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THE DECLINE OF LAW AS AN AUTONOMOUS DISCIPLINE: 1962–1987

*Richard A. Posner**

Being of a skeptical cast of mind, I at first declined the editors' invitation to contribute to this issue commemorating the hundredth anniversary of the founding of the *Harvard Law Review*. That the *Review* is 100 years old has no significance. Even the fact that I live in a house that is eighty-two years old has greater significance: it has implications for problems of maintenance and repair, and it tells one something about the architectural and structural features of the house. But as a journal has no natural life span, the fact that it is 100 years old should interest only people who have a superstitious veneration for round numbers. The reason the *Harvard Law Review* is 100 years old is that it was started 100 years ago; the law reviews of all the major law schools are still being published, and if they had been started 100 years ago they too would be 100 years old.

What is true, however, and an apt subject for anniversary reflections, is that the *Harvard Law Review*, for reasons outside the control of the able students who run it, may have reached the peak of its influence — may, indeed, have started its journey down the mountain. One factor is the democratization of legal teaching and research — a leveling process as a result of which the Harvard Law School is now but one of a half-dozen or so law schools of roughly equal quality, rather than the unquestioned leader of legal education that it once was. Another factor — the one that will concern me in this Essay — is the changes in the legal system and legal thought that began in the early 1960s. Until then the autonomy of legal thought was the relatively secure, though periodically contested, premise of legal education and scholarship. It is no longer. I am particularly conscious of this change because I was educated toward the end of an era in which law — the attack of the legal realists having been blunted — was confidently regarded as an autonomous discipline, and because the law school I attended epitomized this conception (I graduated from the Harvard Law School in 1962); yet much of my professional energy since has been devoted to opposing this conception. I shall try to explain what the conception was, why it has been (as I think) dethroned, and what the implications are for the legal system, for legal

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

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education and scholarship, and, incidentally, for the next century of the *Harvard Law Review*.

I. LAW AS AN AUTONOMOUS DISCIPLINE

The idea that law is an autonomous discipline, by which I mean a subject properly entrusted to persons trained in law and in nothing else, was originally a political idea. The judges of England used it to fend off royal interference with their decisions,¹ and lawyers from time immemorial have used it to protect their monopoly of representing people in legal matters. Langdell in the 1870s made it an academic idea. He said that the principles of law could be inferred from judicial opinions, so that the relevant training for students of the law was in reading and comparing opinions and the relevant knowledge was the knowledge of what those opinions contained.² He thought that this procedure was scientific, but it was not, not in the modern sense at any rate. It was a form of Platonism; just as Plato had regarded particular chairs as manifestations of or approximations to the concept of a chair, Langdell regarded particular decisions on contract law as manifestations of or approximations to the legal concept of contract.

This perverse or at best incomplete way of thinking about law was promptly assailed by Holmes, who pointed out that law is a tool for achieving social ends, so that to understand law requires an understanding of social conditions.³ Holmes thought the future of legal studies belonged to the economist and statistician rather than the "black-letter" man.⁴ But because the economist and the statistician — not to mention the philosopher, the sociologist, the political scientist, the historian, the psychologist, the linguist, and the anthropologist (notably excepting Henry Maine)⁵ — were not much interested in law, Holmes's assault on Langdell did not undermine the autonomy of the

¹ In the words of Sir Edward Coke:

then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace

Prohibitions Del Roy, 6 Coke Rep. 280, 282 (1608).

² See, e.g., C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (2d ed. 1879). For a superb description of his method see Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

³ See O.W. HOLMES, JR., THE COMMON LAW (1881).

⁴ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵ See H. MAINE, ANCIENT LAW (1861).

law as a discipline. Holmes himself was steeped in the philosophical thought, both ethical and epistemological, of the late nineteenth century, in particular Social Darwinism and Charles Peirce's pragmatism. However, the lesson suggested by his career, as by the careers of such other notable legal thinkers as Benjamin Cardozo, Louis Brandeis, Roscoe Pound, John Wigmore, Felix Frankfurter, Karl Llewellyn, Learned Hand, Jerome Frank, Henry Hart, and Lon Fuller, was that a legal thinker should be cultivated, broadly educated, and intellectually well-rounded (rather than merely proficient in the doctrinal analytics taught by Langdell and his successors) — not that any of the keys to understanding law were held by disciplines other than law.

Such was the atmosphere of the Harvard Law School when I was a student. With a handful of exceptions (such as Donald Turner in antitrust),⁶ the faculty believed, or at least appeared to believe, that the only thing law students needed to study was authoritative legal texts — judicial and administrative opinions, statutes, and rules — and that the only essential preparation for a legal scholar was the knowledge of what was in those texts, and the power of logical discrimination and argumentation that came from close and critical study of them. The difference from Langdell's day — a difference that was the legacy of Holmes and the legal realists — was that law now was recognized to be a deliberate instrument of social control, so that one had to know something about society to be able to understand law, criticize it, and improve it. The "something," however, was what any intelligent person with a good general education and some common sense knew; or could pick up from the legal texts themselves (viewed as windows on social custom); or, failing these sources of insight, would acquire naturally in a few years of practicing law: a set of basic ethical and political values, some knowledge of institutions, some acquaintance with the workings of the economy.

You may think that the next thing to be said about this faith in law's autonomy as a discipline is that it was a complacent faith; but if so you are wrong. It was empirically supported. In 1965 it reasonably appeared that any deficiencies in the legal system could be rectified by lawyers trained and operating in the tradition of autonomy. For in a period of twenty-five years, lawyers had, it seemed, with little help from other disciplines, reformed the procedural system of the federal courts⁷ (and by force of example, were well on their way to reforming the procedural systems of the state courts); had corrected the profound epistemological error that had led the Supreme

⁶ See, e.g., Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

⁷ See the Federal Rules of Civil Procedure enacted in 1938.

Court to claim authority to create a general federal common law in diversity of citizenship cases;⁸ had brought commercial law into harmony with modern commercial practices through the Uniform Commercial Code; had (under considerable political pressure, to be sure) saved the Supreme Court by abandoning "liberty of contract" as a substantive constitutional right; had completed (or at least brought much nearer to completion) the work of the Civil War by outlawing racial segregation in public schools and other government institutions both state and federal; had in the second flag salute case⁹ resurrected the Constitution as a charter of civil liberties; had systematized and regularized the administrative process¹⁰ and used that process as the foundation for creating imaginative new systems of legal regulation of labor relations and the securities markets; had taken substantial steps to civilize criminal procedure;¹¹ had overcome the courts' traditional hostility to statutes; had tidied up the common law through the American Law Institute's Restatements; had rethought substantive criminal law in the ALI's Model Penal Code; had eliminated a number of arbitrary barriers to legal liability (such as the privity limitation in products liability); had come to terms with the New Deal; and were well on their way to dismantling the remaining archaic, formalistic, or dysfunctional rules of law, such as the intricate rules governing the liability of landowners to persons injured because of conditions on the land.¹² In hindsight some of these achievements can be questioned, and there were always some doubters, but on the whole the lawyer's traditional faith in the autonomy of his discipline seemed well founded in 1960.

Buttressing this faith was the apparent inability of other disciplines to generate significant insights about law. For example, until the publication in 1961 of articles by Ronald Coase¹³ and Guido Calabresi,¹⁴ economics seemed to have rather little to say about law outside

⁸ See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

⁹ See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁰ See *Administrative Procedure Act*, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-559, 701-706, 3105, 3344 (1982)).

¹¹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying the sixth amendment's guarantee of assistance of counsel to the states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the fourth amendment exclusionary rule to the states); *Brown v. Allen*, 344 U.S. 443 (1953) (holding that federal habeas corpus relief for a state prisoner is not barred simply because certiorari to review his conviction directly has been denied); *Brown v. Mississippi*, 297 U.S. 278 (1936) (excluding coerced confession on due process grounds).

¹² See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561 (1968) (replacing the "ancient" set of "rigid" common law classifications with one general duty to act reasonably toward all who enter upon one's land).

¹³ See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1961).

¹⁴ See Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

the antitrust field (though in retrospect it is hard to understand how Henry Simons' work on the economics of taxation¹⁵ could have been ignored). Even in the field of antitrust there were grounds for skepticism. Antitrust was then the domain of the field of economics known as "industrial organization" — at the time a "soft" field, unlikely to impress lawyers with its rigor, for the very good reason that it was not rigorous.¹⁶ In particular, economists had made little progress toward understanding oligopoly, which was thought to be the central problem of antitrust economics. Hence it was possible for Professor Bok (as he then was) to write an article in 1960 debunking the pretensions of economists to be able to guide the application of the antimerger law.¹⁷ Yet then as now economics was understood to have greater relevance to law than other fields had. Ethical and political philosophy were in a slump, and virtually the only relevance that the then-dominant analytical or linguistic philosophy was thought to have to law was in the age-old debate between positivists and natural lawyers over the question, "What is law?" (a question that has little practical significance if, indeed, it is a meaningful question at all).

An additional reason for the prevailing faith in the autonomy of law was the remarkable political consensus of the late 1950s and early 1960s. Since 1940, and especially since 1952, there had been little ideological difference between the major parties. At least in the academy, the radical right had been discredited, first by its isolationism and then by its racism, and the radical left had been squashed by the Cold War. Secular, humanistic, patriotic, and centrist, the American intellectual scene in the late 1950s and early 1960s was remarkably free from ideological strife. In such a period it was natural to think of law not in political but in technical terms, as a form of "social engineering" with the lawyers as the engineers. Just as society had left the design of bridges to civil engineers, so it could leave the design of its legal institutions to lawyers. If civil engineers disagreed fun-

¹⁵ See H. SIMONS, *PERSONAL INCOME TAXATION* (1938); see also W. BLUM & H. KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* xiv-xvii (1953) (discussing Simons' work and reaction to it).

¹⁶ See Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928-29 (1979) (discussing, among other works, E. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* (1957)). The rigorous analysis of monopoly and competition by Aaron Director, George Stigler, and others was just beginning to be published and was not yet well known. For early examples, see Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Director & Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281 (1956); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1961).

¹⁷ See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 228, 239-47, 349 (1960).

damentally about wind resistance, society could not safely leave the design of bridges entirely to them; similarly, if lawyers disagreed about the aims and nature and consequences of law, society could not leave the design of legal institutions to them. But in the period of which I am writing there was little such disagreement and therefore little opposition to the lawyers' claim to have an autonomous discipline. And although in some ultimate sense law, unlike civil engineering, is unavoidably political, this fact is unlikely to be noticed, let alone to have practical significance, at a time when the entire respectable band of the professional spectrum agrees on the basic political questions that are important to law. With political differences not infecting legal analysis, the law appeared to be a technical and objective discipline.

It had not always been thus. The legal realists of the 1920s and 1930s believed quite the opposite and mounted a powerful attack on legal doctrines, practices, and institutions. They believed that much of law reflected a politically motivated hostility by judges and the legal profession generally toward state and federal social welfare legislation, administrative agencies, labor unions, radicals, and proposals to change common law doctrines.¹⁸ By the 1950s, however, when many of the changes advocated by the legal realists had been adopted and many of the leading realists had been coopted into the judiciary and into the drafting of uniform laws and other mainstream legal activities, it was widely believed that the law had been restored to a position of political neutrality.

II. THE DECLINE OF LAW'S AUTONOMY

The supports for the faith in law's autonomy as a discipline have been kicked away in the last quarter century. First, the political consensus associated with the "end of ideology"¹⁹ has shattered. The spectrum of political opinion in law schools, which in 1960 occupied a narrow band between mild liberalism and mild conservatism, today runs from Marxism, feminism, and left-wing nihilism and anarchism on the left to economic and political libertarianism and Christian fundamentalism on the right. Even if we lop off the extremes, a broad middle area remains, running from, say, Ronald Dworkin on the left to Robert Bork on the right — both entirely respectable, "establishment" figures who, however, are so distant ideologically from one another that there is no common ground of discourse between

¹⁸ For an authoritative collection of readings on legal realism, see D. Hutchinson, *History of American Legal Thought II: The American "Legal Realists" (1984)* (unpublished manuscript, University of Chicago Law School).

¹⁹ See D. BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960).

them.²⁰ We now know that if we give a legal problem to two equally distinguished legal thinkers chosen at random we may get completely incompatible solutions; so evidently we cannot rely on legal knowledge alone to provide definitive solutions to legal problems.

The shattering of the political consensus would not matter if American law were confined to nonpolitical issues; chemistry has not ceased to be an autonomous discipline just because there is more political diversity among chemists today than there was thirty years ago. But far from being so confined, many fields of law today are deeply entangled with political questions. In part, this entanglement is due to the aggressiveness with which the Supreme Court has created constitutional rights in politically controversial areas, such as abortion (and other matters involving sex), reapportionment, political patronage, and school and prison conditions. In part, it is due to the expansion of government generally, which has brought more and more subjects, often intensely political ones, into the courts — subjects such as poverty, campaign financing, environmental protection, and the plight of disabled people. Moreover, the Supreme Court has pioneered an aggressive style of judicial activism that, imitated by state courts and by lower federal courts in diversity cases, has led to politically controversial extensions of rights in such nonfederal fields as tort and contract law. There are still politically uncontroversial fields of law, such as trusts and taxation (the latter a field where statutory detail leaves little room for judicial discretion), but fewer than in the 1950s.

Coinciding with the decline of political consensus has been a second development: a boom in disciplines that are complementary to law, particularly economics and philosophy. Economics not only has become more rigorous since the 1950s, but it has branched out from market to nonmarket behavior,²¹ thus taking in the subject matter of most interest to legal thinkers. It has also become more empirical. Not only is there today a well-developed economic theory of crime, but economists have measured the effects of punishment on the crime rate more rigorously than other social scientists, or lawyers, have ever done.²² There is an economics of accidents and accident law, of the family and family law, of property rights and property law, of finance and corporations, even of free speech and the first amendment, and so on through almost the whole law school curriculum. In several

²⁰ See Dworkin, *Reagan's Justice*, N.Y. REV. BOOKS, Nov. 8, 1984, at 27. There are methodological as well as political differences between Bork and Dworkin; but the motivation for Dworkin's attack on Bork, which begins with speculation that Reagan might appoint Bork to the Supreme Court, is unmistakably political.

²¹ See G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV., Dec. 1985, at 53 (special issue commemorating the American Economic Association's centennial).

²² See D. PYLE, *THE ECONOMICS OF CRIME AND LAW ENFORCEMENT* chs. 3-4 (1983).

important fields — antitrust, commercial law (including bankruptcy), corporations and securities regulation, regulated industries, and taxation — the economic perspective either is already dominant or will soon be, when the older professors and practitioners retire. In other important fields, such as torts, property law, environmental law, and labor law, the economic approach is making rapid strides. In still others, such as criminal law and family law, the traditionalists retain the upper hand — but for how long, who can say?²³

Philosophy has also made notable progress in areas related to law. The revival of interest in moral and political philosophy, a revival that owes much to the work of John Rawls, has generated philosophical perspectives on a variety of issues of great importance to law, including capital punishment; abortion, obscenity, and women's rights; the rights of the poor; and the role of corrective justice and distributive justice in the theory and practice of law.²⁴ Developments in Continental philosophy and in literary theory (for present purposes best regarded as a specialized branch of epistemology) have exposed a deep vein of profound skepticism about the possibility of authoritative interpretation of texts.²⁵ This skepticism has fueled, along with political radicalism and sheer infantilism,²⁶ the contemporary movement in legal scholarship known as "critical legal studies." The combined impact of radicalism and philosophy on constitutional law scholarship has been especially dramatic, some might say disastrous.²⁷ Lacking real intellectual autonomy, law may be too open to incursions from other fields of thought.

The theory of public choice, a hybrid of economics and political science, is beginning to be used in the analysis of law;²⁸ so, too, are game theory,²⁹ statistical theory (particularly in relation to the law of evidence),³⁰ empirical statistics (as in discrimination and antitrust

²³ For a recent summary of the economic approach to law, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

²⁴ See J. RAWLS, *A THEORY OF JUSTICE* (1971). For an up-to-date set of readings, see J. FEINBERG & H. GROSS, *PHILOSOPHY OF LAW* (3d ed. 1986).

²⁵ See, e.g., T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* ch. 4 (1983).

²⁶ See, e.g., Freeman & Schlegel, *Sex, Power and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 *CARDOZO L. REV.* 847 (1985); Gabel & Kennedy, *Roll Over Beethoven*, 36 *STAN. L. REV.* 1 (1984). For a broader sense of the field, see *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984).

²⁷ The rejection of the possibility of objective constitutional interpretation is illustrated by Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982), and the rejection of rejectionism is illustrated by Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1 (1984).

²⁸ See, e.g., Easterbrook, *Ways of Criticizing the Court*, 95 *HARV. L. REV.* 802 (1982); Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to Bakke, the FCC, and the Courts*, 88 *YALE L.J.* 717 (1979).

²⁹ See, e.g., C. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* 8-20 (1984); Birmingham, *Legal and Moral Duty in Game Theory: Common Law Contract and Chinese Analogies*, 18 *BUFF. L. REV.* 99 (1969).

³⁰ See, e.g., Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably*

cases),³¹ rational but not economic social theory,³² and even literary criticism.³³ Legal history has become more rigorous and more professional. Some fields that had once seemed to promise important applications to law, such as psychology, linguistics, and sociology, have not made much recent progress toward improving our understanding of law. Nevertheless, the overall progress of disciplines other than law in illuminating law has been striking and cannot but undermine the lawyer's (especially the academic lawyer's) faith in the autonomy of his discipline.

Third, confidence in the ability of lawyers on their own to put right the major problems of the legal system has collapsed. Some of the supposed triumphs of the 1930s through 1950s have been revalued and no longer seem so triumphant; this is true, for example, of the Federal Rules of Civil Procedure and of the Administrative Procedure Act (and of the trial and administrative processes generally).³⁴ This reason is related to the second: the decline of lawyers' self-confidence is due partly to the rise of other disciplines to positions where they can rival the law's claim to privileged insight into its subject matter. More important than any revaluation of the older legal achievements, however, is a series of confidence-shattering events since the early 1960s. All sorts of reforms adopted in this period, reforms engineered by lawyers, appear to have miscarried. These include a bankruptcy code that has led to a large and unanticipated increase in the number of bankruptcy filings,³⁵ a runaway expansion of tort liability that may be destroying the institution of liability insurance,³⁶ coupled with the

Naked Statistical Evidence and Multiple Causation, 1982 AM. B. FOUND. RES. J. 487; Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34 (1979).

³¹ See D. BARNES & J. CONLEY, *STATISTICAL EVIDENCE IN LITIGATION* (1986).

³² See Sunstein, *Legal Interference With Private Preferences*, U. CHI. L. REV. (forthcoming 1986).

³³ See, e.g., *Symposium: Law and Literature*, 60 TEX. L. REV. 373 (1982); Papke, *Neo-Marxists, Nietzscheans, and New Critics: The Voices of the Contemporary Law and Literature Discourse*, 1985 AM. B. FOUND. RES. J. 883 (reviewing J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984)); Posner, *Law and Literature*, 72 VA. L. REV. 1351 (1986).

³⁴ These codes have been criticized for encouraging excessive and even predatory discovery, fomenting litigation, being too pro-plaintiff, and taking to long to join issue and eliminate groundless claims. See, for example, Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-88 (1975); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986), and references cited therein.

³⁵ See Boyes & Faith, *Some Effects of the Bankruptcy Reform Act of 1978*, 29 J.L. & ECON. 139 (1986); Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419 (1984).

³⁶ See, e.g., REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDA-

disappointing results (and lethal side-effects) of the no-fault automobile compensation movement;³⁷ a no-fault divorce movement that has boomeranged against the women's movement that urged its adoption;³⁸ the creation of a system of environmental regulation at once incredibly complex and either perverse or ineffective in much of its operation;³⁹ the destruction of certainty in the field of conflict-of-laws (especially in accident cases) as a result of the replacement of mechanical rules (such as the rule of *lex loci delicti*) by "interest analysis" and its many variants;⁴⁰ the rather hapless blundering of the federal courts into immensely contentious, analytically insoluble ethical-political questions such as capital punishment, prison conditions (how comfortable must they be?), sex and the family, and political patronage; the accidental growth of the class-action lawsuit, through a seemingly minor amendment to rule 23 of the Federal Rules of Civil Procedure, into what many observers believe is an engine for coercing the settlement of cases that have no real merit yet expose defendants to astronomical potential liabilities;⁴¹ the flood of one-way attorney's-

BILITY (GPO Feb. 1986); *Sorting Out the Liability Debate*, NEWSWEEK, May 12, 1986, at 60; *Sky-High Damage Suits*, U.S. NEWS & WORLD REP., Jan. 27, 1986, at 35; *Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 16. For a discussion of the capacity of lawyers to resolve the fundamental issues of tort policy, see Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CALIF. L. REV. 747 (1985).

³⁷ See, e.g., 1979 Nev. Stat. 1513 (repealing Nevada's no-fault statute); Karcher, *No More No-Fault: Beyond the Rhetoric Toward True Reform of the New Jersey Automobile Insurance System*, 8 SETON HALL LEGIS. J. 173 (1984); AUTOMOBILE NO-FAULT INSURANCE: A STUDY BY THE SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION 26-39 (Am. Bar Ass'n Feb. 1978); Comment, *Michigan No-Fault: The Rise and Fall of Socialized Negligence*, 56 U. DET. J. URB. L. 99 (1978). For an account of the unfortunate side-effects of no-fault auto insurance (including an increased rate of fatal accidents), see Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49, 50 (1982).

³⁸ "The major economic result of the divorce law revolution is the systematic impoverishment of divorced women and their children." L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICAN* xiv (1985); see Becker, *Cut the Divorce Rate With Marriage Contracts*, BUS. WEEK, Dec. 23, 1985, at 12; Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789.

³⁹ See, e.g., R. CRANDALL, *CONTROLLING INDUSTRIAL POLLUTION: THE ECONOMICS AND POLITICS OF CLEAN AIR* (1983); Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985); Crandall, Keeler & Lave, *The Cost of Automobile Safety and Emissions Regulation to the Consumer: Some Preliminary Results*, 72 AM. ECON. REV. 324 (1982); Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1 (1984).

⁴⁰ See, e.g., Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Tort Cases*, 33 VAND. L. REV. 717, 734-37 (1980).

⁴¹ See, e.g., *Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A.*, 55 F.R.D. 26, 30

fee-shifting statutes, which overencourage litigation;⁴² and the creation of an intricate code of federal criminal procedure (requiring for example a three-volume treatise on search and seizure)⁴³ in the name of the Constitution, and the wholesale imposition of the code on state criminal proceedings through the doctrine of incorporation.

In part as a result of these developments, the last quarter century has witnessed an astonishing rise in the amount of litigation in the country (including a ten fold increase in the number of cases filed annually in the federal courts of appeals),⁴⁴ to which the legal profession has responded with all the imagination of a traffic engineer whose only answer to highway congestion is to build more highways, or of a political establishment whose only answer to increased demands for government services is to print more money. Rather than raising court fees to dampen demand for court services, the powers who administer the judicial systems of this country (lawyers all) have lowered them in real terms. Our society's response to more litigation — dubious though much of that litigation is — has been more judges, more lawyers, more subsidies to litigation, more bureaucrats, and more law clerks and other judicial adjuncts.⁴⁵ Responding at last to a sense that the overload of the courts has become critical, lawyers and judges are now busy proposing reforms (collectively referred to as "alternative dispute resolution") that raise substantial questions both of efficacy and legality.⁴⁶ The fundamental reason this litigation explosion has gone unchecked is that nothing in a conventional legal education — nothing gleaned from a close reading of judicial opinions, statutes, and rules — equips a person to notice, let alone to measure, explain, temper, and adjust to, an increase in the demand for judicial services. Whatever the reasons, the performance of the legal profession in responding to the challenges of the past quarter century has undermined confidence that reform of the system can be left to lawyers.

The weakening of the traditional supports of faith in the law's autonomy as a discipline is not the only reason (or set of reasons) for the decline of that faith. Another reason, which is purely internal to the enterprise of academic law, is the same one that led composers to write atonal music and that led English poets eventually to tire of the heroic couplet. When a technique is perfected, the most imaginative

(S.D.N.Y. 1972); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1972).

⁴² See R. POSNER, *supra* note 23, at 542.

⁴³ See W. LAFAVE, SEARCH AND SEIZURE (1978).

⁴⁴ See R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 61 (1985) (tab. 3.1); ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 2 (Mar. 1986).

⁴⁵ See R. POSNER, *supra* note 44, at 94-112.

⁴⁶ See Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

practitioners get restless.⁴⁷ They want to be innovators rather than imitators, and this desire requires that they strike out in a new direction. By 1960 most of the changes on the theme of the law's autonomy had been rung. Holmes and Cardozo between them had said most of the important things; Henry Hart, Jr. and Albert Sacks in their deservedly renowned book on the legal process,⁴⁸ and Edward Levi in his classic *Introduction to Legal Reasoning*,⁴⁹ had completed the edifice of what might be termed classical legal thought. Of course, with law in continuous flux there were (and are) always new cases, new doctrines, even entire new fields to which to apply the techniques of legal reasoning in the autonomous tradition, often with splendid results, as in the opinions of Judge Henry Friendly. Nevertheless, after a while this was bound to seem, at least in the higher reaches of the academy, and whether rightly or wrongly, work for followers rather than leaders.⁵⁰ Because of this perception, and also because of the growth of other disciplines, in the 1960s a new type of legal scholarship began to emerge in the leading law schools — the conscious application of other disciplines, such as political and moral philosophy and economics, to traditional legal problems. A notable example besides those already mentioned is Frank Michelman's article on just compensation, which used both philosophy and economics to examine legal doctrine in a more scientific spirit than had been traditional.⁵¹ Between a Barton Leach and a Frank Michelman in property law, as between a Warren Seavey and a Guido Calabresi in tort law, yawned a chasm.

A related reason for the decline of faith in law as an autonomous discipline is the continuing rise in the prestige and authority of scientific and other exact modes of inquiry in general, that is, apart from any direct application they might have to legal analysis. Advances in medical science, space and weapons technology, computers, mathematics and statistics, cosmology, biology, economics, linguistics, and

⁴⁷ See T.S. ELIOT, "Milton II," in *ON POETRY AND POETS* 146, 150 (1957).

⁴⁸ See H.M. HART, JR. & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

⁴⁹ E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1949).

⁵⁰ For disparagement of doctrinal analysis by influential legal academics, see H. PACKER & T. EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 32 (1972); Wellington, *Alumni Weekend*, 25 *YALE L. REP.*, Winter 1978-1979, at 4, 7-8. Even though I have criticized the disparagement of doctrinal analysis, see R. POSNER, *supra* note 44, at 330-34, some practitioners of such analysis are so defensive that they perceive my unwillingness to agree that doctrinal analysis is the be-all and end-all of legal scholarship as an implicit denial that it deserves any important place in legal scholarship at all. See, e.g., Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 *COLUM. L. REV.* 1378 (1985). The issue is not the indispensability of doctrinal analysis (which of course need not be so narrowly conceived as it was by Langdell and the other nineteenth-century formalists) but rather its sufficiency.

⁵¹ See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 *HARV. L. REV.* 1165 (1967).

many other areas of scientific and technological endeavor are making traditional legal doctrinal analysis — the heart of legal thinking when law is conceived as an autonomous discipline — seem to many younger scholars old-fashioned, passé, tired. Fields in similar plight, such as literary criticism, have not hesitated to borrow from trendier, arguably more rigorous fields; in retrospect it is obvious that academic law would do the same thing. Although the classic works of traditional legal scholarship can still be read with profit and admiration, it is no longer easy for academic lawyers who want to be considered on the “cutting edge” of legal thought to imagine writing in the same vein. This point is distinct from my previous one, that the genre has been perfected (which is not to say completed). A purely verbal, purely lawyer’s scholarship, in which the categories of analysis are the same as, or very close to, those used by the judges or legislators whose work is being analyzed — a scholarship moreover in which political consensus is assumed and the insights of other disciplines ignored — does not fit comfortably into today’s scholarly *Zeitgeist*.

The last cause of the decline of faith in the law’s autonomy that I shall consider is the increasing importance of statutes and of the Constitution, compared to common law, as sources of law. The particular skill honed by legal education and cultivated by legal scholars is that of extracting a legal doctrine from a series of cases and fitting it together with other doctrines similarly derived. It is a particularly valuable skill in dealing with common law, that is, judge-made law. Now it is true that much statutory and more constitutional law is common law in a practical sense, because after a while a statutory or constitutional provision becomes so encrusted with interpretive decisions that the original text almost disappears, and the analyst’s principal task becomes that of interpreting the decisions. This description is dramatically true of the antitrust laws, the first, fourth, sixth, and eighth amendments to the Constitution, the due process and equal protection clauses, and much else besides. Nevertheless, a body of case law building upon a statute or upon the Constitution can never free itself entirely from its roots, because ultimately its legitimacy depends, at least in part, on fidelity to the original written instrument, in a way that common law doctrines do not. Moreover, new statutes are continually passed which must be interpreted, and for this interpretive task there is no crutch of case law.

The growing importance of statutes and the Constitution as sources of law would be of no significance to my present inquiry if lawyers had good tools for interpreting legislative texts; but, sad to say, we do not. This fact was obscured in Hart and Sacks’s influential treatment of statutory interpretation by certain assumptions whose arbitrariness was not perceived at the time. Writing in the wake of the New Deal, of which they heartily approved, Hart and Sacks implicitly treated the legislature (including the original constitutional convention

and the ratifying state legislatures) as a single mind, an intelligent and far-seeing mind, and moreover a mind that both was dedicated to serving the public interest and had a conception of the public interest identical to that of the judges who would be called on to interpret the legislation (the last point was an aspect of the political consensus that existed when they wrote).⁵² This conception of the legislature made the task of statutory interpretation no more problematic than interpreting a contract — indeed, less problematic, because it had always been recognized that the parties to a contract might have different objectives and also different understandings of just what they had agreed to.

Since Hart and Sacks wrote, a large number of factors have combined to inflict a mortal blow on the comfortable view of statutory interpretation they espoused. Chief among these factors have been the breakdown of political consensus; the growth of social choice theory on the foundation of Arrow's impossibility theorem;⁵³ the re-discovery of interest groups by economists and political scientists on both the left and the right; the criticisms of the "public-interestedness" of legislation by the conservative and deregulation movements; the debunking of the "canons of statutory construction";⁵⁴ and the attacks made by Continental philosophers and their American followers on the objectivity of interpretation.

The inherently problematic character of statutory interpretation is well illustrated by the Supreme Court's unanimous — and at first blush dry, technical, unexceptional, and unexceptionable — decision in *Leo Sheep Co. v. United States*.⁵⁵ In 1862 Congress granted land to the Union Pacific Railroad as a means of subsidizing the construction of a transcontinental railroad. The grant was not limited to the right of way but included land on both sides of the right of way. This land was divided into "checkerboard" sections, each of 640 acres, the odd-numbered sections of which were given to the railroad, while the even-numbered ones were retained by the government. The idea behind this arrangement was that because the construction of the railroad would increase the value of the adjacent lands, the government could reap a direct benefit from its grant to the Union Pacific by retaining some of the land. The *Leo Sheep* case arose more than a century after the land grant. Land owned by the petitioners in the

⁵² See 2 H.M. HART & A. SACKS, *supra* note 48, at 1414-15. For criticism of this view see R. POSNER, cited above in note 44, at 288-89.

⁵³ Arrow's theorem, brutally simplified, is that voting is not a reliable method of aggregating the voters' preferences. For an application of the theorem to Supreme Court decisionmaking, see Easterbrook, cited above in note 28, at 813-31.

⁵⁴ See R. POSNER, *supra* note 44, at 276-86.

⁵⁵ 440 U.S. 668 (1979). Justice White did not participate in the decision.

case, successors in interest to the Union Pacific, blocked access to a government-owned reservoir from the south and east. The government wanted to run an access road over the petitioners' land to connect the reservoir area (which was used for recreation) to a county road. The issue in the case was whether Congress had implicitly reserved (for there was no express reservation) an easement of access when it granted the land to the Union Pacific back in 1862. The Court held that it had not.

The Court begins its analysis by noting that the 1862 statute contained several specific reservations to the checkerboard grant, such as a reservation of mineral rights, and comments that "given the existence of such explicit exceptions, this Court has in the past refused to add to this list by divining some 'implicit' congressional intent."⁵⁶ Although the Court does not explain why the existence of explicit exceptions should negate an implicit exception, it must have been alluding to the well-known canon of statutory construction that *expressio unius est exclusio alterius* — the expression of one thing is the exclusion of another. Recent Supreme Court decisions sometimes approve the canon, but more often reject it.⁵⁷ The doctrine should be rejected. Congress may want to create an exception to a general grant without wanting to prevent the courts from recognizing additional exceptions in keeping with the spirit of the statute.

Next, the Court turns to the government's argument that all the government wants is an easement of necessity, and that, because such an easement would be implied in any private conveyance of real estate, it should also be implied in a public one.⁵⁸ The Court rejects the argument on a number of grounds. First, it states that "whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area."⁵⁹ To say that a proposition "is not at all clear" is not to say it is false; but the Court may think these are equivalents, because it moves immediately to its second ground: that "the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain."⁶⁰ There is, however, a big

⁵⁶ *Id.* at 679.

⁵⁷ Compare *TVA v. Hill*, 437 U.S. 153, 188 (1978) (applying the canon *expressio unius est exclusio alterius*), and Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 896-98 (1982) (discussing the canon), with *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting the canon), *Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980) (same), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 29 n.6 (1979) (same).

⁵⁸ For example, if you sell the land that surrounds your house but retain the house, you retain by implication a right of access to the house.

⁵⁹ *Leo Sheep*, 440 U.S. at 679 (footnote omitted).

⁶⁰ *Id.* at 679-80.

difference, not remarked upon by the Court, between having a “free” right of access and having to pay the fair market value of the right of access.

The Court then points out that some states do not recognize easements of necessity in favor of the government and that others have abolished the doctrine in favor of giving all owners of surrounded lands the power of eminent domain; the court makes no effort, however, to connect these apparently recent developments with the Congress of 1862. Next, the Court remarks unexpectedly that the application of the doctrine of easements of necessity is

ultimately of little significance. The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862. The 1862 Act specifically listed reservations to the grant, and we do not find the tenuous relevance of the common-law doctrine of ways of necessity sufficient to overcome the inference prompted by the omission of any reference to the reserved right asserted by the Government in this case.⁶¹

This argument is just *expressio unius est exclusio alterius* again. The Court then remarks, “It is possible that Congress gave the problem of access little thought; but it is at least as likely that the thought which was given focused on negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes.”⁶² Yet suppose these two possibilities *are* equally likely; what is the inference to be drawn?

Next, the Court confronts an objection based on “the familiar canon of construction that, when grants to federal lands are at issue, any doubts ‘are resolved for the Government, not against it’”⁶³ but dispenses with it by noting that “this Court long ago declined to apply this canon in its full vigor to grants under the railroad Acts.”⁶⁴ In support of this proposition the Court quotes from two old decisions⁶⁵ but neglects to mention *United States v. Union Pacific Railroad*,⁶⁶ in which the Court in 1957 had applied the canon to the very statute involved in *Leo Sheep*.⁶⁷

Notice that apart from its repeated allusions to the canon *expressio unius est exclusio alterius*, the Court spends all of its time batting down the government’s arguments rather than constructing an affirmative case — until at the very end of the opinion it says, “we are

⁶¹ *Id.* at 680–81.

⁶² *Id.* at 681 (footnote omitted).

⁶³ *Id.* at 682 (quoting *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 617 (1978)).

⁶⁴ *Id.*

⁶⁵ *See id.* at 682–83 (quoting *United States v. Denver & Rio Grande R. Co.*, 150 U.S. 1, 14 (1893), and *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618 (1885)).

⁶⁶ 353 U.S. 112 (1957).

⁶⁷ *See id.* at 116.

unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation."⁶⁸ This is a good argument, but it has nothing to do with the intent of Congress in 1862. The truth is that no one knows how Congress would have resolved the issue of the case had that issue been brought to its attention in 1862.

Unfortunately, such indeterminacy is a frequent problem in interpreting statutory and constitutional provisions, especially old ones. With the aging of the Constitution and the expansion of statutory law relative to common law, lawyers and judges are increasingly engaged in a form of inquiry — the interpretation of unclear texts — for which conventional legal training, with its emphasis on the analysis of judge-made doctrine, does not prepare them well. And, unfortunately, the arguments from economics, social choice, and interpretive theory (“hermeneutics”) that have undermined the lawyer’s naive faith in the easy interpretability of statutory and constitutional provisions have put nothing in its place. The skeptics have not succeeded either in creating widely accepted alternative methods of interpretation or in persuading the profession that we should forget about interpretation — that we should call what we do “construction” and mean it literally. The more diffident that academic lawyers become in defending the objectivity of their interpretations of statutes and the Constitution, the less confidence they will have about even attempting this traditional form of legal scholarship.

III. SUGGESTIONS AND PROGNOSSES

I hope the reader will not think that by describing the decline over the past twenty-five years of law as an autonomous discipline, I am predicting or would welcome the disappearance of traditional legal thought and scholarship. As an appellate judge, I am both a consumer and producer of doctrinal analysis. I do think, though, that the law was too parochial twenty-five years ago and that despite all the false starts and silly fads that have marred its reaching out to other fields, the growth of interdisciplinary legal analysis has been a good thing, which ought to (and will) continue. Disinterested legal-doctrinal analysis of the traditional kind remains the indispensable core of legal thought, and there is no surfeit of such analysis today. I daresay that many legal scholars who today are breathing the heady fumes of deconstruction, structuralism, moral philosophy, and the theory of the second best would be better employed studying the origins of the *Enelow-Ettelson* doctrine or synthesizing the law of insurance. Never-

⁶⁸ *Id.* at 687–88 (footnote omitted).

theless it seems unlikely that we shall soon (if ever) return to a serene belief in the law's autonomy.

Recognition that the law is increasingly an interdisciplinary field has many implications, several of which I shall mention, but without trying to elaborate on them:

1. Economists, statisticians, and other social scientists should have a far more prominent role in efforts at legal reform than has been traditional — such as the effort of the Sentencing Commission (whose research director and two of whose members, I am happy to say, are social scientists rather than lawyers) to revise federal sentencing, and efforts in process or to come to revise the Federal Rules of Civil Procedure, the Bankruptcy Code, the tax code, and tort law.

2. The type of “advocacy” scholarship in which political sallies are concealed in formalistic legal discourse — a staple of modern law review writing — should be replaced by a more candid literature on the political merits of contested legal doctrines. In this literature, as yet almost unknown, the author would acknowledge the point at which authoritative legal materials run out, and justify the leap of faith necessary to bridge the gap between those materials and his conclusion.

3. A related point is that we need a new style of judicial opinion writing (really a return to an older style), in which formalistic crutches — such as the canons of statutory construction and the pretense of deterministic precedent — that exaggerate the autonomous elements in legal reasoning are replaced by a more candid engagement with the realistic premises of decision.⁶⁹ Judicial decisionmaking must also become more receptive to the insights of social science. Lawyers and judges must overcome the prevalent (and disgraceful) math-block that afflicts the legal profession.

4. The law schools need to encourage the branch of academic law that I call “Legal Theory,” viewed as an endeavor distinct from doctrinal analysis, clinical education, and the other traditional, practice-

⁶⁹ Candor is illustrated by *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687 (1978) (Stevens, J.) (“§ 1 of the Sherman Act . . . cannot mean what it says”); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it”); *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”); *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“We have to choose”); *Hynes v. New York Central Railroad Co.*, 231 N.Y. 229, 131 N.E. 898 (1921) (Cardozo, J.). Judge Cardozo stated in *Hynes*:

Rules appropriate to spheres which are conceived of as separate and distinct cannot both be enforced when the spheres become concentric. There must then be readjustment or collision. In one sense, and that a highly technical and artificial one, the diver at the end of the springboard is an intruder on the adjoining lands. In another sense, and one that realists will accept more readily, he is still on public waters in the exercise of public rights.

Id. at 236, 131 N.E. at 900.

oriented branches of legal training and scholarship. By Legal Theory, I mean the study of the law not as a means of acquiring conventional professional competence but "from the outside," using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system. There should be departments of law, where students can pursue doctoral programs in Legal Theory, or alternatively programs that meld college, law school, and doctoral training in another discipline into an integrated course of study taking less than the minimum of ten years after high school that such a program would currently require. Three years of college, two years of law school, and three years of doctoral study should, if these stages of training are integrated, equip a student to contribute creatively to the understanding and improvement of the legal system of the twenty-first century. I hope I will not be understood to be suggesting either that instruction and research in Legal Theory replace doctrinal analysis, or that Legal Theory be equated with, or even be thought to include, the advocacy of new constitutional rights.

5. And what of the law reviews? What is to be the second century of the *Harvard Law Review*? The student-edited law review is a fine vehicle for the publication of doctrinal analysis written by students, professors of law, and practitioners. The best law students, who staff the law reviews (though this is changing at some law schools),⁷⁰ are sufficiently adept at doctrinal analysis to be able to make intelligent selections among submitted works of such analysis, to edit them helpfully, and to write useful doctrinal scholarship of their own. And doctrinal analysis will always be the mainstay of legal scholarship.

However, as the rise of faculty-edited law journals in the past three decades attests,⁷¹ the focus of scholarly publication at the academic frontier is gradually shifting from student-edited to faculty-edited, faculty-refereed journals. More scholars are coming to realize that law reviews are not well-equipped to select, and through editing to improve, articles outside of the core of legal doctrinal analysis, which, important though it is, no longer exhausts the domain of legal scholarship. For years to come, the authors of nontraditional articles will continue to seek publication of much of their work in the traditional law reviews in order to reach a wide audience and to take advantage of the quick turnaround time of the reviews compared to that of most faculty-edited journals. Moreover, some law reviews may be able to compete effectively with the faculty-edited reviews by

⁷⁰ Traditionally, the best student-edited journals were staffed by the best exam-takers, but some law reviews are now abandoning (or diluting) that criterion in favor of others — and some in favor of purely voluntary membership.

⁷¹ This trend is illustrated by the *Journal of Law and Economics*, the *Supreme Court Review*, *Law & Society Review*, the *Journal of Legal Studies*, the *American Bar Foundation Research Journal*.

making greater use of referees (though this process will increase turnaround time) and, more important, by using a student's prelegal training (for example, graduate study in economics or philosophy), as well as grades or performance in a writing competition, as a criterion of selection, promotion, or assignment. Nevertheless, the faculty-edited journals may one day control the commanding heights of advanced legal scholarship.⁷² If so, then quite apart from the leveling trend I mentioned at the outset, the next century will not belong to the *Harvard Law Review* in quite the way the last century has.

⁷² See Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1 (1986).