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Subsidiarity and Federalism: The Relationship Between Law Schools and Their Universities

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SUBSIDIARITY AND FEDERALISM: THE RELATIONSHIP BETWEEN LAW SCHOOLS AND THEIR UNIVERSITIES

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INTRODUCTION

In his book on the history of Fordham University School of Law, Bob Kaczorowski does not take an explicit position on how decision-making authority on matters ranging from resource utilization to curriculum development should be allocated between a law school and its university.[1] Rather, he offers in detail a story and extensive evidence that tends to reflect and support the view traditionally taken by the American Bar Association (ABA), the vast majority of law faculty, and most law school deans on the subject: listen, you folks over there at the university—we know what we are doing, so just leave us alone to do it.[2] And, most of all, do not steal our resources for your pet projects.[3]

Kaczorowski's is an outstanding book worthy of consideration by anyone concerned with university-law school relations and law school financing. In this regard, I should add, the traditional view of law school advocates and constituents on how their schools should be treated is virtually identical to the positions taken by their colleagues in other disciplinary homes within the university. However, the pervasiveness of a viewpoint is not proof of its validity. I disagree in important respects with the traditional view held within schools on the relationship of those schools to their university, and I want to offer in these pages a different perspective on how to think about the issue.

Before detailing my perspective, however, I need to provide a little historical background on New York University (NYU) and its law school, and on how I came to be dean and then president. I then will turn to my views on what I see as issues of federalism and subsidiarity or, alternatively, allocation of authority. I will close with an analysis of some dangers I see

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1. *See generally* ROBERT J. KACZOROWSKI, FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY (2012).
2. *Id.* at 267–71.
3. *Id*.

ahead, dangers that for many law schools (perhaps as many as three quarters of them) are existential and that may turn the world on its head, putting law schools into a dramatically different relationship with their university homes.

I. HISTORICAL BACKGROUND

I begin by relating the "Mueller Macaroni Treaty" story as I told it between 1988 and 2002, when I was dean of NYU Law School. In 1943, Frank Sommer's deanship ended at NYU.[4] Let us stipulate that at that time NYU Law School was among the worst law schools in the United States. Happily, Sommer was succeeded by a man who would prove to be a giant among the law school deans of the twentieth century: Arthur Vanderbilt.[5]

Vanderbilt was not one of *the* Vanderbilts, but he had risen from modest means to become the kingpin of New Jersey Republicans. Technically, he was dean of NYU Law School for only five years—from 1943 until he moved on to become the chief justice of the New Jersey Supreme Court in 1948.[6] But, in truth, he was the dean until 1957, the year of his death.[7] First directly, and later through his chosen successor, Russell Niles, he made every decision (large and small) and continued to implement his brilliant strategy of institutional improvement. In the process, he transformed the Law School and planted the seeds of what it is today.

Vanderbilt's two passions were NYU Law School and reforming New Jersey's court system. For the latter, Vanderbilt has been recognized for his leadership in improving how justice is administered.[8] Using his assignment power as chief justice, he assigned the incompetent judges to the distant Cherry Hill, New Jersey, courthouse—an arduous, lengthy commute from their homes in Newark, New Jersey. This prompted them to forfeit their judgeships and allowed him to appoint judges who positively changed the character of the bench. Brilliant.

And his brilliance was recognized. As the presidential race of 1952 unfolded, Dwight Eisenhower was in a close contest with Robert Taft for the Republican nomination.[9] Eisenhower promised that if Vanderbilt delivered the New Jersey Republican delegates to Eisenhower, then Eisenhower, if elected, would name Vanderbilt chief justice of the United States.[10] Eisenhower simultaneously told Earl Warren, then governor of California, that if he delivered the California delegation, he would name him to the first

4. *See Dean of Law School at N.Y.U. to Retire*, N.Y. TIMES, Mar. 29, 1943, at 32.

5. *See id.*

6. *See Arthur T. Vanderbilt: Chief Justice of the New Jersey Supreme Court*, 35 A.B.A. J. 740, 792 (1949).

7. *See Vanderbilt, 68, Dead; Jersey Chief Justice*, N.Y. TIMES, June 16, 1957, at 1.

8. *See generally* Peter M. Koelling, *The ABA Judicial Division Turns 100: The Vanderbilt Reforms*, 53 JUDGES' J. 9 (2014).

9. W. H. Lawrence, *Eisenhower in First Test Wins on Disputed Delegates, 658 to 548; M'Arthur Scores Truman's Rule*, N.Y. TIMES, July 8, 1952, at A1.

10. *See* Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 528–29 (1995).

Court vacancy.[11] Vanderbilt and Warren both delivered, Eisenhower was elected, and the first vacancy that materialized was for chief justice.[12] Eisenhower, who wanted Vanderbilt to be chief justice, sent Attorney General Herbert Brownell to California to try to persuade Warren, who had never been a judge, to await the next vacancy, but Warren refused to relent, arguing that he had delivered the larger of the two delegations.[13] And so, Earl Warren became chief justice of the United States.[14]

Given subsequent events, this quirk of history had momentous consequences. First, many U.S. Supreme Court historians say that it was in no small part Earl Warren's political skill that created a unanimous Court for the decision in *Brown v. Board of Education*;[15] it is not clear that Vanderbilt, a more conservative jurist, would have voted with the majority or would have been able to deliver a unanimous decision. Second, in the years just after 1954, Vanderbilt declined physically, so when Eisenhower called to offer him a position as an associate justice, he declined and suggested a young member of his New Jersey Supreme Court, William Brennan, thereby setting in place perhaps the most influential justice of the next two generations.[16] Why would Vanderbilt, a conservative Republican, have recommended Brennan, a liberal Democrat? Because Brennan had delivered the Irish clubhouse politicians of New Jersey in support of Vanderbilt's court reform proposals.[17]

I said earlier that Vanderbilt's two passions were NYU Law School and reform of New Jersey's court system. As is evident, the latter was a major priority for him. But, even as he effected huge change in New Jersey's system of justice and became a fixture on the national political scene, Arthur Vanderbilt never lost interest in NYU Law School and in shaping it into a new version of what an elite law school could be. From the moment he came to lead the Law School in 1943, Vanderbilt began to set goals for the school beyond what most people thought possible.

At the time, NYU Law School was comprised of two floors (including its library) in a factory building on the east side of Washington Square Park.[18] Vanderbilt's first dream was to create, in two dedicated buildings (one for classrooms and offices, the other a dorm), the "Inns of Court at Washington Square." When Vanderbilt proposed this plan to the university's president,

11. ARTHUR T. VANDERBILT II, CHANGING LAW: A BIOGRAPHY OF ARTHUR T. VANDERBILT 211–12 (1976).

12. *Id.* at 213.

13. *Id.*

14. *Id.*

15. 347 U.S. 483 (1954).

16. In his memoir, Dwight D. Eisenhower explains that Arthur Vanderbilt supported William Brennan. DWIGHT D. EISENHOWER, MANDATE FOR CHANGE: THE WHITE HOUSE YEARS, 1953–1956, at 230 (1963).

17. Interview with William Brennan, Chief Justice, U.S. Supreme Court, in Washington, D.C. (Oct. 1980).

18. *See New Jersey Supreme Court Virtual Museum, Chief Justice Arthur T. Vanderbilt (1948–1957)*, NJCOURTS.GOV, https://www.njcourts.gov/courts/supreme/vm/vanderbilt.html#lawschool [https://perma.cc/74ME-ZFR7] (last visited Nov. 15, 2018).

Harry Chase, Chase refused, so Vanderbilt created a separate entity, the Law Center Foundation, and used it to raise money for the project. And he was successful.

Vanderbilt Hall, the Law School's first building, opened in 1951.[19] Fritz Alexander, the president of the graduating class,[20] who would later become the first black member of the New York State Court of Appeals,[21] led the procession into the building for what was the first event inside it: the graduation of his class. In a remarkable display of self-confidence, Vanderbilt, in the presence of three justices of the United States Supreme Court and of a representative from the highest court of every state, gave a speech dedicating the building *to himself*.

Hayden Hall (now Lipton Hall, after the great Martin Lipton, class of 1955), the dormitory, opened shortly thereafter.[22] Like Vanderbilt Hall, it was not and is still not owned by the university; the buildings remain the property of the separate entity, the Law Center Foundation. To underscore the point, Vanderbilt dedicated the fourth floor of the new building to offices, a conference room, and a dining room for the university's president and provost—for which he charged them rent. Today, the Law School has six main buildings, all of which have been financed and are owned by the foundation Vanderbilt created.

Vanderbilt was not merely a builder; he also was a remarkable academic innovator who created many programs we see today as hallmarks of legal education. His was the genius behind nationalizing NYU Law School, attracting students from across the United States through the Root-Tilden Public Interest Scholarship Program (now, Root-Tilden-Kern)[23] and through the signature LL.M. program in taxation. He also internationalized the Law School through what was then called the American Law Program, which brought in lawyers from South America to study at NYU Law School in the LL.M. program.

The way Vanderbilt designed the Root-Tilden selection process reveals the marketing genius of the man (well before the halcyon days of marketing in the business world, let alone in the academic world). Root-Tilden Scholars were chosen in interviews conducted throughout the country. Capitalizing on his own contacts and prestige, Vanderbilt arranged for them to take place in the chambers of the chief judges of the federal circuits (two scholarships

19. *See* Russell D. Niles, *New York University Dedicates Its Law Center*, 37 A.B.A. J. 829, 829 (1951).

20. *See* Andy Newman, Obituary, *Fritz Alexander II, 73, Judge Who Became a Deputy Mayor*, N.Y. TIMES, Apr. 25, 2000, at B8.

21. *See id.* (describing Fritz as "the first black judge to serve a full term on New York State's highest court").

22. Anne Cruz, *Hayden Hall to Be Renamed to Lipton Hall*, WASH. SQUARE NEWS (Mar. 21, 2016), https://nyunews.com/2016/03/21/hayden-hall-to-be-renamed-to-lipton-hall/ [https://perma.cc/CP7Q-DHX2].

23. Jessica O'Brien, *Public Interest Yesterday and Today*, N.Y.U. L. MAG., Autumn 2003, at 67, 67, http://issuu.com/nyulaw/docs/2003 [https://perma.cc/7DHN-CPSQ].

were initially awarded to each circuit).[24] Sitting on the interview panel would be a chief judge, a distinguished business person from the area, and an NYU faculty member. Thus, candidates associated NYU Law School, essentially a local commuter school at the time, with these major figures from their area, perhaps even assuming the interviewers had attended NYU. From the beginning, the Root-Tilden Program brought extraordinary students to NYU, students who would not have attended the Law School were it not for the program.

All of these listed accomplishments pale in comparison to his most remarkable gambit and the one most relevant to the propositions at stake in this Article: the Mueller Macaroni Treaty.[25]

For this matter, which occurred during his time as dean, Vanderbilt brought together three of his clients; he represented the Law Center Foundation, a New Jersey insurance company, and the Mueller family, owners of a macaroni company. In what today might be called a leveraged buyout, the insurance firm lent money to the Law Center Foundation to buy the macaroni company from the family while the family continued to run the company.[26] But there was a special ingredient that made the deal even more attractive: because the new owner of the macaroni company, the Law Center Foundation, was a not-for-profit organization, it did not have to pay taxes. What would have been paid in taxes now would be given to the Law School by the Foundation. The "unrelated business income" provisions of the tax code had not yet been passed;[27] indeed, the legislative history of those provisions cites NYU's Mueller deal as part of what prompted the law.[28]

Vanderbilt died in 1957, but his New Jersey protégés continued as trustees of the Law Center Foundation. The Mueller family continued to run—and grow—what had been their business. The annual checks discharged in support of NYU Law School grew as well. As the years went forward, the Law School moved up in the rankings. As the 1960s turned to the 1970s, the demand for lawyers in New York firms expanded, and there was a need for another source of candidates. NYU was ready. More of the top students coming out of college (including women) wanted to go to law school, the elite firms wanted more candidates, and the traditional providers of talent to those firms did not increase the sizes of their entering classes. And, because it had additional resources from the Law Center Foundation as a result of the Mueller Macaroni Treaty and nationalized its scope by building dorms and

24. This information comes from various conversations the author had with Root-Tilden Scholars from the 1950s and 1960s while he was serving as director of the Root-Tilden Program.

25. The *New Yorker* published a detailed account of this deal. *See generally* John Brooks, *The Marts of Trade: The Law School and the Noodle Factory*, NEW YORKER, Dec. 26, 1977, at 48.

26. *Id.* at 48.

27. 26 U.S.C. § 501(b) (2012).

28. *See* Susan Rose-Ackerman, *Unfair Competition and Corporate Income Taxation*, 34 STAN. L. REV. 1017, 1017 (1982) (explaining that NYU's ownership of the Mueller Macaroni Company helped spur legislation).

creating programs like the Root-Tilden Program, NYU was ready to fill the gap.

Yet even as it thrived, New York City and NYU as a university were flirting with bankruptcy. In the 1970s, while Columbia University was buying property at the bottom of the market, NYU had to make significant cutbacks;[29] the university "had been running annual deficits since 1964."[30] It began selling properties—perhaps most notably its beautiful Bronx campus overlooking the Hudson River,[31] where to this day the Hall of Fame of Great Americans, the very first hall of fame, can be seen. A symbol of these hard days for NYU is the beautiful art deco building just north and east of the arch in Washington Square Park, One Fifth Avenue. The university sold that building for less than the cost of a one-bedroom apartment in the building today.[32] But they sold it to stay alive; they had no choice.

At this point, a young lawyer named Martin Lipton and a young investment banker named Lester Pollack were appointed to the Law Center Foundation Board.[33] They saw that there was an opportunity to sell the company (which was now operating under the unrelated income provisions) and put the proceeds of the sale in the bank where it would earn interest, on which there was no tax liability. They estimated that the company was worth "$70 or $75 million."[34]

The university's president thought that selling the Mueller Company was a terrific idea and wanted the proceeds to save the university. But, the president soon confronted the ramifications of his predecessor's denial of Vanderbilt's request for permission to build *within the university* the "Inns of Court at Washington Square." That denial, decades before, led to the creation of the Law Center Foundation as an entity completely separate from NYU, and the Foundation, *not NYU*, owned Mueller Macaroni.[35] Still, both the university and the Law School (through the Foundation) now claimed ownership of the prized asset.

Before long, both the university and the Law School had hired lawyers—Simon Rifkind for the university and Francis Plimpton for the Law School. The law faculty took a preliminary vote about seceding from the university and offering the Law School's buildings (which the Foundation owned), the staff, and the Law Center Foundation to Princeton University.[36]

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29. *See* Brooks, *supra* note 25, at 50.

30. *See A Brief History of New York University*, N.Y.U., https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/history-and-traditions-of-new-york-university/a-brief-history-of-new-york-university.html [https://perma.cc/4L7Q-EHC2] (last visited Nov. 15, 2018) .

31. *Id.* ("NYU—which had been running annual deficits since 1964—reluctantly sold its Bronx campus in order to regain solvency.").

32. *See* IN OUR OWN VOICE: AN ORAL HISTORY OF NEW YORK UNIVERSITY'S DRAMATIC TRANSFORMATION 13 (2015) [hereinafter NYU ORAL HISTORY].

33. *See Board of Trustees*, N.Y.U. L., http://www.law.nyu.edu/about/trustees [https://perma.cc/5LY9-4Q3S] (last visited Nov. 15, 2018).

34. *See* NYU ORAL HISTORY, *supra* note 32, at 45.

35. *Id.*

36. *See* Brooks, *supra* note 25, at 50.

In the end, cooler heads prevailed, helped in part by the fact that the company ultimately sold for $115 million.[37] The university received $47.5 million from the sale and the Law School received $67.5 million.[38] As part of the settlement, what came to be known as "the treaty" was signed: henceforth, the president of the university would appoint the Law School's dean as he or she always had (and would have the power to remove the dean) and would set the dean's salary annually; beyond that, the Law School would operate autonomously, set its own budget, and shape its own internal operations.[39]

Overnight, NYU Law School had an endowment, and it began a conversation about how best to deploy its newfound wealth. It felt that it was rich. So deep was this feeling that in 1981, at the orientation for a new faculty class that included me, the dean welcomed us to the richest law school in the United States. NYU was not, in fact, the richest law school in the United States. It was not even close. Like a poor family that had won $100,000 in the lottery, we were a lot better off than we had been, but we were certainly not rich.

As NYU Law School moved through the 1980s, there was discomfort among the faculty about how the Law School's resources were being deployed. Many (including me) thought that the dean had embarked on a large, ill-conceived spending spree focused upon expanding and upgrading the Law School's facilities. One initiative was a two-story underground expansion of the library, connected to the main reading room by a winding two-story staircase that was made of beautiful mahogany. Some faculty members dubbed it "the million dollar staircase." And the dean felt the sting of criticism. At one faculty meeting, after a colleague cruelly had used the phrase, the dean had a *Caine Mutiny* moment, clasping the table with white knuckles while exclaiming, "You don't understand that it is not just a staircase." Many of us felt saddened and horrified.

Three decades later, I can report that we (myself and the substantial majority of my colleagues who criticized the dean) were wrong about the building program; the dean was 100 percent right. In the wake of his work in my years as NYU Law School's dean, I raised many tens of millions of dollars in gifts to the Law School from alumni partly by walking them down that staircase and showing them the library and the other buildings he had the vision to create. Their unanimous reaction was that the Law School was a place that did things in a first-class way. Because they could see that kind of attention to excellence in the infrastructure of the Law School, they had faith that the same standard of excellence would be deployed in areas where it was more difficult to measure results (such as initiatives on faculty, students, and curriculum). After each such conversation, I uttered a prayer for forgiveness.

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37. JOAN MARANS DIM & NANCY MURPHY CRICCO, THE MIRACLE ON WASHINGTON SQUARE: NEW YORK UNIVERSITY 49 (2001).

38. *See* Brooks, *supra* note 25, at 53.

39. *See id.*

As important as it was, however, the building program alone did not make NYU a truly great law school. More substantive moves were needed. Thus, when the dean announced he would step down in 1987, a relatively small group of faculty felt that it was important to devote attention to defining those moves. I allowed my name to go forward for the job as a representative of that group. However, I did not expect—nor desire—to become dean. It was only eight years since my wife Lisa and I had graduated from law school, and I had only started at NYU in 1981. The idea was that, as part of the search process, I would play the role of the messenger. In that role, I would work to advance the message that the eight or ten of us thought was important. Since it was an ambitious message, in part critical of the status quo, we thought it better that an "insider" deliver it. If it could be heard in the loving way it was intended, the stage might be set for the right "outsider" to be chosen as dean.

We actually had two outsiders that we preferred—and wanted—as dean. One was Harry Edwards, who had been a distinguished professor at Harvard before becoming a great federal judge.[40] Harry and I were already friends, and I spent a lot of time trying to persuade him to allow us to submit his name (though in the end he refused). The other was Michael Levine, who did enter the process but withdrew to become the dean of the Yale Management School.[41] Years later, he joined the NYU faculty, where he finished his career.[42] In a delightful turn of events, his office was next to the one I occupied as a law professor. Until his death, he made a practice of visiting me regularly to say that he would have been a disastrous dean.

Our message in support of candidates like Harry and Michael had two key parts. The first was that the NYU Law School of 1988 was not nearly as good as those of us who were there thought it was. We thought of ourselves as a top-ten law school, or as one of the fifteen schools that could claim to be in the top ten; but no one else thought of us that way. Just as I began to deliver this hard truth, Harvard Law School's dean, Robert Clark, proved the point by gratuitously offering in his annual letter to his alumni a parenthetical in which he named what he thought were the country's top-ten law schools; notably, NYU was not in that parenthetical.

The second part of the message was that in order to become a truly great law school, we had to become more dedicated to discussions about what the law ought to be, discussions which inherently cause us to engage with other parts of the university. I used to tell the law faculty that law itself really only has two principles—efficiency and fairness—but it has no way to define either of them without bringing in other disciplines, whether philosophy or

40. *See Harry T. Edwards*, N.Y.U. L., https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=19895 [https://perma.cc/FEY9-4TQL] (last visited Nov. 15, 2018).

41. *See In Memoriam: Michael Levine*, N.Y.U. L., http://www.law.nyu.edu/news/michael-levine-in-memoriam [https://perma.cc/V77Q-3JVG] (last visited Nov. 15, 2018).

42. *Id.*

history or economics or any other field. We argued, in short, that other disciplines are an inherent part of serious thinking in the law.

There were those on the faculty, perhaps the center of gravity of the faculty at the time, who felt that attention to the "ought" of the law was unimportant and that the obligation of a law school was to impart the "is" of the law. What scholarship these colleagues produced tended to be descriptive, and some of the best of those who chronicled the latest developments in this way enjoyed prestigious and lucrative positions in the leading law firms of New York City, positions that they rightly felt ratified their status as experts. We were asking these colleagues to "come home" to the vocation of teaching, to be present in the building, and to sacrifice very profitable external activities. We were asking them to embrace a role that defined their essence as citizens of a university.

This message, you might imagine, was extremely unpopular with the faculty. I was, however, a relatively new arrival, unscathed by previous battles, and I had no longstanding enemies (though there were a handful horrified at the prospect of my becoming dean who were very vocal about it).

In the end, NYU President John Brademas selected me as dean in 1988. And, in the end, the faculty of NYU Law School embraced the agenda of becoming one of the leading law schools in the world and embraced the notion that creating connections with other parts of the university was integral to that agenda. Then they went on to devote themselves to shaping the Law School into just that.

I always knew that I would be at NYU for life, but this started a twenty-eight-year journey, fourteen as dean and fourteen as president, which I have found very fulfilling. In January 2016, I moved back to the Law School's faculty and I am happy to report that I received a warm welcome from my colleagues. And I am even happier to report that the Law School they created is indeed what we hoped it would be.

II. FEDERALISM AND SUBSIDIARITY

A. As Seen by a Dean

Law school citizens like us—I use the first person because I am, above all, part of the law school tribe—generally do not resist being dual citizens, with a local home (the law school) that is part of an integrated commonwealth (a university). But we guard jealously our freedom to do what we do excellently, because what we do is important in the everyday lives of real people. Law is the instrument that brings into society, in a way that makes a difference in the society beyond the walls of our campuses, the wisdom of the university's disciplines.

That said, we should recognize an issue of federalism and subsidiarity when it appears. Any organization consisting of an overarching structure that contains subunits confronts questions of how to allocate decision-making authority on a range of issues. Governments, businesses, universities, and a

variety of other organizations face such questions all the time. Within our universities, we face them on myriad issues, from budget, to hiring and promotion, to curriculum, to IT protocols, to construction, to benefits, and so on. On each of these issues, it might be asked: Where within the university should the final decision-making authority reside? At the university-wide level? The school level? Or some other level?

The loudest discussions of these organizational questions usually center on the finances of the university and its schools. Many a law school dean and faculty spokesman has complained that some university official was diverting from the school resources that rightfully should remain in the school—that the school, in the vernacular, was being used as a "cash cow" in support of a foreign agenda. Kaczorowski documents that this refrain became conventional wisdom at Fordham School of Law in the years before Dean John Feerick.[43] Similar rhetoric, as I noted earlier, often is heard from deans and faculty in schools other than law. Indeed, it is the time-honored lament of the subunit, whether it is uttered by a dean, a mayor, a governor, or a division head within a business.

It is instructive that we generally ignore these structural issues of federalism and subsidiarity as we set operating rules *within* law schools. But they are there. Consider the following example, which thankfully is only hypothetical.

Suppose, when I was dean, the tax faculty (which at NYU mounts a large LL.M. program with nearly ten full-time tenured faculty) had argued that they wanted to run on their own because they were tired of seeing the resources they generated diverted to other causes. Suppose they argued that they were a specialized program, clearly distinguishable from the rest of the Law School, and that they did not think their efforts and the vast resources they produced should be subsidizing colleagues who attracted fewer students, who taught small classes, and who, essentially, ran deficits.

Should the tax faculty remain under the control of the dean and the full-time faculty? Or should it receive some sort of federal status, if not autonomy? What if it extended its demand to include a claim that only it should decide on hiring and promotion in its area? That it should be able to give itself more secretarial support and implement a specialized IT system, both of which it could subsidize if it retained all of the tuition revenue it generated?

I do not propose to answer the questions I raise in this hypothetical. Any reader for whom the answers are not obvious will find the argument I will make in this paper ridiculous; so, if you do not find at least *this* version of the "every tub on its own bottom" policy fundamentally flawed, I suggest that you put this piece aside and move on to the other reading you have to do.

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43. *See* KACZOROWSKI, *supra* note 1, at 313 ("The most serious deficiency was related to Fordham University's handling of the Law School's finances. The [ABA] Accreditation Committee found that 'a very large portion' of the Law School's revenue was not available to meet the needs of the Law School's programs.").

The relationship between a school (in my hypothetical, NYU Law School) and a subject matter subset of its faculty (the tax faculty) is more integrated than the relationship between a university as a whole and its constituent schools. There are a handful of universities, perhaps fewer than a dozen, where every school can operate on its own resources. And there surely are schools within other universities—most typically business, law, or medicine—that, at given moments in their history, *claim* the capacity to operate autonomously if allowed to retain all of the revenue they produce.[44] But no school, not even medicine (where even the most funded researchers receive some institutional support), would extend the principle of "every tub on its own bottom" to the faculty within the school, not to mention applying it to other cost centers like placement or counseling. This truism should evoke some skepticism about the wisdom of applying the principle in universities other than the few sanctuaries blessed with such high endowments that money flows freely. NYU certainly is not such a place.

In retrospect, the Mueller Macaroni Treaty proved to be both a model and a tool in service of a more collaborative relationship between the Law School and the university and the other schools. It clearly was a model: the sharing of an asset that arguably belonged to one or the other of the parties saved NYU, even as it set NYU Law School on the path to preeminence. But it also was a tool. Under its terms, NYU Law School had what many law schools desire: autonomy. So, if the Law School proposed a collaborative regime, the proposal was credible and had a certain moral authority. Counterintuitively, autonomy facilitated genuine cooperation.

Between 1988 and 2002, as I conceptualized my role as NYU Law School's dean, I came to view my primary task as facilitating the Law School's advance, led by its faculty, into the best possible version of itself. However, it was clear from the beginning that facilitating the development of the school entailed the secondary task of capturing possible synergies with schools and departments within the broader NYU family—or, put another way, entailed the secondary task of creating a positive-sum game with the university and actors within it. This was especially the case if we hoped the Law School would devote itself more to studying what the law *ought to be,* as opposed to describing what it was in the moment.

Early on, as I turned myself to the task of generating new resources for our new agenda, I was faced with a version of these issues of federalism and subsidiarity that I had not anticipated, though I should have. Fundraising, a priority of every dean, is a place where the tension between institutional cooperation and institutional competition is frequently palpable.

Consider this hypothetical: Helena is an extremely wealthy potential donor. She attended NYU for her undergraduate degree, her MBA, and her

44. Teresa Watanabe, *UC Campuses Want More Autonomy from Napolitano's Office, Study Says*, L.A. TIMES (Aug. 1, 2018), http://www.latimes.com/local/education/la-me-edu-uc-campuses-president-20180801-story.html [https://perma.cc/9KV4-9XTR] (explaining how some of the schools within the University of California, for example, would prefer to have more independence).

law degree, but her passion is her art collection and she has been attending a seminar on Picasso at the School of Fine Arts. Whose prospect is she? Which dean should do the fundraising and cultivation? Or should the president do it? If so, only the president? Suppose it is clear that Helena does not like the person you otherwise would choose. How do you know who she will respond positively to?

I can tell you from experience that these decisions about Helena usually result from a very dynamic process and a lot of conversation. Whatever allocative rule may have been articulated in the abstract by university leadership, or whatever view a particular dean may have about where Helena's loyalty or charitable obligation might lie, Helena is not bound by that view. And, in the end, Helena is the one who gets to set the terms. It is easy to miss a reality that dominated the fundraising conversation, even if it is never mentioned: there are others who know of Helena's wealth, many of whom lead other charities or support terrific ventures other than Helena's university or school; she probably is asked three or four times a week to support worthy causes that have nothing to do with the university.

I think it foolish for the law school dean in my hypothetical to tie himself or herself in knots if, in the end, Helena donates $5 million to the School of Fine Arts. Only a slightly sophisticated understanding of the fundraising dynamic should suffice to instill calm (and even joy) at the good that will be done in one of the university's other schools, yet our deans frequently do tie themselves in knots.

In my experience, a much better—and ultimately more successful—path leads to a conversation among the university leadership and the deans on strategies for making the fundraising process collaborative and on ways that beneficiary schools (in the hypothetical, the School of Fine Arts) might use their improved financial position in ways that would support the schools that were disappointed (for example, by allowing interested law students to take courses in the School of Fine Arts).

It turns out that this principle of collaboration, if applied aggressively, creates opportunities that otherwise might not be seen or, even if seen, might not be pursued because of a sense of lingering bitterness born in earlier battles. This is true even in the single most important and sacred of areas: faculty hiring.

Let me offer eight names: Bill Allen (Business), J. P. Benoît (Economics), Jerome Bruner (Psychology), Ronald Dworkin (Philosophy), Anna Deavere Smith (Arts), David Garland (Sociology), Carol Gilligan (Education), and Stephen Holmes (Political Science). This is only a partial list of major law school appointments during my time that were made jointly with another NYU school. Most, if not all, would have been impossible without the other school's cooperation. There is no doubt that NYU Law School would not have become the extraordinary center of intellectual activity that it is without these colleagues and others like them.

Their presence, combined with the talents of colleagues already at the Law School, created innovative programs. I recall, as one example, a meeting

with two on this list, Carol Gilligan and Anna Deavere Smith; another newcomer, Derrick Bell; and Norman Dorsen, a revered, senior member of the faculty who was leading the law school's new Global Law School Program.[45] Once we had the work they were doing before us, we realized that there was a common theme: listening to voices we are not accustomed to hearing. Carol's work was on women,[46] Derrick's was on race,[47] Norman's was on other cultures,[48] and Anna's was on bringing all voices to us in ways that we can hear.[49] Taken together, they carried a powerful message. This collection of scholars, made possible only by collaborating with other schools in the university, drew serious attention to *listening* in the Law School, a school which trains lawyers, society's communicators.

A final example illustrates that it is often the case that seeing the opportunities made possible through collaboration requires creativity and imagination.

At NYU, a major obstacle to recruiting top faculty talent is a serious lack of affordable housing. The university has a substantial stock of apartments,[50] though not enough to meet demand, and, even when one is available, it will likely provide fewer rooms and less space than the living spaces offered by the peer universities competing for the same faculty member.

Shortly after I became dean, we at the Law School saw this issue as a major impediment to attracting the kind of people we wanted for our community. Very soon, with the full support of the trustees of the Law Center Foundation, we developed a solution: a faculty housing assistance program.[51] Best of all, it did not cost the Foundation or the Law School anything; it required only redirecting the investment of a relatively small portion of the Foundation's endowment away from government bonds and into secured mortgages for faculty, payable with interest equaling the bond dividends. Since all or part of the interest could be deferred until the faculty member retired or left NYU, this program made it feasible for faculty to find housing that met their needs. What had been a problem in recruiting faculty turned into an asset that made NYU even more attractive. Moreover, by satisfying

45. This program was created in 1995, and its full name is the Hauser Global Law School Program. *See About the Hauser Global Law Program*, N.Y.U. L., http://www.law.nyu.edu/global/abouthauser [https://perma.cc/U3RB-FEKC] (last visited Nov. 15, 2018).

46. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

47. *See generally* Derrick A. Bell, Jr., *Waiting on the Promise of* Brown, 39 LAW & CONTEMP. PROBS. 341 (1975).

48. *See generally* Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837.

49. *See generally* ANNA DEAVERE SMITH, TWILIGHT: LOS ANGELES, 1992 (1994).

50. *Faculty Rental Apartments*, N.Y.U., https://www.nyu.edu/faculty/faculty-housing/Rentals.html [https://perma.cc/HM7X-74MS] (last visited Nov. 15, 2018) ("NYU owns and manages a portfolio of 2,100 apartments in large and mid-sized buildings in the Washington Square neighborhood. Most faculty members reside in either Silver Towers or Washington Square Village, two large residential complexes located south of Washington Square Park.").

51. *See Faculty Housing*, N.Y.U., https://www.nyu.edu/faculty/faculty-housing.html [https://perma.cc/5Q9P-XB8A] (last visited Nov. 15, 2018).

a family need, we increased their desire to stay at NYU over time, and they have stayed.

The university alone could not afford to create such a program, even though it truly was cost neutral. First, the number of faculty who might want to participate was many times the number at the Law School. Second, the university endowment, most especially if measured on a student and faculty per capita basis, was considerably smaller than the Law School (i.e., the Law Center Foundation) endowment. Thus, diverting funds into an illiquid asset was problematic.

Here, creativity and imagination were employed, and the Mueller Macaroni Treaty proved useful yet again. First, the faculty voted to make joint appointees, like the stars listed above, eligible for the Law School's housing assistance program. Second, the faculty also voted to authorize the dean, in special circumstances, to extend that assistance to appointments in other schools that could be seen as benefitting the Law School, even if the new faculty members were not formally appointed in the Law School. This, of course, made the tool available in a limited way to the deans of the other schools, and it led to some wonderful additions to NYU. But it also graphically illustrated the fact that the Law School, as organically connected to the university as it is, has a deep interest in the health and well-being of the entire body of which it is a vital part.

B. As Seen by a President

A university president sees issues of subsidiarity or federalism, or alternatively allocation of authority, through a different lens—though, in the end, not necessarily in a different way.

What immediately became very clear to me as I moved to be NYU's president was how tiny the Law School was compared to the university. I do not mean that the Law School is not a major component of the university in terms of its agenda or influence. I mean only that the Law School is much more intimate and manageable than the university, and it is far less complex. I never lost my love of the law as a key contact point, but I began to realize some of the battles that we had fought at the Law School were relatively inconsequential. A great deal of emotional energy was spent on relatively unimportant matters.

In terms of budget, during my last year as president of NYU the university's budget was in the neighborhood of $8 billion;[52] the Law School's budget was close to $200 million. The major financial difference between the two was not the budget, however; it was the endowment.

Of course, we made fundraising a priority. For seven consecutive years, we raised over $1 million a day, 365 days a year.[53] By 2016, the per capita

52. *See Fiscal 2016 Budget*, N.Y.U., https://www.nyu.edu/about/news-publications/budget/budgets-of-prior-fiscal-years/fiscal-2016-budget.html [https://perma.cc/9CJG-JZ7M] (last visited Nov. 15, 2018).

53. *Development, Fundraising, and Finances*, N.Y.U., https://www.nyu.edu/about/leadership-university-administration/office-of-the-president-emeritus/accomplishments/

endowment had increased to about $80,000 per student,[54] but even today resources are hard to find. There may be a few more than a dozen universities where this is not the case. But, most of America's law schools are affiliated with universities like NYU, where resources are scarce.

And, everywhere, there are important things to be done: new disciplines to be incorporated into the curriculum (for instance, twenty years ago, genomics was unknown), old disciplines to be equipped (research computers for scientists must be state-of-the-art, just as the cameras in the film department must be the latest), wellness programs to be funded (roughly four American college students commit suicide each day,[55] and a majority of our students report serious depression[56]), and new unfunded mandates and regulations to be honored. The list continues.

And, finally, each university has its own dreams. I offer just a sampling of major initiatives undertaken at NYU's New York campus over my time to give you a sense. I do not include our signature program, the development of a fully integrated Global Network University with full research university campuses in Abu Dhabi and Shanghai and study away campuses in twelve other world capitals,[57] for two reasons: first, this signature initiative was totally self-supporting, in no small part due to government support from the United Arab Emirates and China; and, second, these programs are distinctive NYU programs and my focus here is on issues of a more general applicability.

One major initiative that consumed a lot of time and energy was enlarging the size of the Faculty of Arts and Science (FAS) by 30 percent. The NYU deans, including the Law School's dean, saw significantly strengthening the FAS faculty as important to each and every school in the university. FAS certainly did not have the resources for such a move, so we went to five donors with whom we had a close connection and asked them each to make a commitment of $10 million, so long as we got four others to make the same commitment (a reverse prisoner's dilemma). We raised a matching $50 million from smaller commitments in a short time, and the university's board agreed to match the $100 million fund with an additional $100 million. The donors agreed, and we got it done. Even though all the hiring was done in

development--fundraising-and-finances.html [https://perma.cc/8YFV-YJDS] (last visited Nov. 15, 2018).

54. Letter from Martin S. Dorph, Chief Fin. Officer, NYU, to Orrin Hatch, Chairman, U.S. Senate Comm. on Fin., et al. (Mar. 31, 2016), https://www.nyu.edu/about/news-publications/news/2016/april/nyu-letter-to-congress-on-the-role-of-the-endowment.html [https://perma.cc/2ZBP-7P9L].

55. Julie Scelfo, *Fear of Failing*, N.Y. TIMES, Aug. 2, 2015, at 14, 15 (noting that approximately 1100 undergraduates commit suicide each year).

56. Rui Wang et al., *Tracking Depression Dynamics in College Students Using Mobile Phone and Wearable Sensing*, 2 ASS'N FOR COMPUTING MACHINERY, Mar. 2018, at 1, 2 ("Surveys at colleges across the U.S. found that 53% of respondents experienced depression at some point after entering college . . . .").

57. *See generally The Global Network*, N.Y.U., https://www.nyu.edu/faculty/governance-policies-and-procedures/faculty-handbook/the-university/organization-and-administration/the-global-network.html [https://perma.cc/GP6P-HGYL] (last visited Nov. 15, 2018).

just one of NYU's schools, the strengthening of that school, which sits at the heart of every university, and the consequent elevation of the stature of the university as a whole benefitted every part of the university. It bothered no one, not even the Law School dean, that three of those $10 million donors to FAS came from the Law School's donor list, along with one from the Business School's and one from the Medical School's.

The first decision I had to make as president was not so grandiose, however. It involved whether to purchase a machine from General Electric or Siemens. At the Law School, I never would have been asked my view on such a decision; but this machine (a 7 Tesla MRI) cost $40 million. That's when I knew I was going to have to operate at a different level. And, of course, the premise of the decision I was asked to make was the assumption that we should purchase the machine at all. I never had spent such an amount in one sitting, much less in one life. In the end, guided by a genius radiology chair (now dean of medicine and CEO of our medical center), I made the right choice.

Over the years, we continued to believe that NYU could not be one of a handful of truly great universities unless it was great in science. Ultimately, we came to realize that, even with the expansion of the science faculty in FAS and major investment in the medical center, the university could not become excellent in science without a major quality presence in engineering. But NYU had no engineering department because we had closed the school as an economy measure during the university's existential crisis that preceded the Mueller sale. And there was a danger that some, if not many, of the faculty in whom we were investing would be lured away in a few years because of this void.

Then we noticed a once great, but struggling, engineering school that had some great assets. First, it had some very strong faculty in boutique but emerging areas, like cybersecurity. Second, it had a well-located campus in downtown Brooklyn and additional building rights. It was across the street from a 500,000 square foot building that was owned but not used by the New York City Transit Authority. So, while Cornell and Stanford were battling over Roosevelt Island,[58] we went to New York's visionary mayor, Michael Bloomberg, and pledged that, if he would give us the building, we would absorb the engineering school, build it into a first-tier school, connect it to several other parts of NYU (medicine, education, and theater), and create an extraordinary center for the study of cities.

The mayor said yes, and over the last decade the huge transformation that we hoped would happen has been accomplished.[59] Some of the top engineering faculty in the world have joined the school. In the last academic

58. Richard Pérez-Peña, *Stanford Ends Effort to Build New York Arm*, N.Y. TIMES, Dec. 17, 2011, at A1.

59. *See generally Tandon History*, N.Y.U. TANDON SCH. ENGINEERING, https://engineering.nyu.edu/about/history [https://perma.cc/W32J-P4MP] (last visited Nov. 15, 2018).

year, 41 percent of the entering freshmen were women,[60] which is well above the national average.[61] Still more, because of this success, in 2015 the school received a $100 million gift from Chandrika and Ranjan Tandon, the philanthropists who the school is now named after.[62] It also now has a female dean.[63]

The three examples I have given so far each involved a new initiative. Of course, there were schools and departments at NYU in 2001 that already were "best in breed" or close to it. The Law School, for example, plausibly claimed that it was one of the four schools that might be the best in the world. As every decision was made about a new initiative, maintaining the existing centers of excellence had to be a priority. This inevitably entailed some investment in these preeminent programs. We knew that new dreams could not be achieved at the cost of hard-won accomplishments already gained.

I was in the unusual position of appointing my successor at the Law School. In addition, he or she ostensibly would report to me. This seemed to me strange and wrong, so for the fourteen years that I was NYU's president, I recused myself from all decisions regarding the Law School. NYU's extraordinary provost, Dr. David W. McLaughlin, a world-class mathematician,[64] dealt with law school matters. Indeed, generally, I did not even *speak* to anyone about NYU Law School or legal education during those fourteen years. I was not surprised, however, that the provost and the leadership team of the university each year, after a discussion *on the merits*, recommended that the Law School receive support from the university. It would have been foolish to do otherwise.

These examples are just a sampling of the kind of resource-intensive strategic decisions that are frequently before a president and a provost of a major research university. They are important examples, but they are not unusual in a fourteen-year period. There were several other decisions that had greater financial implications than any of these, many that had less financial import, and many, many decisions that had little, if any, financial importance but great importance to the university and its schools.

Whatever the nature of the issue involved, decisions on major issues made at the university level affect the ecosystem of the university and the schools

60. *Tandon Celebrates Women in STEM*, N.Y.U. TANDON SCH. ENGINEERING (Mar. 8, 2018), https://engineering.nyu.edu/news/tandon-celebrates-women-stem [https://perma.cc/K3K4-3LSQ].

61. *See* Carly Stockwell, *Women vs. Men in STEM Degrees: Do We Have a Problem?*, C. FACTUAL (Oct. 27, 2017), https://inside.collegefactual.com/stories/women-vs-men-in-stem-degrees [https://perma.cc/7E32-Q43P].

62. *Id*.

63. *Tandon Leadership Team*, N.Y.U. TANDON SCH. ENGINEERING, https://engineering.nyu.edu/about/tandon-leadership-team [https://perma.cc/X5HF-D2V2] (last visited Nov. 15, 2018) ("Jelena Kovačević became Dean of NYU's Tandon School of Engineering in August 2018. [She] is the first woman to head the school since its founding in 1854 as the Brooklyn Collegiate and Polytechnic Institute.").

64. *See generally Provost Emeritus*, N.Y.U., https://www.nyu.edu/about/leadership-university-administration/provost-emeritus.html [https://perma.cc/LM3Q-KMBS] (last visited Nov. 15, 2018).

that live in that ecosystem. The rhetorical focus often is on the budget and financial matters; frequently, however, important decisions do not implicate the budget.

To the extent that Kaczorowski treats issues of federalism and subsidiarity in his wonderful history of Fordham Law, he focuses on the financial tension that developed between Fordham's leaders and the Law School.[65] He repeated this motif in his remarks earlier today.[66] I took some notes as he was speaking; I wrote down exactly what he said: "The university continued to divert the Law School's surplus to university's uses." This was—and remains—the proverbial bone of contention. Since that is Kaczorowski's focus, and since he invited me here, I will use that focus to make my remaining points in this area.

Decades ago, my friend Bob Shrum, who was at the time assisting New York City's charismatic mayor, John Lindsay, recounted to me a conversation with the mayor in which Lindsay said there is rarely an easy choice. We generally will have to make a choice between two goods or two evils—for example, between schools and firehouses. On a good day, it is which we can open; on a bad day, it is which we must close.

We citizens can demonstrate on behalf of opening both or protest against closing either, but the mayor was preparing Shrum for a life without that luxury, a life where choices have to be made. In our better moments, we know this; and in those moments we ask only that the decision be made on the merits—on whether, based upon the priorities of the city as a whole, there is a greater need for a school or a firehouse.

Late one night twenty years ago, during my time as dean, I sat in a diner with a wonderful friend and colleague, a major scholar who was head of the faculty research committee and thereby charged with assessing the applications of our faculty for sabbatical and summer grants. He argued that he needed more money to satisfy the appetite for grants. I resisted: "Our faculty research fund is better funded than any other school's. Rather than divert money from other programs to it, I want you to make a few tough decisions. Tell a professor that his or her proposed book is good but not as good as the others that you are funding. Deny funding to the bottom 10 percent. Give forty-five grants instead of fifty to your group of applicants. Can you do that?" "No," he responded, "you don't understand how important the faculty research program is." I said, "I do understand how important it is, and I am happy that we are generous in giving it support. But, there are other unmet priorities. Let me give you a hypothetical. If a donor offered me a gift of $100,000 which I could give, without splitting it, to either

65. *See* KACZOROWSKI, *supra* note 1, at 159–62 (detailing Fordham School of Law's initial quest to keep the funds it generated rather than share them with Fordham University). Kaczorowski notes that before the 1970s "[t]here was cause for concern about Fordham University's diversion of Law School funds to university uses" and recounts one story about a sizeable donation left to the Law School in a family's will that was used to benefit other schools instead of being put toward law student scholarships as intended. *Id*. at 269.

66. *See* Robert J. Kaczorowski, *Fordham University School of Law: A Case Study of Legal Education in Twentieth-Century America*, 87 FORDHAM L. REV. 861, 867–71 (2018).

financial aid for students or for further support of faculty research grants, which program should get the $100,000?" I still find it quite astonishing that this expert in public choice theory answered quickly: "Give it to both." This is not the real world of decision-making.

I hope by now it is common ground that, day in and day out, university leaders must make decisions about which university units, schools, or departments are going to be major investment points. This is inevitable: priorities must be set and choices must be made.

So, let us examine a law school's claim—*any* law school's claim—that it should have resources that its university is using for purposes outside the law school. Surely, the law school should not get the resources simply *because* it claims them; it must advance a reason why *on the merits* it should have them.

Kaczorowski offers such a reason to support Fordham School of Law's claim: ownership.[67] Fordham Law School owns the funds because it runs a surplus and the university "continued to pay [the Law School's surplus] into the university's general funds."[68]

But, as we lawyers know, it depends; it is all about definition. Surpluses can disappear in a flash. Kaczorowski cites one technique is his book: charge interest for the use of the law school's money.[69] But there are much less obvious ways to make a surplus disappear.

What does it mean to divert? What is a mere charge for a service? What portion of the salary of the university officers and staff the law school (or its faculty or students) may or may not choose to use? Or the general counsel's office? Or the costs of the university library? Do law faculty and students never read in other disciplines? And what about career services? If you have a dedicated career services department in the law school, should you pay at all for the university's placement service?

The argument is that the money was "diverted" to a "university use." What is a university use? Is the president's salary a university use? Is alumni relations and development a university use? And what does the "uni" in university mean? The fact is that a claim based on a putative "surplus" stands on fragile ground. Allocative decisions have to be made. And we in law schools, above all, should want the decisions to be made in a *fair process* and *on the merits*, not on some a priori claim of right. Tuition revenues and authorized expenditures can be the starting point; annual zero-based budgeting is impossible. But the simple fact of an apparent surplus should not create a claim to those funds. A case should be made for their use, with perhaps a lesser burden required to retain apparent surpluses than would be required for a subsidy.

If we really believe in the mission of the law school, and I do, we should appreciate that allocative decisions are made in a fair process on the merits. We train our students in the use of the powerful instrument of law, and we

67. KACZOROWSKI, *supra* note 1, at 162.
68. *Id.*
69. *Id.* at 159–60.

research and write about how the law can be an even more powerful instrument for the advancement of a just society. We are the perfect laboratory for the theories developed in other parts of the university. Law schools should show that we do these things excellently and show the effect in real lives. *That* is a powerful case on the merits, and it is the only principled way to argue for resources being used for your efforts as opposed to the efforts of those folks in other parts of a university.

It is about persuasion, and we at law schools claim to be really good at that. That is why John Feerick was so successful. That is why Guido Calabresi was so successful. That is why I was successful. We worked on the merits. And it did not hurt that we all were viewed as cooperative in building better universities along the way.

III. SOME CHALLENGES AHEAD

There are ill winds blowing in the land. Law schools, until very recently, have been sheltered from these winds and even then have been exposed only to the mildest of them. Since I have written extensively elsewhere about these general trends,[70] here I will introduce them briefly.

First, beginning with the election of Ronald Reagan in 1980, our nation began to abandon the notion that higher education was a public good, reconceptualizing it instead as a private good for which the benefitting individual should pay. The result has been dramatic disinvestment by government in higher education and a concomitant demand that the student pay the cost, a demand that created an increase in student debt.[71] Actual average indebtedness is not as staggering as the headlines and conventional wisdom would have it (actual average debt for those who borrowed to go to college is around $40,000);[72] nonetheless, there is a pervasive sense that the increasing cost and price of a university education are problematic.

As the disinvestment in higher education continues (and, barring major change in policy, it likely will), universities in general will find the resources required to maintain their traditional standards of excellence harder and harder to locate; the idea that in this context they will be able to share *more* resources with their law schools is difficult to see. Moreover, as the undergraduate tuition increases that are required to maintain excellence in the university precipitate more and more borrowing by students, those

70. *See generally* John E. Sexton, *Curricular Responses to Globalization*, 20 PENN ST. INT'L L. REV. 15 (2001); John E. Sexton, *"Out of the Box": Thinking About the Training of Lawyers in the Next Millennium*, 43 S. TEX. L. REV. 623 (2002) (discussing the future of three-year law schools).

71. *See generally* ADAM LOONEY & CONSTANTINE YANNELIS, BROOKINGS INSTITUTION, BORROWERS WITH LARGE BALANCES: RISING STUDENT DEBT AND FALLING REPAYMENT RATES (2018), https://www.brookings.edu/wp-content/uploads/2018/02/es_20180216_looneylargebalances.pdf [https://perma.cc/T7YG-SAK5].

72. Abigail Hess, *Here's How Much the Average Student Loan Borrower Owes When They Graduate*, CNBC (Feb. 15, 2018), https://www.cnbc.com/2018/02/15/heres-how-much-the-average-student-loan-borrower-owes-when-they-graduate.html [https://perma.cc/7XH3-DV6H] ("When they graduate, the average student loan borrower has $37,172 in student loans.").

students will be deciding about whether or not to attend law school with greater price sensitivity than they have now.

Here, a second general trend enters: since at least the middle of the 1990s, a segment of the political class has waged an unrelenting campaign against our nation's lawyers, judges, and even the concept of law. I first warned that this was happening in 1997 after reading a memo by a political consultant advising his clients that "*it's almost impossible to go too far when it comes to demonizing lawyers*."[73] As president of the Association of American Law Schools, I wrote a letter to the nation's law deans and professors in which I said, "this attack on lawyers is just another, more general version of the attack on judges and the notion of an independent (and sometimes anti-majoritarian!) judiciary."[74] Now we have seen the president of the United States join these attacks.[75]

Putting aside the other ramifications of this second trend, its ramifications for law schools may be profound. We all have tales from classmates and students of how *Perry Mason* or *Boston Legal* first stimulated an interest in law; lawyers were heroes, to be admired and emulated. It was widely believed that a life in the law was a worthy one. We in legal education know, through our own lives and those of countless students, that it is. But, if the zeitgeist is otherwise, the effect on applications will be felt, only exacerbating the effects of the first of the two trends I have highlighted.

Quite apart from these external trends and their associated threats to legal education, however, there is an internal danger that may force a reckoning of greater magnitude: the danger that the requirement of a three-year graduate degree as a condition for taking the bar examination is unsustainable.

Beginning in earnest in the 1990s, we in legal education (NYU included) made a Faustian bargain with bar examiners (designed to make our LL.M. degrees more attractive to foreign students) whereby foreign lawyers who obtained an LL.M. (typically a one-year degree) were eligible to take the bar examination. This was the beginning of the end of the requirement that an American student have a JD degree to be eligible.

In 2000, in speeches at the annual meetings of both the American Bar Association and the Association of American Law Schools, I urged legal educators to consider and prepare for the consequences of that reality.[76] I offered a prediction: great universities will one day offer an undergraduate concentration in law and, eventually, a major in law (similar to the majors

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73. *See* John Sexton, *We Must Protect the Law and Its Role from the Demagogues*, AALS NEWSL. (Ass'n of Am. Law Schs., Washington, D.C.), Nov. 1997, at 1 (quoting and discussing language used in the Luntz Research Companies' book, *The Language of the 21st Century*).

74. *Id.* at 2.

75. Nina Totenberg, *Who Is Judge Gonzalo Curiel, the Man Trump Attacked for His Mexican Ancestry?*, NPR (June 7, 2016), https://www.npr.org/2016/06/07/481140881/who-is-judge-gonzalo-curiel-the-man-trump-attacked-for-his-mexican-ancestry [https://perma.cc/WG3H-44MD].

76. *See generally* John Sexton, Dean of NYU Law School, Address at the American Bar Association Conference in London, England: "Out of the Box": Thinking About the Training of Lawyers in the Next Millennium (July 18, 2000) (transcript on file with New York University's Office of the President Emeritus).

offered in great universities all around the world outside of the United States).[77] Maybe these universities might label the degree an LL.B. Maybe not. In any case, some students who go through the program, armed with letters of recommendation from distinguished faculty whose work we all admire, may go on to apply for an LL.M. My guess is that even private law schools would admit them; public universities might be required to do so, at least if they are American citizens and the curriculum is virtually the same as those underlying the undergraduate LL.B. degrees of the foreign students we have admitted. A year later, when (LL.M. in hand) they apply to take the bar, it seems they likely would be able to take it.

In today's world of practice, the elite law firms with international offices have attorneys working on the same cases, some of whom have an undergraduate LL.B. from a university outside the United States and a one-year LL.M., and others of whom have a traditional American undergraduate degree and a three-year JD.[78] If the clients see no difference, how do we sustain an argument that the Americans must study law for three years after college before taking the bar, while others do not?

This makes three-year JD degree programs very vulnerable. I believe a set of law schools (perhaps as many as fifty, but certainly not two hundred) will manage to justify the three-year JD degree as a good in itself as opposed to a bar ticket. They rightly will argue that it is worthy and interesting to study the law and what the law "ought" to be deeply, as one can do only over a period of a few years. And they likely will offer a number of generous fellowship packages, as most first-rate PhD programs do, to attract outstanding candidates. The JD at these few schools will survive, no doubt with fewer students than now enrolled in their three-year programs, because they will attract students who want to study the law in this profound way and who want to form lifelong bonds with others who share that interest and the view of the law that it implies. But, it will be impossible for 75 percent of existing law schools to market a three-year degree program on these terms.

So what happens to the faculty of the law schools that cannot sustain what they are doing? Do they become part of an undergraduate law department in the university where they once had been law school faculty? Who pays them when two-thirds of the tuition base from which their salaries had been drawn is gone? When they divert students to major in law instead of history or literature, who pays the professors of history and literature who no longer have students? The traditional argument that tuition paid by students who study law should not be diverted from law schools to other uses no longer has much traction. Someone will need to focus deeply on the merits of how lawyers should be educated, on who should educate them, and on how that education should be funded. But there is no guarantee that law schools that once rode what they claimed was a school surplus into the president's office, arguing against the use of resources from one school (theirs) to give help to

77. *Id.* at 2–3.
78. *Id.*

another, will not find themselves arriving hat in hand, arguing that a discipline as noble and important as law deserves subsidy and support.

CONCLUSION

The poet Robert Burns once wrote that it would be a gift "to see ourselves as others see us."[79] One of the joys of the last fifty years for me has been that I have been blessed to see the wondrous enterprise of higher education from four different vantage points: before law school as a professor and department chair at a small, faith-based teaching college, then, in nearly forty years at NYU, first as a professor, then as a dean, and then as president. Moreover, since during my years as president I neither taught at the Law School nor conversed about it or legal education in general with anyone other than NYU Law School's dean, I returned only recently from a fourteen-year journey. This combination of factors inherently brings a bit of what Robert Burns sought into my perspective as it appears on these pages.

I love NYU Law School and my colleagues there, and I love both the enterprise of legal education and the grand profession of the law. I also love NYU in the larger sense, the university; I love my colleagues throughout its precincts; and I love the enterprise of expanding the minds of young scholars to the maximum and of facilitating the advancement of thought by the most gifted researchers and artists that populate the world's great universities.

It is possible to love all of these things at once. They are not in a contest with each other, a zero-sum game. Choices do have to be made, and they should be made on merit, not status—and certainly not on profitability. Whether reference be made to Burns or John Rawls, the principle is the same. And we all would do better to heed their call.

I hope that this helps.

APPENDIX: TRANSCRIPT*

JUDGE GUIDO CALABRESI: I think a great university cannot do what Harvard claims to do, which is to say, every ship on its own bottom. There are parts of the university that cannot be topflight because they cannot raise enough money. Now Yale and many universities in that situation have incorporated these parts into the university budget system and look over their individual budgets every year. The result is that these places do not raise money on their own because they have no incentive; it only goes back to the university. And the university is telling them what to do, that they know better what is best for them. We were part of the university budget system when I became dean and it cost the university $1 million a year. But it also

79. Robert Burns, *To a Louse*, *in* THE POEMS AND SONGS OF ROBERT BURNS 198, 199 (P. F. Collier & Son ed. 1909). The original language of the poem is Scots: "To see oursels as ithers see us!"

* This discussion followed the author's presentation of this Article at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 FORDHAM L. REV. 859 (2018).

doesn't work that well when parts of the university are financially independent. Then any time the university feels short of money, it simply raises the charges on those parts that are independent. And it does so with no relationship to what the charges actually are. My own answer, which I have never been able to sell because in the end the university powers do not want to give up their power to decide, is something that is just standard economics. You just divide up the university endowment and give each school its portion, while withholding a portion for the university to fund central costs. After that, every school is independent and is on its own. But, if the university is deeply weak in some areas, how do you make them better? Yale has been traditionally weak in the sciences and engineering, and they have often taken money from where they are strong—the humanities. I think that is a mistake because it will move the humanities from an A or A+ to an A-, which is less good, and maybe move the sciences from being a C to being a B or B+, which isn't good enough.

PRESIDENT EMERITUS JOHN SEXTON: There's not a word you said with which I disagree. But understand that any allocative system has a lot of softness built into it. Where Guido and I agree is that it's all about allocation in a context of subsidiarity, where schools are capacitated to be excellent. There may be decisions made where we should not invest in a C+ unit to bring it to an A.

JUDGE CALABRESI: That's right. If you think your law school is lousy, really lousy . . .

PRESIDENT EMERITUS SEXTON: Don't throw money in it.

JUDGE CALABRESI: . . . you're not going to make it good.

PRESIDENT EMERITUS SEXTON: Right.

JUDGE CALABRESI: If you think your law school is super selective, then you're going to have to say it's an expensive thing.

PRESIDENT EMERITUS SEXTON: So if a dean of the School of Continuing Education came to me and said, "I want to make the School of Continuing Education as selective as the College," I would say, "That's not why I hired you. I want you to do the opposite. I want you to accept students we would not accept and give them a chance. If they do well, we'll let them transfer into the College."

You talked about the allocation of money in the endowment. Those of us that are human are living in a world very different from Princeton, Harvard, and Yale, where you might solve the problem by how you allocate the endowment. Only a tiny part of the NYU budget is funded by endowment. But the real issue is a variation of the same thing: Who owns the tuition revenue? Most schools are starved for investment resources. The endowment will not provide it. So, by common agreement, the deans at NYU agreed that each of them would give 1 percent of their gross budget to the provost for a "provost investment fund," which is then meritocratically allocated back out to the schools with peer review on the merits.

JUDGE CALABRESI: But, you see, you are doing in the context and financial structure of NYU precisely what I am saying. The structure is the

same. It's always the same because when you're talking about finances you're always talking about the same things here. And it's just a question of finding a way to do it.

PRESIDENT EMERITUS SEXTON: But a key is to make judgments and allocations, and that has to be transparent and on the merits. My point is that you can't assume a priori that a particular unit—the law school or any other—wins or loses all the time. The constant way we pose this question, even in Bob's book, assumes a deus ex machina providing resources.

PROFESSOR WILLIAM NELSON: The other thing you need is imagination. Much of the way almost everyone talks about these issues is within an existing structure that they assume is unchangeable.

PRESIDENT EMERITUS SEXTON: It was a great sadness to me to return to the Law School for my first faculty meetings during the year of strategic planning and hear conversations about whether we should have a regulation course in the first year or have a writing requirement. Big issues were just ignored.

PROFESSOR DANIEL COQUILLETTE: Harvard has never been able to break its reliance on very large enrollments. Landis wanted to bring the enrollment down to 1000 students from 1500, but failed to do it.

JUDGE CALABRESI: At the beginning, Yale was so small, so local, that it could not possibly survive on tuition. What they did was to have local faculty members in the social sciences and local practitioners, some of them very good, and they started raising an endowment long before any other law school. Financial need shaped the whole thing.

When Harvard had its troubles with CLS, I had an idea to divide it into two schools, one primarily a school of law reform and another the traditional kind of what Harvard Law used to describe itself. Each one would have its own admissions, but students could take courses in the other. Each school would make its own appointments, so that they wouldn't be arguing to get whoever had their views but would each be fighting for the very best.

PRESIDENT EMERITUS SEXTON: Be careful about that bifurcation. It raises the issue that I saw as president of a university that had not one but nine undergraduate schools. With three different ways to get a liberal arts degree, you get into balance-of-payments issues and that gets us into the formula about allocation. All of a sudden, people are talking about balance of payments and formulas for allocation. Who gets the benefit if your student takes a course in my school? What we developed was a very dean-centric but not top-down approach, where a dean and his or her faculty were given great autonomy and governance capacity inside of a budget envelope, with the presumption that tuition payments remained where they started but with certain balance-of-payments rules and with an übertax that created a general fund.

JUDGE CALABRESI: What you're saying is absolutely right in terms of universities generally, but what Ken and I are talking about is the position of our particular schools. At my time, Stanford made a decision tying itself to

the university, and it did well, but not as well as we did untying ourselves. If the game is what you do for your school at the moment, you pick . . .

PROFESSOR KENNETH MACK: What is the future of the 75 percent of law schools that have no large sources of wealth? Some of them are attaching to universities, some of them are not. You said a couple of things. One is that tuition is going to continue to go up. The prospect of law schools being subsidized by universities presents a number of problems. So what is our most likely future, and a future in which somebody actually figured out a creative way to attack the problem? I've been very pessimistic about the future. I think a number of law schools are going to disappear.

PRESIDENT EMERITUS SEXTON: There'll be probably somewhere between 500 and 1000 law schools a decade or more out, but they won't be law schools of the sort that we have today. Some of them will be online. Some of them will be certifying people into special practices. But if you talk about law school the way we think about law schools, there will be fewer, just as there should be fewer PhD programs. If thereby we lower the overall cost of what's broadly called legal education such that legal service can actually be increased in the long run . . .

PROFESSOR MACK: Well that's going to require . . .

PRESIDENT EMERITUS SEXTON: . . . fewer jobs for people like professors. If my child can become a member of the New York bar by going to Oxford for four years and getting an LL.M. at Yale, I don't understand how you can sustain over time a three-year JD program that requires two extra years of school and $250,000 more in expense, not including forgone income. It's just untenable if you care about the issue of diversification. Because to some families $250,000 is nothing, but to others it means a lot, especially in the absence of serious loan repayment assistance in the system.

JUDGE CALABRESI: But you've got to be sure that the people at law school are learning law in some way that is relevant to the United States. Frankly, at Oxford and Cambridge today and at most European universities, they are not. The greatest mistake Ronnie Dworkin made, he told me, was to read law at Oxford. He spent most of his time playing with philosophers, but the law, the two years that he did get, got in his way as a scholar because when he came back to Harvard, he got just the last years and not the crucial first year of teaching what American law is about. You can say, go to Oxford, go to Cambridge, but you're better . . .

PRESIDENT EMERITUS SEXTON: My argument's different. My argument is that we made that Faustian bargain twenty years ago. We all fought to get those LL.M. students the right to take the bar exam. As a result, since we are now addicted to the revenue those students bring in, the system is unsustainable because we cannot go back—and soon American students will be taking the same route.

JUDGE CALABRESI: As an entry to the bar, you're right; as an entry into scholarship . . .

PROFESSOR NELSON: This strikes me as returning to the beginning. The LL.B. was the law degree, and you initially only had to spend two years

in law school to qualify for the bar. Then it extended to three years and then it became a college degree plus. We seem to be going back to the LL.B. plus something like a year of clerkship or apprenticeship.

PROFESSOR COQUILLETTE: This is the old-century model.

PRESIDENT EMERITUS SEXTON: That's not my goal. There's still room for a JD degree, and it's a powerful argument coming out of Tocqueville and Jefferson and humanism and so forth. But if we think the way to sustain the JD degree is this arrangement with bar examiners, that's going to disappear. Therefore, we have to start making an argument on the merits that it makes sense for a person who could take the bar after one year to stay around for three years. I think the argument could be made for some, but it will not be made for 35,000 students a year.

JUDGE CALABRESI: The bulk of the bar can be done in some completely different way. The only sad thing about it is that it would bring us back to the time when there were almost no schools worth teaching in.

PRESIDENT EMERITUS SEXTON: For people like us.

PROFESSOR ROBIN WEST: I don't agree. I do think that's the way to the future, but I don't think it's right to say that as long as there are some JD programs at the top twenty schools, it's fine for the other schools to go basically vocational. Because I do think that the merits-based argument you have in mind, based on Jeffersonian ideals and humanism, is just as true for students at the University of Illinois, Indiana, and Maryland.

PRESIDENT EMERITUS SEXTON: It sure is, but . . .

PROFESSOR WEST: I would not want to endorse a picture of the future of legal education that is missing what I think is part of its great value, and that is the democratization of legal education. Everybody's getting this three-year JD degree. It's a humanist degree. It conveys and presupposes an awful lot of knowledge about the culture and about the humanities as well as political science, economics, and so forth. We need to protect that, and it's going to be extremely difficult going forward to protect that. So I just don't want to compromise.

JUDGE CALABRESI: Ezra Stiles, the great Enlightenment president of Yale, indicated that we must teach law because, as a free nation, law must be taught, not primarily for the practitioners, but for . . .

PROFESSOR WEST: Citizens.

JUDGE CALABRESI: . . . to have citizens who defend what this form of government is about.[80]

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80. 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 166–67 (1908) ("The Professorship of Law is equally important with that of Medicine; not indeed towards educating Lawyers or Barristers, but for forming *Civilians*. . . . It is scarce possible to enslave a Republic of Civilians, well instructed in their Laws, Rights & Liberties."); Robert Stevens, *History of the Yale Law School: Provenance and Perspective*, *in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 1, 8 (Anthony T. Kronman ed., 2004) ("The four-year B.A. allowed lectures on a range of subjects in the fourth year, and Ezra Stiles, president of Yale from 1777 to 1795, was sympathetic to an element of law: 'It is scarcely possible to enslave a Republic where the body of the People are civilians well instructed in their Laws, Rights and Liberties' . . . .").

PRESIDENT EMERITUS SEXTON: When my daughter convened a family council as a junior and said, "I'm thinking of going to law school," we all said, "This is the best extension of a liberal arts education you can get. Fortunately, you come from a family that can pay for it." When tuition gets to $125,000 a year, which it will, you've got to do income redistribution through the tuition mechanism or through loan repayment assistance. Now, the very top law schools could get tuition free tomorrow if they admitted 90 percent of the class with no tuition and auctioned off the remaining 10 percent of the seats to anybody who wants to buy them. But if we draw the battle line where you're suggesting we draw it, I'm telling you the economics can't sustain a diverse student body.

PROFESSOR WEST: Yeah, I get it.

PRESIDENT EMERITUS SEXTON: Then higher education will be about perpetuating the elites, and we'll be back to where we've been trying to get away from for fifty years. The economics is such that we've got to decide where we're going to draw the battle line, and I guess I'm arguing for strategic retreat. But not giving up.

JUDGE CALABRESI: I'd just like to say one thing. We also need to keep our eyes on the question of how a law school, not just financially, but intellectually, does its job within the university. We are supposed to be right at the center of the university and need to remain there.