

Institute for Constitutional History Summer Seminar on Embedded Histories in Constitutional Argument, Stanford Law School, July 14-18, 2014

“No man can have in his mind a conception of the future, for the future is not yet. But out of our conceptions of the past, we make a future.” Hobbes,  
*Elements of Law*

In judicial opinions, oral advocacy and briefs arguing cases before courts, and in articles and treatises, lawyers use history to connect the past to the present, to show how law and society have evolved from past enactments or cases to the present day. Sometimes these histories are explicit, such as those exploring "original" public meanings of constitutional text, sometimes implicit stories of changing interpretations and social circumstances. This seminar will examine selected fragments of such embedded histories in several areas of constitutional law, including: the history of the "ancient [English] constitution" and common law in the legal arguments of American revolutionaries; the history of regulation in constitutional arguments over the police power; the history of the right to bear arms in arguments over the Second Amendment; the history of racial discrimination in recent arguments over civil rights; and the history of church-state separation in arguments over the religion clauses.

NOTE: This list of readings is intended to get us started thinking about the themes of the seminar. We'll probably add some more as we go along – and indeed I'll welcome suggestions for additional readings on these themes. Many of these readings will probably already be familiar to participants. Let's try to read them in a new way, not just as attempts to appeal to history for justification or explanation of decisions, but as narratives connecting the past to the present, invoking the past as authority or inspiration, or as a model of what has been fortunately overcome or left behind.

When you've had a chance to look over the list of topics and readings, could you e-mail me (rwgordon@stanford.edu) to let me know on which topics you would volunteer to help lead off the day's discussion? It's fine to pick more than one.

Session 1, Monday, July 14:

Revolutionary Argument: Histories of the English Constitution and Common Law

Charles Gray, Blackstone's History of English Law

James Otis, Rights of the British Colonies

John Adams, A Dissertation on the Canon and Feudal Law

John Reid, The Ancient Constitution

Bernardette Meyler, Common Law Originalism\*

[\*Bernadette Meyler of the Stanford Law faculty will join us for this session.]

Session 2, Tuesday, July 15:  
The Police Power and Regulation

Commonwealth v. Alger (Mass 1851)  
John A. Campbell, Brief for the Butchers in the Slaughterhouse Cases  
Munn v. Illinois (US S Ct., 1877)  
People v. Walsh (Peckham, J. dissent) (NY 1889)  
Thomas M. Cooley, Limits to State Control of Private Business  
Holden v. Hardy (US S Ct., 1897)  
Walton Hamilton, Affectation with a Public Interest

(Harry Scheiber of the Boalt Hall faculty will join us for this session.)

Session 3, Wednesday, July 16  
Histories of Civil Rights in Brown and After

Brown v. Board of Education (S Ct, 1954)  
Regents of the University of California v. Bakke (S Ct. 1978)  
City of Richmond v. JA Croson Co. (S Ct. 1989)  
Parents Involved in Community Schools v. Seattle School District 1 (SCt 2007)  
Shelby County v. Holder, Oral Argument (S Ct. 2013)  
Shelby County v. Holder (S Ct. 2013)  
Fisher v. University of Texas at Austin ( S Ct. 2013)  
Jamal Greene, Fourteenth Amendment Originalism

Session 4, Thursday, July 17  
Histories of the Right to Bear Arms

D.C. v. Heller (S Ct. 2008)  
Jack Rakove et al., Historians' Brief in Heller\*  
David Konig on history in Heller  
Reva Siegel, Heller as Living Constitutionalism  
McDonald v. Chicago (S Ct. 2010)

[\*Jack Rakove of the Stanford History faculty will join us for this session.]

Session 5, Friday, July 18  
Histories of Church and State

Everson v. Board of Education of Ewing Township (S Ct. 1947)  
Engel v. Vitale (S Ct., 1962)  
Wallace v. Jaffree (S Ct. 1985)  
Lee v. Weisman (S Ct. 1992)  
Hosanna-Tabor Evangelical Lutheran Church (S Ct. 2012)  
Town of Greece, NY v. Galloway (S Ct. 2014)

We'll set aside the final hours of the Friday session for general discussion of the uses of history in constitutional argument. Our plan is to adjourn by 4 p.m.