

Duke Law Magazine

WINTER, 1984



"Mr. Duke Goes To Washington"

Duke Law Magazine

Contents

- 2** *Editor's Column*
-
- 3** ***Law & Philosophy***
- 4** *Philosophers and Lawyers —
Profile of Martin Golding*
- 5** *Aesthetics and Legal Reasoning:
A Strand in American Legal Thought / Martin Golding*
- 9** *British Legal Education / Daniel Dannello*
- 11** *Other Oxford Experiences*
-
- 13** ***Ad Testificandum***
- 14** *William W. Van Alstyne*
- 19** *Walter Dellinger*
- 25** *Donald L. Horowitz*
- 30** *David Lange*
- 33** *Paul D. Carrington*
- 37** *Arthur Larson*
- 40** *Horace B. Robertson, Jr.*

DEAN
Paul D. Carrington

EDITORS
Joyce Rutledge
Penny Lozon Crook

SENIOR REPORTERS
Don Fitzgerald
Ellen Hausler
David Lips

STAFF
Michael Jarman
Sandy Smith



-
- 45** *The Docket*
- 46** *Black Graduates in the Profession*
- 51** *From Washington to Duke / Alumnus Profile*
- 53** *Specially Noted*
- 55** *The Unsettled International Law
Governing Mining of the Seabed / Article Note*

Duke Law Magazine is published under the auspices
of the Office of the Dean, Duke University, School of Law,
Durham, North Carolina 27706
© Duke University 1984

SPECIAL STAFF

Sonja Steptoe

DESIGN

Anistatia Renard

TYPOGRAPHY/PRODUCTION

Carolintype

CONSULTANT

Rachel Bornstein

PHOTOGRAPHY

Diana Ingallinera

John Rutledge

Editor's Column

Two issues ago, the *Magazine* carried my speech suggesting law reform as a primary function of a university law school. In this issue, the Editors have been kind enough to publish a series of law reform efforts by members of the Duke faculty, including a brief one of my own. The frequency with which the Duke faculty is used by the Congress of the United States as a source of advice is itself evidence of the sound condition of the faculty and of the legal academic enterprise at Duke. It is also worth noting that one reason for the faculty's utility in

this respect is the generally high standard of professional commitment maintained by the Duke faculty. No Duke law professor maintains any tie, direct or indirect, to any private interest that might create any kind of conflict in giving advice to Congress or other law makers. When a Duke professor speaks on public affairs, it is therefore from a position of disinterest. (There are, of course, other law faculties of which this is true, but not many.) The absence of interest adds both quality and weight to their advice. All of the legislative testimony

presented in this issue can illustrate this, but Professor Lange's is especially notable in that he speaks to an issue on which disinterested knowledge is very rare.

I also take this occasion to welcome the first in a series on blacks at the Law School; the first article was written by Sonja Steptoe, a second-year student. For reasons that she reveals, we are very proud of the achievements of our black alumni and alumnae. We wish our enrollments were even higher.

P.D.C.

James B. Duke, subject of the cover and founder of the Duke Endowment, benevolently supports the two main activities described in this issue. The Congressional testimony by Duke Law School professors is previewed by Dean Carrington in the guest columns above. I extend thanks to the reference staff of the Law Library and to the office of Congressman Tim Valentine for their efforts in trying to obtain a photograph of the U.S. Capitol for the cover.

The photo on this page previews the section on "Law and Philosophy" and depicts part of a separate collection of books on jurisprudence housed on shelves in the Reading Room of the Duke Law Library. The collection was first assembled in 1973

in honor of George C. Christie, James B. Duke Professor of Law, who like Professor Golding teaches courses in the area of law and philosophy (Jurisprudence, Seminar in Jurisprudence, Research Tutorial in Discretion). Professor Christie's casebook for West on *Jurisprudence* appeared in 1973.

The Christie Collection was made under a bequest by the Mordecai Society, which several times each decade makes an award in recognition of an outstanding professor at the Law School. Containing major works in English, German, and French, the collection currently numbers about 400 volumes.

J.S.R.



VOL. 2, NO. 1 / 3

LAW & PHILOSOPHY

Philosophers and Lawyers

Citing a revival in the field of legal philosophy which began in the mid-fifties, Duke Philosophy Professor Martin P. Golding contends that the philosopher is not out of place in the law school classroom. "The [Duke] Law faculty is very philosophical," Golding notes, "and quite sympathetic to the kinds of problems posed to philosophers."

In fact, it seems that the Law School climate has been a fertile breeding ground for several projects currently occupying Golding's attention. In addition to teaching a course in Jewish Law at the Law School, Golding has lured several law students into his philosophy course entitled "Responsibility in Law and Morals," which deals with aspects of *mens rea*, causation, and the insanity defense. Moreover, Golding is helping to coordinate the development of a joint JD-MA program in Law and Philosophy.

Golding's interest in legal philosophy is long lived, dating back to his days as a graduate student in philosophy at Columbia where, he admits, he took several courses in the Law School and even taught an interdisciplinary course. He has gone on to become an active member of the American Society of Political-Legal Philosophy, a group composed of both philosophers and lawyers formed, as Golding puts it, "to articulate and defend views on the function and nature of law." The Society, in addition to publishing its own scholarly journal, *Norma*, conducts joint seminars with the American Bar Association and holds triennial meetings with the Association of American Law Schools to discuss changing trends in legal thought and education.

Golding's most recent impact on legal/philosophical scholarship, in



Martin P. Golding

"The study of law is a humanistic discipline, although it is not always taught this way."

addition to his book *Legal Reasoning*, which will be reviewed in a future issue of the *Law Magazine*, came as a result of his participation in the American Delegation to the 11th World Congress on Philosophy of Law and Social Philosophy held in Helsinki this past August. Reprinted in this issue of *DLM* is his contribution to the Congress, entitled "Aesthetics and Legal Reasoning," which examines the work of legal realist Felix Cohen, who criticized the legal "formalism" of American judges, arguing that they "pay too much

attention to aesthetic considerations (i.e., harmonizing their decisions to prior law) in contrast to social and ethical considerations." "Cohen does not establish his view properly," Golding notes; "however his theory should not be ignored." In all, the conference hosted over 40 speakers from more than 20 nations on topics ranging from "nordic legal philosophy" to "law and morality."

The Duke Law School became attracted to Golding's inter-disciplinary approach as part of Dean Paul Carrington's push to broaden the academic experience of law students. "The study of law is a humanistic discipline, although it is not always taught this way," says Golding. However, the new joint degree program appears to be a step in the right direction, a program inspired to some extent by interaction between the philosophy department and the law faculty which has now expanded to cover other areas of academic interest.

The joint degree program had its debut this summer with 24 students attending one law course and one course in another field of interest, in this case economics or philosophy. The summer session helps to relieve some of the burden of first-year courses, and also permits the students to take additional courses each semester in their outside fields. At the completion of the program, students receive a joint JD-MA degree. Golding noted the common hope among members of the law and philosophy faculties that the program will alleviate the trend toward "narrowly professional" legal education by permitting students to develop and retain "the types of varied interests they had when they entered law school."

Aesthetics and Legal Reasoning: A Strand in American Legal Thought

Martin P. Golding

This paper deals with a small part of a large topic. It considers the two ends of a strand in a line of thought on legal reasoning that began, in the United States, about 1880 in the scholarly writings of Justice Oliver Wendell Holmes and culminated, there, in a book *Ethical Systems and Legal Ideals*, published in 1933 by the legal realist Felix S. Cohen. This line of thought may be described as a critique of so-called "legal formalism." Parallels to this critique may be found in contemporaneous Continental writers; it was also suggested, with differing emphases, by such American jurists and legal philosophers as Roscoe Pound, Justice Benjamin Cardozo, and Morris R. Cohen, Felix's father. Aside from the last, however, none of these other writers will be mentioned again here. I begin with Holmes because he initiated the critique and because his work helps us in identifying the object under attack. Felix Cohen is taken as the end-point of this critique because he not only absorbed its earlier details but also because he presented the particular strand in which I am interested in a more sustained and fresher manner than other American theorists.

Before I turn to Holmes, it will be useful to state the essentials of Cohen's criticism of "formalism." Briefly, his claim was that judges, in reasoning to a conclusion of law, pay too much attention to aesthetic considerations, in contrast to ethical and social considerations. Cohen used the term "aesthetic" in a rather pejorative way. Judges, and also jurisprudes and practitioners, he argued, determine—and in his opinion, wrongly determine—the so-called "correctness" of a decision or rule mainly by the criteria of harmony and coherence with the prior law, which are essentially aesthetic criteria, according to Cohen. Cohen's claim is, in some respects, an extension of views expressed earlier by Holmes.

Together with the economist Thorstein Veblen and the philosopher John Dewey, Justice Holmes is identified by Professor Morton White as one of the three main figures in the "revolt against formalism" in American social thought. The hallmark of this revolt is a new methodology of explanation: social facts are to be explained in terms of phenomena that are different in kind from the type of phenomena under investigation. Thus, legal phenomena, legal rules, and doctrines are to be explained in terms of factors from outside the law itself. This idea is expressed in Holmes's statement in his book *The Common Law* (1881), that "other tools are

Legal phenomena, legal rules, and doctrines are to be explained in terms of factors from outside the law itself.

needed besides logic" in order to give a general view of the law. And in 1897, Holmes spoke of "the failure of all theories which consider law only from its formal side."

The connection between these remarks and the new methodology can be seen if we recognize that they are, in part, directed against a particular individual, namely, Christopher Columbus Langdell, the Harvard law professor who is credited with introducing the case method into American law teaching. There are numerous references to Langdell in Holmes's book reviews, articles, and letters. Langdell, Holmes wrote, represents "the powers of darkness," he is a "legal theologian," a "Hegelian in disguise, so entirely is he interested in the formal connections of things," he is "all for logic and hates reference to anything outside of it, and his explanations and reconciliations of the cases would have astonished the judges who decided them." It seems clear that Holmes's remarks on the insufficiency of logic to account for the law and on the failure of formalistic theories were made with Langdell in mind.

Langdell's position appears to have been that the common law consists of a fixed and complete set of concepts, doctrines, and principles, out of which rules are developed in accordance with their logical coherence with these "settled and invariable principles of justice," to use Sir William Blackstone's phrase. This position is given expression in the manner in which Langdell constructed his 1871 casebook on Contracts. According to Langdell, relatively few cases are needed to illustrate the doctrines of the law and, he said, the "number of fundamental doctrines is less than is commonly supposed." The principle of legal growth and, in turn, the explanation of legal growth, then, is that of logical development from fundamental doctrines. And the implication for judicial reasoning is that every case coming before a judge has to be subsumed, directly or by analogy, under one or the other of the fundamental doctrines or concepts. It is very probable that Langdell accepted the idea stated by the German jurist Karl Gareis: "All thinking is subsuming." It is the Langdellian

conception of the common law and its growth which explains the negative attitude that some judges had to legislation and their consequent adoption of the canon that statutes in derogation of the common law should be narrowly construed. No wonder that in 1911 the New York Court of Appeals could doubt whether a legislature can abolish the common-law doctrine of assumption of risk (*Ives v. So. Buffalo Ry*, 201 N.Y. 271). It is against the Langdellian "formalist" theory of legal growth and judicial reasoning that Holmes directed his attack.

But if "logic" alone cannot account for legal growth, what is the basis of growth in the common law? "Every important principle which is developed in litigation," Holmes wrote in 1879, "is in fact and at bottom the result of more or less definitely understood views of public policy . . ." that is, judges' views of what is right, expedient, or convenient for their society. It is the burden of his book *The Common Law* to demonstrate this proposition by reference to the details of legal history. He did not deny the importance of doctrines and concepts in the development of the law, nor did he deny the role of formal logic or analogical reasoning in the judicial decision of cases. Nevertheless, he held, the growth of the law—the important principles developed in litigation—was primarily the result of *judicial legislation*, rather than a logical development of the prior law. As Holmes asserted in 1897, the logical form into which judges cast their opinions conceals what actually goes on in the judicial process, for judges often fail to articulate the legislative, policy premises that underlie their reasoning. It is a "fallacy of logical form," as he called it, to suppose that policy premises can be dispensed with. Other tools besides logic, therefore, are needed to give a general view of the law.

[Holmes] held the growth of the law... was primarily the result of judicial legislation.

On a few occasions Holmes referred to the method of his opponents by the term *elegantia juris*. Although this term is suggestive of an aesthetic notion, he apparently equated it with the belief that the legal system is characterized by the "logical cohesion of part to part." At any rate, Holmes did not pursue the suggestion that legal reasoning might somehow be reducible to aesthetics; nor did Morris R. Cohen, who noted that "very few students at the law have paid sufficient attention to the principle of aesthetics in the law," that is, that judges frequently legislate in the interests of the abstract symmetry of the law. Allusions to this suggestion can be found in various other writers after Holmes, but it was left to Felix Cohen to develop the point. Notwithstanding his cautionary remarks against the realists' tendency to

denigrate logic, he held that juristic logic is basically "intellectual aesthetics."

Traditional jurisprudence, according to Cohen, is committed to the "aesthetic valuation" of law as the "standard of legal criticism." A notable academic example, in his opinion, was the Restatement of the Law

Juristic logic is basically "intellectual aesthetics."

undertaken in the 1920s by the American Law Institute. The proponents of the Restatement asserted that judges and lawyers are confronted by a "great swamp of decisions," and they proposed to reduce legal uncertainty through a restatement of the "fundamental principles of the common law." Cohen, on the other side, viewed the Restatement as the "last long-drawn-out gasp" to a dying tradition. "The more intelligent of the younger law teachers and students," he averred, "are not interested in 'restating' the dogmas of legal theology."

What is wrong with their approach, according to Cohen, is that the authors of the Restatement (at least the early parts) did not supply an account of the social consequences or moral standards which make a rule or decision in one state preferable to a rule or decision laid down in another. Instead, they maintained the "pious fiction" that intellectual inspection reveals a definite answer for every legal question. Decisions are hailed as "correct" or "incorrect" rather than good or bad. And this they did, he claimed, by "reacting aesthetically to the harmony or discord between a questioned rule and the rest of the legal system." The "juristic logic" of the courts, he held, can be similarly characterized.

Various arguments were offered in support of his claim. He considered the meaning of the question which a judge puts to himself while deliberating on a case, the question: "What is the law?" This question, Cohen said, is merely a polite way of asking: What decision would an intelligent lawyer familiar with the statutes and past decisions expect in this situation?" Cohen by this implied that the latter is not an issue of legal correctness but of aesthetics. His point can be understood in terms of the notion of aesthetic simplicity. "Aesthetic simplicity"—which rarely is a ground for preference of art objects—may be defined by reference to a guessing pattern. Given a series of numbers or an array of colored squares, we are asked to guess the next

Cohen... viewed the Restatement as the "last long-drawn-out gasp" to a dying tradition.

number or the color of the next square. The more difficult it is to guess, the less the simplicity ascribed to the series or array. Some guessing patterns feel natural: given the series 2, 4, 6, 8..., we guess the next number to be 10. Some guessing patterns require background information in order that no difficulty be felt. Ask a New Yorker what follows in the series 14, 34, 42, 72... and he will answer 96, which is the street number of the next stop on the Broadway-IRT Express. Now, judges and lawyers have background information, the statutes, and past decisions; and the so-called correct answer to the judge's question "What is the law?," the next element in the series as it were, is the one that comes naturally, with no felt difficulty. When intelligent lawyers do not experience this kind of reaction, or when lawyers have variant reactions, we may suppose that they would say that there is no correct answer to the question of law or that it is a "hard case." Cohen, of course, would have disagreed with Professor Ronald Dworkin's view that

"Aesthetic simplicity" ... may be defined by reference to a guessing pattern.

there nevertheless are correct answers in such cases. Cohen thought that he was undermining the traditional theory that legal questions have correct answers by arguing that "correctness" is a function of aesthetic reactions.

Still, judges do offer justifications of their decisions on questions of law, and we may ask: Why shouldn't those decisions that are deducible from the prior law or are consistent with it be considered correct rather than just aesthetically appropriate? Against this suggestion Cohen responds that decisions are commands, which are pieces of behavior, and as such the categories of consistency and inconsistency do not apply to them. This response is so seriously misleading, however, that it can be passed by without comment. Cohen himself could not have been very happy with it, for he somewhat paradoxically recognized a proper, though limited role for formal logic in juristic reasoning. It seems, however, that he would have confined this role to litigations in which no important legal principles are developed, as Holmes would have put it. Beyond such cases, juristic logic, with its appeal to coherence and consistency with the prior law and so-called fundamental doctrines, would be just so much "intellectual aesthetics."

But if Cohen is right, an explanation is called for why the traditional jurisprudence sets up coherence and consistency as the standard of the correctness of a rule or decision. And Cohen, in fact, was ready with an explanation, namely, that "formalist" theory mistakenly assumes that the question that a judge faces in decision is purely legal rather than moral or ethical. Consistency with the statutes and precedents is important only to the extent that legal certainty is important, and the value

Consistency with the statutes and precedents is important only to the extent that legal certainty is important....

of certainty is ethical, not logical. It is purely an ethical question how far precedent and statute ought to be followed in coming to a decision. The interest in the harmony and unity of the law is dignified by the formalists by the name of "logic" but, again, it really is aesthetics. (Cohen thought that something close to Benthamite utilitarianism supplied the proper standard of legal valuation.)

There are two separate though related claims being made here: first, that aside from whatever importance legal certainty has, the only reason for being concerned with the logical harmony of a decision with the law is aesthetic. This proposition, however, is an error. Cohen's claim reflects the neglect of a very fundamental issue, a neglect he shared with other legal realists: the issue of "validity." What is it that invests a judge's decision with legal authority if not consistency with the prior law?, by what authority does a judge depart from the law?, is a "good" decision necessarily a legally correct decision? Cohen and the other realists hardly deal with these questions. Cohen's failure to deal with the issue of validity is perhaps understandable in the light of the critical line of thought initiated by Holmes. Cohen may have been so impressed by the critique of "formalism," and so-called mechanical and conceptual jurisprudence,

It is purely an ethical question how far precedent and statute ought to be followed in coming to a decision.

that he forgot that many of the critics acknowledged that mechanics and concepts have an important place in the law. Perhaps less understandably, he seems to have forgotten his father's thesis that there is a significantly workable distinction between judicial adherence to rule and judicial discretion.

The last point has a bearing on Cohen's second claim, the claim that there is no such thing as a purely legal question. It was this claim, in fact, which was the principal basis of his complaint that judges pay too much attention to legal aesthetics and not enough to the social and ethical consequences of their decisions. Cohen's argument for the claim was simply that in any litigation we can always pose the *ethical* question: "What would be the best way of treating this case?" But Cohen appears to have been confused. It does not follow from the fact that this question can be asked that there also is no purely legal question: "What does the law require

regarding the case?" Cohen seems wrongly to have supposed that because the latter question is a normative one, it therefore must either be a disguised ethical question or a disguised question about aesthetic reactions.

Yet, Cohen's position should not be entirely dismissed. As were other legal realists, Cohen was impressed—perhaps too impressed—by the uncertainty of the common law, and he agreed with them that the doctrine of adherence to precedent imposes only very loose reins on judges. But he went on to stress that in a precedential system a judge's decision will have to be based on judgments of whether similarities and differences between cases are of sufficient importance to warrant sameness or difference of disposition, and, he insisted, "importance" is a purely ethical notion. In addition to factors noted earlier, the failure of judges to rec-

The doctrine of adherence to precedent imposes only very loose reins on judges.

ognize the ethical nature of judgments of "importance" contributes to the reduction of juristic logic to intellectual aesthetics. Cohen's contention about the nature of such judgments is not implausible, but it is too complex for discussion here.

Cohen's book *Ethical Systems and Legal Ideals* was published fifty years ago. Cohen's work was a significant contribution to the critique of "formalism" that had been initiated by Holmes some fifty years earlier. Since 1933 little if anything new has been added to that critique in the United States, perhaps because "formalism" is dead there. Certainly, no one maintains it in its Langdellian form. There have been presentations of new theories of legal reasoning, and there has been a revival of a kind of "coherentism," most notably by Professor Ronald Dworkin. In Dworkin's view there always is a uniquely right answer to every question of law: the correct or right answer to a question of law is the answer that is supportable by a better legal argument than any alternative answer. He maintains, however, that there is no mechanical method for determining which is the better argument. In this important respect, his coherentism departs from the older "formalism." The concept of "best argument" itself, however, seems to be something like an aesthetic notion, for there appear to be no positive criteria for its application. It is not easy to escape the feeling that it is the *expectations* of intelligent lawyers—their aesthetic reactions, as Cohen would put it—that are functioning as the determinant of correctness for Dworkin. All this is debatable, of course. But it would be fascinating to speculate on what the reaction of Holmes and Cohen would have been to this new "coherentist" theory of legal reasoning, if time permitted.

British Legal Education

by Daniel F. Dannello

Daniel F. Dannello is a Duke Law student who previously earned a degree in Law from Christ Church, Oxford University. He is originally from Cleveland, Ohio, and graduated from Harvard University with a major in American History.

Dannello's interest in travel abroad and international law led him to apply for the special program for graduates of American universities to study at Oxford University. The program allowed Dannello, with four years of American university education, to complete the British three year program in only two years.

At Christ Church, Dannello was one of three law students from the United States or Canada, in a law student population of thirty-six. Dannello sought the practical aspects of a legal education at Oxford University. At Duke Law School, Dannello is interested in all aspects of American legal education.

Like many other British university degrees, the Oxford degree in law requires a three year course of study. (As a graduate of an American university, I was entitled to begin the course in its second year.) The first year student must study constitutional law, Roman law, and criminal law during two eight-week trimesters before attempting examinations in each subject.

If successful on these examinations, the law student must schedule eight additional subjects into six remaining trimesters. Of these eight subjects, four are requirements—Torts, Contracts, Land, and Jurisprudence—and four are options to be selected from offerings that range from Administrative Law to Moral and Political Philosophy. Comprehensive examinations in all eight subjects, given in the last week of the final trimester of the third year, determine in an all-or-nothing manner one's grades.

As a balanced introduction to the substance, history, and science of the common law, the Oxford legal curriculum encourages students to learn both what the law is and what is the law. While my classmates at Christ Church may not be representative of all Oxford law students,¹ it is interesting to note that all twelve chose as



Daniel F. Dannello

one of their options either an English Legal History course or an advanced course in Roman law. By promoting an historical and philosophical explo-

The Oxford legal curriculum encourages students to learn both what the law is and what is the law.

ration of the law, the Oxford curriculum exposes students to both the logic and experience of the life of the law.

The Socratic method of teaching law is rarely seen at Oxford. One attempt by an American trained lecturer to impose this technique last year inspired only silence from students. While lectures occur, similar to those given to undergraduates at American universities, the primary teaching method at Oxford is the tutorial, the intimate instruction of several students by a senior faculty member. Seldom are more than two students present at one tutorial session.

The tutorial assignments generally include readings in relevant treatises. But the substance of the work each week is both the digestion of twenty to twenty-five cases and their synthesis into an eight- to ten-page essay on an assigned topic. This workload is not eased by the availability of either case summaries or commercial outlines. Each student must pull out the appropriate reporters, plod through the entire text of the decisions, separate the dicta from the holdings, and finally piece those findings together to reveal what the student feels are the key issues to be raised in tutorial.

Thorough preparation for the twice-weekly sessions is a product of necessity and common sense. The element of fear that often manifests itself among first year law students in America is absent from Oxford: the possibility of embarrassment significantly diminishes when the "audience" is merely a pair of individuals. At the same time, because a tutor's office offers few hiding places from questions that touch upon areas that have been superficially prepared, such intimacy is a source of inspiration to work. This method of instruction allows no student to glide through class—as one Canadian acquaintance learned, the rule is to do one's work or be admonished to return when proper preparation is complete.

Moreover, the tutorial demands that the British law student employ

[The tutorial] method of instruction allows no student to glide through class....

his research and writing skills throughout the course of his academic studies. By assignments to resources in their unabridged state, tutorial familiarizes the student with legal resources in at least eight areas of the law. The law student hones his legal analysis and develops his critical perception in the process of plucking from these sources the significant threads of opinion and of weaving these findings into the fabric of a tutorial essay.

Within tutorial, the British student encounters a situation that, I imagine, approximates an hour long meeting between a partner and a young associate in an American law firm. Each tutor utilizes his teaching opportunity in his own way: some listen quietly to the reading of an entire essay before raising questions that expose the work's shortcomings; some interrupt the reading constantly, demanding expansion of a thought or defense of

an assertion; and others, dispensing with the essay altogether, launch instead into a discussion of a judgment recently handed down that did not appear on the reading list but was published that week in the *London Times*. The tutorial presents the student with the chance to acquire some qualities of a good lawyer: the responsibility of being well-briefed, the skill of producing tightly-argued writing, the confidence to present oral argument and counter-argument, and the tact to accommodate another's views while maintaining one's own convictions.

Perhaps the most striking characteristic of the Oxford education in law is its availability to undergraduates. Students eighteen to twenty-one years of age who successfully grapple with the problems that are left in the United States to graduate students earn a B.A. in Law. Thereafter, the student may enter a professional law school for a year to prepare for bar qualifying examinations or alternatively may pursue a career outside of the legal profession.

The British law student never loses sight of the fact that there is life outside of the law. The broader concerns of an undergraduate education dissolve the intensity of the law students, encouraging full participation in university extracurricular activities. Many law students row for their college as well as engage in political debates at the Oxford Union. Finally, because the Oxford program aims to train independent thinkers as well as lawyers, the student of law remains flexible in choosing a career. While many law students eventually practice that profession as barristers and solicitors, a substantial contingent acquire the intellectual discipline to serve them generally in life.

The British law student never loses sight of the fact that there is life outside of the law.

For institutions which must educate large numbers of students who lack the financial support British students receive from government subsidies, the Oxford system of legal education may be impractical. But in its curriculum, style of teaching, and purpose, the Oxford course in law exhibits qualities that exemplify the belief that education should broaden rather than narrow the intellect. How the American education in law stands by comparison is an opinion that I shall be forming as I complete my degree at Duke.

1. Approximately 1000 law students are enrolled throughout Oxford's 35 colleges such as Christ Church, Balliol, Trinity, etc.

Other Oxford Experiences

Several Duke Law School faculty also attended English universities as students. The earliest of these experiences dates back to 1932, when Arthur Larson, James B. Duke Professor of Law Emeritus since 1980, began work on his B.A. Jurisp. at Oxford as a Rhodes Scholar (M.A. Jurisp. 1938; B.C.L. and D.C.L. 1957). C. Allen Foster took a B.A. in Jurisprudence in 1965 after two years at Brasenose College, Oxford, where he studied on a Fulbright scholarship. Tom Rowe (M.Phil. 1967) and Walter Pratt (D.Phil., Politics, 1974) both spent three years as Rhodes Scholars at Oxford's Balliol College. The Oxford veterans have a friendly rivalry with George Christie, who spent 1961–62 as a Fulbright Scholar at Cambridge University earning a Diploma in International Law.

The relatively small Pembroke College, school of both Dr. Samuel Johnson and Sir William Blackstone, gave Larson the typically less legally specialized training offered at Oxford. He remembers he had little trouble in 1932–35 with Latin there,

since he had studied it for seven years in America; but that fluency had grown somewhat rusty by 1957, when the Bachelor and Doctor of Civil Laws were conferred on him in a unique ceremony involving the usual exchange in Latin of questions and answers. The D.C.L. had been conferred as Oxford's highest honorary degree on Churchill, Eisenhower, and Adlai Stevenson. Larson read the Oxford statutes, discovered a little-known section under which a D.C.L. could be earned, and he qualified because he had a First as a B.A. student and had since written a work of legal scholarship of outstanding distinction, his treatise on workers' compensation.

Larson served as Treasurer, Librarian, and Vice-President of the Oxford Union Society, a debating group of considerable significance for future political careers in Britain. He was also active in rowing, Oxford's elite sport, even though his only previous experience had been as a hobbyist fisherman. In 1933 the crew on which Larson rowed moved up six

places in the famous Bumping Race on the Isis (as the Thames is called in Oxford), thereby "winning its oar" (which Larson still displays in his home) and enjoying the sumptuous thirteen-course Bump Supper, which occurs about once every twenty-two years.

Like Professor Larson, Foster earned his first law degree in England, and would have practiced as a licensed barrister there if his mentor had not been elevated to Lord Chancellor. Brasenose was still strictly male during Foster's years there; Foster estimates that Oxford had about 300 students in law in the early sixties, among them several dozen Americans.

Foster describes the curriculum as "the purest of the pure" case method, requiring the absorption of about fifty cases each week, which were digested into an essay read alone to one's Don. Foster took an occasional tutorial at Balliol, and did International Law at All Souls with Sir Humphrey Waldock. Foster's Princeton background as an ancient histo-



Arthur Larson



C. Allen Foster



Thomas Rowe

rian helped, he reports, with his courses in Greek and Roman law, which were taught entirely in Latin.

Foster took First Class Honors, won the Williams Prize (awarded to the top law student), was President of the Law Society, and managed to play cricket. His 1971 M.A. entitles him to participate in Congregation, the governing body of the university, which still holds its meetings in Latin. Asked about his reactions to England, Foster commented that one year it rained every day from December 1 to February 9, but fortunately that fell in the middle of the duck season.

Rowe's memories of England are similarly paradoxical: "It's the most maddening country in the world—I loved it." At Balliol, which was still all male at that time, Rowe began in the standard program of Philosophy, Politics, and Economics. Later he switched to a graduate program in modern comparative literature (English, French, and American). He spent summers at home in the United States, working as a construction laborer by day and studying modern literature at night. Rowe observes that



Walter Pratt

adjustment at Oxford was sometimes hard for Americans used to questioning historical attitudes.

For Rowe, too, sports at Oxford provided an important outlet. According to Oxford's rankings, his sport (ice hockey) was "half blue"

(crew was "full blue"). Rowe was a "triple half blue" since he played three times in Oxford-Cambridge games.

Pratt had to defer his study at Oxford because of a three-year stint in the Army. He believes he is the only Rhodes Scholar in history allowed to begin the first year already married. Pratt went to Oxford with the intention of eventually entering law school; he decided not to pursue a regular (B.A.) law degree at Oxford because he wanted to have the freedom to take graduate courses. Therefore he concentrated, at a graduate-level equivalent, on legal history and politics, producing a thesis on the right of privacy in England. Like other Duke Oxonians, Pratt also participated in Oxford athletics, serving for two years as captain of the Balliol tennis team.

The variety of personal and academic experiences of these men at Oxford has left a lasting interest in American-English connections. Rowe presently serves on the N.C. Rhodes Scholar Committee; Pratt is Chairman of Duke's Rhodes Scholar Committee.

VOL. 2, NO. 1 / 13

AD TESTIFICANDUM

Statement of William W. Van Alstyne before the Senate Judiciary Committee, September 16, 1982

Professor William Van Alstyne discusses a proposed constitutional amendment that would permit voluntary prayer in governmental institutions. Professor Van Alstyne criticizes the amendment as inconsistent with the establishment clause of the first amendment and sees in it dangers in allowing the government to select among various creeds in prescribing a common prayer for all.

The proposed amendment to our Constitution reads as follows:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

Accompanying the proposed amendment is a thirty-four page explanation, captioned "Analysis," as part of the President's submission of May 17, 1982. The Analysis makes clear that the following consequences are contemplated under the proposed amendment:

1. "Individual or group prayer" is inclusive of denominational and sectarian prayer (and denominational and sectarian scriptural, devotional recitation) incorporating the religious beliefs of one sect in preference to other sets of religious belief.
2. Such prayers may be composed under governmental auspices and may be enacted for exclusive use as prescribed by government.
3. Such government-composed, sectarian religious exercises may be prescribed for use in any public institution including, but not limited to, schools (at which attendance is compulsory), legislative assemblies, courts, public offices, and any other public facility operated under governmental auspices.



Van Alstyne

4. The determination of the content and requirement of such prayer is to be a function of that level of government otherwise having legislative power to prescribe the conditions of operation for the public school or other public institution.
5. Persons shall be deemed as not being "required" to participate assuming only that no penalty as a matter of official sanction is attached insofar as, during the performance of the government-prescribed, sectarian religious devotional exercise, they merely "sit quietly, occupy themselves with other matters, or leave the room."

6. Prior interpretations of the first amendment by the Supreme Court are no longer to apply; neither the first amendment nor any other part of the Constitution is hereafter to be construed as restraining any acts or involvement of government in the arrangements made according to the scope of this amendment as described above.

My misgivings about this proposed amendment can be summarized as follows:

1. The amendment will abandon the existing constitutional protection from sectarian conflict by providing political incentives for competing religions to establish their theology to the exclusion of others in our public institutions;
2. The amendment will encourage the establishment of a dominant religious creed at the national level under official government sponsorship, establishing a particular religion as *the* religion of the United States; and it will encourage the establishment of other religions as the official religion of each state and community in which a sufficient majority or coalition exists to secure the enactment of that religion under law;
3. The amendment will encourage the behavioral conditioning of captive audiences by the technique of ritual, repetitive, group recitation of dominant

sectarian theology, under controlled circumstances of compulsory attendance of the young, reinforced by official government sanction, the regular use of government premises, the regular involvement of government-employed figures of authority, and implicit disapproval of nonconforming beliefs;

4. The amendment invites political and religious conflict between *local* majorities that may enact religious rituals in local public institutions offensive to the sectarian preferences of *different* majorities controlling in legislative bodies having the power to supplant the locally-dominant religion with a state-dominant religion;
5. The amendment may (and probably would) enable Congress to influence both (a) whether a state or local government shall provide for religious ritual, and (b) the acceptable character of such religious ritual that a state or local government must accommodate, by utilizing its combined powers of taxation and of spending to condition the availability of federal largesse upon the willingness of state and local governments to provide for that minimum of "voluntary prayer" as the national government otherwise resolves to provide in its own facilities;
6. The amendment embraces a constitutional theory of religious combination with government power that may necessarily affect Supreme Court interpretations of the first amendment in matters *additional* to prayer and scriptural recitations in public institutions. I.e., its open departure from a minimum theory of "neutrality" at least among all "religions" creates an intolerable inconsistency with current first amendment doctrine in general;
7. The amendment is compro-

mitting to the privacy and intensity of diverse religious creeds within the United States by subjecting each religion to the political imperative of compromising its own integrity as a necessary concession to secure government support;

8. The amendment would install in our Constitution the principle of theocracy, i.e., the theory that it is appropriate for governments to determine the theological foundation of the nation state and to incorporate that theology among its governing powers.

These several objections are serious and fundamental. I am grateful for this opportunity briefly to explain them.

Our Constitution (which is literally the oldest written, continuously-operating constitution in the world) currently contains two provisions which explicitly deal with "religion." Both of these provisions are radically unlike the proposed amendment. The first is the only provision in the original Constitution of 1789 to mention religion at all. It is the provision in Article VI, Clause 3, that provides:

[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. (Emphasis added)

This clause separates the secular from the theological. It not merely forbids the use of some particular "religious test" for holding office, e.g., a test restricting office-holding to Protestants. Rather, it declares that there shall be *no* religious test at all. It makes clear that the "religiousness" of an individual is not the proper object of governmental inquiry in determining his or her qualification to *any* office or *any* public trust under the United States. The sentence that precedes it in Article VI provides, moreover, that even in affirming a mere willingness to support the Constitution (as a condition of holding state or federal office), the act of swearing to an "oath" cannot be required.

The other provision in the Consti-

tution dealing with religion is that which opens the first amendment:

Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof. (Emphasis added)

In contrast with the tenor of Article VI, and in contrast explicitly with the language of the first amendment, the proposed amendment would invest a power in Congress to make laws respecting the establishment of whatever religion Congress prefers, in the regular operation of any federal institution. It similarly proposes to authorize each state to establish the religious practice of a dominant majority, in the regular operation of any state or local government institution. Such accommodation as the amendment provides to others is merely that of withholding any punishment from them insofar as, without disruption, they remain silent or leave the room at such times as the government's preferred religious service is being conducted.

The materials accompanying the amendment aver that the amendment means to respect a benign neutrality among religious creeds in the United States. But the examples of what Supreme Court decisions would be overruled, and specifically what practices would be allowed, flatly belie that claim. What is to be approved here is not neutrality, but the power to impose whatever exclusive religious ceremony as wins out in legislative competition for that privileged status: whether orthodox Catholicism throughout one school district irrespective of the diverse faiths of others in compulsory attendance at such schools; orthodox Islam throughout another in which the Koran and Islamic forms of prayer may reflect the school board's will; strictly Mormon in another jurisdiction; or some compromised variety of Protestantism in such public institutions whose religious devotional exercises

*What is to be approved
here is not neutrality....*

shall have been prescribed by that majority. At the national level, in such public facilities as are subject to the legislative jurisdiction of this Congress, the amendment will grant to this Congress the power to establish a single national religious liturgy for regular and exclusive group recitation in all federally-operated public institutions.

The materials accompanying the amendment also aver that the amendment means merely to "accommodate" the purely private, i.e., individual, exercise of religious faith. But the examples of what Supreme Court decisions would be overruled, and specifically what practices would be allowed, flatly belie that claim as well. What is to be approved here is not

The amendment will grant to this Congress the power to establish a single national religious liturgy...

"accommodation," but prescription. It is not the arrangement of public business to accommodate those who wish to attend the church of their choice or to attend places of instruction provided by churches of their affiliation—accommodations *already* allowed under law. Neither is it the special accommodation of tax exempt status accorded neutrally to *all* religiously held and used property, as already exists. Neither is it the accommodations widely already existing under state laws that excuse Sabbatarians from ceasing business on a given day if, as a consequence of religious obligation, they are already obliged to close on a different day. Neither is it the accommodation already provided by Act of Congress excusing any person, bound by religious objection, from military combatant training and combatant service. *All* of these accommodations and others are already provided and allowed under the first amendment.

(Certain other accommodations are not merely permitted by the first amendment, moreover, but are already required by force of its free exercise clause.)

The proposed amendment is no "accommodation" *in any of these senses*. Rather, it contemplates that specific, governmentally-preferred religious prayers and specific, governmentally-preferred religious scriptures may hereafter be enacted for institutionalized government religious ceremonies in any or in all government facilities.

An egregious example of what this amendment portends is provided by the case of *Engel v. Vitale*, which the accompanying materials declare explicitly it is the object of this amendment to overrule. The case involved a prayer composed by a state government agency. The "Regents Prayer" (as it was called) was alone authorized for use in the public schools; no other was to be permitted. Its use was to take place in public school classrooms, for the organized, chorused, oral, group recitation of its provisions as a devotional exercise each day (as wholly distinct from studies about prayer, and as wholly distinct from the study of various scriptures in history or in literature courses). The contents of the prayer and the prescribed formula for its devotional use elected all of the following distinctive religious preferences as implicitly reflecting *the* "correct" religion. There is, within this list of characteristics that were governmentally-selected, governmentally-drafted, and governmentally-adopted for use in governmentally-operated public schools, *not one element* that is "neutral" or "common" to the religious diversity of the New York public school population. These were the implicit and explicit sectarian statements involved in *Engel v. Vitale*, as authoritatively determined by the state government's Board of Regents:

1. The appropriate form of praying is to do so orally, in unison with others, in a secular place, from a standing position, under the guidance of a public school teacher;

2. The appropriate object for which one should pray is to invoke divine blessing for: (a) one's country; (b) one's teachers [under whose direction the prayer is being recited]; and (c) one's parents;
3. The proper relationship of human beings to an immanent spiritual force is one of dependence and of supplication; specifically, what one does in prayer is to "beg";
4. The subject of divine supplication is a unitary, immanent, metaphysical presence, i.e., a single and singular "God";
5. The essential characteristic of this singular "God" is that it is absolutely powerful, i.e., "almighty."

The Regents Prayer, involved in the *Engel* case, is fraught with irony. The "prayer" was rightly criticized by some on the basis that it was a tepid, watered-down compromise—that it tended to dilute genuine religious expression as a necessary condition of achieving sufficient political support. And, of course, the criticism is essentially well taken. At the same time, however, the Regents Prayer was not merely sectarian; it was also strongly offensive to a number of deeply held faiths. The manner of its utterance (aloud, in unison, in a secular place) is offensive to certain faiths; its stipulation of one god is offensive to polytheisms. Its stipulation of omnipotence in a single god is blasphemous to other religions which reason differently; they are unable to impute the world's diseases, its wars, its recurring cycles of poverty, famine, and mass death, to a single deity absolutely powerful to end these tragedies. And, that the devotional allegiance of young, impressionable children would be enlisted by the New York Regents to "beg" blessings for the state's own agents (its teachers), moreover, shows how slippery is the gentle slide when the state seizes the instruments of religion to cultivate its own secular interests.

A subsequent case, which the materials accompanying the proposed amendment likewise state will be overruled by the amendment, merely confirms this same point.

Here (in *Schempp*), the government-directed, public school devotional was drawn as daily passages from "The" Bible. That *any* chapter would have to be explicitly sectarian was obvious (New Testament? Old Testament?). That *any* edition would be sectarian was equally obvious (King James edition? Vatican-approved edition?). That "The" Bible would certainly not be The Koran, The Bhagavad Gita, The Upanishad, or The Book of Mormon, etc., merely italicized the implicit involvement of the school system and of its teachers in the sectarian processes of invidious preference.

In brief, there is a pretense in the amendment that it is simultaneously possible for public authority to determine the content of religious exercises to be conducted under its auspices and yet remain "neutral" among all sects otherwise entitled to equal protection consistent with the free exercise clause. The fatuousness of that assumption is at the heart of the Supreme Court's own decisions to the contrary. It is also at the heart of the first amendment which withdraws from government the prerogative to make such dangerous, divisive, and demoralizing choices.

In *Engel*, Mr. Justice Black very soundly observed:

[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.

And in *Schempp*, Mr. Justice Goldberg noted, with Mr. Justice Harlan's complete concurrence:

The practices here involved do not fall within any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which *both* religion clauses of the First Amendment preclude. [The] pervasive religiosity and direct governmental involvement inherent in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day,

involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment.

These observations were absolutely sound when they were written. They are equally correct today. Respectfully, I am amazed that this Congress would seriously consider the deliberate insertion of sectarian religious devotional exercises in all public institutions as a proper and desirable object of an amendment to our Constitution.

But this amendment will also do more than sponsor acrimony and sectarian competition at levels of local government now spared that distress. It must necessarily invite equivalent rivalries among units of state government and, finally, between the national government and the several states. That it would do so within a state can readily be forecast, as follows.

The amendment and its accompanying analysis are clear in asserting that no state need provide for any particular religious services in its public schools or public institutions. Rather, it is, in the first instance, within the determination of each state (and each state's constitution) as to what practices, if any, shall be provided. Suppose, then, that in the local school district of a state (which state is dominated by a "conventional" religious majority), the local board first prescribes an exclusive, daily prayer that is regarded as both unwise and dangerous at the state legislative level?—A "prayer" requiring that one prostrate oneself on the floor, for instance, facing east; a prayer rendering an appeal not to "God" but to "Allah"; a prayer not begging blessings on one's teachers, but strength for Islam as the one, true faith? The amendment contemplates the prerogative of each "local community" to fashion this kind of choice in the first instance. And, again, the choice is *not* to be faulted merely because it is (necessarily) sectarian. But, of course, by a different sentiment prevailing in the

state's legislature, the state may enact a prohibition against such an (unwise?) prayer; similarly, as in *Engel*, it may draft a completely different prayer that must be used, if any is to be used, in lieu of the local preference.

The rich, divisive possibilities do not end here. Congress, the amendment provides, may formulate the policy (and thus the range, character, and content) of religious recitation to be employed devotionally and exclusively, in such "public institutions" as are subject to *its* jurisdiction. Once that power is invested in Congress, there is no restriction upon Congress's *recommending* the national policy for such states and local communities as themselves are willing to adopt it. Additionally, there is *no* constitutional barrier against a decision by Congress to condition the availability of federal financial assistance upon each state's willingness to conform to the national policy respecting group prayer.

In brief, if this Congress believes that a certain prayer is a good and desirable thing for state universities and state public schools to provide, it may (with uniform precedential support from a very long series of Supreme Court opinions) restrict eligibility for its assistance to such state universities and state public schools as can and will provide for such "voluntary...group prayer" as Congress believes to be in the national interest. There is no novelty or improbability in this (unanticipated?) use of congressional power if this amendment passes. A state need not now provide for any course providing military training in its state universities; but it is familiar learning that a state that does not see fit to provide for ROTC courses agreeable to federally-described standards disables its state universities from remaining eligible for significant amounts of federal fiscal assistance. We have seen the formula at work with respect to public schools as well as all other state institutions. The modification of state and local laws, to provide for such "affirmative action," or such assistance to the handicapped, or such conditions of

employment as Congress believes appropriate for the general welfare, in the spending of federal monies, we know *can* be compelled by Congress. The established theory is that, consistent with the tenth amendment, Congress cannot direct these changes obtusely. It may, however, confine the availability of federal largesse to such states as will in fact "voluntarily" alter their laws (including where necessary their constitutions) to permit compliance with the national policy. So it follows, if this amendment becomes part of our fundamental law. A further erosion of federalism is contemplated here, enabling this Congress to withhold assistance to states that may, under their own constitutions, want no part of providing for "voluntary prayer" in the operation of public schools or other public institutions.

*This proposed amendment
[installs] the first seeds of
theocracy into our
government institutions.*

This proposed amendment thus does in fact install the first seeds of theocracy into our government institutions. Under the false auspices of religious solicitude, it contemplates all levels of government becoming involved in the determination and prescription of religious exercises in tax-financed, compulsory public education and in any other public (i.e., government) institution. It supposes a benign harmlessness about what is involved here. It imagines that spirited discussion and moderate demo-

cratic institutions can work out congenial prayers, acceptable scriptural readings, and an agreeable liturgy of a mild, uncontroversial, state-sponsored religion. It yields to the frustration of various sects that believe they have a missionary purpose to harness the power of secular government in the propagation of (their) faith. And our Supreme Court has rendered itself a scapegoat of these interests by clinging so obstinately to its view that this is not the nature of our Constitution: that the assimilation of religion within the state threatens the civil polity even as it begins, inevitably, to degrade religion as well. My belief both professionally and as a citizen is that the Court's vision is vastly more clear-eyed and entirely more sound than what is proposed here. I hope you will not approve this amendment.

Statement of Walter Dellinger

Last summer, Professor Walter Dellinger testified before both the United States Senate Subcommittee on the Constitution and the full Senate Judiciary Committee on proposed constitutional amendments relating to school prayer. On April 29, 1983, Professor Dellinger testified before the Subcommittee chaired by Senator Orrin Hatch (R-Utah) on S.J. 73, a constitutional amendment proposed by President Reagan. The text of the amendment provides:

Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

Excerpts from the transcript of Professor Dellinger's oral testimony follow:

Professor Dellinger. Senator Hatch, I would prefer to summarize my views this morning and, with the permission of the Chair, submit next week a full written statement addressing the constitutional amendment proposed in S.J. Resolution 73.

Senator Hatch. We will be delighted to put that in the record, without objection.

Professor Dellinger. The constitutional amendment, Senator Hatch, proposed by this Administration is one that I fear would lead to government control of the content of religious exercises. The issue of government control is one which the Administration has assiduously sought to avoid discussing. Deputy Attorney General, Mr. Schmults, again avoided discussing that question this morning.

I believe that if S.J. Resolution 73 is fully analyzed, many of those who believe that they support that amendment will not support it. It is an amendment that would permit state officials and elected and appointed bureaucrats and politicians to compose prayers and religious liturgies and to require that those prayers be said in every school district in a state.

Senator Hatch. You would not have the same objection with a silent prayer?

Professor Dellinger. No. In fact, one of the virtues of a period of silent meditation is that no government official is involved in the composition of prayer.



Dellinger

Senator Hatch. Yes.

Professor Dellinger. Now, what is so troublesome about S.J. Resolution 73 is that several of those who testified at the hearings last summer in favor of it—Mr. Murphy, the Deputy Supreme Knight of the Knights of Columbus, and Mr. Jarmon of Project Prayer—stated that they were *opposed* to allowing state officials to compose and draft official prayers. They did not understand this amendment to permit that. They are wrong, and I think they would not necessarily support this amendment if they were, for example, to attend to the Department of Justice's own analysis of this amendment—an analysis that

the Administration has attempted to avoid since last summer.

Senator Hatch. Well, that is a good point.

Professor Dellinger. I would like to cite to you, Senator, chapter and verse from the legal analysis prepared by the Office of Legal Policy of the Department of Justice and transmitted by the President of the United States which states, "The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities." The Administration also expressly recognizes that the amendment would allow "arguably sectarian prayer" to be "promoted by the state." The Department of Justice's legal memorandum states further, "The proposed amendment also does not specifically limit prayer in public schools and other public institutions to non-denominational prayer." Finally, the Administration states, "The language of the amendment is intended to overrule *Engel v. Vitale*, which forbade the reading of brief *state-composed* prayers" (emphasis added).

In the question and answer list provided by the White House on May 6, 1982, the White House said that state governments "could choose prayers that have already been written or they could compose their own prayers." Indeed, there is no way around that conclusion. What the amendment does is to remove the present First Amendment barrier to

prayer in public schools and public institutions. By removing the First Amendment barrier presently existing, power resumes in state legislatures, which have control over the schools of the state, to make whatever rules or regulations they wish.

So, for example, if this amendment is adopted and ratified by three-fourths of the states, a local school board could have a meeting of its elected officials and sit down and hammer out and compose a prayer that every school within the district in every classroom is required to recite every day. An individual child, I quite clearly understand, could absent himself from such an exercise. But the vice here is the *composition* of that prayer by school board officials.

If the state department of public instruction is not satisfied with what some localities are requiring in the way of sectarian prayer, that department could mandate its own bureaucratically-composed prayer required of every school district in the state.

The vice here is the composition of [an official] prayer by school board officials.

The Administration must acknowledge this to be so, because the very case they expressly seek to overrule, *Engel v. Vitale*, involved a prayer whose vice was that it was composed by state government officials. It was composed by state officials who were politically appointed and who drafted and composed an official prayer for New York public schools.

Finally, we need to look at an aspect of this proposal that should be seriously considered by someone who has shown the great concern for the principles of federalism that you have exhibited throughout your career in the United States Senate. Ponder this next possibility: If this amendment is adopted, there would be nothing in the Constitution of the

United States to prevent the federal government, through bureaucrats in the United States Department of Education, from conditioning all federal funding in 38,000 school districts in the United States on those school districts engaging in a religious exercise which is composed, drafted, and mandated by bureaucrats in the United States Department of Education. If there were any doubt as to the plausibility of that scenario, I think that doubt is removed by the fact that that very same legislative device has been utilized in two bills which are also before this Committee.

Senator Hatch. Do you think a statute could actually enable that to happen?

Professor Dellinger. Yes. Congress could say that future federal funding to all 38,000 school districts is dependent upon those school districts following the religious ritual mandated by Congress, or it could simply turn that determination over to the Department of Education for the issuance of appropriate religious liturgy and approved liturgical guidelines.

Now, the Administration is obviously very concerned about the issue of who would control and compose the prayers because they seek in every way possible to avoid that issue. The Deputy Attorney General's testimony was carefully rewritten from last year to dance around their previous clear acknowledgement that state officials could compose prayers if that amendment were adopted.

Senator Hatch. I would have to acknowledge that.

Professor Dellinger. Once you remove the only barrier in the Constitution that prevents a prayer from being drafted by government officials—once you remove that by completely carving out of the Constitution all issues relating to prayer in public schools and other public institutions, then whoever is in charge of the premises, whatever level of government has ultimate authority to make determinations about the public institution or public school, has a constitutional carte blanche to draft and determine whatever the prayer will be.

Senator Hatch. Let me interrupt you on that point.

Professor Dellinger. Yes.

Senator Hatch. I really think you are doing the Committee a great service in pointing that out. I feel the same way. I feel we have to resolve that in this Subcommittee in what we will come up with as a final draft of this constitutional amendment.

I agree with you that the Administration witnesses have carefully skirted that issue.

Professor Dellinger. My colleague, William Van Alstyne, and I published a short piece in the *Washington Post* and indicated the possibility that the federal government would indeed have the authority under the spending power, if this amendment passed, to mandate a federally-composed prayer. There followed a considerable silence from the Department of Justice which I think recognized the correctness of our position. We did find a response published in the *Post* from the Deputy in the Department of Education, who just simply characterized that suggestion as ludicrous. We wrote back in response and went through the Department of Justice's own memorandum, citing the Department's own acknowledgement that government control could follow from this amendment.

The First Amendment has been part of our Constitution for 192 years and this amendment, were it, say, the Twenty-Seventh Amendment, would be part of our Constitution perhaps for centuries to come, and it would thus permanently remove the First Amendment barrier to control of prayer by government officials.

My only closing remark, Senator, is that I wish, if representatives of either the Department of Education or the Department of Justice come back before the Committee on this issue, I would like to see the Com-

Government control could follow from this amendment.

mittee directly put to those officials—for example, to the Deputy Attorney General—this question: *if this amendment is adopted and ratified by the states, will there be anything in the Constitution that would prohibit the federal government from conditioning the receipt of federal funds in all school districts in the United States on the adoption by those school districts of federal religious exercise guidelines issued by the United States Department of Education?*

Senator Hatch. We will be happy to submit that to them.

Professor Dellinger. Thank you.

Senator Hatch. We will see that they answer that question.

What about the intent of the Fourteenth Amendment to incorporate the First Amendment?

Professor Dellinger. Those are issues that I think, Senator, are buried in the womb of time. I certainly agree that the First Amendment of the Constitution was only intended to limit the federal government and not to limit the states at all.

After the adoption of the Fourteenth Amendment, it then became the responsibility of the courts to determine the content of liberty protected against state interference by the Fourteenth Amendment. There are many sources for a court to provide some content for that "liberty." One source is to look and see what liberties were guaranteed against the federal government, and to ask whether the meaning of the Fourteenth Amendment is that those same liberties should be applied against the state governments.

Even those Justices who do not believe in some strict incorporation, however, like Justices Harlan and Frankfurter, believed that the principle of liberty guaranteed against state infringement by the Fourteenth Amendment is one which the courts are in a very real sense charged with developing.

You have to remember, Senator, that the Congress which proposed the Fourteenth Amendment was made up very largely of lawyers—lawyers who were fully familiar with both *Marbury v. Madison* and

McCulloch v. Maryland. So, those who drafted the Fourteenth Amendment and sent it to the states were familiar both with the concept of judicial review and with an open-textured reading of the Constitution. They knew John Marshall, so in that sense they knew what they were doing.

Senator Hatch. That is great. In light of the intent of the Framers concerning the Establishment Clause of the First Amendment, do you not feel that there is a need for amending the Constitution to erase the Court's error?

Professor Dellinger. I am not at all persuaded that the Court is in error. Senator, one problem is this: the Supreme Court's decisions have only invalidated teacher-led, school-initiated, government-sponsored prayer. Now, this Committee has heard accurate statements from around the country that there are school principals who say, "We cannot allow the Fellowship of Christian Athletes to have a meeting at our school, even though we permit the key club and the rodeo club to meet."

There are school principals around the country that think that. Do you know why they think that? They think that, in part, because the President of the United States and many distinguished members of Congress have for many years been misleading the American people by constantly stating that the U.S. Supreme Court has forbidden all prayer in the public schools.

That just is not true, but unfortunately a lot of school principals believe what United States Senators and Presidents tell them the Supreme Court has decided. Members of Congress have gone out telling people over and over again, and the President has said as a candidate and later, that the Supreme Court of the United States has forbidden little children to pray in schools. And what happens? Some people take them at their word, including a lot of school principals who think that you cannot allow any prayer on public premises.

The Supreme Court has never held that. And when the Court in *Widmar v. Vincent* had the first occa-

sion to deal with any truly voluntary student activity, they expressly held that on state university property, built with state funds and paid for by state taxpayers, you could indeed have prayer. And you could have worship to the extent that the facilities were available to similarly situated, non-religious organizations. That was concurred in, might I say, by Justices Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor and by the Chief Justice—eight of the nine Justices agreeing on a single opinion.

Senator Hatch. That is astounding.

Professor Dellinger. I think what we have here is a non-problem, a problem which, if it exists, it exists because a lot of school principals have been misled by statements attributing to the Supreme Court something the Supreme Court has never held.

Senator Hatch. Well, let me at least say this. Things have been so

What we have here is a non-problem which... exists because a lot of school principals have been misled....

confused that there at least has been a chilling effect on the free exercise of religion.

Professor Dellinger. I think that may be a problem.

Senator Hatch. It may take a constitutional amendment to resolve that problem, in the opinion of a number of us.

Professor Dellinger. Well, the reason I think we do not need a constitutional amendment is that the Supreme Court has not addressed the question of whether high schools, junior high schools, or any school that allows student-initiated, voluntary activities must also allow student-initiated religious clubs.

What evidence do we have on this question? We have an eight-to-one

opinion that firmly states the principle that you can use public property for religious activities—an eight-to-one decision of the United States Supreme Court in the college setting. The Court noted in a footnote, “We do not reach in this case the high school issue.” I am willing to bet, Senator, though I know that you are not a betting man, that in a case involving truly student-initiated, voluntary activities in a public school setting, the Supreme Court will apply the principles of *Widmar* and forbid discrimination against truly voluntary extra-curricular activities involving religious speech.

The idea that we need a constitutional amendment to beat the Supreme Court to the punch—an amendment to the Constitution to deal with, at the most, two erroneous decisions of lower three-judge court panels—does not strike me as very persuasive, given the risk that this particular amendment does so much more by creating a First Amendment black hole with respect to prayer.

When you create a black hole in the Constitution—which is what you do when you use the language “nothing in this Constitution prohibits,”—no matter how sectarian the

*This... amendment
[creates] a First
Amendment black hole
with respect to prayer.*

prayer, no matter how many politicians and bureaucrats were involved in divisive religious warfare in agreeing on the liturgy, when such a case comes to the Supreme Court they are going to say that nothing in this Constitution prohibits it.

Senator Hatch. Let me just say something to you. I have really appreciated your testimony today because I agree with much of it.

Professor Dellinger. Well, Senator, one of the reasons I enjoy testifying before this Committee is that you take these issues very seriously.

Senator Hatch. Well, let me say that I think you and your colleague, Bill Van Alstyne, have both contributed generously to this Committee and to its thought processes on constitutional issues. I think you have been very helpful. I have had lots of questions about the Administration's constitutional amendment. I have no

doubt that that is not going to be the final language out of this Committee; at least I do not believe it will be.

Professor Dellinger. People tend to overreact to lower court decisions. We have a whole lot of federal judges these days, and in area after area I find people overreacting to lower court decisions which often do not stand the test of time when they come to the scrutiny of the United States Supreme Court.

Senator Hatch. I agree with you on that. You know, among you, Bill Van Alstyne, and Don Horowitz, I think we have had some tremendous testimony up here. . . . I just want to personally thank you for being with us today. As usual, you folks from Duke never let us down. You know, I commend your university for having the high quality of thinking that you have down there. I do not always agree with you, but that does not mean that I am right either. All I can say is that I think you have added a lot to this Committee's deliberation and the future deliberations of this Committee on this very important issue. Thank you so much, Professor Dellinger; we appreciate it.

Professor Dellinger. Thank you.

On July 27, 1983, Professor Dellinger testified before the Senate Judiciary Committee, chaired by Senator Strom Thurmond (R-S.C.), on the original Administration proposal, S.J. 73, and on a milder substitute proposal by Senator Hatch permitting for a moment of silence for prayer or meditation and requiring equal access to the use of public school facilities for all voluntary student groups (which would include voluntary student religious groups). Dellinger first addressed again the original Administration proposal, S.J. 73.

Professor Dellinger. Mr. Chairman, my statement is not a formally-prepared statement. I would like to directly confront the statements made by the previous witness, the Deputy Attorney General, which I think go to the heart of the matter that is before this Committee. I think that once again spokesmen for the Administration have evaded addressing the central issue under the Administration's proposal, S.J. Resolution 73: Who will compose the group prayer?

If S.J. Resolution 73 is adopted as a part of the Constitution, there

*[The central issue is:]
Who will compose the
group prayer?*

would be nothing left in that document that would prevent federal bureaucrats in the Department of Education from requiring, as a conditioning of federal funding, that local school districts adopt religious prayer guidelines issued by the Department

of Education. My colleague and I previously challenged the Administration in the *Washington Post* and in my testimony last April to show why this would not be the case. They had no answer then; they have not answered since; they have not answered that question today.

When you asked the Deputy Attorney General the very pertinent question this morning, at what level of government would the determination of the proper prayer be made, he said, “Oh, we expect the determination to be made by local people,

maybe even in each classroom." But the first local determination could clearly be overruled, as can all other affairs in the school districts, by the school board, by the state education board, by the state legislature, or by whoever would otherwise have authority to set the rules.

Only one thing now prevents state and federal officials from prescribing their preferred official religious guidelines, and that one thing is the First Amendment's ban on government-sponsored prayers in the public schools, a ban the Administration explicitly wishes to overturn.

Professor Dellinger then addressed the modified school prayer amendment offered as a committee substitute by Senator Hatch. The Hatch substitute would propose a constitutional amendment providing that:

Section 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in public schools. Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation.

Section 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.

Professor Dellinger: I would like to commend the Subcommittee for its wisdom in offering a substitute for what I think is the extremely dangerous amendment proposed by President Reagan which was unfortunately defended again this morning by Deputy Attorney General Schmults. The Subcommittee proposal which Senator Hatch and Senator Grassley have endorsed avoids the central vice of the Administration's proposal since it provides for a moment of silent prayer or meditation. It thus leaves to each individual child the choice of a prayer or whether to pray at all. That avoids the problem of government control of the prayer itself. It does not give a constitutional carte blanche to government officials, as does the Reagan proposal, to compose official prayer.

The second portion of the Com-

The Chairman [Senator Thurmond]. Did you have any suggestions on that point? What would you suggest?

Professor Dellinger: I would suggest, Senator, that no amendment that eliminates the constitutional barrier to organized group prayer in the public schools can avoid the problem of having a government official determine that prayer.

The Chairman. I understand. Now, you are opposed to that?

Professor Dellinger: Yes, sir.

The Chairman. I understand your position. But now, do you have a sug-

gestion to make that would modify that or remedy that?

Professor Dellinger: The only suggestion I have, Senator, is that the Committee propose no amendment.

The Chairman. Well, if they do propose one, what do you suggest?

Professor Dellinger: Senator, I do not believe that any constitutional amendment is necessary.

The Chairman. In other words, do you not think it could be modified to stand the test?

Professor Dellinger: No, I do not think it could be modified in any way to make it acceptable.

mittee substitute concerning equal access for student groups states a basically sound constitutional principle. It is indeed with some reluctance, given how preferable the Committee substitute is, that I urge you not to report either of these proposed constitutional amendments to the Senate floor.

The two provisions in the Committee substitute, which I will refer to as the "moment of silence/equal access" amendment, generally represent present law, or the law that I would expect the Supreme Court to adopt. There are three relevant Supreme Court decisions. They do not preclude all prayer in the public schools. They do not preclude an individual student from quietly saying a prayer. They do not preclude a school board from adopting a pure moment for silent meditation which would afford an opportunity for individual prayer. The Deputy Attorney General stated this morning that

Relevant Supreme Court decisions... do not preclude all prayer in the public schools.

there are "lots of lower court decisions" holding that silent prayer is impermissible. I beg to differ. On my count, there are now three lower federal court decisions which hold moment of silence statutes unconstitutional; and a fourth issuance of a temporary restraining order in New Jersey. There are also three lower court decisions sustaining moments of silence—one by the New Hampshire court, one by the New Jersey state court, one by the federal district court in Massachusetts.

The opinion of scholars who have studied this constitutional issue, however, is that a pure moment of silence would be sustained by the United States Supreme Court. It therefore seems to me clearly premature to adopt this amendment.

The Chairman. As I understand your position, Professor Dellinger, you are strongly opposed to the President's proposal on the grounds that it is very dangerous, and as to the alternative, you feel that they can do that now without a constitutional amendment; is that correct?

Professor Dellinger: I think that is what the Supreme Court will hold, Senator. A school board policy that there will be a moment of reflective silence observed at the beginning of each school day would in my view pass constitutional muster. If you add

the word "prayer," or specifically suggest prayer in the school board policy, I have some doubt about its validity. If one is litmus-paper sensitive to establishment violations, I think you would have to find there a trace of establishmentism, since the government would be specifically suggesting that one of the things you might do with your time is utilize it for prayer. I would therefore think it more constitutionally defensible if any moment of silence were designated simply as a moment for reflection—period, and letting each individual child choose how to use that time, free of governmental suggestion. Their parents can suggest that they use it for prayer; their ministers, their rabbis can suggest that they use it for prayer—or, if they wish, the children may reflect on non-religious matters. But whether or not the word "prayer" appears in a moment of silence provision, I think the Supreme Court might well sustain such a policy. Justice Brennan so indicated in his concurring opinion in *Abington Township v. Schempp*.

Thus, while the Administration's proposal is, in my opinion, deeply pernicious, the Subcommittee substitute is merely unnecessary. If it is

The Administration's proposal is, in my opinion, deeply pernicious.

unnecessary but might clarify the situation, why not adopt it? I think there is a very good reason for not proposing an unnecessary constitutional amendment dealing with prayer.

During the ratification debate over the Equal Rights Amendment, we learned how much we do not know about the ratification process. We do not know whether states can rescind a ratification. We have no definitive answer to whether Congress can extend the time for ratification. Proposing amendments at this time is a very uncertain process. What this Committee proposes to do is to send to 50 state capitals two potentially divisive amendments, one that would be harmful, and one that is unnecessary, which are likely to heighten religious tensions in this country. From Montpelier to Sacramento, from Tallahassee to Juneau, you are inviting proceedings that set Jew against Gentile, that put the

Knights of Columbus in conflict with the United Presbyterian Church. For 7 to 10 years, we will have a struggle among religious groups over whether to adopt these amendments.

This is a time in our country and other countries when many religious minorities feel that there is great stress on religious liberty. To propose either amendment would add to that stress.

To summarize my views on the two amendments, I find it extraordinary that anyone who is serious about religion could support S.J. 73, the Reagan Administration's proposal, that could lead to meddling by government officials and bureaucrats in determining the proper, official, governmentally-sanctioned prayer. And I am unpersuaded that we need a constitutional amendment to deal with issues that have not yet come before the Supreme Court concerning a moment of reflective silence and equal access to public school facilities, when the amendment process itself could foster religious strife and turmoil in 50 state legislatures.

Thank you, Mr. Chairman, and members of the Committee.

Statement of Donald L. Horowitz before the Subcommittee on the Constitution, Senate Judiciary Committee, February 12, 1982

Professor Donald L. Horowitz analyzes the proposed revision of section 2 of the Voting Rights Act. That amendment would prohibit voting qualifications and electoral practices that abridge or deny the right to vote on discriminatory grounds. Professor Horowitz contends that this version of section 2 would unwisely change the relevant constitutional law on the subject by doing away with the requirement that there be an intent to discriminate before forbidding a given practice. Moreover, he argues, section 2 as proposed is likely to divide and possibly polarize minority and majority voters during an election by fostering separate political constituencies. Professor Horowitz thus suggests not adopting the revision.

My testimony will be confined to the House version of section 2 of the proposed Voting Rights Bill. Section 2 deals with voting qualifications and electoral practices. Since the inception of the Act, section 2 has forbidden the enforcement of any voting qualification or electoral practice "to deny or abridge the right of any citizen of the United States to vote" on discriminatory grounds. The House amendment would substitute for this language a prohibition on voting qualifications and electoral practices applied "in a manner which results in a denial or abridgement" of the right to vote on discriminatory grounds....

I. THE VOTING RIGHTS ACT AND ITS EFFECTS

For someone like myself, who has spent much time analyzing the unintended consequences of public policy, the Voting Rights Act stands out as a remarkable achievement. Here is a statute that declares the intention to abolish racial discrimination in voting and, in the course of a decade and a half, has gone a considerable way toward fulfillment of that objective. The results so far can be seen in progress made in minority registration and officeholding.



Horowitz

The figures on black voter registration in the Southern states are extraordinary. Georgia, Louisiana, and Mississippi have all been above the national average in registration for more than five years. Four of the Southern states (Alabama, South Carolina, North Carolina, and Virginia) hover around the national average. Before the Voting Rights Act, none of these states was at the 50 percent mark in black registration. Alabama

was at 23 percent eligible black voters, and Mississippi, lowest of all, was at 6.7 percent.

In officeholding, too, the results have been dramatic.¹ Between 1968 and 1980, the number of black elected officials increased tenfold (1,000 percent) in Alabama, while the number of elective offices remained about the same. In Georgia, there was a twelvefold increase in black elected officials, in the face of a nine percent decrease in the total number of elected offices. In Louisiana, there was a tenfold increase in black officeholders in the face of a slight decrease in total offices; in Mississippi, a thirteenfold increase; in North Carolina, a twenty-fivefold increase; in South Carolina, a twenty-onefold increase; in Virginia, only a fourfold increase....[I]n each case, the percentage of black officeholders is [still] far below the black percentage of the population; yet who could have imagined that, little more than a decade later, there would be some 5,300 elected black officials in Mississippi, which in 1968 had 29?

It is important to be very clear on the meaning of these developments. It is not asserted that the work of the Voting Rights Act is over, that obstacles to minority participation have evaporated, or that Congress can

It is not asserted that the work of the Voting Rights Act is over...

smugly conclude that discrimination in the political process is a thing of the past. If that were true, there would be no need to extend the life of the Voting Rights Act, and few informed observers believe this to be the case. But it does seem plain that the Voting Rights Act has, in conjunction with other forces, set in motion a considerable political change in the South—a change very much in the direction intended by the legislation.

Now it seems to be a rule of American public policymaking that, if a process, institution, or policy demonstrates its capacity to fulfill one purpose, it will soon be given additional and quite different functions to perform. It will then be taxed beyond its capacity. Its earlier success will then prove to be its undoing. This is what has now been proposed for the Voting Rights Act, and I intend to argue that this is both unnecessary and unwise.

II. THE PROPOSED AMENDMENT AND THE STATE OF CURRENT LAW

As currently written, section 2 of the Voting Rights Act provides that no state or municipality may apply a "voting qualification or prerequisite to voting, or standard, practice, or procedure" in such a way as to "deny or abridge" the right to vote on grounds of race or color or linguistic affiliation. In *City of Mobile v. Bolden*,² a clear majority of the [Supreme] Court agreed that racially discriminatory effect alone is not sufficient to invalidate an electoral arrangement.

It is asserted in the House report on the proposal presently before this Subcommittee that the change sought in section 2 of the Act is required to "clarify ambiguities" created by the Supreme Court decision in *Bolden*.³ The House report states that the amendment of section 2 would "restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and con-

sequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."⁴ This would appear to suggest that *Bolden* produced a change in the Supreme Court's view of the Act.

To suggest this, however, is very seriously to misrepresent the state of Supreme Court decisions under the Voting Rights Act and under the Constitution. To my knowledge, the Supreme Court has never endorsed the view that the "proper legal standard" under section 2 is anything other than discriminatory intent.

A brief review of a few leading cases makes this quite clear. In *Whitcomb v. Chavis*,⁵ a district court had invalidated a multimember constitu-

But it does seem plain that the Voting Rights Act has... set in motion a considerable political change in the South...

ency arrangement for a state legislature on the grounds that, under it, disproportionately few legislators had been elected from an identifiable black ghetto area. After an exhaustive consideration of the evidence, the Supreme Court reversed, holding flatly that the standard is intent to discriminate:

Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political process and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence pur-

port to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.⁶

There could hardly be a more decisive refutation of the position the House report says was the "proper legal standard" before *Bolden*.

To be sure, some electoral arrangements have been overturned by the Supreme Court on grounds of invidious discrimination. In each case, there has been a finding of intent to discriminate. For example, in *Gomillion v. Lightfoot*,⁷ the Court invalidated an attempt by a state legislature to redefine the boundaries of a city so as to exclude black citizens from voting in local elections. The Court found this to be intentionally discriminatory and violative of the fifteenth amendment. Similarly, in *White v. Regester*,⁸ the Supreme Court sustained a district court finding that certain multimember legislative constituencies in Texas were unconstitutionally discriminatory. In the course of its opinion, the Court made clear the intentional character of the discriminatory actions. "To sustain such claims," Mr. Justice White wrote in a portion of the opinion joined by all nine Justices, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the groups in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."⁹

Bolden, then, introduced no "ambiguity." On the contrary, it reaffirmed longstanding doctrine that the concept of discrimination entails more than merely disparate results by race or ethnic group. This doctrine has been applied, not only in the area of electoral discrimination but more generally in laying down constitutional standards applicable to govern-

mental action impinging on ethnic and racial interests.¹⁰

The proposed amendment to section 2, then, far from "restoring" some "prior understanding," would produce a radical change in the Act...

III. SECTION 2 AND SECTION 5

Section 5, unlike section 2, currently contains a "purpose and effect" standard. That is, it judges voting qualifications and electoral practices by whether they "have the purpose" or "will have the effect" of denying or abridging the right to vote on discriminatory grounds. However, there are two crucial differences between section 5 and section 2. First, section 5 applies only to jurisdictions that fall within the coverage formula of section 4(b), whereas section 2 applies to all jurisdictions. Second, section 5 applies only to *changes* in electoral law, whereas section 2 applies to all electoral arrangements, including those that have been in force for many decades.

The rationale for the stricter standard of section 5 is clear. In states and municipalities with a history of discrimination or of enforcing qualifications conducive to discrimination, such as literacy tests, there was some ground for thinking that changes might be enacted in order to perpetuate discrimination at the polls. In such jurisdictions, a change that had the effect of reducing black registration, for example, might be presumed discriminatory.

The contrast between section 2 and section 5 is best revealed by contrasting *Bolden*, a section 2 case, with *City of Rome v. United States*,¹¹ a section 5 case decided the same day as *Bolden*. The city of Rome, Georgia, had made changes in its electoral system, requiring majority votes to elect city commission members, reducing the number of wards from nine to three (each with three members), staggering the terms of commission members, and requiring commission members to reside in the wards from which they were elected. A different set of changes was enacted for the Board of Education, and the city had also annexed a large number of adjacent areas, incorpo-

The... amendment... would produce a radical change in the Act...

rating them in the electoral boundaries of the city. Pursuant to the preclearance procedure of section 4(b) of the Act, Georgia being a "covered" jurisdiction, the Attorney General declined to approve many of the changes and annexations (most of which had white-majority populations). When the city brought suit, the district court found that the changes had no discriminatory purpose but did have a discriminatory effect. That effect was to "dilute the effectiveness of the Negro vote in Rome." Specifically, the ward and electoral formula changes reduced the chance that a black candidate could be elected by a plurality in a black-minority city, by forcing such a candidate into a runoff election in which white voters would be more likely to provide a majority vote for a white candidate. The annexation of areas with a greater proportion of whites than the city previously had was also held to be an unlawful "dilution." Section 5, the majority held, renders unlawful any electoral change that might produce a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral process."¹² And "effective exercise" means the likelihood of electing minority candidates.

It should be underscored that the prohibitions of section 5, as construed, are absolute. No matter what other goals and values are served by electoral changes, the changes are invalid if they "dilute" the effective voting strength of minorities. So, for example, if a city like Rome annexes an adjacent area to enhance its tax base or to fulfill an urgent development need in waste management or transportation, or to achieve economies of scale in the delivery of municipal services, or to serve any of the myriad purposes government might reasonably wish to serve by annexation, it may not do this if, as in Rome, the proportion of blacks to

whites in the annexed area is lower than that in the annexing area and the electoral system is not altered somehow to compensate.

I have doubts that the Court's interpretation of section 5 in the Rome case accords with what was intended when the Act was passed, as well as doubts about whether such an interpretation is necessary for the purposes proclaimed. But let us put these doubts aside for a moment. Whatever the wisdom of this view of section 5, it is not the Court's view of section 2, as *Bolden* makes abundantly clear. The "effects" standard of section 5, as now construed, applies only to covered jurisdictions, and covered jurisdictions have a history of outright voting discrimination or of dubious voting practices coupled with historically low voter registration.

Finally, the stringent view of "effects" under section 5 is coupled with two sets of safeguards. First, preclearance provides administrative flexibility, so that the Attorney General can use his discretion in judging between permissible and impermissible changes in electoral laws proposed by states and municipalities. Second, there is the so-called bail-out provision of section 4(a), whereby a covered jurisdiction may, by bringing a declaratory judgment action and proving that no "test or device" with a discriminatory purpose or effect has been used for a period of years, secure exemption from the preclearance requirement of section 5. Consequently, the very rigid standards of section 5 are accompanied by safeguards in their application and in at least the possibility of exemption from them. No such safeguards would be available were the "effects" standard made part of section 2.

The House version of section 2 wisely disclaims any intention to enact a regime of ethnic or racial proportionality in officeholding. But if the "effects" standard is imported into section 2, this may be impossible to avoid. As we have seen, the effects standard under section 5 implies some concept of "dilution" of minority voting strength. Where, as in section 5 cases, there is a change in electoral arrangements, it is at least

possible to gauge whether a "dilution" will occur by forecasting the likely impact of the electoral change and comparing it to the status quo ante. If there are more minority officeholders before the change than are forecast for after, then a dilution can be found. Section 2, however, applies to existing arrangements as well as to changes. Without a before and an after to compare, the meaning of a discriminatory result is impossible to gauge, unless it means representation below the level minorities "ought to have." And if one admits that such an objective standard of representation exists, despite the absence of a before-and-after, it is a short step to ethnic and racial proportionality. The disclaimer of ethnic proportionality in the House amendment may ultimately come to nought...

IV. SECTION 2: ASSUMPTIONS AND IMPACT

Quite apart from the differences between section 2 and section 5 situations, there is a host of largely-unexamined premises surrounding the concept of "discriminatory effects." Chief among these is a very limited and mechanistic view of minority political power. The notion is abroad in the courts and in these halls that the only effective political representation of minorities is the actual election of minority representatives. Hence "dilution" of voting strength has come to mean, in operational terms, a likelihood of fewer minority representatives the day after an electoral change than the day before. This was not the original meaning of the term, which comes from the quite different context of the one-person, one-vote reapportionment cases. There what it means is that a voter in one constituency has a smaller say in electing his representative than does a voter in another constituency, because the size of the constituencies is unequal and thus "malapportioned."

The transfer of the term dilution to ethnic and racial issues is unfortunate, because it implies a view of the vote that exalts "representation" at the expense of power and influence.

Even at that, it is, as I have said, a curious view of representation that gauges it by whether an ethnic or racial minority has elected a few minority representatives. Consider what this constricted view implies... [B]y making minority representation the standard... this view of dilution consigns minorities to a minority role and a segregated place in the political process... [A]ssured separate minority representation encourages local white politicians to say to the minority communities: "You have your own representatives. Don't come to us with your problems; speak to them." But, in the vast majority of cases, minority representatives will also be a minority in the city council or legislature, and a plea to them alone will be unavailing. At best,

This view of dilution consigns minorities to a minority role and a segregated place in the political process...

under such circumstances, it can be said that separate representation postpones interethnic and interracial political contact and bargaining until after the election results are in, when polarization may already have occurred and when a minority on a local council may be powerless. In my judgment, it is preferable to seek ways in which that bargaining can take place *before* the election, while the results are uncertain and the marginal value of minority support for majority politicians who seek it is likely to be greatest.

Indeed, the point can and should be pushed a bit further. Assured separate representation is likely to have an important effect on the political process of a locality. It is likely to discourage appeals to the minority electorate by majority politicians. For the most part, minority votes will not count in election contests in which the contestants are both white. In those contests, there will be every

incentive to appeal instead to anti-minority biases where majority-minority tensions are running high. It is no mere cliché to suggest that separate representation of minority interests, by reducing electoral incentives to appeal across ethnic or racial lines to minority votes, may well foster polarization.

There is yet another variable that needs to be considered: demography. Those who argue on "dilution" grounds against at-large representation and against annexation do so because they believe minorities to be geographically compact and, more precisely, to be clustered in center-city areas. For the black population in metropolitan areas, this has largely been true, though it is less true for Mexican-Americans. But we should not overlook changes in population distribution that bear on this question. Some of these changes are extraordinary. From 1960 to 1978, the black population inside central cities in metropolitan areas grew by 79 percent. In the same period, the black population outside central cities in the same metropolitan areas grew by 134 percent, not quite twice as fast but much faster. Where residential concentration could be taken for granted in the past, it no longer can be.

The implications of this seem obvious. It is a mistake to lock the country into a system of minority representation that assumes racial clustering in perpetuity, that accordingly favors single-member constituencies, and that measures effectiveness of the vote by the proportion of minority representatives to minority population. That is the ineluctable trend under the "effects" standard, and that seems to me what the amendment to section 2 would do nationwide.

Finally, there is a more general

We should not overlook changes in population distribution that bear on this question.

point to be made about this amendment and the future of race relations. In a good many countries that have been torn by ethnic and racial conflict, the electoral system has been one of the tools of amelioration. A range of electoral formulae and ballot structures has been employed to achieve a variety of conflicting-reducing goals. The goals include inducing moderation on the part of a majority toward a minority, encouraging formation of multiethnic coalitions, and reducing majority voting cohesion. Different devices are apt for each goal, given divergent demographic and party structures. But one thing is clear: if these conflict-reducing devices had to be tested by a rigid "effects" standard, they could not be implemented. The same is true for municipalities and states in the United States that might wish to use the electoral system constructively in the quest for a more just and satisfying relationship among ethnic and racial groups or, one might add, for other legitimate, racially-neutral purposes. The rigidity of the "effects" standard, as it is likely to be construed, will preclude a great many such innovations.

V. CONCLUSION

...[W]e are urged to rewrite section 2 with no showing of need and with no apparent understanding that

The sanctions of the Act should be reserved for discriminatory practices.

the new section, as it is likely to be construed in the light of section 5, comes close to mandating on a nationwide basis—in state and local elections, moreover—single-member constituencies and practically reserved seats for members of ethnic and racial minorities. I find this a depressing prospect for our polity.

The matter goes much beyond the Voting Rights Act, for the proposed amendment to section 2 muddies the meaning of discrimination. As I have just suggested, there is in fact racially discriminatory behavior that takes place and needs to be identified, condemned, and redressed. The existing section 2 is aimed at that kind of behavior; the amendment is not. It calls something else—namely, disparate results in the electoral process—"discrimination," and it opens the way to findings of discrimination against states and municipalities that have been guilty of no such thing. In my view, this would be a deplorable result. The sanctions of the Act should

be reserved for discriminatory practices. Law is debased when the language which constitutes its currency is devalued. The late Hannah Arendt, speaking of the need to identify those Nazis guilty of atrocities, once criticized the concept of the "collective guilt" of the whole German nation. "Where all are guilty," she said, "none is." The same principle applies here. We should be wary of calling something discrimination which manifestly is not discrimination, lest those who really practice discrimination come to be regarded as no worse than those who do not.

1. See Joint Center for Political Studies, *National Roster of Black Elected Officials—1980*, reprinted in H.R. Rep. No. 227, 97th Cong., 1st Sess. 9 (1981).

2. 446 U.S. 55 (1980).

3. H.R. Rep. No. 227, 97th Cong., 1st Sess. 2 (1981).

4. *Id.* at 29–30.

5. 403 U.S. 124 (1971).

6. *Id.* at 149–50.

7. 364 U.S. 339 (1960).

8. 412 U.S. 755 (1973).

9. *Id.* at 765–66.

10. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

11. 446 U.S. 156 (1980).

12. *Id.* at 185, quoting *Beer v. United States*, 426 U.S. 130, 141 (1976).

Statement of David Lange before the Subcommittee on the Constitution, Senate Judiciary Committee, October 6–7, 1983

Professor David Lange questions the wisdom of a proposed federal law that would forbid or restrict businesses that rent phonorecords to consumers. The law would effectively abolish the "first sale" copyright doctrine as to phonorecords without, according to Professor Lange, a convincing justification for treating phonorecords differently from other copyrighted material.

The legislation on which I will comment would repeal the "first sale doctrine"¹ in the case of commercial rentals of sound recordings.

Federal copyright is a field of constitutional law and the conventional "right" of copy is in fact a limited privilege which Congress is to grant only in order "to promote the Progress of Science [i.e., knowledge]...."² The essence of this constitutional provision for copyright is that no new or extended interest may be recognized under the law unless its proponent succeeds in demonstrating that it *ought* to be recognized—succeeds in demonstrating, that is to say, how the progress of human knowledge will be advanced. In effect, then, the Constitution establishes a presumption against copyright which can—and *must*—be overcome by a showing of something more than merely a natural desire for private gain.

Acknowledging this presumption against copyright two months ago, I proposed a five-part test for determining whether copyright protection should be granted in any given instance to new forms of technology. Specifically I listed in my earlier testimony before this Subcommittee five challenges which the proponents of new rights (like the rights provided by the audio first sale bill) ought to be able to meet:

First, the new right ought to be clearly defined, in its statutory



Lange

expression and in its conceptual implications alike.

Second, the new right ought to be clearly delineated against the public domain so that what is not to be appropriated also will be clearly understood.

Third, the competing costs and benefits of the new right ought to be carefully assessed by its proponents,

The Constitution establishes a presumption against copyright....

who should be prepared to demonstrate persuasively that the benefits likely to result from passage will in fact outweigh the costs; self-serving generalities and endorsements by third parties with economic interests adjacent or comparable to those of the proponents should not suffice. *Fourth*, proponents should show how as a practical matter the new right ultimately will "promote the progress" of the public domain, which is the province of science or human knowledge.

Fifth, proponents generally should be able to reconcile and harmonize the new right with comparable provisions of copyright law.

I originally proposed these five tests in general terms. In the remainder of this statement I will suggest more specifically how the audio first sale legislation can be evaluated within this framework.

(1) STATUTORY AND CONCEPTUAL CLARITY

The Statute: H.R. 1027 (which corresponds to S. 32 already passed by the Senate) certainly seems reasonably clear as a preliminary exercise in draftsmanship. That is not to say that all questions of meaning have been foreclosed. Identifying "the copyright owner" in any matter involving phonorecords is a potentially complex and puzzling undertaking, but that problem is not a particular consequence of the wording of this bill. The bill does introduce

some new ambiguities: What is an "indirect commercial advantage," for example? What is a "practice in the nature of rental, lease, or lending?" I have no doubt that these (and perhaps other) questions arising from the language of the bill may one day lead to litigation, but still, in fairness it must be said that no one otherwise familiar with the 1976 General Revision [of the copyright laws] will be in doubt about the principal meaning or intention of the bill.

The Concept: Similarly, on its face, the basic concept of this legislation is easy enough to grasp. In effect, the proponents want copyright proprietors to be able to manipulate copyright law to control or tax—or to preclude altogether, insofar as this bill is concerned—other businesses which might otherwise presume to enter or establish a new corner of the rental marketplace for phonorecords or sound recordings.

(2) DELINEATION AGAINST THE PUBLIC DOMAIN

What is not clear about this bill is where the concept it reflects would end. Is there any principled reason why the extended monopoly now proposed for the proprietors of copyright in sound recordings should not extend to the material embodiment of other works as well? To books, for example, or paintings or (to take an even more obvious example, given the introduction of H.R. 1029) to videocassettes of motion pictures or audio-visual works? Indeed, suppose (to consider a hypothetical raised in a note now being prepared for publication by the *Duke Law Journal*) that Lee Iacocca were to ask Congress for the right to control car rentals by Hertz and Avis on the ground that the automobile patents were held by Chrysler. Would that proposal also be thought to deserve serious consideration under the principle of the audio first sale bill?

If the audio first sale proposal can be distinguished meaningfully from these other examples of works fixed in tangible form, then the proponents of this bill should by all means do so. But if, in principle, the audio first sale bill poses the same basic issues as in

these other examples—and if, in particular, it is in some sense a stalking horse for the video first sale bill—then its proponents ought to be expected to defend it on substantially broader grounds.

(3) COSTS AND BENEFITS

The music and recording industries are notoriously beset these days by problems which can be summarized in three points: first, revenues from sales of tapes and records (like paid attendance at concerts) are depressed; second, home taping, including off-air taping of broadcast music, is widespread and presumably contributes to the depressed revenues; and third, a relatively new rental industry has sprung up and is making further inroads into sales while contributing to the home taping problem. Even if we concede these three points, however, it does not follow that the audio first sale bill is an appropriate response.

I suspect the basic troubles of the industry have their origins in circumstances far removed from copyright. As Nick Schenck once said of the motion picture industry, there may be nothing wrong with this business that good product wouldn't cure. I certainly do not mean to lecture to this Subcommittee on recent American history, but the fact is that during the Sixties and on into the early Seventies some extraordinary groups were recording extraordinary music for an extraordinary market in an extraordinary time. The industry expanded rapidly (perhaps too rapidly) on the strength of these successes. Now, times and the music have changed and so have the tastes of the marketplace. A new generation of consumers may simply be spending its money elsewhere.

Meanwhile, whether or not the market has declined in some absolute sense, production costs have risen while high quality recording technology has been making its way into every second home along Elm Street, U.S.A. In a pure economic sense, records and tapes today often cost more or are offered for sale at higher prices than they are worth. For many new releases the casual col-

There may be nothing wrong with [the record] business that good product wouldn't cure.

lector can be content with second, third, and fourth generation dubs from somebody's sister's boyfriend's tape.

At this point, of course, we do have a potential copyright problem. That problem is with home taping, however, but not with rentals as such. Yet the audio first sale bill does not deal with home taping directly at all. The bill may have some marginal impact on the current availability of studio produced records and tapes for home taping. But that impact is likely to be transient, lasting only as long as it takes for the home taping market to accommodate itself to what will be at most a trivial nuisance. The bill will have no long term impact on private non-commercial circulation of tapes and records after sale or rental; nor will it address the question of off-air taping of broadcast music.

Perhaps this bill can be seen as a way of controlling rental entrepreneurs whose clear expectations—indeed, advertised intentions—are that their customers will copy the tapes and records they rent. Now (and particularly so if those activities violate the reproduction right) the bill begins to make more direct sense, but there are still at least two objections to be raised. First, home taping may be a problem, but it is not clear that it is illegal; that may be the most important single question now facing the courts and this Subcommittee, but it ought to be addressed directly—not indirectly, through a bill like audio first sale. Second, whether or not home taping is illegal (or simply ought to be made the subject of additional revenues for the copyright proprietor), the audio first sale bill seems overbroad: it covers not only the person who rents expressly for the purpose of taping; it also covers the rental contracted for the purpose

Home taping may be a problem, but it is not clear that it is illegal.

merely of listening. In the latter case, I suppose, what might be envisioned is a new right akin to a performance right; but performance rights in sound recordings also present serious questions of copyright policy which, once again, ought to be addressed directly, rather than indirectly through manipulation of the distribution right.

It seems to me, then, that the collateral benefits this bill promises are either unrealistic, unwarranted, or better addressed directly in other more suitably-tailored legislation. ... In any event, the one undeniable benefit of the bill is that it will produce revenues for the copyright proprietor that are presently unavailable under the law. That is a perfectly acceptable consequence if the benefit to the proprietor is not outweighed by costs to others, and if that net benefit can be translated ultimately into a public benefit.

Two potential costs stand out in the case of this legislation. One is that the fledgling audio tape and record rental industry may be jeopardized. It is not easy to see why a business founded in reliance on a public domain concept as well-embedded as the first sale doctrine ought to be imperilled. If the rental market is consequential in and of itself, then certainly the music and recording industry should be encouraged to jump in and compete; but legislation is not needed to make that competition possible and the established industry's new competitors should not be expected to carry it on their backs.

The second cost of the audio first sale legislation is that it may tend to perpetuate inefficiencies and bad judgments in the established segments of the industry while discouraging desirable competitors and alternative marketing practices. ... In short, the question is whether this legislation can be defended as some-

thing more than adventitious opportunism by an entrenched segment of the entertainment industry.

(4) "PROMOTING THE PROGRESS OF SCIENCE...."

As I have pointed out earlier in this statement, the "progress of science" is the ultimate constitutional standard against which this legislation must be measured. It will not be enough for the proponents to show that financial benefits will accrue to them as a result of this legislation; they must demonstrate that those benefits will translate into public advancement. If they succeed in justifying the legislation in the several respects I have already discussed, then surely they can be conceded this issue as well; but it is still not wrong to make a separate point of it or to ask that the connection between private and public benefit be drawn in explicit terms.

Meanwhile, there is some potential for a serious constitutional question on another ground. The Copyright Clause authorizes protection "for limited times," and it is generally agreed that copyrighted (or copy-rightable) material that has passed into the public domain by deliberate Congressional design cannot later be taken out of the public domain and placed under copyright again. Applied to this legislation, this constitutional principle may well mean that no phonorecords or sound recordings which have already been subjected to the first sale doctrine as it is presently reflected in Section 109 of the Act can be subjected now to the restraints contemplated by this legislation. The prospects for confusion on this issue in the practical administration of this

legislation, as well as for litigation itself, seem substantial—and all the more so, given the history of phonorecords in copyright law. At the least, the proponents of this legislation can be expected to anticipate this problem and explain how it ought to be minimized or avoided.

(5) RECONCILIATION WITH OTHER PROVISIONS

The main question to be raised here, again, is why other material embodiments of copyright (books, paintings, and so on) are not also subject to repeal of the first sale doctrine. That no such general proposal has been introduced suggests, I think, the essentially adventitious nature of this legislation.

CONCLUSION

My comments on this legislation may seem unfriendly to those who favor it. In fact, however, I am essentially neutral toward its proponents, who are simply seeking an advantage, and neutral as well toward those whose own economic interests may lead them to oppose the bill. The legislation itself seems to me to be unwarranted and, on the whole, unwise—but my principal interest is in seeing the bill fully justified if it is indeed to pass.

1. "[T]he first sale doctrine provides that where a copyright owner parts with title to a particular copy of his copyrighted work, he divests himself of his exclusive right to vend that particular copy." *United States v. Wise*, 550 F.2d 1180, 1187 (9th Cir. 1977).

2. U.S. Const. Art I, §8.

The "progress of science" is the ultimate constitutional standard against which this legislation must be measured.

Statement of Paul D. Carrington before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, Honorable Robert W. Kastenmeier, Chairman: Hearings on H.R. 1968 and H.R. 1970, November 10, 1983

In his comments on the House proposal to set up an Inter-Circuit Tribunal, Dean Carrington urges an evaluation that takes into account institutional weaknesses at the bottom rather than at the top of the federal judicial system. Consumers of the law, he observes, can conform their behavior to the demands and expectations of law only if consumers are given better information on the identity and values of the judges who will ultimately decide particular disputes over the meaning of national law. Dean Carrington therefore concludes that the Tribunal can be effective only if the Supreme Court is willing to make the Tribunal a court of last resort in specific categories of cases and to refer those specific categories to individual fixed panels on the Tribunal.

Mr. Chairman:

I am Paul D. Carrington, a member of the Law faculty at Duke University. I appear in regard to H.R. 1970, which would establish an Inter-Circuit Tribunal. I have been contemplating the subject of this bill from time to time since 1966, when I was employed by the American Bar Foundation to study the business of the United States Court of Appeals. I believe that my study, which was published in 1968, was the first to propose a structural reform of the sort contained in H.R. 1970.

It is my conclusion that a court established in the manner set forth in H.R. 1970 could make a positive contribution to the effective administration of the national law. I must, however, concede that the court could operate in a manner which would incur the costs which some of its critics have identified, without conferring any of the benefits which its proponents desire. Whether such a court can and will be made to work may depend on several factors.



Carrington

Let me begin with the observation that the allegedly excessive workload of the Supreme Court is a symptom, not the disease. The problems encountered by our highest Court cannot wisely be appraised in the narrow perspective of the daily calen-

dars of the nine Justices. To be sure, there are biological limits to the number of decisions which such a group can make in an orderly, rational, and collegial way. But the number of such decisions required is a question of institutional form that should be measured in relation to function. If we do not need for the Court to deal as an institution with each of the lengthy petitions addressed to it, then it may be that the load of paper is not too great. Whether so many matters really require the attention of the Court is a question that can be answered if at all only in light of the perceived circumstances of the lower courts and the litigants who use them, because it is that audience that the highest Court serves and directs. If it were only a matter of how the Justices spend their time, we can surely dispose of excessive paper being placed before the Court, including some means that have been suggested by critics of the bill before us, such as changes in the certiorari procedure

The allegedly excessive workload of the Supreme Court is a symptom, not the disease.

or the overt delegation of responsibility to clerks or other para-Justices.

Similarly, the phenomenon of inter-circuit conflict is a symptom which should not be mistaken for the real disease or disability. We should sympathize with the victim, that is the unfortunate litigant who suffers an adverse judgment when it appears that he would prevail if the stated views regarding the law of other and perhaps more numerous federal judges were applied instead of those perhaps idiosyncratic few whose views resulted in the unwelcome decision. And there are costs to both litigants and the system itself in the relitigation of questions previously decided. Whether these consequences of inter-circuit conflict are unacceptable depends again on the expectations and needs of those using the system at lower levels. And, again, there are remedies which can rather simply and directly eliminate formal conflict, such as that suggested for changes in the doctrine of precedent.

If, as I believe, there is a real problem, it is not to be found in the perspective of the overworked Justice or the tireless appellant struggling to create a conflict between the circuits. As my previous remarks suggest, the appropriate vantage point from which to view problems of judicial administration is from the broad base of unlitigated matters to which appellate and Supreme Court litigation form the top of the pyramid. Thus, bear in mind that one Supreme Court decision of a federal civil case is the product of approximately 2,000 civil litigations in the district courts, and a much larger number of disputes which were settled without any litigation at all. It is this great base which is the stuff of the law and the real concern of sound judicial administration. The superstructure of the system

should be evaluated by reference to this base.

In examining the system from the perspective of that base, I perceive a lack of structural cohesiveness. To use a metaphor, there are not enough rafters, not enough studs in the wall, to make the structure of the federal judiciary as firm as it should be. This lack causes the hierarchy of the judicial system to be less effective than it should be, with the result that there is too much indiscipline or freedom for lower and intermediate court judges, and thus too little predictabil-

One Supreme Court decision of a federal civil case is the product of approximately 2,000 civil litigations in the district courts.

ity or, as Llewellyn put it, "reckonability" in the national law. To return to my metaphor, there is too much sway in the frame.

Legal Realism has taught American lawyers and judges, and perhaps even the American public, that it matters who decides questions of law. Law is a language like any other that gains meaning from both speaker or author and audience. The consumers of the law, that is the litigants, lawyers, and lower officials who are expected to obey it, to conform their transactions and relations to it, can expect to share more widely in a common understanding of what it means if they can know the values and mindset of the group of persons who will ultimately give it specific application.

Law is a language like any other that gains meaning from both speaker or author and audience.

Law is more effective if that group having ultimate responsibility for its interpretation is readily identifiable when the consumers are doing their planning and negotiating. Ideally, the highest court or ultimate decision-making group should be a kind of brooding presence in every legal proceeding, a ready identity which supports, and corrects, and is represented by the trial judge. As the identity of the decision-making group becomes blurred, that benign presence becomes more remote, the meaning of the law becomes less clear, and disputes over its meaning become more frequent and more prolonged.

The present structure of the federal judiciary is notable for giving very little information to the consumers of the law as to who might make the ultimate interpretative decision to resolve any issues regarding the meaning of the national law. A federal appeal is in significant measure, and to an increasing degree, a game of chance in which adversaries can speculate in the hope that their legal contentions can fortuitously find a receptive audience among those who will bear the ultimate operative responsibility for decision.

Consider the situation at the time that a civil action is filed in federal court. Neither party, nor the trial judge, can know which group might ultimately decide an appeal if an appeal should be taken. What they know is that an appeal will be heard by a small number of randomly selected judges who are likely to sit in isolation from their judicial brothers on the appellate bench. There is the remote chance that their case might be heard *en banc* by the larger and identifiable group of circuit judges, but this possibility is so remote that it cannot be a factor in the expectations of the lower court participants. There is the almost equally remote chance that the Supreme Court might in its discretion take an interest in some issue arising in their case, but the odds are, as I have noted, less than 1 in 2,000.

Accordingly, lawyers and prospective litigants must conduct negotia-

tions and litigation on the basis of the language of statutes and published opinions but without the illuminating knowledge of the identity of the persons who will make the decisions, or the assurance that previous opinions reflect the values or mind-

Law is more effective if that group having ultimate responsibility for its interpretation is readily identifiable....

set of the judges who will bear ultimate responsibility for their case. Trial judges are likewise required to make their interpretations of the national law without certainty as to the identity and continuity of the reviewing panel or court. The effect of this uncertainty in the identity of the decision-making group is to make settlement less likely at each stage or level of the pyramid. While there are other causes, notably the diminution of the relative real cost of an appeal, I have little doubt that this particular element of uncertainty in federal litigation has contributed to the rising rate of appeal, and to the increase in the number of certiorari petitions filed in the Supreme Court.

The problem is one that feeds itself. As the number of appeals increases, we increase the number of judges, the diversity of the possible panels, and the remoteness and ineffectiveness of the controlling superstructure. Thus we diminish the sense of parties and trial judges that a particular appellate court is a stabilizing presence whose views of the law must be felt, leaving still more "sway" in the structure, and causing still further increase in the rate of appeal, and in the number of judges, and the diversity of the possible panels, and so forth.

Whether the Inter-Circuit Tribunal will contribute to the strengthening and stiffening of the organization of the federal courts depends on how it is used. As Chief Judge Feinberg and

others have observed, it is imaginable that the Tribunal could become nothing more than another elongation of the appellate process. This would occur if the Supreme Court uses its power of reference in unpredictable ways, if it then reviews the decisions of the Tribunal on an ad hoc basis, and if the Tribunal is organized in a way that does not permit lawyers, litigants, and trial judges at the lower levels of the system to foretell the identity of the seven-member panel which will be exercising ultimate authority in the case. The Supreme Court will have been made more busy by the need to sort cases and maintain surveillance of the Tribunal and the outcome of federal litigation will not have been made notably more predictable; the process will merely have been made longer and more expensive for a substantial number of litigants.

On the other hand, if the Supreme Court is truly prepared to entrust the Tribunal with important functions,

A federal appeal is... to an increasing degree a game of chance....

then an important advance could be made. What is needed is to make it clear that in many identifiable cases a particular panel of the Tribunal is for most purposes *the* court of last resort. If litigants and lawyers, and district judges, or administrative law judges, can be provided with an assurance that particular kinds of cases will be referred to a particular panel of judges, and that the Supreme Court will not disturb the legislative interpretations made by the Tribunal, then a new level of certainty, predictability, and stability in the national law will have been achieved. With regard to such classes of cases, we could look forward to a reduction in the rate of appeal and in the amount of paper moving up the ladder of review.

These comments point to three features of the management of the Tribunal which are important to its

success and which I would like to emphasize. First, the reference of cases to the Tribunal should be made by category, not on a case-by-case basis. This can be done by sorting cases in a variety of different ways. It would not be so important what the categories are as that they be discrete. People at the bottom of the pyramid should be able to know, for example, that all tax cases will be referred. Perfection in establishing the categories of reference is not required; if there is a little confusion or overlap at the margins, the resulting uncertainty would have no serious adverse consequences. But if references were made on a case-by-case basis, those who are trying to reckon and predict the operation of the system would not be able to do so. The new forum would be yet another element of uncertainty for those trying to identify the ultimate decision-makers.

Secondly, once a category of cases has been referred to the Tribunal, its decisions on the matters of statutory interpretations which are within its categories must be left undisturbed by the Court, in the absence of conflict with other statutes not within the category of reference. If tax cases, for example, were to be referred, the Supreme Court would need to forswear further participation in tax litigation in the absence of a constitutional issue or a conflict with some other federal law. Occasional forays by the Supreme Court into the category would render the entire reference largely nugatory. If the highest Court intervened a few times a year in tax cases, then consumers, that is the trial judges, litigants, and lawyers litigating in lower courts and planning their affairs to avoid litigation could not regard the decisions of either court as truly final words.

Thirdly, it is desirable that cases

The reference of cases to the Tribunal should be made by category, not on a case-by-case basis.

referred to the Tribunal be divided among its panels by the same categories of reference. Thus, it will be possible for the persons at the bottom of the pyramid to know at the earliest point of planning, at settlement, and at pretrial who will be the judges assigned to resolve issues of statutory interpretation as they arise. If the best that we can do is to tell consumers that issues will be presented to a randomly selected group of 7 judges out of 28, a substantial level of uncertainty is maintained, and the benefit of the Tribunal is significantly impaired.

I am frankly in doubt about the wisdom of H.R. 1970 if these three features of the reform are not clearly embraced. In the absence of further clarification along these lines, I am

Occasional forays by the Supreme Court... would render the entire reference largely nugatory.

not certain that the Court will perceive the problem in the light in which I have presented it; the Justices have not spoken to the issue in these terms. Some Justices might well feel a moral and professional obligation to proceed with the power of reference on a case-by-case basis, since that manner of decision is customary to the judicial process. Some of them might also feel a responsibility to entertain petitions challenging the wisdom of statutory interpretation

provided by a panel of the Tribunal. If these reasonable impulses were to manifest themselves, then I fear that the reform proposed by this bill will indeed be negative in its result. Not only will this particular reform prove fruitless and in due course be repealed, but there is the added risk that other similar but more effective patterns of reform will be discredited. That would be doubly unfortunate.

Thus, I say that the present bill potentially addresses a real problem of the federal judicial system. But in the context of the antecedent discussion by judges and the use which is likely to be made of the bill's reform, I have limited confidence in its ultimate success. I wish the Committee the best of wisdom in its deliberation.

Statement of Arthur Larson before the Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, April 27, 1983

Professor Emeritus Arthur Larson discusses the Senate version of the Product Liability Act insofar as it regulates rights between employers and product liability defendants in suits brought by injured workers. Professor Larson delineates the schemes currently used for adjusting the rights between employers, who seek reimbursement of workers' compensation paid to the worker, and defendants, who wish to collect from the employer for its fault. He concludes by endorsing, with a slight amendment, the solution proposed in the Senate bill, i.e., abolishing the employer's right of reimbursement and allowing the defendant a credit for the amount of compensation paid.

I want to thank the Subcommittee for this opportunity to comment on one portion of S. 44, the Product Liability Act—the portion concerned with the relation of the Act to workers' compensation. . . . [I]n 1952, [I described the allocation of liability between employers and products liability defendants as] the "most evenly-balanced controversy in all of workers' compensation law." Suppose a chemical manufacturer was 20% negligent in the inadequacy of the warnings printed on the package. But suppose the plaintiff's employer was 80% negligent, in failing to follow precautions on the label, in using untrained personnel for the work, and in failure to air out the premises properly after fumigation with the chemical. The plaintiff employee recovers \$30,000 in workers' compensation, and \$100,000 damages from the chemical manufacturer. The *manufacturer* then attempts to sue the *employer*. Each party has an argument which, considered alone, sounds irresistible. The employer complains with some cogency that if the action succeeds, \$100,000 will have left his pocket and entered the employee's pocket in spite of the plain statement in the compensation act that his compensation liability is



Larson

exclusive. Yet if the third party is made to bear the entire \$100,000 damage, he can argue with equal cogency that it is unfair to subject him, much the lesser of two wrongdoers, to a huge liability which he would not have had but for the sheer chance that the other parties happened to be under a compensation act. Why should he, a stranger to their arrangement, subsidize the compensation system by assuming liabilities

that he could normally shift to or share with the employer?

The solutions to this dilemma can be grouped in three rough categories. The classical rule, accepted in the great majority of states, bars any recovery-over by the third party in either contribution or implied indemnity. A second category would include a variety of compromise attempts, both legislative and judicial, which in some degree adjust the liability as between employer and third party to reflect the employer's fault. The third solution is that adopted in S. 44, which reduces all third-party recoveries by employees to the extent of compensation paid or payable, whether the employer was negligent or not, and abolishes both subrogation actions by the employer against the third party, and third party actions, where they exist, against the employer.

All of these approaches have flaws, but I came to the conclusion several years ago that, drastic as it sounds, the third solution is on balance the most desirable.

The principal objection to the classical approach is the apparent unfairness of not only letting off the 80% negligent employer with no liability, but of actually reimbursing

him for his compensation outlay at the expense of the 20% negligent third party.... The result of... smoldering dissatisfaction [with this approach] is severe instability and unpredictability, which may erupt at any moment into legislative or judicial improvisations aspiring to achieve a somewhat more equitable balance.

The second category contains an assortment of such improvisations—all well-intended, but each with serious drawbacks. Among these are: the former Pennsylvania rule, allowing the third party an action over for contribution, but only up to the amount of the employer's compensation liability; the California-North Carolina rule, which achieves the same end result by reducing the employee's third party recovery directly by the amount of compensation if the employer's negligence contributed to the injury; the Minnesota rule, which makes the negligent employer liable for contribution in proportion to his fault, but only up to the amount of compensation; the New York rule, under which the employer is liable in indemnity in proportion to his fault, with no upper limit; and the former Illinois rule achieving the same result under the name of contribution, followed by an amendment overruling the result as to contribution, but apparently leaving it intact as to indemnity. One objection to the New York-Illinois result is that it gives no weight to the employer's traditional immunity to liability beyond his compensation obligation. In other words, fairness is appraised as if between two equal strangers, ignoring the fact that one, the employer, has already made concessions and assumed liabilities to the employee for which his immunity was the *quid pro quo*. The Minnesota formula at least recognizes this factor. But the more serious criticism is that the price of this supposed equity is the sacrifice of simplicity. Litigation will be complicated. It would appear that all three parties will have to be involved in practically all cases, with percentage assessments of fault for each. California has had the longest experience with a compro-

mise solution, and the judicial quagmire that has resulted hardly invites others to follow in the same path....

The third solution, that adopted by S. 44, achieves essentially the compromise sought by California without [its] complications. Most of the complexities result... from trying to deal with the employer's negligence in an action to which he is not a party. In the S. 44 approach, the employer and his carrier are simply out of the third-party picture altogether.

To achieve this optimum simplicity, however, one change in S. 44 is necessary. Section 10 provides that the third party's liability is reduced by the amount attributable to misuse, alteration, or modification by anyone other than the defendant—which of course would include the employer. There are two serious objections to this addition. First, it re-injects into the third party action the whole ques-

Most of the complexities result... from trying to deal with the employer's negligence in an action to which he is not a party.

tion of the employer's relative fault—in his absence. Ideally there should be only one issue: the third party's liability, as modified, if applicable, by the plaintiff's own comparative negligence. True, the employer could be called in the capacity of a witness, but the prospect of an employer being in a position to raise or lower his employee's recovery and the third party's liability, with no consequence whatever on his own liability, is a rather disquieting one.

The other objection is that Section 10 will in some cases reduce the employee's total recovery from combined compensation and damages below his actual full damages. In a curious twist, it is almost as if the employee were vicariously liable for the negligence of the employer, since his recovery is directly reduced by the

degree of the employer's fault. Suppose the total damages are \$10,000. Compensation paid is \$4,000. The products manufacturer's fault is 20 percent. The employer's percentage of fault is 80 percent. The employee would recover a total of \$4,000 compensation plus \$2,000 damages, or \$6,000, although his actual damages are \$10,000. There is no system in force in any state today that reduces the employee's ultimate recovery below his full damages in this kind of situation.

Section 10, therefore, should be changed to exclude employers throughout.... In addition, of course, if the third party can prove that the employer's conduct was a completely independent intervening cause, so as to insulate the third party's conduct completely from legal cause relation to the injury, that course is always open.

Subject to this change, I would support the S. 44 solution of the relation of products liability to workers' compensation.

It is significant that both the American Insurance Association and the American Bar Association Special Committee to Study Product Liability, although they have some fundamental disagreements with S. 44 in other respects, agree on this simple solution to the compensation relation problem.

In conclusion, it should be noted that there is something for everybody in this wholesale compromise, which is important both as a matter of fairness and as a matter of constitutionality. The employee comes out with full damages, with fewer complications and delays, and without the possible prejudice to his interests arising from the presence of the employer in the litigation. The employer and his carrier lose some opportunities for reimbursement from the third party. But in jurisdic-

There is something for everybody in this wholesale compromise....

tions where some kind of recovery over by the third party against the employer is possible, the employer would be relieved of any such liability. And in jurisdictions where the employer is still immune, he is relieved of the nightmare that some

Simplicity and freedom from litigation were at the top of the list of objectives in the original founding of workers' compensation.

morning he might awake to find, as did employers in New York and Illinois, that their immunity had vanished overnight. The products defendant, in turn, would have his liability reduced below what it is now in most jurisdictions, and in all jurisdictions in cases in which the employer was not at fault.

And, of course, everyone would gain in the avoidance of litigation, delays, and the attendant expenses. It should never be forgotten that simplicity and freedom from litigation were at the top of the list of objectives in the original founding of workers' compensation. Any step in that direction is a step toward the oldest and finest tradition of workers' compensation.

Statement of Horace B. Robertson, Jr., before the House Committee on Merchant Marine and Fisheries, July 27, 1982

In his comments on the impact of the new Draft Convention on the Law of the Sea on U.S. navigation rights and freedoms, Professor Robertson supports his position that important navigational principles included in the treaty are more securely guaranteed to signatory nations than to non-signatory nations. Especially important are the transit-passage articles, which establish broader and more objective rules than those available under the law of innocent passage. The Convention also supplies a more secure base for recognition and definition of exclusive coastal economic zones, where navigational freedoms would be preserved. Since the United States has now decided not to become a party to the treaty, Professor Robertson's concerns forecast possible results of that decision.

Mr. Chairman and Members of the Committee:

First, I would like to tell you a little bit about myself so that the Committee can be aware of the background against which I view the issues of navigation rights in the Draft Convention on the Law of the Sea.

I served in the U.S. Navy from 1945 to 1976—the first ten years as an unrestricted line officer and the last twenty-one as a Law Specialist and member of the Judge Advocate General's Corps from which I retired as a Rear Admiral. I have been involved directly and indirectly in the law of the sea since 1957, when I participated in the U.S. preparation for the First United Nations Conference on the Law of the Sea and as a member of the U.S. delegation at that Conference. In 1973, while I was serving as Deputy Judge Advocate General of the Navy, I was given additional duty as the Representative of the Joint Chiefs of Staff on the U.S. Delegation for the Sixth (and final) Preparatory Session of the United Nations Seabeds Committee for the Third United Nations Conference on the Law of the Sea. At other times my participation



Robertson

was not as direct, but until my retirement from the Navy in 1976, I participated peripherally in the formulation of United States law-of-the-sea positions as a staff officer on the staffs of the Commander in Chief, U.S. Pacific Fleet, Secretary of the Navy, Chief of Naval Operations, and as Judge Advocate General.

Since my retirement in 1976 I have had no official connection with the U.S. Government's law-of-the-sea processes nor the United States delegation to the Third United Nations Conference on the Law of the Sea. My interest has been confined to research in the area, teaching international law and a law-of-the-sea seminar at Duke, and supervising the research of law students interested in the subject. I have continued to follow the policy debates on the law of the sea through research, reading, and attendance at seminars and symposia. My current opinions are thus based on materials in open publication. However, they were formed against the background of my naval career and dealings in the law of the sea as an "insider" for many years. The views I state today are solely my own.

Although most persons who write or talk about the origins of the present law-of-the-sea conference trace its origins to Ambassador Arvid Pardo's much-publicized initiative on the deep seabed in the United Nations General Assembly in 1967, the process actually began about a year earlier when the United States, in private

discussions with the USSR, agreed to consult other nations about convening a third multilateral conference on the law of the sea. The objective of the Soviet-U.S. initiative was to stop the creep of coastal-state jurisdiction seaward. The device that seemed most promising was to obtain global agreement on a 12-mile territorial sea, provided it could be coupled with free transit through straits for ships, aircraft, and submarines of all nations. As Mr. Leigh Ratiner has pointed out in his recently published article in *Foreign Affairs*, Ambassador Pardo's action added the deep seabed to the agenda, and by the time the Third Conference convened in 1973, "its agenda included essentially all uses of the oceans." For a number of reasons, including their intractability, their novelty, and their perceived

The objective of the Soviet-U.S. initiative was to stop the creep of coastal-state jurisdiction seaward.

potential for major transfers of wealth to the developing countries, seabed mining issues have dominated the proceedings of the Conference as well as the publicity and comments about them. Nevertheless, as was repeatedly emphasized by United States spokesmen from the outset, navigational issues were of predominant interest to the United States. Free transit through straits, as well as assured access to seabed minerals, was a *sine qua non* for U.S. acceptance of any law-of-the-sea treaty. As I concluded in a 1980 article in the *Virginia Journal of International Law*; this important navigational objective was attained in the Draft Convention.

Of course, navigational issues cannot be examined in isolation, since, as U.S. and other spokesmen have also repeatedly emphasized, the projected treaty was generally conceded to be a "package deal," a document which would govern all ocean

Nevertheless... navigational issues were of predominant interest to the United States.

uses and would have to be accepted in its entirety or not at all. The negotiating objective was to fashion a document that would have sufficient "sweeteners" for every nation so that they would accept those parts they found less desirable in order to obtain the greater benefits flowing from other parts. For purposes of determining whether to accept the treaty, then, no nation could view one particular part (whether seabed, navigation, fishing, or whatever) in isolation. Rather each would be required to conduct a pragmatic review in which all features of the treaty would have to be balanced against each other to determine whether being a party to the treaty would be a net gain or a net detriment to the national interests of that state.

In a nation such as the United States, this is a particularly difficult task, since we have an interest in every ocean use covered in the treaty and each interest is represented by powerful constituencies inside and outside of the government. The process is complicated by the fact that there is no government official short of the President authorized to make a binding decision, and only the most major decisions are taken to him. The decision-making process within the United States Government is thus not substantially different from that in the Conference itself—a negotiation conducted on the principle of consensus. The requirement for Senate ratification and Congressional oversight by Congressional Committees such as this one adds still another dimension. These complexities should, however, ensure that all

proper interests are taken into account in the development of a final U.S. national position.

It was therefore with some dismay that those of us who have been following the law-of-the-sea negotiations and the developing U.S. positions on the law-of-the-sea treaty from the outside have observed what appears to be an almost complete concentration of the current administration's reviews of its law-of-the-sea positions on the deep seabed provisions alone. Although the original announcement of the Reagan administration's review indicated that it would deal comprehensively with all issues before the Conference, the announcement of the completion and results of the review, with one exception, addressed seabed issues alone. Furthermore, even those constituencies (such as the Department of Defense) that would be expected to be strong advocates for the protection of navigational rights (and have been so in the past) seem to have shifted their focus from navigation to the seabed, apparently considering that the major defense interests at stake in the negotiations lie more in access to the strategic metals than in freedom of navigation.

This impression may be an erroneous one, since it is based only on what one can read in the open publications, but it is nevertheless reinforced by the package of amendments tabled by the United States delegation at the March-April 1982 session of the Law of the Sea Conference. Rather than being a set of modest (but substantive) changes that would have had some reasonable chance of acceptance by the Conference while at the same time implementing the President's broadly stated objectives, they were instead a major redrafting of some of the most fundamental and laboriously negotiated provisions of the seabed part of the

We have an interest in every ocean use covered in the treaty and each interest is represented by powerful constituencies inside and outside of the government.

treaty. They seem to have been drafted from an ideological base rather than with the pragmatic goal of finding a solution that would be acceptable to the Conference as a whole.

Mr. Ratiner's recent article in *Foreign Affairs* details some of the erroneous assumptions that underlay the formulation and presentation of these proposals to the Conference, and he suggests that essential changes desired by the United States in the seabed part of the treaty might be accomplished even at this late date. I understand that Mr. Elliot Richardson testified last week to the same effect. For the reasons I shall try to elaborate on now, I would hope that their conclusions that the seabed articles might still be salvaged are correct and that the administration would choose to follow their advice in this respect, for in my view there are important principles established in the navigational provisions of the treaty which would be better protected under the treaty than without it. The most important of these provisions, which represent an improvement over either the comparable provisions of the 1958 Conventions or customary international law, are the following:

1. A termination of the seaward "creep" of the maritime boundary of the territorial sea by a provision that the breadth of the territorial sea shall not exceed twelve miles.
2. A guarantee of freedom of transit ("transit passage") for ships and aircraft of all nationalities and character of service

In my view there are important principles established in the navigational provisions of the treaty which would be better protected under the treaty than without it.

through straits used for international navigation.

3. A clear statement of the criteria for determining when a ship is in innocent passage through the territorial sea, thus eliminating the possibility for what some have labeled as a "subjective" interpretation of that principle.
4. A guarantee of freedom of navigation and overflight in the exclusive economic zone.
5. A guarantee of archipelagic sea lanes passage for ships and aircraft through waters that may be claimed as archipelagic waters....

TRANSIT PASSAGE THROUGH STRAITS

As has been emphasized repeatedly by spokesmen for the United States since the beginning of the U.S. participation in the process leading to the present Law of the Sea Conference, United States agreement to a broadening of the territorial sea to 12 miles is contingent upon inclusion of a provision guaranteeing freedom of transit for ships and aircraft through straits used for international navigation. This position was based on a governmental study which showed that more than 100 significant straits around the world are between 6 and 24 miles wide. Increasing the territorial sea from 3 to 12 miles would cause these straits to be overlapped by the territorial sea of the coastal states bordering the straits. The result would be that rather than being entitled to transit these straits in the ribbon of high seas through the middle as a matter of right under the freedom of navigation of the high seas, a foreign vessel could transit the strait only in the exercise of the right of innocent passage. Foreign aircraft could go through only with the permission of the coastal state, since aircraft do not enjoy the right of innocent passage, and submarines would be required to operate on the surface and display their flag. Something more was required. The answer provided in the treaty text is the right of transit passage.

Transit passage under the Con-

vention differs from innocent passage in four principal ways.

1. Innocent passage does not include freedom of overflight. Although no international convention dealing with innocent passage specifically abrogates this right for aircraft, there is no accepted principle of international law that provides for freedom of overflight of the territorial sea.

Transit passage, on the other hand, does apply equally to aircraft. Article 38(1) states that all ships *and aircraft* enjoy the right of transit passage, and paragraph 2 of Article 38 defines transit passage in terms of both navigation and overflight.

2. Submarines in innocent passage are required to navigate on the surface and show their flag. This was specifically set forth in the Convention on the Territorial Sea and Contiguous Zone, Article 14, paragraph 6, and is carried forward into the Draft Convention on the Law of the Sea in Article 20.

There is no accepted principle of international law that provides for freedom of overflight of the territorial sea.

Submarines exercising the right of transit passage, on the other hand, are not required to operate on the surface but may transit in the submerged mode.

3. In innocent passage the coastal state has competence to determine that passage is non-innocent and deny passage on this basis. As I shall develop later, this determination could be based on subjective factors.

In the transit-passage articles, on the other hand, the requirement for the transiting ship to observe certain coastal state rules for ships in passage are "delinked" from coastal state enforcement of those rules. A ship in

violation of its obligations might be legally liable or make its flag state legally responsible, but it would not forfeit its right of transit passage.

4. Innocent passage may be suspended under certain circumstances.

Transit passage, on the other hand, cannot be suspended.

Although Article 16(4) of the 1958 Convention on the Territorial Sea and Contiguous Zone prohibits the suspension of innocent passage of foreign ships through straits used for international navigation, that Convention has not achieved universal adherence, and a number of states bordering critical international straits

Transit passage... cannot be suspended.

are not parties to it. My opinion, based principally on the Corfu Channel Case before the International Court of Justice, is that the rule against suspension of innocent passage in international straits is a rule of customary international law, but I cannot predict with assurance that that view would prevail before an international tribunal.

An important bonus feature flowing from the transit passage articles—and one sometimes overlooked in the analysis of these articles—is that their provisions do not apply just to straits between 6 and 24 miles wide. They apply also to straits less than 6 miles wide. Without the treaty, such straits would be governed by the regime of non-suspendable innocent passage, even with a 3-mile territorial sea.

INNOCENT PASSAGE

Under Article 14 of the 1958 Convention on the Territorial Sea and Contiguous Zone, ships of all nationalities enjoy the right of innocent passage through the territorial sea of any other state. Paragraph 4 of that article states:

Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.

This simple definition poses a problem. First, it does not limit the coastal state, in its determination of whether or not passage is innocent, to consider only acts committed while the ship is in passage through the territorial sea. This, in turn, at least in the view of some states, allows the determination of innocence to turn on the purpose of the voyage, its destination, or the cargo carried. Thus, determination of whether passage is innocent is arguably within the subjective judgment of the coastal state.

Article 19 of the Draft Convention on the Law of the Sea goes a long way toward clearing up this ambiguity. While the first paragraph contains the same phrasing as Article 14 of the Territorial Sea Convention, the next paragraph adds:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if *in the territorial sea* it engages in any of the following activities:

[then follows a list of specific prohibited activities]. (Emphasis supplied)

The words "in the territorial sea" are extremely important. They make it clear that any determination of non-innocence of passage by a transiting ship must be made on the basis of acts committed while in the territorial sea. Thus, cargo, destination, or purpose of the voyage cannot be used as criteria in determining that passage is not innocent.

THE EXCLUSIVE ECONOMIC ZONE

Like the concept of the continental shelf, which gained rapid acceptance in the international community following President Truman's Proclamation in 1945, the idea of a 200-mile wide exclusive coastal economic zone has also gained rapid acceptance in the past fifteen years or so. Based on the number of states that have proclaimed such 200-mile zones, it appears that the concept will become a part of international law by custom whether or not a Law of the Sea Convention containing such a concept enters into force. Since, however, the zones proclaimed by different states vary widely in legal

Thus, cargo, destination, or purpose of the voyage cannot be used as criteria in determining that passage is not innocent.

content, stretching from the rather modest Fishery Management and Conservation Zone proclaimed by the United States all the way to what appear to be 200-mile territorial seas proclaimed by such states as Argentina and Brazil, it is important that the limits of the legal jurisdiction exercised in such zones be carefully defined. Otherwise they could, over time, become claims to full sovereignty as a territorial sea. Since 200-mile coastal zones around every coastal state would severely reduce the area remaining in the ocean as high seas, it is extremely important that freedom of navigation and overflight be preserved in such zones. This is accomplished in the Draft Convention on the Law of the Sea. In the absence of such a convention, the United States could argue that such a right exists, but that argument would not have as secure a base as that provided by the Convention.

The relevant provision of the Convention is Article 58(1), which provides that in the exclusive economic zone, all States, whether coastal or land-locked, shall enjoy the freedoms of navigation and overflight and laying of submarine cables and pipelines....

ALTERNATIVES TO THE TREATY

It has been suggested by some that adherence by the United States to the Convention on the Law of the Sea is not necessary to obtain the benefit of the treaty provisions I have been discussing. The argument is made that most of the navigational provisions of the Convention are mere restatements of existing treaty provisions found in one of the 1958 Conventions or are mere codifications of customary international law. Those who advance this argument also suggest that for the few provi-

sions which are not a part of existing international law—as for example transit passage through straits—the United States should be able, by bilateral or multilateral negotiation with the states concerned, to obtain identical or similar rights. It is sometimes pointed out that most of the key international straits are controlled by states that are allied with the United States in one way or another. Some suggest, that as a last resort in a crisis, we would ignore the law and take whatever action was necessary to obtain essential navigation routes.

With a 3-mile territorial sea, and with no broad exclusive economic-zone and archipelagic-water claims removing large chunks from the high seas, these arguments have a great deal of force. Most areas of the oceans remain high seas, and most of the important straits have a ribbon of high seas through which ships could sail and aircraft could fly. For those

Some suggest, that as a last resort in a crisis, we would ignore the law and take whatever action was necessary to obtain essential navigation routes.

less than 6 miles wide we could still rely on the doctrine of innocent passage. But as I pointed out earlier, I do not know how much longer we can seriously advance our claim that the 3-mile limit represents international law. Further, this does not solve the problems of overflight for aircraft and submerged passage for submarines.

If we must take 12-mile claims more seriously, the problem becomes more difficult, and we would be

forced to rely more heavily on previously negotiated bilateral agreements or *ad hoc* arrangements made at the time of necessity. I am not sanguine about our ability either to predict in advance where we will need such bilateral arrangements or whether we will be able to obtain the necessary rights either in advance or on an *ad hoc* basis at the time of crisis. Even allies have different perceptions of how their interests may be involved in a particular crisis, and landing and overflight rights that we may count on may not be forthcoming at the time of crisis. I am reminded of the Middle East crisis of 1973, when it was reported that all of our European allies except Portugal refused to grant overflight rights, forcing many of our flights to the Middle East to “thread the needle” through the Straits of Gibraltar.

Further, without a treaty, the concepts of the exclusive economic zone and archipelagic waters remain largely undefined, allowing a mischievous government to use such zones as obstacles to freedom of navigation.

Of course, if the treaty enters into force without our becoming a party, an argument can be made that the navigational package is universally binding—that the negotiating process itself, conducted on the basis of consensus and with the outcome having near unanimous support from all sectors of the community of states, has created customary international law binding non-parties as well as parties. This argument is not without merit and might well be successful. But some parts of the navigational package, such as transit passage through straits, are “new” international law, found only in the treaty. And a strong counter-argument can also be made that they are binding only as to the parties to the treaty. Further, the United States might be reluctant to argue for the applicability

I do not know how much longer we can seriously advance our claim that the 3-mile limit represents international law.

of these provisions to non-parties, since a similar argument has already been suggested as to the universally binding nature of the deep sea mining provisions of the Convention.

Finally, as to the solution of last resort—that is, to ignore the legal niceties and proceed—I can only respond that such choices are accompanied by substantial political costs.

CONCLUDING REMARKS

I recognize that our military forces and merchant marine have to this time not experienced substantial impediments to their freedom of navigation on the world's oceans. There have, of course, been some instances in which claims contrary to our concepts of the narrow territorial sea and the right of free navigation have affected the way we conduct our operations, but to my knowledge the impact has not been significant.

But times are changing. Coastal state claims are continuing to multiply in number, size, and legal effect. The trend, which is reflected in the Convention itself, is toward increased exercise of coastal-state jurisdiction and shrinking freedoms. Whether we can continue to have the same freedom of movement for our military forces and merchant marine that we have had in the past is not certain. The navigation provisions of the Convention are an important step in assuring that we do. They should be given a proper weight in the balance of any decision as to whether the United States should be a party to that treaty.

VOL. 2, NO. 1 / 45

THE DOCKET

Black Graduates in the Profession

Since 1964 more than eighty black men and women have received Duke law degrees. Most of those graduates enjoy great success in public and private legal practices. They include a state court of appeals judge, a state district court judge, an assistant state attorney general, a state representative, and a number of public defenders. Those working in the private sector are engaged in large and small practices in North Carolina, Georgia, the District of Columbia, Pennsylvania, California, New Jersey, Virginia, and Ohio.

The history of black students at Duke Law School began in 1960 when Dean Elvin Latty sought potential applicants for the entering class in 1961 from black undergraduate schools and eventually admitted Walter Johnson and David Robinson II. At the time, parts of the university community, including the Law School, were urging the University Board of Trustees to approve the admission of black students.

In March 1960, the Law School Bar Association sent a resolution to the Board stating that an admissions policy of excluding blacks was "inconsistent with the fundamental principles of American democracy and with the religious principles upon which the university was founded." The student group also said segregation "not only hurts the excluded races, but also deprives other students of increased understanding through the widest possible association of able minds and denies the community potential legal talent."

Professor Melvin Shimm recalls, "There was strong sentiment in the Law School among the faculty in favor of admitting black students, notwithstanding that the university had taken a negative position."

Portions of the Graduate School and Divinity School, along with the undergraduate Student Government Association, earlier had called for a change in admissions procedures. In the spring of 1961, the trustees voted to allow the admission of qualified persons to the university, regardless of race or color.

The decision of which black students to admit to the Law School in 1961 raised questions among the faculty. "We wanted to integrate the school, but we didn't want to make the school seem attractive just to get students and then crack down on them once they got here," Professor Shimm says. "We also didn't want to relax the standards because we'd be doing those students as well as the profession a disservice. Our guiding philosophy was to be sure that the applicants we admitted demonstrated the capacity to get through," he says. "I think we chose well with David and Walter."

David Robinson recalls being told that Duke Law School was preparing for "a journey into uncharted



David Robinson II

waters" and that it wanted to interview Howard University seniors for admission to the school. "It was highly competitive, challenging and stimulating," Robinson says of his years at Duke. "Everything went very smoothly. It was all about studying law, which is as it should have been," he says.

But Robinson, now senior counsel for Xerox Corporation's west coast operations, still faced barriers. During his third year he realized that certain opportunities were not available to him. "Rather than interview with law firms—some of which were not anxious to interview or hire blacks—I chose to work in the public sector," Robinson says. He spent the first three years of his career with the Board of Governors of the Federal Reserve in Washington, D.C., where he was responsible for interpreting the Bank Holding Company Act of 1956 and for making recommendations on applications under that Act. He moved to Xerox in 1967 and was promoted to his present position in 1978. His work includes litigation, preventive legal counselling, and commercial negotiation.

This fall, Robinson returned to the Law School for the first time since resigning his position on the Board of Visitors in 1978. As a job interviewer, he noted a consistent level of quality among the students and a growing school. "I witnessed the Law School's move from the old Gothic structure on main campus to the new building," Robinson says. "I was struck by how the Law School is continuing to grow." He says, "I was also pleased to see that Duke has several black students and a visiting black professor. It's a big change from the days when I was a student there."

In addition to serving on the Board of Visitors, Robinson is a board member of the Youth Service Bureau, a private agency in Los Angeles that counsels young people involved in crime and provides other

social services to their families. He is a member of the American Corporate Counsel Association and a former member of the Long Beach Fair Housing Foundation.

Walter Johnson applied to Duke after hearing from a friend who was a Duke undergraduate that the Law School would be admitting blacks the following year. "I wasn't sure he knew what he was talking about," Johnson says. "Later I found out that the Law School administration had asked student government leaders to encourage qualified black students they knew to apply," he says. Johnson expected to attend Columbia or Yale after graduating from North Carolina A&T State University, where he was student body president. But after UNC President William Friday met him and put him in touch with Dean Latty, Johnson decided to study law at Duke.

He describes his years at Duke as challenging and rewarding. "The faculty and students made a concerted effort to make me feel welcome," Johnson recalls. "But certain incidents reminded me that Duke had been a rigidly segregated institution. The first year was a challenge," he says. "Previously I'd had limited contact with white students and no opportunity to compete across the board with them."

Johnson's law career, including his years at Duke, is best characterized as a series of "firsts." He was presi-

"The faculty and students made a concerted effort to make me feel welcome."

dent of the first Moot Court Board and served as treasurer and as vice president of the Law School Bar Association. Following graduation in 1964, he served as clerk to North Carolina District Judge Elreta Alexander. For the next three years he was an Air Force judge advocate general. In 1968 he became the state's first black assistant solicitor (district attorney). Prior to his appointment as head of the North Carolina Parole Commission in 1981, Johnson was a member of the Frye, Barbee &



Walter Johnson



Judge Charles Becton

Jervay law firm in Greensboro. He was the first black member of the North Carolina Bar Association's Board of Governors. He has served as chairman of the Greensboro School Board and of the state Inmate Grievance Board. In addition, he served on the Board of Visitors and for several years, beginning in 1969, taught trial practice at Duke.

Like other alumni, he has been bothered "for some time" that the Law School does not have a permanent black faculty member. "I think it's inexcusable. A great school like Duke should have a permanent black scholar, not only to impart knowledge in a specific area, but, more importantly, to give all students a feel for how their work will affect particular segments of society," Johnson says. He believes the school should take a more active role in producing black legal scholars. "If Duke is serious about hiring top-ranked faculty that reflect a cross section, it should help groom outstanding black students for the position through clerkships and job placement," he says.

A desire to return to his native North Carolina to practice and a football game coalesced to bring North Carolina Court of Appeals Judge Charles Becton, '69, to Duke in 1966. Professor Clark Havighurst visited Howard University during Becton's senior year and talked to the basketball star about Duke. They also discussed the upcoming Duke-University of North Carolina football game and each made a prediction about the outcome. "Professor Havighurst wrote me after the game had been played," Judge Becton recalls. "I had been impressed by him. That, coupled with my desire to come back to eastern North Carolina to practice law and to help poor people, motivated me to apply to Duke."

During the late 1960s Duke, like many college campuses around the country, was the scene of demonstra-

"But certain incidents reminded me that Duke had been a rigidly segregated institution."



Brenda Becton

tions and confrontations. Becton participated in many of them. He was the only graduate student to participate in the takeover of the Allen Building in 1968 and as a result was placed on probation for violating the university's picketing and protest policies. But then-Dean Kenneth Pye and the state bar association supported his acts and he was reinstated. Becton wrote letters to the *Duke Chronicle* complaining of racism on campus and helped to protest the policy of holding university functions at country clubs that did not admit blacks. While picketing at the Hope Valley Country Club Becton met another picketer, Brenda Brown, a Duke undergraduate whom he later married.

Becton was the only black member of his entering class. He has pleasant memories of his law school experiences. Nonetheless, he was not oblivious to the feelings of other blacks at Duke. Motivated by the experiences of the school's black undergraduates and sensing their need for fraternity, Becton and two others formed an organization of black undergraduates, the predecessor to the undergraduate Black Student Alliance that exists at Duke today.

"The undergraduates were concerned about the treatment they received from the faculty and complained about unfairness and racial animus," Becton says. "I never had a sense of that in the Law School. In general, I had good teachers and had no problems creating friendships," he says. "Nonetheless, my experiences at Duke crystallized my commitment to helping people."

He landed a position with the NAACP Legal Defense and Educational Fund in 1969, after applying for the job and showing up unexpectedly at the Fund offices in New York to be interviewed. "I think my boldness, if nothing else, impressed them," Becton says. Charlotte attorney Julius Chambers, founder of Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, also interviewed Becton for the Fund position. When his tenure at the Fund ended, Becton joined Chambers's law firm and spent the next ten years in the Charlotte and Chapel Hill offices.

At Chambers, Ferguson, Becton litigated a full range of civil rights and civil liberty issues in state and federal court. He helped represent the Wilmington Ten and Communist Workers' Party members following the Ku

Klux Klan shooting incident in Greensboro. He has represented more than 100 expelled students and litigated school desegregation and employment discrimination cases.

Becton's appointment to the state Court of Appeals in 1981 temporarily ended his career as a trial lawyer. He teaches trial practice at Duke and UNC on an adjunct basis, which helps satisfy his urge to try cases. "It's a way to practice law vicariously," Becton says.

Becton is a member of the North Carolina Judicial Commission and serves on the Law-Related Advisory Committee of the North Carolina Department of Public Instruction. He also conducts trial advocacy seminars around the country, helping lawyers improve their advocacy skills, for the National Institute of Trial Advocacy.

Brenda Becton, '74, State Representative Daniel Blue, Jr., '73, Evelyn Cannon, '74, and North Carolina District Court Judge Karen Galloway, '74, were students at a time when the number of blacks in law school classes was increasing. There were four black students in the 1973 class and six in the 1974 class. The classes of 1975 and 1976 had seven and eleven black members, respectively. Nonetheless, members of the group often felt detached and isolated, and looked to each other for support.

"I didn't find the students especially friendly," says Cannon, who recently became assistant attorney general for Maryland. "I had gone to a predominantly white undergraduate institution where I interacted very well with all the students. But that wasn't the case at Duke," she says. "It's more than just having a higher number of blacks that helps you adjust; it's the feeling you get from other students."

During her first year at Duke, Cannon spent a week out of school deciding whether she would continue. "Brenda (Becton) and Karen (Galloway) came over and encouraged me to come back because they said we needed each other's support."

Blue, with whom Cannon teamed to win the 1973 Moot Court Competition, says, "It makes a big difference having a support system available to you." Having spent his undergraduate years across town at North Carolina Central University, Blue was able to maintain social



Daniel Blue, Jr.

"It's more than just having a higher number of blacks that helps you adjust; it's the feeling you get from other students."

ties with college friends during law school. "I still had a social network from my undergraduate days to rely on and I tried to draw others into it," he says. Blue was also involved in law school student activities, serving as class representative to the admissions committee. "I saw my time at Duke as a total experience, of which law school was only a part," he says. "I wanted to have fun as well."

Galloway and Brenda Becton felt somewhat unprepared for beginning the study of law. "I had a hard time early on because I felt my background hadn't adequately prepared me for what I faced," Becton, a North Carolina Industrial Commissioner, says. "In many courses, especially the business-related ones, I had to learn the basics before I could learn the law." Galloway says, "I had to work especially hard also. It helped that I was able to work at a law firm while I was in school, applying what I learned every day."

None of the graduates regrets the decision to attend Duke. They all say their education adequately prepared them for successful legal careers and for life outside law school.

"Duke served as a transition from a totally segregated black undergraduate institution to an almost totally segregated white school. I learned to adapt to the different environment," Blue says.

"My objective of going to a fine law school was more than met when I decided to attend Duke. It was one of the smartest moves I've made," Robinson says. "If it was an historic experience, all the better."

Karen Galloway says, "I don't think law school was meant to be liked. But, Duke prepared me for what was out there. It made my skin a little tougher."

That tough skin served her well during the years immediately following law school. In her first case after



Karen Galloway



Reginald J. Clark

taking the bar exam, Galloway helped defend Joan Little, who was charged with and later acquitted of killing Clarence Alligood in the Beaufort County Jail in 1974. The trial attracted national attention and pushed Galloway, along with Little, into the spotlight.

"I knew I would be looked upon by the public as Joan," Galloway recalls. "I wasn't surprised that it became one of my roles. But my true role was as her defense attorney," she says.

The hard work in law school prepared Galloway for what was ahead in the Little trial. "Going in, there was a lot I didn't know," she says. "I had to learn quickly and do my share of the work." For some, it might have been easier to fold under the pressure, but Galloway did not. "None of it overwhelmed me. I just did my job."

She enjoyed the respect of her colleagues after the trial ended. Repeat performances in later criminal and civil rights cases earned her a reputation as a very good attorney. In 1976, she was honored as Lawyer of the Year by the National Conference of Black Lawyers. Several years following the Little case, Judge Hamilton Hobgood, who presided over the trial, recommended that Galloway be appointed to the bench. Her term as district court judge began in 1980.

Evelyn Cannon spent an extra year at Duke earning a master's of law degree and serving as the first Bradway Teaching Fellow. She was offered a teaching position at Duke but chose to join the District of Columbia Public Defender Service in 1976. A year later she began a six-year stint as professor of law at the University of Maryland. She left that post this fall to begin serving as Maryland assistant attorney general.

"When I came to Duke I hadn't planned to stay permanently," Cannon says. "I declined the teaching job because it was time to go out and practice law. When I accepted the attorney general's offer, I had decided it was time to move on again," she says.

"[Attending Duke] was one of the smartest moves I've made."

"There will have to be a greater thrust [toward] a more concentrated recruiting effort."

Brenda Becton, like her husband and her classmates, heard the call to public service. After graduating from Duke, she served as an attorney with Durham Legal Services. Later, she joined the staff of Prisoner Legal Services in Durham, where she was an advocate for mentally- and physically-handicapped prisoners' rights. She sought better treatment for those prisoners who, regardless of their classification, are incarcerated in the same facility and, thereby, are deprived of the privileges similarly classified non-handicapped prisoners enjoy. In her present position with the Industrial Commission, she hears and decides workers' compensation and tort claims.

"Each job has been fulfilling in a different way," Becton says. "The legal services jobs were gratifying not only because I developed skills I hadn't acquired in law school, but also because I felt useful to people who needed help," she says. "I think I bring a sense of fairness and compassion to my job."

Blue is a partner in the Raleigh law firm of Thigpen, Blue & Stephens and is serving his second term in the North Carolina House of Representatives. He chairs the legislature's Criminal Code Revision Study Commission and serves on the Law School Board of Visitors and the Board of the North Carolina Academy of Trial Lawyers.

Many of Duke's black alumni are also concerned about the law school's minority recruiting efforts and results. "I think there will have to be a greater thrust in extending the benefits of the university and the Law

"We've never had large numbers of black students and that's been a source of chagrin."

School to black students through a more concentrated recruiting effort," Blue says. Judge Becton has compared the situation at Duke with that at UNC. He is disturbed by what the comparison reveals. He reports that for each of the past several years there have been twenty or more black students in the UNC entering class. At Duke, the number of black students in this year's entering class is ten, up from six and seven for the two previous years.

Walter Johnson hopes the school will continue to expand on its tradition of giving black students the opportunity to develop leadership skills. "Dean Latty recruited potential leaders. Kenneth Pye made a concerted effort to increase the number of black students and to provide them with opportunities to grow," he says. "I think the question now is whether the same

kind of concerted effort is present in the Law School to give black students the opportunity to be part of the leadership cadre of this country through recruiting and job placement."

"We've never had large numbers of black students and that's been a source of chagrin," says Shimm. He can relate several stories of black undergraduates the school has courted, only to see them select Harvard, Yale, or Chicago instead. "The problem is that to get students we're sure will pass, we have to compete with a lot of other good schools that have the same objective," Shimm says. "We're going to have to maintain a greater than average alertness to potentially good black students."

Judge Becton agrees. "I'm convinced that there are many black students who meet Duke's standards that the school doesn't recruit."

One product of the law school's recruitment of black undergraduates is Reginald Clark, '78. Clark was heavily

Collectively, black students... have demonstrated the ability to succeed at Duke.

recruited while he was an undergraduate political science major at Duke and entered the Law School as a Womble Scholar. He joined the *Duke Law Journal* in 1976 after his first year and served as a Note and Comment Editor in 1977-78. Clark is a tax attorney with the Atlanta law firm of Sutherland, Asbill & Brennan. He is a member of the NAACP, the YMCA, and is a former secretary of the Metropolitan Atlanta Crime Commission.

Duke's black graduates harbor mixed feelings about their days at the Law School. Some remember law school as emotionally trying. For others, it was either a time of personal development or a vehicle for achieving professional goals. Whatever their individual experiences have been, collectively, black students have met the standard that was developed by the school in the 1960s and have demonstrated the ability to succeed at Duke. Undoubtedly the history of Duke's black law students will continue to unfold as one of academic, personal, and professional successes, making the trip Dean Latty and the university took into uncharted waters over twenty years ago well worth it.

*Alumnus Profile***From Washington to Duke**

Allen G. Siegel's life has been profoundly influenced by his study of law at Duke. This influence manifests itself not only in his successful career as a practicing attorney, but also in his continuing ties with the law school as both teacher and benefactor.

As a student at Duke (J.D. 1960), Siegel compiled an outstanding academic record, culminating with his election to the Order of the Coif. The ensuing years have seen him develop a respected labor practice as a partner in the Washington, D.C., law firm of Arent, Fox, Kintner, Plotkin & Kahn. He now leads a group which engages in the administrative and litigation phases of labor law and allied fields on behalf of management. Ironically, he professes that he had no real interest in the labor field as a student and that only a fortuitous "accident of history" brought him to his present work.

After his graduation from Duke, Siegel entered the private practice of law in Jacksonville, Florida, and embarked on a career of civil litigation. Two years later, however, as he was getting settled into that practice, he was called into the service from the ready reserves by mistake. It took three months to get the mistake cleared up, and by the time he returned to Jacksonville, he had become dissatisfied with his practice.

It was at that point that fortune truly played its hand. By chance, Siegel ran into Tony Legio, a classmate of his at Duke who worked with the National Labor Relations Board in Atlanta and who had come into Jacksonville as a hearing officer. The two men talked about labor work, and shortly thereafter Siegel went to Atlanta as a Field Attorney with the Board.

In 1964, Siegel re-entered private practice in Washington, specializing in labor relations. As a practitioner, Siegel has represented a wide variety of labor management clients, among



Allen G. Siegel

them the Washington Hospital Center, Prince Georges County, and the Dana Corporation, as well as several hotels, construction companies, laundries, and building service contracting companies. In addition, he renders services on behalf of his firm's clients and for a number of trade associations which the firm represents as general counsel or labor counsel. A recent project has been Siegel's representation of Toyota in its joint automaking venture with GMC. He notes that these negotiations have been particularly interesting since he has been able to observe the different views of the Japanese and the Americans on employer-employee relationships.

Siegel is often called upon to represent both local and national clients in proceedings before the National Labor Relations Board and in labor contract negotiations. Siegel also

assists employers in defending against unfair labor practice charges, and participates in the preparation and presentation of arbitration and grievance proceedings. He also gives advice and prepares materials on most aspects of industrial relations, on minimum wage and public contracts matters, and on equal employment policies.

In connection with his specialty, Siegel has maintained an affiliation with the Labor Law and Administrative Law sections of the American Bar Association. His bar duties have included service as Co-chairman of the Subcommittee on the Equal Pay Act, and Co-chairman of the Subcommittee on the Fair Labor Standards Act.

In his role as teacher, Siegel serves as a Senior Lecturer in Law at the Law School, teaching an annual seminar on collective bargaining. During the fall semester of each of the last six years, Siegel has made weekly visits to Durham to instruct students in both the legal and practical aspects of negotiating a labor agreement. Drawing upon the skills and knowledge he has acquired as a labor relations practitioner, he engages students in intensive examinations of the various facets of the management-union relationship and the dynamics of the negotiating process. His goal in the course is to give a "dimension of reality" to legal concepts: ultimately, he wants his students to be able to mesh both the theoretical and the practical aspects of the collective bargaining process.

Siegel's association with the collective bargaining seminar came at the behest of then Associate Dean Melvin Shimm, with whom Siegel had maintained close association since his days as a student. Siegel, who had pursued an academic interest in the subject by authoring several law review articles and by serving as guest lecturer at numerous

Only a fortuitous "accident of history" brought him to his present work.

colleges, says that when he was asked to teach the course he "jumped at the chance."

"I've always had an academic interest and an interest in Duke," he says, "and when I was asked to teach the course I was very flattered and excited. The opportunity to teach addressed a need in myself—my pedagogical instincts. In a sense I'm a frustrated teacher, and the chance to teach gave me the opportunity to fulfill a dream."

Siegel's wish to aid Duke students also entered into his decision to take on the responsibility of teaching the course. This desire had previously been fulfilled through his funding of the David H. Siegel Scholarships,

"The opportunity to teach addressed a need in myself—my pedagogical instincts."

which he established in memory of his father. The Siegel scholarships are awarded through the Law School to those students who are most in need of financial assistance. Siegel calls them an attempt to repay the kindness shown him by the school in the past—a kindness that was essential to his being able to receive an education in the law.

Siegel recalls that when he started Law School in 1957, he had no financial resources other than the money he had earned—just enough to pay for one semester. He says that he arrived at school "just hoping that the rest would take care of itself," and that he set about trying to do the best possible job he could as a student. In the end, it was the strength of his academic performance that enabled him to continue his studies.

Siegel remembers going to the Law School Dean at the end of his first semester and asking for help. The Dean offered him little encouragement, sending him to the university treasurer to see if a loan could be arranged. No loan funds were avail-

able, however, so Siegel was forced to return to the Dean empty-handed.

The Dean's response to Siegel's plight remained unencouraging, as he suggested that Siegel might have to leave the school. Siegel pressed him, though, inquiring how he might get a scholarship. The Dean stated he would need a B average and, after looking at Siegel's academic record, told him he just "wasn't a good bet to make it."

Siegel recalls his response: "At the time, we had taken first semester exams, but the grades weren't out yet. I challenged the Dean, saying that if he was a betting man, I would like him to stake a scholarship against my making a B average. He agreed, and when the grades came out I had made As. The result was a scholarship for the rest of my time at Duke, and a refund of my first semester's expenses."

Siegel says that his many generousities to Duke all stem from that support. "At that time, I decided I would repay the university by doing the same kindness to someone else," he says. "And when I reached a point in my career that I was able to fund a scholarship, I did so in response to the promise I had made to myself at that time. All of the achievements in

"I challenged the Dean... to stake a scholarship against my making a B average."

my life since law school somehow trace to Duke, and funding a scholarship is my way of trying to repay the school."

Most recently, Siegel has further supported the Duke program by establishing the Siegel Prize, which he calls "a further expression of my desire to repay the kindness done to me."

The Siegel Prize was established in 1982 in an attempt to promote a moot court competition focusing on labor law subjects. The prize was first awarded in Spring 1983 to Kim Gagne, '83, for his brief and oral

argument in a tutorial in labor law advocacy.

Siegel's hope is that the award will promote the level of interest in labor law among the students at Duke, and will enhance Duke's reputation in the labor law field.

SPECIALLY NOTED



Williams

L. Neil Williams, Jr.

L. Neil Williams, Jr. (J.D. 1961, B.A. 1958) has become Chairman of the Board of Trustees of Duke University. He succeeds J. Alexander McMahan, who was Board Chairman for twelve years. Mr. Williams was elected at the Trustees' commencement weekend meeting last May.

Mr. Williams is a senior partner of Alston & Bird of Atlanta, Georgia. He has been a member of the Duke University Board of Trustees and its Executive Committee and on the Board of Visitors of Duke Law School. He is past president of the Georgia Alumni Association. Professionally, Mr. Williams has served as Chairman of the Corporate and Banking Law Section of the State Bar of Georgia and as a lecturer in various C.L.E. programs.

Kenneth W. Starr

Kenneth W. Starr (J.D. 1973) has been appointed Judge for the United States Court of Appeals for the District of Columbia.

Before ascending to the bench, Starr was a partner in the firm of Gibson, Dunn & Crutcher and had worked, since 1981, as Counselor and Chief of Staff to the Attorney General of the United States Department of Justice.

He served as law clerk to Judge David Dyer, United States Court of Appeals for the Fifth Circuit, from 1973 to 1974. He then clerked for Chief Justice Warren Burger, United States Supreme Court, for two years.

Carlyle C. Ring, Jr.

Carlyle C. Ring, Jr. (J.D. 1956) was elected this past July as President of the National Conference of Commissioners on Uniform State Laws at the 92nd annual meeting of the Conference. He will serve a two year term.

The Conference is a prestigious body for the reform and improvement of state law whose premier product is the Uniform Commercial Code. Altogether, several hundred uniform laws have been widely enacted by the states. The Conference is composed of some two hundred fifty Commissioners, including practicing lawyers, law professors, state legislators, and state and federal judges, generally appointed by the governors.

Ring was first appointed a Commissioner to the Conference in 1970 by then Virginia Governor Linwood Holton and was reappointed every two years. For the past two years, he was Chairman of the Executive Committee.

He is a senior partner in the firm of Kaler, Worsley, Daniele & Hollman and has been a member of the Alexandria (Virginia) City Council since 1979. From 1969 to 1978 he served on the Alexandria School Board and was its Chairman for two years.

Charles S. Murphy

Duke Law School alumnus and former Duke University Trustee Charles S. Murphy (J.D. 1934) died this past August in Washington, D.C. Murphy had a long and distinguished career both in private practice and in government service where he held several positions in the administrations of Presidents Truman, Kennedy, and Johnson.

First in the Office of the Legislative Counsel of the U.S. Senate, from 1934-1946, and later in the White House, Murphy was associated closely with Senator, later President, Truman. Under Truman, he was administrative assistant and special counsel.

The esteem with which President Truman held him is evident from the letter the President wrote upon Murphy's resignation as his special counsel, saying, among other things: "Great abilities, such as yours, in clear analytical thinking and unusual powers of expression, are seldom harnessed to such good judgment, exceptional character, and self-sac-



Murphy

rific devotion to the common cause, as in your case. You have always given more of yourself than the situation demanded, and you have never asked anything for yourself except the chance to work. There is almost no great decision or achievement of this Administration that does not bear some impress of your work and your judgment. In everything you have been to me a faithful friend and an inspired fellow worker. I owe you more than I can say..."

Murphy remained closely associated with Truman, serving as President of the Harry S. Truman Library Institute and as general counsel of

the Harry S. Truman Scholarship Foundation. He spent this past summer before he died working on plans to commemorate the 100th anniversary of President Truman's birth.

After leaving the Truman administration in the 1950s, Murphy was counsel to the Democratic National Committee. He entered private practice with the firm of Baker & Hostetler in 1953. During the 1960s he left the firm to return to government service with a succession of appointments in the Kennedy and Johnson administrations.

Murphy was Kennedy's Undersecretary of Agriculture in 1961 and

was appointed Chairman of the Civil Aeronautics Board in 1965. He was also named counselor to President Johnson in 1968 and was the Johnson administration's representative in the transition to the Nixon presidency.

Murphy was also active with Duke University, where he received his undergraduate and law degrees. He was a Duke trustee from 1969 to 1979, then was named trustee emeritus. He was also a member of the Board of Visitors of Duke Law School and served on numerous special alumni committees. In 1967 he was awarded an honorary Doctor of Law degree by Duke.

Currie Lecture

The annual Currie lecture—named in honor of the late Professor Brainerd Currie of the Duke Law faculty—was given this year on November 3. This year's lecture, entitled "Woman's Constitution," was delivered by Professor Kenneth L. Karst of the UCLA School of Law. Professor Karst has been a member of the UCLA law faculty since 1965; prior to joining that faculty he served in the early 1960s on the faculty at Ohio State School of Law along with Paul Carrington and William Van Alstyne.

Professor Karst is well-known for his scholarship in U.S. constitutional law and Latin American law; he is currently working on an encyclopedia of constitutional law.

This year's Currie lecture was delivered to an overflowing and enthusiastic audience in the newly remodeled Moot Court Room. The audience included Mrs. Brainerd Currie, the widow of the late professor, and John L. Lewis, one of the original organizers and the current patron of the Currie lectures. The

reception in the Brown Lounge following the lecture was the site of an animated discussion on the substance of Professor Karst's remarks; indeed, perhaps the only consensus was that his proposals were controversial.

Duke Law Magazine will publish excerpts from Professor Karst's lecture in the spring/summer issue; a longer treatment of the topic is due to be published in a forthcoming issue of *Duke Law Journal*.

Article Note

The Unsettled International Law Governing Mining of the Seabed

UNCLOS III and the Struggle for Law: The Elusive Customary Law of Seabed Mining, Brad Shingleton, *Ocean Development and International Law Journal*, Volume 13, Number 1 (1983).

After almost ten years of negotiations and numerous drafts, the Third U.N. Law of the Sea Conference formally adopted the Third U.N. Convention on the Law of the Sea (UNCLOS III) in April of 1982. In July of 1982, President Reagan announced that the United States would not sign the Convention. The reason the United States rejected the Convention is that the proposed regime for governing mining of the deep seabed was viewed as being adverse to American interests. In this article, Brad Shingleton (J.D. 1983) explores the legal foundations of the controversy surrounding the seabed mining articles of UNCLOS III. Shingleton examines how and why, after more than nine years of negotiation, a seabed regime was produced that was "so disfavored by critical segments of American industry and government."

While acknowledging the political and economic differences between developed and developing nations, Shingleton proposes that certain fundamental legal difficulties exist that have been a significant factor in establishing a seabed mining regime repugnant to American interests. The legal problems include different opinions among nations about the status of the existing international law governing mining of the seabed, the status and character of norms governing the UNCLOS III negotiations, and the place and extent of state sovereignty in a future seabed mining regime. The author proceeds through a historical review of the development of the Convention in

which he highlights the sources of these fundamental legal difficulties.

Shingleton first develops his thesis by observing that the customary international law applicable to the seabed is the theory of *res communis*, whereby the seabed belongs to all for the use of all. Under this legal theory, the seabed is not subject to exclusive exploitation rights or unilateral appropriation. The mineral nodules in the seabed, however, do not share this legal status, according to the author. These nodules are subject to the legal regime of *res nullius*, making them subject to appropriation by capture in a manner similar to the way fish (in international waters) are able to be legally caught by any nation.

The right to capture the resources of the high seas (all areas of the ocean beyond any nation's jurisdiction) is a universally recognized principle. The right is subject to the caveat that acts of capture may not interfere with the rights of others to use the high seas and their resources freely. Shingleton notes, however, that "...since nodule exploitation has only recently become feasible, historical evidence of the traditional right of high seas capture may be less probative than first appears." He observes that because no ocean resource has ever been immune from capture and the presence of nodules has been known for more than 100 years without any distinction made under the capture

The right to capture the resources of the high seas ... is a universally recognized principle.

principle until recently, the customary law of the high seas furnishes legal support for nodule exploitation.

Shingleton proceeds to explore two major series of events directly affecting the legal status of the seabed, the 1958 Geneva Conventions on the Law of the Sea and the United Nations resolutions on the seabed. The 1958 First U.N. Conference on the Law of the Sea (UNCLOS I) produced the *Convention on the High Seas* which was the only one of the four Geneva Conventions expressly declaring that it was "generally declaratory of established principles of international law..." It provided that:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and for non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The *Convention* did not address the issue of the legality of exploitation of the minerals in the seabed. Shingleton points to the International Law Commission preparatory work and the absence of any specific limitations on seabed exploitation as evidence that "seabed mining was permitted since it was not disallowed." The reference to the freedoms not recognized lends further support to the

theory that seabed mining was one of the freedoms of the high seas under the 1958 Convention.

A literal reading of the Convention does not clearly support the author's theory. The prohibition that "... no State may validly purport to subject any part of them (the high seas) to its sovereignty" indicates that any territorial claim to an area of the seabed for extraction of mineral nodules (even temporarily) might be illegal. The four freedoms specifically listed in the Convention (navigation, fishing, overflight, and laying of submarine cables and pipelines) do not require a territorial appropriation of the seabed or delineation of a "claim" as extraction of the nodules presumably would. It is, of course, conceivable that no exercise of sovereignty, however temporary, over an area of the seabed would be required to mine the nodules. In the absence of some guarantee of protection for mineral claims in the seabed, however, it is doubtful that any group, public or private, would be willing to invest the large amounts of capital required to undertake a seabed mining operation. Consequently, it is uncertain whether the 1958 UNCLOS I can be read as permitting seabed mining under the High Seas Convention because of the absence of a specific prohibition.

The next series of events influencing the customary legal regime for exploitation of the seabed were the U.N. resolutions embodying the principle that the seabed is the "common heritage of mankind." In 1967 the Ambassador from Malta, Arvin Pardo, proposed that the legal regime governing the seabed be founded on the principle that the seabed was the "common heritage of mankind." Between 1967 and 1970, the U.N. General Assembly passed several resolutions addressing the legal status of the seabed, including a moratorium on seabed exploitation in 1969 which established:

that, pending the establishment of the afore-mentioned international regime:

a) States and persons, physical and juridical, are bound to refrain from all activities of exploitation

of the resources of the area of the seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.

b) No claim to any part of last area or its resources shall be recognized.

The General Assembly adopted by a vote of 108 in favor to none opposed (14 abstentions) the *Declaration of Principles* in 1970 which proclaimed that the deep seabed and ocean floor were the common heritage of mankind and therefore "not subject to appropriation by any means by States or persons..."

Shingleton proposes that the combined effect of these resolutions on the legal regime governing the seabed is minimal because the General Assembly resolutions have no legal force in a "legislative" sense in international law and they fail to establish customary international law under traditional criteria.

Those nations which support the idea that U.N. resolutions are binding on the Assembly members reason that because the 1958 Geneva Conventions did not recognize seabed exploitation as a high seas freedom there is no customary international law governing this activity. As Shingleton points out, the General Assembly is specifically denied the power to enact rules of international law. The resolutions of the U.N. General Assembly are not per se binding on the members. The body of resolutions such as those concerning the seabed are, however, indicative of the general customary law on the subject. The nations favoring a binding interpretation of the resolutions argue that in the absence of any customary international law governing the seabed and ocean floor, the body of resolutions embracing the common heritage principle constitute newly emerging customary law.

Shingleton argues that no customary law governing the seabed has emerged from the body of resolutions passed between 1968 and 1970 because the common heritage principle "undoubtedly resembles a purposively ambiguous political concept more than anything else." He points to three occurrences to sup-

port this view. The first is the appearance of the concept of unilateral ocean mining legislation, such as the *United States Deep Seabed Hard Mineral Resources Act of 1980* (P.L. 96-283), which attempts to establish a framework for mining of the seabed by U.S. entities. The second, and probably most significant factor, is the contradictory official interpretations of the status of the common heritage principle by various nations. Finally, Shingleton notes that the practices of nations after the 1970 *Declaration of Principles* have not been sufficiently uniform to meet the traditional criteria used to measure whether a general practice has become accepted customary law.

One excellent example of the lack of uniformity in practice concerning the exploitation of the seabed is the *Agreement Concerning Interim Arrangements Relating To Polymetallic Nodules of the Deep Seabed* entered into in 1982 by the Federal Republic of Germany, France, the United Kingdom, and the United States. According to the terms of this agreement, the parties established an arbitration procedure for settlement of disputes arising from national legislation authorizing licensing of seabed exploitation. These acts refute the contention that the *Declaration of Principles* and the moratorium on seabed exploitation have effect as customary international law.

Shingleton concludes that the difficulties in establishing the legal regime governing the seabed is really a "struggle for law" as much as a political and economic struggle. The uncertainty over the existing legal regime governing the seabed prior to UNCLOS III had a profound impact on the negotiations and may continue to create further legal uncertainty after the Convention enters into effect without U.S. participation. Finally, Shingleton sees the conflict over the seabed reaching beyond the legal regime for mining of nodules and influencing the process of developing customary international law, agreements between nations, and the role of the sovereignty of nations in the international legal system.

CHANGE OF ADDRESS

Name _____ Class of _____

Position, firm _____

Office address _____

Office phone _____

Home address _____

Home phone _____

PLACEMENT

Anticipated opening for third , second , and/or first year law students, or experienced attorney .

Date position(s) available _____

Employer's name and address _____

Person to contact _____

Requirements/comments _____

I would be willing to serve as a resource or contact person in my area for law school students.

I would like to be placed on the mailing list for the *Placement Bulletin*.

Submitted by: _____ Class of _____

ALUMNI NEWS

Name _____ Class of _____

Address _____

Phone _____

News or comments _____

On Monday and Tuesday evenings, February 13 and 14, law students and faculty will gather at the press box of Wade Stadium to participate in the third annual **Law School Phonathon**. Law alumni/ae across the country who have yet to contribute to the 1983-84 Law School Annual Fund will be called and asked to make a pledge to the

campaign. Last year's Phonathon netted over \$100,000 in funds to support the work of the School.

The Law School is in need of computer and word processing equipment. Should anyone be considering upgrading his or her present equipment, we would be very glad to discuss the possibility of arranging a donation.

Duke Law Magazine
Duke University School of Law
Durham, NC 27706

Address Correction Requested

NON-PROFIT ORG.
U.S. POSTAGE
PAID
DURHAM, NC
PERMIT No. 60
