Law and the Wisconsin Idea

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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. In the last years of the nineteenth century, one academic professional
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.\textsuperscript{12}

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
by editorialist William Leggett\textsuperscript{18} and in the more theoretical writing of Theodore Sedgwick.\textsuperscript{19} 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 Ameri-
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,\textsuperscript{26} 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,\textsuperscript{27} 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,\textsuperscript{28} 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,\textsuperscript{29} suffered from a severe shortage of funds,\textsuperscript{30} and was exposed to hostility voiced by sectarian colleges. Some sectarian legislators considered the institution "godless."\textsuperscript{31}
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." 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. The chancellor was also to be replaced with a considerably weakened "president"—one with no seat or voice in the Board of Regents.

In 1874 the regents elected John Bascom, then president at Williams College, to be president of the university. He was a man of wide ranging
and under the statute that in the public places they would come. But the
er struggle between Bascom and the board resulted in Bascom’s departure in 1887.62

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.63 This may have been due in part to a calming of ethnic tensions in the state. In 1860 Wisconsin was hardly populated by Indians and Wisconsin Indians.64
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. One response to the prolonged disorder of that time was the advent of social Darwinism and the
the public's benefit, and for a time charged no tuition. Likewise, in Iowa, the
The law school suffered in these early years because of the regents' insistence that it be chiefly fee-driven.\textsuperscript{106} 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."\textsuperscript{107} 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.\textsuperscript{108}

Although the faculty and student body grew, and new subjects were introduced,\textsuperscript{109} local practitioners and lower-court judges continued to provide most of the teaching.\textsuperscript{110} The courses were vocationally oriented,\textsuperscript{111} 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.\textsuperscript{112} 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.\textsuperscript{113}

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.\textsuperscript{114} 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.\textsuperscript{115}

\textsuperscript{106} 2 Curti & Carstensen, \textit{supra} note 57, at 425.

\textsuperscript{107}  Johnson, \textit{supra} note 62, at 142 (quoting U. Press, Nov. 25, 1881, at 4).

\textsuperscript{108}  \textit{Id.} at 123.

\textsuperscript{109}  \textit{Id.} at 118.

\textsuperscript{110}  \textit{Id.} at 123; 2 Curti & Carstensen, \textit{supra} note 57, at 107.
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
was his classmate\textsuperscript{160} and fellow admirer of Bascom,\textsuperscript{161} Charles Van Hise. The search was contentious. Candidates included Henry Pritchett (later director of the Carnegie Foundation for the Advancement of Teaching),\textsuperscript{162} Nicholas Murray Butler (whom Columbia hired), and Edward A. Birge, within the university.\textsuperscript{163} Vilas, then on the Board of Regents, bitterly opposed Van Hise\textsuperscript{164} and openly objected to La Follette's having stacked the Board of Regents to ensure Van Hise's success.\textsuperscript{165} Through the efforts of La Follette and Frederick Jackson Turner, Van Hise was awarded the position.\textsuperscript{166} Vilas would later
interest. 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.

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
department helped to draft the state's income tax law in 1911.\textsuperscript{178} La Follette
pointments to the federal bench.\textsuperscript{194} 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.\textsuperscript{195}

The relationship between this ferment in legal education and the Progressive movement was explained by Herbert Croly, who founded \textit{The New Republic} in 1914 and was an intellectual leader of Progressive politics.
universities to bear on the problems of our public life. 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, 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. They settled upon Harry Richards, who
was brought to Wisconsin from Iowa. Like Gilmore, he had served at Harvard.
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
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.
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. The cabal also included President Van Hise.
do. 244 "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." 245

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. 246 In 1912 Gilmore and Moore prepared a brief on constitutional issues of the Workmen's
Smith, while visiting at Stanford, wrote to Richards that he did not feel
1908 the Conservation Commission was established with three of its five members being university officials.
sity; during the 1915 legislative session “forty-two bills were introduced, each aimed at correcting one or another ‘abuse’ rampant at the university.”291 The “brain trust” of Van Hise, Ely, Commons, Gilmore, and others, “were no longer welcome in the capitol building.”292

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.”293 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

Cook, and Gilmore would be seen to have a conflict of interest disqualifying them from playing a role in the accreditation of Marquette. Nevertheless,
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 believe would be adopted at some of other law schools through which
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.324 The AALS had been dormant during the war,325 but as its first active postwar president, Gilmore resurrected the idea first advanced in 1914 by Hohfeld,326 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
Restatement 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). 335 The Uniform Commercial Code and the Model Penal Code, as well as ALI involvement in continuing legal education, would follow World War II. 336 The Second
presidency of that university in 1934. In 1932 he published a short essay on
the Eighteenth Amendment exhibiting his old reformist zeal. He was respond-
ing to the 1932 Democratic Party platform advocating repeal of the amend-
ment, or in the alternative at least liberalization of the Volstead Act by
changing the statutory definition of “intoxicating liquor.” 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
tradition, as would his colleagues Nathan Feinsinger in labor law\textsuperscript{350} and Jacob Beuscher in land use.\textsuperscript{351} And Garrison’s time saw the beginning of the career of James Willard Hurst, perhaps the most eminent legal historian of this
was an antecedent to legal realism, and was distinctly Progressive and Western
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