



---

Spring 3-1-1988

## Joseph Story and American Equity

Calvin Woodard

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Legal Biography Commons](#)

---

### Recommended Citation

Calvin Woodard, *Joseph Story and American Equity*, 45 Wash. & Lee L. Rev. 623 (1988).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol45/iss2/7>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# JOSEPH STORY AND AMERICAN EQUITY

CALVIN WOODARD\*

## I.

In a recently published biography of Joseph Story, R. Kent Newmeyer recalled a chilling encounter. It seems Newmeyer was working away in a New England library rich in Story source materials when he was confronted by an unkempt and bedraggled old man who was obviously down on his luck. The old timer demanded to know if Newmeyer was the stranger in town writing a biography of Story. Upon Newmeyer acknowledging that fact, his accuser delivered himself of a single oracular warning: "Young man, studying Joseph Story could ruin your career!" With that ominous pronouncement, he vanished, leaving Mr. Newmeyer to ponder his fate.

No one knows how many promising scholarly careers have ended dead in the water with would-be authors hopelessly adrift in a sea of Story data and source materials, the sheer quantity of which, coupled with its diversity and complexity, seemed too much for one mind to comprehend, still less to master. For make no mistake, Joseph Story was a giant of a man, and assessing the nature and extent of his influence on modern U.S. law is an overwhelming task.

Consider, for example, his impact on our Constitution: as a United States Supreme Court Justice, he definitively "interpreted" it in some of the most celebrated cases in American constitutional history. As a teacher and major commentator, he expounded it, scarcely less authoritatively, to a vast reading public—professional and lay, politically inclined and "purely academic," alike—of unknowable size and with unmeasurable effect. Under such circumstances it is patently impossible to determine his influence.

After all, how does one measure the impact of a single thinker on our history when his version of "federalism" has been very substantially realized and, indeed, has set the tone of much of the twentieth century; when his favorite legal institution—the United States Supreme Court—has come to play a decisive (some would say *too* decisive) role in contemporary affairs; and when his much esteemed academic perch, the Harvard Law School—which he, personally, did so much to shape and to elevate—has long been regarded as the leader of legal education in this country and very possibly in the common-law world.

---

\* Henry L. and Grace Doherty Professor of Law, University of Virginia. B.A. 1950, University of North Carolina; LL.B. 1953, Yale University; Ph.D. 1961, Cambridge University. This Article is adapted from an introduction by the same author for a reprint of Story's *Commentaries on Equity Jurisprudence* and is published with the permission of the Legal Classics Library.

The shadow of this remarkable man seems to grow longer with the passage of time, and the problem of assigning him his rightful place in our history (legal and otherwise) has grown more difficult in recent years. For the more we learn about him, the more we want to know about him; and the better we come to know him, the more complex and intellectually sophisticated his ideas appear.

Oddly enough, however, down to the years following World War II, and with a few exceptions down to the 1970s, Story's reputation languished in a curious backwater. The reason is not hard to find. Most serious scholarship on American history, including social, political, and constitutional history, had been done by scholars with little interest and still less training in law. As a result, Story, who was the quintessential man of law, has been vastly under-appreciated. For several generations after his death, most American historians distanced themselves from him. They did so chiefly by assigning to him a fixed role in our history and then ignoring or minimizing the importance of his works that had little or no bearing on that role. Thus he generally was dismissed after rather boiler-plate accounts of his early shift in political persuasion from Jeffersonian Republicanism to stolid Federalism. Appointed to the Supreme Court by Jefferson to stem the rising tide of Federalism, Story quickly allied himself with Chief Justice John Marshall and became an ardent champion of the very philosophy of government he was supposed to fight. Consequently, he often was depicted as a political turn-coat—never a very endearing picture. Much hated by Jefferson in his day, Story has been an enemy of all champions of states' rights ever since. Along the way, his work on the Supreme Court was also often down-played, and he was rather condescendingly dismissed as John Marshall's pedantic, slightly obsequious, certainly intellectually inferior junior colleague.

Certainly Story did not always cut a very attractive figure, and so he came to be known to, and dismissed by many readers of American History. Rather than tangle with him as a legal thinker, most commentators focused on his political activities and regarded his legal works, like his politics, as reflections of his class and party biases. In other words, he was stereotyped and forgotten.

Insofar as Story's historic image reflected, and depended upon, political considerations, interest in him has reflected the winds of political change. At times during which the role of the Federal Government vis-a-vis that of the states was a burning issue, he was resuscitated—and lionized or castigated, according to one's political preferences. Likewise, in periods during which economic questions dominated the political arena, he was depicted as a dogged champion of property and "business" interests—and, once again, praised or berated according to the appraiser's views on those matters. Recent generations of history students know him best as the author of a celebrated opinion in the *Charles River Bridge* case, and most modern jurisprudence students remember him chiefly as the judge whose theory of law in *Swift v. Tyson* inspired Holmes' celebrated dictum that law is *not* "a brooding omnipresence in the sky" and caused endless

confusion until it was finally overruled by *Erie Railroad Co. v. Tompkins*.

The consequence of the widespread tendency of historians to focus on Story's political ideas and activities is that his contribution to our jurisprudence has gone largely unappreciated. And, once again, the reason is perfectly clear. Much of his most enduring influence involved scholarship of a kind that attracted little attention precisely because it dealt with lawyer's law—such subjects as bailments, agency, general average, promissory notes and partnerships. Few historians were tempted to explore such matters. And the lawyers that might be interested were not inclined to spend their valuable time speculating about his (or any other deceased judge's) contribution to American law and jurisprudence.

So it was that, except for a few isolated articles on his influence in specific fields of law—such as conflicts and patents—Joseph Story slumbered the undisturbed sleep of those whose work comes to an end when they are laid to rest. For more than a century after his death in 1845, his place in our history languished; and by the 1920s, only a few lawyers, most notably Roscoe Pound, suspected that his place in the history of American law might be seriously underrated.

During the last twenty or so years, Story's star has begun to rise again. And it must be said that it was not until lawyers—that is, persons themselves trained in our legal tradition—took on the task of exploring and assaying the corpus of his work that a new (and largely unsuspected) Joseph Story began to emerge.

One of the first signs that a change might be coming was a modest collection of writings by and about Story published in 1959 by two lawyers, M.D. Schwartz and J.C. Hogan. They simply could not understand why, as of that time, "there has never been an adequate biography written about" one of the outstanding men in American judicial history. They thus stepped into the breach, offering to the public a stop-gap sampler. Later, starting in the 1960s, Story found his first modern biographer, Gerald T. Dunne, a lawyer who previously had written a number of articles on specific aspects of Story's legal work. In 1970 he published *Justice Joseph Story and the Rise of the Supreme Court*. The book opened a door as well as many eyes.

Since Dunne's book appeared, Story has enjoyed a minor revival. Both historians interested in law and lawyers interested in history have turned to him with a new sense of purpose. Of course, some of the modern attention is but a replay of the old-style political history. But a few modern scholars seem to be doing something quite different. In 1985, R. Kent Newmeyer (who was quoted at the beginning of this article) published a splendid biography—an intellectual biography, really—that makes it possible for the modern reader to get a sense of the quality of Story's mind, including his infectious love for the law that pervades everything he touched. Another contemporary scholar, H. Jefferson Powell, currently is reexamining Story's constitutional theory and ideas about the "science of law" with impressive intellectual seriousness and sophistication. After many generations of purblind neglect, it may be that Joseph

Story, the legal thinker, is finally getting the attention he deserves.

If one looks to Story as a legal thinker, rather than as a political animal caught up in a power struggle, one is not denying that a political struggle was going on. Nor can one deny that he, like all responsible citizens in a democracy, was greatly concerned about the outcome of that struggle. One may confidently assert, however, that he, unlike countless others caught up in that struggle with him, had developed his own ideas about the role law should play in the new Republic. Moreover, Story welded those ideas into a coherent whole (perhaps "vision" is a better word), which he spent his life trying to transform into reality.

In this sense, Story was making a genuine contribution to American jurisprudence, for he wrestled with the most basic of all jurisprudential questions: What is law? What forms should it take? Who should administer it? And to what ends? Moreover, he did so at a time when a new Nation was coming into being. Hence he was not simply speculating in an ivory tower about these age-old issues. Nor was he, like so many of his reform-minded contemporaries abroad, doing so in the cloying context of deeply rooted customs and vested interests that sharply curtailed the practical likelihood of any one generation accomplishing major social change. Rather, he worked in circumstances that made creating a nation from scratch appear to be imperative; and if the new Nation's slate were something other than a *tabula rasa*, it was still the closest thing to it in the mind and memory of Western Europeans.

To these unique circumstances Story brought the elements necessary for building a legal system: (i) a comprehensive vision of the role of law in society; (ii) a masterly command of the technical aspects of "lawyer's law"; and (iii) the capacity (including the desire) to express his thoughts in ways likely to reach the greatest number of his compatriots capable of translating his vision of law into a workable legal system. And to these three necessary attributes Story added a sense of time, meaning an awareness of the past that made him approach contemporary American law not in the abstract of "pure" thought, but in a specific historical context (that is, that of the common law of England), and a concern for the future (which gave him the patience to seek long-term as well as immediate means in trying to fulfill his vision). Each of these several attributes deserve more comment.

#### A. *Story's Vision Of The Role Of Law In America*

Story's vision of law and its place in the new world was no idle dream. Nor was it solely the product of his philosophical speculation. It was, rather, the result of his deep immersion in the traditional legal learning of his times, most of which was English. Story was probably the Nation's foremost authority on the English common law of his day. But his vision of law reflected more than learning. It also reflected his poetic nature, not in a penchant for insipid versification or romantic rapture one is perhaps wont to associate with that much maligned attribute, but with an

enlarged awareness of the splendor of the object of his closest attention. In fact, he sublimated law to the highest reaches of human experience, as his Puritanical ancestors did the Deity. He undoubtedly believed law was the new Republic's saviour.

The "law" that Story sublimated—and that became the essence of his vision of the American future—may be found to embrace at least three diverse components, each of which complemented the others. First, he had a clear conception of "law in general." Second, he held strong convictions as to the role that law should play in a nation with a republican form of government. And, finally, he held a cluster of practical ideas about the United States legal system under the Constitution. Any attempt to explain Story's life work, therefore, including his ideas about equity jurisprudence, must start with a comment on these three basic components of his vision (and version) of law.

### 1. Story's Concept of "Law"

Story was deeply committed to the natural law theory that dominated orthodox legal thought on the Continent in the eighteenth century. Expounded by such influential authors as Grotius and Samuel Puffendorf and their numerous popularizers, including J.J. Burlamaqui (upon whom Blackstone based his famous first chapter of the *Commentaries* entitled "Of Law in General"), the natural law theory was well known in this country. It characterized law as an hierarchical pyramid. At the top, and hence the highest authority, was divine law. Below that, in descending authority, were the law of nature and the law of nations. At the bottom was municipal law (that is, the domestic law of sovereign nations). The legitimacy of any given law—whatever its place in the hierarchy—depended upon it being compatible with all the forms of law above it. Thus, no municipal law (of, for example, the United States) was binding if it clashed with the law of nations, the law of nature, or divine law. Such a "law" would not be bad law: it would not be law at all.

As a result of Story's commitment to natural law, he was never a "legal nationalist." In fact, he always assumed U.S. law, as a whole, to be a system of municipal law firmly anchored at the bottom of the natural law pyramid. Thus, he believed its legitimacy depended in the first instance (even before Constitutional considerations) on its compatibility with the several forms of (non-U.S.) law ranking "higher" in the natural law hierarchy (including, as he intimated in *Swift v. Tyson*, the law merchant, a body of customary law recognized by all civilized nations, which governed such important matters as the negotiability of commercial paper.)

Story's natural law proclivities will be seen to have direct, if (for reasons to be discussed) largely inconsequential effects on his treatment of equity, a subject long associated with natural law. Still, his basic vision of law in America, which subordinated all human law to both religion (divine law) and morality (the law of nature), was widely shared in this country; and undoubtedly that belief was of great practical value in

building a viable legal system in the turbulent early life of the Republic. For Story's vision gave American law a badly needed claim to legitimacy among a society of persons not totally committed to the habit of deferring to law as such, and certainly not to law made by politicians in Washington or anywhere else.

Be that as it may, it is not surprising that Story, believing so strongly that the legitimacy of law is derived from both religion and morality, vehemently denied Jefferson's suggestion that Christianity might not be a part of the common law. To Story, the issue was not so much a matter of religion as it was one of the legitimacy of law. As an advocate of natural law, he saw that this Nation's new, still struggling legal system had an urgent need for more than the pure reason of positive law, whether in the form of a Constitution, legislation, or judicial decisions. Story thought it needed a kind of authority greater than any group of mortals could bestow upon it.

## 2. Story's Ideas About The Role Of Law In Free Nations Based on the Republican Form of Government

In one sense Story assumed the "rule of law" (a phrase popularized only at the end of the nineteenth century, long after Story's death) included all the commandments, prohibitions and injunctions he, with his New England background, associated with civility and high-mindedness. But Story was also an American Unitarian familiar with the tortured history of religious persecution in both England and Massachusetts. As such, he shared with most of his countrymen an unholy fear of religion administered as law, and law administered as religion, by a clergy. In his opinion, a republican form of government presupposed that "the people" were sovereign of their own (that is, municipal) law and, further, that their law, insofar as it was consistent with the natural law, would define the legitimate limits of their freedom. Moreover, he believed it was the right and duty (as well as privilege) of free men, exercising their free will—tempered, of course, by reason, common sense and self-interest—to govern themselves through laws of their own making.

Thus, he believed that self-government was the most appropriate form of governance for freemen. But he seems to have assumed that freemen would, as a matter of course, govern themselves by laws that reflected the "higher" authority of natural law, including the moral values shared by persons of his own background and class. Naturally, therefore, he became deeply depressed in the 1830s—the so-called "Age of Jackson"—when his worst fears appeared to have materialized: control of the U.S. (federal) government fell to the uncouth and semiliterate followers of Andrew Jackson. In his view, the least civilized and responsible elements of society—the dreaded "mob"—would not hesitate to use the lawmaking authority inherent in a republic to pursue their own corrupt ends, uninhibited by the "higher" forms of law, religion and morality. To him, the prospect of human beings, however free, using law indiscriminately and

irresponsibly was utterly revolting. For he believed that the essence of "freedom" was not license and anarchy but discipline imposed by means appropriate to a "free man." That is, freedom meant being governed by laws compatible with and reflecting the dictates of conscience, virtue, and common sense.

Thus, an important aspect of Story's commitment to law was his idealized conviction that the only really suitable form of government for a nation of free men is a republic in which responsible representatives of the people make and enforce their own laws. That they might use their freedom to evade their obligations to the "higher" law, or to enact unworthy laws, only showed how important a proper understanding of the nature of law really is. He thus made it his personal responsibility to battle ignorance and misguided ideas about law wherever they appeared. More important, he also made it his duty to instruct his fellowmen in this all important matter.

### 3. Story's Vision Of The Role Of Law In The United States

Story is recognized as an ardent champion of the United States Constitution and American Federalism. His devotion to natural law and its effect on his legal thought has, however, attracted rather less attention. In fact, his attitudes towards both the Constitution and our legal system bore an uncanny resemblance to his version of natural law.

Because divine law stood at the pinnacle of Story's natural law pyramid, so, in his opinion, the Constitution stood at the apex of our system of municipal law. The municipal law hierarchy descended from the *laws* (the Constitution, federal law, state law, and local law), to the *lawmaking bodies* (Congress, state legislatures, and county or city boards), to the *courts* (federal and state, trial and appellate), each forming hierarchies within one vast federal hierarchy.

Likewise, the relationship between the law of the several states and federal law mirrored the relationship between the law of all nations, including the United States, and the law of nature or the law of God. The legitimacy of *all* such laws—state, on the one hand, and national/municipal, on the other—depended upon their compatibility with the law "above" them in their respective hierarchies. Therefore, any U.S. law, state or federal, that clashed with our "highest" law (the Constitution) came to be regarded in the same manner that natural law advocates regarded human law that clashed with the law of God: it was *ultra vires* and hence not law at all.

Story's conclusion, it should be noted, did not come from England or the "common law tradition." Though the notion of an independent judiciary was clearly and unmistakably English in origin, the common-law courts did not presume either to invalidate or to ignore statutes.

Despite Story's early political affiliations with the states'-rights Jeffersonians (to whom, indeed, he owed his seat on the Supreme Court), his vision of the role of law in this country came, increasingly, to resemble



a kind of natural-law federalism. Moreover, with the Constitution as the highest and most authoritative law, and the federal government vested with the power to govern the nation "through law," Story sensed more clearly than most the strategic and tactical importance law and the legal profession must necessarily play in the future of the Nation. He therefore devoted his best efforts to improving both.

*B. Story's Mastery of the Lawyerly Details of Private (Mostly Common) Law*

Story was obviously a man of vision; and his vision was tinged by his love of the esoteric, the exotic, and the lofty. Thus, his works are peppered with allusions to foreign (especially Roman) law and to the works of obscure continental authors. His readers cannot fail to be impressed with his easy familiarity with a huge body of such arcane knowledge. He wore the cloak of learning lightly and elegantly.

But Story was bred in the common law and, despite trappings and flourishes from further afield, his commanding knowledge was in English case law. Like a Bencher of one of the Inns of Court, or perhaps a Serjeant, he seems to have lived the common law so fully that it became a part of his person—an ancient tradition that could (in the old phrase) "be learned but not taught." He always seemed to have hundreds of cases, their citations and holdings, the names and reputations of the judges, and the reliability of the reporters all on tap, available for instant recall. According to an oft-told, probably apocryphal tale, John Marshall was in the habit of deliberating on difficult cases, striking like lightning to the heart of the matter, and reaching an immediate decision. "Defendant wins," he would say. "Mr. Justice Story will give the reasons why." And, sure enough, he would, in thirty closely-reasoned pages studded with dozens of citations.

Many, probably most of Story's readers cared little about his "vision" of law. But his law books were marvelously clear, well organized, straightforward in exposition, and chock-full of cases. So much so that no less an authority than T.F.T. Plucknett tells us that they contributed mightily to the emergence of what he called "the modern legal textbook," a kind of law book which had no counterpart in the literature of English law before his day. Here is Plucknett's description of the *genre*:

It begins with a definition of its subject matter, and proceeds by logical and systematic stages to cover the whole field. The result is to present the law in a strictly deductive framework, with the implication that in the beginning there were principles, and that in the end those principles were found to cover a large multitude of cases deductible from them. Needless to say, such a presentation of English law was fundamentally false during most of its history. . . .

Such was the style of Story's *Commentaries*. American lawyers, and more than a few English lawyers as well, found them eminently useful.

As a result, they bought them in great numbers. Of course, most lawyers did not read his books because they fancied his lofty ideas about natural law or his quixotic notions about a "science of law." Instead, they were interested in the dozens of cases he collected and arranged according to his own wonderfully useful organizing scheme. Regardless of their motivation, however, lawyers read Story's books, and that is the point: Story's vision of law was interlarded with lawyer's law so thoroughly and so naturally that countless hardheaded lawyers found his books indispensable. Without even knowing it, they became his agents, carrying his ideas and his vision into practice.

*C. Story's Willingness and Ability to Publicize and Disseminate His Ideas*

Story's ability to translate his vision of law into more than an idle dream greatly was enhanced by his temperament. He was of solid Puritan stock, and he appears to have been a born New England schoolmaster. His subject, however, was American law rather than the catechism, and his classroom was not confined to any one school, not even to Harvard. He was teacher to a Nation. And he was always teaching. As a member of the United States Supreme Court, he handed down opinions that were, on matters of general interest, often lectures on the duties of good citizenship directed to the literate public. On more technical points of law, he tended to deliver learned discourses, rather like law review articles, aimed at instructing the bar.

Likewise, as a legal commentator, Story addressed practicing lawyers in the language they could best understand. Being a good teacher, he did not aim too high. Knowing that the standards of legal education in this country were then abysmally low, he was at pains to speak clearly and, like a teacher instructing a class of mature but intellectually unsophisticated adults, he sensed his students' need for something solid and unambiguous. He therefore gave them black letter law even if there was none. But he also gave them more. He sought to familiarize his countless unknown reader/students with general principles, and to identify difficult issues while plying them with a plethora of elegant and impeccable "authorities" upon which they, as practioners, could base their own cases. At the same time, he helped build, through them, a respectable body of precedent throughout the land.

But it was undoubtedly as a law professor that Story was most at home. Surrounded by young men with proven academic ability, intellectual ambition, and good personal prospects, he must have felt like Blackstone lecturing to the scions of the English squirearchy in eighteenth century Oxford. The flower of the Nation's youth were in his Harvard classroom and, through them, he had the opportunity to train a class of lawyers equal to the learned jurisconsults of Rome and the proud barristers of England.

Such was his goal for this most favored group. But they would have to be trained in ways appropriate for a Nation in which law was destined

to play a unique role. Indeed, they would have to study law as a "science" to understand it fully and to be able to make it serve the Nation most effectively. Story also realized that such an undertaking necessitated a permanent institution with a carefully crafted curriculum dedicated to this important task. He made the still ill-formed Harvard Law School of the 1830s and 1840s the receptacle of his hopes and the embodiment of his vision. During the 1870s, scarcely a generation after his death, the Harvard Law School became, under the inspired leadership of Dean Christopher Columbus Langdell, the fulfillment of Story's dream. Langdell made it an institution dedicated to the study of law as a science and to training a cadre of lawyers capable of assuming leadership of the American bar and determining the course and direction of legal change. There the spirit of Story lived on.

Story the law teacher educated a nation about the virtues, the mysteries, and the mission of law. For more than forty years he spread his message as widely, in as many ways, and to as many different types of persons as he could. Being a natural teacher, he managed to convey to all of them some of his own enthusiasm for law. No one knows how, or how many "students" he touched. There is, however, every reason to believe that our Nation and our law are both richer for his efforts.

## II.

Such was the manner of a man who, in 1835, published a two-volume treatise entitled *Commentaries on Equity Jurisprudence as Administered in England and America*. The book was an instant success, and a second edition came out in 1839. Other editions followed in 1843, 1846, 1853, 1857, 1861, 1866, 1870, 1873, 1877, 1886, and lastly in 1918. The treatise also was published in London in 1839, 1892, and 1920; and John N. Pomeroy, whose treatise on the same subject gradually replaced Story's as the standard work in this country, noted that Story's was "one of the few American law books that is frequently cited by the English courts." (Pomeroy made this concession, however, only after dismissing Story's treatise with the faintest of faint praise: "It presents the results of the English cases up to its date with all its famous author's learning, gracefulness of literary style, and entire absence of originality.")

In 1838 Story published what he called "an appropriate sequel to my former work on Equity Jurisprudence." He was referring to his treatise entitled *Commentaries on Equity Pleadings, and the Incident Thereof, According to the Practice of the Courts of Equity, of America and England*. As suggested earlier, Story, the teacher, was always conscious of the wants, needs, and limitations of his students. In this instance, he was sensitive to the needs of the practicing bar. Undoubtedly he feared that his earlier work, *Equity Jurisprudence*, which was essentially an exposition of the leading principles of "an important branch of the science of law," may have been too abstract for some of his more practice-oriented student/readers. Hence, in the second book he brought the

abstract subject down to earth. Leaving nothing to chance, he set out to connect the previously illuminated principles with the actual forms of proceedings followed in the courts of equity. Once again, he accurately gauged the needs of the students in his extended classroom. Only two years later, in 1838, a second edition was called for, and subsequent editions followed in 1840, 1844, 1848, 1852, 1865, 1879, and 1892.

Clearly, Joseph Story had a major impact on equity jurisprudence in this country. Hence, we must consider the importance he ascribed to the subject, as well as his approach to it.

Two points must be borne in mind. First, Story published *Commentaries* on subjects other than equity. In addition to equity jurisprudence and equity pleadings, he wrote on bailments, the Constitution, conflict of laws, agency, partnership, bills of exchange, and promissory notes. Second, his interest in equity began very early in his legal career and continued with remarkable persistence for some forty years. As both of these points bear on his decision to publish his treatise on *Equity Jurisprudence*, a word about each is in order.

#### A. *Circumstances Leading to Story's Commentaries*

In 1829, while still an active member of the United States Supreme Court, Story accepted the newly created Dane Chair in Law at Harvard University. The Chair was endowed by Nathan Dane (1752-1835) from funds he had earned from his own legal publications. Dane made the gift to Harvard contingent upon Story becoming the first incumbent.

Undoubtedly, one reason Story accepted the added burden of lecturing while sitting on the Supreme Court was his tremendous intellectual energy. A fast and astonishingly efficient worker, Story, like Justice William O. Douglas of a later era, simply found that his judicial duties did not keep him fully occupied. There was, however, another more melancholy reason. Story was disturbed by the rising tide of popularism that became ever more evident in Washington during the late 1820s and reached a triumphant peak in 1828 when Jackson won the presidential election. As stated earlier, Story found these roiling circumstances most depressing. The Dane Professorship provided him a welcomed opportunity to spend more time in Cambridge among promising law students. Not surprisingly, therefore, Story returned to Harvard, on a part time basis, the same year Jackson moved into the White House.

In his Inaugural Lecture at Harvard, Story noted that "the duties of the Dane Professorship are, in the first instance, to deliver lectures upon the Law of Nature, the Law of Nations, Maritime and Commercial Law, Equity Law, and lastly the Constitution of the United States." And so he did. Between 1832 and 1845 Story faithfully published his professorial lectures in the form of nine treatises which, collectively, make up his celebrated *Commentaries on American Law*. The subject matter obviously tracked the "duties" Dane imposed upon the incumbent of the Chair he had created. It also reflected the natural law hierarchy to which Story was so deeply committed.

The circumstances surrounding Story's appointment to the Dane Chair raise two immediate questions: Why did Dane wish to endow a law chair at all? and, more particularly, Why did he insist that Story, and only Story, could hold it? These questions deserve brief comment.

The answer to the first question is that Dane was keenly aware of the chaotic state of American (and English) law. He knew that the traditional common law mode of reasoning produced an unending array of details about individual cases. He also knew that those very details concealed the basic principles of our law from even the most experienced lawyers. Consequently, law students were poorly trained, lawyers represented their clients inadequately, and judges often failed to do justice to the parties and to the legal system itself. In his view, the promise of American law was being dissipated and lost in the masses of undigested statutes and decisions issuing from the welter of U.S. and English jurisdictions.

Dane knew of what he spoke. For some forty years, beginning in 1795, he had been an indefatigable student of American law. Following the tradition of English legal scholarship, he had pursued the subject relentlessly through dozens and dozens of individual cases and statutes, and he had struggled to find in them some kind of order and underlying general principles. Finally, in 1823, he managed to bring his herculean labors to an end: he published, in eight volumes, his *General Abridgment and Digest of American Law*. A ninth, and final, volume appeared in 1829.

Weary from his efforts, Dane knew that he had not solved the problem. He also knew that it would not go away. What was still desperately needed was an overview of the entire legal system, broad in outline and accurate in detail, based on clearly identified principles, with its various parts integrated into a coherent whole. But who had the necessary learning, creative energy, mental discipline, and philosophic outlook to take on such an enterprise?

The answer, of course, was Story, a long-time acquaintance of Dane and a fellow worker in the tangled field of legal scholarship. Dane long had admired Story, but the inspiration to name him to the new chair may have come from a review Story published of Dane's *Digest* in 1826. It was no ordinary review. Rather, it was a critical survey of the traditional forms of Anglo-American legal literature, including commonplace books and abridgments, as well as digests. Story thus discussed Dane's work in the context of a long line of legal scholars (which Story traced back to "the earliest abridgment of the law" by Nicholas Stratham, c.1468), endeavoring to summarize or restate in systematic form the (unwritten) common law.

Dane realized that the author of the article, Story, was sympathetically aware of the problem with which he, Dane, had so long struggled. He must also have sensed that Story was the one man capable of doing for American law what Sir William Blackstone had done for English law. Dane took the necessary steps to make sure that Story did it.

As was well known at the time, Blackstone's epoch-making *Commentaries on the Laws of England*, published between 1765 and 1769, had

first taken the form of lectures delivered in Oxford. The remarkable success of those lectures inspired Charles Viner to create a chair (bearing the donor's name) in order to assure that Blackstone would be financially able to continue giving his lectures. And from that bit of largesse issued one of the greatest law books in history.

Viner, like Dane himself, had been an old-fashioned legal scholar who, between 1741 and 1756, had published a *Compendium of English Law*, in 23 volumes. Story had referred to Viner's work in his article about Dane's *Digest*, even repeating the saga of Blackstone and the Viner Chair. But there was an even more pertinent and poignant parallel between Viner and Dane. Despite their heroic efforts to clarify the common law, both Viner and Dane knew that they had been less than successful. (Story had pronounced Viner's work "both long and confused.") And it was, at bottom, their enlarged awareness of the hopelessly disorganized state of the common law, together with a keen sense of the failure of their own efforts to remedy the situation, that drove these two veterans of traditional forms of legal scholarship to create university chairs for the study of law. It is no coincidence that they both did so out of their earnings from their legal publications. True scholars that they were, they were humbly returning their profits to law itself, the subject to which they were dedicated, to be put to new and more productive purposes.

Be that as it may, there is no doubt that Dane was well aware of Story's rare, Blackstone-like ability to make law intelligible and coherent, and that he decided to emulate Viner by endowing a chair (also out of the earnings from a *Digest*) for the American Blackstone.

### B. Story's Preoccupation with Equity

From the beginning of his legal career Story had a persistent interest in equity. In 1807, when he had been a member of the Essex County, Massachusetts bar for only six years, and had been elected to the Massachusetts House of Representatives, he chaired a committee and drafted a bill that called for the creation of a court of equity in the Commonwealth. The bill failed. In 1820, while a member of the United States Supreme Court, he served as a delegate to the Massachusetts Constitutional Convention. Once again he raised the issue of creating a court of equity in Massachusetts. This time, as chairman of the Commission on the Judiciary, he drafted a four point proposal for judicial reform. One point gave the state courts equity jurisdiction. Again the measure failed.

Later that same year he wrote a lengthy article entitled *Chancery Jurisdiction* in the *North American Review*. The occasion for the article was the recent publication of *Johnson's New York Chancery Reports*, consisting, for the most part, of cases decided by Chancellor Edward Kent. In the article Story took the opportunity to extol the virtues of equity as administered in New York under the rigorous discipline of the strong-willed Kent. Story clearly hoped other states, including his own, would adopt or emulate the New York model.

Ten years later, in 1830, Story contributed a brief article entitled *Equity* to the multivolumed *Encyclopedia Americana*, which was edited by his friend, Francis Lieber, a struggling young German emigre scholar. Shortly thereafter he began publishing his Dane lectures, and in 1835 and 1838 his two *Commentaries* on equity (*Equity Jurisprudence* and *Equity Pleadings*) appeared.

It is clear that Story had a long and continuing interest in equity. Our final inquiry, therefore, must be to explore briefly the nature of that interest and its significance to his larger vision of the role of law in America.

### III.

Even in Story's day equity had long been a problem for Americans. It had been a problem for Englishmen for a much longer time. And it has *always* been a problem for human beings living under any kind of law. To understand Story's treatment of this bedeviled subject, we must briefly consider, first, the general problem of law and equity and, second, the form it took in England. Then we shall consider equity in the new world.

#### A. *The Problem of Law and Equity: Two Paradigms*

The basic difficulty in grasping the nature of the relationship between law and equity has to do with the definition of the word "law." Law implies universality and uniformity. Life, however, is lived by individuals who differ from each other in their genetic makeup, social background, education, and the circumstances in which they find themselves at any given time. The problem, therefore, is whether law, with its intrinsic indifference to such differences, can be imposed upon a society of unique individuals without tyrannizing some of them.

Two sharply different approaches to the problem emerged in the ancient world. Plato observed that no universal rule could be applied uniformly to individuals without causing, in some cases, unjust hardship. He suggested, therefore, that the very idea of law forces us to make a difficult choice. We must either impose the law blindly, disregarding all extenuating factors, and treat everyone as if they are the same, or we must make "exception" to the law, thereby undercutting its authority and indeed its reason for being. In Plato's view there was no solution to the dilemma. He thought that if the integrity of law was to be upheld, the only course of action was to impose the law to the letter. If rigid application of the law led to unjust hardship, Plato thought there should be an authority or source of relief *outside* the law and the legal system altogether, to which the deserving victims of law could appeal for relief. Such extralegal relief is a form of "equity."

Aristotle begged to differ with Plato. Aristotle said that if law is administered "justly," rather than blindly, there is no need to go outside the legal system for relief. He thought that judges had a duty to make

distinctions and to draw delicate lines in considering the unique circumstances of each case coming before them. Implicit in Aristotle's approach is the idea that judges do more than apply the rules of law mechanically. In applying the law to the situation, Aristotle believed judges added an indispensable humanizing factor to the legal process. That extra factor, by which judges save law from its own rigidity and injustices, is also a form of "equity." Hence, much confusion existed.

These two paradigmatic forms of "equity"—Plato's extralegal version and Aristotle's legal (or really judicial) kind—are still with us. Even today, if our law causes grave injustices or fails to give justice we demand something more (or less) than law, strictly speaking. That "something," a congenitally missing "X" factor which, when added to law, will bring it closer to justice, is the quintessential equity. In this sense "equity" is really a talismanic symbol in the basic legal equation: Law + Equity = Justice. What form equity takes and what name we give it differs from time to time and from place to place. But so long as law falls short of justice, as it must, there will always be demands for equity.

While philosophers differ widely as to the meaning of such slippery terms as "law," "justice," and "equity," societies and everyday lawyers have been forced to define them empirically. That is, having established a legal system, they have developed (consciously or otherwise) some variation of the Platonic or the Aristotelian form of equity to make their legal systems work more effectively, if not more justly. By so doing, they have defined "equity" in fact, if not in theory.

One important part of understanding our (or any) legal system is, therefore, to be aware of the basic paradigm of equity adopted by a given legal system, and any variations and changes in its forms, because legal systems can and do change through time. As they become more complex, they generate new and more complex forms of law. The new forms of law, no less than the old, demand new forms of equity.

### *B. Equity in England*

For historical reasons too intricate to discuss here, England adopted the Platonic paradigm. That is, the Crown—rather than the judges—came to be the source of (extralegal) equitable relief.

The medieval kingship was widely assumed to be "the fountain of justice." Not law, but justice. In theory, the king delegated his responsibility over law to the judges. If parties found no justice in law, they had recourse to the king (with his residual powers over law and his higher obligation to see that justice was done) for relief from the injustices or shortcomings of law itself. The king was, in short, the extralegal source of Platonic equity.

In time the king delegated responsibility for such matters to his chancellor, who was often called "the keeper of the king's conscience." Gradually, there grew up around the chancellor a court with its own jurisdiction. As most chancellors were clergymen trained in canon and



Roman (rather than the common) law, they developed a quasi-legal system fundamentally different from the common-law system. In the first place, they adopted procedures appropriate to humble supplicants praying for relief (rather than plaintiffs demanding their legal rights, as in the common law courts). Second, as the relief was given in the discretion of the Crown, the petitioners had no right to a jury trial and, in fact, the proceedings were carried out wholly in writing. Finally, the chancellors only took jurisdiction over the individuals, not the legal "cause of action" involved, and accordingly they framed remedies, derived from canon law with its concern about things spiritual, including matters of conscience and motive, that were suitable for their unique *in personam* jurisdiction.

The Court of Chancery, as it was called, thus became the major forum in which the "equity" powers of the Crown were put into use, though several other "prerogative" courts—such as the Court of the Exchequer Chamber, the Court of Requests, and the Star Chamber—also exercised, in a more limited context, the equitable powers of the Crown. The chancellor and the chancery also had other functions, many of which were not of an equitable but of an administrative nature. Nevertheless, in England the term "equity" came to refer loosely to proceedings in the chancellor's court.

Thus, in England the early established (Platonic) version of equity—a supplementary source of extralegal relief from injustice caused by law itself—gradually crystalized into a second legal system with its own distinct jurisdiction, procedures, and remedies. As an emerging legal system it faced the basic problem common to all other legal systems: that is, whether its law (chancery-law equity) should consist of lawlike rules that promoted certainty and predictability, or whether it should take the form of ad hoc determinations tailored to fit the circumstances of each particular case. Of course, the more it tended towards the former, the less it resembled, or served the function of equity.

For reasons more closely related to political history than to legal philosophy, powerful forces transformed the equity administered by the chancery into an ever more legalistic form of chancery law. One such force was the pressure from the common law bench and bar.

As might be expected, the existence of an institution resembling a second court system stimulated intense, often unseemly rivalry with the common law court system. The fact that the early chancellors were clergymen, trained in a noncommon law (Roman canon) legal tradition, added suspicion, hostility, and a full measure of misunderstanding to the rivalry. Moreover, because of chancery's historic concern for matters of trust and fiduciary relationships, and its capacity (through special masters and administrators) to deal with complicated trusts, large landowners came to prefer chancery to the clumsier and less flexible common law courts. It has been said that, by the seventeenth century, one out of every five of the great estates of England came under the scrutiny of the Chancellor every generation.

Clearly chancery, with its royal connections, was a serious rival, and indeed a threat to the common law itself, but it had become too important

to be summarily abolished. Accordingly, the common law lawyers launched a long campaign to transform the Court of Chancery into a veritable common-law court. They continued to get common law lawyers named Chancellor, they demanded that chancery decisions be reported and followed as precedent, and they sought to define (and delimit) the scope of chancery jurisdiction strictly in legal terms. The movement reached its logical climax in 1818 when the Lord Chancellor asserted in a celebrated dictum in *Gee v. Pritchard*, 2 Swanst. 414 (1818) that:

The doctrines of this court ought to be as well settled, and made as uniform *almost* as those of the common law, *laying down fixed principles*, but taking care that they are to be applied according to the circumstances of each particular case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

Equity had become, in short, as legalistic as law. England had two legal systems, one called chancery. Whether it had any equity is an open question.

As a result of this lawyer-led movement, the ancient equity problem underwent a remarkable turnabout. The traditional quasi-moral question of how to make law more just through some form of equity was translated into a legal problem of how to make the Court of Chancery and its equity jurisdiction conform more closely to the legal standards of the law courts (that is, universality and uniformity of application and predictability). The original reason for having anything called "equity"—that is, to allay the hardships caused by the nature of law itself—seems to have been lost.

By the early nineteenth century, when the United States was just coming into being and Story was deeply concerned about the role equity should play in the new Nation, many people in England thought that, for whatever reason, England had two legal systems, not one. It had thereby more than doubled its legal woes for the second system—commonly referred to as "equity" or "chancery"—was both costly and grotesquely inefficient. Indeed, the state of English equity at that time was widely thought to be a national disgrace. Readers of Charles Dickens's *Bleak House* readily will agree. Jeremy Bentham summed up its evils in three words: expense, delay, and vexation.

Moreover, by Story's day, English equity had become closely identified with one particular Chancellor, Lord Eldon, who sat on the woosack from 1801 to 1827. Often called the "best hated man in Britain," he was described by Walter Bagehot (in an essay written a generation after his death) as follows:

As for Lord Eldon, it is the most difficult thing in the world to believe that there ever was such a man; it only shows how intense historical evidence is, that no one really doubts it. He believed in

everything which it is impossible to believe in—in the danger of Parliamentary Reform, the danger of Catholic Emancipation, the danger of altering the Court of Chancery, the danger of altering the courts of law, the danger of abolishing capital punishment for trivial thefts, the danger of making land-owners pay their debts, the danger of making anything more, the danger of making anything less.

It is little wonder that in England the term “equity” had become a very bad joke.

Such was the fate of chancery-law equity in England. The fate of *other* forms of equity, especially Aristotle’s spirit of justice *within* the law, is perhaps more problematic. Suffice it to say that in 1952 Lord Denning, who was then Master of the Rolls, called for a “new equity.” In his words: “There must rise up another Bentham to expose the fallacies and failings of the past and to point the way to a new age and a new equity.”

### C. *Equity in the New World*

Equity was troublesome to Americans from Colonial times. One problem was its historic association with the Crown. As stated earlier, equity stemmed from the king as “the fountain of justice.” Thus, the perceived value of crown-equity, whether administered by the king personally or through his chancellor, depended, at bottom, on attitudes towards the Crown. So long as the medieval notion of kingship prevailed, faith in (or deference to) the king and his judgment was a compelling reality. Royal prerogatives and broad discretion, including the authority to intervene in the judicial process to make law just, were accepted as inherent in royal power. Once faith in the kingship came into question, however, such exercises of power appeared in the eyes of many to be arbitrary, capricious, and tyrannical.

The kingship ideal was shattered in England during the seventeenth century. One king lost his head and yet another fled from his throne. Out of the turmoil rose a new form of government, a bicameral parliamentary system, bolstered by the elegant fiction that “the king in Parliament” is sovereign. The rise of Parliamentary Sovereignty had been materially aided by members of the common law bench and bar. One of their main enemies had been their rivals, the (royal) prerogative courts, one of which was the Court of Chancery. The champions of the common law—including John Sleden, Lord Coke, and Sir Matthew Hale—deplored royal intervention in the judicial process for whatever reason. Through Parliament they abolished the worst offenders, including the Court of the Star Chamber and the Court of Requests. A bill to abolish chancery was introduced but not acted upon, probably because the work of that court had become, practically speaking, too important to trifle with.

Be that as it may, chancery and equity had become firmly associated in the public mind with the king’s arbitrary and capricious abuse of power.

At the same time, the common law, under the spirited leadership of Lord Coke, became linked with the virtues of the Ancient Constitution, Magna Carta, and opposition to an unpopular king. It was touted as England's bulwark against tyranny.

Many colonists in America who favored Parliament instead of the Stuart kings became, if not champions of the common law, detesters of the Crown and everything associated with it, including the chancellor and chancery. For purely political reasons, therefore, equity started off in this country with a black eye. Also, the fact that one of the most common grievances in the colonies was the arbitrary and capricious behavior of Crown officials (precisely the same criticism leveled at English chancery law) did little to promote equity's popularity or good name.

It also has been suggested that New Englanders, especially, with their strong Puritanical heritage, may have resisted any law-related institution purporting to probe the consciences of men, as equity surely does. (One of the most curious aspects of the history of English equity is how it started with an appeal to the king's conscience and ended up weighing that of the parties.) Certainly religious zealots that fled their homeland rather than submit to the dogmas of the Anglican church were not likely to expose their consciences to the scrutiny of chancellors or any other representatives of the Crown.

For whatever reasons, however, American Colonial attitudes towards equity were bound up with English tradition and, generally speaking, the forms equity took in the new world mirrored local attitudes toward England itself. Thus, in those colonies, and later states, that had a powerful class of leaders who identified closely with the mother country—such as Virginia, South Carolina, and to a lesser degree New York—the home system was replicated: a separate court of chancery with traditional English chancery jurisdiction, presided over by a chancellor, was established. In colonies in which the dominant classes were strongly hostile to England and things English—such as those in New England—the English chancery model was rejected altogether or in large part, and equity—not chancery law but equity—was sought in other, perhaps more appropriate ways. In some of these states, for example, the jury was given a part in what would be chancery cases in England.

The United States Constitution reflects the colonial ambivalence on the matter. It created a federal judiciary with power extending to "cases in law and equity" but it did no more. It created no office of chancellor and no court of chancery. It gave no hint as to the scope of equity jurisdiction. Indeed, it offered no meaning of "equity" itself. All it did, in fact, was to raise questions that send us back to Plato and Aristotle. In our quest to make American law just, the former colonists, as Founding Fathers, had to ask themselves whether the new Nation should emulate England's dual system of law and chancery law. If not, where, outside the legal system, should we look for equity? To the President with his pardoning power? To "the people" as sovereign, acting through their elected legislative representatives? Or to our judges, expecting them to be

Aristotelians, administering law in a just (rather than strictly legal) manner?

From the inception of this Nation, equity was a problem with political, historical, jurisprudential and legal overtones. The Founding Fathers talked much about law and a Nation under law, and a law of laws, not a law of men. But they said very little about the quintessential problem of law and the diversity of human beings. They made scant provision for relief from the injustices caused by law, and they did still less to protect individuals from the abuse of law and lawfully delegated powers of responsibility over other persons.

The nature and form of equity in a Nation in which "the people," not a king, were sovereign was a novel and pressing problem.

#### IV.

Story approached the problem of equity as (i) a devotee of natural law; (ii) a student of English law; and (iii) an American with a vision of the legal order that should be established and prevail in this country.

Natural law theorists typically associated equity with "natural justice"—which to Story meant "honesty, right, and *ex aquat bono*." He naturally endorsed these values. Moreover, insofar as natural-law equity represented "soul and spirit" of the law, he agreed that it was naturally superior to positive law. Thus he asserted (in true Aristotelian fashion) that, in interpreting statutes, judges should look to the intention of the lawmakers, rather than to the letter of the law. But beyond that, Story's vaunted interest in natural law played a very minor role in his treatment of equity.

The reason is that he was a common-law lawyer to the core; his real frame of reference in legal matters was England and its legal tradition; and hence his views of equity were based on English chancery law rather than the "natural justice" ideas of the natural law school. In fact, he disposed of the latter in the first thirty pages of a 750-page tome.

As a student of English law, he was privy to the debate then raging between reformers who would abolish the court of chancery and merge law and equity, and defenders of the existing bifurcated system; and he carefully weighed the merits of Lord Kames' arguments against having a separate equity court, but came down firmly on the side of the status quo. To Story's great credit, he managed to observe the often unseemly fracas without losing sight of the fact that his real interest in the matter was not what should be done in England but in this country. His concern was always the same: granted the horrors and abuses of English chancery law in the past (which he outlined in a chapter on the origin and history of the subject), what can we, as Americans, glean from the experience that would strengthen our law and legal system?

He reached two main conclusions: (i) chancery law was so deeply rooted in the English legal tradition that it was indispensable to understanding English—and therefore American—law; and (ii) the Court of

Chancery had developed certain unique characteristics, both procedural and remedial, that were of great potential value to our court system.

Story explained that, for historical reasons, the Court of Chancery had jurisdiction over matters of conscience, such as fraud, trust, and confidentiality; and he further noted that, because of its close relationship with the Crown, the Chancellor had inherited a special ("tutelary") jurisdiction over certain classes of persons that were vulnerable to abuse because of circumstances beyond their control. Also, because of its roots in canon law, equity had developed a number of remedies unknown to the law courts—such as injunctions, specific performance, and discovery—that often were far more practicable than the money damages law courts awarded. All of these aspects of English law had developed *outside* the common law, and they were as important, in their way, as the common law itself.

Following the plan of John de Grenier Fonblanque (1760-1837), the author of an earlier treatise on the subject, Story structured his discussion of equity jurisprudence in terms of the jurisdictional relationship between England's two court systems: that is, matters in which the court of chancery had (i) exclusive, (ii) concurrent, and (iii) auxiliary jurisdiction. Arranging cases in categories under these three headings, he gave substance to chancery law while demonstrating how it had developed, symbiotically, beside the common law. To him, the point was clear: our law, because it was derived from England, needed chancery law to make it whole.

But Story advocated a system of equity jurisdiction for more affirmative reasons. First, he admired the flexibility of the court of chancery as compared to the rigidity of the law courts. Notwithstanding the horrid reality of English chancery, he envisioned such courts dealing far more efficiently, and effectively, with commercial matters and patents than law courts. He did so because he believed chancery procedure was less formal and more adaptable to modern needs.

Most important of all, however, he realized that the tension between law and justice was inevitable. He also knew that a healthy legal system must anticipate public dissatisfaction with law that is cold, unbending, and uncompromising. Some kind of equity was therefore essential. The only question was what kind of equity was appropriate in a nation of freemen.

To Story, the man of law, the answer was clear. Equity meant English equity and English equity meant chancery law. His reason: in chancery law there was discretion—more discretion than in the law courts—but it was judicial (rather than arbitrary) discretion. Story's favorite equitable maxim was one attributed to Lord Hardwick: "equity follows law." As such, it strengthened public confidence in law by improving what later legal reformers would call its "social performance," without subjecting it to the whim and caprice of the public. He found great comfort in the limits Lords Nottingham, Hardwick, and Eldon had imposed on English equity, but he also saw much promise in the "moral machinery" of equity. As a part of the new "science of law," equity would be overhauled,

streamlined, and modernized for use in the new Nation. Best of all, it would remain in the control of a learned bar—not vulgar politicians—that could use it as a rational and reasonable means of introducing moderation, flexibility, and change into law itself, thereby making it even more effective and more just.

Such was Story's fondest hope for American law and equity.

# WASHINGTON AND LEE LAW REVIEW

---

Volume 45

Spring 1988

Number 2

---

*Editor-in-Chief*

DAVID ALAN WALSH

*Lead Articles Editors*

JOHN R. ALFORD, JR.

JAMES K. VINES

*Research Editor*

KEVIN C. MILNE

*Managing Editor*

WILLIAM W. SENFT

*Executive Editors*

PAMELA SANSFIELD FOX

HAROLD D. LESTER

ALAN F. GARRISON

DAVID M. SCHILLI

LANCE ORMAND VALDEZ

*Note & Comment Editors*

STACY D. BLANK

MONICA LEE MILLER

STEVEN A. BROECKAERT

SANDRA J. MORRIS

LORI ANN CIARROCCA

MARK A. MURPHY

JEFFREY J. HATCH

STEPHEN H. THOMAS

*Staff Writers*

MARY HOGE ACKERLY

EDWARD S. MADARA, III

THERESA A. CALDARONE

DAVID A. MCKAY

J. PATRICK DARBY

ANDREW H. MILNE

WADE MATTHEW FRICKE

CHARLES S. MURRAY, JR.

MELISSA J. HALSTEAD-WHITE

ROBERT W. PONTZ

VINCENT J. X. HEDRICK, II

RONALD S. RANGE

KEVIN J. HENDERSON

ERNEST E. SHAVER

JAMES D. HIGGASON, JR.

JILL SUZANNE TALBOT

KEVIN LAWSON KELLER

MICHAEL W. TAN

KATHRYN D. KIRMAYER

ANNE R. YUENGERT

*Faculty Advisor*

SAMUEL W. CALHOUN



## DEANS AND FACULTY—SCHOOL OF LAW

- JOHN D. WILSON, B.A., M.A., Ph.D., *President of the University*  
FREDERIC L. KIRGIS, JR., B.A., J.D., *Dean and Professor of Law*  
WILFRED J. RITZ, A.B., LL.B., LL.M., S.J.D., *Professor Emeritus*  
ROY L. STEINHEIMER, JR., A.B., J.D., *Robert E.R. Huntley Professor of Law, Emeritus*  
EDWARD O. HENNEMAN, B.A., J.D., *Associate Dean and Associate Professor of Law*  
MEREDITH SUSAN PALMER, A.B., J.D., *Assistant Dean*  
DENIS J. BRION, B.S., J.D., *Professor of Law*  
ROGER D. GROOT, B.A., J.D., *Professor of Law*  
MARK H. GRUNEWALD, B.A., J.D., *Professor of Law*  
LEWIS H. LARUE, A.B., LL.B., *Director, Frances Lewis Law Center and Professor of Law*  
ANDREW W. MCTHENIA, JR., A.B., M.A., LL.B., *Professor of Law*  
JAMES M. PHEMISTER, B.S., J.D., *Professor of Law*  
J. TIMOTHY PHILIPPS, B.S., J.D., LL.M., *Professor of Law*  
THOMAS L. SHAFFER, B.A., J.D., LL.D., *Robert E.R. Huntley Professor of Law*  
JOSEPH E. ULRICH, A.B., LL.B., *Professor of Law*  
SAMUEL W. CALHOUN, B.A., J.D., *Associate Professor of Law*  
WILLIAM S. GEIMER, B.S., J.D., *Associate Professor of Law*  
STEVEN H. HOBBS, B.A., J.D., *Associate Professor of Law*  
BRIAN C. MURCHISON, B.A., J.D., *Associate Professor of Law*  
SARAH K. WIANT, B.A., M.L.S., J.D., *Law Librarian and Associate Professor of Law*  
GWEN T. JOHNSON, B.A., J.D., *Assistant Professor of Law*  
LYMAN PAUL QUENTIN JOHNSON, B.A., J.D., *Assistant Professor of Law*  
DAVID K. MILLON, B.A., M.A., Ph.D., J.D., *Assistant Professor of Law*  
JOAN M. SHAUGHNESSY, B.A., J.D., *Assistant Professor of Law*  
GREGORY HOWARD STANTON, B.A., M.A., M.T.S., J.D., Ph.D., *Assistant Professor of Law*  
DOUGLAS R. HADDOCK, B.A., J.D., *Visiting Professor of Law*  
THOMAS W. MAPP, B.A., J.D., *Visiting Professor of Law*  
RUDOLPH BUMGARNER, III, A.B., LL.B., *Adjunct Professor of Law*  
LAWRENCE H. HOOVER, JR., B.A., J.D., *Adjunct Professor of Law*  
ANN MACLEAN MASSIE, B.A., M.A., J.D., *Adjunct Professor of Law*  
BEVERLY S. SENG, B.A., M.A., J.D., *Adjunct Professor of Law*  
WILLIAM W. SWEENEY, A.B., LL.B., *Adjunct Professor of Law*  
PAUL R. THOMSON, JR., B.A., J.D., *Adjunct Professor of Law*  
ROBERT C. WOOD, III, B.A., LL.B., *Adjunct Professor of Law*  
HENRY L. WOODWARD, A.B., LL.B., *Adjunct Professor of Law*  
JOHN KEVIN GREEN, B.A., M.A., Ph.D., *Adjunct Associate Professor of Law*  
J. STEPHEN LAWRENCE, JR., A.B., J.D., *Adjunct Professor of Law*  
DOUG RENDLEMAN, B.A., M.A., J.D., LL.M., *Frances Lewis Scholar in Residence*