Law Quadrangle Notes

The University of Michigan Law School

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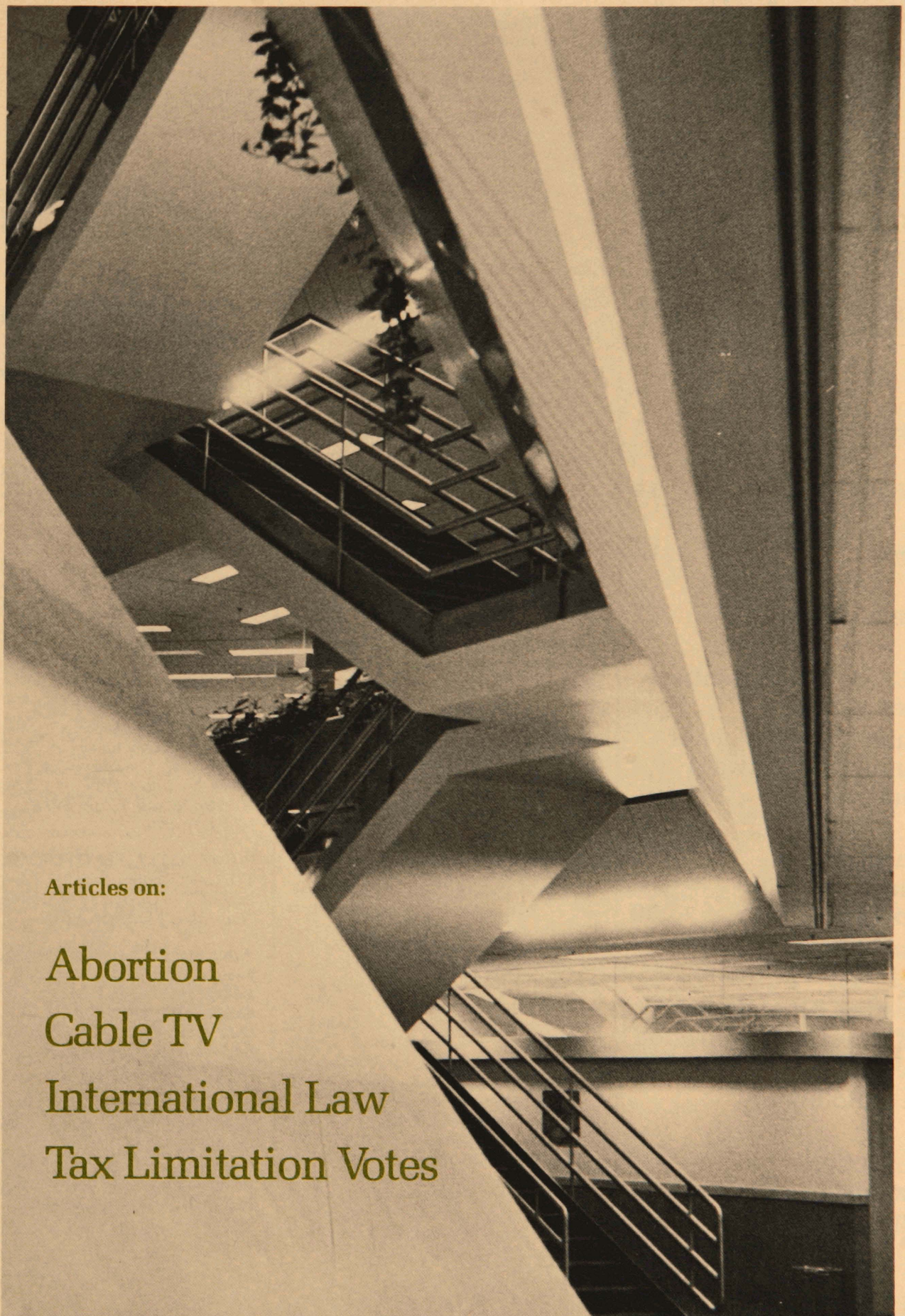

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briefs

Professor St. Antoine On the Persisting Problem of Picketing

"Peaceful picketing," the Supreme Court has said, "is the workingman's means of communication." For forty years the court treated peaceful picketing as a form of free speech entitled to constitutional protection under the first amendment except where it was coercive or directed to achieve unlawful objectives. Yet, argues Michigan labor law expert Theodore J. St. Antoine, the Supreme Court's 1980 decision in *NLRB v. Retail Clerk's Local 1001* [Safeco] suggests a change.

In the first lecture of this year's Donahue Series at Suffolk University in Boston, Professor St. Antoine held that "*Safeco* was the first time the Supreme Court has ever clearly sustained a ban on peaceful, orderly picketing addressed to, and calling for seemingly lawful responses by, individual consumers acting on their own." Furthermore, *Safeco* is unlikely to put an end to debate, said St. Antoine, since it "comes close to being an unreasoned decision on the issue of picketing as free speech." There was no majority opinion on the constitutional question in the case, St. Antoine pointed out, so "we do not have five Justices in agreement on a rationale for constitutionally proscribing peaceful secondary consumer picketing."

This sort of picketing, which was involved in *Safeco*, "asks consumers not to buy a nonunion product being distributed by a second party." At least two important questions about such picketing remained unanswered by the court's opinion in an earlier case known as "Tree Fruits" where the court upheld the picketing of nonunion apples which were only one of many products handled by a supermarket chain, St. Antoine said. First, would such picketing be upheld where the boycotted product constituted a substantial part of the secondary retailer's business?

"Second, as a matter of constitutional free speech, could a union be forbidden to engage in peaceful, orderly picketing asking individual members of the consuming public to refrain either from purchasing a primary product . . . or from patronizing the retailer entirely?" Professor St. Antoine's analysis of the opinions in *Safeco* stressed the failure of the court to address this constitutional question adequately.

There has been a continuing debate about picketing, St. Antoine said. One line of analysis has held "that as a means of communication, picketing is free speech and is entitled to every constitutional protection afforded any other form of expression." In this view it should make little difference whether a message appears on a placard carried by an individual, or whether it appears in a newspaper, a handbill, or a bumper sticker. "The opposing line of analysis," said St. Antoine, "is that picketing is . . . 'speech plus.' That 'plus' element . . . enables picketing to be regulated in ways that would not be constitutionally tolerated for other forms of communication."

The Supreme Court's history of treating picketing as constitutionally protected free speech began in a 1940 case, *Thornhill v. Alabama*, in which the court held that abridgement of the right to picket "can be justified only where the clear danger of substantive evils arises. . . ."

Constitutionally allowable limitations on picketing have been recognized by the court where the end pursued was unlawful, or where employees exerted *concerted* pressure on an employer, St. Antoine said. Yet Justice Douglas has also written that "picketing by an organized group is more than free speech, since it . . . may induce action . . . irrespective of the nature of the ideas which are being disseminated."

This could happen if picketers are physically threatening or intimidating, St. Antoine said, but "then we have a problem in the law of assault, not of the First Amendment." Picketing might also trigger activity in a viewer when it functions as a "signal," but the same would be true of "an unfair list, or a red flag," St. Antoine reasoned.

"Perhaps the deepest objection to picketing's claims as protected speech," he continued, "is that it

Theodore J. St. Antoine

Francis A. Allen

involves no intellectual appeal, no exchange of ideas." While granting the argument has some truth, St. Antoine pointed out that the same could be said of bumperstickers "or such ancient political battle cries as 'Tippecanoe and Tyler too.' " The physical aspect of picketing, similarly, is not a distinguishing feature. St. Antoine said, "I see no basis for distinguishing constitutionally between the handbiller and the picketer. Each has the capacity to confront us with an accusing pair of eyes."

Through such parallels, Professor St. Antoine constructed his thesis that picketing must be seen as constitutionally protected communication. "To the extent that particular picketing may properly be subject to regulation or prohibition, it is because of elements that would similarly subject other particular communications to regulation or prohibition," he said.

The picket line is the traditional means of communication of working men and women, said St. Antoine. If their message or object in picketing is "constitutionally beyond the reach of the law, so too is peaceful, orderly picketing" to secure it. If picketers' goals are lawful, and their actions peaceful, then their means should be approved. "Surely different treatment would not be warranted," St. Antoine argued, "just because picketing may be the most visible, efficacious way for working people to get their message across to their intended audience at the crucial moment of decision."

In conclusion Professor St. Antoine said that if the Constitution protects the rights of middle class people to use their natural means of communication, the media, then "working men and women should be no less free to use theirs, the picket line." Professor St. Antoine's speech will be published in full in the *Suffolk University Law Review*, the publication which sponsors the Donahue Lecture Series. The Lectures honor the memory of a long-time Associate Justice of the Superior Court of Massachusetts, Frank J. Donahue.

Professor Allen Speaks On Penal Policy and Consensual Behavior

Professor Francis A. Allen delivered the Siebenthaler Lecture sponsored by Salmon P. Chase College of Law at Northern Kentucky University in February. In his speech Professor Allen, who is Edson R. Sunderland Professor of Law at Michigan, discussed the history of American criminal justice, focusing on "problems arising out of sumptuary criminal regulations enacted, in significant part, to vindicate certain moral attitudes—attitudes that typically are in great contention and dispute within contemporary society."

Professor Allen pointed out that laws defining sumptuary offenses, by contrast with other criminal legislation, "bespeak a morality that in greater or lesser degree is rejected and sometimes actively opposed by large groups within the community." The history of the American experience with such legislation makes the point, Professor Allen said. "For the most part criminal sanctions have been resorted to during periods when the older consensus has broken down, and when the proponents of repression are experiencing grave anxieties about the survival of the traditional moral codes. Criminal enforcement of morals at such times displays a critical loss of confidence in the efficacy of persuasion, education and example to preserve the traditional values."

Professor Allen cited the telling instance of the ratification of the Eighteenth Amendment which only came about after the prohibition movement was in disarray. The temperance movement began as an effort at persuasion, he demonstrated, rather than at regulation. It changed, Professor Allen said, as reformers lost confidence and changed their "conception of those who were to be the objects of reform, a progression from persons requiring compassion and assistance to those seen as adversaries and enemies."

Frequently sumptuary criminal regulation is advocated in part for symbolic reasons. This explains "the willingness of the proponents to sponsor or urge the retention of criminal provisions that are patently unenforcable, or unenforcable without exhorbitant costs that even the proponents are unwilling to incur." Yet, Professor Allen cautioned, this has lead to situations "in which law enforcement was demoralized, sanc-

tions were applied capriciously and hence unjustly, and in which public life was corrupted and hypocrisy reigned," notably during Prohibition.

Sumptuary legislation which is widely opposed can be passed because of the narrow focus of its proponents. Similarly, limited-interest groups can sometimes exercise veto power even when they cannot effect legislation favoring their positions, by refusing to compromise or moderate their stance. Yet their success can result in decreased respect for law, if it means statutes are enacted but not consistently enforced.

In conclusion Professor Allen urged that law has a morality which offers some important guidelines: "No law should be passed imposing stigmatic penal sanctions on persons that does not clearly define the behavior that is made criminal. No such law should be enacted before realistic appraisal is made of the chance of its achieving its stated objectives; without estimating the social costs incurred and the personal values sacrificed in efforts to enforce it; without thinking about what is lost, not only if the enforcement effort fails, but also if it succeeds."

Judge Wade McCree Receives Various Honors

Former Solicitor General of the United States Wade H. McCree, Jr. joined the Law School faculty this fall. Since then he has been kept almost as busy accepting accolades as in giving students the benefits of his experience as a judge and as one of the nation's most distinguished lawyers.

Upon arrival at the Law School Judge McCree was named first holder of the Lewis W. Simes Professorship of Law. Simes was a noted authority on property law who taught at Michigan from 1932 until 1959. After that time, he held emeritus status until his death in 1974.

Judge McCree was also invited to deliver the second annual Dave Miller Memorial Lecture at Wayne State University in October. His topic on that occasion was "The Federal Government in the Supreme Court: Who Determines Policy?" His speech examined the relationship between the role of the Solicitor General and the overall impact of the federal government on public policy. During his own term as Solicitor General, McCree argued some twenty-five cases before the Supreme Court.

The lecture series was established in 1979 with a grant from the United Auto Workers Retired and Older Workers Council to honor Dave Miller who was a founding member of the National Council of Senior Citizens. Judge McCree was introduced on the occasion of his lecture by current president of the United Auto Workers International Union, Douglas Fraser.

More recently Judge McCree received recognition from the military. Last December he was inducted into the Hall of Fame at the United States Army Infantry Officers Candidate School at Fort Bennings, Georgia. McCree, who attended the school, served four years in the United States Army during World War II and was awarded the Combat Infantry Badge and the Bronze Star. His picture now hangs in Wigle Hall with those of other distinguished graduates of the Officers Candidate School.

Finally, Judge McCree has been awarded an honorary Doctorate of Humane Letters from Hebrew Union College in Cincinnati, Ohio. The degree, which was handed out at Founders' Day exercises in March, will be the twenty-fifth honorary degree that Judge McCree has received in his distinguished career as a lawyer and jurist.

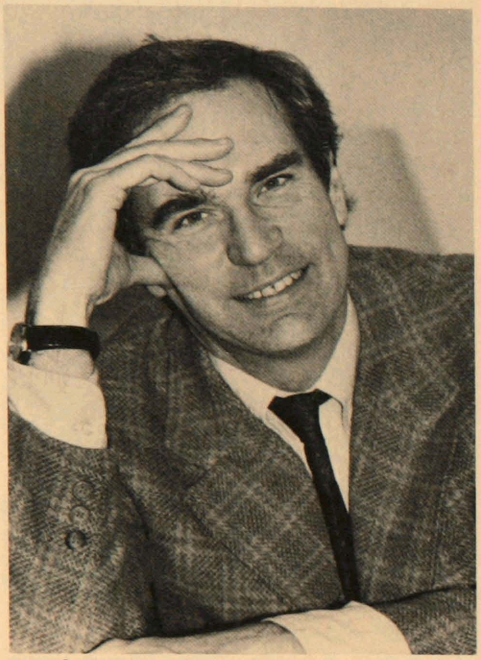
Lawyers Club Made Accessible To Handicapped

The theme of 1981, proclaimed the International Year of Disabled Persons by the United Nations, was "The Full Participation of Disabled Persons in their Society." The University of Michigan sponsored various activities to remind the community of the role disabled people have and do play at Michigan. Changes were also financed to facilitate the continuing participation of the disabled in all phases of campus life.

One small but important change at the Law School was the replacement of the steps leading into the Lawyers Club from State Street with a gradual ramp. This makes wheelchair access to the building considerably easier to manage.

Wade H. McCree

Before renovation this entrance to the Lawyers Club was daunting to people in wheelchairs.



Joseph Vining

Grant Will Support Vining's Work on Legal Authority

Professor Joseph Vining of the University of Michigan Law School has won a Senior Fellowship for Independent Study and Research from the National Endowment in the Humanities. Vining is an expert in administrative law who served on the staff of the President's Commission on Law Enforcement and the Administration of Justice under Lyndon Johnson. The fellowship will enable Vining to devote the next academic year to completing a book entitled *The Authoritative and the Authoritarian*. The book will explore the prospects for individual freedom and willing obedience to law in an increasingly bureaucratized world.

Vining will criticize recent developments in legal practice in the light of theoretical and historical views on the necessary and appropriate role of law in society. Vining's aim is to bring the traditional presuppositions about legal method in our culture to bear on the growing institutional impersonality of the legal system.

In his current research, as in his previous book *Legal Identity: The Coming of Age of Public Law*, Professor Vining is concerned with the relationship between individuals and institutions. While his earlier work dealt with the nature of the persons who speak to courts, this study of the authoritative and the authoritarian will examine the voice of the courts which articulates law.

Complaints have been increasing, Vining says, about the decline of the authority of law in our society. He hypothesizes that changes in institutional structures may be partly responsible. Lawyers have traditionally turned to documents and texts for authoritative statements of law, Vining says, notably to Supreme Court opinions. The scrupulous reading which lawyers give such texts expresses faith that a responsible individual mind has conceived and composed them. One cause of the decline in the authority of law, Vining suggests, may be the growing recognition that judicial opinions are produced by a bureaucratic system which seems uncentered and mindless.

This is an institutional development over which society has some control. Reform that will counter this disintegration of the authority of law may be hoped for, Vining says, when we better understand which elements in our traditional legal system have been essential in eliciting willing obedience to law. Vining's intention is to clarify how legal institutions and practice express or counter the theoretical presuppositions of the legal system. His study of what has lent legal texts their authority will draw on the history of theology, another discipline where the relationship of language, belief, and behavior is crucial.

Vining is convinced that there are methodological affinities between law and theology, and that the discussion of these similarities may help us to see more clearly how to identify and foster those aspects of the legal system which are essential to preserving its legitimacy and authority.

Law School Fund Historical Update

A short history of the Law School Fund was included in Professor Roy Proffit's article, "Reading . . . Between the Sheets," which appeared in the Summer 1981 issue of *Law Quadrangle Notes*. The summer issue carries the annual report of the Fund and alumni notes.

In his article Professor Proffitt wrote that no complete list of those who participated in the initial planning session for the Fund that occurred in February of 1961 was available. Happily, a copy of the minutes of that historic meeting has since come to light. To correct the record, and to acknowledge our appreciation for their important contributions, we are now listing the names of all alumni and faculty who attended:

Alumni:

Hon. James R. Breakey, Jr., Ann Arbor, MI
Chester J. Byrns, Benton Harbor, MI
Ralph M. Carson, New York City
Glenn M. Coulter, Detroit, MI
George E. Diethelm, New York City
Thomas V. Koykka, Cleveland, OH
Sam Ford Massie, Jr., Grand Rapids, MI
John H. Pickering, Washington, DC
James A. Sprowl, Chicago, IL
Jack L. White, Cleveland, OH
Herbert E. Wilson, Indianapolis, IN

Faculty:

Dean Allan F. Smith
Associate Dean Charles W. Joiner
Associate Dean Russell A. Smith
Professor John W. Reed

Book Award Commends Sax's Reflections On the National Parks

Professor Joseph Sax of the Law School has won the University of Michigan Press Book Award for 1981. This award, which is given to a member of the teaching and research staff of the University whose book has added distinction to the Michigan Press list, recognizes Sax's latest book, *Mountains Without Handrails: Reflections on the National Parks*.

The award describes the book thus: "Joseph L. Sax gives perspective to the longstanding and bitter battles over the use of our national parklands: hikers vs. cyclists; ski resort developers vs. wilderness advocates; 'industrial tourism' vs. recreational 'elitism.' Drawing upon the most controversial disputes of recent years—those involving Yosemite National Park, the Colorado River in the Grand Canyon, and the Disney Plan for California's Mineral King Valley—Professor Sax proposed a novel scheme for the protection and management of America's national parks. Nathaniel Reed, former Assistant Secretary of the Department of the Interior for Fish, Wildlife, and Parks says in his review, 'Brilliant, daring to break new ground, . . . the book is a must for concerned conservationists. Joseph Sax's keen legal mind and penetrating vision has produced a highly controversial review and blueprint for future management of America's unique national park system.' "

Mountains Without Handrails, which is currently in its fourth paperback edition, has received much such praise since its original publication in 1980. Reviewers have commended Sax's ability to make a philosophical and moral argument in a tone that is neither simplistic nor "too preachy."

Here is an example of the style of Sax's comments: "While nature is not a uniquely suitable setting, it seems to have a peculiar power to stimulate us to reflectiveness by its awesomeness and grandeur, its complexity, the unfamiliarity of untrammeled ecosystems to urban residents, and the absence of distraction. The special additional claim for nature as a setting is that it not only promotes self-understanding, but also an understanding of the world in which we live. Our initial response to nature is often awe and wonderment: trees that have survived for millenia; a profusion of flowers in the seeming sterility of the desert; predator and prey living in equilibrium. These marvels are intriguing, but their appeal is not merely aesthetic. Nature is also a successful model of many things that human communities seek: continuity, stability and sustenance, adaptation, sustained productivity, diversity and evolutionary change. The frequent observations that natural systems renew themselves without exhaustion of resources, that they thrive on tolerance for diversity, and they resist the arrogance of the conqueror all seem to give confirmation to the intuitions of the contemplative recreationist."

In *Mountains Without Handrails* Sax says, "Early park supporters had an idea in their minds about the importance to people of encounters with nature." This picture of a Michigan student in 1868, visiting what was to become Isle Royale National Park, shows the solitary shoreline that awaited the contemplation of nineteenth century adventurers.

It is Sax's view that we should use the national parks to develop our tastes for natural beauty, much as we use museums to develop our tastes in art. National parks should be places where we learn how to enjoy reflective, independent recreation, Sax asserts. In this he exemplifies his own characterization of preservationists: "The preservationist is not an elitist who wants to exclude others, notwithstanding popular opinion to the contrary; he is a moralist who wants to convert them."

Professor Sax, who is a national authority on environmental law, is the author of two earlier books, *Defending the Environment* and *Water Law: Planning and Policy*. He is co-author of the book *Water and Water Rights* and has written numerous articles for legal journals and for national magazines.

Alfred Conard

Alfred Conard's Achievements

To the sound of enthusiastic applause reverberating through the large lecture hall in which his Enterprise Organization course met and carrying the champagne bottle with which the final class lucky enough to profit from his brilliant, exacting instruction rewarded him, Professor Alfred Conard swept out the door. For thirty-seven years Professor Conard has been stimulating law students and exacting the highest levels of performance from them. Tributes by former students and colleagues all expressed the conviction that Professor Conard will continue to educate through his writing and his example for many years.

Professor Conard came to Michigan in 1954. In his teaching and contributions to curricular planning, he has always been governed by his sense of the particular character and importance of legal education. Professor Conard is one of the foremost authorities in the corporate field; in addition he is a comparatist of international reputation. He has advocated the use of empirical research in legal scholarship and has demonstrated how that can be done to powerful and elegant effect.

Even in fields that were not his central concern, Professor Conard's contributions have been highly original and important. "Insurance," said Professor Jeffrey O'Connell of University of Virginia Law School, "is something that he has dealt with using only his left hand, just occasionally spending time with it. . . . But when he focused on insurance . . . the result was . . . as fine a piece on the nature and impact of insurance as anybody has ever done."

Former colleague Professor Stanley Siegel of the UCLA Law Faculty has spoken of Conard's wider contribution: "Al Conard is the magic combination of scholar, teacher, and colleague that we all seek to become. He has written authoritatively on an enormous range of subjects, from the problems of the tort system of reparation for automobile accidents to the responsibilities of corporate directors, from the abstraction of a complete rethinking of the perspectives of corporations to the practical details of revising the Model Business Corporation Act. He has not limited himself to the 'safe' and ready solutions to legal problems, but instead has blazed new paths. To name but a few: no-fault auto insurance, elimination of the concept of corporate stated capital, wholesale revision of the derivative suit, reexamination of the personal liability of corporate directors. His approach is innovative, integrative, and scholarly. . . .

"Alfred Conard, a very special colleague, a most gifted teacher and scholar, . . . is a gift from The University of Michigan to the world of law, and to those fortunate ones . . . who have the joy of working with him."

Down with Equality Says Westen in *Harvard Law Review*

Law School Professor Peter Westen argues that equality is an idea that should be "banished from moral and legal discourse as an explanatory norm." In a *Harvard Law Review* article entitled "The Empty Idea of Equality" Westen maintains that this concept which pervades Western thought is really both superfluous and dangerously confusing.

Discussing rights in terms of equality is unnecessary, Westen claims, because "the entitlements people mistakenly attribute to the idea of equality all derive from external substantive rights." The claim that "likes should be treated alike," is tautological; it offers no moral, administrative, or legal guide in the absence of specific rules with regard to which individuals are judged to be the same.

In his article, Westen analyzes representative equal protection cases, demonstrating that the idea of equality is superfluous to them, since it is "logically indistinguishable from the standard formula for distributive justice, that is, that 'every person should be given his due.' " One modern day application of Westen's argument which is discussed in the article is the proposed Equal Rights Amendment (ERA).

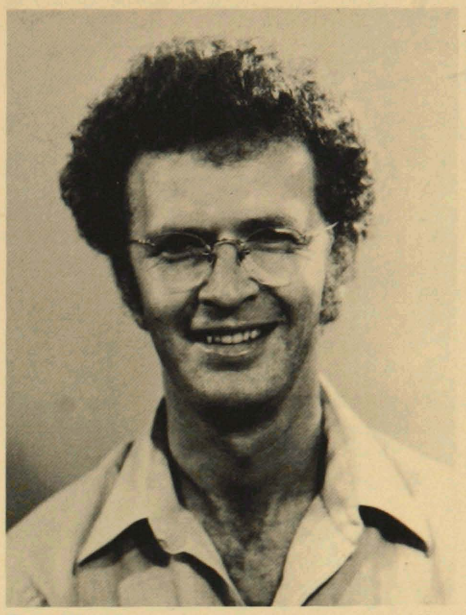
The ERA seeks to guarantee that "equality of rights under the law shall not be denied . . . on account of sex." Westen argues that the term "equality" adds "nothing whatever" to the substance and meaning of the amendment. Without the use of the word "equality," says Westen, the ERA would have essentially the same message and implications: "Rights under the law shall not be denied . . . on account of sex."

Westen goes on to argue that the idea of equality is not merely redundant but also harmful to logical, moral, and political discourse. Throughout history, he says, respect

for the rhetoric of equality has caused "values asserted in the form of equality to carry greater moral and legal weight than they deserve on their merits." The result is that such arguments "invariably place all opposing arguments on the defensive."

In the case of the Equal Rights Amendment, Westen suggests that the traditional prestige of the concept of equality "may explain why proponents of the ERA drafted it in the language of equality." Their adversaries, perhaps because they do not perceive the tautological nature of the concept, "are placed in the uncomfortable position of having to argue against equality."

Another case in point, according to Westen, is the 1964 Supreme Court case, *Reynolds v. Sims*, dealing with the apportionment of representatives for state legislatures on the basis of population. "Chief Justice Earl Warren, advocating the substantive principle of 'one person, one vote,' chose to frame his position as an argument for 'equality.' As a consequence, Justice John Harlan, writing for the dissenters, was placed on the defensive," Westen says. He could not deny that the 14th Amendment guarantees equality, nor could he deny that equality means treating equals equally. Therefore, says Westen, "Justice Harlan found himself in the unhappy position of having to argue against equality."



Peter Westen

Until people come to recognize that 'equality' is an empty concept which has no particular substantive content, use of the rhetoric of equality will probably continue to "skew moral and political discourse." When people realize that every moral and legal argument can be framed in the form of an argument for equality, the concept should lose its usefulness. "People will answer arguments for equality by making counterarguments for equality," based on a different standard of comparison. But until people see that equality is a derivative concept, it will be used to mystity the rights with which it becomes associated and will distort decisionmaking, Westen concluded.

The Concept of Equality: Peter Westen States His Thesis

Equality. Wars are waged over it, states are founded on it, revolutions are started in its name. Aristotle declared it the basis of all just societies. A "just" society, he said, is an "equal" society, a society that treats equals equally.

But what does equality really mean? What do we mean by saying two things are empirically equal? Or two people are legally equal?

To say persons or things are equal cannot mean they are empirically or legally the same in every respect. No two things or persons are ever entirely the same. Sticks of wood that are empirically the same in length are empirically different in the space they occupy and the matter they contain. Rich and poor people who are legally the same when it comes to voting are legally different when it comes to medicaid.

Nor does "equal" mean that two persons or things are empirically or legally the same in some random respect. For all persons and things are the same in some respect. Rocks and flowers contain the same empirical kind of electrons. Saints and criminals have the same legal right to be free from cruel and unusual punishment.

To say things are equal means they are the same by reference to the particular standard of measurement at hand, whatever the empirical or legal standard may be. Sticks of wood that are equal as measured by length may be unequal as measured by thickness. Saints and criminals who are equal as measured by legal standards against torture are unequal as measured by legal standards for voting.

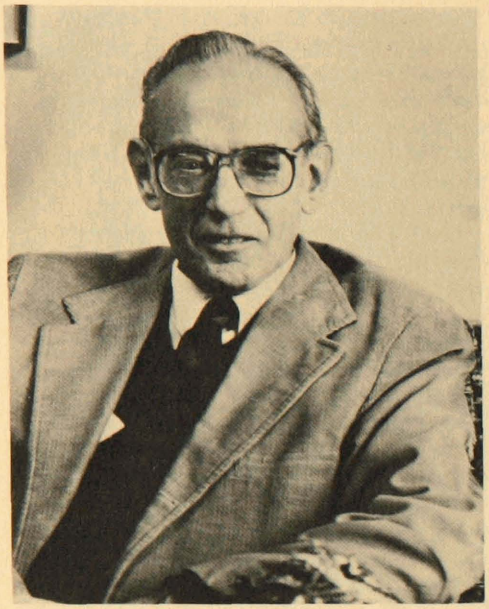
In short, equality and inequality have no meaning apart from the particular standard at hand. They are simply a spelling out of what it means to apply a given empirical or legal standard to two persons or things. In the absence of agreement on an applicable standard, equalities and inequalities cannot exist. Given agreement on an applicable standard, equalities and inequalities ensue automatically.

Consider the relationship between matching red apples and green apples. Are they equal, or are they not? Obviously it depends upon the standard of measurement. If we measure them by size, or shape, or weight, they are equal. If we measure them by color, taste, or acidity, they are unequal. And if we cannot decide whether to measure them by size or by color, we cannot tell whether they are equal or unequal.

The same also holds for issues of moral and legal equality. Take equality in wages and salaries, for example. People disagree about whether salaries should be based on standards of merit, or need, or supply and demand. Each standard is a measure for defining "equals." Employees who are equal by per-capita standards may be unequal by standards of need. Employees who are equal by need may be unequal by merit. The real dispute is not about equality (which each standard provides), but about the standard by which equality is to be measured.

This means that all arguments about equality are derivative. Is it "equal" or "unequal" to base salaries on merit as opposed to need? The answer turns on one's standards. By standards of merit, it is perfectly equal. By standards of need, it is unequal. To call it "unequal" is simply a roundabout way of saying that one prefers a standard of need to a standard of merit.

So what about the wars and revolutions? What about Aristotle? Doesn't equality itself count for anything? Yes and no. Equality is as important and unimportant—as good and bad—as the moral and legal standards by which it is measured. To say two people are legally equal means that some moral or written law exists that treats them the same, but it says nothing at all about the content of the law. Aristotle's principle that "equals should be treated equally" means: people who by law should be treated the same should by law be treated the same. It is perfectly true. But it is not very interesting.



Allan Smith

Allan Smith Reflects on University Administration

Throughout a 35-year academic career at The University of Michigan, Allan F. Smith has learned to accept challenges gracefully—as Law School dean, the U-M's vice-president for academic affairs, interim U-M president, and law professor.

Now, his latest challenge is retirement. This past fall term, Smith taught his last class in property law at the Law School, having reached the retirement age of 70. After a winter vacation in Florida, he plans to return to Ann Arbor. He is due to receive the formal "emeritus" status in May and is considering an offer from the Law School to teach a post-retirement seminar starting next fall.

Looking back at accomplishments during his career, Smith views the equanimity with which the U-M administration dealt with periods of student turbulence in the 1960s and 1970s, while he was vice-president for academic affairs, as a significant achievement. "As a group, I feel administrators of the University did a better job of keeping control over all situations—in avoiding destruction and keeping the place from shutting down—than any other major institution in the country," said Smith in a recent interview. "Of course, much of the credit must go to Robben Fleming," who was President of the University at that time.

Among other accomplishments which were gratifying to him during his administrative career, Smith lists the "nurturing" of a newly created U-M Center for Continuing Education for Women, creation of the Institute for the Study of Mental Retardation and Related Disabilities, development of U-M area centers during 1965-1974 under Ford Foundation and governmental grants, and finally successful efforts while he was interim president to obtain a "Certificate of Need" for the U-M's Replacement Hospital Project which is now under way. He said he also relishes his work with Eugene and Sadye Power on the performing arts building for the University.

Today, however, the focus of administrative attention has shifted to the economic sphere, as the U-M—among other higher education institutions—must find ways to cut costs and, in some cases, reduce programs without compromising on quality. "The problems the University faces now, in terms of money, are of a dimension I never had to experience," Smith said.

"I've never been an advocate of size for its own sake. On the contrary, I think the process we've followed for 30 years of controlling growth through individual school or college decisions of what the size should be is the best procedure to follow. I'm not at all sure we didn't get overextended, but I still think those schools and colleges can best determine what their capacities are, and what the demand for their product is."

Smith maintains that, despite financial problems, growth of units should not be slowed in areas where there is great societal need. For example, "the School of Business Administration faces great demand for their services and product, and I see no reason why they shouldn't expand," noted Smith.

"In the literary college, neither the undergraduate program nor the graduate program should necessarily get much smaller. Since tuition revenue today represents some 38 percent of the University's general fund budget, the program would have to be reduced considerably to realize any budgetary benefits."

Smith said a major difficulty for U-M administrators, especially on budget matters, is having to be accountable to many constituencies. President Shapiro and the vice-president for academic affairs, B. E. Frye, "have a tough job because they have to let Lansing and our alumni know that the University's fiscal problems are very real and that we do risk declining quality. At the same time, they have to find a way to let the internal units know that all is not lost and that this is still a very strong institution."

Smith said he felt University-wide budget pressures have not necessarily meant greater centralization of University governance. "I have very little sympathy with the notion that we have suddenly become a highly centralized institution. Yet he said he believes certain matters, such as program discontinuance, can best be decided "by people who are paid to think at a University level."

A native of Nebraska, Smith graduated in 1933 from Nebraska State Teachers College and planned to become a high school English teacher. But because of limited economic opportunities in teaching at that time, he took a job as a legal stenographer for three years, and then went on to receive a law degree from the University of Nebraska in 1940.

He came to the U-M in 1940 to pursue advanced law degrees. Gov-

ernment and military service intervened, and he returned to the U-M in 1946, joining the law faculty as lecturer. An authority on the law of property, Professor Smith has made the field accessible in his perennially popular first-year course. University Regent Thomas Roach is one of Smith's former students in the course, as are the parents of several students who were fortunate enough to be in Smith's final Property class this fall. All Smith's students seem to agree that he was challenging yet fair and engaging, revealing the interest and importance of Property Law.

Professor Smith became a full professor in 1953, then Dean of the Law School. As Dean, Smith played a critical role. Although Michigan had already been a great law school for many years, a 1959 evaluation expressed concern about the homogeneity of the faculty which had resulted from the retirement of several distinguished scholars. Taking over the deanship in 1960, Smith moved to diversify the curriculum and the faculty, while preserving the traditional high standards of the institution. According to current dean Terrance Sandalow, Smith's deanship marked "the beginning of the modern history of the Law School"; during it "a large number of exceedingly able faculty members," were hired, "many of whom have in the years since become important members of the faculty and major figures in the law." At the same time that Smith worked to broaden the intellectual activities of the School, he also preserved the spirit of collegiality which characterizes the Michigan faculty.

He left the deanship to become vice-president for academic affairs in 1965, guiding academic programs for the University for nine years. In 1979 he was asked by the Regents to serve as interim president of the University until a successor was named for retiring President Robben Fleming.

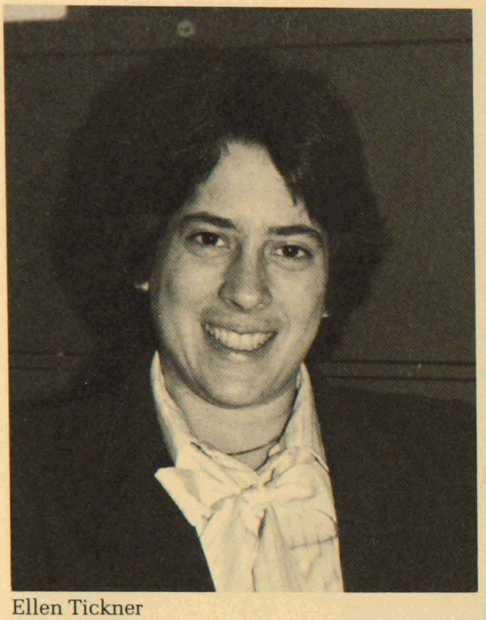
In December 1980, upon completion of his presidency, Smith was awarded an honorary doctor of laws degree by the Regents. The citation noted in part: "Rarely has a single person had such a telling impact on every facet of the University's mission. Allan Smith is at once author, scholar, teacher, educational leader and spokesman. The Regents thus recognize this remarkably talented and dedicated friend."

by Harley Schwadron

Economics Building Destroyed by Fire

On Christmas Eve a fire, which officials say was set by an arsonist, destroyed the University of Michigan Economics Building. Constructed in various stages, the building was begun in the 1840s. It was the oldest classroom building still in use on the University campus.

The Law School sponsors a joint program in Law and Economics, and several law professors hold joint appointments in Economics, maintaining offices there as well as in the Law Quadrangle. Many of them lost valuable private libraries and irreplaceable research materials in the fire. Among those who sustained serious losses was Law School faculty member William James Adams. His records and results of a year spent doing research in France were collected in a file cabinet that was in the most heavily burned section of the building. All papers not destroyed by flames have been subjected to a freeze-drying process that minimizes water damage resulting from the fire-fighting efforts.



Ellen Tickner

Parental Rights of Imprisoned at Issue In Clinic Case

The Michigan Supreme Court will soon decide a case which has received national attention. Termination of the parental rights of an incarcerated mother is the problem in *In re Taurus F_____*. Few cases which concern termination of parental rights reach the Supreme Court since appellants in these cases have only one appeal of right. The constitutionality of the 1972 Michigan statute under which Mrs. F_____'s parental rights were terminated in Probate Court is at issue. The jurisdiction of the court over the child is also contested, and the Supreme Court opinion could well address the scope of dependency jurisdiction and offer probate courts guidance about procedure in such cases.

Both sides of the question in the F_____ case were argued by attorneys with connections to the University of Michigan Law School. Chief counsel for the mother is Robert F. Gillett of Wayne County Neighborhood Legal Services who graduated from the Law School in 1978. The American Civil Liberties Union and Prison Legal Services have submitted Amicus Curiae briefs which maintain, as does Gillett, that Mrs. F_____ was wrongfully denied her parental rights solely because of her imprisonment.

Supervising attorney with the University's Child Advocacy Law Clinic, Ellen Tickner represented the Washtenaw County Department of Social Services in the case, both at the Supreme Court and earlier at an evidentiary hearing and finding of fact in Probate Court. Representation of the government child protection agency as of Counsel to the Washtenaw County Prosecuting Attorney is only one aspect of the work of this law clinic. Students work in two other Michigan counties, defending parents in one and acting as *guardian ad litem* in another. Thus, they get three perspectives on child abuse and neglect cases. The law students have primary responsibility for clinic cases but are closely supervised by experienced attorneys as well as a child psychiatrist and a social worker.

Clinic students had primary responsibility for this case from its inception in 1978. They represented Washtenaw County Department of Social Services at the termination proceeding, at the Court of Appeals, and at a Supreme Court-ordered evidentiary hearing. That hearing extended over the semester break, when students are away from Ann Arbor, so Tickner took over as lead counsel. Since law students may not appear before the Supreme Court, Tickner has continued in that role.

Nevertheless, students have remained closely involved with the case. The Supreme Court heard oral arguments during the fall semester. This provided students a unique learning experience. All clinic participants, accompanied by Professor Donald Duquette who heads the clinic, Professor David Chambers, and the members of his seminar in Child Abuse and Neglect, went to Lansing to hear the arguments presented. Students read the briefs prepared by both sides and met immediately after the arguments for a seminar session to discuss the case with Tickner and with the *guardian ad litem* who also attended.

Arguments in the case turn on whether the mother's sister, Michelle T_____, was available to provide the child, Taurus, an adequate home until the mother's release from prison. According to Tickner, Mrs. T_____ set conditions under which she would care for Taurus which were unacceptable to Mrs. F_____. Because no agreement was reached about the child's care, Mrs. T_____ was not truly "available," Tickner argued, defending the Department of Social Services's placement of the child with a foster family and their initiation of termination proceedings. The Probate Court did terminate parental rights and the Circuit Court upheld that decision on appeal. Before agreeing to hear arguments in the case, the Supreme Court remanded it to Probate Court for findings of fact about placement alternatives for the child. In that instance, Tickner argued that the long-term psychic health of the child, who is now three and a half and has lived with the same foster parents since she was ten days old, would be threatened if the termination ruling were overturned. The foster parents are anxious to adopt Taurus, and the recommendation of the Judge at the remand was that the child remain with them and that adoption be pursued.

Tickner argues for the significance of the age of the child who had to pass through developmental stages requiring the formation of stable, loving bonds with her care-giver well before the mother could be released from prison. The competing wishes and rights of female prisoners are advanced in the briefs for the mother. Clinic students were also taken to visit other imprisoned women to get

a fuller understanding of the mother's perspective. Whatever the eventual decision in the case, law clinic students this year have had a particularly dramatic insight into the competing needs and claims which courts must weigh in deciding such difficult cases. The continuance of the Child Advocacy Clinc, which was founded through outside funding, has recently been approved by the Law School faculty.

Presidential Order On Cost-Benefit Analysis May Be Unconstitutional

Executive Order 12,291, announced by President Reagan in February 1981, requires that rules passed by executive agencies be subjected to a rigid cost-benefit analysis before they can take effect. The order, which is intended to improve the efficiency and accountability of the informal rulemaking processes of executive agencies, is unconstitutional according to an article in a recent issue of the *Michigan Law Review*.

By requiring that the Office of Management and Budget analyze all major rules, the Order displaces the discretion of agency officials, executing essentially legislative duties delegated to the agencies by Congress, to formulate domestic policy. Thus the Order violates the constitutional principle of separation of powers between the executive and legislative branches and "exceeds the proper bounds of presidential authority."

The article further argues that the Order raises the possibility of secret contacts between agency officials and the Office of Management and Budget which could be exploited by "private parties with allies in the White House." In effect, the article says, such contacts become weighted with the prestige and authority of the presidential office and "bypass the integrity of formal and informal rulemaking as envisaged by Congress."

Morton Rosenberg, a public law specialist working for the Congressional Research Service at the Library of Congress, is the author of the article. It is the first published extensive scholarly analysis of Executive Order 12,291.

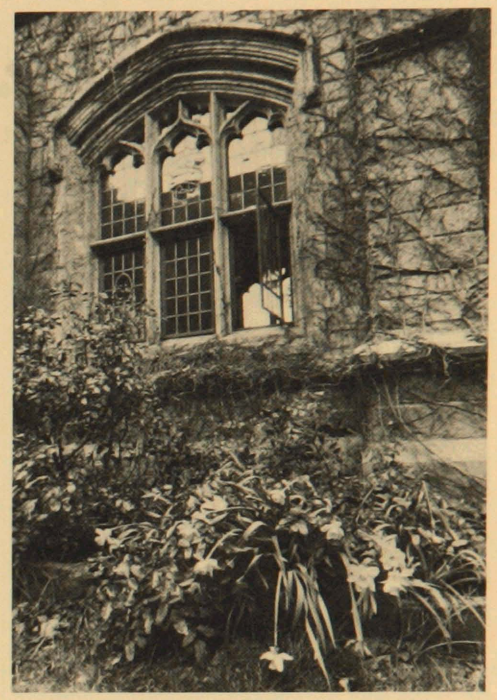
Rosenberg contends that the Order "sets up a framework for management of the administrative rulemaking process that is unprecedented in scope and substance. Thus, he says, the order "significantly interferes with a function over which the Constitution gives Congress primary, if not exclusive, control."

In support of his argument that the Order violates the doctrine of separation of powers, Rosenberg points to a 1952 United States Supreme Court Decision invalidating President Truman's seizure of steel mills to avert a strike during the Korean War. Citing the opinion of Justice Robert Jackson in that case, Rosenberg argues that certain powers belong exclusively to the Congress under the Constitution; others are exclusively the President's, while still others fall into a "zone of twilight" in which President and Congress have concurrent authority.

According to Rosenberg, "strong reasons exist for viewing the Order as within Congress's exclusive domain," where the President may not legitimately act unless Congress has validly delegated power to him. While Congress has nowhere stated the role that the President should play in informal rulemaking, relevant sources "convincingly demonstrate Congress's intention to exclude the President from a policy-making role in the administrative process." Congressional use of the legislative veto over certain agency rules, the Administrative Procedures Act, and the description of the President's budgetary and reorganizational powers all reveal an affirmative intent to *deny* the President the authority assumed in Presidential Order 12,291. Under Judge Jackson's test, says Rosenberg, the President "has exceeded his authority, and the order represents an intrusion by the executive branch into the legislative sphere."

The *Michigan Law Review* article is also critical of the Order's oversight provisions which require that regulatory agencies' cost-benefit analyses be reviewed by a centralized body composed of the President's top advisors. This provision creates a new and influential entry point to the rulemaking process for *ex parte* contacts. "To ensure fidelity to due process and the integrity of informal rulemaking as envisaged by the Congress," Rosenberg concludes, "courts should require that significant White House contacts be disclosed in the rulemaking docket."

Rosenberg sees Order 12,291 as an outgrowth of contemporary political rhetoric which implies that the President has virtually unbounded authority when, in fact, his power "to implement his domestic policies is subject to powerful constitutional and statutory constraints."



Marcus Plant

Marcus Plant Retires After Three Decades on Law School Faculty

Marcus L. Plant, Professor of Law, is retiring from active faculty status as of May 31, 1982, after a dedicated career of teaching and research.

Professor Plant was born in New London, Wisconsin, in 1911. He received his B.A. and M.A. degress from Lawrence College in 1932 and 1934. After two years as a high school teacher he returned to law school, receiving his J.D. from the University of Michigan in 1938. His career as a practicing lawyer included private practice in Milwaukee, Wisconsin and New York, and service with the Office of Price Administration.

Professor Plant joined the Law School in 1946 and has been a member of the faculty ever since.

At the Law School, Professor Plant's teaching and scholarly interests have spanned three major fields. He has taught torts from the beginning of his career and published a book on *Cases on Torts* (1953). He has long taught and lectured on the relationships between law and medicine and co-authored a treatise on *The Law of Medicine* (1959). His teaching and writing on workers' compensation and allied laws have borne fruit in several succeeding editions of a book most recently titled *Cases and Materials on Workers' Compensation and Employment Rights* (1980). He has written and lectured widely on these topics, spreading his influence far beyond the limits of the University.

In a tribute to Professor Plant his colleague, Luke K. Cooperrider, characterized his scholarship thus:

"The clarity of his analysis, his fidelity to the facts, and his appreciation of the capacity of the facts to limit the law-making character of the decision have frequently shed light upon a law left murky by the explications of the decision-makers. Broad generalizations, philosophical digressions, manipulation of the materials to fit personal ideology, are not his style. His approach may seem cautious, but if so the caution is that of the careful lawyer, central to the lawyer's craft."

Law has not been the only area of Professor Plant's service to the University and the community. He served for twenty-four years as the University's faculty representative to The Intercollegiate Conference of Faculty Representatives and the National Collegiate Athletic Association. From 1967 to 1969 he was President of the N.C.A.A., and from 1969 to 1972 he was a member of the United States Olympic Committee. He worked tirelessly in these roles to preserve the place of amateur and academic values in athletic competition.

As Professor Cooperrider wrote,

"Marc is a practical minded person, lawyer as much as academician, a fact that helps account for the esteem in which his counsel was held in athletic circles, and his success in explaining the law to medical audiences. It has much to do also with his success in the classroom. His students cherish the wealth of anecdotal material he adds to the casebook fare to make the subject come clear and alive, and the way he calls upon his own experiences and those of his former students and other professional acquaintances for that purpose. With fewer than sixty class hours to cover the basic first-year topics he moves briskly through the cases at a pace that sometimes leaves the students breathless, but they tell me that his class nevertheless benefits more than most from a classroom dialogue conducted in an atmosphere free from fear, joined by an unusually large proportion of the class, and frequently continued in the corridor and in visits to his office. He appears to them to be less concerned with abstract doctrine than with the cases, and from him they learn well the importance of attending closely to the facts and to the decisions. At the end of the term they enter the examination room with a good feeling, in the belief that they have learned what it was all about and can face with confidence what lies ahead. They give him very high marks as a teacher and as a human being, and remember him with affection. In conversations with alumni graduated in the last three decades, his is one of the names that most frequently arise."

For more than three decades, Professor Plant has engaged the intellects and captured the affection and respect of students, alumni, members of the practicing bar, the medical profession, people engaged in athletics, and his colleagues. He has played well all of the many roles that he has assumed in his active career.

Visitors To and Fro

Distinguished visiting professors at the Law School during the 1981-82 academic year have contributed expertise and experience in a wide variety of fields. Among those who visited for the full year was **Per Lachman** from Copenhagen, Denmark where he serves as counsel to the Danish Foreign Ministry. During the fall semester Mr. Lachman was a research scholar at Michigan. In the winter he taught courses on Foreign Relations of the European Community and on International Law.

Professor Joan Hollinger of the University of Detroit Law School also visited for the academic year. An expert in family law, Professor Hollinger taught a seminar entitled "Problems in the History of Family Law" in the fall and a lecture course on law and the family in the winter. Throughout the year she also taught a section of the first year course in Contracts. Professor Hollinger's current research is on the history of adoption laws in America with special emphasis on the problems of confidentiality and secrecy in the adoption process.

Professor Barry Furrow also visited at the Law School for the year. He is on the faculty of American University and is a scholar on the interaction of law and science. While at Michigan Professor Furrow has taught the first-year course in Civil Procedure and a course in evidence during the fall. In the winter he conducted a seminar on medico-legal problems. He is most recently the author of *Malpractice in Psychotherapy* (Boston: D.C. Heath, 1980).

Visiting for the fall semester was **John Barton** of Stanford University Law School. Professor Barton taught a course on International Business and a seminar on problems of arms control.

Winter-term visitors included **Professor Roger Findley** from the University of Illinois College of Law in Champaign. He taught the basic course in Property this term. Professor Findley is an authority in environmental law and most recently is co-author of a casebook on the subject, published by West and Co. in 1981.

Professor Kurt Hanslowe of Cornell University Law School was also at Michigan for the winter, teaching a course on labor law and a Labor Arbitration seminar. Professor Hanslowe is the author of many books and articles in that field.

Professor John R. Price from the University of Washington Law School was another winter term visitor. He taught courses in his areas of expertise, one on trusts and estates and another on estate planning. Professor Price has written most recently on "The Uses and Abuses of Irrevocable Life Insurance Trusts."

Visiting from France was **Patrick Juillard** who practices as French counsel to O'Melveny and Meyers and teaches law at the Academie de Paris, Université René Descartes. Professor Juillard taught International Law and "Selected Problems in Constitutional Law: A Comparison," while at Michigan.

Martin J. Adelman, a Michigan alumnus (JD '69) and member of the faculty of Wayne State University, taught Antitrust Analysis and Copyright Law this winter at the Law School. **A. Dan Tarlocke** of the faculty of Illinois Institute of Technology—Chicago-Kent College of Law also visited during the winter. An expert in environmental law who has written widely, Professor Tarlocke taught a course on oil and gas and another on Public Control of Land Use. He is most recently co-author of a book on the subject of land use controls.

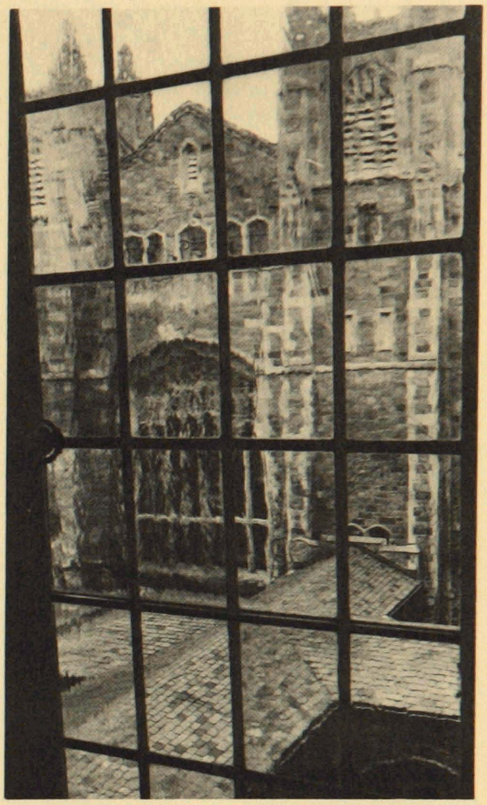
Ellen J. Messing served as Clinical Instructor during the winter term, supervising the work of students in the Clinical Law Program. Before coming to the Law School she was litigation attorney for the Bi-Regional Older Americans Advocacy Center in Ann Arbor.

* * * *

The Law School was fortunate in securing the services of these visitors since several Michigan faculty were either on research leave, sabbatical, or were invited to visit at other schools:

Professor Roger A. Cunningham of the Michigan Faculty was appointed the Stephen C. O'Connell Visiting Professor at the University of Florida College of Law for the winter semester. The professorship, which is the first endowed chair at the University of Florida College of Law, honors an alumnus of the school who became Chief Justice of the Florida Supreme Court and President of the University of Florida.

Professor Cunningham has taught and written on Property, Land Finance, and Land Use Control Law. He is co-author of a widely used coursebook, *Basic Property Law* (with Professors Olin Browder and Allan Smith of Michigan, as well as with Professor Julin of the University of Florida College of Law). Professor Cunningham is currently at work on



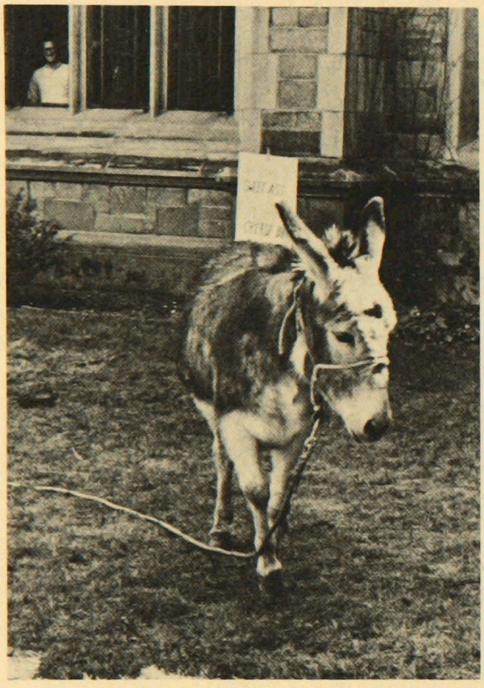
a comprehensive single-volume textbook on property law.

Professor John Reed of Michigan visited at Harvard Law School during the winter semester. Professor Reed is an expert in the field of civil litigation and is active in evidence law reform. He recently became editor of the *International Society of Barristers Quarterly*.

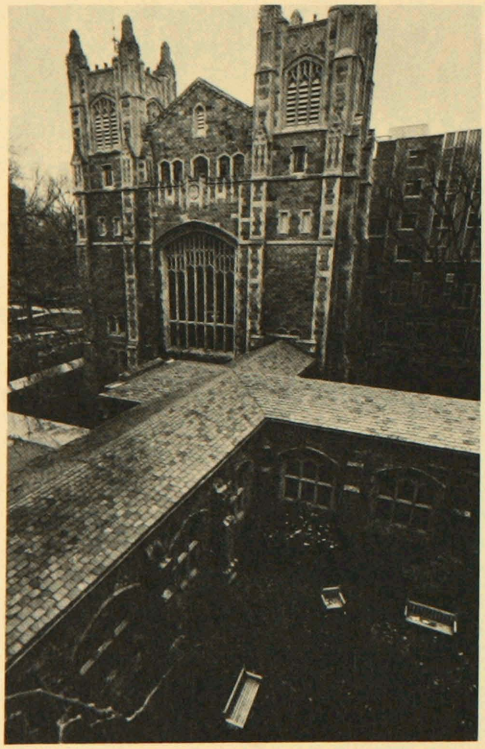
Professor Frank R. Kennedy, who is the Thomas M. Cooley Professor of Law at Michigan, was a visiting professor at Hastings College of the Law at the University of California during the winter semester. Formerly the Reporter for the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, Professor Kennedy is an authority in the areas of bankruptcy and debtors' and creditors' rights. His explication and assessment of Public Law No. 95-598, The Bankruptcy Reform Act of 1978, was recently reprinted in *The American Bankruptcy Law Journal* (Volume 55, Winter 1981).

The article, entitled "The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction," offers an overview of changes instituted and how they accomplish the major goals articulated by the Commission on the Bankruptcy Laws of the United States.

letters



Swift's Stunt Reenacted



The Courtyard

Another Look At the Unicorn In the Garden

The account of the "Unicorn in the Garden" caper which appeared in the Fall issue of *Law Quadrangle Notes* provoked responses from alumni all over the country. Letters gleefully recall other escapades or glumly declare that such levity was impossible when the writers were at the Law School. Several praise Theodore Swift for his bravado, past and present, suggesting that he may have missed his true calling in becoming a lawyer instead of a writer.

Here is a selection from letters received by the editor and by Mr. Swift.

Bleak Times

To the Editor:

Congratulations to Ted Swift for one of the most amusing and well written accounts I have ever read. In today's era of serious issues, it is really fun to laugh again. Shades of P. G. Wodehouse!

Way back in 1932 my class started in the old law school building, then moved into the brand new Hutchins Hall the following year. Off and on over the years I have idly wondered what purpose the courtyard served, since I never saw anyone in it.

In those depression years, life and our futures were a very serious affair. There was very little humor in the Law School in those days. Times were much too bleak to ever risk jeopardizing our futures. If such administrators as Bates, Leidy, Aigler, or Grismore had any sense of humor, they kept it well hidden from the student body. They publicized the expulsion of students on arbitrary grounds with what seemed like glee. They warned us we would lose credit if we missed classes, regardless of the reason. At the end of each year, they politely told the bottom third of the freshman class not to return. Theirs was a strictly no nonsense attitude.

In that somber regime, there were some rays of sunshine. We always felt that we received a lot more empathy from Durfee, Dawson, and Stason. These men showed some evidence of fun. I remember Stason well as a teacher. He never told jokes in the classroom, but he had a relaxed joyfulness. His class was a pleasure.

Now for the point of this whole letter. I sincerely believe that if Swift and company had pulled their unicorn caper when I was at the School, they would have quickly found themselves out on the pavement. It would have been a totally arbitrary decision—no trial, no appeal, finis. However, I doubt if Mr. Swift believes for a minute that he fooled Dean Stason. In a small community like the Law School there are no real secrets for very long. It would seem that while such high jinks were condemned, the administration was amused enough by the whole affair to simply ignore it. More power to them! Well done, Swift and Company!

William F. Harlton, Jr., JD '36
Hobe Sound, Florida

Puerile Piffle

Dear Mr. Swift:

You probably don't remember me at law school, for I was the scholarly type. However, I do remember you—a rather noisy chap. Many a late night, my roommate, Harvey Dean, and I were disturbed in our studies by your returning from your nocturnal soirees and forays. It was quite difficult to master the Rule against Perpetuities while some inebriate was trying to sing Marine Corps ballads. I was quite shocked to pick up the latest *Law Quadrangle Notes* and find not only that you had returned to school in the fall of '53 but had been granted a degree in '55. I was appalled that the University of Michigan Law School would publish such drivel as "There's a Unicorn in the Garden."

At first, I feared that the school was prostituting itself by stroking the "over-inflated ego" of one of its financial contributors, but I cannot imagine a person of your ilk making any positive contribution to the school. I was going to write directly to the school, but then I read that this was the last issue for the managing editor. I can understand why.

Regardless of the poor tastes of the now departed editor, I should think that you, at your age, would have enough respect for your school and your contemporaries not to embarrass them with public accounts of your infantile behavior. Most of us outgrew Hallowe'en by the time we were in high school. You have tarnished the image of an entire generation of distinguished alumni with this puerile piffle. No doubt Harvard also has graduated a few barbarians, but that august institution does not

advertise them or accord them "indirect praise" by publishing tales of their boorish exploits. I am sure that G. Gordon Liddy isn't a contributing editor to the Fordham Law School Alumni magazine.

I just hope you haven't left my beloved alma mater vulnerable to any libel actions. I remember Bill Van't Hof as a gentleman and am sure that he would not have brutalized a horse or have participated in such nefarious nonsense.

And poor "Bubbles" Stason must be turning in his tomb. He was just too trusting and kind a soul for the good of the school. . . .

In conclusion, let me admit, Ted, that you made my day, and I've got $100 that says you can't get the *DePauw Alumnus* to print a story of your undergrad feats.

George R. Glass, JD '53
Santa Fe, New Mexico

Career Advice

Dear Mr. Swift,

Two things are obvious. First, the Class of 1948 was too serious and too dull, and second, successful as you are in the law, you should have been a writer.

A great production.

Wayne G. Wolfe, JD '48
Johnstown,
Pennsylvania

Dear "Barrister,"

My father was in the class of 1894 at the Michigan Law School, and I was one of Leidy's rejects from the 1934 class. We now recognize that 1932 was the real bottom of the depression, but Leidy's edict was "if you must work outside to go to law school, then do it elsewhere." University of Illinois Law School was more tolerant. . . .

I wish to urge you to forsake the mundane practice of law and devote full time to the expression of your mental gymnastics either on paper or possibly in person on the tube or platform. Your presentation was so engrossing that I never laid it down. Sam Levenson forsook teaching for television exposure with much success. I think you have much to offer that the practice of law may never allow you the joy of expressing. "There's a Unicorn in the Garden" is truly a gem!

Max L. Weinberg, JD University of Illinois Law School '38
Quincy, Illinois

Albino Squirrel Mystery

The unicorn in the garden article reminded me of the disappearance of a very rare albino squirrel which was under a glass display case in the lounge of the Lawyers Club during the time I was there.

It seems that this albino squirrel had been given to the club by no less a person than W.W. Cook who also gave the money for the building. There was an impending visit to the Law School by Mr. Cook, and Dean Bates was fit to be tied as he feared that Mr. Cook would be offended if the aforesaid squirrel was not on display in its usual prominent place. . . . An investigation was launched, but no one knew anything about the squirrel. Lo and behold, the very night before Mr. Cook was scheduled to arrive, the squirrel reappeared as mysteriously as it had originally disappeared. . . .

Dean Bates later talked Mr. Cook out of the John Cook Dormitory, the Library, and Hutchins Hall.

Archibald J. Weaver, JD '29
Falls City, Nebraska

Bravo!

Dear Mr. Swift,

As a former Barrister and, more importantly, as a former law student at Michigan, I wanted you to know how much I enjoyed your article which appeared in *Law Quadrangle Notes*. It's the first time I can remember laughing while reading that austere publication, and it certainly was the first LQN article I have ever been able to read in one sitting.

Thanks for bringing back a lot of memories.

David D. Dodge, JD '65
Phoenix, Arizona

Dear Ted,

. . . I found your recent unicorn story very funny. You may, as you said, have peaked early, but you have bloomed, so to speak, late. The fact that you hoodwinked *Law Quadrangle Notes* into printing your lengthy confession is a latter day feat equal (when you consider your declining years) to the original.

Hurrah!

Ronald R. Pentecost, JD '57
Bloomfield Hills,
Michigan

Dear Ted Swift,

Your "confession" in the Fall *Law Quadrangle Notes* is a gem! Unfortunately my class had no ex-marine to spark our imaginations. Our capers never amounted to anything more than the dropping of bags of water from a tower room in the Lawyers Club on unsuspecting targets.

How about letting us all in on the skyrockets episode?

Karl Y. Donecker, JD '32
Allentown,
Pennsylvania

Memories of Dean Stason

Dear Ted,

I have just read your article on the unicorn in the garden. It is hilarious. Imagining Dean Stason becoming hysterical is enough to bring tears to the eyes of anyone who was a law student during that era.

Kirby A. Scott, JD '56
Hollywood,
California

Dear Ted Swift,

You may recognize me as the former Circuit Judge who presided over the 5th Circuit which adjoins your circuit. While I graduated a long time ago—even before you were born—when the present Law School was only a dream in the mind of Dean Bates, your article brought back memories.

Dean Stason was a member of our class. Otherwise he lived in a dream world of scholarship that few, if any, shared. Certainly not me. He had graduated from Wisconsin with all A's, and the same at M.I.T. as well as in our class. At the same time he was teaching a course in Electrical Engineering in the Michigan Engineering College, and the story was that he wrote a text in Electrical Engineering at the same time.

So I appreciate very well the seriousness with which he looked upon the effort that went into placing a modern unicorn in his private garden. I was raised on a farm and can readily understand that climbing marble steps was not a feat which a horse was attracted to. Your account was a masterful piece of work, and well told. Should you ever tire of the law, you could well emulate John Voelker (JD '28) who left the Michigan Supreme Court to give all his time to writing.

Archie D. McDonald, JD '22
Knoxville, Tennessee

events

The Cook Lectures: Politics in the Television Age

This year the distinguished political scientist, Austin Ranney, delivered the three William W. Cook Lectures on American Institutions. This lecture series was established by the Law School's former dean and benefactor to support and strengthen American institutions by encouraging thoughtful reconsideration of them. Widespread and frequently contradictory commentary on the recent changes in our national political life led the committee selecting a lecturer to turn to Austin Ranney for a systematic analysis. One of the foremost students of the American political process, Mr. Ranney is Resident Scholar at the American Enterprise Institute for Public Policy Research in Washington and Professorial Lecturer at Georgetown University. Mr. Ranney has written extensively on American politics and elections. Among his books are *The Doctrine of Responsible Party Government* and *Curing the Mischiefs of Faction*. Most recently Mr. Ranney edited and contributed to a volume entitled *The American Elections of 1980*.

In his Cook lectures, Mr. Ranney was equally topical. "The American Way of Politics" was his overall subject, and his focus was on the nature and significance of the changes in our national political life since World War II. His first lecture described the decline of national parties, the rise of the single issue pressure group, and the rise of Neo-Progressivism as the most influential developments of the period. The second and third lectures examined the significance of television's having become the primary medium through which we learn about politics.

Lecture I: Neo-Progressives and Old Institutions

Before beginning his discussion of changes in the American way of politics since World War II, Mr. Ranney remarked that not everything political has changed. Attention to flaws in government and impatience to remove them have predominated in the American character since Alexis de Toqueville observed them in the nineteenth century. Organization is as essential to political effectiveness as it ever was. But the role of political parties as organizers has significantly declined, Ranney said. Party identification is no longer the most powerful factor in determining votes. A study carried out by the University of Michigan Center for Political Studies shows, Ranney said, that the voters' feelings about issues and about the personality of the candidates have recently become more important than party allegiance in accounting for votes. Increases in the number of voters who register as independents are indicative of this trend, as is the decline in straight ticket votes. Parties have also lost much of their traditional power over the financing and directing of presidential campaigns since 1945.

One form of organization which has arisen to fill the political vacuum left by the decline of presidential parties, Ranney said, is the single issue pressure group. What distinguishes these from traditional pressure groups is that they do not represent coalitions of various interests which have already made compromises and accommodations among themselves. The new single interest groups, like the anti-abortionists or the National Rifle Association, tend to have deep emotional commitment to a single cause, to seek total victory, and to regard compromise as surrender to evil. Ranney argued that the direct methods of operation of these groups express growing impatience with all intermediating institutions including the mechanisms of representative government.

This impatience can be seen as a facet of the general cynicism about leaders and political institutions that has arisen since the Vietnam war and the Watergate scandel. Yet this disaffection from government expresses not the conviction that our system is hopeless, Ranney said, but the need for reform. The nature of reforms currently advocated is telling. Most people favor legislation enabling the people to act directly, and greater restriction on the power and tenure of elected officials. Ranney labelled

this movement for reforms which restrict the power of intermediating institutions to work ill and empower ordinary people to by-pass them "Neo-Progressivism."

Like the Progressivism which dominated American politics in the first two decades of this century, the current movement for reform seeks both political purification and more direct democracy. The "old" progressives won important institutional changes which survive today, like the initiative, the referendum, and the direct primary. Ranney saw these reforms as intended to help the individual citizen, believed to be the disinterested "man of good will," to wrest power from political machines and trusts. Cleansing government of special interests is also an important aspect of Neo-Progressivism.

The most visible and influential group recently advocating such reform has been Common Cause. It successfully fought for financial disclosure laws and reforms intended to assure that special interests must operate openly.

Faith in direct democracy is another aspect of Neo-Progressivism with roots in traditional Progressive thought, Ranney said. This view holds that government will remain suspect, despite all efforts at purification, and that the only way to remove popular cynicism is to return power to the people. Increased use of the referendum in states where it is legal is an outcome of the Neo-Progressive demand for immediate action. Conservatives have sought direct legislation to restrict government's spending powers, while liberal and environmental groups have used similar methods to restrict the construction of nuclear power plants or the use of disposable beverage containers.

The rise of such Neo-Progressive thinking, which cuts across the traditional opposition of liberal and conservative, as well as the decline in the influence of political parties and the emergence of single issue pressure groups are among the most influential political developments since World War II. Another important development, Ranney said, would be the subject of his second and third lectures: the advent of television.

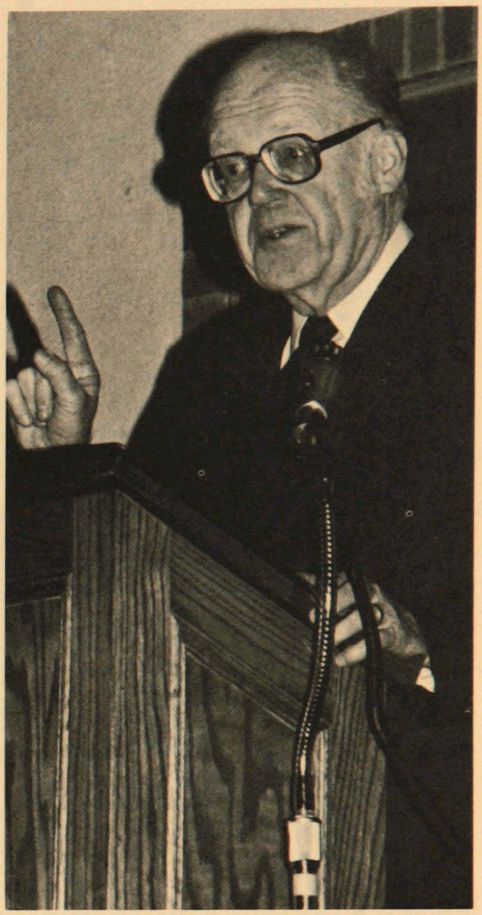
Lecture II: Political Reality . . . in the Television Age

Television has become the primary source of Americans' political information in the past twenty-five years, Mr. Ranney said. Questioning how that development has come to affect, and perhaps determine, political reality, he offered a telling example. In 1968, when President Johnson was still committed to winning the Vietnam war, Walter Cronkite went on location to determine the facts and reported that the only rational way out was to negotiate, not as a winner but as an honorable person. Johnson, watching the newscast, is said to have told his aides "It's all over." Soon after, he declared to the nation that he would end the war and not seek reelection. This event, which has been called "the first time a war has been declared over by an anchorman," suggests the power of televised reports to influence or shape events.

Television's influence over our political understanding results in part from the commonly held view that politics are confusing and not the most interesting aspect of life. Americans traditionally have not made an effort to acquire political information. Until the advent of television most people's views of government and issues were shaped by contact with the few of their friends, relatives and acquaintances who read the mass media. It has been theorized, Ranney said, that these interested, informed opinion leaders largely shaped the views of the apathetic.

Television renders such theories obsolete, Ranney said. In the 1980s there is no part of the United States that does not receive a television signal. Ninety-eight percent of American homes have at least one television set, and 50 percent have two or more. In fact there are more televisions in America than there are telephones, toilets, or bathtubs, and they are turned on 6 or 7 hours a day. Pervasive as television is, its influence is hard to assess. We should recognize, Ranney said, that one fifth of the time televisions are on, they play to an empty room; another fifth of the time whoever is in the room isn't watching. Even watching television is customarily a communal activity demanding little effort or attention.

Although televisions are thus experienced as small pieces of living room, bedroom or den furniture, their influence is not trivial. Television tends to define the framework within which family life occurs. It affects



Austin Ranney

the character of our lives, Ranney said, and takes time away from other activities.

The passivity of television viewing contributes to its importance as a medium of political information. The audience for national newscasts is often an inadvertant one composed of those who neglect to turn off their sets after the local sports and weather, and other people in the room with them. It is much easier to get the news from television than from print media, and nearly two-thirds of Americans say that they do so. Viewers get political information without seeking it; televised news requires little more than that the audience believe what is said, and evidence suggests that they do. Television is a more trusted medium that print journalism, Ranney said, in part because of its tendency to transmit the personality of the reporter. While we do not know the human source of the words on a page of newsprint, our sense of facts and opinions that we learn about from television is profoundly influenced by the looks and demeanor of the people who report them. Because television presents us with a combination of word, tone and look, it seems to give a fuller sense of who a person is than other media. This has had a significant impact, Ranney pointed out, in instances like the Kennedy-Nixon debates. Radio listeners generally thought Nixon won the debates, while television viewers favored Kennedy. Kennedy gained political advantage from the debates because so many more people were viewers rather than listeners.

After thus allowing television's particular capacity for conveying a sense of reality, Ranney questioned how much television creates or shapes this reality. Is there a political life which television represents, Ranney asked. How can we know that pre-existing reality and measure the effectiveness of media coverage of it? Ranney began his answer to these questions by asserting that most news broadcasters do believe there is a pre-existing reality which they simply report.

Several examples of television coverage might call that belief into question. CBS's 1968 documentary, "Hunger in America" was cited in Edward J. Epstein's book on television news as an interesting case in point. It pictured a baby actually dying on camera while the commentary declared, "Hunger is easy to recognize when it looks like this." In fact, the baby pictured had been born three months premature when its mother was involved in an automobile accident, and its death was not the result of starvation. When this was discovered and CBS criticized, the network responded that the show was accurate since the conditions it described did exist, even if their shocking picture showed quite a different tragedy. This example reveals the bias of television news. Rather than favoring any particular view or candidate, it is designed to attract and hold an audience, Ranney said.

The difference between televised reality and "real" reality is blurred by the sort of events which might not have occurred without television crews on the scene. Networks sometimes favor such events, called "medialities" by one commentator, because they are predictable. The difficulty and expense of arranging to have camera crews on location as dramatic happenings occur fosters coverage of scheduled events like news conferences and protest demonstrations. The debates between presidential candidates have provided other examples of how significantly television coverage may shape an event.

The televised debate between Carter and Ford in 1976 was made possible by an F.C.C. holding that the equal time rules did not preclude television's covering a debate between only the two major candidates if it was sponsored by an organization other than the networks. The League of Women Voters held the debate, but when the audio equipment of the television crews failed to operate for twenty-six minutes, the candidates ceased speaking, and waited at the podium for it to be repaired. Had television really been only reporting on debates presented for the League's audience, clearly the debates would have continued uninterrupted.

The severe, fixed time restrictions of television news combine with the expense of camera coverage to make editorial choice its very essence. Unlike newspaper stories which summarize in a headline and lead paragraph, television news items are designed to be viewed in their entirety by all of the audience. They are extremely short. To enable the public to grasp briefly seen pictures and graphics, voiceover commentary is designed to place individual events into an on-going narrative or overarching schema. Reference is repeatedly made to a significant pattern in the transient phenomena covered. To select stories which will work effectively, networks rely heavily on the wire services, on news magazines, and on national newspapers. One might say that in this process the old two step flow of political information is reincarnated, Ranney pointed out.

While television commentators thus depend on other journalists to determine which events to cover, their interpretations of those events profoundly affect the opinions of their audience. Gerald Ford's remark about the Eastern European nations not being dominated by the Soviets went unnoticed by most viewers who thought he had won the debate until they heard critiques of his gaffe.

Subsequent presidential debates have provided other examples of "medialities" which influenced public perceptions of the candidates. Our experience of the three series of debates suggest a pattern. In each case a challenger was up against an incumbent, or in the case of Nixon in 1960, a quasi-incumbent. In each case the challenger was thought to have won the debate, and did go on to win the election. In every case, the perceived victory in the debate was seen as a key to subsequent success in the election.

This suggests that the political "medialities" created by the presence of television have been at least as important in presidential politics as any reality independent of television. For many people television images have great power, validity, and substance. For the majority, if not for politics buffs, televised political reality *is* real reality. That fact is crucial, Ranney concluded for understanding why the American way of politics has changed in the television age.

Lecture III: Bias in Television News

In his third lecture Mr. Ranney questioned the existence, nature, and effect of bias in newscasting. Since some charges of bias accuse broadcasters of excessive conservatism while others decry the unvarying leftist liberal slant of the news, an overview of the charges suggest there is no one consistent bias.

In fact, Ranney suggested, the bias of television news is less political than journalistic. It is a structural slant resulting from the inherent form of television and from the circumstances of news gathering in the United States today. Some of those circumstances are economic, Ranney said. Commercial stations and networks are private businesses whose financial welfare depends on attracting and holding an audience of the right age and economic status. Since research into viewer preference indicates that pictures of things happening are more interesting to watch than people talking, and that the novel and weird is more interesting than the norm, television news is likely to overstress the dramatic and unusual. Broadcasters only turn to coverage of the normal when it is likely to appear strange to audiences already sated with the bizarre.

Time is another structural factor shaping television news coverage. Any one story is given very little air time, rarely more than a minute. These snippets which can offer only brisk headline treatment would be incomprehensible if the networks did not provide continuity. They do so by presenting one day's stories as part of larger, on-going dramas, or as illustrative of themes already familiar to the viewers. To hold the audience's attention, networks evolve enduring characterizations of political candidates, movements, and conflicts around which to order the presentation of isolated events.

News coverage is also influenced by legal regulations. Indeed some people have argued that we might get no national news if economic and time considerations were the only factors controlling the commercial networks. Federal Communications Commission regulations do require that local stations broadcast a certain amount of national news, and carrying their network's nightly news program is the easiest method of compliance. Conformity with the F.C.C.'s equal time rule and fairness doctrine requirements thus become the problem of the national networks. Most broadcasters comply with these restrictions by presenting issues in a point/counterpoint format. No issue is presented as sustaining only one defensible position. Even the Surgeon General's report on the dangers of cigarette smoking was countered with statements from the tobacco industry, Ranney pointed out. News producers also suspect that representation of more than two contrasting viewpoints on any subject will be confusing. Thus television news fosters the questionable impression that every political issue has two sides, and only two sides, Ranney said.

Television news is also influenced by the nature of the individuals who make it. Several studies of network newspeople reveal, contrary to the accusations of elitism and sophisticated snobbery from former Vice President Agnew and others, that news correspondants tend to come from small towns, most often in the Midwest. The majority of them attended public colleges where they majored in English, Journalism, or Communication rather than in History or Political Science. Few of them have had a long-standing relationship with political causes or organizations, and almost none have ever worked for a political party or candidate. In fact, over two-thirds of those surveyed claimed never to have registered to vote for either political party.

Newscasters' apolitical backgrounds are an asset since most networks forbid correspondants from voicing committment to political causes or from taking sides in any political disputes in ways that might reflect on the network's impartiality. Most newspeople seem to view themselves as "liberals," but interpret the term as indicating only that they are independent and open-minded. Their politics can be seen as a variety of the Neo-Progressivism discussed in the first lecture, Ranney pointed out. The ideal of the individual good citizen, independent of special interests and party loyalties, making up his own mind about the measures and candidates that will best promote the public good, underlies both Progressive thought and television broadcasting.

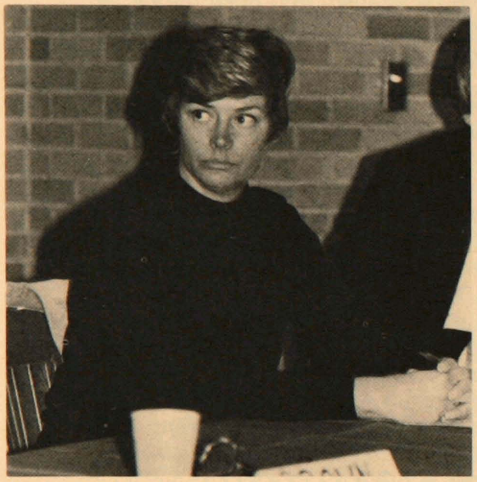
The bias of television news is not political but structural, Ranney concluded from this discussion. It arises from the economic, organizational, and legal circumstances within which broadcasters operate, and from the nature of the people who are attracted to the field. That bias tends to produce a picture of politics as a competetive game played by individuals in front of an audience of the electorate. Individuals, not groups and organizations, are ideal television subjects; they are easily interviewed and understood. When television news does cover parties or institutions, it personifies them, Ranney said. A presidential campaign is characterized as Reagan versus Carter, not as a conflict of parties or ideologies.

What is interesting in political contests, according to the networks, is who is winning. Candidates are portrayed as motivated by self-interest and the drive to win elections rather than by ideals or political philosophy. Some critics have suggested, Ranney said, that network news can best be understood as a form of sports reporting in its emphasis on strategy and outcome rather than on the candidates' views and records.

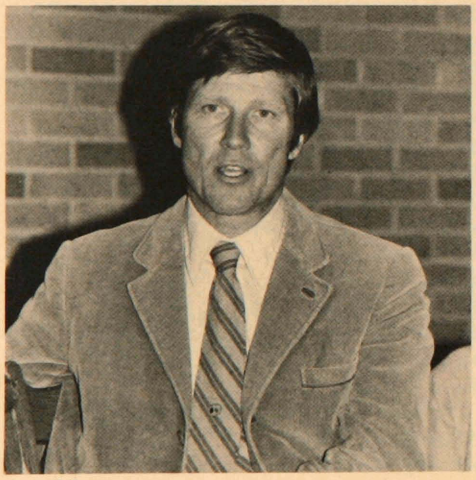
In conclusion, Ranney described what he sees as two significant substantive biases characterizing the portrayal of American politics in the national news which could materially affect the opinions of the people. News commentators' suspicion of all politicians, especially those most identified with electoral politics, was the first. Correspondants tend to see their job to be exposing the falseness of politicians' rhetorical claims. Their adversial stance is intensified by the difference between print journalism and television interviewing where the politician can speak directly to his audience. The describing of the candidate and his views that is a traditional aspect of journalism is accomplished by the cameras and recording equipment, while the commentator tends to provide only balancing opposition. Television's fictional politicians, a group of windbags and phonies, reflect a skepticism on the part of their creators which is similar to the newscasters'. Political compromise, Ranney said, tends not to involve the clear and snappy opposition of right and wrong that is the stuff of television drama.

Suspicion of the establishment was the second substantial bias which Ranney saw in television news. Broadcasters, like all journalists, see their job as informing the electorate. They are proud of the instances where their exposés lead to reform. In television news this attitude works in combination with the stress on competition that is intended to hold audience attention and provide continuity. The win of an underdog or the emergence of a new cause is more exciting than the status quo, so such events receive disporportionate attention. "Carter the long shot" attracted very different coverage than

Joseph Sax



Kathy Stocklen



Donald Brown

"Carter the front-runner." Television news has taken on the role of the "loyal opposition," Ranney said. Even more than the party out of power, newscasters have accepted the job of subjecting established political figures and policies to suspicious and critical scrutiny. The bias of such a "loyal opposition" is more structural than ideological, yet it is understandable, constant, and predictable, Ranney said. In the American Way of Politics in the 1980s, he concluded, "That's the way it is."

Seminar Sparked Sharp Debate on National Parks

Law School Professor Joseph L. Sax, whose work on the National Park System has brought him wide recognition both within and without the legal profession, recently served as moderator of a panel discussion that probed the tensions between public and private interests in the National Parks.

The seminar, entitled "Our National Parks: Business and Pleasure," was sponsored by the Environmental Law Society, the Law School Student Senate, and several other organizations. Panelists representing a range of opinions were chosen, and debate was lively.

Participants included two National Park Superintendants, Donald Brown of Isle Royal National Park and Richard Peterson of Sleeping Bear National Lake Shore. Representing the Sierra Club was Ed Hamilton; the National In-Holders Association (In-Holders are those who own private property within park boundaries) was represented by Kathy Stocklen who owns a business that lies within Sleeping Bear National Lake Shore. David Hales, a former Deputy Assistant Secretary of the Interior who is now a professor at The University of Michigan School of Natural Resources, and Michael Preisnitz, a former Assistant Commissioner of Planning and Policy for the Minnesota Department of Natural Resources, also participated.

National Parks, Professor Sax explained in his introductory remarks, cannot be viewed simply as government enclaves. Private businesses and privately held land are found within the boundaries of most parks. The inevitable result, according to Professor Sax, is conflict and misunderstanding between the public, as represented by the National Park Service, and such private business and property owners.

The sharp debate which ensued among the panelists made this conflict manifest. While In-Holder Kathy Stocklen decried the "socially destructive" effect of allowing the Park Service to acquire owner-occupied land by condemnation, David Hales argued that the Park Service's "unique goal" of providing "for the enjoyment of future generations" sometimes requires that the interests of present landowners be sacrificed. The park superintendants present both held that the problems of condemnation of private lands had been exaggerated, and that arrangements are often made which are satisfactory to both parties involved.

Other issues discussed were changes in the Park Service in recent years, and revised attitudes toward the purpose of National Parks. Until recently they were seen as recreation areas rather than as natural areas to be preserved.

Members of the audience had the opportunity to question and debate with panelists, and several did so. Among those was Michigan professor of wildlands management, Kenton Miller, who argued that in the future we will be more concerned about preserving parks in a wild state. The seminar was open to the public and attracted a substantial crowd of law students and others.

Do Children of Undocumented Aliens Have a Right To Education?

The Supreme Court has agreed to rule on the right of undocumented alien children to receive public education. Isaias D. Torres, the Houston attorney who argued the case for these children's right to attend American public schools spoke about the case this fall at a lecture sponsored by the LaRaza Law Students Association at Michigan. The organization, made up of Chicano, Cubano, and Puerto Riqueno students at the Law School, also invited Esteven T. Flores to be on the program. He is an Alburquerque, N.M., sociologist whose testimony has been important in the case.

At issue is a 1975 Texas statute which denies public education to undocumented aliens. The constitutional question turns on whether undocumented aliens are entitled to the equal protection guaranteed by the 14th amendment. The language of the amendment assures these rights to "persons," not just to citizens. But the state has argued against the "person" status of undocumented aliens, as well as against their falling within the jurisdiction of the court, said Torres. He has argued, by contrast, that the jurisdiction of the 14th amendment is territorial in nature. The government which taxes illegal aliens, or gives them parking tickets, he says, is already treating them as persons.

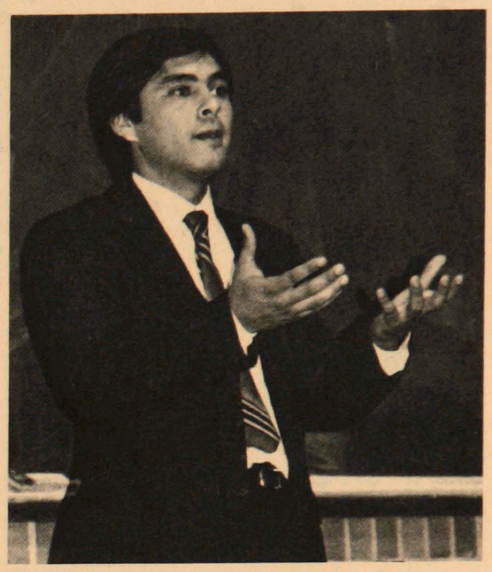
If the Supreme Court holds that the 14th amendment does apply to these children, the question of the kind of scrutiny to apply to the statute will arise. An important question, Torres said, is whether education is a fundamental right. He worked closely with Flores and other social scientists to show that total deprivation is at issue in this case, that school districts are denying the alien children any access to education. Other arguments concern the provision of the statute which permits school attendance by aliens whose parents pay for it. According to Torres this constitutes discrimination by wealth. The statute also makes innocent children suffer for the acts of their parents, Torres said.

If the court decides that the principle of strict scrutiny applies, the burden falls on the state to provide a rationale for the statute. Claims that the fiscal impact of admitting undocumented aliens to the educational system would be great and that the bilingual education program could not be expanded enough to meet the new demand were countered by Mr. Torres. He drew on evidence gathered by social scientists. Their work has been crucial, Torres said, in disproving myths and speculation.

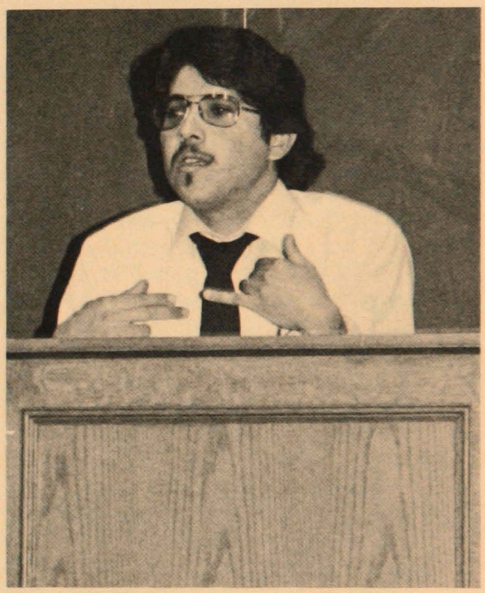
Esteven Flores, a doctoral candidate from the University of Texas, continued the program with a discussion of the challenges and rewards of collaboration between lawyers and social scientists. Noting that resistance to such alliances is based on the assumption that social science must be objective and free of bias, Flores argued that all researchers work in a context. What we should expect, he said, is that they acknowledge their assumptions.

Studies important to this case were designed to produce a social, demographic and economic description of undocumented aliens. Flores remarked on the difficulty of getting data about people who are afraid to reveal their status and the need for researchers to be people who could build rapport with them. Results indicated that by and large the aliens who have school-age children are permanent residents. According to one study they have an average family income of $800 per month. Ninety percent of the families have income tax deducted from wages, and two-thirds file tax returns.

The presentation sparked a lively question and answer session. Professor Yale Kamisar suggested that, for tactical purposes, the lawyer representing the undocumented alien children might want to separate the rights of the children under the fourteenth amendment from the rights of adult aliens. Professor T. Alexander Aleinikoff, who joined the faculty this fall and will lecture on immigration at the Law Alumni Reunion and Law Forum, contributed to the discussion. Other audience members questioned the significance of Justice Sandra O'Conner's having replaced Justice Potter Stewart on the Supreme Court.



Isaias D. Torres



Esteven T. Flores

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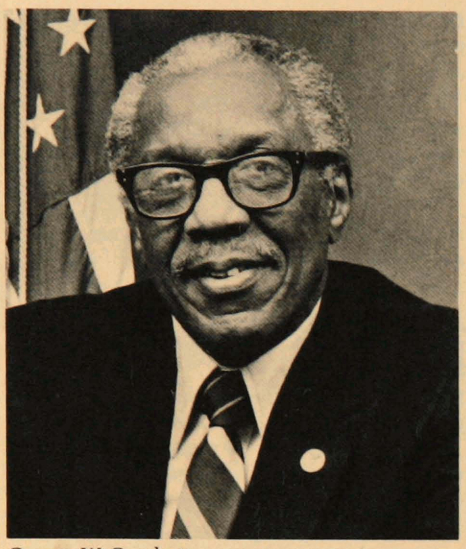


George W. Crockett

☐ **George W. Crockett**, who graduated from the Law School in the class of 1934, has been elected to represent Michigan's 13th District in the U.S. House of Representatives. Mr. Crockett's election to Congress in 1980 followed his distinguished career as a lawyer, civil rights activist, and judge.

For many years Crockett was a senior partner in one of the nation's first interracial law firms, Goodman, Crockett, Eden, & Robb. He was also the first black lawyer in the United States Department of Labor, to which he was appointed in 1939. He later became the Senior Attorney there and the department specialist on employee lawsuits under the Fair Labor Standards Act. In 1943, with the formation of the nation's Fair Employment Practices Commission, President Roosevelt named Crockett to be one of its first Hearing Examiners. In 1944 Crockett founded and became Director of the International United Auto Workers Fair Employment Practices Department.

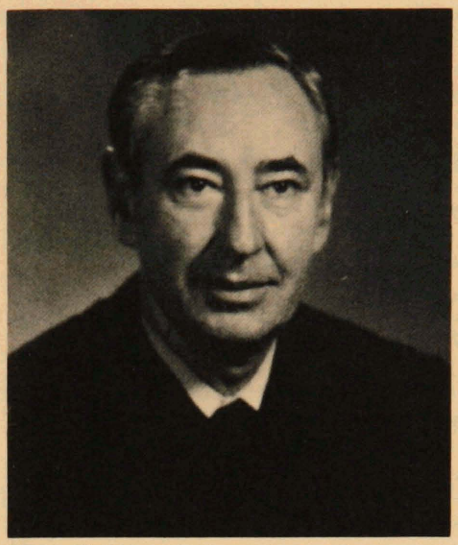
In 1966 Crockett was elected Judge of Recorders Court in Detroit. In 1972 he was reelected to the Recorders Court, and in 1974 was elected presiding judge of that court. Following his retirement from the Recorders Court, Crockett served as a visiting Judge for the Michigan Court of Appeals. In 1980 Crockett became Acting Corporation Counsel for the City of Detroit.

In Congress, Crockett serves on the Committee on Foreign Affairs, the Committee on Small Business, and the Select Committee on Aging. He is a member of the Executive Board of the Democratic Study Group, and of the Congressional Black Caucus.

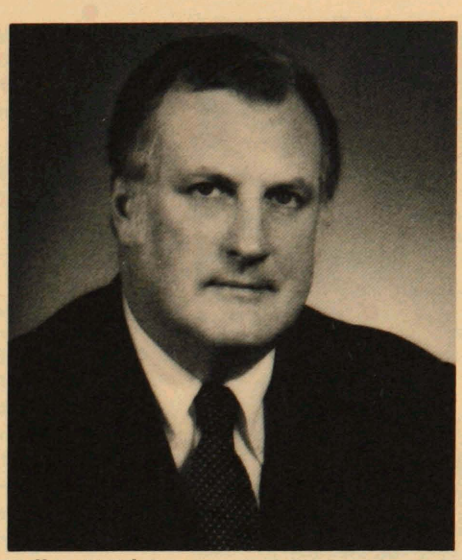
Joseph E. Stevens, Jr.

☐ **Joseph E. Stevens, Jr.** has been appointed Judge of the U.S. District Court for the Eastern and Western Districts of Missouri. He received his J.D. degree from Michigan in 1952. A member of the firm Lathrop, Koontz, Righter, Clagett & Norquist in his native Kansas City, Missouri, Stevens was awarded the Lon O. Hocker Memorial Trial Lawyers Award by the Missouri Bar Foundation in 1963. He is currently President of the Board of Governors of the Missouri Bar.

Stevens has been active in Republican politics in Missouri, serving on campaign committees for Senator Danforth and Governor Bond. He has also served on various committees of the Missouri Bar, and was Chairman of the Fund Raising Committee which raised $450,000 in voluntary contributions for construction of the Missouri Bar Center in Jefferson City. He is on the Board of Directors of the Truman Medical Center, on The Board of Trustees of the Barstow School, and on the Board of Trustees of Central United Methodist Church.



Vernon R. Pearson



Wallace D. Riley

☐ **Vernon R. Pearson**, 1950 alumnus of the Law School, was appointed to the Supreme Court of the State of Washington by Governor John Spellman this December. Pearson has served for twelve years as a Judge on the Washington Court of Appeals Division II in his home town of Tacoma. He was chief judge on that court from 1972 through 1974 and from 1978 through 1980. In 1979 Pearson was presiding chief judge for the entire State Appeals Court system.

Pearson's record as an outstanding lawyer and judge were cited by Governor Spellman in the announcement of his selection. A fellow Washington Appeals Court Judge characterized Pearson as "a lawyer's judge"; other lawyers and friends praised Pearson's balanced and deliberate approach to legal problems. As an appointee to the court, Pearson will have to stand for election in the fall. During his tenure on the Court of Appeals, Pearson was elected three times without opposition after his initial appointment by former Governor Evans.

A North Dakota native, Pearson was on active duty in the Navy before coming to Michigan to study law. After receiving his degree, he taught at the University of Washington Law School for a year, then served as regional attorney advisor to the federal Office of Price Stabilization in Seattle, before entering the private practice of law. From 1952 until his appointment to the appeals court in 1969, Pearson was a partner in the Tacoma firm, Davies, Pearson, Adderson and Pearson.

Pearson has also been active in local and state bar activities. He was president of his local bar association, was elected to the Board of Governors of the state bar, and served as bar examiner for five years. He has also served on his local school board, and on the State Board of Education.

With the addition of Pearson in Washington, the Law School has alumni serving as State Supreme Court justices in seven different states. In addition to the four alumni now on the Supreme Court of Michigan. Justices in Minnesota, Missouri, Maine, New Hampshire, and Hawaii are graduates of the Law School.

☐ Law School alumnus **Wallace D. Riley**, JD '52, has been nominated to be president-elect of the American Bar Association. His nomination will be voted on by the House of Delegates of the ABA when it convenes next August. If elected, Riley will serve one year as president-elect, then in 1983 he will become president of the Association. With its 280,000 members, the ABA is the largest voluntary professional association in the world.

Riley, who holds BBA and MBA degrees from Michigan in addition to his JD, has long been active in the ABA. Since 1972 he has been a member of the policy-making House of Delegates of the organization. He was a member of the Board of Governors from 1977 to 1980, chaired its Finance Committee in 1979-80, and served on its Long Range Financial Planning Committee in 1978-80. He also sat on the ABA's Standing Committee on Judicial Selection, Tenure and Compensation in 1974-79 and Committee on Legislation in 1962-68.

Riley has been active in the ABA sections of Corporation, Banking and Business Law, Economic of Law Practice and General Practice and the Young Lawyers Division. He served on the General Practice Section Council from 1976 to 1980.

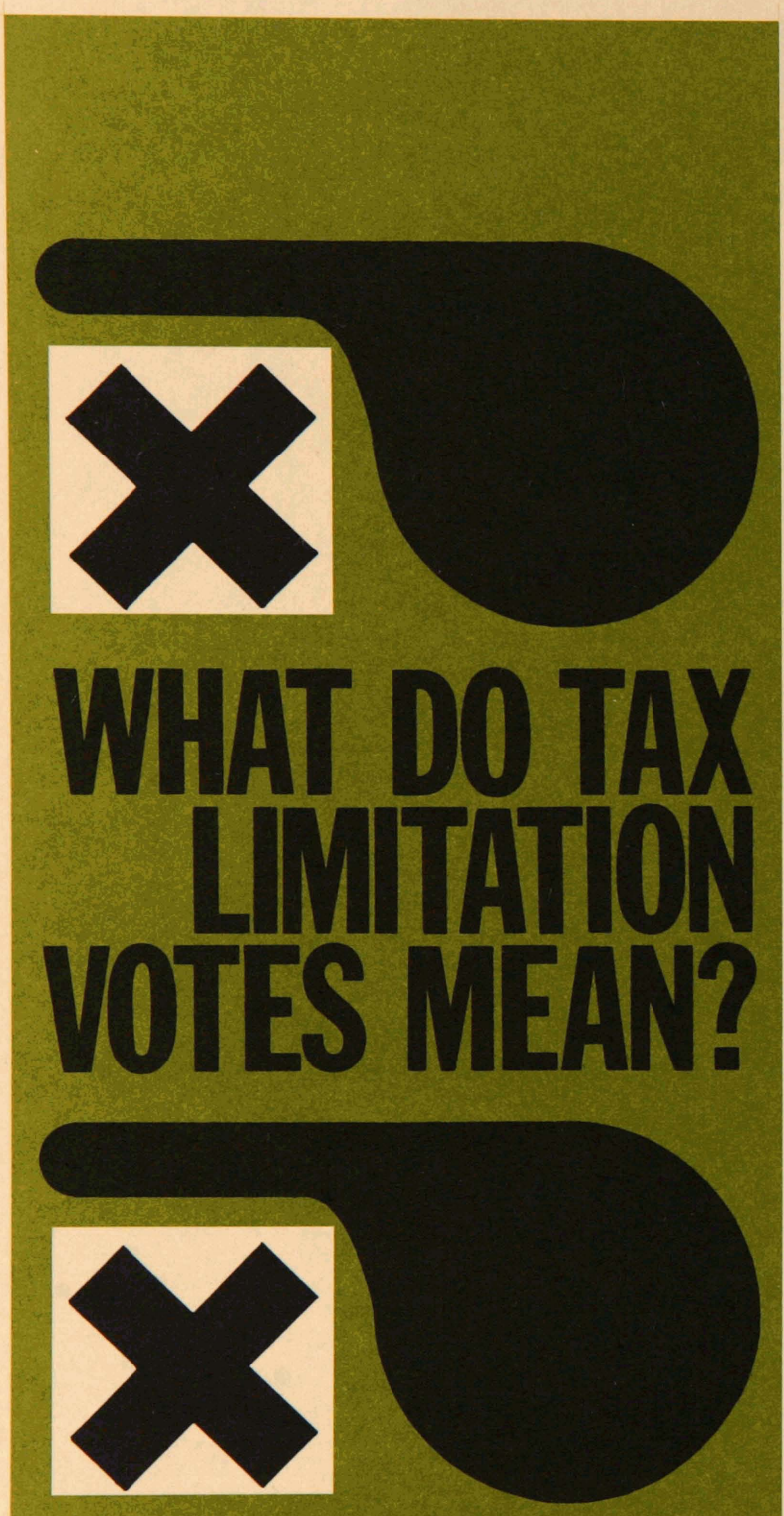
Also active in the Federal Bar Association, Riley was national vice-president in 1963-64 and president of the Detroit Chapter in 1962-63. He has been a trustee of the Federal Bar Foundation (Detroit) since 1968.

Riley was president of the State Bar of Michigan in 1972-73, and served on the state bar's Board of Commissioners in 1965-73. He chaired its Young Lawyers Section in 1960-61. With the Detroit Bar Association, Riley chaired the Young Lawyers Section in 1959-60, and has served on committees on the Circuit Court, U.S. District Court, Law Day, Library, and Publications.

In other professional organizations, Riley has been Michigan State Bar Foundation president since 1974 and is a former vice-president, secretary and trustee. He served the American Bar Retirement Association as president, vice-president and a director.

Riley has been a special assistant attorney general for the State of Michigan since 1969. He has been a member of the state's Board of State Canvassers since 1970, serving as its chairman in 1974-76 and again since 1980.

Riley is married to Judge Dorothy Comstock Riley of the Michigan Court of Appeals. He holds a master of laws degree from George Washington University in addition to his Michigan JD.



WHAT DO TAX LIMITATION VOTES MEAN?

by
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In response to the tax limitation movement which received national attention with the passage of California's Proposition 13 and which gave rise to a slate of tax limitation referenda on the Michigan ballot in 1978, we began a theoretical and empirical study of the relationship between the size of state and local governing units and issues in public finance.

The Theoretical Work

The Size of Government and the Limits Thereon

The theoretical investigation focused on two questions: whether there are natural limits to the size of government when public sector employees are well organized to advance their own interests and whether, given that local governments use more resources than might be considered ideal, tax limitation is an effective remedy. Although government may be considered too large because of its intrusiveness into private affairs or its wastefulness, we restricted our study to situations in which government either produces more public output than voters would choose freely or those in which public employees are paid more than they would be in the free market.

The bulk of the academic literature on excessive government spending has been concerned with excess public output, taking the level of public sector wages as given and concentrating on developing theories that would explain why the public sector engages in more activity than would be optimal. In contrast, our first theoretical paper in this area deals with the interaction between public employee bargaining power over wages and the size of government spending.

The general view has been that public wage growth and public employment growth are complements. As public wages rise, there is an incentive for workers to join the public sector. As this increased population of public employees votes for sympathetic political candidates, the probability that such candidates get elected rises, and public employees are rewarded with wage increases. The process appears to be unstable, leading to ever-higher levels of public wages, public employment, and tax rates.

While not denying the existence of political interactions of this sort, we have tried to put fears of a large and growing government sector into perspective by focusing on the economic aspects of the problem. We assume that private employees are free to leave a community in response to rising costs for public output and that when they leave, the tax base falls. This, combined with the fact that public budgets are financed through taxes paid by both public and private employees, implies that there is a real constraint on the extent to which public employees can raise their wages. As their wages increase and private employees leave the community, revenue resulting from property taxes could fall by so much that the higher tax rates needed to pay these wages would lower after-tax public wages.

As public employment rises, the public wage might also rise for a time because of the growing political power of public employee unions. However, that rise would only be temporary, because an upper constraint will always be set by the resultant increase in tax rates, the greater proportion of public employees in the population, and consequent lowering of the after-tax income of public employees.

Extensions of the Model

The basic theoretical model can be used to consider how important public employees' voting power can be in affecting the level of government spending. One byproduct of our work in this area is based on the observation that in order for public employees to bias the outcomes of referenda, they must have different preferences for public spending from

private employees. Only then will different voting turnout rates matter.

The Effect of Tax Limitation

We have considered in some detail the effects of tax limitations on the economic well-being of residents in jurisdictions that operate under such limitations. Our study indicates that tax limitation may either improve or reduce economic welfare, depending on the causes of excessive government size. If government is seen as too large because public employees receive wages that exceed the competitive private sector wage, but private employees choose the optimum level of government output, then tax limitation can lead to reductions in the welfare of both private and public employees. If the opposite case holds, namely that public employees are paid market wages but are somehow able to produce more output than would be competitively determined, then tax limitation (at least over some range) will improve the welfare of private employees. Where government's excessive size is a combination of the two phenomena, the effect of tax limitation is ambiguous—it could go either way.

The Empirical Findings

The Data

In November 1978 Michigan voters were faced with three constitutional tax limitation proposals on the ballot. In light of the widely perceived "taxpayer revolt" stemming from the then recent passage of Proposition 13 in California, the Michigan proposals provided an ideal natural opportunity to determine why people vote for such proposals and what they assume the effects will be. We also wanted to know whether public employees are able to bias the outcomes of elections in their own interest, whether the preferences of nonvoters are well represented by those who do vote, what determines the demand for local public services, and what factors differentiate people who vote for tax limitation from its opponents. In particular we were interested in the nature, causes, and extent of voter dissatisfaction with the budget performance of state and local governments. Did this dissatisfaction represent a conservative push toward smaller, or limited, levels of government spending, or did it reflect the voters' feeling that they may be able to lower their tax bills without undergoing a reduction in public services? In more formal terms, our study provided an opportunity to answer a question that is puzzling in light of the degree to which budgets, especially at the local level, are already directly influenced by voters: why would these voters add amendments to the state constitution to constrain the behavior of themselves and of their elected representatives?

In order to answer these questions, we conducted a telephone survey of a random sample of 2001 Michigan residents. The survey was performed in the three weeks immediately after the election, and questions were asked about respondents' voting in the recent election, past voting behavior, political affiliation, income, family characteristics, tax payments, and perceptions about the state of the world and the impact of the proposed amendments.

Our analysis concentrated on two limitation amendments. The Headlee Amendment, which passed with 52 percent of the overall vote, was essentially a limitation on the behavior of the state government. It limited state revenues (exclusive of federal aid) to a constant share of state personal income, while prohibiting the state from mandating expenditures on local governments without paying for them. It also placed a constraint on local fiscal behavior: property tax levies on existing property could not grow at a rate in excess of the inflation rate as measured by the Consumer Price Index without tax rates being cut automatically. However, these automatic cuts in rates could be prevented by an explicit local referendum on the matter.

The Tisch Amendment, which was defeated because it received only 36 percent of the vote, would have been essentially a local limitation—requiring a large cut in the assessed value of property. Along with other restrictions on tax rates already in the Michigan constitution, this limitation would have forced property tax revenue cuts in some, though not all, communities. It also would have placed a slight constraint on the fiscal behavior of the state government by limiting the state income tax rate, but other revenue sources would have not been restricted. Hence, the Headlee Amendment was a limit on state taxing behavior with a modest constraint on the behavior of some localities, while the Tisch Amendment drastically limited the fiscal behavior of many, but not all, localities and placed a slight constraint on state taxing behavior.

The third limitation amendment on the Michigan ballot in 1978, one that we asked about in our survey but found too complex to analyze, called for an educational voucher plan to finance local education but left almost all details of this complex plan unspecified. It received only 25 percent of the vote.

Preferences for Public Spending

The most striking empirical result from the survey is that by and large citizens of Michigan did not wish to restrict current levels of output of either state and local governments. Indeed, with the exception of spending on welfare programs, there is a decided sentiment for expansion (and a stated willingness to pay for expansion) in all of the program areas for which responses were elicited. To the extent that there is a taxpayer revolt in Michigan, it would seem to be a revolt against welfare spending. Ironically, that is a type of spending that in Michigan, as in most other states, is financed about equally by the federal government and by state and local governments.

This characterization of the voters is strengthened when we consider stated preferences regarding state and local spending as a whole. For each of the two levels of government, respondents were informed of the major functional responsibilites of the respective levels and were then asked if they would favor an across-the-board increase or decrease or no change in both spending and taxes, assuming that all spending and tax categories were to be changed proportionately. Furthermore, those voters who favored an across-the-board increase or decrease in spending and taxes were asked to give their desired percentage amount. The mean percentage change desired is very close to zero, only -3.53 percent at the state level and -0.22 percent at the local level. These mean changes are small both absolutely and relative to the within-group standard deviations. Indeed, for both levels of government, the median desired change was zero. Since more than half the respondents expressed a desire for no change at both levels of government, the median respondent is apparently happy with the status quo at both the state and local levels.

It is perhaps unwise to take these results too seriously because so many voters expressed preference for no change in the amount of public spending—over half the sample at both the state and local level. One might argue that some of the voters preferring the status quo were really either uninformed or unable to comprehend the question. To see how sensitive our results were to this possibility we omitted voters preferring the status quo and recalculated the means and medians, obtaining mean and median desired percentage changes of -7.8 and -8.3 at the state level and -0.5 and 4.5 at the local level. Even this strong correction—surely

an overreaction because some of those choosing no change must have truly felt that way—did not give very large reductions in desired state spending and had very modest impacts at the local level. The clear conclusion is that at least as respondents answer explicit questions, there appears to be a desire for only a modest cutback in state spending and essentially no change in local spending. We might also predict that a statewide tax limitation amendment like Headlee would have a better chance of passage than a local limitation amendment like Tisch, but that gets ahead of our story.

Preferences of Different Groups

The finding that residents are generally satisfied with the status quo does not change very much when we examine the preferences of voters with particular demographic and economic characteristics. Federal government employees living in the state want the least state expenditures, while blacks want the smallest cuts. However, even blacks would like slightly less spending than is now undertaken—and the difference between the two groups is only about five percentage points. The results are similar for local expenditures: federal government employees are among the most negative and blacks the most positive. In this case, however, blacks do support increases in local spending, as do a few other subcategories of the population.

Despite the relative uniformity of responses, there were some important differences among groups which conform with prior expectations. Of greatest interest to us, in light of our concern with the political effects of private versus public sector employment, is the role of the employment status variable. Private sector voters want less state and local public spending than those in the public sector, especially when federal government employees are counted in the private sector. Nevertheless, the finding that employment status does affect attitudes toward government spending does not change the fact that the differences are small.

Explaining Votes with Preferences

Until now we have discussed state and local public spending demands. The next question is whether these spending demands themselves can predict the vote on the Headlee and Tisch Amendments. The results generally do correspond to prior expectations. Only 36 percent of those desiring more state spending and taxes voted for Headlee, while 67 percent of those desiring less state spending and taxes voted for the amendment. For Tisch the same percentages were 16 and 45, respectively. The fact that 51 percent of those desiring the same spending and tax levels supported Headlee may be surprising if Headlee is interpreted as altering the status quo, but these voters could have interpreted Headlee as preventing further growth of government spending as a proportion of income and thus as preserving the status quo.

Perceptions About Tax Limitations

The statistical analysis shows, however, that spending preferences alone do not provide a very powerful explanation of tax limitation voting. We tried to do better by examining the interaction of spending preferences with perceptions about the likely impact of the limitation amendments. To do this we used answers to a series of perception questions which followed the format: "Do you think the passage of the Headlee (Tisch) proposal will lead to:

a) a reduction in the overall level of taxes in Michigan
b) a reduction in property taxes
c) an increase in income taxes
d) a reduction in the number of state and local government employees
e) a reduction in the funds available to the local public school system
f) a reduction in the future wage increases of government employees?"

These questions were followed by the open-ended question of what respondents thought would be the most important impact of the amendment. Perhaps giving choices listed as a) to f) increased the probability of one of our answers being selected as the most important impact, but other responses were possible and were quite frequently given.

Our data indicate that spending preferences and perceptions about the likely impact of the amendment should be considered jointly in explaining votes. If, for example, a voter desired less spending and also perceived that the Headlee amendment would lower public spending, the voter should support the amendment. If the voter had the same perception but desired more spending, the voter should vote against the amendment.

We have constructed statistical models based on this conclusion to explain the vote on both amendments along these lines. The variable to be explained was coded as "one" if the voter voted for the amendment and "zero" if against. The explanatory variables were a series interactions of preference and perception, patterned on the above example. Whenever relevant, the variables were further split according to whether voters were in the public or private sector and, hence, would view an outcome such as lower government wages or employment differently. For these purposes all nonworking respondents were considered as private, since they would still pay property and sales taxes, as were all working in the federal government. All those working and nonworking respondents with either the respondent or spouse working in the state or local public sector, about 11 percent of the sample, were considered public.

The first thing to be noticed is that the explanatory power of this model is much improved over the case in which just spending preferences were calculated without regard to perceptions about the amendment. Most of the variables are statistically significant and more or less internally consistent, though in some cases puzzling. For example, among the voter-respondents who perceived that the most important impact of the Headlee Amendment would be to reduce government spending, those wanting less state spending and taxes voted heavily for the amendment, as would be expected. Those wanting more state spending and taxes were evenly split on the amendment. Among those who felt that the Headlee Amendment would have tax reduction as its most important impact, support was very strong for the amendment, even among voters who favored maintaining the current level of state spending and taxes. The obvious explanation for this behavior is that these voters felt that taxes could be cut without a reduction in spending.

We might even imagine a motive based on uncertainty about the impact of the amendment: voters feel fairly certain their taxes will be cut but much less certain that public services affecting them will be. Whatever the case, such uncertainty is mirrored among the cynics who felt the most important impact of the amendment would be to increase taxes. These voters were strongly inclined to vote against the amendment whatever their spending preference.

Far and away the strongest support for the amendment came from those who felt that it would increase either governmental efficiency or voter control of government. There are 120 voters in these categories, and ninety percent of them voted for the amendment.

Regarding the wages of public employees, while very few public or private voters felt limitation of future government wage increases would be the most important impact of the

amendment, many felt it would have that impact. Among public sector voters, votes went against Headlee regardless of whether these workers felt that public wages were above those for comparable private sector jobs. Among private sector voters, those who felt that public wages are higher than private were fairly neutral on the amendment, but those who felt that public wages are lower than private opposed it. Certainly among private sector voters there appears to be little resentment directed against high wages of government employees and little voting for tax limitation on that account. Whether this result would obtain in other states is uncertain; perhaps the union solidarity tradition is very strong in Michigan.

The public employment findings also demonstrate the nonpunitive feelings of private sector voters. Among those who felt the amendment would reduce government employment, such voters opposed or were neutral about the amendment, even if they felt that public employees worked less hard than private employees. On this issue, however, public employees show some mysterious devotion to the common interest. Those who felt the amendment would lower employment and that government workers did not work as hard as private workers supported the amendment. Presumably they felt the other guy would get laid off. Finally, voters who felt the amendment would hurt schools were heavily against it even if they favored less school spending, and those who felt it would increase governmental efficiency or voter control were much more favorably inclined.

When we consider the Headlee amendment and compare its overall plurality with the pluralities it received among groups of voters identified by voter perceptions of its most important impact, we can see the extent to which passage of tax limitation amendments reflects each of three motives: reduction of public spending, lowering of public sector wages, and gains in government efficiency.

In our sample of Headlee voters, 578 voted for the amendment and 450 against, giving an overall plurality of 128 votes. This plurality was small or negative among those who want lower wages, those who want no change, and those who did not respond. Among all these groups the net plurality was −36 votes. Hence, the passage of the amendment can be attributed to the plurality of 128 + 36 = 164 votes among the other groups. Among these groups, those who wanted a smaller public sector accounted for a 43 vote plurality. Those who were looking either for efficiency gains or for a free lunch were responsible for a 41 vote plurality, and those who were clearly looking for a gain in efficiency or control accounted for an 80 vote plurality. Hence, three out of four voters responsible for the plurality of the Headlee Amendment were motivated either by a desire for a free lunch or for genuine efficiency gains. Only one out of four appears to favor a smaller-sized public sector where both spending and taxes are reduced.

Implications of the Tax Limitation Vote

Surveys are always somewhat suspect, in part because one never knows if one has asked the "right" questions and in part because respondents do not have to act on the basis of their answers. Allowing for these limitations, however, our analysis of the tax limitation vote leads to the following conclusions.

- The tax limitation movement is not primarily an attempt to correct public sector versus private sector spending imbalances. Although more people think that government is too large than believe it is too small, the differences are not substantial and are also not strongly related to reported voting behavior.
- The tax limitation vote does not appear to be an attempt to "punish" public employees for earning wages that exceed those of private sector workers.
- There is a strong correlation between the desire for both more control over government and more efficient government and votes for tax limitation.
- The perception that tax limitation will reduce taxes is strongly associated with affirmative votes, even among voters who express a preference for government that is no smaller than the status quo. Such voters may perceive that their own taxes will be cut but that the difference will be made up by gain in governmental efficiency, or they may be searching for the ever-elusive "free lunch."

Do Public Employees Exert Disproportionate Political Power?

The survey analysis also provided us with some interesting results concerning the voting process and the role of the public employee vote in particular. If public employees can affect their own wages, they have a special incentive to vote for higher public spending. We sought to discover how powerful they are in effecting their own desired budget outcome as opposed to that desired by private voters.

If bureaucrats and private citizens have the same opinions, bureaucrats' possible power will not matter. The outcome of the vote will be the private sector's desired outcome, regardless of the turnout rates of government bureaucrats. If preferences are different, differential power does matter and matters increasingly as the share of bureaucrats in the total vote population goes up. The conventional wisdom is that bureaucrats exert disproportionate power both because their turnout rates are high and because they hold special views. In fact, this conventional wisdom is based on surprisingly limited empirical information. Most economists writing on the subject cite an analysis of voters in a 1933 municipal election in Austin, Texas. This study found an 87 percent bureaucratic turnout rate and a 53 percent private employer rate but did not measure attitude differences.

We used our voting data to expand on that study, measuring both participation and voting differences. Federal government workers had lower voting participation than private workers. State government employees voted with about the same frequency as those in the private sector. Local government employees and those public workers who were paid substantially less in the public sector than they would be by private employers had significantly higher rates of voter participation than private voters. Collectively, public workers have higher turn out rates in elections that concern them directly than to private voters.

Given all this factual information and working with both an inclusive and a narrowly restricted definition of public employees, we learned that the vote against the Headlee Amendment was between 2.2 and 4.3 percentage points higher than it would have been had only private employees been voting on the amendment. To get a sense of the impact of such a percentage increase in the vote, we used data gathered about millage elections in 17 Michigan school districts between 1959 and 1961 and between 1969 and 1971. We were able to conclude that the percent of election successes that would have been failed because of the 4.3 percent point bias was 9.7 percent in 1959-61 and 10.6 percent in 1969-71, with correspondingly smaller proportions if the bias were closer to 2.2 percent. These results are clearly nontrivial. Nevertheless, the impact of biases of this sort on overall levels of spending on education is likely to be rather small. If it were to become significant, there is nothing to prevent private voters organizing to counteract the higher degree of organization of public employees.

Summary and Implications

On the issues of whether government is seen as too large and whether mechanisms exist to prevent the unchecked growth of state and local government, we are quite confident, based on both our theoretical and empirical work, in concluding that:

- The overall size of state and local government in Michigan is at most slightly greater than would be desired by the voting-age population.
- At least in principle (especially in large metropolitan areas) the fact that population is mobile across jurisdictions imposes powerful limits on the degree to which public employees can combine market and voting power to expand the size of the public sector.
- Public employees have stronger preferences for public spending and have higher turnout rates in relevant elections than do private employees. Moreover, both the preferences and the turnout rates are positively associated with a measure of the degree to which public employees receive wages that are higher than they would get in the private sector. Thus, public employees do bias the outcomes of local referenda and seem to do so in part in their own self-interest (rather than just because they favor a larger public sector). However, the magnitude of the bias is relatively small.

Regarding the causes and consequences of tax limitations themselves, our results are somewhat more ambiguous:

- Given that government is of excessive size, tax limitation will be effective in increasing the welfare of private sector employees only in certain circumstances.
- Votes for tax limitation are not strongly related to the economic and demographic characteristics of voters. Rather, the key determinants of votes are voters' perceptions of what the consequences of the limitation will prove to be. These perceptions, in turn, are also quite randomly distributed across different groups in the population. Thus, an understanding of the vote for tax limitation will require research into how such perceptions are formed.

This paper summarizes research which is more fully described in these articles:

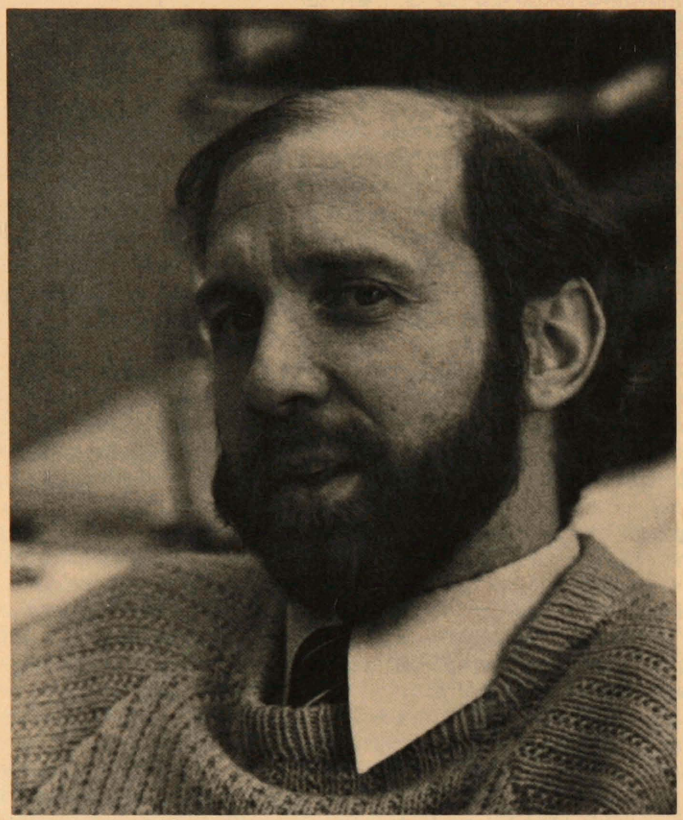
Courant, P., E. Gramlich, and D. Rubinfeld. "Public Employee Market Power and the Level of Government Spending." *American Economic Review* 69 (1979): 806-17.

Courant, P., E. Gramlich, and D. Rubinfeld. "Tax Limitation and the Demand for Public Service in Michigan." 32 *National Tax Journal* 147, supplement, June (1979).

Courant, P., E. Gramlich, and D. Rubinfeld, "Why Voters Support Tax Limitation Amendments: The Michigan Case." 33 *National Tax Journal* 1 (1980); Also in *Tax and Expenditure Limitations*, edited by Ladd and Tideman, COUPE Papers on Public Economics, The Urban Institute, 1981.

Courant, P., and D. Rubinfeld. "On the Welfare Effects of Tax Limitation." 14 *Journal of Public Economics* (1981), forthcoming.

Gramlich, E., and D. Rubinfeld. "Public Employment, Voting and Spending Tastes: Some Empirical Evidence." *Journal of Policy Analysis and Management*, forthcoming.



Daniel Rubinfeld

Congressional Testimony:

Regan on Abortion

Bollinger on Communication Technologies

Constitutional Amendments on Abortion

Statement of

Donald Regan,

Professor of Law, The University of Michigan

Before the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Orrin Hatch, Chairman, November 17, 1981.

Editor's Note: *This excerpt from Professor Regan's testimony questions the theoretical advisability of amending the Constitution to restrict or prohibit abortion.*

This committee is considering proposed amendments to the Constitution. No one should vote for a constitutional amendment at any stage of the process as a matter of mere political expediency.

The question of whether to amend the Constitution should be treated as a matter of the highest principle. Granting that, how does one look for a principled answer to the question, "What should the Constitution say about abortion?" One possible approach is to consider the abstract question, "What would an ideal Constitution for an ideal State say about abortion?"

I am sure many witnesses before this committee, speaking on both sides of the issue, have taken essentially that approach. If I followed them in this, I would produce moral and philosophical arguments that a fetus should not be regarded as a person and that a woman should not be made to bear a child she does not want. If I did this, I would only repeat what you have heard before.

There is another way to approach the problem, which is in some respects a better way. You should be asking, "What legal position on abortion coheres best with the general spirit of our laws?" Our laws are a rich fabric, and they reveal more than any philosophical argument about what our values really are.

I believe that laws forbidding abortion are inconsistent with the general spirit of our legal system. Fundamental principles of American law, principles recognized in the common law and statutes as well as in parts of the Constitution that no one suggests should be amended, argue strongly that we should not prohibit abortion.

It is true that we are contemplating changing our laws if we amend the Constitution; but, still, what is being contemplated is a change in one part of our laws. We do not wish to change them all, all at once, nor could we do so. We should therefore be certain before we make a change that what we propose to add is consistent in spirit with what we already have and are satisfied with. The proposed amendments on abortion fail that test.

The first issue that arises, on my approach as on a standard approach, is whether the fetus is to be regarded as a person. In my view, a general consideration of our laws does not compel an answer to this question either way. I shall therefore concede for purposes of the following argument that it is permissible to regard the fetus as a person.

I suggest that, even so, laws prohibiting abortion are inconsistent with the basic tenets of our legal culture. The reason, simply stated, is this: It is a deeply rooted principle of our law that, in general, one individual should not be legally compelled to provide aid to another individual. For example, a Pennsylvania court recently held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin, even though the operation involved little risk, even though healthy bone marrow regenerates, and even though there was no other source of aid.

We value highly the freedom to choose one's associations and responsibilities. We do not believe that one individual should be compelled to serve another. Forbidding abortion is tantamount to compelling a pregnant woman to serve the fetus—to give aid and to give aid of a specially personal, invasive, and burdensome sort. Unless there is some reason to set aside the general principle I have referred to, abortion should not be forbidden.

There are a number of possible objections to this argument. It might be said, "Abortion is not a mere refusal to aid; it is an active killing." It might said, "Surely it is not a fundamental principle of our law that individuals may ignore others in their need and, if it is a principle of our law, it is time we changed it." It might be said, "We make exceptions to the principle of not compelling aid. Surely laws against abortion would fall under some such exception." These objections are mistaken. I shall do what I can in the limited time available to explain why.

The most troublesome objection is the claim that abortion is not a mere refusal to aid but an active killing. We normally discuss problems about giving aid in terms of acts and omissions. That is the way lawyers talk about the problems. It is omissions that we normally decline to punish. Securing an abortion seems active and therefore seems to fall on the wrong side of the traditional distinction for my purposes.

The truth, however, is not that abortion falls on the wrong side of the traditional distinction; the truth is that abortion does not fit comfortably on either side. In some respects, to be sure, abortion looks like an act, but in other respects it is quite unlike the standard act which we forbid.

In the standard case, when we forbid an act against a victim—murder, for example—we are forbidding an invasion of the victim's life from outside. The victim's interests could be completely protected by removing the would-be actor from the scene entirely. The victim makes no claim on the actor except that the actor go away. That is not true in the abortion context. We cannot serve the fetus's interests by removing the woman from the scene. The fetus needs the woman. The fetus makes a positive claim and a substantial claim on the woman. The issue is whether the woman should be free to reject the fetus's claim.

In its basic structure then, the abortion situation is most like cases—the bone marrow case, for example—where the issue is whether aid must be provided and where a refusal to aid is a standard omission. The central issue is whether the woman may reject the fetus's positive claim. That issue is much more basic than whether, because of the special features of the case, the woman's refusal to aid must be accomplished by seemingly active methods.

That brings us to the second question—whether our law embodies a principle allowing one to refuse aid and, if it

does, whether we should change it. There are a wide range of cases in which our laws impose essentially trivial duties of aid—for example, a duty to call a doctor for someone who is injured. In fact, even cases involving these trivial duties are clearly treated by courts as exceptions to a general principle that no aid is required.

If I had time, I would argue at length that the pregnant woman has done less to make herself an appropriate subject for a duty to aid than any of the other individuals on whom we are willing to impose these trivial duties. But the first point which should be emphasized is that in no other case do we impose duties of aid which involve a physical invasion and physical burdens like those of pregnancy.

I have already mentioned the only decided "duty to aid" case which at all resembles the abortion case in this respect—the case which held that a man could not be compelled to give bone marrow to be transplanted into his dying cousin. The burden that was too great to impose on that man was much less than the burdens of a normal pregnancy.

We must not close our eyes to the fact that pregnancy is invasive. It alters the entire functioning of a woman's body. And it is burdensome. It involves substantial pain, discomfort, and disability spread over many months. Further, many aspects of our jurisprudence, from the disappearance of state-imposed corporal punishment to judicial scruples about organ donation by incompetent persons, show that the imposition of physical invasion and physical pain are specially disfavored.

It is true that some women accept the burdens of pregnancy willingly, even joyfully, if they want the child they are carrying, but the proper measure of the burdens for our purposes is how they appear to women who do not want the child. The issue is what we may impose on them.

If we want to consider cases involving burdens genuinely comparable to the burdens of pregnancy, we must consider hypothetical cases. Would any court punish a parent for not running into a burning building to rescue his child? I think not. Would any court order a parent to donate a kidney to his child? No. Even though these hypothetical cases involve people who intentionally became parents of living children—in some respects the people most appropriately compelled to give aid—I submit that no court would find a duty in these cases. It follows that a pregnant woman should have no duty to remain pregnant.

Let me say a few words on a topic I have already mentioned, the range of recognized exceptions to the principle that there is no duty to aid. We impose some duties of aid on lifeguards and innkeepers, on parents and social hosts, on people who voluntarily begin a process of rescue, and on people who innocently cause accidents to others. Why not on pregnant women?

All I can do, given the limitations of time, is to sum up in a series of negative propositions the facts that distinguish the pregnant woman from all others on whom we impose duties to aid. In the standard case of a woman who wants an abortion, the woman has not made any contract to give aid. She has not engaged in an economic enterprise involving the provision of services. She has not invited the formation of a relationship with the particular fetus inside her or indeed with any fetus at all. She has not acted in such a way as to discourage or deflect anyone else who could give the required aid. She has not volunteered aid to the fetus. She has not incurred a duty by barging into the fetus's life and damaging the prospects it enjoyed before her intervention. In short, none of the usual reasons for requiring aid apply.

It may seem that at least one of the standard reasons does apply. It may seem that any woman who voluntarily has sex, even if she uses the best available contraceptive measures, knows there is a chance she will become pregnant and may therefore be held to have assumed the risk that she will be required to aid a fetus.

Is not this "assumption of risk" argument essentially the basis on which we impose a duty to aid on innkeepers, for example? The innkeeper wants healthy guests, not sick ones, as the woman wants to have sex but not to get pregnant. But the innkeeper runs the risk of receiving a sick guest and suffering added responsibility, as the woman runs the risk of getting pregnant and being made to carry the fetus to term.

There are a number of points to be made here. The "assumption of risk" argument provides *no basis at all* for forbidding abortion in pregnancies resulting from rape. More broadly, it is not the general tendency of our law to hold people responsible for all the risks they can possibly foresee, however small. Strict liability has a place in our law but hardly any place at present when the result would be to impose substantial costs on individuals.

That brings us to the crucial point: there may be cases where we are willing to say that one has a duty to aid because he has assumed the risk, but in no other case do we impose burdens remotely approaching the burdens of pregnancy on such a slender basis as that. We speak easily of the innkeeper's duty to aid, but it would never occur to us to require an innkeeper to donate a kidney, say, to a guest in need.

It may seem that I have somehow forgotten the central point, which is that if the fetus is regarded as a person, then there is a person's life at stake. I have not forgotten that. One of the lessons of my argument is precisely that to say there is a life at stake is not to settle the issue. We have other values besides the preservation of life, and the other values sometimes prevail over the value of life.

There are many cases, having nothing to do with abortion, where we allow refusals to aid even though life is at stake. In such cases, the value of life is outweighed, and it is outweighed by precisely the same values that support a woman's right to choose abortion.

I turn now to the last point in my written statement. I have argued that it is inconsistent with the general spirit of our laws to forbid abortion. To forbid abortion is to impose on the pregnant woman burdens of a sort we impose on no one else.

If that is correct, then the injustice of forbidding abortion is exacerbated by the fact that it is women who suffer. Women as a class have suffered from much discrimination, both private and public. We should not add new discrimination. Further, no one chooses his or her sex. We should be, and in general we are, particularly reluctant to impose burdens on a class defined by a characteristic over which individuals have no control.

In sum, to forbid abortion is to compel women to give aid to other individuals at substantial cost to themselves in a manner at odds with the general tenor of our laws. It is wrong to impose special disadvantages on any class, and it is especially wrong when the victims are a class such as women.

The force of this argument cannot be avoided by saying that we reject the general principle that one is entitled to refuse aid and that the proposed constitutional amendments before this subcommittee represent first steps towards a better legal order.

First of all, even most opponents of abortion would not reject the basic principle that one may refuse aid in cases such as those raising the possibility of compelled organ donation.

Second, there is no evidence at all that the movement to forbid abortion is the first step in a movement to impose greater duties of aid generally.

Third, and most important, even if we were inclined to impose greater duties of aid, starting by forbidding abortion is starting at the wrong end. The pregnant woman has done much less to invite the imposition of a duty to aid than

many others on whom we currently impose no duties at all. The burdens that we would impose on her are vastly more objectionable than any we impose in other contexts.

I think it is also appropriate to remind the subcommittee at this point that, although I have been assuming the fetus may be treated as a person, the status of the fetus is highly controversial, and that controversy further argues against starting with a prohibition on abortion. Even if we are inclined to make enormous changes in the areas of law I have discussed—and I do not believe we are—prohibiting abortion is not the way to start.

Editor's Note: *After testifying on the inadvisability of any constitutional amendment prohibiting abortion, Professor Regan went on to comment on each of the proposals that were before the subcommittee. One of them, the Hatch proposal, has since been voted out of subcommittee and approved by the full Senate Judiciary Committee. It now will go to the Senate floor. It will have to be approved there and in the House by a two-thirds majority, as well as be ratified by three-quarters of the states to become part of the Constitution.*

The portion of Professor Regan's testimony which concerns this specific proposal and responses by Senator Hatch are given here. The wording of the proposed amendment, S.J. Res. 110, is: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have the concurrent power to restrict and prohibit abortions: Provided, That the law of a State which is more restrictive than a law of Congress shall govern."

Mr. Regan: The Hatch proposal represents an unprecedented invitation to Congress to enter areas of family law and ordinary criminal law. Our whole history presupposes that Congress should leave these areas alone. If we must act, then what we should do is simply return the matter to the States. I am interested to note that that is how Senator Hatch describes his proposal, although the proposal as written does a bit more.

Senator Hatch: Actually, that is not correct. It does absolutely nothing. All it does is give the option. I might mention, and it is speculation on my part, . . . that the likely congressional action would probably be to do away with federal funding of abortions. But there will certainly be an effort by those who are anti-abortion to enact a very stringent federal law, as there will always be by those on the other side as well to not have a stringent law.

Mr. Regan: I am not denying that, Senator, but I believe you have characterized your amendment as essentially doing nothing but reversing *Roe v. Wade* and putting the matter back under State jurisdiction.

Senator Hatch: No. I make it very clear that the Congress can act on this matter.

Mr. Regan: What I mean is that I believe in your original statement—the statement you read us earlier this morning—you characterized your proposal that way, and you now agree with me that you do in fact create a brand new congressional power under your proposal.

Senator Hatch: No. We create what existed previously, prior to *Roe* and *Doe*. Frankly, I do not find that a very difficult position to be in. I do not mean to interrupt you, but I just want to correct that one point.

We have filed a new Criminal Code. It is going to be passed out of the committee within the next week or so. That Code opens up all kinds of areas that heretofore have not been considered, and we codified certain areas which have. There is nothing in the law that says Congress has no right to do that or should not have the right to do it. It comes down to a question of philosophy whether Congress should or should not have the right to pass stringent or non-stringent abortion laws.

All my amendment does, in my opinion, should it be passed by two-thirds of the Congress and be ratified by three-quarters of the States, is provide the opportunity for the people, through elected representatives, to determine the outcome of this particular issue.

I might add that whether or not congressional authority existed with respect to abortions prior to *Roe* is the real question. I think it did.

Be that as it may, your statement has been very provocative today, and I have enjoyed it, in spite of the fact that you have differed with me, which I find just awful. That is supposed to be humorous.

Mr. Regan: Despite your comments, I continue to believe that your proposal creates a new form of federal jurisdiction to prohibit and restrict abortion. Conceivably it existed previously but that would have been regarded as extremely doubtful by most constitutional scholars. It certainly represents a kind of legislation which Congress has by and large avoided, I believe.

To make a related but more technical point, this would be an almost unprecedented creation of a situation in which Congress has a power to legislate but not a supreme power.

Ordinarily, of course, federal law is made controlling by the supremacy clause. You have suggested creating a congressional power and specifically stipulating that it shall not be supreme.

Senator Hatch: You are probably right also, although not necessarily so, that that power may not have existed prior to *Roe v. Wade*. I have to acknowledge that. On the other hand, this is a very innovative country.

Mr. Regan: Indeed it is, but there is always a question of whether inventions are a good thing.

Senator Hatch: And occasionally we Senators can be fairly innovative, but most inventions are certainly worthy of debate.

Mr. Regan: That is a matter on which we could have a long discussion, which I will attempt not to begin.

I have two more very specific points. The stipulation in the Hatch proposal that the more restrictive of two laws, one state and one federal, shall control is likely to produce severe problems about deciding which of two laws is in fact more restrictive. I think the most difficult problems, which may be the least immediately obvious, will arise when states and Congress prescribe different procedures, either different medical procedures for an abortion everybody agrees is permitted, or different procedures for deciding whether a specific abortion is permitted under the relevant law. Again, I think that these particular problems are problems that no one really wants to create.

Finally, I cannot help suggesting that one defect of the Hatch proposal, to my mind, is that it would allow states and Congress to forbid abortions even when a woman's life is at stake. I hope that no state or Congress would do that, but one of the advantages of other proposals is that they at least suggest that would not be a good idea.

Senator Hatch: If I could interrupt you on that, I cannot conceive of anybody doing that.

Mr. Regan: I am glad to hear that, Senator. Thank you.

Senator Hatch: Let me ask another question about the amendment I have offered. I have argued that one of its virtues is that it allows these very difficult issues relating to abortion to be resolved by legislative consensus rather than by solutions imposed upon everyone kicking and screaming by the Supreme Court itself.

I have been criticized, however, for leaving a question of

basic individual rights up to a democratic vote, something that is generally inconsistent with the Constitution. In return, I have suggested that S.J. Res. 110 is nevertheless an appropriate constitutional solution because of the deep division over what precisely these individual rights in fact are—the rights of a pregnant woman or rights of the unborn child.

Could you offer some comments on this whole issue of leaving an issue such as abortion to a democratic representative process rather than to unelected jurors?

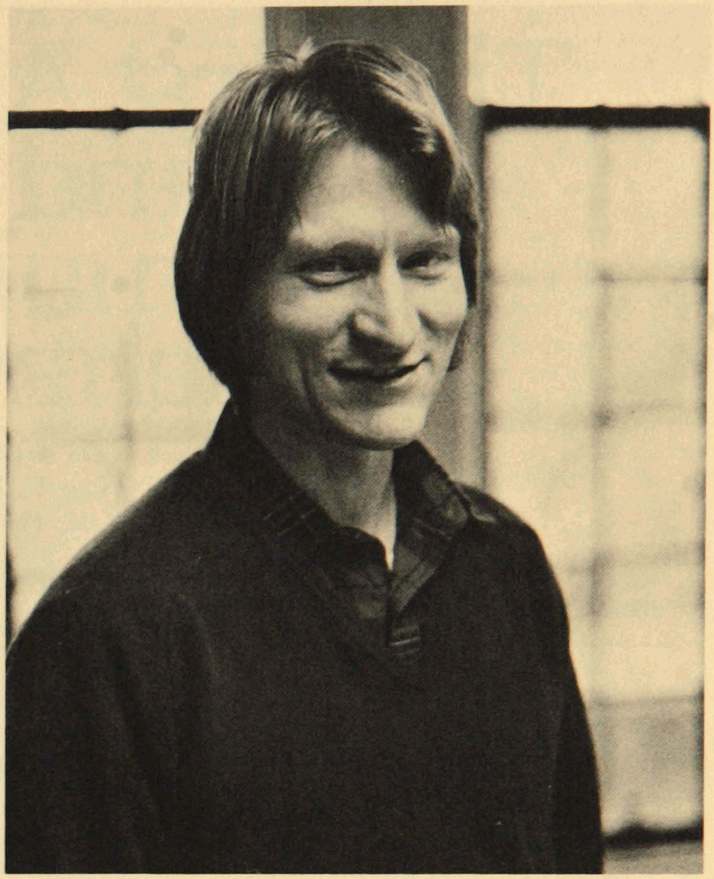
Mr. Regan: The claim that the Supreme Court Justices went beyond their judicial role in *Roe v. Wade* is, I think, simply mistaken. It has always been an essential part of the Court's role to interpret the Constitution and to protect individual rights. That means sometimes making controversial decisions about what individual rights are. We do not say, and we have never said, that every question should be left to ordinary legislative processes.

The fact of the matter is that *Roe* has been a controversial decision and has made lots of changes in state laws. I do not think, on the whole, that it made greater incursions on state laws than, say, *Brown v. Board of Education* or than, say, *Reynolds v. Sims*, and I could go on. We have never said that all questions should be left to the ordinary political processes. In particular, questions about rights should not.

You are absolutely right that the claim can be made that there are rights on both sides of this issue. The same could be said, for example, about the issue of race discrimination. It was claimed in favor of those who wanted to discriminate that there were rights of association. There are usually ways to find rights on both sides.

The mere fact that this is a controversial question about which there is great division in our nation, which nobody can fail to see, is not by itself an argument for giving it back to the states or taking it away from the Court. The Court has made decisions, decisions that almost everybody would now approve of, on many highly divisive issues, as divisive as abortion.

The real question, which we should not try to avoid, is, given that the Court was operating within their role, were they right? I think they were.



Donald Regan

The First Amendment and New Communications Technologies

Statement of

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Before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, September 15, 1981

The proliferation of new technologies of communication dazzles us all. Around us is the promise of abundance and diversity; even our vocabulary is expanding, as people talk of "dishes," "dbs," "videotext," and "home information centers." Amidst the confusion that often reigns over discussions about what the future will be, there is an anticipation of a life filled with a superabundance of information and ideas. How much will turn out to be reality and how much airy speculation it is now impossible to say. We can be sure, however, that there will be change, and, to a major degree, the form it will take will depend upon a myriad of choices we will make as we move through this period of technological transition. What fundamental principles, what values, should guide the making of those choices?

The First Amendment to the United States Constitution will set the boundaries of our choice-making capacity. What are those limits likely to be? The First Amendment is more than a negative statement about the limits of state involvement in the domain of expression. It is also for us a positive embodiment of basic social values which can, and should, guide the policy choices permitted us. What, then, are the values embodied in the First Amendment to which we should refer when facing the difficult choices ahead as we define the nature and shape of the American mass media?

These are the subjects of this paper.

I

As we look for guidance in defining the present and future constitutional limits to congressional authority in the communications field, our attention should first turn to our past experience with radio and television. History may occasionally, or even often, be a poor indicator of the future, but, as has been said, it may be one of the few we have. If we can acquire an understanding of the way in which the courts, and especially the Supreme Court, responded to the transition from a print medium to a bifuracted print and electronic mass media, we will be much better prepared to anticipate the role the First Amendment will play in the next stage of technological evolution. However, a simple application of past responses to the future will not work. We must also try to anticipate in what ways the future will diverge significantly from the past and, to the extent that it will, devise new policies which take account of those differences. Finally, we must also reach some judgment about how well the past has worked in fact before we extend its life.

We have only recently begun to appreciate that our half century of experience with government oversight of the electronic media and of the judicial response to that official involvement in the press deserves our serious attention and study. Part of the broadcast regulation experience has been the ignoring of it, partly because it was new and complicated and partly because it diverged so greatly from our inherited tradition of freedom of the press. The recent emergence of a "press" identity within the electronic media has had the salutary effect of leading us to wonder how we got to where we are and what lessons inhere in that experience which might enhance our understanding of the development of new technologies of communication.

As one studies this past half century of broadcast regulation and the First Amendment, many important lessons stand out. The most significant would appear to be the fact that the courts seem generally prepared to permit experimentation with regulation, as we seek to cope with the exigencies of technological change. The courts have not kept the government in a straightjacket of traditional principles but rather have recognized that new problems may demand new responses. This attitude was an especially essential one to take with broadcasting because some degree of government supervision and allocation was imperative given the potential problems of frequency overuse and interference. The government was impelled to enter the field and to engage in an allocating function because chaos was the only alternative. Once this step had been taken, the incremental impact of a more expansive regulatory role on our traditional notions of a free press was significantly lessened. This reality, in a totally new and unexplored medium, seemed to justify a government–press relationship that would not have been tolerated anywhere else.

The relationship was, however, carefully tailored to satisfy many of our traditional principles. One critical limitation on government involvement was embodied in section 326 of the Communications Act, which provided that the government could not "censor" any particular material broadcast over the airwaves. On the other hand, the government could promote "diversity" of viewpoints, establish broad standards of "fairness" to regulate discussion of public issues and insist on general subject-matter categories for programming in order to insure that the "public interests," broadly con-

ceived, were met by the new media. In short, the government's role was severely limited, according to traditional norms, on the "negative" side of censorship, but greatly enlarged on the "affirmative" side of expanding the range of discussion over the airwaves.

However, it is incorrect to think that the Supreme Court has responded with a carte blanche to the government in its efforts to regulate the electronic media even in affirmative ways. While it is true that the Court has been extremely tolerant of the broadcast regulatory scheme, it is also the case that its tolerance has been of a special variety. In general terms I would characterize the Court's response to broadcast regulation as one infused with ambiguity and even confusion. Its tolerance was most often one of Delphic silence: while decades passed and the Court was erecting an imposing edifice of First Amendment doctrine, it chose largely to ignore the efforts of Congress and its administrative agency, the Federal Radio Commission, and then the Federal Communications Commission to arrive at a viable federal communications policy. Silence is, of course, an act of extreme ambiguity. It can be interpreted as tacit approval or endorsement, as temporary uncertainty as to the proper response, or as a mere biding of time until the moment is ripe for definitive reversal. The Court waited 16 years until it gave a summary constitutional approval to the general regulatory system (in *National Broadcasting Co.* v. *United States*, 319 U.S. 190) in 1943, and then another 26 until it affirmed the constitutionality of the most important regulation in the overall scheme, the fairness doctrine (in *Red Lion Broadcasting Co.* v. *F.C.C.*, 295 U.S. 367) in 1969.

Even when the Court did speak on the constitutional issues raised by regulation and extended the constitutional imprimatur, it did so in a peculiar way. In *National Broadcasting Co.* Justice Frankfurter wrote for the Court and treated the First Amendment question as so obvious as to merit little consideration. In one sense such a positive endorsement of the constitutionality of broadcast regulation

CONGRESS SHALL MAKE NO LAW

would seem the most encouraging to its proponents; but in another sense it suggests a lack of studied examination or appreciation of the real issues at stake, a failure on the part of the Court to see and grapple with the problems raised by regulation. Decisions that find difficult questions "obvious" are never very secure as precedents.

In *Red Lion* the Court did finally engage in a full-scale consideration of the constitutionality of one major form of regulation. There the Court did extend what appeared to be an unconditional approval. In words that seemed to solidly entrench and legitimate the entire regulatory scheme, the Court said:

> By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.
>
> This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in section 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Not long after the Court spoke these words, however, it spoke others which seemed to convey the sense that it was moving in precisely the opposite direction from that begun in *Red Lion*. First came *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). There the Court rejected a claim that the First Amendment compelled broadcasters to permit private individuals or groups to purchase airtime in order to broadcast their political viewpoints. The FCC had refused to require broadcasters to sell commercial airtime for editorial advertisements, and the Court declined the invitation to reverse the Commission's decision on First Amendment or statutory grounds. On this basis alone one would not have expected the underlying principles of *Red Lion* to undergo any erosion, but the path of reasoning which the Court took in reaching its result in *CBS* did cut against them. For the first time the Court spoke of broadcasters in terms familiar to the print media: they were referred to as "editors" and "journalists," and their role was envisioned as akin to their counterparts in the print media. In another famous Supreme Court dictum, the Court remarked that "editing is what editors are for," thereby conveying the idea that broadcasters were to be thought of as similar to editors and journalists in the print media. Much is in a name, and it is an important indicator of judicial attitudes whether a broadcaster is referred to as a "public trustee" or as a "journalist."

One year later the Court decided *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Florida had adopted a statute requiring newspapers to grant political candidates a right to reply to criticisms of them appearing in the newspaper. The Supreme Court struck down the statute as unconstitutional because it infringed on the First Amendment freedom of the press. Recognizing the existence of serious problems of concentration and monopolization in the print media, the Court nevertheless found no constitutional room for a policy allowing states to compel what goes into a newspaper. Their language indicated an unyielding, inflexible resolve to preserve a totally free press:

> Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or

RESPECTING AN ESTABLISHMENT OF RELIGION, OR

PROHIBITING THE FREE EXERCISE THEREOF; OR

unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Though this perspective on the meaning of the freedom of the press concept was enunciated only with respect to the print media and though the Court did not even refer to its earlier decision in *Red Lion*, it was impossible for the Court's statements to read as having no import for the question of legitimacy of broadcast regulation. Not surprisingly, the passage of time since the *Miami Herald* decision has brought forth a variety of comment the general tenor of which has been to take that decision as casting a substantial shadow of doubt over the *Red Lion* decision itself.

The process we can observe in the sequence of cases from *Red Lion* to *Miami Herald* reflects an underlying and profound ambivalence in attitude towards government regulation of the technology of broadcasting. The Court has been prepared to tolerate certain forms of "affirmative" regulation as the new technology emerged and developed, but the Court's tolerance was infected with a considerable degree of anxiety. Sometimes this ambivalence has been expressed through a stony silence; but even when the Court spoke out and, in some cases, appeared to give its wholehearted endorsement to the enterprise of regulation, it then felt the necessity of cutting back on that approval and undermining its own endorsement by making it appear something of an anomaly.

And well the Court should. For it is certainly the case that official intervention, even of an "affirmative" variety, carries with it significant risks. It represents a major departure from our traditional libertarian notions towards the concept of freedom of the press. Stability of traditions has social value independent of its particular applications, but it is also the case that government regulation of the press, even in the name of the "public interest," can be used in authoritarian, repressive ways, both obvious and subtle. Even when applied and enforced in an even-handed, fair-minded way, such regulations invariably reflect a particular attitude, or set of attitudes, about such fundamental issues as: what is the proper function and role of the press in American life; what should the American public be interested in listening to and thinking about; and a host of other value-laden issues about which people may reasonably disagree. In short, any government regulation is much more than simply the sum of the particular consequences emanating from the application of the rules to particular cases; it is also, and this may be the more important point, an injection into the arena of public debate, through the very act of reshaping it, of a set of values, or a particular philosophy, about the basic structure of American life.

It is also the case, and this is what leads to a willingness to tolerate regulation in the first instance, that the problems we perceive as justifying regulation are very real in themselves. Concentration, whether the result of physical or economic factors, within the mass media raises serious concerns about the successful operation of the "marketplace of ideas," as serious as those arising from government intervention itself. We cannot accept the facile conclusion that private enterprise in the mass media acts merely to "give the public what it wants." It does that in part, to be sure, but it also, we may reasonably assume, shapes the very tastes to which it claims to be responsive. How much is one and how much the other will remain always a mystery to us, but our inability to decipher the line between the two should not lead us naively to ignore the common feeling of dissatisfaction at having to choose among the limited array of choices offered by the marketplace. Not in every instance do we feel we fully know what our "wants" are, and even on those occasions when we do and even when they are shared by substantial numbers of people, it may be years, if ever, before any market rises to meet them. In a medium that provides a limited and standardized fare, whether or not dictated by economic considerations of a mass market, we may properly worry about the unmet needs of diverse groups whose interests place them on the periphery of general public tastes. These considerations, and others that might be mentioned, provide a forceful case for intervention.

ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE

However, the costs of intervention are real, and consequential. The upshot has been, in terms of the role played by the First Amendment, that affirmative regulation has been tolerated but only as an anomaly in a broader system otherwise free from intrusion.

II

The development of cable television and the judicial treatment of the regulation of it have been especially revealing about our acceptance and fears of government regulation under the First Amendment. One often hears the argument that, since the legitimacy of broadcast regulation has been premised on the scarcity of the electromagnetic spectrum and since cable virtually eliminates the problem of scarcity (because cables may carry as many channels as may be wanted), government regulation of cable is unconstitutional. It is only a short extension from this to the conclusion that regulation of all broadcast media is now (or soon will be) unconstitutional—not because the electromagnetic spectrum is no longer scarce but because the abundance of cable channels eliminates the problem of scarcity in the *medium*, that is to say, television, and it is the medium and not the partiuclar methods of reaching the medium that should be the relevant consideration on the constitutional issue. I reject this analysis.

First, it is true that, since the *NBC* case in 1943, the Court has espoused the scarcity rationale as the principal justification for government regulation of broadcasting. Justice White in *Red Lion* spoke in these terms: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Though there have been other efforts to distinguish broadcasting from the print media, thereby justifying the imposition of regulation on the former and not the latter (such as the fact that broadcasters must use the "public" airwaves in order to

broadcast or that "impact" of broadcasting on its audience is sufficiently overwhelming to justify oversight) the scarcity rationale has been the dominant point of departure for justifying regulation.

The best that can be said of the scarcity rationale, however, is that it has been a convenient, if invalid, basis for upholding the regulatory enterprise. The potential chaos of a totally unregulated, unallocated, medium surely did, and continues to, justify minimal government intervention to establish guidelines for effective use of the airwaves. This in itself could be achieved by the issuance of licenses, along with other technical restrictions; but, as various economists and legal theorists have now pointed out, these technical considerations do not alone justify the added measure of government supervision regarding the content of the medium. Rather than giving away licenses free and insisting that certain programming requirements be satisfied by the licensee, the government could have imposed some technical restrictions necessary to minimize or eliminate interference but allowed market forces to regulate content, in the same way that we rely on them to exert pressure on the content of other media throughout the society, most notably of course, the print medium.

To discount the scarcity rationale does not leave us without any justification or rationale for the choice to regulate broadcasting so as to achieve a more diversified and fair discussion of political and social issues. I have already identified what to many is a critical problem with the broadcast media, as they are presently composed—namely, that of excessive concentration. While it is true that the print medium is characterized by a similar problem, some might say even more seriously afflicted, that in itself does not establish the necessity of either extending regulation throughout the media or disallowing it entirely. A sensible solution to dealing with the underlying problem of concentration and power has been the one we have, in fact, employed, albeit perhaps inadvertently—that is, imposing corrective regulation in one segment of the media (the new technology of broadcasting) while retaining a traditional hands-off posture with respect to the other (the traditional technology of print). This limited, restrained approach to remedying perceived defects in the structure of the marketplace of ideas has proved effective both in terms of enhancing public debate and in reducing the risks commonly associated with government intervention, and for that reason—not because of such artificial differences between the media as the idea of scarcity—the regulatory enterprise has, in my judgment, proved acceptable to the courts when challenged under the First Amendment.

RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE,

This means that we should find the development of cable and its enlarged channel capacity will not in itself fundamentally alter the regulatory system as it has heretofore existed. As long as the phenomenon of concentration, of audience domination, continues, the basic underlying issue, which has in the past justified regulation, will continue to do so.

The Supreme Court appears to be following this path. In the Court's first decision concerning FCC regulation of cable, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the Court upheld the Commission's "local carriage" rule which prohibited some cable systems from importing broadcast signals without Commission approval. The purpose of the rule was to protect the economic viability of local broadcasters. The Court found the rule to be "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting." Subsequently, in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), the Court divided on the question whether to uphold the statutory validity of the Commission's "program orientation" rule, which provided that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." Justice Brennan, writing for a plurality of four justices, found that the "effect of the regulation . . . is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming," an effect which those justices believed consistent with the basic rationale of the Court's earlier broadcasting decision. The four remaining justices dissented on the ground that the Communications Act did not empower the FCC to order anyone "to enter the broadcasting field."

These decisions strongly suggest that the Court will not be inclined to insist as a matter of constitutional principle that the government deregulate broadcasting because of the emergence of the new technology of cable. On the contrary, they indicate that the regulatory system over broadcasting is secure and itself provides the justification for at least some extension of regulation over the cable medium itself. It is true that in neither of these decisions did the Court consider a First Amendment challenge to the Commission's regulations regarding cable. The Court is certainly free later under these precedents to reject the entire statutory scheme as unconstitutional; but, as a practical matter, it seems less than likely to occur given the Court's handling of the cases.

All this is not to say, however, that cable and its associated technologies will not or should not affect the Court's general treatment of the regulatory system. The new issues raised by the emerging technologies and their potential for achieving diversity and fairness also suggest a need for *congressional* reevaluation, which the Court should encourage. This need was recently recognized in the Court's latest cable decision, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), where the Court found the FCC without statutory authority to require cable operators to provide channels and equipment for public, educational, governmental, or leased access users or to insist upon a specified channel capacity. We might well expect, as the new technologies develop, the Court to demand that Congress periodically reassess its regulatory policies. It is also possible that the Court will go even further and intimate at, or even openly pronounce, a general First Amendment obligation on the part of the government to encourage, or at least not to inhibit, the development of these new technologies, which at least in theory offer the

AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

potential of diversity without government regulation. This, in fact, may be the implicit motivation behind the 1979 *Midwest Video* decision. Surely one of the more unfortunate consequences of the early Commission regulatory scheme regarding cable was its serious inhibition of cable's economic development.

For the moment and the foreseeable future, however, one must conclude that the basic structure of the regulatory system, both with respect to broadcasting and to the new technologies, is constitutionally permissible. That in any event, is the recent message of *Columbia Broadcasting System, Inc.* v. *FCC*, 49 USLW 4891 (1981), where the Court upheld the statutory and constitutional validity of the Commission's interpretation of Section 312(a)(7) of the Communications Act.

In summary, regulation in the interest of promoting diversity of opinion and fairness in public discussion will continue to be a stepchild of the First Amendment concept of a free press, never fully embraced, always uncertain of its precise status and pedigree but still kept comfortably within the general home. The general problem which characterizes the electronic media and which justifies regulation in the "public interest," that is to say, concentration of power, and not the fiction of "scarcity" will continue to provide the central if underlying rational for regulation, both of broadcasting and of the newer electronic technologies.

III

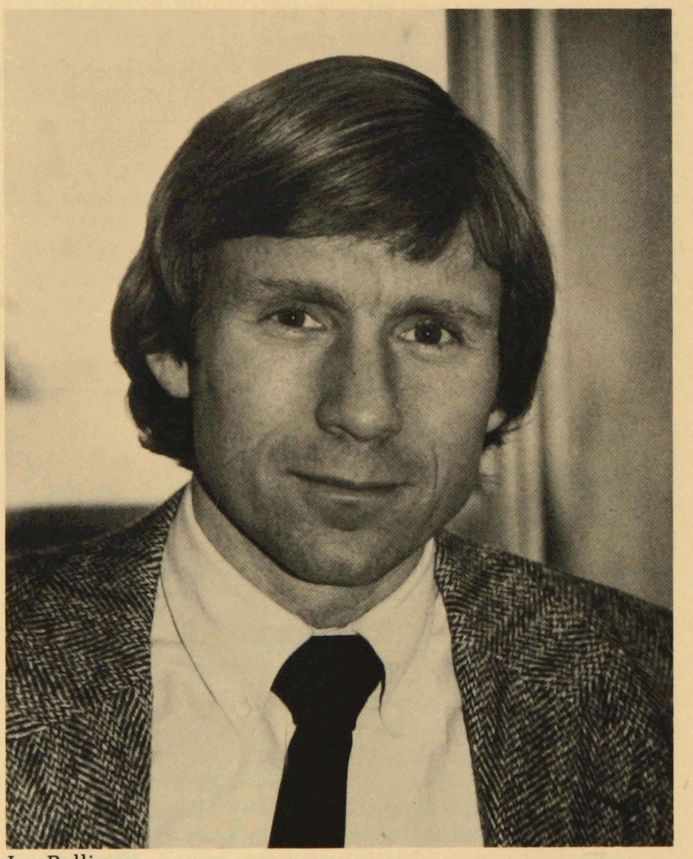
I have thus far argued that the radical departure from traditional libertarian notions of freedom of the press represented by the American experiment in broadcast regulation has been possible only because there has existed a sharp delineation between the two branches of the mass media. It was important that regulation was introduced in a new discrete technology at a time when the traditional libertarian model was coming under increasing question as the sources of news were growing fewer in number. In the bifurcated system that developed, one branch of the media was treated as "unique" and "special" and accordingly subject to regulation in the "public interest" while the other branch was regarded as representing the embodiment of traditional notions of the press and hence left completely unregulated. We thus preserved tradition while experimenting in the face of changed circumstances. To many, including myself, this method of dealing with the evolution of the mass media and the concept of a free press has seemed eminently sensible.

Yet a further change in technology looms on the horizon that may well call into serious question the system of regulation we have developed. I have in mind here the use by the print media of television and video screens as a means of disseminating their news and information. The technology goes by such names as "videotext" and "teletext." Though it is now in its most rudimentary, experimental stages, many foresee it as the principal method of distribution in the next decade. What are the implictions of this technological change for a system of regulation that has been constructed on a principle of partiality and duality?

For several reasons, it would appear to be undesirable at any future stage of technological merger between the print and electronic media to continue with a system of partial regulation. Singling out only some channel users for regulation would probably seem in that context too anomalous. Moreover, no viable distinction could be drawn between, for example, communication through words or through visual images and sound. We will feel compelled to choose whether or not to regulate at all. Though it is difficult now to assess how that choice should, or will, be made in the distant future, the presumption should be, I think, against, rather than for, total regulation. Total regulation would remove the checks inherent in a system of partial regulation, and we might lose in the process that intangible but nevertheless vital sense within the press of being independent and to some degree "unaccountable" to anything but journalistic standards. This is not to say, however, that the government would be completely foreclosed from pursuing other avenues of promoting diversity and encouraging vigorous debate. Channels might be reserved for public use, and financial support might be provided for alternative programming, along the model of the public broadcasting system.

Conclusion

The new technologies of communication demand that we be prepared to reappraise some of our policies with respect to regulation of the electronic media. They are also entitled to a favorable environment in which to develop, but their emergence does not for the near future entirely undermine the system of affirmative regulation of the electronic medium in the "public interest." The same principles which have guided the development of broadcast regulaton—promotion of diversity and fairness in public discussion—continue to provide meaningful and legitimate goals within this discrete branch of the mass media.



Lee Bollinger

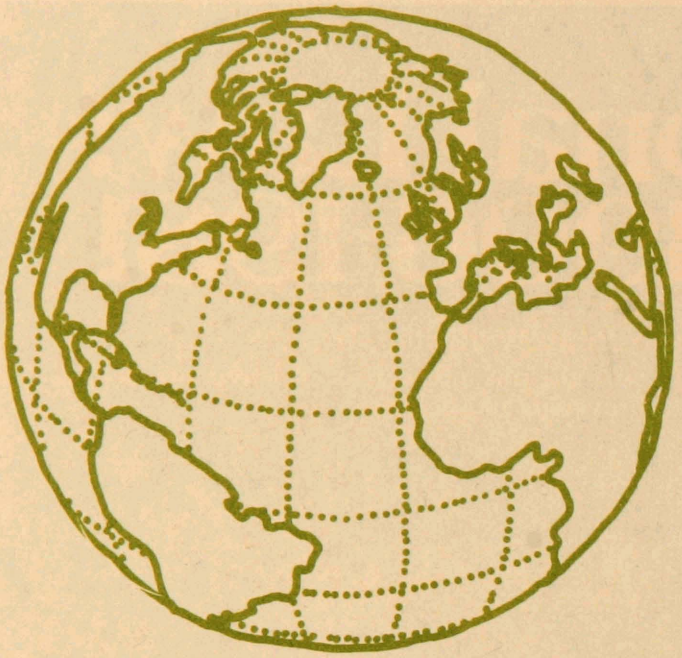
International Law: 1906-1981

by William W. Bishop, Jr.,
Edwin D. Dickinson Professor of Law Emeritus,
The University of Michigan

Editor's Note: *This article is based on remarks delivered by Prof. Bishop at the 75th anniversary meeting of the American Society of International Law, held in Washington, D.C., April 23-25, 1981.*

U-M Law School was well represented at the meeting. In addition to Prof. Bishop, who presented the opening panel address at the meeting, Prof. John H. Jackson chaired a special two-day program in international trade which immediately preceded the 75th anniversary meeting. The session was co-sponsored by the American Society of International Law and the American Bar Association.

Prof. Eric Stein of the Law School wrote the lead article for the anniversary volume of the American Journal of International Law, *published by the American Society of International Law. Four Michigan professors serve on the editorial board of that publication: Stein, Bishop, Jackson, and Prof. Harold K. Jacobson of the U-M political science department.*



Looking back at the past 75 years of international law, I would say we have now basically the same system of customary law and treaties which existed when the American Society of International Law was founded in 1906. It is still applied by foreign offices and, occasionally, by international tribunals and often is used in national and local courts and in dealings of government officials, companies, and individuals. However, the world of 1981 is not the world of 1906, and the international law of today shows marked differences from that of the early years of the twentieth century.

Yet the change is not too extreme. The subject matter of some of the pieces in Volume I of the *American Journal of International Law* (1907) would not be entirely out of place today; I might mention international arbitration, the extent of and limits on the treaty-making power of the United States, and the Geneva Convention on Sick and Wounded in military action as examples. The first sentence, indeed, in the first article in the first issue of the *Journal*, written by Elihu Root (who was both Secretary of State and President of our Society), is still appropriate:

> The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international rights and duties.

Two pages later he added:

> Of course it cannot be expected that the whole body of any people will study international law, but a sufficient number can readily become sufficiently familiar with it to lead and form popular opinion in every community in our country upon all important international questions as they arise.

In 1906 the states principally concerned with international affairs were European, of European descent, or had European-derived cultures. International law focused on the Hague Peace Conferences of 1899 and 1907, with far greater interest than today in the law of war and neutrality. The Permanent Court of Arbitration dates from that period. The comparatively recent memory of the success of the Alabama Claims Arbitration after our Civil War, the Fur Seals Arbitration, and the ten tribunals of 1903 between Venezuela and other nations—all these contributed to the hope that international arbitration would gradually become a substitute for war in settling international disputes. One much-discussed aspect of international law then was belligerent interference with neutral commerce in time of war, that now almost forgotten "prize law" of blockade, contraband, and the like, highlighted by the 1909 Declaration of London and the disputes between neutrals and belligerents in the earlier part of World War I. Except for a brief revival early in World War II, this has become an archaic, if not obsolete, branch of law. Until 1914, despite various wars in the decades since 1815 and particularly our own Civil War, there had been no major world-wide war since Napoleon's time.

How different the scene became as these 75 years rolled on! Two World Wars, the founding of the League of Nations after the first and of the United Nations and its family of specialized organizations after the second; the economic and ideological split between the West and the communist (or "Socialist") group of nations; decolonization and the great influx of a hundred new nations onto the international scene since World War II; the "Cold War" and the "nuclear balance of terror"—all of these factors, and others, have changed the world of international relations in which international law must grow and function. The law, too, has changed and is changing as the world changes.

Foremost of the changes has been the great growth in the number of states among whom international law must operate. Almost a hundred new, or newly independent, nations (particularly in Asia and Africa) have taken their places. Most of these new states are fiercely proud of their independence and in many cases unhappy with colonial pasts; they are frequently economically underdeveloped; often they derive many social, cultural, and ethical ideas and values from sources other than that Western-European cultural heritage in which our international law grew up. Often these new nations lack trained personnel, are inexperienced in the conduct of international relations, and are dissatisfied to be bound by rules in the making of which they had no part. As actors on the international scene, and as U.N. members, however, they are a majority in number among the states in the international law system.

One of the characteristics of international law during this 75 years has been the increasing predominance of treaties. We must think of the amazing number, variety, and complexity of the international agreements, whether bilateral, regional, or almost world-wide, which represent purposeful development of the law and which in many fields so largely replace custom with more clearly defined rules chosen by the parties to meet their needs. This process of putting international law into treaty form was already exemplified by the codifications (chiefly of the laws of war and neutrality) at the 1899 and 1907 Hague Peace Conferences, and it continues unabated. I merely mention a few: the Vienna Conventions on diplomats, consuls, and the law of treaties; the Geneva Law of the Sea Conventions of 1958 and the ongoing work of the Law of the Sea Conference; and the efforts in 1929, 1949, 1977, and since, to codify and improve aspects of the international law of war.

Codification of customary international law progresses, while efforts to make new law have taken the form of treaties, (bilateral and especially multilateral treaties formed under the auspices of the League of Nations, the United Nations, and its specialized agencies, as well as the regional international organizations). This international law development may well be compared with the great growth of legislation since 1800 in the internal law of many countries. In making international law in some fields like the law of warfare, we must guard against letting the new treaty law become too prolix and too complex for use by line officers and people in the field.

Our increasing use of, and dependence upon, international agreements renders more and more acute the problem of their binding force and the possibilities of modifying or terminating them. *Pacta sunt servanda* becomes increasingly the most important rule of international law. We have devel-

oped fairly adequate methods of making international agreements to register what it is possible for states to agree upon. We are slowly developing arrangements in technical fields for giving consent in advance to be bound by later-adopted rules to which formal assent need not be given again when the rules are actually made; but we remain far from any true legislative process in which rules are adopted by majority vote or anything less than unanimous consent of the parties to be bound. The most serious problems of treaties arise today in situations where one nation wants to escape the obligations of a treaty into which it has entered, or at least to stop performing the treaty, and the other party or parties want to keep it in force and demand continuing performance. The question arises about how far those responsible for determining state policies will judge that the general interest in maintaining the sanctity of treaties is superior to the immediate gain they may see in repudiating a burdensome treaty obligation.

Custom remains an important source of international law, while we still find evidences of the law in judicial decisions and the works of writers. Though "general principles of law recognized by civilized nations" are also among the sources of international law, in practice neither international tribunals nor foreign offices seem to rely on such general principles as much as may have been expected when the World Court was created in 1920. The greatest controversy concerning "sources" of international law today centers upon the place of resolutions, especially those of the UN General Assembly. Although the 1945 San Francisco Conference rejected a proposal that the General Assembly "be vested with the legislative authority to enact rules of international law," in fact, we see General Assembly resolutions frequently treated, especially if they are repeated, more or less *as if* they formed rules of international law—whether on the theory of resolutions being a kind of agreement among those who vote for them, or instituting a kind of "instant custom," or perhaps on the feeling among some of the newer states that resolutions represent one way in which they can join in "making" of international law.

The last 75 years, especially the latter half of that period, has seen a tremendous growth of international orgnaizations of all types whose nineteenth-century forerunners have expanded into the United Nations and its family of specialized agencies, as well as regional organizations like the Organization of American States, the Organization of African Unity and the Council of Europe. One must not forget bilateral organizations like the International Joint Commission set up by the United States and Canada to deal with boundary waters and related problems. These organizations, especially the United Nations, the specialized agencies, and the Organization of American States, bring us multilateral negotiations and parliamentary diplomacy, with concern for the "constitutional law" and the "administrative law" of each organization. They play a role of ever-increasing importance in the establishment of order and control in many types of activities transcending international boundaries. They are based upon treaties, and they frequently give birth to further international agreements, whether formalized in treaties or left in the more doubtful status of resolution.

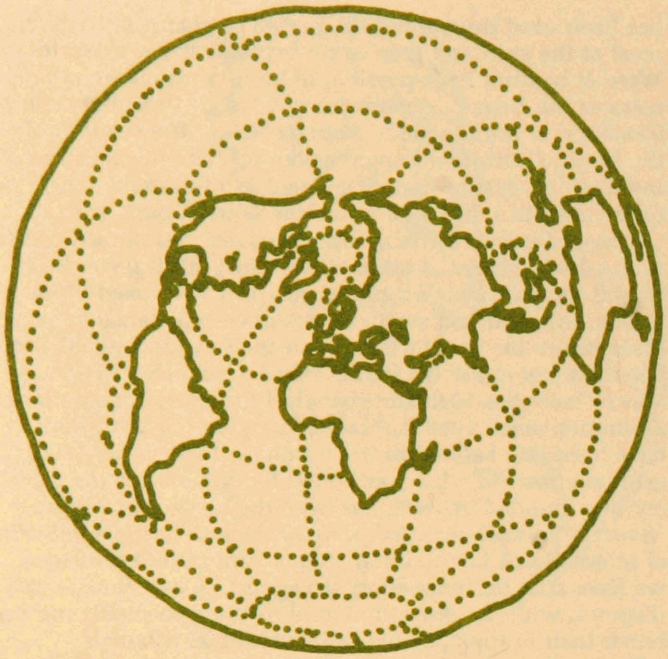
Mention of international organizations at once brings to mind the development in the last 30 years of the European Economic Communities. Starting with the European Coal and Steel Community, then the "Common Market" and Euratom, now largely merged into a single organization, we see a new phenomenon: a limited ten-state federation in the economic sphere, with supranational powers and functions. How extraordinarily different from Europe of 1906!

Turning to procedures and mechanisms for application of international law to international disputes, we have seen changes in these 75 years. The hopes of 1906 centered upon international arbitration; the international arbitral process has been used throughout the period, perhaps flourishing most at the start and then again between the two World Wars. It had not been possible to build a true international court at the Hague Conferences of 1899 or 1907; but with the formation of the League of Nations we see the creation of the World Court, first known as the Permanent Court of International Justice and since 1946 as the International Court of Justice. In its 60 years, the World Court, with its judgments and its advisory opinions, has contributed greatly to the development of international law; but it never has played the part which it might play if it were used more.

Nations, great and small, have shown reluctance to bring cases before the Court. Aside from the so-called conciliation commissions under the Italian Peace Treaty after World War II, there has been surprisingly little use of international arbitration since 1946, although some important matters have been laid before arbitral tribunals. Indeed, one of the great contrasts to what was hoped for, back when our Society was founded in 1906, has been the lesser part played in recent decades by third-party settlement in the application of international law to international controversies. Instead, we have seen far more effort at negotiating settlements of disputes, with the law only found in the agreements reached rather than in the opinions of international tribunals.

During these 75 years we have seen a considerable change of attitude towards the possibility that the individual (and the company) might be a person of international law, with rights and duties under that law. Unlike the days surrounding the beginning of American independence, when individuals were at least regarded as able to commit crimes against international law, in 1906 the theory was that international law personality was limited to states, belligerents, and insurgents; later, possible personality of international organizations was admitted. Only in the past four decades have individuals been recognized as clearly having *international* legal rights and duties.

On the duty side, this seems to have been clearly established by the war crimes trials after World War II. On the "rights" side, we have the whole human rights program of the United Nations and of regional groups, particularly in Western Europe and in the American Republics. By now it has been generally recognized that individuals have rights under international law which do not depend solely upon enforcement by the states of which they are nationals. I am not saying that individuals *enjoy* human rights throughout



the world; I only wish that one could truthfully say so! The point I make is that, unlike the situation in 1906, we have by 1981 come to acknowledge that international law is concerned with the rights of individuals and not solely the rights of states. As Professor Louis Henkin well wrote, even back in 1965,

> . . . the existence of the United Nations, the language of the Charter and its dissemination among all peoples, the adoption and invocation of the Declaration, and mountains of documents and years of discussions have made human rights a subject of international concern, and indelibly established human rights in the aspirations of peoples, even in the consciences of governments.

War crimes trials on the "duty" side and human rights on the "rights" side have led the way to our acceptance of the individual as a "person of international law," while developments in the relationships of enterprises and individuals with foreign governments begin, at least slightly, to point in the same direction.

A big change as compared with 1906, at least in the "law-on-paper," has been the development of international rules against free resort to military force. In 1906, international law left a state free to start a war for whatever reason it chose, aside from the need to issue a formal declaration of war. After the First World War, known as the "war to end all wars", we saw the efforts in the League of the Nations Covenant to cut down the legality of resort to force. The 1928 Kellogg-Briand Pact of Paris "outlawed" war as an instrument of national policy. Of course, that treaty did not stop future wars, but it gave legal form to an idea which was developing and spreading. In the United Nations Charter we find it stated, that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The only clear exceptions are the use of force under United Nations auspices or in individual or collective self-defense.

It is a tragedy that the plan of the Charter to deal with force through the Security Council has not been carried out in many cases, due to the veto and to the unwillingness of U.N. members to comply with the Charter. It is fascinating to see how improvisation has been attempted in such crises as Korea, Suez, Congo, Cyprus, and repeatedly in the Middle East with the whole concept of UN "peace-keeping forces" a development not clearly embodied in the Charter. However, the ideal remains in the Charter language. It is only when there is agreement on what *ought* to be the rule that there is much chance of the rule being made effective in action. The United Nations has gone at least that far, which is a first step. No one can be sure whether the lip service paid by the Charter to this ideal will eventually be carried out in practice, but I would see it as at least a partial change from the international law of 1906.

In all this we must recognize that law cannot *coerce* states in matters of primary political importance, unless there is a sufficiently strong feeling of international political community. Law cannot bring order when there is not enough common will to keep the peace. Philip Jessup said:

> Until the world achieves some form of international government in which the collective will takes precedence over the individual will of the sovereign state, the ultimate function of law, which is the elimination of force for the solution of human conflicts, will not be fulfilled.

Meanwhile, of course, international law can be, and is, a most useful instrument for giving effect to policies upon which there is common agreement, but it cannot succeed if it gets too far ahead of the actual feelings and attitudes of the states concerned. With our international society what it is, we must think of international law chiefly in terms of agreement rather than coercion.

Now I will touch briefly on other fields of international law. In the law of the sea, we have seen a steady increase in shore-state control over wider and wider bands of the sea. In contrast with three miles of territorial sea and perhaps nine further miles of contiguous zone, which *was* the most common, though by no means universally accepted, limit of littoral state control in 1906, the on-going efforts of the current Third UN Law of the Sea Conference now seem likely to give us 12 miles of territorial waters, a further 12 miles of contiguous zone, a 200-mile economic zone for exclusive fishing as well as seabed and subsoil resources, and continental shelf rights out as far as 350 miles from shore when geological conditions fit. The pendulum is swinging further and further towards increase in the sea areas under exclusive national control and diminution of the high seas.

State responsibility for injury to aliens, or *Diplomatic Protection of Citizens Abroad* (to use Borchard's famous title), developed considerably in the first 30 years of our period. Now there is skepticism in many quarters as to its usefulness or even its continuing existence as part of international law. Particularly with respect to the duties of compensation when foreign property is nationalized, we see increasing doubts throughout much of the world as to whether there is, indeed, any relevant international law generally accepted. Disagreement over this one point has led to disillusionment with the entire law of state responsibility. Garcia-Amador's imaginative attempt in the International Law Commission to combine the rule of "no-more-than-national-treatment-for-aliens," with the protection of human rights as a minimum for aliens and nationals alike, appears to have been abandoned by the Commission in its more recent work. Yet as individuals and businesses travel, live, and carry on activities abroad, the world will continue to need some international law of state responsibility. Changes from the older law (found largely in arbitral decisions from 1803 to 1938) are needed, but an international law of state responsibility for injury to aliens will remain necessary and useful.

In the field of immunities of foreign states, international organizations, and the personnel of both, we see more and more use of treaties to clarify the exact extent of immunities. So far as states are concerned, the world-wide trend (except, apparently, for the Communist countries) is toward the restrictive theory of sovereign immunities, that is, confining immunities to strictly sovereign acts, which in 1906 was

chiefly limited to Belgium and Italy. Many would agree that national courts may, on the whole, do a better job of dealing with disputes which arise out of "commercial" operations by foreign states, than diplomatic settlement can.

In the law of nationality, we have seen increasing recognition that women, including married women, should have their own nationality rights, even at the expense of unity of the family. Even more impressive has been the effort to get international agreement to deal with stateless persons, primarily refugees, at least since the end of World War I.

Increasingly modern states domestically, and the international community, have found it necessary to develop rules and institutions of the law to deal with problems which formerly escaped any need for legal and governmental regulation. Among others, Professor Wolfgang Friedmann pointed in 1964 to the "developing cooperative law of nations," binding nations "not in the traditional rules of abstention and respect, but in positive principles of cooperation for common interests."

In many areas new international law has been developed to deal with new problems caused by expanding technology. I mention the growth of international aviation law, the development of space law, much of the international law of telecommunications, and the slow growth of international law dealing with transnational pollution, especially of the sea. All this has been chiefly by treaty. One might also speak of the international law of trade, commerce, and finance, particularly of the General Agreement on Tariffs and Trade, the World Bank and the International Monetary Fund, commodity agreements, and all that goes into the "international law of trade and development." Only a little of that was with us in 1906; many of us are not proficient in the details, but we should all recognize its importance. Even 50 years ago my old professor, Edwin De Witt Dickinson, used to remark that international law was no longer in the "Blackstone-Chancellor Kent era" but had even then become "a whole curriculum." With this emphasis on specialized areas of international law we also see its broadening in scope and the obliteration of boundaries separating it from other areas of the law, exemplified in the use of terms like "transnational law," or "international legal studies," or "world law."

On the educational and scholarly side, the period under review has seen, at least in the United States, a sizeable increase in number of those studying international law in its various aspects in the law schools, with some falling off in the proportion of college undergraduates taking political science courses in international law as other international studies have attracted more faculty and students. Many new international legal journals have been born in this country, particularly in the last few years; there has been some increase in such journals abroad as well. Collections of documents, and of international law decisions of national and international courts, have become available (I mention only the *Annual Digest of Public International Law Cases*, now the *International Law Reports*). Moore's eight-volume *Digest of International Law*, as found particularly in the practice of the United States, was published in 1906, to be followed by the *Hackworth Digest*, and more recently the magnificent 15 volumes of the *Whiteman Digest*, and the digest volumes issued by the State Department for 1973-1977.

We are happy to see similar compilations of the international practice of other nations. These new journals, new compilations of practice, and the tremendous growth in the monographic literature in various languages make it more and more difficult for any individual scholar to keep abreast of what is happening in international law but give us far more information about it than was available 75 years ago.

I have spoken too long on a field I've enjoyed working in for 54 years. In closing, let me join in the cautious optimism Professor J. L. Brierly showed in his outstanding little introduction to international law, first published 53 years ago:

> . . . the law of nations is neither a myth on the one hand, nor a panacea on the other, but just one institution among others which we can use for the building of saner international order.