Global Re-Imagination: Proposal for a Post-Conflict Veteran Education Strategy

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This work expresses the author’s thoughts and beliefs alone, and no others, public or private. Any errors are my own. Inferences beyond the singular idea that promoting veteran education in foreign conflict areas will help factions rise above the tendency to violence to promote a higher level of civilization can easily be made, but should not. This idea may not be immediately applicable everywhere, but at some future point perhaps it will.
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ABSTRACT

This essay is about defending the rule of law with an approach that weaves the rule of law through American Indian treaties, law school classrooms, and every small town where an American veteran re-imagines his or her potential after military service. The common thread is post-conflict veteran education, now a national ideal within a national ideal. Following World War II American veterans went to school in unprecedented numbers, re-imagined themselves, and defended the rule of law by helping to build the nation. Yet our approach to foreign post-conflict nation building presumes that adult ex-combatants, at whatever age one defines adult, transition seamlessly to civilian occupations absent such re-imagination. Whether armed conflict in the 21st century results from economic competition, refugee migrations, global warming stressors, or any other cause this essay proposes to promote an ideal drawn from American experience and logic to others, one that will help them gain control over their post-conflict environments. In this maturing post-Cold War world veteran education in overseas post-conflict environments will help defend, not just promote, the rule of law.
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INTRODUCTION

This essay is about defending the rule of law with an approach the rule of law itself weaved through American Indian treaties, law school classrooms, and every isolated town where an institution of higher learning exists. The common thread of these seemingly unrelated way stations along the American journey is the steady broadening of post-conflict education, a “bottom-up” idea traceable to the founding generation that is now so ingrained in American society it has become an invisible backdrop to daily life and the rule of law itself.\(^1\) America and its rule of law have been searching for the correct application of military force to ameliorate factious violence in Iraq and Afghanistan, but I suggest the real challenge is a need to promote stability in many more conflict environments.\(^2\)

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\(^1\) Jeff Zeleny, 2 G.O.P. Senators Press to Change U.S. Role in Iraq, N.Y. TIMES, July 14, 2007, at A1 (Senator John W. Warner and Senator Richard G. Lugar reportedly asked President Bush “to present to Congress a [new strategy] to switch to a narrower mission in Iraq, including the protection of Iraqi borders, training Iraqi forces, protecting American military personnel and going after terrorists.” Media commentators labeled this a shift to a bottom-up strategy).

\(^2\) This essay proposes an idea to capitalize on any increased stability a revised strategy yields. A bottom up approach is a pre-condition for the positive release of individual human energy that, according to Hurst, is what the rule of law promoted domestically in 19\(^{th}\) century America. See James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth – Century United States (1956)[hereinafter Hurst, Freedom]. Expanding access to education was part of that release: knowledge spread, infrastructure developed, and the economy grew as interests and relationships became increasingly blended. But will such a release work in really different foreign cultures? To simply say “it works here” is not necessarily satisfying. Suggesting that “something like it must work there” is more to the point as local, national, and global interests continue to take on a sense of interdependence. Yet it is impossible to ignore that the trek and destination involve the unknown.
The world needs American ideas more than ever before.\textsuperscript{3} When the Berlin Wall was battered to the ground almost two decades ago the world community cast its eyes toward our shores and asked, “What will America do as the most powerful nation on earth, what is this democracy of theirs, how did they build it?”\textsuperscript{4} Even as the first East German shook hands with a West German another submerged question began to rise, “How do they accommodate their potentially violent factions?” A void was created when that wall came down, one being filled with or without American influence. This signals a challenge to export ideals others will recognize as important to American democratic development, ideals that built the nation.\textsuperscript{5}

Post-conflict veteran education is one of those ideals whose time for export has come.\textsuperscript{6} Republican and Democratic

\textsuperscript{3} This work is a “think piece” that neither explores all of the possible branches and sequels of a post-conflict veteran education strategy nor professes absolute proof of any supporting pillar. It probably raises more questions than are answered. One will immediately agree the idea can move us toward a more ideal civilization, will hesitate, or will immediately be certain it is averse to American and/or global interests. If this is the reaction it signals a step into the cultural study of law Kahn argues is “a necessary supplement to our current practice of legal studies” Paul W. Kahn, The Cultural Study of Law 40 (1999)[hereinafter Kahn, Study].

\textsuperscript{4} Thomas L. Friedman, The World Is Flat 181, 52 (2005)[hereinafter Friedman, World](I agree “the fall of the wall did not just open the way for more people to tap into one another’s knowledge pools…[by] enhanc[ing] the free movement of best practices” and, “the adoption of common standards.” But education, particularly in conflict areas, rises as an ideal rather than a best practice or common standard).

\textsuperscript{5} Mr. Justice Brandeis 135 (Felix Frankfurter, ed., 1932)[hereinafter Frankfurter, Brandeis](proposing that democratic development is fundamentally a bottom up endeavor: “The development of the individual is, thus, both a necessary means and the end sought. For our objective is the making of men and women who shall be free, self-respecting members of a democracy - and who shall be worthy of respect”).

\textsuperscript{6} Cf. David Rohde, Army Enlists Anthropology In War Zones, N.Y. Times, October 5, 2007, at 1 and 12)(the Army is experimenting with anthropologists and sociologists in Human Terrain Teams assigned to combat units in Afghanistan in an attempt to “understand subtle points of tribal relations” and “bring governance down to the people.” Factious academic debate has ensued: “the scientists’ advice…[helps the Army] see the situation from an Afghan perspective and [allows] them to cut back on combat operations [that have] been reduced by 60 percent since the scientists arrived in February [allowing soldiers] to focus more on improving security, health care and education for the population.” But critics cite “the past misuse of social sciences in counterinsurgency campaigns, including in Vietnam and Latin America, [and] denounce the program as ‘mercenary anthropology’ that exploits
Congress alike have supported veteran education for over half a century not just to reward veterans for their service and sacrifice but because we Americans believe each citizen is important to nation-building at every level of society, a sentiment not yet universally held. America has long extended important foreign defense training and infrastructure development, but the idea of veteran post-conflict education is inspiration we model better than export. Education allows veterans to re-imagine themselves

social science for political gain.” A participating anthropologist defends the program as an effort “to help the military decrease conflict instead of provoking it.” A UN official says “the [U.S.] military [is] going through an enormous change right now where they recognize they won’t succeed militarily…but they don’t yet have the skill sets to implement a coherent nonmilitary strategy.” The strategy includes building a new $100,000 school for the children of two rival factions in the Zadran Tribe in the hope it might “end a 70-year dispute between the groups over control of a mountainside covered with lucrative timber.” “After six years of American promises, Afghans, too, appear to be waiting to see whether the Americans or the Taliban will win a protracted test of wills.” Positive solutions are needed in every environment. Submerged in this multi-disciplinary discourse is the central question of this work: What are the constitutive elements the rule of law might promote to effect positive change and build positive relationships in conflict environments? Such inquiry is at least as important as the increasingly revealing work of domestic innocence projects, factious debate over illegal immigration, even access to affordable housing – how we answer such questions with and through the rule of law comments not just on who we are as a people, but on who others think we are. The ongoing answer will influence such protracted tests of will. The norms of intervention and non-intervention, domestic and global, are part of the equation).

7 See Jeffrey Gettleman, Savage Rapes Stroke Trauma of Congo War, N.Y. TIMES, October 7, 2007, at 11 (reporting on an “epidemic of rapes [that] seems to have started in the mid-1990’s [in the Congo]...[and] coincides with the waves of Hutu militia-men who escaped into Congo’s forests after exterminating 800,000 Tutsis.” Andre Bourque, a Canadian working with aid groups in eastern Congo suggests “[t]hese are people who were involved with the genocide and have been psychologically destroyed by it [in a phenomena he calls] “reversed values” [which] could develop in heavily traumatized areas that had been steeped in conflict for many years.” A question this raises is whether other world cultures distinguish between “soldiers,” “warriors,” and “veterans”? Do other rules of law promote dividing lines as ours does? In America rituals like retirement parades or joining a veteran group partially draws the line. Readjustment education and training are also constitutive elements deliberately drawn by the rule of law. What is happening in the Congo suggests the complete absence of any similar dividing line).

8 My singular idea is that our rule of law used education to ameliorate potential factious violence and that approach will work in foreign conflict environments. The idea submerges controversy in terms of human
and their future; this engenders a sense of community that is as critical to gaining control over the post-conflict environment as any other form of aid.\(^9\)

Where would civilization be today if veteran education had been promoted in the post-World War I environment?\(^10\)

rights obligations: “human rights create negative obligations for the state — duties not to interfere with our free speech, life, liberty, property, and occupation. On this function of human rights there is general agreement. Much more controversial is the question of the extent to which human rights also create positive obligations for the state, especially obligations to protect and promote human rights.”

Brun-Otto Bryde, *Fundamental Rights as Guidelines and Inspiration: German Constitutionalism in International Perspective*, 25 Wis. Int’l L.J. 189 (2007). The United States adhered to a doctrine of non-intervention through most of the 20\(^{th}\) century, even delaying entrance into World Wars I and II, but it recently relaxed that stance in the face of great human suffering in Somalia and Bosnia. Still, promoting literacy and basic skills education in the aftermath of conflict might yet be considered an unwelcome or overbearing intrusion into the free development of other peoples. In the face of global environmental stressors that are of increasing concern, not to mention the need to promote economic growth, these long-standing norms require what Kahn calls the temporary suspension of the rule of law. See *Kahn, Study*, supra note 3, at 32. The suspension I suggest is this: what if the rule of law promoted for veterans in post-conflict areas, not just children, that which it promotes for itself — education? What would happen? \(^9\)

*Cf. Rory Stewart, Where Less is More, N.Y. TIMES, July 23, 2007* (Stewart calls for deliberate institution building with a strategy in Afghanistan that “does not rely on large amounts of troops and money but on intelligence, pragmatic politics, savvy use of our development assistance and on special forces operations.” The deliberate institution building I suggest falls foremost within the sphere where pragmatic politics and developmental assistance overlap). \(^10\)

*Cf. Alan Greenspan, The Age of Turbulence, 366 (2007) [hereinafter Greenspan, Turbulence]* (noting that the “[p]ost-World War II economic recovery was fostered initially by the wide-spread recognition of economists and political leaders that the surge of protectionism following World War I had been a primary contributor to the depth of the Great Depression”).

When World War I ended our veterans came home and we pulled inside ourselves leaving, in Europe, the seeds of faction that would ripen into a second world war a generation later. Although pondering the potential for Civil War on our soil, the Founders might have predicted the Second World War from their observations of the lasting effect war has on logic and reason:

> When the sword is once drawn, the passions of men observe no bounds of moderation. The suggestions of wounded pride, the instigations of irritated resentment, would be apt to carry the states, against which the arms of the union were exerted, to any extremes necessary to avenge the affront, or to avoid the disgrace of submission.
Time and space practicalities were higher bars a century ago. But today's shrinking distances and increasingly expanded mutual interests suggest that every practicality bar must be pointedly weighed against the reflective impact of failing to promote economic and cultural reconstruction where nations or regions have taken steps backward by resorting to arms. This is not a crusade, the suggestion to eradicate any other spiritual or cultural heritage, the idea to lessen our defenses or to forget those who have fallen. It is the idea to promote globe building as we have undertaken nation building, with productive ideals.

The Federalist No. 16, at 87 (Alexander Hamilton) (Barnes & Noble, 2006) [hereinafter BARNES, FEDERALIST NO.__].

Id. at 133 (a constant: “The improvements in the art of navigation, have, as to the facility of communication, rendered distant nations, in a great measure, neighbours [sic].” The quotes in this essay include word spellings that have fallen out of common usage. Since, as here, none of them are misleading, further use of [sic] will not be found).

Not unlike the founding deliberations over the powers of government in relation to potential majority and minority clashes:

In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing a state to pieces, than the representatives of confederate states not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would it be, if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual, could be established for the universal peace of mankind.

BARNES, FEDERALIST NO. 43, supra note 10, at 244-45 (James Madison).

Cf. GREENSPAN, TURBULENCE, supra note 10, at 365 (herein are difficult questions converging on non-intervention norms that have existed for a century:

Hovering over us as well is the prospect of terrorism that would threaten the rule of law and thus prosperity. A worldwide debate is underway on the future of globalization and capitalism, and its resolution will define the world marketplace for decades to come.

History warns us that globalization is reversible. We can lose many of the historic gains of the past half century. The barriers to trade and commerce that came down following World War II can be resurrected, but surely not without consequences similar to those that followed the stock market crash of 1929.
To suggest such an unconventional approach might appear the height of illogical folly if not treason. Who has the passion to teach a foreign veteran that recently bore arms against us basic literacy or the skills to build a home? Why, if America is not involved, is it in our interest to help nations exhausted by localized conflict to re-define their veterans by promoting education? Because logic and experience tell us an educated veteran population is a bridge from war inspired anomie to the stability of more highly developed economies and relationships, that’s why. Promoting the ideal of veteran education in foreign conflict environments will have this effect. The scope moves well beyond all past conventional experience.

Part I reviews Madison’s observations on faction; however impractical the fullest expression of the idea was in his day, the importance of education in quieting the violence of faction is identifiable. Part II reviews two post-Civil War examples of expanding practicality. The common thread of these seemingly unrelated chapters in the American journey traces to Madison’s discourse on faction; expanding the practicality of education is a faction ameliorating strategy. Part III makes the case that those 19th century experiences in expanding practicality resemble stepping-stones from the founding generation to the generation that enjoyed post-conflict veteran education under the 1944 G.I. Bill of Rights. The Bill changed America in the second half of the 20th century and can be the model for a stepping-stone to something even larger in the 21st century. Part IV suggests a tentative form for a globally inclusive veteran education strategy. Part V has my concluding remarks.

I do not propose that America build great universities like those at home, but this strategy will sow the seeds

14 I would broadly promote post-conflict veteran education however difficult combatant status, and thus veteran status, is to determine. I use “veteran” to signify whomever our national leadership chooses to define as a veteran for the purpose of the strategy. Duration, scope, substance, and other questions beyond our borders and certain influence similarly present national leadership challenges.

15 Cf. BARNES, FEDERALIST No. 21, supra note 10, at 125-126(Alexander Hamilton) (“[I]t is impossible to foresee or to define the extent and variety of national exigencies, and the compelling extent and variety of the means which may be necessary to satisfy them...the means ought to be proportioned to the end.” The means will vary: we may suggest
for others to build their own in a century or more. It may be difficult to imagine, but if our experience is any measure we will not only build stronger economies where anomie and faction linger in post-conflict environments, we will release human energy that might nudge us all toward a more ideal civilization. The challenge of this post-Cold War environment includes how the rule of law can shape the maturation process in unsettled times. This is about defending, not just promoting, the rule of law.

that others provide veteran education, we may only provide small measures of technical support, we might build the entire program).

See The Harvard Law School Association, The Centennial History of the Harvard Law School, 231 (1918) [hereinafter Harvard, Centennial] (the shift to a bottom up strategy echoes a law in action approach:

Not only law in books but law in action has to be considered, and after learning the principles evolved by a process of inclusion and exclusion in the decisions or by intermittent legislative action the legal scholar must find how those principles actually work in the bank, the workshop, the street, and the jail).

As Elliot noted:

I believe that in peace as well as in war our nation has shown it has ideals for which it is ready to bear labor, pain, and loss. I believe that no people ever sees clearly those steps in its own progress, those events in its own life, which future generations will count glorious...[w]e strive toward a progressive improvement of human condition, an amelioration of the average lot. We begin to get a realizing sense of that perfect democratic ideal: “We are members one of another.” The gradual diminution of the exercise of arbitrary authority in the family, in education, and in government is another ideal toward which we press. Charles W. Elliot, A Late Harvest: Miscellaneous Papers Written Between Eighty and Ninety, 269 (1924) [hereinafter Elliot, Harvest].

Where America is a concerned observer in some future conflict it may be reasonable to afford veteran status to all ex-combatants. In other situations the world community and America will differ on who will receive veteran status even for education. In still other situations America and the world community will unite against affording veteran status to specific individuals or factions, those supporting terrorism or terrorist acts currently exemplify. See, e.g., Raymond Bonner, Australia Charges Doctor With Aiding Terrorist Group, N.Y. Times, July 14, 2007, at 3 (Dr. Mohammed Haneef was arrested in connection with failed car bombings in England). Drawing such lines falls to others; my singular task is verbalizing a vision.
I. FACTION

The Federalist Papers frame a vision of the Union our Founders hoped to achieve, "[t]he best of [which] reach[es] for national identity through claims of universal rights and faith in the dignity of humankind." Urgency is evident as they strive to understand and mollify internal and external factious violence and their writings show a variety of prescriptions equally considered, today's distinguishable characteristic is that faction is increasingly accepted as cultural in nature. The factious interests they confronted had faces no less potent or active than those we see today, and they pragmatically considered ancient Greek models to inform their deliberations. An example of the philosophy underpinning those models is given in this Part to support a later premise that 19th and 20th century examples of expanding post-conflict access to education reflects more than imaginative experimentation by those generations. They reflect fidelity to a founding vision that something never before known could be achieved.

A. The Founders on Faction.

The Founders considered faction in both its present and future senses, a synergy exists in the expectation that government will address its evils: "[t]he friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their [factional] propensity to this dangerous vice [violence]." Ancient models

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19 Barnes, Federalist, supra note 10, at xiii.
20 See Barnes, Federalist No. 21, supra note 10, at 112 (Alexander Hamilton)(evoking the "tempestuous situation from which Massachusetts has scarcely emerged" to underscore how a "successful faction may erect a tyranny on the ruins of order and law, while no succor could constitutionally be afforded by the union to the friends and supporters of the government").
21 See accompanying text Part II A&B, III B, infra.
22 See Alexis De Tocqueville, Democracy in America, 344 (2003)[hereinafter De Tocqueville, Democracy](fidelity also originates at the bottom, and emanates upward: "what is understood by a republican government in the United States is the slow and quiet action of society upon itself. It is a regular state of things founded upon the enlightened will of the people").
23 See Barnes, Federalist No. 11, supra note 10, at 59(Alexander Hamilton)(suggesting that foreign powers "will naturally indicate the policy of fostering divisions among us, and depriving us, as far as possible, of an ACTIVE COMMERCE in our own bottoms [but suggesting that] if we continue united, we may, in a variety of ways, counteract a policy so unfriendly to our prosperity").
24 Barnes, Federalist No. 10, supra note 10, at 51 (James Madison).
suggested this was so: "[t]he instability, injustice and confusion introduced into the public councils, have, in truth been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favourite and fruitful topics from which the adversaries to liberty derive their most specious declamations." The Founders carefully considered those models; rules of law that had vanished were critically parsed by a rule of law in the making:

Sparta, Athens, Rome, and Carthage, were all republics; two of them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighbouring monarchies of the same times. Sparta was little better than a well regulated camp; and Rome was never sated of carnage and conquest.

That critical parsing of ancient systems resulted in the observation that faction and its violence springs from external and internal sources alike:

Safety from external danger, is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.

The Founders sought out and appraised those ancient models to craft a governmental form that would better address factious violence, yet experience told them faction would vex

25 Id. at 51-52.
26 BARNES, FEDERALIST No. 6, supra note 10, at 32 (Alexander Hamilton) (speaking to the danger of War between the States).
27 BARNES, FEDERALIST No. 17 supra note 10 (Alexander Hamilton), Nos. 18, 19 (James Madison) (discussing the lessons of "ancient systems").
28 BARNES, FEDERALIST No. 8, supra note 10, at 42 (Alexander Hamilton) (considering the effects of internal war).
29 BARNES, FEDERALIST No. 52, supra note 10, at 293 (James Madison) (liberty was the goal, one not achieved by the ancients; Madison pondered "the scheme of representation, as a substitute for a meeting of the citizens in person, [concluding that] being at most but very imperfectly known to ancient polity; it is in more modern times only that we are to expect instructive examples").
their successors just as it had vexed the old world: “The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side as was wished and expected.” Vexation was and probably is inevitable, for faction springs from discrete human and environmental factors as unique as they are interesting:

The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens; the degree of information they possess; the state of commerce, of arts, of industry; these circumstances, and many more too complex, minute, or adventitious, to admit of a particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries.

Their tumultuous post-revolutionary environment was replete with potential violence among the States and ongoing conflict with Indian tribes. Their task, as their successors, was to learn from and improve on past experience leading to the search for a governmental form that would establish an identity unlike any known to humankind. That search left us a written legacy of idealism and optimism refusing to dwell on a more critical parsing as was possible:

The Hellenistic world was not one for idealist philosophies. The same may be said of Rome at the end of the republic and the beginning of empire. The time was one of political breakdown and civil war. Three generations of civil war had exhausted the social organization of the time quite as the Peloponnesian War had exhausted the Greek world of the classical period. Disillusionment and unsettled conditions and autocratic governments had turned men to skepticism

30 Barnes, Federalist No. 10, supra note 10, at 52 (James Madison).
31 Barnes, Federalist No. 21, supra note 10, at 114 (Alexander Hamilton) (considering potential defects in the proposed constitution, Hamilton draws these connections between the environment, citizenry and government).
32 Barnes, Federalist No. 8, supra note 10, at 41 (Alexander Hamilton).
33 Barnes, Federalist No. 24, supra note 10, at 133 (Alexander Hamilton) (describing "the savage tribes on our western frontier" not only as immediate threats to security and thus "natural enemies," but also the "natural allies" of foreign powers and, thus, potentially an even more potent if not ominous source of faction).
and Epicureanism, which seemed to tell men how to live in distracted times. These became prevailing types of thought and like the philosophies current today were philosophies of give-it-up.  

The Founders do not characterize faction as a cultural matter. Instead, reference to classes, sects, majorities, minorities and interests both public and private are found in their writings. Today’s generations recognize and accept the existence of discrete domestic cultures the Founders lumped together in their 18th century worldview. But faction, the Founders knew, has a face:

[A]ccording to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for pre-eminence and power; or persons of other descriptions, whose fortunes have been interesting to the human passions...[b]ut the most common and durable source of factions, has been the various and unequal distributions of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.

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34 ROSEO POUND, SOCIAL CONTROL THROUGH LAW 36-37 (1968)[hereinafter POUND, LAW](the outline for my discussion in Part III rose from this work).
35 Like education, culture is submerged but evident. In one example, Madison distinguishes the government they envisioned from those blending “aristocracy and monarchy in their worst forms” resulting in what might be called cultures today, but which Madison referred to as classes: “It is essential to government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it. BARNES, FEDERALIST NO. 39, supra note 10, at 210(James Madison).
36 See BARNES, FEDERALIST NO. 10, 39 supra note 10, at 51-59, 211 (James Madison).
37 BARNES, FEDERALIST NO. 18, supra note 10, at 97 (James Madison)(such distinctions were possibly considered less important than the existence of faction itself: “As a weak government, when not at war, is ever agitated by internal dissentions; so these never fail to bring on fresh calamities from abroad”).
38 See BARNES, FEDERALIST NO. 10, supra note 10, at 53-54 (James Madison).
Cultural or not, recognized or not, the implications for a well-constructed Union at the founding mirrors our challenge: to ameliorate or control the violence of faction without “violating the principles to which [the friend of popular government] is attached.”

The Founders considered that faction has a face, it is internal and external in nature, it springs from nature just as it springs from conflicting human interests, and it will ever vex government. Since concern over faction is not new or unique, a universal model would be helpful. The ancient models that informed the founding deliberations on form and function also provided philosophical insights into the ways the rule of law might shoulder back faction by shouldering back its many causes. Education emerged as a vibrant solution.

B. The Allegory of the Cave.

The Founders surveyed the experiences of the Greek republics in deliberating on governmental form and function: “[a]mong the confederacies of antiquity, the most considerable was that of the Grecian republics, associated under the Amphyctionic council. From the best accounts transmitted of this celebrated institution, it bore a very instructive analogy to the present confederation of the American states.” As a companion to form and function, the Allegory of the Cave is a bit of ancient Greek philosophy that so lends understanding to

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39 Barnes, Federalist No. 10, supra note 10, at 51 (James Madison).
40 Pound’s comment below highlights a significant and predictable cultural difference that will be encountered; in many environments the “unit” will not be individual but group. Amid other differences one might see, education is nevertheless a very good starting point:

The highest good is the maximum of free self-assertion on the part of these units [individual men as independent economic “units”]. The significant feature of [such human “units”] is their natural rights, that is, qualities by virtue of which they ought to have certain things or be free to do certain things. The end of law is to secure these natural rights, to give the fullest and freest rein to the competitive acquisitory activities of these units, to order the competition with a minimum of interference.

Pound, Law, supra note 34, at 122.

41 See accompanying text Part II, A & B, infra.
42 Barnes, Federalist No. 18, supra note 10, at 95-96 (James Madison).
the founding deliberations over faction, as well as the later use of education in post-conflict environments, that it warrants consideration here.

Plato’s Allegory of the Cave symbolizes the journey humans must take to reach higher levels of reason and understanding, a journey holding the potential to ameliorate distractions in the world such as factious violence:

Imagine several prisoners who have been chained up in a cave for all of their lives. They have never been outside the cave. They face a wall in the cave and they can never look at the entrance of the cave. Sometimes animals, birds, people, or other objects pass by the entrance of the cave casting a shadow on the wall inside the cave. The prisoners see the shadows on the wall and mistakenly view the shadows as reality. However, one man breaks free from his chains and runs out of the cave. He pees in his pants dramatically for the first time, he sees the real world and now knows that it is far beyond the shadows he had been seeing. He sees real birds and animals, not just shadows of birds and animals. This man is excited about what he sees and he goes back to his fellow prisoners in the cave to tell them about the real world. But to his astonishment, they don’t believe him. In fact, they are angry with him. They say the shadows are reality and that the escaped prisoner is crazy for saying otherwise. POINT OF THE CAVE ANALOGY: According to Plato, the world outside the cave represents the world of forms while the shadows on the wall represent objects in the physical world. The escape of the prisoner represents philosophical enlightenment and the realization that forms are the true reality. Most people are like the prisoners in the cave. They think the shadows are reality.43

The Allegory infers the importance of education and the variables that influence making a journey possible.44 At the

44 Id. (there are four possibilities:
   (1) prisoners who think that shadows are reality; (2) prisoners who are freed and forced to look at the things that used to cast shadows on the wall and do not recognize these as sources for shadows; (3) prisoners who are freed
individual level, it also emphasizes the metamorphosis education promotes as the first prisoner makes the journey, sees new forms, and returns. Faction is visible if not inevitable: the prisoners appear initially equal even though there may be some advantage to being chained to one side of the cave or the other. Faction might arise among those remaining on whether to make the journey or even whether or not to believe those who have returned. The first prisoner to make the journey distinguishes himself from the others by immediately creating a discernable faction in relation to those still imprisoned. As others make the journey faction is likely to develop outside the cave depending on the forms each notes and follows as he or she exits the cave. If for no other reason than mobility, it is possible those outside the cave will form a faction at odds with those remaining. Those inside are in the domain of the least liberty and the least faction. Those outside are in the domain of greater liberty and enhanced potential for positive pursuits.

Is there intent to limit the Allegory to a finite group of prisoners or allow its application to clans, colonies, and polities? Is the first to leave a “culture of one” or perhaps a “culture alone”? Do those remaining, or those who leave, attain a separate cultural identity? If so, what reciprocal relationship, if any, does or should exist between cultures? Raising such questions is the point of the Allegory; the breadth of questioning and the potential answers are limited only by imagination. Absent proof the Allegory influenced the Founders as they imagined their young nation maturing and expanding and reaching for the dignity of humankind, the appearance it exerted influence is not only evident in how

and dragged along to the outside of the cave; (4) free men returning to the cave to former fellow prisoners).

45 Barnes, Federalist No. 1, supra note 10, at 9 (Alexander Hamilton) (on the importance of their deliberations to the formation of the Union:

[I]t seems to have been reserved to the people of this country to decide, by their conduct and example, the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force ... a wrong decision of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind).
their successors deliberately broadened access to education, but in their words.\textsuperscript{46}

C. To Cure Faction.

Madison noted two possible methods for removing the causes of faction: “destroying the liberty which is essential to its existence; [or] giving to every citizen the same opinions, the same passions, and the same interests.”\textsuperscript{47} Declaring the former unwise and the latter impracticable,\textsuperscript{48} Madison infers “the causes of faction cannot be removed; relief is only to be sought in the means of controlling its effects”\textsuperscript{49} (original emphasis). With this Madison confronted the same dilemma that faced the first prisoner who returned to the cave: what to do about the human and environmental distractions inherent in getting others to make the journey. The Federalist Papers suggest education as a partial solution.

1. Practicality.

Deliberating on faction, Madison considered interactions between majorities and minorities in relation to governmental form. On one hand, Madison suggests the causes of faction can be removed by “giving to every citizen the same opinions, the same passions, and the same interests,” an expedient as “impracticable as the removal of liberty would be unwise.”\textsuperscript{50} Governmental form itself might also act to ameliorate such conflict but Madison suggests we either prevent the same passions and interests from arising in a majority or, if they already exist, render them “by their number and local

\textsuperscript{46} See accompanying text Part II and III, infra.
\textsuperscript{47} BARNES, FEDERALIST NO. 10, supra note 10, at 52-53 (James Madison)(in terms of the Allegory, Madison effectively contemplates locking everyone in the cave by removing liberty - an unwise prescription, or requiring all to make the journey and pursue the same form in exactly the same way to exactly the same end - an impractical prescription. The right size is somewhere in the middle).
\textsuperscript{48} Id. at 53 (if Madison considered the Allegory, the choice to leave the prisoners in the cave would represent his unwise prescription. Impracticality is seen in the limitations encountered by the first to make the journey as he attempts to lead others from the cave).
\textsuperscript{49} Id. at 55.
\textsuperscript{50} Id. at 53 (circumstance also influences practicality in the Allegory: once a prisoner leaves the cave he may presumably exercise choice in gravitating toward various animals, birds, people, or other objects happening by, choice may also be limited. Despite this, Madison’s writings seem to suggest the journey is preferable to life in a cave).
situation, unable to concert and carry into effect schemes of oppression.” This suggestion of impracticality is what first drew me toward considering the Allegory, not just the form and legacy of ancient models, had influenced Madison’s thoughts and writings. Keep the Allegory in mind:

The second expedient, giving to every citizen the same opinions, the same passions, and the same interests is as impracticable, as the first [removing liberty] would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensures a division of the society into different interests and parties.

As it may be impossible for the first enlightened prisoner to convince or drag all of the others to and beyond the cave entrance, it is impossible to instill in every citizen the same opinion on which form to pursue once outside. While the Allegory holds the promise of an assent to reason and understanding that is “more good,” fallible reasoning remains a matter of degree, so too does the liberty to make the journey or to simply shift one’s place slightly on the cave floor.

This passage is primarily about the inherent challenge of humankind, but it is also about a synergy required between the governed and government, if: “protection of these faculties is the first object of Government.” We know Madison was speaking to his countrymen and fledgling government through the

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51 Id. at 57.
52 Id. at 53.
53 Id. at 53; See also FRAUNFURTER, BRANDEIS, supra note 5, at 109 (process is involved: “Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary”).
Federalist Papers,\textsuperscript{54} it is possible the Allegory served to speak to government and leaders in its day, before they vanished.

Madison does not limit the idea of a practicality hurdle to what government does or does not do. By leaving open the definition of what constitutes "diversity in the faculties of men" he sparks imagination independent of era. The possibilities vary as radically between then and today, as farming contrasts with Information Technology; adaptation and imagination by government and men alike is key. Keep the Allegory in mind:

It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one, by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from, and dependent on the society; the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.\textsuperscript{55}

Here, as in the Allegory initially, the will of the community to resist oppression is the first practicality hurdle. But interests expand as prisoners break their chains and exit the cave, at some point the majority might even migrate from inside to outside with an expansion of interests furthering the welfare of all. This passage is

\textsuperscript{54} See, text accompanying FN 26, supra (Hamilton noted the tendency of ancient republics, like neighboring monarchies, to engage in war, regardless of their commercial nature).

\textsuperscript{55} BARNES, FEDERALIST No. 51, supra note 10, at 290 (James Madison) (on the division of governmental power).
about practicality at the individual level where the bars are not in “hereditary or self-appointed authority” but in the will of free men and women themselves. Finding and promoting such will evokes the idea of a journey, one that is occurring now globally whether we recognized it or not.\textsuperscript{56}

The impracticability Madison saw in “giving to every citizen the same opinions, the same passions, and the same interests” holds at least two distinct senses. First, what the government can and can not do impacts on practicality multi-dimensionally: the interests of those governing and governed, the infrastructure they have to build upon, environmental restraints or bounty, and many other factors. The second sense is individual: the will in each to improve themselves, the spark of passion and interest leading them beyond that which their forbearers knew or achieved. These might seem matters of individual ambition, but according to Madison they can be encouraged and nurtured by the will of government. In both clear and implied words the Founders evoked education as part of some future change agent.

2. Implied Values.

Hamilton implies that expanding the practicality of access to education would ameliorate the causes and violence of faction. He does this by suggesting “too many checks cannot be provided” to preserve peace in society; a citizenry uniformly educated to some minimal level would make better informed decisions about the expressions of governmental power unfolding around them:

The guarantee could only operate against changes to be effected by violence. Towards the prevention of calamities of this kind, too many checks cannot be provided. The peace of society, and the stability of government, depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies, in partial or occasional distempers of the state.\textsuperscript{57}

\textsuperscript{56} See text accompanying FN 235, infra.
\textsuperscript{57} BARNES, FEDERALIST No. 21, supra note 10, at 113 (Alexander Hamilton)(on defects in the present constitution).
An Antifederalist even crossed the aisle to shake hands with the federalist position agreeing a reciprocal relationship between government and the people must exist, with expanding knowledge and virtue the measure of success:

If the constitution, offered to your acceptance, be a wise one, calculated to preserve the invaluable blessings of liberty, to secure the inestimable rights of mankind, and promote human happiness, then, if you accept it, you will lay a lasting foundation of happiness for millions yet unborn; generations will rise up and call you blessed. You may rejoice in the prospects of this vast extended continent becoming filled with freemen, who will assert the dignity of human nature. You may solace yourselves with the idea, that society, in this favored land, will fast advance to the highest point of perfection; the human mind will expand in knowledge and virtue, and the golden age be, in some measure, realised. But if, on the other hand, this form of government contains principles that will lead to the subversion of liberty – if it tends to establish a despotism, or, what is worse, a tyrannic aristocracy; then, if you adopt it, this only remaining asylum for liberty will be shut up, and posterity will execrate your memory.  

The Allegory is visible in this passage, which merely implies education will have a hand “expanding knowledge and virtue [thereby leading to a] golden age,” but clearer examples that it influenced the Founders also exist.

3. Clear Values.

Hurst noted a founding optimism for the future of the new nation wedded to the ability to control change with, under, and through the law: “Jefferson and Hamilton, Jacksonian and Whig, were alike confident that men could materially control their environment through the legally mobilized power of the community.” To Jefferson, this meant encouraging the development of a society of small successful farmers and part of that effort lay in the nexus between a public school system, national growth, liberty,

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59 HURST, FREEDOM, supra note 2, at 33 (“Jefferson saw education as a force that could fundamentally mould society”).
and democratic governance he considered critical to national survival and prosperity:

By that part of our plan which prescribes the selection of the youths of genius from among the classes of the poor, we hope to avail the State of those talents which nature has sown as liberally among the poor as the rich, but which perish without use, if not sought for and cultivated. But of the views of this law none is more important, none more legitimate, than that of rendering the people the safe, as they are the ultimate, guardians of their own liberty . . . Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment of our constitution must here come in aid of the public education. The influence over government must be shared among all the people.60

John Jay was just as clear: "It is happy for the United States that so great a part of the people are able to discern their true interests...the United States [will] be safer when a greater proportion of our people become well informed. Schools, colleges, and churches are in my opinion absolutely essential to governments like ours."61 Franklin took it a step further by personally modeling education as a value: "[Franklin] had begun as a young man by teaching his fellow tradesmen ways to become virtuous, diligent, and responsible citizens. Then he sought to enlist them in associations - Juntos, libraries, fire departments, neighborhood patrols, and militias - for their mutual benefit and the good of the common community."62

In direct and indirect language the founding generation suggested that public education was, and would be, as critical to national development and national survival as any other factor; an ideal to be kneaded and

60 Id. at 34 (citing Jefferson, Notes on the State of Virginia, in PADOVER, THE COMPLETE JEFFERSON, 668 (New York, 1943; Original, 1782)).
61 WALTER STAHR, JOHN JAY, 359 (2005); See also BARNES, FEDERALIST No. 22, supra note 10, at 122-23 (Alexander Hamilton)(noting that in the judiciary "[t]here are endless diversities in the opinions of men which promotes healthy discourse").
broadened: “[t]he wealth of nations depends [on] . . . the genius of its citizens.” To that generation broad access to education was critical to democratic development and nation building, an ideal that would require deliberately overcoming hurdles to practicality to achieve its fullest usefulness. Hurdles their will and government could leap. Hurdles no earlier governmental form had leapt.

D. Facing Faction.

The Founders recognized that faction not only has a face, its causes and propensity to disrupt the advantages of a well-constructed union will always exist in this country and abroad, but of the cures destroying liberty “is worse than the disease.” The founding deliberations not only evoke the various models of Greek antiquity, they voice the philosophical underpinnings of those models including the out-of-the-box idea that education might reduce the tendency to factious violence and thus elevate the state of humankind. Whether it is the ability or will of government to act, or the will of the citizenry to respond, something about this was impractical in Madison’s day and left unexplored, perhaps in recognition that their successors would be required to forge the conditions needed for a broader societal journey toward the entrance of the cave. But if faction could be soothed by education, the domestic result would probably be something “more good” than Madison saw around him in his day, something that might withstand the test of time.

63 BARNES, FEDERALIST No. 21, supra note 10, at 114 (Alexander Hamilton).
64 Id.
65 Cf. FRIEDMAN, WORLD, supra note 4, at 181-182 (since the fall of the wall faction has decidedly increased: “The Berlin Wall came down, the Berlin mall opened up, and suddenly some 3 billion people who had been behind walls walked onto the flattened global piazza”).
66 BARNES, FEDERALIST No. 10, supra note 10, at 53 (James Madison)(citing a relationship between reason and self-love, a reciprocal relationship joining opinion and passion, but stopping short at expounding on all that might influence reason).
67 See ELLIOT, HARVEST, supra note 17, at 148 (Elliott suggested that education forged a reflexive relationship during the second half of the 19th century: “All men and women who believe that education is the best safeguard of democracy may rest content with the progress of education in the United States since the Civil War”).
68 Madison’s concerns extend well beyond his present day:

To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve
American education would not begin substantially improving until after the First World War. But as the nation matured in the 19th century public and private action took hesitant steps toward reducing the impracticalities of education as a pragmatic nation-building catalyst. The examples in Part II suggest the Civil War generation brought the founding ideals into their modern day by

the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

BARNES, FEDERALIST No. 10, supra note 10, at 55 (James Madison).

See ELLIOT, HARVEST, supra note 17, at 110 (war was a catalyst:

The [WWI] draft also revealed an amount of illiteracy and bodily incapacity among young men between twenty-one and thirty-one which surprised and mortified everybody. These bodily and mental defects were bad enough in time of war; but most persons now see that they are even worse in time of peace, through their effects on the productive industries of the country, and hence on the comfort and happiness of the entire people).

Elliot evokes the same idea:

Into this rigid and comparatively fruitless [American educational] system came gradually, between 1865 and 1885, the individual election of studies by the student or pupil, first for college students and then for the pupils of secondary schools, and the adoption of the underlying principle that hard and happy work is only to be obtained from the young on subjects which interest the pupil and induce in him eager, spontaneous activities. Interest, choice, and activity had arrived as the motive powers in organized education. Id. at 123-24.

BARNES, FEDERALIST No. 7, supra note 10, at 34 (Alexander Hamilton)(considering the danger of wars between states, Hamilton portrays what may be an out of character sense of “give it up.” If so, it is not what transpired in the 19th and 20th centuries; America made a domestic ascent that included shouldering back bars to education:

Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, the weaknesses, and the evils incident to society in every shape? Is it not time to awake from the deceitful dream of
promoting a shift away from the tendency toward disunion and conflict that faction encourages, using education.\textsuperscript{72}

II. POST-CONFLICT EDUCATION

As with the rule of law itself,\textsuperscript{73} the practicality of evoking education as a national ideal to foster continuous, purposeful, democratic nation building has developed by slow degrees.\textsuperscript{74} Two post-Civil War examples are provided here: the extension of education as a value in a series of treaties with American Indian tribes and a pedagogical adjustment that began in a single law school classroom.\textsuperscript{75}

\begin{itemize}
\item a golden age, and to adopt as a practical maxim for the direction of our political conduct, that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect wisdom and perfect virtue?
\end{itemize}

\textsuperscript{72} See Saul K. Padover, The Complete Jefferson 610 (1943)[hereinafter Padover, Jefferson] (Jefferson suggested this required something of a leap of faith, a journey beginning with one:

\begin{quote}
Before we condemn the Indians of the continent of wanting genius, we must consider that education has not yet been introduced among them. Were we to compare them in their present state with the Europeans, north of the alps, when Rome and its arms first crossed those mountains, the comparison would be unequal, because, at that time those portions of Europe were swarming with numbers; because numbers promotes emulation, and multiply the chances of improvement; and one improvement begets another).
\end{quote}

\textsuperscript{73} Harvard, Centennial, supra note 16, at 230 (Langdell: “Law, considered as a science, consists of certain principles or doctrines...[e]ach of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries”).

\textsuperscript{74} See Elliot, Harvest, supra note 17, at 121-22 (reflecting on the years between 1854 and 1921, Elliot characterizes education as “the principal safeguard of democracy”).

\textsuperscript{75} Cf. Friedman, World Is Flat, supra note 4, at 289 (the idea that a flat world resulted from the fall of the Berlin wall is compelling; education in such an environment matters just as it mattered in 19\textsuperscript{th} century America:

\begin{quote}
When it comes to building muscles of employability, government has another critical role to play. Each century, as we push out the frontiers of human knowledge, work at every level becomes more complex, requiring more pattern recognition and problem solving. In the pre-industrial age, human strength really mattered...there is
Each suggests an ongoing public and private search to identify and pragmatically push back the contours of impracticality to ameliorate faction with education, but also to encourage positive lasting inter- and intra-cultural relationships. Each was established by or for the rule of law and each is a stepping-stone from the founding to the Civil War generation. If time has relegated their existence to the far ends of our societal backdrop it is doubtful humankind knows of them at all. Others can observe what exists, how it developed is not obvious.

A. A Treaty Set

An education theme generally weaves through the treaty making experience with American Indian tribes. Those bilateral political agreements and that theme were begun by the founding generation and continued by succeeding generations through much of the 19th century. But in the four years following the Civil War America struck three-dozen or so treaties with tribes from Florida to Oregon and Arizona to the Dakotas that are unique. I suggest uniqueness because they represent how the rule of law re-imagined itself in the wake of America’s first total war

little premium for strength anymore. But there is an increasing premium for pattern recognition and complex problem solving, even down on the farm).

76 Cf. GREENSPAN, TURBULENCE, supra note 10, at 400 (on the increasing [wealth] inequality, a condition that has spread globally in recent decades, Greenspan says: “The key policy levers to address the problem . . . are thus primarily education and immigration. Markets are already working in this direction. We need to quicken the process. Specifically, we need to harness better the forces of competition that have shaped the development of education in the United States”).

77 On your way home tonight take note of the advertising promoting education. It is everywhere, and it is invisible.

78 See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 239 (1942) [hereinafter COHEN, HANDBOOK](the Treaty of August 13, 1803, 7 Stat. 78,79 with the Kaskaskia Indians, exemplifies this point by extending “educational provisions [for] technical education in agriculture and the mechanical arts, support of reservation schools, boarding schools, or schools and teachers generally, and contributions for educational purposes”).

79 See Worcester v. Georgia, 31 U.S. 515, 593, 6 Pet 515, 8 L.Ed. 483 (1832) (treaties are bilateral political agreements).

80 COHEN, HANDBOOK supra note 78, at 46-66 (we may think of it as the “treaty era” today, but Cohen identified eight distinct periods in that experience. The post-Civil War treaties, those struck between 1865 and 1868, are a distinct subset of the overall experience. These were the last treaties).
amid the largest outlay of veteran benefits to that point.\textsuperscript{81} This juxtaposition opens a window into how the Civil War generation transported founding thoughts on education with its faction ameliorating potential into their modern day. In the wake of war, with the absolute need to mediate between unsettled factions to promote stability and growth, education becomes a conscious, deliberate, post-conflict reconstruction stratagem, not just an expedient to civilize Indians.\textsuperscript{82}

1. Ending War.

Condemnation of the American Indian treaty experience has been undertaken between the covers of many law reviews,\textsuperscript{83} but the experience also reveals positive and pointed efforts by both parties to halt warring

\textsuperscript{81} I use “total war” here in the sense that civilian populations were as affected by war as much as the military participants. The treaties show that Indian Affairs officials like Dennis N. Cooley, Lewis V. Bogy, Thos. Murphy and Elijah Sells signed many of the 1865-68 treaties, but so did many military officers with Civil War experience including Colonel Ely S. Parker, Major General S.R. Curtis, Brigadier General Henry H. Sibley and Major General C.C. Augur. Given American Indian participation in the Civil War, the presence of these officers lent a distinct military flavor to those negotiations; Cf. Laurence M. Hauptman, BETWEEN TWO FIRES: AMERICAN INDIANS IN THE CIVIL WAR (2004)(American Indian tribes and factions allied themselves with both the North and South in a conflict where sovereignty, land tenure, and cultural preservation were also themes); See also COHEN, HANDBOOK, supra note 78 at 46 (noting “[t]he Civil War brought new occasions for the use of federal power...as a result of conflicts between different factions of a tribe.” At least part of the federal task, therefore, was to devise strategies that would ameliorate both inter- and intra-cultural faction toward the ultimate end of a lasting union).

\textsuperscript{82} See 8 Am. State Papers (Indian Affairs, class II, vol. 2) 1815-27, pp. 150-51, in COHEN, HANDBOOK, supra note 78, at 237(earlier in the 19\textsuperscript{th} century educational provisions in the treaty reveal the sense of a cost/benefit “civilizing” policy rather than the reconstruction flavor found between 1865 and 1868: “in order to induce the Indian to cease active resistance to further encroachment upon his domain, it was thought wise to educate him in the white man’s culture...to obviate responsibility for his support, or the alternative of slow starvation, they would instruct him in the ways of the farm, in the arts of the fireside, and in means of earning a livelihood...this offered a practical alternative to a policy of warfare which, it has been estimated, cost the Federal Government in the neighborhood of one million dollars for each dead Indian”).

\textsuperscript{83} I do not dismiss such arguments, but this work examines a very narrow thread in that experience.
relationships\(^{84}\) and to preclude future\(^{85}\) warfare: more than two-thirds of the treaties in the post-Civil War treaty set have clauses related to war and peace.\(^{86}\) In the East, tribal governments agreed to repudiate earlier treaties they had struck with the Confederate States of America, promise perpetual peace, adhere to military-political alliances with the United States, promise peace with other tribes, and deliver up any "ordinance, ordinance-stores, and arms of all kinds."\(^{87}\) Amnesty "arising out of wrongs committed in aid of or in the suppression of the [Civil War]"\(^{88}\) is bilaterally afforded. Similar language and provisions are found in treaties struck with tribes in the West: "[f]rom this day forward all war between the parties to this agreement shall forever cease," prisoner exchanges will

\(^{84}\) See, e.g., Treaty with the Cherokee, 14 Stat. 799, Art. 1, July 19, 1866; Treaty with the Seminole, 14 Stat. 755, Art. 1, March 21, 1866; Treaty with the Creeks, 14 Stat. 785, Art. 1, June 14, 1866; Treaty with the Cheyenne and Arapaho, 15 Stat. 593, Art. 1, October 28, 1867; the Article cited in each ends war between the parties.

\(^{85}\) See, e.g., COHEN, HANDBOOK, supra note 78, at 65 ("In October of 1865 the Cheyenne and Arapaho, the Apache, Cheyenne, and Arapaho, the Comanche and Kiowa met with Army officers Sanborn and Harney and signed treaties promising that peace would hereafter be maintained. A few days later eight tribes of Sioux at Fort Sully made the same promise"); See also, Treaty with the Sioux, Yanktonai Band, 14 Stat. 735, October 20, 1865 (Articles 1 and 2 contain similar "war preclusion" promises).

\(^{86}\) See, e.g., CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES, Vol. II. 876-1025 (1904) (eleven of the thirty-seven post-Civil War treaties do not use the words war or peace, for example: Treaty with the Apache, Cheyenne, and Arapaho, 14 Stat. 713, October 17, 1865 (three tribes sought to unite as a confederated tribe or band); Treaty with the Middle Oregon Tribes, 14 Stat. 751, November 15, 1865 (Indians must reside on their reservation); Treaty with the Delaware, 14 Stat. 793, July 4, 1866 (the Delaware renewed their "pledges of devotion" to the United States consistent with their long and distinguished record of military service); Treaty with the Seneca, Mixed Seneca, and Shawnee, Quapaw, Etc., 15 Stat. 513, February 23, 1867 (providing for removal to the Indian country); Treaty with the Sioux, Sisseton and Wahpeton Bands, 15 Stat. 505, February 19, 1867 (payment of annuities and reservation establishment); Treaty with the Sauk and Foxes, 13 Stat. 495, February 18, 1867 (land cession); Treaty with the Cherokee, 16 Stat. 727, April 27, 1868 (amending an earlier treaty).

\(^{87}\) Treaty with the Cherokee, 14 Stat. 799, Art. 1, July 19, 1866. (the US-Cherokee treaties struck prior to a CSA-Cherokee treaty had become "insufficient to meet their mutual necessities"); Treaty with Cheyenne and Arapaho, 14 Stat. 703, Art. 1, October 14, 1865 (perpetual peace); Treaty with the Seminole, 14 Stat. 755, Art. 1, March 21, 1866 (Seminole promise to "always faithfully aid the [U.S.] Government...to put down its enemies"); Treaty with the Choctaw and Chickasaw, 14 Stat. 769, Art. 1 & 5, April 28, 1866 (promote peace and deliver up ordinance).

\(^{88}\) See Treaty with the Cherokee, 14 Stat. 799, Art 2, July 19, 1866.
occur, and “resort to arms” would not be allowed as an acceptable dispute resolution alternative.  

In the post-Civil War period specifically, the treaty experience was as much about unambiguously ending war and forging peaceful relationships as it was about accomplishing any other end. As interactions spanning a continent unfolded, the rule of law promoted an end to anomie using education as a partial strategy approach amid

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89 Treaty with the Navajo, 15 Stat. 667, Art. 1, June 1, 1968 (war to cease); Treaty with the Northern Paiute or Snake, 14 Stat. 683, Art. 1, August 12, 1865 (prisoner exchange); Treaty with the Cheyenne and Arapaho, 14 Stat. 703, Art. 1, October 14, 1865 (no resort to arms).


91 COHEN, HANDBOOK, supra note 78 at 65 (if memories of World War II are rapidly slipping from our national consciousness, the turbulence of the Indian War era is long passed. Imagine: “[t]he summer of 1867 found the Plains still in the grip of the Sioux War. Moreover, the Cheyenne and Arapaho, the Comanche and Kiowa had joined the belligerents, carrying hostilities over a wide area. The Indian Peace Commission (established by the Act of July 20, 1867, 15 Stat. 17) composed of civilians and Army officers appointed “to investigate the cause of the war and to arrange for peace,” was successful in part. At Medicine Lodge Creek in Kansas, the Kiowa, Comanche, and Apache; and the Arapaho and Cheyenne promised peace, the abandonment of the chase, and the pursuit of the habits of civilized living”).

92 See, e.g., Treaty with the Sioux, Yanktonai Band, 14 Stat. 735, October 20, 1865 (wording in the nine Sioux treaties is pattern: “not only to cease all hostilities against the persons and property of [United States] citizens, but to use their influence, and, if requisite, physical force, to prevent other bands of the Dakota or Sioux, or other adjacent tribes, from making hostile demonstrations against the Government or people of the United States”); But See COHEN, HANDBOOK, supra note 78 at 65 (“The peace established by these agreements was a fleeting one. War continued with the Sioux save for a brief interruption for 2 years thereafter”).

93 INST. FOR THE DEVELOPMENT OF INDIAN LAW, PROCEEDINGS OF THE GREAT PEACE COMMISSION OF 1867-1868, 11 (1975) [hereinafter DEVELOPMENT, PEACE] (Major General Hancock, Commander of the Department of the Missouri, appeared before the Peace Commission on August 12, 1867 to testify about the situation in his area of responsibility. His statement to General Sherman was that he had “never known any period when the war was so general and conducted with so much spirit and malignity”); See also Id. at 46 (in a comment to Senator Henderson and General Sherman during a council aboard the Steamboat “St. John” near the Yankton Agency on September 4, 1867, “The Walking Elk” linked the promise of a “blacksmith, carpenter, sawmill and a mowing machine” to his fulfilling a promise to maintain peaceful relations: “He told me also not to go to war with any other Indians. I minded him”); See also Id. at 137 (during the council at Fort Rice on July 2, 1868, “The Man that goes in the Middle,” an Uncpapa, remarked to General Sanborn: “You fought me and of course I had to fight you too. I am a soldier”).
multi-dimensional conceptual legal issues tracing to, but not resolved by, the Founders:

The regulation of commerce with the Indian tribes, is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the states, and is not to violate or infringe the legislative right of any state within its own limits. What description of Indians are to be deemed members of a state, is not yet settled; and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a state, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.\textsuperscript{94}

2. A Thinking Warring Class.

A tribal warring class is identifiable in the post-Civil War treaty set in three distinctly different senses: Union and Confederate veterans, warriors, and individuals with irregular service.\textsuperscript{95} A Treaty with the Cherokee directed that the bounties and arrears of pay of deceased Cherokee (Union) soldiers would be used to establish an “asylum for the education of orphan children . . . under the control of the [Cherokee] national council, or of such benevolent society as said council may designate.”\textsuperscript{96} Tribal “warriors” are specifically identified in an 1866 treaty with the Chippewa.\textsuperscript{97} Seminole Indians were eligible for

\textsuperscript{94} BARNES, FEDERALIST No. 42, supra note 10, at 236 (James Madison).

\textsuperscript{95} Regular and irregular service was recognized before the Civil War. See, e.g., COHEN, HANDBOOK, supra note 78 at 161 (Treaty with the Choctaws, 7 Stat. 333, 338, Art. 21, September 27, 1830, tribe fought foreign foes; Treaty with the Pawnees, 11 Stat. 729, 732, Art. 11, September 24, 1857, Pawnee scouts compensated for losses during an expedition against the Cheyenne; Treaty with the Choctaw, 7 Stat. 210, Art. 7, October 18, 1820, U.S. funds a tribal corps of light horse; Id. at Art. 5, warriors were provided a “blanket, kettle, rifle gun, bullet moulds and nippers, and ammunition sufficient for hunting and defense, for one year”; The Act of July 29, 1848, 9 Stat. 265, provided a pension for widows of Indian spies who served in the Continental line).

\textsuperscript{96} Treaty with the Cherokee, 14 Stat. 799, Art. 25, July 19, 1866.

\textsuperscript{97} Treaty with the Chippewa, Bois Forte Band, 14 Stat. 765, Art. 4, April 7, 1866 (distinguishing a warring class among chiefs and headmen, and warriors).
[veteran] benefits if they had not “aid[ed] or abet[ed] the enemies of the Government, but remained loyal during said rebellion...according to [their] treaty obligations.”98 Creek “soldiers that enlisted in the Federal Army and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces” were paid “in proportion to their respective losses” from funds generated by the sale of Creek land.99 The Creeks divided the proceeds per capita to help them “occupy, restore, and improve their farms, and to make their nation independent and self-sustaining.”100 Even in this small set of treaties, a warring class101 involving itself in post-conflict reconstruction activities is clearly evident.102

3. An Education Lens.

In 1865 education was a discernable theme as federal negotiators promised to make a range of adult technical and literacy opportunities available in post-conflict environments spanning a continent.103 Where most consider education a childhood or young adult undertaking today, the first of the post-Civil War treaties offered a range of

99 Treaty with the Creeks, 14 Stat. 785, Art. 4, June 14, 1866.
100 Id. at Art. 3.
101 See DEVELOPMENT, PEACE, supra Id. note 93, at 64(a thinking warring class. “Pawnee Killer” to Senator Henderson during a council at Spotted Bear’s Camp: “I am not a chief, I am a soldier. My Grandfather may have some mighty good ideas and notions in his head. I have some very good ones also”).
102 Distinct and culturally relevant warring classes existed in those American Indian cultures. See, e.g. ROYAL B. HASSRICK, THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY, 16-31 (1964) [hereinafter HASSRICK, SIOUX](the Sioux Akicitas, policing and warring societies, were constituted by younger men of military age. Invitation to join an Akicita society like the Kit Foxes, Badgers, Brave Hearts, and Crow Owners was a great honor. The Naca societies were charged with civil leadership and were generally constituted by older men. The requirements of leadership were shared: “to provide for the people the daily requirements of life as well as protection against dangers”). Cf. DEVELOPMENT, PEACE, supra note 93(the term “warriors” is sprinkled throughout the proceedings).
103 See Treaty with the Sioux, Upper Yanktonai Band, 14 Stat. 743, Art. 1 & 4, October 28, 1865 (Art. 1 includes war preclusion language that requires the tribe to “withdraw from overland routes” to prevent inadvertent hostilities from erupting. In Article 4, the United States promises to compensate each family settling on land for agricultural purposes with a monetary payment. Farmers, blacksmiths, and teachers are promised for primary occupational training, industrial arts technical training, and to improve literacy).
educational opportunities for children and adults alike. Eight of the fifteen treaties struck in 1865 included some extension of education and training as a post-conflict reconstruction strategy. This strategy broadened in the succeeding two years. Of the fourteen treaties struck in 1866 and 1867, half contain war cession and preclusion clauses. The first indicator the post-Civil War treaty set should be considered a reconstruction strategy is the notable expansion of articles that occurs. Just two of the fifteen treaties struck in 1865 have eight or more articles suggesting that forging peaceful relations was the prime objective. In contrast just three of the fourteen treaties struck between 1866 and 1867 have fewer than eight articles; the increased number of articles reflect a deliberate sense of reconstruction including many provisions for education. Given the continental

104 Compare Treaty with the Osage, 14 Stat. 687, Art. 2 & 7, September 29, 1865 (authorizing funds to build a schoolhouse and educate children), with Treaty with the Northern Paiute or Snake 14 Stat. 683, Art. 7, August 12, 1865 (providing mechanics, teachers, and millers; adult industrial arts training is combined with basic literacy).
105 Cf. Treaty with the Comanche and Kiowa, 14 Stat. 717, Art 5, October 18, 1865 (a general sense of upended society is reflected in this treaty where the tribe promises to induce absent members to reunite with them, education would promote such cultural regeneration).
106 BARNES, FEDERALIST NO. 6, supra note 10 at 31 (Alexander Hamilton) (the economic development assistance combined with training and education in the post-Civil War treaty set suggests founding inspiration:

The genius of republics, say they, is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humours which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.

107 See, e.g., Treaty with the Seminole, 14 Stat. 755, Art. 1, March 21, 1866 (war cession); Treaty with the Cheyenne and Arapaho, 15 Stat. 593, Art. 1, October 28, 1867 (war preclusion).
108 See, e.g., Treaty with the Osage, 14 Stat. 687, Art. 16, September 29, 1865 (the Osage were longstanding allies, this treaty contains seventeen articles including provisions for schools, land grants, and continuing peaceful relations).
109 See Treaty with the Sioux, Sisseton and Wahpeton Bands, 15 Stat. 505, Art. 9, February 19, 1867 (promoting a shift from hunting and trapping to farming and mechanical arts); Treaty with the Kiowa, Comanche and Apache, 15 Stat. 589, Art. 2, October 21, 1867 (the Apache are entitled
dimensions involved a fiscal safeguard emerged in 1866 to ensure requested resources were actually needed and then used appropriately.\textsuperscript{110} Finally, a "Best Farmer Award" emerged in 1867 to reward successful farming efforts; the treaty framers pragmatically tried to encourage tribal members to successfully apply what they had learned.\textsuperscript{111} In far-flung environments with dramatically different conditions the rule of law crafted adjustments designed to promote stability and positive relationships using education as a common thread.\textsuperscript{112}

By 1868 education for Indian veterans fully emerged as a reconstruction principle.\textsuperscript{113} Six of those 1868 treaties provide education for children under the age of 16,\textsuperscript{114} six to benefit from the carpenters and teachers extended to the Kiowa and Comanche under an earlier treaty); Treaty with the Cherokee, 14 Stat. 799, Art. 14, July 19, 1866 (provision for educational facilities); Treaty with Choctaw and Chickasaw, 14 Stat. 769, Art. 9, April 28, 1866 (affirms that funds earmarked for education would be used for education); Treaty with the Cherokee, 14 Stat. 799, Art. 25, July 19, 1866 (the bounties of Indian soldiers to be used for a school); Treaty with the Seneca, 15 Stat. 513, Art. 19, February 23, 1867 (a boarding school provision); Treaty with the Cheyenne and Arapaho, 15 Stat. 593, Art. 7, October 28, 1867 (a provision to educate children).

\textsuperscript{110} See Treaty with the Choctaw and Chickasaw, 14 Stat. 769, Art. 20, April 2, 1866 (to obtain funds for "improvements" or the "necessity of cultivation" the treaty required local federal Indian officials to substantiate need. The treaty is, however, silent on process).

\textsuperscript{111} See Treaty with the Cheyenne and Arapaho, 15 Stat. 593, Art. 14, October 28, 1867 (what I call the "Best Farmer Award" is in Article 14); See Also Gordon S. Wood, The Creation of the American Republic, 1776-1787, 65-70 (1969) (this "Best Farmer Award" is consistent with Jefferson's idea to promote "independent self-governing citizens under social and political objectives to create an autarchic, agrarian republic of independent, small-scale, diversified farmers").

\textsuperscript{112} Development, Peace, supra note 93 at 47 (but inducements were more of a driving rather than of a leading nature. Statement of Senator Henderson during the council with the Yanktons on September 4, 1867:

You must cease to think of war. . . [h]e who among you now goes to war will soon die. . . you should persuade all your warriors to make peace, and come in among the peace party. We will see our great father and have him provide a school for you next year).

\textsuperscript{113} Just one of the 1868 treaties had no provision for education. See Treaty with the Cherokee, 16 Stat. 727, April 27, 1868 (this treaty involved the sale of Cherokee Neutral Lands in Kansas).

\textsuperscript{114} See, e.g., Treaty with the Crow, 15 Stat. 649, Art. 7, May 7, 1868 (providing education for children).
also provide industrial arts education for adults. And the "Best Farmer Award" was extended to the Eastern Shoshone, Crow, and Sioux. By 1868 treaty agreements were broadly encouraging the potential warring populations of the tribes, those generally between the ages of 6 and 40, to learn and then apply what they learned. The inter-cultural extension of education as an ideal is identifiable as a post-conflict strategy in the post-Civil War treaty set. And in one instance the treaty process itself became an open window into tribal culture in a positive example of reciprocal relationship forming. The use of

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115 See, e.g., Treaty with the Eastern Shoshone and Bannock, 15 Stat. 673, Art. 8 & 10, July 3, 1868 (Art. 8 promises blacksmith and farming trainers; Art. 10 reaffirms the promise to send farmers, blacksmiths, teachers, carpenters, millers, and engineers to the tribe).
116 See, e.g., Id. at Art. 12 (providing $500 a year for three years).
117 See, e.g., Treaty with the Northern Cheyenne and Arapaho, 15 Stat. 655, March 10, 1868 (the provisions in this treaty are emblematic of the idea that this treaty set includes notions of reconstruction: Art. 1 establishes peace; Art. 2 establishes the reservation; Art. 3 provides land to individuals for farming; Art. 4 is schooling for children ages 6-16; Art. 5 provides funding and trainers for adults to learn farming; Art. 6 provides goods in the form of clothing and other items to males over the age of 14 and females over that age of 12 - the potential warring population of the tribe; Art. 7 reaffirms the promise to send physicians, teachers, carpenters, millers, engineers, farmers, and blacksmiths; Art. 8 establishes conditions for future treaties; Art. 9 establishes a “Best Farmer Award”); See DEVELOPMENT, PEACE, supra note 93 at 47 (in council with the Yanktons on September 4, 1867, Senator Henderson promised to send a blacksmith for education saying, “you must have your children to learn the trade”); See Also Id. at 62 (General Sherman distinguishes between education for children and adults during a council at Spotted Tail’s camp: “We propose to help you there as long as you need help and to let you have any kind of men you want to show [train/educate] you how to raise corn, weave wool into blankets, and to make houses. We will teach your children to read and write.” Sherman effectively advocates adult technical/vocational training and basic literacy for children).
118 As it does today. Census 2000 showed that 48,000 Indian children were attending 185 BIA schools on 63 reservations in 23 states; two-thirds of these schools are operated by Tribal governments or organizations. DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 20 (5th ed., 2005).
119 Aside from education, societal mores and values are also bilaterally reflected in the treaty record. Compare, Treaty with the Potawatomi, 12 Stat. 1191, Art. 3, November 15, 1861, and Treaty with the Potawatomi, 14 Stat. 763, Art. 1, March 29, 1866 (the 1861 treaty specifies that “males and heads of families” would hold land in severalty conveyed by patent in fee-simple with power of alienation. The 1866 treaty amends the former by extending the conveyance to all adult persons of the tribe without gender distinctions and whether or not they were the heads of families. Even though American women would not have the vote for several decades it is not necessarily noteworthy
education to re-imagine the future is a common thread; even in this small treaty set we see the rule of law attempting to build more cooperative relationships by reaching for common understanding in specific economically oriented fields.

The post-Civil War treaty record finally suggests the self-determination of tribal governments would be a byproduct of education. This is partially suggested by the time-irrelevant observation that educated workforces that Potawatomi women wielded sufficient intra-cultural influence after the first treaty was signed to cause a second inter-cultural treaty to be signed. More interesting is the open window into tribal culture: if property ownership is the measure the tribe seems to value increased faction devoid of gender and familial status bars as a matter of positive law. Further, the Potawatomi reflected internal tribal values back to the United States using the culturally foreign treaty process itself as the chosen mechanism).

Cf. DEVELOPMENT, PEACE, supra note 93 at 42 (during a council aboard the Steamship "St. John" near the Yankton Agency on September 4, 1867, "Strike the Ree" reminded General Sherman of the promise for a blacksmith and school to "learn my young men").

Cf. DEVELOPMENT, PEACE, supra note 93 at 52 (to this end the notion that the rule of law itself promoted different sorts of stakeholders is found in this statement by Senator Henderson during a council with the Yanktons on September 6, 1867: "It is more honorable to be a good farmer than to be a great warrior").

See Treaty with the Sioux, Sans Arc Band, 14 Stat.731, Art. 2, October 20, 1865 (recognizing the Band is represented in council); Treaty with the Cherokee, 14 Stat. 799, Art. 8, July 19, 1866 (recognizing that the Cherokee national council approves all commerce); Treaty with the Seneca, 15 Stat. 513, Art. 5, February 23, 1867 (recognizing sovereign prerogative of the Seneca and Shawnee to enter into a mutually beneficial confederation); Treaty with the Cherokee, 14 Stat. 799, Art. 12, July 19, 1866 (a self-determined constitutional form of government existed at the time of signing); Treaty with the Potawatomi, 12 Stat. 1191, November 15, 1861 (reflecting self-determination, B. N. Bertrand penned “Business Committee” beside his signature when he signed this treaty for the Potawatomi leaving no doubt that a self-determined and defined governmental form existed).

It may perhaps be asked, by way of objection, why did not standing armies spring up out of the contentions which so often distracted the ancient republics of Greece? Different answers equally satisfactory, may be given to this question. The industrious habits of the people of the present day, absorbed in the pursuits of gain, and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation of soldiers,
are required in post-conflict environments, an idea promoted by the treaty set in environments spanning a continent. But it is also suggested in the federal promise to extend educational assistance beyond the initial ten-year limit as needed. It is also heard in the voices of tribal warriors. The rule of law imagined by the

which was the true condition of the people of those republics.

See Also HASSRICK, SIOUX, supra note 102, at 94 (Hassrick characterizes the Sioux as a martial people but notes “For the Sioux peace was a counterpart of war—both realities, both desirable, and both worthy of man’s endeavor”).

Forcing the transformation of hunter-gatherer societies to any other form of existence has been as contentious an idea as the treaty experience itself. An ameliorating observation is that however our generation might view occupations like farming, blacksmithing, or milling found in these 19th century treaties, the skill sets involved translate into those needed in that 19th century marketplace. Amid the many interpretations and value judgments possible, I suggest what we see goes beyond “might makes right,” the rule of law was attempting to effect positive and pragmatic change.

See Treaty with the Sioux, Brule', Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee and Arapaho, 15 Stat. 635, Art. 9, April 29, 1868 (the physician, farmer, blacksmith, carpenter, engineer, and miller were provided for a ten-year period, but the Commissioner of Indian Affairs could approve additional monies to “promote the educational and moral improvement of said tribes” if needed); See also U.S. CONST. art. I, §8, cl. 3 (Congress regulates commerce “with foreign nations, and among the several states, and with the Indian tribes,” so this flexibility was as much in the federal interest as in the tribal interest).

Development, Peace, supra note 93 at 38 (education was valued, but barriers had to be breached. “Iron Mountain” of the Lower Brules to Senator Henderson and General Sherman during a meeting of the Peace Commission on August 31, 1867: “You are not common people, and we will take your advice...When I settle I want to keep an interpreter, a half-breed, on my land. He (alluding to Aleck, our present interpreter) is my connection. We have got farmers, but we do not understand them”); See also Id. at 36 (The desire to learn existed among the warring population. “Big Horn,” a Minneconjou, during the same meeting: “You want to help us to farm...I do not know how to work the land myself but I want about twenty men to teach us. The whole nation wants them”); But See Id. at 49 (There were also setbacks. “Lone Chief” to General Sherman during a council with the Poncas on September 5, 1867: “I have a very nice house...It was a school to learn our children to read and write. We could not stay up there. We did not like the place because we got killed most every day by some of another tribe. We were scared off”); See also, Id. at 111 (the Civil War generation confronted distinct cultural challenges as seen in this remark by “White Crane” to General Harney and General Sanborn during a council with the Brule at Fort Laramie on April 28, 1868: “If you want me to live hereafter, wish for plenty of game for me. My great father wants me to sign a paper here.
Civil War generation recognized that education could be a theme in a modern post-conflict strategy.

One can raise any number of issues about the American Indian treaty experience. But if we set those issues aside momentarily without denying their importance, other observations also rise.\textsuperscript{127} First, silhouetted against the largest national post-war reconstruction to that point, the post-Civil War treaty set moves beyond the idea of education as a civilizing catalyst, education was employed as a deliberate bottom up reconstruction mechanism, in this case an inter-cultural undertaking.\textsuperscript{128} Secondly, the post-Civil War treaty set itself can also be characterized as a stepping-stone that pushes back the impracticalities of using education as a faction ameliorating strategy in environments as radically different as Florida differs from New York or South Dakota.\textsuperscript{129}

\textsuperscript{127} Examples exist even in this small set of treaties. See Treaty with the Nez Perce, 15 Stat. 693, Art. 3, August 13, 1868 (funds earmarked for education under an earlier treaty had been misused, so Congress promises additional funding in this treaty).

\textsuperscript{128} See ELLIOT, HARVEST, supra note 17 at 122:

The most important part of education has always been the training of the senses through which that best part of knowledge comes. This training has two precious results in the individual, besides the faculty of accurate observation, are the acquisition of some sort of skill, the other the habit of careful reflection and measured reasoning”.

\textsuperscript{129} See, generally, http://www. collegefund.org; follow hyperlink to “Tribal Colleges”(But was education as a value transferred? According to the American Indian College Fund, there are more than 30 tribal colleges and universities today with 30,000 students in attendance. These institutions combine academics and Native culture to build self-esteem and cultural identity. The power of education is found on the Pine Ridge reservation in South Dakota. The Oglala Lakota College has an accredited, 2-year Associate of Arts degree in nursing and their graduates are “in great demand...[the] program is critical to the region and key to assuring these rural hospitals and health services can continue to operate...the college curriculum incorporates Lakota values of WOWAHOLA (respect), WOKSAPE (wisdom), WACANTOGNKA (generosity), and WOOHITIKA (courage).” It is beyond the scope of this work to definitively prove education as an ideal was transferred as a result of educational assistance in the post-Civil War treaty set. The point is simply that education is revealed as a stratagem to promote a transition from war to peace. Still, after a century and a half the Oglala Lakota College appears to have blended mainstream educational
The inference is also possible that the treaty experience generally, with post-conflict education submerged in that experience, was the catalyst for deliberate inter-cultural relationship forming and the form with culture; transference occurred as they made it their own and became stakeholders. It is also notable that this particular school is located in the poorest county in America, is tribally run, and its graduates are having a positive intra- and inter-cultural impact.

Cf. Cohen, Handbook, supra note 78, at 68 (in 1940, as American Indians effectively fulfilled 19th century promises of mutual defense in World War II, Solicitor Marigold implied that a sense of timelessness orbited those 19th century treaties: “Not only is it important to recognize the “temporal depth” of existing legislation, it is also important to appreciate the past existence of legislation [like treaties which have] technically, ceased to exist. For there is a very real sense in which it can be said that no provision of law is ever completely wiped out”).

Part of the relationship is intra-cultural, part inter-cultural. The World War I generation included the grandsons of post-Civil War treaty signers and the promises of perpetual peace and mutual defense were within living memory. The following encounter during mobilization for the First World War exemplifies Marigold’s inter-cultural and time-independent “temporal depth” of legislation:

Dixon testified that in the summer of 1917, a Sioux man presented himself before a local board to register. A member of the board then asked him, “Are you an alien?” “No,” he responded, “I was born in the United States.” “Then you are a citizen,” they asked him. “No,” he responded again, “I am not a citizen. I am not an alien.” “What are you then?” the board inquired. “I am an Indian,” he said. “I have neither the rights of an alien nor of a citizen, yet I was born in the United States. My father is a full blood Sioux Chieftain...and I must offer myself up for service.


The World War I generation began fulfilling the inter-cultural mutual defense pacts made by their grandfathers, and at great cost:

During the Meuse-Argonne campaign, Major Tom (“Fighting Tom”) Reilley, commander of the Third Battalion, 165th Infantry Regiment, estimated that he started out with 876 men and returned from the battle with only 400. “The Indians in the front ranks were thoroughly swept away,” he reported grimly. “When an Indian went down, another Indian stepped immediately to the front...[t]hey were always at the front...if a battle was on, and you wanted to find the Indians, you would always find them at the front. Id. at 79.
counterintuitive 20th century phenomena that American Indians defended the rule of law through military service in numbers exceeding those of any other ethnic group.\textsuperscript{133} This record would be less if taking up arms were the only measure. But since families in economically struggling communities also sacrificed a higher, incomprehensible, sense is reached:

In the rate of volunteering for the armed services... particularly in World War I and II, [the American Indian] far surpassed the white or black populations of the United States. In the proportion of their funds which [the American Indian] voluntarily placed at the disposal of the Federal Government, through subscription to war bonds or otherwise, they have again far surpassed the rest of the country.\textsuperscript{134}

B. A Legal Culture.

A development in legal education provides a second example of expanding practicality during the post-Civil War decades.\textsuperscript{135} In 1870, as before the Civil War, students

\begin{quote}
The legacy of Navajo Code Talkers from the Second World War is still fresh in our minds, but slipping from memory is the record that over 17,000 American Indians served in World War I. See Flickinger, \textit{A Lawyer Looks at the American Indian, Past and present}, pt. 2 (1939), cited in COHEN, \textsc{HANDBOOK}, supra note 78 at 161.
\end{quote}

\textsuperscript{133} See Hearings on the Native American Veterans’ Home Loan Equity Act of 1992, Before the Senate Committee on Veterans Affairs, p. 2, (1992)(the statement of Mr. Kenneth Webster, National Congress of American Indians holds sentiments applicable to every culturally distinct group: “More Native Americans have served the United States of America in military service than any other minority group nationwide. This has held true for every major conflict in the history of the United States including the Persian Gulf War. Native Americans have always shown the utmost patriotism to this country and have viewed serving it as a great honor and privilege”); See also JACK UTTER, \textit{AMERICAN INDIANS: ANSWERS TO TODAY’S QUESTIONS}, p.68 (1993)(in 1993 almost half of all tribal chairmen in America, the chief executives, were veterans. Imagine the implications).

\textsuperscript{134} FELIX S. COHEN, \textit{THE LEGAL CONSCIENCE}, 231 (Lucy Kramer Cohen, ed., 1970)(the “temporal depth” of the treaty relationship is also evident in the level of giving by those on the home front).

\textsuperscript{135} See ELLIOT, \textit{HARVEST}, supra note 16 at 123 (1924)(the Allegory suggests that resistance to change is a universal. Even so, it may be that the state of education before the Civil War made the prospect of change afterward not only palatable, but welcome. Elliot’s characterization of education before the Civil War is reminiscent of the first enlightened escapee returning to the cave to lead another outside:
learned the law through lectures predictably subject to broad pedagogical variance\(^{136}\) depending on the lecturer.\(^{137}\) In that year a newly appointed Professor named Christopher Columbus Langdell\(^{138}\) made a small pedagogical adjustment that would improve legal education\(^{139}\) and the science of law for generations to come.\(^{140}\) Where the treaty example

Neither school nor college paid attention to training the senses, to the acquisition of any skill, or to implanting in the pupil’s or student’s mind the method of the inductive philosophy or the love of reading. The discipline in both school and college was of the driving, not of the leading, sort).

\(^{136}\) See, e.g. William Blackstone, 121 (not unique to American education:
The objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically . . . avoiding, as much as possible, divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion).

\(^{137}\) Harvard, Centennial, supra note 16 at 228-229 (the state of the art Langdell found in the 1870 prospectus of the Harvard Law School exemplifies this point:

Each instructor will adopt such mode of teaching the subject of which he has charge as in his judgment will best advance the pupils in his course . . . “[by] the method of instruction then current the student listened to lectures and read treatises...[but to avoid] “the memorizing of [the Lecturer’s] generalizations, some instructors devoted much time to discussing concrete problems).

\(^{138}\) Id. at 223-28 (Langdell was the first Dean of Harvard Law School and the founder of the case system).

\(^{139}\) Harvard Law School Association, Report of the Ninth Annual Meeting at Cambridge, June 25, 1895, 61 (1895)[hereinafter, Harvard, Report](this work holds the remarks given during a dinner to honor Professor Langdell, more than 500 attendees were present and the case system was prominently noted in the orations given that night. Suggesting the importance of innovation, Justice Oliver W. Holmes, Jr. said:

An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom).

\(^{140}\) Id. at 40 (innovation would yield results. Harvard President James C. Carter: “[w]e have long heard that the law is a science, but we have never before known, as we now know, what kind of science it is, what are the facts with which it is concerned, where those facts are to be found, and
portrays public rule of law efforts to figuratively bring factions together physically, Langdell engineered a private undertaking to bring factions together intellectually. Both sought common if not greater understanding, both sought to preserve the Union. This second example of expanding practicality began in a single classroom with the limited goal of effecting intra-cultural change. The results went much further.

1. The Case System.

The pedagogical adjustment Langdell crafted was simply to supplant the long accepted top-down lecture strategy with a bottom-up strategy emphasizing student self-sufficiency: “[i]ts chief thesis is that the student in preparing for a lecture should study cases, rather than the conclusions which others have derived from the cases; petere fontes is its motto” and a “Best Student Award” promoted long draughts. If the word had existed, developing student stakeholders might describe the goal:

[T]he existence and limits of a rule of law must be proved finally, not by a textbook, but by the reported decisions of courts. He [Langdell] knew that when a lawyer has occasion to test a rule of law he searches for those decisions. Langdell determined that the student should be trained to use those original authorities, and to derive from judicial decisions, by criticism and comparison, the general propositions.

141 Id. at 80 (“many of the Students in the School, under the influence of practising lawyers, revolted against the new method, - [but] time has brought its perfect vindication”).

142 HARVARD, CENTENNIAL, supra note 16 at 64-65 (before Langdell law was taught using three methods: apprenticeship, the development of treatises and their use in lectures on branches of the law through Inns of Court, and comments on a text in the student’s hands by a teacher. Langdell introduced a hybrid called the case system: training “the student in legal investigation through a first-hand study of judicial decisions and other sources, and tests by class discussion [on] the results of this investigation”).

143 Id. at 36-37 (“melius est petere fontes quam sectari rivulos” is the full saying: It is better to drink at the fountain than to sip in the streams); See also HARVARD, CENTENNIAL supra note 16, at 21 (about 1864 the Harvard Law School began offering what I have coined the “Best Student Award” to stimulate legal scholarship, trips to the fountain).

144 Id. at 229.
The strategy required the student to come to terms with the material, doing so leads to understanding and self-confidence, then to what some might call effectiveness at the bar but which I’ll call the potential for reduced factional violence.\textsuperscript{145} In contrast to how farmers, engineers, millers, and carpenters might train many hands to build different lives and a common reference point for mutual understanding if not cooperative relationships, the case method converged on student mental faculties anticipating a positive outward expansion to the physical world.\textsuperscript{146}

2. Imagine a Bar Chart.

The case method has been used to teach first year courses for many decades so the societal impact of Langdell’s 1870 innovation will be more difficult for recent law school graduates to discern than those who graduated a half-century ago. Standardization has a way of obscuring both the pre-adjustment conditions urging action as well as its own existence.\textsuperscript{147} But before 1870 and certainly before the Civil War the study of law was not as consistent as it is today. The case method began movement toward that end.

\textsuperscript{145} Id. at 229 (discourse is modeled: “[t]he plan, as worked out, was that the instructor should reprint from the reports the cases adapted to show the growth of legal doctrine; that the student should master five or six cases in preparation for each classroom exercise; and that the exercise shall consist of stating and discussing these cases and solving related hypothetical problems”).
\textsuperscript{146} HARVARD, REPORT, supra note 139 at 21 (“However easy it may be today to see that this plan is reasonable, in 1870 it appeared to many persons and indeed to most, impracticable and unscientific. Development is a process, and not a succession of incidents. Environment limits and guides the direction of effort; it cannot create the living growth”).
\textsuperscript{147} J.C. Gray CASES AND TREATISES, 22 Am. L. Rev. 756, 762 (1888).
Legal education is thus partitioned into two eras: every day before Langdell stood in front of his first class, and every day since. In the former, specifically the decades between the Revolution and the Civil War, if one were to depict the way the law was taught using a modern PowerPoint bar diagram vast differences would be identifiable within each law school, among law schools, and therefore among the States. If maintaining the Union were the measure, two decidedly different camps were evident. After more than a century of movement toward a center amid respect for difference, a contrasting diagram would reflect a more even horizontal distribution although clear spikes and plunges will still exist; variance in State approaches to capital punishment might exemplify.

The late historian Shelby Foote once noted that before the Civil War American’s would say, “the United States are. . . [g]ramatically it was spoken that way and thought of as a collection of independent states.” But, “after the war it was always the United States is as we say today without being self-conscious at all.” Langdell’s small adjustment promoted that shift by systematizing the way the legal profession learns, and thus understands and applies, the law. It took a Civil War to change the way we think about our national identity; Langdell changed, a student at a time, how the legal profession learns with the potential to influence how it thinks, its ideals, what it will defend. He may have forestalled a second lapse into anomie.

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148 Id. At 618 (the new system held the potential to bring minds together, it: “exulted the prestige of law and legal learning; at the same time it affixed that legal science stood on its own two feet. It was an independent entity, a separate science; it was distinct from politics, legislation, and the opinions of the laymen”).

149 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 607-608 (1973) (hereinafter FRIEDMAN, HISTORY) (in 1850 there were 15 law schools in 12 of the 31 states; 19 states had none. The number increased to 21 by 1860; to 31 in 1870; 51 by 1880; 61 in 1890; and 102 in 1900 when there were 45 states. Thirty years after Langdell introduced the case system the number of law schools had exploded. Relate my theory to this growth by substituting “expanding population” for law school and “middle class” for state. Imagine the year 2208. Does the education needed to develop middle classes exist? Will stable middle classes elsewhere help or hurt a commercial republic like ours? What if the case system had not been introduced exactly when it was? What would have happened?

150 ALFRED A. KNOFF, INC, THE CIVIL WAR, (1990) (Foote then said, “that sums up what the [Civil War] accomplished. It made us an “is””).

151 See HARVARD, CENTENNIAL, supra note 16, at 47 (Langdell’s “striking success” is directly related to “the consequent change in the attitude of students toward their profession...[I]t is hardly too much to say of
3. Classroom to Globe.

Langdell’s innovation was not initially well received because the long-range impact was so difficult to imagine. But its slow acceptance standardized legal education and helped to reduce the difficulty that vexed Madison: the practicality of giving to all men the same faculties of reason to reduce the potential for factious causes to erupt in violence:

Let it be repeated: the Law School is not to abandon all that has been learned since Langdell and give way to the idea that there must be a formal course in everything. Rather it will continue to seek to train a body of men who have so mastered the art of legal reasoning and have secured so solid a foundation in legal science and so firm a grasp of the materials of our legal system that they may approach new problems in new fields and old problems in unfamiliar fields with assurance and achieve results of real value. But this does not mean that the significant movements in legal science that have related it to the other social sciences and are making it over are to be ignored. It means rather that these movements are to be treated, not as revolutionary but as evolutionary.

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152 See also Id. at 66 (“A list of such students who have attained distinction in various branches of the profession is a sufficient defense of the method…it must be used in a school which purports to teach the law not of a particular state, but of the entire United States”); See also FRIEDMAN, HISTORY, supra note 147, at 618 ("Langdell’s method also proposed to solve the problem of teaching law in a federal union. Langdell handled local diversity by ignoring it entirely").

153 Id. at 80 (Mr. Gustavus H. Ward: “Its triumph, like that of all great reforms, has been, not instantaneous, but gradual”).

154 See HARVARD, CENTENNIAL, supra note 16, at 236 (acceptance was deliberate. In 1918, the year World War I ended and a half-century after Langdell began the system in a single classroom, the idea of it was still “making new converts, - almost every year another law school adopts the case system”).

155 Id. at 170.
Langdell started a small intra-cultural change that began influencing his local environment.\(^{156}\) It then expanded ever outward to influence the legal culture nationally.\(^{157}\) And at some point, probably long before the breach itself was fully accepted at every local level, its original intra-cultural essence gave way to an inter-cultural dimension unimpressed by borders: “the work of genius wrought by Professor Langdell was the revolution of the methods of legal study, not only in this School, but in the schools of all lands where English law is studied.”\(^{158}\) Langdell’s classroom spanned continents:

The Italians have begun to work upon the notion that the foundations of the law ought to be scientific, and, if our civilization does not collapse, I feel pretty sure that the regiment or division that follows us will carry that flag. Our own word seems the last always; yet the change of emphasis from an argument in Plowden to one in the time of Lord Ellenborough, or even from that to one in our own day, is as marked as the difference between Cowley’s poetry and Shelly’s. Other changes as great will happen. And so the eternal procession moves on, we in the front for the moment; and, stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for near a thousand years.\(^{159}\)

\(^{156}\) *Id.* at 18 (Sir Frederick Pollock: “The same spirit in which [Langdell] has taught and critised has been carried by others not only into the literary exposition, but into the judicial development of the law”).

\(^{157}\) HARVARD REPORT, supra note 139, at 65 (The Honorable Joseph H. Choate describes what Hurst later called a positive release of human energy:

There are results of the modern system which I do most heartily approve. It sends out to the great cities of this Union young men annually, far better equipped with legal knowledge, far better equipped with the fundamental principles which are to prepare them for the practice of the law, than any of their predecessors enjoyed. And I think we may safely say that we practitioners at the New York bar welcome all we can get of them. There is only one trouble, Professor Langdell, and that is that they know altogether too much. They know it all. And there are none of us old men in the law who cannot learn a great deal from them).

\(^{158}\) *Id.* at 79 (comment attributed to Mr. Gustavus H. Wald).

\(^{159}\) Cf. HARVARD REPORT, supra note 139, at 61-62 (Justice Oliver Wendell Holmes, Jr.).
By shouldering back impracticality Langdell allowed every generation of American lawyers since to re-imagine itself when most receptive to re-imagination, as students. Like the Founders, later generations would agree that education is a good thing:

For my own part, lately my thoughts have been turned to "old, unhappy, far-off things, And battles long ago;” and when once the ghosts of the dead fifers of thirty years since begin to play in my head, the laws are silent. . .

Learning, my learned brethren, is a very good thing. I should be the last to undervalue it . . . [turning, now, to the dead hand of the past] . . . The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.160

Langdell engineered a conservative experiment that blossomed in succeeding decades to influence the way the law is taught, understood, and practiced.161 He pushed back the contours of impracticality by employing education as a positive societal influence that would defend the rule of law.162

C. Hesitant Steps From the Cave.

The provision of education in the post-Civil War treaty set was an inter-cultural beginning for tribal communities seeking to retain the best aspects of their unique cultural heritage while meeting the needs of life in

160 Id. at 60-61(Justice Holmes seems to lay bare his own metamorphosis including esteem for the place education occupied in that journey).
161 See ELLIOT, HARVEST supra note 17, at 48(Elliot urged Langdell to apply for a professorship: "Then began in 1870 a process of conservative experimentation and construction in the Law School which is not yet finished").
162 See HARVARD, REPORT, supra note 139, at 80(far from American shores: "Since then [1882] England. . . has seen the Langdellian system introduced into the Inns of Court and the ancient universities").
a modern context. American Indian leadership on the Boards of educational scholarship foundations exemplifies that ideal today. Langdell’s adjustment of legal pedagogy may have had a similar long-term impact as evidenced by contemporary efforts to include previously disenfranchised citizens in the legal profession. On one hand, each suggests a narrowing of the idea to promote prosperity by encouraging stability and minimizing the threat of factious conflict – ideas tracing to the founding. On the other hand each represents successive generations returning to, and journeying from, the bottom of a cave, with others.

The experience however, highlights that respect for other cultures should be near the center of any such undertaking.

See e.g., COHEN, HANDBOOK, supra note 78 at 132, citing F.S. Cohen, How Long Will Indian Constitutions Last? (1939). Rebutting doubts Indian people could begin controlling education, Cohen noted that some teachers in Indian schools were already being paid using tribal as opposed to federal funds – transference appeared to be occurring); See Also, GAIL ANN SCHLACHTER AND R. DAVID WEBER, FINANCIAL AID FOR NATIVE AMERICANS 2006-2008, 33-173 (2006)(continuing adult education is promoted by American Indian tribal governments today. Amid 1,463 financial aid offerings from a myriad of public and private sources are fifteen scholarships promoting adult continuing education by tribal governments including the Bad River, Blackfeet, Sault, Seminole, Seneca, Shoshone, Ho-Chunk, Hopi, Navajo, Northern Cheyenne, Penobscot, and Pueblo of Zuni tribal governments. There are many tribal programs for undergraduate and graduate level education in this reference; See also, http://catchingthedream.org, follow the “About Us” hyperlink. Since 1986, Catching The Dream has achieved an 83% success rate, 552 students, following the goal “to help improve the quality of life in Indian communities through the higher education of Indian people”–transference is yet occurring).

See, e.g., http://fedbar.org (follow the “Sections and Divisions” hyperlink. Expanding diversity is found on the Federal Bar website; the American Indian law section includes a “Public Education” committee”).

See MICHAEL SULLIVAN, LEGAL PRAGMATISM: COMMUNITY, RIGHTS, AND DEMOCRACY (2007)(suggesting “any view of the future must be informed by who we are as a people – this depends upon an interpretation of our history”).

The science of finance did not removed the need for the science of war in the 19th or 20th centuries, but stepping-stones were laid:

The means of revenue, which have been so greatly multiplied by the increase of gold and silver, and of the arts of industry, and the science of finance, which is the offspring of modern times, concurring with the habits of nations, have produced an entire revolution in the system of war, and have rendered disciplined armies, distinct from the body of the citizens, the inseparable companion of frequent hostility.

BARNES, FEDERALIST No. 8, supra note 10, at 43-44(Alexander Hamilton).
If ancient Greek philosophy is submerged in Madison’s discourse on faction, the 19th-century saw efforts to expand the practicality of education as stepping-stones from our founding values to an environment with fractures to bridge that are at least as significant as those evident today.168

If the 19th century was about releasing positive human energy as Hurst and these examples suggest, the 20th century represents a similar fidelity to founding principles when the lens shifted to education focused on veterans under the 1944 G.I. Bill.169

III. RE-IMAGINATION

168 See George C. Christie, Jurisprudence: Text and Readings on the Philosophy of Law, 5 (1973) [hereinafter Christie, Philosophy] (stepping stones placed by the rule of law. In the Statesman, Plato was said to suggest that a state without law would be the best, but since there “has not yet been an ideal state or a true statesman...there is no choice but to settle for second best, namely the rule of law. While the best state would be lawless, a lawless non-ideal state would be a disaster”). See also Friedman, World, supra note 4 at 184-185 (the idea of a “flat world” seems to center less on the rule of law than on bottom up decision-making that might benefit from learning:

We tend to think of global trade and economics as something driven by the IMF, the G-8, the World Bank, the WTO, and the trade treaties forged by trade ministers. I don’t want to suggest that these governmental agencies are irrelevant. They are not. But they are going to become less important. In the future globalization is going to be increasingly driven by the individuals who understand the flat world, adapt themselves quickly to its processes and technologies, and start to march forward-without any treaties or advice from the IMF. They will be every color of the rainbow and from every corner of the world.

This may be too strong, but could the search for a bottom-up strategy itself signal something as strong as a constitutional moment? Were any of the constitutional moments our forbears confronted clear enough to be verbalized in their time? Or were they so cloaked by circumstances that logic and experience were overwhelmed? If so, evoking any of the bottom-up strategies that built our nation might restore balance. Consider this single perception of our founding philosophy:

"The Federalist [Papers] denies, on the whole, the possibility of peace among nations."

If this is true about an important part of our core belief system a continuous turning of corners is ahead and our expression of democracy might never fully contribute to a more cooperative or peaceful civilization. I disagree with this judgment. The sum of America’s parts is greater than the whole. America will defend herself and her interests, but domestic and global cooperation if not peace is preferred. Stepping-stones from the furthest reaches

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170 Friedman, History, supra note 147, at 337 (hindsight is clearer:

In many ways, wars fundamentally disrupt the operation of the legal system. The Civil War . . . was an unusually violent episode, and it did unusual violence to the orderly administration of justice. It was also a constitutional crisis . . . All this meant a domestic escalation in the role of the national government. This too was reflected in many ways in every part of the law.


172 Elliot, Harvest, supra note 17, at 249 ("An American, therefore, is likely to be a man of individualistic quality, who nevertheless possesses a strong community-sense and is ready to fight in defense of his family and his community").

173 Barnes, Federalist No. 6, supra note 10, at 31 (Alexander Hamilton) (although arguing a narrow point, using a top down lens Hamilton suggests that "[c]ommercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interests, and will cultivate a spirit of mutual amity and concord"); See also, The Essential Holmes, 86 (Richard A. Posner, ed., 1992) [hereinafter Holmes, Posner] (using a bottom up lens, Justice Holmes gave the soldier’s perspective during an unprepared speech at a regimental gathering on December 11, 1897:

As I look into your eyes I feel as I always do that a great trial in your youth made you different—made all of us different from what we could have been without it. It made
of the rule of law, and nearer ones, have and can promote a more ideal civilization.\textsuperscript{174} This requires contemplating questions of justice, force and choice that are high on the discourse agenda of every generation.

A. Justice.

A global economic contest of wills has succeeded the earlier contests of strength. Without granting that the latter have fully dissipated, to most of the world how America comports herself in overseas conflicts regardless of whether or not we are militarily engaged will inter- and intra-culturally mark the contours of our conception of democracy and, by extension, ideal civilization. Strategy reflects this. The first question I submerge here is “What is marked?” Pound suggested justice:

\begin{quote}
\textit{[T]he end of the law is justice. We do not mean justice as an individual virtue. We do not mean justice as the ideal relation among men. We mean a regime. We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste.}\textsuperscript{175}
\end{quote}

But this rests on value assignments beginning with the nature of humankind. Dietz, who characterized the Federalist Papers as “a classic of liberalism, an us feel the brotherhood of man. It made us believe in something else besides doing the best for ourselves and getting all the loaves and fishes we could...Those of us who survive have heard the same music and through all the hard work of later years have remembered that once we listened to strains from a higher world).\textsuperscript{174}

\textsuperscript{174} \textit{Elliot, Harvest}, supra note 17, at 250 (this Victorian era quote strikes a cord:

As a result of his own experience in public affairs and of his ancestors’ experience, a true American always acquiesces in the decision of a majority of the legitimate participants in an election or other public contest. This is an American trait of high political value. It makes American political and social progress, as a rule, a peaceful evolution. People who have long been helpless under political or ecclesiastical oppression, and have had no practice in self-government, have difficulty in acquiring this trait).\textsuperscript{175}

\textsuperscript{175} \textit{Pound, Law} supra note 34, at 64-65.
expression of America’s English heritage and her western tradition,” made a bleak assessment:

No matter how often the authors admit that there are people who are sufficiently reasonable and good to be trusted with self-government, the Federalist entertains, on the whole, a rather pessimistic view of human nature. This raises the question of whether the contributors to this American classic believe that man can be improved. The answer is in the negative. No millennium is foreseen in which human selfishness would disappear and in which it would be possible to live happily without the restraints of a government. All kinds of men, whether poor or rich, whether of common or aristocratic stock, are selfish and always will be. On the other hand, it follows from the present analysis of the Papers that the authors are confident that enlightened reason could check selfish passions (emphasis added).

In contrast, Madison provided a more balanced and optimistic view confident that the form of government itself would encourage what is good in humankind to rise to the surface, a matter of importance if the whole is to weather factional violence to endure beyond the present:

176 Dietz, Federalist, supra note 170 at 255-256 (liberal in the sense that “[r]egardless of whether the authors were concerned with free government, or peace, or security, they were always primarily interested in the individual’s freedom and welfare”); see, however, Benjamin N. Cardozo, The Paradoxes of Legal Science, 94 (1928) [hereinafter Cardozo, Paradoxes] (balance is required: “Liberty as a legal concept contains an underlying paradox. Liberty in the most literal sense is the negation of law, for law is restraint, and the absence of restraint is anarchy. On the other hand, anarchy by destroying restraint would leave liberty the exclusive possession of the strong or the unscrupulous”).

177 Dietz, Federalist, supra note 170 at 259.

178 De Tocqueville, Democracy, supra note 22, at 398 (De Tocqueville contrasted what he observed in 18th century America with the aristocracy he observed elsewhere: “an aristocratic people [do not] abstractly deny man’s faculty of self-improvement, but they do not hold it to be indefinite; they can imagine amelioration, but not change; they imagine that the future condition of society may be better, but not necessarily different; and, whilst they admit that humanity has made progress, and may still have some to make, they assign to it beforehand impossible limits”).

179 Id. at 399 (De Tocqueville sheds light on that optimism: “Aristocratic nations are naturally more apt to narrow the scope of human perfectibility; democratic nations, to expand it beyond reason”).
As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.\textsuperscript{180}

Writing in the same 20\textsuperscript{th} century years as Dietz, but reflecting on our 19\textsuperscript{th} century experience, Hurst offered a similar intra-cultural view that also presupposes what is good in individual men, today including women, will rise to quiet depravity, with a similar result materializing where factions form to act on larger interests:

Nineteenth-century policy moved in successive waves of response, now to one felt challenge of environment, now to another. Constant in the background, however, was the theme of resort to law to enlarge the options open to private individual and group energy. This was a basic point of contrast with the seventeenth- and early eighteenth- century stress on community security. On the other hand, this was the point of contact between two working principles - release of energy and control of circumstance - which dominated the character of nineteenth-century law.\textsuperscript{181}

But Hurst also recognized that that such a release is bounded by external and internal environmental realities, a consideration lawmakers must strive to overcome:

Another yet more subtle [19\textsuperscript{th} century American] change marked our perception of reality in relation to men’s liberties. Much sentimentality and irrelevant moralizing went into mid-century movements . . . toward the end of the century [Americans] began to recognize that people might be in trouble because they were trapped within their own limitations . . . [I]n this aspect budgets for public institutions responded to a third kind of environmental limit on men’s freedom, that constituted by the configuration of personality.\textsuperscript{182}

\textsuperscript{180} BARNES, FEDERALIST No. 11, supra note 10, at 62(Alexander Hamilton)(on the utility of a Union in respect to commerce, and a navy).
\textsuperscript{181} HURST, FREEDOM, supra note 2, at 39-40.
\textsuperscript{182} HURST, FREEDOM, supra note 2, at 102.
If we narrowly consider the idea that post-conflict education extended by public action on dozens of treaty blankets or adjusted privately in one small law classroom were attempts to expand the practicality of giving to all men similar faculties of reason, then post-conflict education begins to emerge as more than sentimentality or irrelevant moralizing.\textsuperscript{183} It becomes understandable as a pragmatic step\textsuperscript{184} to enlarge individual and societal liberty through individual re-imagination:

The public school system expressed primarily the values we put on political and social mobility. But in a measure it, too, began to reflect the sense of this scarcely defined challenge of men’s inner environment. Once we had outlined a policy of sanitary controls of the general environment, we began to control disease by changing personal ways of life. This meant control by the spread of knowledge, largely through public school hygiene and physical education programs, and the work of public clinics and tax-exempt private health associations. Thus law allocated community resources to enlarge liberty by helping individuals to restructure the habits and beliefs which make of personality a kind of limiting environment.\textsuperscript{185}

In the 19\textsuperscript{th} century expanding practicality moved beyond theoretical ideas bounded by 18\textsuperscript{th} century impracticalities to trace the edges of a bottom-up strategy that would deliberately build a nation. However inefficiently pursued, America expressed a positive view of humankind in its 19\textsuperscript{th}

\textsuperscript{183} BARNES, FEDERALIST No. 6, supra note 10, at 31 (Alexander Hamilton) (suggesting that the “genius of republics” is that they are pacific, “the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humours which have so often kindled into wars”).

\textsuperscript{184} ELLIOT, HARVEST, supra note 17, at 142 (setting aside soft visions of enlightenment, education is more often a matter of practical necessity whose import expanded from local to national prominence a century ago. In 1917, during mobilization for World War I, draftee examinations revealed facts about the population that “took the people of the United States and its Government by surprise, and made them both eager for remedies. The first was the amount of illiteracy. . . . [the conclusion arrived at was] . . . that the education of the entire people could not be left exclusively in the hands of the States and the municipalities, but must be treated as a fundamental national interest”).

\textsuperscript{185} HURST, FREEDOM, supra note 2, at 102.
century policy expressions and a similar theme was transported into the 20th century as post-conflict education under the 1944 G.I. Bill of Rights. With this Madison's positive view of humankind emerges as the American perspective and post-conflict education as a stepping-stone traceable to our founding philosophy. Each recognizes that factional competition and even violence will continue, but that a broader and more enduring peace among nations is not outside the realm of human imagination.

B. Force.

The second question I submerged above is how the rule of law is to mark the contours of democracy and, thus, promote movement toward ideal civilization, holding our ground, or even backsliding? Finding a starting point for analysis requires finding a common ground. That common ground is force:

Many today say that law is power, where we used to think of it as a restraint upon power. Social control requires power--power to influence the behavior of men through the pressure of their fellow men. The legal order as a highly specialized form of social control rests upon the power or force of politically organized society. But so far from the law being power, it is

186 Cf. William R. Bishin & Christopher D. Stone, Law, Language and Ethics: An Introduction to Legal Method 1125 (1972) (hereinafter Bishin, Method) (a sentiment reflected in this passage on meaningful life and the social order: "But the group that must be brought together is getting larger and more unruly; the technological problems more desperate than promising; and the risks, should the social organization fail, higher—perhaps final").

187 See, e.g. Elliot, Harvest, supra note 17, at 268 (a theme carrying over from the beginning of the 20th century: "These five contributions to civilization—peacekeeping, religious toleration, the development of womanhood suffrage, the welcoming of newcomers, and the diffusion of well-being— I hold to have been eminently characteristic of our country, and so important that, in spite of the qualifications and deductions which every candid citizen would admit with regard to every one of them, they will ever be held in the grateful remembrance of mankind").

188 Bishin, Method, supra note 185, at 1125 ("Force and the threat of force can contribute to a social order of sorts. But force by itself—unmitigated by principle—has never worked as a way of organizing people, whether it were the force of "each man for himself" or the crushing force that the state can monopolize. Indeed, what is more striking, there probably never has been a society in which it was even tried, in which people did not arbitrate their capacities for violence with some rituals and customs and senses of value").
something that organizes and systematizes the exercise of power and makes power effective toward the maintaining and furthering of civilization.\textsuperscript{189}

This passage suggests the fundamental difference between the top-down law-as-power approach we are trying to set aside, and a bottom-up law-as-a-restraint-on-power strategy we are trying to find.\textsuperscript{190} The former strives to influence behavior with top-down pressure: the slogan “click-it or ticket” is a simple law-as-force example used to promote highway safety. In contrast, the latter strives to organize and systematize the exercise of power from the bottom-up: forming a “community watch group” is an example that has been around since colonial days.\textsuperscript{191} Both are undertaken to reduce the ill effects of faction within the myriad relationships found in any given environment; each has a place and time.

Insight is gained from even the short review of the 1944 G.I. Bill that follows. As a rule of law benchmark the G.I. Bill is more emblematic of law-as-a-restraint-on-power than law-as-power not just because of the obvious difference in individual liberty it encourages, but because of the multi-dimensional modeling it demands.\textsuperscript{192} And

\textsuperscript{189} POUND, LAW, supra note 34, at 49.
\textsuperscript{190} See, generally, BARNES, FEDERALIST NO. 11, supra note 10, at 61 (Alexander Hamilton) (the search is as old as the nation):

\begin{quote}
[I]n relation to operations in the West Indies. A few ships of the line, sent opportunely to the reinforcement of either side, would often be sufficient to decide the fate of a campaign, on the event of which, interests of the greatest magnitude were suspended. Our position is, in this respect, a very commanding one. And if to this consideration we add that of the usefulness of supplies from this country, in the prosecution of military operations in the West Indies, it will readily be perceived, that a situation so favourable, would enable us to bargain with great advantage for commercial privileges. A price would be set not only upon our friendship, but upon our neutrality).
\end{quote}

\textsuperscript{191} See text accompanying note 62, supra.
\textsuperscript{192} See FRIEDMAN, WORLD, supra note 4, at 289 (as in our three examples, multi-dimensional modeling is part and parcel of the flat world. Another question is “Where is everyone else?” in relation to us:

“We said everyone is going to have a secondary education,” said Stanford University economist Paul Romer. “That was what the high school movement in the early part of the
because it was applied to existing form, it allows a better
time-compressed impact analysis than either of the 19th
century examples discussed in Part II. In that
compression the synergy between government and governed the
Founders imagined is found. Still, even the G.I. Bill is
probably not a perfect representation of what the Founders
might have imagined; but like those earlier examples it
demonstrates what can happen when a "culture of one"
returns to the cave to promote a "culture of many" who
defend stability as productive societal stakeholders.

1. 1944 The G.I. Bill.

The generation that sacrificed itself in the Second
World War returned to the most imaginative post-conflict
educational opportunity in history. The Servicemen’s
Readjustment Act of 1944 afforded the veteran 12-48 months
of undergraduate or graduate education, vocational and farm
training, and unemployment compensation of $20 per week for
a year. Veterans would help gain control over the post-
war environment after re-imagining themselves and becoming:

The twentieth century was all about.” As economic historians
have demonstrated...both technology and trade are making the
pie bigger, but they are also shifting the shares of that
pie away from low-skilled labor to high-skilled labor. As
American society produced more high[ly]-skilled people by
making high school mandatory, it empowered more people to
get a bigger slice of the bigger, more complex economic pie.
As that century progressed, we added, on top of the high
school movement, the GI Bill and the modern university
system).

Where the G.I. Bill promoted a metaphorical bottom up explosion of
students leading to increased facilities, faculty, and curriculum, Elliot saw a slower top-down 19th century reality: “[t]his development
[in education] has not been steady during the two generations of men,
but rather in waves, and at various speeds. Moreover, the waves of
educational progress, like ocean waves, are often long prepared and
come from far”). Elliot, Harvest, supra note 17 at 122.

Cf. Milton J. Esman, Ethnic Diversity and the Structure of
Government, in BEYOND RECONSTRUCTION IN AFGHANISTAN 156 (John D. Montgomery
and Dennis A. Rondinelli, eds., 2004)(urging foreign aid donors to
focus on institution building in any post-Taliban Afghani environment,
and to promote equitable participation by major ethnic communities).

See MILTON GREENBERG, THE G.I. BILL: THE LAW THAT CHANGED AMERICA, 24
(1997)[hereinafter GREENBERG, LAW](in contrast, just two decades earlier
non-disabled veterans of World War I faced an environment little
changed since the Civil War: they “were given $60, a train ticket home,
and the promise of a $500 bonus to be paid in 1944”).

Id. at 18-37.
[E]ngineers, scientists, manufacturers, doctors, dentists, accountants, lawyers, teachers and scholars. At least ten Nobel Prizewinners were GIs. About fifty percent of the engineers who worked for the National Aeronautics and Space Administration (NASA) and designed or managed space flight, took their degrees under the GI Bill, most of whom would not otherwise have gone to college.\(^{197}\)

Displaying inter- and intra-cultural resistance, or just fear of the unknown, the institutions that would have predictably benefited from a more highly educated veteran population voiced opposition one can characterize as near-sighted factional\(^{198}\) conflict:

Many educators opposed [the G.I. Bill] as a threat to higher education standards. Other veteran organizations dedicated to disabled veterans feared that funds would be diverted from the most needy. Unions enjoying the protection of closed shops were cautious, and bankers feared government involvement in loans. And racial discrimination, legally commonplace at that time, including segregated military forces, became an issue regarding opportunities for black veterans.\(^{199}\)

Despite such opposition, access to education under the G.I. Bill came to epitomize the American Dream: “The law made available to sixteen million veterans of World War II ...generous educational opportunities ranging from vocational job training to higher education, and home ownership. This combination of opportunities changed the

\(^{197}\)Id. at 47. See also Harold M. Hyman, American Singularity: The 1887 Northwest Ordinance, the 1862 Homestead and Morrill Acts, and the 1944 G.I. Bill, 67 (1986)(broad access to technical and professional skill training dovetails with Hyman’s suggestion of a cause and effect relationship between the G.I. Bill’s home loan benefit and the development of middle class; suburban housing under the G.I. Bill “became the substitute” for the agrarian lifestyle in our post-WWII environment. The way we thought and the way we lived, nationally, changed in tandem).

\(^{198}\)See e.g., Dan Goff, Scholar Becomes Chief Explainer in a ‘Mormon Moment’ N.Y. TIMES INTERNATIONAL, July 28, 2007, at A13 (as an undergraduate 57 years ago, Prof. Bushman reported a factional clash between his Mormon faith and “Ivy League bullies” that he describes as cultural in nature. Professor Bushman ultimately enjoyed an Ivy League career teaching and researching American colonial history).

\(^{199}\)Greenberg, Law, supra note 194, at 39(some educators were outspokenly cautious of the new and expansive program for veterans: Harvard President James B. Conant feared unqualified veterans would flood the campus, but by 1947 [Conant] was calling veterans “the most mature and promising students Harvard has ever had”).
social and economic landscape of America. It was the American Dream come true."\textsuperscript{200}

2. Re-imagination.

President Roosevelt vastly underestimated the interest veterans would exhibit in access to education under the G.I. Bill.\textsuperscript{201} For the architect of the New Deal to underestimate the power a promise of inter-and intra-cultural mobility might foster in the human spirit is curious, but understandable considering the uncertainty of the dark days preceding and following the Normandy invasion.\textsuperscript{202} One veteran might have spoken for his entire generation when he described the positive impact such a right-sized and right-timed opportunity presents:

They were trained killers, accustomed to carnage and quick, violent reactions. Few of them had any college education before the war; the only skill most of them possessed was that of Combat Infantryman. They came out determined to make up for lost time. They went to college using the G.I. Bill of Rights universally

\textsuperscript{200} Id. at 9.
\textsuperscript{201} Id. at 35-37 (the Act was established on June 22, 1944, just two weeks after the Allied invasion of occupied Europe:

President Roosevelt estimated that 150,000 veterans would attend college per year under the Bill, with a grand total of about 700,000 by the time the law expired in 1956 . . . by 1947 there were 1,164,000 veterans registering for college, about 2.2 million eventually went, about half of whom were the first in their families to do so).

\textsuperscript{202} That generation moved forward in fidelity to founding ideals and inspiration in the name of nation building, and globe building:

No amount of money could ever repay the great sacrifice made by the flower of American youth. We all remember - and will never forget - Pearl Harbor, Bataan, Corregidor, Guadalcanal, Tarawa, Anzio beachhead, D-day. Thousands of our gallant boys died so that we might live. Thus, it is clearly our responsibility to guarantee these returning servicemen the right to live, work, and worship as they believe, in a great country that has clearly proven in wartime that by working together we can out produce the world. And certainly we have the facilities to continue such production to rehabilitate the world in time of peace. The G.I. Bill of Rights, Appendix to the Congressional Record, Vol. 90 - Part 10, 78th Congress, 2d Session, A3008 (June 13, 1944) (remarks of Hon. Samuel A. Weiss of Pennsylvania, in the House of Representatives).
praised by the veterans as the best piece of legislation the U.S. ever conceived.203

This is the same story millions204 of veterans now tell after a half-century, a story of process rather than a succession of randomly occurring events. In the words of Nobel Laureate and veteran Martin Perl, “progress in a complex universe does not come from tinkering. What the GI Bill did was to open up opportunity “and then all these fresh minds came in and all these things were invented.””205


The full effect of the G.I. Bill, the sheer weight of it, will probably have to be left for future generations to measure.206 As an ongoing experiment it may be impossible to fully gauge the impact. But as Alan Greenspan recently observed the G.I. Bill helped to promote the shift from a war economy to a commercial economy, a shift important to those desiring to develop as commercial republics:

The significant addition of college graduates to the labor force, in part the result of schooling financed by the G.I. Bill, was sufficient to contain wage increases for the highly skilled . . . In short, technical proficiencies across all job levels appeared to rise about in line with the needs of our ever-more-complex infrastructure, stabilizing the income distribution in the United States for three decades. While the GI Bill and on-the-job training in the World War II military were not, of course, initially market-driven, they helped to meet the needs of a changing labor market.

The G.I. Bill helped veterans launch careers, start businesses, hire employees, raise their families, build their communities, re-imagine themselves and the nation: “[I]t has been estimated that for every dollar spent on GI Bill education benefits, the nation received as much as

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204 GREENBERG, LAW, supra note 194, at 37 (about eight million veterans benefited: “In addition to the 2.2 million in colleges, 3.5 million attended other schools such as business schools, trade schools, art and drama schools, and even high school. About 1.4 million were involved in on-the-job training programs and 690,000 in farm training”).
205 Id. at 47.
206 See Id. at 36-37(suggesting a corollary between increased earning capacity and educational attainment).
207 GREENSPAN, TUMULTUOUS, supra note 10 at 400-401.
eight dollars in income taxes, but the true value is incalculable.”

Primary, secondary, even tertiary economic effects, and the dignity the Founders thought possible for humankind are found in this veteran’s words:

They accepted a hand-up in the G.I. Bill, but they never took a handout. They made their own way. A few of them became rich, a few became powerful, almost all of them built their houses and did their jobs and raised their families and lived good lives, taking full advantage of the freedom they had helped to preserve . . . [I]s it accidental that so many ex-paratroopers from E Company became teachers? Perhaps for some men a period of violence and destruction at one time attracted them to look for something creative as a balance in another part of life. We seem also to have a disproportionate number of builders of houses and other things in the group we see at reunions.

The largest impact of the G.I. Bill was probably not economic, but in widely changed attitudes about individual potential and community. Both race and gender became

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208 GREENBERG, LAW, supra note 194 at 37.
209 AMBROSE, BAND, supra note 202 at 306; See also HOLMES, POSNER supra note 171 at 86 (the G.I. Bill may have been successful because, as a dividing line, it spanned generations. In an address delivered on May 30, 1884, Justice Holmes said, “if the armies of our war [the Civil War] did anything worth remembering, the credit belongs ... to average human nature... if we would be worthy of the past, we must find new fields for action or thought, and make for ourselves new careers”).
210 GREENBERG, LAW, supra note 194 at 12 (in a pre-enactment radio address on the G.I. Bill “the national commander of the [American] Legion, Warren H. Atherton, warned that the returning veterans could “make our country or break it” and “restore our democracy or scrap it.” My suggestion is that this is the case elsewhere).
211 Id. at 61 (singer and actor Harry Bellefonte suggested the G.I. Bill allowed minorities to reach for the middle class:

I didn’t hardly finish first term high school. I had no desire to read, to learn . . . most of the men in my outfit were unskilled black workers, unskilled laborers. And how do you then compete for jobs if you have no training . . . It is in this respect that I think the GI Bill became a God-send. . . once we had access to education, to knowledge, to skill, we could upgrade ourselves. Id. at 61.

212 Office of Information Management and Statistics, Veterans Administration, Pub. No. M 70-85-3, Female Veterans’ Usage of the Post-Korean Conflict G.I. Bill (CH 34, title 36, U.S.C.) 12 (1985)(in 1984 there were 1,162,700 female veterans in 1984, about 4.1% of the total population; 1709,867 of them were trained under the post-Korean
smaller obstacles to self-improvement and advancement. The idea of who could attend college became less linked to earlier notions of social status as classrooms began serving as generational and class blenders where ideas, issues, and solutions might be shared and common ground could be found where faction once divided. The Bill also inspired future generations to improve themselves through education. A positive economic impact followed, but its impact was also very personal: “It was the higher education portion that became synonymous with the term “GI Bill” and which evokes the most emotion.”

Veterans re-defined and re-imagined themselves to the benefit of their communities and the economy as a whole in the post-World War II decades. It was more than a bridge from anomic to more productive commercial lives, education restored their balance by following the bottom-up principles of productive change, unity and individuality which presumes individual re-imagination is important, that cultural and institutional barriers are less important, and recognizing that a knowledge society is the hallmark of

Conflict G.I. Bill. This post-1980 census study suggests the beginnings of changing attitudes toward individual potential and community:

Those women who did use the GI Bill used a greater percentage of their available entitlement than did male veterans, even though women began training later after separation. Also...female veterans who did use the GI Bill were more persistent in their training than male veterans in that the women used a greater percentage of their eligibility entitlement regardless of how long they waited to begin training).

213 Greenberg, Law, supra note 194 at 51 (“A permanent and vital legacy of the educational provisions of the GI Bill is a change in the very idea of who could be a university student. . . Older people could share classrooms with recent high school graduates and adults could go to school while married, raising children, and working at a job”).

214 See Id. at 36-37([h]igher education had become democratized, irrevocably altered. As the twentieth century draws to a close, the descendents of GIs have made college attendance an expectation and by the mid 1990’s enrollments soared to more than fourteen million students”).

215 Id. at 18.

216 Id. at 107(the G.I. bill “is still looked upon with appreciation, reverence, and respect . . . [it] turned the nation into one of stakeholders—“independent yeoman in Thomas Jefferson’s phrase” made possible a quick restoration of the nation’s human, economic, and social capital which had been restrained or distorted by the Great Depression and the Great War . . . It now serves as an inducement for enlistment in America’s volunteer military forces).
In terms of the Allegory the G.I. Bill experience suggests that expanding the practicality of education in diverse environments might meet initial resistance, but over time positive intra-and inter-cultural effects will be realized as anomie falls away and different forms are seen.

The success achieved by the G.I. Bill suggests that expanding the contours of practicality to embrace post-conflict education justifies supplanting our fears and artificial limitations with a measured risk. Such educational access was the catalyst for broad economic and social attainment, and with that movement toward a more ideal society.

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217 BARNES, FEDERALIST NO. 45, supra note 10 at 256 (James Madison)(in fidelity to founding values:

We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape, that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this object.

218 Cf. ELLIOT, HARVEST, supra note 17, at 145(Elliot suggests: “every state or nation seems to need more intelligence, more vision . . . [t]here is but one road upward - more education, and wiser”).

219 John Bound and Sarah Turner, Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans? INST. FOR SOCIAL RESEARCH, UNIV. OF MICHIGAN 16 (noting:

[S]ome of the most lasting impacts of increasing college enrollment for World War II veterans are not visible in educational attainment, but in the form of more subtle institutional changes that widened the pipeline to elite schools to include public school graduates and students from a wider range of ethnic, religious, and geographic backgrounds).

220 See THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, 418 (HENRY CABOT LODGE, ed., 1888)(in the 19th century spirit: “A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best obtained”).
If post-conflict education is the measure, the "release of energy" Hurst saw in the 19th century moved far beyond the simple formation of public opinion in the 20th century. At the half-century mark both sides of the aisle agreed that post-conflict education under the G.I. Bill has irrevocably and positively "changed the life of our nation." It unleashed a burst of creative human energy that helped to build the "world's largest middle class and the world's strongest economy." So, what's next?

C. Choice.

The final question submerged above involves choice. Which way should we go, what might a bottom-up strategy look like? As a refresher, my theory is simply that

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221 Hurst, Freedom, supra note 2, at 39 ("In the nineteenth century we used law to shape the environment (1) by directing or affecting the allocation of economic resources, (2) by regulating behavior, (3) by affecting, and (4) in a small degree directing, the advancement of knowledge or belief and the formation of public opinion in consequence").

222 See Greenberg, Law, supra note 194 at 36(On June 5, 1990, President George H.W. Bush said: "The GI Bill changed the lives of millions by replacing old roadblocks with paths of opportunity. And, in so doing, it boosted America's work force, it boosted America's economy, and really, it changed the life of our nation").

223 See Id., at 16. On June 22, 1994, "President William J. Clinton said the legacy of the G.I. Bill of Rights was the world's largest middle class and the world's strongest economy").

224 Another question beyond scope here; what is the "right size" amid widely varying traditions and expectations:

As [the 20th] century progressed, we added, on top of the high school movement, the GI Bill and the modern university system. "These were big ideas," noted Romer, "and what is missing at the moment is a political imagination of how do we do something just as big and just as important for the transition into the twenty-first century as we did for the nineteenth and twentieth.

See Friedman, World, supra note 4 at 289.

225 Cf. Bishin, Method, supra note 185 at 1125("We have always had, between force and the unconscious, a margin for reasoning—for questioning whether a rule of conduct be 'just' and 'right,' for consciously debating whether we ought to do some act or not, for allowing ourselves the sense of a freedom 'to be or not to be' what we choose").

226 Cf. Friedman, World, supra note 4 at 181-182(here is where the notion of a new convergence of new players, on "new playing fields developing new processes and habits for horizontal collaboration" can and probably should look to the past. Relationship and capacity building is seen on treaty blankets, in lantern lit law classrooms, and on hundreds of college campuses which suggests the rule of law has been weaving
promoting post-conflict education among foreign veterans will have the same positive effect on them and their communities as we have experienced. But this involves a personal value judgment that exporting ideals will engender positive bottom-up economic development by promoting human re-imagination in vastly different environments where democratic governance is not necessarily the historical or cultural norm. Pound suggested the end and means:

An ideal civilization, of raising human powers to their highest possible unfolding, of the maximum of human control over external nature and over internal nature for human purposes, must recognize two factors in achieving control: on the one hand, free individual initiative, spontaneous self assertion of individual men; and on the other hand coöperative, ordered, if you will, regimented activity. Neither can be ignored if we are to maintain, go forward with, and hand down control over nature.

But Pound’s power theory contains an “either or” quality requiring amelioration to inform the “right size” of any application. Law can be pure force, but our domestic experience suggests that law-as-a-restraint-on-force equally promotes movement toward ideal civilization: regulating hazardous pollutants comes to mind as a quick brush against one of the major debates of this day – to what extent will global warming affect us and what steps does the rule of law need to take now to prepare for the next two centuries? Limiting work hours and setting age limits on employment also come to mind; in earlier days

227 CARDOZO, PARADOXES, supra note 175 at 124 (“There is no freedom without choice, and there is no choice without knowledge, - or none that is not illusory.” By this point one will have asked whether my proposal goes to policy, or law. We search the Founder’s words for enlightment, for the law; but are the turns, pauses, and inflections we hear in their voices policy, or law? Langdell walked into his first classroom with a new pedagogical method, a new policy; after more than a century does any American lawyer consciously distinguish between the way they find the law, and the law itself? Are they not one? Did it matter to the veteran fresh from Saipan or Saigon or Somalia whether the hand-up was law or policy? The question of policy or law is, quite possibly, more at home in a top-down framework. Each may form an answer. The question is not mine, and I doubt it can be answered in our time).

228 POUND, LAW, supra note 34 at 132.

229 Id. at 49; see also FN 189, supra.
weaving in these areas was said to invade personality
calling forward another debate this essay cannot
unilaterally answer — what implications rise in terms of
negative and positive human rights obligations on the
state? Choosing the right size will begin ameliorating the
inter- and intra-cultural dimensions in play, promote
commerce and cooperation, and ease or preclude suffering if
we do move into a less hospitable physical environment. \(^{230}\)
But, unless anomie obviates consensus building, finding the
right size requires broadly asking “How far is too far?”

Experience suggests education is a right-sized
approach. Post-Civil War education forged in treaties was
an inter-cultural offering \(^{231}\) of a foreign form, the
existence of thirty-plus tribal colleges and universities
today suggests it was a horizontal stepping-stone from our
founding philosophy to today, one still yielding positive
results. \(^{232}\)

Similarly, while Langdell’s inspiration is not
necessarily directly related to greater inclusion of
disenfranchised minority groups by the legal profession
today, a vertical step, its inter- and intra-cultural
dimensions may have encouraged that result. At a minimum,
his inspiration can be viewed as a stepping-stone from our
founding philosophy to the Civil War generation, and then
horizontally to every law school in the nation that later
adopted the case method. One is again free to define its
overseas journey as a vertical or horizontal manifestation.

The G.I. Bill of 1944 is an even better example. It
was more than the catalyst for re-directing and refreshing
our national economy, it did that by broadly eliminating

\(^{230}\) Id. at 132(probably a middle ground: “[w]e are no longer bound to
believe that only one of the two, individual freedom of action and
cooperative organized activity, can be taken of in our picture of human
life. We are not precluded from an ideal which allows both for
competition and for cooperation”).

\(^{231}\) Cf. Development, Peace, supra note 93 at 36 (a stepping-stone relying
on a positive conception of humankind beginning with those wielding the
power to lead others out of the cave. “Bear Like Him” of the Two
Kettles Band to General Sherman during council at Fort Sully on August
31, 1867: “I have not much to say. I am not much of a man but all
these men are head Chiefs and I will agree to whatever they say they
will do...I am a soldier but not a chief. [But] I think [of] myself
just as much [as others thinks of themselves].” I do not speak to
efficiency of effort, an important matter, but that education is
observable from one era to the next, it is part of the main channel).

\(^{232}\) The experience also holds lessons on that which is too far, lessons
that should guide any application of this proposal.
practicality barriers like race, age, religion, and gender. That leap was a vertical and horizontal, intra- and inter-cultural stepping-stone with an unmistakable resemblance to the founding thoughts about the role of education as a faction-ameliorating stratagem, one that may never have occurred if those hesitant 19th century efforts to push back practicality had not occurred first. But this is visible only if we expand our sense of time beyond the here and now, and then imagine strategies based not just on law-as-force, but on law-as-a-restraint-on-force. The rule of law began weaving education into the pattern long before the Berlin Wall fell. The question then becomes whether borders should present an insurmountable impracticality.

Here we return to Madison and his views on quelling the violence of faction. As we see today overseas, and Madison saw in his day, factions united by common interests pose threats to security, public health, the advancement of science, economic development, and literally any facet one might include in their world-view of ideal civilization.

233 See supra text accompanying Part I.C.
234 Cf. FRIEDMAN, WORLD, supra note 3 at 430-431 (and devise or revise approaches accordingly. Friedman frames the rise of al-Qaeda in terms of the Dell conflict resolution theory:

There has been a proliferation of these informal mutual supply chains throughout the Arab-Muslim world today - small networks of people who . . . recruit through alternative education systems . . . What we have witnessed in Iraq is an even more perverse mutation of this mutant supply chain . . . Just as you take an item off the shelf in a discount store in Birmingham and another one is immediately made in Beijing, so the retailers of suicide deploy a human bomber in Baghdad and another one is immediately recruited and indoctrinated in Beirut. To the extent that this tactic spreads, it will require a major rethinking of U.S. military doctrine.

235 BARNES, FEDERALIST NO. 10, supra note 10 at 52 (James Madison)(on faction:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community).

236 FRIEDMAN, WORLD, supra note 3 at 421 (whether to adopt a top down or a bottom up strategy reflects choice by the rule of law: 64
The causes to which factions adhere are as varied in foreign environments as they were in America then, or in America today, they are “thus sown in the nature of man” and will exist in any future conflict we encounter. If we accept that the world presents intra- and inter-cultural challenges, then Madison’s “regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.” This is an intra- and inter-cultural proposition compelling us to search for the blend of force that will promote, over time, “zeal in cherishing the spirit, and supporting the character” of democratic governance despite the certain existence of potentially violent faction.

When we lived in a more centralized, and more vertically organized, world—where states had a near total monopoly of power—individual imagination was a big problem when the leader of a superpower state—a Stalin, a Mao, or a Hitler—became warped. But today, when individuals can easily access all the tools of collaboration and superempower themselves, or their small cells, individuals do not need to control a country to threaten large numbers of other people. The small can act very big today and pose a serious danger to world order—without the instruments of a state. Therefore, thinking about how we stimulate positive imaginations is of the utmost importance.

Barnes, Federalist No. 10, supra note 10, at 53 (James Madison) (Madison’s day may have been a horizontal environment; however, framed stimulating productive imagination was his challenge, a constant:

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good).

Id. at 54.

Id. at 59.

Friedman, World, supra note 3 at 421 (citing IBM computer scientist Irving Wladawsky-Berger whose words may as easily be those of the Founding generation, and those who bring down walls wherever found: “We need to think more seriously than ever about how we encourage people to focus on productive outcomes that advance and unite civilization—peaceful imaginations that seek to minimize alienation and celebrate interdependence rather than self-sufficiency, inclusion rather than
If the educational stepping-stones portrayed in this essay had the positive effects they appear to have had, a law-as-a-restraint-on-force strategy is as likely as law-as-force to promote positive, cooperative, nation-building polities. At the street level our strategy includes veteran education, inspiration unbounded by borders in the 19th and 20th centuries. Concluding with Pound, his suggestion that we no longer think of power or law as restraint-on-force was made in an earlier day with clear reflective forces, nevertheless:

What the power theory may mean in action has been exemplified in recent times in the identification of international law with power which has been leading to its undoing.241

The full implications of two people shaking hands through a breach in a wall they created with their own hands may not be evident for some time. It is possible nothing changed, but it is also possible a release of human energy hesitantly arose as their minds led the actions of their hands. If so, because it was a human activity that resembles something we’ve modeled we might first reflect on our founding aspirations for humankind, and then on whether the rule of law can weave a theme beyond our shores that it has woven into every corner of the nation – nurturing thought as a nation-building strategy.242

exclusion, openness, opportunity, and hope rather than limits, suspicion, and grievance”).

241 POUND, LAW, supra note 34 at 49.
242 Id. at 51 (Friedman describes a 21st century release of human energy similar to that which Hurst saw in the 19th century; I see veterans submerged in both eras, on all sides:

The fall of the Berlin Wall didn’t just help flatten the alternatives to free-market capitalism and unlock enormous pent-up energies for hundreds of millions of people in places like India, Brazil, China, and the former Soviet Empire. It also allowed us to think about the world differently—to see it as more of a seamless whole. Because the Berlin Wall was not only blocking our way; it was blocking our sight—our ability to think about the world as a single market, a single ecosystem, and a single community... [it] was not only a symbol of keeping people inside East Germany—it was a way of preventing a kind of global view of our future).
I propose a focus on post-conflict veteran education not as a this-is-it strategy, but as one of several hand-up-not-a-hand-out stepping-stones for those seeking something resembling the liberty we enjoy. This does not rise to the level of a constitutional moment, but as Langdell and treaty framers and G.I.’s in field jackets strolling into millions of classrooms have shown us, America has another opportunity to make a small intra-cultural shift with the potential of broad, positive, inter-cultural change. And this will take time. Part of the bottom up strategy we need is right there in the rule of law, it just has to be recognized and released.

IV. ONE BOTTOM-UP STRATEGY

The general form of a globally inclusive veteran education strategy follows. The first application will yield a template that can be culturally and practically tailored for use elsewhere.

243 See, e.g., Elliot, Harvest, supra note 17 at 116 (suggesting education can remedy reasoning and willpower “by steady work on a whole generation, if sound educational methods be employed”).

244 See Greenberg, Law, supra note 194 at 7 (Senator Bob Dole:

But when we came home, things were different. What would our country do with millions of returning veterans? Thanks to the GI Bill of Rights, individuals were given many different opportunities and equipped with many different skills. Were it not for this program, veterans might have found themselves unemployed, standing in a bread line. We had a government that knew its proper role as a neighbor not a warden - a government that was lending a helping hand).

245 See Aristotle, The Politics, Book III, Cl2, in Cristie, Philosophy, supra note 167 at 27 (of course the “difficulty of any general principle embracing all particulars” will always exist); see also Cardozo, Paradoxes, supra note 175 at 120 (“We must know how men work, and how they live, before we can say whether liberty will be increased or diminished by regulations affecting the manner of their living”; The form portrayed here constitutes a unilaterally undertaken starting point where such an approach will be well received; it will be possible to cite many past and current events in declaring it is already at work. A more holistic starting point is one of corroboration and relationship building noted many times in this essay. If education in this post-Cold War environment should be considered a fundamental global interest with long-term economic import as current and projected conditions suggest, I would urge our national leaders to lobby for the elevation of education as an interest area in the United Nations. The vision
A. A POST-CONFLICT STARTING POINT.

Iraq & Afghanistan serve as post-conflict models whatever the level of ongoing violence. The principles of a veteran education strategy are simplicity, literacy, time, modeling, and liberty. These principles are submerged in the text with a caution that the challenge is completely cultural, therefore the experience must be faith and politically neutral. The idea is to build experience memory as athletes build muscle memory. For this we listen, observe, and reflect more than we speak.

I suggest testing this theory by building a generic curriculum that centers on literacy and an array of environmentally specific trade and technical skills veterans can select from according to interest. As a starting point, any skill related to building their style of a home will serve. Whatever track they choose should lead to certification as an apprentice or journeyman craftsmen. Build institutions offering G.E.D. programs and even undergraduate opportunities. Implement the strategy through a host nation Department of Education with a submerged Veteran Office, build or re-build them if necessary specifically including design and evaluation functions for stake-holding. Some teaching will be inevitable at first, but we should train, develop, and reward confident host nation educators and administrators. To this end we need to capitalize on the skills and expertise of non-governmental organizations.

would be the establishment of a bottom-up oriented Education Council in place alongside the Secretariat, Economic & Social Council, Court of Justice, Trusteeship Council, and Security Council).

246 Cf. Frankfurter, Brandeis, supra note 5, at 135 (focused experimentation: Seek for betterment within the broad lines of existing institutions. Do so by attacking evil in situ; and proceed from the individual to the general. Remember that progress is necessarily slow; that remedies are necessarily tentative; that because of varying conditions there must be much and constant inquiry into facts...and much experimentation).

247 Elliott, Harvest, supra note 17, at 143 (NGOs are not a new concept: At the same time, [World War I] many non-governmental agencies set to work to contend against the evil of illiteracy...this success is a strong encouragement to the idea dawning among thinking Americans that popular education should by no means be confined to children under fourteen or under eighteen, or to young people under twenty-four, but should be carried forward by evening
Build many libraries. Invite and encourage all veterans to participate, provide each some form of a modest stipend and invite families to the graduation. Establish community employment offices and teach someone to run job fairs. Start an inter-school soccer league; invite the teachers and librarians, have kids on the sidelines hand out flags, let them keep the jerseys.

Resources will be required but should never reach the level of intensity a conventional law-as-force strategy implies; resources are not solely an American burden—all have expertise that can contribute. By the time we see something resembling your local community college our aid will lessen, but they will remember when it began, and who got it started. Just one thing, whenever American soldiers deploy have some guard the schools. That is America.

B. A Pre-Conflict Starting Point.

The idea of a pre-conflict veteran educational strategy is a different matter. Long before the Marshall Plan the American people began expressing greater generosity to others than any people in the history of mankind, ever. Despite this the challenges of this new

248 In some places $25 a month is a fortune; this is not solely America’s burden.
249 Yes, even though a soccer game once started a war. See WWW.onwar.com/aced/data/sierra/soccer1969.htm Contact sports are culturally offensive in many places. Baseball might work but requires more resources. I’ve watched pick-up Cricket matches; try it.
250 I have declined to “pile on” empirical proof to stave off the entrenchment I think it would yield; my aim has been to promote thought. But one observation is so easily forgotten a reminder is appropriate – like others, America is a nation of generous people. And its rule of law has woven its ideals into many post-conflict strategies striving to achieve positive inter- and intra-cultural results:

“Food will win the war!” was the motto...in the United States during World War I...[and then following the Armistice] the United States provided food for some 300,000,000 people, shipping approximately 17.5 million tons of food to France, Italy, and the United Kingdom as well as to European neutrals at a cost of approximately $2.5 billion. Allied governments supplemented this amount with a distribution of another one billion dollars...in the minds of leading policy makers in Europe and the United
century will be no less significant than any in living memory. Specifically, if environmental estimates are wrong, faction and conflict will evolve as they did in Madison’s day and we will navigate many corners. If they are right, the scope of need may far exceed the capability of any sovereign or alliance – it will be a bottom up fight everywhere and skills both practical and intellectual will be needed. I would therefore promote strategy application in pre-conflict environments with an emphasis on what I’ll call environmental/economic regional hot spots. The elements of a post-conflict strategy remain applicable but will require different emphasis. Whether applied in pre- or post-conflict environments education will elevate the importance of the human restoration amid any infrastructure re-building considered essential to stability.

C. The Re-Imagination Age.

States food not only won the war; it won the peace. The rationale was that putting food in people’s stomachs would not only stave off hunger; it also would stave off “Revolution, Unemployment, Suspicion, and Hate,” Hoover’s four “new recruits” to the Apocalyptic horsemen that were sweeping Europe.


If this proposal were formally announced by the government today, its potential could not be empirically proven. What has proceeded only provides a past sense of things, the future is yet to be imagined. Moreover, important questions orbiting norms of intervention and non-intervention are left un-addressed whether the program is promoted in pre- or post-conflict environments. How might this idea be folded into relationships undergoing change everywhere? To what degree does any nation lose sovereign prerogative in joining such an effort? Where and when and with whom is it appropriate to apply a global veteran education strategy? What is the line between far, and too far? Who draws the line? Once drawn, do we liberate or oppress? Is there a neutral, non-culture threatening program middle ground the expanding community will accept, or might it spur some sort of “education race”? Will it help us gain control over the environment? The world focused on and long afterward brought to trial those responsible for the Holocaust; how would justice and this proposal work in the Congo? Will promoting something positive there promote positive long-term relationships and, thus, a positive, here, or anywhere? It cannot hope to diminish the grief of those military families who have lost loved ones, but will it ultimately save the lives of our soldiers, and innocents, as I believe, or result in greater losses? There are no fully satisfying answers, but then, no generation has ever enjoyed such certainty.
Territories lost or gained, cities standing, resources controlled, command of the seas, national survival, or any other historically linked definition might be the measure of “winning” in future wars. Education does not directly promote our interests in such historical terms; it reduces the need for future generations to dust them off for use. If we believe longer lasting peace is not only possible but increasingly essential to local, regional, and global economic growth and cooperation without abandoning the idea of nation states, then one might recognize promoting education as an ideal already submerged in the notion of any bottom up strategy. Evoking ancient Greece one last time, what does the Allegory represent if not a bottom up trek from darkness to the light of a “more good” reality, where influence is heightened by knowledge? We have the alternative: when most combatants lay down their weapons in conflict areas today they return to a status quo of faction, and its

Cf. CHARLES W. ELLIOT: THE MAN AND HIS BELIEFS, 374 (William Allen Neilson, ed., 1926) (The sword will be drawn again, and America will defend herself, and others. Still, there will be times where the rule of law will be able to defend itself just as handily, and more enduring, by promoting education for veterans. Forging dividing lines between warriors and veterans is rare in the history of humankind. Elliot, speaking as Madison or Hamilton might have, provides a final thought:

We are here to-day to remember lovingly and with reverence the characters and deeds of the brave and generous soldiers of our Civil War on both sides. Yes, on both sides. Men who fight strenuously even in a cause which their opponents hold to be unrighteous, and act humanely after either in victory or defeat, win the respect of their adversaries, and may easily become, when peace is made, good friends and neighbors. That happened after the Civil War on an immense scale. It is barbarities before or after the fight and behind the battlefront that embitter both combatants and non-combatants, and instill lasting national hatreds).

Mark Landler, Anxiety Crashes the Party at Davos, N.Y. TIMES, January 23, 2008, at C1 (“It seemed like just another meeting of the world’s most exclusive talk shop...[t]he trouble is nobody was talking about anything but the global market turmoil and the faltering American economy. This year, the World Economic Forum is actually going to be about the world economy.” Nationally, renewed commitment to education, including veterans, should probably be as much a part of our economic recovery as a rate cut. Globally any emphasis on education, but particularly for veterans, re-imagination wherever it can occur, might form part of the bottom up solution to calm the “anxiety” of the global “movers and shakers from business, politics and nonprofits” at this summit. The proposal is admittedly unconventional resistance to the idea of “give it up.” But then, these are unconventional times).
latent violence. Despite this modern day, there are few dividing lines.

V. CONCLUSION

This essay has reached back to dusty treaty blankets and law school classrooms heated by wood burning stoves to suggest that a veteran education strategy will promote more productive and stable environments in cultures that are vastly different from our own. Violence flows from faction, a universal observation the Founders suggested will always vex us causing me to consider what foreign veterans have to draw on as they confront their post-conflict environments. To address this, I suggest that any strategy one might undertake must draw on the entire depth and breadth of our national experience. Our rule of law envisioned education, with an increasing focus on veterans, as a partial strategy, one with a slow inter- and intra-cultural impact that has not yet ended. The world is far different today than it was for Franklin, “The Man that goes in the Middle,” Langdell, and a veteran named Bellefonte. Or is it? If this proposal were attempted, what would happen?

254 Cf. Holmes, Posner supra note 172 at 323, citing U.S. v. Schwimmer, 279 U.S. 644 (1929) (Justice Holmes dissenting) (although pessimistic that mankind would soon “unite in peaceful leagues,” or “that a philosophic view of the world would regard war as absurd,” Justice Holmes nevertheless voiced the bottom-up view that shouldering back impracticality is an important societal goal: “most people who have known [war] regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace”); See also Garrett Hardin, The Tragedy of the Commons, in Economic Foundations of Property Law 2, 4 (Bruce Ackerman, ed., 1975). In 1833, William Forster Lloyd wrote a rebuttal to the invisible hand theory that better describes the bottom up view Holmes framed from the soldier’s perspective. According to Hardin, “the essence of dramatic tragedy is not unhappiness. It resides in the solemnity of the remorseless working of things...” As individuals strive to maximize gain in an environment presumed to be finite, the resulting positive and negative utilities tend to negative. “The individual benefits as an individual from his ability to deny the truth even though society as a whole, of which he is a part, suffers. Education can counteract the natural tendency to do the wrong thing, but the inexorable succession of generations requires that the basis for this knowledge be constantly refreshed”; See also Edward De Bono, Serious Creativity 15 (1992). De Bono’s “lateral thinking” can yield many ideas on how to stimulate positive imaginations. See FN 236, supra. The genesis of my veteran education strategy came during my experiences as a military advisor in which I interacted with soldiers, combatants, and
Our experience and our Founders tell us that education, and the rule of law, will defend one another.

ex-combatants on five continents, but it was my subsequent legal studies that allowed my shift in focus to move beyond those experiences. Blending Holmes and Lloyd, those experiences tell me that if we move laterally from Lloyd’s herdsman to Holmes’ warriors, individuals Lloyd submerges in the commons, education will have a counteractive effect where “the remorseless working of things” is most strongly felt. But to De Bono the creative idea must not only be logical in hindsight, there is also a question of how the idea will fit within existing value systems, however narrowly or broadly that system is defined. Education has revealed that solutions to the world’s problems may not be as finite as Lloyd found the world itself, it can do so again. Yielding to environment is an option. But so too is shouldering back impracticality, publicly and privately).