

Stanford Lawyer



Stanford Lawyer

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Stanford Lawyer is published semi-annually for alumni and friends of Stanford Law School. Materials for publication and correspondence are welcome and should be sent to the Editor.

A Message from the Dean

Change and continuity seems an appropriate topic for my first essay in this space. In addition to being the new dean, I have just returned with my family from four months in the Languedoc in southwestern France, where scenes of change and continuity are everyday experiences. In our town of Nizas (population 600) we lived around the corner from a 13th Century tower and a 16th Century chateau, on the walls of which were posters for such modern nostrums as DDT and the Communist Party. We did our shopping in nearby Pézenas (population 8,000—we called it “Big P”), where Molière lived and produced his plays for several years; today it has a porno theatre. Every roof-top in Nizas has red tile—and a TV antenna. (Except ours; my daughter said, “You *would* have to rent from another professor.”) Every field within our view was planted to grapes, and has been for 2,000 years; and every one was cultivated by a powerful, modern tractor.

At Stanford we lack the antiquity of France and hence the contrasts are less striking. Yet in physical appearance and intellectual interests, the University at large and the Law School in particular have changed from our beginnings some eighty years ago. In only fourteen years, the time I’ve been here, major changes have occurred in the faculty, the library and the physical plant. Only six members of the current law faculty were present in 1962 to meet the Eastern Invasion (Franklin, Gunther, Sneed and myself). The library that year had 115,000 volumes in it; it now has 230,000. The difference between our quarters then and now does not bear description. Some of these changes were of our own making, the result of prodigious effort; others were involuntary, as in the case of faculty losses from retirement, death and defection. There have been other changes as well,

notably in the curriculum, in the increased number of applications for admission and (a Dean is obliged to say) in the cost of doing business.

But these changes have occurred, have been *accomplished* is a word that better describes the process, with conscious concern for continuity with the past and with specific attention to the continuing and central goal of the School: The education and training of men and women to excel in the practice of law. That has always been the aim of the School and I trust that it will always continue to be. To attain the goal requires constant attention to the three basic elements that make for excellence in a law school. The first is a faculty with the energy, interest and intellect to be both good classroom teachers and inquiring scholars. Every graduate appreciates the value of animated, engaged classroom teaching. We should also recognize that scholarship contributes not only to general knowledge but also to teaching, for through scholarship teachers remain mentally alert and active in their areas of specialty.

A good law school must also have a good library; this repository of accumulated knowledge should be a working tool for students, in constant use like pen and paper, so that it is instinctive when confronted with a problem to go to the books.

And to produce lawyers who excel in the practice, a law school must have students with intelligence and industry who can and do benefit from the education offered them. The reputation of the Stanford Law School, and all other law schools, finds its ultimate foundation mainly in the achievements of its alumni, for therein lies the proof of whether the aim to produce excellent lawyers has been fulfilled.

Everyone associated with the Stanford Law School can be proud of its accomplishments and of the high quality that characterizes every aspect of its operation. Such pride ought to be accompanied, however, by an awareness that quality is a product of unflagging attention to the essential elements of legal education and of constant efforts to make improvements. Complacency is the enemy of quality. But if you read the students’ answers to the recent questionnaire, or talk to the alumni, or listen to the faculty, I think you will conclude that complacency is not our chief problem.

I wrote earlier of education and training for excellence. Separating education from training may be a false dichotomy, for a well-trained lawyer presupposes a well-educated person. But I make the dis-

inction here to draw attention to the difference between information and skills.

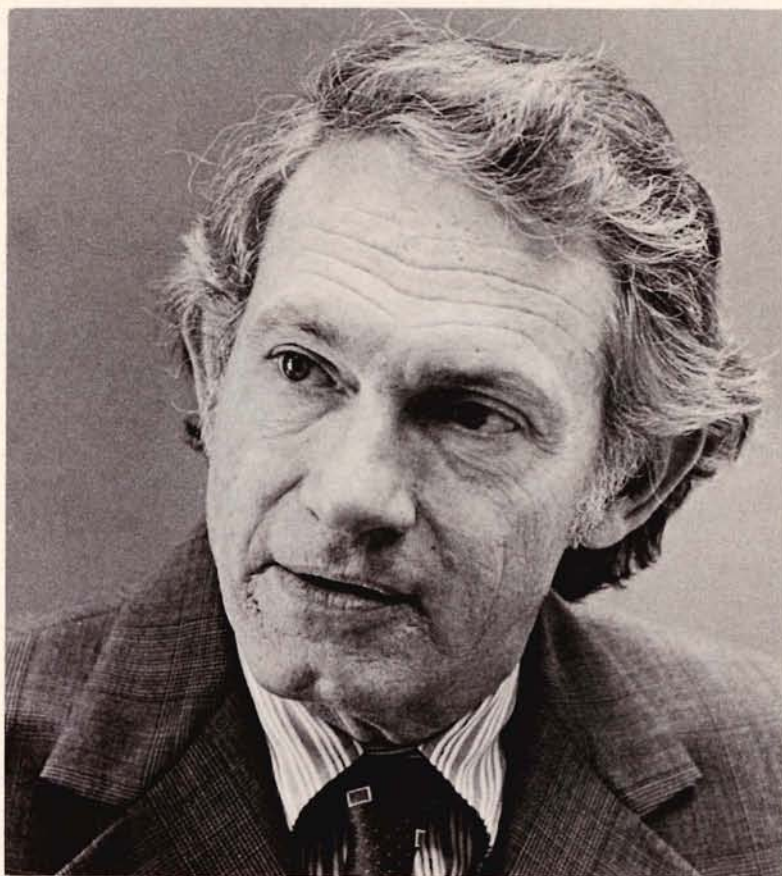
I do not perceive that any great change is taking place in the skills needed by lawyers to succeed in practice: reading, writing, analysis, synthesis, advocacy, conciliation and compromise, to name some of the more important. The law schools have offered pretty good training in the first four, and with the emergence and growing sophistication of our clinical programs, Stanford is doing much better with the last three. Success in skills training is directly related to student-faculty contact, which in turn is a function of faculty resources and ultimately of finances.

But if there is continuity in the skills required of lawyers, there is change in the knowledge they must have. Perhaps I will be forgiven a personal reference by way of illustrating the point. I began law teaching in 1949 and very soon thereafter made oil and gas law my specialty. In 1959 Howard Williams and I published the first two volumes of what became a six-volume treatise. While I played hooky on the Colorado River (serving as law clerk to the Special Master in *Arizona v. California*), Howard published two more volumes, and our final two volumes appeared in 1964. I think it is a fine book for what it sets out to do (and I can say that without undue immodesty because Howard did most of the work), but it is not the book we would do today—just twelve years after the book was finished and about twenty from the time it was started. Today the book would deal with the economics of the industry, international politics, foreign concession agreements, environmental protection—peripheral topics for lawyers twenty years ago, central today and requiring a different, and broader, information base. The communication skills needed these days to write a good book, or contract, or brief haven't changed, but the knowledge requirements have.

I do not think mine is an isolated experience. Most of the lawyers I talk to feel and respond to the need to broaden their education, to increase their information base. Today, and it will be increasingly true in the future, lawyers need a better grasp of economics, a greater familiarity with the quantitative methods of businessmen and government officials, and a fuller appreciation of empirical research that can help us predict which laws will work and which will not.

Change is not a choice, it is a condition. It is how we respond to change that determines our fortune. Stanford Law School is in a strong position to respond

positively to the need for greater knowledge that lawyers will feel in the last quarter of this century. The faculty is cognizant of the need and has already begun some modernization of the curriculum, though much remains to be done. The University is endowed with intellectual riches in a great variety of disciplines related to law; we are involved with some



Dean Charles J. Meyers

of them now, and I hope we become more involved soon. Lastly, the Law School benefits from active participation in instruction by members of the Bar who have unique sources of knowledge gained from a specialized practice. At a considerable sacrifice of leisure time, they make their expertise available to our students in special courses and seminars.

This is the first of a number of papers and talks I will be giving to friends and alumni of the School. I have deliberately chosen to deal with the educational mission of the School for that is our reason for being. We, of course, have other concerns, and they will be addressed from time to time. But initially, welcome is the opportunity to restate our primary goals and our determination to continue to fulfill them.

THREE ESSAYS

FOR THE BICENTENNIAL



My major concern today is to identify the Constitution's most distinctive contributions to nation-building. I want to ask what was most original, most significant, most lasting about the framework for government that emerged from those remarkable debates during that memorable Philadelphia summer of 1787. I want also to trace some critical steps in the implementation of the key features of that framework. And I want to note that, in a real sense, the arguments of nearly two centuries ago speak in important ways to us today.

The critical, novel breakthrough at the Constitutional Convention was *not* the emergence of the idea of Union or the drafting of a written constitution or the establishment of a national government or the specification of congressional powers or the effort to solve the problems of democratic government through republican means. In my view, the most distinctive contributions lie not in those features commonly associated with the Convention, but rather in the institutions and remedies the Convention sketched for the system we have come to know as federalism.

The Framers were engaged in the never-ending search for a proper accommodation between adequate national authority and adequate local autonomy. Their novel *theoretical* solution was to conceive of a system in which both nation and state could operate directly on the same individuals. But I want especially to emphasize the central features of their *practical* solution. To me, the critical innovation was the Supremacy Clause, Article VI of the Constitution, the Clause that declared the Constitution to be the supreme law of the land, enforceable in courts. There, to me, lies the most creative contribution: the Convention's decision, emanating from surprising sources and not wholly understood in the summer of 1787, to assure the effectiveness of the national government, not through resort to military and political confrontations, but rather through invocation of routine judicial processes.

It is easy to miss the innovative features of the Supremacy Clause, for the natural inclination is to focus on the notion of supremacy. But that was not a new idea: even under the Articles, authorized acts of Congress were theoretically supreme. The trouble lay in the practice, not the theory. It lay in the absence of an effective national enforcement mechanism. The national government could make requests of the states, but could not command. The

fatal flaw was the absence of machinery to enforce national measures at the grass roots, against individuals.

The critical breakthrough at the Convention, then, was the adoption of a system in which the national government *would* have that capacity. And the remedy that was truly a novel product of Convention debates rather than a mere elaboration of prior ideas is reflected in the Supremacy Clause. The Constitution and federal laws and treaties were made the supreme law of the land; state judges—and, implicitly, federal judges—were “bound” to enforce the supreme federal law, “any Thing in the Constitution or Laws of any States to the Contrary notwithstanding.”

The central phrase in that central clause of the Constitution is “the supreme Law of the Land”; and the critical word is not “supreme” but “Law.” The ordinary processes of law, of litigation, of judicial decision-making, were to be the prime devices to enable the federal government to act directly upon each individual. Reliance on routine judicial processes, instead of the use of military or political force by nation against state, was the Convention's truly innovative contribution to national autonomy and effectiveness.

The significance of that choice is not a startling perception for any reader of the Federalist Papers. The central and frequently reiterated themes of Hamilton's early essays are that government under the Articles failed because it sought to act against states “as contradistinguished from the INDIVIDUALS of whom they consist,” because the theoretically binding congressional acts were “in practice” “mere recommendations”; that effective government required sanctions, remedies for disobedience of law; that the choice of remedies was between “the COERTION of the magistracy” and “the COERTION of arms”; that the Constitution chose to rely on “law,” not “violence”; that critical to the extension of national authority “to the individual citizens of the several States” was the decision to “enable the government to employ the ordinary magistracy” in the execution of laws; and that this theme, still in Hamilton's words, would assure “a regular and peaceable execution of the laws of the Union.” It was themes such as those that Madison summarized in Number 39 of *The Federalist*. Madison's description of the new government emphasized, in the terminology of that day, a mixture of “national” and “federal” elements: “national, not federal” in the execution of

Toward “A More Perfect Union”: Framing and Implementing the Distinctive Nation- Building Elements of the Constitution

by Gerald Gunther

powers; "federal, not national" in the extent of powers.

If those themes had been clearly articulated throughout our history, it would hardly be worthwhile to reiterate them here. But, in fact, they sound only faintly in the records of the Convention debates themselves. The Convention records encourage preoccupation with such issues as the problem resolved by the Great Compromise. And those debates encourage speculation about the conflicts between large states and small states, and between extreme nationalists and those more concerned about preservation of state autonomy.

But those typical generalizations about divisions at the Convention have little to do with the evolution of the critical reliance on routine legal proceedings as the central enforcement mechanism. That enforcement scheme, it turns out, was itself a product of perhaps the greatest compromise of all. Ironically, its features were not elaborately debated on the floor of the Convention; its significance was not fully appreciated until after the Convention had adjourned; and, despite its overriding importance to the growth of national power, it derived from proposals submitted *not* by well-known nationalist delegates from large states, but rather by small-state delegates and even Anti-Federalists. Not James Madison of Virginia or Alexander Hamilton of New York, but William Paterson of New Jersey and Oliver Ellsworth of Connecticut and even George Mason of Virginia and Luther Martin of Maryland deserve most of the credit for the greatest nation-building devices developed at the Convention.

Reliance on routine judicial processes as the central enforcement device, unlike most other features of the Constitution, was not part of the arsenal of remedies that the strongest advocates of institutional reform brought to Philadelphia. When the delegates convened, many believed that disunion was imminent. There was widespread recognition too that a stronger national government was necessary. And nationalists such as Madison came to the Convention in search of a "middle ground" between "a due supremacy of the national authority" and some state autonomy. The critical problem of remedies was perceived to be the establishment of adequate coercive authority in the national government.

When the delegates gathered in May 1787, most nationalists considered the most obvious coercive weapon to be the use of armed force against recalcitrant

states. When the nationalists' Randolph-Madison-Virginia Plan was submitted soon after, the thinking had not moved significantly beyond that point: its solution for the crucial problem of enforcement was coercion of states, political as well as military. It provided for a congressional veto of state legislation, and for the use of armed force. Primary reliance instead on the "magistracy," on ordinary judicial processes, was a much later development in the Convention's thinking.

By the time William Paterson offered the New Jersey Plan in mid-June, the Convention had already rejected the remedy of military coercion. But Madison's favorite remedy, the congressional veto, was still at center stage. At that point, Paterson's plan revived the notion of military force. But that remedy, so inconsistent with orderly government, was joined with a far more significant provision in Paterson's scheme: his New Jersey Plan contained the first antecedent of what ultimately became the Supremacy Clause.

National effectiveness through ordinary law enforcement, not through waging war against states, emerged as the ultimate solution. On the Convention floor, it reemerged after the New Jersey Plan itself had been rejected. It reemerged on the motion of a delegate from Maryland, Luther Martin, who refused to sign the finished product and became one of the most vociferous Anti-Federalists in the ratification debates. Martin's motion was adopted without dissent—indeed, without discussion. Later, during the ratification controversy, Luther Martin would claim that his proposal had been hammered into an objectionable shape on the Convention floor and in the Committees of Detail and of Style. It is true that some significant changes were made in Martin's language. Yet Martin did not revive the "supreme Law" proposal until mid-July; and he did not revive it until just after Madison's favorite device, the congressional veto, had been rejected. Martin's act of reviving the "supreme Law" feature of the discarded Paterson proposal, and especially his timing, strongly suggest, then, that even he saw some need for a national coercive authority, and that reliance on normal judicial processes seemed to him the least abrasive device.

I suspect that neither Paterson nor Martin—nor, indeed, most of the delegates—appreciated the full significance of what they had wrought. What they had in fact contributed was the central device to enable "a complicated and

delicate political system" to work "by peaceful and judicial processes." Those are the words of Andrew C. McLaughlin, the great constitutional historian of the early decades of this century who, above all others, emphasized the theme that I am trying to revive here: the critical operational significance of making the Constitution "enforceable like any other law in courts." McLaughlin saw that the Supremacy Clause was "the central clause" of the Constitution, "because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces."

The central coercive mechanism adopted at the Convention, then, was a device acceptable to the lowest common denominator among the delegates. To the strongest nationalists, reliance on judicial processes seemed a minimal and probably inadequate scheme. The Supremacy Clause of Article VI—introduced by Paterson, revived by Martin—lay at the heart of the device. Article III of the Constitution, on the judiciary, reinforced it.

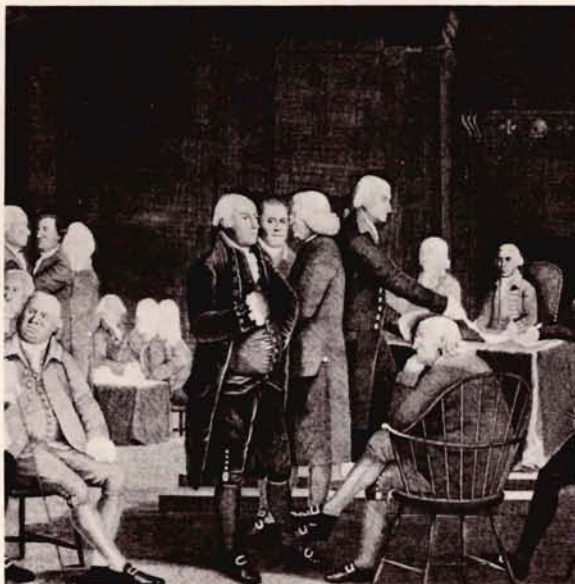
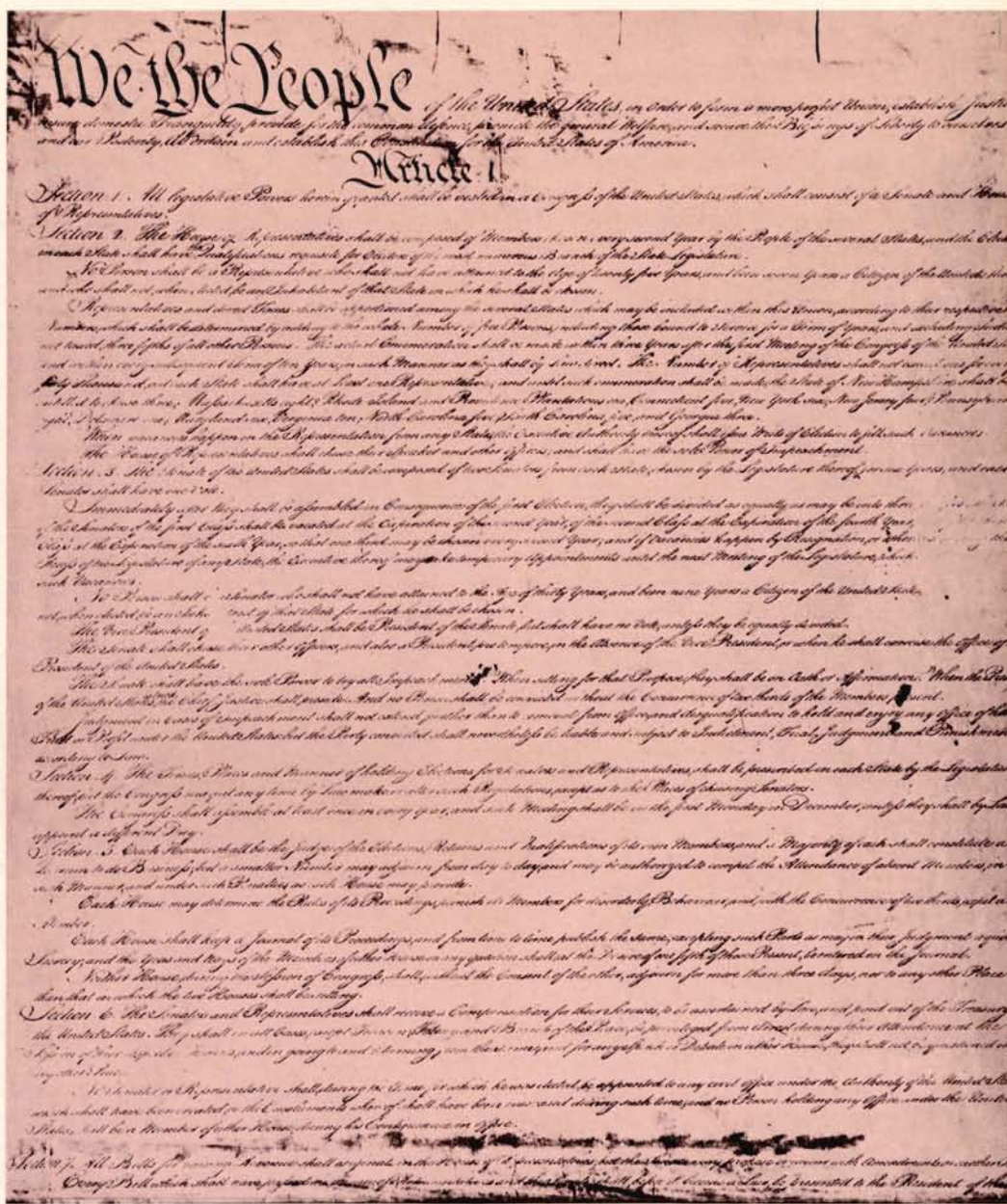
Article III mandated the establishment of a Supreme Court, as Paterson's plan had contemplated. It did not mandate lower federal courts, as the Virginia plan had provided: supporters of Paterson's plan argued that Supreme Court review of state court decisions on federal issues would be adequate to assure national supremacy and uniformity, that lower federal courts would be too intrusive. In an important compromise on that issue, creation of lower federal courts was left to the discretion of Congress. And Article III also extended the federal judicial power to questions arising under the Constitution, reemphasizing that constitutional norms would become operative law in ordinary litigation. A "middle way" between excessive consolidation and excessive states' rights had been found, though it was not the way Madison would have preferred.

By a narrow vote in the critical states, the Constitution was ratified. In the ratification debates, much more than at the Convention, the fears of excessive national authority surfaced. The defenders of the Constitution slowly came to appreciate the significance of the chosen coercive mechanism, as the Federalist Papers illustrate. Yet the Supremacy Clause and the prospect of Supreme Court review of state court decisions still were not major targets of the Anti-Federalists. The most frequently voiced fears about Supreme Court review concerned the risks

to jury determinations, if the Court were permitted to review questions of fact. States' righters had not yet awakened to the far greater threat from review of questions of federal law.

But the Convention's product provided only a sketch and a framework. Nation-building through legal processes required continuous energy and implementation. A critical first step came in the very first Congress, with the Judiciary Act of 1789. Figures typically described as moderates or states' righters during the Convention debates once again played the leading roles. William Paterson of New Jersey and Oliver Ellsworth of Connecticut, now Federalist members of the Senate, were the chief drafters of the 1789 law. That Act exercised the congressional discretion under Article III to establish "inferior" federal courts, but gave those early lower courts only a small portion of the potential federal judicial power. Lower federal court jurisdiction did not include general authority over federal questions until well after the Civil War. Under the 1789 structure, state courts, bound by the Supremacy Clause, were ordinarily the initial forums for the decision of federal issues. And that scheme made Section 25 of the 1789 Act critical: it provided for Supreme Court review of state court decisions rejecting claims under the federal Constitution, treaties and laws; and it accordingly became the central implementation of the enforcement method chosen at the Convention.

But constitutional phrases and statutory language could not assure that that remedial scheme would work in practice. That assurance was left to the future, especially to the Marshall Court in the decade after the end of the War of 1812. In a sense, the Supreme Court during those years after the Second War for Independence served as a second constitutional convention. The context was remarkably similar to that of 1787. Once again, nationalists bewailed the ineffectiveness of federal law enforcement machinery, in the face of rampant New England localism. Once again, talk of disunion and anarchy was in the air. And in the final years of the divisive War of 1812, the highest court of Virginia joined the states' rights challenge and aimed its attack on the nationalistic weapon which the earlier generation of Anti-Federalists had only dimly appreciated: the Supreme Court's review authority over state courts under Section 25 of the 1789 Act. Led by Spencer Roane—political leader, pamphleteer, and the most articulate state



Engraving by Edward Savage (1761-1817) of Robert Edge Pine's CONGRESS VOTING INDEPENDENCE IN THE CONGRESS CHAMBER, STATE HOUSE, PHILADELPHIA, c. 1788.

judge of his day—Virginia courts found Section 25 unauthorized by the Constitution and refused to obey a Supreme Court mandate.

And so the perennial dispute between excessive centralization and excessive localism erupted once more. In 1787, the battle had been couched in terms of acceptance or rejection of the Constitution; at the end of the War of 1812, and for later generations, the battle was between contending interpretations of a constitution to which all swore loyalty. The terms had changed but the underlying contentions remained the same. The Marshall Court, in *Martin v. Hunter's Lessee* in 1816, and once again in *Cohens v. Virginia* in 1821, forcefully rejected Virginia's challenge to Section 25. Again, there was a parallel to 1787: within the Court, as within the Convention, there was a remarkably strong nationalistic consensus; in the country at large, the division was close and deep.

On the critical issue of Supreme Court review authority, the Court spoke nationalistically and unanimously. The unanimity was not the product of some hypnotic spell cast by John Marshall, the Federalist Chief Justice. Rather, it sprang from genuinely shared convictions. The five Jeffersonian Republicans as well as the two Federalists on the Court were committed, unflinching nationalists. Nationalism was expectable from John Marshall and his Virginia colleague, Bushrod Washington, the General's favorite nephew. Both had supported the Constitution at the Virginia ratifying convention; both had been Federalists in politics shortly before the Jeffersonian victory of 1800. Yet nationalism came equally naturally to the five Republicans. All of them, from William Johnson and Brockholst Livingston and Thomas Todd to Gabriel Duvall and Joseph Story, drew from the quite nationalistic heritage of the Jefferson and Madison Administrations—a nationalism which Jefferson, far more than Madison, was at pains to disavow when he was out of power.

That spontaneously united Court spoke to an increasingly divided country. *Martin* and *Cohens* did not end the controversy, though the Court remained unswerving. Other states emulated Virginia in challenging the Court in the ensuing decade. That judicial enforcement of the Supremacy Clause, especially through Supreme Court review of state court decisions, was indeed the linchpin of national effectiveness became increasingly evident to those fearful of consolidation. Well before John

C. Calhoun publicly proclaimed the doctrines of Nullification, for example, he recognized that removal of the Supreme Court's review authority would assure the minority veto he sought. If there were no Section 25, he wrote in 1827, "the practical consequence would be, that each government would have a negative on the other, and thus possess the most effectual remedy that can be conceived against encroachment." To him, Section 25 was a provision "of the deepest importance, much more so, than any other in the statute books."

Section 25 and the Supremacy Clause survived the judicial and legislative onslaughts. Yet even the Marshall Court's considerable contributions did not end the battle over the underlying issues. A civil war, a rare resort to arms rather than judicial processes, helped build the nationalizing forces. Economic and social developments contributed even more to Joseph Story's central objective, to "prevent the possibility of a division, by creating great national interests which shall bind us in an indissoluble chain."

Yet despite this vast proliferation of unifying forces and the vast increase of national government activity, localism has not died. And we should be glad. The Union is no longer in danger and we take for granted that federal law will be enforced through routine judicial processes. But the Anti-Federalist concerns continue to be heard, and they should be heard.

Designing a system that would assure adequate local autonomy as well as adequate centralization was an awesome challenge in 1787. The solutions of the Framers and the contributions of the Marshall Court were remarkably ingenious first steps toward meeting that challenge. Yet the risks of excesses in either direction persist; and it is well that the Anti-Federalists' skepticism of national power—because of its distance from the populace, its inefficiency, its tendency toward tyranny unless carefully controlled—surfaces so frequently in the campaign speeches of this Bicentennial year.

Perhaps, then, I should not speak of the 1787 Convention and of the Marshall Court as the first and second constitutional conventions. More accurately, we are all engaged in a continuing constitutional convention, forever struggling with the problem of efficient governance of a continent with adequate regard to local needs and popular wishes. And rightly so: surely, we must not abandon the debate about the central problem that confronted the Framers.

On April 23, 1976, Gerald Gunther, William Nelson Cromwell Professor of Law, addressed the Annual General Meeting and Bicentennial Observance of The American Philosophical Society in Philadelphia. The Observance featured a series of papers presented by distinguished lecturers on the philosophical, historical, and political aspects of American liberty. Professor Gunther's paper focused on the Constitution as the culmination of the process of nation-building. The paper will be published by the Society in a volume resulting from the symposium. Excerpts are reprinted here with the Society's permission for which the Stanford Lawyer is grateful.

The event whose bicentennial we celebrated on July 4 of this year was not the actual legislative disavowal of the sovereignty of the British crown over the United States. That formal step was taken on July 2, 1776, when the Continental Congress adopted Richard Henry Lee's short resolution declaring the "United Colonies" to be "free and independent states."¹ Then on July 4, Congress voted its approval of a longer document—the Declaration of Independence—which set forth the reasons and justification for its action of two days before. Our selection of the later date as our symbolic moment of birth as a nation suggests that the Declaration of Independence said something of fundamental importance about America and American government that went beyond the earlier unadorned statement of our independent sovereignty.

In my view, the theory of government on which Jefferson based the case for independence does have lasting significance for American government and politics—and particularly for American constitutional law. The point is a simple one, and perhaps it is obvious, but I have found that it is controversial among many

lawyers and legal scholars and so it may bear repeating.

The young Jefferson was chosen as chief draftsman for the Declaration because he was recognized to possess, in John Adams' words, a "peculiar felicity of expression." Nowhere is that quality more apparent than in the most celebrated lines he was ever to write, the simple and eloquent statement of the philosophy of government which lay behind the colonists' case for independence:

We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed....

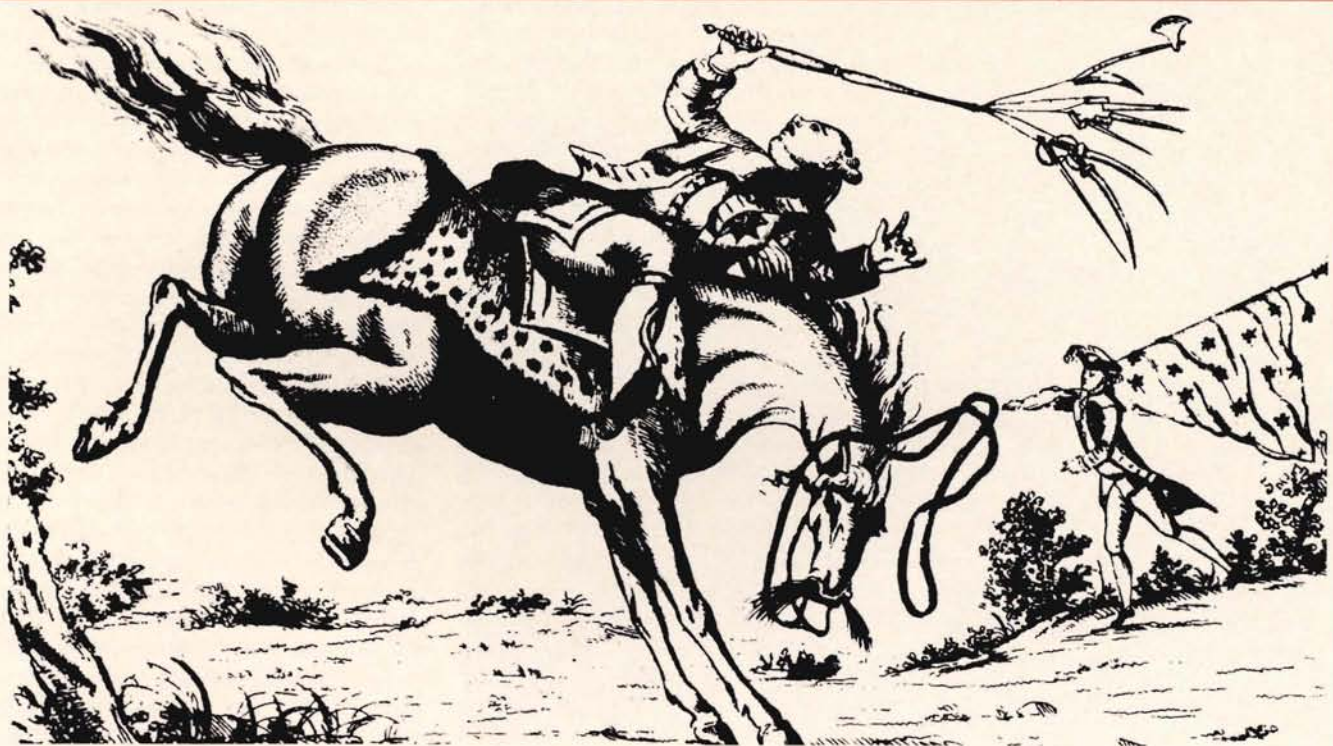
The expression of these ideas is remarkable for its clarity and grace, but the ideas themselves were in no way peculiar to Jefferson. As he wrote many years later, his purpose in drafting the Declaration was simply:

...to place before mankind the common sense of the subject, in terms so plain and firm as to com-

Certain Unalienable Rights: The Declaration of Independence in Constitutional Law

by Thomas C. Grey

1. C.L. Becker, *The Declaration of Independence* 3 (1922).



THE HORSE AMERICA, throwing his Master

British cartoon printed in reaction to the news of America's Declaration of Independence.

A Declaration by the Representatives of the UNITED STATES
OF AMERICA, in General Congress assembled.

When in the course of human events it becomes necessary for ^{one} people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the ^{separate and equal} station to which the laws of nature & of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to ~~the~~ ^{self-evident} separation.

We hold these truths to be ^{self-evident} that all men are created equal & independent; that they are endowed by their Creator with ^{unalienable} rights; that among ^{these} are life, liberty, & the pursuit of happiness; that to secure these ^{rights}, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, & to institute new government, laying its foundation on such principles & organising it's powers in such form, as to them it shall seem most likely to effect their safety & happiness. prudence indeed will dictate that governments long established should not be changed for light & transient causes: and accordingly all experience hath shewn that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. but when a long train of abuses & usurpations [beginning at a distinguished period] & pursuing invariably the same object, evinces a design to ~~reduce~~ ^{under absolute Despotism} reduce them to ~~absolute Despotism~~, it is their right, it is their duty, to throw off such government, & to provide new guards for their future security. such has been the patient sufferance of these colonies; & such is now the necessity which constrains them to ~~expunge~~ ^{King of Great Britain} expunge their former systems of government. the history of ^{the} present ~~rebellion~~ ^{repeated} is a history of ^{repeated} ~~unremitting~~ injuries and usurpations, [among which, ^{appears no solitary fact} appears no solitary fact] to contradict the uniform tenor of the rest, [all of which] ^{installs no solitary fact} have in direct object the establishment of an absolute tyranny over these states. to prove this, let facts be submitted to a candid world, [for the truth of which we pledge a faith yet unswerving by falsehood]

mand their assent.... Neither aiming at originality of principles or sentiments, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind....²

As a matter of historical fact, there can be little doubt that Jefferson did capture the dominant themes of the political thought of his day. At the center of that political thought was the concept of individual rights. These were "natural" rights, generally regarded as the gifts of an omnipotent God, but in any case certainly not dependent for their existence upon their enactment into positive law or their enforcement through the actual machinery of government. These rights provided the reason for instituting government and at the same time constituted basic limitations on legitimate governmental authority. Finally, the content of the individual rights was "self-evident"—directly ascertainable by reason and common sense.

A second theme of the political philosophy expressed in the Declaration was the separateness of government and people. Government depended for its rightful authority on popular consent, but it was not yet conceived as an extension or mere agency of a sovereign people who were to rule themselves through its machinery. Further, there was no suggestion that majoritarian democracy was essential to just government, though some mechanism for popular consent was required. Indeed, there is little textual support for the common view that the Declaration of Independence was a radically democratic charter of government, which was later undermined by the more conservative Constitution, with its counter-majoritarian devices and restrictions.

The Declaration's philosophy is that of 18th Century Whig liberalism—rationalistic, individualistic, libertarian, not strikingly democratic. The equality referred to is an equality of rights, not any supposed equality of ability or capacity to govern. This is the liberalism of Locke, Harrington and Montesquieu, not the modern egalitarian and democratic liberalism that flows from the thought of Rousseau.

This Whig liberalism is different in emphasis and in some respects quite alien to the democratic populism which has since come to dominate American political ideology. Whether that dominance dates from the presidency of Jefferson himself, or from the Age of Jackson, it seems certain that for over a century the overriding

standard of legitimacy in our politics has been the correspondence of public policy with the popular will as expressed through institutions designed to ascertain and implement majority sentiment.

Of course the practical reality of American politics has never corresponded to any ideal model of plebiscitary democracy. But departures from that model have generally been either accepted as necessary concessions to the demands of practicality, or regarded as suspect or illegitimate perversions of the American ideal. Only with respect to judicial review has there been anything resembling forthright assertion of the positive virtue of the frustration of majority will in the name of independent standards of law or justice.

However, even with respect to judicial review a powerful tradition in our constitutional thought has sought to maintain a pure and consistent majoritarian democracy. This is the tradition, traceable back to *Marbury v. Madison* and beyond it to the 78th Federalist Paper, which seeks to found judicial review solely on the judicial interpretation of the positive commands of the written Constitution. On this view, the Constitution derives its overriding authority, not from the intrinsic force of the principles which it contains, but from its original adoption by the people acting as a legislative body. On this view, statutes in conflict with constitutional principles are invalid not because they violate fundamental rights, but because they represent instances of the people's representatives in the legislature violating the most direct and highest expression of the popular will—the written Constitution. Judicial review is then not an undemocratic institution, but rather represents the implementation of the popular will as expressed directly in the Constitution itself.

Any casual student of American constitutional law can recognize the generous portion of fiction necessary to maintain this view as an actual description of the historical record of constitutional judicial review. But the question is not whether the ideal has been lived up to, but rather whether the theory of the sovereign majority has indeed been the sole ideal. It seems to me clear that it has not. In my view, quite consistently throughout our history there has been continuous reassertion and acceptance of one variant or another of the dominant theme of the Declaration of Independence—the ascertainability and ultimate inviolability of fundamental individual rights, quite apart from their statement in the Bill of Rights or elsewhere in the Constitution.

The Constitution itself states the position about as concisely and clearly as it can be put into words, in the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." And throughout our constitutional history, the judiciary—along with other actors in our political process—has ascertained and defined "unenumerated" fundamental rights thought to be beyond the reach of legitimate legislative power.

During the first generation after the adoption of the Constitution, these were largely rights of property or their near cousins. Both state and federal courts in case after case asserted and enforced the power to disregard as void statutes which infringed upon "vested rights," very often without reference to particular constitutional prohibitions. In more than one state, for example, courts imposed the prohibition against the taking of private property without just compensation as an inherent limit upon legislative power, even though there was no just compensation clause in the state constitution.³ And the United States Supreme Court, speaking through Chief Justice Marshall in *Fletcher v. Peck*, invalidated the Georgia legislature's attempt to revoke land grants originally obtained by bribery, but which subsequently had passed to innocent third parties, as in violation of "general principles which are common to our free institutions."⁴

The most significant and explicit injection of the principles of the Declaration of Independence into the living body of American constitutional law came between 1830 and 1870 in the course of the struggle over slavery. The wing of the anti-slavery movement best remembered in history—the Garrisonian abolitionists—accepted that slavery was valid under the Constitution. Their recourse was to denounce the Constitution and press for disunion. But a numerically more important anti-slavery element constructed constitutional anti-slavery arguments based on the theory that the core of the Constitution was made up of the unalienable principle of human equality in the enjoyment of the rights of life, liberty and the pursuit of happiness proclaimed in the

Declaration. As former President John Quincy Adams said:

[T]he Declaration of Independence comprises and embodies the fundamental elements and principles of American constitutional law.... The mere outward form, the minutely detailed provisions of the subsequently written constitution, these are but the instruments of which those principles are the living spirit and substance.⁵

These advocates often argued that the Due Process Clause of the Fifth Amendment embodied the substantive natural rights proclaimed in the Declaration and thus prohibited slavery in federal territory, a position asserted in the Republican party platforms of 1856 and 1860.

Of course, anti-slavery constitutionalism did not prevail in the courts in the years before the Civil War. Slavery was too well entrenched in both the text of the Constitution and in the life of the slave states to be rooted out by argument alone. But after the war, when the Reconstruction Congress came to write into the Constitution the results of the anti-slavery revolution which had been won on the battlefield, they reached back to those once-rejected constitutional arguments in their drafting of the Fourteenth Amendment. Historical scholarship has in the last few decades convincingly shown that Section 1 of the Fourteenth Amendment, with its Equal Protection, Due Process, and Privileges and Immunities Clauses, was intended by its framers—chief among whom was John Bingham, one of the anti-slavery constitutionalists of the pre-war era—to enshrine in the constitutional text the principle that fundamental individual rights were to be inviolate from infringement by state legislation.⁶ For present purposes, the important point is that those fundamental rights were left unenumerated and undefined, except for the almost wholly indeterminate traditional reference to "life, liberty and property" in the Due Process Clause.

In the first two generations after the Civil War, the tradition of unenumerated fundamental rights again became the property of the conservatives—as it had been before 1830 in the heyday of vested property rights. During the years from 1870 to 1905, the courts first rejected, then tentatively accepted, then en-

3. For a collection of the "vested rights" cases, see Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247 (1914).

4. *Fletcher v. Peck*, 10 U.S. (6 Branch) 87, 139 (1810).

5. Quoted in J. ten Broek, *Equal Under Law* 84, n.20 (1965).

6. See generally, J. ten Broek, *supra* note 5; H. Graham, *Everyman's Constitution* (1968).



Anonymous rendering of a public reading of the Declaration of Independence.

thusiastically embraced the notion of “liberty of contract” as a substantive constitutional right protected against legislative infringement by the Due Process Clauses of the Fifth and Fourteenth Amendments. That liberty of contract was held to invalidate maximum hour and minimum wage laws, legal protection of unions, and safety and consumer protection legislation in a wholesale fashion. The outcome of this unhappy chapter in our constitutional history is well-known—the notion that “liberty of contract” as the courts interpreted it was a fundamental individual right simply ran in the face of general opinion, and by 1940 the doctrine had virtually disappeared from our constitutional law.

In the course of the long doctrinal war against “liberty of contract,” constitutional lawyers, scholars and dissenting judges were often led to attack not only the substance of the doctrine, but also the background presupposition that fundamental rights not given explicit protection in the text of the Constitution had constitutional status. In particular, the concept of “substantive due process”—a concept familiar to the old anti-slavery constitutionalists who drafted the Fourteenth Amendment—was sometimes said to be without legitimacy as a general matter.

However, this general assault on the old tradition of unenumerated fundamental rights has not prevailed. It is true that for some years after the debacle of “liberty of contract,” many judges would not use the term “substantive due process” except as a pejorative. But they continued to enforce the doctrine. For example, the Constitution nowhere forbids the states to infringe freedom of speech or religion. But the years since 1920 have seen a great flowering of federal court decisions enforcing these substantive freedoms against violation by state governments under the due process clause of the Fourteenth Amendment. Conversely, the written Constitution nowhere prohibits the federal government from engaging in racial discrimination. Yet without any controversy or even much discussion, the courts have uniformly enforced against the federal government the same law of anti-discrimination applicable to the states under the Equal Protection Clause—again in the name of the Due Process Clause of the Fifth Amendment.⁷

Finally, in the last decade the courts have again begun to assert and protect

against legislative violation individual rights which have no explicit textual warrant whatever in the Constitution. The best known examples are the Supreme Court’s invalidation of state laws proscribing contraception and abortion.⁸ Old “substantive due process” decisions establishing certain rights of family autonomy in child-rearing have been resuscitated and approvingly cited.⁹ Some lower courts have gone quite far in establishing personal rights to autonomy in matters of dress, private sexual relations between consenting adults, and other related areas. I believe that few constitutional law observers would be surprised if the Supreme Court significantly expanded the reach of the unenumerated constitutional rights of privacy and personal autonomy over the next decade or so.

Whether or not such a development takes place, and indeed whether or not it is desirable, it would fit quite securely within the important tradition in our constitutional history which I have outlined above. That tradition is not the invention of activist liberal judges of the Warren Court era. It was not the invention of activist conservative judges of the late Nineteenth Century. It runs in an unbroken line, back through the Civil War Amendments and the constitutional theories of the anti-slavery movement, back through the property-respecting federalist judges of the Jeffersonian era, back to the founding document of our nation and its central assertion: that Americans are possessed of certain unalienable rights which take precedence over the decrees of sovereigns and officials.

Much of the Eighteenth Century vocabulary and metaphysics surrounding that assertion in the Declaration of Independence rings strange to contemporary ears. We do not so readily describe our rights as “natural.” Perhaps many of us lack confidence that they have a divine Author; perhaps we are not quite as sure that they are universal and immutable and readily accessible to the clear light of reason as were Jefferson’s contemporaries. But as our continuing constitutional practice shows, we have stuck to the central idea of individual rights superior even to the will of the majority, and we have given it remarkable and persistent institutional vitality in our courts of law.

8. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

9. E.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), cited in *Griswold v. Connecticut*, *supra* note 8.

7. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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There is much of great interest in the rich and diverse body of material that comprises the American legal system, particularly from a historical perspective. In this essay I will sketch out, very briefly, a few themes in this history.

Centralization and Diffusion

One theme is the dramatic dialectic between centralization and decentralization, the push and pull of both centrifugal and centripetal forces. A key formal sign of decentralization is the federal system itself. The national law is fragmented into fifty smaller pieces. Federalism is not unique to the United States; but we take it more seriously than other countries that are nominally "federal," with the possible exception of Switzerland. Federalism has deep roots in the American past. The colonies were in many regards virtually independent. After the Revolutionary War, the states continued to be quite independent of each other. In 1787, they agreed on a constitution; it embodied a federal plan, and this frame of government has lasted to this day, with certain amendments. To be sure, the Constitution had a centralizing tendency, compared to the Articles of Confederation which it replaced. But the states governed themselves in almost every important regard except foreign policy, until the time of the Civil War. Population grew, and the country prospered, but Washington, D.C., the national capital, was little better than a miserable village in a pestilent swamp. Even the senators and congressmen tended to live in boarding houses, tarrying in Washington only as long as Congress was in session, and leaving as soon as they could for their homes. Commerce and intellectual life focused on the states and the growing cities: Boston, New York, New Orleans, Philadelphia, Cincinnati. The federal establishment was pitifully small. Taxation was minimal. Control of the economy was a matter, by and large, for the states.

This was the situation until about 1850. In the late 19th century, federal or national policy became more important—incomparably so in the 20th century. For one thing, the United States became a world power; for another, the concept of the welfare state defeated 19th century theories of government. Today, Washington has the look and size of a capital at last; and the federal government has encroached on the power and authority of the states. National government is a gigantic enterprise, controlling vast areas of life, spending more than \$300 billion a year, and levying the enor-

mous taxes needed to pay for its activities.

What is left for the states? First, virtually all of what one might call "private law" remains largely within their control: marriage and divorce, contracts, commercial law, and torts. Rules of procedure are local (although the federal rules have become very influential). Criminal law is also local; and state and local taxes have been rising in recent years even faster than federal taxes. The practice of law is intensely local. Each state admits and controls its own bar. A California lawyer cannot practice law in New York, unless he is admitted to the New York bar too. Few practice in more than one state; probably there is no lawyer in the country entitled to practice in more than three or four.

Technically, each state is sovereign in its own domain. But how sovereign is a single state *in fact*? The laws of the states are like dialects of a single language. Some dialects resemble each other closely. Some states are satellites of large states. Nevada, for example, a state with a small population, has tended to borrow law from its neighbor, California. There are important differences in legal tradition. The case of Louisiana is of course well known. Spanish and French tradition are still strong in Louisiana, which adheres, at least in part, to civil law practices. Spanish or Mexican traditions also color the law of California, Texas, New Mexico and other western states. The outstanding legacy of the Spanish-Mexican period is the community property system, unknown to such states as New York or Illinois. The strongest influence of all may be the social, geographic, and economic conditions in the states—whether the state is urban and industrial, or rural and agricultural; whether largely white, or racially mixed; whether conservative or heir to a progressive or populist tradition.

Formal legal structures can be very different state by state. The living law is harder to compare. Even when formal structures are the same, two communities may have very different laws. Studies of local courts, even within a state, reveal great differences. Procedures and norms are supposed to be identical; but local customs bend or ignore these. Localism seems far greater than, for example, in the countries of continental Europe.

What perpetuates these disparities in behavior? Traditions and habits develop within a community, and there seems to be no easy way to break them down. Lawyers practice locally, and do not carry knowledge of local ways to other communities. Judges do not associate with

Some Thoughts on the History of American Law

by Lawrence M. Friedman



An early nineteenth-century picture of the Capitol.



Benjamin Franklin's famous cartoon first appeared in 1754 in his *Pennsylvania Gazette*.

judges in other states; local judges mostly fraternize with other judges in town. Judgeship is not a profession, not part of the civil service, as it is on the continent. The judge is most likely a local lawyer who has been politically active. The governor has appointed him to the bench, or he has been elected in a partisan election. There is no specific training for judges, and their social world, by and large, is the little world of lawyers, litigants, and politicians. Moreover, the tradition of local rule is intense. It is so pronounced that it amounts almost to a kind of warlord system, a "national instinct to break up government into many small parts."¹

Federalism itself is part of the tradition of local, limited rule. There are many states, and they compete in what we might call the *jurisprudential free market*. This comes about because of the ironic fact that the United States is an economic union, but not a legal union; it is a common *economic* market, but not a common *legal* market. Goods and people freely cross boundaries; indeed, the states, under the Constitution, cannot keep out unwanted immigrants and unwanted goods. Yet the laws on one side of a border may be entirely different from those on the other. The borders themselves are largely artificial. They do not necessarily follow natural features, rarely follow cultural or social lines, and are almost never *economic* boundaries. Yet they are *legal* borders, and must be taken seriously as such.

The *jurisprudential free market* means that one state can frustrate the policy of others, by offering for "sale" a cheaper, better, or simply different brand of law. The state of Nevada can be looked on as a kind of horrible case. Nevada was admitted to the union in 1864. Basically the state has no economic base, yet this vast empty expanse, covered with sage brush and creosote bushes, possesses one great natural resource: its sovereignty, its legislative power. It can offer laws to compete with its neighbors, especially California.

Hence, Nevada, by design or happy accident, stumbled into its present role. Since the 1920s, Nevada has been the state *par excellence* for easy divorces. Gambling is legal in Nevada, and gambling is the largest industry in the state. Californians by the hundreds of thousands fly or drive across the Mojave Desert to reach Nevada; thousands more fly in to Las Vegas and other towns from everywhere in the country. Prostitution is also

legal in some Nevada counties, as perhaps nowhere else in the country. It is easier and quicker to get married in Nevada than in California; hence young California couples who want to elope head for the border.²

Nevada provides only one set of examples out of many, showing the jurisprudential market at work. Another is Delaware, where many of the great corporations are chartered. The reason is simple: Delaware enacted liberal corporation laws around 1900, specifically to attract these companies. The situation reminds one of the fleets of ships flying the flags of Panama or Liberia; but it is unusual for flags of convenience to be flown *within* a country.

The legal "free market" has had both advantages and disadvantages. On the one hand, a state could forge ahead of its neighbors—it could act, in Justice Brandeis' phrase, as a "laboratory" of social reform. But reform could also be retarded by a bloc of conservative states. As an example, the northern industrial states demanded uniform—and federal—child labor laws. The conservative South had no child labor laws. The fear was that factories would run to the South, to take advantage of low wages and child labor. The first successful workmen's compensation law was enacted by Wisconsin, a liberal midwestern state, in 1911. Mississippi, the poorest state in per capita income, and the most oligarchic, did not join in this movement until 1948.

It is easy, of course, to overestimate the amount of local variation in American law. From the very outset important forces tended to drive apart the law of the states; but equally powerful forces were pulling them together. One such force was the massive movement of people. In the 19th century, an epic migration took place from East to West. Laws and ideas moved as well as people. Young attorneys, who packed their bags and trekked to Oregon or Idaho, brought with them habits they had learned in the East. Moreover, they often carried the very statutes of their home states. Some older states—New York and Massachusetts, for example—had special legal prestige. Even more important was the unity and interdependence of the economy. The United States was, of course, the original common market. To work, a common market needs some minimal uniformity of law. American jurists were aware that local idiosyn-

1. Andrew Shonfield, *Modern Capitalism* (1965), p. 318.

2. See, in general, Gilman M. Ostrander, *Nevada, The Great Rotten Borough* (1966).

cracy was out of place in commercial law. Controlling local variation was, however, no easy matter.

In the late 19th century, a serious movement arose among jurists, with the aim of making more uniform the laws of the states. The technique was simple: scholars drafted texts of "uniform" laws, then tried to induce the states, one by one, to enact them into law. The movement was most successful with commercial statutes—the Uniform Sales Act, for example, proposed in 1906, and the Negotiable Instruments Law (late 19th century). These original "uniform" laws were ultimately replaced in the 1950s and 1960s by the Uniform Commercial Code. This too, was independently adopted by some states, one by one. It has, however, brought about at least formal unification of some parts of commercial law.

The national element in law has grown very rapidly as well. In the 19th century, the states led in controlling the economy; they also took the lead in building roads and canals, and stimulating enterprise. The Interstate Commerce Act of 1887 was a landmark: it created an important federal agency, to regulate the railroads. The drama of regulation began to move toward the national stage.

Federal control has become more and more pervasive, less and less encumbered by traditional ideas of states' rights. Primarily, national control is economic, but a federal law helped put an end to lotteries (1895); and the so-called white slave law (the Mann Act), in the early 20th century (1910), made it illegal to move people across state lines for "immoral" purposes. An amendment to the Constitution committed the country in 1919 to Prohibition; after a disastrous decade, liquor regained its legitimacy in 1933. Technically, the federal government may only regulate those events and transactions that move across state borders; but this has become less and less a real restraint. In the 1960s, the (federal) civil rights act outlawed discrimination by race, in restaurants, stores and hotels. These are hardly "interstate" in a sense the 19th century could have understood. The act used as an excuse the fact that most cans of food on store shelves, for example, have crossed state lines. The Supreme Court upheld this argument, logically flimsy even if ethically strong, in *Katzbach v. McClung* (1964). The great taxing power of the federal government, its position in world politics, its huge army and nuclear strength, all feed federal power, and reduce the relative importance of the states.

Judicial Review

At the same time, Americans exhibit an extraordinary interest in the law. This habit is associated of course with that amazing American phenomenon, *judicial review*—the power of judges to assess the validity of acts of other branches of government. More particularly, judicial review is the power to decide whether state and federal statutes meet the demands of the Constitution. If they do not, the court can declare them void. Judicial review in this latter sense has grown fairly slowly. *Marbury v. Madison* (1803) was the first case in which the United States Supreme Court declared void a solemn act of Congress. The Court did not exercise this power again until 1857, in *Dred Scott v. Sandford* (1857), a judicial *cause célèbre* without parallel in the history of American law. The case turned on the poisonous issue of slavery, and especially the spread of slavery into the western territories. The Supreme Court had, however, declared a number of state statutes unconstitutional, before 1857, and with much less diffidence. And many state courts had exercised the power of review in their home states, using their own constitutions as the measuring rod.

In the late 19th century, judicial review expanded to the point where it was in frequent (and controversial) use. In *Pollock v. Farmers' Loan and Trust Company* (1895), the United States Supreme Court declared void the federal income tax. There was no federal income tax until twenty years later, when the Constitution was amended to permit it. The Supreme Court continued to review many state statutes as well. Sometimes it struck down legislation which favored the program of organized labor. We can select, as one example, the New York bakers' case, *Lochner v. New York* (1905). A state statute fixed maximum hours of work for bakers. The majority of the Supreme Court felt that the statute was unconstitutional. It infringed on the "liberty" of masters and workmen to make their own contracts.

Some state courts used judicial review in an even more flamboyant way. Each state, of course, had its own constitution. State constitutions have not been, on the whole, as stable as the federal constitution. The federal constitution has been amended from time to time; but basically it retains its 18th century form. It is, in fact, the oldest *living* constitution. Louisiana, on the other hand, has had at least nine constitutions, and a few other states almost as many. Some state constitutions are very long, and inflated with



Typical scene in a New England book bindery at the turn of the century.

The TIMES are Dreadful, Dismal Doleful Dolorous, and DOLLAR-LESS.

The Pennsylvania Journal's bitter comment on the colonists' plight.



The rigors of early travel.

clauses, general and specific, on which a hungry court can feed, for purposes of judicial review. Some state courts were unusually vigorous in trying to stamp out what they considered to be socialist legislation. Perhaps the highwater mark was *Godcharles v. Wigeman*, decided in Pennsylvania in 1886. A state law required workers to be paid at regular intervals. The Supreme Court of Pennsylvania threw out the statute, which was, in its words, "utterly unconstitutional and void." Not a single clause of any constitution, state or federal, was cited.

Naturally, the more high-handed examples of judicial review did not go uncriticized. The left, in particular, was outraged. Reforms won at great cost, and after long struggle in the legislature, died in the courts. Yet the Supreme Court did not mend its ways until the 1930s. In the early years of the Roosevelt Administration, the Supreme Court voided statutes which were the very keystone of Roosevelt's New Deal. Roosevelt, however, stayed in office thirteen years; as justices died or resigned, he was able to replace them with more sympathetic men. After the 1930s, the Supreme Court essentially gave up its review of *economic* regulation. There has been hardly an instance of a regulatory statute, since 1940, which failed to pass the test. On the other hand, particularly after Earl Warren became Chief Justice in 1953, the Court was bold in defense of civil liberties, and in extending the rights of criminal defendants, protecting freedom of speech and expression, and helping the black minority gain full rights. In 1954, the Warren Court handed down its most famous decision, *Brown v. Board of Education*. This case ordered an end to the racial segregation of schools—a truly revolutionary step. More recently, the Supreme Court swept restrictive abortion laws off the books, and, in *United States v. Nixon*, handed down a decision which helped drive a President from office. Probably no court in the world has similar power, and similar pretension. The boldness and power of the Supreme Court is more than tradition and style; it could not survive without support from the public, or at least from the national elites. Consider the fate of the high court in South Africa, when it attempted to rule on *apartheid*, or more recently, consider what happened in India, when a lower court decision threatened Mrs. Ghandi's office.

The *political* power of the courts extends beyond constitutional litigation. Courts may and do review any action of

government, on any level: cities and counties, administrative agencies, public schools, even private power-holders, in the appropriate case. It is literally true that a major highway or airport cannot, at the present time, be built without reckoning with litigation. Opponents can delay and obfuscate for years, on this technicality or that, and the courts will at least *listen*. Obviously, people who try to block "progress" do not usually win; and on the whole, judicial review is both fearfully expensive and usually ineffective. But it has more than mere nuisance value. If an organized group has the money and the desire, it can "buy" judicial review in almost unlimited quantities. This is the negative side of judicial review.

The positive side is well-known. The courts have done heroic work in defending the weak and the powerless, and they have done nobly, where they could, as general watchdogs over government. Society, to be sure, pays a price. And, ironically, with regard to every day lawsuits, ordinary disputes between ordinary people, and even ordinary business and commercial transactions, the courts in the United States have steadily lost ground because of their expense, their technicality, their remoteness.

Nevertheless, it is striking that American courts are so interventionist. This feature demands some explanation. Partly, the courts are simply another player in the American game of checks and balances, the game of diffusion of power. Federal and state governments, throughout much of our history, have stood in uneasy balance. Local governments also have extraordinary power vis-à-vis their state capitals; the courts, too, are yet another center of power. But it is tempting to look further, for other cultural explanations.

Compared to most countries, the United States is relatively classless. Of course, there are wide gulfs between rich and poor, black and white, men and women; but, put next to European societies, the United States seems unusually fluid, mobile, lacking in ascriptive social structure. Traditional norms and traditional authority are weak. In most societies, such norms and authority do most of the work of social control. Society would be rootless, almost anarchic, without hierarchy, or some substitute. One substitute is organized religion, which has been unusually vital and tenacious in the United States. But there is also the law, which has become a kind of secular religion. Americans do not defer to kings, princes, or heroes; but they tip their hat

to legal authority and legal norms.

There is an extraordinary description of a trial court in the Illinois country, around 1818, written by Governor Thomas Ford. "The judges," he recounts, "held their courts mostly in loghouses, or in the bar-rooms of taverns, fitted up with a temporary bench for the judge.... At the First Circuit Court in Washington County, held by Judge John Reynolds, the sheriff on opening the court, went out into the courtyard and said to the people: 'Boys, come in; our John is going to hold court.'"³ What is striking is the informality. Unlike the English squire, the authority of the American judge rests not in his person, not in his social position, not in his trappings; he derives power and authority from the *law*, and from the physical power of the state. Of course, most legal process is more formal than Ford's judge. The Justices of the Supreme Court wear robes, they are addressed as "Your Honor," and courtroom decorum prevails. Yet, in the United States, the law is the true and legitimate ruler; judges and other leaders are only representatives—human, personal, political. The law is all-powerful; and yet it is at the same time profoundly man-made, lacking traditional or transcendental character.

This gives it both great strength, and great fragility. The American state is founded on law; and law is founded on consent—willing consent. Consent, however, depends on consensus; and over the course of years, as moral and other norms tend to weaken, consensus becomes much flabbier. This is a source of danger for the state, and for its legal order; yet one immediate impact is, paradoxically, to increase the trend toward funneling political and economic issues into court. If everybody agrees on an issue, or on the way people should behave, or the values they should profess, there is no need for an outside arbiter. But controversy seems to be growing in many areas of life, because agreement on certain basic issues has broken down. During the 19th century, for example, there was no real debate over pornography; everyone conceded that pornography ought to be illegal, that the right of free speech did not cover it. This opinion is still widespread. But there are also millions today who see nothing wrong with pornography, and demand the right to buy and sell it openly. Who will decide between these two contending fac-

tions? More and more, in the United States, the last word is with the courts.

On the other hand, perhaps precisely because of the range and sweep of judicial power, there has always been a strong movement to bring judges under tight public control. The first federal judges, appointed by Washington and John Adams, were adherents of the Federalist party. When Thomas Jefferson became president, he and his followers confronted a bench of conservative judges, strongly biased, he felt, in favor of his political opponents. An attack on the federal judiciary began, with its climax in the attempt to impeach Justice Samuel Chase (1805). The attempt failed, but a movement for popular election of judges had more permanent results. It began early in the 19th century and steadily gathered strength. New York swung over in 1846, and the elective principle became almost universal in the later 19th century. Election of judges is still the rule in the United States, except for federal courts, and the courts of a handful of states (for example, Massachusetts). In the 20th century once again strong counter-trends developed. The so-called Missouri Plan tries to eliminate partisanship in election of judges; it has been adopted in a number of states.

Law for the Many

Another major theme in the history of law is the development of legal institutions suitable for a broadly-based, middle class society: the law of the middle class mass. Even before the Revolution, ownership of land and other means of production was very widespread, compared to older European societies. It was never the case in this country that a few great families owned the bulk of the soil. There were always large land-owners, but they never dominated the tenure system; and ownership, not tenancy, was the rule in the United States, especially in the North. After independence, the national government acquired an enormous tract of land. As the nation expanded across the continent, the federal government became, temporarily, the largest landowner in the world. But it never was official policy to keep this land as part of the public domain, and exploit it. The government was a trustee, a custodian. The land belonged by right to the general public. Hence, the land was sold, usually at low prices. The goal of land policy was to ensure that, in the end, small farmers and townsmen owned the land. The history of the public domain is a history of one long sale, a great withdrawal, as the soil passed from



Satiric painting by American artist David Blythe (1750-1784) mocking a country lawyer and his comatose jury.

3. Thomas Ford, *A History of Illinois from Its Commencement as a State in 1818 to 1847* (1854), pp. 82-83.



Engraving depicting the evolution of the farm in America. After the land was cleared, a cabin was built, waterpower put to use, and a more permanent house finally constructed.

public to private hands. On the whole, despite scandal and corruption, the policy worked; the land passed to hundreds of thousands of working farmers and tradesmen. The famous Homestead Act of 1864, which promised free land to those who would settle in the West, symbolizes the goal of land policy, if not the method or result.

For the legal system, mass ownership of land had incalculable consequences. It meant that English land law, a maze of technicalities, designed to work (if at all) for the world of the landed gentry, was unsuitable and had to undergo drastic change. It had to be stripped of technicality—recast in the interests of a rapid and efficient land market, where tracts of land changed hands almost as easily as shares on a stock exchange. Land law never lost all its cloudy complexity, but it was refined to the level where it *worked*. Other fields of law underwent the same sort of transformation. Commercial law and family law were simplified. The social situation required no less and old-fashioned legal skill was in short supply.

The huge demand for legal institutions explains many quirks of American law—for example the rise of the so-called common law marriage, which appeared in the early 19th century. Some scholars have tried to trace the institution to English law. But any such explanation is essentially misleading. In the new country, there were very few clergymen, the population was thin, formal marriage was inconvenient. But why legitimate common law marriage? There are countries where most people do not “marry” in the strict legal sense; most children are technically bastards, even though their parents live together for a lifetime. Such a system works well enough in a village; it is disastrous in a society of landowners, where wives and children inherit land, and where people buy and sell land rapidly and often, instead of sitting on a patch of land through all eternity. Either the law excludes the common law wife, and the children, from rights to the land, or it must recognize, somehow, the validity of the “marriage.” This is what many states chose to do.

Ultimately the common law marriage declined, and by the end of the 19th century many states had discarded it. Its passing is as instructive as the manner of its birth. In the first place, as population grew and communication improved, it became easier to marry in the regular way. Common law marriage had disadvantages, as well as advantages. Because it

was an informal arrangement, an important legal status, affecting rights to land, was nowhere to be found in official records. For a similar reason, law modernized the widow’s rights to her husband’s estate. English law gave the wife *dower*, which was a life interest in part of the husband’s land. A widow could claim dower even as to land the husband had sold, if he sold it without her consent. Dower rights, then, were potentially a “cloud” or blemish on land titles. At least partly for this reason, many states abolished dower; instead, they simply gave the wife a fixed share of her husband’s estate.

Not everyone shared in the American cornucopia. The exceptions were glaring and large: Indians and black slaves most notably. American slave law, basically indigenous, is an invention Americans do not boast about. Some aspects of early slave law are clouded in obscurity; but by 1700, the essential features of this corpus of law were firmly fixed. Slavery was abolished in the 1860s, but blacks remained under severe disabilities. In the late 19th century, immigration swelled to enormous size. The landless urban poor, mostly foreign born, were effectively shut off from access to justice by rising costs. Welfare law was archaic and intensely local; the federal government did not play a significant part in this field until the Great Depression of the 1930s. Legal harassment and violence plagued the Chinese on the West Coast in the late 19th century. American toleration stopped short, too, when it confronted the Mormons. Their clannishness, their strange beliefs—most dramatically, plural marriage—enraged the majority. Harsh federal laws, persecution, raids, put some of the Mormon leadership in jail, while others went underground. The battle ended only when the church renounced polygamy (1890).

American Law and Individual Freedom

In any brief sketch of the development of American Law it is easy to ignore (or take for granted) what struck foreign visitors, in the late 18th or early 19th century as a most remarkable feature of our country: the great personal freedom enjoyed by Americans, guaranteed by law and supported by public opinion. In this Bicentennial year, many intellectuals, disgusted and disillusioned with recent events, find it easy to forget this rare and successful achievement. On the whole, throughout American history, people have enjoyed

great personal liberty. They might say what they wanted to say, write what they wanted to write, go to the church of their choice, or none at all; men could participate in government by voting and by serving on juries.

Liberty, however, is a matter of more or less. In 1800, only men who owned property could vote in New York. By mid-century, all adult men, even the poorest, had the right to vote. Women did not vote until the 20th century. The black man in the South was technically a full citizen, after the Civil War; but when northern troops withdrew, whites seized power and disenfranchised the black man through a variety of technicalities, backed by social pressure and, at times, by terror. This situation did not change, fundamentally, until the 1960s.

Yet at every stage, personal freedom kept growing in the United States, while, paradoxically, the network of regulation also constantly thickened. In some sense the one implies the other. Take, for example, the freedom to travel. The ancient peasant or serf was tied to the land. The American moves about freely, almost restlessly. The sheer volume of travel makes accidents inevitable. Safety becomes a major issue. It generates an enormous body of regulation. In the 19th century, the railroad was perhaps the single greatest maker of law; no Justinian, no jurist ever changed the requirements of law so dramatically. The law of torts sprang up almost *ex nihilo*; its creator was the railroad accident. The automobile accident, in the 20th century, has been scarcely less fruitful. Insurance, seat belts, the Warsaw convention, passport regulation—one could go on and on, mentioning aspects of law and regulation that flow directly or indirectly from the freedom to travel, and its supporting institutions.

American Legal History: The State of the Art

American legal education has always been pragmatic; has always had at least one eye cocked toward the practical needs and experiences of lawyers. Neither the structure of the law nor legal education encourages theory and scholarship that does not pay in the market. Legal history has shared in the general intellectual neglect. Until recently, too, for a variety of reasons, "legal history" in the United States meant history of the common law, that is, English legal history, and pre-modern history at that.

In the last generation, however, the tempo of work has increased dramatically.

One leading influence has been Professor Willard Hurst, of the University of Wisconsin School of Law. Hurst stresses the relationship of law to social forces; he treats the legal system as a dependent variable, as an effect, rather than a cause; and he plays down the role of jurists, of conceptual thinking, of the formal, doctrinal elements of law. Hurst has concentrated mainly on the 19th century, most intensively on his own state of Wisconsin. The first half of the 19th century, in his view, was an age of "release of energy"; people used law to foster economic growth, to turn land and resources to productive use. People had practical goals; they treated law as a practical tool.

Law, in Hurst's view, is not the conscious creation of people who think about law. It is hammered out in bargains between contending groups. Of course, people have always had values, and they translate these values into law. But the important values are popular values, values of people who act (businessmen, politicians), not the values of people who write and who think.

A substantial body of recent work has begun to explore the relationship of law, business, and the economy, chiefly in the 19th century. Some legal historians, however, feel that the Wisconsin school unduly neglects the intellectual element in law. A few radical scholars feel that the work underplays the dark and oppressive aspects of American law.

The field is still young. Many areas are still almost untouched. Somewhat surprisingly, little has been done on the history of criminal justice; but interest in this subject is rapidly growing. The public looks on crime as a major problem. Criminal justice has a rich and interesting past. If the history of law is, in general, a history of opportunity, a history of incentive, the history of crime and punishment is a history of suppression: a history of what society has defined as a threat, and tried to control. One part of the law is the underside of the other.

Of course, there are difficulties in the study of legal history. The subject is complex and technical. But it is also important. And there are materials at hand. Despite riots, upheavals, a fair share of floods, earthquakes, fires and other natural disasters, the great American land mass has known unusual tranquility. Many legal records survive. Every county courthouse, every state capitol, is a potential storehouse of records. Millions of documents, covered with dust, await the wand of the scholar to bring them to life.



Illustration depicting a political discussion at the grass-roots level by George Caleb Bingham (1811-1879).

These remarks are based on an address delivered by Professor Friedman on the occasion of the International Congress of Historical Science in San Francisco in August 1975. An expert in American legal history and law and social science, Professor Friedman received the 1976 John Bingham Hurlbut Award for Excellence in Teaching. On September 1, he became the Marion Rice Kirkwood Professor of Law, following the retirement of Professor Moffatt Hancock.

Moffatt Hancock Bids Farewell to Stanford Law School

by Thomas Boothe '78

My best moments? Well, you see, the life of a law teacher is not like being a movie star or a football player. It is a life of quiet satisfactions, enduring satisfactions. Best moments? Singing with Joe (Leininger), being elected to the chair, watching first-year students progress. These are the enduring satisfactions.

On August 31 Moffatt Hancock retired from Stanford Law School after 23 years on the faculty. Retirement for Moffatt Hancock is not an absence from the law but a trip to Hastings to begin his fifth decade of teaching law, spanning five schools and two flags. Those years are rooted in Toronto where Hancock was born and later received his BA in law from the University of Toronto in 1933.

When I was growing up in Toronto, I used to ride around on my bicycle and look at the old houses. I always wanted to own such a house, but I suppose I never will. I'll try to find an old house in San Francisco or maybe an old apartment in Pacific Heights. And I'd like to get an old grandfather's clock that will chime the quarter hours to me.

Hancock first began teaching at the University of Toronto in 1937, where he stayed until 1945 when he joined the faculty at Dalhousie University in Nova Scotia. In 1949, Hancock married and moved west to teach at the University of Southern California.

One summer, while at USC, there were some Stanford students in a Conflicts class that Hancock was teaching. Those students then mentioned his name to Dean Carl Spaeth and various faculty members. As it was, Dean Spaeth wanted to offer a course in Jurisprudence, a course that had not been taught at Stanford since Joseph Bingham had retired in 1944. Also, Marion Rice Kirkwood was retiring, so there was a need for a property professor.

The chairman of the appointments committee at the time was George Osborne, who, while leafing through the directory of law teachers, noticed that Hancock was teaching Jurisprudence and Legal History and that he had taught Property. That teaching background, combined with the students' reports, led them to invite him to teach a summer course in Property. At the end of the summer, Hancock was asked to come back. In 1953, Moffatt Hancock joined the faculty at Stanford Law School. Nine years later he was appointed to the Marion Rice Kirkwood Professorship of Law.

I'm not a reformer and I don't get grand ideas on how to make the law school bigger and better. I feel generally good about law schools. The Deans have to pretend they are innovative because young professors are attracted by innovators. But I'm uncertain about those innovations just to be innovative. After WW II we proved

When I first remember Moffatt Hancock he was teaching at USC and known as the best law professor there. We offered him a bonus to come to Stanford, where he taught several years before I became emeritus. His great ambition, he told me, was to be known as the best teacher in the law school, and he flattered me by saying he was going to be my successor there and patterned his teaching after mine. He asked for my picture to hang on the wall of his office when he moved into the new law building, saying that he wanted his office to have some of the feeling of Stanford tradition.

I have recently become emeritus at Hastings, and I regret that I will not be on campus to welcome him as a colleague on that distinguished faculty. I know that Hastings is looking forward to his arrival.

GEORGE E. OSBORNE,
WILLIAM NELSON CROMWELL
PROFESSOR OF LAW, EMERITUS



that three years of law school was good. The past 20 years have just been frosting on the cake. The semblance of change is necessary, however, because a successful institution must look at itself as always changing lest others look at it as paralyzed.

With the greater complexity all over now, the law schools must carry on with their greatest weapon, producing generalists. Herbert Packer was in charge of all university academics. We were both surprised at how graduate work, especially the PhDs, was so narrow. Law is for the generalists. That has been the most important thing and will be for the future.

During his career, Hancock has been a prolific scholar. Besides his *Torts in the Conflict of Laws* (1942), he has written for the *Encyclopaedia Britannica*. He also received a Guggenheim Fellowship in 1963 for a series of articles dealing with conflict of laws in land title litigation.

His major concern, however, has been for his students. Sitting in his office, amidst his photographs and etchings, his roll top desk and antique furniture, he can reflect back over the changes he has witnessed.

When I started teaching law at the University of Toronto I wore a long black robe and I wrote my lectures out and had them before me in a big book. What is more, up until a few years ago the crusty

old professor, like the one portrayed in "Paper Chase," was very much a part of the academic scene. In fact when George Osborne, who was one of the great crusty professors of all time, retired, I had the ambition of taking over his role of crustiness. I tried it for a few years, but I found it took too much time and energy.

Hancock, however, has not bound himself with his books. In 1961 he was voted Red Hot Professor. At the Washington State game that year, his students wore sweaters emblazoned with Lex and rode him around the track in a chariot. Afterwards he led a cheer.

He has also collaborated with Associate Dean Joseph Leininger of the Law School in writing and performing Gilbert and Sullivan-style songs parodying the life and times of the law student, the law professor, and the lawyer. A highlight of dedication week at the new Law School last September was the Hancock-Leininger Revue, which was performed before a capacity audience in Kresge Auditorium. They delighted the audience with such clever ditties as *The Duties of the Dean*, *Is a Raft of Logs a Vessel?* and *The Grade in Torts*.

Hancock's talent as a songwriter is matched only by his ability as a photographer. Though now legally blind, Hancock was once an accomplished photographer. His photographs, mostly of the Stanford campus, are widely used in Uni-

We cannot believe that Moffatt Hancock is retiring. He is a superb teacher and scholar, a wonderfully witty teller of tales and singer of songs, and a warm friend.

Among law schools, Stanford is nationally recognized as placing particular emphasis on the classroom, and Moffatt is very much in the Stanford teaching tradition. His students of decades ago still recall what he said and the special spice with which he said it. Even more, they know how much they learned from this uniquely gifted man. Over the years, Moffatt has also produced an impressive array of scholarly prose on the law—what it is and what it should be.

Fortunately, Moffatt will be close by, and all of us often will be able to see him and his talented wife, Eileen. We look forward to that pleasure for many good years.

J. KEITH MANN
ACTING DEAN, JANUARY-AUGUST, 1976



Photographs by Moffatt Hancock

versity publications and are displayed in several areas of the Law School.

Hancock's love of the law has spread to his family. His daughter Catherine, attended the University of Chicago Law School and has recently completed a clerkship with Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit. She joined the law faculty of Tulane University in September.

His son, Graeme, a Stanford undergraduate in religious studies, is a member of the Class of 1979 at the Law School.

His wife, Eileen, is Regional Consultant of the American Foundation for the Blind.

The students today have higher and higher GPAs and LSATs, but they're not necessarily more excited about the law. I

like the over-assertive student: he livens up the class. But he's relatively hard to find. All Stanford students are too polite.

For many students, the basic problem of law school is to make law exciting. The real world of law is very exciting: clients, the drama of the courtroom. But school is four barren walls and classrooms, no clients, no drama. It's up to us to tantalize them. That's the great test of the law teacher: his ability to go into class year after year and get all worked up about the same old case he got worked up about ten, twenty, even forty years ago.

Reprinted, with minor revisions, from the *Stanford Law School Journal* of April 20, 1976.

Moffatt Hancock is a teacher in the grand tradition of Stanford Law School. He has the rigor of George Osborne, the learning of Marion Kirkwood, and the wit and some of the iconoclasm of Joe Bingham; but, though we are reminded of them, there is, and could be, only one Moffatt Hancock. We will miss him greatly.

CHARLES J. MEYERS
DEAN

Moffatt picks up where A.P. Herbert and the Uncommon Law leave off. But Moffatt goes Herbert one better. He does it all in verse, and given a tune—any tune—he'll sing all the parts himself.

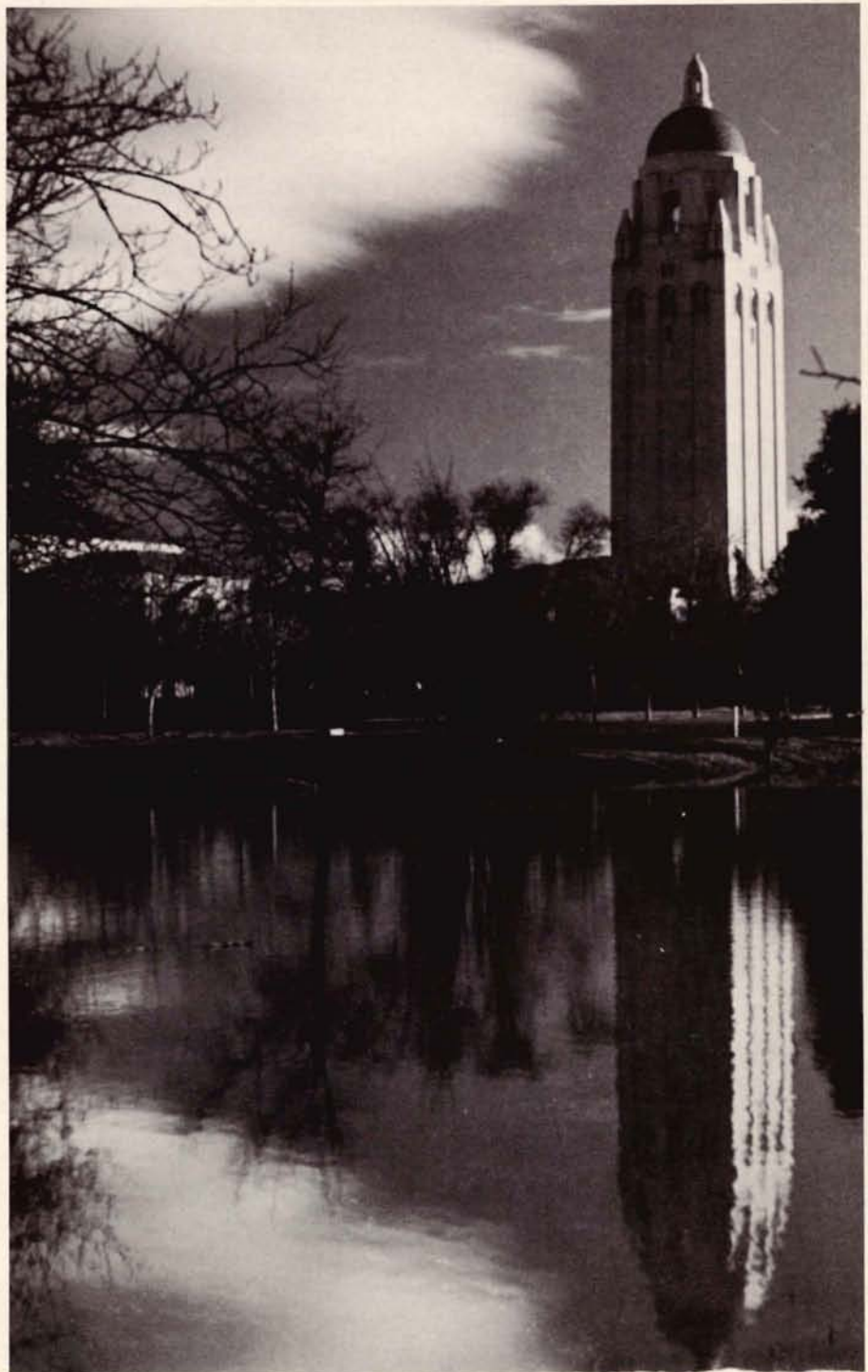
JOSEPH E. LEININGER
ASSOCIATE DEAN

A salute to Moffatt Hancock—distinguished scholar, teacher, and gentleman. One who heard his generous, perceptive eulogy to Professor J. Walter Bingham in the Stanford Memorial Church last year would need no other proof of Moffatt's own qualities.

LOWELL TURRENTINE,
MARION RICE KIRKWOOD PROFESSOR OF LAW,
EMERITUS

In all our universities great minds abound. Wisdom, humor, warmth and an indefinable spark make a few professors outstanding. Moffatt Hancock combined them all and served us well and everlastingly.

THOMAS A. TWEEDY '57





A TOAST TO THE STANFORD LAW SCHOOL

Let us drink to the Stanford Law
School,
But before you raise your glass,
Remember the teachers who tried
so hard
To dramatize every class.
Remember the pieces they've
written
With analysis, learning and zest,
To help the courts decide cases
In the way they believe would be
best.

Remember our loyal alumni
Who help us in every way,
Sincerely concerned with our
problems
As they change from day to day.

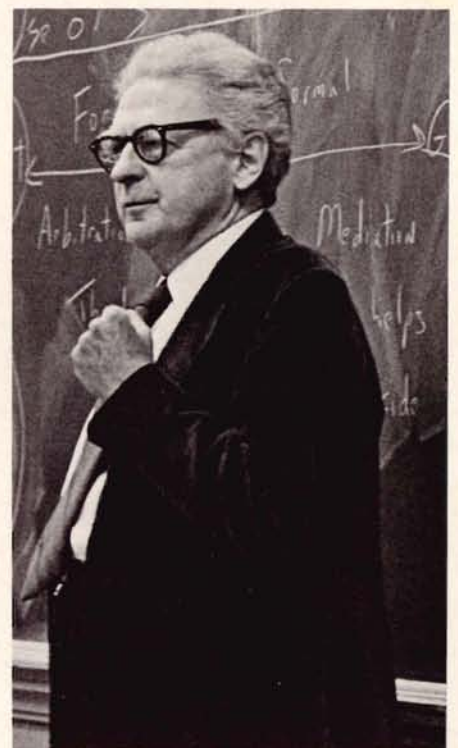
Remember our deans who have
labored
(and their task is never done),
To attract the support that is
needed

For a school that is second to
none.

And remember each wave of new
students
That comes and struggles and
strives,
With their eager, inspiring
assurance
That our School can enrich their
lives.

Oh remember those waves of new
students
Drawn here as by a bright star,
Who challenge us all to be better
Always better than we are.

MOFFATT HANCOCK



Stanford Law School 1893 - 1907

As a young lawyer in San Francisco many years ago, I once asked an eminent city lawyer what school he had attended. He looked at me and said: "I went to Toulumne Law School. We didn't have any of these professors out here but whenever I went into a court and a point was raised I didn't understand, I would pick up my inkstand and throw it at the opposing lawyer. The judge would lock me up 24 hours for contempt and while in such confinement, I would study up the point and be ready for that lawyer."

W.S. BARNES

SAN FRANCISCO DISTRICT ATTORNEY IN
A LECTURE AT THE STANFORD LAW
SCHOOL, SEPTEMBER 28, 1894.

"Toulumne" law school training for lawyers in the 19th century was the rule rather than the exception. Until the second decade of the 19th century, training for the practice of law was almost entirely restricted to apprenticeship. Since apprenticeships were long, ranging up to ten years, and the number of apprentices a lawyer could handle was severely limited (usually about two), the profession grew slowly in numbers. As the population of the U.S. increased, the demand for legal services outstripped supply.

This increased demand for legal services fostered the growth of formal legal education in universities. Most of the law schools established during this period were not actually "schools," but regular university departments that offered a law "major." Requirements for admission were ordinarily only those exacted for admission to the freshman class of the college. This was true in 43 of the 61 universities offering law training in 1890. Even when the Association of American Law Schools was organized in 1900 it decided that its members need require only a high school education for admission. Instruction during this period was normally based on lectures used to supplement and illuminate assigned textbook reading.

By the time Stanford began offering instruction in law in 1893, the trend toward modern law schools was under way. Harvard was the center of innovation, with the publication of Langdell's casebook in 1871. Moreover, in 1878 Harvard began requiring three years of graduate study, though only two had to be spent in residence, with the third year checked by examination.

Law school admission and graduation requirements reflected then, as they do now, the standards set by the state bars and legal community. Until 1909 there were virtually no California Bar admission requirements. It was very common for students to have a pre-legal curriculum, take one year of law, get their A.B. degrees, and go into practice. Since there was no committee of bar examiners, admission to the Bar was by action of the appellate courts. No written examination was given and standard procedure was to take a group of 35 to 40 aspiring lawyers into a room, ask each one a few questions, and, if he answered them satisfactorily, he was admitted.

The following letter to Judge Samuel F. Lieb, first president of the Board of Trustees of the University, from a graduate of the Law Department depicts a typical bar examination in the early 1900s.

Dear Sir:

Thinking it may interest you to hear how the recent examination of the applicants for the admission (sic) to the bar was conducted I take the liberty to give you a brief report thereof.

There were about forty applicants, but only twenty five were successful. I have the great pleasure to announce that I am one of them. My examination was exceptionally brief, presumably on account of your endorsement on my application blank. They asked me no more than fifteen questions on criminal law, which I promptly answered.

The whole examination was very rigid, covering the entire field of Jurisprudence. It took them fully two

In the spirit of the Bicentennial, Stanford Lawyer offers this brief look back to the founding of the Stanford Law School

From Toulumne's Peer To Respectability





Edwin Hamlin Woodruff

hours to examine a class of ten applicants. The questions were fair, practical legal questions, such as a student is accustomed to learn in a class recitation, or in a good textbook.

I write this with the deepest gratitude to you as the president of the board of trustees of our university for attaching your honorable name to my application, and secondly, as a Stanford student, inspired by the Stanford Spirit, I am endeavoring hereby to express my honor and appreciation of the noble and great "STANFORD", a name that will perpetually sound in my heart with love and praise for the benefit that I received in this great institution.

Whatever my carrier (sic) may be in the future, whether successful or not successful, pleasant or gloomy, or no matter what condition I shall occupy, it will always be my earnest endeavor to live for the honor of the Stanford Spirit, and as a member of the legal profession, try to make the truth visible, as Dr. Abbott has taught me.

I remain Yours,
very respectfully,
Frederick May

Though bar standards were weak, practicing law was not an easy way to get rich quick. Justice Myrick of the California Supreme Court warned his Stanford law

student audience in a speech before them in 1898 that "In the legitimate practice of law, you will probably never accumulate a fortune." Worried that he would quickly lose his audience to Klondike gold fields, he hastened to add that "you can make a good living and more, you can attain an honorable place in the world." He did not warn his audience about the regional differences in fee "schedules," however. A few months later, a Stanford law graduate, Carl Smith, ruefully explained in the *Daily Palo Alto* that such a difference existed between California and Hawaii. Smith defended a man accused of selling liquor. After clearing his client on a technicality, he did not know what to charge him, and sought the advice of a Japanese interpreter. Smith suggested \$10 to the interpreter who exclaimed "holy smokes." Smith blanched and said he would make it only five. Only later did he discover that \$100 would have been a low fee.

Stanford University was founded in 1891. A year later, President David Starr Jordan began serious planning of a law department. He traveled to Chicago to consult with Professors Ernest Huffcutt and Nathan Abbott at Northwestern, two nationally recognized law professors. Jordan's hope was to secure two or three "name" professors and build from there. He and the Stanfords favored a shortened, pragmatic approach to education which



The first faculty of Stanford University. Edwin Hamlin Woodruff, the Law School's first professor and librarian, appears in the top row, fourth from the left.

would turn out self-supporting individuals in the shortest possible time. Jordan's law school curriculum plan was somewhat of a compromise between the then fashionable undergraduate law degree, and the more rigorous Harvard Law School graduate program. The plan called for the distribution of courses over a five-year period beginning with the sophomore year and continuing for two years after graduation from college. The junior and senior years would contain the normal graduate law school first-year curriculum. On graduation, the law major would receive an A.B. in law. He would then enroll in the equivalent of today's second- and third-year J.D. curriculum and graduate with an LL.B.

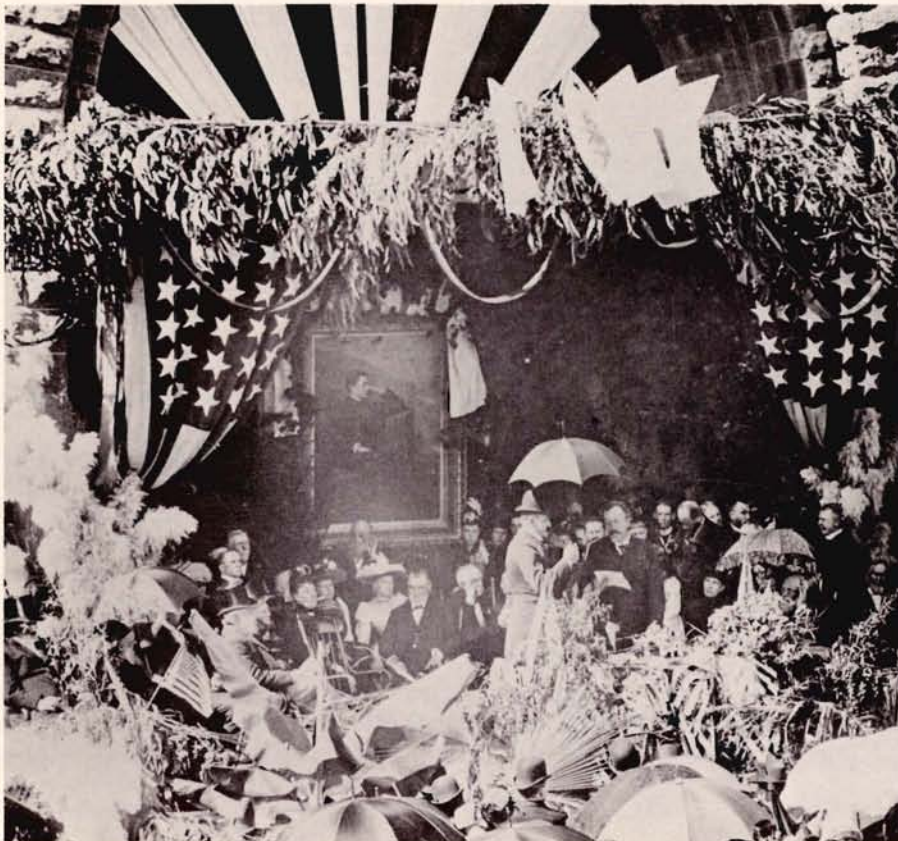
Jordan's plans for recruiting faculty were highly ambitious. He intended to have Professor Huffcutt open the school, to be followed in successive years by Professor Abbott, Professor Melville Bigelow (dean of Cornell's Law School), Sir Frederick Pollack (Regius Professor of Jurisprudence at Oxford), and finally, Woodrow Wilson, then a professor at Princeton.

Jordan also expected to provide an ample law library. Unfortunately, he was unable to dredge the necessary funds from the fledgling and financially starved University. As a result, Huffcutt rejected the Stanford offer in favor of Cornell, which had just received a gift of the Moak Li-

brary. To fill the gap created by Huffcutt's withdrawal, Jordan asked Abbott to come to Stanford a year early. He also persuaded Benjamin Harrison, President of the U.S. at the time, to come to Stanford after his term ended in 1893, and open the School with a series of lectures on Constitutional Law. Harrison was to be a non-resident professor.

Even these plans had to be shelved after financial disaster swept the University in 1893. Senator Stanford died in June; the great financial panic struck immediately thereafter; and towards the end of the year, the United States sued to establish a claim against the Senator's estate for \$15,237,000, allegedly due under the California stockholders liability law for money loaned by the United States to Senator Stanford's Central Pacific Railroad Company to aid in the construction of the railway. The panic depleted the value of the assets in the estate and depressed their earnings. The litigation tied up assets retained by the Stanfords after the Founding Grant and only a generous family allowance granted to Mrs. Stanford by an understanding probate judge, which she used for university expenses, and loyal faculty who accepted sharp reductions in salary prevented bankruptcy.

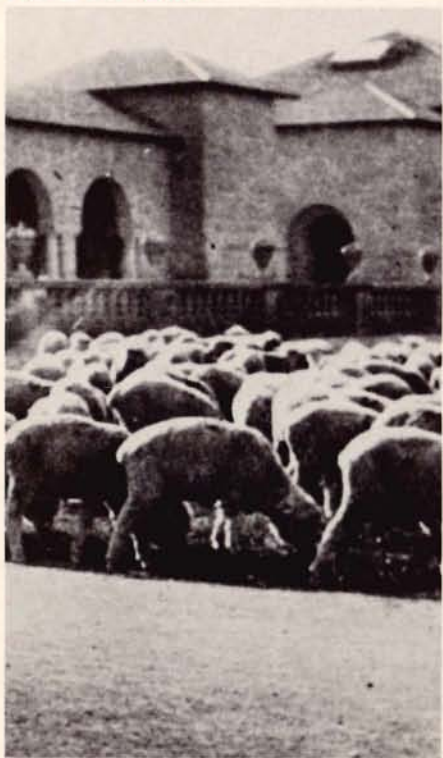
Abbott heard of these developments en route to Stanford. He called Dr. Jordan from St. Paul, Minnesota, asking him



Opening day ceremonies at Stanford University, October 2, 1891. Senator and Mrs. Stanford are seated to the left of the speaker, David Starr Jordan, first president of the University. A portrait of Leland Stanford, Jr. dominates the scene.



Life on the "farm."



whether he should still come. Jordan offered Abbott a year's leave of absence by return cable and Abbott accepted, apprehensive about the future of the University.

In desperation, Jordan turned to his University Librarian, Edward Woodruff, who had graduated from Cornell Law School in 1888. Woodruff had taught English at Cornell for two years, practiced law only briefly, and was reluctant to accept the assignment. He complained to Jordan that he was too busy as Librarian already, and that he hadn't opened a law book in four years. Jordan offered Woodruff extra help in the library, however, and coaxed him into accepting the job. Woodruff apparently grew to like his new job, for he continued to teach law until his retirement from the Cornell law faculty in 1926.

Thus, the Stanford law department got off to an austere start. Woodruff taught Elementary Law and Contracts during the first year of its existence. Benjamin Harrison had given his set of lectures the previous spring, focusing on Constitutional Law and the development of the constitutions of the original thirteen colonies. Harrison left shortly afterwards. He did not think too much of the proposed school and especially disapproved of including work for the A.B. degree in credit for the LL.B. degree. He compared this double service to a passage from Oliver Goldsmith's *The Deserted Village*:

The chest contrived a double debt to pay, A bed at night, a chest of drawers by day.

By 1894, things had begun to settle down at Stanford, and Abbott agreed to assume his position. Though the government suit was not dismissed until 1895 with *United States v. Stanford*, the financial panic had passed, and the University had managed to achieve fiscal balance.

Abbott was an extraordinary individual. His academic interests were property and the history of property law, which he combined with apparently limitless interests in subjects outside the law and various hobbies. These outside interests included Greek literature and art, membership in the Dickens Society in London (the first American to be so honored), horticulture, carpentry, chamber music, and Abraham Lincoln. He regularly played the cello in a chamber society, and skillfully employed his carpentry talents in building the furniture for the Law School after he arrived, including all the desks and podia. It is likely that he took a substantial income cut to come to Stanford, since he was

earning \$25,000 a year in Chicago as a consultant to the legal department of a large corporation, in addition to his academic salary.

Student interest in the Law Department increased rapidly. In 1894-95, 100 students were enrolled in the Department's courses, a figure which climbed to 171 by 1899. Abbott faced significant problems in meeting this demand.

To begin with, the Law Department had little space. It occupied three former bedrooms in Encina Hall, a men's dormitory. One of these was used as a library. In 1900 the department occupied rooms in the northeast corner of the Inner Quadrangle, formerly used by the main library. These rooms were divided into a law library, reading room, three offices and two lecture rooms. In contrast to the 1975 move to Crown Quadrangle, which took professional movers several weeks, this move was completed in one day by the students themselves.

Abbott's second major problem was the lack of an adequate library. In a letter dated March 3, 1933 Professor Abbott remembers the start of the Stanford Law Library:

The absence of any law books for the use of the students also had its effect on our program....I advised the buying of the American Decisions because of the extensive notes which the students could refer to in the absence of text books which Pres. Jordan did not feel the University could afford to buy. I believe I am correct in saying that before the Decisions were received the Bancroft Whitney Company gave us a set of books called "The Pony Law Series". I remember making a little book case about fifteen inches long and seven or eight inches high and five inches deep to hold these books. At this time the students had no place in the quadrangle to study and we were given the first room on the left hand (ground floor) of the entrance to Encina Hall. I remember hanging this book shelf, like a picture, on the wall of this little room and it was the beginning of your Law Library.

Abbott's third and perhaps most difficult task was retaining good faculty. Woodruff left for Cornell in 1896, despite President Jordan's entreaties. Jordan first wrote him a letter on February 18, 1896, asking him whether he would return to be librarian or law professor but indicating it would be best if he would do both until the money crisis was over. Woodruff de-

murred and Jordan wrote a letter on March 12 pleading, "Please don't go—We need you. Only Abbott, Huffcutt and yourself know the Law School I dream of. It will come and great will be the man who brings it." Two days later he added in a telegram, "Don't go. Needed here. We offer law professorship exclusively now." When Woodruff persisted in his refusal, Jordan wrote to Woodruff acknowledging his decision, "As soon as we are rich we shall undoubtedly wish to call some first-class men to the Law Department such as Huffcutt, Woodruff or Woodrow Wilson. In the meantime, we shall have to be content with temporary supplies."

Jordan and Abbott's "temporary supplies" proved to be all too temporary. During the years 1897-1907 the Stanford Law School became a developing ground for promising young law professors who were pirated away by more established law schools. Two of them, Professors James Hall and Clarke Whittier, went to the University of Chicago in 1901. A third, Jackson Eli Reynolds, who had been an undergraduate at Stanford and a great halfback on the football team, went to Columbia in 1901. All of these men were assistant or associate professors at Stanford, and were hired away as full professors. Money as well as prestige was an important factor in their decision. Whittier received only \$150 for his teaching in 1897 and some professors in other departments were teaching *gratis*, because of the University's financial plight. Those who were paid took a mandatory 10% cut in salary to pay for the defense of the Government suit. When Whittier went to Chicago he was paid \$5,500 a year, a considerable improvement over his meager Stanford salary. He also had access to a substantial law library, which was not something Stanford could offer to its faculty before 1903. Until then, faculty had to trek to San Francisco to do their research at the county courthouse library.

Throughout this period, Abbott did a remarkable job keeping together a rather good faculty. His was continually able to make up his losses by hiring promising newcomers. To supplement the regular faculty, which normally numbered between three and five professors, he imported practicing lawyers to teach courses on a parttime basis. Some of them, such as Judge Curtis Lindley of San Francisco, who taught Mining Law and Irrigation Law, had national reputations and had published a considerable amount. In his recollections Whittier noted that the Law School came of age in 1900-01, in spite of



Nathan Abbott, the Law School's first full-time professor and dean from 1894 to 1907.



The Inner Quad courtyard, 1905.



The University's first library.



Views of the Chapel and Memorial Arch after the earthquake, 1906.



the losses of himself and other faculty members shortly afterwards:

The year 1900-01 lived up to the promise of the Register that 'this department offers such courses in law as are usually given in professional law schools.' There was a fine spirit in the Department. Mr. Abbott was in his prime and the rest of us were young fellows trying to win a modest place in the sun and enthusiastic about the new Department and its future. The students seemed to think we were a lot of 'wise guys' and that before long, Harvard Law School would have to look to its laurels.

In the spring of 1901, the Law Department conferred its first professional degree, the Bachelor of Laws or LL.B., on James Burcham. This degree had been introduced by Harvard in this country and was the chief law degree conferred in 1901, though some schools, like Stanford, also conferred B.A.s. Since by this time many law schools required graduation from college as an admission requirement, it seemed odd to award a second baccalaureate degree. Recognizing this, Stanford changed its degree to a Juris Doctor (J.D.) in 1906, making it analogous to the degrees of M.D. and Ph.D. Harvard retained the LL.B., though other law schools including Chicago and Hastings, joined Stanford and replaced it with a J.D. Stanford resurrected the LL.B. in 1911, abolished it again in 1921, reinstated it in 1927, and finally abolished it again in 1969 in favor of the J.D. It is unclear why the faculty was so whimsical about this issue over the years, but the sequence is a tribute to Abbott's practice of having the faculty decide major issues by majority vote, a tradition continued to the present.

Few women entered the Department of Law in its formative years, though the University was coeducational from the beginning and, according to Professor Whittier, "The few young women who joined our ranks were not in any separate category from the men. They found their individual places in class work and in records just as so many extra men would have done." Though women were an established part of the University, the issue of coeducation was controversial. President Jordan was a firm believer in it. In a forum on the issue in the *Daily Palo Alto* on October 23, 1901, he suggested that "women educated with men are likely to have sounder ideas of work and a clearer perspective of things as they are than ones educated by or among women only. Men educated with women are likely to de-

velop better personal habits and finer tastes than those who are monastically educated, meeting either no women at all or only on the inferior plane of social functions."

In contrast, Professor Abbott opposed not only coeducation, but the whole system of higher education for women. In the same forum he stated: "The whole business is a mistake. I do not believe in the modern system of educating women. I think they are over-educated. The tendency is to spoil a good woman to make a poor man out of her."

The only example of overt discrimination against women during this era was their exclusion from the Law School steps. The steps were at the end of the corridor running in front of the Law School, the side of the Inner Quad that now houses the President's Office. Jordan strongly opposed the use of tobacco on the quad. In deference to his wishes, students would walk to the steps where they would talk and smoke between classes. As soon as they got out from under the arcade, they figured they were no longer on the Quad. The steps were strictly reserved for law students and fights would occasionally erupt when non-law students attempted to break the tradition. Women law students were not welcome either. They would not be thrown off, but were immediately made to feel unwelcome. The tradition of the Law School steps apparently persisted until the Second World War.

During Abbott's tenure as department head, several extracurricular clubs and organizations for law students got their start. The Law Student Association was formed in 1904, with James Burcham, the first Stanford LL.B., as president. Moot Court was very popular during this period and several clubs were formed whose principal purpose was oral advocacy and debating. Bench and Bar and the Coif Club were the oldest and most prestigious clubs and a rather intense rivalry existed between them. Each year two representatives of each club argued a case against the other, the prestige of the clubs riding on the outcome. They also played in a baseball game against each other annually. Professor Abbott was always the umpire and was noted for his ability to call all balls strikes, and all strikes balls.

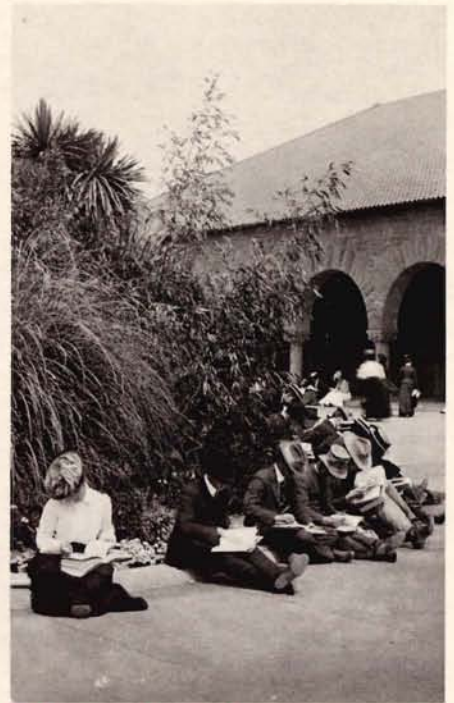
On April 18, 1906, the devastating earthquake hit the Bay Area, destroying much of San Francisco and causing heavy damage to Stanford. The Law Department, being in a one-story building, suffered little physical loss, but along with the rest

of the University, it had to face a further period of austerity so that the plant could be restored. The entire University closed temporarily. The Law School suffered an even more crippling blow a month later when Abbott decided to leave Stanford for Columbia, succumbing to the same pressures that he had to fight against to retain his faculty against raids from other law schools. Jackson Eli Reynolds, formerly a professor at Stanford and then at Columbia, was a major influence in Abbott's decision. Abbott was reluctant to leave, but Reynolds was adamant. In a letter to Abbott on May 29, 1906, he wrote: "If you throw me down on this thing I shall be thoroughly vexed. I've set my heart on this connection between you and Columbia and I've been working to bring it about ever since I first broached the idea to you. That is all bally flubdub about you not being suited to Columbia and I won't listen to such nonsense."

Abbott eventually relented and agreed to take a year's leave of absence to become a visiting professor at Columbia. Columbia was apparently to his liking, for he never came back. Jordan made a last ditch attempt to coax him back in early 1907. In a letter to Abbott on January 30, 1907, Jordan offered him a raise to \$5000, as well as raises for all the other professors and reimbursement for Abbott's own out-of-pocket expenses incurred in building up the new law school. Abbott demurred and on February 10, 1907, the *New York Daily Tribune* published news of his resignation: "Stanford University has suffered a serious loss in the removal of Dr. Nathan Abbott to Columbia.... It has been known for some time that he was dissatisfied with conditions at Stanford, especially with the arbitrary action of the faculty last year on suspending one of the best students in Dr. Abbott's class because, as the editor of the college paper, he criticized the system of faculty espionage in the dormitory."

In the thirteen years of his tenure at Stanford, Nathan Abbott left an indelible mark on the School. Perhaps the special qualities of this extraordinary teacher and scholar were best described by Chief Justice Harlan Fiske Stone, Abbott's former colleague at Columbia Law School, on the occasion of Abbott's death in 1941:

Withal, intimate association with a man of such colorful personality who never did anything quite as more ordinary mortals do it, broadened the student horizon and added a piquant flavor to student life.... We shall not see his like again.



Students on the Quad.

A pre-quake view of the campus from Lake Lagunita.



SCHOOL NEWS

ELS Projects Gain Support

The Environmental Law Society is gaining broad recognition and support for its publications in various areas of environmental law. One of the Society's 1975 publications, *Disposing of Non-Returnables: A Guide to Minimum Deposit Legislation*, has attracted the attention of the Environmental Protection Agency. The Agency's Office of Solid Waste Management Programs has purchased 500 copies of the handbook for free distribution to anyone interested in minimum deposit legislation. The 132-page guide, written by Thomas Fenner '76, Edwin Lowry '76, and Rosemary Lowry, a student at Boalt Hall, evaluates the bottle control legislation adopted by Oregon and Vermont in terms

of its effectiveness in reducing litter and conserving energy. The book also provides legislators and pro-bottle bill environmental lobbyists with facts and statistics to counter the barrage of arguments used in opposition to such legislation.

The Society has recently published a sequel to *Disposing of Non-Returnables*, entitled *Beverage Container Laws at the Local Level*. Also written by Thomas Fenner, it is a handbook for facilitating the enactment and defense of minimum deposit legislation on the municipal and county levels. The book presents a model ordinance, a look at tactics, and an analysis of the legal issues involved.

Another recent publication which uses a similar format

is *A Guide to Noise Control at the Municipal Level in California*. This handbook examines the effects of noise on people and property and the interlocking state and federal regulations. A strategic guide to solving noise pollution problems, with special emphasis on local action, is included.

Geothermal Energy: Legal problems of Resource Development, published in early 1976, has elicited strong reactions from the energy industry and environmentalists alike. The book describes and evaluates geothermal resources on public lands, summarizes the legal problems inhibiting their development, and suggests statutory and regulatory changes to facilitate their use as a source

of energy for the nation.

A Handbook for Bicycle Activists, the Society's latest publication, analyzes the legal status of bicycles and the possibility of encouraging their use in the national transportation network.

Projects soon to be published include *The Fragile Balance: Environmental Problems of the California Desert*; *An Environmentalist's Primer on Weather Modification*; and *A Handbook for Billboard Control*. This summer members of the Society studied no-smoking laws, commuter transit alternatives, and public involvement in U.S. Forest Service land-use decisions. These projects are supported by grants from the Alamo Foundation and the Ford Foundation. ■

Snowfall Stuns Stanford



To the amazement of all, an inch of snow fell on Stanford on February 5, ending one of Northern California's worst droughts in history. Within minutes after the storm subsided, elated students abandoned their books for snowball fights and building snowmen. The last time so much snow fell on the campus was in 1962 and, prior to then, 1887 (also on February 5). Just before the snowfall the temperatures had been in the 70s; hours later the skies cleared and the sun quickly made the snow a memory.

Clerkships Announced

Seventeen members of the Stanford Law School Class of 1976, plus three former graduates, have accepted judicial clerkships for the coming year. Clerking for the United States Supreme Court will be Tyler A. Baker ('75) of Cleburne, Texas, for Justice Lewis F. Powell, Jr.; Stuart Baskin ('75) of Whittier for Justice William J. Brennan, Jr.; and Michael Quinn Eagan ('74) of New Orleans for Justice William H. Rehnquist, who graduated from Stanford Law School in 1952.

Four graduates will be clerking for the U.S. Court of Appeals, Ninth Circuit. Barbara E. Bergman, Peoria, Ill.,

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will clerk for Judge Ben. C. Duniway '31; Barton H. Thompson, Jr., Los Angeles, for Judge Josep T. Sneed. Gregory M. Schmidt, Washington, D.C., and Frederick T. Williams, Stanford will be clerks to the Court.

Clerking in the U.S. District Courts in California are: Steven M. Block, Seattle, for Judge Robert F. Peckham '45, San Jose; Daniel L. Brenner, Beverly Hills, for Judge Matthew Byrne, Los Angeles; Jonathan L. Kempner, Detroit, for Judge David W. Williams, Los Angeles; Ronald K. Meyer, Decorah, Iowa, for Judge Stanley A. Weigel '28, San Francisco; Thomas E. Wilson, Canton, Ohio, for Judge Edward J. Schwartz, San Diego; and Ralph A. Zarefsky, Palo Alto, for Judge Lawrence T. Lydick '42, Los Angeles.

Laurence K. Sullivan of Los Alamitos will clerk for Justice Murray Draper '30, California Court of Appeals, San Francisco.

Those winning appointments outside of California are: Patrick R. Cowlshaw of Dallas, who will clerk for Judge Irving L. Goldberg, U.S. Court of Appeals, Fifth Circuit, Dallas; Steven A. Reiss, Philadelphia, for Judge John Minor Wisdom, U.S. Court of Appeals, Fifth Circuit, New Orleans; Bonnie S. Brier of North Miami for Judge Joseph S. Lord III, U.S. District Court, Philadelphia; Daniel J. Gonzalez of Baltimore for Judge Joseph L. Young, U.S. District Court, Baltimore; Peter R. Osinoff of New York City for Judge Sherman F. Finesilver, U.S. District Court, Denver; Bruce A. Rosenfield of Minneapolis for Judge Raymond J. Broderick, U.S. District Court, Philadelphia. ■

Commencement, 1976



Five hundred relatives and friends attended commencement exercises for the Class of 1976, the School's eighty-third graduating class, on June 13.

Thomas Ehrlich, who resigned as dean in January to become the first president of the Legal Services Corporation in Washington, D.C., addressed the class. The class response was given by Daniel Brenner, president of the Class of 1976.

Emalie Ortega, president of the Law Association for 1975-76, announced that Professor Lawrence Friedman was voted by the class to receive the 1976 John Bingham Hurlbut Award for Excellence in Teaching. Established in 1974, the award is named in honor of Professor Emeritus Hurlbut and is intended to give special recognition to those faculty members who, in the tradition of Professor Hurlbut, strive to make teaching an art. Previous recipients are William

D. Warren, now dean of UCLA Law School, and Anthony Amsterdam.

Acting Dean J. Keith Mann announced the following honors and prizes.

Prizes

Nathan Abbott Prize for highest cumulative grade point average: Barton Hurst Thompson, Jr.

Urban A. Sontheimer Third-Year Honor for second highest cumulative grade point average: Steven Mark Block

Lawrence S. Fletcher Alumni Association Prize for outstanding contributions to the life of the Law School: Emalie Monarrez Ortega

Frank Baker Belcher Evidence Award for best academic work in Evidence: Ronald Keith Meyer

Nathan Burkan Memorial Competition for best written work in the field of Copyright Law: Eric Peter Marcus

Olaus and Adolph Murie Award in Environmental Law for best written work in the field of Environmental Law: Richard Smith Mallory

Rocky Mountain Mineral Law Foundation Award for best written work on the subject of mineral resources: Ronald Keith Meyer and William Karl Swank

Honors

The following students were elected to the Order of the Coif, the national law school honor society: Steven Mark Block, Bonnie Susan Brier, Jeremiah Andrew Collins, Patrick Ray Cowlshaw, Grady Gammage, Jr., Gary Scott Gildin, Daniel Joseph Gonzalez, Robert Frank Knox, David Anthony Lombardero, Ronald Keith Meyer, Robert James Ogilvie, Jay Marion Spears, David Charles Spielberg, Barton Hurst Thompson, Jr., and Timothy Tomlinson. ■

SCHOOL NEWS

New Faculty Appointments



Julius (Jack) Getman

Julius G. Getman of Indiana University School of Law and David L. Engel, a Boston attorney, have been appointed to the faculty, effective July 1.

Professor Getman, who spent the past year at the School as a visiting professor, is a graduate of City College of New York and Harvard Law School. A former attorney for the National Labor Relations Board, Professor Getman is one of the nation's foremost specialists in labor law and has written extensively on the subject. His latest work, *Union Representation Elections: Law and Realities* was published in September by the Russell Sage Foundation. It is the culmination of an eight-year study. The book will also be the subject of a symposium to be published by the *Stanford Law Review*.

A popular guest lecturer, Professor Getman spoke to the NTL Academy of Arbitrators in San Francisco in April on "Arbitration, the Constitution and Personal Freedom." In September he addressed



David Engel

the Industrial Relations Research Association in New Jersey on suggestions for changes in Labor Board Election policies.

In addition to labor law, Mr. Getman will offer a course in first-year contracts and a new interdisciplinary course, Government Regulation of Industrial Relations, with Professor Robert Flanagan of the Business School.

David L. Engel has joined the faculty as an assistant professor of law. Mr. Engel graduated *magna cum laude* in 1973 from Harvard Law School, where he was president of the *Harvard Law Review*. He served as law clerk to Judge Henry J. Friendly, U.S. Court of Appeals for the Second Circuit, in 1973-74. Following his clerkship, he joined the Boston firm of Goodwin, Procter & Hoar, where he remained until coming to Stanford.

Mr. Engel will teach a course in business associations, a research seminar in the regulation of investment-advisory activities, and first-year contracts. ■

New Scholarship Funds Honor Alumni

Three new scholarship funds have been established at the School to honor distinguished alumni. Two are the generous gifts of law firms.

In memory of its founding partner, the Los Angeles firm of Beardsley, Hufstедler & Kemble has established the Charles E. Beardsley Scholarship Fund. Mr. Beardsley, who died on August 6, 1975, was a 1927 graduate of the School. His career spanned nearly half a century and included extensive bar activities on the county, state, and national level. In 1974 he received the Shattuck-Price Award, the highest honor the Los Angeles County Bar Association can bestow, for outstanding contributions to the legal profession and the Association. In addition to his varied contributions to the profession, Mr. Beardsley remained an active friend of the Law School, serving as a member of the Board of Visitors from 1958 to 1963 and as a Benjamin Harrison Fellow of the Law Fund.

To honor two senior partners who have become "Of Counsel," the Los Angeles firm of Latham & Watkins has established the Keene Watkins and Austin H. Peck, Jr. Honorary Scholarship Fund. Keene Watkins, who graduated from the Law School in 1934, has been a member of the firm since 1945, chairing the real estate and finance department for the past several years. He was a member of the School's Board of Visitors

from 1972 to 1974.

Austin Peck, a graduate of the Class of 1938, has practiced with the firm for thirty-five years, serving for many of those years as chairman of the tax department. He, too, is a former member of the Board of Visitors and more recently has been a volunteer and member of the Law Fund's Inner Quad Program.

In addition to the funds instituted by law firms, the Eleanora and C. Fenton Nichols Law Scholarships were recently established by a provision of the will of Eleanora Nichols. Mr. Nichols, a 1915 graduate of the School, was an attorney for San Francisco's Board of Permit Appeals. He died in 1968.

In announcing the new funds, Dean Meyers noted, "I cannot imagine a more appropriate or beneficent tribute to these distinguished alumni. While tuition has reached a staggering \$4426, it still provides only half of the School's income. And, as tuition continues to rise each year, more and more students require financial assistance. These new funds will be a vital source of support for deserving students as well as a permanent memorial to prominent alumni whose careers will serve as models for future generations of Stanford Lawyers. We are especially encouraged by the growing interest and support of law firms in private legal education." ■

SCHOOL NEWS

Kirkwood Finals Held

"Thank you, Mr. Kissinger."

With that slip of the tongue, U.S. Supreme Court Justice Potter Stewart dissipated the nervous tension in Kresge Auditorium. Steven C. Kenninger '77 had just finished his argument in the 24th Annual Marion Rice Kirkwood Moot Court Competition. Justice Stewart, flanked by Judge Constance Baker Motley of the U.S. District Court, Southern District of New York, and California Supreme Court Justice Frank K. Richardson '38, prepared to hear arguments from the remaining counsel.

When all were done, the judges rated A. Randall Friday '76 the best overall advocate and author of the best brief. Michael J. Shepard '77 was chosen second-best

overall advocate. Kenninger and Stephen Leach '76 also argued persuasively in the final round.

The hypothetical case they argued, *United States v. Chaim Jack*, concerned the standards for searches and seizures conducted under airport security procedures. The defendant had been stopped, searched and arrested by a U.S. Marshal, who uncovered drugs during the search. The trial court refused to suppress the evidence, and convicted the defendant. The Court of Appeals reversed on the ground that the search uncovering the drugs violated the Fourth Amendment. In that posture, the case came before Justices Stewart, Motley and Richardson, sitting as the

U. S. Supreme Court.

Persistent and thoughtful questioning marked the judges' participation. Judge Motley frequently asked counsel whether an analogy to the law concerning border searches could be drawn. Justice Richardson pressed counsel to be specific in their citation of facts in the record. Justice Stewart tested counsels' knowledge of cases involving similar facts and legal theories.

In announcing the decision of the judges, Justice Stewart complimented the participants for the quality of their briefs and oral argument. "Our job was difficult," he told the audience, "because it turned out to be a job of assessing degrees of excellence...." ■

Assistant Dean Henderson To Enter Private Practice



Assistant Dean Thelton Henderson will resign effective December 31 to enter private practice.

A former director of the East Palo Alto Legal Aid Office and attorney in the Civil Rights Division of the United States Department of Justice, Dean Henderson will form a new firm in San Francisco with Sanford Rosen, former litigation director for the Mexican-American Legal Defense and Education Fund, and Joseph Remcho, an ACLU staff attorney in San Francisco. According to Dean Henderson, the firm will do "as much civil rights work as we can afford."

Dean Henderson joined the Law School staff in 1968 and since that time has been the chief administrator of the minority admissions program and adviser to student organizations. He will continue his functions on a part-time basis through December. ■



A. Randall Friday '76 delivers his winning oral argument.

SCHOOL NEWS

School, Alumni Pay Tribute to Ehrlich Years at Stanford Law School



The Ehrlichs admire a silver bowl and spoon handcrafted by Italian artisan Alfredo Sciarrotta, a gift from the faculty.



Tom and Ellen Ehrlich with the Honorable George W. Ball.

During the past several months Thomas Ehrlich has been wined, dined, toasted (and yes, even roasted!) by the students, faculty, staff and alumni in recognition of his contributions to the School during his five-year tenure as dean.

Among the memorable evenings held in honor of the Ehrlichs were the annual Christmas banquet, a holiday ball given by the Law School staff, a faculty dinner in the School's Forty-Niner Room, and an alumni dinner hosted by the Stanford Law Society

of San Francisco and Marin.

A highlight of the alumni dinner was a speech by the Honorable George W. Ball, Managing Director of Lehman Brothers, Inc. and former Under Secretary of State. Describing his longtime friendship with Dean Ehrlich, Mr. Ball noted that he first became acquainted with Tom when, as Under Secretary, he received lucid and remarkably "unbureaucratic" memoranda from Tom, who was then special assistant to the Legal Adviser. Mr. Ball made a point of getting to know Tom

and soon asked him to become his special assistant, thus beginning a professional and personal relationship that has continued for more than a decade.

As dean of the School from 1971 to January 1976, when he became the first executive head of the Legal Services Corporation in Washington, D.C., Tom Ehrlich was the primary force behind the funding for the new Law School buildings. His dedication and tireless efforts earned him the admiration of the entire Law School community — alumni,

faculty, students and staff. Associate Dean J. Keith Mann, speaking on behalf of the School, observed of the Ehrlich years: "Much was lavished upon this School during Tom's tenure, but it was the care and concern that Tom and Ellen gave it, and the people in it, this combined endowment of the Ehrlich years is what has created the opportunities that now fall into our hands.... You have given us the treasure of yourselves, and I thank you on behalf of us all because it is a gift shared by us all."

Faculty News

Professor **John Barton** will be on leave during the 1976-77 academic year in London where he will be working at the International Institute for Strategic Studies on guarantee and enforcement arrangements for arms control under a Rockefeller Foundation Conflict in International Relations Fellowship. Together with Dean Charles Meyers, Professor Barton contributed a chapter to the Stanford Institute of Energy Studies book, *The California Nuclear Initiative*. He also co-edited with Lawrence Weiler of the Political Science department an arms control text which will soon be published under the title, *International Arms Control: Issues and Agreements*.

William Baxter, Wm. Benjamin Scott and Luna M. Scott Professor of Law, is currently preparing a book with Professor **Kenneth Scott** and Professor Paul Cootner of the Graduate School of Business on costs of the electronic funds transfer systems (EFTS), a new aspect of retail banking. Such systems would use electronic "point-of-sale" terminals to replace checks and to allow direct bank access from many more locations. Although EFTS would not replace the use of checks and cash, it would enable more banks to compete for a single customer's business. The study is funded by Citicorp.

Associate Professor **Richard Danzig** was awarded a Guggenheim fellowship for a study of decisionmaking in the Supreme Court of the United States from 1938 to 1961. He has also received a grant for study in the humanities from the Rockefeller Foundation.

Marc A. Franklin, Frederick I. Richman Professor of Law, spoke on "The Press and the Law: Collision?" as part of a spring quarter series of lectures on "The Anatomy of the Press," sponsored by the Stanford Alumni Association.

Professor **Paul Goldstein** recently completed the 1976 Supplement to his casebook, *Copyright, Patent, Trademark and Related State Doctrines: Cases and*

Materials. He will soon begin a study of patent law and the patent system, which is supported by the University's Research and Development Fund. He was a guest speaker at a workshop on copyright for practicing lawyers presented by the New York University School of Law on September 7-9 in New York City.

Professor **William Gould** travelled extensively this summer to meet with labor management and government organizations around the world. In Australia he gave talks at the University of New South Wales in Sydney and the Department of Labor in Melbourne. In Tokyo he spoke at the Japan Institute of Labor and also in Fukuoka, Sapporo and Nagoya. He then travelled to Bombay to address the National Institute of Labor Management and the Employers' Federation of India. Finally, he met with trade union employer and government representatives in Germany, Sweden and Norway to discuss new labor legislation in those countries.

John Kaplan, Jackson Eli Reynolds Professor of Law, has received a grant from the Law Enforcement Assistance Administration of the Department of Justice to study "Regulatory Policy and Crime." The project will examine regulatory policies on alcohol, heroin and firearms as they relate to criminal behavior and law enforcement.

Donald Lunde, Cooperating Clinical Associate Professor of Psychiatry and Behavioral Sciences, recently published *Murder and Madness* (San Francisco Book Co.) which explores the myths and realities about mental illness. The book is also part of the Portable Stanford series. Dr. Lunde is currently working on an article, "Brainwashing as a Defense to Criminal Liability," for the *Stanford Law Review*.

Victor Li, Lewis Talbot and Nadine Hearn Shelton Professor of International Legal Studies, spoke on "Law without Lawyers: The Legal System of the People's Republic of China" in June when he participated in *Stanford Today*, a program



Professor William Gould admires the intricate design of a sari made at the Port and Dock Workers' Federation in Bombay, India.

sponsored by the Stanford Annual Fund staff to familiarize Annual Fund volunteers with research currently being done at Stanford.

John Henry Merryman, Sweitzer Professor of Law, participated as a member of the faculty of the Smithsonian Institution and ALI-ABA conference on Legal Problems of Museum Administration IV, which was held at the Los Angeles County Museum in March. In May he addressed the annual meeting of the American Association of Art Museum Directors on the proposed Code of Conduct for Curators. He published an article, "The Refrigerator of Bernard Buffet," in the May issue of the *Hastings Law Review*. Professor Merryman has recently completed research and begun preparation of a series of volumes embodying the results of SLADE, a five-year, six-nation (Chile, Columbia, Costa Rica, Italy, Peru, and Spain) study of law and development in Latin America and Mediterranean Europe. This fall he will offer an interdisciplinary research seminar based on the SLADE data with Professor S.M. Lipset, who currently holds joint appointments in the departments of political science and sociology and is a senior fellow at the Hoover Institution.

Professor **Robert Rabin** has recently published a book, *Perspectives on Tort Law*, and an article on public interest law for the *Stanford Law Review*. He is currently doing research and writing on the history of product safety legislation, as well as the administrative and judicial aspects of regulating product safety.

Professor **Byron Sher** has been elected chairman of the Faculty Senate at Stanford for 1976-77. In June he gave testimony to the Federal Trade Commission in connection with the proposed Trade Regulation Rule on funeral industry practices.

Wald Granted Tenure

The University Board of Trustees approved the faculty recommendation for promotion to professor of law for Associate Professor Michael S. Wald, effective July 1.

A member of the faculty since 1967, Professor Wald has been a leader in developing clinical teaching techniques at the School, particularly in the areas of family law and juvenile law. His work in juvenile law has been extremely influential in the development of legal policy towards children. His latest articles, including "State Care of Children: Proposed Standards for Placement of Children, Supervision of Children in Foster Care, and Termination of Parental Rights," which

was published in the April issue of *Stanford Law Review*, provide important insights for considering the problem of rule versus discretion in the context of juvenile justice.

Professor Wald is currently engaged in three major projects. The first is the development of a set of standards, or model laws, for the legal system to deal with the problem of abused and neglected children. This effort is part of the ABA's Project on Juvenile Justice. The second project is a major empirical study on the impact of different types of intervention programs for helping neglected and abused children. It is being conducted through the Boys Town Center. Professor Wald is also working to develop a theoretical framework for analyzing the issue of children's rights.



Professor Wald's work has attracted the attention of several groups outside the University that are interested in children. He has been asked by many governmental agencies to help draft policies affecting children and has presented courses to juvenile court judges, social work groups and other child care professionals about the proper handling of cases involving children.

In addition to his duties at Stanford, Professor Wald is a consultant to a task force on juvenile justice for the Federal Law Enforcement Administration; a director of the Youth Law Center in San Francisco, the Learning House in Palo Alto and the Boys Town Center on Youth Development at Stanford; and a judge pro tem of the Santa Clara County Juvenile Court.

Professor Wald was born in New York in 1941. He received a B.A. in government from Cornell University in 1963, and in 1967 both an M.A. in political science and an LL.B. from Yale, where he was projects and topics editor of the *Yale Law Journal*.

Four Professors Named To Endowed Chairs

Professors William F. Baxter, Marc A. Franklin, Lawrence M. Friedman, and John Kaplan have been named to endowed chairs.

Professor Baxter, a specialist in antitrust law and regulated industries, will hold the Wm. Benjamin Scott and Luna M. Scott professorship. He succeeds former Stanford Law Professor William Warren, now dean of UCLA Law School. The chair was established in 1970 by Josephine Scott Crocker in memory of her parents.

A former consultant to the Federal Aviation Administration, Professor Baxter has published significant studies on environmental pollution, including the legal and economic aspects of aircraft noise control.

He received an A.B. in economics in 1951 and a J.D. in 1956 from Stanford, where he was comment editor of the *Stanford Law Review*. Following an initial period as an assistant professor of law at Stanford, Professor Baxter became an associate of the Washington, D.C. firm of Covington & Burling. He returned to Stanford in 1960.

In 1968 he was appointed to a Program of Studies established at the Brookings Institution to produce a systematic evaluation of government practices and policies for regulating business activities. That same year he was also a member of White House Task Forces on Antitrust Policy and Communications Policy. He was a consultant to the Federal Reserve Board from 1969 to 1974 and a Fellow at the Center for Advanced Study in the Behavioral Sciences in 1972-73.

Professor Baxter's writings on economic regulation are enriched by an extensive background in economics and mathematics. He has published both technical works for other experts and analyses for laymen, including *People or Penguins: The Case for Optimal Pollution* (1974). He is often called on to speak before leading public and private groups concerned with national economic policies.

He is currently working with Professor Kenneth Scott of the Law School and Professor Paul Cootner of the Stanford Graduate School of Business on an extended study of the technology, economics, and associated legal and regulatory problems of electronic funds transfer systems.

Professor Franklin is the first Frederick I. Richman Professor of Law. The professorship is the gift of Mr. Richman, a prominent Southern California attorney

and 1928 graduate of the Law School.

Nationally recognized as an expert in tort law, Professor Franklin has been a member of the Stanford faculty since 1962. He earned an A.B. in government (1953) and an LL.B. (1956) from Cornell, where he was editor-in-chief of the *Cornell Law Quarterly*. Following a year in private practice in New York, he served as law clerk to Judge Hincks of the U.S. Court of Appeals for the Second Circuit and to Chief Justice of the United States Earl Warren. He taught at Columbia Law School from 1959 until coming to Stanford.

A prolific scholar, Professor Franklin spent the spring semester of 1973 as a Fulbright research scholar at Victoria University in Wellington, New Zealand, where he studied that country's new statutory approach toward compensating victims of most personal injury accidents. He is also the author of a major study of liability for diseased and faulty blood transfusions. His casebook on tort law and his materials for law training at the undergraduate level are widely used throughout the country.

In addition to his courses in the Law School, Professor Franklin offers a course in Communication Law to undergraduates to acquaint non-law students with the issues surrounding government regulation of the mass media. Most recently, he has focused a significant amount of his attention on the communications field and the interaction between free press and media problems and the law and is now preparing a book on the subject. He is also teaching courses about legal regulation of mass media to law students and to students majoring in Communication.

Professor Friedman, whose fields of expertise include American legal history, law and society, and trusts and estates, succeeded Professor Moffatt Hancock as the

Marion Rice Kirkwood Professor of Law on September 1, following the retirement of Professor Hancock. The Kirkwood professorship was established in 1952 by friends of Marion Rice Kirkwood, dean of the Stanford Law School from 1922 to 1945.

A member of the Stanford Law faculty since 1967, Professor Friedman received an A.B. (1948), a J.D. (1951), and an LL.M. (1953) from the University of Chicago, where he was an associate editor of the *University of Chicago Law Review*. After private practice in Chicago from 1955 to 1957, he taught at St. Louis University during 1957-60 and at the University of Wisconsin from 1961 until coming to Stanford.

Professor Friedman is recognized nationally and internationally as an expert on the history of American law and on the relationships between legal systems and their societies. His several books include *Contract Law in America, A Social and Economic Case Study* (1965); *Government and Slum Housing, A Century of Frustration* (1968); and *The Legal System: A Social Science Perspective* (1975). His *A History of American Law*, published in 1973, was nominated for a National Book Award and won the SCRIBES award as the best book on law published in that year. It is the first general history of American law ever published.

Currently, Professor Friedman is involved in several innovative studies in legal history and in law and society, including a major project examining the growth of the criminal justice system in the United States and a path-breaking quantitative study of sixteen state supreme courts over the past century. He has also pioneered in developing teaching materials and methods for the integration of social science knowledge and techniques with legal training.

Professor John Kaplan has been named to the Jackson Eli Reynolds Professorship, formerly held by the late Professor Herbert Packer and Emeritus Professor John Bingham Hurlbut. The chair was established in 1959 from the estate of Jackson Eli Reynolds, who graduated from the University in 1896.

Professor Kaplan, a leading law expert in the field of drug control and author of the nationally known *Marijuana: The New Prohibition* (1970), received an A.B. in physics in 1951 and an LL.B. in 1954 from Harvard, where he was a member of the *Law Review*.

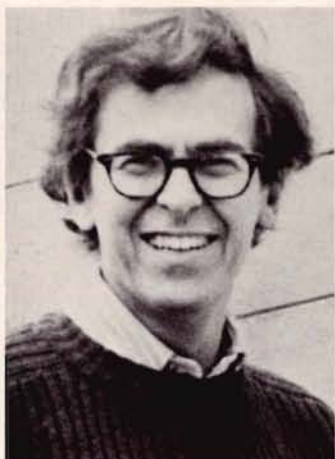
He served as clerk to U.S. Supreme Court Justice Tom Clark in 1954-55. In 1956 he attended the University of Vienna to study criminology. In 1957 he was a Special Attorney for the United States Department of Justice, and between 1958 and 1961 he served as Assistant U.S. Attorney in the Northern District of California, concentrating primarily on civil and criminal fraud work.

During 1962-64 he was an associate professor of law at Northwestern University and in 1964-65 a visiting associate professor of law at the University of California at Berkeley. He joined the Stanford faculty in 1965. In 1969-70 he attended the London Institute for the study of Drug Dependence.

Since entering academic life, Professor Kaplan has published widely in the fields of constitutional law in the racial area, criminal law and evidence, and he has established himself as a leading scholar and teacher in the latter two fields. He has also written several books for classroom use. Beyond his law school courses, Professor Kaplan offers an extraordinarily popular undergraduate law course, *The Criminal Law and the Criminal System*, and he has also taught an undergraduate course on the Bill of Rights.



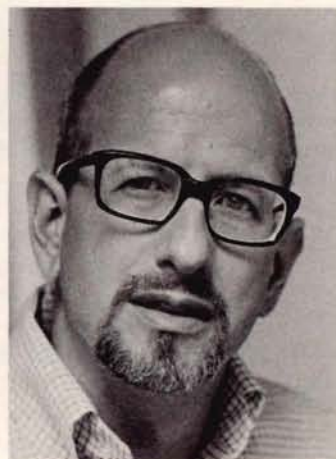
John Kaplan



Lawrence Friedman



William Baxter



Marc Franklin

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If "Yes", how often? ☐ 3 times ☐ 4 times

The Alumni Office Also Wants To Hear From You!

What types of alumni activities would you be interested in attending at the School _____?
in your city _____?

Traditionally, reunions are held at the School during Alumni Weekend each spring. Would you prefer to attend your reunion on a football weekend in the fall?
☐ Yes ☐ No

What activities would you enjoy during Alumni Weekend?

Additional comments? (If you have any news for the Class Notes section of the next *Lawyer*, please include them here.)

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