shaped by larger trends in legal education. The major trend was toward a formalist insistence that law involved only deductive logic applied to some fundamental legal principals, without consideration of societal context or social values. According to Lawrence Friedman, Langdell "purged from the curriculum whatever touched directly on economic and political questions, whatever was argued, voted on, or fought over," replacing engagement with the realities of life with a "worship of the common law" and disdain for legislation.⁷² Thus, law "was an independent entity, a separate science; it was distinct from politics, legislation, and the opinions of lay people."⁷³ Friedman also expressed a jaundiced view of the legal treatises of the period, which he says were "barren enough reading when they first appeared and would be sheer torture for the reader today."⁷⁴ "[H]umorless, imperson-

Id. For brief descriptions of the first issue of the Harvard, Yale, and Chicago law reviews, see generally Editor's Note, *But Cf.*, . . ., 1 CONST. COMMENT. 3 (1984).

68. Closen & Dzielak, *supra* note 57, at 35.

69. STAFF OF THE FOUND. FOR RESEARCH IN LEGAL HISTORY UNDER THE DIRECTION OF JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW COLUMBIA UNIVERSITY 182 (1955) [hereinafter GOEBEL].

70. *Id.*

71. *History*, MICH. L. REV., <http://michiganlawreview.org/history> (last visited Sept. 25, 2015). The first student editor-in-chief was selected just before World War II. *Id.*

72. FRIEDMAN, *supra* note 16, at 471-72.

73. *Id.* at 472.

74. *Id.* at 477.

al," the treatises focused on "bare exposition of law," and were typically "empty of philosophy or social science."⁷⁵ Harvard avoided issues of public law in part because issues relating to public policy were controversial and had led to faculty firings in other university departments.⁷⁶

Another eminent legal historian describes the dominant view of legal scholarship at that time as an effort to correct legal errors by tracing legal rules to their origins and identifying the general principle behind the rules, so that deviations by courts could be ironed out.⁷⁷ Formalism ruled the day, with a focus on identifying and classifying legal principles.⁷⁸

G. Edward White presents a somewhat more nuanced view of turn-of-the-century formalism and of its later critics.⁷⁹ He explains formalism as a perspective that views legal principles as an essence that is embodied in cases.⁸⁰ In most cases, application of a principle is routine, but in some cases, applying the principle requires some tweaking or clarification of its boundary, a process that allowed the common law to grow.⁸¹ Thus, the formalists were not necessarily opposed to legal change, but they viewed it as happening through slow, incremental revision as principles were clarified or subtly reformulated.

Later perspectives on the formalists were undoubtedly shaped by their critics (and to some extent successors), the legal realists. If nothing else, our view of the formalists is inevitably shaped by an implicit comparison with the realists. According to White, the realists saw legal principles as merely generalizations based on the cases and therefore "utterly dependent on the facts and consequences of the cases in which they had been formulated."⁸² Hence, for the realists, the law does not consist of a collection of principles but of many cases with their own distinctive character.⁸³ The realist account of law stressed the temporary and contextual nature of law, as

75. *Id.* at 478-79.

76. Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL*, *supra* note 18, at 80.

77. *Id.* at 78.

78. KALMAN, *supra* note 35, at 46-47.

79. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 167 (2000).

80. *Id.*

81. *Id.*

82. *Id.* at 168.

83. *Id.*

opposed to the (relatively) timeless and abstract quality of the formalist's "principles."⁸⁴

II. LEGAL EDUCATION AT MINNESOTA

Now that we have seen how the legal academy in general developed in the late nineteenth century and the early twentieth century, it is time to take a look at developments specifically in Minnesota. It was these developments that were to bring Issue 1 into being.

A. THE EARLY YEARS AT MINNESOTA

The University of Minnesota gained academic stature only through some struggle. The "Minnesota Plan," developed by the then-president of the University,⁸⁵ William Folwell, was one early effort to upgrade the University, including a plan to establish professional schools.⁸⁶ The plan failed when Folwell resigned in the aftermath of a student demonstration.⁸⁷ The demonstration, a student protest against disciplinary practices, was conducted by students wearing blackened faces and Ku Klux Klan costumes; the protest came to an abrupt end when a professor shot one of the students in the leg.⁸⁸

The history of Minnesota's Law School began with the appointment of William Pattee as the first dean in 1888 (and its only permanent faculty member before 1890).⁸⁹ Since the Regents required the school to be self-supporting, the new Dean's highest priority was enrollment.⁹⁰ Essentially, "[t]he more students and the more fees, the better."⁹¹ Recruiting students primarily involved persuading them that a law school education was better preparation for a legal career than law office study.⁹² This emphasis on persuading a larger number of aspiring lawyers to attend law school was part of a national trend, fostered by an 1892 ABA resolution calling for two years of legal educa-

84. *Id.* at 172.

85. ROBERT A. STEIN, IN PURSUIT OF EXCELLENCE: A HISTORY OF THE UNIVERSITY OF MINNESOTA LAW SCHOOL 10 (1978).

86. *Id.*

87. *Id.*

88. *Id.* at 10 n.*. It is not clear from the description whether their faces were simply darkened to be less visible or whether they were appearing in blackface.

89. *Id.* at 3.

90. *Id.* at 7.

91. *Id.* at 8.

92. *Id.*

tion.⁹³ By 1900, law schools were the wave of the future in legal education.⁹⁴

Six years after Folwell's 1882 forced departure, the law school opened in the basement of the main University building with thirty-two students in the day program and thirty-five at night.⁹⁵ The school soon became better established, with its own building (Pattee Hall) and with the addition of two more permanent faculty members (making three in total) within its first decade.⁹⁶ The small size of the faculty is a reflection of a common pattern. Full-time law faculty were an innovation of Dean Langdell at Harvard; traditionally, teaching was done by practicing lawyers and judges.⁹⁷ The admission requirements for the law school required either a high school diploma or passing an entrance examination.⁹⁸ By 1911, however, Minnesota was requiring two years of college before law school admission.⁹⁹

The spotty admission requirements were not unique to Minnesota. At Columbia in the 1890s, fewer than half of law students were college graduates compared with about a third at Northwestern and Yale, and under one-fifth at Michigan.¹⁰⁰ The Minnesota curriculum was also typical, covering a small set of courses that remained standard as late as the 1920s before additions became more frequent.¹⁰¹ The early curriculum was un-

93. STEVENS, *supra* note 21, at 95.

94. FRIEDMAN, *supra* note 16.

95. *History*, U. MINN. L. SCH., <https://www.law.umn.edu/about/history> (last visited Sept. 27, 2015). Night school enrollment peaked in 1901 with 194 students. *Id.* For purposes of comparison, the law school currently has 698 J.D., 18 international visiting, 2 domestic visiting, and 56 LL.M. students. *Law School Profile*, U. MINN. L. SCH., <https://www.law.umn.edu/admissions/law-school-profile> (last visited Sept. 27, 2015).

96. *History*, *supra* note 95. The small faculty did not make Minnesota unique: Columbia and Harvard reached as many as four faculty members only in 1874. STEVENS, *supra* note 21, at 71 n.90. By way of comparison, in 2015 Minnesota had sixty-seven full-time law faculty. *Law School Profile*, *supra* note 95.

97. FRIEDMAN, *supra* note 16, at 466.

98. STEIN, *supra* note 85, at 11.

99. *History*, *supra* note 95. Similarly, at the University of Wisconsin, it was only in 1905 that the law school began requiring a full year at some college for admission, and indeed, it was only in 1896 that the admission standard for law students had been increased to equal elsewhere in the university. See *Important Dates in the History of UW Law School*, U. WIS. L. SCH., <http://law.wisc.edu/current/rtf/21.html> (last visited Sept. 27, 2015).

100. STEVENS, *supra* note 21, at 45.

101. *Id.* Note that this was a two-year program, which does not seem to have been unusual. For instance, Wisconsin added a third year only in 1895. *Important Dates in the History of UW Law School*, *supra* note 99. According to

relentingly focused on private law, including the standbys of today's 1L curriculum: contracts, criminal law, property, and procedure (in the form of courses on pleading and evidence).¹⁰² Notably, there were no courses on constitutional or administrative law.¹⁰³

At the end of Pattee's deanship, the law school was known on campus as a source of easy grades for the football team.¹⁰⁴ The next dean was to change all that. William Vance had become dean of Washington and Lee Law School at the age of thirty.¹⁰⁵ He came to Minnesota from a spot on the Yale faculty.¹⁰⁶ Pattee's goal had been to offer the opportunity to obtain a legal education (and to pay fees to the Law School) to as many students as possible.¹⁰⁷ When Vance became Dean in 1911,¹⁰⁸ his goal was to give the state a high quality legal bar to serve the state as lawyers, judges, and legislators.¹⁰⁹ With the support of the Regents, Vance began to recruit new faculty members with national reputations.¹¹⁰ He also made law school a much more serious educational experience for students, as expressed in a 1913 doggerel:

No longer does the care-free stude
 Play cards and sing and dance.
 But now they're plugging night and day,

Friedman the three-year degree was an innovation that began at Harvard. See FRIEDMAN, *supra* note 16, at 466. This requirement began there in 1899, although students had had the option of a three-year degree by 1876. *Id.* at 468.

102. STEIN, *supra* note 85, at 16–17.

103. *Id.* at 17–18. For extensive information on early law school curriculums, see ALFRED ZANTZINGER REED, *PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA* 230–36 (1928); ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 351, 453–56 (1921). These two books are a treasure-trove of information about early law schools. This array of subjects traces back to Blackstone's organizational scheme. See Langbein, *Blackstone*, *supra* note 18, at 21. Administrative law was introduced later, during the Vance years. STEIN, *supra* note 85, at 58. Similarly, at Harvard, constitutional law was not part of the original three-year curriculum. FRIEDMAN, *supra* note 16, at 469. At Columbia, public law was taught by a separate faculty drawn from the political science department until after the retirement of John William Burgess in 1912, when the law school began to gradually develop its own program. GOEBEL, *supra* note 69, at 240–41.

104. STEIN, *supra* note 85, at 32.

105. *Id.* at 37.

106. *Id.* at 40.

107. *Id.* at 41.

108. *Id.* at 40.

109. *Id.* at 41. When he became dean at Columbia, Harlan Fiske Stone (later to be Chief Justice) took a similar view. GOEBEL, *supra* note 69, at 234.

110. STEIN, *supra* note 85, at 49.

Since the advent of Dean Vance.

...

They don't shake dice at Louie's now,
Nor gamble on the races;
You'll find them in the library,
Always reading cases.¹¹¹

As the reference to "reading cases" suggests, Vance introduced the case method and the Socratic approach at Minnesota.¹¹² The case method was sufficiently controversial that, when Vance later returned to Yale, he negotiated for a guarantee that he would be allowed to use it in class.¹¹³ But it was to become the dominant method of education for nearly a century.¹¹⁴

Although he agreed that an emphasis on theory would be more appropriate in the eastern states where students would have a better chance to learn practice skills under the tutelage of established lawyers, Vance's goal at Minnesota was to produce practice-ready lawyers:

In the University of Minnesota Law School we are earnestly trying to fit our graduates for the actual practice of the law. It is unreasonable to expect them to be finished lawyers when they leave the law school. How many men are finished lawyers after five years at the bar, or even ten? But we are trying to train them so they can institute and prosecute to a final conclusion any ordinary court proceeding with reasonable safety to the cause intrusted [sic] to them.¹¹⁵

To teach skills, Vance revitalized the moot court program and—decades ahead of his time—established a legal clinic in conjunction with the local aid society.¹¹⁶ The model for clinics was provided by medical school clinics: "We think we have found a way in a plan never before fully tried, so far as I know, by which we can provide for law students something of the

111. *Id.* at 55.

112. *Id.* at 56.

113. Arthur L. Corbin, *William Reynolds Vance*, 50 YALE L.J. 195, 195 (1940). According to a Yale colleague, at least, Vance's use of the Socratic method was not designed to be intimidating:

He was courteous and patient in the classroom, respecting the dignity of his students. They felt that they were co-workers with him in the search for a better understanding. He did not seek to drive or dominate, but rather to awaken an intellectual curiosity which would serve as an enduring stimulus to industry.

Ashbel G. Gulliver, *William Reynolds Vance*, 50 YALE L.J. 197, 198-99 (1940).

114. STEVENS, *supra* note 21, at xiv.

115. William R. Vance, *The Function of the State-Supported Law School*, 3 AM. L. SCH. REV. 409, 411 (1914).

116. STEIN, *supra* note 85, at 59.

same kind of clinic which medical students find in the hospital and free dispensary."¹¹⁷ One lesson learned from the clinic was the difficulty of dealing with small claims (under \$10). This led Vance to lobby for the establishment of a small claims court, resulting in new state legislation in April 1917.¹¹⁸

A second purpose of a state law school, he said, was to advance knowledge about the legal system, and for that reason Vance called for funding to hire research professors in charge of empirical legal research:

[I]t is loudly alleged and pretty generally believed that there are many delays in our courts that could be obviated. Are the delays in fact unreasonable, or is it merely a matter of orderly and dignified procedure in determining the right of matters in contest? Why not investigate the records of some important county and demonstrate the [right] one . . .¹¹⁹

Elsewhere Vance wrote that law professors, in order to help adapt the law to changing economic and social conditions, would need interdisciplinary knowledge and keen skills: "The successful accomplishment of this work of adaptation will require intellectual ability of the very highest order, and wide and balanced learning in a field as broad as our social organization itself and as varied as human activities and interests."¹²⁰ This task would "demand immense labor, involving the expenditure of much time in research, in comparing, restating, remolding, and readjusting our conceptions of the right and wrong of social and industrial relations, and our notions of the procedure by which the right is to be upheld and the wrong prevented."¹²¹

Vance also had high aspirations for students. Admissions became tougher and tougher under Vance,¹²² requiring comple-

117. *Id.* at 412-13.

118. *Id.* at 66.

119. Vance, *supra* note 115, at 414-15.

120. William R. Vance, *The Ultimate Function of the Teacher of Law*, 3 AM. L. SCH. REV. 2, 6 (1911).

121. *Id.*

122. The requirement of at least some college education followed the advice of law school experts from elsewhere, such as Dean Dwight of Columbia. STEIN, *supra* note 85, at 450. Although Harvard required a bachelor's degree at the beginning of the century, other schools were slow to follow suit, with Stanford adopting this requirement in 1924 and George Washington in 1935; it was not until the 1960s that accreditation authorities required a four-year college degree. FRIEDMAN, *supra* note 16, at 542-43.

tion of three years of college (with the first year of law school counting as the fourth toward a Bachelor's degree).¹²³

A member of the Minnesota faculty who ultimately ended up at Harvard spoke admiringly of Vance's deanship.¹²⁴ Vance "found a heterogeneous, indifferent, inefficient study body; he made it unified, loyal, industrious and efficient."¹²⁵ While strengthening the student body, Vance also "built up a faculty of full-time teachers recognized as among the most competent in the country."¹²⁶ And most importantly, he "found a school divorced from activities connected with the improvement of the law and its administration; he made it a source to which legislators and law reformers naturally turned for help, with a first-class Law Review to which the members of the bar gave enthusiastic support."¹²⁷

Vance's faculty hiring was part of a trend. By 1915, there was concern that "the practicing lawyer and the professor have been getting further and further apart all the time."¹²⁸ (Many readers will have heard—or made—that complaint themselves!) The turn toward more academically-oriented professors, using the case method, led to complaints about the distance between law schools and the profession. The bar "worried as the leading schools increasingly had students who had no contemporaneous practical experience taught by faculty members who had little or no experience of practice."¹²⁹

123. STEIN, *supra* note 85, at 411. Admission standards could sometimes have a dark side:

George T. Strong, writing in his diary in 1874, hailed the idea that the Columbia Law School should institute an admission test: "either a college diploma, or an *examination including Latin*. This will keep out the little scrubs (German Jew boys mostly) whom the School now promoted from grocery-counter . . . to be 'gentlemen of the Bar.'"

FRIEDMAN, *supra* note 16, at 487.

124. E. M. Morgan, *William Reynolds Vance*, 50 YALE L.J. 199, 200 (1940). Gilmore refers to this period as the "great age of the American law school." GILMORE, *supra* note 31, at 51.

It may well be that no educational institutions in any country at any time have enjoyed the prestige and achieved the success of the dozen or so national law school which grew up in the image of Langdell's Harvard.

Id. While this is an exaggeration, it does attest to the success of the Langdellian model that was fostered by Vance at Minnesota.

125. Morgan, *supra* note 124.

126. *Id.*

127. *Id.*

128. STEVENS, *supra* note 21, at 129 n.55.

129. *Id.* at 119.

In terms of Vance's effort to orient the school toward law reform based on a wide range of knowledge, this too had parallels elsewhere. By World War I, a few academics were just beginning to think about use of the social sciences to illuminate law,¹³⁰ although the social sciences of the time may not have had as much to offer as anticipated.¹³¹ Around the same time, Roscoe Pound became Dean of Harvard and launched an attack on legal formalism.¹³²

Vance later returned to Yale, where he was considered one of the more conservative members of the faculty,¹³³ with a leaning toward the Harvard approach to education.¹³⁴ But his conservatism was only relative to the rest of the Yale faculty—he was still considered a founder of legal realism, a pragmatic approach to the law.¹³⁵ He remained an opponent of legal formal-

130. *Id.* at 135.

131. *Id.* at 139.

132. *Id.* at 136.

133. KALMAN, *supra* note 35, at 27. It is unclear whether Kalman was referring to Vance's politics or his views on educational policy. In any event, Vance appears to have been at least something of a liberal. For instance, in the early days of World War I, he wrote an article on speech by dissenters arguing that:

The theory of construction which seems to the writer to rest upon sound principle is that the constitutional guaranty in question was intended not only to abolish forever previous censorship of publications by the government, but also to safeguard the citizen from any larger liability for his uncensored publication, or for his public utterance, than was imposed by the rules of the common law as accepted at the time of the making of the federal constitution.

W. R. Vance, *Freedom of Speech and of the Press*, 2 MINN. L. REV. 239, 255 (1918). Vance concedes that "it is difficult to determine how to draw the line just at the place where criticism of the government and its measures becomes opposition to the government and resistance to the laws." *Id.* at 240. In terms of wartime speech, he concluded that:

Congress has no power to abridge the right freely to discuss all public measures, to expose their defects and urge their alteration or repeal by legal methods, to criticise [sic] the constitution and the laws and advocate their amendment, and to comment, however severely if only it be fairly, upon the conduct of the officers of the government. Such adverse comment, so long as it does not tend to excite resistance to the law or breach of the peace, though it may be intemperate and unreasonable, and possibly vexatious and even harmful, is not seditious.

Id. at 259. This seems to be somewhat in advance of the Supreme Court's views during the war, since the Court considered it sufficient that a writing could persuade its audience "not to aid government loans, and not to work in ammunition factories," *Abrams v. United States*, 250 U.S. 616, 625 (1919), whereas Vance would have required a showing that the writings would tend to lead to illegal actions.

134. KALMAN, *supra* note 35, at 263 n.43.

135. *Id.* at 119.

ism, opposing the Restatement of Property as a collection of "pontificating black letter formulas purporting to restate the law of property."¹³⁶ He also supported the appointment as Dean at Yale of Robert Hutchins, who was considered a radical reformer.¹³⁷ Vance retired from Yale in 1938.¹³⁸

B. THE CREATION OF THE MINNESOTA LAW REVIEW

The *Minnesota Law Review* was founded during the Vance years.¹³⁹ The first editor-in-chief was Professor Henry J. Fletcher.¹⁴⁰ One former student described Fletcher as a "very distinguished old practitioner—a southern gentlemen type" who loved to teach.¹⁴¹ Another former student described him as a "very hard working teacher," though not as impressive as Vance and two other professors (all three of whom later departed for Yale).¹⁴² The *Review* was made possible by funding from the state bar association,¹⁴³ and more than fifty lawyers guar-

136. *Id.* at 27.

137. *Id.* at 108–09.

138. *Id.* at 256.

139. Wisconsin established its law review three years later. *Important Dates in the History of the UW Law School*, *supra* note 99.

140. STEIN, *supra* note 85, at 63. Fletcher, hired in 1902, was the fourth permanent member of the law faculty. *Id.* at 443. He taught a wide array of courses, including constitutional law, property law, and bankruptcy. UNIV. OF MINN., 13 GENERAL CATALOGUE 442–45 (1910). The only publication by Fletcher that I have been able to find is Henry J. Fletcher, *The Civilian and the War Power*, 2 MINN. L. REV. 110 (1917) (arguing that the government is not bound by the Constitution once Congress declares war). However, he was still editor-in-chief when the journal published a student note arguing that "[i]t is of the utmost importance to clear away such dangerous misconceptions . . . leading to the rash assumption by the executive of unwarranted powers, the infliction of grievous wrongs, and the incurring of serious liabilities, civil and criminal." Note, *Constitutional Law—Martial Law—Punishment of Civilians by Military Court*, 5 MINN. L. REV. 540, 542 (1922) (though perhaps Fletcher thought the issue was distinguishable because this was an action by state government). According to a memorial note:

Professor Fletcher was a native of Maquoketa, Iowa, and was educated at the University of Michigan. After a few years of legal practice in Minneapolis, he joined the faculty of the Law School of the University of Minnesota in 1895, when the school was seven years old. He continued to teach without interruption until his retirement, because of illness, in 1929.

In Memoriam, 23 MINN. L. REV. 1 (1938). The memorial also notes that "by far the greater number of the graduates of the school now living had the good fortune to come under his instruction." *Id.*

141. STEIN, *supra* note 85, at 408–09.

142. *Id.* at 412.

143. Bar associations were relatively recent innovations, or at least it was novel for them to serve as anything more than social clubs. The Association of

anteed its finances for the first three years.¹⁴⁴ In 1920, the *Review* became the official journal of the Minnesota Bar Association.¹⁴⁵ It took forty years until the *Review* severed its tie to the bar association and the faculty abandoned editorial oversight of the review.¹⁴⁶

Although they did not play the lead role, the student editors were an impressive group. My overall impression is that the student Notes and Case Comments provide concise, well-argued doctrinal analysis of then-current legal problems. A. L. Gausewitz, the President of the *Review*, became a member of the Wisconsin faculty,¹⁴⁷ and was later the first dean of the University of New Mexico law school.¹⁴⁸ He received an LL.M. at Stanford, and was active in the Wisconsin bar and as a consultant to the American Law Institute.¹⁴⁹ The Note Editor, Charles M. Dale, moved to New Hampshire after World War I, where he ultimately became governor.¹⁵⁰ Harry W. Davis, the

the Bar of the City of New York was founded in 1869. FRIEDMAN, *supra* note 16, at 495. Membership in state and city bar associations tended to be selective rather than open to all lawyers. *Id.* at 497.

144. STEIN, *supra* note 85, at 64. Faculty involvement was not unusual during this period. The law reviews at Michigan and Northwestern were also faculty edited. Closen & Dzielak, *supra* note 57, at 12.

145. *History*, *supra* note 95.

146. *About Us*, MINN. L. REV., <http://www.minnesotalawreview.org/about> (last visited Sept. 27, 2015). At elite schools, the norm was student control. See STEVENS, *supra* note 21, at 127.

147. He seems to have been particularly interested in the evidentiary role of presumptions. See Alfred L. Gausewitz, *Presumptions*, 40 MINN. L. REV. 391, 406–08 (1956); Alfred L. Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 333–34 (1952). His work on criminal law was also influential. See Alfred L. Gausewitz, *Considerations Basic to a New Penal Code*, 11 WIS. L. REV. 346, 364, 365–69 (1936).

148. *Professor A. L. Gausewitz Appointed Dean of New Mexico Law School*, 1947 WIS. L. REV. 291 (1947).

149. *Id.* at 292. Gausewitz's granddaughter also pursued a legal career. See Nancy Gausewitz Berner, *The Uninjured Plaintiff: Constitutional Standing of Qui Tam Plaintiffs After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 35 U.S.F. L. REV. 783, 798 (2001).

150. Briefly,

He served as mayor of Portsmouth from 1926 to 1928 and 1943 to 1944; and was a member of the New Hampshire State Senate from 1933 to 1937 and 1938 to 1939. He also served as senate president from 1935 to 1937; and was a member of the Governor's Council from 1937 to 1938. Dale next secured the Republican gubernatorial nomination, and was elected governor by a popular vote in 1944. He won reelection to a second term in 1946. During his tenure, a state employees' retirement plan was created; tourism and the state's industry were both promoted; and the deficit was reduced. After completing his term, Dale retired from political life. He stayed active, working in the

Recent Cases editor, was born in Russia and came to the United States as a child.¹⁵¹ He became assistant superintendent of a Jewish Orphan Home in Cleveland after graduation.¹⁵² He married an unusually proactive woman for the times. During the war, she worked for the Jewish Aid Society at a settlement house in Chicago.¹⁵³ After the war, Davis went to work for the Federal Land Bank of St. Paul.¹⁵⁴ He became a prominent attorney and civic leader in Duluth,¹⁵⁵ while his wife became a notable member of the Duluth Jewish community and active advocate for social welfare, while also finding time to write a book about *The Fun of Yiddish*.¹⁵⁶

The *Review* editors hoped to bring the law school closer to the profession and to make the courts “more truly institutions for the administration of justice rather than for the mere me-

banking industry, as well as owning and operating the WHEB radio station. Governor Charles M. Dale passed away on September 28, 1978, and was buried in the Valley View Cemetery in Browns Valley, New Hampshire.

New Hampshire Governor Charles Milby Dale, NAT'L GOVERNOR'S ASS'N, http://www.nga.org/cms/home/governors/past-governors-bios/page_new_hampshire/col2-content/main-content-list/title_dale_charles.html (last visited Sept. 27, 2015).

151. *Harry Davis Dies at 57*, DETROIT HERALD, Dec. 30, 1948 (on file with the Duluth Public Library).

152. 20 MINN. ALUMNI WKLY, Mar. 21, 1921, at 11 (on file with the University of Minnesota Law School Library). Although the Minnesota area later became rife with anti-Semitism, this was apparently less true before the 1920s:

In the early years of the 20th century, the University of Minnesota maintained a reputation for civility and open-mindedness within the Jewish community that would continue through World War I and into the 1920s. In contrast to the growing anti-Semitism that emerged later, particularly in Minneapolis, there was, in the words of one faculty member, a “striking difference between the attitude of the University of Minnesota and the city in which it was located. The lack of prejudice, the fairmindedness, the really democratic spirit of the university are so outstanding as to merit special recognition.”

Tim Brady, *A Difference in Tone*, U. MINN. ALUMNI ASS'N, <http://www.minnesotaalumni.org/s/1118/content.aspx?pgid=1383> (last visited Sept. 27, 2015). The alumni association refers to Davis as one of a pioneering group of Jewish students at Minnesota. *Id.*

153. MINN. ALUMNI WKLY, at 12 (1918) (on file with the University of Minnesota Law School Library).

154. MINN. ALUMNI WKLY (1919) (on file with the University of Minnesota Law School Library).

155. *Harry Davis Dies at 57*, *supra* note 151.

156. Her papers are kept at the Minnesota Historical Society. *Ida Bleher Davis: An Inventory of Her Papers*, MINN. HIST. SOC'Y, <http://www2.mnhs.org/library/findaids/p2635.xml> (last visited Sept. 27, 2015). At the time of writing, it was still possible to find an old copy of the *Fun of Yiddish* on Amazon.com.

chanical application of the rules of law.”¹⁵⁷ Moreover, the *Review* would also provide a public service of a kind especially appropriate to a public university. Public universities in particular should be involved in solving a state’s legal problems, just as the engineering and agriculture faculties contribute to solving problems in their fields.¹⁵⁸

The *Foreword* to Issue 1 begins with an apology for foisting yet another law review on the world¹⁵⁹—a complaint that must strike the modern reader as ironic given the explosion of student law reviews since then.¹⁶⁰ According to the *Foreword*, the goal of the *Review* was to “survey the entire field of law, in its most recent developments,” as reflected in new legislation, judicial decisions in the United States and England, and the “almost imperceptible effect of economic changes upon the development of the law.”¹⁶¹ Because law school classes focused on current doctrine and its development, there was a risk that a “narrow and petrifying legalism” would be imprinted on students.¹⁶² By providing the opportunity for collaboration between students and faculty, a law review “ought to do something to develop the spirit of statesmanship as distinguished from a dry professionalism.”¹⁶³

The aims expressed in Issue 1 do not fit well with standard descriptions of legal scholarship in the early part of the twentieth century. The *Foreword* to Issue 1 seems dedicated to the goal of public improvement more than the perfection of legal “science,” and the preference for the administration of justice over “dry legalism” seems out of tune with the formalism identified with Harvard and the dominant strain of scholarship. But formalism, while dominant, did not hold universal sway, as clearly was true at Minnesota judging by the editorial and lead articles (especially the one on juvenile welfare).

There were signs of discontent with formalism elsewhere. In particular, Yale, which would later become a bastion of legal

157. Fletcher, *supra* note 14, at 65.

158. *See id.*

159. *See id.* at 63. Perhaps the editors would not have been so apologetic if they had realized that several hundred additional law reviews would come after they did.

160. The Library of Congress now carries approximately 350 law reviews. *Law Reviews and Periodicals*, LIBR. OF CONGRESS, <http://www.loc.gov/law/help/periodicals.php> (last visited Sept. 27, 2015).

161. Fletcher, *supra* note 14, at 63.

162. *Id.* at 64.

163. *Id.*

realism, took a different intellectual approach, partly in an effort to compete with the more prestigious programs at Harvard and Columbia.¹⁶⁴ It stressed its connections with other parts of the university, claiming with a bit of exaggeration to be the leading interdisciplinary law school in the country.¹⁶⁵ In 1916 the outgoing Yale dean called for more study into comparative law and greater attention to the "legal-political problems which the changes in our economic and social life are creating with unprecedented rapidity."¹⁶⁶ A Yale faculty member, Wesley Hohfeld, called for the use of legal science to make the law more efficient, to eliminate worn-out doctrines (like "liberty of contract"), and to evaluate the benefits of legislation.¹⁶⁷ Thus, faculty members would hopefully become active as legal reformers.¹⁶⁸ Vance may have been influenced in the direction of realism by his time at Yale, although it is equally possible that he came there with a realist bent and helped contribute to Yale's move in that direction. Or perhaps legal scholarship even outside of Yale and Columbia had already begun to shift more in the direction of public law and consideration of policy than the conventional account suggests.¹⁶⁹

III. LAW AND LEGAL SCHOLARSHIP IN THE PROGRESSIVE ERA

So far, I have been focusing narrowly on the legal academy, first with the development of legal education more broadly and then at Minnesota, followed by similar explorations of the early law reviews. But to understand Issue 1, we need a broader per-

164. Gordon, *supra* note 76, at 80–81.

165. Langbein, *University*, *supra* note 23, at 65.

166. Gordon, *supra* note 76, at 82.

167. *Id.* I have to confess that I knew of Hohfeld only as the creator of a system for classifying legal relations into duties, licenses, privileges, rights, etc. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). As a result, I imagined him to be a champion of conceptualism, which was obviously an injustice.

168. Gordon, *supra* note 76, at 83. The pragmatist philosophers emerged during roughly the same time period, MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA* 237 (2003), though I am not aware of any evidence that anyone on the Yale faculty had ever heard of them.

169. For instance, the Harvard Law Review for 1916–1917 probably had a majority of private law articles, some on subjects like suretyship that have dropped out of the law school curriculum. However, there were several public law articles. See generally *Table of Contents*, 30 HARV. L. REV. iii (1916).

spective about the times in which it was written and how some of the articles reflected the temper of the times.

A. TEDDY ROOSEVELT, WOODROW WILSON, AND PROGRESSIVE POLITICS

It was a period in some ways not unlike our own and in some ways very different (but isn't that always true?). In 1910 the population of the United States, almost 92 million, was less than a third of the current population.¹⁷⁰ About fifteen percent of the population was foreign-born,¹⁷¹ only slightly higher than the percentage in 2010.¹⁷²

While the economy was growing, the benefits were not equally distributed: the top one percent owned almost half the wealth and got about fifteen percent of the income.¹⁷³ (Sound familiar?) About half the population was working class, performing manual labor for wages rather than owning their own businesses or farms.¹⁷⁴ Differences between social groups were in some ways sharper than they are today. In a society where less than one percent of adults had been divorced, the figure for the wealthy was ten to twenty times higher.¹⁷⁵

Life expectancy differed sharply between different groups at the turn of the last century. A child born to a white-collar family in Detroit in 1900 had a life expectancy of fifty-three years; the life expectancy for a working class child was five years less, and the life expectancy of a child of Polish immigrants was only forty-one.¹⁷⁶ The country was becoming more urban, with a major shift toward cities in terms of population and wealth.¹⁷⁷ The surge in immigration continued into the new century, with over a million immigrants arriving in 1905 alone.¹⁷⁸ There were also shifts in family patterns, with women

170. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921* 9 (1984) (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 9).

171. *Id.*

172. See *The Foreign-Born Population in the United States*, U.S. CENSUS BUREAU, https://www.census.gov/newsroom/pdf/cspan_fb_slides.pdf (last visited Sept. 27, 2015).

173. BICKEL & SCHMIDT, *supra* note 170.

174. MCGERR, *supra* note 168, at 15.

175. *Id.* at 11.

176. *Id.* at 17.

177. *Id.* at 30.

178. *Id.* at 33.

engaging in more activities outside the home, and couples marrying later and having fewer children.¹⁷⁹

Given the demographics, it may be no surprise that class conflict was a visible of life in early twentieth century America. There were several, frequently violent, strikes with national impact in 1892 and 1894.¹⁸⁰ A 1902 strike by coal miners threatened to leave the eastern United States without enough coal for heating, and the strike was settled only by the active intervention of President Theodore Roosevelt, who forced the mine owners to agree to arbitration.¹⁸¹

Roosevelt's presidency represented the arrival of the Progressive movement to national influence. Progressivism has been called "the creed of a crusading middle class."¹⁸² The movement sprang from concerns about the unbridled free market after a serious depression and two serious bank panics.¹⁸³ Progressives believed that only government could limit private power as the free market would benefit society rather than serving as a source of abuse and predation.¹⁸⁴ It was government's responsibility to:

establish rules for business, to guarantee unions and cooperatives rights to organize and pursue collective action, to regulate the hours of work in areas of federal jurisdiction, to maintain a creative competition among firms, to keep prices reasonable (through competition and a low tariff) and to create public central banking and credit institutions.¹⁸⁵

The Progressive crusade resulted in tangible legislative changes. At the state level, there was considerable legislative ferment. State laws addressed a wide range of matters relating to the workplace, all of them now familiar parts of the economic order. They prohibited child labor, set maximum work hours, and set workplace safety standards.¹⁸⁶ These measures were not part of a coordinated program and varied considerably between

179. *Id.* at 44-45, 51-52.

180. *Id.* at 55.

181. *Id.* at 118-25.

182. *Id.* at xiv.

183. Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1290 (2011).

184. *Id.*

185. *Id.*

186. OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910* 155 (1993) (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 8).

states.¹⁸⁷ But “[t]aken collectively . . . they represented a striking enlargement of the domain of government power.”¹⁸⁸

At the national level, the Progressives were responsible for a great deal of important new legislation. Between 1910 and 1920, Congress enacted legislation creating the Federal Reserve,¹⁸⁹ established an agricultural extension service to improve farming practices,¹⁹⁰ formed the Federal Trade Commission,¹⁹¹ set up the Labor Department,¹⁹² banned child labor,¹⁹³ enacted an eight-hour day law for railroad workers,¹⁹⁴ and enacted an income tax.¹⁹⁵ Other innovations included the first serious efforts at conserving national forests, the creation of the Departments of Commerce and Labor, and health regulations in the food and drug industries.¹⁹⁶ The constitutional views of the opponents of the Progressives were in some ways similar to those of current conservatives regarding the importance of safeguarding property and liberty from over-extensions of federal and state power.¹⁹⁷ But it may surprise readers in the early twenty-first century, to learn that the sharp debates over progressive reforms did not fall along partisan lines. In Congress, progressive measures were backed by Democrats from the South and the West, along with Midwestern and Western Republicans.¹⁹⁸

187. *Id.* at 151.

188. *Id.* at 155.

189. KENDRICK A. CLEMENTS, *THE PRESIDENCY OF WOODROW WILSON* 43 (1992).

190. *Id.* at 58–59.

191. *Id.* at 50.

192. *Id.* at 77.

193. CARL H. CHRISLOCK, *THE PROGRESSIVE ERA IN MINNESOTA, 1899–1918* 5 (1971).

194. *Id.*

195. CLEMENTS, *supra* note 189, at 39.

196. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 629 (1997).

197. Their worldview is well-summarized by a recent writer:

Convinced that theirs was the only true interpretation of the Constitution, constitutional conservatives presented themselves as warriors in an epic struggle between individualism and collectivism. For them, the Progressive reforms culminating in the New Deal would have the effect of supplanting individual liberty with servitude of the individual to the state. It thus represented a challenge to the Constitution itself.

Paul Kens, *Revision of Progressive Era History Continues*, 50 *TULSA L. REV.* 519, 523 (2015).

198. Sanders, *supra* note 183, at 1282.

The Progressive movement also had a darker side, including its tolerance of segregation (sometimes shading into actual support for Jim Crow laws),¹⁹⁹ coupled with a patronizing attitude toward African Americans.²⁰⁰ President Wilson himself was genteelly, but unmistakably, racist and supported segregation of black federal workers.²⁰¹ Progressives were also attracted to eugenics as a means of social improvement in a way we would find very disturbing today.²⁰² In short, some progressive ideas became building blocks of modern society, others now seem signs of a less enlightened era.

Progressives were near at hand for a law school located in Minnesota, but its supporters were not who you might expect. Political divisions were complicated. Today, big cities are associated with liberalism, but in Progressive Era Minnesota, the Progressive “base” consisted of the non-urban middle class, with small-town residents from places like New Ulm and Long Prairie emerging as leaders in the movement.²⁰³ The Twin Cities business community was ambivalent but opposed progressives on many issues.²⁰⁴ Ethnic divisions were also important, given that more than two-thirds of the population of Minnesota had foreign-born fathers in 1905.²⁰⁵ The German-American community rejected progressivism, partly because it was identified with Prohibition,²⁰⁶ while Norwegian-Americans were attracted to progressivism, in part for the same reason the German-Americans were opposed.

The strength of support for progressivism in Minnesota is indicated by the fact that in 1912 Teddy Roosevelt carried the

199. MCGERR, *supra* note 168, at 180–81.

200. *Id.* at 194–96. See also CHRISLOCK, *supra* note 193, at 3 (belief in white biological superiority “inhibited solid identification with the Negro rights movement”).

201. CLEMENTS, *supra* note 189, at 45.

202. It has been said that “the eugenics movement was the dark underside of the Progressive Movement with its desire to apply principles of efficiency to the management of government and to delegate control of social welfare programs to a professionally trained class of experts.” Seemingly, eugenics was the experts’ solution to problems of crime and economic dependency. Kevin E. Grady, *A Review of Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell*, 26 GA. ST. U. L. REV. 1295, 1296 (2010) (despite Holmes’ statement in *Buck v. Bell* that three generations of idiots are enough; description does not apply to any of three involved in the case, including the one who was subjected to compulsory sterilization).

203. CLEMENTS, *supra* note 189, at 22.

204. *Id.* at 25–30.

205. *Id.* at 32.

206. *Id.* at 34.

state as a third-party Progressive candidate, with Wilson a close second, and the Republican conservative Taft far behind.²⁰⁷ At the movement's high point in 1915, Minnesota Progressives succeeded in enacting some important state legislation, including a county-option plan for liquor, a law creating regulatory jurisdiction over telephone companies, a state-wide pension plan for public school teachers, and a liberalization of the workers' compensation law adopted just two years earlier.²⁰⁸

Under the influence of the Progressives, the government attempted to take on novel and untested roles. The legal system was then confronted with the question whether to respond by adapting to these new rules or attempting to undo them. As we will see in Section B, judicial responses were inconsistent but often the latter approach held sway.

B. LAW AND THE MODERN REGULATORY STATE

Judicial opinions from the late nineteenth and early twentieth century have not, on the whole, enjoyed a favorable reputation today.²⁰⁹ With characteristic pungency (and not-uncharacteristic hyperbole), Grant Gilmore remarked that the "few people—including myself—who have ever spent much time studying the judicial product of the period have been appalled by what they found."²¹⁰ After the Civil War, he says of the state courts, "the supply of great judges seemed, almost overnight, to vanish," and "it is hard, even for someone who is familiar with the literature, to summon up the name of a single judge."²¹¹ Gilmore contended that judges seemed to "start from

207. *Id.* at 55.

208. *Id.* at 87.

209. It has been suggested that the increasingly activist role of the courts after the Civil War was linked to a change in the nature of legal education:

Thus, the decline of the broad view of academic legal education after the midpoint of the nineteenth century may be attributed not so much to the triumph of the Harvard model of legal education as to the triumph of the judiciary. . . . As lawmaking power increasingly became concentrated in the judiciary, training for public service increasingly became synonymous with training in private law for those preparing to practice before the courts. Academic legal education could no longer aspire to provide any broader training for citizenship and public service when citizenry and legal profession alike were preoccupied with the pursuit and protection of private gain.

Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 643 (1941).

210. GILMORE, *supra* note 31, at 54.

211. *Id.* at 55. This is surely an exaggeration: Gilmore must have been familiar at least with Chief Justice Thomas Cooley in Michigan, author of a fa-

the assumption that the law is a closed, logical system," so that the "judicial function has nothing to do with the adaptation of rules of law to changing conditions."²¹² Rather than explaining the reasons for their decisions, "[i]t was enough to say: The rule which we apply has long been settled in this state (citing cases)."²¹³ It was the great age of the string citation.²¹⁴ Lawrence Friedman agrees that the "work of the average judge in 1870 or 1900 seems plainly weaker than the average work of 1830."²¹⁵

On the whole, the courts aligned themselves with business against workers. Although they upheld protections for women and children—considered to be weaker groups in need of protection²¹⁶—the courts of this period have been called the "long-time enemy of organized, assertive wage earners."²¹⁷ They prohibited union shop contracts in which employers agreed to hire only union workers, upheld suspension of habeas corpus during a violent strike, held that union activities were subject to the anti-trust laws, and issued injunctions against sympathy strikes and secondary boycotts.²¹⁸

At the Supreme Court, there were major constitutional developments.²¹⁹ In the decade prior to the launch of the *Minnesota Law Review*, the Court handed down its momentous decision in *Lochner v. New York*, striking down a maximum-hours law for bakers as a violation of their freedom of contract.²²⁰ Similar-

mous treatise on constitutional law, and Judge John Dillon in Iowa, a leading authority on the rapidly burgeoning subject of municipal law.

212. *Id.* at 56.

213. *Id.* at 56–57.

214. *Id.* at 56.

215. FRIEDMAN, *supra* note 16, at 476 (emphasis omitted).

216. MCGERR, *supra* note 168, at 137.

217. *Id.* at 143.

218. *Id.* at 144–53.

219. Revisionist constitutional historians argue that these cases reflected "mapping out the boundary between public power and private rights as judges sought to apply constitutional principles to individual cases." WHITE, *supra* note 79, at 244.

220. 198 U.S. 45, 64–65 (1905). Fiss sees *Lochner* as being rooted in a conception of the constitutional community that delegated power to government over only limited matters. That power did not allow legislation favoring particular groups such as workers, although there was an exception for certain groups who were considered disabled in some sense. FISS, *supra* note 186, at 160–61. The state could adopt measures that directly protected the health of workers, but not laws that interfered explicitly with "the freedom of the parties to bargain—a freedom that was seen as the central dynamic of the market." *Id.* at 164.

ly, in *Adair v. United States*,²²¹ the Court invalidated a federal law that prohibited “yellow dog contracts,” in which employees agreed never to join a union.²²² But the Court’s decisions during that decade have been called “uncertain and jagged,” because the Court seemed to lack clear standards and had little guidance from the common law or constitutional precedent.²²³ For instance, although it struck down a maximum hours law for bakers in *Lochner*, it upheld such a law for female workers in *Muller v. Oregon*.²²⁴ Outside of the labor area, the Court also whittled away at progressive efforts by cutting back on rate regulation of railroads.²²⁵

The period between *Lochner* and 1917 also saw a number of rulings favorable to progressive legislation. The Court upheld a statute that imposed liability on shippers for items damaged in transit.²²⁶ It also upheld a federal statute that imposed liability on railroads for negligent injury and abolished common law defenses such as contributory negligence in those cases.²²⁷ Likewise, the Court upheld congressional power to regulate intrastate railroad rates as an adjunct of its regulation of interstate rates.²²⁸ After 1914, although there were exceptions, federal reform legislation continued to be upheld in most cases.²²⁹ For instance, the Court upheld the Mann Act,²³⁰ which prohibited the transportation of women in interstate commerce for “immoral” purposes.²³¹ But, as one Supreme Court historian put

221. 208 U.S. 161 (1908).

222. Fiss explains the decision as resting on the view that complete freedom to fire an employee was the counterpart of complete freedom of the employee to quit, both of which “expressed the essentially consensual nature of the employment relationship.” FISS, *supra* note 186, at 167. More generally, Fiss sees these cases as representing a reaction to the progressive movement and an insistence that “the state was denied the authority to alter the distribution of power or wealth in civil society.” *Id.* at 295.

223. *Id.* at 157.

224. *Id.* at 174.

225. *Id.* at 185–221.

226. *Atlantic Coast Line R.R. Co. v. Riverside Mills*, 219 U.S. 186, 208 (1911).

227. *Howard v. Ill. Cent. R.R. Co. (Employers’ Liability Cases)*, 207 U.S. 463, 498 (1908).

228. *BICKEL & SCHMIDT*, *supra* note 170, at 216–17. In another case upholding federal power, the Court held that congressional control of navigable waters trumped the property interest of the owner of the river bed, usually the owner of adjacent land. *Id.* at 221–22.

229. *Id.* at 415.

230. 18 U.S.C. §§ 2421–24 (2012).

231. *Caminetti v. United States*, 242 U.S. 470, 483 (1917).

it, this line of cases “came to a crashing halt” in 1918,²³² when the Court struck down a federal child labor law as exceeding congressional power under the commerce clause.²³³ Thus, the courts were very much involved in the contest between Progressives and their opponents.

The influence of the Progressive movement is not hard to see in Issue 1. The most obvious example is the article by Judge Edward F. Waite.²³⁴ Waite seemingly had close ties to the law school, because he surfaces again as a key supporter for a later law school plan to add courses on legislation, judicial administration, and the history of law and criminology to the curriculum.²³⁵ Waite had been a prosecutor in a major municipal corruption case, chief of police, and then a judge in Minneapolis.²³⁶ Although racial issues receive only a passing mention in the article, Waite was also a strong advocate of racial equality.²³⁷ But his main passions were child welfare and juvenile courts.²³⁸

Waite offered a strong endorsement of children’s rights, including the right to a fair opportunity to develop the child’s potential.²³⁹ He proclaimed the twentieth century “the century of the child,” because “[n]ever before have the obligations of socie-

232. BICKEL & SCHMIDT, *supra* note 170, at 447.

233. *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

234. Waite, *supra* note 11, at 48.

235. See STEIN, *supra* note 85, at 105–06.

236. See Waite, *Edward Foote (1860–1958)*, MNOPEDIA, <http://www.mnopedia.org/person/waite-edward-foote-1860-1958> (last visited Sept. 27, 2015) (administered by the Minnesota Historical Society). Waite died at the age of 98 in 1958. *Id.*

237. *Id.*

Waite explored a range of local issues in his publications and speeches. He wrote about the separation between church and state, about the condition of minorities in Minneapolis, and about racial segregation in the city’s public schools. He stressed the importance of overcoming prejudice, pointing out that facets of identity like race and religion are determined by chance.

Id.

238. *Id.* Barry Feld links the creation of juvenile courts to changing cultural understandings of childhood:

The newer view of children altered traditional child-rearing practices and imposed a greater responsibility on parents to supervise their children’s moral and social development. Many Progressive reform programs shared a child-centered theme; the juvenile court, child labor and welfare laws, and compulsory school attendance laws reflected and advanced the changing imagery of childhood.

Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991).

239. Waite, *supra* note 11, at 52–53.

ty to its more helpless members been so generally recognized."²⁴⁰ Waite argued that legislators need to learn from experience with new laws, which are hardly likely to be perfect when they start out.²⁴¹ The task of suggesting improvements was delegated to an expert commission with the goal of bringing Minnesota law up to the "best contemporary thought and experience."²⁴²

In many respects, Waite seems ahead of his time, with his plea to consider giving illegitimate children the right to inherit from their fathers.²⁴³ He castigates the current state of the law as "but a slightly humanized survival of the cruel common law,—so careful of inheritable property and so careless of innocent and helpless childhood."²⁴⁴ He also argued that it was time to reconsider the exclusion of unmarried women from government aid granted to mothers with dependent children.²⁴⁵ Such aid was a new idea first adopted in the United States six years earlier and in Minnesota four years earlier.²⁴⁶

But there were also some harsher notes in the article. It is disturbing to read his endorsement of sterilization for the mentally disabled,²⁴⁷ a practice upheld by the Supreme Court in *Buck v. Bell*.²⁴⁸ Other parts of the discussion manage to be *both* appealing and repelling. He argues for more state control over the placement of children for adoption, having had before him "children who had been picked up and kept as one might harbor a vagrant kitten until a chance occasion brought them into court."²⁴⁹ So far, so good. But he spoils the discussion with his example of the inappropriateness of an African American family raising a white child who had been left at their door.²⁵⁰

240. *Id.* at 48.

241. *Id.* at 49.

242. *Id.* at 51.

243. *Id.* at 55.

244. *Id.*

245. *Id.* at 60.

246. *Id.*

247. *Id.* at 53–54.

248. 274 U.S. 200, 207 (1927).

249. Waite, *supra* note 11, at 58.

250. *Id.* at 58–59. His language seems a bit condescending:

It is no reflection upon the good man and woman who cared for him, took him into their hearts and wished to keep him as their own, to question whether it was well that this relation should continue; but in all the great state there was no one whose official duty it was to raise that question.

Thus, Waite's article reflects both the strengths of the Progressive movement, such as its willingness to experiment with new ways of helping the disadvantaged, and its weaknesses, such as its ability to treat those very people as less than equal. Both his strengths and his weaknesses were those of the Progressive moment, not merely his own.

A second article in Issue 1 also has Progressive affinities. Although it is purely doctrinal, its topic is how to draw the boundary between governmental control and the public interest versus private exploitation of resources.²⁵¹ The author of the article, Oscar Hallam, was an Associate Justice on the Minnesota Supreme Court. He had an academic bent, having joined the faculty of the St. Paul School of Law (later William Mitchell College of Law), where he became Dean in 1919.²⁵² When he later unsuccessfully ran for the Republican nomination for the U.S. Senate, he was described as "a progressive, but not of the extreme kind."²⁵³

Justice Hallam at the onset eschews any purpose of discussing "abstract theories"; instead, he says, he will limit himself to the case law.²⁵⁴ In some states, the government held title to the land under the water (as well as an interest in the waters themselves), either in a proprietary capacity (which would include ownership of minerals) or in a sovereign capacity.²⁵⁵ In terms of states taking the latter view, Hallam says "little more can be done than to give the substance of the few decisions that we have."²⁵⁶ He then proceeds to do so, allotting one paragraph per case, for seven tedious pages, ending without drawing any conclusion of his own.²⁵⁷ The article is well below the others in quality, being purely descriptive, but presumably being a Minnesota Supreme Court justice gave him a certain amount of freedom from the editors' control. What is most interesting

Id. at 59. Later in life, at least, he seems to have been a champion of racial equality. See *supra* note 237.

251. Hallam, *supra* note 10.

252. *Proceedings in Memory of Associate Justice Ingerval M. Olsen and Associate Justice Oscar Hallam*, 220 MINN. REP. xxix (1946), <http://mn.gov/lawlib/judges/memorials/Mem220MinnHallam.pdf>.

253. *Primary Monday in Gopher Race*, MILWAUKEE SENTINEL, June 16, 1923, at 1. For the benefit of those who hail from further away, it may be worth mentioning that the University of Minnesota's sports mascot is the gopher.

254. Hallam, *supra* note 10.

255. *Id.* at 40.

256. *Id.*

257. *Id.* at 40-47.

about the article is the public-private conflict inherent in the topic—a preoccupation of the Progressives—rather than what Hallam has to say about it.²⁵⁸

Some of the student work in Issue 1 also addresses major concerns of the Progressive Era. One student note discusses a Massachusetts case involving an injunction against a union, which was trying to prevent members of a more radical union (the Industrial Workers of the World, also known as Wobblies) from getting jobs.²⁵⁹ In order to prevent anti-labor injunctions, the state legislature had passed a law declaring that the right to work is not a form of property, on the assumption that equity courts would act only to protect property rights.²⁶⁰ The state court declared the state law unconstitutional, but the student note argued for a different approach to the case.²⁶¹ The author argued that the supposed rule limiting courts to the protection of property interests had been stretched so far as to be meaningless, and that the only test should be irreparable injury.²⁶² The author concluded that the Massachusetts court was obliged “to protect by injunction the personal right of a group of laborers to work, unless it can be said that they have an adequate remedy at law.”²⁶³ The author then questioned whether “a ver-

258. It is unfortunate that Hallam did not delve into the issue more deeply. The general topic of the government's rights and duties involving navigable waters became important with the rise of the environmental movement a half a century later, in the guise of the public trust doctrine. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 471 (1970).

259. *Property Rights Note*, *supra* note 12.

260. *Id.* at 72.

261. *Id.*

262. *Id.* at 72–76. The student was well ahead of his times, as shown by this discussion of the law almost fifty years later:

During the course of the nineteenth century, American courts extended the range of protectible property interests to include the right to do business free from various sorts of unfair competition and free from picketing. The process has continued during this century, permitting injunctions to become increasingly available to protect what had previously been considered personal rights An increasing number of jurisdictions—perhaps the majority today—have rejected the rule outright . . . by holding that “equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction.”

Development in the Law: Injunctions, 78 HARV. L. REV. 994, 999 (1965). The irreparable injury test, in turn, was later criticized as too formalistic and subject to manipulation to be useful. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 5–7 (1991). Notably, the index to the book does not contain an entry for “property” or “property rights.”

263. *Property Rights Note*, *supra* note 12, at 76.

dict for damages against a labor organization would be a plain, adequate, and complete remedy for being unlawfully deprived of the right to earn a living.”²⁶⁴ So far as I can tell, the property requirement for injunctions is now extinct—two of the remedies professors I consulted had never heard of it, and a third thought it might perhaps have been found in nineteenth century treatises without ever being really followed. But the student’s willingness to suggest reform of a long-standing rule of law, in a case involving the rights of radical workers, seems notable.

A case note also reflects Progressive thought.²⁶⁵ It discusses with approval a case holding that a regulatory commission could force one telephone company to connect with another company’s phone lines.²⁶⁶ The case note seems to exemplify the Progressive Era’s enthusiasm for regulation in the public interest as opposed to private control.

In at least one way, then, Issue 1 reflected the preoccupations and concerns of its times. But it was also forward looking in its orientation toward law reform, its open discussion of policy, and its avoidance of formalism. This policy orientation is also clearly present in the current issue of the Review, nearly a century later.²⁶⁷ Like the student note about telephone interconnection, two of the articles deal with the need to adapt the law to changing technologies.²⁶⁸ Indeed, another article in the Issue devotes considerable attention to *Lochner*-era cases that so upset the Progressives.²⁶⁹ Thus, we continue today, in many ways, to pursue an intellectual agenda that now goes back at

264. *Id.*

265. See generally Recent Cases, *Telephones—Physical Connection—Eminent Domain—Police Power*, 1 MINN. L. REV. 95 (1917).

266. *Id.*

267. For instance, Katharine Baker argues that discrimination law provides a better method than criminal law for controlling nonconsensual sexual behavior on campus. Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221 (2015).

268. See Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015) (contending that the government’s use of “jawboning” as an informal regulatory technique should be limited, with particular reference to the Internet); Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129 (2015) (arguing that the new realities of interstate electricity transmission require changes in the law governing the approval of new power lines).

269. Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 323–31 (2015).

least a century, of bringing law into tune with technological and social changes through the use of policy analysis.

IV. THE LAW SCHOOL AND THE BROADER WORLD

The year 1917 was, as it turned out, nearly the end of the Progressive Era. For it was not to be long before the United States was drawn into World War I, shifting the nation's priorities and putting reform on the back burner until the New Deal. Issue 1 was not blind to the risk of war, nor was it parochially confined to the domestic sphere in its view of the law.

A. THE ROAD TO WORLD WAR I

Europe had been at war since the summer of 1914, with a half a million men killed in the first month of the war alone.²⁷⁰ The war ended almost fifty years of peace in Europe.²⁷¹

It rapidly became clear that the war was not going to end any time soon, and Wilson adopted a policy of neutrality in the hope that the belligerents would eventually turn to the United States to mediate the conflict.²⁷² He also feared that war would bring out the worst in American society.²⁷³ Initially, loans to any of the belligerents were banned, but this ban was weakened substantially and then abandoned once it became clear that it would tip the balance of power in favor of the Germans.²⁷⁴

The biggest sore spot concerned the right of the United States to trade with the belligerent parties under international law.²⁷⁵ Britain imposed an embargo on Germany, with the result that in two years American trade with Germany collapsed, while trade with England, France, and Italy tripled.²⁷⁶ The German effort to cut off trade with Britain was the main cause for the United States' entrance into the war.²⁷⁷ Tensions escalated in 1915 when the Germans announced they would sink neutral vessels approaching or leaving the British Isles.²⁷⁸ Policies on both sides vacillated, as the Germans made fitful efforts

270. CLEMENTS, *supra* note 189, at 115.

271. *Id.* at 114.

272. *Id.* at 116.

273. JOHNSON, *supra* note 196, at 643.

274. CLEMENTS, *supra* note 189, at 116–18.

275. *Id.* at 119–20.

276. JOHNSON, *supra* note 196, at 644.

277. *Id.* at 643.

278. CLEMENTS, *supra* note 189, at 123–25.

to placate the Americans and Wilson continued to pursue a role as a neutral mediator. A series of German attacks on ships disrupted these efforts at reconciliation. The best remembered is a German submarine's sinking, without warning, of the English passenger ship *Lusitania*, killing 1201 passengers and crew members including 128 Americans.²⁷⁹ One modern historian calls this "an international crime without precedent or mitigating circumstance."²⁸⁰ Relations somewhat stabilized after the Germans adopted a more limited approach to submarine warfare.²⁸¹ But this stability did not last.

Ultimately, the Germans decided that if they could cut off trade to Britain, they could win the war before the United States could effectively intervene.²⁸² On January 31, 1917, they again announced a policy of sinking all ships near the British Isles.²⁸³ This policy had originally been supported by the military but was opposed by the civilian leadership until a conference with the Kaiser.²⁸⁴ The new German policy led to what has been called "an appalling slaughter of seamen and civilian passengers in the Atlantic sea-lanes."²⁸⁵ Wilson broke off diplomatic relations with Germany.²⁸⁶ After learning of the sinking of three American ships, Wilson convened a special session of Congress, which declared war on April 2.

Public opinion in Minnesota began as heavily neutralist, with blame for the war placed on the European political system rather than either side.²⁸⁷ As one historian put it, "[w]hat most Americans thought they saw in Europe was a conflict between two unprincipled power blocs, neither of which had a sufficient moral edge to warrant risking American neutrality."²⁸⁸ Rural Minnesotans and urban workers embraced neutrality.²⁸⁹ By 1916, however, American opinion was more divided.²⁹⁰ The

279. *Id.* at 125.

280. JOHNSON, *supra* note 196, at 537.

281. CHRISLOCK, *supra* note 193, at 91.

282. CLEMENTS, *supra* note 189, at 137-38.

283. *Id.* at 138.

284. CHRISLOCK, *supra* note 193, at 128-29.

285. JOHNSON, *supra* note 196, at 537. Tensions were also increased by publication of a secret telegram from Germany to the Mexican government proposing a joint offensive alliance against the United States. *Id.* at 537-38.

286. *Id.*

287. CHRISLOCK, *supra* note 193, at 69.

288. *Id.* at 75.

289. *Id.* at 93.

290. *Id.* at 91.

German-American, Scandinavian, and Irish communities remained strongly anti-interventionist.²⁹¹ Those of Anglo-Saxon descent, however, favored intervention on the side of the Allies.²⁹² Thus, in January 2017 when Issue 1 appeared, a divided nation was teetering on the edge of the precipice.

B. THE MINNESOTA LAW REVIEW AND THE INTERNATIONAL SPHERE

The threatening prospect of war did not escape the notice of the law review, and the issue of neutrality was the subject of the lead article in the issue.²⁹³ C. D. Allin, the author of the article, was a member of the University of Minnesota political science department whose expertise included political theory, political parties, and English constitutional law.²⁹⁴ He went to college at the University of Toronto, studied for a year as a graduate student at Harvard, and then served as an instructor at Stanford for three years.²⁹⁵ He continued his graduate studies in Berlin and at Oxford, and before coming to Minnesota had taught at Queen's University, where he published a book on the origins of Australian federalism.²⁹⁶

291. *Id.* at 100.

292. *Id.*

293. Allin, *supra* note 8, at 1.

294. We learn something of his interests from a notice in *The Daily Palo Alto* four years later describing his teaching areas there:

Professor Allin will give a course in Political Theory showing the historical development of political ideas from the classical period to the present, with special reference to such topics as the nature of the state; the right of the individual; the doctrine of sovereignty; and general will and the separation of powers.

He will also give a course in the Government and Politics of the British Empire, with the organization and workings of the English and Imperial constitutions.

Professor C. D. Allin To Teach Political Science, THE DAILY PALO ALTO, Mar. 6, 1923, at 3, <http://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19230306-01.2.38>.

295. Allin may also have had training in economics. An earlier article in the *Stanford Daily* refers to C. D. Allin as a former instructor of economics there. *Return of Professor Marx*, THE DAILY PALO ALTO, Sept. 7, 1904, at 1, <http://stanforddailyarchive.com/cgi-bin/stanford?a=d&d=stanford19040907-01.2.6&e>. But this was probably an error, particularly as the primary subject of the story was someone else.

296. See 8 UNIVERSITY OF TORONTO MONTHLY 91 (1907–1908). The same volume also contains a short review of Allin's book on Australian federation by S.J. McLean, which emphasizes the way Allin connected constitutional issues to social dynamics:

Mr. Allin has made a real contribution in the field of political science. His study of the movement in Australia shows that in governmental,

Allin's article in Issue 1 concerned a British ship, the Appam, which had been seized by the Germans and taken into an American port.²⁹⁷ The question was whether the Germans had forfeited their rights to the ship by taking it to a neutral port and keeping it there.²⁹⁸ A treaty between the United States and Prussia, originally entered into in 1799, by its terms allowed free access in such cases to neutral ports, but the United States had taken the position that this language was limited to use of neutral ports under escort by the ship that had captured the prize, a view that Allin disputed.²⁹⁹ It was a closer question, however, whether the captured ship was entitled to long-term refuge in the American port or only to a temporary stop for purposes such as repair or refuge from a storm.³⁰⁰ Practices by different nations, and even by the United States itself, were not consistent.³⁰¹ Allin concluded, however, that the rule limiting the prize to temporary purposes was "considerably in advance of the generally accepted principles of international law," "gaining in favor" but not yet embraced by all of the "family of nations."³⁰² Given the rule's unclear acceptance by the community of nations, Allin argued that Germany was not bound by the

as well as more technically juristic matters, the position of Savigny, that continuing institutions are a part of a country's life, not something superimposed, holds good.

S.J. McClean, *The Early Federation Movement of Australia*, in 8 UNIVERSITY OF TORONTO MONTHLY 81, 82 (1907-1908).

297. Allin, *supra* note 8. Prize law has little direct practical significance today given changes in methods of warfare, but still has left an imprint on many doctrines in international law:

Regulation of naval prizes is part of the public international law concerned with war and neutrality. One of the prerogatives of warfare has been the capture of the enemy's property and the transfer of its possession and ownership to the apprehending State and its citizens. While the taking of enemy property on land as booty became the subject of international legal regulation (through codification) only early in this century, controls on the seizure of an adversary's ships and cargoes—as well as those of neutral powers—have preoccupied the minds of masters, merchants, and naval officers (along with their lawyers) since the early Middle Ages. The law of naval prize has an extraordinarily rich history, longer and deeper than perhaps any other discrete subject matter in the law of nations.

David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 33 (1995) (footnotes omitted).

298. Allin, *supra* note 8.

299. *Id.* at 2.

300. *Id.* at 3.

301. *Id.* at 5.

302. *Id.* at 6.

rule in the absence of a public declaration prior to the ship's entry by the United States government.³⁰³

The district court exercised jurisdiction over the ship on the ground that "the entrance of the Appam into a United States port to escape capture constituted . . . a violation of neutrality."³⁰⁴ But Allin observed that no American court had taken such a position and that it was contrary to the view of the State Department.³⁰⁵ In short, Allin said, the lower court's view was "considerably in advance of the accepted principles of international law."³⁰⁶

Allin admitted that the district court's views were "excellent in themselves" and that some of them would probably be incorporated into international law.³⁰⁷ Still, "it is scarcely possible for a neutral court or government to modify the rules of international law to the disadvantage of one or the other of the parties during the course of a world-wide war."³⁰⁸ In any event, it was for Congress, not the courts, to bring the neutrality laws of the United States up to date, since the government "has gotten itself into an embarrassing situation by allowing its treaties and neutrality laws to fall so far behind the more enlightened practices of other nations."³⁰⁹ It is not hard to see the contemporary anxiety over maintaining the country's neutral

303. *Id.*

304. *Id.* at 7.

305. *Id.* at 8.

306. *Id.* at 9.

307. *Id.*

308. *Id.*

309. *Id.* The Supreme Court took a different view:

The principles of international law recognized by this government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

Berg v. British & African Steam Navigation Co., 243 U.S. 124, 149 (1917). Indeed, the Court said,

Were the rule otherwise . . . our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

Id. at 156. The decision was handed down on March 6, after the Germans announced their policy of sinking all ships in the vicinity of England but about a month before the United States declared war.

status at work in Allin's argument against what the Germans might regard as an unfriendly act.³¹⁰

Allin's was not the only internationally-oriented article in Issue 1, which also contained a comparative study of an issue in the conflict of laws.³¹¹ The author was Minnesota Professor Ernest Gustav Lorenzen, who had succeeded Vance as dean at George Washington and then taught at the University of Wisconsin.³¹² Lorenzen was raised in Germany, went to college in the United States, and returned to Germany for a doctorate in law.³¹³ Despite his German origins, he apparently was passionate in his American patriotism.³¹⁴ His interest in European civil law was apparently disdained at Harvard, and Yale had refused to hire him when a faculty member called his views "not only heretical but logically indefensible."³¹⁵ Lorenzen was seemingly something of a workaholic but said that he had agreed to give up working Sundays for a year after his marriage in honor of his new bride.³¹⁶ He left Minnesota for Yale after 1917; apparently the objecting Yale faculty member either became reconciled to his heresies, departed, or was outvoted.³¹⁷ Lorenzen was included later in a list of legal realists,³¹⁸ along with Vance.

310. The Harvard Law Review agreed with Allin:

This policy, enunciated again in the principal case, must inevitably result in the destruction at sea of vessels that would otherwise be harbored until the close of war; but, unless disturbed by the Supreme Court, its adoption by us seems certain.

The Case of the Appam, 30 HARV. L. REV. 161, 162 (1916) (footnote omitted). However, the Yale Law Journal disagreed:

Inasmuch as the bringing of the Appam into Hampton Roads was in violation of our neutral rights, and of our established policy, as shown by our rejection of Article XXIII of the Hague Convention relative to giving asylum to a prize, restitution was rightfully made to the original owners. This was done by virtue of the *res* itself being within the control of the District Court of Virginia, and of its general jurisdiction as a district court to take cognizance of questions of prize, exclusive of German prize court proceedings.

George Stewart, Jr., Editorial, *Jurisdiction of the United States Courts in the Case of the Appam*, 26 YALE L.J. 148, 150 (1916).

311. Lorenzen, *supra* note 9.

312. STEIN, *supra* note 85, at 50.

313. Arthur L. Corbin, *Ernest Gustav Lorenzen*, 60 YALE L.J. 579 (1951).

314. *Id.* Corbin tells the story of how, when Lorenzen was in Washington and the Capitol suddenly came into view, Lorenzen exclaimed "My Country!" *Id.*

315. STEIN, *supra* note 85, at 50.

316. *Id.* at 51.

317. *Id.* at 66-67. However, Lorenzen's time at Yale may not have been entirely happy. According to Kalman, his teaching was considered too traditionalist, at least by more intellectually adventuresome students, and he de-

The title of Lorenzen's article, "The Rules of the Conflict of Laws Applicable to Bills and Notes: A Study in Comparative Law," is hardly likely to generate excitement among readers today.³¹⁹ Two things are notable about the article, however. One is Lorenzen's careful attention to the rules of foreign jurisdictions as a guide (even though they were often contrary to American case law). The other is Lorenzen's focus on practical consequences rather than conceptual purity, contrary to the formalism that generally still reigned at the time.³²⁰

The article focuses on the situation where the person signing a promissory note or bill lacks capacity to contract—either because of youth or because the person was a married woman in a jurisdiction that disallowed contracts by wives.³²¹ The conflict of law issue arises when the rules differ between the jurisdiction of the signer's residence or citizenship and the jurisdiction where the transaction occurs. For instance, a seventeen-year-old might be competent to enter a contract in her home country, but might sign a promissory note for a loan in a country where the legal age of contracting is eighteen. Is the promissory note binding on her in either of those jurisdictions or in a third jurisdiction where enforcement might be sought? Lorenzen analyzes how this type of problem is handled in England, the United States, France, Germany, and Italy.³²² He criticizes professors in "the theoretical atmosphere of their study" for adopting an unrealistic position, in contrast with interna-

camped for Harvard in 1930. KALMAN, *supra* note 35, at 103. Kalman's account is a little at odds with Corbin's description of Lorenzen's affectionate relationship with the students, but perhaps Corbin was putting a favorable spin on things in his memorial essay. Corbin, *supra* note 313, at 580. In any event, by 1947, Yale initiated and financed a book collecting many of his writings on conflicts. See ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947).

318. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226–27 (1931).

319. Lorenzen, *supra* note 9.

320. Lorenzen opposed the Restatement of Conflicts because it classified "completely dissimilar situations under a general abstract principle." KALMAN, *supra* note 35, at 27. At Yale, he continued to oppose "the judicial and scholarly practice of lumping together cases in which 'domicile' gave the courts jurisdiction to divorce, tax, and determine inheritance." *Id.* at 23. Instead, he showed that "regardless of what courts said, the judicial definition of 'domicile' varied according to the fact situation involved." *Id.* at 24. Kalman cites him as an early legal realist. *Id.* at 101.

321. Lorenzen, *supra* note 9, at 11.

322. *Id.* at 11–18.

tional associations had taken into account "the actual needs of business life."³²³

Lorenzen then asks what "sound policy" requires in this situation.³²⁴ In passing, he rejects two leading theories of conflicts law, one based on territoriality and the other on the presumed intent of the parties, as not leading to "satisfactory results."³²⁵ He then tries to balance the policies at stake. He concedes that the rule favored by the international associations would be "practicable," in that it would promote the negotiability of bills and notes and would help harmonize the British and American approaches with "the best thought on the subject in continental Europe."³²⁶ But on the other hand, the United States alone could not ensure uniform treatment by other countries, and this rule might lead to increased litigation in cases where the domicile (but not the place of contracting) allowed the contract.³²⁷ On balance, Lorenzen concludes that the disadvantages of the proposed rule outweigh the advantages, so that any uniform law on the subject should stick to the place of the contract as the sole test.³²⁸ Thus, Lorenzen looks to practical consequences rather than fundamental principles to resolve the issue, in a distinctly modern way.

In addition to these internationally-oriented lead articles, one student's case comment discussed an issue relating to the

323. *Id.* at 18.

324. *Id.* at 27.

325. *Id.* at 29.

326. *Id.* at 30.

327. *Id.* at 31.

328. *Id.* The Second Restatement of Conflict of Laws allows the parties to opt in favor of domiciliary law. Illustration 7 to section 187 states:

H and W, husband and wife, are domiciled in state X. In state Y, W enters into a contract with C, who is domiciled and doing business in that state, in which C agrees to sell goods to H on credit in return for a guaranty from W in the amount of \$1,000.00. The contract recites that it shall be governed by X law. Under the local law of X, married women have full contractual capacity. Under the local law of Y, however, they lack capacity to bind themselves as sureties for their husbands. In an action by C against W, the contract will not be held invalid for lack of contractual capacity on the part of W.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d., illus. 7 (AM. LAW INST. 1971). Section 188 provides a rather open-ended test (place of the most significant contact) for contracts cases, but suggests that contracts should be upheld where possible, so that the case would probably come out the same way even without a choice of law clause in the contract. *See id.* at § 188 cmt. e, illus. 2. It seems somewhat surprising that the capacity of married women to contract continued to provide a source of examples as late as the Second Restatement.

war.³²⁹ A corporation was organized in England before the war; all but one of the shareholders were German.³³⁰ The corporation filed suit after war broke out to recover money that was due before the war.³³¹ The House of Lords ruled that "to allow the suit would be to permit the payment of money to the King's enemies."³³² Although the English court went further than American courts had in piercing the corporate veil, the student author approved.³³³ In the author's view, the court was right to override the "technical theory of the separate entity of the corporation" and to hold that the corporation's nationality was "that of the men who controlled and directed its affairs."³³⁴ "To hold the contrary," said the author, "would be to allow a mere legal fiction to outweigh the palpable fact."³³⁵ Not very formalist!

It is worth noting that, although his work does not appear in Issue 1, Dean Vance also took an interest in international law. In two pamphlets, one published in 1915 and the other just a month after Issue 1, he advocated creation of a World Court.³³⁶ He defended this idea on the basis of the role that the U.S. Supreme Court had played in unifying the nation and resolving disputes between state governments.³³⁷ Although he admitted that such a court would not be successful when vital matters of nation security were in conflict, he considered that it could do much to resolve lesser disputes.³³⁸

329. Recent Cases, *Corporations—Nature and Theory of—Enemy Character*, 1 MINN. L. REV. 89 (1917).

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. See William R. Vance, Dean of the Law School, Univ. of Minn., *The Vision of a World Court* (Aug. 10, 1916), in 28 JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (1917); William R. Vance, Dean of the Law School, Univ. of Minn., *The Supreme Court of the United States as an International Tribunal* (June 16, 1915), in 23 JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 7–8 (1915).

337. The Supreme Court analogy is the general theme of the 1915 pamphlet. The 1917 pamphlet argues that, while much of the World Court's influence would come through its moral authority, it would need to have at its disposal "a small military and naval force that would perform functions analogous to those of marshals and bailiffs in our municipal courts." Vance, *The Vision of a World Court*, *supra* note 336, at 7.

338. *Id.*

CONCLUSION

This Article has recounted the "life and times" of Issue 1. Apart from the sheer interest of exploring a bygone era in the life of the legal academy, there are some broader morals to the story. One is that the usual picture of the development of legal thought is too simplistic, positing an era of unremitting formalism followed by the dazzling counterpoint of legal realism in around the time of the New Deal. Signs of realism began to emerge earlier, and not just at Columbia or Yale. The idea that law can be a tool of social policy did not suddenly burst forth in the New Deal era. It was already percolating in the law school world a dozen years before the 1929 crash.

There are also some lessons that are commonplace in the study of history, but always still a bit jarring. One is about the contingency and erratic evolution of institutions. We learn that student law reviews, which are now so deeply entrenched in the American academy, arose in a haphazard way and did not reach their final form (complete student control) everywhere until much later. We also learn how much scholarly thought is shaped by its time period, with the developments first of the Progressive Era and then of the slide toward involvement in World War I, setting the intellectual agenda. It is easy to see that in retrospect; it is harder to realize that someday, future scholars will describe our own work as merely "typical early twenty-first-century scholarship." Our own values may someday appear as forward looking in some ways and yet as backward in others as Judge Waite's views on non-marital children, children's rights, and eugenics.

Yet at the same time we learn that the intellectual perspective of the time is not as foreign to us as we might have expected. Lorenzen's effort to balance conflicting policies is reminiscent of many articles today. Issue 1 contains interdisciplinary scholarship (in the form of Allin's contribution as a political scientist); advocacy of social change (by Judge Waite); and an international/comparative law orientation (Allin and Lorenzen). No one who reads modern law reviews will find this mix of articles terribly surprising. This can be seen as a tribute to the forward-thinking authors and editors of Issue 1, and it may also be a sign that Minnesota was an early haven for what would later become recognized as the Realist movement.

When we debate legal formalism today, we might learn something through a closer look at how it was actually prac-

ticed in an earlier era and what its critics actually saw as its weaknesses, as opposed to relying on second-half caricatures of both perspectives. And by understanding something of the contingency of current practices and how they have evolved, we may help open our eyes to possibilities for further change. If law schools have changed so much since the days of Dean Pattee, when the law school was the last refuge for academically failing athletes, perhaps they can change again, in equally surprising and unexpected directions.

As the *Minnesota Law Review* moves toward its second century, it has been enlightening to look back at the beginning of its first century. Taken as a whole, the first issue was an auspicious start for the Review. It began nearly a century³³⁹ of deep intellectual engagement with the major issues facing our legal system. May the next century be equally successful.

339. See *supra* note 2 for an explanation of why Volume 100 actually appeared ninety-eight rather than one hundred years after Volume 1.
