

From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America*

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This article describes how the classical past, including Roman law and a classics-based education, influenced elite legal culture in the United States and university-educated Americans into the twentieth century and helped to encourage Scott, Blume, and Pharr to labor for many years on their English translations of ancient Roman law.

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Introduction

¶1 A new English translation of the Justinian Codex using the most authoritative Latin and Greek sources, will be published early in 2016.¹ This translation, created by an Anglo-American panel, is based on an unpublished translation made by Wyoming Supreme Court Justice Fred H. Blume (1875–1971) in the early decades

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1. THE CODEX OF JUSTINIAN (Bruce W. Frier ed., forthcoming 2016). The publisher, Cambridge University Press, also plans to issue a new English translation of Justinian’s *Novellae Constitutiones* (by David J.D. Miller and Peter Sarris) within the next few years.

of the twentieth century.² The new translation almost certainly will replace the poorly received English translation by Samuel Parsons Scott (1846–1929) published in 1932.³ In the same era, Clyde Pharr (1883–1972) led a group (which included Justice Blume) that produced the only English translation of the Theodosian Codex.⁴

¶2 Each of these projects required countless hours of work over many years in the first half of the twentieth century. An observer situated in the second decade of the twenty-first century might well wonder why these men chose to devote such huge amounts of time to these efforts. What caused Scott, Blume, and Pharr to dedicate so much of their lives to translating ancient Roman law into English in that era? Were their activities related to a movement then prevalent in American law, or was each driven solely by personal interest? Also, what equipped these men for their arduous undertakings? How is it that three men from very different socio-economic origins were able, and inclined, to translate difficult, ancient Latin into English?

¶3 This article examines these questions and concludes that the answer to the first two lies between the polar extremes. It suggests that although Scott, Blume, and Pharr probably were supported and encouraged by enthusiasms then prevailing in an elite segment of the American legal community—including the Restatement movement—each man seems to have been motivated mainly by a sense of personal mission and a desire to connect himself to the history of Western civilization. As to the second cluster of queries, the article finds that despite their very different backgrounds, Scott, Blume, and Pharr all shared a classics-oriented education, similar to that of the American Founders, which made them value highly the Roman legal tradition and gave them the tools for translating its laws. Few persons in the present day would be able to undertake similar projects.

Rome and the Classical Tradition in Early American History

¶4 To understand why Scott, Blume, and Pharr devoted much of their lives to translating Roman law into English, we first need to examine the role the Roman Republic and the classical tradition played in American history from colonial times into the early twentieth century.

2. The author of this article published Blume's translation online in 2008 and supplied the panel with the files it used as the basis for its new version. See generally Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 LAW LIBR. J. 525, 2007 LAW LIBR. J. 31. For Blume's original work, see *Annotated Justinian Code*, UNIV. OF WYO. LAW LIBR. (2008), <http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2>.

3. For a description of Scott's life and work, see generally Timothy G. Kearley, *The Enigma of Samuel Parsons Scott*, 10 ROMAN LEGAL TRADITION 1 (2014), <http://romanlegaltradition.org/contents/2014/RLT10-KEARLEY.PDF>. Scott's translation of the entire *Corpus Juris Civilis* and its critical reception is discussed at pp. 29–34.

4. See generally Linda Jones Hall, *Clyde Pharr, the Women of Vanderbilt, and the Wyoming Judge: The Story Behind the Translation of the Theodosian Code in Mid-Century America*, 8 ROMAN LEGAL TRADITION 1 (2012), <http://romanlegaltradition.org/contents/2012/RLT8-JONESHALL.PDF>. While the work was undertaken in the 1940s, the translation was not published until 1952: CLYDE PHARR, *THE THEodosian CODE AND NOVELS, AND THE SIRMONTIAN CONSTITUTIONS* (1952).

¶5 Most of the Founders received a classics-oriented education, whether at Latin schools or from tutors.⁵ Colonial education for the elite was modeled on the English grammar school, which emphasized Latin and the classics.⁶ Hence, most American leaders into the early 1800s could read Livy, Cicero, Justinian's Digest, and the like, in Latin, and they shared common cultural references.⁷ The American Founders culled what they deemed to be most worthy from the thought of the founders of Western civilization and employed it in creating their new nation.⁸ The American Founders were particularly enamored of the Roman Republic. Modern students of the Constitution acquire a vague sense of this when they read the *Federalist Papers* and see that the writers signed themselves as Publius, Brutus, Cicero, Cato, and so on. However, as Helmholtz notes, the Founders' esteem for the ancient Rome sometimes approached veneration.⁹ Most of them saw the Roman Republic's mixed constitutional system as ideal and viewed themselves as creating a similar republic in the New World.¹⁰ As Mortimer Sellers succinctly states it, "The Roman example gave Americans heroes, the vocabulary, architecture, and constitution for their revolutionary experiment in governing without a king."¹¹ General Washington

5. "It is well known that most of the signers of the Declaration and the delegates to the Constitutional Convention had a classical education." Meyer Reinhold, *Survey of Scholarship on Classical Traditions in Early America*, in CLASSICAL TRADITIONS IN EARLY AMERICA 1, 46 (John W. Eadie ed., 1976). Reinhold describes the shifts that have occurred in historians' estimation of the importance of the classical tradition in America up to the early 1800s. The modern consensus is that it was substantial. See generally JAMES J. WALSH, EDUCATION OF THE FOUNDING FATHERS OF THE REPUBLIC (1935). Walsh describes the education of several Founders in detail at 33–63 and notes that "Virginians usually obtained their preliminary education from private tutors in their homes." *Id.* at 38.

6. Reinhold, *supra* note 5, at 23 (noting that in colonial America "[t]he experience of the Latin grammar school, an institution transplanted from England, was a *sine qua non* for college bound students preparatory to training in the professions . . ."); see also R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 75–76 (1953); Françoise Waquet, *Latin Language*, in THE CLASSICAL TRADITION 509 (Anthony Grafton, Glenn W. Most & Salvatore Settis eds., 2010).

7. James Madison, John Jay, and Alexander Hamilton, for example, all read the same classical texts that helped inform their views expressed in *The Federalist*. George Kennedy, *Classical Influences on The Federalist*, in CLASSICAL TRADITIONS IN EARLY AMERICA, *supra* note 5, at 119, 120. Hamilton and Jay studied the classics further at King's College (now Columbia University), while Madison learned more of the classics at the College of New Jersey (now Princeton). *Id.* at 119. Hamilton was largely self-taught as a youth, but he prepped at the Elizabethtown (New Jersey) Academy, where his studies included Latin and Greek. RON CHERNOW, ALEXANDER HAMILTON 33, 42 (2004).

8. "The ancestry of the Constitution in the thought of Plato, Aristotle, Polybius, Cicero, and Carthage is too authentic to require repeated legitimating any longer." Reinhold, *supra* note 5, at 36–37; see also Kennedy, *supra* note 7, at 127 (noting Madison's citation of Demosthenes, Polybius, and Plutarch).

9. Richard H. Helmholtz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1649 (1992).

10. "The American revolution was . . . a neo-Roman revolution from the start." Mortimer N.S. Sellers, *Founding Fathers in America*, in THE CLASSICAL TRADITION, *supra* note 6, at 367. "Americans needed new models of government to replace the British institutions that had failed them. Rome supplied a name ('republic'), a goal ('liberty'), and a technique ('checks and balances') in the structure of the Roman constitution . . ." *Id.* at 369.

11. *Id.* at 368. The Founders were often depicted as Romans in art of the period. See, e.g., BARBARA J. MITNICK & WILLIAM S. AYERS, GEORGE WASHINGTON: AMERICAN SYMBOL 41 (1999) ("In the various busts . . . the artist [Jean-Antoine Houdon] evoked the classical past by depicting the figure [of George

demonstrated his own veneration of Roman heroes when, in the dire circumstances at Valley Forge, he staged a reenactment of Cato the Younger's resistance to Caesar and his death at Utica trying to save the Roman Republic.¹²

Roman Law, Civil Law, and Natural Law in Early America

Uses and Sources

¶6 In addition to learning some Roman law as part of their classics-based education, elite colonial and early American lawyers found Roman law, as well as Roman-based civil law and natural law, to be of practical use in court. Roman law was particularly relevant in admiralty cases,¹³ but it also was employed in the law of mercantile suretyship, conflict of laws, and public international law.¹⁴ In addition, early in American history jurists made extensive use of natural law,¹⁵ which borrowed Roman law concepts.¹⁶

¶7 Moreover, the Founders and other Enlightenment thinkers were attracted to “scientific systems” generally, and they saw Roman law as such a system. Michael Hoeflich notes that early modern jurists were impressed by the orderly and logical nature of the arguments made by classical jurists in Digest fragments.¹⁷ The Founders, and others who appreciated Roman law, considered it to be *ratio scripta*—reason in writing.¹⁸

¶8 However, the Founders also were quite human, and they were not above using their classical educations, and specifically their knowledge of the Roman and civil law,¹⁹ to elevate themselves above the majority of their “common” contempo-

Washington] as either toga-clad or undraped.”). Shortly after the War of 1812, the state of North Carolina commissioned Italian sculptor Canova to depict Washington as Cincinnatus. See *Canova's Statue of Washington*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-newnation/4999> (last visited Aug. 24, 2015).

12. Sellers, *supra* note 10, at 370.

13. See, e.g., Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 75, 82–87 (Steve Sheppard ed., 1999). As the title of the article implies, it provides an excellent overview of the status and use of Roman law during the colonial and early American eras. Regarding admiralty law in particular, see Max Radin, *Roman Law in the United States*, in 2 ATTI DEL CONGRESSO INTERNAZIONALE DI DIRITTO ROMANO, BOLOGNA 17-2-APRILE 1933, at 345, 353 (1935).

14. Radin, *supra* note 13, at 352; see also Helmholtz, *supra* note 9, at 1657–64.

15. ROSCOE POUND, THE FORMATIVE ERA IN AMERICAN LAW 12 (1938); see also PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 164–67 (1965) (stating that “the concept of a law of nature was deeply imbedded in their intellectual inheritance,” *id.* at 164). Helmholtz offers many instances of jurists’ use of natural law early in this country’s formative years. See Helmholtz, *supra* note 9, at 1671–76.

16. Radin points out that Grotius and other early modern natural law theorists used the classifications and categories of the *Corpus Juris* and its commentators. Radin, *supra* note 13, at 348–49.

17. M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 97 (1986).

18. Peter Stein, *The Attraction of Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 404 (1966).

19. The phrase “Roman and civil law” is often used in discussing together Roman law per se and the later continental legal systems founded on it. See, e.g., William Wirt Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342, 344 (1903).

raries. John Adams (1735–1826) was clear about this in his diary: “Few of my contemporary beginners in the study of law have the resolution to aim at much knowledge in the civil law. Let me therefore distinguish myself from them, by the study of the civil law, in its native languages, those of Greece and Rome.”²⁰ Adams went so far as to refer to ordinary practitioners making a living litigating as “petty foggers” and “dirty dabblers in the law.”²¹

¶9 To gain favor with Jeremiah Gridley and other elite Boston lawyers, whose support he knew he would need to be admitted to the Suffolk bar, Adams studied Justinian’s *Institutes* and Cicero.²² Not only did this strategy succeed for purposes of Adams’s bar admission, but it led eventually to him being asked to join as a founding member of the Sodalitas law club, an association of gentlemanly Bostonian lawyers who read Cicero, the *Corpus Juris Civilis*, and other classics, together.²³

¶10 James Kent (1763–1847), judge, law professor, treatise writer, and graduate of Yale College, used his classical education similarly.²⁴ Although by his own admission he was “a very inferior classical scholar” while at Yale, an embarrassing encounter with his classmate Edward Livingston a few years after they graduated motivated him to much improve his Greek, Latin, and French.²⁵ He confessed that later, as a judge, “I made much use of the *Corpus Juris*, and as the judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethren to rout and carry my point”²⁶

¶11 As we shall see, acquiring Roman law knowledge as part of a gentlemanly and scholarly legal education, to distinguish its holders from ordinary attorneys, is a thread that runs through the history of Roman law in the United States into the twentieth century. Hoeflich writes that Roman law was part of the “high legal culture” in early America.²⁷ Classically educated lawyers considered themselves to be part of a “philosophical and legal profession.”²⁸

¶12 Finally, Roman law, and Roman-based civil law and natural law, flowed into colonial and early American legal life via the influence of the many Scottish settlers

20. Coquillette, *supra* note 13, at 76 (quoting 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 44–45 (1964)).

21. *Id.*

22. *Id.* at 76–77.

23. *Id.* at 80–82.

24. For a relatively concise but informative sketch of Kent and his career, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 548–66 (1993).

25. James Kent, *Experiences as a Law Student*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, *supra* note 13, at 122. Livingston, who later drafted the Louisiana Civil Code, dropped by Kent’s office one day to share the beauties of Horace’s poetry with him, assuming Kent would grasp the Latin—which he did not, causing Kent great chagrin. *Id.* at 120. Livingston’s assumption says much about the elite culture of the day.

26. *Id.* at 122.

27. M.H. Hoeflich, *Roman Law in American Legal Culture*, 66 TUL. L. REV. 1723, 1723–24 (1992). Hoeflich takes “high legal culture” to consist of the study of legal philosophy, as opposed to the study of case law and precedent. *Id.* Roman law, in his view, was a fundamental part of American high legal culture in the eighteenth and nineteenth centuries. *Id.* at 1724.

28. See *id.* at 1724. Hoeflich believes the high legal culture was at its apogee in the late eighteenth and early nineteenth centuries. See *id.* at 1725.

who had lived under the civil law before immigrating to America.²⁹ For instance, James Wilson, a Founder, a Declaration of Independence signer, and an original U.S. Supreme Court Justice, was born and raised in Scotland, and on account of his Scottish heritage, he argued for an American law that was independent from English common law and that incorporated much natural law.³⁰

Possible Adoption of the Civil Law in the United States

¶13 Contrary to what likely would be the assumption of most modern American lawyers, not only did the former colonies refrain from immediately accepting the English common law as the basis for their legal systems, many specifically rejected it,³¹ and they might have adopted a civil law system instead. After the Revolution, there was a lingering antipathy against what was seen by many to be the oppressive motherland and the legal system associated with it. This anti-English feeling was reinforced by the War of 1812. Perry Miller points to the “patriotic hatred of everything British” in explaining the hostility of most Americans to “any and every use of the English Common Law.”³² Typifying a common sentiment, Benjamin Austin asked: “Can the monarchical and aristocratical [sic] institutions of England be consistent with the republican principles of our Constitution? We may as well adopt the law of the Medes and Persians.”³³ Other commentators have made similar points in noting the American reaction against English common law.³⁴

¶14 Some commentators believe there was a real possibility for a civil law system to take root in the United States. Stein has argued, “Immediately after the Revolution there was so little local authority in many areas of the law that American courts could have incorporated much civil law into their systems with little opposition.”³⁵ He points out that not only were things British disliked, but that there was “a corresponding sympathy with things French. There could have been a reception of the civil law into the American corresponding to the French ‘Reception,’ which was a gradual process . . .”³⁶ Friedman also notes that the “civil law domain . . . encircled the domain of the common law” in the initial years of independence.³⁷ In addition, as noted above, most elite American lawyers already were familiar with, and favorably disposed toward, the civil law and its Roman law roots.

29. See Radin, *supra* note 13, at 346, 349.

30. Stein, *supra* note 18, at 407–08.

31. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 224–28, 232 (photo. reprint 1966) (1911).

32. MILLER, *supra* note 15, at 105; see also CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 33 (1981).

33. MILLER, *supra* note 15, at 106.

34. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 108 (2d ed. 1985); GRANT GILMORE, THE AGES OF AMERICAN LAW 22 (1977); POUND, *supra* note 15, at 40, 107; see also Radin, *supra* note 13, at 347–51, for a discussion of the attitudes of the colonists toward the English common law.

35. Stein, *supra* note 18, at 410.

36. *Id.*

37. FRIEDMAN, *supra* note 34, at 167–68 (referring to the French and Spanish civil law in effect along the Mississippi, and in New Orleans, the Floridas, and Texas).

¶15 It is impossible to know whether civil law actually might have been adopted in the United States soon after the Revolution. However, it is clear that Roman law and civil law had lost their appeal for most American lawyers by the middle of the nineteenth century.³⁸ There were several reasons for this. The decade of the 1830s marked a sea-change in American leadership, with the poorly educated populist, Andrew Jackson, succeeding the classically educated John Quincy Adams in 1829.³⁹ One aspect of Jacksonian democracy was an anti-elitist sentiment that involved lowering bar admission standards to accommodate the less educated,⁴⁰ who had either “read law” or learned it as a trade in their law office apprenticeships.⁴¹ These new lawyers could not read Greek, Latin, or French and were not inclined to favor foreign law.⁴² In addition, the anti-English feeling and the antipathy to English common law associated with it had dissipated as the Revolution and the War of 1812 receded from memory. The common law by then was less likely to be seen as an antiquated, feudal system and more as an ancient source of rights against the central government, whereas codes were associated with tyrannies.⁴³ Moreover, by this time, a sufficient body of American case law and writing had developed to obviate the need to look abroad for authority.⁴⁴

Roman Law and Civil Law in the Later Nineteenth Century

¶16 However, Roman law and civil law continued to be of interest throughout the nineteenth century to American jurists in the codification movement, which began in the 1820s,⁴⁵ as well as to those in the movement to replace the legal apprenticeship system with law school education, which started around the same time⁴⁶ but took hold only much later in the century.⁴⁷

38. Reimann finds that “[a]round 1820, the die was cast against a wholesale adoption of the civil law.” Mathias Reimann, *Introduction*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920*, at 9 (Mathias Reimann ed., 1993). Stein holds that “[t]he 1820s and 1830s were the hey-day of civil law in the United States . . . [y]et by 1850 it had probably ceased to be a real force in the development of American law.” Stein, *supra* note 18, at 431–32.

39. Reinhold, *supra* note 5, at 19.

40. See ALBERT HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 39 (1953); see also FRIEDMAN, *supra* note 34, at 304; Alfred S. Konefsky, *The Legal Profession: From the Revolution to the Civil War*, in *2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 68, 84 (Michael Grossberg & Christopher Tomlins eds., 2008).

41. By 1848, the overwhelming majority of lawyers in the United States had read law on their own or had done a law office apprenticeship. See FRIEDMAN, *supra* note 34, at 606.

42. POUND, *supra* note 15, at 12–15.

43. See, e.g., Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlasical Jurisprudence of the Anticodification Movement*, 19 *YALE J.L. & HUMAN.* 149, 170 n.129 (1997); MILLER, *supra* note 15, at 240.

44. GILMORE, *supra* note 34, at 23.

45. See COOK, *supra* note 32, at ix. Stein’s statement that the 1820s and 1830s were the heyday of civil law in America refers to the fact that Edward Livingston’s Civil Code for Louisiana was published in 1825 and seemed to foretell the adoption by other states of civil law–based codes. Stein, *supra* note 18, at 431–32.

46. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 4–5 (1989) (noting the rise of private law schools and how, in the 1820s, “colleges began to provide an umbrella under which [the law schools] might find shelter”).

47. Jacksonian democracy is blamed for this false start. *Id.* at 10. But by the 1850s, “the pendulum began to swing back, with the re-founding of law schools.” *Id.*

The Codification Movement

¶17 It is hard for a modern American lawyer to fathom the intensity and importance of the codification debate. “No technical issue of law reform so agitated the elite and academic lawyers of the nineteenth century as codification.”⁴⁸ Many ordinary citizens complained of the complexity of law, and progressive forces wanted to achieve change through law, while lawyers were frustrated by the many conflicting statutes and case law among the states.⁴⁹ Jeremy Bentham (who coined the term “codification”)⁵⁰ was active during the early part of this period and provided inspiration for many,⁵¹ as did the French civil code of 1804.⁵² David Dudley Field (1805–1894), the most prominent American codification advocate, was a New England aristocrat who knew Latin and Greek.⁵³ Field was well disposed toward Roman and civil law and believed American law was at a stage of confusion similar to that of France before Napoleon and the Roman Empire before Justinian.⁵⁴ Field’s Code of Civil Procedure was partially adopted in New York in 1846,⁵⁵ and it and his Code of Criminal Procedure were enacted by many of the new western states following the Civil War.⁵⁶ However, the champions of true codification, in the sense of a *Code Civil*–style simplification and harmonization of law, lost to those who did not trust legislatures and who favored the judicial discretion, and flexibility, of the common law.⁵⁷ Moreover, the codifications that had been enacted were routinely amended by legislatures and construed like ordinary legislation by courts.⁵⁸

Law School Education in the Nineteenth Century

¶18 Although law teaching in colleges began in the United States in the late 1700s, the first wave of law schools did not appear until the nineteenth century—from about 1810 to 1860.⁵⁹ Roman law played a significant role in the curriculum of some of these early law schools. In the second decade of the 1800s at the Univer-

48. Konefsky, *supra* note 40, at 95.

49. *Id.*; see also COOK, *supra* note 32, at 5; David S. Clark, *The Civil Law Influence on David D. Field’s Code of Civil Procedure*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920*, *supra* note 38, at 63, 65.

50. MILLER, *supra* note 15, at 243.

51. Charles Noble Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344 (1899).

52. See Clark, *supra* note 49, at 67–68. Cook notes that the Napoleonic Code already was functioning in France and seemed applicable to the United States. COOK, *supra* note 32, at 71.

53. Irving Browne, *David Dudley Field*, 3 GREEN BAG 49 (1981).

54. Clark, *supra* note 49, at 73, 76.

55. Browne, *supra* note 53, at 51.

56. *Id.* at 52; see also FRIEDMAN, *supra* note 34, at 405–06; MAURICE EUGEN LANG, *CODIFICATION IN THE BRITISH EMPIRE AND AMERICA* 131 (1924).

57. See, e.g., MILLER, *supra* note 15, at 255 (characterizing the struggle as a contest between nationalism and cosmopolitanism).

58. FRIEDMAN, *supra* note 34, at 406.

59. M.H. HOEFELICH, *THE GLADSOME LIGHT OF JURISPRUDENCE* 6 (1988). Hoeflich notes that chairs in law were established at the College of William and Mary, Columbia College, and Penn (the College of Philadelphia) in the last two decades of the eighteenth century, but that most law schools per se, such as those at Harvard, Tulane, and Transylvania, did not arise until the next century. The Litchfield law school was an exception in the late 1700s. See also FRIEDMAN, *supra* note 34, at 318–22; STEVENS, *supra* note 46, at 4–10; WARREN, *supra* note 31, at 341–65; Hugh C. Macgill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790–1920*, in 2 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, *supra* note 40, at 36, 45–48.

sity of Maryland, David Hoffman gave thirty lectures on Roman law,⁶⁰ and Daniel Mayes included Roman law in the Transylvania law school curriculum in the 1830s.⁶¹ Others, such as Simon Greenleaf at Harvard, used Roman law for purposes of comparison with the common law.⁶² As Stein points out, the leading figures of legal education in this period viewed the civil law “as the source of that academic method of legal study they hoped would replace the traditional practical learning.”⁶³ However, as has been noted above, the practice of law as a profession was under attack in the third and fourth decades of the nineteenth century, and as a result, many law schools closed.⁶⁴

¶19 Still, law school education (and the legal profession) rebounded in the second half of the century, and, again, Roman law accompanied it to a significant extent. There were 31 law schools in the United States in 1830, 51 by 1880, 61 by 1890, and a total of 102 at the turn of the century.⁶⁵ It was in the later 1800s that many universities added law schools.⁶⁶

¶20 The reasons for this resurgence of the bar and of university-based legal education in the second half of the nineteenth century include the general institutionalization and industrialization of life in America and an associated interest in “scientific” progress in all areas of life,⁶⁷ as well as a reform movement in law and government that also led to the organization of the American Bar Association (ABA) by an elite group of lawyers in 1878.⁶⁸ Tellingly, one of the ABA’s first actions was to create the Committee on Legal Education and Admission to the Bar, headed by Carlton Hunt, a Louisiana lawyer.⁶⁹

¶21 The universities in which these new law schools were taking root looked toward continental European models, and especially to Germany, where law was seen as a science and the prestige of the professoriate was high.⁷⁰ Thus, it is not

60. Lewis C. Cassidy, *The Teaching and Study of Roman Law in the United States*, 19 GEO. L.J. 297, 301 (1930); see also Stein, *supra* note 18, at 424. Hoffman’s course of lectures is outlined in David Hoffman, *Syllabus of a Course of Lectures on Law*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, *supra* note 13, at 250.

61. Hoeflich, *supra* note 27, at 1725. Both Hoffman and Mayes believed law was a science and ought to be taught as one. See Hoeflich, *supra* note 17, at 114–18. Roman law was added to the Harvard Law School curriculum in 1829. Hoeflich, *supra* note 27, at 1730.

62. HOEFLICH, *supra* note 59, at 139–40.

63. Stein, *supra* note 18, at 423.

64. The reasons for this are disputed, but they include the Jacksonian democracy previously mentioned. STEVENS, *supra* note 46, at 7–10; see also Konefsky, *supra* note 40, at 83–84 (noting that from 1800 to 1840, lawyers lost control over bar admission standards).

65. FRIEDMAN, *supra* note 34, at 607.

66. *Id.* at 608–09. Friedman mentions the Universities of Michigan, Notre Dame, Georgetown, Howard, and Northwestern, among others.

67. See STEVENS, *supra* note 46, at 20–23.

68. See HARNO, *supra* note 40, at 71–73; see also Macgill & Newmyer, *supra* note 59, at 49. As to the elite nature of the ABA in its early decades, see LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 41 (2002).

69. HARNO, *supra* note 40, at 73.

70. Mathias Reimann, *A Career in Itself: The German Professoriate as a Model for American Legal Academia*, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920, *supra* note 38, at 169. He points to the German professoriate’s “elegant systematization of legal concepts and whose historical research [American law professors] deeply admired.” *Id.*; see also David S. Clark, *Tracing the Roots of American Legal Education: A Nineteenth Century German Connection*, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, *supra* note 13, at 495, 498.

surprising that many American law schools of the era viewed Roman law as the paradigm of the scientific legal system they ought to teach. The 1879 *Report of the ABA Committee on Legal Education and Admission to the Bar* reflected this view in referring to “the movement everywhere observable in favor of codification and the use of the symmetry and scientific accuracy of the Roman jurisprudence.”⁷¹ The committee, chaired by the civilian lawyer Hunt, lauded Roman and civil law at length⁷² and ended by recommending that state and local bars lobby for the creation in their jurisdictions “by public authority” of law schools “whose diplomas shall . . . be essential as a qualification for practicing law” and in which “the Civil or Roman Law” was part of the curriculum.⁷³

¶22 Absorbing Roman law also was viewed as a way of establishing law in the United States as a learned profession, as opposed to a trade, inasmuch as it provided a broad historical understanding of the law in its ethical, political, and economic aspects.⁷⁴ Introducing Roman law into the curriculum also was often associated with making law a “gentlemanly” profession. Hoeflich points this out nicely in quoting Simon Greenleaf’s closing address to Harvard Law School students a few decades earlier when Greenleaf told them: “[L]aw school is ‘an association of students’ who are ‘gentlemen’ whose object is to make ‘good lawyers of good men . . .’”⁷⁵ Hoeflich goes on to note that Greenleaf and others in what he refers to as the Boston circle saw lawyering as evolving into a “broadly learned profession comprised of gentlemen.”⁷⁶ This is the type of legal profession the ABA and university law schools were seeking to create in the late 1800s.⁷⁷

¶23 However, the explosive growth in the number of law schools that occurred in the late 1800s (and on into the early 1900s) included many nontraditional institutions, whose philosophies and goals differed from those of the ABA and university law schools. Many of them were not affiliated with universities, most were urban, and many had part-time programs, including evening courses, that were aimed at immigrant populations and working people who could not afford to attend full-time.⁷⁸ The number of evening law schools, which typically were not university-affiliated, grew from ten to forty-five between 1890 and 1910.⁷⁹ The YMCA, for instance, founded numerous part-time, night law schools in big cities

71. *Report of the Committee on Legal Education and Admission to the Bar*, 2 ANN. REP. A.B.A. 209, 220 (1879).

72. *Id.* at 221–22.

73. *Id.* at 235–36.

74. Munroe Smith, *Roman Law in American Law Schools*, 45 AM. L. REG. 175, 178–81 (1897). Smith goes on to opine that an even stronger case could be made for teaching Roman law to the extent law is a science. *Id.* at 181–84.

75. Hoeflich, *supra* note 27, at 1729 (quoting an undated, unpaginated manuscript at the Harvard Archives).

76. *Id.* at 1729–30.

77. The University of Iowa, for instance, offered a course in Roman law in 1870. Lewis C. Cassidy, *The Teaching and Study of Roman Law in the United States*, 19 GEO. L.J. 297, 302 (1931).

78. STEVENS, *supra* note 46, at 74–75; see also FRIEDMAN, *supra* note 68, at 36–37.

79. FRIEDMAN, *supra* note 68, at 36. See also STEVENS, *supra* note 46, at 75–76, for statistics about the number of law schools and law students in the various sorts of programs in this period. For example, while there were 1200 law students in twenty-one law schools in 1870, the numbers had grown to 4500 students in sixty-one schools by 1890.

starting in the 1890s.⁸⁰ Thus, at the turn of the twentieth century, conflicting currents were sweeping through the legal profession and legal education.

Roman Law in Twentieth-Century America

¶24 While the legal profession and legal education were thriving in the United States as the twentieth century began, they lacked cohesion. The elite bar and university law schools saw law as a learned profession for gentlemen, whereas the less affluent (who often did not have good educational backgrounds)⁸¹ and the schools that served them tended to see law more as a technical skill that could lift life prospects and solve social problems. Economic interests were at stake in addition to these philosophical ones. Friedman puts it clearly: “These evening and part-time schools supplied the ranks of Greek lawyers, Jewish lawyers, Irish and Italian lawyers, and other lawyers who took care of clients in immigrant communities The upper-crust lawyers worried about the prestige of their profession . . . and they worried about money, too.”⁸² Hence, the well-established bar and traditional law schools suggested solutions that at once reflected economic self-interest, perhaps anti-immigrant bias, and possibly a sincere concern for professional competence: raising standards for legal education and for admission to the bar.⁸³ A detailed examination of these movements is beyond the scope of this article, but they are relevant here to the extent that many of those involved in these movements also tended to value knowledge of Latin and Roman law and to see their continued relevance to law and legal education in the United States.

¶25 In the 1920s, the AALS and ABA pushed hard to raise standards for law school admission; this included an ABA recommendation for at least two years of college education before law school.⁸⁴ As we shall see, given the common curricula of higher educational institutions in the era, this meant that the students meeting these standards for the “high-entrance” law schools would have learned Latin and have studied the classics.⁸⁵ Around this same time, twenty AALS law schools offered

80. Steven C. Bahls & David S. Jackson, *The Legacy of the YMCA Night Law Schools*, 26 *CAPITAL U.L. REV.* 235, 236 (1997).

81. The founder of the John Marshall Law School in Chicago admitted that his night students were not generally “as well prepared intellectually for the law” as his day students. FRIEDMAN, *supra* note 68, at 37. In 1927, thirty-two states had no educational requirements for prelaw studies, and eleven mandated only a high school diploma. See STEVENS, *supra* note 46, at 174.

82. FRIEDMAN, *supra* note 34, at 36.

83. See *id.*; see also STEVENS, *supra* note 46, at 92–103; Macgill & Newmyer, *supra* note 59, at 56–59, 61–67. The Association of American Law Schools (AALS) was founded in 1900 as a result of these concerns. See STEVENS, *supra* note 46, at 96–103; Macgill & Newmyer, *supra* note 59, at 57–59. Stevens notes that “the motives behind the urge of the AALS, eventually joined by the ABA, to reform legal education in the United States are complex.” STEVENS, *supra* note 46, at 99. Regarding raising standards as possibly involving nativism, see JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* 29–35 (2013); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* 1, 17–18 (1997).

84. STEVENS, *supra* note 46, at 172.

85. See *infra* notes 126–145 and accompanying text at ¶¶ 40–47. “Low-entrance” full-time law schools, on the other hand, required “little or no prior education.” STEVENS, *supra* note 46, at 124 n.12.

Roman law,⁸⁶ the Riccobono Seminar on Roman Law in America was being founded at the Catholic University of America,⁸⁷ and at least one law professor was suggesting that Roman law should be required for admission to the bar in every American jurisdiction, because “it would lead . . . to a diminution of the present professional incompetency.”⁸⁸ So, when Scott, Blume, and Pharr were laboring at their translations of Roman law in the first part of the twentieth century, they were in harmony with the positive attitudes toward Roman law held by elite members of the bar and traditionalist legal educators.

¶26 Moreover, they were supported to some extent by another movement of the era that, at first glance, might appear to have nothing whatsoever to do with Roman law: the American Law Institute’s Restatement of the Law project.

The Restatements and Roman Law

¶27 The American Law Institute (ALI) was founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”⁸⁹ The report that recommended creating the ALI⁹⁰ was produced by a committee whose membership reads like a *Who’s Who* of elite American lawyers, judges, and law professors, including Elihu Root (chairman), George W. Wickersham (vice chairman and subsequently the Institute’s first president), William Draper Lewis (secretary and then the ALI’s first director), Joseph H. Beale, Benjamin Cardozo, Arthur L. Corbin, Ernst Freund, Learned Hand, Roscoe Pound, Harlan F. Stone, John H. Wigmore, and Samuel Williston.

¶28 The Restatements and their promoters are relevant here for two reasons. First of all, many ALI members were familiar with and well disposed toward Roman law and codes; many of them later provided the positive comments Pharr used in his attempts to obtain grant support for his Roman law translation proj-

86. Cassidy, *supra* note 60, at 302. When Thomas Swann became dean of Yale Law School in 1916, he recommended the school emphasize the areas of criminology, administrative law, international law, and Roman law. See STEVENS, *supra* note 46, at 135.

87. Salvo Randazzo, *Roman Legal Tradition and American Law: The Riccobono Seminar of Roman Law in Washington*, 1 ROMAN LEGAL TRADITION 123 (2002), <http://romanlegaltradition.org/contents/2002/RLT-RANDAZZO1.PDF>.

88. Charles P. Sherman, *The Nineteenth Century Revival of Roman Law Study in England and America*, 23 GREEN BAG 624, 626 (1911). Here, Sherman was following up on remarks made by another in a speech to the ABA that distinguished the “better equipped” university law school graduates from the less well-equipped graduates of part-time and night law schools. See Frederic R. Coudert, *The Crisis of the Law and Professional Incompetency*, 36 A.B.A. REP. 677, 682 (1911); see also MOLITERNO, *supra* note 83, at 31 (commenting on Coudert’s and other elite bar members’ association of immigrants and part-time and night law schools with incompetence).

89. William Draper Lewis, *Work of the American Law Institute*, 9 A.B.A. J. 636 (1923).

90. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of the American Law Institute*, in 1 A.L.I. PROC. 1 (1923); see also William Draper Lewis, *Plan to Establish American Law Institute*, 9 A.B.A. J. 77 (1923) (noting that the report was largely funded by a \$25,000 grant from the Carnegie Corporation). The Carnegie Corporation also agreed to finance the ALI with a grant of \$110,000 per year through 1933. Lewis, *supra* note 89, at 636.

ect.⁹¹ Second, to a significant extent the Restatements were a continuation, or permutation, of the Roman and civil law–influenced codification movement (as can be seen in the rationale for the ALI’s creation provided above).⁹² Views vary as to the role of the Restatements in American legal history—whether, for example, they were conservative or progressive—and this article does not delve into that debate.⁹³ We shall look only at how the Restatements implicated Roman law and the extent to which both were of interest to the elite bar and therefore may have helped create the atmosphere in which Scott, Blume, and Pharr conducted their arduous work of translating ancient Roman law.

¶29 In his report on the ALI’s organizational meeting, William Draper Lewis emphasized that the committee was opposed to codification owing to the rigidity of codes compared with the flexibility of common law and the ability of judges in that system to elucidate the law in greater detail.⁹⁴ Friedman agrees that the Restatement drafters wanted to save the common law system and head off codification,⁹⁵ while Williston, one of the Restatement drafters, explained that they were attempting to procure some of the advantages of codification without the disadvantages.⁹⁶

¶30 However, some saw the Restatements either as a precursor to codification or a sort of quasi-codification. Williston himself actually was in the former group. Discussing codification he opined: “It has been the history of law in every other civilized country that after a customary or common law has developed to a certain degree . . . a Code has followed . . . [M]y own belief is that we shall repeat the history of other countries.”⁹⁷ He then went on to say, referring to the Restatements, that “if we are going to do so, it is highly desirable that we should have something that will be a good Code. This Restatement . . . after [having been] put through the mill, so to speak . . . will serve as a better foundation for a Code . . . than any country has ever had before.”⁹⁸ Mitchell Franklin, of the Tulane College of Law faculty, viewed the Restatements similarly, writing that “[t]he American Romanist . . . will compare this enterprise with corresponding enterprises in modern civil law,”⁹⁹ and noting Williston’s awareness that the Institute’s texts are “dress rehearsals for

91. See *infra* notes 108–109 and accompanying text at ¶ 35.

92. See Grossman, *supra* note 43, at 149 (noting that “the codification impulse lasted into the twentieth century, as reflected in the Uniform Code and Restatement projects”); see also Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979); Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435 (2000).

93. See, e.g., FRIEDMAN, *supra* note 34, at 676; GRANT GILMORE, *THE DEATH OF CONTRACT* 65–67 (2d ed. 1995); N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990); White, *supra* note 83.

94. Lewis, *supra* note 89, at 636. George Wickersham, ALI president, reiterated this in his address at the Institute’s second meeting, stating this was not an endeavor to formulate a code of law for legislative enactment. *Progress Is Made in Restatement and Classification of Law*, 10 A.B.A. J. 157, 158 (1924).

95. FRIEDMAN, *supra* note 34, at 676.

96. Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1931).

97. *Id.* at 41.

98. *Id.*

99. Mitchell Franklin, *Restatement of the Law of Contracts*, 8 TUL. L. REV. 149, 149 (1933) (book review).

codes.”¹⁰⁰ Franklin expounded on this position at length in an article whose title clearly states his thesis: “Restatement as Transitional to Codification.”¹⁰¹

¶31 Others, while not necessarily viewing the Restatements as a preliminary stage of codification, connected them with Roman law. One writer referred to them “as a sort of [Justinian] *Digest* without its statutory force,¹⁰² while an ALI member making the same connection saw the Restatements as being more like the glossators’ annotations on the *Digest*.¹⁰³

¶32 Even the ALI officials who most stoutly denied that the Restatements were attempts to codify connected them to Roman law. Lewis compared the “difficulty and magnitude” of the project to the “codification and exposition of Roman law undertaken in the reign of Justinian,”¹⁰⁴ while Wickersham repeated the assertion made in the original committee report: “As a scientific, constructive legal work, there has been nothing to compare with it, not even the work of framing the Napoleonic Code, since under the direction of Justinian, the Roman law was given systematic expression.”¹⁰⁵

¶33 For reasons that will be described below, it is certain that Blume was aware of the Restatement movement and its connection to Roman law, and it is highly likely that Scott and Pharr were as well. Moreover, members of the elite bar knew and valued Roman law. Thus, the translators were working in an atmosphere that encouraged their endeavors.

The Classics and Roman Law in the Elite Bar

¶34 The classics and Roman law continued to be part of higher legal culture in the United States from the late nineteenth century into the early twentieth century. Hoeflich notes how “[d]uring the last two decades of the nineteenth century and the first two of the twentieth, it was difficult to avoid seeing an article on [Roman and civil law] if one read the legal literature.”¹⁰⁶ This interest was supported by the ongoing importance placed on offering a classical education to students. We shall look at this in detail when we discuss the education Scott, Blume, and Pharr had to prepare them to translate Latin, but it will be sufficient and convenient here to again refer to Hoeflich, who points to a 1905 symposium on the continued teaching of Latin and Greek to undergraduates, which included a discussion on the importance of classical languages as “a pre-professional subject for would-be lawyers.”¹⁰⁷

100. *Id.* at 149 n.2.

101. Mitchell Franklin, *Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934).

102. H.G. Hanbury, *Some Remarks on Law and Legal Education in the United States* (pt. 2), 11 BELL YARD: J. L. SOC’Y SCH. L. 8, 10 (1933).

103. Henry Upson Sims, *The Restatement of Law by the American Law Institute*, 3 ALA. LAW. 383, 391 (1942); see also JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW 851 (2009) (noting that the Restatements are “the closest analogue to the civil law of European civil codes of private law”).

104. Lewis, *supra* note 89, at 636.

105. George W. Wickersham, *Address of President Wickersham*, 19 A.B.A. J. 327 (1933) (quoting the report).

106. M.H. HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 115 (1997).

107. *Id.* Hoeflich writes: “[S]everal practicing lawyers argued that Latin was particularly well suited as a prelaw subject, especially if the study of the language included the elementary legal literature (including Justinian’s *Institutes*).” *Id.*

¶35 Illustrative of the elite bar's interest in Roman law in this era is the list of notables whose endorsements Pharr gathered in 1933 for his *Project for a Variorum Translation into English of the Entire Body of Roman Law*.¹⁰⁸ Fifteen of them were members of the American elite bar: officers or members of the ALI or of important bar associations, U.S. Supreme Court Justices, former high U.S. government officials, and prominent law faculty members.¹⁰⁹ So, it was not shocking when, in May 1938, U.S. Supreme Court Justice Pierce Butler attended Justice Blume's address to the Riccobono Seminar on "The Code of Justinian and Its Value,"¹¹⁰ nor was it surprising that Justice Blume would attend the ALI meeting while he was in Washington, D.C., to deliver that paper on Roman law.¹¹¹ Moreover, it was not unusual at the time for other legal academic worthies who today are commonly associated with subjects other than Roman law, such as Pound, Wigmore, and Williston, to be interested also in Roman, civil, and comparative law.¹¹² Wigmore, for instance, suggested that the AALS pursue the translation into English of foreign legal scholarship that resulted in the Continental Legal History series.¹¹³ None of this was extraordinary for the period because these men had classics-oriented educations—like the Founders, and like Scott, Blume, and Pharr—and one gets the distinct sense from reading of their activities that showing an appreciation for Roman law was one way elite lawyers verified their status.

Scott, Blume, Pharr and Classically Oriented American Education

¶36 Although they were from diverse socioeconomic backgrounds and attended very different sorts of schools, Scott, Blume, and Pharr all had educations that

108. Clyde Pharr, *A Project for a Variorum Translation into English of the Entire Body of Roman Law* app. (1933) (unpublished seven-page proposal, with twelve-page appendix, "Comments on the Project," and a one-page supplement) (on file with author). Pharr created several iterations of this project over the years in an effort to obtain funding. He first proposed it to the American Philological Association in 1932. See 63 *TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N*, at xxxi (1932).

109. Clyde Pharr, *Comments on the Roman Law Project* (unpublished manuscript, on file with author). These commenters were Benjamin Cardozo (Supreme Court), Zechariah Chafee (Professor, Harvard Law School), John W. Davis (N.Y. Bar Association president), Albert Harno (Dean, University of Illinois College of Law), Charles Evans Hughes (Supreme Court), William Draper Lewis (ALI), Justin Miller (Dean, Duke Law School), George Wharton Popper (ALI; former U.S. senator), Roscoe Pound (Dean, Harvard Law School), Owen J. Roberts (Supreme Court), Elihu Root (ALI; former U.S. secretary of state), Harlan F. Stone (Supreme Court), J.B. Thayer (Professor, Harvard Law School), Guy Thompson (ABA president), and George W. Wickersham (ALI; former U.S. attorney general). Interestingly, seven of the members of the committee that wrote the report recommending the ALI's creation also endorsed Pharr's project. That committee and its reports are discussed at *Report of the Committee*, *supra* note 90; Lewis, *supra* note 90; Lewis, *supra* note 89, at 636.

110. Salvatore Riccobono, *Il Diritto Romano in America*, 17 *BOLLETTINO DELL'ISTITUTO DI DIRITTO ROMANO* 335, 416 (1938).

111. As chief justice of the Wyoming Supreme Court, Blume was an ex-officio ALI member. See *Ex Officio Members and Those Appointed to Represent Them*, 15 *A.L.I. PROC.* 20 (1938).

112. Wigmore and Williston also attended the Riccobono Seminar at which Blume gave his paper, as did Harvard Professor Joseph Beale, who noted that it was Pound "who really brought the spirit of Roman law to Harvard." Riccobono, *supra* note 110, at 416, 425. In addition, Pound, Wigmore, and Williston all were officers or editors of the ABA's Comparative Law Bureau. See *Organization and Work of the Bureau of Comparative Law*, 1 *A.B.A. J.* 591, 592 (1915).

113. HARNO, *supra* note 40, at 94–95.

connected them to the ancient Greeks and Romans and that provided them with the basic tools they needed to translate ancient Roman laws.

Samuel Parsons Scott

¶37 S.P. Scott was born into a wealthy family in Hillsboro, Ohio, only ten years after the death of Founder and fourth U.S. president James Madison, so it was to be expected that Scott would be provided a classics-based education.¹¹⁴ As already has been described, a Latin grammar school education had been the sine qua non for college-bound students, such as Madison, who were preparing for careers in the ministry, medicine, or law, in the Colonial and early post-Revolutionary era.¹¹⁵

¶38 Despite some efforts to make education in the United States more practical and to deemphasize the study of Latin and Greek, the classical curriculum of grammar schools and colleges remained much the same into the first decades of the 1800s.¹¹⁶ Latin grammar schools gradually gave way to “academies,” which taught Latin and Greek less intensively but that still “retained the study of Latin, and usually Greek through the medium of English.”¹¹⁷ It seems that Scott attended such an academy in Hillsboro, Ohio, before going on to earn an A.B. degree from Miami University (Ohio), and Phi Beta Kappa honors, in 1867.¹¹⁸ At Miami University, Scott’s studies were heavily weighted toward the classics; according to his college catalog, twenty of the fifty-one required courses were on Greek or Latin literature or history (e.g., Heroditus, Greek History, Livy, and Roman history).¹¹⁹ Scott’s university education also included training in the classical art of rhetoric, and he gave a skillful valedictory address at his graduation.¹²⁰

Fred H. Blume

¶39 Blume’s background was much less privileged than Scott’s, yet he also obtained the fundamentals of a classics-based education that made him later believe he could translate the Justinian Codex and helped equip him to do so. He was born in Winzlar, Germany (near Hannover), in 1875, where his parents, Wilhelm and Caroline, owned a small forty-acre farm.¹²¹ Friedrich, as he was christened, almost certainly attended school, for long before then German states had mandated compulsory elementary school education.¹²² While it is not known which of the four types of school he attended, we can be sure he was literate when he immigrated to the United States in 1887 to join his elder brother Wilhelm and

114. See Kennedy, *supra* note 7, at 119–20.

115. See *id.*; WALSH, *supra* note 5, at 33–68.

116. See Reinhold, *supra* note 5, at 27.

117. BUTTS & CREMIN, *supra* note 6, at 126–27.

118. Kearley, *supra* note 3, at 6–7.

119. FORTY-FIRST ANNUAL CIRCULAR OF MIAMI UNIVERSITY 11–12 (Oxford, Ohio 1866). These were for the “College,” in which he was enrolled, as opposed to those for the “English and Scientific” department. Scott went on to earn an A.M. from the university as well, but nothing is known about the requirements for that degree.

120. Kearley, *supra* note 3, at 6.

121. Michael Golden, *Journey for the Pole: The Life and Times of Fred H. Blume, Justice of the Wyoming Supreme Court*, 28 LAND & WATER L. REV. 193, 202–03 (1993).

122. See GORDON A. CRAIG, GERMANY, 1866–1945, at 186 (1978).

that he knew some French.¹²³ The family's economic prospects must not have been good, even by the standards of that place and time, for each of the three sons eventually emigrated to the United States.¹²⁴

¶40 In the United States, Fred (as he became) attended rural or small-town schools in several midwestern states while working as a farmhand.¹²⁵ He settled in Audubon, Iowa, where he graduated from high school in 1894, in a class of 13.¹²⁶ Yet he learned Latin even in that small-town high school, and he helped some of his classmates with it.¹²⁷

¶41 The admission requirements of the State University of Iowa (now the University of Iowa) for the bachelors in philosophy, which Blume earned there in 1898, prove that high school education in Iowa must have been rich in the classics. It is not known which set of requirements Blume qualified under, but both courses included Group I, Ancient Languages. The Philosophy A Course entrance requirements consisted of seven or nine terms (depending on their length in the applicant's high school) of ancient languages, including Latin grammar, Caesar (four books), Cicero (four orations), Virgil (six books) with prosody, Latin prose composition, Greek grammar, and Xenophon's *Anabasis* (two books). Taking the Philosophy B Course path allowed a student to substitute science or modern languages (German or French), but B Course students still had to take fifteen credits in Latin during their first year at the university and nine in ancient history, and in the second year they had to pass fifteen hours of Latin or French.¹²⁸ In short, regardless of which set of requirements he satisfied, Blume could not have earned his degree without having studied a significant amount of Latin, and some Greek,¹²⁹ and clearly this sort of background was not uncommon among state university graduates of the era.

¶42 Blume, like Scott, also learned the classical art of rhetoric. Blume was a member, and ultimately president, of a literary, or forensic, society called the Irving Institute, which was part of the university's Debating League whose teams engaged in both intra- and intercollegiate debate.¹³⁰ Blume remained proud all through his life of these endeavors.¹³¹

123. Golden, *supra* note 121, at 203, 206; Frank Mantz, *Audubon High School Graduates of 1957 Can Get Inspiration from Blume Story*, AUDUBON NEWS-GUIDE, May 16, 1957 (unpaginated photocopy; on file with author). The types of school were the *Gymnasium*, *Realgymnasium*, *Oberrealschule*, and *Volksschule*. CRAIG, *supra* note 122, at 189–90. Blume may have attended the second or third listed, given that they taught modern languages. *Id.*

124. Golden, *supra* note 121, at 203–04.

125. *Id.* at 203–05.

126. *Id.* at 206.

127. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Clyde Pharr, Prof., Vanderbilt Univ. (Dec. 28, 1943) (on file with the Wyo. State Archives); Mantz, *supra* note 123.

128. CATALOGUE OF THE STATE UNIVERSITY OF IOWA, IOWA CITY IOWA, 1894–95, at 12–19, <http://hdl.handle.net/2027/uiug.30112076172102?urlappend=%3Bseq=16>.

129. Blume's university Greek notebooks (heavily corrected in red) are among the materials he bequeathed to the University of Wyoming.

130. HISTORY AND ALUMNI REGISTER OF THE IRVING INSTITUTE 15, 50 (1908), <http://hdl.handle.net/2027/loc.ark:/13960/t1pg2m314>.

131. In his eighties, Blume referred to his forensic activities in letters to University of Wyoming officials stating the highlights of his career in connection with his receipt of an honorary degree. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to R.R. Hamilton, Dean, Univ. of Wyo. Coll. of Law (Oct. 29, 1956) (on file with the Wyo. State Archives); Letter from Fred Blume, Justice, Wyo. Sup. Ct.,

Clyde Pharr

¶43 Clyde Pharr was the least privileged of the three translators. He was born February 17, 1883, near Saltillo, Texas, the son of a poor Texas farmer and his wife.¹³² He worked on the farm most of the year and attended a country school only two or three months a year—in the winter, when his labor was not needed.¹³³ After running away from home several times, Clyde was fortunate in being sent away to school in Evans Point, Texas, where he was inspired to learn by his teacher, A.S. Harper.¹³⁴ Pharr's late-found enthusiasm for education convinced his father to allow him to start East Texas Normal College, some forty miles distant, in Commerce, Texas, in 1901, when Clyde was eighteen.¹³⁵

¶44 East Texas Normal College (ETNC) was typical of the many normal schools of that era in having as its primary function the training of young men and women to teach in rural elementary schools.¹³⁶ Public normal schools in the United States arose in New England in the third decade of the 1800s and increased in number and geographical extent throughout the following decades, so that there were 139 by 1900, shortly before Pharr began at ETNC.¹³⁷

¶45 The original basic normal school course of studies was a two-year certificate program, not one ending with a degree. However, as the country industrialized and urbanized, normal schools raised their standards and expanded their goals;

to George, "Duke" Humphrey, President, Univ. of Wyo. (Mar. 22, 1957) (on file with the Wyo. State Archives). As a young politician on the rise in Wyoming, Blume employed his oratorical skills. A local newspaper refers to Senator F.H. Blume's memorial address as "impressive and eloquent." *Elks Hold Memorial*, SHERIDAN POST, Dec. 5, 1911, at 10.

132. There is confusion over the year of Pharr's birth. Most sources give it as 1885. See, e.g., BIOGRAPHICAL DICTIONARY OF NORTH AMERICAN CLASSICISTS 498 (Ward W. Briggs ed., 1994); In Memoriam, Clyde Pharr (2001), <http://www.utexas.edu/faculty/council/2000-2001/memorials/SCANNED/pharr.pdf> (unpublished Report of the Memorial Resolution Committee for Clyde Pharr, University of Texas, Austin). However, public records, such as the Social Security Death Index and passport and draft board records, have it as 1893. See FAMILYSEARCH, <https://familysearch.org> (last visited Aug. 24, 2015). Also stating 1883 is 1 HISTORY OF THE CLASS, 1906 YALE COLLEGE 259 (1906), <https://archive.org/details/historyofclass01yale>, which is likely to have obtained its information directly from Pharr. Therefore, I have chosen the earlier year.

133. Letter from Clyde Pharr, Prof., Vanderbilt Univ., to Dr. S.H. Whitney, E. Tex. State Teacher's Coll. (Jan. 12, 1929) (on file with author).

134. *Id.*

135. *Id.*

136. See generally *Normal School*, in NEW WORLD ENCYCLOPEDIA 1, http://www.newworldencyclopedia.org/entry/Normal_school (last visited Aug. 24, 2015); Julie A. Helton, A Historical Analysis of Teacher Preparation Program Content Beginning with Teacher Normal Colleges in 1839 Through School District Alternative Certification Programs in 2007, at 23–25 (2008), http://etd.fcla.edu/CF/CFE0002139/Helton_Julie_A_200805_EdD.pdf (unpublished D.Ed. dissertation, University of Central Florida). For information about ETNC specifically, see JAMES MARCUS BLEDSOE, A HISTORY OF MAYO AND HIS COLLEGE (1946); DONALD E. REYNOLDS, PROFESSOR MAYO'S COLLEGE: A HISTORY OF EAST TEXAS STATE UNIVERSITY (1993); David Gold, *Where Brains Had a Chance: William Mayo and Rhetorical Instruction at East Texas Normal College, 1889–1917*, 67 C. ENG. 311 (2005); Ralph Goodwin, A Light Which Cannot Be Hid: The Story of East Texas State University, 1889–1989, <http://dmc.tamuc.edu/cdm/ref/collection/historic-et/id/3622> (last visited Aug. 24, 2015) (unpublished incomplete manuscript).

137. ROGER L. GEIGER, THE HISTORY OF AMERICAN HIGHER EDUCATION 272–73 (2015). Forty-two opened in ten new states in the 1890s, which put ETNC on the leading edge of this new wave. *Id.* at 273.

they made four years of secondary education an entrance requirement and began offering degrees.¹³⁸

¶46 ETNC was founded in 1889 by William L. Mayo as a “first-class private college, based on Normal principles.”¹³⁹ In the American West, normal schools often substituted for liberal arts colleges or regional universities, and ETNC developed aspects of the latter two. At the end of the first year, its students could take an exam to obtain their temporary elementary school teaching certificate. In this way, the students could “keep school” (teach in elementary school) periodically to pay their way through additional years at ETNC.¹⁴⁰ By 1894, ETNC had secondary degree and B.S. programs, and plans were underway for a bachelor of literature, as well as philosophy and arts programs.¹⁴¹

¶47 To acquire his B.S. degree in 1903, alongside future Speaker of the U.S. House of Representatives Sam Rayburn,¹⁴² Pharr had to take four terms of Latin, including Caesar and Virgil.¹⁴³ For the A.B. degree he earned two years later, Pharr was required to take the “classics course,” which included four more terms of Latin (encompassing Cicero, Horace, Livy, and Tacitus), as well as a year’s study of Greek (or he might have substituted two full courses of German, French, or Spanish).¹⁴⁴ Moreover, Mayo emphasized public speaking throughout the curriculum, so it is likely that Pharr learned the same sort of rhetorical skills as Scott and Blume.¹⁴⁵ A year after graduating from ETNC, Pharr earned an A.B., with honors, from Yale University in classical languages and literature and gave a philosophical oration there.¹⁴⁶ He received his Ph.D. in classics, as an Abernethy Fellow, from Yale in 1910.¹⁴⁷ Pharr went on to a successful career as a professor of classics and wrote Greek and Latin textbooks, revised editions of which remain in use.¹⁴⁸ Thus, Pharr not only must have been an excellent student, but little ETNC must have given him a very sound educational foundation.¹⁴⁹

138. *Normal School*, *supra* note 136; Helton, *supra* note 136, at 30, 34–35.

139. REYNOLDS, *supra* note 136, at 3.

140. See Goodwin, *supra* note 136, at 85–86. Pharr was one of those who “kept school.” *Id.* at 86.

141. REYNOLDS, *supra* note 136, at 13. Like many normal schools, the missions of which changed over the years, ETNC has had many names: East Texas Normal College (1889–1917), East Texas State Normal College (1917–1923), East Texas State Teacher’s College (1923–1957), East Texas State University (1962–1996), and Texas A & M University at Commerce (1996–). For a description of how normal schools evolved into teachers’ colleges, see GEIGER, *supra* note 137, at 435–38.

142. See, e.g., C. DWIGHT DOROUGH, MR. SAM 73 (1962). A picture of Pharr and Rayburn, and the rest of the ETNC class of 1903, is available at BRISCOE CTR. FOR AM. HISTORY, UNIV. OF TEXAS, http://www.cah.utexas.edu/db/dmr/image_lg.php?variable=di_04299 (last visited Aug. 24, 2015).

143. See Goodwin, *supra* note 136, at 177.

144. See BLEDSOE, *supra* note 136, at 234–35; REYNOLDS, *supra* note 136, at 13.

145. Gold, *supra* note 136, at 320–21. At his 1903 graduation ceremony, Pharr gave an oration entitled “Deeds and Endeavor.” Goodwin, *supra* note 136, at 133.

146. HISTORY OF THE CLASS OF 1906, YALE COLLEGE 78, 81 (Edwin Rogers Embree ed., 1911).

147. For a full list of Pharr’s degrees, see BIOGRAPHICAL DICTIONARY OF NORTH AMERICAN CLASSICISTS, *supra* note 132, at 498. See also In Memoriam, Clyde Pharr, *supra* note 132. Pharr also was an Archeological Institute of America fellow at the American School of Classical Studies in Athens from 1910 to 1912. *Id.*

148. See Hall, *supra* note 4, at 2. The latest editions of his texts are HOMERIC GREEK (Clyde Pharr, John Wright & Paula Debnar eds., 4th ed. 2012); VERGIL’S AENEID (2007).

149. ETNC graduated many students who went on to highly successful careers. See, e.g., BLEDSOE, *supra* note 136, at app. for pictures and descriptions of some of them.

Early Twentieth-Century Support for Ancient Law Translations

¶48 S.P. Scott, Fred Blume, and Clyde Pharr participated in the high American culture of the time, which celebrated the ancient Greek and Roman basis of Western civilization. This culture was one factor in the elite bar's involvement in the codification movement of the latter part of the nineteenth century and in the Restatement movement that began in the early twentieth century, as has been shown above. Scott and Blume were part of this legal subculture, whereas Pharr's advanced education and subsequent career in the classics provided him with a similar orientation. For reasons that remain unclear, Pharr changed his research agenda in midcareer to narrow his focus toward translating Roman law,¹⁵⁰ and he too became connected with the elite legal culture. This connection was encouraging of their translation endeavors, but each man was, in the end, motivated mainly by his own desire to make a lasting contribution to Western culture.

¶49 The reasons for Scott's willingness to dedicate so much of his life to translating ancient Roman law has to be inferred from surrounding circumstances because none of his correspondence survives.¹⁵¹ It appears as though Scott's interest in Roman law derived from his study of European history. He saw law mainly as a historical artifact, and he began to translate it out of his fascination with the history and culture of Spain. In his preface to *The Visigothic Code*, Scott approves of Gibbon's statement that "Laws form the most important portion of a nation's history," before he goes on to remark on the laborious nature of his translation work.¹⁵²

¶50 Scott elaborates on this theme in his preface to *The Civil Law*, writing: "No more faithful or suggestive picture of the rise, development, and destruction of a race can be obtained, than by the philosophical study of the laws by which it was governed . . . and to no state is this remark more applicable than to Rome."¹⁵³ He then connects Roman law to Western civilization in asserting that "[t]he rules of the civil law, as laid down and promulgated by Justinian, *more than any other factor*, have contributed to the establishment of modern civilization, to the maintenance of good government and public order, and to the preservation of the vital interests of society."¹⁵⁴ Scott goes on to say that the translation of the *Corpus Juris Civilis* took him eight years to complete (although he actually spent more time than that on it, inasmuch as he clearly had to translate some of the *CJC* in the course of translating the Visigothic Code).¹⁵⁵

¶51 Moreover, although Scott lived largely as a recluse in Hillsboro in his later years,¹⁵⁶ he had connections with elite legal professionals in the ABA. For more than twenty years Scott was a member of the ABA's Comparative Law Bureau,

150. See Hall, *supra* note 4, at 2–3.

151. Scott was estranged from his wife at the time of his death, referring in his will to her alleged "insults, outrages, cruelties, disgrace and humiliation which she has constantly and without reason, during my entire married life, heaped upon me." See Kearley, *supra* note 3, at 4 n.15 and accompanying text. Hence, she doubtlessly had no desire to keep his correspondence or otherwise perpetuate his memory.

152. THE VISIGOTHIC CODE (FORUM JUDICUM), at v (S.P. Scott ed. & trans., 1910).

153. THE CIVIL LAW 29 (S.P. Scott ed. & trans., 1932).

154. *Id.* at 48–49 (emphasis added).

155. *Id.*

156. See Kearley, *supra* note 3, at 4, 10–14.

which published two of his translations.¹⁵⁷ He corresponded with Judge Charles S. Lobingier, a fellow bureau editor and Roman law scholar, who urged the bureau to move forward with the publication of *Las Siete Partidas*.¹⁵⁸ The connections among members of this group also are shown by Dean Wigmore's awareness that a posthumous publication of Scott's Justinian translation was in the offing.¹⁵⁹

¶52 Thus, it is reasonable to deduce from the above that Scott consciously undertook the onerous task of translation, in part, on account of its historical significance and his desire to become a link in the chain of transmission for some of the fundamental documents of Western culture and that he likely was encouraged in this work by the elite legal culture of the day with which he was in contact.

¶53 Fred Blume was a man of great energy, who cared about both current events and the broad sweep of history. When his early political ambitions were blocked, he transferred his efforts to the study of Western civilization and thence to the translation of Roman law.¹⁶⁰ His correspondence reveals his motivations clearly.

¶54 In describing to Pharr the history of his translation, Blume wrote that, on being informed that no English translation of either the Theodosian or Justinian codes existed, "I wondered if I might not be able to add my little mite of culture to the world by translating at least one of these Codes."¹⁶¹ He also remarked in a letter to Thomas Swann, Dean of Yale Law School: "It is only occasionally that a person can be found who has either the ability or the inclination to make such a translation, and hence I have sometimes thought that, inasmuch as I am . . . reasonably fitted to do the work, my knowledge ought not to be altogether wasted."¹⁶²

¶55 Blume also believed that the Justinian Code and other Roman law could be of practical value for twentieth-century American jurists, and he hoped his translation would be "used by courts for analogy or contrast."¹⁶³ In addition, Blume was encouraged in his translating by elite legal academicians such as Deans Swann and Wigmore. The latter invited Blume to teach Roman law at Northwestern University's

157. He was one of the bureau's original editors in 1907 and remained one until his death in 1929. *Id.* at 20 n.111 and accompanying text. The two translations were THE VISIGOTHIC CODE (FORUM JUDICUM) (1910) and LAS SIETE PARTIDAS (1931).

158. Regarding Lobingier, see *Hon. Charles S. Lobingier*, 10 LAW & BANKER & S. BENCH & B. BAR. REV. 209 (1917). The correspondence and Lobingier's advocacy is described in *Spanish Law—Publication of Siete Partidas Advocated*, 50 CHI. LEGAL NEWS 351 (1917). The letter from Scott to Lobingier mentioned in the article has not been found.

159. He was only partially informed, writing that "[t]he late Mr. S.P. Scott's translation of the *Digest* now has some chance of publication, owing to Mr. Scott having left some money for the purpose in his will" (apparently not knowing publication of the entire *CJC* was contemplated). Letter from John Wigmore, Dean, Northwestern Univ. Law Sch., to Fred Blume, Justice, Wyo. Sup. Ct. (Jan. 15, 1931) (on file with the Northwestern Univ. Archives).

160. See Kearley, *supra* note 2, at 530–31, ¶ 16.

161. *Id.* at 531, ¶ 16.

162. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Thomas Swann, Dean, Yale Law Sch. (Feb. 18, 1924) (on file with the Wyo. State Archives).

163. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Clyde Pharr, Prof., Vanderbilt Univ. (June 30, 1933) (on file with the Wyo. State Archives). However, in this same letter, Blume indicates he limited Roman law references in his opinions so as not to vex his fellow justices. For a detailed examination of Justice Blume's use of Roman law in his Wyoming Supreme Court opinions, see Harold D. Evjen, *Rome on the Range: Roman Law and Justice Blume of Wyoming*, in ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (ROMANISTISCHE ABTEILUNG) 213 (1980).

law school and responded to Blume's report of his Codex translation by telling him it was "the most fascinating piece of news that I have received for a long time."¹⁶⁴

¶56 Clyde Pharr's interest in ancient Roman law is less mysterious, in that he was a classics professor. However, his shift from writing introductory textbooks¹⁶⁵ to undertaking the massive translation project he proposed is interesting. While the reasons for this shift remain obscure, two things are clear: (1) his choice of persons from whom to elicit project endorsements shows he knew who was who in the elite American bar of the day, and (2) like Blume, he wanted to make a lasting contribution to our cultural heritage. In an early explanation of his ambitious (and never completed) program to translate all ancient Roman law, he wrote: "A variorum translation of Roman law would be of inestimable worth and should be of value as long as civilization endures."¹⁶⁶ Pharr, again like Blume, also attributed practical value to the translations. He pointed out the importance of civil law in the modern world, claimed that "the proper approach to an adequate understanding of the Civil Law is through a study of Roman law," and asserted the proposed translations would be of "great value in helping English-speaking people to a fuller and more sympathetic understanding and appreciation of the laws and institutions of other countries."¹⁶⁷ In any case, from the inception of the translation project in 1933 and across the many iterations of his project proposals, Pharr firmly maintained its historical importance and repeated its "inestimable value as long as civilization endures."¹⁶⁸

Conclusion

¶57 In short, S.P. Scott, Fred Blume, and Clyde Pharr were able, and eager, to toil at translating ancient Roman law in twentieth-century America because they were imbued with much of the same classically based intellectual tradition that helped inspire the Founders to establish a new Roman Republic in North America and that remained prevalent in the elite legal culture of the translators' time. Both the connection they felt to our ancient cultural heritage and their knowledge of it are rare in the United States today.

164. Letter from John Wigmore, Dean, Northwestern Univ. Law Sch., to Fred Blume, Justice, Wyo. Sup. Ct. (Dec. 18, 1922) (on file with the Wyo. State Archives). Blume finally taught Roman law at Northwestern in the summer of 1929. Kearley, *supra* note 2, at 535, ¶ 22. Wigmore held Blume in great esteem as a judge and included him in a small group of state supreme court justices whom he said habitually wrote masterly opinions. John H. Wigmore, *Grading Our State Supreme Courts: A Tentative Method*, 22 A.B.A. J. 227, 231 (1936).

165. See sources cited *supra* note 148.

166. Pharr, *supra* note 108, at 1.

167. Clyde Pharr, A Project for the Collection, Translation, and Annotation of All the Source Material of Roman Law 4-5 (1952) (unpublished twenty-one-page proposal) (on file with author). A similar claim is made for the project in Clyde Pharr, Theresa Sherrer Davidson & Mary Brown Pharr, *A Project for the Translation of Roman Law*, 42 CLASSICAL J. 141 (1946). The explanations of the practical value of the project varied over time in his many proposals, and one suspects they were rationales aimed more at acquiring funding than they were an expression of his deepest motivations.

168. Pharr, *supra* note 108. It is repeated again, for instance, in 1952. Pharr, *supra* note 167, at 3.