

**The Lochner Era**  
**Interdisciplinary Summer Workshop for Junior Faculty**  
**Institute for Constitutional History**  
**Stanford Constitutional Law Center**  
**July 9-14, 2017**  
**Stanford, California**  
**Professor Barry Cushman**  
**University of Notre Dame**

The texts for the course are Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford, 1998); David Bernstein, *Rehabilitating Lochner* (Chicago, 2011); and a set of materials made available by the Institute.

### **Session I: Substantive Due Process in the *Lochner* Era**

Munn v. Illinois (1877)  
Lochner v. New York (1905)  
Muller v. Oregon (1908)  
Bunting v. Oregon (1917)  
Coppage v. Kansas (1915)  
Adkins v. Childrens Hospital (1923)  
Wolff Packing v. Court of Industrial Relations (1923)  
Tyson & Bro. v. Banton (1927)

### **Session II: *Lochner* Historiography**

David Bernstein, “*Lochner* Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism,” 92 Geo. L. J. 1 (2003)  
Robert Post, “Defending the Lifeworld: Substantive Due Process in the Taft Court Era,” 78 B. U. L. Rev. 1489 (1998)  
Cushman, “Some Varieties and Vicissitudes of *Lochnerism*,” 85 B. U. L. Rev. 881-982, 998-1000 (2005)

### **Session III: Race, Sex, and *Lochner***

Charles McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth Century America* (1994), pp. 83-92, 93-95, 98-105, 115-32  
David Bernstein, *Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal* (2001), pp. 1-45  
Bernstein, *Rehabilitating Lochner*, pp. 56-89

#### **Session IV: The Commerce Clause in the Progressive Era**

Cushman, "Formalism and Realism in Commerce Clause Jurisprudence," 67 U. Chi. L. Rev. 1089-1131 (2000)

Charles McCurdy, "The *Knight Sugar* Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," 53 Bus. Hist. Rev. 304 (1979)

Cushman, "*Carolene Products* and Constitutional Structure," 2012 Sup. Ct. Rev. 321, 321-53 (2013)

#### **Session V: New Deal Historiography I**

Cushman, *Rethinking the New Deal Court*, pp. 3-32

Cushman, "The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock," 88 Notre Dame L. Rev. 2089-2106 (2013)

Cushman, "Court-Packing and Compromise," 29 Const. Comm. 1-30 (2013)

Cushman, "The Place of Economic Crisis in American Constitutional Law: The Great Depression as a Case Study" (in draft)

#### **Session VI: New Deal Historiography II**

Cushman, "The Secret Lives of the Four Horsemen," 83 Va. L. Rev. 559 (1997)

Cushman, "Justice Brandeis and Substantive Due Process," 19 Green Bag 2d 145-56 (2016)

Cushman, "Clerking for Scrooge," 70 U. Chi. L. Rev. 721 (2003)

Cushman, *Rethinking the New Deal Court*, pp. 33-43

Cushman, "The Hughes Court and Constitutional Consultation," 23-1 J. Sup. Ct. Hist. 79 (1998)

#### **Session VII: Substantive Due Process in the New Deal Era**

*Nebbia v. New York* (1934)

Cushman, *Rethinking the New Deal Court*, pp. 45-138

Cushman, "Some Varieties and Vicissitudes of Lochnerism," 85 B. U. L. Rev. 881, 982-98 (2005)

Cushman, "Inside the 'Constitutional Revolution' of 1937," 2016 Sup. Ct. Rev. \_\_ (2017)

#### **Session VIII: The Commerce Clause in the New Deal Era**

Cushman, *Rethinking the New Deal Court*, pp. 139-225

Cushman, "*Carolene Products* and Constitutional Structure," 2012 Sup. Ct. Rev. 321, 353-77 (2013)

### **Session IX: The Fiscal Powers**

Cushman, “Inside the ‘Constitutional Revolution’ of 1937,” 2016 Sup. Ct. Rev. \_\_ (2017)  
Cushman, “*NFIB v. Sebelius* and the Transformation of the Taxing Power,” 89 Notre Dame L. Rev. 133-98 (2014)

### **Session X: The *Lochner* Era, Then and Now**

Howard Gillman, “DeLochnerizing *Lochner*,” 85 B.U. L. Rev. 859, 859-65 (2005)  
Victoria F. Nourse, “A Tale of Two *Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights,” 97 Cal. L. Rev. 751, 778-88 (2009)  
Jamal Greene, “The Anticanon,” 125 Harv. L. Rev. 379, 385-98, 417-22, 446-56 (2011)  
Bernstein, *Rehabilitating Lochner*, pp. 108-24  
Thomas Colby & Peter J. Smith, “The Return of *Lochner*,” 100 Corn. L. Rev. 527, 558-81, 600 (2015)  
Patel v. Texas Dept. of Licensing & Regulation, 469 S.W.3d 69, 92-123 (2015) (Willett, J., concurring); *id.* at 126-40 (Hecht, C.J., dissenting)