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Clark Kerr and Me: The Future of the Public Law School

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Clark Kerr and Me: The Future of the Public Law School

Erratum

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Clark Kerr and Me: The Future of the Public Law School

RACHEL F. MORAN*

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INTRODUCTION

Clark Kerr has long enjoyed an iconic status among leaders in public higher education. The former president of the University of California left a lasting impression on the academic world with his Godkin Lectures on the future of colleges and universities delivered at Harvard in 1963.¹ He spoke at a moment when public higher education, and indeed higher education more generally, had been enjoying a renaissance of energy and vision. After World War II, veterans returned and reinvigorated the student body with the support of the GI Bill, and state legislatures generously funded public institutions to keep tuition low so that postsecondary education would be affordable and accessible.² This state support in turn assured the kind of quality instruction necessary to prepare adults for the complexities of the workplace and civic life at a time of increasingly sophisticated technology and an explosive growth in knowledge.³ The federal government pumped grant money into the sciences to wage the Cold War, and private industry saw the potential for gain by investing in promising new research with possible commercial applications.⁴ The expansion of programs and activities at colleges and universities was so diverse and dynamic that Kerr dubbed institutions like the University of California “multiversities.”⁵

But if Kerr’s rise to prominence seemed rapid, his fall from grace was just as sudden. In the wake of antiwar protests at the University of California campuses, especially Berkeley, he was summarily dismissed from his post by then-Governor

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1. See CLARK KERR, *THE USES OF THE UNIVERSITY* vii (5th ed. 2001).

2. JOHN R. THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 260–71 (2004).

3. *Id.* at 268–71.

4. *Id.* at 271–74.

5. See KERR, *supra* note 1, at 5–7, 102–07.

Ronald Reagan in 1967.⁶ Kerr returned to a relatively modest—some might say obscure—existence at the Berkeley campus.⁷ People sometimes wondered whether he was still alive. One day, as I was riding in a car with a longtime law professor at Boalt Hall, he turned to me and pointed out a nondescript man in a trench coat walking down the sidewalk. “That’s Clark Kerr,” my colleague said. It was as though I had glimpsed the last of a vanishing species, a kind of exotica, and I felt the poignancy of this once influential leader who had now become an object of curiosity.

I have to confess that when I first learned about Clark Kerr I was reminded of the myth of Icarus. It seemed that Kerr had flown too high, too close to the sun, and had been humbled for his precocious display of virtuosity. But, in truth, Icarus was never an apt comparison for Kerr. For one thing, there was the good humor and the good grace that Kerr displayed when he learned of his dismissal. He quipped that he was leaving the job as he began it, “fired with enthusiasm.”⁸ There was no arrogance in that tongue-in-cheek observation. In reading his book *The Uses of the University*, I found only an erudite voice and a lively mind. In fact, his naïve faith in moderate, managerial leadership as the key to stability and success in the modern multiversity revealed not a trace of hubris—albeit, in retrospect, perhaps a hint of political naïveté.⁹

And so, I have discovered that the poignancy I felt on the occasion of sighting Clark Kerr had even deeper roots than I appreciated at the time. The State of California has built the single greatest system of public higher education that the world has ever known. And, like one of the University’s great leaders, the system has increasingly taken on the colorations of an endangered species, yet another form of exotica headed for extinction in a state with a steadily declining commitment to its colleges and universities.¹⁰ The purpose of this Article is to reflect on whether there will be a second act—if not for Kerr himself, then for the vision of public higher education that he cherished and nurtured. Kerr believed that public colleges and universities were integral to the health of our economy and the legitimacy of our democracy,¹¹ a foundational conviction that I share. In this Article, I focus on the sector of public higher education that I know best, the public law school. To that end, I want to briefly recount the history of public law schools before I turn to the unique mission they pursue and the current difficulties they

6. See 1 CLARK KERR, *THE GOLD AND THE BLUE: A PERSONAL MEMOIR OF THE UNIVERSITY OF CALIFORNIA, 1949–1967*, at 146 (2001).

7. Kerr became the first beneficiary of the continuous tenure policy he instituted in the wake of faculty discharges for failure to swear a loyalty oath. Reagan objected to Kerr’s return to teaching on the Berkeley campus. *Id.* at 140.

8. Christopher Reed, *Clark Kerr: American University Reformer Sacked by Reagan at the Height of the 1960s Student Protests*, GUARDIAN.CO.UK (Dec. 8, 2003), <http://www.guardian.co.uk/news/2003/dec/08/guardianobituaries.obituaries>.

9. Kerr himself may have acknowledged as much when he expressed regret that he had described university presidents as mediators and failed to address their role as image makers. See KERR, *supra* note 1, at 108–10.

10. See Jennifer Medina, *California Cuts Threaten Universities’ Reputation*, N.Y. TIMES, June 2, 2012, at A14, [available at http://www.nytimes.com/2012/06/02/us/california-cuts-threaten-the-status-of-universities.html](http://www.nytimes.com/2012/06/02/us/california-cuts-threaten-the-status-of-universities.html).

11. KERR, *supra* note 1, at 65–71, 86–89, 92–95.

face. I will close with some reasons to be hopeful about their prospects and some steps that we must take to secure their future.

I. THE INNOVATION OF PUBLIC LEGAL EDUCATION

Public law schools are something of a recent innovation. At the nation's inception, the few law schools that existed were typically private, freestanding institutions. In the early 1820s, colleges and universities that sought to establish a law school usually absorbed a private one.¹² Though public law schools were something of a rarity, the most successful examples of liberal law teaching took place at the College of William and Mary and the University of Virginia, both public institutions that reflected Thomas Jefferson's abiding belief in the central significance of the citizen-lawyer to a robust republic.¹³ In the late 1820s and 1830s, the rise of Jacksonian democracy, which challenged the Jeffersonian emphasis on education as the pathway to leadership, threatened formal legal instruction, whether public or private. A populist backlash included an attack on educational requirements that were seen as creating an elitist and exclusionary class of lawyers.¹⁴ Traditionally, lawyers apprenticed in private law offices after paying substantial fees to practitioners, particularly those with a reputation as strong teachers and mentors.¹⁵ States increasingly questioned the necessity for an organized bar, and requirements for apprenticeships were weakened or abolished.¹⁶ Not surprisingly, the number of law schools also declined as college-affiliated programs of legal instruction came and went.¹⁷ These developments reflected the intensification of longstanding hostility to the legal profession. At times, the resistance became so severe that states eliminated all formal barriers to the practice of law. In 1842, for instance, New Hampshire provided that any citizen over the age of twenty-one could be admitted to practice law in the state.¹⁸ This approach achieved democratization of the profession by stripping it of any claim to special knowledge.

The prominence of Jacksonian democracy would wane in the mid-1850s as slavery and the Civil War came to dominate American political discourse. In 1851, during the final stages of the Jacksonian period, Indiana revised its state constitution to provide that "every person of good moral character, being a voter, shall be entitled to practice law in all courts of justice," and this provision remained in place until the 1930s.¹⁹ As a result, lawyers and judges often administered the

12. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 5 (1983).

13. *Id.* at 4–5; see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 529, 532 (1990).

14. STEVENS, *supra* note 12, at 6–8.

15. *Id.* at 3, 10–11 n.5.

16. *Id.* at 7–8.

17. *Id.* at 8.

18. *Id.* at 9.

19. Shirley S. Abrahamson, *The Justice Who Never Graduates: Law Schools and the Judicial Endeavor*, 68 IND. L.J. 621, 625 (1993); see also Colleen Kristl Pauwels, *Hepburn's Dream: The History of the Indiana Law Journal*, 75 IND. L.J. i, iv, vii (2000).

justice system without the benefit of a law degree.²⁰ Whatever danger an elitist bar might pose, a wholly untrained lawyer was ill-equipped to deal with the nuances of judicial decisions, statutes, rules, and regulations. The law, as it turned out, was not so common after all. To remedy concerns about poorly trained lawyers, Indiana University pressed to establish a law school beginning in the mid-1830s.²¹ Only in 1842 did the campus succeed when David McDonald, a circuit court judge and Bloomington resident, became a professor of law. McDonald agreed to the appointment only if the school term was shortened to three months so that he could continue to serve as a judge.²² The law curriculum began as a two-year undergraduate program with two terms each year.²³ In Judge McDonald's inaugural address, he clearly linked formal legal education to the foundations of a healthy democracy:

Other calamities may [befall] a nation, and it may survive them; . . . but when the laws, by which the people are governed and protected, have fallen into disrepute, revolution or ruin is the inevitable consequence. . . . To study our jurisprudence as a science, and to be thoroughly learned in its precepts, are . . . not only honorable to us [as lawyers] and necessary to a wise administration of justice, but of the highest moment to the permanence of our political institutions.²⁴

It is worth noting that Indiana University–Bloomington School of Law (now the Maurer School of Law) has continued to take its obligations as a premier source of high-quality legal education seriously in the intervening years. Not only has the law school risen steadily in the national rankings, but it has become a leading source of timely and relevant research on both legal education and the legal profession.²⁵

By comparison to Indiana University Maurer School of Law, UCLA School of Law is a mere infant, having been founded in the late 1940s after World War II.²⁶ By then, the American Bar Association and the Association of American Law Schools had succeeded in achieving newfound respect for law schools by professionalizing legal education through an increasingly rigorous accreditation process.²⁷ State legislators were showing a growing inclination to fund public law

20. Abrahamson, *supra* note 19, at 622. *See generally* STEVENS, *supra* note 12, at 24–28 (describing the battle to eliminate laissez-faire approaches to law practice and elevate standards so that law would be seen as a profession and not a trade).

21. *See* Abrahamson, *supra* note 19, at 622–25. Indeed, institutionalized legal education in general enjoyed a renewal in the mid-1850s. STEVENS, *supra* note 12, at 21.

22. Abrahamson, *supra* note 19, at 625.

23. *Id.* at 625–26.

24. *Id.* at 628 (quoting David McDonald, Introductory Address on the Study of Law, Delivered in the Chapel of Indiana University, Dec. 5, 1842, at 6 (transcript printed by Marcus L. Deal, available at Lilly Library, Indiana University, Bloomington)).

25. *See, e.g., Center on the Global Legal Profession*, MAURER SCH. OF LAW, <http://globalprofession.law.indiana.edu>. The 2013 *U.S. News & World Report* rankings placed Maurer School of Law at 26th. *Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings/page+2>.

26. *See* MARINA DUNDJERSKI, UCLA: THE FIRST CENTURY 118–19 (2011).

27. STEVENS, *supra* note 12, at 205–07.

schools at the level necessary to meet these standards.²⁸ Far from having to overcome the legacy of Jacksonian democracy as Indiana University Maurer School of Law did, UCLA Law was buoyed by an unprecedented wave of post-World War II prosperity and possibility, the very moment that Kerr would likely describe as a “golden age” for higher education.²⁹ The importance of the rule of law had been made evident through the ravages of Nazism and the cruelties of the Holocaust.³⁰ The United States, now viewed as the leader of the free world, was a defender of democratic ideals rooted in liberty and equality.³¹ Esteem for law schools grew as a result, and their prospects within a flourishing university system were brighter due to these developments.

Roscoe Pound, a former Harvard Law School dean, joined the UCLA Law faculty during the school’s founding to participate in the excitement of this new undertaking.³² His remarks at the dedication of the law school building reflected his sense of the special obligations of the public law school, obligations that permeated teaching, research, and service:

[T]o teach law in the grand manner means . . . to raise up lawyers as conscious members of a profession; as members of an organized body of men pursuing a common calling as a learned art in the spirit of a public service—no less a public service because it is incidentally and so only secondarily a means of livelihood.

There is no way of learning a field of the law like teaching it to well-educated students such as alone are now admitted to study in accredited American law schools. Likewise there are special advantages for the work of a law teacher, as to taking on part of the work of a ministry of justice, in the method of instruction from adjudged cases which prevails in our law schools. . . . Teaching the law in action . . . from study of its operation rather than by indoctrination, is a real preparation for effective activity to initiate and promote legislation for improving the administration of justice.

I submit that a duty is cast upon the faculty of the law school of a state university, both as members of the teaching profession and as members of the legal profession, to exercise the learned arts they pursue in the spirit of a public service in the great and needed service of taking upon themselves the role of a Ministry of Justice.³³

28. *Id.* at 207–08.

29. KERR, *supra* note 1, at 141.

30. See Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT’L HUM. RTS. 5, 12–13, 18–19 (2004).

31. See Christopher W. Schmidt, “Freedom Comes Only from the Law”: *The Debate over Law’s Capacity and the Making of Brown v. Board of Education*, 2008 UTAH L. REV. 1493, 1514–15 (2008) (describing faith in law after World War II as key to the rise of the civil rights movement).

32. DUNDJERSKI, *supra* note 26, at 119.

33. Roscoe Pound, *A Ministry of Justice: A New Role for the Law School*, 38 A.B.A. J. 637, 637, 705 (1952).

By the time Roscoe Pound dedicated the new UCLA Law School building, which was completed in 1951,³⁴ public legal education was well established, and its special ethic of service was substantial and significant. Though never officially denominated a ministry of justice, in the intervening years UCLA Law acted as a first-mover in many areas, actions that suggest that the institution had a deep understanding of its public mission. In addition, the law school recognized its obligation to train a broad cross-section of the public for positions of leadership. The very first graduating class included several women, who were still a rarity in legal education at the time, as well as a student with disabilities; one of the women graduated first in the inaugural class.³⁵

UCLA School of Law has remained true to these early traditions of access and service. UCLA Law led the way in diversifying its student body, and it remained among the most diverse law schools in the nation until California voters did away with affirmative action by popular referendum in the mid-1990s.³⁶ The law school also played a pivotal role in developing clinical education programs in the 1970s, one of the key ways in which law schools inculcate norms of professionalism and an ethic of service to the community.³⁷ UCLA Law's public interest program, now endowed by alumnus David Epstein, was in the vanguard of efforts to provide specialized training for students planning to pursue careers in public service and government.³⁸

Today, UCLA School of Law continues to innovate in ways that reflect its precepts as a public institution with an obligation of leadership and service. The law school's Critical Race Studies Program remains unique in American legal education as a space for teaching and research that explore the hard questions about race and ethnicity that must be resolved if we are to be a people with a shared sense of destiny.³⁹ The Williams Institute on Sexual Orientation and Gender Identity Law

34. DUNDJERSKI, *supra* note 26, at 119.

35. Laverne Sagmaster was first in the class of 1952 and Stephen McNally was a paraplegic. See *Girl 'High Man' of UCLA Law Graduate Class*, L.A. TIMES, June 20, 1952, at 12.

36. See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 9-12, 29-36 (2003). In recent years, law schools at the University of California have enrolled only 3-4% African American students, and these proportions are lower than in the years preceding passage of the initiative banning affirmative action in admissions. Brief Amicus Curiae of the President and Chancellors of the Univ. of Cal. in Support of Respondents at 34, *Fisher v. Univ. of Texas*, No. 11-345 (U.S. Aug. 13, 2012).

37. See STEVENS, *supra* note 12, at 214; Evelyn Cruz, *Through the Clinical Lens: A Pragmatic Look at Infusing Therapeutic Jurisprudence Into Clinical Pedagogy*, 30 T. JEFFERSON L. REV. 463, 467 (2008) (describing David Binder at UCLA Law as a pioneer in clinical legal education); George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 181 (1974); Cruger Bright, *Real Life Law Programs Consolidated Here*, UCLA DOCKET, Sept. 28, 1970, at 1; *Practice in the Art of Lawyering*, UCLA L., Fall 1979, at 1.

38. See *David J. Epstein Program in Public Interest Law and Policy*, UCLA SCH. OF LAW, <http://www.law.ucla.edu/academic-programs-and-courses/specializations/david-j-epstein-program-in-public-interest-law-and-policy>.

39. See *Overview of the Critical Race Studies Program*, UCLA SCH. OF LAW,

and Policy remains the first and only initiative of its kind at a U.S. law school, playing a pivotal role in generating the research and policy analysis necessary to address new civil rights challenges with their own dilemmas of equity, access, and inclusion.⁴⁰ Finally, the Emmett Center on Climate Change and the Environment is the first program at any law school in the country devoted entirely to this pressing problem of global significance.⁴¹ Clearly, the ideal of serving the common good that Roscoe Pound described at the law school's inception has shaped UCLA School of Law's evolution in the intervening decades. This legacy has enabled UCLA Law to be a truly public institution, one that has perceived no inconsistency between an ethic of service and an aspiration for greatness during its rapid ascent into the ranks of the top law schools in the nation.

This brief history reveals a recurring theme, that is, a special role for the public law school. Both Judge McDonald and Roscoe Pound linked public law schools to particular visions of law and politics. McDonald saw high-quality instruction of law students as integral to the administration of justice and the permanence of political institutions in the state of Indiana. Pound's address is notable for its unabashedly activist account of the state university law professor's role in law training and reform, a boldly ambitious model that McDonald could hardly have contemplated when he became the sole professor at Indiana University–Bloomington while continuing his work as a circuit judge. Both McDonald and Pound believed that law schools could serve uniquely public functions without falling prey to politics, so long as their faculty had integrity and observed principles of objectivity coupled with a passion for justice. In retrospect, this faith in the power of pure reason may seem unworldly in a landscape marked by intensely partisan debate, but the ideals of leadership and service for the public law school remain significant.

II. THE DEBATE OVER THE SPECIAL MISSION OF THE PUBLIC LAW SCHOOL

Despite the historical case for a unique mission for the public law school, more recent commentary has cast doubt on the ongoing relevance of any distinction between public and private institutions of higher education.⁴² According to former law school dean Richard Matasar, the stereotypical differences between public and private colleges and universities have broken down. Once, he argues, a public school was seen as inexpensive, state subsidized, and oriented to community service, while a private school was considered expensive, market based, and oriented to commercial concerns.⁴³ The public school was driven by an egalitarian, democratic ethic, while a private school adopted a more elitist and authoritarian approach.⁴⁴ Public institutions were limited by bureaucratic structure and financial

<http://www.law.ucla.edu/academic-programs-and-courses/specializations/critical-race-studies>.

40. *Historic Gift for Lesbian and Gay Think Tank*, UCLA SCH. L., Fall/Winter 2001, at 44; THE WILLIAMS INSTITUTE, <http://williamsinstitute.law.ucla.edu>.

41. *About the Emmett Center*, UCLA SCH. OF LAW, <http://www.law.ucla.edu/centers-programs/emmett-center-on-climate-change-and-the-environment/Pages/About-the-Emmett-Center.aspx>.

42. See generally Richard A. Matasar, *Private Publics, Public Privates: An Essay on Convergence in Higher Education*, 10 U. FLA. J.L. & PUB. POL'Y 5 (1998).

43. *Id.* at 9.

44. *Id.*

struggles, while consumer-oriented private schools were more nimble and well supported.⁴⁵

According to Matasar, public and private schools now converge around cost—both are expensive because of the need to compete for students by adding new programs, facilities, and services and because of the decline in state support for public higher education.⁴⁶ With rising tuition, public and private schools alike benefit from state and federal support that goes directly to students in the form of grants and loans. Public schools have grown more entrepreneurial, and private schools more public spirited.⁴⁷ Both public and private schools strive to stand out in the marketplace, and they must offer quality service to students to ensure satisfied consumers who graduate with the inclination to give back to their alma maters in the future.⁴⁸ Whether public or private, colleges and universities now seek a diverse student body composed of the best and the brightest students from all walks of life, and every school is facing increased scrutiny of how it uses its dollars to fund the educational enterprise.⁴⁹

Although Matasar focused on higher education in general, Rex Perschbacher, then-dean of the University of California at Davis School of Law, asked whether this analysis also suggested that the distinctions between public and private law schools had eroded.⁵⁰ Perschbacher acknowledged that initially nearly all formal legal education was private.⁵¹ In fact, law schools did not emerge as part of a university education until the mid-nineteenth century, that is, at about the time that the Indiana University–Bloomington was establishing the state’s first law school.⁵² And, Perschbacher notes, even when the current form of university-based legal education took shape under Christopher Columbus Langdell at the Harvard Law School, “there [still] was no obvious distinction between the mission of publicly affiliated law schools and privately affiliated schools.”⁵³ Later, however, as law schools became increasingly professionalized, key differences related to price, mission, and accountability emerged, and Perschbacher believes that these distinctions remain real and compelling.⁵⁴

In particular, Perschbacher argues that public law schools are obligated “to seek students from the broadest cross-section of the state public.”⁵⁵ Though a racially diverse student body is now a feature of both public and private law schools, the commitment to equal access and inclusion remains a special responsibility of state institutions. Indeed, the rise in diversity throughout higher education is one of the great transformations of twentieth-century colleges and universities. Public

45. *Id.* at 6–9.

46. *See id.* at 10–11.

47. *See id.* at 9.

48. *Id.* at 11–14.

49. *Id.* at 14–19.

50. Rex R. Perschbacher, *The Public Responsibilities of a Public Law School*, 31 U. TOL. L. REV. 693, 693 (2000).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 693–94.

55. *Id.* at 694.

institutions were the first to open their doors to a broad swath of students, in part because tuition was affordable, and some schools even had open admissions.⁵⁶

Perschbacher contends that public law schools also have a unique responsibility to provide training that will prepare students for democratic leadership.⁵⁷ To do so, schools must strive to hire a diverse faculty and staff, and they must offer a classroom experience that prepares students for influential roles as citizen-lawyers.⁵⁸ Public law schools also need to be especially sensitive to policy concerns and should offer clinical opportunities that enable students to serve the state and community.⁵⁹ Perschbacher emphasizes the need to support pro bono and public interest work, and he reminds us that “public law school teachers and administrators should be particularly careful about their images and models, because they speak, however attenuated the connection may seem, on behalf of the public.”⁶⁰

Perschbacher asserts that accountability is yet another unique but especially burdensome responsibility for public law schools. He admits that “[i]t is difficult living in the glare of public scrutiny,” but “[t]his is a burden we should shoulder with as much grace as we can muster.”⁶¹ Although the right of the public to know can be abused, Perschbacher considers this scrutiny essential to ensuring that public law schools remain reflective about their special obligations.⁶² In his view, public law schools must “examine what we do in light of the public interest—and ask how we are to locate that public interest—more often than a private law school needs to.”⁶³ These obligations in turn are “linked to the uniquely democratic and egalitarian tradition of public higher education.”⁶⁴

The debate between Matasar and Perschbacher necessarily reflects changing notions about the proper reach of the public domain. It is, after all, no accident that Governor Ronald Reagan sent Clark Kerr off to spend his later years quietly as a largely unsung professor at the Berkeley campus.⁶⁵ Reagan would spearhead a revolution that transformed our nation’s understanding of what is properly within the public realm, and the answer increasingly seems to be very little. For Reaganites, private actors nearly always deliver results superior to those generated by the public sector, so the goal is to rely on market principles and private processes as much as possible when allocating resources and delivering services.⁶⁶

56. Michael Mumper, *The Future of College Access: The Declining Role of Public Higher Education in Promoting Equal Opportunity*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 100–01 (2003); John B. Noftsinger, Jr. & Kenneth F. Newbold, Jr., *Historical Underpinnings of Access to American Higher Education*, NEW DIRECTIONS FOR HIGHER EDUC., Summer 2007, at 3, 7–8, 12–13.

57. Perschbacher, *supra* note 50, at 694.

58. *Id.* at 694–96.

59. *Id.* at 695–96.

60. *Id.* at 696.

61. *Id.* at 697.

62. *Id.*

63. *Id.*

64. *Id.*

65. 2 KERR, *supra* note 6, at 317.

66. See Edward Rubin, Book Review, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 892 (2010); see also Steven J. Kelman, *Achieving Contracting*

For Matasar, the legacy of that transformed understanding has been convergence and hybridity: the public looks increasingly private, as pressures to compete grow and taxpayer support dwindles; but at the same time, the private college or university adopts appealing features of the public ethos if that assists in the intense market competition for students. Perschbacher, by contrast, continues to believe that state law schools have unique obligations. For him, public values are nonnegotiable features of these law schools, constitutive of their identities, and not simply features of an attractive marketing campaign to boost enrollments. As a result, a state law school cannot abandon principles of equity and access if they become inconvenient, nor can it relinquish an ethic of pro bono and public service even if it becomes unfashionable.

How one resolves the debate between Matasar and Perschbacher likely turns on ideological beliefs about the need for a robust public sector, one in which public law schools train citizen-lawyers to preserve a healthy body politic. In an earlier era, formal legal education of any kind was attacked as exclusionary and elitist. The Jacksonian impulse converted access to law practice into a birthright of every white male adult citizen—no training required. Yet, without specialized instruction, attorneys could not master the rules and regulations needed to promote order and decency in an increasingly complex world. That training could have been accomplished through purely private means, but states saw that law was critical to developing a sound infrastructure for thriving economies and flourishing democracies.⁶⁷ This sense of a public interest in the law prompted efforts to create high-quality public law schools. Today, the importance of law to democracy seems every bit as compelling as it did in the mid-1800s when Indiana University–Bloomington founded its law school. But we as a society are less convinced that the public interest requires state-funded law schools that embody norms of access and service that Perschbacher prized and Pound praised. We have—at least until recently with the collapse of the financial sector—become far more trusting of private paths to the public good, and the result has been a growing set of challenges for the public law school.

III. THE CONTESTED FUTURE OF THE PUBLIC LAW SCHOOL

The verdict is still out on the debate between Richard Matasar and Rex Perschbacher over the distinctive nature of public law schools. This lingering doubt should come as no surprise given the ongoing and widespread uncertainty about the kind of democracy we want to be, the type of government we want to have, and the nature of the public values that we hold in common and must preserve for future generations. Though the battle over the future of public law schools is part of a larger political zeitgeist, there are nonetheless features of this particular struggle that are worth singling out.

Goals and Recognizing Public Law Concerns: A Contracting Management Perspective, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 153, 154–60 (Jody Freeman & Martha Minow eds., 2009).

67. STEVENS, *supra* note 12, at 78–79 (describing the struggle to launch public law schools in the mid- to late 1800s as a response to both the inaccessibility of elite private institutions and the problems of quality at emerging commercial law schools).

Access. First, as Perschbacher suggests, the question of access is vital to understanding the nature of a public law school. If the law school is to serve the people, it must be open to individuals from all walks of life with the talent, character, and will to become citizen-lawyers of the finest caliber. For that reason, access to public legal education historically has been based on the ability to contribute rather than the ability to pay. The decline in state subsidies for public higher education in general, and public law schools in particular, has inexorably eroded this core principle of access. Although many commentators have argued that access to public colleges and universities is vital because they educate about 80% of undergraduates, the same cannot be said for public law schools.⁶⁸ Because legal education originally was highly privatized, public law schools are a relatively recent innovation, and they operate alongside a robust cohort of private institutions, some of which are freestanding, proprietary enterprises and some of which are housed at private universities. In fact, according to 2008–09 data collected by the American Bar Association, 41% of all accredited law schools are public, but they enroll only 33% of all law students.⁶⁹ Public law schools are on average smaller than private schools and enroll fewer part-time students.⁷⁰ Though the case for public law schools cannot be made on attendance figures alone, these institutions emerged because of intense dissatisfaction with a legal profession steeped in a purely market-driven ethic of training and practice. At the core of the push for public law schools was a conviction that they would better safeguard the ideal of the citizen-lawyer than an exclusively private system of legal instruction could.

Today, as state revenues for public law schools decline, there is a growing rhetoric of privatization and self-sufficiency. The law schools at the University of Michigan and the University of Virginia already have moved decisively in this direction, while those at Arizona State University and the University of Minnesota have announced plans to become self-sufficient.⁷¹ Typically, these changes translate into rising tuition and intense pressure for private fundraising.⁷² Building an endowment has been like building wealth, and until recently it has largely been the province of elite private institutions. Most public law schools have relatively small endowments, in part because of their traditional dependence on state support and their emphasis on keeping tuition and costs down to make their programs affordable and accessible.⁷³ Consequently, many state law schools have become

68. E-mail from Terry Stedman, Research Assistant, UCLA Sch. of Law, to Rachel F. Moran, Dean, UCLA Sch. Of Law (Jan. 4, 2012, 02:42 PST) (on file with author).

69. *Id.*

70. *Id.*

71. Karen Dybis, *When Public Funding Is No Longer Available*, NAT'L JURIST, Jan. 2011, at 12; Jenna Ross, *The Next U*, STAR TRIB. (Minneapolis), July 4, 2011, at 1A.

72. See Dybis, *supra* note 71, at 12; Ross, *supra* note 71.

73. Of the twenty universities with the largest endowments, fifteen are private and five are public. Hsiu-Ling Lee, *The Growth and Stratification of College Endowments in the United States*, 8 INT'L J. EDUC. ADVANCEMENT 136, 137 (2008). In 2005, Harvard and Yale had endowments of \$25.5 billion and \$15.2 billion respectively, while the University of Texas had an endowment of \$11.62 billion, the largest for any public university. *Id.* at 137 fig.1. The University of California followed at \$5.2 billion. *Id.* And the rich got richer. In 2009, Harvard Law School completed a \$400 million campaign, the largest in law school history. Sharon Theimer, *Kagan: Harvard Law's \$476 Million Dean*, ASSOCIATED PRESS,

heavily tuition-driven as state support drops. With small endowments, public law schools struggle to offset rapid increases in tuition with equivalently large increments in financial aid.⁷⁴ The upshot is that public legal education is generally more expensive than it used to be, and public law schools will not be able to preserve access and affordability without substantial infusions of money from private donors.⁷⁵

This shift in the cost of tuition coincides with changes in government policy on financial aid. Unfortunately, the coincidence is not a happy one. Historically, the United States has relied on the targeted provision of aid to students, rather than on the general allocation of taxpayer dollars to make higher education free for all.⁷⁶ In some instances, the federal government has promoted affordable private loans to finance a college or university student's education, while in other cases the government has undertaken direct lending.⁷⁷ Recently, Congress enacted legislation that ends protections and guarantees for students in the private credit market, but the new regime does not adequately expand the availability of direct federal loans.⁷⁸ As a result, some students may delay or forego higher education because they cannot obtain favorable loans to finance their education.⁷⁹ The increasing reliance on student loans has taken its toll. At one time, among developed countries, the United States had the highest proportion of college graduates among adults aged twenty-five to thirty-four.⁸⁰ As of 2007, our country ranked twelfth, in part because it stands alone among industrialized nations in requiring youth to self-finance higher education.⁸¹ The obstacles to obtaining an undergraduate degree can be daunting, and students arrive at and graduate from law schools—whether public or private—more heavily burdened by debt.⁸²

July 7, 2010.

74. See Karen Sloan, *At Public Law Schools, Tuition Jumps Sharply; Students May Pay as Much as 20% More at Some State Institutions*, NAT'L. L.J., Aug. 3, 2009, at 1; see also Ronald G. Ehrenberg, *The Perfect Storm and the Privatization of Public Higher Education*, CHANGE, Jan./Feb. 2006, at 46, 51. According to a Government Accountability Office report in 2009, public law schools offered an average of \$3,271 per capita in aid, while private schools offered \$7,542. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 19 (2009). Public law school aid offset non-resident tuition by 12% and resident tuition by 24%, while private school aid offset tuition by 24%. *Id.*

75. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 74, at 29.

76. Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 20–21 (2011).

77. *Id.* at 34–42.

78. See *id.* at 42–43, 56–57.

79. See *id.* at 13–14, 57–58.

80. See JOHN MICHAEL LEE, JR. & ANITA RAWLS, THE COLLEGE COMPLETION AGENDA 2010 PROGRESS REPORT 6 (2010).

81. *Id.*; COLL. BD. ADVOCACY, COMING TO OUR SENSES: EDUCATION AND THE AMERICAN FUTURE 16–17 (2008); see also William R. Doyle, *Hard Choices*, CHANGE, Nov./Dec. 2009, at 50.

82. See William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 485–86 (2011); LAW SCH. SURVEY OF STUDENT ENGAGEMENT, STUDENT ENGAGEMENT IN LAW SCHOOL: ENHANCING STUDENT LEARNING 3, 14 (2009) (reporting a substantial increase in the number of students who expect to graduate

At the same time, one of the great changes in higher education—the diversification of the student body—is under siege.⁸³ Although public and private colleges and universities alike now aspire to admit a diverse student body, the war on affirmative action primarily has been waged at public schools, often public law schools. Lawsuits have been filed against two of the leading institutions of public legal education, the University of Michigan⁸⁴ and the University of Texas.⁸⁵ The University of California law schools have been subject to federal inquiries into the permissibility of race-conscious admissions practices as well as Regents' resolutions and a popular referendum that have banned any use of racial or ethnic preferences.⁸⁶ As a result, public law schools often face more substantial challenges to achieving a diverse student body than their private counterparts do.

Interestingly, however, there are areas of access in which public institutions continue to take the lead. In particular, the growing socioeconomic divide in the United States has raised significant questions about whether children from the most disadvantaged backgrounds are able to pursue higher education. Here, public institutions remain gateways to opportunity. Community colleges offer low-income and first-generation students a chance to get started on a degree,⁸⁷ and campuses like Berkeley and UCLA are home to unparalleled numbers of Pell grant recipients, students who by definition come from backgrounds marked by poverty and disadvantage.⁸⁸ In fact, each of four University of California campuses—Berkeley, Davis, UCLA, and San Diego—enrolls more students on Pell grants than the entire Ivy League combined.⁸⁹

The picture for law schools admittedly is more complicated. According to Richard Sander's recent study of law students who graduated around the year 2000, only 18% of those at top ten schools came from the bottom 75% of the socioeconomic stratum.⁹⁰ For schools ranked eleventh through twentieth, 24% did, while for those ranked twenty-first through fiftieth, 27% did.⁹¹ Conversely, at the top ten schools, 57% of the student body came from the highest 10% in terms of

with over \$120,000 in debt).

83. See, e.g., *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011).

84. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

85. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

86. Prop. 209 (codified at CAL. CONST. art. I, § 31); UNIV. OF CAL. BD. OF REGENTS, POLICY ENSURING EQUAL TREATMENT ADMISSIONS (SP-1) (approved July 20, 1995; rescinded May 16, 2001); OFFICE OF STRATEGIC COMMUNICATIONS, UNIV. OF CAL., FACTS ABOUT THE UNIVERSITY OF CALIFORNIA (2001); Larry Gordon, *UC Berkeley Law School Faces Federal Bias Inquiry*, L.A. TIMES, Apr. 7, 1990, at A28.

87. Katharine C. Lyall & Kathleen R. Sell, *The De Facto Privatization of American Public Higher Education*, CHANGE, Jan./Feb. 2006, at 6, 9.

88. Caralee J. Adams, *Budget Deal Ushers in New Pell Grant Eligibility Rules*, EDUC. WEEK, Jan. 11, 2012, at 18 (describing the Pell grant program as designed "to help low-income students attend college").

89. *Guest Commentary: A Baker's Dozen Myths About Higher Education*, CalChamber (Dec. 9, 2011), <http://www.calchamber.com/headlines/pages/12092011-guestcommentary-abakersdozenmythsabouthighereducation.aspx> (publishing University of California President Mark G. Yudof's presentation at the California Chamber of Commerce Board Meeting, San Francisco, CA, Dec. 2, 2011).

90. Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 639 tbl.1 (2011).

91. *Id.*

socioeconomic status, while at the schools ranked eleventh through twentieth, 49% did, and at those ranked twenty-first through fiftieth, 48% did.⁹² To the extent that elite law schools are pathways to leadership, it would appear that the most disadvantaged segments of our population are seriously underrepresented—even more so than is true in undergraduate programs at American colleges and universities. Sander notes that class stratification in U.S. law schools likely has intensified because of rising tuition, financial aid that is no longer as tightly tied to need, the failure to account for grade inflation at elite private universities in the law school admissions process, the premium attached to resumes with interesting experiences more available to affluent students, and the persistence of legacy preferences.⁹³

Sander observes that in response to bans on racial and ethnic preferences in state college and university admissions, UCLA School of Law experimented with a system that gives some weight to socioeconomic disadvantage as measured by limited family wealth and education as well as attendance at a secondary school in a high-poverty neighborhood.⁹⁴ Sander finds that the experiment had a dramatic impact on socioeconomic diversity in the law school class, with one-third of the students coming from the bottom half of the socioeconomic distribution and the proportion in the highest levels of the distribution dropping substantially.⁹⁵ Sander concludes that the effort succeeded in part because no other law school was interested in socioeconomic diversity, so UCLA Law faced little competition in attracting highly qualified students from the cohort it had identified as disadvantaged.⁹⁶ He acknowledges that the experiment could not be replicated on a national scale.⁹⁷ Yet, he observes that “in the absence of a change in legal regime, it is unlikely that many law schools will institute even modest class-based preferences in the near future. The field is open for a few schools willing to show leadership in fostering SES [socioeconomic status] diversity.”⁹⁸

Whether such leadership will materialize in a world marked by declining state support and growing competition for law students who have high grades and Law School Admission Test (LSAT) scores is an open question. Sander himself appears skeptical, and his account makes no distinction between the public and private law school in imagining where such transformation might begin. Though he cites a public law school as a model, he does not suggest that this reform sprang from some core notion of what it means to be truly public. One might argue, of course, that, in fact, a commitment to access was crucial to UCLA Law’s decision to implement this experiment. But Sander seems tacitly to accept Matasar’s view that the differences between public and private law schools—at least insofar as they bear on access—have largely disappeared. The primary axis of distinction appears to be elite status—whether public or private—which in turn correlates with a socioeconomically privileged student body.

92. *Id.*

93. *Id.* at 658–61.

94. *Id.* at 661–62.

95. *Id.* at 662–63.

96. *See id.* at 663.

97. *Id.*

98. *Id.*

Training for Leadership. Providing access to a wide range of students is just the beginning of advancing a distinctly public mission. In justifying the University of Michigan Law School's efforts to promote diversity in the student body, the U.S. Supreme Court pointed out that this elite public law school was a pathway to leadership, and that leadership from all segments of the community was key to the legitimacy and integrity of our democracy.⁹⁹ To build pathways to leadership, public law schools must train students to become citizen-lawyers, who remember their duty not just to represent individual clients but to serve the common good. These values are fundamental, no matter what area of law practice a student chooses to pursue. A citizen-lawyer is not confined to practice in public interest or government but also can be a leader in private practice or business. Indeed, citizen-lawyers have played key roles as architects of the New Deal and the civil rights movement.¹⁰⁰

Training for leadership moves well beyond a recitation of formal doctrine; students are taught to "think like a lawyer" who can appreciate all sides of a complicated issue. In addition, students gain an ethical perspective on practice, one that instills respect for distinct points of view and sensitivity to the varied interests at stake in any particular lawsuit or transaction.¹⁰¹ Some of this knowledge is imparted in traditional lecture courses. Clinical experiences deepen the student's understanding by offering insights into the complexity of real-world practice. Still other lessons are learned outside the formal curriculum through participation in voluntary pro bono activities, student organizations, and law school committees.¹⁰² These exercises in intellectual engagement and democratic participation are an integral part of the public law school's preparation of citizen-lawyers. It is, after all, no coincidence that UCLA was the first law school in the country to appoint student members to its official faculty committees.¹⁰³ This innovation was entirely consistent with its obligation to train future leaders for the state.

Increasing stratification and segmentation in the legal profession have threatened the very notion of the citizen-lawyer, particularly in private practice where a focus on the bottom line may appear to be driving out public spiritedness. If law is simply a business, it is not clear why attorneys should strive to serve the greater good.¹⁰⁴ As a result, all law schools face mounting challenges to a pedagogical model that rests on a universal image of the citizen-lawyer, with core values and commitments that transcend any particular practice setting. Today, public law schools have a special duty to nurture this tradition of professional obligation by resisting curricula that treat the norms for public service and private practice as sharply divergent and disconnected.

99. *Gutter v. Bollinger*, 539 U.S. at 306, 331–32 (2003).

100. Rachel Moran, *The President's Message*, AALS NEWS, Mar. 2009, at 1, 1–2.

101. *Id.* at 12.

102. See Faith Rivers James, *Engaging Law Students in Leadership*, 30 ST. LOUIS U. PUB. L. REV. 409, 430–31, 436–37 (2011).

103. UCLA School of Law adopted this policy in 1968. *Quiet Revolution Occurs at Law School*, L.A. TIMES, Dec. 15, 1968, at K8; *UCLA Pioneers Law Student Reps on Faculty Committees*, UCLA DOCKET, Oct. 28, 1968, at 1; see also Arval A. Morris, *Student Participation in Law School Decision Making*, 22 J. LEGAL EDUC. 127, 137 (1969) (noting limited student participation in governance at American law schools).

104. Moran, *supra* note 100, at 3.

To date, curricular innovation and training for leadership have flourished in both public and private law schools. Historically, elite private schools were associated with entry into prestigious private practice.¹⁰⁵ Indeed, Jerold Auerbach remarked that in the 1950s, “not only were Columbia Law School and Wall Street stations on the same subway line; they were stations on the same career line.”¹⁰⁶ In the intervening years, these schools have become synonymous with fundamental curricular reforms that permeate all of legal education. Most notably, of course, in the late 1800s, Christopher Columbus Langdell at Harvard developed the “case method,” which has dominated legal education ever since.¹⁰⁷ And, in the 1920s, Columbia Law School initiated efforts to focus on law and the social sciences,¹⁰⁸ although later formative debates about the law and society movement were dominated by two public institutions, the University of Wisconsin and the University of California at Berkeley.¹⁰⁹ As the number of law schools, both public and private, grew, new trends in legal education often occurred at a range of institutions. For example, one of the great innovations of our time, the rise of clinical legal education, got its start at both private and public law schools. The rise of clinical education in the 1960s and 1970s reflected a larger political ethos, one in which many students came to law school because they hoped to change the world. With the triumph of the civil rights and antiwar movements, these young people believed that law could be a powerful instrument of social transformation.¹¹⁰ Indeed, it became almost *de rigueur* for prospective students to include an essay in their law school applications that expounded on their aspirations to make a difference through legal activism.

Today, clinical education is a hallmark of all law schools, whether public or private. The spread of clinical instruction has coincided with a newfound emphasis on skills training, one that may dilute any focus on service to the disadvantaged. Skills training can reduce clinical instruction to a purely technical pedagogical exercise, one that focuses on teaching discrete skills and core competencies. Although there is utility in disaggregating skills and measuring their mastery, part of the promise of clinical education has been that it helps students to think holistically about their roles as lawyers. Whether in a live-client clinic or as part of a complex simulated practice exercise, students must draw expansively on doctrine and skills and deploy strategic thinking and ethical judgment to solve a client’s problems. By serving those in need, students also confront the role of the lawyer in the larger society, one in which access to justice is far from equal.¹¹¹

105. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* viii (1976).

106. *Id.*

107. See STEVENS, *supra* note 12, at 36, 52–53.

108. *Id.* at 137–40.

109. Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 L. & SOC’Y REV. 409, 459–63 (1998).

110. STEVENS, *supra* note 12, at 215–16, 240–41; George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172–78 (1974); Rachel Moran, *Transformation and Training in the Law: Serving Clinical Legal Education’s Two Masters*, AALS NEWS, May 2009, at 1.

111. Moran, *supra* note 110, at 16–17.

Assuming that public law schools have a special trust to preserve the tradition of the citizen-lawyer, they may play a key part in preserving an ethic of service in clinical education, even as there are calls to implement skills training in a largely technocratic way. Unfortunately, there are serious obstacles for public law schools that want to assume this role. For one thing, clinical instruction, particularly the live-client clinic, is extremely resource intensive and may be difficult for increasingly cash-strapped institutions to sustain.¹¹² Innovation in this area will likely require not just dedicated faculty who support a curriculum that is theoretically sophisticated, deeply interdisciplinary, and socially conscious but also resources from foundations, alumni, or concerned community members who share this pedagogical vision. Further complicating public law schools' efforts to shoulder this responsibility will be the political fallout that can arise when clinics do cutting-edge work in fields that are ideologically controversial. In recent years, for instance, environmental law clinics have been especially susceptible to legislative and administrative backlash when they challenge lucrative private development efforts.¹¹³

To some extent, the emergence of specialized curricula, programs, and centers in American law schools already has hinted at the demise of the generalist, which in turn may augur the end of any all-encompassing ideal of the citizen-lawyer. Some specialization is undoubtedly necessary to address the growing complexity of law practice.¹¹⁴ However, public law schools in particular should be thinking hard about how to avoid the pitfalls of an unduly narrow focus that can come with specialization. When establishing specialized research centers and programs, public law schools have an obligation to consider how these initiatives can serve society, for instance, through conferences, policy briefs, and white papers that provide authoritative information to policy makers, community activists, and the general public.

Public law schools also must be extra vigilant in ensuring that every specialization includes training that prepares students for public-spirited leadership. For example, recently UCLA School of Law received an unprecedented \$10 million gift from alumnus Lowell Milken to support a core area of the curriculum—the program in business law and policy.¹¹⁵ This program enrolls the largest number of students of any specialization at UCLA Law and attracts LLMs

112. See STEVENS, *supra* note 12, at 241; John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 183 (1993); Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Cost?*, 1 CLINICAL L. REV. 677, 677–78 (1995); Marjorie Anne McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 286 (1990).

113. Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469, 471–73 (2011); Katherine Bishop, *Oregon Law Clinic Battles the Timber Industry*, N.Y. TIMES, Aug. 5, 1988, at B5; Mark Schleifstein, *Professors Protest Law Clinic Rules—Access to Courts Restricted for Poor, Minorities, Critics Say*, TIMES-PICAYUNE (NEW ORLEANS), Jan. 8, 1999, at 2A.

114. Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 732–34 (2009).

115. *\$10 Million Gift Establishes Institute Advancing Business Law and Policy*, UCLA L., Fall 2011, at 34.

from around the world.¹¹⁶ In addition, the JD/MBA degree is the most popular joint degree that the law school offers.¹¹⁷ From the outset, it was clear that the Lowell Milken Institute for Business Law and Policy would do more than offer narrow training to pursue a business law practice. Students should be prepared not just to be business lawyers but also to enter business, to craft business law and policy in government positions, and to make wise investments in the world of philanthropy.¹¹⁸ To that end, students had to master a deep understanding of the role of law and business in the larger society so that they could pursue a range of careers.

Finally, public law schools bear an extra responsibility to ensure that students in specialized areas of study have opportunities to collaborate with one other. Innovative partnerships across areas of expertise can foster a sense of common identity as lawyers, enrich the learning experience, and afford insights into the distinct challenges that citizen-lawyers face in a variety of fields. For instance, at UCLA Law, we are considering how business law students and public interest law students may benefit from joint participation in a community development clinic.¹¹⁹ Our hope is that students will bring their respective strengths to a shared problem-solving effort, learning from each other and garnering the unique benefits that peer-to-peer interaction can generate. By working together, students can exchange doctrinal knowledge, explore divergent values and priorities, and evaluate competing notions of what leadership as lawyers means. This interaction will enable students to identify with one another as members of a common profession, rather than as people with very different ambitions who just happen to attend law school together.

Once upon a time, when public law school tuition was low and when the legal world was less stratified and segmented than it is today, a sense of common identity and purpose may have come naturally to law students. After all, with a relatively affordable legal education, any member of the class could imagine going into government or public interest as well as private practice. Today, with rising tuition and a divided profession, fewer students arrive at law school with a sense that their career options are open and fluid. Those committed to public interest work must devote much of their time to strategizing about how to finance their legal education and obtain a job or fellowship in the nonprofit world, while those interested in private law practice may feel compelled to use specializations to position themselves in an ever more competitive legal marketplace. Public law schools no longer can assume that the ethic of the citizen-lawyer will be acquired simply by dint of attendance at an institution that is open to all and that has a history of placing students in every sector of practice. Deliberate pedagogical choices will need to be made—in the classroom and in the curriculum—to ensure that a sense of

116. E-mail from Sean Pine, Assistant Dean, UCLA Sch. of Law, to Rachel F. Moran, Dean, UCLA Sch. of Law (June 20, 2012, 07:54 PDT) (on file with the author).

117. *Id.*

118. See Jeremy Deutchman, *Breadth of Influence: The New Lowell Milken Institute for Business Law and Policy*, UCLA L., Fall 2011, at 41, 42–44.

119. E-mail from Eric Zolt, Faculty Dir., Lowell Milken Inst. for Bus. Law and Policy, to Rachel F. Moran, Dean, UCLA Sch. of Law (June 19, 2012, 19:27 PDT) (on file with author).

public spiritedness survives intact for all members of the class, no matter how disparate their career aspirations.

Transparency and Accountability. State law schools are distinct from their private counterparts because of the public's sense of ownership, which is expressed through a range of laws and policies that regulate everything from the contracting process to salary scales, admissions policy, and tuition rates.¹²⁰ Pervasive oversight continues largely undiminished, even as government funding steadily drops. Increasingly, as in other areas of public life, officials are imposing mostly unfunded mandates rather than granting additional funds with strings attached.¹²¹ In addition, public institutions of higher education are subject to "government in the sunshine" provisions that typically enable any member of the public to demand information about admissions, placement, faculty and staff salaries, private donations—indeed, just about every facet of the school's operations.¹²² Although there are some constraints to protect privacy concerns and the public interest, these disclosure requirements are far-ranging, and in an era in which the cost of communication has dropped dramatically, an individual can send off a quick e-mail and command substantial staff time and resources to answer a broad request for information.¹²³ In some instances, demands for information can be ways to redirect an institution's priorities and plans through an implicit threat of litigation, lobbying, or negative publicity.¹²⁴

The result can be a chilling effect on university leadership. In the book *Moneyball*, Michael Lewis describes how big-league baseball managers often are more afraid of making a high-profile, humiliating mistake than of incurring the costs associated with perpetuating the status quo.¹²⁵ In colleges and universities, the costs of standing pat are simply taken for granted and are largely invisible to

120. See Bruce W. Speck, *The Growing Role of Private Giving in Financing the Modern University*, NEW DIRECTIONS FOR HIGHER EDUC., Spring 2010, at 7, 13–14 (describing the competitive disadvantage that public universities face when state funding declines but "a significant yardage of red tape" remains).

121. *Id.*; Julie Davis Bell, *Taking the "State" Out of State Universities*, STATE LEGISLATORS, June 2011, at 20, 20–22, available at [http://www.ncsl.org/issues-research/educ/taking-the-\"state\"-out-of-state-universities-june.aspx](http://www.ncsl.org/issues-research/educ/taking-the-\).

122. JAMES J. DUDERSTADT & FARRIS W. WOMACK, *THE FUTURE OF THE PUBLIC UNIVERSITY IN AMERICA: BEYOND THE CROSSROADS* 157–58 (2003).

123. See *id.*; Michael K. McLendon & James C. Hearn, *Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance*, 77 J. HIGHER EDUC. 645, 666 (2006); James C. Hearn & Michael K. McLendon, *Sunshine Laws in Higher Education*, ACADEME, May–June 2005, at 28, 31; James C. Hearn, Michael K. McLendon & Leigh Z. Gilchrist, *Governing in the Sunshine: Studying the Impact of State Open-Meetings and Records Laws on Decisionmaking in Higher Education* (July 2003) (unpublished).

124. See, e.g., Jennifer Dearborn, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 RUTGERS L. REC. 16, 21–27 (2011); Steven Greenhouse, *Group Seeks Labor E-Mails by Professors in Michigan*, N.Y. TIMES, Mar. 30, 2011, at A13; John Nichols, *Wisconsin GOP Seeks to Silence a Distinguished Dissenter. McCarthyism is Back*, THE NATION (Mar. 25, 2011), <http://www.thenation.com/blog/159489/wisconsin-gop-seeks-silence-distinguished-dissenter-mccarthyism-back>.

125. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* 80 (paperback ed. 2004).

administrators and the general public. Change, on the other hand, is likely to trigger scrutiny and suspicion—the kind of backlash that can end the career of a university president, chancellor, vice provost, or dean.¹²⁶ The cost of living in a political fishbowl may be a decline in visionary leadership just when it is needed the most. In a 2001 article entitled *It's Lowly at the Top: What Became of the Great College Presidents*, Jay Mathews argues that it is increasingly difficult to find the kind of intellectual giants who once led colleges or universities, whether public or private.¹²⁷ Mathews believes that presidents today are primarily known as “fundraisers and ribbon cutters and coat holders, filling a slot rather than changing the world.”¹²⁸ This new breed of president reacts to change instead of making it happen. Clark Kerr himself wondered whether the days of what Isaiah Berlin termed “hedgehogs,” university leaders who were big-picture thinkers, had come to an end.¹²⁹ Kerr saw institutions of higher education dominated by “foxes,” who pursue numerous activities and seize opportunities without having any unified vision to guide their decisions.¹³⁰ Kerr did not explain how a fox could recognize a genuine opportunity in the absence of the hedgehog’s vision, but perhaps he resolved this dilemma with an ironical wink: “To the hedgehogs of the 1960s of which I was one: rest in peace; to the foxes of the twenty-first century: great expectations for success in your attempted escapes from the maze!”¹³¹

Mathews attributes the emergence of the glad-handing yet hollow president to what he terms the corporatization of university leadership, but in public institutions other forces may be at work.¹³² Whatever new pressures may exist, top administrators at state colleges and universities have long worried that a sclerotic bureaucracy, coupled with intense public scrutiny, will impede efforts to keep pace with the production of knowledge and respond nimbly to a volatile political environment.¹³³ As James Duderstadt, former president of the University of Michigan, notes:

The public university must always function in an intensely political environment. Public university governing boards are generally political in nature, frequently viewing their primary responsibilities as being to various political constituencies rather than confined to the university itself. Changes that might threaten these constituencies are frequently resisted, even if they might enable the institution to serve broader society better. The public university also must operate within a complex array of government regulations and relationships at the local, state, and federal level, most of which tend to be highly reactive and supportive of the status quo. Furthermore, the press itself is generally far more intrusive in the affairs of public universities, viewing itself as

126. See JAMES J. DUDERSTADT, *A UNIVERSITY FOR THE 21ST CENTURY* 253 (2000); DUDERSTADT & WOMACK, *supra* note 122, at 130–31, 137, 147–49.

127. Jay Mathews, *It's Lowly at the Top: What Became of the Great College Presidents?*, WASH. POST, June 10, 2001, at B1.

128. *Id.*

129. KERR, *supra* note 1, at 207–09.

130. *Id.*

131. *Id.* at 229.

132. Mathews, *supra* note 127, at B1.

133. DUDERSTADT & WOMACK, *supra* note 122, at 98–99, 178–80.

the guardian of the public interest and using powerful tools such as sunshine laws to hold public universities accountable.

As a result, actions that would be straightforward for private universities, such as enrollment adjustments, tuition increases, program reductions or elimination, or campus modifications, can be formidable for public institutions. For example, the actions taken by many public universities to adjust to eroding state support through tuition increases or program restructuring have triggered major political upheavals that threaten to constrain further efforts to balance activities with resources.

. . . It could well be that many public universities will simply not be able to respond adequately during periods of great change in our society.¹³⁴

It is not, of course, the brief of the public law school to address these issues directly. The power to confront the freighted politics of higher education lies with presidents and chancellors who speak for university systems and campuses as a whole. However, public law schools can be a source of creative advice and consultation in working through possible solutions to preserve political oversight without unduly compromising the flexibility and discretion of university officials. Public law schools can offer significant insights when revisiting the compacts that structure the operation of state colleges and universities, determining whether unfunded mandates are appropriate, and evaluating the proper scope of public records acts requests. In short, state law schools can play an invaluable part in tackling the governance questions that lie at the heart of the future of public higher education.

I must add a comment about another form of scrutiny that affects both public and private law schools, the *U.S. News and World Report* rankings. Although the rankings appear to have a similar impact on all institutions, there are reasons to believe that public law schools face special challenges. The rankings were changed several years after their inception in ways that reduced the number of state law schools in the most elite cohort and depressed the rankings of those that remained.¹³⁵ In addition, the *U.S. News* rankings tend to privilege national law schools, while many public law schools were established with a distinct mission of serving their state and region. Consequently, a number of these law schools draw their student bodies largely from their own states and place graduates in those states and the surrounding region.¹³⁶ This local or regional focus adversely affects the

134. DUDERSTADT, *supra* note 126, at 67.

135. See Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 16–17 (2006); Stephanie C. Emens, *The Methodology & Manipulation of the U.S. News Law School Rankings*, 34 J. LEGAL PROF. 197, 199–200 (2009); Brian Leiter, *Why U.S. News Makes State Law Schools Angry*, NAT'L L.J., Mar. 24, 1997, at A24.

136. Of all public law schools, only seven report that most graduates leave the state (Michigan, Virginia, Iowa, William and Mary, Indiana University Maurer School of Law, and George Mason). The District of Columbia Law School also sends most students elsewhere, but it is not located in a state. At the high end, four state law schools report that approximately 90% or more of their students work in the state (Georgia State, Wayne State, Florida A&M, and Houston). The University of Puerto Rico also reports that over 90% of its graduates remain in the territory. LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS: 2012 EDITION 40–45 (2011).

schools' ability to compete when reputational factors are assessed on a nationwide basis.¹³⁷ In addition, public law schools long have had to make the most of limited resources. Yet, the rankings typically reward schools for total expenditures, regardless of how efficiently the money is used. There are no boosts in a school's standing because it contains costs through prudent management.¹³⁸

Returning to the story of *Moneyball*, the Oakland A's were a relatively poor major league baseball team that sought to compete with wealthy competitors by using science and statistics to make the most of limited assets.¹³⁹ The A's were able to measure the success of these efforts by using an easily quantifiable measure, the number of bases gained, points earned, and games won.¹⁴⁰ But even if public law schools were to emulate the A's by adopting efficient strategies that maximize the return on their resources, the impact on the rankings would be negligible. There are no discrete events like number of games won that could change general perceptions rooted in surmise and intuition. Reputational factors, which weigh heavily in the rankings, are so "sticky" that they would continue to perpetuate the current hierarchical ordering.¹⁴¹ The remaining factors are heavily driven by total available wealth and income, so maximizing the use of a school's dollars would prove largely irrelevant because there is no metric that recognizes the marginal return on expenditures.¹⁴² As a result, the rankings reinforce the message that, by and large, elite, private institutions are superior to public ones. This perception in turn can play an insidious role in bolstering the view that privatization will necessarily enhance law school performance, regardless of the impact on public values.¹⁴³

137. Among the *U.S. News* top twenty law schools, the number of students who remained in the state after graduation in 2009 varied from 4.7% (Yale) to 86.2% (USC). Of the public law schools in this cohort, Michigan and Virginia had the lowest number of graduates who remained in state (11.6% and 13.6%) respectively, while UCLA was at the high end with 82.6%. In the middle were Minnesota (50.8%), Berkeley (60.9%), and Texas (67.9%). LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N, *supra* note 135, at 40–45; *Best Law Schools*, *supra* note 25. Interestingly, the top public law schools with the lowest proportion of graduates remaining in-state were the first to privatize. See Dybis, *supra* note 71; Sloan, *supra* note 74.

138. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 501–10, 539–45 (2007); Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Misperceive*, 81 IND. L.J. 229, 260 (2006).

139. See LEWIS, *supra* note 125, at 119.

140. *Id.* at 119–37.

141. Seto, *supra* note 138, at 497, 516–17.

142. See *id.* at 539–45.

143. See William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163, 182–87 (2006) (describing impact of rankings on student choices about attending law school). Public law schools that are less highly ranked can compete for students by discounting in-state tuition, see *id.* at 187–88, but this in turn reinforces the effects of a regional identity and reduces the available resources to rise in the rankings.

IV. THE ONGOING PROMISE AND PERIL OF THE PUBLIC LAW SCHOOL

Despite these challenges, there are reasons to be hopeful about the future of public law schools and the preservation of their historic mission and values. The profession itself has long grappled with the need to respect certain public obligations of the bar. Attorneys with lucrative practices at large firms have been expected to give back in various ways, including pro bono work, philanthropic giving, and civic leadership.¹⁴⁴ The use of interest on client trust accounts to fund public interest practice is further evidence of the profession's acceptance of cross subsidies to ensure that law remains responsive to the common good.¹⁴⁵ This professional ethic in turn underscores the ongoing vitality of the citizen-lawyer as an aspirational ideal.

Graduates of public law schools very often share this ideal. At UCLA Law, I regularly meet with alumni who emphasize the importance of traditions of access, excellence, and service. For many of them, law school was a life-changing experience that opened up careers previously unimaginable to them. Far from treating professional success as a purely individual triumph, these alumni are acutely aware of the role that access to a high-quality, affordable legal education played in making their dreams a reality. And they understand their own critically important role in keeping these structures of opportunity in place for future generations.

Although the regional concentration of alumni may be an obstacle to high national rankings, it does produce robust social networks that can cultivate a strong attachment to state alma maters. These networks in turn reduce some of the free rider effects that allow graduates to assume that someone else will shoulder the responsibility for keeping public values alive in legal education. Alumni often stay in touch with one another, and peers can be the best ambassadors in making the case for supporting a public law school facing declining state support and rising tuition. Certainly, at UCLA Law, the close professional and personal ties among our graduates make the metaphor of "family" far from an empty rhetoric.¹⁴⁶

Law schools also benefit from the fact that many of their graduates will have careers that permit them to be philanthropic. Indeed, it is precisely the lucrative nature of private practice that has allowed public law schools to raise tuition to keep programs and services intact in the face of declining government support.¹⁴⁷

144. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 7–40 (2004); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2364–72 (2010).

145. See Tarra L. Morris, Comment, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605, 606–11 (2005); Dru Stevenson, *Rethinking IOLTA*, 76 MO. L. REV. 455, 456–59 (2011).

146. This tight-knit alumni network may reflect the fact that UCLA School of Law has traditionally enrolled mostly California residents and that most of its graduates remain in California, particularly southern California. E-mail from Robert Schwartz, Assistant Dean, UCLA Sch. of Law, to Rachel F. Moran, Dean, UCLA Sch. of Law (June 19, 2012, 19:40 PDT) (on file with author); E-mail from Beth Moeller, Assistant Dean, UCLA Sch. of Law, to Rachel F. Moran, Dean, UCLA Sch. of Law (June 19, 2012, 21:23 PDT) (on file with author).

147. See Dybis, *supra* note 71; Howard, *supra* note 82, at 486 (reporting that, between

As state financial crises worsen, however, there is a nagging concern that law schools, already called upon to subsidize less profitable activities on campus, will be asked to do even more. Although public law schools should be good citizens of their campuses, increased subsidies to other programs and departments can seriously hinder efforts to keep the model of the citizen-lawyer alive in hard times. Stripped of necessary resources, public law schools will be less able to offer the kind of financial aid necessary to attract low-income students, first-generation students, and students interested in public interest careers.¹⁴⁸ The question of what constitutes a fair surcharge to be part of the campus intellectual community always has been a thorny one, but with deep cuts and austere budgets, the dilemma is only likely to deepen.¹⁴⁹

As hopeful as I generally am about the future of state law schools, I do worry about ongoing uncertainties that threaten the possibilities for maintaining their uniquely public features. First, there are unresolved questions about restructuring in the legal profession that could jeopardize the historical commitment to generating subsidies for less lucrative sectors of practice. If law becomes a business focused on the bottom line, law firms may be less willing than before to provide pro bono services and financial support to public interest attorneys.¹⁵⁰ This shift in turn could damage the public law school's efforts to instill a sense of mutual obligation and shared identity among students, regardless of the kind of career they intend to pursue.

In addition, the pressures to globalize in higher education in general and in law schools in particular may further test the commitment to the citizen-lawyer. Although Henry Rosovsky, former vice provost at Harvard, once described support for a public college or university as an act of "local patriotism,"¹⁵¹ many university administrators increasingly worry that they will not be able to compete in a worldwide marketplace unless they diversify the enterprise beyond any particular locality.¹⁵² To the extent that the compact between public law schools and the citizenry has turned on a certain understanding about contributions to the state, region, and local community, the effort to go global will unsettle this traditional

1987 and 2005, the average tuition at public law schools grew by 448%); Sloan, *supra* note 74.

148. See Daniel J. Morrissey, *Saving Legal Education*, 56 J. LEGAL EDUC. 254, 266–67 (2006). See generally Doyle, *supra* note 81 (describing decline in available financial aid for low-income students at public colleges and universities); Glater, *supra* note 76, at 29 (describing impact of financial aid on choice of public interest career).

149. See Phillip J. Closius, *The Incredible Shrinking Law School*, 31 U. TOL. L. REV. 581, 584 (2000); Morrissey, *supra* note 148, at 276; Lawrence Ponoroff, *Law School/Central University Relations. Sleeping with the Enemy*, 34 U. TOL. L. REV. 147, 147, 151–52 (2002); Cynthia Cotts, *No Good Dean Goes Unpunished: Seven Law Deans Were Fired So Far This Year. Despite Raising Funds, Hiring Legal Stars, Etc.*, NAT'L L.J., May 11, 1998, at A1; David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1.

150. See Cummings & Rhode, *supra* note 144, at 2415–17 (noting adverse impact on pro bono programs at large law firms during economic downturn is in part because of a perception "that pro bono is only a cost" according to one counsel).

151. HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER'S MANUAL* 35 (1990).

152. Lauren K. Robel, *Association of American Law Schools Presidential Address 2012*, AALS NEWS, Feb. 2012, at 1, 6–7 (urging law schools to engage in the globalization of law practice).

arrangement. Martha Nussbaum has argued for defining ourselves as “citizens of the world,”¹⁵³ signaling her cosmopolitan intellectual preoccupations. But there are aspects of our law that do seem uniquely American, rooted in principles of democratic government and rights to individual liberty and equality. Although it may be entirely possible to imagine what commercial law looks like in a global market based on overarching economic rules, it is considerably harder to discern what norms of equality, liberty, and democratic participation will govern the global village.¹⁵⁴ So public law schools face a dilemma. On the one hand, they must grapple with the prospect that their traditionally domestic focus on the citizen-lawyer will leave them at a competitive disadvantage. Yet, at the same time, these schools must confront the possibility that forging a global presence will undermine the very understanding of what “public” the school serves and how its mission is defined.

CONCLUSION

For me, the questions that surround the public law school are of intense significance, not just for our profession but for our society. It is no accident that I accepted a deanship at UCLA School of Law, one of the great public law schools in America. I have spent my entire career in public legal education, I believe deeply in its history and mission, and I am dedicated to its future. As I reflect on why I became a dean, I am reminded of Jill Ker Conway’s candid account of her decision to accept the presidency of Smith College.¹⁵⁵ She described how torn she was about taking the job, should it be offered to her. Though she would be joining a small private college, she worried about her ability to get things done in the face of bureaucratic obstacles and administrative headaches:

Where would I be most effective? What could one person do to shape events? I’d already begun to be haunted by the time consumed in the bureaucratic processes of administrative life [as vice president of internal affairs at the University of Toronto]. One had to process so many feelings for others, wait while the people with minds for minutiae fussed over petty detail, listen endlessly to complaints about the human condition. Some days I would count how many hours closer I was to my death, hours in which nothing had happened but the same repetitive human complaints, or ritual committee maneuvers that were substitutes for thought.¹⁵⁶

Despite her misgivings, Conway ultimately accepted the presidency because she thought that she could have a real impact on women’s education. She aspired to

153. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOS. REV., Oct./Nov. 1994, available at <http://bostonreview.net/BR19.5/nussbaum.php>.

154. Indra de Soysa & Krishna Chaitanya Vadlamannati, *Does Being Bound Together Suffocate, or Liberate? The Effects of Economic, Social, and Political Globalization on Human Rights, 1981–2005*, 64 KYKLOS 20, 22–26 (2011) (describing competing views on the impact of economic globalization on democratization and human rights).

155. See JILL KER CONWAY, TRUE NORTH: A MEMOIR 242–48 (1994).

156. *Id.* at 247.

“prove to a doubting public that a women’s institution could thrive in the modern world, that in itself it embodied important aspects of modernity.”¹⁵⁷ And she was convinced that “[i]f [she were] successful, it might be possible to make [Smith] an intellectual center for research on women’s lives and women’s issues.”¹⁵⁸ Her faith in a hedgehog’s vision (undoubtedly coupled with the skills of a fox) enabled her to achieve many successes as the first woman president of Smith.

This account is, of course, an affirming one for anyone who assumes a position of university leadership. I do not underestimate the differences between a small, private women’s college and a large, public research university, but Conway’s story is a testament to the importance of having a lodestar, those fundamental values and core commitments that carry us through the vexing and the mundane. But I also recognize the unique challenges that arise when the lodestar is rooted in the conception of being public. The very notion of what counts as “public” is sprawling and amorphous and itself an object of intense contestation. What happens, after all, when the lodestar explodes into a thousand points of light? At public law schools, our task must be to restore a coherent and compelling vision of the citizen-lawyer as the epitome of professionalism. If we do, then perhaps we can help to ensure a second act—if not for Clark Kerr—then for the public law school that sustains his vision of a distinguished, dynamic, and democratic site for higher education.

157. *Id.* at 248.

158. *Id.* at 248.