

Processes of Legal and Constitutional Change

Professors Steven Teles and David Fontana

Interdisciplinary Summer Workshop for College Instructors

July 11-16, 2010

Yale Law School

New Haven, Connecticut

DESCRIPTION: One of the central scholarly debates regarding American and comparative constitutional law, and all other forms of law, is a simple—but crucial—question: How does law change? This workshop focuses on this question, by discussing several scholarly debates that share the common research question of trying to explain constitutional and other forms of legal change. By examining each of these debates, we can better understand the different ways that law evolves, and we can also understand the successes and failures of scholars in trying to explain legal change.

The workshop will discuss on its first day what political and social dynamics lead to the creation of law and legal systems in the first place. Why do some countries create—and succeed—in creating the rule of law, while other countries do not even try in the first place, or try and fail? After we better understand how legal systems are created in the first place, we will then turn to the different forms of legal systems currently in existence, from the more court-driven common law systems of the British-inspired legal systems to the more legislatively-driven civil law systems inspired by Continental Europe. By examining how the common law and civil law systems rise and fall, this second day of the workshop will give workshop participants of how change transpires within a legal system—after the basic fundamentals for the rule of law are first established.

After the workshop discusses these larger, structural dynamics of legal systems, we will focus on changes that take place once the basic structural fundamentals of the legal system are already established. The third day of the workshop will focus on the role that elections play in transforming law. While some political scientists and law professors have proposed that electoral change is the key to explaining change in the law, others have suggested that the professional and expert character of the law insulates it from shifts in popular sentiment. Our final day of sessions will reverse field, examining the ongoing scholarly debate about whether and how law changes the rest of the political and social world. We will focus primarily on the claim that structural features of the courts severely limit their efficacy as an instrument in driving change, as well as the counter-argument that focuses on the indirect effects of legal mobilization.

While the content of each day might change, the theme remains constant: How does law change, and how does law change the world—and how have scholars tried to explain this? Our focus will be both on American law and law in the rest of the world. Each day of the workshop, we will have a

session led by a member of the faculty of our host institution, Yale Law School, whose scholarship relates to the particular scholarly debate we are discussing that day. Our current Yale Law faculty participants are Bruce Ackerman, Jack Balkin and Robert Gordon.

LOGISTICS: The seminar will formally commence on Sunday, July 11 and finish on Friday, July 16. On Sunday, July 11 we will have a dinner to welcome everyone to New Haven and to meet one another. The dinner will begin at 7 p.m. (at Barcelona Restaurant at 155 Temple Street in New Haven), so please make sure to be in New Haven in time.

The schedule will vary slightly from day to day, but a few general notes are worth making. First, we have kept open a large block of time around lunch and in the early afternoon every day. This means that everyone is both free to do what they want for lunch and also should have sufficient time to do other exploring during that extended break in the middle of the day. Second, we only have a group dinner together for Sunday, July 11. Every other evening you are free to do as you wish after the final class session finishes those days.

On Monday, July 12, we will begin the class sessions for the week. While on other days we will have only three class sessions, on the first day we will meet in four separate sessions. During the first class session, from 9 until 10:45 a.m., we will highlight some of the main issues running through the seminar for the rest of the week. During our second session, from 11:15 a.m. until 1 p.m., we will begin our discussion of the substantive readings for that class session. During our third session, from 3 until 4:30 p.m., Professor Bruce Ackerman, Sterling Professor of Law and Political Science at Yale Law School, will join us to discuss the readings. Professor Ackerman will offer remarks for about twenty minutes, and then we will have a group discussion. The final class session that day, from 5 until 6:30 p.m., will focus on how this particularly scholarly debate might be integrated into classroom teaching by seminar participants.

On Tuesday, July 13, Wednesday, July 14, and Thursday, July 15, the format will be the same each day. There will be three class sessions: the first from 9 until 10:45 a.m., the second from 11:15 a.m. until 1 p.m., and the third from 3 until 4:30 p.m. During the first class session, we will discuss the readings for that session. During the second class session, we will again be joined by a guest speaker and participant, who will offer twenty minutes of remarks before we begin general discussion transitioning us from the first set of readings to the next set of readings. The guest speakers for the remainder of the week are as follows: on Tuesday, Robert W. Gordon, Chancellor Kent Professor of Law and Legal History at Yale Law School, and on Wednesday, Jack Balkin, Knight Professor of Constitutional Law and the First Amendment. During the third class session, we will focus on the final set of readings for that day.

On Friday, July 16, we will tie together many of our discussions for the week. There will be no extra reading for class that day.

Monday, July 12: Introduction and the Creation of Democratic Constitutionalism

Session #1: Introduction

David Fontana, *The Rise and Fall of Comparative Constitutional Law* (forthcoming in *The Yale Journal of International Law*) (Part II.A)

Scott Frickel & Neil Gross, *A General Theory of Scientific/Intellectual Movements*, 70 AMERICAN SOCIOLOGICAL REVIEW 204 (2005)

Session #2: The Early Years: Explaining Democracy

Juan Linz, *The Perils of Presidentialism*, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT (Arend Lijphart, ed., 2004)

Juan Linz, *The Virtues of Parliamentarism*, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT (Arend Lijphart, ed., 2004)

Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy* 53 AMERICAN POLITICAL SCIENCE REVIEW 69 (1959)

Session #3: Session with Guest Speaker Bruce Ackerman

Session #4: The Later Years: Explaining Constitutionalism

CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998), introduction and chapters 1-2

TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003), introduction and chapters 1-4

Tom Ginsburg, *The Global Spread of Constitutional Review*, in OXFORD HANDBOOK OF LAW AND POLITICS (Keith Whittington & Daniel Keleman, eds., 2008)

RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004), introduction and chapters 1-3

Mark J. Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 JOURNAL OF LEGAL STUDIES 721 (1994)

Keith Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AMERICAN POLITICAL SCIENCE REVIEW 583 (2005)

Tuesday, July 13: The Forms of Legal Systems

Session #1: The Common Law Versus Civil Law in the Early Years

Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 THE AMERICAN JOURNAL OF COMPARATIVE LAW 419 (1967)

Richard S. Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency: A Response to Professor Posner's Reply*, 11 HOFSTRA LAW REVIEW 667 (1983)

Douglas C. North & Barry Weingast, *Constitution and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 THE JOURNAL OF ECONOMIC HISTORY 803 (1989)

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973), chapters 13 and 19

Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA LAW REVIEW 775 (1981)

George L. Priest, *Selective Characteristics of Litigation*, 9 JOURNAL OF LEGAL STUDIES 399 (1980)

Session #2: Guest Speaker Robert Gordon

Session #3: The Common Law Versus Civil Law: The Debate Returns

Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 UNIVERSITY OF CHICAGO LAW REVIEW 1179 (2007)

Daniel Klerman and Paul Mahoney, *Legal Origin?*, 35 JOURNAL OF COMPARATIVE ECONOMICS 278-293 (2007)

Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AMERICAN LAW AND ECONOMICS REVIEW 1 (2005)

John Reitz, *Legal Origins, Comparative Law, and Political Economy*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 847 (2009)

Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NORTHWESTERN UNIVERSITY LAW REVIEW 1551 (2003)

Wednesday, July 14: Are Elections The Key To Legal Change?

Session #1: Electoral Theories of Legal Change

Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE LAW JOURNAL 453 (1989) (skim)

Robert Dahl, *Decision Making in a Democracy: The Supreme Court as National Policy Maker*, 6 JOURNAL OF PUBLIC LAW 279 (1957) (skim)

Jack Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VIRGINIA LAW REVIEW 1045 (2001), read pp. 1069-1097, skim the rest.

JEFFREY SEGAL AND HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002), pages 86-114

Session #2: Guest Speaker Jack Balkin

Session #3: Alternatives to Electoral Theories

CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998), chapters 3-4

STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008), chapters 1-2, 4, 6 and conclusion

Steven Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 61 (2009)

LEE EPSTEIN AND JOSEPH KOBLYKA, THE SUPREME COURT AND LEGAL CHANGE (1992), pages 25-70 (skim)

Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARVARD LAW REVIEW 191 (2008) (recommended)

Thursday, July 15: Can Law Change Society?

Session #1: Rosenberg and the Critiques of Legalism

Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley, eds., 2002)

GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991), skim pages 1-172 (read Chapter One closely, and skim the rest)

NATHANIEL PERSILY, JACK CITRIN AND PATRICK EGAN, EDS., THE SUPREME COURT AND CONSTITUTIONAL CONTROVERSY (2008), introduction, chapters 1,2 and 10

Session #2: The Anti-Rosenberg Backlash

Charles Epp, *Implementing the Rights Revolution: Repeat Players and The Interpretation of Diffuse Legal Messages*, 71 LAW AND CONTEMPORARY PROBLEMS 41 (2008)

MALCOLM FEELEY AND ED RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE (1998), pages 30-144.

Shep Melnick, *Entrepreneurial Litigation: Advocacy Coalitions and Strategies in the Fragmented American*

Welfare State, in REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY (Joe Soss, Jacob Hacker & Suzanne Mettler, eds., 2007)

Jeb Barnes and Thomas Burke, *From Law on the Books to Organizational Rights Practices*, 40 LAW AND SOCIETY REVIEW 493 (2006)

Session #3: Frontiers of Legal Implementation—Is Conservative Litigation The Real Hollow Hope?

Jon Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW AND SOCIETY REVIEW 345 (2001)

Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINNESOTA LAW REVIEW 2100 (2009)

GRUTTER V. BOLLINGER (SKIM)

Tim Groseclose, "Report on Suspected Malfeasance in ULCA Admissions and the Accompanying Cover-Up," August 28, 2008
<http://www.sscnet.ucla.edu/polisci/faculty/groseclose/CUARS.Resignation.Report.pdf>

Friday, July 16: Review Discussions