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## The Bulls and Bears of Law Teaching

Sara K. Stadler

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# The Bulls and Bears of Law Teaching

Sara K. Stadler\*

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\* The author (J.D. Virginia, B.A. Emory) is an Assistant Professor of Law at the Emory University School of Law and a member of its Appointments Committee. To continue in the third person, she would like to thank: (1) Theodore H. Davis, Jr., who encouraged her to ignore her tenure articles and write this Essay; (2) G. Mitu Gulati, who was kind enough to read and comment on this Essay within hours of meeting her; and (3) her Emory colleagues, including Margo A. Bagley, William J. Carney, Martha Grace Duncan, Michael Kang, Kay L. Levine, Michael J. Perry, Julie Seaman, Joanna Shepherd, Frederick Tung, and John Witte Jr., for offering their comments and support.

## I. Introduction

*[Y]ou eat a bull, and a bear eats you.*<sup>1</sup>

As a rule, the terms "bull market" and "bear market" refer to conditions on Wall Street. Bulls are good, bears are bad. But things other than stocks can be in a bull market or a bear market, too; there has been a bull market in absurdity, for example, for as long as anybody can remember.<sup>2</sup> If something—call it  $\chi^3$ —were in a bull market, we might say that  $\chi$  is rallying; that  $\chi$  is hot; that the smart money is liquidating everything and plowing its assets<sup>4</sup> into  $\chi$ . If, by contrast,  $\chi$  were in a bear market, then it might be time to avoid investing in  $\chi$  and perhaps to invest in its opposite, "not  $\chi$ ." The trick, of course, is knowing whether one is running with the bulls or the bears. Still, because life is cyclical, almost everything may be observed to have bull markets and bear markets. This Essay seeks to demonstrate that law teaching is no exception.

To generate the data that lies at the heart of this Essay, I catalogued (by subject) almost every Article, Book Review, Book Note, Comment, Essay, Note, Recent Case, Recent Publication, and Recent Statute published in the *Harvard Law Review* between and including the years 1946 and 2003. I performed this Herculean labor in search of a relationship between the subjects on which faculty chose to write and the subjects on which students chose to write. I suspected that such a relationship existed, and what is more, I suspected that the relationship would be an interesting one—even a predictive one. But I wanted proof.

I found it.

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1. Chuck DiFalco, Financial Sense University, Get Religion with Secular Bears (Sept. 16, 2004), <http://www.financialsense.com/fsu/editorials/2004/0916.html> (on file with the Washington and Lee Law Review).

2. "[F]or there is no nonsense so gross that society will not . . . make a doctrine of it and defend it with every weapon of communal stupidity." ROBERTSON DAVIES, *THE CUNNING MAN* 390 (Penguin 1994).

3. In the sentence appearing in the text above, the " $\chi$ " is not an X, but the Greek letter chi; and thus " $\chi^3$ " is not  $X^3$  (X cubed), but a chi followed by a signal alerting the reader to the presence of a footnote—*this* footnote. I use Greek letters throughout this Essay because economists do; why economists use Greek letters is beyond the scope of this Essay.

4. The word "assets" includes money, but it also includes such things as time and energy (which can be used to make money). See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (1993) (defining asset as "an item of value owned [or] a quality, condition, or entity that serves as [a] . . . resource"). It should come as no surprise that law professors tend to be richer in time and energy than in money. This Essay is evidence of that.

## II. Methodology

*There are three kinds of lies: lies, damned lies and statistics.*<sup>5</sup>

### A. Developing the Thesis

As a junior scholar of intellectual property law (and in particular, copyright and trademark law), I long have imagined that while senior scholars were busy churning out articles on such rarified subjects as constitutional jurisprudence, their students were exploring education law, election law, health law, and yes, intellectual property law—what I imagined to be the waves of the future. If the laws of economics applied to law schools,<sup>6</sup> one would expect that if students were increasingly interested in, say, intellectual property law, then faculties would "wise up"<sup>7</sup> and seek to hire professors qualified to teach intellectual property law.<sup>8</sup> That is, if student demand for intellectual property

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5. This sentence is attributed to Benjamin Disraeli, THE OXFORD DICTIONARY OF QUOTES 270 (Elizabeth Knowles ed., 5th ed. 1999), but "[t]he words have never been found among Disraeli's works; alternative attributions include the radical journalist and politician Henry Labouchère (1831–1912)." BARTLEBY.COM, THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 2001), <http://www.bartleby.com/66/99/16799.html> (on file with the Washington and Lee Law Review).

6. I submit that the laws of economics *do* apply to law schools, but this does not mean that faculties behave in ways that most would describe as "rational." Put most simply, the laws of economics have it that human beings are rational maximizers of wealth, but as Professors Bainbridge and Gulati have observed, this rationality, inevitably, is "bounded" by a host of factors. See Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 89–118 (2002) (discussing the rationality of federal judges). One of those factors is "cognitive power," the (limited) supply of which may cause decisionmakers to "minimize effort in the face of complexity and ambiguity." *Id.* at 101. On a law faculty, the scarcity of cognitive power might manifest itself in several ways. One, it might cause faculties (or those in positions of power on faculties) to hire scholars in their own or related disciplines, regardless of need. To a jurist, what could be more obviously "right" than to hire someone with a strong interest in jurisprudence? Two, the scarcity of cognitive power might cause faculties (or those in power on faculties) to make decisions based on—*gasp!*—a desire to "impose their personal preferences on society." See *id.* at 103 (suggesting that federal judges attempt to maximize the power to impose their personal preferences on society). These motivations may converge. See George F. Will, Editorial, *Academia, Stuck to the Left*, WASH. POST, Nov. 28, 2004, at B7 (arguing university faculties are predominantly liberal because only the liberal viewpoint is accepted); Mark Bauerlein, *Liberal Groupthink Is Anti-Intellectual*, CHRON. HIGHER EDUC., Nov. 12, 2004, at B6 (same).

7. Eventually.

8. I have assumed, of course, that law faculties are responsive to the demands of their students, but I believe that faculties *are* responsive, on the whole, if only because they understand that their salaries are paid out of a budget that bears some relationship to the amount of money the school can collect in tuition. Fewer students means fewer tuition dollars, which,

law exceeded faculty supply of intellectual property law, faculties would hire in the area until the gap between supply and demand had narrowed or disappeared.<sup>9</sup> In Wall Street terms, there would be a bull market in intellectual property law. This would be useful information for people who thought they might wish to become law professors in the foreseeable future. If, for example, one knew that there were a bull market in intellectual property law, but a bear market in, say, admiralty law, she could direct her studies or her law practice accordingly, thus increasing her chances of being hired on the tenure track. She could, in Wall Street terminology, go "long" intellectual property while "shorting" admiralty.

When I began to think of how one might prove this thesis, so as to offer this public service, I reflected on the number of students who plead with me each year to advise them as they write their Notes on issues of copyright or trademark law. Add to this number the students who wish to engage in research, for credit, on issues of copyright or trademark law, and the sum is more than one untenured professor can reasonably absorb.<sup>10</sup> A colleague of mine teaches and writes in the area of patent law; she too faces the pleading, the pressure to say "yes"—the only differences being that: (a) she has tenure; and (b) her supplicants have science and engineering degrees. When it comes to intellectual property law (at Emory, at least), student demand for faculty "attention" far exceeds the available supply.<sup>11</sup> Anecdotal evidence (i.e., "I hear tell") suggests that Emory is not the only law school facing such a shortage.

I wondered: Could one locate the supply and demand curves for intellectual property law at law schools nationwide? If so, could one locate the supply and demand curves for other areas of law, too? On both counts, I believed that one could. But then I wondered: Could one locate supply and demand from the comfort of the office (or, at worst, from the law library), without conducting the kind of surveys that would require one to go from law school to law school, asking intrusive questions of registrars and appointments committees? Could one, in fact, gather probative information without licking a stamp, without picking up the telephone, and without sending a single email?

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in turn, means less money to pay faculty salaries. (The laws of economics do apply to law schools, after all!)

9. Working against this theory is the institution of tenure, which (whatever its merits) makes it harder for schools to decrease the supply of law school subjects that are in less demand among students. Thus, tenure makes law schools less nimble than, say, businesses are.

10. I assume that copyright and trademark law are popular among students, at least at Emory, but there is another explanation, of course: *I* might be popular.

11. The laws of economics suggest that if student demand for my attention exceeded my supply of it, then I would be able to enrich myself by charging more for my attention or Emory would pay me a higher salary to compensate for my inability to do so. Alas, neither is true.

Again, I believed that one could. Thus inspired, I hit upon my methodology, which I describe in detail below. Let me state for the record: I can imagine engaging in more rigorous methods than the ones in which I have engaged. But, if my methodology is crude, it is unusual, and it yields interesting results, which (let us be honest) was my goal in the first place.

### B. Refining the Methodology

Law reviews (like the *Harvard Law Review*) publish submissions by faculty and students alike. Both faculty and students choose the subjects on which they wish to write, and the student editors of each law review select a combination of pieces for publication. I began with a simple hypothesis: By counting the number of times faculty and students chose to write on each subject ( $\chi$ ),<sup>12</sup> I could estimate what I termed "excess demand" for each subject by calculating the difference between the number of student pieces on that subject ( $\sigma$ ) and the number of faculty pieces on that subject ( $\phi$ ).<sup>13</sup> Excess demand ( $\sigma - \phi$ ) for a given subject ( $\chi$ ) could be positive, of course, but it also could be negative, indicating that more professors than students were writing on the subject. Positive numbers would indicate bull markets; negative numbers would indicate bear markets. What could be simpler? One could argue, of course, that every publication decision reflects a student preference, not a faculty one—i.e., that professors write and submit articles on selected subjects not because they are interested in those subjects, but because they believe that *students* are interested in those subjects.<sup>14</sup> I rejected this view of faculty "supply," not because it was necessarily false,<sup>15</sup> but because I did not

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12. See *supra* note 3 (describing the use of  $\chi$  and Greek letters generally in this Essay).

13. Classics majors have noticed that the number of student pieces on a given subject is represented by the Greek letter sigma ( $\sigma$ ), while the number of faculty pieces on a given subject is represented by the Greek letter phi ( $\phi$ ).

14. This is the strong form of the argument. In its weak form, the argument might be that professors write and submit articles on subjects that interest them, and if those subjects are (unfortunately) uninteresting to the students who make publication decisions at law reviews, then professors either: (a) find other interests (i.e., interesting ones); or (b) learn to deal with rejection. Given that only tenured professors have the luxury of rejection, however, professors without tenure are more likely to find other interests than to cling, doggedly, to their own uninteresting interests—thus bringing us back to the strong form of the argument.

15. *Supra* note 14. Some faculty are more aggressive than others in marketing their articles to students. I know of at least one scholar who has hired (i.e., paid) members of the managing board of the law review at a top law school, asking them how he might "spin" his thesis so as to make his article as appealing as possible to students. His articles have landed in a number of top journals.

believe it was necessarily true. I simply did not (or could not) believe that law professors are engaged in the equivalent of academic prostitution, servicing students (in the intellectual sense) in return for the currency of publication.<sup>16</sup> Perhaps this makes me an optimist.

Armed with my hypothesis, I turned to the task of selecting law reviews to mine for data. In an ideal world, of course, I would catalogue every law review in the United States, or ten, or even five. But this is not an ideal world. Yes, I burned with intellectual curiosity, but I also wished to keep my job. To qualify for tenure, law professors are required to write "law review articles," not essays like this one. I would have to economize.

After paying a visit to the website on which Brian Leiter, Professor of Law at the University of Texas, ranks almost everything there is to rank about law teaching,<sup>17</sup> I reached the shocking conclusion that most law professors graduated from the three top<sup>18</sup> law schools in the United States: Yale, Harvard, and Stanford (in that order).<sup>19</sup> To my mind, then, it made sense to start with the law reviews of these elite institutions for two reasons, one relating to supply and one to demand. First, on the demand side, there is no reason to believe that law students at Yale, Harvard, and Stanford are interested in different subjects than are law students at other schools.<sup>20</sup> If, for example, Harvard students increasingly are interested in  $\chi$ , the same is likely to be true of other law students as well. Second, on the supply side, the law graduates of Yale, Harvard, and Stanford are the men and women who are most likely to become law professors one day.<sup>21</sup> They are (statistically, at least) the Law Professors of

16. I am not suggesting that the scholar in note 15, *supra*, is an academic prostitute.

17. See generally Leiter's Law School Rankings, <http://www.leiterrankings.com/> (last visited Jan. 25, 2006).

18. See *infra* note 64 and accompanying text (stating that law schools are ranked by *U.S. News and World Report*, the Bible of law school admissions).

19. Leiter's Law School Rankings, Where Tenure Track Faculty Went to Law School, 2000–02, [http://www.leiterrankings.com/faculty/2000faculty\\_education.shtml](http://www.leiterrankings.com/faculty/2000faculty_education.shtml) (last visited Nov. 7, 2005) (on file with the Washington and Lee Law Review). Rounding out the top ten—with ties, the top 14—are: Chicago, Michigan, Columbia, Berkeley, Virginia, NYU, Cornell, Duke, Georgetown, Penn, and Texas. *Id.*

20. This might be less true of students at Yale. Last academic year, Yale students enjoyed the opportunity to enroll in such diverse courses as "[The] Book of Job and Injustice"; "Corruption, Economic Development, and Democracy"; "Cultural Evolution and Memetics" ("Memetics holds that culture evolves through the competition of bits of culture, called memes, for space in human memory and belief."); "Empire, Tolerance, and Law"; "Groups, Diversity, and Law"; and simply "Justice." *Course Offerings*, in BULLETIN OF YALE UNIVERSITY, <http://www.yale.edu/bulletin/html/law/course.html> (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review).

21. *Supra* note 19 and accompanying text.

the Future. Obviously, this makes their interests relevant to questions concerning the courses that law schools are likely to offer a year or two (or five) in the future. This is particularly true given the nature of the "appointments" (faculty hiring) process. It is no secret that the very best candidates often can dictate the areas in which they teach. If the very best candidates want to teach courses in  $\chi$ , the faculties who hire them are likely to let them teach at least *some* courses in  $\chi$ , thus adding to the supply of  $\chi$ .

Thus did I resolve to catalogue each and every issue of the *Yale Law Journal*, the *Harvard Law Review*, and the *Stanford Law Review*, going back in time from the present day to—when? I would stop when I could not stand the thought of looking at another law review, but in no event would I stop before reaching 1968, which would give me thirty-six years of data.<sup>22</sup> I decided to start with the *Harvard Law Review* because I had heard that its editors long ago had made their publication decisions "blind"; that is, without being influenced by the prestige of the author or her law school.<sup>23</sup> (As I later learned, "long" means since 1999.) Of course, the practice of blind review does not make publication in the *Harvard Law Review* any more of a realistic prospect for most law professors; to be selected for publication in *Harvard* (or *Yale*, or *Stanford*) is to win the lottery. Even so, I made a (then) educated guess that the professors selected for publication in the *Harvard Law Review* were more various, in terms of prestige, than the professors selected for publication in the *Yale Law Journal* and the *Stanford Law Review*, at least in recent years. (The students selected for publication in the *Harvard Law Review* have a lot in common, of course.)

It was time to create the spreadsheet. After teaching myself how to use the Microsoft<sup>®</sup> Excel<sup>®</sup> program, I made a list of the courses that one might find at an American law school, typed that list into my spreadsheet, and started work, beginning my review with the 2003 volume of the *Harvard Law Review* (*Review*) and working backward. (I did not catalogue the 2004 volume because it was incomplete at the time.) Because my office is more comfortable than the library, I perused the *Review* online (using a combination of Lexis<sup>®</sup> and Westlaw<sup>®</sup>)<sup>24</sup> until I reached the 1949 volume, at which point I was forced to hit

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22. I was born in 1968, so I, too, represent thirty-six years of data. Okay, thirty-seven.

23. Harvard Law Review, Guidelines for Submitting Manuscripts, <http://www.harvardlawreview.org/manuscript.shtml> (last visited Nov. 15, 2005) ("To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgments to a separate cover page.") (emphasis added) (on file with the Washington and Lee Law Review).

24. At the time, the Lexis<sup>®</sup> database permitted electronic searches of the *Review* through 1983. The Westlaw<sup>®</sup> database was larger; it permitted searches through 1950.



the books. From time to time, I realized that I had forgotten to list a course, which required me to ask myself an unpleasant question: Should I go back? Being compulsive, I did go back, adding courses throughout the process and conducting multiple searches to capture the data lurking in issues I already had reviewed. Long before I reached the 1946 volume of the *Review*, I was confident that my course list was as complete as I could expect it to be.<sup>25</sup>

### C. Gathering the Data

Once I had the spreadsheet in place, there was nothing to do but gather the data. Before starting the project I had advertised for a research assistant, but I got no takers (probably because I believe in truth in advertising).<sup>26</sup> As it turned out, this was for the best. It can be surprisingly difficult to categorize a piece of legal scholarship, even to the point of labeling it as "law" as opposed to economics or political science or philosophy. (This is where the "law and" courses come in.) In this, I was fortunate to have been the sort of law student who would take any course, in any field, so long as it sounded interesting. As a law student at the University of Virginia, I took elective courses in administrative law, antitrust, civil rights, constitutional history, copyright, corporations, criminal law and procedure, criminal psychiatry, employment discrimination, environmental law, evidence, jurisprudence, tax, and voting rights. I liked issues of federalism so much that I took two courses in "Fed Courts." Thus armed, I was able to discern a difference between constitutional law, on the one hand, and federal courts and jurisdiction on the other.

Not every piece fit nicely into one category. Many authors had chosen to write on subjects that might arise in more than one course in law school. The issue of school desegregation, for example, might arise in constitutional law (which is ubiquitous in law school curricula), but it also might arise in a course

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25. *But see infra* notes 68–69 (noting my surprise at finding a law review article addressing the problems of men from Mars).

26. My notice read:

I am seeking a research assistant, preferably a third year, to conduct research for an essay entitled, "The Bulls and Bears of Law Teaching." The project entails the compilation and graphical representation of data, which means, in English, that as my assistant, you would be asked to spend hours in the library making lists of information from three sources: the *Harvard Law Review*, the *Stanford Law Review*, and the *Yale Law Journal*. I value your ability to use computers to generate graphs and things. I prefer a student in his or her third year because most third years have taken a wider variety of courses, which qualification is relevant to my project. Please provide me with a brief note of interest along with an unofficial transcript. Thank you.

on education law, or a course on law and race. When I encountered such a piece, I gave it a point in each category and, as a result, I began to see that my data were not subjects of articles, per se, but "interest points," reflecting one interest of one author. While I skimmed plenty of pieces about  $\chi$ , I skimmed just as many pieces about  $\chi$  and  $\gamma$ , or about  $\chi$  and  $\gamma$  and  $\xi$ .<sup>27</sup> As one might expect, some pieces required more skimming than others; I sometimes found myself reading two or three or four pages before I stumbled across what one might label a "thesis," if one were being charitable.<sup>28</sup> But never mind that.

I have stated that I catalogued almost every piece published in the *Harvard Law Review* between and including the years 1946 and 2003. On the faculty side, those pieces took the form of Articles, mainly, but law professors were responsible for plenty of Comments and Book Reviews, too—particularly in decades past. On the student side, the pieces included the usual Notes (and Book Notes), but, on the practical side, they also included Recent Cases, Recent Publications, and Recent Statutes—in other words, more data. I made the decision to include the "Recents" as interest points because I believed that when a student chose to write about a case recently decided, a book recently published, or a statute recently enacted, that student was choosing an area of law, thus expressing an interest in it. Courts decide thousands of cases every year. Legislatures enact fewer statutes, but if one considers both federal and state statutes (as students did), there are plenty of statutes from which to choose. "[M]any are called, but few are chosen."<sup>29</sup> The same is true of books on subjects that have some relation, however tangential, to the law.<sup>30</sup>

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27. Chi and gamma and xi, if you want to get technical about it.

28. Examples abound. For one, see Note, *The Price of Everything, The Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003):

This Note attempts to add some precision to the dialogue by mapping out the conceptual space of the commodification debate and deriving (and tentatively evaluating) the entailments of different anticommodificationist positions when understood in their proper terms. In particular, this Note suggests that articulating the various attitudes that an anticommodificationist takes toward the notions of "sale," "barter," and "gift" can help in evaluating the arguments she is really putting forth.

*Id.* at 689. What?

29. *Matthew* 22:14.

30. See, e.g., Recent Publications, 108 HARV. L. REV. 1417, 1421 (1995) (reviewing WILLIAM GADDIS, *A FROLIC OF HIS OWN* (1995)). "The result is a layman's impressionistic understanding of a foreign language—words and case citations and bombast whipped into a froth and served with a generous dose of mockery. If nothing else, Gaddis delivers the rare spectacle of the Federal Rules of Civil Procedure used as a comic device." *Id.* Turns out, the editors of the *Harvard Law Review* do have a sense of humor!

I did not catalogue everything. First, I excluded those pieces in which the *Review* (and, oftentimes, its faculty contributors) reported or commented on recent decisions of the United States Supreme Court. Not only are those decisions few in number, but the subjects of those decisions represent the interest points of a majority of nine Justices,<sup>31</sup> and not (thankfully) the editorial board of the *Harvard Law Review*.<sup>32</sup> This rule resulted in my excluding most of the November issue of the *Review*, year after year. I also excluded "in memoriam" pieces, along with pieces written in tribute to a living person. (In contrast, I included biographies, which I categorized as legal history.)

A word about symposia, that is, "book[s] consisting of essays on various aspects of a subject contributed by a number of different authors."<sup>33</sup> Most every law review has them,<sup>34</sup> and the *Harvard Law Review* is no exception, having published two types of symposia over the years: The first, and the more formal of the two, is the legal "Development," which, in the *Review*, has included a series of pieces written by students on such timely subjects as "The National Security Interest and Civil Liberties" (from the April 1972 book).<sup>35</sup> The second consists of those instances in which the editors of the *Review* have encouraged faculty to take an argument and run with it, generating such things as Comments, Replies, and Last Words.<sup>36</sup> (The first type of symposium has been far more common than the second.) Because, in each case, the *Review* had decided to publish at least three pieces on the same subject, I believed the *Review* to have expressed a particularly strong interest that (one hopes) a majority of its editors shared. A symposium requires a level of editorial

31. That majority (or at least a plurality of four) expresses its interest by granting a writ of certiorari.

32. Harvard Law School has influence enough: Of the nine sitting Justices of the United States Supreme Court at the end of the most recent term, five (Stephen Breyer, Anthony Kennedy, John Roberts, Antonin Scalia, and David Souter) received their law degrees from Harvard, and one (Ruth Bader Ginsburg) attended Harvard before transferring to Columbia Law School.

33. XVII THE OXFORD ENGLISH DICTIONARY 464 (2d ed. 1989) (giving the scholarly definition of "symposium" at 2.a).

34. This is particularly true in light of the primary definition of "symposium," from the Greek συμπόσιον or συμπότης ("fellow-drinker"): "A drinking-party; a convivial meeting for drinking, conversation, and intellectual entertainment: properly among the ancient Greeks, hence generally." See *id.* (giving the primary definition of "symposium" at definition 1.a).

35. *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

36. For examples, see Paul J. Mishkin, Comment, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); John Hart Ely, Comment, *Some Further Last Words on Erie—The Necklace*, 87 HARV. L. REV. 753 (1974); Abram Chayes, Comment, *Some Further Last Words on Erie—The Bead Game*, 87 HARV. L. REV. 741 (1974); and John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

commitment that a single submission does not. For this reason, I assigned three interest points to each "symposium," as I have defined it here. I assigned these points to *students*, not faculty, even when professors were arguing amongst themselves, because I guessed that in most cases the student editors had solicited responses to the opening argument, demonstrating an interest in the subject surpassing that needed to publish an article in isolation. These instances were rare enough that we need not quibble over scoring.

By now, readers might be wondering what happened to my resolve to catalogue each and every issue of the *Yale Law Journal*, the *Harvard Law Review*, and the *Stanford Law Review*. Whither *Yale* and *Stanford*? Would those fine journals have provided me with interesting data? No doubt they would have. Might those data have changed the conclusions I reach here? Yes. But I was tired of cataloguing. I had taken enough of a detour from writing tenure articles. In the end, I decided simply to state that while the *Yale Law Journal* and the *Stanford Law Review* were, unfortunately, "beyond the scope" of this Essay, they were (and are) "worthy of close attention in future research"—the usual expedient.<sup>37</sup>

#### D. Crunching the Numbers

After I had catalogued almost every Article, Book Review, Book Note, Comment, Essay, Note, Recent Case, Recent Publication, and Recent Statute that the *Harvard Law Review* had published since 1946, I was left with a spreadsheet containing data from fifty-eight years representing faculty and student interest points (call them, collectively,  $\iota$ <sup>38</sup>) that corresponded to fifty-nine hypothetical law school courses. That is, for each year, I had collected three columns of data: (1) total faculty interest in each course ( $\phi$ ); (2) total student interest in each course; and (3) total number of symposia on subjects relating to each course, multiplied by three.<sup>39</sup> By adding columns (2) and (3), I produced the total student interest in each course ( $\sigma$ ). I soon discovered, however, that I could not simply subtract each  $\phi$  from each  $\sigma$ —even assuming, as I did, that the two variables are independent.<sup>40</sup> Instead, I had to crunch the

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37. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1270 n.383 (1999).

38. Iota.

39. See *supra* Part I.C for an explanation of my data collection techniques.

40. In fact, faculty interest ( $\phi$ ) and student interest ( $\sigma$ ) probably are *dependent* variables, meaning that one is a function of the other, and vice versa. Student interests fuel interests among faculty, I suspect, and faculty often are the sources of topics about which students write. To discover the extent of the dependence, however, would require me to engage in regression

numbers in several ways, a task that I confess to enjoying more than I should have.

*First Crunch.* In every year except for 1985, the total student interest ( $\sigma$ ) was greater than the total faculty interest ( $\phi$ ), there being more student authors than faculty authors in each issue of the *Review*. (The numbers themselves varied widely.) Unless I adjusted these numbers, subtracting each  $\phi$  from each  $\sigma$  would yield a positive number for each hypothetical course, indicating excess student interest across the board. To avoid comparing apples ( $\sigma$ ) to oranges ( $\phi$ )—and, in mathematical terms, to locate, at zero, the point at which total faculty and student interest were equivalent—I adjusted student interest by a number that would give equal weight to the (collective) interests of professors and students, respectively.<sup>41</sup> When I multiplied this number by total student interest ( $\sigma$ ) in each course ( $\chi$ ) I produced an adjusted total of student interest for each course, which I shall call  $\sigma'$  (sigma prime). I then subtracted each  $\phi$  from each  $\sigma'$ , and the difference became "Excess Student Interest"—again, per course per year.<sup>42</sup>

*Second Crunch.* As I worked my way back through time, I began to notice that subjects now thought to be marginal (e.g., admiralty law or trusts and estates)<sup>43</sup> were surprisingly dominant in earlier years. Finding this interesting, I decided to track what I called "Total Interest," or the sum of faculty and student interest in each subject in each year ( $\phi + \sigma$ , or  $\iota$ ).<sup>44</sup> It was not long before I

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analysis, which, fortunately, is beyond the scope of this Essay (if not, perhaps, beyond that of another one in the future).

41. That number, as it turns out, was the sum of the faculty interest points in a given year divided by the sum of the student interest points in that year, or  $\sum\phi / \sum\sigma$ .

42. In 1968, for example, there were 53 faculty interest points and 94 student interest points scattered throughout my hypothetical courses. Thus,  $\sum\phi = 53$  and  $\sum\sigma = 94$ . I simply divided 53 by 94, yielding .5638297872, and then I multiplied this number by the total number of student interest points for each course. To choose a course at random, there were, in antitrust law (again, in 1968), 4 faculty interest points and 2 student interest points. Thus, for antitrust,  $\phi = 4$  and  $\sigma = 2$ . To arrive at adjusted student interest ( $\sigma'$ ), I multiplied 2 ( $\sigma$ ) by my number, .5638297872, yielding an equally cumbersome number (1.1276595744) that I prefer to think of as 1.128. Subtracting 4 ( $\phi$ ) from 1.128, I discovered that in 1968, there was Excess Student Interest in antitrust law of -2.872. The "negativity" of this number indicated that significantly more faculty than students were interested in writing on the subject of antitrust law in 1968—a bearish indicator for antitrust in that year. To put it another way, there already were more professors than students interested in antitrust in 1968—an imbalance that only worsened after I adjusted the numbers to take into account the larger numbers of students who might, conceivably, have taken an interest in antitrust law, but did not.

43. These subjects are not marginal at Emory, of course, nor are they marginal at any other law school whose faculty may be asked to decide whether to appoint me, promote me, or grant me tenure.

44. In the example in note 42, *supra*, there were six points of Total Interest in antitrust law in 1968.

discovered another way in which my Excess Student Interest data required adjustment.

In recent years, the *Review* has published a few lengthy articles and notes. In decades past, however, faculty and student authors were more concise, and as a result, the *Review* published more (shorter) pieces on more subjects. This meant that the "Total Total Interest"<sup>45</sup> in 1946 (256) was a much larger number than the Total Total Interest in 2003 (145). What was more, the variability in this measure was significant, ranging from a low of 83 in 2000 to a high of 375 in 1948. Unadjusted, this effect—which I have termed the "Verbosity Effect"<sup>46</sup>—distorted the data so as to produce graphs that showed faculty and student interest in *every single subject* declining from 1946 through 2003 (yielding, perhaps, the "Apathy Distortion").<sup>47</sup> I decided to adjust the data using a "magic number," the calculation of which I leave to this footnote.<sup>48</sup> When I multiplied this magic number by each and every expression of Excess Student Interest and Total Interest, I was able to correct for the Apathy Distortion that the Verbosity Effect had produced in both sets of data. This operation, in turn, yielded what I called "Weighted Excess Student Interest" and "Weighted Total Interest."<sup>49</sup>

45. Total Interest in every law school subject, or  $\sum t$ .

46. Twelve top law reviews recently have discovered the Verbosity Effect and have responded by placing length limitations on submissions. See e.g., Michigan Law Review, Article Length Policy, <http://students.law.umich.edu/mlr/articlelength.html> (last visited Nov. 15, 2005) ("The vast majority of law review articles can effectively convey their arguments within the range of 40–70 law review pages, and any impression that law reviews only publish or strongly prefer lengthier articles should be dispelled.") (on file with the Washington and Lee Law Review).

47. A quantum of verbosity is to be expected among legal academics. As the thread of knowledge about the law grows longer with the passage of time, it takes more and more words merely to describe the thread before weaving new thoughts onto its length. A cynic might add that a quantum of apathy is not unexpected either, because everything worth saying already has been said. See Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make Articles About the Wrong Topics Worse*, LEGAL AFFAIRS, Nov./Dec. 2004, at 57–58, available at [http://www.legalaffairs.org/issues/November-December-2004/review\\_posner\\_novdec04.msp](http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp) ("The result of the system of scholarly publication in law is that too many articles are too long, too dull, and too heavily annotated . . .").

48. I adjusted the data as follows: (1) I calculated the mean Total Total Interest ( $\sum t$ ) by adding those sums and dividing by 58, the number of years in the study, yielding 161.897 (call it  $\mu$ ); (2) I compared the total interest in each year ( $\sum t$ ) to that average ( $\mu$ ); and (3) I produced a number that yielded the mean ( $\mu$ ) when multiplied by the total interest in each year ( $\sum t$ ). Thanks to the magic of algebra, that number may be represented as  $\mu / \sum t$ , where  $\sum t$  is the Total Total Interest in a given year. For example: In 1968, the sum of faculty and student interest in every subject (the Total Total Interest) was 147. Dividing the average sum ( $\mu$ ), or 161.897, by 147 ( $\sum t$ 1968) produced 1.1013370866—1.101, for short—which is the number by which I had to multiply every piece of 1968 data to correct for the Verbosity Effect.

49. To return to our antitrust example, the Weighted Excess Student Interest in antitrust

*Third Crunch.* In trying to predict the future prices of stocks, technical analysts<sup>50</sup> use a tool known as a "moving average," which "smooth[es] a data series and make[s] it easier to spot trends."<sup>51</sup> When I began to chart my Weighted Excess Student Interest and Weighted Total Interest, I noticed that my data was decidedly prickly; it needed smoothing. In addition, I found that I needed all the help I could get in spotting trends. I reached for the moving average with both hands.

Computing a "simple moving average"<sup>52</sup> is, as its name suggests, fairly simple: An analyst begins by choosing a time period over which the average "moves," and then she expresses each data point as an average of the preceding data points in the period.<sup>53</sup> Technical analysts of stock prices have thousands of data points with which to work—one for each day in which the stock traded, over a period of years—and so those analysts tend to favor large moving averages. Because my data were expressed yearly, and because I only had fifty-eight years of data with which to work, I chose to perform a "three-year moving average," which means that I computed a value for, say, 2003 by averaging the numbers for 2003, 2002, and 2001. Similarly, I achieved the value for 2002 by averaging the numbers for 2002, 2001, and 2000. And so on. I soon found, to my satisfaction, that outlying data points were reduced from mountains to molehills, minimizing distortions in the charts while keeping larger trends intact. I went on to perform this moving average on the data for Weighted Excess Student Interest and Weighted Total Interest, yielding the cumbersome "Moving Average of Weighted Excess Student Interest" and "Moving Average of Weighted Total Interest," to which I shall refer as "Excess Interest" and "Total Interest," respectively, for the remainder of this Essay.

I had finished crunching the numbers. When, in the end, I held my breath and began to print the graphs of Excess Interest, I knew I was onto something.

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law in 1968 was -3.163 (-2.872 x 1.101), while the Weighted Total Interest in antitrust in that year was 6.608 (6 x 1.101). In 1968, there was significant interest in antitrust law, but it was located mostly among professors, not students.

50. See *infra* notes 56–59 and accompanying text (describing technical analysis).

51. StockCharts.com, Moving Averages, [http://www.stockcharts.com/education/IndicatorAnalysis/indic\\_movingAvg.html](http://www.stockcharts.com/education/IndicatorAnalysis/indic_movingAvg.html) (last visited Nov. 15, 2005) ("Moving averages are one of the most popular and easy to use [sic] tools available to the technical analyst. They smooth a data series and make it easier to spot trends, something that is especially helpful in volatile markets.") (on file with the Washington and Lee Law Review).

52. Moving averages can be "exponential" instead of "simple," but I rejected the former as too complicated for the purposes of this Essay. See *id.* (If you dare.)

53. See *id.* (providing an example of how to calculate a moving average). Thus, "moving averages are lagging indicators." *Id.*

As it turns out, there *was* something interesting about the relationship between the subjects on which faculty and students chose to write.

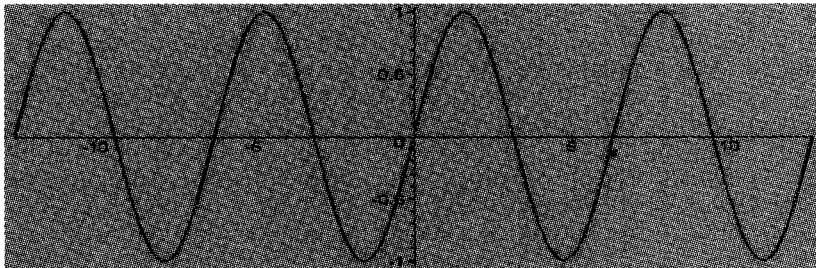
### E. Surveying the Results

The results were interesting on a number of levels. First, on a statistical level, it was startling to see the extent to which Excess Interest and Total Interest in law school subjects were cyclical. Unfortunately, a few charts refused to play along, but most charts revealed the kinds of cycles, including ups and downs, that investors have come to associate with the prices of assets such as stocks.

This is not to say that the charts were as predictable as a sine curve,<sup>54</sup> and "there's the rub."<sup>55</sup> Speaking generally, there are two schools of thought as to how to predict the future prices of stocks. The first, "technical analysis," is "the examination of past price movements to forecast future price movements."<sup>56</sup> Technical analysts—or "chartists"—"rely almost exclusively on charts for their analysis,"<sup>57</sup> and they read those charts like so many tea leaves, finding shapes that they believe indicate future movements in price. Just as technical analysts pore over their charts, worrying about whether a stock is topping or merely pausing on the way to new highs, I spent an inordinate amount of time asking

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54. The equation  $y = \sin(x)$  is represented as follows:



I found this graph at The A-B-C's of the Generic Sine Curve, [http://math.la.asu.edu/~walker/mat170/homework/sine\\_curves.htm](http://math.la.asu.edu/~walker/mat170/homework/sine_curves.htm) (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review), but there is an absolutely fascinating "sine curve [interactive] visualization tool" by Vera Fleischer, *Sine Curve Visualization Tool*, <http://www.galaxygoo.org/math/sineCurve.html> (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review).

55. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 3, sc. 1.

56. StockCharts.com, *Technical Analysis*, <http://www.stockcharts.com/education/Overview/techAnalysis1.html> (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review).

57. *Id.*



myself whether what looked like a change in trend (and thus a signal to "buy" or "sell") was not a change at all, but a blip—an anomaly. It is easy enough to see anomalies for what they are with the benefit of hindsight. When it comes to predicting the future, though, even the soundest predictions are mocked by what actually happens. As mutual funds warn investors, "Past performance . . . is no guarantee of future results."<sup>58</sup> Sadly enough, when it comes to technical analysis, the past is notoriously unreliable as a means of predicting the future.<sup>59</sup>

In the face of such uncertainty, I turned to another tool in the arsenal of stock price analysts: "fundamental analysis," or (in Wall Street terms) "the examination of the underlying forces that affect the well[-]being of the economy, industry groups, and companies."<sup>60</sup> Those who engage in fundamental analysis of stocks gather data about the companies who issue that stock, placing that data in economic and historical perspective in an effort to see what the future holds for the company, and thus for the price of its stock.

For me, engaging in fundamental analysis meant becoming a student of history in at least two ways. First, on a micro level, I sought to learn about the subjects in which faculty had hired in the recent past—say, within the last five years. If faculties had hired bunches of new professors to teach antitrust law, for example, one would expect Excess Interest in antitrust law to decrease (even, perhaps, turning negative) unless students suddenly became more enthusiastic about antitrust.

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58. Fidelity Investments provides investors with this (ubiquitous) warning, adding, helpfully, that "[c]urrent performance may be higher or lower than the performance data quoted." Fidelity Investments, Quarterly Performance, <http://content.members.fidelity.com/mfl/catperf/0,,qtr%7C%7C.00.html> (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review). Really?

59. See, e.g., BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 16 (4th ed. 1985) (suggesting that "a blindfolded monkey" could select a portfolio as successful as one selected by an expert). There are later editions of this book, but this is the edition that I was assigned as an undergraduate and that I kept as a reminder that no regression model, however sophisticated, could enable me to make a fortune in the stock market.

60. StockCharts.com, Fundamental Analysis, <http://www.stockcharts.com/education/Overview/fundAnalysis1.html> (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review). This website explains:

As with most analysis, the goal is to derive a forecast and profit from future price movements. At the company level, fundamental analysis may involve examination of financial data, management, business concept and competition. At the industry level, there might be an examination of supply and demand forces for the products offered. For the national economy, fundamental analysis might focus on economic data to assess the present and future growth of the economy.

*Id.*

Professor Leiter only tracks "Major Law School Faculty Moves,"<sup>61</sup> so I improvised by using the Internet (again, from the comfort of my office) to search the websites of a handful of top law schools, locate the "new professors" teaching there, and catalogue, by subject, the courses that those professors were hired to teach.<sup>62</sup> This methodology obviously required me to make certain assumptions. First, a "new professor" was anyone who: (a) had been hired to teach at her first law school in 1999 or later; or, if schools did not report that information, (b) was either an Assistant or an Associate Professor in 2004—thus excluding any stars who achieved the rank of Professor within five years of being hired. (But who cares about them, anyway?) I also assumed that my "new professors" have taught the same courses since they were hired. The remaining question was which handful of law schools to include in my survey. Ideally, I would have located every new professor teaching at every law school in the United States,<sup>63</sup> but, again, this is not an ideal world. Instead, I visited the websites of the top twenty-five law schools in the United States, as ranked by that Bible of law school admissions, *U.S. News & World Report*. (With ties, the "top twenty-five" actually includes twenty-six schools.)<sup>64</sup> When I had finished cataloguing, I counted the number of new hires in each subject area since 1999, expressing that number as a percentage of the total new hires in my sample (434). I then extrapolated from that percentage. If, for example, law schools in my sample hired fourteen new professors to teach courses in intellectual property law, or 3.23% of the total new hires in my sample, then I assumed that a survey of every law school in the country would yield a similar percentage.

As a fundamental analyst, I also became a student of history on a macro level, asking how events in the country and the world have impacted the subjects taught in law schools since the end of the Second World War. This was such an interesting question that it managed to distract me from the boredom of gathering the data.

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61. See Leiter's Law School Rankings, Law School Faculty Moves, 1995–2004, [http://www.leiterrankings.com/faculty/1995faculty\\_moves.shtml](http://www.leiterrankings.com/faculty/1995faculty_moves.shtml) (last visited Nov. 15, 2005) (stating that the "list records lateral moves of faculty since 1995 at the top 25 law schools") (on file with the Washington and Lee Law Review).

62. The Association of American Law Schools publishes a directory entitled *The AALS Directory of Law Teachers*, but its list of "Law Teachers by Subject" is more fiction than fact. The explanation has to do with intellectual curiosity, I think: When asked to list the subjects in which she has an interest, what scholar would not select as many subjects as she could? She might not be teaching courses or writing articles on those subjects now, but as a fictional Atlantan famously declared, "After all, tomorrow is another day." MARGARET MITCHELL, *GONE WITH THE WIND* 1037 (Scribner 1964) (1936).

63. I also would have located every retiring professor, and then subtracted the outgoings from the ingoings. Alas, I did not.

64. *America's Best Graduate Schools, 2005 Edition*, U.S. NEWS & WORLD REP., available at [http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank\\_brief.php](http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php) (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review).

During my research I found, to my great delight, that the pages of the *Harvard Law Review* read like a history book inscribed in code—the "code" that lawyers use to communicate with each other. I was forced to conclude, for example, that the Fifties had witnessed a rise in juvenile delinquency, because a number of authors sought to explain that rise in a variety of ways.<sup>65</sup> One Note suggested that the problem was "comic books specializing in stories of sex, crime, and violence,"<sup>66</sup> and as it happens, the Fifties marked the end of the golden age of the comic book in America.<sup>67</sup> The pages of the *Review* revealed other historical quirks, too, a few of which required creativity in categorization. In 1964, for example, Judge Posner (who else?) wrote a review of a book entitled *Law and Public Order in Space*,<sup>68</sup> a subject that seems quaint now. I had not created a subject for "space law," of course, and I was in no mood to create one after reviewing four decades of data. After some reflection, I catalogued space as the "final frontier" of international and comparative law—but not before having a good laugh.<sup>69</sup>

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65. See, e.g., Elijah Adlow, Book Review, 69 HARV. L. REV. 789 (1956) (reviewing FREDERICK J. LUDWIG, *YOUTH AND THE LAW* (1955)); Felix Frankfurter, Book Review, 64 HARV. L. REV. 1022 (1951) (reviewing SHELDON GLUECK & ELEANOR GLUECK, *A SYMPOSIUM ON UNRAVELING JUVENILE DELINQUENCY* (1950)); Albert Morris, Book Review, 70 HARV. L. REV. 753 (1957) (reviewing SHELDON GLUECK & ELEANOR GLUECK, *PHYSIQUE AND DELINQUENCY* (1956)); Lloyd E. Ohlin, Book Review, 70 HARV. L. REV. 398 (1956) (reviewing HERMANN MANNHEIM & LESLIE T. WILKINS, *PREDICTION METHODS IN RELATION TO BORSTAL TRAINING* (1955)). Harvard Law School also had a Juvenile Delinquency Project in the Fifties, directed—oddly enough—by Professor Sheldon Glueck and Doctor Eleanor Glueck. See Morris, Book Review, *supra*, at 753 nn.1 & 2 (describing Professor Glueck and Doctor Glueck as Directors of the Juvenile Delinquency Project at Harvard Law School).

66. Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489 (1955); see also *Hearings Before the Subcomm. to Investigate Juvenile Delinquency, of the S. Comm. on the Judiciary 84th Cong. 75* (1955) (statement of George D. Riley, Nat'l Legislative Comm., Am. Fed'n of Labor) ("We join in the real concern that lurid publications and entertainment offerings [including crime comics], stressing violence and beamed toward a youthful audience, may harmfully influence many youngsters."). But see *id.* ("Although certain children may be lured into delinquency by the savagery and antisocial examples of crime comic books, radio and television programs, the formidable and shameful problem of delinquency is rooted in far more basic considerations.").

67. See Arie Kaplan, *Kings of Comics: How the Jews Created the Comic Book Industry, Part I: The Golden Age (1933–1955)*, REFORM JUDAISM, Fall 2003, at 14, 18, available at <http://www.uahc.org/rjmag/03fall/comics.shtml> (stating that the Golden Age of comic books ended in, roughly, 1955) (on file with the Washington and Lee Law Review).

68. Richard Posner, Book Review, 77 HARV. L. REV. 1370 (1964) (reviewing MYRES S. MCDUGAL ET AL., *LAW AND PUBLIC ORDER IN SPACE* (1963)). At the time, Judge Posner described himself as a "Member of the New York Bar." *Id.* at 1374.

69. *Law and Public Order in Space* would have been incomplete without at least a word on the topic of "[t]he problem of men from Mars," and the authors of the book did not disappoint, devoting a whole chapter to the subject. *Id.* at 1373. What might such men be like? The authors did not know, but they did discuss "the problem of Chinese adaptation to the realities of Western power in the late nineteenth century." *Id.* What?

The American philosopher George Santayana once wrote that "[t]hose who cannot remember the past are condemned to repeat it"<sup>70</sup>—implying, perhaps, that if we educate ourselves, we can escape the destinies that our ancestors have woven for us. This is not true, of course. If only it were. Life would be easier if we could use the lessons of history to predict the future, and thus to avoid repeating the mistakes of the past. But as the humorist Samuel Clemens (better known as Mark Twain) once observed: "History doesn't repeat itself—at best it sometimes rhymes."<sup>71</sup> Like poetry, history is enigmatic: it asks more questions than it answers. Is 2006 likely to resemble 1976, with a guerrilla war behind us but economic misery ahead in the forms of high inflation (or more likely, a declining dollar),<sup>72</sup> high energy prices, and stagnating wages? What about 1926—the height of that experiment in public morality known as "Prohibition"—when our enchantment with "borrow and spend" paved the way for the crash and the depression to come? Or are we living in the midst of another Gilded Age, as in 1896, when businesses were consolidating, labor unions were flexing their muscles, and wealth was becoming more concentrated in the hands of a few? Might the answer be "all of the above"? And what impact might that answer have on the courses that law students are likely to demand in the balance of the decade? This last question is the one to which I gave a great deal of thought. My conclusions follow.

### *III. Results and Recommendations*

*The future lies hid in the present, for those that can read it.*<sup>73</sup>

Stock analysts advise investors to "buy," "sell," or "hold." In each case, the message for investors could not be simpler. If an analyst issues a buy recommendation, investors are advised to buy shares of the recommended stock—say, Acme Corporation. If the analyst issues a sell recommendation, investors are advised to sell Acme, whether by unloading the shares they own

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70. GEORGE SANTAYANA, *THE LIFE OF REASON* 82 (Charles Scribners Sons 1954) (1905).

71. Thinkexist.com, [http://en.thinkexist.com/quotation/history\\_doesn-t\\_repeat\\_itself-at\\_best\\_it/163316.html](http://en.thinkexist.com/quotation/history_doesn-t_repeat_itself-at_best_it/163316.html) (last visited Nov. 15, 2005) (on file with the Washington and Lee Law Review).

72. See Floyd Norris, *Currency Weakness Continues to Ripple Through the Economy and the Markets*, N.Y. TIMES, Jan. 3, 2005, at C1 ("This is going to be the year the world learns to live with a cheaper dollar."); Daniel Altman, *A Field Guide to the Falling Dollar*, N.Y. TIMES, Dec. 5, 2004, § 3, at 3 (discussing the effects of a declining dollar). If the dollar continues to drop, 2006 may look like 1986, not 1976. See Eduardo Porter, *Whoops! It's 1985 All Over Again*, N.Y. TIMES, Dec. 19, 2004, § 3, at 1 (discussing the Plaza Accord and the current economic environment).

73. MARGARET ATWOOD, *ALIAS GRACE* 265 (1996).

or by "shorting" the stock.<sup>74</sup> If the analyst issues a hold recommendation, investors are advised to keep the shares they already own, but not to acquire any more of a stake in Acme. In essence, to hold means to do nothing.

In my role as analyst of the market for law teachers, I both simplified and complicated the model of buy, sell, or hold, creating four categories ranging from the most bullish to the most bearish: (1) strong buys; (2) weak buys; (3) weak sells; and (4) strong sells. I abandoned the concept of the hold because in this market, the only people who have the luxury of doing nothing (or, if you prefer, of keeping the shares we own, but not acquiring any more) are those of us who already teach. My evidence may be anecdotal, but I suspect that in most law schools, faculty are not forced to abandon existing interests in subject  $\chi$  (however anachronistic or ubiquitous  $\chi$  might be) so that they can teach and write in subject  $\gamma$ . And if a professor knows she can hold her interest in  $\chi$  until her retirement, why would she be inclined to buy or sell?<sup>75</sup>

Those who wish to become law professors are forced to be more flexible, in large part because of the process by which most new professors are hired. Each August, the Association of American Law Schools (AALS) invites applicants to visit its website<sup>76</sup> where, for a fee, applicants can transmit information about themselves to every member school. That information is standardized in a database by means of a list of categories, including the law school subjects applicants would "Most Like to Teach." While applicants are entering their preferences, appointments committees at law schools throughout the country determine their curricular needs and perform searches of the database, thus yielding a list of applicants whom they wish to interview at the Faculty Recruitment Conference, better known as the "meat market." If there is no demand for subject  $\chi$ —because  $\chi$  is an anachronism, or ubiquitous, or just plain weird—an applicant who lists  $\chi$  as her primary area of interest risks torpedoing her chances of being hired, unless, of course, she has clerked on the United States Supreme Court.

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74. An investor "sells short" by selling shares of a stock that she does not own. She does so by borrowing the shares from her broker. If the price goes up, the broker may ask her to return the shares, in which case she must buy them at the market price—thus suffering a loss. If, however, the price goes down, the investor can buy the shares at a lower price, return those shares to her broker, and pocket the difference. For a more detailed explanation of short selling, see Investopedia.com, Short Selling: What is Short Selling?, <http://www.investopedia.com/university/shortselling/shortselling1.asp> (last visited Oct. 23, 2005) (on file with the Washington and Lee Law Review).

75. *But see supra* note 62 ("[T]omorrow is another day.").

76. American Association of Law Schools, Welcome to the Association of American Law Schools, <http://www.aals.org/> (last visited Nov. 17, 2005).

Faced with this reality, what applicant would not wish to make herself useful to law schools—to rate herself as a strong buy—by listing interests that appointments committees are likely to demand, in part because of excess interest among students? I am not suggesting that applicants lie about their interests. Not only would this be wrong, but it would be foolish, as an applicant who faked an interest in, say, antitrust law would be forced to live with the consequences. I simply am suggesting that, where possible, applicants might consider selecting and developing their areas of interest with an eye toward making themselves marketable. If an applicant has a strong interest in a subject that I have rated a strong sell, then she might wish to select an interest or two from the buy side of the ledger, just in case my predictions prove to be correct. Of course, diversification does not ensure a profit or guarantee against loss. As with all of your investments, you must make your own determination of whether an investment in a particular subject is consistent with your investment objectives. Past performance is no guarantee of future results.<sup>77</sup>

Finally, a word on the subject of courses taught during the first year: A few of my readers have expressed concern at the number of "sells" on this list. These courses are *required*, after all. Surely professors who wish to teach courses to first years are in demand, year after year? Of course they are. But what of supply, which might overwhelm even the most vigorous demand? This is not to say that my methodology is perfect, of course: A few readers have suggested, for example, that my data are unreliable because at the *Harvard Law Review*, students are discouraged (it should be added, by other students) from writing their Notes on topics taught during the first year. Why? Because (the argument goes) readers are unlikely to care what a student has to say about such things as constitutional law. This seems harsh. It might be true nonetheless, but one suspects it is not uniformly so.<sup>78</sup> Moreover, my methodology corrects for this "Humility Bias,"<sup>79</sup> at least in part, by giving Notes more than one "interest point," as appropriate. If, for example, a student were to write about tort law as it relates to bankruptcy law, her Note would receive a point for both bankruptcy and torts.<sup>80</sup> So, let us not be squeamish and change the results to match our expectations. Numbers do not lie.<sup>81</sup>

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77. *Supra* note 58 and accompanying text.

78. *See, e.g., supra* note 28 (citing a Note on a topic of property law—I think).

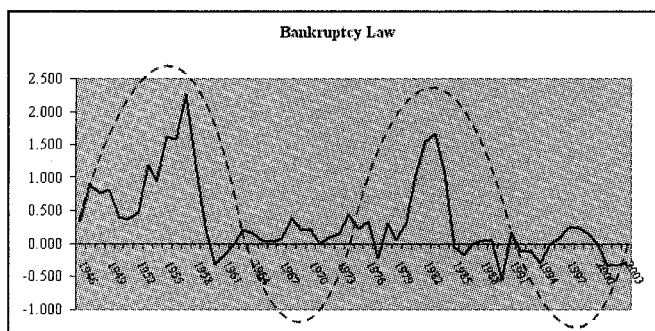
79. Or "Hazing Bias," perhaps?

80. *See, e.g., Note, Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541 (2003).

81. *But see supra* note 5 and accompanying text.

### A. Strong Buys

#### Bankruptcy Law



"Volume" (i.e. Total Interest) in bankruptcy law has been low over the last two decades, but it is showing signs of life, which is consistent with a chart that looks like the graphical representation of a heartbeat—on the verge of beating for the third time since 1946. Excess interest is shown as the solid line; a sine curve, shown as a dashed line, helps to clarify the trend. On the fundamentals, the future looks bright for bankruptcy hopefuls, if less bright for debtors. Congress recently enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,<sup>82</sup> which President Bush said would "restore 'integrity to the bankruptcy process.'"<sup>83</sup> In the face of the integrity to come, debtors rushed to declare bankruptcy before the law took effect.<sup>84</sup> Despite these and other bullish indicators,<sup>85</sup> the handful of law schools in my survey has hired only three new professors to teach bankruptcy courses since 1999 (.69% of the total), leaving law schools short on supply.

82. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

83. *Bankruptcy Bill Now Law*, N.Y. TIMES, Apr. 21, 2005, at C12.

84. See Timothy Egan, *Debtors in Rush to Bankruptcy as Change Nears*, N.Y. TIMES, Aug. 21, 2005, § 1, at 1 (noting that "rising numbers of Americans have filed for bankruptcy in anticipation of the change in bankruptcy law"); see also Mark Stein, *Getting Back on Track (With a Few Derailments)*, N.Y. TIMES, Sept. 17, 2005, at C2 ("Life returned to normal this week, for better or worse. Major airlines [Delta and Northwest] tumbled into bankruptcy protection.").

85. Another bullish indicator: Professor Elizabeth Warren, who teaches bankruptcy law at Harvard, has been quoted by the news media so frequently that she is becoming a household name. On February 3, 2006, I performed a Westlaw® search for the phrase "Elizabeth Warren" in the "allnews" library, restricting my search to the "most recent 3 years." The search yielded an impressive 830 "hits."

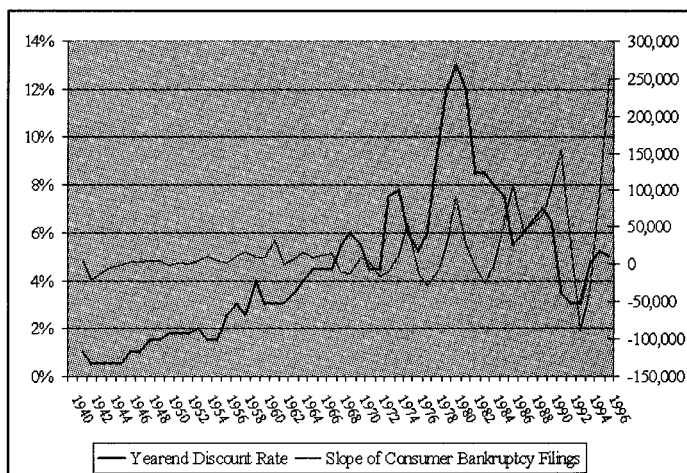
Then there is the economic (demand) picture: Everyone seems to be in agreement that American consumers have burdened themselves with an unprecedented level of indebtedness,<sup>86</sup> and now that the Federal Reserve has acted to combat inflation by raising the discount rate (not once but several times),<sup>87</sup> interest rates are increasing across the board, making debt held at variable interest rates (like credit card debt) increasingly harder to repay.<sup>88</sup> Historically, too, there is support for the idea that higher interest rates produce higher numbers of personal bankruptcies: Since 1950, *every spike* in the discount rate has preceded a spike in the "slope" of personal bankruptcy filings—that is, the rate at which those filings increased.<sup>89</sup> (Students obviously picked up on the most dramatic rise in the discount rate, which topped out at

86. See Ameet Sachdev, *Fed Chief Fearless on Debt*, CHI. TRIB., Oct. 20, 2004, at C1 (disputing the optimistic view, held by Alan Greenspan (among others), of the difficulties attending excessive household debt).

87. *Fed Comments About Rules Send Major Indexes Lower*, N.Y. TIMES, Feb. 1, 2006, at C10 ("That was the Fed's 14th consecutive rate increase since its cycle of tightening credit began on June 30, 2004.").

88. Patrick McGeehan, *Soaring Interest Is Compounding Credit Card Woes for Millions*, N.Y. TIMES, Nov. 21, 2004, § 1, at 1 (stating that increasing interest rates make it more difficult for consumers to pay their credit card debts).

89. Consider this graphic (which I created for this Essay):

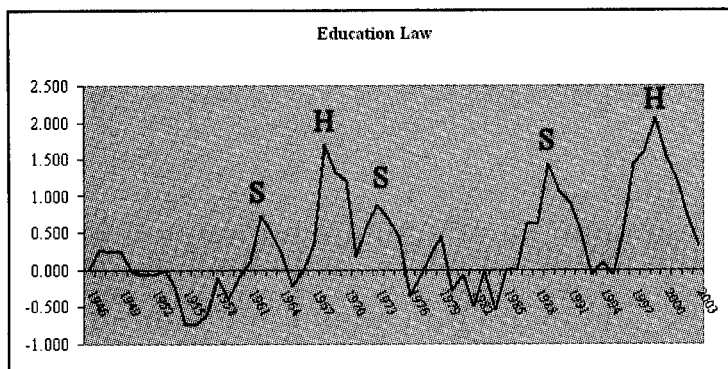


Sources: Bd. of Governors of the Fed. Reserve Sys., *Discount Rate Changes: Historical Dates of Changes and Rates*, <http://research.stlouisfed.org/fred2/data/DISCOUNT.txt> (last visited Nov. 17, 2005) (on file with the Washington and Lee Law Review); Vern McKinley, *Ballooning Bankruptcies*, REGULATION, Fall 1997, at 33, available at <http://www.cato.org/pubs/regulation/reg20n4f.html> (on file with the Washington and Lee Law Review).



13% in 1980.)<sup>90</sup> With the discount rate at 4.5% and rising<sup>91</sup> (along with inflation),<sup>92</sup> the bankruptcy courts are squarely in the path of "economic Armageddon."<sup>93</sup> More bankruptcies mean more demand for bankruptcy lawyers, meaning more demand for bankruptcy courses in law school. Strong buy.

### Education Law



The formation of a "head-and-shoulders top" between 1961 and 1976 predicted a reversal to the downside,<sup>94</sup> but there was not much downside to be had, as Excess Interest dipped only modestly from 1976 through 1987. There followed a significant breakout to the upside and the beginnings of what could

90. Discount Rate Changes, *supra* note 89. Market rates of interest began rising in 1979, when Paul Volcker took the helm of the Fed, and they peaked in 1981. Excess Interest in bankruptcy law also peaked in 1981, although the moving average pushed that peak, graphically, to 1983.

91. James P. Miller, *Consumer Inflation Surges: Energy Costs Spike; "Core" Rate "Benign,"* CHI. TRIB., Feb. 23, 2006, at C3 ("And that, [some experts] suggest, most likely increases the likelihood that the Fed not only will raise rates by a quarter-point in March, as expected, but will do so again in May."); *Fed Comments, supra* note 87, at C10 (noting an increase in the federal funds rate to 4.5%).

92. Miller, *supra* note 91 ("Consumer prices climbed a punishing 0.7 percent last month . . ."); Vikas Bajaj, *Energy Prices Lead Inflation, Overcoming Salary Increases,* N.Y. TIMES, Sept. 16, 2005, at C4.

93. Brett Arends, *Economic "Armageddon" Predicted,* BOSTON HERALD, Nov. 23, 2004, at 35.

94. "A head[-]and[-]shoulders reversal pattern forms after an uptrend, and its completion marks a trend reversal. The pattern contains three successive peaks with the middle peak (head) being the highest and the two outside peaks (shoulders) being low and roughly equal." StockCharts.com, *Head and Shoulders Top (Reversal)*, <http://www.stockcharts.com/education/ChartAnalysis/headShouldersTop.html> (last visited Nov. 17, 2005) (on file with the Washington and Lee Law Review).

be another top—and with the second shoulder yet to come, this would be a bullish signal, for now. Yes, the line is heading toward zero, but education law appears to enjoy significant "support"<sup>95</sup> at that level. Couple these technical factors with the fundamental ones, and education law looks like a winner: On the demand side, the public education system is in shambles (more lawyers); and President Bush recently has restated his commitment to the bureaucracy of education (again, more lawyers).<sup>96</sup> On the supply side, have I mentioned that since 1999, my handful of law schools has hired only three new professors to teach education law (.69% of the total)? Together, these conditions make for a strong buy.

### *Energy Law*

Anyone who was alive during the early Seventies remembers the "oil crisis," during which energy prices (and energy conservation) spiked. Oddly enough, the Seventies also saw a spike in Excess Interest in energy law. Coincidence? I think not. With experts warning that world oil production has peaked,<sup>97</sup> and with the developing world demanding increasing amounts of oil,<sup>98</sup> energy supplies are tight enough to create significant price shocks, as occurred in the aftermath of Hurricane Katrina.<sup>99</sup> Law schools appear not to have considered the possibility of a resurgence here, but to my mind, this subject is a strong buy, particularly if law schools can bundle energy law and water law into one course that addresses the problems of a developing world in a developing millennium: "Natural Resources Law," perhaps.

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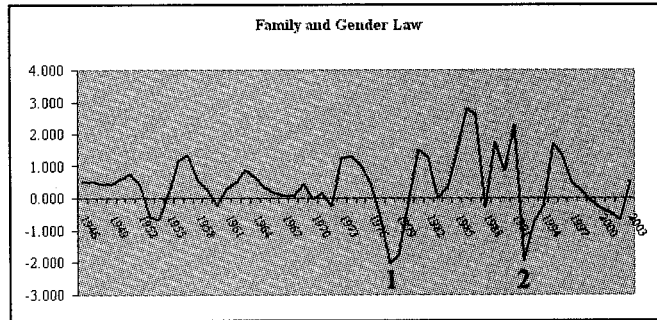
95. "Support is the price level at which demand is thought to be strong enough to prevent the price from declining further." StockCharts.com, Support and Resistance, <http://www.stockcharts.com/education/ChartAnalysis/supportResistance.html> (last visited Oct. 23, 2005) (on file with the Washington and Lee Law Review).

96. See Diana Jean Schemo, *Bush Nominates a Close Adviser for Top Education Post*, N.Y. TIMES, Nov. 18, 2004, at A28 (noting nomination of Margaret Spellings, a White House insider and chief adviser on domestic issues, to Secretary of Education).

97. See Daniel Yergin, *Imagining a \$7-a-Gallon Future*, N.Y. TIMES, Apr. 4, 2004, § 4, at 1 (describing experts' belief that the demand for oil will soon outstrip the world's capacity to produce oil).

98. See Simon Romero, *China Is Emerging as a Rival to U.S. for Oil in Canada*, N.Y. TIMES, Dec. 23, 2004, at A1 (observing China's move to access Canadian oil reserves, which traditionally have gone to the United States); Neela Banerjee, *Oil's Pressure Points*, N.Y. TIMES, Apr. 13, 2003, § 3, at 1 (highlighting the rise in demand for oil and its corresponding effect on price volatility).

99. Jad Mouawad, *Katrina's Shock to the System*, N.Y. TIMES, Sept. 4, 2005, § 3, at 1 (reporting the leap in oil prices resulting from damage that Hurricane Katrina inflicted on oil refineries).

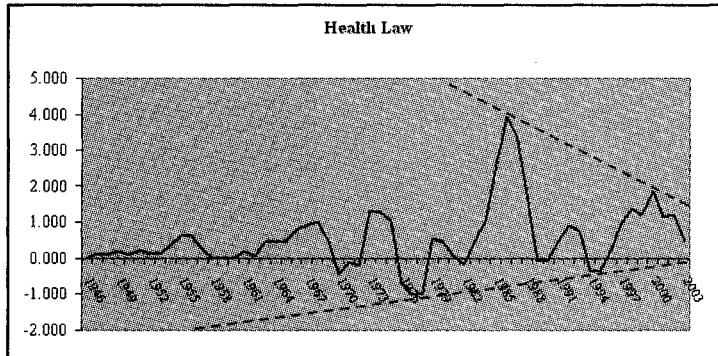
*Family and Gender Law*

If we were to stretch the definition of "double bottom,"<sup>100</sup> we might find one here. Chartists consider the double bottom to be a bullish indicator, perhaps because it is easier, in hindsight, to call a bottom when the phenomenon seems to have repeated itself. On the fundamental side, if the last presidential election taught us anything, it is that the media, at least, thinks that "morality" issues (by which they mean abortion and gay marriage) are of primary concern to a majority of Americans.<sup>101</sup> Certainly the issue of gay marriage is a familiar one to those Americans living in the eleven states whose voters recently opted to amend their state constitutions to prohibit the recognition of those marriages.<sup>102</sup> And while issues of family and gender may seem to be everywhere these days, my handful of law schools has managed to hire only eight new professors to teach courses in the field since 1999, comprising a relatively modest 1.84% of the total. While faculty interest in family and gender law may be strong, interest among students appears to be stronger. Strong buy.

100. "The double bottom is a major reversal pattern that forms after an extended downtrend. As its name implies, the pattern is made up of two consecutive troughs that are roughly equal, with a moderate peak in between." StockCharts.com, Double Bottom (Reversal), <http://www.stockcharts.com/education/ChartAnalysis/doubleBottom.html> (last visited Jan. 9, 2005) (on file with the Washington and Lee Law Review).

101. *But see* David Brooks, Op-Ed., *The Values-Vote Myth*, N.Y. TIMES, Nov. 6, 2004, at A19 (arguing that the Bush victory in the presidential election was not attributable to votes based on moral issues, such as gay marriage, abortion, or civil rights).

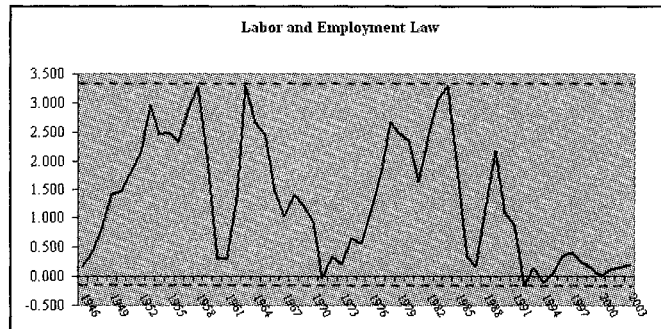
102. *See* Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16. *But see* Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

*Health Law*

Since the spike in Excess Interest in health law in 1986, the chart appears to have formed what chartists term a "falling wedge," shown as dashed lines—a bullish signal.<sup>103</sup> While it may take another year or two to produce the expected upside, health law is a buy for those with the luxury of a few years to wait. The fundamentals make health law look even stronger in the long run, as problems with the present system of delivering health care are abundant, solutions to those problems are few, and the ranks of new professors who teach courses in health law have swelled by only 2.07% of the total since 1999. Strong buy.

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103. "The falling wedge is a bullish pattern that begins wide at the top and contracts as prices move lower." StockCharts.com, Falling Wedge (Reversal), <http://www.stockcharts.com/education/ChartAnalysis/fallingWedge.html> (last visited Jan. 9, 2005) (on file with the Washington and Lee Law Review).

*Labor and Employment Law*

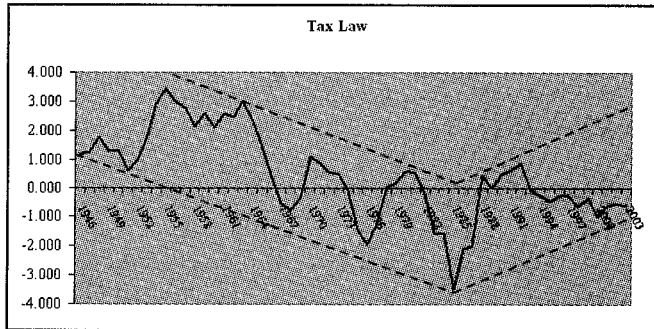
Technically, Excess Interest in labor and employment law exhibits support just below zero and "resistance"<sup>104</sup> at 3.300, which means that a chartist might expect this subject to trade between the dashed lines—that is, anywhere from bullish to wildly so. The fundamental analyst, for her part, might find her bullish indicators in recent events: Employers, taking lessons from retail giant Wal-Mart, increasingly are requiring their employees to work "off the books" (i.e., without pay)<sup>105</sup> even as Wal-Mart, in particular, resists unionization (at least in this country).<sup>106</sup> The labor movement has been weak for so long, it is hard to imagine labor as a force in American life. But in a world in which history rhymes, if not repeats, who can be surprised when even the pizza delivery guys are forming a labor union?<sup>107</sup> The answer, it appears, is "law schools," for those in my handful, at least, are unprepared for the coming rally in labor and employment law, having hired only four new professors to teach courses in the area since 1999 (.92% of the total hires). For me, these factors make labor and employment law one of the stronger buys on the list.

104. "Resistance is the price level at which selling is thought to be strong enough to prevent the price from rising further . . . . By the time the price reaches the resistance level, it is believed that supply will overcome demand and prevent the price from rising above resistance." StockCharts.com, Support and Resistance, <http://www.stockcharts.com/education/ChartAnalysis/supportResistance.html> (last visited Jan. 6, 2006) (on file with the Washington and Lee Law Review); see also *supra* note 95 (discussing support).

105. Steven Greenhouse, *Forced to Work Off the Clock, Some Fight Back*, N.Y. TIMES, Nov. 19, 2004, at A1.

106. Richard McGregor, *Wal-Mart Says It Would Allow a Union in China*, FIN. TIMES, Nov. 24, 2004, at 31 ("Wal-Mart, which has long battled to keep unions out of its stores in the US and around the world, has been under pressure from the All China Federation of Trade Unions, an official organisation, to allow it to establish branches in its stores.")

107. Association of Pizza Delivery Drivers, <http://www.pizzadeliverydrivers.org/> (last visited January 9, 2006) (on file with the Washington and Lee Law Review).

*Tax Law*

This is the kind of chart about which technical analysts dream. After tracing an undulating "price channel"<sup>108</sup> to the downside, Excess Interest in tax law broke out of its bearish trend in 1988, then traced the beginnings of a new price channel—a bullish one. Since then, of course, Excess Interest has turned negative, but even a sine curve has its ups and downs. I admit to being influenced by the fundamentals here, which suggest that if President Bush delivers on his promise (threat?) to reform the tax code,<sup>109</sup> then we might have the opportunity to engage in a national debate about tax policy for the first time in twenty years. This might be an opportune time: The tax burden on Americans (which includes income taxes, real property taxes, personal property taxes, sales taxes, and use taxes) is at its highest ever.<sup>110</sup> Yes, my handful of law schools has hired significantly in the area, adding ten new professors to

108. "A price channel is a continuation pattern that slopes up or down and is bound by an upper and lower trendline. The upper trend line marks resistance and the lower trend line marks support. Price channels with negative slopes (down) are considered bearish and those with positive slopes (up) bullish." StockCharts.com, Price Channel, <http://www.stockcharts.com/education/ChartAnalysis/priceChannel.html> (last visited Jan. 16, 2006) (on file with the Washington and Lee Law Review).

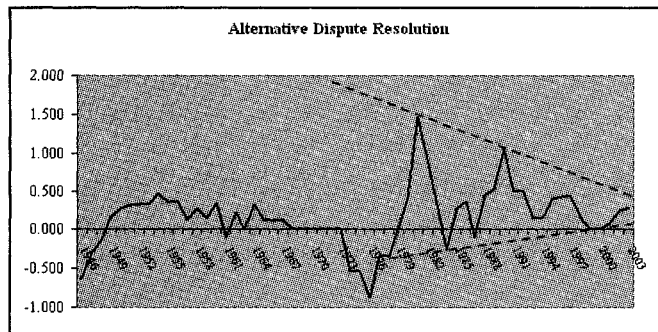
109. See Edmund L. Andrews, *Deficits and Tax System Changes in Bush's Second-Term Economy*, N.Y. TIMES, Nov. 4, 2004, at C1 (reporting that Bush has vowed to overhaul the income tax system).

110. See Tax Foundation, *New Study Profiles Total Tax Burden of Median American Family*, TAX BITES, Mar. 9, 2000, at 1 ("Federal, state and local taxes claimed 39.0 percent of a median two-income family's total income . . . down from 40.9 percent in 1997 and down from the historical high of 41.5 percent in 1996.") (on file with the Washington and Lee Law Review); Bruce Bartlett, National Center for Policy Analysis, Brief Analysis #205: Fighting the Rising Tax Burden 1 (June 5, 1996), <http://www.ncpa.org/pub/ba/pdf/ba205.pdf> ("Recently released data from the Department of Commerce reveal that federal, state and local taxes consumed a record 31.3 percent of gross domestic product last year [1995]—the highest level in U.S. history.") (on file with the Washington and Lee Law Review).

teach courses in tax law since 1999 (2.30% of the total), but who says economics is a science? Strong buy.

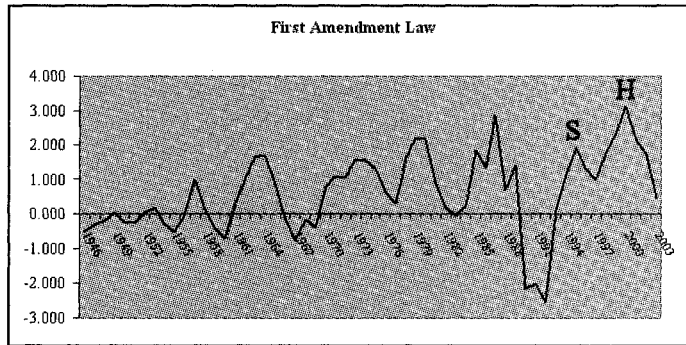
### B. Weak Buys

#### *Alternative Dispute Resolution*



Technical analysts would find a falling wedge here, signaling a breakout to the upside. Fundamentally, my handful of law schools has hired only *one* new professor to teach courses in alternative dispute resolution since 1999, equating to significantly less than 1% (.23%, to be precise) of the total new hires by those schools. This necessarily means that most of the rise in Total Interest is occurring among *students*, not faculty—another bullish indicator. Further, anecdotal evidence shows strong student interest in alternative dispute resolution; at Emory, at least, courses in mediation and negotiation are always full. Why, then, do I rate this subject a weak buy, and not a strong one? Because I suspect that faculties view mediation, negotiation, and other courses in the area as practical courses that can (and perhaps should) be taught by adjunct professors—that is, practicing lawyers. But I also expect faculties to "wise up."<sup>111</sup>

111. Eventually.

*First Amendment Law*

A technical analyst might find a shoulder and a head in this chart, which ultimately would indicate a reversal to the downside, but which would be bullish (for now) if the curve goes on to trace a second shoulder. A fundamentalist might add that issues of church and state, in particular, are resonant among the liberati,<sup>112</sup> who recently have warned of a "theocracy" in the making—much like the ones in Iran and Saudi Arabia, only with crosses (and without the *hijab*).<sup>113</sup> Where there is smoke, there are lawyers: Among the lawsuits filed within the last year or two are several to prevent the teaching of "intelligent design" as an alternative to evolution;<sup>114</sup> and, of course, several

112. I thought I had coined this word by combining "liberal" and "literati," but David Blunkett, the former Home Secretary of the United Kingdom, was there before me. Brian Wheeler, *Who Are the Liberati?*, BBC NEWS ONLINE, July 7, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/3872675.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/3872675.stm) (on file with the Washington and Lee Law Review).

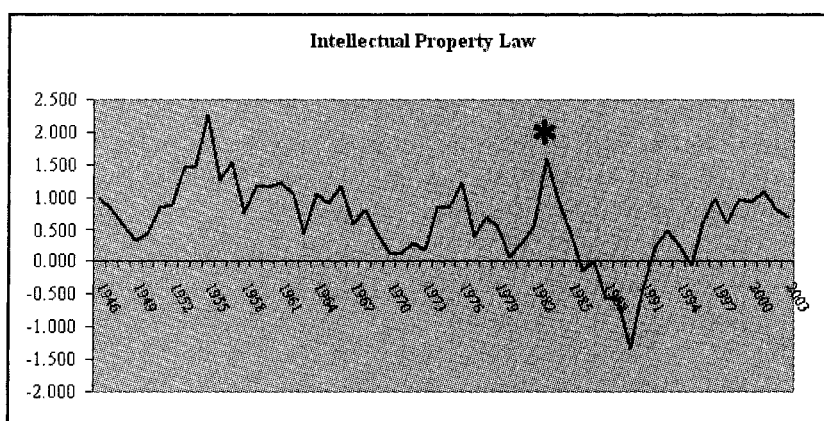
113. See Neal Gabler, Op-Ed., *Karl Rove: America's Mullah*, L.A. TIMES, Oct. 24, 2004, at M1 ("[Karl] Rove and [President] Bush . . . are reconfiguring the system in extra-constitutional, theocratic terms. The idea of the United States as an ironfisted theocracy is terrifying . . . This time, it's not about policy . . . it's about the nature of American government. We all have reason to be very, very afraid."); see also Garry Wills, Op-Ed., *The Day the Enlightenment Went Out*, N.Y. TIMES, Nov. 4, 2004, at A25 ("Can a people that believes more fervently in the Virgin Birth than in evolution still be called an Enlightened nation?").

114. On December 15, 2005, a panel of the Eleventh Circuit Court of Appeals heard arguments in a case concerning the "stickering" of science textbooks in Cobb County, Georgia. The stickers informed students that evolution is a "theory, not a fact," and that evolution "should be approached with an open mind, studied carefully and critically considered." Bill Rankin, *Appeals Judges Skeptical About Cobb Ruling; Evolution Disclaimers Called "Literally Accurate,"* ATL. J-CONST., Dec. 16, 2005, at A1. Less than one week later, on December 20, a federal district judge in Pennsylvania ruled "that it was unconstitutional for a Pennsylvania school district to present intelligent design as an alternative to evolution in high school biology courses because it is a religious viewpoint that advances 'a particular version of Christianity.'" Laurie Goodstein, *Issuing Rebuke, Judge rejects Teaching of Intelligent Design*, N.Y. TIMES, Dec. 21, 2005, at A1; see also *id.* (describing intelligent design).



others to prevent the display of the Ten Commandments in or on the grounds of public buildings, of which lawsuits the Supreme Court recently decided two.<sup>115</sup> (Sort of.)<sup>116</sup> When the Declaration of Independence is described as a "powerful tool for the Christian right,"<sup>117</sup> the First Amendment stands a good chance of continuing to hold its own in the competition for student interest. And with only a modest amount of hiring in the area since 1999 (1.61% of the total), First Amendment law looks like a weak buy.

### *Intellectual Property Law*



For the most part, intellectual property law has been plagued by excess student interest since at least 1946<sup>118</sup>—good news for those who wish to teach in the area. The only instance in which the supply of intellectual property law exceeded demand succeeded a burst of responsive hiring in the area (marked

115. See *McCreary County v. Am. Civil Liberties Union of Ky.*, 125 S. Ct. 2722, 2727 (2005) (challenging the posting of the Ten Commandments at courthouses as a violation of the First Amendment); *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (challenging the posting of the Ten Commandments at the Texas State Capitol as a violation of the First Amendment).

116. See Linda Greenhouse, *Justices Allow a Commandments Display, Bar Others*, N.Y. TIMES, June 28, 2005, at A1 (noting that the display of the Ten Commandments in Texas was Constitutional while two displays of the Ten Commandments in Kentucky were not).

117. See Dean E. Murphy, *God, American History, and a Fifth-Grade Class*, N.Y. TIMES, Dec. 5, 2004, § 4, at 4 (discussing how a fifth-grade teacher has used the Declaration to "thrust . . . God and Christianity into the very same history lesson as George Washington and Thomas Jefferson").

118. Can it be a coincidence that Congress passed a landmark piece of trademark legislation in 1946? See Trademark Act of 1946 (the "Lanham Act"), Pub. L. No. 79-489, 60 Stat. 427 (codified at 15 U.S.C. § 1051 *et seq.*) (promulgating standards for the registration and protection of trademarks used in interstate commerce).

with a "\*""), the beneficiaries of which now are among the luminaries in the field.<sup>119</sup>

The past five years have seen another burst of hiring in intellectual property law; my handful of law schools has hired fourteen new professors to teach courses in this area (a significant 3.23% of the total). Still, the relatively modest dip in Excess Interest that resulted is testimony to the enduring popularity of this subject among students. And why not? Is there another area of law that can explain why the International Olympic Committee felt wronged by President Bush;<sup>120</sup> why Governor Schwarzenegger felt wronged by a "bobble head" manufacturer;<sup>121</sup> why the late Rosa Parks felt wronged by two recording artists known as OutKast;<sup>122</sup> and why Ray Bradbury (author of the novel *Fahrenheit 451*) felt wronged by filmmaker Michael Moore, best known for his recent campaign contribution, *Fahrenheit 9/11*?<sup>123</sup> And what about the

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119. Not surprisingly, I used the Internet to compile the start dates for a handful of my luminaries who were hired during the period marked with an "\*", including: Robert Denicola, University of Nebraska College of Law, 1976; Rochelle Cooper Dreyfuss, New York University School of Law, 1983; Margreth Barrett, University of California Hastings College of the Law, 1984; Rebecca Eisenberg, University of Michigan Law School, 1984; Jane Ginsburg, Columbia Law School, 1984; and Jessica Litman, Wayne State University Law School (at least as of this writing), 1984. I do not have the start dates for Wendy Gordon (Boston University School of Law) and Peter Jaszi (American University College of Law), but I believe they started during this period. By the time Robert Merges (University of California, Berkeley School of Law, Boalt Hall (Boalt) 1988), Peter Menell (Boalt 1990), and Glynn Lunney (Tulane University Law School, 1991) began teaching, the slide to the faculty side was underway.

120. See Craig Whitlock, *Bush Campaign Won't Pull Ad Despite Complaint by USOC*, WASH. POST, Aug. 27, 2004, at A12 ("President Bush's reelection campaign said Thursday that it would continue to run television ads crediting his policies for the presence of 'two more free nations' at the Olympics, despite objections from the U.S. Olympic Committee and Iraqi athletes.").

121. See John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES, May 18, 2004, at A16. The article states:

Schwarzenegger's film production company filed a lawsuit last week against a small Ohio toy maker, claiming that the company's \$19.95 Schwarzenegger bobblehead doll illegally exploits his image for commercial purposes. . . . The suit says that Mr. Schwarzenegger is an instantly recognizable global celebrity whose name and likeness are worth millions of dollars and are solely his property.

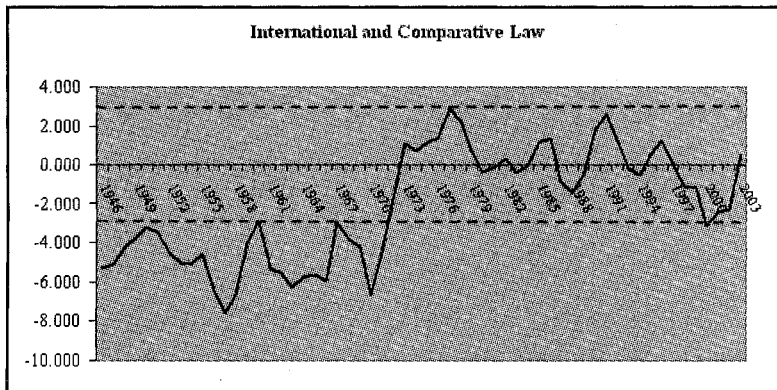
*Id.*

122. See *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003) ("Rosa Parks is a civil rights icon who first gained prominence during the Montgomery, Alabama bus boycott in 1955. She brings suit against LaFace Records, a record producer, and OutKast, a 'rap' (or 'hip-hop') music duo . . . for using her name as the title of their song, *Rosa Parks*.").

123. *Bradbury Hot Over Moore Film's Title*, CHI. TRIB., June 20, 2004, at C14 ("Bradbury said he would rather avoid litigation and is 'hoping to settle this as two gentlemen, if he'll shake hands with me and give me back my book and title.'").

fate of the Blackberry®?<sup>124</sup> Students love intellectual property law because it is inherently interesting, which is not something one can say about every subject taught in law school. This subject would have been a strong buy as recently as 1997; I give it a weak buy today.

### *International and Comparative Law*



I have a colleague who preaches the gospel of international law, arguing that law faculties are shortchanging their students by ignoring the international and comparative aspects of their disciplines. He cannot understand how this can be so, particularly in this age of globalization. When I began gathering data from the Forties, Fifties, and Sixties, I appreciated his confusion. My colleague began teaching at Harvard Law School in 1948—which makes him, like everybody else, a product of his age—and his age (among Harvard faculty, at least) was something of a golden one for scholars of international law. No other chart indicates such a disparity between faculty and student interests; only in 1974 did Excess Interest turn positive.

Since 1972, the old line of resistance (at -3.000) has become support for a higher price channel in which Excess Interest is trading in a range between -3.000 and 3.000, between bearish and bullish. Thus, the future lies somewhere between bad and good. All we can say for sure is that the line is heading up—for now. But with a whopping 6.68% of the new professors in my sample teaching courses in international and comparative law, those who wish to join them are advised to move quickly. Weak buy.

124. For the latest (as of this writing), see Ian Austen, *Ruling Aids Manufacturer of Blackberry*, N.Y. TIMES, Feb. 2, 2006, at C4. A Blackberry®, of course, is a "wireless e-mail device." *Id.*

*International Trade*

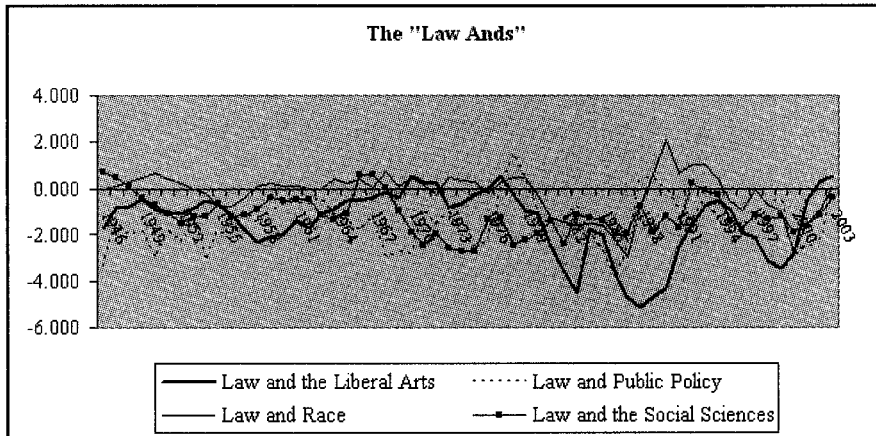
Excess Interest in international trade turned positive in 2003, and with good reason. The United States has posted the most lopsided balance of payments in the history of the world, which means that it must attract *billions* of dollars in foreign capital every day in order to support the penchant of its citizens for borrowing money and spending it on goods manufactured abroad.<sup>125</sup> As we race to import our manufactured goods and export our manufacturing (and service) jobs to lower cost countries, the usual suspects have begun to demand protectionist measures<sup>126</sup> like tariffs and penalties for "dumping" (which occurs when a foreign manufacturer sells goods into a domestic market at a price set below his marginal cost).<sup>127</sup> Against this backdrop, international trade would be a strong buy were it not for the relatively healthy amount of hiring in this most special of specialties, at 1.38% of the total. Weak buy.

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125. See Altman, *supra* note 72 (predicting falling dollar in upcoming year); Porter, *supra* note 72 (same).

126. See Floyd Norris, *Campaign Tactic: Blame Foreigners and Ignore the Trade Deficit*, N.Y. TIMES, Aug. 20, 2004, at C1 ("Blame the foreigners. That is a time-tested political tactic in America, and this year is no exception. With the job outlook uncertain, protectionist winds are blowing."); see also Associated Press, *Orange Growers Ask for Tariffs*, N.Y. TIMES, Dec. 28, 2004, at C5; Keith Bradsher, *China Relents, and Promises Textile Tariffs*, N.Y. TIMES, Dec. 13, 2004, at A1; Associated Press, *Tariffs on Shrimp Upheld*, N.Y. TIMES, Dec. 1, 2004, at C2; Bloomberg News, *U.S. Appeals NAFTA Ruling Against Tariffs on Canadian Lumber*, N.Y. TIMES, Nov. 25, 2004, at C4; *Sneaky Moves on Tobacco*, N.Y. TIMES, June 9, 2004, at A22 (disapproving of "buyout payments" to tobacco farmers in exchange for losing the price support system "under which many tobacco farmers were losing out to foreign competition"); Richard W. Stevenson, *Bush Is Urged to Maintain Import Tariffs for Steel*, N.Y. TIMES, Dec. 3, 2003, at A29; cf. Porter, *supra* note 72 (detailing the introduction of protectionist legislation in 1985, when the (then) "record" trade deficit first was recognized as "a 'disaster' that was crimping growth and 'radically changing the way American firms are doing business' by 'driving more and more of them abroad'").

127. See JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 681–82 (4th ed. 2002) (explaining the policy issues of antidumping laws and naming the United States as one of the four major proponents of antidumping measures); see also Paul Meller, *W.T.O. Ready to Take Action Against U.S. Over Trade Law*, N.Y. TIMES, Nov. 26, 2004, at C5 ("The law, known as the Byrd amendment, states that levies raised from antidumping tariffs collected on cheap imports to the United States should be distributed to the American companies that compete against the importers.").

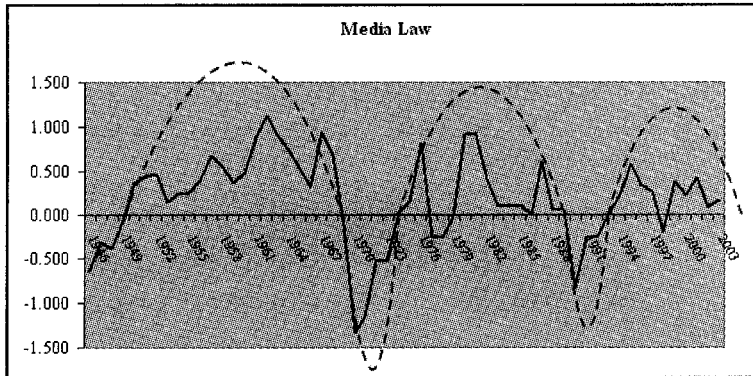
*The "Law Ands"*

Do we need to know anything about technical analysis to observe how these curves, like so much confetti, are dancing in the red? The graphical evidence of a persistent excess interest in interdisciplinary work among faculty, coupled with a fair amount of recent hiring<sup>128</sup> in the fields of law and economics, law and literature, law and philosophy, law and political science (including "public choice"), law and psychology, law and religion, and law and sociology, to name a few, might make these subjects look like a sell. For now, though, each of the lines is peeking above zero, and the "law ands" are hot. Hopefuls should bear in mind, however, that the end of this interdisciplinary world may be at hand. According to Judge Posner, at least, it is high time we stop dabbling and start writing on subjects that we actually know something about.<sup>129</sup> Like *Law and Public Order in Space*, say.<sup>130</sup>

128. My handful of schools has hired forty-three new professors to teach courses in my "law ands," or 9.91% of the total, since 1999. Of the four "law ands," law and public policy leads the pack, with 2.76% of the total (twelve new hires).

129. See Posner, *supra* note 47, at 58 (noting that "[s]ubmissions in 'law and . . .' fields magnify the bad effects of the inexperience of student editors and their failure to use peer review to separate the wheat from the chaff" and that, as a result, "many interdisciplinary articles are published that have no merit at all"). This one, of course, is an exception. See also RICHARD A. POSNER, *LAW AND LITERATURE* (rev. & enlarged ed., 1998).

130. *Supra* notes 68–69 and accompanying text.

*Media Law*

On the one hand, I suspect that law schools (and law students) do not know, exactly, what "media law" is, which makes it hard to supply or demand it. On the other hand, if students do figure out what media law is and decide to study it, there are very few of us qualified to teach it to them: Among the new professors hired in my sample since 1999, only 0.46% (less than 1%) teach courses suggestive of media law. And if the sine curve (the dashed line) is any indication, the technical picture looks reasonably bullish, at least for a few more years.

In rating media law a buy, though, I was most persuaded by what I found in the newspaper: Turns out, the Federal Communications Commission (FCC) recently has issued record fines for "indecenty," not only to Clear Channel Communications, for airing a particularly objectionable show by the habitual offender, disc jockey Howard Stern (\$495,000)<sup>131</sup>; but also to the Columbia Broadcasting System (CBS) for airing a Super Bowl halftime show during which entertainer Janet Jackson exposed her right breast (\$550,000) and to Fox for airing a particularly racy episode of its reality television show, *Married by the Media—er, by America* (\$1,183,000).<sup>132</sup> With "the FCC . . . propos[ing]

131. See John Dunbar, *Indecency on the Air: Shock-Radio Jock Howard Stern Remains "King of All Fines,"* CENTER FOR PUB. INTEGRITY, Apr. 9, 2004, <http://www.publicintegrity.org/telecom/report.aspx?aid=239> (finding fines against radio stations broadcasting Howard Stern accounted for more than half of the total fines assessed by the FCC) (on file with the Washington and Lee Law Review).

132. Associated Press, *Show's Raunchy Antics May Cost Fox \$1.2M; FCC Proposing Record Fine for Reality Series*, CHI. TRIB., Oct. 13, 2004, at A4; Paul Davidson, *Fox, Affiliates Could Face \$1.2 Million Fine; FCC Points to Party Episode of "Married by America,"* USA TODAY, Oct. 13, 2004, at B1; see also Frank Rich, *The Plot Against Sex in America*, N.Y. TIMES, Dec. 12, 2004, § 2, at 1 (complaining that television stations had removed programming

more fines for broadcast indecency [in 2004] than the previous 10 years combined,"<sup>133</sup> students are likely to take at least *some* interest in media law. Weak buy.

### C. Weak Sells

#### *Civil Procedure and Evidence*

Every law school in the United States requires students to take civil procedure in the first year, and many law schools require evidence during the second or third year as well. One might think this would make civil procedure and evidence a pair of blue chip stocks, if only because someone has to teach these courses. But even the bluest of blue chips can have a bad year—look at General Motors (GM).<sup>134</sup> In the law teaching market, even the healthiest of demands can be overwhelmed by supply.

Civil procedure first. For most of its history (or since 1946, at least), Excess Interest in civil procedure has traded above zero, but in recent years, this measure has turned decidedly negative. Historically, evidence has been less popular among students, but it, too, has turned negative. One explanation for these moves—and particularly the one in civil procedure—is the level of recent hiring: Among my handful of law schools, there are nineteen new professors (4.38%) teaching civil procedure and four teaching evidence (.92%). Both civil procedure and evidence look to be sells, if weak ones. My advice to those who love the rules? Be patient. Many scholars hired to teach these courses get sick of them,<sup>135</sup> and after a few years of complaining to the Dean, they manage to extricate themselves, thus freeing up space for new scholars like you. When opportunity knocks, open the door.

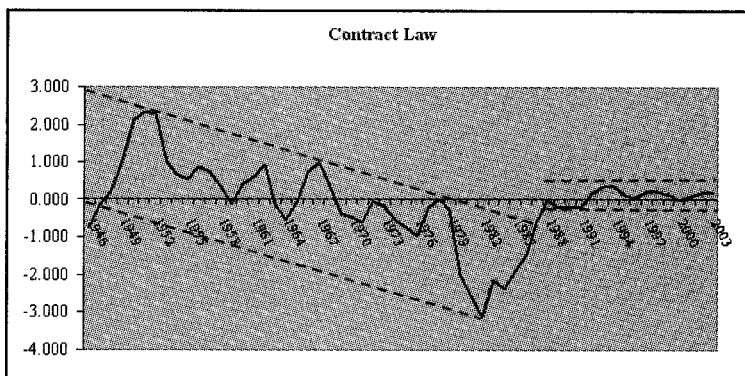
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for fear of incurring indecency penalties).

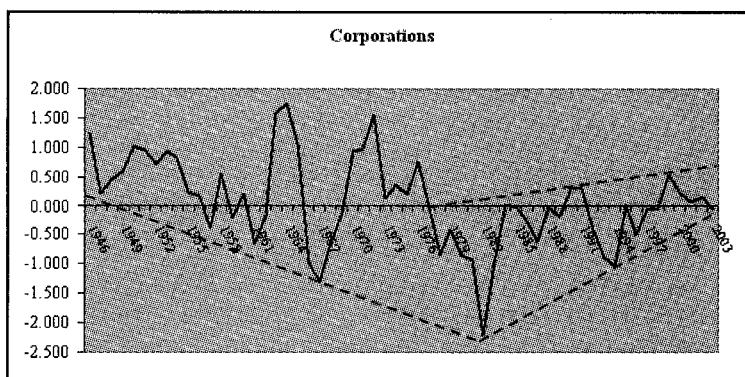
133. Dunbar, *supra* note 131; see also Krysten Crawford, *Breasts, Butts, Backs . . . Oh My!*, CNNMONEY.COM, Dec. 17, 2004, <http://money.cnn.com> (discussing the record complaints to and fines levied by the FCC for indecency) (on file with the Washington and Lee Law Review). *But see* Frank Rich, *The Great Indecency Hoax*, N.Y. TIMES, Nov. 28, 2004, § 2, at 1 (arguing that a small but vocal group of complainants—not the majority of Americans—has fueled the rise in indecency penalties).

134. For a chart of GM's performance over the past year, see MSN Money's Stock Research Wizard, <http://moneycentral.msn.com/investor/research/wizards/SRW.asp>. (If you dare.)

135. Anecdotal evidence (i.e., "I hear tell") suggests that this phenomenon is not limited to scholars who teach civil procedure and evidence.

*Contract Law*

Excess Interest in contract law was trading in a bearish price channel until it broke to the upside in 1987, rising modestly thereafter. Unfortunately, it has traded in a narrow range since 1988, rising feebly only to fall back to zero. Notwithstanding this technical weakness, the law schools in my sample have hired energetically in this field, adding seventeen new professors (3.92% of the total) since 1999. Is it *The Death of Contract*?<sup>136</sup> Well, no. But contract law does look overbought for now. Weak sell.

*Corporations*

136. See generally GRANT GILMORE, *THE DEATH OF CONTRACT* (1974) (making an argument that my contracts professor thought was important enough to justify assigning this book).



Enron. Tyco. "Sarbox" compliance.<sup>137</sup> The recent shenanigans at Fannie Mae and Freddie Mac.<sup>138</sup> With so many fundamentals pointing to a renewed interest in corporate governance,<sup>139</sup> why have I rated corporations ("business associations," at Emory) a weak sell? First, the technical analysis: After a textbook price channel saw Excess Interest declining since 1946, that measure made a (very modest) breakout in 1990. Since then, however, the chart has formed a "rising wedge," signaling an impending breakout to the downside.<sup>140</sup> The fundamentals confirm this reading: Since 1999, my handful of law schools has hired twenty new professors to teach courses in the corporate area—a heavy 4.61% of the total. This might have seemed like a good idea at the time, but to many analysts, a share of Enron stock seemed like a bargain at \$80.<sup>141</sup> While Excess Interest in corporations may bounce to the upside in the short term, in the longer term, it looks like a weak sell.

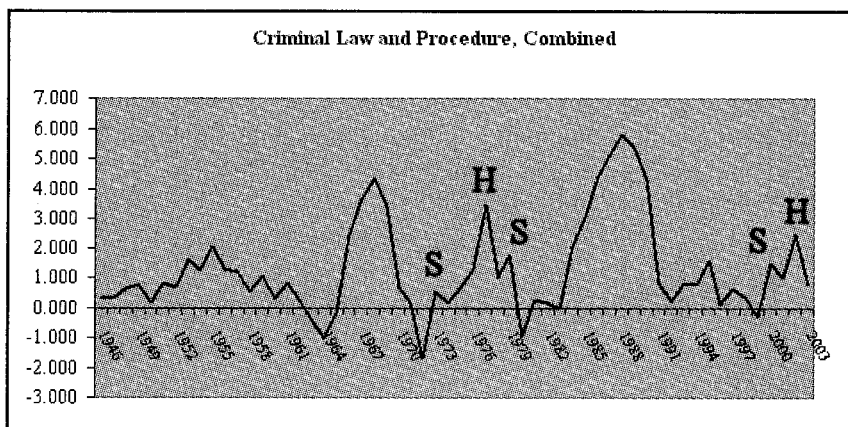
137. "Sarbox" refers to the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18, 28 and 29 U.S.C.), which Congress enacted in response to what one scholar has termed the "Big Four Frauds": Enron, Global Crossing, Qwest, and WorldCom. See Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 928 (2003) (commenting on the Big Four Frauds in auditing, accounting, and corporate governance). See generally Symposium, *In the Wake of Corporate Reform: One Year in the Life of Sarbanes-Oxley—A Critical Review*, 2004 MICH. ST. L. REV. 271–614.

138. See Stephen Labaton, *Top Regulator of Fannie Mae and Freddie Mac to Depart*, N.Y. TIMES, Apr. 6, 2005, at C5 (describing the resignation of the top regulator of Fannie Mae and Freddie Mac because of accounting scandals); Gretchen Morgenson, *Fannie's Fans Must Be in Denial*, N.Y. TIMES, Dec. 19, 2004, § 3, at 1 (discussing the SEC's requirement that Fannie Mae restate its earnings for the past four years); Peter Eavis, *The Wheels of Justice Flatten Fannie Mae*, THESTREET.COM, Dec. 16, 2004, <http://www.thestreet.com/pf/comment/detox/10199412.html> ("Can the Fannie Mae . . . scandal now take its place as the Enron-sized debacle it long has been shaping up as?") (on file with the Washington and Lee Law Review).

139. See William H. Simon, *The Confidentiality Fetish*, THE ATL. MONTHLY, Dec. 2004, at 113, 113–14 ("A recent move to tighten financial-disclosure requirements for public companies—the Sarbanes-Oxley Act, passed by Congress in reaction to the Enron scandal and other corporate infractions—has increased the demand for lawyers even more.").

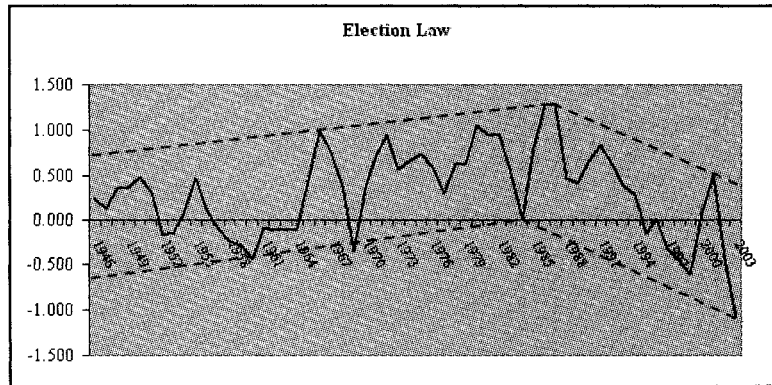
140. "The rising wedge is a bearish pattern that begins wide at the bottom and contracts as prices move higher and the trading range narrows." StockCharts.com, *Rising Wedge (Reversal Pattern)*, <http://www.stockcharts.com/education/ChartAnalysis/risingWedge.html> (last visited January 9, 2006) (on file with the Washington and Lee Law Review).

141. As Enron tumbled into bankruptcy, stock analysts were slow to adjust their expectations. This from 2001: "Two brokerage firms . . . just downgraded Enron from a Strong Buy on Wednesday, after the stock already had fallen from a 52-week high of \$84.87 to \$4.14. Thanks for nothing." Paul R. LaMonica, *Where Wall Street Went Wrong*, CNNMONEY.COM, Nov. 29, 2001, <http://money.cnn.com> (on file with the Washington and Lee Law Review). Say it with me: Past performance is no guarantee of future results.

*Criminal Law and Procedure*

Because Excess Interest in criminal law and criminal procedure have tracked each other so closely, I combined the two in this chart, thinking that doing so would make it easier to spot the kinds of shapes that so excite technical analysts. The result was a disappointment. What can I say? The chart *looks* cyclical enough—the line squiggles, then spikes, then squiggles, then spikes. It is in the squiggle stage now, although in both charts (criminal law and criminal procedure), the line is heading toward zero. Even if the curve goes on to form a second shoulder, it seems likely to decline thereafter, as this shape is a bearish one. How can I be so sure? I cannot, of course, but I admit to being influenced by the twenty-one (4.84%) new professors hired to teach criminal law since 1999.<sup>142</sup> Weak sell.

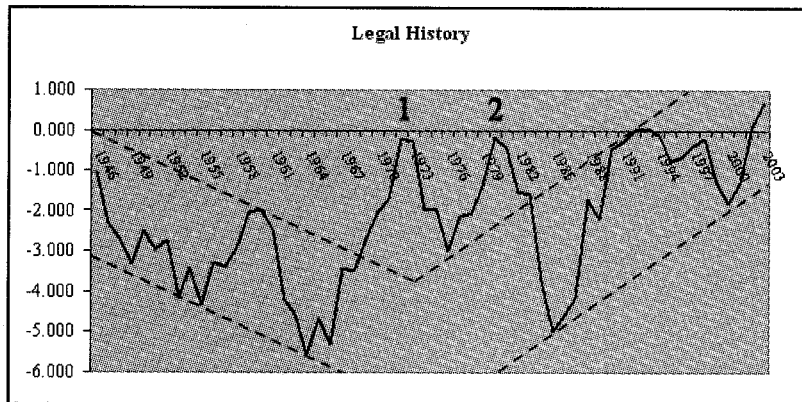
142. My handful of law schools hired seven new professors (1.61% of the total) to teach courses in criminal procedure during that period.

*Election Law*

Excess Interest in election law was in a rising price channel until 1994, when it broke to the downside, starting a new price channel with a decidedly different trajectory. This is not because election law is unpopular—on the contrary, the subject is *too* popular among law professors, that "herd of independent minds"<sup>143</sup> who have found much about which to complain during the last two presidential elections. Notwithstanding this stampede to one side of the boat,<sup>144</sup> there are hints of a rebound: First, in my handful of law schools, only five new professors (1.15% of the total) have been hired to teach courses in election law since 1999. Second, the media is obsessed with election law. Because students tend to be interested in subjects that make the news, Excess Interest in election law might be in for a turn to the positive, perhaps in time for the elections in 2008. For now, though, I give election law a weak sell.

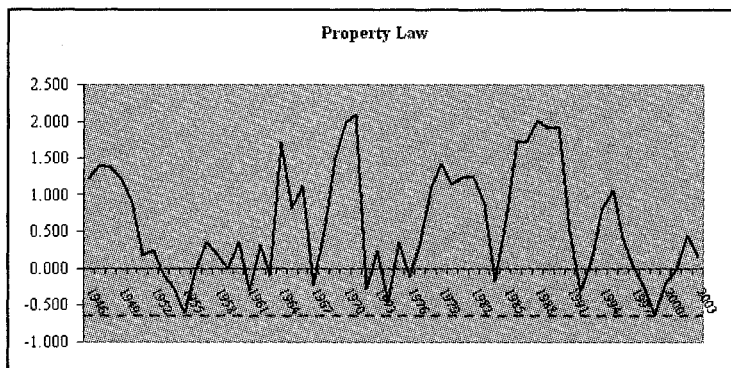
143. See Ruth R. Wisse, Op-Ed., *John Kerry U*, WALL ST. J., Oct. 25, 2004, at A18 (describing "the 'herd of independent minds'—the image is Harold Rosenberg's—charging through the American academy"); Arthur Krystal, *Poet in the Machine*, HARPER'S MAG., Feb. 2004, at 79, 84 ("If most politicians met with [Paul] Valery's disdain, intellectuals fared no better. He referred to them as a 'tribe of *uniques*,' (prefiguring Harold Rosenberg's 'herd of independent minds' by half a century) and likened them to demons frequently looking into paper mirrors.").

144. The faculty side. What did you think I meant?

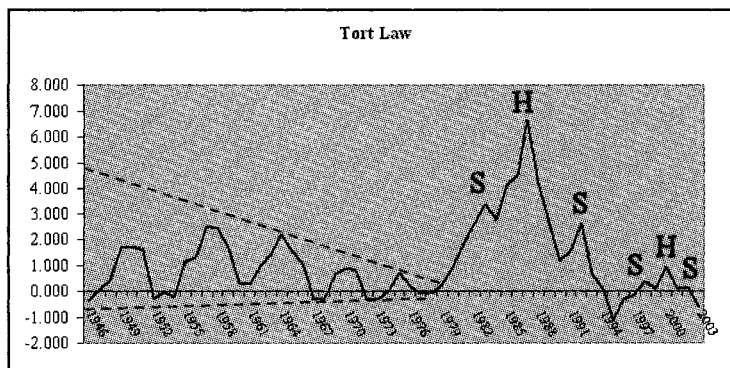
*Legal History*

On the technical side, legal history was in a bearish price channel until 1969, when it broke to the upside. Since then, the curve has formed a "double top," and as chartists would have predicted,<sup>145</sup> it sunk like a stone, finding the bottom in 1985. Excess Interest actually turned positive in 1992—the first time in, like, *forever* that more students than faculty were interested in writing about legal history. Even so, it took ten more years for Excess Interest to break above zero and stay there. Because fifty years of data for legal history demonstrates excess interest on the faculty side, readers might be wondering why I have not rated legal history a strong sell, which looks to be an even safer prediction once we know that the law schools in my sample have made thirteen new hires in legal history since 1999 (3% of the total). As should be clear by now, however, I like to dabble in history myself. Weak sell.

145. "The double top is a major reversal pattern that forms after an extended uptrend. As its name implies, the pattern is made up of two consecutive peaks that are roughly equal, with a moderate trough in between. . . . [It] marks [a] . . . change . . . in trend from bullish to bearish . . ." StockCharts.com, Double Top (Reversal), <http://www.stockcharts.com/education/ChartAnalysis/doubleTop.html> (last visited on Jan. 9, 2006) (on file with the Washington and Lee Law Review).

*Property Law*

The fact that Excess Interest in property law finds support at -.600 means that most of the solid line is above the dashed line, which means a bullish chart for property law, on the whole. Why, then, have I rated property law a weak sell—particularly following a year in which the Supreme Court decided "one of its most closely watched property rights cases in years"?<sup>146</sup> I hate to pick on subjects taught in the first year, and I particularly hate to pick on a subject that *I* teach, but with 4.84% of the new professors teaching property law, is it any wonder the curve is heading south? Weak sell.

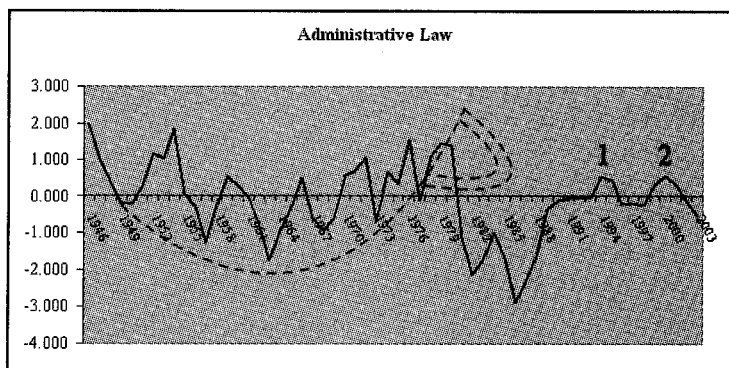
*Tort Law*

146. Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1; see *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (holding that economic development could meet the public use requirement for a city exercising eminent domain).

After tracing a falling wedge from 1946 to 1979 (as we know, a bullish signal), Excess Interest in tort law broke strongly to the upside and formed a perfect head and shoulders top (a bearish signal). The curve has been an underachiever ever since. During my first week of law school, my torts professor revealed, through Socratic questioning (read, "torture"), the definition of a tort: any legal wrong not located in contract. One wonders: Could there ever be a shortage of such wrongs in the world? With 3.69% of the total hires since 1999 teaching tort law, the answer might be "yes"—supply might (finally) have overwhelmed demand, even in a dangerous world. For now, at least, tort law is the last of the weak sells.

#### D. Strong Sells

##### *Administrative Law*



Several hopefuls have told me of their passion for teaching, writing about, and thinking about administrative law. At first, I thought they must be joking, but when nobody else laughed, I knew I had stumbled onto a trend. Unfortunately, this trend is not their friend.<sup>147</sup> Technically, the chart traces a lovely "cup with handle" (sans saucer) formation, which is "a bullish continuation pattern that marks a consolidation period followed by a

147. "The trend is your friend' is a great stock market saying. What it means is that momentum, upwards or downwards, lasts longer than we may imagine. If you decide to go against the market trend then you need a clear idea of when prices are going to turn." Nick Louth, *The Disciplines of Investing: The Trend is Your Friend*, MSN MONEY SHARE ACADEMY, Jan. 1, 2005, [http://money.uk.msn.com/Investing/Insight/Special\\_Features/Share\\_Academy/Share\\_Academy\\_Discipline\\_of\\_Investing/article.aspx?cp-documentid=144802](http://money.uk.msn.com/Investing/Insight/Special_Features/Share_Academy/Share_Academy_Discipline_of_Investing/article.aspx?cp-documentid=144802) (on file with the Washington and Lee Law Review).

breakout."<sup>148</sup> Chartists warn, however, that "[t]o qualify as a continuation pattern"—which continues until it does not<sup>149</sup>—"a prior trend should exist."<sup>150</sup> We might know whether there was such a "prior trend" if I had gathered any data prior to 1946, but alas, I did not. No harm done; it seems obvious by now that somebody (President Reagan?) knocked the cup off the table and onto the floor in 1981, where it broke into two big pieces. Since then, the double top—bearish!—that formed during the Clinton years provided us with an indication of further declines, and we began seeing those declines in 2002, when the curve dropped into negative territory.

Is it any wonder that law students are finding other things to write about? First, President Bush is a Republican, and the only two Republican Presidents who presided over a surge in Excess Interest were Presidents Eisenhower and Nixon—hardly exemplars of government-shrinking Republicanism. Second, while President Bush is no penny pincher, he has, so far, opted to "spend" federal money by lowering taxes, not by raising the level of agency regulation and enforcement, the burden of which has fallen upon state actors (including, most famously, Eliot Spitzer, the Attorney General of New York). Notwithstanding these bearish indicators, my handful of law schools has hired significantly in the area, hiring twelve new professors since 1999 (2.76% of the total). Strong sell.

### *Antitrust Law*

Antitrust has its own rhythms, ebbing and flowing in popularity under the force of gravity exerted by politics. When corporations get "too big" for the public taste, the public tends to elect Democrats, and Democrats tend to light a fire under the Antitrust Division of the Department of Justice (and to a lesser extent, the Federal Trade Commission). The data support this theory: President Reagan took office in 1981, and a year later, Excess Interest in antitrust peaked, then plummeted by 1986. If President Bush favors a less vigorous enforcement

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148. StockCharts.com, Cup with Handle (Continuation), <http://www.stockcharts.com/education/ChartAnalysis/cupHandle.html> (last visited Jan. 9, 2006) (on file with the Washington and Lee Law Review).

149. As one analyst put it, "The problem is, as most of us have learned the hard way . . . stocks moving lower tend to continue moving lower. That is, until they don't anymore." Charles E. Kirk, *The Fed, Oil, Earnings & Charts*, THE KIRK REPORT, Aug. 9, 2004, [http://www.thekirkreport.com/2004/08/the\\_fed\\_oil\\_ear.html](http://www.thekirkreport.com/2004/08/the_fed_oil_ear.html) (on file with the Washington and Lee Law Review); cf. StockCharts.com, Symmetrical Triangle (Continuation), <http://www.stockcharts.com/education/ChartAnalysis/symmTriangle.html> ("The future direction of the breakout can only be determined after the break has occurred. Sound[s] obvious enough, but attempting to guess the direction of the breakout can be dangerous.") (last visited Jan. 9, 2006) (on file with the Washington and Lee Law Review).

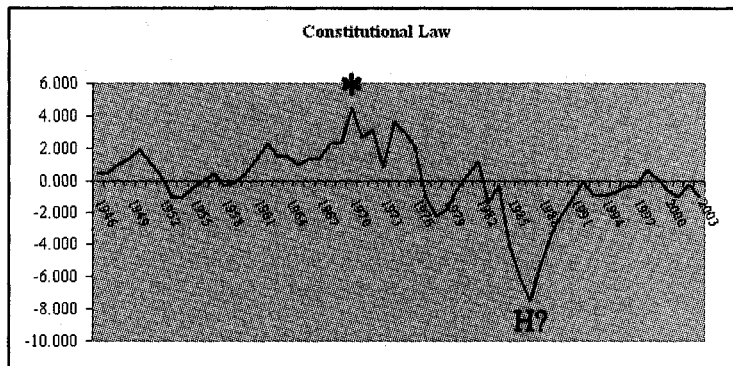
150. See Cup With Handle, *supra* note 148.

of the antitrust laws (and the Microsoft settlement suggests that he does),<sup>151</sup> we would expect students to lose interest in the subject—and they have. Strong sell.

### Commercial Law

In the pages of the *Harvard Law Review* at least, there has been *absolutely no interest* in commercial law since 1999.<sup>152</sup> If a tree falls in the forest, and nobody is there to hear it, does it make a sound? With seven (1.61%) extremely optimistic new hires in the area since 1999, commercial law looks like a strong sell.

### Constitutional Law



If this chart contained a "head-and-shoulders bottom" (which signals a bullish reversal),<sup>153</sup> it would be a huge head indeed—but then again, we are

151. See Steve Lohr, *Antitrust Deal Is Called Big Victory for Microsoft*, N.Y. TIMES, Nov. 2, 2001, at C4 (describing the Bush administration as "malleable"); cf. Jaret Seiberg, *When D.C. Freezes Over*, THEDEAL.COM, Nov. 15, 2004, <http://www.thedeal.com/NASApp/cs/CS?page name=TheDeal/TDDArticle/StandardArticle&bn=NULL&c=TDDArticle&cid=1099927545730> (on file with the Washington and Lee Law Review). That article states:

Merger enforcement for the past several decades has evolved gradually rather than undergoing a series of radical transformations. That may be about to change. President Bush's election to a second term offers federal antitrust enforcers a chance to correct what they see as major flaws with U.S. competition policy. The result could be a system more favorable to big business.

*Id.*

152. See Posner, *supra* note 47, at 58 ("My only criticism of the student-written portions of the law reviews is that the students have a propensity to write about 'hot' subjects, like partial-birth abortion [and] gay marriage . . . to the neglect of equally important commercial subjects that cry out for informed doctrinal analysis.").

153. See StockCharts.com, *Head and Shoulders Bottom (Reversal)*, <http://www.stockcharts.com/education/ChartAnalysis/headShouldersBottom.html> (describing the head and



speaking of constitutional law. Nonetheless, the absence of visible shoulders in this chart makes me wonder whether things are as bullish as a chartist might think. As a fundamental matter, the lows in 1978 and 1987 happened to come on the heels of a flurry of hiring in constitutional law in the late Sixties and into the Seventies (marked, inexactly, with an "\*").<sup>154</sup> This is a bad sign for those hoping to teach constitutional law anytime soon, as the law schools in my survey have hired a whopping twenty-eight new professors (6.45% of the total) to teach courses in the subject since 1999. These fundamental factors lead me to think that the chart is preparing to form a double bottom—a bullish indicator, perhaps, after the second "bottom," but decidedly bearish until then. Yes, constitutional law is ubiquitous in the law school curriculum, but too much of a good thing is still *too much*. Bottom line: Strong sell.

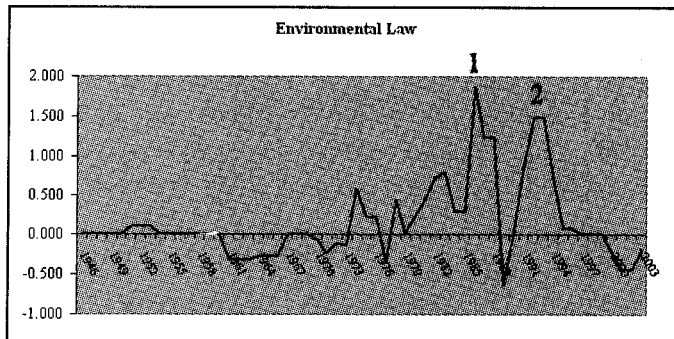
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shoulders bottom trend) (last visited Jan. 9, 2006) (on file with the Washington and Lee Law Review). The website explains:

As a major reversal pattern, the head and shoulders bottom forms after a downtrend, and its completion marks a change in trend. The pattern contains three successive troughs with the middle trough (head) being the deepest and the two outside troughs (shoulders) being shallower. Ideally, the two shoulders would be equal in height and width.

*Id.*

154. I do not teach or write on the subject of constitutional law, and so if I have heard of a scholar in the field, I think of him as "famous." Using this criterion, I used the Internet to compile the start dates for a handful of famous scholars who were hired before and during the period marked with an "\*": Vincent Blasi, Columbia Law School, 1967; Owen Fiss, Yale Law School ("Yale"), 1968; Laurence Tribe, Harvard Law School, 1968; Bruce Ackerman, Yale, 1969; Paul Brest, Stanford Law School, 1969; Mark Tushnet, Georgetown University Law Center, 1973; and John Jeffries, University of Virginia School of Law, 1975. Derrick Bell (New York University School of Law) and the late John Hart Ely (University of Miami School of Law) also appear to have been hired during this period. Excess Interest had fallen off a cliff by the time the rest of the scholars on my "famous" list joined the club: Cass Sunstein, University of Chicago Law School, 1981; Stephen Carter, Yale, 1982; and Akil Amar, Yale, 1985. Erwin Chemerinsky (Duke Law School) probably falls in this category as well.

*Environmental Law*

Environmental law was an outpost of the law school curriculum until 1974, four years into "[a] decade of awakening and cleanup"<sup>155</sup> that witnessed, among other events, the first Earth Day (1970); the passage of the Clean Air Act (1970); the creation of the National Resources Defense Council and the Environmental Protection Agency (1970); the passage of the Clean Water Act (1972) and the Endangered Species Act (1973); the death of Karen Silkwood (1974); the beginning of the end of leaded gasoline (1976); passage of a precursor to the "Superfund" legislation (1976); the creation of the Department of Energy (1977); exposure of the toxic waste at Love Canal (1978); and the accident at Three Mile Island (1979).<sup>156</sup> A marginal subject had exploded, and as the Eighties were no stranger to environmental disaster, either, Excess Interest in environmental law stayed strongly to the positive.<sup>157</sup>

155. See Bill Kovarik et al., Environmental History Timeline, <http://www.radford.edu/~wkovarik/envhist/> (listing important American environmental events chronologically by decade, as compiled by "one academic historian with input from a community of historians") (last visited Jan. 9, 2006) (on file with the Washington and Lee Law Review). The quoted phrase appears on a page that a reader can access by placing the cursor over the circle marked "1970-1980."

156. See *id.*

157. That decade included the passage of the Superfund legislation, entitled the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), in 1980; the publication of *Gorillas in the Mist*, by Dian Fossey, also in 1980; the passage of the United Nations World Charter for Nature in 1982; the resignation of James Watt, the Secretary of the Interior under President Reagan, in 1983; the Union Carbide disaster in Bhopal, India in 1984; the discovery of an ozone hole over Antarctica, in 1985, by British scientist Joe Farman; the French bombing of a Green Peace ship docked in Auckland, New Zealand in 1985; the explosion of the Chernobyl nuclear reactor in Ukraine in 1986; and the Exxon Valdez oil spill in 1989. See *id.* (on file with the Washington and Lee Law Review).

After the formation of a double top<sup>158</sup>—a bearish signal—hopefuls might be asking whether this subject might be returning to the narrow trading range it enjoyed prior to 1974. The answer is probably "yes." For now, at least, the only people focusing on the environment are gadflies like Princeton economist (and *New York Times* columnist) Paul Krugman<sup>159</sup>—not President Bush, not Christie Whitman,<sup>160</sup> and not law students. This political shift, coupled with the significant hiring in environmental law since 1999 (nine new hires, or 2.07% of the total), makes me think the price spikes of the past are what the British call a "one-off."<sup>161</sup> Strong sell.

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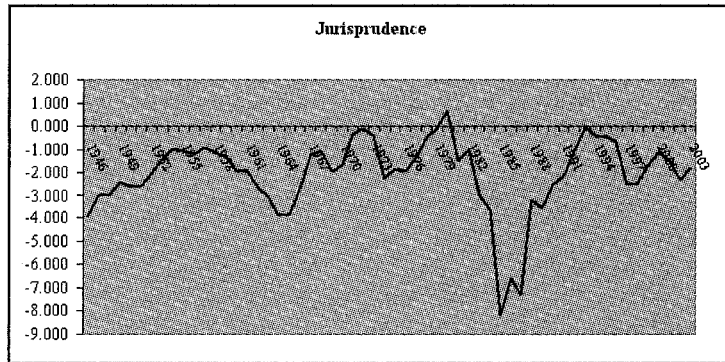
158. Even the second "top" may be a gift here. In 1991, the *Harvard Law Review* published a symposium (*Developments in the Law*) on the subject of international environmental law, which yielded three interest points on the student side of the ledger. See generally Symposium, *International Environmental Law*, 104 HARV. L. REV. 1484–1639 (1991). Those points, added to two other student interest points and adjusted, *supra* Part I.D., yielded an adjusted student interest ( $\sigma$ ) of 1.728. (There was no faculty interest ( $\phi$ ) in environmental law in 1991.) In creating what I have termed, for short, Excess Interest (i.e., Moving Average of Weighted Total Interest), I used a moving average, which smoothed this outlying data point over three years, which, in turn, led to the creation of a high of 1.487 in both 1992 and 1993. In some sense, this is a false high; without the symposium, Excess Interest in environmental law would not have topped for the second time.

159. See, e.g., Paul Krugman, Op-Ed., *The Mercury Scandal*, N.Y. TIMES, Apr. 6, 2004, at A23 (criticizing the Bush administration's proposal for handling mercury pollution); Paul Krugman, Op-Ed., *Dust and Deception*, N.Y. TIMES, Aug. 26, 2003, at A19 (mentioning that government officials were forced to reveal that dust resulting from the collapse of the World Trade Center was harmful); Paul Krugman, Op-Ed., *Rejecting the World*, N.Y. TIMES, Apr. 18, 2003, at A15 (opining that Bush has generally reneged on the environmental promises made in his 2000 presidential campaign); Paul Krugman, Op-Ed., *Every Breath You Take*, N.Y. TIMES, Nov. 26, 2002, at A27 (disagreeing with the Bush administration's policy to scrap a component of air pollution control); Paul Krugman, Op-Ed., *Bush on Fire*, N.Y. TIMES, Aug. 27, 2002, at A17 (positing that Bush's healthy forest program is environmentally unsound).

160. See Katharine Q. Seelye, *Often Isolated, Whitman Quits as E.P.A. Chief*, N.Y. TIMES, May 22, 2003, at A1 (describing the reasons for Whitman's departure from the Environmental Protection Agency).

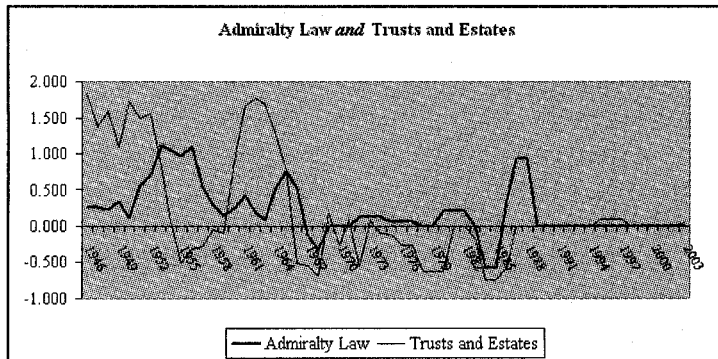
161. The Merriam-Webster Online Dictionary defines "one-off" as a Britishism for "limited to a single time, occasion, or instance." Merriam-Webster Online Dictionary, <http://www.m-w.com> (last visited Jan. 9, 2006) (on file with the Washington and Lee Law Review). "One-off" can be a noun or an adjective. *Id.*

*Jurisprudence*



Is there *anything* good in this chart for those hoping to teach jurisprudence? Sell! Sell! Sell!

*Admiralty Law and Trusts and Estates*

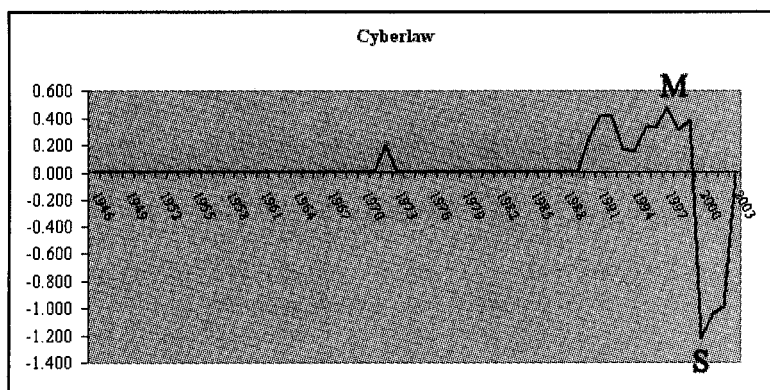


Why would I include these two curves on the same chart? They have at least one thing in common: Since 1989, both curves look like the heart monitor of a terminal patient; although the heart may be beating, however feebly, for trusts and estates, the doctor called a "code" in admiralty law more than a decade ago. This is not to say that these courses are uninteresting; at Emory, at least, both are taught by popular professors, and both are well subscribed. But they are not oversubscribed, and class sizes are modest. If nothing else, this chart shows that law schools are making efficient use of their resources in admiralty law and trusts and estates. There is, to use an economics term, equilibrium between supply (on the faculty side) and demand (on the student side). Even when it comes to hiring, my handful of law schools may have

gotten this one right: zero in admiralty; four (.92% of the total) in trusts and estates. My advice to hopefuls in these subjects is this: You know who you are. Find the people like you, wait for them to retire, and replace yourselves in the population.

*E. Hmm*

*Cyberlaw*



This chart makes an important point about Excess Interest. In general, students are the first to spot a trend; they write about it; and they publish notes about it. Faculty only begin writing about the trend when it has become obvious to students; and at the end of the trend, faculty are the only ones left writing about it.

This chart also reminds me of a story: When I was about ten years old, my mother went through a phase during which she ground her own flour and everything had to be whole wheat. One day I discovered a stale bag of marshmallows ("M") hidden in the back of a cupboard and, thinking they were the greatest thing since sliced (white) bread, I ate the entire bag. Then I was sick ("S"). When I recovered from my binge, would I have eaten more marshmallows? Hard to say. On the supply side, have law schools recovered from their binge in hiring faculty who teach and write about cyberlaw? And on the demand side, do students still like the taste of it? On both counts: Hard to say.

## IV. Conclusion

*With a little bit of luck, you'll never work.*<sup>162</sup>

When I went to the meat market as a hopeful in 2000, I decided to drop by a cocktail party to meet other hopefuls. At the party, I met a young scholar, and our conversation went something like this:

*He:* Is this your first time here?

*Me:* Yes.

*He:* Nobody finds a job the first time. But eventually—(Shrugs.) This is my seventh year here.

I was working for a law firm at the time. When I heard the phrase "seventh year," my skin actually crawled with horror.

*He:* What do you want to teach, anyway?

*Me:* Intellectual property.

My young scholar glared at me for a moment. Then he left to torment somebody else. (He hoped to teach courses in—you guessed it!—constitutional law.) This conversation taught me a couple of things: First, intellectual property law was hot at the time; and second, constitutional law was not. As it turned out, several law schools were looking for someone to teach and write about copyright and trademark law, and, fortunately, one of them hired me. Because I was able to supply a subject that was much in demand, I only needed a little bit of luck to land a job. My young scholar needed a *lot* of it.

Becoming a law professor requires more than a law degree, a clerkship, and increasingly, a list of published articles. It takes a little bit of luck. But with a little bit of luck, you might land a job that almost never feels like work.<sup>163</sup>

Scholar, sell thyself.

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162. ALAN JAY LERNER & FREDERICK LOEWE, *With a Little Bit of Luck, on MY FAIR LADY* (Sony 1994) (1964).

163. There are obvious exceptions: grading exams, going to faculty meetings, and grinding out the last few footnotes to Essays like this one.



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# ARTICLES

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