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21H.224 Law and Society in US History
Spring 2003

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Massachusetts Institute of Technology

21H.224 Spring 2003

Law and Society in U.S. History

As events of the last few years have shown, the Supreme Court has played a crucial role in American political life. There is practically no issue of social significance in the American past that did not at some point end up in the nation's courtrooms, yet much of the workings of the constitution remain obscure. This subject is designed to introduce students to the main themes and events of American constitutional law since 1787. It introduces terms and concepts of law and legal history, focusing on three recurring themes in American public life: liberty, equality, and property. Readings consist mostly of original court cases, especially from the U.S. Supreme Court, but the focus of the class is on the historical connections between those cases and broader social, political, and cultural trends.

Requirements: The success of this class depends on the active participation of all students. Classroom participation (15%) represents a substantial portion of the grade, and will be evaluated in terms of preparation, participation in large and small group discussion, active listening, collaboration, and overall contributions to the class experience during the term. Needless to say, if you do not attend a class it is impossible for you to contribute to it. Students are expected to keep up with the readings and attend class regularly, as classroom discussions and readings do not always overlap.

Writing assignments are frequent, but short. All students will submit a case brief on one of the assigned cases (10%). All students will submit position papers (5-6pp.) on two of the three class themes (25% each), and take the final examination (25%). Writing assignments are generally due on paper in person at the beginning of the class in which they are due. If the due date is set for a Friday, papers may be submitted by attachment, on the condition that you keep a backup paper copy of the paper in case there is difficulty reading the attachment. Extensions will be granted only for good reasons explained well in advance; computer malfunctions are never an acceptable excuse for a late submission. Adherence to standards of academic honesty is required; if you have any questions about how to go about your writing or cite your sources, don't hesitate to ask.

Books: Copies of all required books have been placed on reserve in the Humanities Library. Most of the cases listed below are included in Hall et al., eds., *American Legal History*. Recent cases can be found online at www.findlaw.com. Readings should be completed by the beginning of the class under which they appear, unless otherwise stated.

Hall, Kermit, et al., eds. *American Legal History: Cases and Materials*. 2nd. ed. 1996.

Garraty, John A., ed. *Quarrels That Have Shaped the Constitution*. 2nd. ed. 1987.

Horwitz, Morton J. *The Warren Court and the Pursuit of Justice*. 1998.

Greenberg, Ellen. *The Supreme Court Explained*. 1997.

**** CLASS OUTLINE ****

WEEK ONE: INTRODUCTION: WHAT IS LAW? WHAT IS THE CONSTITUTION?

Class 1

READING: Franz Kafka, "Before the Law," In *The Metamorphosis, In the Penal Colony, and Other Stories* (1948), pp. 148-150.

Class 2

READING: Edmund S. Morgan, *The Birth of the Republic, 1763-89*, 3d. ed. (1992), pp. 129-156.

Howard Zinn, *A People's History of the United States, 1492-Present*, rev. ed. (1995), pp. 89-101.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 80-96.

WEEK TWO: THE CONSTITUTION AND JUDICIAL REVIEW

Class 3

READING: The Constitution. Members of the class will take responsibility for different portions.

Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution." *Harvard Law Review* 101 (November 1987): 1-5.

Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (1991), pp. 27-31.

"The Slaves' Appeal to the Royal Governor of Massachusetts" (1774), in Diane Ravitch, ed., *The American Reader: Words that Moved a Nation* (1990), pp. 16-17.

Abigail Adams, "Correspondence with John" (1776), in Diane Ravitch, ed., *The American Reader: Words that Moved a Nation* (1990), pp. 30-32.

Class 4

READING: Ellen Greenberg, *The Supreme Court Explained*, pp. 1-12, 61-75, and any other portions of the book that you wish. You will find that you will refer back to this book frequently over the course of the semester.

John A. Garraty, "The Case of the Missing Commissions," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 7-19.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 103-105, 109-113.

CASE: *Marbury v. Madison*, 5 U.S. 137 (1803).

WEEK THREE: PROPERTY RULES IN THE NEW NATION

Class 5

READING: Richard N. Current, "The Dartmouth College Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 21-35.

Bray Hammond, "The Bank Cases," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 37-55.

George Dangerfield, "The Steamboat Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 57-69.

Henry F. Graff, "The Charles River Bridge Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 71-85.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 114-116, 121-132, 139-150.

CASES: *Dartmouth College v. Woodward*, 17 U.S. (1819).
McCulloch v. Maryland, 17 U.S. 316 (1819).
Gibbons v. Ogden, 22 U.S. 1 (1824).
Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. 420 (1837).

WEEK FOUR: PROPERTY AND EQUALITY BEFORE THE CIVIL WAR

Class 6

READING: Linda K. Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (1980), pp. 137-155.

Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (1991), pp. 377-382.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 255-260, 264-268.

CASE: *Johnson v. M'Intosh*, 21 U.S. 543 (1823).
Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
Worcester v. Georgia, 31 U.S. 515 (1832).

Class 7

READING: Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (1974), pp. 25-49.

Don E. Fehrenbacher, "The Dred Scott Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 87-99.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 72-74, 187-190, 200-216.

CASES: *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).
Dred Scott v. Sanford, 60 U.S. 393 (1857).

Class 8

WRITING: CASE BRIEF due.

WEEK FIVE: EQUALITY: THE STRANGE CAREER OF THE 14TH AMENDMENT

Class 9

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 226-228, 230-236.

Alan F. Westin, "The Case of the Prejudiced Doorkeeper," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 139-156.

C. Vann Woodward, "The Case of the Louisiana Traveler," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 157-174.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 236-242, 250-255.

CASES: *The Slaughterhouse Cases*, 83 U.S. 36 (1873).
The Civil Rights Cases, 109 U.S. 3 (1883).
Plessy v. Ferguson, 163 U.S. 537 (1896).

Class 10

READING: Maxine Hong Kingston, "The Laws," from *China Men* (1980), in Christopher Ricks and William L. Vance, eds., *The Faber Book of America* (1992), pp. 432-437.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 260-264, 268-271.

CASES: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
Bradwell v. Illinois, 83 U.S. 130 (1873).
Minor v. Happersett, 88 U.S. 162 (1875).
United States v. Schwimmer, 279 U.S. 644 (1929).
Ozawa v. United States, 260 U.S. 178 (1922).

WEEK SIX: PROPERTY: THE FALL AND RISE OF REGULATION

Class 11

READING: C. Peter McGrath, "The Case of the Unscrupulous Warehouseman," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 119-138.

R. W. Apple, Jr., "The Case of the Monopolistic Railroadmen," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 175-192.

Alpheus Thomas Mason, "The Case of the Overworked Laundress," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 193-208.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 353-357, 362-374, 378-381, 383-386, 388-394, 460-464.

CASES: *Munn v. Illinois*, 94 U.S. 113 (1877).
In re Debs, 294 U.S. 564 (1895).
Northern Securities Co. et al. v. U.S., 193 U.S. 197 (1904).
Lochner v. New York, 198 U.S. 45 (1905).
Muller v. Oregon, 208 U.S. 412 (1908).

Class 12

READING: William E. Leuchtenburg, "The Constitutional Revolution of 1937," in *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995), pp. 213-236.

Frank Freidel, "The Sick Chicken Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 233-252.

William E. Leuchtenburg, "The Case of the Wenatchee Chambermaid" in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 266-284.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 455-457, 470-478, 482-490.

CASES: *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
NLRB v. Jones and Laughlin Steel Co., 301 U.S. 1 (1937).

Class 13

WRITING: FIRST position paper due.

WEEK SEVEN: LIBERTY: MODERNIZING THE FIRST AMENDMENT

Class 14

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 400-402, 407-419.

Alison M. Parker, *Purifying America: Women, Cultural Reform, and Pro-Censorship Activism, 1873-1933* (1997), pp. 134-157.

Richard Polenberg, "Oliver Wendell Holmes, Jr., and Clear and Present Danger," in Kermit L. Hall, ed., *Major Problems in American Constitutional History* (1992), pp. 174-182.

CASES: *Schenck v. U.S.*, 249 U.S. 47 (1919).
Abrams et al. v. U.S., 250 U.S. 616 (1919).
United States v. One Book Entitled "Ulysses," 8 F.Supp. 182 (1933).

Class 15

READING: Philippa Strum, *When the Nazis Came to Skokie: Freedom for Speech We Hate* (1999), pp. 1-35.

Richard Delgado and Jean Stefancic, "'The Speech We Hate': The Romantic Appeal of First Amendment Absolutism: Does Defending Nazis Really Strengthen the System of Free Speech?" in *Must We Defend Nazis?: Hate Speech, Pornography, and the New First Amendment* (1997), pp. 149-162.

CASES: *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).
Terminiello v. City of Chicago, 337 U.S. 1 (1949).
National Socialist Party of America v. Village of Skokie, 434 U.S. 1327 (1977).
Texas v. Johnson, 491 U.S. 397 (1989).

WEEK EIGHT: LIBERTY: FREEDOM OF (AND FROM) RELIGION

Class 16

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 74-75.

Irving Dilliard, "The Flag-Salute Cases," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 285-306.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 421-427, 535-538.

CASES: *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).
West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943).
Engel et al. v. Vitale et al., 370 U.S. 421 (1962).

Class 17

READINGS: Readings on vouchers to be announced based on developments in the US Supreme Court.

CASES: *Wisconsin v. Yoder*, 406 US 208 (1972).
Board of Ed. of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994).
Zelman v. Simmons-Harris, 536 U.S. ____ (2002).

WEEK NINE: EQUALITY: THE WARREN COURT AND SUBSTANTIVE DUE PROCESS

Class 18

READING: Peter Irons, "Gordon Hirabayashi v. United States," in *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (1990), pp. 37-62.

William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998), pp. 184-211.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 427-437, 490-493.

CASES: *Hirabayashi v. United States*, 320 U.S. 81 (1943).
Korematsu v. United States, 323 U.S. 214 (1944).
Ex parte Endo, 323 U.S. 273 (1944).
Palko v. Connecticut, 302 U.S. 219 (1937).
United States v. Carolene Products Co., 304 U.S. 144 (1938).

Class 19

READING: Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (1998), pp. 1-51.

Alfred H. Kelly, "The School Desegregation Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 307-333.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 445-454, 510-518.

CASES: *Shelley v. Kraemer*, 334 U.S. 1 (1948).
Sweatt v. Painter, 339 U.S. 629 (1950).
Brown v. Board of Ed. of Topeka, Kansas, 347 U.S. 483 (1954).

WEEK TEN: LIBERTY: THE WARREN COURT AND IMPLIED LIBERTIES

Class 20

READING: Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (1998), pp. 52-98.

Anthony Lewis, "The Case of the Florida Drifter," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 335-350.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 541-545.

CASES: *Gideon v. Wainwright*, 372 U.S. 335 (1963).
Miranda v. Arizona, 384 U.S. 436 (1966).

Class 21

READING: Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (1998), pp. 98-115.

Rosalind Rosenberg, "The Abortion Case," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 351-375.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 518-526, 563-569.

Peter G. Filene, *In the Arms of Others: A Cultural History of the Right-to-Die in America* (1998), pp. 11-46.

CASES: *Griswold v. Connecticut*, 381 U.S. 479 (1965).
Roe v. Wade, 410 U.S. 113 (1973).
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
Cruzan v. Director, Missouri Department of Health, 497 U.S. 621 (1990).

WEEK ELEVEN: EQUALITY: THE RISE AND FALL OF AFFIRMATIVE ACTION

Class 22

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 526-530, 560-563.

Lyndon Johnson, "Howard University Address," in Diane Ravitch, ed., *The American Reader: Words that Moved a Nation* (1990), pp. 340-342.

Readings on affirmative action to be announced based on developments in the US Supreme Court this spring.

CASES: *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
Fullilove v. Klutznick, 448 U.S. 448 (1980).
Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987).
Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
Hopwood v. Texas, 84 F.3d 720 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).
Gratz v. Bollinger, 122 F.Supp.2d 811 (2000).

Class 23

WRITING: SECOND position paper due.

WEEK TWELVE: EQUALITY: OTHER SUSPECT CLASSIFICATIONS

Class 24

READING: Catharine A. Mackinnon, "Sexual Harassment of Working Women: A Case of Sex Discrimination," in *Sexual Harassment: Issues and Answers*, ed. Linda LeMoncheck and James P. Sterba (2001), pp. 42-49.

Vicki Schultz, "Sex Is the Least of It: Let's Focus Harassment Law on Work, Not Sex," in *Sexual Harassment: Issues and Answers*, ed. Linda LeMoncheck and James P. Sterba (2001), pp. 269-273.

Readings on Title IX to be announced based on developments this spring.

CASES: *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
U.S. v. Virginia, 518 U.S. 515 (1996).

Class 25

READINGS: Arthur S. Leonard, "From *Bowers v. Hardwick* to *Romer v. Evans*: Lesbian and Gay Rights in the U.S. Supreme Court," in *Creating Change: Sexuality, Public Policy, and Civil Rights*, ed. John D'Emilio, William B. Turner, and Urvashi Vaid (2000), pp. 57-77.

Kermit Hall, et al., eds., *American Legal History* (1996), pp. 570-574.

CASES: *Loving v. Virginia*, 388 U.S. 1 (1967).
Bowers v. Hardwick, 478 U.S. 186 (1986).
Baehr et al. v. Lewin, 852 P.2d 44 (1993).
Romer v. Evans, 517 U.S. 620 (1996).
Baker v. State of Vermont, 744 A.2d 865 (Vt. 1999).

WEEK THIRTEEN: LIBERTY: CONSERVATIVE CONSTITUTIONALISM

Class 26

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 554-560.

Michael Les Benedict, "The Supreme Court and Conservative Constitutionalism," in *The Blessings of Liberty: A Concise History of the Constitution of the United States* (1996), pp. 356-366 and 369-387.

Edwin Meese, "A Jurisprudence of Original Intention" (1985), in Michael Les Benedict, comp., *Sources in American Constitutional History* (1996), pp. 249-253.

CASES: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
United States v. Lopez, 514 U.S. 549 (1995).
City of Boerne v. Flores, 117 S. Ct. 2157 (1997).

Class 27

READING: Kermit Hall, et al., eds., *American Legal History* (1996), pp. 228-230 (for background), 545-550.

E.J. Dionne, Jr. and William Kristol, eds., *Bush v. Gore: The Court Cases and the Commentary* (2001), pp. tba.

CASES: *U.S. v. Nixon*, 418 U.S. 683 (1974).
Clinton v. Jones, 520 U.S. 681 (1997).
Bush v. Gore, 531 U.S. ____ (2000).

Class 28

WRITING: THIRD position paper due.

WEEK FOURTEEN: CONCLUSIONS: THE CONSTITUTION AFTER SEPTEMBER 11TH

Class 29

READINGS: Allan Nevins, "The Case of the Copperhead Conspirator," in Garraty, *Quarrels that Have Shaped the Constitution*, pp. 101-118.

William H. Rehnquist, *All the Laws but One: Civil Liberties during Wartime* (1998), pp. 218-225.

Readings on civil liberties after September 11th to be announced.

Class 30

READINGS: Franz Kafka, "In the Penal Colony," in *The Metamorphosis, In the Penal Colony, and Other Stories* (1948), pp. 191-227.

FINAL EXAMINATION

The final examination for this class will be only two hours long, and will draw primarily from the second half of the semester.