

INSTITUTE FOR CONSTITUTIONAL STUDIES
Summer Workshop – Constitutional History Redux: Rethinking ‘Major Cases’
State University of New York at Albany

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SYLLABUS

Welcome to the Institute’s Inaugural summer workshop for collegiate instructors! We undertake this event in part to memorialize the life, work, and ongoing influence of Kermit L. Hall, at the time of his death perhaps the nation’s most influential constitutional historian as well as President of SUNY at Albany. He was our friend, intellectual ally, and generous colleague. This workshop would have been many times richer and fuller, had he been here.

We nevertheless forge ahead. Look through this rather lengthy document and get as much of the reading in hand as you can manage before we actually meet. Wherever possible, my helpers and I offer choices and rankings. If you cannot find the materials, get in touch with me at once (or with Maeve, the Institute’s new administrative assistant – not to be confused with the Institute’s director, Maeva Marcus!). I might be able to supply materials from Detroit (for which I may have to charge you copying and postal fees – sorry!), or suggest other sources. Articles, e.g., often can be ordered or called up through electronic data services. Consider buying books in which readings recur; also consider buying some of the books listed with cases (e.g., Nancy Woloch’s little book about *Muller v. Oregon* – the *Dred Scott* and *Plessy* volumes – etc.). I place an asterisk beside all works that I take to be good candidates for purchase.

Read Supreme Court opinions in the original *U.S. Reports* format; view electronic versions (such as Lexus or Westlaw) or the Lawyer’s Edition as fallbacks (but see Richard Hamm’s instructions to the contrary). Edited case books should be consulted only as a last resort (and, below, see Danny Marcus’ instructions to the contrary!). Sometimes, the most interesting material for our purposes has been edited out in order to convey legal content without background noise. The *Dred Scott* ruling, which is hideously long, is a case in point. Bring materials with you, whether finished or not. You’ll have time for reading.

During our brief time together, I hope to foster serious thought about whether and how we should begin to ‘retell’ or enrich the Supreme Court- and case-centered master narrative in constitutional history (and, by extension, in adjacent disciplines) – not by dispensing with judicial texts (I think of them as judicial state papers), but by digging beneath and around them. I surely hope to generate fresh ideas about how to mount engaging university-level courses, with increased regard for intersections between constitutionalism and the rest of the lived-in world (people, time, space). Give thought to other, possible avenues or points of entry. Remember this: We gather in Albany, not to hear lectures nor replicate knowledge easily found in textbooks, but to shake things up a bit. Plus, we get to go to the movies!

Below, you’ll find a short list of preliminary readings. They provide an introduction to the kind of law-related speculations that I will encourage in Albany. Some of these materials strike me, frankly, as misguided. But that’s me, not you. Other scholars have made different judgments about the merits. As you read, please think about (a) how the various disciplines approach classic juridical texts, and (b) how writings about other varieties of law (criminal, civil, etc.) might help us think imaginatively about constitutionalism. Read them in the order given. I have assigned a particularly interesting article/chapter for discussion during our wrap-up session. Even if you don’t find it congenial, I will want to talk about it. It will force us to think about uni-directional conceptions of change – the idea, e.g., that law either leads

social change or is led by it. This dichotomous frame of mind has particular resonance in constitutional studies. So we'll use the essay as a springboard, a way to approach synthesis and conclusion. In our wrap-up session, we'll also talk about how to carry new learning into the classroom. On our last day, I will ask each of you to say (a) where the workshop made a difference in your thinking – that is, what went well in your estimation (with specific references to content); (b) where you think we might revise the approach or content; and (c) how you think new learning might be carried into the classroom. Where have we been? Where, if anywhere, might we go next? Of course, you might decide that we should chuck everything out the window – but I'll ask you to explain your conclusion!!!

Preliminary Readings -- Designed to Provoke Thought...!

Read these things in the order given. Keep track of your reactions in an intellectual journal.

- Robert Cover, "Nomos and Narrative," in M. Minow, et al., eds., *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992), 95-172. This is a long piece. But it rewards a close reading. As you read, consider how Cover situates law in culture and society – we'll come back to his ideas.
- David Thelen, ed., *The Constitution and American Life* (1987), reprinting an issue of *Journal of American History* – especially the essays by Hendrik Hartog, ("Constitutions of Aspiration and the 'Rights that Belong to Us All'"), Harry Scheiber ("Introduction: The Bicentennial and the Rediscovery of American Constitutional History"), Morton Keller ("Powers and Rights...."), Joyce Appleby ("The Heirs and the Disinherited"), Thomas Haskell ("Curious Persistence of Rights Talk in the 'Age of Interpretation'").
- Pierre Bourdieu, "Rethinking the State: Genesis and Structure of the Bureaucratic Field," in George Steinmetz, ed., *State/Culture: State-Formation after the Cultural Turn* (1999), 53-75. An introduction to the important contributions of a French cultural theorist usually associated with 'practice theory.' You may have to read it twice – it's easier, I'm told, in the original French (many of Bourdieu's terms/concepts don't translate cleanly).
- Sandra F. VanBurkleo, "The Human Subject in American Constitutional History," available on-line at http://www.h-net.org/~law/teaching_legal_history/vanburkleo.htm
- Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999). Give this one a heavy skim.
- Christopher Tomlins, *The Many Legalities of Colonial America*, Introduction and passim. I recommend this collection, not only because it's fascinating, but also because the concept of 'legalities' figures large in our discussion. Think about what passes for authoritative 'law'; in the case of semi-autonomous peoples, where we might look for 'law,' and whether/how Indian (or Chinese, or Mormon, or Islamic, or ... who else?) 'legalities' matter, have mattered, ought to matter, in American courtrooms.

Questions (you will come up with others):

We begin with the discipline of history, but we won't end there. To what extent is American constitutional history co-extensive with the history of the United States Supreme Court – that is, constitutional history as presently written but also as lived by the American people? Would Americans living in, say, 1820 recognize this now-familiar association? (To gain some perspective on this question, you might want to go have a look at some of the very old constitutional histories generated before the 1930s – Parkman, Bancroft, Andrews, etc. For names, see the essays by Robert Gordon and Paul Murphy, collected in K. Hall, ed., *Main Themes in American Constitutional History* (Garland). Or, for a hybrid/transitional account, have a look at Charles Haines' antiquated *The Role of the Supreme Court in American Government and Politics*.) What might we learn from close scrutiny of 'the cases' and their

immediate surrounds? The formal legal content, to be sure – but what else? What distinguishes lawyerly accounts of cases from those of, say, historians or political scientists? Are differences (and disciplinary boundaries) useful and defensible? Are post-modern theorists right about their irrationality, artificiality, and hegemonic properties? To what extent do courtrooms function as sites of culture formation and reformation? Is it useful to think of law (all varieties – if there are ‘varieties’ beyond lawyerly terms of art) as a language or languages capable of shaping social or cultural reality? If so, in what ways? How would such a view alter the master narrative? What counts (or ought to count) as “the subject(s)” of American constitutional history? What counts (or ought to count) as analytical objectives? Again: do multi- and inter-disciplinarity expand, complicate, confound, or (other possibilities?) the study of constitutionalism? If constitutionalism forms some kind of civil religion or ‘ideology,’ what can be learned about its properties, functions, and dynamics from students of religion, political culture, and ideology? What exactly do Americans mean when they think about ‘law’? Constitutions? What about Mormon law for Mormons? Are ‘legalities’ the same as ‘law’? Finally: Is the old “law in action” vs. “law on the books” distinction useful? Are we satisfied with the idea that constitutional law EITHER mirrors social aspirations (the law-and-society approach) OR single-handedly constructs social reality (the constitutive approach)?

BASIC TEXTS (to be consulted, not read):

Toss at least one basic (fact-filled) text into your suitcase. Here are a few suggestions, any of which would help you gain or regain familiarity with the narrative and ‘major cases.’ Other volumes might have been included, but ... these will do the trick well enough. I include law scholar Laurence Tribe’s casebook largely for its engaging treatment of the law of privacy. I will bring copies of basic texts and will place them in a shared space so that everyone can use them. I will publicly humiliate you if you monopolize my books!

- K. Hall, *The Magic Mirror* (best one-volume attempt to merge the histories of American public and private law – now a bit dated, but important for its conceptual apparatus. Not the best source, though, for lots and lots of detail about constitutional developments).
- M. Les Benedict, *Blessings of Liberty* (a short constitutional history text).
- M. Urofsky, et al., *The March of Liberty* (excellent longer text) – with document collections.
- A. Kelley, W. Harbison, and H. Belz, *The American Constitution* (the old classic – extensively recast by Belz), also with document collections.
- Laurence Tribe, *Constitutional Law* (3rd edition, or most recent – the 3rd was published in 2000).
- K. Hall, ed., *Major Problems in American Constitutional History* (documents).
- K. Hall, et al., eds., *American Legal History: Cases and Materials* (1995).
- S. VanBurkleo, K. Hall, R. Kaczorowski, eds., *Constitutionalism and American Culture: Writing the New Constitutional History* (2002) – essays (cited below as VanBurkleo, et al., *Constitutionalism*).
- S. VanBurkleo, *‘Belonging to the World’: Women’s Rights and American Constitutional Culture* (2002).

WORKSHOP SCHEDULE

Sunday, July 8

4:00 PM Welcoming reception – Introduction and Opening Remarks

Monday, July 9

9-noon ***Federalism and the Economy in 19th-Century America: Political Scientists' Approaches to Early American 'State Papers'***

Discussion Leader: Prof. Stephen Schechter (Professor of Political Science and Director of the Council for Citizenship Education, Russell Sage College)

Introduction: During this session, we will explore some of the ways in which political scientists might address Supreme Court cases on federalism and the economy in the early 19th century. I use “might” not as a form of politeness but to indicate a condition contrary to fact, since much of the political science on this subject takes the form of constitutional law casebooks that take a long and frankly Sherman-like doctrinal march through history. Participants motivated to correct this dearth of political science scholarship might look to two outlets for publication: *PUBLIUS: The Journal of Federalism*, published on a quarterly basis by Oxford University Press; and *Studies in Political Development* published on a semiannual basis by Cambridge University.

This session is also a personal tribute to the memory and legacy of Kermit Hall whose interests and writings ranged widely across this reading list, especially as concerns 1, 6, and 8.

Assignment: Select **three (3)** of the following approaches, do the readings, and reflect on how you might (or already do) use these approaches in your teaching and/or research. Come prepared to share your reflections. If possible, use the official version of the opinions in U.S. Report (or the electronic equivalent), not an edited text. The Lawyer’s Edition can be used instead of the original Reports if it’s the only version available.

1. The New Institutionalism and the Jurisdictional Question: Martin v. Hunter’s Lessee (1816); G. Edward White, *The Marshall Court and Cultural Change*, Abridged Edition (Oxford University Press, 1991), chapter 8, pp. 485-504. Those unfamiliar with the new institutionalism can consult James Gibson, “Judicial Institutions” in *The Oxford Handbook of Political Institutions* (2006), chapter 26, which also has an excellent bibliography and makes use of comparative (cross-national) analysis.

2. Political Culture: Dartmouth College v. Woodward (1819); White, *The Marshall Court*, chapter 9, pp. 595-602 and 612-628. White waxes eloquent on the evolving importance of contracts as a vested right and a natural right in republicanism and liberalism. We will supply the federalism dimension.

3. Constitutional Choice Theory: Sturges v. Crowninshield (1819); White, *The Marshall Court*, chapter 9, pp. 628-640. White probes an interesting set of delicacies in this case where the court must decide amongst two rights while answering the federalism question, can states legislate in an enumerated Article I field of rising social importance in which the Congress has not yet acted.

When Tocqueville wrote that most political questions are eventually resolved into a judicial question, he might well have had this case in mind as an exemplar.

4. Legal Doctrine as Policy Device: *McCulloch v. Maryland* (1819); two-page handout on Engdahl's variations of the telic (means-end) relationship.

5. Governments at Work: *McCulloch v. Maryland* (1819); Daniel J. Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* (University of Chicago Press, 1962), chapter 5, pp. 70-88. Those unfamiliar with Elazar's cooperative federalism thesis should take a look at his first chapter.

6. The Magic Mirror and High Drama: *Gibbons v. Ogden* (1824); George Dangerfield, "The Steamboat Case," in John A. Garraty, *Quarrels That Have Shaped the Constitution*, Revised and Expanded Edition (Harper and Row, 1987), chapter 4, pp. 57-70. When Kermit Hall adopted the Holmesian aphorism – that the law is a magic mirror reflecting the lives of all people who have been – he certainly would have applauded the cast of characters in this political drama – which is also a good introduction to the politics and law of New York State and its capitol city.

7. Change and its Impact: *Charles River Bridge* (1837); Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (W.W. Norton, 1978). Read one of the following: chapter 8 on local impact, chapter 9 on the revolution of 1937, or chapter 10 on doctrinal impact. Together, these chapters examine three layers of change and their impact.

8. Comparative Studies: *Gibbons v. Ogden* (1824). To the extent that *Gibbons* is the Court's emancipation proclamation of national commerce, it is comparable to one of the most important decisions by the European Court of Justice – *Cassis de Dijon*. For background see Donna Starr-Deelen and Bart Deelen, "The European Court of Justice as Federator" in *PUBLIUS* 26, no. 4 (Fall 1996): 81-97; and then Karen J. Alter and Sophie Meunier-Aitsahalia, "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision" in *Comparative Political Studies* 26 (January 1994): 554.

2-5:00 ***American Indians in Law/American Indians' Experiences of Law: Sovereignty, Competing Legalities, and the Problem of Language***

In this session, we'll consider (a) the Supreme Court's decisions in a handful of major cases involving American Indian rights and sovereignty, and, more important, (b) the cultural and linguistic questions that such decisions bring to mind among scholars working in such fields as literary criticism or political theory. In the process, we confront the problem of divergent legal languages, fragmented notions of what counts as 'law,' the Americans' distrust of customary or unwritten law, and the critical question of national and individual sovereignty (what it entails, what it permits or prevents in relations with formal governments). In the *Santa Clara Pueblo* case, we confront another dynamic – how a 'dominant' system deals with policies taken to be illegal or retrogressive within the 'alien' or 'inferior' legal system.

Readings: *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), *Worcester v. Georgia*, 31 U.S. 515 (1832), *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Ex Parte Crow Dog* (*Crow Dog's Case*), 109 U.S. 556, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Optional cases: *Green v. Biddle*, 21 U.S. 1 (1823), *Elmendorf v. Taylor*, 23 U.S. 152 (1825), and *Hawkins v. Barney's Lessee*, 30 U.S. 457 (1831) – included so that we might consider possible connections with land law

development, should you have time. If not, don't worry – I'll supply information. Please read these books carefully: Sidney Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (2002); and Theda Perdue and Michael D. Green, eds., *The Cherokee Removal: A Brief History with Documents* (2002).

I omit some of the more familiar accounts of Indian-white relations (e.g., works by Barsh and Henderson or Prucha or Washburn). Instead, peruse these works:

* John R. Wunder, *"Retained by the People": A History of American Indians and the Bill of Rights* (1994), 19th century chapters. A brief, culturally sensitive account of Indians' evolving place in constitutional law.

* John Sayer, *Ghost Dancing the Law: The Wounded Knee Trials* (Harvard 200). Sayer considers the ways in which competing 'languages' of law sabotaged cross-cultural communication.

Calvin Trillin, *Killings* (1985), particularly the amazing chapter about homicide and customary law in hill-country Kentucky.

Questions:

How exactly should legal scholars treat customary constitutions, informal rules or practices that have the force of law, and competing (that is, 'alien') legal systems? Do they form part of our subject? In the case of American Indians' experiences with and of 'law,' how do we proceed? Do we construct a 'braided narrative' or try to unify the account? If so, whose law do we put center stage? And whose 'nation'? Who controls the incidents of citizenship and the conditions of freedom? Is it useful to think about encounters like the Wounded Knee Trials as cultural-linguistic or rhetorical struggles? If so, how might they be prevented? And why did I want you to read Santa Clara Pueblo?

Evening: Movie: "Gideon's Trumpet" (starring Henry Fonda, on VCR, location to be announced – for discussion Wednesday afternoon) – As you watch the film, be sensitive to how the script translates and transmits constitutional 'knowledge.'

Tuesday, July 10

9-noon Social Theory and the Fourteenth Amendment: Beyond Slaughterhouse

Readings: *The Slaughterhouse Cases*, 83 U.S. Reports 36 (1873), and the lower federal court rulings. Make time to undertake a bit of research. The lower federal court rulings are important to our inquiry. Be prepared to say what you found. Pay particular attention to talk about the 'radical' implications of certain choices re: the future of the 14th amendment. Also *Bradwell v. Illinois*, 83 U.S. Reports 130 (1873), *Minor v. Happersett*, 88 U.S. Reports 162 (1874), and *Ex Parte Yarbrough*, 110 U.S. Reports 651 (1884).

* Ronald Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (2005).

On the Fourteenth Amendment: * William Nelson, *The Fourteenth Amendment*, and * Michael Kent Curtis, *No State Shall Abridge....* (compare the two treatments and prepare to talk about points of convergence or disagreement).

Here, I want us to think not only about Slaughterhouse, political radicalism, and the 14th amendment, but – however unlikely it may seem in conversations about Slaughterhouse -- about searches for and attachment to the intentions of the framers of constitutions and amendments. On this point, I'd like someone PLEASE to look at the introductory material in Jack Rakove, *Original Meanings*, and perhaps at Leonard Levy's little book, *Original Intent and the Framers' Constitution*. To what extent do circumstances beyond the boundaries of the cases at hand shape outcomes? Is "case biography" a useful exercise – that is, capturing the life history of a case? Toward what ends? As you read, explore not only the gutting of key clauses within the 14th amendment, but also the rather tantalizing challenges to the Court's political choices/sentiments in cases heard virtually at the same moment.

[I am deliberately shortening the reading list for this session – we will need a breather, and time to prepare for subsequent sessions.]

2:00-5:00 Public Voices: Experiences of First Amendment Freedoms

This session proposes to use "First Amendment" (I use quotes deliberately) and liberty of speech-related scholarship as a window into broader problems. For the purpose, I am going to disregard liberty of the press, assembly, and conscience – though, with more time, they would have to be included. This is also the most entirely selfish reading list in the workshop. I am beginning to conceptualize and write a book about people's actual experiences with so-called First Amendment freedoms, with particular attention to speech and press, and I want your thoughts on how to proceed. In the process, though, we will learn something about constitutional historians' tendency to universalize claims based upon the universality built into formal texts (i.e., the texts do not formally exclude, say, women, black men, or poor people), and a general tendency to leave human consciousness behind, as if irrelevant or merely contextual. I offer some examples of traditional speech-related scholarship, and then toss some unconventional material into the heap. More might have been tossed. Have fun.

I don't think you need to read cases unless you are completely unfamiliar with post-WWI Supreme Court rulings in political dissent cases, etc. If so, find a standard document collection and gain familiarity with (e.g.) *Abrams*, *Schenk*, *Gitlow*, *Stromberg*, the 'Nazis in Skokie' ruling, and so on. Any of the basic textbooks will identify leading cases.

Selected traditional accounts – skim one or two:

Paul Murphy, *The Meaning of Freedom of Speech...* (1972).

Zachariah Chafee, *Free Speech in the United States* (1941).

Leonard Levy, *Jefferson and Civil Liberties: The Darker Side* (1989).

Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (1987).

Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1992).

....and some not-so-traditional material:

- * Sandra F. VanBurkleo, “‘Words as Hard as Cannon-Balls’...” in VanBurkleo, et al., *Constitutionalism and American Culture...*
 - * Cass Sunstein, *Democracy and the Problem of Free Speech* (1995).
 - Catherine Mackinnon, *Only Words* (1996). Highly controversial, readable, important.
 - * Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000). A very fine account.
 - * Kermit L. Hall, “Cultural History and the First Amendment: New York Times v. Sullivan and its Times,” in VanBurkleo et al., *Constitutionalism...*
 - Susan Bickford, *The Dissonance of Democracy* (1996). A really fascinating exploration of interactive speech in democratic societies (implicitly a critique of Habermas).
 - Kenneth Cmiel, *Democratic Eloquence: The Fight over Popular Speech in 19th-Century America* (1991). Primarily a treatment of white working men’s struggle for access to the public forum.
- [Someday, look at the chapter about speech in Ida B. Wells’ autobiography.]

Questions: Where do traditional and newer accounts diverge? Has the subject shifted? How do we tell the story if experiences of freedoms are wildly different within the citizenry? Is that one of the reasons scholars resort to ‘objective,’ universalizing narratives about doctrinal development? What difference have gender, race, and class made in experiences of public vocality? Can we talk about civil liberties history before the Supreme Court called First Amendment jurisprudence into being?

Evening Presentation by ConSource: Online Sources for Constitutional Studies

Wednesday, July 11

9-noon Race, Gender, and the Social Sciences: Before and After Plessy

This session explores, first, the imprint of race in American law before the Civil War, particularly in the law of slavery, and second, the ongoing importance of both scientific race theory and political choices in Reconstruction-era remapping of the Civil War amendments. We read *Brown v. Board of Education* in this context in order to underscore its complex relationship to *Plessy* (both, after all, were taken to make use of ‘progressive’ social theory). The question of the role of social theory in constitutional adjudication recurs in our discussion of protectionism (e.g., *Muller v. Oregon*).

Prigg v. Pennsylvania (1842), *Dred Scott v. Sandford* (1857)
Plessy v. Ferguson (1896)
Brown v. Board of Education of Topeka (1954)

Discussion Co-Leader: Paul Finkelman (Albany Law School)

Readings: Constitution of the United States (see the appendices of basic texts); think about slavery and how it related to/appears in the original document and amendments.

Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 2nd ed. (2001), chapters 1, 2 and 4.

Read the original, long ruling in *Dred Scott* if possible. If time does not permit, see Finkelman’s concise document collection, *Dred Scott v. Sandford* (below), which carries an edited version.

* Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (1997).
 Charles Lofgren, *Plessy v. Ferguson: A Legal-Historical Interpretation* (1987). Pay particular attention (if you manage to peruse this volume) to the central chapter on racial ideologies.
 * Brook Thomas, ed., *Plessy v. Ferguson: A Brief History with Documents* (1996).
 Joseph L. Graves, Jr., *The Emperor's New Clothes: Biological Theories of Race at the Millennium* (2003), especially Part 2.
 William Stanton, *The Leopard's Spots: Scientific Attitudes Toward Race..., 1815-59* (1982).
 Ida B. Wells, *Crusade for Justice: The Autobiography of Ida B. Wells* (Alfreda Duster, ed., 1991).
 * Waldo Martin, *Brown v. Board of Education of Topeka: A Brief History with Doc's.* (1998).
 On the 14th amendment, see books by Curtis and Nelson listed below (Slaughterhouse session).
 See also Hyman and Wiecek, *Equal Justice Under Law*, chapter on relationship between the 13th and 14th amendments.

I hope that someone will peruse political scientist Wayne Moore's *Constitutional Rights and Powers of the People* (1998), which makes genuinely fascinating use of Dred Scott and Frederick Douglass. I'll buy coffee for everyone who reads at least part of Moore's book. And, someday, read Derrick Bell, *Faces at the Bottom of a Well*, and *The Rooster's Egg* by Patricia Williams.

Questions: Where have/do race and racial ideologies imprint American law most powerfully and indelibly? What do you make of the use of cutting-edge social science in Plessy, Bradwell, and Brown? Does this mean that judges should rely solely on legal authorities? Could they do that even if they wanted to – that is, what do we DO about ideological systems? Finally: since everyone 'has' both race and sex, not to mention class, how do we manage over time to construct a legal culture that recognizes these inherent differences without damage to individuals?

**2-5:00 *Popular Constitutionalism, the Media, and Cultural Transmission/Translation—
 (or) Clint Eastwood and Henry Fonda as Agents of Cultural Change***

Main Text: "Gideon's Trumpet" – shown Monday night (about *Gideon v. Wainwright*).

Readings:

Norman Rosenberg, "Constitutional History and the Cultural Turn: Cross-Examining the Legal-Reelist Narratives of Henry Fonda," in VanBurkleo, et al., *Constitutionalism*, 381-409.

Marjorie Garber, "Cinema Scopes: Evolution, Media, and the Law," also (if time allows) C. Clover, "Law and the Order of Popular Culture" and William Ian Miller, "Clint Eastwood and Equity...", all in A. Sarat and T. Kearns, *Law in the Domains of Culture* (2000), 121-159, 97-119, 161-202.

Clifford Geertz, "Deep Play: Notes on the Balinese Cockfight," in Geertz, *The Interpretation of Cultures* (1973), ch. 15, pp. 412-453. This is a classic essay; work through the detail (which can be daunting) and consider applications of findings for, say, trial or appellate court 'rituals,' whether 'real' or fictionalized (Geertz might not admire the distinction – nor would Rosenberg). Don't miss the masculinity business.

Richard Hamm, *Murder, Honor and Law: Four Virginia Homicides from Reconstruction to the Great Depression* (2003). Hamm explores the permeable boundaries between observers and participants in notorious criminal trials, the role of the media as cultural translators/transmitters, and boundaries between 'law' and local custom possessed of the force of law.

Try to gain at least passing familiarity with Michael Grossberg, *A Judgment for Solomon* (about the courtroom as a site of cultural reformation in a notorious custody case. As you read, consider constitutional cases in the same light. Notice the influence of anthropologist Victor Turner – explore his work if you have time, particularly the concept of a civic or public drama). Grossberg synopsised portions of the book under the title “Battling over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict,” in Mindie Lazarus-Black and Susan Hirsch, eds., *Contested States: Law, Hegemony, and Resistance* (1994) at 153.

Questions: To what extent do films, TV programs and other mass media presentations, the productions of political parties during elections, and popular election of judges (to give only a few examples) transmit and translate constitutional norms for socio-cultural consumption? Is constitutional culture created or recreated in the process? Suppose understandings/meanings diverge: Which is the “real” legality – the formal one, or the one popularly understood and recognized? Think about school prayer, e.g., and widespread resistance and reinterpretation – or the notion of one’s ‘right’ to an SUV. To the extent that understandings explain behavior, do oversimplifications or misinterpretations function as legal facts within society? *Ask me about popular reception of the Dartmouth ruling.* As teachers, how do we deal with these layers and layers and layers of meaning?

Thursday July 12

9-noon State Paternalism: The Protective Impulse, Past and Present

Readings:

Lochner v. New York

Muller v. Oregon

(read *Bunting case* if you want to...see basic texts for citation)

Adkins v. Children’s Hospital

West Coast Hotel v. Parrish

Civil Rights Act of 1964 (look in basic document collections)

Johnson v. Transportation Agency, Santa Clara County, 480 US 616 (1987).

Regents of the University of California v. Bakke, 438 US 265 (1978).

Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991).

Try to procure and read: * Nancy Woloch, *Muller v. Oregon: A Brief History with Documents*.

Please gain some familiarity with 2 or 3 of the following:

* Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990), esp. Part I, II, and Afterword. Minow’s book explores tensions between equality and difference, and the possibility of invoking relational as well as individual rights. It commands close attention.

* Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (1998).

* Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law and Labor in the Progressive Era and New Deal Years* (2001).

Linda Gordon, *Putting Children First...* (1993).

Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (1995). A hugely influential book about state paternalism.

- * Ulla Wikander, et al., eds., *Protecting Women: Labor Legislation in Europe, the U.S., and Australia, 1880-1920* (1995).
- * Seth Koven and Sonya Michel, eds., *Mothers of a New World: Maternalist Politics and the Origins of Welfare States* (1993).
- Melvin Urofsky, *Affirmative Action on Trial: Sex Discrimination in Johnson v. Santa Clara* (1997).
- Dana Takagi, *The Retreat from Race: Asian-American Admissions and Racial Politics* (1993).
- Howard Ball, *The Bakke Case: Race, Education and Affirmative Action* (2000)
- Or Susan Banfield, *The Bakke Case* (1998).
- T. Harvey Wilkinson, *From Brown to Bakke* (1981).
- Francis Beckwith et al., *Affirmative Action: Social Justice or Reverse Discrimination?* (1997)
- John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).
- * William W. Fisher et al., eds., *American Legal Realism* (1993).
- Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* (1995).

Note: The briefs in Muller v. Oregon and a good many other major cases are reprinted in full in *Landmark Briefs.....*, a resource that every good university library ought to have. If your library has the collection, and/or has a full edition of the Muller brief, you might want to read around in it. It's much more interesting that the edited versions in document collections might suggest.

Note: The literature surrounding affirmative action is both huge and multi-disciplinary. You will have your own suggestions as to what might be read – the list above doesn't begin to record even my own preferences. I frankly gave up. But we can talk about the broader question of state-sponsored economic and social protection without having read everything in sight.

Questions: How are state-sponsored economic protection and the affirmative action policies emanating from the Civil Rights Act of 1964 alike and different? Arguments for and against each – do they converge or diverge? Florence Kelley (Progressive reformer) once argued that, until societies managed to develop a genuinely universal suffrage system and effective labor unions, state protection of comparatively powerless groups (including women) would have to continue – if only to put people on an even playing field, in factories and elsewhere. I omit the child labor question for the most part, but it's still with us, and was a primary concern for Kelley. Do the same arguments attach to racial or religious (etc.) minorities? What do you think of the argument (mounted by critical legal scholars and critical race theorists especially) that 'tilt' inherent in law (that is, a bias toward the interests of white people, men, and capitalism) lead inevitably toward an inversion of the intentions of the framers of compensatory policies – e.g., the NLRB, or affirmative action – so that the objects of legislative restraint end up the main beneficiaries?

2-5:00 Self-Sovereignty: The Strange Career of the Right to Privacy

We begin with a discussion of the 'roots' of the right of privacy – its progress from tort to constitutional right – and then explore the shifting contours of the right as jurists confronted and began to address such developments as new information-gathering technology (Kodak cameras, wiretaps, etc.), prohibition, contraception, abortion, and so on.

Discussion Co-Leader: Richard Hamm (Dept. of History, University at Albany)

Readings for Richard Hamm:

Ex Parte Jackson, 96 U.S. Reports 727; *Boyd v. United States*, 116 U. S. Reports 616, *Weeks v. United States*, 232 U.S. Reports 383, *Buck v. Bell*, 274 U.S. Reports 200 (esp. the argument of Irving Whitehead before the U.S. Supreme Court), available at this website:

<http://eres.ulib.albany.edu.libproxy.albany.edu/eres/coursepass.aspx?cid=171>

Password “law” in unit III, document K; *Olmstead v. United States*, 277 U.S. Reports 438, especially the Lawyer’s Edition, 72 L. Ed. 944, which has the briefs.

See also: <http://www.louisville.edu/library/law/brandeis/privacy.html> This is an electronic version of the formative essay, “The Right to Privacy,” by Samuel Warren and Louis D. Brandeis. Originally published in 4 *Harvard Law Review* 193 (1890).

For background on privacy, prohibition, eugenics, and the particular cases see:

Thomas Pegram, *Battling Demon Rum* (1999).

Norman Clark, *The Dry Years*, <http://www.eugenicsarchive.org/eugenics/> (see also Clark’s book, *Deliver Us From Evil*).

Paul Lombardo, “Three Generations, No Imbeciles . . .,” 60 *New York University Law Review* (1985), 31-62.

Richard Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920* (1994). Here, Hamm explores not only the march of events, but the interaction of informal and formal systems of ‘law’ and ‘rules’ – as with the reliance on Mosaic law by temperance reformers – to shape legal outcomes.

Readings for VanBurkleo:

Shared readings: *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade* and *Doe v. Bolton*, 410 U.S. 113, and subsequent rulings about reproductive rights, if you have time – see VanBurkleo, *Belonging to the World*, for citations. See also an old Michigan case, *John H. DeMay and Alfred B. Scattergood v. Alvira Roberts*, 46 Mich. Reports 160 (1881), which is cited in the Warren-Brandeis article (see Hamm’s list above). Also read Anne M. Coughlin, “Sex and Self-Government,” *McGeorge Law Review* (Fall 1997), and skim Philippa Strum, *Privacy: The Debate in the United States Since 1945* (1997)

Gain some familiarity with 2 or 3 of these volumes:

* Rickie Solinger, *Wake Up Little Susie: Single Pregnancy and Race before Roe v. Wade* (1992).

* Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973* (1997).

* N.E.H. Hull and Peter Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (2001).

David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (1994, revised ed. 1998)

* John Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (2005).

* S. F. VanBurkleo, “*Belonging to the World*”: *Women’s Rights and American Constitutional Culture*,” Parts II and III (zero in on privacy and reproductive rights).

Margaret Sanger, *Autobiography*.

Jack Balkin, ed., *What Roe v. Wade Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Most Controversial Decision* (2007)

* Mason, *Killing for Life: The Apocalyptic Narrative of Pro-Life Politics* (2002).

Optional: VanBurkleo, “The Right of Privacy,” in Kermit L. Hall, ed., *By and For the People: Constitutional Rights in American History: A Project of the OAH Ad Hoc Committee on the Bicentennial* (1991). A brief account of the passage from tort to constitutional right.

Questions: Reconsider our previous discussion of public dramas. How would you describe the remarkable transformation of a privacy tort into a multi-faceted right of privacy – and then the very modern notion that privacy is mostly about reproductive rights? To what extent has the public been involved for several decades in an ongoing ‘trial’ of a woman’s equal right to self-sovereignty? To what extent does the public have a legitimate interest in maternity? How might we connect our discussion of privacy, gender, and self-sovereignty to our discussion of economic protectionism in *Muller v. Oregon* and elsewhere? Is Philippa Strum right to say that *Roe v. Wade* is really about physicians’ rights rather than women’s rights? Consider Hamm’s discussion of the Mosaic ‘law’ to which the anti-drinking reformers adhered before the 1920’s: Are the two movements analogous? Does the permeability (or perhaps contingency) of boundaries around women’s bodies/the assumption of access to pregnant women’s bodies, etc., indicate a social decision to guarantee personal security primarily to white men? Or is it something else? More generally, does a modern willingness to devalue privacy on a day-to-day basis (as with cell phone exhibitionism, necking in public, and so on) reflect widespread lack of interest in privacy – or something else? Were jurists wrong, in other words, to think that the citizenry applauded constitutionalization of all elements of this compound right? What if we carved out reproductive rights and recast them as 14th amendment rights, as Ruth Bader Ginsberg suggested long ago? Do you see a link between public declarations of an interest in the health and welfare of women/children in the workplace, and state declarations of an interest in maternity and/or pregnancy? How do we manage to teach such a complex subject without reducing the subject to black-letter law?

Friday July 13

9-noon *The Strange Career of the Constitutional Revolution of 1937*

Cases: Have a look at all of the New Deal-related cases in a document collection (e.g., *Nebbia*, *Schechter*, *Carolene Products*, the AAA and NRA cases, etc.).

Paul Conkin, *The New Deal* (a brief history of the New Deal, for the uninitiated)

* Stephen Shaw, et al., eds., *Franklin D. Roosevelt and the Transformation of the Supreme Court* (2003).

* William Wiecek, *The Lost World of Classical Legal Thought* (2001).

* William Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995) – classic account of the Switch in Time....

* Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998). Frustrating to read, but vitally important.

G. Edward White, *The Constitution and the New Deal* (2002).

...and for a very early account, see chapter in Paul Murphy, *The Constitution in Crisis Times* (1972) (“The Constitutional Revolution of 1937”).

Questions: “Internal” and “external” explanations for the ‘switch in time that saved nine’ have emerged. See particularly Leuchtenberg and Cushman. What do you make of these categories and related explanations for change? On the point, consider Bill Wiecek’s concluding chapter and the implications of Howard Gillman’s book, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993) – highly recommended. Why do you suppose the events of 1934-1940 came to be called ‘a revolution’? WERE they revolutionary, or something else? [Sometime, by the way, charge a good student with collecting newspaper and magazine cartooning from about 1936 to 1938 – the transformation of media treatments of FDR and the Court are simply amazing].

2-5:00 *Executive Power and Privilege in the Age of Terrorism*

Discussion Leader: Daniel Marcus (American University – Law School)

[With luck, we’ll be able to persuade Maeva Marcus to join us for a discussion of the Steel Seizure Case. She wrote the definitive account of this important decision].

The 9/11 attacks have had a profound impact on American politics and society. They have also provided the setting for the implementation – or attempted implementation – by the Bush Administration of an extraordinarily robust theory of executive power. This theory is most closely identified with Vice President Cheney, David Addington (Cheney’s former counsel and current chief of staff), and John Yoo, a University of California law professor who, as Deputy Assistant Attorney General for the Office of Legal Counsel at the Justice Department, was the author of the key legal opinions justifying the Bush Administration’s actions in the “war on terror.” The Cheney/Addington/Yoo theory centers around a muscular definition of the President’s constitutional authority as Commander in Chief of the armed forces, a correspondingly narrow definition of Congress’s war powers, and -- most controversially -- a view of separation of powers that holds that the President is free to disregard otherwise valid statutes passed by Congress if they interfere with his discretion as Commander in Chief.

In our session we will discuss how this theory fits with historic understandings of executive power and separation of powers and examine how it has played out and is continuing to play out in the controversies over the detention, treatment, and trial of “enemy combatants” in the war on terror and the President’s establishment of a secret electronic surveillance program outside the statutory scheme set up by Congress.

Assigned Readings:

A. Cases (please read the abridged versions in any of the leading Constitutional Law casebooks (e.g., Sullivan & Gunther; Stone, Seidman et al.; Choper, Fallon et al.; or Chemerinsky), or – preferably -- the indicated portions of the opinions from the United States Reports):

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the Steel Seizure Case). Read Justice Black’s opinion for the Court and Justice Jackson’s concurring opinion. Skim Chief Justice Vinson’s dissent.

2. Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (President’s power to detain U.S. citizens as enemy combatants). Read Parts II and III of Justice O’Connor’s plurality opinion; Part III-D of Justice Souter’s opinion (concurring in part); and Justice Thomas’s dissenting opinion.

3. Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (President’s power to establish military commissions). Read Parts IV and VI of Justice Stevens’s opinion for the Court, taking particular note of footnote 23; and Part I of Justice Kennedy’s concurring opinion.

B. Justice Department opinions and related material:

1. OLC Opinion, signed by Assistant Attorney General Jay Bybee, “Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A” (the “Torture Opinion”), August 1, 2002, available, *inter alia*, at www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%. Skim Parts I-IV. Read Part V.

2. U.S. Department of Justice “White Paper,” “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,” January 19, 2006, available, *inter alia*, at www.usdoj.gov/opa/whitepaperonnsalellegalauthorities. Read Part I. Skim Parts II-III-C. Read Part III-D.

3. “On NSA Spying: A Letter to Congress” (from 14 law professors and former Government officials), available, *inter alia*, at www.nybooks.com/articles/18650.

C. Articles from the March 2007 issue of Presidential Studies Quarterly (Volume 57, No. 1), available through www.blackwell-synergy.com:

1. Louis Fisher, “Invoking Presidential Powers: A Primer,” pp. 1-22.

2. Richard M. Pious, “Inherent War and Executive Powers and Prerogative Politics,” pp. 66-84.

3. Jack N. Rakove, “Taking the Prerogative out of the Presidency: An Originalist Perspective,” pp. 85-100.

Saturday July 14

9-noon Wrap-Up: Re-Thinking the Master Narrative, the Cases, the Subject

Reading:

* Austin Sarat and Thomas R. Kearns, “Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life,” in *Law in Everyday Life* (1993), 21-61.

Bring your intellectual journals. Be prepared to say a few words (five minutes for each participant) about what you have been prompted to think about, where good things happened, where we might improve the experience, and so on. Pay attention as well to how learning might be transferred into college classrooms.

Questions: We will begin here, but we’ll end with your questions. How exactly might scholars mold constitutional history (and adjacent regions in constitutional studies) into a field or fields more responsive to law’s actual, complex operations within society, culture, polity, and economy? How exactly would the several disciplines we’ve considered over the past week contribute to a field that we’re calling ‘constitutional studies’? Also, to the extent that old categories are important but incomplete (and in some cases unhelpful), and also to the extent that purely doctrinal approaches trivialize constitutionalism’s centrality in both public and private life, it might make sense to play with some new categories/approaches, and find ways to carry out ideas into the classroom. Or not. That’s up to you.

FINAL THOUGHT:

This is a gigantic load of reading. Remember that I do this partly to give you something to read for awhile – but also to challenge you. If you can’t find time for all of this, try to read around in materials with an asterisk, and of course you’ll want to have a go at the cases, if only in edited form.

See you soon!

svb