

## Law and the Wisconsin Idea

Paul D. Carrington and Erika King

We recall a summer of contentment when American law was suffused with optimism, a season ending a long winter of despair and disorder. For the first fifteen years of this century, many (and perhaps most) American lawyers were filled with confidence that America had healed the wounds of civil war and was healing those of class struggle. We could, and we would, overcome all obstacles to peace and prosperity, not only for our people but for all mankind.<sup>1</sup> This, it was widely believed, would be our century.

As early as 1879 Daniel Coit Gilman, the premier educator of his time, had foretold that we would turn America into a vast "earthly paradise, void of crime, poverty, and unjust discrimination or privilege."<sup>2</sup> By the turn of the century, many Americans were convinced that this was so. The age of invention was in full swing. The sixteen-week war with the Spanish Empire had, despite its ambiguities, reinforced America's evangelical hope that we might liberate all mankind from its many oppressions.<sup>3</sup> And a metaphorical moment was the completion by the United States government of the Panama Canal in January 1914—a task that had confounded Europe, and that the world had regarded as impossible; yet it had been completed on time, under budget, and without a hint of corruption.<sup>4</sup> Progress—moral as well as economic and technical—became for a time the dominant theme of our political discourse.

In no sphere of American life was there greater optimism than in higher education. During the nation's first century, American colleges had found it a

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1. See generally Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.*, 1st ed. (New York, 1955). For a more sympathetic treatment of the populist antecedents to the Progressive Era, see Michael Kazin, *The Populist Persuasion: An American History 193–95* (New York, 1995).
2. President's Opening Address at Saratoga, 12 *J. Soc. Sci.* xxii, xxii (1880).
3. See generally G. J. A. O'Toole, *The Spanish War: An American Epic—1898* (New York, 1984).
4. David McCullough, *The Path Between the Seas: The Creation of the Panama Canal, 1870–1914*, at 611 (New York, 1977).

struggle to keep their doors open, but by the end of the nineteenth century they enjoyed an astonishing boom driven by the appetite of young men and women for credentials certifying their readiness for roles in an industrializing society.<sup>5</sup> In the last years of the nineteenth century, one academic professional organization after another appeared.<sup>6</sup> The American Association of University Professors was founded in 1915; the event signified the emergence of an academic meta-profession comprising numerous subprofessions many of which had materialized over the course of the three preceding decades. The primary *raison d'être* of the AAUP was the establishment of academic freedom and tenure as entitlements of the new profession,<sup>7</sup> entitlements long acknowledged in European universities but new to this continent.

The American Bar Association had been founded in 1878,<sup>8</sup> and in 1900 had spawned the Association of American Law Schools,<sup>9</sup> an institution celebrating the newly emergent academic subprofession of the law. It was an especially heady time for this particular subprofession. In 1906 Roscoe Pound, then dean of the University of Nebraska Law School, challenged the ABA to deal with the many “causes of popular dissatisfaction” with the law,<sup>10</sup> and within a very few years he, John Henry Wigmore, and others had turned the ABA (at least for the moment) from reaction to reform.<sup>11</sup> In 1910, Governor Woodrow Wilson observed to the same audience:

I suppose that all struggle for law has been conscious; that very little of it has been blind or merely instinctive. . . . [B]ut in very few ages of the world has the struggle for change been so widespread, so deliberate, or upon so great a scale as that which we are taking part in. The transition we are witnessing is no equable transition of growth and normal alteration, no silent, unconscious unfolding of one age into another, its natural heir and successor. Society is looking itself over, in our day, from top to bottom, is making fresh and critical analysis of its very elements, is questioning its oldest practices as freely as its

5. Laurence R. Veysey, *The Emergence of the American University* (Chicago, 1965). The male and female roles were of course distinct, but large numbers of women were seeking academic credentials as schoolteachers, social workers, nurses, and librarians—four career tracks that emerged in the last third of the nineteenth century and were almost from the start dominated by women.
6. Mary O. Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905*, at 69–75 (Lexington, Ky., 1975); Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority 168–89* (Urbana, 1977); Dorothy Ross, *The Origins of American Social Science 63* (Cambridge, Mass., 1990).
7. J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 *Yale L.J.* 251, 273–79 (1989).
8. John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt, 75 (Westport, 1984).
9. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s*, at 96–98 (Chapel Hill, 1983); see also American Bar Association, *Report of the Twenty-third Annual Meeting 569–75* (1900).
10. *The Causes of Popular Dissatisfaction with the Administration of Justice*, American Bar Association, *Report of the Twenty-ninth Annual Meeting 395* (1906).
11. N. E. H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *Law & Hist. Rev.* 55, 57–61 (1990).

newest, scrutinizing every arrangement and motive of its life, and stands ready to attempt nothing less than a radical reconstruction, which only frank and honest counsels and the forces of generous cooperation can hold back from becoming a revolution.<sup>12</sup>

The new academic profession, especially the legal academy, expected to play a large role in fashioning our earthly paradise. The model for this role was cast in the most heroic bronze at the University of Wisconsin. One reason may have been that Wisconsin was a state with a large population of German immigrants,<sup>13</sup> who had brought Prussian notions of government responsibility and higher education (including the idea of *lehrfreiheit*, or professorial autonomy)<sup>14</sup> to this continent. The state was also the scene of the most vigorous Progressive politics. Accordingly, it was the best venue for the formation of an academic subprofession devoted to social and economic reform. Indeed, the idea of progressive political reform as an academic mission came for a time to be known as the Wisconsin-Idea. Among those striving to rebuild Wisconsin as an earthly paradise in the early years of this century were several members of the university law faculty. A leader among them was Eugene Gilmore. This article is an account of the Wisconsin Idea at the law school, and hence a partial account of Gilmore's career.

### I. The University of Wisconsin

Because the Wisconsin Idea made an earlier appearance, we begin with a brief account of the development of the University of Wisconsin preceding those years of high optimism. The 1848 constitution of the new state provided for "the establishment of a state university at or near the seat of government."<sup>15</sup> Thus the university and the capitol were from the beginning symbolically linked, lying at opposite ends of State Street in Madison.

The first chancellor of the university, John Hiram Lathrop,<sup>16</sup> was a native of upstate New York. He brought with him to the Midwest the Jacksonian political faith predominating in New York in the 1830s. Upstate Jacksonians of that time followed the leadership of Martin Van Buren and were sometimes known as Barnburners for their alleged willingness to burn their barns to kill the rats residing in them.<sup>17</sup> The Barnburner faith was perhaps best expressed

12. *The Lawyer and the Community*, American Bar Association, Report of the Thirty-fifth Annual Meeting 419, 420-21 (1910).

13. See Richard Nelson Current, *Wisconsin: A Bicentennial History* 34-66 (New York, 1977).

14. For a brief account of German university education at the time, see Abraham Flexner, *Universities: American, English, German* 305-61 (Oxford, 1930). On their notions of academic freedom, see Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 *Tex. L. Rev.* 1265, 1269-81 (1988).

15. Howard J. McMurray, *Some Influences of the University of Wisconsin on the State Government of Wisconsin* 5-6 (1940) (unpublished Ph.D. dissertation, University of Wisconsin); *Wis. Const. art. X, § 6*.

16. Jesse H. Coursault, *John Hiram Lathrop*, 6 *Dictionary of American Biography*, ed. Dumas Malone, 16 (New York, 1935).

17. Herbert D. A. Donovan, *The Barnburners: A Study of the Internal Movements in the Political History of New York State and of the Resulting Changes in Political Affiliation, 1830-1852* (Philadelphia, 1974); see also Whitney R. Cross, *The Burnt Over District: The Social and*

by editorialist William Leggett<sup>18</sup> and in the more theoretical writing of Theodore Sedgwick.<sup>19</sup> Among the other Barnburner evangelicals was Thomas McIntyre Cooley, the founding spirit of the University of Michigan Law School, chief justice of Michigan, author of legal treatises, and the most celebrated American lawyer of the post-Civil War era.<sup>20</sup> The legal professions in the states of the former Northwest Territory were animated by the Jacksonian spirit.

Barnburners proclaimed their doctrine of Equal Rights, the essential themes of which were elaborated in Leggett's editorials: free labor, free schools, free speech, and free trade.<sup>21</sup> A scripture to them was President Jackson's bank veto message deriding the tendency of government to become the tool of the rich and powerful in their unending effort to exploit the working poor.<sup>22</sup> Barnburners were not to be mistaken for Marxists; they did not seek redistribution, nor did they generally favor government intervention on the side of the working class; what they wanted was "a good letting alone." Policies they generally favored included antislavery, free suffrage, equal rights for women (at least with respect to property), prison reform, and temperance. They were prone to mistrust professionalism as a pretense and a form of manipulation. They often wrote legislation abolishing apprenticeship requirements and providing for the election of judges. Many favored codification of the common law to eliminate anachronisms and provide greater access to legal texts for untrained citizens.

Some of those imbued with these ideas saw a need for new institutions of higher education designed for the offspring of the farmers and laborers constituting the core of the citizenry. Among the institutions of higher education established by Jacksonians were New York University,<sup>23</sup> Oberlin College (the first coeducational institution of higher education in the world),<sup>24</sup> and the University of Michigan.<sup>25</sup> They favored more practical education than that

Intellectual History of Enthusiastic Religion in Western New York, 1800–1850 (New York, 1950); Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford, 1957).

18. Richard Hofstadter, William Leggett, Spokesman of Jacksonian Democracy, 58 *Pol. Sci. Q.* 581 (1943); see *A Collection of Political Writings of William Leggett*, ed. Theodore Sedgwick, Jr. (New York, 1840); William Leggett, *Democratick Editorials: Essays in Jacksonian Political Economy*, ed. Lawrence H. White (Indianapolis, 1984).
19. *Public and Private Economy* (3 vols., New York, 1836–39). On the Sedgwick family and Williams College, see Paul D. Carrington, *Legal Education for the People: Populism and Civic Virtue*, 43 *U. Kan. L. Rev.* 1, 15 n.124 (1994).
20. See generally Alan Robert Jones, *The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas* (New York, 1987).
21. See generally Leggett, *supra* note 18, at 3–59.
22. 2 *Compilation of the Messages and Papers of the Presidents 1789–1897*, comp. James D. Richardson, 590 (Washington, 1900).
23. See *New York University, 1832–1932*, ed. Theodore Francis Jones (New York, 1933); *The Law School Papers of Benjamin F. Butler: New York University School of Law in the 1830s*, ed. Ronald L. Brown (New York, 1987).
24. See 1 Robert Samuel Fletcher, *A History of Oberlin College: From Its Foundations Through the Civil War 375–76* (Oberlin, 1943).
25. See Howard H. Peckham, *The Making of the University of Michigan, 1817–1967*, at 16–17 (Ann Arbor, 1967).

customary in the English universities or the older American colleges; in this respect they were influenced by what they knew about universities then emerging in Germany and about the new University of London,<sup>26</sup> an institution reflecting the utilitarianism of Jeremy Bentham. European ideas about the utility of higher education were reformulated in America in 1842 by Francis Wayland,<sup>27</sup> then president of Brown University, regarded by many of his contemporaries as the nation's most thoughtful educator. Their utilitarian ideas were shared by the Congress that adopted the Morrill Act of 1862,<sup>28</sup> setting aside public lands as endowment for state universities and especially for schools of agriculture.

Lathrop was a veteran founder, having founded the law department of Hamilton College before serving as the founding president of the University of Missouri. When he arrived in the new state of Wisconsin to assume his founding duties there, he took the helm of an institution having an acreage and nothing else.

Although the mood at Lathrop's inauguration had been festive and optimistic, for the sixteen years of his tenure the university was plagued with troubles. It struggled to define its relationship to the state,<sup>29</sup> suffered from a severe shortage of funds,<sup>30</sup> and was exposed to hostility voiced by sectarian colleges. Some sectarian legislators considered the institution "godless,"<sup>31</sup> despite its requirement that all students attend chapel daily.<sup>32</sup> Still other critics insisted that the university served primarily local (i.e., Madison) rather than statewide interests.<sup>33</sup>

Lathrop seemingly wearied, and he left in 1859.<sup>34</sup> The subsequent seven or eight years were unproductive; the university endured without leadership,<sup>35</sup> and for a few years almost without students.<sup>36</sup> But the Morrill Act was a turning point in its fortunes. Through that legislation, the federal government made 240,000 acres of land available,<sup>37</sup> conditioned on the university's offering

26. See H. Hale Bellot, *The University College, London, 1826-1926* (London, 1929).

27. *Thoughts on the Present Collegiate System in the United States* (photo reprint, New York, 1969) (1842).

28. Ch. 130, 12 Stat. 503 (codified at 7 U.S.C. §§ 301-308).

29. Merle Curti & Vernon Carstensen, *The University of Wisconsin: To 1925*, in *The University of Wisconsin: One Hundred and Twenty-five Years*, eds. Allen G. Bogue & Robert Taylor, 3, 5 (Madison, 1975) (noting "lack of consensus as to what a state university should be").

30. *Id.* at 5, 8-9; McMurray, *supra* note 15, at 7.

31. McMurray, *supra* note 15, at 7; Curti & Carstensen, *supra* note 29, at 6.

32. Curti & Carstensen, *supra* note 29, at 11. Lathrop's religiosity was on display in John H. Lathrop, *Dedication of the Edifice* (Columbia, Mo., 1843).

33. Curti & Carstensen, *supra* note 29, at 6.

34. *Id.* at 7.

35. Henry Barnard, the second chancellor, lasted less than a year. An interim chancellor, John Sterling, kept the university afloat after Barnard's departure. McMurray, *supra* note 15, at 5; Curti & Carstensen, *supra* note 29, at 7-8.

36. The university admitted women during the Civil War, at least partly in order to keep from closing. Curti & Carstensen, *supra* note 29, at 8.

37. *Id.* at 11.

instruction in "agriculture" and "scientific and classical studies" as well as "military tactics," "in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life."<sup>38</sup> This federal statute provided the impetus for a major reorganization of the university by the Wisconsin legislature. Among the changes was a provision that the regents were now to be appointed by the governor, rather than chosen by the legislature.<sup>39</sup> The chancellor was also to be replaced with a considerably weakened "president"—one with no seat or voice in the Board of Regents.<sup>40</sup>

In 1874 the regents elected John Bascom, then president at Williams College, to be president of the university.<sup>41</sup> He was a man of wide-ranging interests and, apparently, equally diverse abilities; his scholarship included works in philosophy, psychology, religion, economics, literature, and art.<sup>42</sup> The son of a Congregationalist minister, he had trained in the seminaries at Williams and Andover.<sup>43</sup> Like Lathrop and Cooley, he was a Barnburner in his politics. Williams College was the college of David Dudley Field<sup>44</sup> and his brother Stephen Johnson Field,<sup>45</sup> two prominent partisans of the Jacksonian political faith, and seems to have nurtured others of that persuasion. It was also the school of Theodore Sedgwick, the Jacksonian political economist, and of "Uncle Jimmy" Green, the populist founder of the University of Kansas Law School, established in 1878.<sup>46</sup> Bascom was also an active member in the reformist American Social Science Association, founded in Boston in 1865 by former abolitionists. The ASSA included among its founding members the aged Francis Wayland of Brown University and Francis Lieber, a legal and political theorist then concluding his career at the Columbia Law School.<sup>47</sup> Active members included the presidents of Harvard, Yale, Johns Hopkins, and MIT, leading clergymen, and a cadre of law teachers including Theodore Dwight of Columbia, William Gardiner Hammond of Iowa, and James Bradley Thayer of Harvard. It was to this audience that Daniel Coit Gilman had proclaimed the aim to turn America into "an earthly paradise." The ASSA hoped to employ the techniques of social science to reveal the fundamental truths of social organization and thus to reform, indeed to perfect, all our public institutions, including courts, hospitals, schools and universities, pris-

38. Morrill Act § 4, 12 Stat. 504 (codified at 7 U.S.C. § 304).

39. Curti & Carstensen, *supra* note 29, at 12. This change would have significant repercussions during Robert La Follette's governorship.

40. *Id.* at 13. The first such president was Paul Chadbourne.

41. Bascom would return to Williams after his tenure at Wisconsin. James Lamb Gearity, *The First Brain Trust: Academics, Reform, and the Wisconsin Idea 6* (1979) (unpublished Ph.D. dissertation, University of Minnesota).

42. LaFayette G. Harter, Jr., *John R. Commons: His Assault on Laissez-Faire* 51 (Corvallis, 1962).

43. Gearity, *supra* note 41, at 58–60.

44. Daun van Ee, *David Dudley Field and the Reconstruction of American Law* 7 (New York, 1986). Field did not graduate from Williams; his time there was a stormy one for him.

45. Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* 16 (Washington, 1930).

46. Carrington, *supra* note 19, at 14–15.

47. Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* 364–69 (Baton Rouge, 1947).

ons, our welfare and public health programs (such as they were), and our professions.<sup>48</sup>

Bascom remained a classicist at heart and advocated to the people of Wisconsin the value of liberal learning. Yet, as an educator, he sought to bridge academic knowledge and theory to the public need. He was a partisan of many causes. As a Barnburner and ASSA member, he believed in the right of laborers to strike and the obligation of government to serve the interests of farmers and workers. He had been a champion of coeducation at Williams and published an article in 1869 that merits description as feminist by the standards of its time;<sup>49</sup> and he maintained an active role in the suffrage movement<sup>50</sup> while serving as Wisconsin's president. In addition, he was a committed champion of temperance and staunchly advocated that cause almost on the premises of the Milwaukee brewers, striving to persuade the many German immigrants who were populating that very German city<sup>51</sup> that they should forsake the consumption of beer.<sup>52</sup>

But Bascom saved his most strenuous advocacy to espouse the moral duty of his students and his university to serve the state. Indeed, he was committed to public service and to social reform, both of which he infused with Christian optimism and moralism.<sup>53</sup> He preached in the university chapel and taught a mandatory seminar for seniors on moral philosophy.<sup>54</sup> And he was a moral influence on his students—among them, Frederick Jackson Turner, Charles Richard Van Hise, and Robert La Follette, all major figures in the later history of the university.<sup>55</sup>

The necessity of selling the university to Wisconsin taxpayers and voters likely inspired some of Bascom's thinking. It was easier to justify the public investment in the university when he advocated practical education of the sort favored by German educators, Bentham, Jacksonians, and the authors of the Morrill Act, especially training in intellectual skills that were of direct value

48. See works cited *supra* note 6.

49. *The Foci of the Social Eclipse*, 4 Putnam's Mag. 713 (1869).

50. On the early suffrage movement in Wisconsin see David P. Thelen, *The New Citizenship: Origins of Progressivism in Wisconsin, 1885–1900*, at 18–22 (Columbia, Mo., 1972).

51. German was more useful to James Bryce than English when he visited the city in the 1880s. 2 *The American Commonwealth*, rev. ed., 315 n.2 (New York, 1913).

52. He was not alone in the endeavor. On the early Wisconsin vice crusaders, see Thelen, *supra* note 50, at 11–15.

53. For a discussion of Bascom's moral philosophy, see J. David Hoeveler, Jr., *The University and the Social Gospel: The Intellectual Origins of the "Wisconsin Idea"*, 59 *Wisc. Mag. Hist.* 282 (1976). Gearity characterizes Bascom's philosophy as "Social Christianity," noting its assumptions "about the nature of man, the contours of the just society, the purposes and limits of reform." Gearity, *supra* note 41, at 55.

54. Gearity, *supra* note 41, at 67.

55. See McMurray, *supra* note 15, at 37; see also Robert M. La Follette, *La Follette's Autobiography: A Personal Narrative of Political Experience* 26–33 (Madison, 1913) ("The guiding spirit of my time, and the man to whom Wisconsin owes a debt greater than it can ever pay, was its president, John Bascom. . . . It was his teaching, iterated and reiterated, of the obligation of both the university and the students to the mother state that may be said to have originated the Wisconsin idea in education.").

not only to the students but to the public whom they would serve. But his commitment to public duty was also manifestly an outgrowth of the democratic populism of the Barnburners and of the gentrified elitism of the American Social Science Association and its parent movement, abolitionism. From these impulses and out of this background, Bascom developed the concept that would become known a generation later as the Wisconsin Idea.<sup>56</sup>

Bascom's idea was to make the whole university an instrument of enlightened democratic law reform. He sought to apply the widest range of intellectual talents found among the university faculty to promote, in as many ways as might be imagined, the practical well-being of the state. Accordingly, a feature of his Wisconsin Idea was direct involvement of the university faculty in a wide range of public affairs. His university led the way in providing social and technical services for Wisconsin farmers and their families; its impact on Wisconsin agriculture was measurable. Similar services were devised for industrial workers and even their unions. For the law and the legal profession, this idea pointed toward invigorated public responsibility.<sup>57</sup>

The German immigrants who settled Wisconsin brought with them not only German ideas on academic freedom but also German conceptions of public ethics, expressed in America by Francis Lieber and his acolytes.<sup>58</sup> To many of them, the social responsibilities of the university and the professions seemed natural. The Idea was also enormously popular with young Progressives such as Robert La Follette,<sup>59</sup> even if it was not always appreciated by those whose interests were endangered by initiatives coming from university professors. We can easily imagine, for example, the response of Milwaukee's brewers to Bascom's temperance sermons delivered outside their breweries, or of industrialists whose employees Bascom exhorted to organize.

One obstacle Bascom faced was a militant Board of Regents that had harshly fired his predecessor, one regent proposing "that in view of the incompetency of President Twombly, he possessing neither the learning to teach, the capacity to govern, or the wisdom to direct, he [should] be, and is hereby, removed."<sup>60</sup> As this event suggests, the regents' oversight of academic administration was still intimate during Bascom's presidency; he handled the grading system and student discipline under their watchful eye; faculty were rarely consulted on appointments and were forbidden to supplement their salaries with outside sources of income; and the regents had ultimate control over courses, textbooks, and the granting of degrees.<sup>61</sup> A prolonged pow-

56. See Charles McCarthy, *The Wisconsin Idea* (New York, 1912).

57. 1 Merle Curti & Vernon Carstensen, *The University of Wisconsin: A History, 1848-1925*, at 294 (Madison, 1949).

58. See Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 *J. Legal Educ.* 339 (1992) [hereinafter Carrington, *Lieber's Political Ethics*]; on the Lieber revival of the 1880s, see Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 *Cardozo L. Rev.* 2135 (1995) [hereinafter Carrington, *Lieber Revival*].

59. La Follette, *supra* note 55, at 26-27.

60. 1 Curti & Christensen, *supra* note 57, at 244.

61. Curti & Carstensen, *supra* note 29, at 17.



er struggle between Bascom and the board resulted in Bascom's departure in 1887.<sup>62</sup>

Bascom was followed by Thomas Crowder Chamberlin (president from 1887 to 1892) and then Charles Kendall Adams (president from 1892 to 1902). The university experienced rapid growth during their terms.<sup>63</sup> This may have been due in part to a calming of ethnic tensions in the state. In 1860 Wisconsin was heavily populated by immigrants, and in some counties German immigrants outnumbered everyone else;<sup>64</sup> by 1900 most of the population of the state was Wisconsin-born and spoke English.<sup>65</sup> It may also have reflected the maturing of the young state's economy,<sup>66</sup> its agricultural base had shifted from wheat, sheep, and hops to more remunerative dairy production. This change had been effected with the help of the university's College of Agriculture.<sup>67</sup> Also at work were forces operating at the national level, for comparable growth occurred in scores of public universities.

President Chamberlin's most significant contributions may have been the university extension program he launched in 1891<sup>68</sup> and the faculty he built. For example, he brought Joseph Jastrow,<sup>69</sup> Frederick Jackson Turner,<sup>70</sup> Richard Ely,<sup>71</sup> and C. H. Haskins<sup>72</sup> from doctoral studies and junior positions at Johns Hopkins to form an intellectual core of the Wisconsin faculty.<sup>73</sup>

The university's library may have been President Adams's highest priority,<sup>74</sup> but he also increased faculty salaries and retained the distinguished scholars emerging under his wing.<sup>75</sup> It was during his time that the Progressive move-

62. William Robert Johnson, *The University of Wisconsin Law School, 1868-1930*, at 150 (1973) (unpublished Ph.D. dissertation, University of Wisconsin); Curti & Carstensen, *supra* note 29, at 19.

63. By 1900 there were over 2,000 students enrolled. McMurray, *supra* note 15, at 7-8.

64. Current, *supra* note 13, at 36-37.

65. *Id.* at 37-38; see generally *id.* at 34-66.

66. Curti & Carstensen, *supra* note 29, at 20.

67. William Francis Raney, *Wisconsin: A Story of Progress* 217-38 (New York, 1940). Indeed, the needs of farmers—who dominated the population in 1848—would influence the political landscape and the university for some time. *Id.* at 142-43. The agricultural element in Wisconsin provided fertile soil for populism and then progressivism. See *id.* at 241-54.

68. 1 Curti & Carstensen, *supra* note 57, at 547.

69. Max Meenes, Joseph Jastrow, in *Dictionary of American Biography*, Supp. 3, at 383 (New York, 1973).

70. Ray Allen Billington, Frederick Jackson Turner, *Historian, Scholar, Teacher* (New York, 1973).

71. Benjamin G. Rader, *The Academic Mind and Reform: The Influence of Richard T. Ely in American Life* (Lexington, Ky., 1966).

72. Joseph R. Strayer, Charles Homer Haskins, in *Dictionary of American Biography*, Supp. 2, at 289 (New York, 1958).

73. 1 Curti & Carstensen, *supra* note 57, at 545; see Curti & Carstensen, *supra* note 29, at 24, for a complete list of changes under Chamberlin.

74. Clifford L. Lord & Carl Ubbelohde, *Clio's Servant: The State Historical Society of Wisconsin, 1846-1954*, at 104-08 (Madison, 1967). The Historical Society's American collection was second only to the Library of Congress.

75. Curti & Carstensen, *supra* note 29, at 25.

ment emerged as a powerful political response to the violent uprisings of railroad and industrial workers that threatened to overthrow the nation in the two decades beginning with the rail strike of 1877.<sup>76</sup> One response to the prolonged disorder of that time was the advent of social Darwinism and the English ideology of Herbert Spencer.<sup>77</sup> A reaction to social Darwinism was the advent of ethical economics, a school of thought having origins in the Christian gospel and German academic thought.<sup>78</sup> An early leader of the ethical economists was Richard Ely,<sup>79</sup> who came to Wisconsin in 1892, where he was joined in 1904 by his former Johns Hopkins student, John Commons, who was also an ethical economist in the 1890s,<sup>80</sup> and who became a major intellectual presence at Wisconsin as a founder of labor economics.<sup>81</sup>

In 1894 President Adams warned the graduating class that they would be “confronted with some of the gravest questions that have yet perplexed the American people. You will see everywhere in the country symptoms of social and political discontent.”<sup>82</sup> That same summer, Adams’s former colleague and close friend, Thomas Cooley, made a presidential address to the American Bar Association, cautioning its members that it was their duty to lay that discontent to rest. They should, he said, “endeavor to have all laws which specifically affect the interests of laborers just and right, and to see that they are so administered as to secure to all whose daily labor must give to them and their families the means of support, the just rewards for their industry.”<sup>83</sup> Yet a leading Wisconsin Republican of the day, steeped in social Darwinism, would respond to such utterances as “crankism.” “It is,” he said, “as if multitudes of people had eaten of the insane root that takes the reason prisoner.”<sup>84</sup>

## II. The Law School

The university’s charter specified that it was to provide training in law, medicine, and education.<sup>85</sup> From the time of his appointment in 1850, Chancellor Lathrop sought to establish a program in law. His principal ally in this

76. See generally 1 Philip S. Foner, *History of the Labor Movement in the United States* 475–524 (New York, 1947); 2 *id.* (New York, 1955); Paul Avrich, *The Haymarket Tragedy* (Princeton, 1984); Almont Lindsey, *The Pullman Strike: The Story of a Unique Experiment and of a Great Labor Upheaval* (Chicago, 1942).

77. Richard Hofstadter, *Social Darwinism in American Thought, 1860–1915* (Philadelphia, 1944).

78. See Ross, *supra* note 6, at 98–122; Furner, *supra* note 6, at 49–57.

79. See Richard T. Ely, *The Past and the Present of Political Economy*, Johns Hopkins University Studies in History and Political Science, 2d ser., no. 3 (Baltimore, 1884).

80. See John R. Commons, *Social Reform and the Church* (New York, 1894).

81. Harter, *supra* note 42, at 69–86.

82. *Milwaukee Sentinel*, June 18, 1894, *quoted in* Thelen, *supra* note 50, at 66.

83. Address of the President, American Bar Association, Report of the Eighteenth Annual Meeting 181, 242 (1894).

84. Horace Rublee, *quoted in* *Milwaukee Sentinel*, May 9, 1894, *quoted in* Thelen, *supra* note 50, at 66.

85. 1 Curti & Christensen, *supra* note 57, at 53.

endeavor was one of his first appointments to the faculty, Daniel Read, who had previously taught law and politics at Ohio University and Indiana University.<sup>86</sup> Read and Lathrop sought to enlist the support of the rustic legal profession of the state, but they encountered considerable opposition.

The legal profession that had materialized in Wisconsin after the territorial judges arrived in 1836 was a motley group. As elsewhere in the territories, each judge was itinerant and was followed by a retinue of lawyers who “resembled a troupe of actors”<sup>87</sup> and often knew nothing about law.<sup>88</sup> Having access to few if any law books, most relied on theatrical skills. There is notable irony in the fact that the work of William Blackstone, a consummate snob who wrote to elevate the status of the English legal profession, served in America as the emblem of a democratic, classless legal profession.<sup>89</sup> But here and there one might find a lawyer such as Roujet Marshall, who was characterized by his fellow professionals as a “drudge”<sup>90</sup> compared to those others “not too much given to hard study.”<sup>91</sup> What qualified Marshall for this opprobrium was that he had studied Blackstone and many other legal works besides. The unlettered rivals of lawyers like Marshall had no interest in elevating the state of learning in the profession. Lathrop argued fruitlessly that formal law study would exalt their science “by the constant suggestion of its beneficent social uses.”<sup>92</sup>

Despite opposition, the Board of Regents proceeded in 1868 to establish a law school.<sup>93</sup> One of their purposes centered on the future financial well-being of the university. They supposed that lawyers educated in the university would be political leaders, and they saw the law school in part as an investment in future legislative appropriations.<sup>94</sup> It was expected, however, in keeping with

86. Jesse H. Coursault, Daniel Read, in 15 *Dictionary of American Biography*, ed. Dumas Malone, A21–22 (New York, 1935). Read’s activities in Indiana are recounted in James Albert Woodburn, *History of Indiana University, 1820–1902*, at 185–205 (Bloomington, 1940).

87. William R. Johnson, *Schooled Lawyers: A Study in the Clash of Cultures* 28 (New York, 1978).

88. One veteran later reported:

I was, as I believe, the first lawyer who moved into the county, and I venture to say that for at least six months, and perhaps a year, after my arrival, there was not a lawbook in the county except an Old Michigan Statute Book owned by Esq. McKaig. At least to my knowledge there was not. During this time, without any law books or jail, law and justice were administered under some disadvantage, and not as was laid down in Blackstone or Kent.

Charles Minton Baker, Report to the Legislature by Commissioner, 1849, *quoted in* W. Scott Van Alstyne, Jr., *The University of Wisconsin Law School 1868–1968: An Outline History*, 1968 *Wis. L. Rev.* 321, 321–22.

89. Daniel J. Boorstin, *The Mysterious Science of the Law* 202 (Boston, 1958).

90. 1 *Autobiography of Roujet D. Marshall: Justice of the Supreme Court of the State of Wisconsin, 1895–1918*, ed. Gilson G. Glasier, 257 (Madison, 1923).

91. Johnson, *supra* note 87, at 27 (citing James Willard Hurst, *The Growth of American Law: The Law Makers* 277 (Boston, 1950)).

92. *Id.* at 2 (citing University of Wisconsin Board of Regents’ Annual Report, 1857, at 26–27).

93. Johnson, *supra* note 62, at 94. Student demand was manifested in the formation of a student law club at the university. *Id.* at 108. The school attracted fifteen students in its first year. *Id.* at 117.

94. 1 Curti & Carstensen, *supra* note 57, at 453; see generally Willard Hurst, *Changing Responsibilities of the Law School: 1868–1968*, 1968 *Wis. L. Rev.* 336.

Lathrop's earlier planning, that law teaching would be done by judges and practicing lawyers, and thus would require little if any expenditure from the university's very scarce funds. Like Columbia's, but unlike Michigan's, the regents expected their law department to be financially self-supporting.<sup>95</sup>

The figure on whom the regents fastened in 1868 as the person to lead this effort was William Vilas. Vilas was then twenty-eight years old, a Madison lawyer, and one of the few Wisconsin lawyers who had attended a law school of any kind; he had studied for a year at the well-established proprietary school in Albany, New York.<sup>96</sup> He had been among Lathrop's few students at the university and had then achieved the rank of lieutenant colonel while serving in the Civil War. At the time of his university appointment he was reporter for the Wisconsin Supreme Court Reports and thus held a public office identical to that held by Thomas Cooley at the time of his appointment at Michigan a decade earlier.<sup>97</sup> Although Vilas later served briefly as attorney for a railroad, he was known in 1868 as "the people's lawyer,"<sup>98</sup> and his selection by the regents deflected populist concern for the possible elitist tendencies of professional training. He was, like Cooley, a Barnburner in his politics; this commitment entailed, in addition to the predispositions previously enumerated, a stern view of government intervention in markets. That commitment made his politics seem increasingly reactionary as the march of events revealed market failures associated with industrialization.

Because he had attended law school, young Vilas was regarded as an expert on legal education. His vision was likely shaped by the fact that the law school he had attended apparently resembled the old Litchfield Law School in Connecticut, which was not a university law school but had set a standard for formal legal instruction as a supplement to a law office apprenticeship. Accordingly, he expressed his aim to be the training of students in "stewardship"—a phrase seldom if ever elaborated, but one that seemingly implied narrow vocational training.

There appears to have been no one in Wisconsin in 1868 advocating legal education as moral training for public life. That had been the primary aim of university legal education, beginning with the law department established by George Wythe at William and Mary in 1779,<sup>99</sup> a department that had served as a model for the University of Michigan Law Department.<sup>100</sup> Such a moral purpose was reflected at Michigan in the teaching of Thomas Cooley, and in the fact that the Michigan program was conducted at public expense for

95. Johnson, *supra* note 62, at 94–95.

96. An account of the school is H. S. McCall, *The Albany Law School: A Historical Sketch* (Albany, 1877).

97. Jones, *supra* note 20, at 67.

98. Johnson, *supra* note 87, at 45 (citing Burr W. Jones, *Colonel Vilas and the Law School*, in *Memorial Service in Honor of William Freeman Vilas at the University of Wisconsin* 18 (Madison, 1908)).

99. See Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 *Wm. & Mary L. Rev.* 527, 527 (1990).

100. Elizabeth Gaspar Brown, *Legal Education at Michigan, 1859–1959*, at 5 (Ann Arbor, 1959).

the public's benefit, and for a time charged no tuition. Likewise, in Iowa, the teaching of William Gardiner Hammond was in keeping with the Wythe tradition. But there is no evidence that such a tradition was in the mind of Vilas.

Vilas lectured occasionally on evidence and pleading. As a law teacher for seventeen years, he was appreciated by his students for a strong sense of history, high standards of professional ethics, sound practical judgment, and high expectations for the professional attainments of his students. He would remain active in practice and in politics. He served as chief reviser of the state's statutes at large in 1878 and 1883, served on the Board of Regents, and was elected to the Wisconsin legislature. In 1884 he was elected chairman of the Democratic National Convention, and thereafter joined the cabinet of President Cleveland as postmaster general (1885–88) and secretary of the interior (1888–90). He would conclude his career as a U.S. senator. Meanwhile, from 1868 until his death in 1908, he served as the political champion of Wisconsin's law school, an institution to which he left the remainder of his estate as an endowment.<sup>101</sup>

Appointed with Vilas was Jairus Carpenter, also a Madison lawyer, a man acclaimed as having "a true judicial temperament," which may have meant little more than that he was unsuited to theatrical work of the sort required to make a living on circuit in the rural courthouses. Carpenter was a full-time teacher and lectured on the whole corpus of private law. The justices of the Wisconsin Supreme Court were also designated members of the faculty,<sup>102</sup> apparently in the hope that one or more of them would lecture on constitutional law, a subject that was initially neglected, as it was at Litchfield and other proprietary schools. It appears, however, that none of the justices actually taught in the early years.<sup>103</sup>

In 1870 the court, following a practice established by the New York legislature, ordered that all the school's graduates be admitted to practice in all courts of the state without further examination.<sup>104</sup> This "diploma privilege" somewhat stimulated enrollment at the law school.<sup>105</sup> But given the standards for admission to the Wisconsin bar at that time, it was not an overly generous gesture. And the court taking the action may have had a conflict of interest inasmuch as the entire membership of the court were listed as members of the law faculty and might have expected to receive compensation from revenue produced by rising enrollment.

101. It was alleged but never proved that the large size of the estate was largely the result of an embezzlement from the Madison Mutual Insurance Company. Horace Samuel Merrill, William Freeman Vilas: Doctrinaire Democrat 23–27 (Madison, 1954).

102. Johnson, *supra* note 62, at 114–15.

103. Chief Justice Winslow taught in the law school at a later time. He was appointed in 1888, before his appointment to the court in 1891. Johnson, *supra* note 87, at 87–88. He served as chief justice from 1907 to 1920 and died in 1921.

104. I Curti & Carstensen, *supra* note 57, at 456.

105. There was a noticeable jump in enrollment after 1870, probably attributable to the introduction of the diploma privilege. Johnson, *supra* note 62, at 155–57. The number of *graduating* students tapered off after 1875. *Id.* at 157–58.

The law school suffered in these early years because of the regents' insistence that it be chiefly fee-driven.<sup>106</sup> Although money was appropriated for the modest salaries of Vilas and Carpenter, there were no appropriations for books or space. As a result, the physical facilities were inadequate. In 1881 the department was "a small, dingy room in the posterior part of the third story of a business block on Main Street."<sup>107</sup> In this early period, the law department was also physically divorced from the remainder of the university; well into the 1880s, classes were held a mile from the main campus, and law students were subject to few university regulations.<sup>108</sup>

Although the faculty and student body grew, and new subjects were introduced,<sup>109</sup> local practitioners and lower-court judges continued to provide most of the teaching,<sup>110</sup> the courses were vocationally oriented,<sup>111</sup> classes were small, and students were admitted with a high school diploma. Academic standards in the school remained low in the early years, perhaps the lowest of any department in the university, yet comparable to standards of other law departments, including those at Michigan and Columbia.<sup>112</sup> In 1876, however, the regents required a public examination of the students, and by stages academic standards were elevated. Among the students were a small number of women, and by 1890 a mother-daughter law firm in Milwaukee claimed to be the world's first to be composed entirely of women.<sup>113</sup>

In 1889 Edwin Bryant, Vilas's law partner, was appointed dean of the school. Dean Bryant continued to regard his school as a refinement of office apprenticeship.<sup>114</sup> In this, Bryant and Vilas remained somewhat out of step with other Midwestern state university law schools, such as Michigan, Iowa, and Nebraska, which were more closely following the Wythe tradition and providing law training as moral education and preparation for public life. That Wisconsin clung to the office model was due to the length of Bryant's stay at the school's helm.<sup>115</sup>

106. 2 Curti & Carstensen, *supra* note 57, at 425.

107. Johnson, *supra* note 62, at 142 (quoting U. Press, Nov. 25, 1881, at 4).

108. *Id.* at 123.

109. *Id.* at 118.

110. *Id.* at 123; 2 Curti & Carstensen, *supra* note 57, at 427.

111. Johnson, *supra* note 62, at 118.

112. Or Harvard before the advent of Christopher Columbus Langdell as dean in 1870. Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967*, at 154-55 (Cambridge, Mass., 1967).

113. Lelia Robinson, *Women Lawyers in the United States*, 2 Green Bag 10, 12 (1890). The first woman graduate of the law school, Belle Case La Follette (wife of Robert M. La Follette) graduated in 1885 but never practiced law. Johnson, *supra* note 87, at 79; Edward Newell Doan, *The La Follettes and the Wisconsin Idea* 18 (New York, 1947).

114. Johnson, *supra* note 62, at 207. Bryant's commitment to the apprenticeship model is well illustrated by Johnson. Bryant was known, for example, to write a personal check to lend a student tuition funds, or to call a student's family about excessive gambling—establishing a rapport, in short, "little different from the relationship one might expect between a lawyer and his apprentice." *Id.* at 246.

115. Johnson, *supra* note 62, at 118-19; Stevens, *supra* note 9, at 22-24; 2 Curti & Carstensen, *supra* note 57, at 429.

Nevertheless, there was during Bryant's administration a gradual transition in the faculty composition from practitioners lecturing part time to full-time career law professors.<sup>116</sup> The subprofession of academic law came to Wisconsin in his time; he hired six full-time teachers. All six were graduates of university law schools, and all were from other areas of the country.<sup>117</sup> Eugene Gilmore was among them. President Adams was an enthusiastic supporter of this development, recommending in 1894 that Wisconsin follow the lead of such schools as Harvard, Columbia, and Cornell.<sup>118</sup> But Bryant was cautious with appointments, avoiding anyone who might prove controversial.<sup>119</sup> And respected part-time lecturers remained an important part of his institution.<sup>120</sup>

As the faculty composition evolved, a breach developed between the academic members and their practitioner colleagues. The tension was reflected in the changing curriculum. The adjunct faculty, supported by the Wisconsin State Bar Association,<sup>121</sup> had emphasized vocational training. As career academicians joined the faculty, the tone of the institution began to change—at least in the catalog.<sup>122</sup> At the same time, however, other forces pushed the school to add more practical training. Specifically, the university was increasingly emphasizing “scientific” or applied work over liberal arts.<sup>123</sup> In addition, in part because of the diploma privilege, law school was increasingly viewed as the *primary* method of preparation for the bar.<sup>124</sup> Accordingly, instruction on drafting documents was added, as was a moot court.<sup>125</sup>

At the suggestion and perhaps the insistence of President Adams, Dean Bryant in 1893 employed as his associate dean Charles Noble Gregory.<sup>126</sup> Gregory would stay only until 1901, when he left to take the deanship at the State University of Iowa. While at Wisconsin, Gregory championed the case method, the more rigorous form of instruction developed at Harvard in the 1870s.<sup>127</sup> That method has often been associated with formalist or apolitical legal theory and technocratic professional training of the sort that Dean Bryant generally favored. But it was widely embraced by academicians such as Gilmore, who were by no means apolitical or technocratic in their profes-

116. Johnson, *supra* note 62, at 232.

117. *Id.* at 237–38.

118. 2 Curti & Carstensen, *supra* note 57, at 427–28. On the hiring of full-time teachers, see Stevens, *supra* note 9, at 38.

119. 2 Curti & Carstensen, *supra* note 57, at 429.

120. Even in 1900 a political brouhaha erupted over the replacement of two eminent practitioners on the faculty. See 2 Curti & Carstensen, *supra* note 57, at 428–29.

121. Johnson, *supra* note 62, at 180.

122. *Id.* at 257.

123. *Id.* at 150. This is in part reflected in the arrival of Turner and Ely. See *id.* at 196.

124. *Id.* at 271. This itself may be linked to something as mundane as overcrowding in Madison and Milwaukee law offices. *Id.*

125. *Id.* at 251, 257–59.

126. Stevens, *supra* note 9, at 61.

127. See Paul D. Carrington, Hail! Langdell! 20 Law & Soc. Inquiry 691, 736 n.238 (1995).

sional work.<sup>128</sup> And Bryant the technocrat, like many lawyers of his generation, opposed it. He began to express doubts about the method as early as 1894,<sup>129</sup> characterizing it as “narrow, slow, and unprofessional.”<sup>130</sup> He told the Wisconsin State Bar that the method taught “*how to learn law*,” rather than the law itself—that it “well fit [the student] for the profound work of historical and archaic studies, rather than the alertness and nimbleness of the active practitioner.”<sup>131</sup> Despite these objections, by the end of Bryant’s term the school was heavily committed to case study.<sup>132</sup> After Harry Richards became dean in 1903, the school would use the case system almost exclusively.<sup>133</sup>

There were other changes as the century drew to a close, notably the lengthening of the academic program and construction of a new building. Arguably, Dean Bryant’s vision of the law school as a complement to law office training had suited its physically isolated building.<sup>134</sup> But there is no evidence that the initiative in constructing a new building on the campus was motivated by the desire to integrate the law school into the university,<sup>135</sup> or to enhance its ability to achieve the vision of President Bascom. When the new building was occupied in 1893,<sup>136</sup> it also held the School of Economics, where Richard Ely was housed and where John Commons would preside.<sup>137</sup> The move nurtured “growing ties between the College of Law and other departments of the university,”<sup>138</sup> and foreshadowed greater cooperation after the turn of the century, cooperation that would be directed to social and political reform.

The curriculum was expanded to three years in 1895,<sup>139</sup> and soon thereafter came the introduction of rigorous grading and student ranking. These changes clearly reflected changing attitudes about entry into the profession<sup>140</sup> that in turn manifested the advent of technocratic professionalism everywhere in

128. On the ironies of the alignments for and against the case method, see generally *id.* at 735–59.

129. Johnson, *supra* note 62, at 280.

130. Stevens, *supra* note 9, at 61.

131. Quoted in Johnson, *supra* note 62, at 281.

132. *Id.* at 285.

133. *Id.* at 310.

134. *Id.* at 144.

135. The regents decided two years of legal study would be necessary for the LL.B. in the early 1890s, *id.* at 166–71, and the legislature provided for the construction of a new building at about this time. 2 Curti & Carstensen, *supra* note 57, at 425.

136. 2 Curti & Carstensen, *supra* note 57, at 426. The building would later prove inadequate in part because the library could not accommodate the volumes spinning off the presses in St. Paul. *Id.* at 417.

137. Johnson, *supra* note 62, at 215.

138. *Id.* at 216. Johnson also links to this the joint degree option (LL.B. and M.A.) first available in 1892, and the fact that faculty (such as Turner) were cross-listed by multiple departments of the university. *Id.* at 216–17.

139. *Id.* at 256.

140. Ranking students may have reflected a shift to an “objective, test-oriented, and impersonal method of certification” and away from the “immediate and personal” means whereby a young lawyer “‘proved’ himself in the arena of the courtroom.” *Id.* at 188.



America. It may be that some who favored these changes elevating the academic status of the profession also favored bringing the law school to the campus in the hope that the move would magnify that effect. But it is unlikely that anyone in 1893 foresaw the social and political consequences that would result from the influence on the law school of Commons and others on the faculty who remembered and sought to sustain the Bascom vision.

### III. The Progressive Movement at the University

Except for a Democratic surge during the Civil War and a brief period of Democratic control in the early 1890s, Wisconsin was a Republican stronghold for its first half-century of existence.<sup>141</sup> In the nineteenth century, however, the Republican machine was tainted by bossism, connections to organized crime, and unscrupulous patronage patterns.<sup>142</sup> It was in this setting in the 1890s that Robert La Follette emerged, a strident voice opposing the entrenched machine and old-style Republicans such as its late-century governors were said to be.

Not only did La Follette attack the Republican machine, but he spent the 1890s developing and advocating a Progressive platform<sup>143</sup> befitting the optimism of Daniel Coit Gilman.<sup>144</sup> Central to the La Follette program were reforms of the political process in the state to achieve direct democracy, including the primary election, regulation of lobbying, limits on political spending, and the establishment of a legislative reference service to provide drafting and information for legislators. While not necessarily hostile to the earlier agrarian politics of Barnburners,<sup>145</sup> Progressives forsook the principle of *laissez-faire* expressed in Jackson's bank veto message and proposed instead to use government to regulate business in the public interest. Among the regulatory measures favored were progressive taxation, environmental protection, compensation of workers for industrial accidents, collective bargaining,<sup>146</sup> and regulation of railroad rates.<sup>147</sup> Wisconsin Progressives also favored comprehensive vocational education to elevate the value of labor, and the dissemination of information to voters through extraordinary library services. By 1900, the state, which was heavily agricultural and already inclined towards populism,<sup>148</sup> was ready for the La Follette message. La Follette served as governor from 1901 to 1906, and then U.S. senator from 1906 to 1921. During most of those years, he was the most eminent presence in the state and a vital force in the university.

141. See Raney, *supra* note 67, at 171–77, 272–75.

142. *Id.* at 263–65.

143. On the forces available for him to marshal, see generally Thelen, *supra* note 50.

144. See *supra* text accompanying note 2.

145. On the connection between agrarian politics and late-century Progressivism, see Thelen, *supra* note 50.

146. Robert W. Ozanne, *The Labor Movement in Wisconsin: A History* (Madison, 1984).

147. Current, *supra* note 13, at 193.

148. See Raney, *supra* note 67, at 217–38, 241–54.

As governor, La Follette was able to implement many of his ideas—establishing in 1903 both the direct primary and an ad valorem railway tax,<sup>149</sup> and in 1905 a railway commission authorized to control rates and quantity of service, and to prevent discrimination.<sup>150</sup> Also in 1905 he secured the passage of a civil service act designed to lessen the effect of patronage practices, and he set up a state board of forestry.<sup>151</sup> In all these measures, he was opposed by the older generation of Republicans and their supporters, who became known as the Stalwarts.<sup>152</sup>

James Davidson, a native of Norway, was governor of Wisconsin from 1906 to 1911. Though also a Progressive, Davidson was less charismatic than La Follette. Nevertheless, under his administration all public utilities were made subject to the railway commission.<sup>153</sup> The state also amplified the regulation of insurance companies<sup>154</sup> and took steps towards conservation of natural resources.<sup>155</sup> Under Francis McGovern, governor from 1911 to 1915, Wisconsin experienced an explosion of social and economic reform legislation. McGovern focused on urban issues, limiting workers' hours and setting up a system of industrial accident compensation; he also established a comprehensive scheme regulating the insurance industry.<sup>156</sup> And he promoted vocational education and a minimum wage for women.<sup>157</sup> None of the major reforms introduced while La Follette was governor would be repealed during his tenure in Washington.<sup>158</sup>

La Follette had been an admiring student of Bascom's,<sup>159</sup> and as governor he sought to bring new life to Bascom's vision of the university. His first and most important step in that direction was to influence the selection of a new president to replace Charles Kendall Adams in 1902. La Follette's candidate

149. *Id.* at 289–91; see 1903 Wis. Laws 754 (primary elections); 1903 Wis. Laws 491 (rail tax).

150. Raney, *supra* note 67, at 293; see 1905 Wis. Laws 549.

151. Raney, *supra* note 67, at 288; see 1905 Wis. Laws 570 (civil service); 1905 Wis. Laws 161 (forestry board).

152. Raney, *supra* note 67, at 288.

153. *Id.* at 344; see 1907 Wis. Laws 1130.

154. 1909 Wis. Laws 564. For the antecedents to this legislation, see Spencer L. Kimball, *Insurance and Public Policy: A Study in the Legal Implementation of Social and Economic Public Policy, Based on Wisconsin Records 1835–1959* (Madison, 1960).

155. Raney, *supra* note 67, at 344; see 1911 Wis. Laws 139.

156. Current, *supra* note 13, at 194; 1913 Wis. Laws 991.

157. Raney, *supra* note 67, at 347.

158. Current, *supra* note 13, at 197–98. This is not to say that he or his programs were universally popular. He became quite unpopular in Wisconsin on account of his opposition to the First World War, despite the large German population in the state. Doan, *supra* note 113, at 84. Indeed, a resolution signed in 1918 by most of the faculty (led by Richard Ely and including President Van Hise) formally repudiated him on account of this stance. 5 *The History of Wisconsin*, ed. William Fletcher Thompson, 39–42 (Madison, 1990). He was also burned in effigy by the students of the university. Current, *supra* note 13, at 200.

159. See, e.g., La Follette, *supra* note 55, at 26–33.

was his classmate<sup>160</sup> and fellow admirer of Bascom,<sup>161</sup> Charles Van Hise. The search was contentious. Candidates included Henry Pritchett (later director of the Carnegie Foundation for the Advancement of Teaching),<sup>162</sup> Nicholas Murray Butler (whom Columbia hired), and Edward A. Birge, within the university.<sup>163</sup> Vilas, then on the Board of Regents, bitterly opposed Van Hise<sup>164</sup> and openly objected to La Follette's having stacked the Board of Regents to ensure Van Hise's success.<sup>165</sup> Through the efforts of La Follette and Frederick Jackson Turner, Van Hise was awarded the position.<sup>166</sup> Vilas would later approve the choice.

Van Hise served as president until 1918. He remained active as an academic geologist even while running the university, publishing a well-regarded treatise in 1904<sup>167</sup> and taking the reins of several scholarly societies during his career.<sup>168</sup> His version of the Wisconsin Idea was influenced by his scientific background. He believed the scientific method applicable to the social sciences: "economic and social questions like minimum wage law and tenement legislation could be dealt with much as questions of wheat hybridization or livestock breeding could be dealt with, as problems to be investigated by the inductive method."<sup>169</sup> In his own work, he turned to economic issues, writing a book in 1912 in which he opposed the dissolution of trusts, arguing that large-scale industrial organization regulated by experts would best provide for the efficient use of natural resources in the public interest.<sup>170</sup> As had his teacher, Bascom, he proposed to subordinate the scholar's interests to the public

160. Robert C. Nesbit, *Wisconsin: A History* 427 (Madison, 1973). La Follette's degree was a bachelor's degree from the general university; he attended the law school for one term only. McMurray, *supra* note 15, at 22. His son, Philip F. La Follette (later governor as well), would earn his LL.B. in 1922. *Id.* Philip taught briefly at the law school. *Id.* at 28.
161. In his inaugural address, for instance, Van Hise spoke of the "obligation of a state university to serve the social and spiritual well being of all citizens" and the obligations of the "University as a leader . . . in service to the people." Curti & Carstensen, *supra* note 29, at 28.
162. Henry Pritchett would later commission the Reed report at the request of the ABA Committee on Legal Education. Ellen Condliffe Lagemann, *The Politics of Knowledge: The Carnegie Corporation, Philanthropy, and Public Policy* 78 (Middletown, 1989).
163. 2 Curti & Carstensen, *supra* note 57, at 12, 12 n.13. Birge was dean of the College of Letters and Sciences at the time, *id.* at 24, and would finally take the presidency when Van Hise died in 1918. Curti & Carstensen, *supra* note 29, at 36–37.
164. 2 Curti & Carstensen, *supra* note 57, at 13 n.17.
165. *Id.* at 11–12; see also Merrill, *supra* note 101, at 253 (Vilas steadfastly opposed "what he considered undue political influence in university affairs on the part of La Follette").
166. 2 Curti & Carstensen, *supra* note 57, at 13.
167. *Id.* at 15 (A Treatise on Metamorphism).
168. He was president of the Geological Society of America in 1907, the International Geological Congress in 1910, the National Academy of Sciences in 1915, and the American Association for the Advancement of Science in 1916. *Id.* at 16.
169. Gearity, *supra* note 41, at 137.
170. See 2 Curti & Carstensen, *supra* note 57, at 23–24. The book was *Concentration and Control: A Solution of the Trust Problem in the United States* (New York, 1912). In the introduction Van Hise credits several university faculty members for contributions to the work, including Ely, McCarthy, and Gilmore.

interest.<sup>171</sup> He believed that the university's mission was to train specialists and to lend them to government for research and reform; it was also to instruct the people to accept, support, and facilitate widespread democratic involvement in this reform.<sup>172</sup>

The Wisconsin Idea required university faculty committed to public service and empirical work; but it also required state government officials committed to reform; and it envisioned reform on a large scale, emerging as a result of close cooperation between university and government. Eugene Gilmore described it as "an earnest attempt to realize democracy through an intelligent and independent electorate which is at the same time industrially and economically trained and efficient, such attempt being aided by the utilization of the expert knowledge and best skill of the community."<sup>173</sup> Others would write that the boundaries of the campus simply extended to the boundaries of the state.<sup>174</sup> University faculty, administrators, and students worked for the state in a variety of capacities from statistics gatherer to legislation drafter, from agricultural extension teacher to economic policy adviser. One list shows forty-one professors working for one state agency or another in 1908.<sup>175</sup> Another list shows forty-six in 1911.<sup>176</sup> The peak was probably reached between 1912 and 1914.<sup>177</sup> Several individual faculty members drafted bills reflecting their own expertise; for example, T. S. Adams of the political economy

171. Some have argued, however, that there is *necessarily* an academic freedom corollary to the Wisconsin Idea, citing the ultimate vindication of Professor Ely when he was charged with economic radicalism. Current, *supra* note 13, at 191–92; see Doan, *supra* note 113, at 14. President Adams's statement exonerating Ely ("[W]e believe the great State University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found.") is often quoted as proof of the university's commitment to academic freedom. *Quoted in id.* at 14–15. Its commitment seems less obvious when one recalls that the Board of Regents found Ely "innocent" of the charge, on the merits (i.e., found him conservative, rather than "entitled" to the radicalism of which he was accused), and that for years the university refused to mount a class gift of a plaque bearing the famous Adams quotation. See Harter, *supra* note 42, at 53–54; Vernon Carstensen, Wisconsin Regents: Academic Freedom and Innovation 1900–1925, 48 Wisc. Mag. Hist. 101, 107–08 (1964). Ely did not argue the academic freedom issue. See Theron F. Schlachbach, An Aristocrat on Trial: The Case of Richard T. Ely, 47 Wisc. Mag. Hist. 146, 156–58 (1964). Van Hise himself was quite cautious about the concept of tenure, being convinced that the institution existed for the students and the public, not for the faculty. 2 Curti & Carstensen, *supra* note 57, at 50–51. Similarly, he opposed the implementation of formal procedures for demotions and dismissals of faculty. *Id.* at 55.

172. See Current, *supra* note 13, at 191.

173. The Wisconsin Idea, 4 Philippine L.J. 271, 284 (1918). It has also been defined as "governmental reform and administration by, or at least on the advice of, academic experts." Current, *supra* note 13, at 191.

174. See, e.g., Current, *supra* note 13, at 191.

175. Curti & Carstensen, *supra* note 29, at 30.

176. Nesbit, *supra* note 160, at 427. Most faculty served in regulatory agencies; for example, B. H. Meyer (political economy) served as member and then chair of the Railroad Commission from 1905 to 1911, and Edwin E. Witte (economics) served as secretary of the Industrial Commission.

177. McMurray, *supra* note 15, at 51. Detailed lists are available in McCarthy, *supra* note 56, at 313–17 and in McMurray, *supra* note 15, at 54–60.

department helped to draft the state's income tax law in 1911.<sup>178</sup> La Follette also turned often to John Commons for drafting.<sup>179</sup> Charles McCarthy, a student of Turner's, was appointed to run the Legislative Reference Library of Wisconsin, a nonpartisan research and drafting service.<sup>180</sup>

#### IV. Eugene Gilmore and Harry Richards

Gilmore came to Wisconsin in the year Van Hise became president of the university. He soon became a central figure in the law school and the central figure in its participation in the Wisconsin Idea.

Gilmore was born in Brownville, Nebraska, in 1871.<sup>181</sup> He graduated from DePauw University in 1893. He took with him to DePauw a typewriter he had learned to use in a business course, and he earned enough money to pay all his expenses by working as secretary to the president of the university.<sup>182</sup> After graduating, Gilmore read law in Indianapolis and was admitted to the Indiana bar in 1895.<sup>183</sup>

Soon after his admission to the bar, Gilmore went to Harvard Law School for further education. He again took with him his trusty Remington, and secured a position in the office of Dean James Barr Ames.<sup>184</sup> He was a member of the Harvard Law Review and, as the dean's secretary, made several suggestions to improve administrative procedures at the school—installing, for instance, a card catalog system to keep student records and a “letterpress” that helped keep track of school correspondence.<sup>185</sup> In 1899 he received the LL.B.<sup>186</sup> and married a college classmate from Indiana to whom he remained married for the remaining fifty-one years of his life. He was admitted to the Massachusetts bar and practiced law for three years with a Boston firm. In 1902, at the age of thirty-one, he accepted an invitation to join the Wisconsin law faculty.<sup>187</sup>

178. McMurray, *supra* note 15, at 40.

179. Harter, *supra* note 42, at 58. Commons would work on the Workmen's Compensation Act and would draft the 1911 Industrial Commission Act. McMurray, *supra* note 15, at 39.

180. Harter, *supra* note 42, at 58. Gilmore approvingly described the library as a much needed “source of reliable and unbiased information for honest legislators [and a body of] expert draftsmen to formulate proper legislation.” It was, he contended, “a veritable storehouse of very practical information on every conceivable subject.” Gilmore, *supra* note 173, at 278–79.

181. See Eugene Allen Gilmore, in 44 *National Cyclopædia of American Biography* 56 (New York, 1962).

182. George B. Manhart, *DePauw Through the Years* 224, 298–99 (Greencastle, Ind., 1962); Leonard K. Eaton, *Two Chicago Architects and Their Clients: Frank Lloyd Wright and Howard Van Doren Shaw* 118 (Cambridge, Mass., 1969).

183. Eaton, *supra* note 182, at 118.

184. *Id.* at 118–19.

185. *Id.* at 119.

186. He later received, as honorary degrees, the LL.D. from DePauw (1922), the LL.D. from the State University of Iowa (1941), and a D.C.L. from the University of Pittsburgh (1942).

187. Gilmore started as an assistant professor, earning \$2,000. In 1903 he was promoted to professor and his salary raised to \$2,500. Johnson, *supra* note 62, at 236–37.

Gilmore was stable, hard-working, and extremely conscientious. He seems also to have been modest; later newspaper accounts of his tenure as acting governor of the Philippines describe him as “unassuming”; he was lauded as having “sought no public acclaim” and for his “absence of any spirit of domination.” He is described as “clear” and “precise,” noted for his efficiency and organizational skills.<sup>188</sup> He was a sober man, not easily given to humor; the letters he later wrote to law professors and practitioners while serving as acting dean at Wisconsin are short, efficient, and quite formal—contrasting sometimes with the chatty and friendly letters to which he was responding. These qualities commended themselves to Van Hise, who quickly gave his confidence to Gilmore.

The time was one of great ferment in university legal education. The University of Chicago law school opened in 1902; its intellectual parent was Ernst Freund, a political scientist as well as a lawyer, who would be one of the most tenacious and effective law reformers of his age.<sup>189</sup> Across town, John Henry Wigmore, another ardent and effective law reformer and one of our most eminent legal scholars, was creating the Northwestern University law school with ideas about legal education not far different from those of Freund.<sup>190</sup> Also in 1902 the University of California opened its new School of Jurisprudence under the leadership of William Carey Jones, a California Progressive and energetic academic ally of Hiram Johnson, the La Follette of California.<sup>191</sup> In the same year, the Princeton Board of Trustees directed their president, Woodrow Wilson, to raise funds to endow a Princeton University School of Jurisprudence.<sup>192</sup> In 1903 Henry Wade Rogers assumed the deanship of the Yale Law School and appointed to the faculty young Arthur Linton Corbin, a native Kansan of Progressive tendencies.<sup>193</sup> Rogers had studied law with Cooley, succeeded him as dean at Michigan, and presided over Northwestern University, where he had recruited Wigmore. He was himself politically active as a Progressive, and would in 1913 become one of President Wilson’s first ap-

188. See *Banquet Offered to His Excellency Eugene A. Gilmore: Acting Governor General of the Philippine Islands*, by the Chamber of Commerce of the Philippine Islands and Other Admirers (Manila, 1928) (citing *The Manila Times* (“unassuming,” “a worker,” having “sought no public acclaim”); *Philippines Free Press* (“absence of any spirit of domination,” “conciliatory attitude”); *The Tribune* (tact); and *El Debate* (“devoid entirely of any hostile spirit towards the national sentiments of the Filipino people,” “clear and precise”)). These laudatory accounts were collected and published by the Manila Bureau of Printing as a tribute to Gilmore. Although their value as primary sources is questionable, their tone is consistent with the general impression one otherwise forms of Gilmore.

189. Paul D. Carrington, *The Missionary Diocese of Chicago*, 44 *J. Legal Educ.* 467, 486–91 (1994).

190. *Id.* at 482–86.

191. See Sandra Pearl Epstein, *Law at Berkeley: History of Boalt Hall* (1979) (unpublished Ph.D. dissertation, University of California).

192. Amelia Carpenter Waller, *Princeton for the Nation’s Service: The Debate over Legal Education in Princeton* 37–41 (1979) (unpublished thesis, Princeton University).

193. Frederick C. Hicks, *Yale Law School: 1895–1915, Twenty Years of Hendrie Hall* 35 (New Haven, 1938).

pointments to the federal bench.<sup>194</sup> Also in 1903 Harlan Fiske Stone was appointed to the Columbia law faculty; he would become dean in 1910, marking a transformation in that institution.<sup>195</sup>

The relationship between this ferment in legal education and the Progressive movement was explained by Herbert Croly, who founded *The New Republic* in 1914 and was an intellectual lion of Progressive politics:

If the lawyers have any reason to misinterpret a serious political problem, the difficulty of dealing therewith is much increased, because in addition to the ordinary risks of political therapeutics, there will be added that of a false diagnosis by the family doctor. The adequacy of the lawyers' training, the disinterestedness of their political motives, the fairness of their mental outlook, and the closeness of their contact with the national public opinion—all become matters of grave public concern.

It can be fairly asserted that the qualifications of the American lawyer for his traditional task as the official interpreter and guide of American constitutional democracy have been considerably impaired. Whatever his qualifications have been for the task (and they have, perhaps, been overestimated) they are no longer as substantial as they were. Not only has the average lawyer become less a representative citizen, but a strictly legal training has become a less desirable preparation for the candid consideration of contemporary political problems.

Since 1870 the lawyer has been traveling the same path as the business man and the politician. He has tended to become a professional expert, and to give all his time to his specialty. The greatest and most successful American lawyers no longer become legislators and statesmen as they did in the time of Daniel Webster. They no longer obtain the experience of men and affairs which an active political life brings with it.<sup>196</sup>

What those who governed California, Chicago, Princeton, Wisconsin, and Yale sought to do was to set at least part of the American legal profession back on the path of civic duty marked by George Wythe and his successors.

Wesley Hohfeld, who supported Arthur Corbin in transforming the Yale Law School in the Progressive Era, provided the most elaborate statement of Progressive aims with respect to the modern law school. Hohfeld favored vocational education to assure competence, and the case method to assure rigor, but he also emphasized the need to break the mold of intellectual isolation that had been created by Langdell and Ames at Harvard only three decades earlier. Expressing an idea also heard in the corridors of Princeton, Columbia, California, Johns Hopkins, and Chicago, he contended for the creation of several great schools of jurisprudence to train not mere lawyers, but jurists who would work actively to bring the intellectual resources of

194. Charles E. Clark, Henry Wade Rogers, in 16 *Dictionary of American Biography* 97 (New York, 1935).

195. *A History of the School of Law, Columbia University*, ed. Julius Goebel, Jr., 216–17 (New York, 1955) [hereinafter Goebel].

196. *The Promise of American Life* 134–35 (New York, 1909).

universities to bear on the problems of our public life.<sup>197</sup> Hohfeld's vision departed from Wythe's in its higher intellectual aspiration, but it was drawn from moral premises very similar to those animating the law teachers in antebellum colleges. In its political dimension, its aspiration to intellectual breadth, and its commitment to public duty, the Progressive aims expressed by Hohfeld were a repudiation of the narrow, apolitical, technocratic vision expressed by Langdell.

The new era began at Wisconsin in 1903 when Dean Bryant resigned,<sup>198</sup> a decade before Hohfeld's synthesis of Progressive aims. Van Hise and Gilmore worked together in the search for a replacement who would suit the law school to the era as well as the place.<sup>199</sup> They settled upon Harry Richards, who was brought to Wisconsin from Iowa. Like Gilmore, he had trained at Harvard. Both Gilmore and Van Hise, "with the concurrence of the University Regents, were well aware that [by choosing Richards] they were firmly aligning the Wisconsin College of Law with the Harvard outlook,"<sup>200</sup> meaning presumably an outlook favoring greater academic rigor and professional elitism. Richards firmly believed "in the educational reforms associated with [Harvard],"<sup>201</sup> and he was the dean for most of Gilmore's tenure at the law school.<sup>202</sup> But through the years of the Van Hise presidency and the predominance of Governor and then Senator La Follette, Gilmore, with the sometimes reluctant support of Richards, made the school an academic partner in the Progressive reform movement, an institution very different from the Harvard Law School that Gilmore and Richards had attended.

Gilmore was a lifelong Republican,<sup>203</sup> but he shared much of the Progressive vision, perhaps especially those reforms designed to broaden political participation. In 1918 he praised La Follette's direct primary, writing that "good results are being attained." Conceding that "[s]o far as the legislature is concerned, while there may not be so many men of distinctive ability elected, still there is a very commendable average of ability and one feels that the body is made up of politically free and independent members responsive to community interests."<sup>204</sup> He also voiced approval of the Corrupt Practices Act

197. A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day? 14 Handbook Ass'n Am. L. Schs. 76 (1914); see generally N. E. H. Hull, *Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910-1919*, 45 J. Legal Educ. 235 (1995).

198. Bryant resigned in June and died in August. Johnson, *supra* note 62, at 288.

199. *Id.* at 291. The regents' papers contain memoranda of interviews conducted by Gilmore pertaining to the qualifications of Harry Richards. See *id.* at 238 n.82.

200. *Id.* at 291. Johnson draws this conclusion from letters in the regents' papers.

201. *Id.* at 289.

202. Richards died in 1929. Van Alstyne, *supra* note 88, at 329.

203. See Eugene Allen Gilmore, *supra* note 181, at 56.

204. Gilmore, *supra* note 173, at 280.



passed during McGovern's tenure in office<sup>205</sup> and shared La Follette's disapproval of private ownership of natural resources. To Underhill Moore, he depicted himself as "one of the dangerous, radical ones."<sup>206</sup> Nevertheless, a biographer inferred that Gilmore was not particularly passionate about politics because he remained on good terms not only with La Follette, but also with Henry Stimson, La Follette's adversary; it may, however, be too much to infer from this emotional maturity that Gilmore "was never identified with the political philosophy of either" of his friends.<sup>207</sup> Clearly Gilmore shared the belief of Bascom, La Follette, and Van Hise that the university was properly a servant of the public in many ways other than the technical training of the state's youth. It was in the time of La Follette, Van Hise, and Gilmore that this notion came to be widely known as the Wisconsin Idea.

Richards, with Gilmore's support, succeeded in recruiting several young teachers who would later achieve note as legal scholars, but he was unable to retain them. Walter Wheeler Cook served on the faculty from 1906 to 1910, when he left for the University of Chicago.<sup>208</sup> Underhill Moore joined the faculty in 1908 but left for Chicago in 1914.<sup>209</sup> Ernest Lorenzen left for Minnesota after only three years.<sup>210</sup> Moore would move on to Columbia<sup>211</sup> and then to Yale, where he would be joined by Lorenzen.<sup>212</sup> Cook would move to Yale and then to Columbia, where he would for a time rejoin Moore, before moving on to Johns Hopkins and then to Northwestern.<sup>213</sup> Richards complained to the regents in 1916, noting that seven junior colleagues had resigned<sup>214</sup> and explaining that "[a]ll the resignations were due to higher salaries paid elsewhere."<sup>215</sup> Richards did succeed in retaining Gilmore; when

205. 1911 Wis. Laws 883 and 1915 Wis. Laws 599; see Raney, *supra* note 67 at 346, on its passage. Gilmore described the act thus:

The Corrupt Practices Act specifically defines the objects for which money may be spent, limits the amount to be expended, whether by a candidate or a committee, and requires a detailed public report as to all expenditures. . . . [N]o newspaper or periodical shall publish for hire any matter intended to influence the voting at any election unless it shall print in connection with such matter, in large type the words, 'Paid Advertisement,' the amount paid, by whom, and on behalf of whom paid.

Gilmore, *supra* note 173, at 277.

206. Letter from Gilmore to Moore (June 3, 1919) (W. Underhill Moore Papers, Rare Book and Manuscript Library, Butler Hall, Columbia University Libraries) [hereinafter Moore Papers].

207. Eaton, *supra* note 182, at 124.

208. John Henry Schlegel, *American Legal Realism and Empirical Social Science* 38 (Chapel Hill, 1995).

209. *Id.* at 38.

210. Johnson, *supra* note 62, at 307.

211. Goebel, *supra* note 195, at 249-52, 262-64.

212. Laura Kalman, *Legal Realism at Yale, 1927-1960*, at 18-27 (Chapel Hill, 1986). On the relationship of Cook to Moore, see generally Schlegel, *supra* note 208.

213. On Cook's role at Yale, see Kalman, *supra* note 212; Schlegel, *supra* note 208, at 147-210.

214. 2 Curti & Carstensen, *supra* note 57, at 431; Johnson, *supra* note 62, at 308.

215. Report of the Dean of the Law School, University of Wisconsin Biennial Report of the Board of Regents for the Years 1914-15 and 1915-16, at 154 (Madison, 1916).

the University of Illinois in 1910 offered him the then glamorous salary of \$4,500, Wisconsin raised Gilmore's salary to \$4,000.<sup>216</sup>

During the era of Richards and Gilmore, the law school, in keeping with their inclination to follow Harvard's lead in elevating the academic pretensions of the legal profession, stiffened the entrance requirements for students. In 1895 the course of study had been increased from two to three years, but prospective law students were required only to pass an admission test equivalent to that administered for admission to the College of Letters and Sciences.<sup>217</sup> And, while the university registrar technically conducted the exam, the final decision to admit (or not) rested with Dean Bryant.<sup>218</sup> In 1903–04 Richards turned that decision over to the registrar. By 1905 only students with a full year's training in college were admitted to the law school.<sup>219</sup> And by 1906–07 the regents had—at the request of the faculty—increased the prerequisite to two years of college training.<sup>220</sup> Wisconsin was therefore the first Midwestern institution to require two years of college work prior to legal study.<sup>221</sup>

Despite the diploma privilege available to graduates of the law school, a noticeable disparity between admission and graduation statistics developed. As at Harvard, Michigan, and other university law schools of the time, students could drop out after two years and pass a state bar exam. Many chose to do just that.<sup>222</sup> This tended to keep pressure on the school to maintain a vocational or clinical orientation in its curriculum.<sup>223</sup> In 1914 the regents, at the request of the faculty, instituted a six-month apprenticeship requirement for all enrolled law students.<sup>224</sup> Richards was less enthusiastic about vocational training than was his faculty, and he succeeded in introducing Roman law and jurisprudence,<sup>225</sup> subjects that had been important to antebellum university law study but were not part of the Langdell curriculum at Harvard.

While Richards was shaping the educational program of the law school, Gilmore was leading its participation in the Wisconsin Idea, by engaging in a wide range of public activities and by sharing them with younger colleagues

216. Johnson, *supra* note 87, at 130 (citing Letter from Richards to Van Hise and the Board of Regents (June 13, 1911)).

217. 2 Curti & Carstensen, *supra* note 57, at 432.

218. Johnson, *supra* note 62, at 295 n.18.

219. 2 Curti & Carstensen, *supra* note 57, at 434.

220. Johnson, *supra* note 62, at 295–96.

221. 2 Curti & Carstensen, *supra* note 57, at 434. The more stringent admission and degree requirements were made possible in part by the 1908 legislative repeal of the statutory provision permitting student fees and the resulting decision of the university administration to assume responsibility for funding the operations of the law school.

222. Johnson, *supra* note 62, at 293–94.

223. 2 Curti & Carstensen, *supra* note 57, at 437.

224. *Id.* at 429. In 1920 the requirement was modified essentially as an acknowledgment of the fact that many students studied law with no intention of practicing it. Many, for example, planned careers in business.

225. *Id.* at 440.

such as Cook and Moore. He became a paradigm of the legal academic as public person or minister without portfolio. As a law reformer, he was hardly unique among his generation; three other premier exemplars were in Chicago in 1910: Harry Wigmore at Northwestern, and Ernst Freund and Roscoe Pound at the University of Chicago.<sup>226</sup> All expended great energy in public affairs, in work with the legal profession and elected officials to effect favorable resolution of public issues.

It was not new that those Progressives who taught law were also engaged in making and reforming it. Most of those who taught law in American colleges and universities in the century beginning in 1779 had been judges, and all but Langdell and Ames had been politically active.<sup>227</sup> Francis Lieber, one of the few who was not a public figure before he taught law, was heavily engaged in diverse political activities, and during the Civil War had served in the War Department as a draftsman of military law that became the international law of war.<sup>228</sup> In the generation preceding Gilmore's, Theodore Dwight, one of the first Americans to devote a career to law teaching, had been actively engaged in the law reform efforts in New York City.<sup>229</sup> Such involvements were congruent with, if not essential to, the traditional aim of higher education in law, i.e., moral preparation for leadership in public affairs. Freund, Gilmore, Pound, and Wigmore were among the first generation of the academic subprofession of law, and they regarded their academic careers not as opportunities to withdraw from public affairs, but as obligations to use their time and energy to improve law and legal institutions. All regarded state and local government as appropriate objects for their professional attention. They shouldered their way into one controversy after another, generally without benefit of academic tenure.<sup>230</sup>

What distinguished Gilmore from his colleagues in Chicago was that he was on the payroll of a public university that undertook to address public issues as an expression of its institutional purpose, and that the range of his interests seemingly knew no bounds. In 1918 Gilmore explained the Wisconsin Idea to a Filipino readership. He described his university as a comprehensive source of useful information and service to individual citizens, local governments, state agencies, and diverse cultural organizations, as well as comprehensive vocational education, and added:

Another part of the Wisconsin Idea concerning education is the utilization for the benefit of the state of the knowledge and experience of its highly trained experts in their several respective fields. It was very early recognized that there was in the state, especially in the University, a great deal of expert

226. Carrington, *supra* note 189, at 491–511.

227. Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 *Duke L.J.* 741, 757–58 (1992).

228. Freidel, *supra* note 47, at 317–41.

229. Goebel, *supra* note 195, at 39–43.

230. For a brief account of academic tenure at the time, see Walter P. Metzger, *The History of Tenure*, in *Tenure*, ed. Walter P. Metzger et al., 3 (Washington, 1979).

knowledge and training which could be used in various ways for advancing the welfare of the people.

This was especially true with respect to great problems in legislation such as regulation of public utilities, taxation, reclaiming waste lands, conserving natural resources, and workmen's compensation. The University professors, experts in their respective fields, have rendered extensive and valuable service in aiding legislative committees in investigating problems and drafting laws. In the constructive legislation of the past fifteen years, the University has had a very active part. Moreover, University professors have served on the various boards and commissions which have been created to administer this legislation, such as the Railroad Commission, the Tax Commission, the Industrial Commission, and the Conservation Commission.

Wisconsin is a democracy. The people believe in democracy. They believe it can be efficient. They have to a remarkable degree had the wisdom to recognize that one great danger of democracy is mediocrity, and that, to avoid this, a state should utilize the expert knowledge and experience of its highly trained citizens in solving the problems of statecraft and in the administration of its laws. It is not, however, a government of experts but it is a government of the people with the aid of experts. The people of the state have used their university as a great laboratory in which to do much of the preliminary study and investigation necessary for wise legislation and their professors have been called to take an active part in constructing and administering the laws.<sup>231</sup>

One effect of the Wisconsin Idea was to bring the university's new, young law teachers into contact not only with public affairs, but also with academic colleagues in other disciplines who possessed useful expertise. The law school established liaison with the political science department in 1907–08, a liaison designed with the purpose of "relating" legal instruction "to modern social and economic conditions."<sup>232</sup> Between 1904 and 1910 law faculty, Gilmore in particular, similarly collaborated with economics faculty such as John Commons and Richard Ely in a large-scale endeavor to document the history of labor in America. With funds from the Carnegie Institution, the newly formed American Bureau of Industrial Research set up shop in the State Historical Society of Wisconsin building, and in 1910–11 published the eleven-volume *Documentary History of American Industrial Society*. By 1915 law school bulletins actively advocated a mixture of law classes with history, economics, political science, and philosophy classes.<sup>233</sup>

As a result of the increased interaction between departments, the university became for a time rather like a salon society.<sup>234</sup> Among the many quasi-formal cross-disciplinary groups that formed to mix companionship with intellectual discourse was the Frances Street Cabal, which included Frederick Jackson Turner and may have briefly included Eugene Gilmore.<sup>235</sup> Certainly, whether

231. Gilmore, *supra* note 173, at 283.

232. 2 Curti & Carstensen, *supra* note 57, at 441.

233. See University of Wisconsin College of Law, *Bulletins 1900–22*.

234. The characterization is Garity's, *supra* note 41, at 37.

235. Intellectual exchange among schools was also common. Both Cook and Moore left Wisconsin initially for Chicago, and the two schools remained closely allied, swapping faculty for the odd class, and meeting for social events. Cook returned to Chicago to teach in the 1912

or not Gilmore was a regular participant, he and his wife would have had a fair amount of contact with the various faculty living on Frances Street; the Gilmores stayed at the Turner residence at 629 Frances Street in 1903–04.<sup>236</sup> The cabal also included President Van Hise.<sup>237</sup>

The unity of interest among teachers and scholars in diverse disciplines was reflected in living arrangements in Madison. In 1904 Gilmore and a professor of education bought land jointly on the highest point of University Heights west of campus, where university faculty had congregated since the mid-1890s. The land was purchased from Richard Ely, who had settled there earlier.<sup>238</sup> Ely, a family friend, had urged Gilmore to become his neighbor. At the suggestion of another colleague, Jastrow in the philosophy department, the Gilmores selected a young architect, Frank Lloyd Wright, to design their home. Their “airplane house” (as it is known today) remains a jewel in Wright’s crown.<sup>239</sup> The house was completed in 1909.<sup>240</sup>

Gilmore’s first major involvement in Wisconsin affairs pertained to the regulation of public utilities. He supported and drafted a Public Utilities Bill<sup>241</sup> merging all the state’s regulatory schemes in the Railroad Commission. He then described his enacted bill as “the consummation of the movement towards a more effective control of public service companies.”<sup>242</sup> He suggested that the possibility (or was it a threat?) of municipal ownership contemplated by the act<sup>243</sup> would spur private operators to provide more efficient service at reasonable rates—which, he claimed, ordinary “competition” had failed to

summer session, for example. Gilmore also taught during that summer session. See Report of the Dean of the Law School, University of Wisconsin Biennial Report of the Board of Regents for the Years 1912–13 and 1913–14 at 146 (Madison, 1914). The evidence also suggests steady intellectual and social interaction among the faculties of Chicago, Wisconsin, and Northwestern. Schlegel, *supra* note 208, at 39–40. Richards was known to go to Chicago during its summer session. *Id.* at 282 n.99.

236. Frank Lloyd Wright and Madison: Eight Decades of Artistic and Social Interaction, ed. Paul E. Sprague, 46 (Madison, 1990) [hereinafter Sprague]. Turner had, by this time, already presented his paper on the American “frontier” to the American Historical Association (“The Significance of the Frontier in American History”). He would leave Wisconsin for Harvard in 1910. Current, *supra* note 13, at 166–67.
237. 2 Curti & Carstensen, *supra* note 57, at 12–13. Other groups included a Saturday Lunch Club under Governor McGovern, which included the governor, Van Hise, Ely, and Commons. An Economics Club and a Literary Club also met. Gearity, *supra* note 41, at 36–37.
238. Sprague, *supra* note 236, at 45–46. It is unclear why Gilmore and O’Shea bought the land together, but several factors suggest that they may have known each other well. The faculty of the university was small (200); their families attended the same church; and the Gilmores’ first three residences were all within two blocks of the O’Shea house on Langdon Street. *Id.* at 46.
239. Eaton, *supra* note 182 at 122.
240. Sprague, *supra* note 236, at 45.
241. *Id.* at 51; see 1907 Wis. Laws 1130.
242. See Eugene Gilmore, The Wisconsin Public Utilities Act, 19 Green Bag 517, 517 (1907).
243. *Id.* at 521 (“The probability of municipal operation is thus always present and may become a reality whenever the existing public utility corporation by its inadequate service or unreasonable charges creates the occasion.”).

do.<sup>244</sup> "The friends of the measure," he wrote, "feel confident that an efficient and conservative administration of the Act will bring certainty and stability to the situation and will attract rather than drive away investment."<sup>245</sup>

Gilmore was not alone on the law faculty in his service to the state. In 1909 Dean Richards, Walter Wheeler Cook, and Underhill Moore helped Commons draft a bill proposing changes in the State Arbitration Act.<sup>246</sup> In 1912 Gilmore and Moore prepared a brief on questions arising out of the Workmen's Compensation Act.<sup>247</sup> In 1912 Moore "prepared a brief on the subject of garnishment . . . and a draft for a stallion law at the request of the Wisconsin Breeder's Association." And in 1912 Richards and Gilmore "were members of the joint committee to consider a law relative to the commission form of government, and participated in the meetings of that committee."<sup>248</sup> Gilmore himself helped to draft, in addition to the Public Utilities Act, Wisconsin's Railroad Commission Law, Riparian Rights Law, and Workmen's Compensation Act.<sup>249</sup>

Involvement of *law* professors such as Gilmore in government service differed from the involvement of those from *other* disciplines. Unlike the biologist or the economist, the law professor's peculiar expertise was that of drafting, evaluating, and improving *law*. As law teachers explored their intellectual linkage with other disciplines, the role of the law teacher in state government came to resemble that of a meta-expert.<sup>250</sup> They generated heat from those opposed to their reforms, much of the heat being directed at the university, where it was felt by the regents and by Van Hise. Professors heavily involved, among them Gilmore, were disparaged as *political reformers* rather than disinterested experts.<sup>251</sup> Perhaps as a result, some law faculty steered clear of the entire enterprise. One of Gilmore's younger colleagues, Howard Leslie

244. *Id.* at 517–18.

245. *Id.* at 518.

246. Johnson, *supra* note 62, at 319.

247. *Id.* at 319–20.

248. *Id.* at 320.

249. Sprague, *supra* note 236, at 51.

250. Gilmore would later argue that

there is much to be said for Comte's contention that any separation of the sciences which deal with human societies is irrational . . . . The sharp separation of law in our American universities and its teaching and study by distinct faculties in schools or departments independently organized and administered is peculiar to our educational system.

The Relation of Law and Economics, 25 *J. Pol. Econ.* 69, 74 (1917). Although this appears simply to contemplate a blurring of boundaries between law and "other" social sciences, Gilmore calls law "one of the basic social sciences," noting that "[t]he jurisprudence of a society is the expression of its thinking and experience with regard to ethics, religion, economy and expediency." *Id.* at 75.

251. See Johnson, *supra* note 62, at 212. Tension between academics and practitioners probably also played into the strong hostility towards the participation of *law* professors *in particular*. Law teacher involvement in reform evoked contempt, suspicion, and even fear, on the part of practitioners. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 90–92 (New York, 1976).

Smith, while visiting at Stanford wrote to Richards that he did not feel comfortable “in the garment of the reformer,” preferring instead “work—teaching and investigation and the pursuit of quiet scholarship”<sup>252</sup> of the sort presumably being done at Stanford. Richards may have sympathized with this attitude.<sup>253</sup> Gilmore, however, remained comfortable in his garb.

Gilmore’s most controversial involvement concerned management of the Wisconsin River. By the turn of the century, the river was badly clogged by logging, paper making, and hydroelectric plants.<sup>254</sup> Two groups squared off: industrialists seeking private control of the entire river and Progressives espousing its public management. In 1906 a group of industrialists (mostly Stalwart Republicans) in the Wisconsin River Valley developed a plan for private management of the river by an organization they would call the Wisconsin Valley Improvement Company.<sup>255</sup> They intended “to establish a unified system to control the flow of water *for industrial purposes* . . . [by] building a network of reservoirs on the headwaters of the Wisconsin where the high water of spring and fall would be stored for release during the summer and winter periods of low flow.” In short, the system would “provide as near to a uniform flow of water as practicable on a year-round basis.”<sup>256</sup> The WVIC was to be a corporation; the stockholders would be industrialists, mostly involved in water power.<sup>257</sup> The corporation itself was to be concerned only with flow management. There were also, however, plans for the coordinated construction of power dams and for unlimited franchises to be obtained for the relevant water power companies.<sup>258</sup> The WVIC drew up articles of organization in September 1906, filed incorporation papers in January 1907, and immediately set about gaining control of the river.<sup>259</sup>

La Follette opposed private ownership of public resources. While governor, he had “declared that Wisconsin’s water and forest resources should be removed from the exclusive domain of private industry and placed in the public trust.”<sup>260</sup> And in the Senate he continued to decry private ownership, insisting on “the conservation of the natural resources in the public domain.”<sup>261</sup> Gilmore shared this view, as did many of the voters of Wisconsin. In

252. Quoted in Johnson, *supra* note 62, at 324. It does not appear that Professor Smith produced much quiet scholarship either.

253. *Id.* at 324.

254. Michael J. Goc, *Stewards of the Wisconsin: Wisconsin Valley Improvement Company 21–22* (Friendship, Wis., 1993).

255. *Id.* at 33–36.

256. *Id.* at 22 (emphasis added).

257. *Id.* at 35–36.

258. 2 Curti & Carstensen, *supra* note 57, at 20.

259. Goc, *supra* note 254, at 36.

260. *Id.* at 17–18.

261. Doan, *supra* note 113, at 95. As senator, La Follette explicitly opposed any plan “that might make a practically free gift to private interests of the public coal, timber, and oil lands,” resorting to a filibuster at the close of the 65th Congress to prevent such a disposition. *Id.* at 95–96.

1908 the Conservation Commission was established with three of its five members being university officials.<sup>262</sup>

The new commission resisted the WVIC's plans, contending that the state owned all navigable waters in trust for the public. As Gilmore wrote: "All navigable waters, in addition to being subject to equal use by all riparian owners, are also subject to use by all members of the public." Thus, he concluded, "[a]s between riparian proprietors and the public, the public right of use is paramount and may be enjoyed to the total exclusion of the private right."<sup>263</sup> Private interests replied that "the state does not own, never did own, and never can own [water resources], except by purchase or by condemnation."<sup>264</sup>

On behalf of the commission, Gilmore appeared before a legislative investigating committee and "delivered lectures on riparian law which called for state regulation of water power."<sup>265</sup> In brief, the commission "recommended to the legislature that franchises which had already been granted to water power companies be revised to insure that proper conservation measures were being taken, and that these franchises be made subject to governmental regulation."<sup>266</sup> After a dam collapsed in 1911, the state legislature made an effort to implement this proposal, transferring ownership of all water power sites to the state.<sup>267</sup> The state supreme court struck down the resulting legislation in 1912.<sup>268</sup> The debate would continue for several years.<sup>269</sup> Senator La Follette then pursued a national policy of public control of water; Gilmore collected his thoughts into a "brief" that Robert La Follette submitted to the Senate,<sup>270</sup> but it resulted in no legislative action.

In 1909, Gilmore became involved in the American Institute of Criminal Law and Criminology, initiated at Northwestern University by Harry Wigmore and Roscoe Pound.<sup>271</sup> He described the institute as a group of "eminent lawyers, judges, physicians, ministers, educators, social workers and laymen in all walks of life" whose purpose was "to further the scientific study of crime,

262. Van Hise was also a member of the forestry commission. McMurray, *supra* note 15, at 49. In 1910 he published *The Conservation of Natural Resources in the United States* (New York, 1910), in which he argued that "the state should assure development of natural resources without waste" and "should take responsibility for preventing waste and unfair monopoly in the development of natural resources." See 2 Curti & Carstensen, *supra* note 57, at 19-20.

263. Quoted in Walter E. Scott, *Water Policy Evolution in Wisconsin: Protection of the Public Trust* 157-58 (1965) (unpublished M. Pol. Sci. thesis, University of Wisconsin).

264. *Id.* at 156.

265. Garity, *supra* note 41, at 34.

266. *Id.* at 15; see also Goc, *supra* note 254, at 60.

267. Goc, *supra* note 254, at 60; 1911 Wis. Laws 905.

268. *Water Power Cases*, 148 Wis. 124, 134 N.W. 330 (1912); see Goc, *supra* note 254, at 60.

269. Goc, *supra* note 254, at 60.

270. *The Nature and Scope of Riparian Rights in Wisconsin and Limitations Thereon Growing Out of the Public Nature of Water*, S. Doc. No. 449, 61st Cong., 2d Sess. 3-66 (1909).

271. See Carrington, *supra* note 189, at 507. The institute continued to reside at the Northwestern University School of Law and published the *Journal of Criminal Law and Criminology* until 1951.



criminal law and procedure, [and] to formulate and promote measures solving the problems connected therewith.”<sup>272</sup> He engaged law school colleagues in the institute, and published an article calling others to the task.<sup>273</sup> A state conference on criminal law was called, and it adopted a resolution asking the Wisconsin Board of Regents to establish a professorship for the study of “the results of remedial law.”<sup>274</sup> Dean Richards endorsed the proposal.<sup>275</sup> When the regents were less enthusiastic, and appropriated a mere \$500 for a faculty-supervised study of criminology (though they *were* willing to grant participating faculty an unpaid leave of absence), Gilmore and other proponents established the Wisconsin Branch of the American Institute of Criminal Law and Criminology.

The president of the Wisconsin Branch was John Winslow, chief justice of the Wisconsin Supreme Court,<sup>276</sup> then listed as a member of the law school’s faculty. Gilmore served as secretary of the national organization.<sup>277</sup> Underhill Moore was secretary of the Wisconsin Branch, Oliver Rundell its assistant secretary. In 1912 Richards reported that “all the members of the faculty are active in committee work, and in the conferences of the Branch of the Institute.”<sup>278</sup>

The Wisconsin Branch engaged in empirical studies of the state’s criminal justice system. Oliver Rundell prepared a report addressing the question whether “there had been undue delays in the institution, trial, and disposition of criminal cases.”<sup>279</sup> The final product was a thirty-page study of criminal cases brought in three Wisconsin counties—specifically, all criminal cases brought in the municipal courts over a five-year period, and all criminal cases brought in the circuit courts over a ten-year period.<sup>280</sup> The report consisted primarily of charts and cursory interpretations of the data. The third chapter, for example, arranged cases by type of offense and indicates the number of days to final disposition. Rundell concluded that cases involving “an offense against the property” were resolved more quickly than those involving an offense “against the person.” Another endeavor, not funded by the institute but loosely affili-

272. The Need of a Scientific Study of Crime, Criminal Law, and Procedure—The American Institute of Criminal Law and Criminology, 11 Mich. L. Rev. 50, 50–51 (1912).

273. *Id.* at 50.

274. Johnson, *supra* note 62, at 320; 2 Curti & Carstensen, *supra* note 57, at 442.

275. Johnson, *supra* note 62, at 320.

276. Gilmore, *supra* note 272, at 54–55.

277. Ernst Freund was also involved in the national organization. See Oliver S. Rundell Miscellaneous Files, Ser. 11/2/7/2, Box 1, File: American Institute of Criminal Law & Criminology (1911–1917) (University of Wisconsin Archives) [hereinafter Rundell Files].

278. Report of the Dean of the Law School, University of Wisconsin Biennial Report of the Board of Regents for the Years 1910–11 and 1911–12, at 143 (Madison, 1912) [hereinafter 1910–11 & 1911–12 Report].

279. 2 Curti & Carstensen, *supra* note 57, at 442.

280. See Oliver S. Rundell, The Time Element in Criminal Prosecutions in Wisconsin, *in* Bulletin of the University of Wisconsin 3 (Madison, 1912).

ated with it, was a comparable study of the civil courts by Kenneth Burgess, an attorney in Lancaster, Wisconsin.<sup>281</sup>

The Wisconsin Branch also discussed reform measures and sponsored bills before the state legislature.<sup>282</sup> One committee, for example, seems to have taken an interest in eugenics, mental disease, and sterilization legislation.<sup>283</sup> Both Ernest Lorenzen and Richards were members of committees studying possible reform measures.<sup>284</sup> Of the recommendations presented by the branch to the 1911 session of the legislature, five were enacted.<sup>285</sup>

In 1912–13, Harry Richards took a leave of absence to travel to Europe, under commission from the American Institute of Criminal Law and Criminology. Specifically, he was to study Italian and German criminal procedure.<sup>286</sup> Van Hise proposed Gilmore as acting dean, and promised the position to him.<sup>287</sup> The suggestion drew heavy criticism from Granville Jones, secretary of the WVIC and a member of the university's Board of Regents.<sup>288</sup> At a board meeting, Van Hise acquiesced to the board's choice of Smith as acting dean. By virtue of a miscommunication, however, the law school was not notified until after Gilmore had taken the reins.<sup>289</sup> Accordingly, he served as acting dean for 1912–13.

Gilmore took leave the following year, spending it in Italy. When he returned, the heyday of the Wisconsin Idea was over. Emanuel L. Philipp, a Stalwart Republican, won the governor's seat in 1914 and would hold it until 1921. With this defeat of the Progressives and the rise of the Stalwarts came a state administration considerably less eager to employ university faculty to illuminate and resolve political issues.<sup>290</sup> There was even hostility to the univer-

281. A report draft was sent to Gilmore in November of 1912. See Letter from Burgess to Gilmore (Nov. 1, 1912), University of Wisconsin Archives, Ser. 11/1/1, Box 13, File B.

282. See Rundell Files, *supra* note 277, Box 1.

283. See *id.*; see also Gilmore, *supra* note 272, at 55 (Wisconsin branch considered the subject of "sterilization of criminals and defectives").

284. See Rundell Files, *supra* note 277.

285. 1910–11 & 1911–12 Report, *supra* note 278, at 143.

286. Letter from Harry Richards to E. A. Birge, acting president of the university (1912), University of Wisconsin Archives, Ser. 11/1/1, Box 13, File B.

287. 2 Curti & Carstensen, *supra* note 57, at 42.

288. Granville Jones was a partner in a prestigious firm in northern Wisconsin. He also managed a real estate company that owned over 30,000 acres of land in Marathon and Lincoln counties, and he served on the boards of the Wisconsin Valley Electric Company, Marathon Paper, and Wassau Sulphite Fiber. Governor Davidson appointed him to the Board of Regents of the University of Wisconsin in 1910. He served as secretary of the Wisconsin Valley Improvement Company until his death in 1925. Goc, *supra* note 254, at 40, 46. Jones opposed Gilmore's deanship "either by reason of the brief [Gilmore] had drawn on riparian law, or for other reasons." 2 Curti & Carstensen, *supra* note 57, at 42. Jones was also highly critical of Gilmore's involvement with the American Institute of Criminal Law and Criminology. He claimed to be expressing a principled objection to the involvement of law faculty in questions of *public policy* (which he deemed beyond their ken), but he appears to have been responding to the nature of the solutions they proposed. Jones's hostility towards Gilmore in particular is well documented. See Johnson, *supra* note 62, at 321–22.

289. 2 Curti & Carstensen, *supra* note 57, at 42.

290. *Id.* at 71.

sity; during the 1915 legislative session “forty-two bills were introduced, each aimed at correcting one or another ‘abuse’ rampant at the university.”<sup>291</sup> The “brain trust” of Van Hise, Ely, Commons, Gilmore, and others, “were no longer welcome in the capitol building.”<sup>292</sup>

Van Hise accommodated the new governor, “no longer encouraging members of the faculty to serve on state commissions and in other respects militantly to champion the Wisconsin Idea.”<sup>293</sup> Instead, he turned his focus to the university’s internal governance. An investigation begun in 1914 by the state’s Board of Public Affairs and subsequent allegations that the faculty was not using its time “efficiently” prompted the formation of a small committee to devise a way for the faculty “in the interest of conserving its time for teaching and investigation, to separate policy-forming from policy-executing functions.”<sup>294</sup> The small committee, which included Gilmore, submitted a “landmark” report<sup>295</sup> to the faculty in 1916, establishing committees for making major decisions of university policy, and reducing the role of general university faculty meetings, while preserving at least the prospect that the faculty would review important questions.<sup>296</sup>

Despite this activity in university governance, being unwelcome in the capitol made Gilmore uneasy. He took brief visiting appointments elsewhere, including California, Chicago, and Columbia. In 1919, when Wesley Hohfeld died, he importuned Underhill Moore to help him secure an appointment at Yale.<sup>297</sup> He conceded that he had invested too little time in serious scholarship to determine his worth as a scholar, and Richards gave him no help, writing Moore that Gilmore was not interested in scholarship.<sup>298</sup>

Gilmore joined Richards in turning attention to legal education and the Association of American Law Schools. Richards had been elected its president in 1914–15,<sup>299</sup> and Gilmore would follow in 1919–20.<sup>300</sup> Among the contested issues at the time was the existence of night schools tending to have lower standards.<sup>301</sup> The massive influx of immigrants and first-generation Americans into night schools,<sup>302</sup> which themselves proliferated at the turn of the cen-

291. Gearity, *supra* note 41, at 51.

292. *Id.* at 41. The brain trust characterization and the list of members is Gearity’s.

293. 2 Curti & Carstensen, *supra* note 57, at 72. His successor, Dean Birge, also believed the Wisconsin Idea a thing of the past, and did little to encourage continuing university participation in public affairs. *Id.* at 132–33.

294. *Id.* at 105.

295. *Id.* at 106.

296. *Id.* at 106–07.

297. Letter from Gilmore to Moore (May 27, 1919), Moore Papers, *supra* note 206.

298. Letter from Richards to Moore (June 26, 1919), *id.*

299. Johnson, *supra* note 62, at 289.

300. Sprague, *supra* note 236, at 51.

301. Night schools charged lower fees than private universities. Many of their students were urban immigrants with day jobs. Auerbach, *supra* note 251, at 97–98.

302. *Id.* at 94–97. Immigration peaked between 1905 and 1914, “with Southern and Eastern Europeans comprising the bulk of the newcomers.” *Id.* at 58.

ture,<sup>303</sup> has suggested to some that a major factor in AALS and ABA opposition to the night schools may have been a desire to maintain a socially elite professional identity for the bar, i.e., to keep out the poor and the foreign. Undeniably, there were advocates of higher standards who were animated at least in part by sheer bigotry. On at least one occasion, Richards spoke to the issue in terms suggesting mistrust of persons having “foreign names,” who aspired to be lawyers but who viewed “the Code of Ethics with uncomprehending eyes,” who were “the class of lawyers that cause Grievance Committees of the Bar Association the most trouble.”<sup>304</sup> Yet the universal desire among professions to establish academic credentials as a standard of admission suggests that sentiments other than bigotry were the operative causes for the initiative led by Richards and others.

Gilmore, on his part, rejected night schools, commenting: “I think most of us will agree that we have plenty of lawyers, and we are not to sit up nights devising ways for poor and worthy individuals to get to the bar.”<sup>305</sup> Edward T. Lee, dean of the John Marshall Law School (a night school in Chicago), responded in annoyance and would later write angrily, “[D]on’t slam the door in the face of brains.”<sup>306</sup> Gilmore also defended high standards within the AALS, writing to the dean at Michigan in 1912 that “in view of the character of a number of schools now in the Association, some of us feel that the Association of American Law Schools is largely used now as a device by schools of doubtful standing to gain a stamp of approval.”<sup>307</sup>

Gilmore participated in an investigation of Marquette and six other law schools in 1916. The investigation, by a five-man executive committee that included Dean Richards and Walter Wheeler Cook, was linked to Marquette’s 1912 admission to the AALS and subsequent allegations that it did not comply with association regulations (for example, in the size of its library, or the fact that it might not have actually applied its written admission requirements).<sup>308</sup> This scrutiny of Marquette may well be tied to its stance as the “other” and less elite Wisconsin law school; by today’s standards, it seems likely that Richards,

303. Between 1890 and 1910, the number of day schools increased 60 percent, the number of night schools 350 percent. *Id.* at 95.

304. Henry S. Richards, *Progress in Legal Education*, 15 *Handbook Ass’n Am. L. Schs.* 60, 63 (1915).

305. Meeting of the Association of American Law Schools—1916, 4 *Am. L. Sch. Rev.* 239, 277 (1916). Richards agreed, stating that night schools enroll “a very large proportion of foreign names. Emigrants . . . covet the title [of attorney] as a badge of distinction. The result is a host of shrewd young men, imperfectly educated . . . all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes.” *Quoted in* Auerbach, *supra* note 251, at 100. So did Underhill Moore, who complained in 1915 about aspiring Jewish lawyers who had not “been brought up in the American family life” and who consequently could “hardly be taught the ethics of the profession as adequately as we desire.” *Quoted in* Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners 1900–1922*, 5 *Persps. Am. Hist.* 551, 579–80 (1971).

306. *Quoted in* Stevens, *supra* note 9, at 107 n.40.

307. Letter from Gilmore to Dean Henry Bates (Dec. 2, 1912), University of Wisconsin Archives, Ser. 11/1/1, Box 13, File B.

308. Johnson, *supra* note 87, at 143–44.

Cook, and Gilmore would be seen to have a conflict of interest disqualifying them from playing a role in the accreditation of Marquette. Nevertheless, Marquette would survive to serve many offspring of immigrants and the poor (among others), and it explicitly “traded in practicality.”<sup>309</sup>

Cook disagreed with Gilmore on the issue of night schools and suggested the idea of a differentiated bar to which not all members would bring the same training.<sup>310</sup> The ABA and the AALS urged the Carnegie Foundation to study legal education, just as it had earlier studied medical education. The medical study had led to the publication of the Flexner Report and thence to the closing of scores of marginal medical schools.<sup>311</sup> The foundation undertook the study of law schools, but its Reed Report came to a very different conclusion from that anticipated by the bar. Calling attention to the political role of the bar and the need to keep the profession responsive to and representative of all citizens, it favored keeping night schools; with Cook, Reed suggested that the de facto stratified bar be accepted de jure.<sup>312</sup>

The involvement of Gilmore and Richards in the AALS effort to elevate academic standards was congruent with their efforts to raise academic standards in their own law school. It was also in keeping with what had been happening in all American professions since 1870, when academic credentialism first became part of the culture. Cook was a rare voice among the professional elite in his resistance to the impulse to elevate standards, for the status of professions was seen to be measured by the number of years of higher education required for certification.

While there were those who pointed to the foreign-born (sometimes especially to those who were Jewish) as persons of suspect professional ethics and who argued that these persons might be excluded by requiring longer periods of study, there is no reason to believe that all persons favoring such reforms were anti-Semitic, and no evidence that xenophobia was any motive of Gilmore. Certainly the reforms he favored did not, when adopted, have much effect on the entry of the foreign-born into the legal profession, and they may actually have facilitated the entry of the children of Jewish immigrants. The new standards did impede the entry of women and persons of color into the profession,<sup>313</sup> but there is no evidence that this was intended. Restricting access to the legal profession by elevating academic standards was not consistent with the populist agrarian leanings of some Midwestern Progressives, but it was quite consistent with the gentrified elitism of the American Social Science Association that had so influenced President Bascom. It could be and was defended by Gilmore and others as a means of maintaining the qualifica-

309. Stevens, *supra* note 9, at 79.

310. *Id.* at 115–16.

311. Paul Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry* 116–23 (New York, 1982).

312. See Alfred Zantlinger Reed, *Training for the Public Profession of the Law* 408–23 (New York, 1921).

313. Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 Fla. L. Rev. 501, 547–57 (1992).

tions of lawyers to share with emerging academic disciplines a role in the making of public policy. But this, of course, depended upon the law schools' and the students' using the longer period of study for that purpose, a reform of legal education that Gilmore was pursuing at Wisconsin but had no reason to suppose would be pursued at scores of other law schools through which many novice lawyers would go.

Gilmore also became involved in the founding of the American Law Institute. Shirley S. Abrahamson has recently suggested that "the idea for a national law organization composed of legal academics, judges, and lawyers [was] carried forward by Wisconsin law professors,"<sup>314</sup> namely Eugene Gilmore, with the support of Harry Richards. Indeed, the concept of the ALI at the time of its founding was close to the Wisconsin Idea;<sup>315</sup> it was to harness legal academicians with judges and wise practitioners of the law to the reform plow, to cultivate a renaissance of American law. Felix Frankfurter, then a professor at Harvard Law School, had urged, in so many words, that the Wisconsin Idea should be given national currency.<sup>316</sup>

There had been numerous earlier proposals to state and classify American law.<sup>317</sup> That idea could even be traced to antebellum efforts to promote codification,<sup>318</sup> for the restatements generated by the ALI were in a sense a compromise of the codification issue. There had also been committees of the American Bar Association that had striven to initiate similar projects.<sup>319</sup> It was thought for a while that the American Academy of Jurisprudence, organized in 1914 and including Roscoe Pound, William Howard Taft, and Samuel Williston,<sup>320</sup> would pick up the proposal to restate the law. In 1916 the AALS first considered the undertaking at the suggestion of its president, Harry Richards.<sup>321</sup> Discussion was stayed during the war,<sup>322</sup> but the ABA classification movement gained steam in 1919 under the leadership of James DeWitt Andrews.<sup>323</sup>

314. Refreshing Institutional Memories: Wisconsin and the American Law Institute, 1995 Wis. L. Rev. 1, 11.

315. Hull, *supra* note 11.

316. Auerbach, *supra* note 305, at 560 (quoting 1913 letter from Frankfurter to Learned Hand).

317. See, e.g., Lucien Hugh Alexander, Memorandum in re Corpus Juris, 22 Green Bag 59 (1910).

318. Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, 1981).

319. For example, a Special Committee on the Classification and Restatement of the Law was formed in 1917. William P. LaPiana, "A Task of No Common Magnitude": The Founding of the American Law Institute, 11 Nova L. Rev. 1085, 1108 (1987).

320. *Id.* at 1108-09.

321. See Richards, *supra* note 304. He was responding in part to the 1914 speech of Hohfeld, *supra* note 197. The action of the AALS is reported in 16 Handbook Ass'n Am. L. Schs. 91 (1916).

322. LaPiana, *supra* note 319, at 1109.

323. *Id.* at 1118.

The AALS, led by Gilmore, simply beat the ABA to the punch—and in doing so opened the possibility that the ALI might *reform* as well as restate.<sup>324</sup> The AALS had been dormant during the war,<sup>325</sup> but as its first active postwar president, Gilmore resurrected the idea first advanced in 1914 by Hohfeld,<sup>326</sup> who had since died, and by his colleague Richards in 1916. Gilmore wrote that

law teachers, judges, and leading members of the bar should be united in an effective organization for critical study and constructive endeavor in the fundamental problems of law and its administration. A law institute with such a personnel, meeting annually for a considerable period and working through ad interim committees could become a potent instrumentality in law reform and law improvement.<sup>327</sup>

He recommended that a committee of five men be appointed to resume investigation of Hohfeld's conception of the institute, a "Committee on Round Table Conferences and the Juristic Center."<sup>328</sup> Joseph Beale of Harvard was to chair the committee.<sup>329</sup> Gilmore then suggested "the creation of 'a national seminar or institute of law' with a membership of practitioners, judges, and teachers who would concern themselves with wide-ranging problems" as well as "closer involvement of law schools in legislative law making" and a "closer [curricular] relationship between law schools and colleges."<sup>330</sup>

The 1920 committee chaired by Beale recommended the creation of a Committee on the Establishment of a Permanent Organization for Improvement of the Law.<sup>331</sup> In 1921 the AALS resolved to invite appointments of committees representing the bench, bar, and other interested bodies for this joint venture. The ABA, through Elihu Root, who had been courted by William Draper Lewis of the University of Pennsylvania,<sup>332</sup> signed up, and a February 1923 meeting in Washington, D.C., created the American Law Institute.<sup>333</sup> Between 1923 and 1943 the institute issued nineteen volumes of the First

324. *Id.* at 1110–11, 1118–19.

325. Abrahamson, *supra* note 314, at 9.

326. Hull, *supra* note 11, at 64.

327. Eugene Gilmore, Some Criticisms of Legal Education, 7 A.B.A. J. 227, 230 (1921).

328. William Draper Lewis, History of the American Law Institute and the First Restatement of the Law: "How We Did It," in Restatement in the Courts 1, 2 (St. Paul, 1945); La Piana, *supra* note 319, at 1120; Hull, *supra* note 11, at 69–70.

329. Lewis, *supra* note 328, at 2. Beale aligned with Richards on the reform versus restatement issue. See Hull, *supra* note 11, at 64 ("Beale and Richards represented the conservative purists who thought law professors should take a passive role by influencing legal interpretation only through their scholarly treatises").

330. LaPiana, *supra* note 319, at 1120.

331. Lewis, *supra* note 328, at 2. The committee included such luminaries as Samuel Williston, Joseph Beale, and Roscoe Pound (all of Harvard), James Parker Hall and Ernst Freund (both at the University of Chicago), John Henry Wigmore (at Northwestern), and William Draper Lewis (at the University of Pennsylvania). Herbert F. Goodrich, The Story of the American Law Institute, 1951 Wash. U. L.Q. 283, 284.

332. Lewis, *supra* note 328, at 2; LaPiana, *supra* note 319, at 1119.

333. La Piana, *supra* note 319, at 1119–20.

Restatement<sup>334</sup> and was involved in only a few attempts at legislation—the Code of Criminal Procedure (1930), the Youth Correction Authority Act (1940), the Youth Court Act (1941), and the Model Code of Evidence (1942).<sup>335</sup> The Uniform Commercial Code and the Model Penal Code, as well as ALI involvement in continuing legal education, would follow World War II.<sup>336</sup> The Second Restatement was begun in 1953.<sup>337</sup> This reformist dimension of the institute's work may be the most enduring consequence of Gilmore's career and reflects the Wisconsinization of a part of the national legal academy.

Among his visiting appointments, Gilmore spent a semester at the University of the Philippines in 1917.<sup>338</sup> He was popular with the Filipino students and “successful in upgrading the curriculum and reorganiz[ing] the law library.”<sup>339</sup> His semester there led in 1922 to his appointment by President Harding as vice-governor general of the Philippine Islands.<sup>340</sup> In that position, he also served as secretary of the Department of Public Instruction, thereby overseeing education, public health and sanitation, and quarantines. Under his direction, the public school system of the Philippines was greatly expanded (both in geographical reach and enrollment figures) and the public health system much improved. He served also as director of private schools and chairman of the university's Board of Regents. And he introduced Filipinos to the Wisconsin Idea.

As he later explained:

With the advent of the Americans there was a complete reversal of the old order [in the Philippines] and a new political era began. The ‘governed,’—those who had served ‘merely as useful adjuncts’ in the Spanish regime,—were to participate extensively in the government and by rapid stages were to attain a large measure of local autonomy, and ultimately, if they wished it, political independence.<sup>341</sup>

The social and political order was in flux, and therefore especially ripe for the attentions of such a man as Gilmore.

Gilmore returned to the states in 1930, at the age of fifty-nine, taking first the deanship of the College of Law at the State University of Iowa and then the

334. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969). Only one reporter, Oliver S. Rundell (Property), was from Wisconsin. Norris Darrell & Paul A. Wolkin, *The American Law Institute*, 52 N.Y. St. B.J. 99, 139 (1980). The bulk were Harvard professors, with a sizeable minority representing Columbia, Chicago, and Pennsylvania. *Id.*

335. Darrell & Wolkin, *supra* note 334 at 140.

336. *Id.* at 141; Wechsler, *supra* note 334, at 148.

337. Wechsler, *supra* note 334, at 147.

338. Report of the Dean of the Law School, University of Wisconsin Biennial Report of the Board of Regents for the Years 1916–17 and 1917–18, at 166 (Madison, 1918).

339. Eaton, *supra* note 182, at 120.

340. Sprague, *supra* note 236, at 51.

341. Eugene A. Gilmore, *An Experiment in Government and Law in the Philippines*, 16 Iowa L. Rev. 1, 2 (1930); see also Eugene A. Gilmore, *The Development of Law in the Philippines*, 16 Iowa L. Rev. 465 (1931).



presidency of that university in 1934.<sup>342</sup> In 1932 he published a short essay on the Eighteenth Amendment exhibiting his old reformist zeal. He was responding to the 1932 Democratic Party platform advocating repeal of the amendment, or in the alternative at least liberalization of the Volstead Act by changing the statutory definition of "intoxicating liquor."<sup>343</sup> He argued that such legislation would violate the amendment and "would present to the court, not the question of effective enforcement of the Amendment, but of its violation, and hence would call for an independent judgment." He also pointed out that liberalization of the Volstead Act would be practically meaningless, given the concurrent power of the states (previously existing and by the Eighteenth Amendment affirmed) to prohibit intoxicating liquors.<sup>344</sup> "Assuming a liberalized Volstead Act, and its acceptance by the federal courts," he wrote, nevertheless "the entire body of state laws and decisions would still be operative as to transactions within the respective states."<sup>345</sup> Thus, he concluded, "a liberalized Volstead Act, if sustained by the United States Supreme Court, would have legal effect only in the federal courts and in places under the exclusive jurisdiction of the United States."<sup>346</sup>

Six years after his appointment as university president, he asked to step down, citing his age.<sup>347</sup> He then briefly served as dean of the law school at the University of Pittsburgh.<sup>348</sup> World War II forced that law school to a halt,<sup>349</sup> and Gilmore returned to the State University of Iowa as professor of law. He remained there until his retirement in 1950 at the age of seventy-nine.

## V. Epilogue

Less has been heard of the Wisconsin Idea since 1920. Senator La Follette left office after a furor over his wartime pacificism but did manage another run for the presidency in 1924. Harry Richards died. Eugene Gilmore went to the Philippines. And the 1920s were for most Americans a "return to normalcy," i.e., a time not congenial to reform. Yet there can be little doubt that the Progressive Era in Wisconsin left its mark not only on the University of Wisconsin Law School, but on the American Law Institute and other institutions as well. The Idea abides.

Thus, the law school would continue, more than most law schools, to serve the government of its state and to maintain close relations with other academic disciplines bearing on legal and political issues. Lloyd Garrison would become dean in 1930; he would be known as a reformer in the Wisconsin

342. Eaton, *supra* note 182, at 121-22.

343. Eugene A. Gilmore, *Liberalizing the Volstead Act*, 18 Iowa L. Rev. 22, 22 (1932). Congress passed the Twenty-first Amendment in February 1933, the Volstead Act was amended in March, and the Twenty-first Amendment was ratified in December.

344. *Id.* at 24.

345. *Id.* at 25.

346. *Id.* at 29.

347. Wis. St. J., Jan. 4, 1940.

348. Eaton, *supra* note 182, at 120.

349. *Id.* at 120.

tradition, as would his colleagues Nathan Feinsinger in labor law<sup>350</sup> and Jacob Beuscher in land use.<sup>351</sup> And Garrison's time saw the beginning of the career of James Willard Hurst, perhaps the most eminent legal historian of this century, whose work was often shaped by the ambition to illuminate the legal and political institutions of Wisconsin.<sup>352</sup> All these scholars kept an eye on events at the other end of State Street. In more recent times, Wisconsin has been the center of the Law and Society Association, the modern and sophisticated iteration of the visionary American Social Science Association so influential with President Bascom. At Wisconsin, at least, the ASSA lives, but shorn of its quixotic optimism.

It also appears that the Progressive spirit emanating from Wisconsin had some role in the development of legal realism at Columbia and Yale in the 1920s. Those developments have been fully told by others,<sup>353</sup> but it bears notice here that Walter Wheeler Cook and Underhill Moore, the sometime protégés of Gilmore, were important figures at Columbia during its critical years, and that Moore and Ernest Lorenzen were significant participants in the later ferment at Yale. There is no evidence to support the hypothesis that their years spent in Wisconsin with Gilmore and Richards powerfully influenced their careers at Columbia and Yale, but neither is there evidence to refute it. There may be, for example, a relation between Moore's reformist activities in Wisconsin and his later conversion to radical empiricism. When Yale critics in the 1930s assailed the premises of the ALI Restatements,<sup>354</sup> they often expressed opinions close to those advanced by the reformer Gilmore in 1920 when he initiated the establishment of the institute.

Any influence the Wisconsin Idea may have had on legal realism at Yale and Columbia was only part of a larger influence of the West on the East. Because of the elevated status of the Ivy League schools, it has been natural to assume that ideas and people were being dispersed from those centers into a colonial hinterland. While that assumption cannot be falsified, the evidence we have adduced to the contrary does not stand alone.<sup>355</sup> A significant number of the most influential academic lawyers in the Progressive Era were native Westerners,<sup>356</sup> and others, such as we have seen, began their careers in Western institutions. Political Progressivism first appeared in the West, and it was Western optimism that infected the East. Pound's "sociological jurisprudence"

350. See *Collective Bargaining in the Trucking Industry* (Philadelphia, 1949).

351. See *Water Rights* (Madison, 1967).

352. See *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, Mass., 1964).

353. See, e.g., Brainerd Currie, *The Materials of Law Study*, 8 *J. Legal Educ.* 1 (1955); Kalman, *supra* note 212; Schlegel, *supra* note 208.

354. Kalman, *supra* note 212, at 26-28; see also Herbert F. Goodrich, *Institute Bards and Yale Reviewers*, 84 *U. Pa. L. Rev.* 452 (1936); Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 *U. Pa. L. Rev.* 811 (1936).

355. See also Carrington, *supra* note 189, at 511-13.

356. Hohfeld, Jones, and Wigmore were natives of California; Corbin of Kansas; Pound and Gilmore of Nebraska. Of those who came a bit later, Llewellyn and Douglas were natives of the state of Washington, Arnold of Wyoming.

was an antecedent to legal realism, and was distinctly Progressive and Western in its origins.<sup>357</sup> Easily the most eminent Progressive lawyer in New England in the first decade and a half of this century was Louis Dembitz Brandeis, a native of the Ohio Valley whose ideas were markedly Jacksonian.<sup>358</sup>

Moreover, a search for the roots of Progressivism leads, at least in important part, to those who in the latter third of the nineteenth century began to adapt agrarian Jacksonian politics and law to an industrial age. Premier among such lawyers was Thomas McIntyre Cooley of Michigan, who was among the last Jacksonians and also among the first Progressives.<sup>359</sup> Many of Brandeis's ideas about law were held in common with Cooley. It is therefore inaccurate to think of Western legal institutions as mere colonial outposts of their Eastern counterparts.<sup>360</sup> Just as young Gilmore did not adhere to the ideas of his mentor, James Barr Ames, we might expect to find that scores of his Western contemporaries, such as those at Berkeley, used Eastern law schools for credentialization but adapted their legal educations, and perhaps even the case method, to the Progressive ideas of the West.

Indeed, like Gilmore and other Progressives, many of the later realists became law reformers, particularly during the era of the New Deal.<sup>361</sup> In this, they practiced the Wisconsin Idea on a grander scale. And while the efforts of scores of legal academics to fulfill the mission of the Commission on Uniform State Laws can be traced to a time antedating Gilmore and Richards, such achievements as Karl Llewellyn's on the Uniform Commercial Code<sup>362</sup> or Richard Wellman's on the Model Probate Code<sup>363</sup> can be seen as extensions of a role pioneered by Eugene Gilmore.

On the other hand, it is hard to identify anyone who has had a career as a law professor quite like Gilmore's. What makes his career distinctive and perhaps unique is the diversity of his political involvements. Utility regulation, criminal law, riparian rights, temperance, a restated common law, and elevated professional standards were causes he espoused. While his work was of sound professional quality, it was not the product or expression of sustained

357. Carrington, *supra* note 189, at 503–11.

358. Two recent studies of Brandeis's ideas make this point, albeit indirectly. See Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* (Cranbury, N.J., 1994); Philippa Strum, *Brandeis: Beyond Progressivism* (Lawrence, 1993).

359. See Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 *Stan. L. Rev.* 495 (1997); *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, \_\_ *Am. J. Legal Hist.* \_\_ (1997); *Relating Law, Economics, and Morals: Thomas Cooley at the Advent of American Administrative Law* \_\_ *Iowa L. Rev.* \_\_ (1997).

360. The metaphor is Schlegel's, *supra* note 208, at 252.

361. Kalman, *supra* note 212, at 13–16; Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham, 1995).

362. William Twining, *Karl Llewellyn and the Realist Movement* 270–301 (London, 1973).

363. Wellman was the reporter for the Uniform Probate Code project of the National Conference of Commissioners on Uniform State Laws and the principal advocate for its adoption. See, e.g., *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 *Ind. L.J.* 191 (1969); *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 *Conn. L. Rev.* 453 (1970); *Lawyers and the Uniform Probate Code*, 26 *Okla. L. Rev.* 548 (1973).

scholarship. Indeed, there is little evidence of direct connection between his teaching or research and his public involvements. Llewellyn, in contrast, thought about commercial law for decades before he undertook to reform it; Wellman did the same for the law governing the administration of decedents' estates. Gilmore, the minister without portfolio, was ever ready to take up a good cause.

Had Gilmore's law reform work issued forth from more solid roots, it might have been more effective and might have been received with less hostility on the part of those whose interests were adverse to the causes he served. The public gadfly role he performed was not exactly the sort of activity that *lehrfreiheit* was designed to shelter.

Yet, from this distance, his enterprise warrants a salute. He put his academic appointment to full use; unlike his reserved colleague Smith, he did not sit idly in a tower, but sallied forth to do what he could to make Wisconsin a better place. Not for him were unworldly schemes to irrigate the far side of the moon. He did not decry politics as dirty or dismiss politicians as vulgar, but knew that "if the government is not to be mastered by ignorance, it must be served by intelligence."<sup>364</sup>

There is no evidence that Gilmore or Richards or their Progressive colleagues were cognizant of the tradition of moral education in law established in 1779 with the academic appointment of George Wythe<sup>365</sup> and extending through such later teachers as Francis Lieber,<sup>366</sup> Joseph Story,<sup>367</sup> George Robertson,<sup>368</sup> Timothy Walker,<sup>369</sup> Thomas Cooley, and William Gardiner Hammond.<sup>370</sup> Nevertheless, Gilmore's own career at Wisconsin was a premier example of the practice of civic virtue. He was a paradigm of the classical republican; had he set out to emulate George Wythe, he could scarcely have come closer to achieving that goal. In his ministrations to politicians and bureaucrats, he accepted himself and his co-citizens as they were, and not as he would have made them had he presided over the creation, and he made of himself a worthy priest of our civic religion. We ought to make more of an example so modest and yet so grand.

364. Leo Wormser, *quoted in* Oscar Kraines, *The World and Ideas of Ernst Freund* 149 (University, Ala., 1974).

365. Carrington, *supra* note 99, at 533.

366. See Carrington, *Lieber's Political Ethics*, *supra* note 58.

367. Sutherland, *supra* note 112, at 92-141.

368. Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*. 41 *Mercer L. Rev.* 673, 692-96 (1990).

369. Walter Theodore Hitchcock, *Timothy Walker, Antebellum Lawyer* (New York, 1990).

370. Carrington, *Lieber Revival*, *supra* note 58, at 2140-43.