A Moment in the Times: Law Professors and the Court-Packing Plan

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A Moment in *The Times*: Law Professors and the Court-Packing Plan

Kyle Graham

From a letter to Charles E. Clark, dean of the Yale Law School:

August 28, 1935

Dear Charlie:

You are a sap and you know it. You have got to make up your mind some time whether you want to lead the life of action or the life of scholarship. You might as well do it now . . . .

—Robert M. Hutchins

In the mid-1930s law teachers found themselves at a professional crossroads. Over the past fifty years they had promoted legal education from the trade school to the university by casting their work as a “scientific” endeavor. But by the thirties the idea of “scientific” legal study had taken on so many meanings that it had become almost meaningless. Moreover, some among a new generation of law teachers—the legal realists—were attacking the Langdellian concept of scientific legal study as sterile and ineffective. At the same time, the Great Depression was snuffing out a “scientific” approach that emphasized empirical research. The writing was on the wall: the profession could no longer rally around abstract scientific principles to organize or promote itself. But what would replace law teachers’ perceived affiliation with and service of their “science” as a source of influence, prestige, and professional meaning?

The path taken connected the law school to the outside world. In the 1930s law teachers leveraged the respect they had cultivated as “scientists” to move beyond law journals and law-reform commissions and assume a more visible and direct role in influencing public opinion on controversial issues. The authors who have discussed the development of the law professor as a public figure have focused principally on the government service of Felix Frankfurter and his disciples and the legal realists who took part in Franklin Roosevelt’s

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1. Yale University Archives, James Angell Presidential Papers [hereinafter Angell Papers], Folder 1240, Box 120, RU 24, RG 2-A.

New Deal. Frankfurter and the realists were indeed groundbreakers, being among the first academics to span the divide between Max Weber’s Science as a Vocation and Politics as a Vocation. But with the notable exception of Frankfurter himself, even these individuals, who hopped back and forth between the academy and government, did not make the professor a public man; rather, to become public figures teachers had to leave the ivory tower behind (if only temporarily, in some cases). Punditry, rather than government service, would ultimately prove the better means of making the law professor a public figure. And a single affray—the controversy surrounding Franklin Roosevelt’s court-packing plan—was crucial in convincing law teachers that this manner of engagement with popular controversies could and indeed should become part of their job description.

The court-packing proposal directed unprecedented and unmatched attention to the nation’s law teachers. More important, it forced a difficult decision upon many academics who considered close association with partisan stances to be unbefitting a disinterested scientist. A number of these same professors detested the court-packing plan. Publicly denouncing the proposal would moderate perceptions of their profession’s political leanings while (they hoped) sinking the plan besides. To speak out, however, meant abandoning a spiritual dichotomy between the Man of Science and the Man of Politics.

The decision proved surprisingly easy. The court-packing plan was so abhorred, and the idea of legal study as a disinterested science so drained of any limiting force, that droves of law teachers left the library for the agora. This episode shifted the fulcrum of the seemingly eternal debate over the propriety of direct professorial engagement in political affairs. Because of their involvement in the court-packing debate, a critical mass of law teachers understood they could exert influence in partisan controversies without necessarily threatening their hard-earned place as recognized experts in law. This answered some questions about the profession’s direction, while provoking new ones that remain unanswered even today. Indeed, the battle lines traced by Frankfurter and Warren, Wigmore and Green, Arnold and Corbin are the same as those now paced by the likes of Neal Devins and Cass Sunstein in their debate over activism in today’s legal academy.

Prologue

The law teacher of the 1800s was a public man. Often a retired judge or practicing lawyer, he taught law on the side or as a second career. This began to change with the appointment of James Barr Ames to the Harvard Law

School faculty in 1873. Ames was the first full-time law teacher who had never previously practiced law. And as the 1800s segued into the 1900s, a discrete professional class of law teachers began to develop. They organized themselves and used "hard work and effective propaganda" to secure a place in the American university. They characterized their work as a science and themselves as scientists. Where other scientists had the lab, they had the library.

This campaign proved successful in securing law teachers a place in American universities influenced by German scientism. But if there ever was a common understanding as to what legal science was and should be, a dubious supposition in the first place, as of the late 1920s those days were long gone. And as boom times gave way to bad, more and more cracks began to show in what had been for two generations the profession's framing ideal. By the 1930s the most successful approach to "scientific" legal study had taken on unsavory meanings in some quarters. In a provocative article Jerome Frank argued that Christopher Langdell's spirit had "choked legal education" by insulating it from the realities of actual legal practice. Other, more modern forms of "scientific" legal study took a body blow from the Great Depression, as fiscal woes doomed the most ambitious schemes for empirical legal research. The Depression also forcefully reminded law teachers that while exhaustive studies might bring them plaudits, teaching students paid the bills. Finally, few who witnessed the corruption of Germany's legal regime at the Nazis' hands were encouraged to find the baseline similarities across legal cultures contemplated by certain groups of law teachers.

As scientism waned, a reformist impulse waxed. Beginning around the turn of the century, law teachers began to participate in law-reform commissions and other efforts to improve the legal system. This brought jurists into contact with politics, but generally in an advisory role not much different from that of the political scientists, botanists, and other academics also tapped for their expertise during the Progressive Era. This sort of contribution toward

8. Schlegel, supra note 6, at 315.
13. For example, student tuition, fees, and dormitory rent provided just 46 percent of Yale Law School's overall revenue for the 1930–31 academic year, but 58 percent of its revenue in 1936–37. Yale University, Report of the Treasurer and Associate Treasurer and Comptroller of Yale University 190–91 (New Haven, 1931); Yale University, Report of the Treasurer and Associate Treasurer and Comptroller of Yale University 148–49 (New Haven, 1937).
15. Auerbach, supra note 9, at 81.
perfecting the legal order was easily squared with the law professor’s embrace of Science as a Vocation.\textsuperscript{16}

Starting no later than the 1920s, however, law teachers also began to direct differently toned arguments toward a larger audience. At Harvard Law School Roscoe Pound, Zechariah Chafee, and Felix Frankfurter publicly denounced infringements on civil liberties during the Red Scare of the early 1920s.\textsuperscript{17} Frankfurter frequently commented on political matters in \textit{The New Republic}, including but not limited to endorsements of presidential candidates.\textsuperscript{18} In 1927 Frankfurter stepped even further into the limelight by writing an \textit{Atlantic Monthly} article critiquing the trial of Italian anarchists Sacco and Vanzetti, as well as a book on the subject.\textsuperscript{19} Other law teachers seconded Frankfurter; their views, too, attracted notice.\textsuperscript{20} And when Northwestern’s John Wigmore, the dean of evidence, publicly took issue with Frankfurter’s position, their exchange (originally printed in the Boston \textit{Evening Transcript}) became nationwide news.\textsuperscript{21} But Sacco-Vanzetti was a trial, and trials eventually end. By 1928 the luckless immigrants had been executed and law teachers had, in the main, returned to the business of more discreetly influencing the legal and social order through training the next generation of lawyers, writing law review articles and treatises, and making occasional contributions to law-reform commissions and drafting committees preparing new legislation.\textsuperscript{22}

Five years later came Roosevelt’s New Deal. From its outset the Roosevelt administration recruited law professors to design and operate the bureaucratic machinery that pushed this program forward. Faculty from Harvard, Columbia, Yale, and other schools were enlisted; many volunteered.\textsuperscript{23} One New Haven newspaper article in October 1933 spoke to the exodus of Yale Law School teachers to Washington with the headline “Administration Relying on Law Faculty So Much in Solving Problems of Idle, Suggestion Has Been

\begin{enumerate}
\item[16.] See \textit{id.} at 85.
\item[17.] Joel Seligman, \textit{The High Citadel} 58–59 (New York, 1978).
\item[22.] Within law reviews, of course, professors often commented on current legislative proposals and other topical issues. See, e.g., Members of Chicago Univ. Law Faculty, Comment, Limiting Jurisdiction of Federal Courts—Pending Bills, 31 Mich. L. Rev. 59 (1932).
\end{enumerate}
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Made School Be Moved to Capital."24 Realist law teachers also made the case for the Roosevelt program through receptive forums such as The New Republic.25

These law teachers were alternately fascinating to, and held in suspicion by, professional politicians and the general public. Their contributions to the New Deal made them a center of attention, and occasionally controversy.26 But their service did little to change the profession’s attitude toward political engagement. Outside of Harvard, Yale, and a few other schools, relatively few faculty actively participated in the New Deal. And when their contributions grew to more than writing an appellate brief or offering informal advice, they often had to take a leave of absence from their academic duties.27 In other words, professors were not marrying science and politics; they were choosing between the two, depending on the semester. Furthermore, law teachers involved with the New Deal often wondered whether their academic robes tripped them up in the court of popular opinion, i.e., whether their professorial opinions carried weight. Even the most effervescent Roosevelt supporters shared this concern; for example, after proposing a farm-relief plan in the pages of the Yale Review in 1933, Thurman Arnold wrote Yale University president James Angell with his concern that “there is a growing hostility in Washington towards professors’ schemes and we are inclined to believe that the less publicity we have, the more chance we will have of getting some of our ideas across.”28

The contributions of these predominantly liberal jurists to the New Deal also produced a backlash on campus.29 Some law teachers, echoing Weber and clinging to older versions of the scientific ethic, believed that overt political action threatened the law school’s reputation as a disinterested body of scholars. Even those who understood law as a social institution considered themselves obliged to foster a perception of nonpartisanship. Making the situation worse, many who regarded the New Dealers’ actions as professionally

24. Yale Experts, supra note 23.
26. Many New Dealers became minor celebrities. Intimate biographical sketches of Landis, Frank, and Frankfurter can be found in The Unofficial Observer [pseudonym of John Franklin Carter], The New Dealers (New York, 1934).
27. See, e.g., School of Law, Bulletin of Yale University—Supplemental Reports of the Dean and of the Librarian of the School of Law for the Academic Year 1934-35 at 10-11 (New Haven, 1935).
28. Letter from Thurman Arnold to James Angell (Mar. 27, 1933) in Angell Papers, supra note 1, Folder 1250, Box 121. Somewhat similarly, later that same year Yale’s Edwin Borchard and Columbia’s Karl Llewellyn thought of circulating a petition admonishing the German government for its persecution of Jews. But, doubting that a petition signed by law teachers would have much effect anyway, they abandoned their plan upon learning of the production of a similar statement by a group of social scientists. Letter from Edwin Borchard to Karl Llewellyn (May 1933) (Yale University Archives, Edwin Borchard Papers [hereinafter Borchard Papers], Folder 352, Box 31, Series II); Llewellyn to Borchard (July 13, 1933) (in Borchard Papers, Folder 357, Box 31, Series II); Borchard to Llewellyn (Aug. 11, 1933) (in Borchard Papers, Folder 357, Box 31, Series II).
29. Shamir, supra note 2, at 133.
improper were also opposed to the Roosevelt program. And so men like
Arthur Corbin shuddered when Frank, a part-time teacher at Yale and one of
the most prominent jurists in the Roosevelt administration, took to the po-
dium at the 1933 annual meeting of the Association of American Law Schools
and praised “experimental” lawyers who are “committed not to mere de-
tached study but are devoted to action on the basis of their tentative judg-
ments.”30 They no doubt cringed even more when Frank’s remarks were
reprinted for the world in the Congressional Record.

Just a year later Frank (recently ousted from the Agricultural Adjustment
Administration) was being considered for a permanent appointment at Yale.
Corbin wrote the school’s executive committee in opposition: “It seems prob-
able to me that as a member of a law faculty he would always occupy an
exaggerated place as its assumed public representative, and that ambition to
fill such a place would make him less contented and less useful as a working
professor of law.”31 Corbin was one of few professors to give vent to his
grievances with politically active colleagues, but others felt the same. Some
jurists still believed that legal study was a scientific endeavor that did not mix
with political activism—at least not quite so publicly. But as the 1930s pro-
gressed and the Depression raged on, neither the New Deal nor law teachers’
engagement with it showed any signs of winding down. Continued conflict
within the academy seemed inevitable. On the one side stood politically active
law teachers who wondered whether the public truly valued their input; on the
other were those who saw entanglement with political controversies as erod-
ing their profession’s hard-earned reputation for objectivity.

The Plan

Then in February 1937 Roosevelt unveiled what would become known as
his court-packing plan. Relations between his administration and the Su-
preme Court had been tense since long before Roosevelt announced his plan.
Law reviews were replete with proposals to solve the impasse between an
administration and a Congress that continually enacted progressive legisla-
tion and a Supreme Court that often struck those laws down.32 As announced,
the plan (whose principal designer was not a law school professor but rather
Princeton’s Edward Corwin) provided that the president could add a new
federal justice or judge when a sitting justice or judge of at least ten years’
service had waited more than six months to resign or retire after turning
seventy. The program, if approved by Congress, would allow Roosevelt to
counterbalance the votes of the Supreme Court’s “four horsemen.”

30. Jerome Frank, Experimental Jurisprudence and the New Deal, Address Before the Annual
Meeting of the Association of American Law Schools, Dec. 30, 1933, in 31 Handbook of the
31. Arthur Corbin to Members of the Executive Committee, Yale Law School (Feb. 8, 1935)
(in Angell Papers, supra note 1, Folder 1252, Box 121).
32. For a list of law review articles about this split, see Reorganization of the Federal Judiciary:
Hearings Before the Committee on the Judiciary, United States Senate, Seventy-Fifth Con-
gress, First Session, on S. 1392, A Bill to Reorganize the Judicial Branch of the Government,
75th Cong. 1878–80 (1937); Osmond K. Fraenkel, What Can Be Done About the Constitu-
tion and the Supreme Court? 37 Colum. L. Rev. 212 (1937).
The press and public immediately grasped the significance of Roosevelt's proposal. As one historian recently (though admittedly before the Clinton impeachment) wrote, "FDR's message generated an intensity of response unmatched by any legislative controversy of this century." The plan was the lead story in the New York Times the day after it was unveiled. The paper's coverage of the plan that day included reactions from former president Herbert Hoover, members of Congress, and Frederick Stinchfield, president of the American Bar Association. Also, tucked away on page 9, the Times carried a brief one-column article entitled "Law Professors Divided," which summarized the views of several Chicago-area law teachers.

The story did not end there. During February and March the controversy surrounding the plan continued to swell. The media, both guiding and guided by public interest, provided extensive coverage. Law teachers' perceptions were often discussed. Progressive jurists supportive of Roosevelt got off some of the first shots in the press. Other articles focused on the close splits of opinion within the law faculties of Cornell and Columbia. Meanwhile, the ABA was rapidly fostering, with great success, a perception that the nation's practicing attorneys unanimously opposed the plan.

The ABA campaign, along with the history of professorial engagement in the New Deal, made every law teacher who supported the plan stand out in sharp relief. It became received wisdom that a disproportionate number of law faculty supported the proposal. "I am not aware of any available statistics showing the number or proportion of law school teachers who were for or against the proposal," wrote one lawyer (Eustace Cullinan) in a California...
State Bar Journal article tellingly entitled “Has the Full-Time Law Professor Got What It Takes?” Nevertheless, that practicing attorney surmised, “much of the support for the proposal within the profession came from the teaching branch and it seemed to me that most of the law-school professors who were vocal on the subject favored the proposal.” Needless to say, the author did not support the plan and was not swayed by academics favoring it: “[T]his generation of law teacher has been pastured on the sheltered college campus and has never had to forage on the unfenced and overcrowded range. If he has gained something thereby he has also missed something. His job is to fit youth for life on the range. But has he got what it takes?”

Conservative professors were appalled. They seemed among the least likely academics to take the public stage. But in this case they had powerful reasons for stepping out of the shadows. At stake, as alumni letters reminded them, was nothing less than their profession’s reputation. And so, not long after the court-packing plan was announced and their colleagues rose up in support, they took novel measures to make their own opinions known. Some made the conditions calling them to the front perfectly clear. At the outset of an open letter critical of the proposal that he cowrote with fellow Harvard Law professors Morton Campbell and Joseph Warren, Edward Warren explained:

The common impression is that the bulk of the Harvard law school faculty is in favor of the President’s proposal. This is partly due to the fact that Prof. Frankfurter has been a prominent advisor to the President. It also is partially due to the fact that Dean-Designate Landis has spoken in favor of the proposal. He did not in so doing assume to state anything but his personal views, and yet there is an inescapable tendency for the public to think of him in his capacity as the new dean and to draw the conclusion that his views are the views of the faculty.

The impression thus created is very much regretted by many members of the faculty, who feel we are in a false position before the public. Most of us are very hesitant to talk in public on questions of burning public interest lest statements made by us as individuals should be taken as corporate statements. But it is clear to us that a false impression has arisen and is widespread in the minds of the public and that it should be corrected.

Other teachers at Harvard and faculty at the University of Chicago and Northwestern also issued joint statements to the press denouncing the plan.

42. 12 State B.J. 137, 137–38 (1937).
43. See, e.g., Letter from H. L. Wessling, president, Northwestern University Club of Chicago, to John Wigmore (Mar. 24, 1937) (Northwestern University Archives, John Wigmore Papers, Folder 8, Box 119).
Still others elsewhere responded to media invitations to voice their opinions. Given the exigencies of the situation, law teachers were abandoning law reviews—where an article’s partisan thesis could be defended as merely the inevitable conclusion of the “scientific” study that preceded it—for the popular press, where they stood a much greater risk of being perceived as partisans first, scientists second.

Law teachers also marched en masse to Congress. Beginning in March, the Senate Judiciary Committee held hearings on Roosevelt’s proposal. Of the approximately eighty witnesses called, almost one-fifth were law teachers. Out of these, only two (three if you include William Draper Lewis of the American Law Institute) spoke in favor of the plan. A dozen others, including Columbia dean Young B. Smith, Harvard’s Erwin Griswold, Michigan’s Henry Bates, and Yale’s Edwin Borchard, were opposed. Politicians considered law professors to be among the plan’s most compelling critics; teachers, along with religious and farm leaders, were given some of the precious final witness slots as the hearings drew to a close. Local media gave the teachers’ appearances extensive coverage.

While faculty on both political extremes acted quickly and publicly, the profession as a whole struggled over how best to express their opinions, if at all. On February 28 the AALS proposed a nationwide poll of law teachers, much like the ABA’s canvass of American lawyers. According to the AALS secretary, “several member schools have expressed themselves as strongly desirous that such a poll be taken.” The AALS asked member schools to approve or reject the idea of a poll while also (in the interest of time) submitting their faculty’s vote on the court-packing proposal itself. During March the schools voted. In all, forty-three schools voted in favor of a poll and thirty-four against. On April 1 it was reported that, given the closeness of the vote, and the fact that “[n]o school in favor of a poll has expressed any particular enthusiasm for it,” the survey would not continue.


49. Reorganization of the Federal Judiciary: Hearings Before the Committee on the Judiciary, supra note 32, at 225, 283, 305 (statements of Leon Green, dean, Northwestern University Law School; Thomas Konop, dean, Law School of the University of Notre Dame; and Lewis). Dean Charles Clark of Yale also submitted a statement supportive of the proposal, though he did not testify. Id. at 1872.


51. 400 Wish to Appear Against Court Bill, N.Y. Times, Mar. 29, 1937, at 4.

52. E.g., Court Bill Invalid, Borchard Tells Hearing, New Haven Evening Register, Mar. 31, 1937, at 1.

53. H. W. Arant to Members of the Association of American Law Schools (Feb. 28, 1937) (Northwestern University Archives, Leon Green Papers [hereinafter Green Papers], Folder 1, Box 34).

The dampened enthusiasm likely was due to two factors. First, upon further reflection both opponents and supporters of the plan probably saw that they had much to lose from a professionwide survey. Those who opposed the plan knew it would be hard to match the near-unanimous vote reported by the ABA; proponents may have believed that they were outnumbered even within the academy. Second and more important, law teachers had no idea whether the poll, as designed, would adequately reconcile individual professors' burgeoning interest in making their feelings known with an equally strong desire to maintain an appearance of institutional indifference. The devil was in the details. How would the poll's results be tabulated and announced—by school, or nationwide? Would it be revealed how each person had voted? These sorts of questions caused the Yale law faculty to initially vote against participating, then to change their minds and tentatively agree (on a divided vote) to postpone any decision until they learned more about the survey, then finally to allow individual faculty members to vote once it became evident that the institution's name would not come into play in announcing any results.\textsuperscript{55}

The most intriguing and telling debate over professorial activism took place at Harvard. Throughout the controversy Felix Frankfurter provided an unlikely voice for restraint. To this day, no one knows for sure whether Frankfurter personally supported or opposed the plan.\textsuperscript{56} In either case, he was silent in public and asserted that his colleagues should act likewise.\textsuperscript{57} He became annoyed when friends pushed him to make his opinions known. "I must confess," he wrote C. C. Burlingham, "that I am a bit puzzled by your insistence on catapulting me into the political cauldron. Although there are men like you who are detachedly for or against the Court proposal, it is inescapably embroiled in partisan politics. For years I have undeviatingly kept out of the politics of the day."\textsuperscript{58} How this position squared with his earlier \textit{New Republic} contributions was left unsaid. In any event, the tension between this position and the outspokenness of his colleagues (not to mention his own activism) reached a boiling point in early March and triggered a debate that hinted at the future relationship between legal academia and politics.

The provocation was a memorandum distributed to the Harvard Law School faculty by Henry Hart, who wrote:

\begin{quote}
The capacity of members of the Faculty to explore problems and to aid in their exploration is not helped, it is hurt, when they are pressed not to explore but to decide. And pressed they are by all polls and widely circulated statements. This seems to me a chief reason why participation in such statements or polls is contrary to the best interests of the School; and why the Faculty as a body should set its face against the growing tendency to engage in them.
\end{quote}

\textsuperscript{55} Yale Law School Faculty Minutes (Mar. 18, 1937); Yale Law School Faculty Minutes (Mar. 4, 1937).


\textsuperscript{57} Hirsch, \textit{supra} note 56, at 121–22.

\textsuperscript{58} Letter from Felix Frankfurter to C. C. Burlingham (Mar. 16, 1937) (Harvard Law School Library, Charles C. Burlingham Papers, Folder 15, Box 4).
This memo was a thinly veiled attack on a petition opposing the plan that had been distributed to the faculty by Samuel Williston (seventeen other professors signed), and on a statement Edward Warren had made to the Christian Science Monitor. On March 8, 1937, the faculty came together for its weekly meeting. At the conclusion of ordinary business, Warren spoke up to address Hart’s memo. He argued that although a law teacher “should be careful to guard the interests of the School, always remembering that the public is liable to confuse individuals with institutions,” ultimately he was bounded only by his conscience in speaking out on public questions. This held true, Warren asserted, even where the issue involved lay outside the field of expertise entrusted to him by the school. Concerning the present crisis, although Warren said that in the past he had been “particularly troubled by the frequent use of this liberty to use the prestige of the School to aid the personal views of some members of the Faculty on burning public questions” (one wonders whether he looked directly at Frankfurter as he said this, or just as deliberately avoided eye contact), the court-packing plan was different because it “raised an issue which is far deeper than any political, economic or social issue.” Speaking out against the court-packing plan was particularly appropriate, Warren argued, because it helped dispel the image “throughout this Country that this School is a School of lawlessness, rather than of law,” an impression created by the activism of Frankfurter and others.59

Williston made the next significant contribution to the debate, in which more than a dozen people spoke overall. Defending his petition, he told his colleagues that “whether we describe ourselves as professors or not, everyone knows we are, and we cannot get away from it. We carry the authority of our positions under our hat. When I feel I am justified, I feel that I have a right to speak out with all the power I carry under my hat.”60

Soon after spoke Frankfurter. He made a more moderate argument than set forth in his letter to Burlingham.61 Instead, he focused on the fact that the letter’s signers had expressly noted they represented a majority of the Harvard law faculty.62 Frankfurter emphasized that he had never purposefully attached the school’s name to any partisan piece he had written. He said,

[T]o make a statement that ‘a clear majority of the Harvard Law School Faculty support X’ is consciously to hold out to the public that some special respect is to be accorded to that body. . . . We may all carry under our hats the banner of the Law School, but don’t wave the banner. We have a profound function in American society and we should protect that function. We have a specialized function—legal education. We should keep it disentangled from ambiguities, and should not let others use us as allies in other causes.63

59. Harvard Law School Faculty Minutes (Mar. 8, 1937) (courtesy of the Harvard University Archives).
60. Id.
61. Frankfurter, supra note 58.
62. As released to the press, the petition expressly provided that it was being promulgated “by [the signers] as individuals and not as a resolution of the faculty of the school.” 18 at Harvard, supra note 45.
63. Harvard Law School Faculty Minutes (Mar. 8, 1937).
The distinction Frankfurter drew between the individual and the institution merits an aside. After decades of struggle the law school had attained a reputation for disinterestedness concomitant with membership in the university community. But here was an occasion where law teachers wanted to weigh in individually on what was clearly a “burning public question,” and the public wanted to listen. How could one reconcile a disinterested institution with partisan professors? Frankfurter’s way of solving this problem was to allow faculty to take public positions on issues with partisan tones, but draw a dividing line between the individual and the institution—and hope that the public accepted the whole as greater than the sum of its parts.

This approach may seem obvious in hindsight. Yet it was not so evident at the time Frankfurter spoke. Not too long before, a strong majority of law teachers had believed that scholars absolutely should avoid jumping into any political frays that had a sharp partisan edge. As for the role of the institution, both Frankfurter and Warren assumed that the law school had become a sufficiently established part of the research university to act, in the public’s eye, as a nonpartisan counterweight to partisan (or at least politically active) individual teachers. Just a few decades before, with law schools still struggling to establish their “scientific” bona fides, this position would have been far less persuasive. In addition, the previous ten years had witnessed the rise and decline of legal research institutions that, although designed to be nonpartisan, were not all that different from the think tanks of today, which of course often become highly politicized. Likewise, Jerome Frank’s ideal of a “clinical lawyer-school,” if accepted and able to flourish, could have transformed the law school into a vehicle for legal reform. Either of these alternative models might have caused the “law school” to become a politically charged institution. Frankfurter’s views were partly premised on their failure.

Of course, some of the difficulties involved in distinguishing the individual from the institution were obvious even then. Just moments after Frankfurter spoke, Barton Leach noted that “the mere initials ‘F. F.’ are more closely identified with the Harvard Law School than is the signature ‘W. Barton Leach, Professor of Law, Harvard Law School.’” Like Frankfurter, though, Leach was ultimately unwilling to deny himself a role in public debates. He seconded Williston’s views on the law professor’s influence, saying, “I believe that the action of the members of the Faculty of signing the statement about the Supreme Court was perfectly proper.... More weight is attached to the heads of members of the Law School faculty than to other heads, and it is proper that this should be so.”

Although others spoke after Leach, the essential points had been made. The remarks of Warren, Williston, Frankfurter, and Leach all manifested a belief that their profession had cultivated significant reputational capital in the past two generations. The discussion also staked the boundaries of a new consensus about how this capital could be maintained and even augmented in the future. Even the conservatives were arguing for activism; Frankfurter’s call for restraint was fatally compromised by his own record. No one was pressing

64. Id.
for a complete retreat back into Langdell's library. And the type of engagement urged by Warren, Williston, and others was not confined to law reviews, backroom lobbying, or political service. Instead, it embraced the risks and opportunities afforded by the American media. The discussion also produced a consensus that while the individual could speak, the institution should remain silent. Variants of this basic scheme are generally recognized as the appropriate model even to this day.65

Frankfurter fully grasped the meeting's importance. Days afterward he wrote Grenville Clark, "I wish you had been present at a rather full dress discussion that the faculty had concerning Hart's memorandum. It was an effort to canvass the function of the School, the role of the faculty, the reconciliation of our responsibilities to the School with our status as citizens." But Frankfurter guessed wrong as to the ultimate outcome. "I think it is fair to say," he wrote Clark, "that probably not six members of the faculty would now sign such a collective statement."66 Far more prophetic was the fact that Hart—the instigator of the discussion—would write an article in the April 16, 1937, Harvard Alumni Bulletin defending Roosevelt's plan, an article later reprinted in the Congressional Record.67

Roosevelt's court-packing plan ultimately disintegrated. Although the opposition of men such as Warren and Williston had little to do with its demise, they probably saw themselves, human nature being what it is, as having played a part in its downfall. The experience had taught (or, in Wigmore's case, reminded) them that participation in public controversies was not solely the province of the profession's liberal wing. The center of gravity in the debate over whether and how law teachers should contribute to public debates had shifted. All law teachers now could foresee circumstances in which direct participation would be useful. And so conservative faculty began to defend, rather than condemn, their colleagues' outspokenness. In early 1939 the law faculties of both Harvard and Yale came under attack by the Chicago Tribune for their allegedly Communist bents.68 At Yale none other than Arthur Corbin came to his colleagues' defense.69

65. Other schools also adopted the same framework at around this time. In his annual report for the 1937–38 academic year, Yale's Clark wrote:

Now I suppose that the more moderate critical view is that [law schools] should remain neutral. As institutions that is wise and desirable. So far as I know, that course is pursued generally, as it is with us. The School as such takes no sides in controversial matters. As individuals, teachers and students must have views or remain colorless nonentities.

Yale University, Bulletin of Yale University: Supplement to the Issue of 15 October 1938—Reports of the Dean and Librarian of the School of Law for the Academic Year 1937–38 at 17–18 (1938).


69. See Letter from Arthur Corbin to Justus Chancellor, Jr. (Jan. 20, 1939) (Yale University Archives, Secretary's Office—Records, Folder 890, Box 214, RU 49, RG 4-A).
At around the same time as Corbin cleared his throat, however, law teachers’ reactions to another controversy demonstrated some of the tensions inherent in the new paradigm. In late 1938 a petition implicitly censuring the German government for Kristallnacht was circulated among American law schools by the University of Amsterdam’s law faculty. Given the petition’s substance, several schools embraced it unanimously and unreservedly. This indicated that the individual/institutional framework was a flexible one, and that schools could be roused to action where an issue was perceived as going to a professional commonality—here, an assault on the rule of law. At Harvard, however, Frankfurter’s efforts to compel institutional approval of the petition were stymied by arguments similar to those he had made just a year before. In a December 1938 faculty meeting, Frankfurter argued that the school’s approval of the petition was proper because it went to “a matter involving the very fibre of what an educational institution should be—a body seeking truths and the principles of justice.” Frankfurter assumed that all law teachers subscribed to the principles set forth in the petition; thus a collective statement was proper, even a professional duty. (Warren, of course, saw opposition to the court-packing plan the same way.) But Dean Landis and some of the other faculty perceived the matter differently. They emphasized the divide between individual and institutional roles that Frankfurter himself had espoused the year before, and they chose not to adopt his exception for matters deemed fundamental to the profession. In the end, the faculty voted only to notify Amsterdam that it was “against the tradition of the Faculty of the Harvard Law School in its corporate capacity to pass a resolution in regard to matters outside of its immediate authority.” Individual faculty were, of course, allowed to issue their own statements indicating their support for the petition’s message, and to mention therein that they were Harvard Law School employees.

The debate over the Amsterdam petition suggested that law teachers would not always agree on where the individual’s place ends and the institution’s (or profession’s) begins—or, framed slightly differently, whether and when making one’s opinion public was a professional duty or an individual right. This issue aside, in the wake of the court-packing controversy well-noticed intervention in (and perceived influence upon) partisan controversies came to be considered part of a law teacher’s professional purpose and one of the keys to his prestige. Uncertainty as to the law teacher’s influence upon the public at large gave way to a belief that law teachers could and should contribute to partisan debates, at least in appropriate circumstances. Even the realists, who had never eschewed dipping into political waters, grew more confident that professors had a place in partisan tussles. Take, for example, Dean Leon

70. Graham, supra note 14.
71. Harvard Law School Faculty Minutes (Dec. 6, 1938).
72. Thurman Arnold wrote probably the most famous—and certainly the most witty and astrident—editorial about the plan. In the midst of the court-packing debate, Arnold ventured into the lion’s den with an article championing Roosevelt’s proposal in an A.B.A. Journal symposium. His piece lampooned the arguments made by other contributors and mocked
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Green of Northwestern. In 1933 Green had espoused a gradualist view of how his school should go about its business. "I may add that we have not sought any publicity of the flaunting type," he wrote Northwestern University's president, Walter Dill Scott. "In fact, we forego many opportunities for the like. Probably we forego much legitimate publicity. Our desire is to grow into the heart of the community and gain its appreciation by the meritorious work we do throughout the years."

Five years later, having received a taste of publicity by virtue of his involvement in the court-packing controversy, Green had a different take on how his school could join the nation's elite. In 1938 he wrote his superiors a lengthy report setting forth his strategic plan. "If your Law School is to deserve a place as a national law school it is essential, to my way of thinking," he wrote, "that the members of its faculty take their parts in the everyday problems of government." Green wrote that law teachers would partake in this "struggle" through "participation in public questions." That "public" was code for "political," and "participation" meant interaction with the media, was underscored by Green's warning that a law teacher

should not only be free but encouraged to add whatever he thinks his professional fitness and duty dictate without fear of repression or criticism from any authority of the university. A university, of all democratic institutions, should stand for the fullest and freest expression of views by the members of its faculty.

Other professors had come to believe that they had an affirmative responsibility to speak out in order to satisfy public demand for their input. At Yale, Dean Clark had wrung his hands when asked to appear before the Senate Judiciary Committee to discuss the court-packing plan. "Although I have been steadily avoiding all sorts of demands for radio and other public appearances," he wrote President Angell at that time, "it did seem to me that I must respond. For twenty years or more I have advocated constitutional change, and I did not see how in any honesty I could back out at the last moment." Clark never did appear before the committee. But looking back on the episode, he recognized practicing attorneys' views of law professors. His editorial's liberal sarcasm played off, instead of accepting, common criticisms of academics. A typical paragraph follows:

The next big gun to go off is Mr. George Bogert. Mr. George Bogert is a legal scholar like the writer and not a practicing lawyer. This makes him a little more cautious in his predictions of disaster because legal scholars are not closely in touch with the world of affairs and therefore more academic and less practical. However, Mr. Bogert is convinced on the main issue, and that is that "he is forced to see in the new plan something subtly immoral and dishonest . . . ." Mr. Bogert is, of course, not the kind of man who is willing to justify immorality of any kind and therefore he is against the plan.


73. Leon Green to Walter Dill Scott (Aug. 28, 1933) (in Green Papers, supra note 53, Folder 2, Box 27).
74. Leon Green, Statement to Vice President Snyder and His Advisory Committee (1938) (in Green Papers, supra note 53, Folder 3, Box 29).
75. Charles Clark to James Angell (Mar. 18, 1937) (in Angell Papers, supra note 1, Folder 1243, Box 120, RU 24, RG 2-A).
that the sky had not fallen when others did. In June 1937 he would tell his
gathered alumni: “When questions arise which concern [law professors’] immediate fields, in which, if at all, they should be expert, they cannot refuse the many and continuous demands for expression without a justified charge of cowardice or lack of conviction.” 76

**Epilogue**

Fast-forward to the present day and the ongoing discussion over whether high-profile involvement in politically charged public debates on “burning public questions,” as Warren framed the issue, compromises or enhances law professors’ reputation and utility. Partisan petitions are a matter of everyday life for the modern law teacher. So too are television and radio appearances, newspaper and magazine columns, and books directed toward the mass market. But now even champions of restraint agree upon a foundational proposition: “law is not a science.” 77 Many, perhaps most, law teachers as recently as the 1920s would not have agreed. Their conception of, and adherence to, “scientific” legal study left little room or time for the agora. But once “science” lost its talismanic appeal and even the most conservative law teachers saw some good in speaking out, the question of engagement inevitably became one of degree, manner, and form, as it is today.

It has always been plain that law (or more precisely, legal study and education) is not an art (except, perhaps, to a select few). Thus its practitioners must derive some of their usefulness from something other than the pure beauty of their insights and constructs. And the recognition that law is not a science necessarily allows for the possibility that debates will always exist over what it is and, more crucially, what it should be. If law teachers want to maintain an important role in society, they must influence these debates.

Much, perhaps most, of that influence has always been exerted obliquely, through academic writing and, especially, training the next generation of practicing attorneys, judges, and politicians. 78 Starting in the early 1900s, law teachers began to contribute more directly to legal reform. Though reflecting broadened methods, this backroom engagement only modestly enhanced their public profile. More recently, in the modern era of mass media, professors have exerted much of their influence through well-noticed intervention in controversies with a legal, or arguably legal, edge. The difficulty involves identifying a level and manner of engagement that allow for the greatest possible exertion of influence without damaging the profession’s overall reputation as a body of truth seekers. The ongoing debate among Devins, Sunstein, and others about law teachers’ involvement in the Clinton impeachment and the controversy surrounding the 2000 presidential election is basically over where to set this level. That it is being set at all is the result of events occurring almost seven decades ago.

76. Charles Clark, Address Before the Yale Law School Alumni Association 1 (June 21, 1937) (transcript available in the Yale University Archives).

77. Devins, supra note 3, at 183.

78. Gordon, supra note 23.