

Broad questions: (1) What are the changes from 1865-present? (2) What causes them? (social history, women's roles, racism, politics, economics, technology, intellectual history) (3) To what extent is the law autonomous of these ideas and social changes? (4) What are the effects of these changes? (5) How do these themes interact?

INTRODUCTION

Private Law

- Massive changes promote economic development: 1800-1865, tort property and contract law change dramatically: no more K supervision, encourage active use of property; development of negligence in torts
- Instrumental judging: these changes were made by activist judiciary (state courts shaping C/L to fit their goals)
- Questions: How does the law continue to change? What becomes of instrumentalism? Who wins and loses due to change?

Constitutional Law

- Dual federalism: idea of 2 independent sovereigns; federal law only dealing with specific matters and states w/everything else
- Nineteenth century notion of "Rights" – no civil rights in constitution; states were free to establish hierarchies of citizenship
 - white males
 - African-Americans: slaves in 15 Southern states before civil war; no property rights; may be punished corporally; also profoundly curtailed in north and west; segregation; not allowed on juries (5 states)
 - women: not allowed on juries; no voting; coverture (no prop. for married women); agent of husband
- Questions: What happens to federal/state relations? Changes in conception of rights?

The Administrative State

- Definition: organizations regulating food, labor, etc.
- The pre-Civil War state is small: more legislators than bureaucrats in DC or in the states
- Questions: Why does it increase in size? What do the new institutions look like?

Legal Education and the Legal Profession

- Entry into profession before the Civil War – no real standards
 - law school was easy – no assignments, bad professors
 - bar exams were a joke
- Nature of profession before civil war:
 - surprisingly egalitarian: no hierarchy, didn't make a lot of money
 - quite homogeneous: white protestant males; 5 African-American lawyers in States where they were allowed; no women; no mormons; no European immigrants
 - generalist practice: solo practitioners doing anything that came in the door
- Question: how do law schools and the legal profession evolve into what we have now?

THE LEGAL CONSEQUENCES OF THE CIVIL WAR

Politics and "Reconstruction" (Reconstruction = 1865-77)

- Northern States figuring out how to re-admit defeated Southern States
- Issue of legal/political status of freed slaves

- Democrats: dominated South; more resistant to war; white supremacy; easygoing attitude towards reconstruction; believed balance btwn. state and feds should not change; wanted slaves
- Radical Republicans: wanted dramatic expansion of fed. power; for African-American rights; wanted to punish rebellious Southern states; wanted to draft new state constitutions; some honest egalitarians, others just wanted to punish South
- Moderate Republicans: dominated after war; for varying expansion of federal power; various degrees of rights to freed slaves

The Thirteenth Amendment (1865) (Abolishing slavery and giving Congress right to enforce)

- Why necessary? Despite emancipation proclamation (1863) many places were not actually in rebellion, therefore e.p. didn't apply; doubt as to whether Lincoln had authority; property law was a matter for the States and outside scope of fed. power
- Scope of the 13th Amendment
 - "Black Codes": Southern legislatures passed laws (1) limiting voting to white men; (2) virtually enslaving AAs: they could not own business or be licensed for profession and were required to enter employment Ks or go to jail; (3) requiring AAs to live on property owned by whites (can't move out of state); violation was steep fine and AAs had to work for the person who paid it off.
 - Conflicting definitions of slavery: Northerners said slavery = absence of rights; said the Black Codes were slavery b/c AAs could not contract freely, sue, own property

The Fourteenth Amendment (1868) [see text](#)

- 1866: The triumph of radical republicans: Northerners outraged at Black Codes and want to punish South; radical republicans are swept into power
- Civil Rights Act of 1866 is passed: prohibiting deprivation of contract and property rights based on race (must be race-neutral), criminal penalties in federal court for those who try to enforce black codes
- The Scope of the fourteenth amendment: Passed to cover the 1866 CRA; Preventing States from disenfranchising AAs by cutting back their Congressional representation; disenfranchising rebels; EQUAL PROTECTION & DUE PROCESS. Courts struggled w/ which rights it was meant to cover:
 - social rights: schools, public accommodations, right to marry who you wanted
 - political rights: right to vote
 - civil rights: Ks, owning property, suing
 - Democrats said it wipes out the States; Radical Reps said it wasn't so broad, but realized ending AA subordination requires dramatic expansion of fed power.
- Ratification of the fourteenth amendment
 - initial reaction: rejected by all Southern States
 - The Reconstruction act of 1867: required South to enfranchise AAs, revoked readmission to Union, required States to ratify 14th Amend. before they could be States again
 - 1868 Southern States ratify but border states and newly admitted States (CA) rejected; controversy that it was achieved through coercion; concern in North with effect on women and immigrants

The Fifteenth Amendment (1870): Prohibits race-based disfranchisement

- Why necessary?
 - Fear of radical republicans that ex-rebels would re-seize control and disfranchise AAs or that democrats would re-seize Congress and do so at state level
 - "Republican party stay in power forever" amendment – after Civil War no AAs would ever vote for democrats, so this ensured their hegemony
 - Trouble w/passing of 14th, so they wanted some guarantee of enfranchisement
 - Idea that is AAs could vote they would make State laws work for them and fed. would not have to intrude – easiest solution
- Scope of 15th Amend:

- not universal – did not apply to women (feminists divided on reaction); allowed Southern blacks to vote but kept poll taxes and literacy reqs. so immigrants in the North couldn't vote (they always went democrat)

Other Reconstruction Legislation

- CRAs of 1870 and 1871: Criminal penalties for conspiring to deprive people of equal protection
- CRA of 1875: Forbidding segregation in public accommodations, e.g. taverns, parks. Required no discrimination in jury selection.
- This was needed because of increased violence and coercion in South – fed. had to make sure blacks voted

The End of Reconstruction

- The Nature of Reconstruction in the South: moderately successful but v. unstable
 - 1868-77 Southern States had mixed-race legislatures (1/2 AA); AA Congressmen and Senators; literacy and schooling increase
 - Whites continue to resist changes through lynching and intimidation; white supremacy party founded by rich and appealing to poor Southern whites
 - Freedman's Bureau to help ex-slaves adjust/integrate
 - 1870 interest in reconstruction fading nationally
- National Consensus for Reconstruction Waivers
 - Perception of Southern State Government: Seen as in constant need of military and financial support
 - Republican Party Scandals: corrupt
 - The Recession of 1873: makes northerners less concerned with "sticking it to the South" and more concerned with their poverty; political motivation to maintain expensive freedman's bureau and troops in South fades. Democrats return to power in most of South.
- Extra-Legal Pressures Disfranchise Southern AAs
 - Withdrawal of law enforcement drops AA voting b/c of KK power and overlap with cops
- The Election of 1876 (Hayes (R) v. Tilden (D)) and the beginning of "Redemption"
 - Tilden wins popular vote but disputed electoral votes and fraud claims create constitutional crisis
 - Democrats agree to drop protest to votes for Hayes if he doesn't run again, appoints bi-partisan cabinet and pulls troops from FL, SC and LA (only non-dem. Southern States)
 - Dems take power in FL, SC and LA within months – Reconstruction's over and South is "redeemed."

THE SC AND THE END OF RECONSTRUCTION: DISCUSSION OF PACKET PP. 1-46

Reese (1876)

- State officials punished for refusing to accept AA ballots; Enforcement Act of 1870 making it a federal crime to hinder voting unconstitutional. 15th Amendment only empowers Congress to prevent hindering due to race.

Strauder (1880)

- West VA law prohibiting AAs from serving on juries is unconstitutional

Civil Rights Cases (1883)

- 1875 CRA unconstitutional. 14th Amendment requires State action; 13th doesn't, but segregation is not a "badge or incident of slavery."
- Congress can pass all necessary and proper laws, but denial of equal accommodations and privileges not "incident of slavery"
- Man emerging from slavery should "cease to be favorite of the laws."

Slaughterhouse Cases (1873)

- o Butchers challenge State-given monopoly to one slaughterhouse under 14th Amendment. Court Holds that they apply to AAs not butchers. Result is evisceration of privileges and immunities clause which has narrow and limited application (not to businesses)
- o Idea that judiciary could be used to push forward rights (e.g. apply these to women) very forward-thinking; more likely that people thought these would be defined through Congress and legislation
- o Radical Republicans may have been happy because it endorses policy goal of freeing slaves but may have been worried because definition of slavery limited to AAs, does not discuss slavery as eradication of rights – to vote, be on juries, sue, Ks, property, pursue chosen profession (in a sense the butchers are enslaved)
- o State rights: Refutes idea behind CRA that State can't interfere with certain rights; Radical Reps. concerned w/State interfering with all rights; dems are worried about fed. interfering

Harris (1883)

- o Lynching prosecuted under KKK Act (crime to conspire to deprive s/o of civil liberties)
- o 13th Amendment allows Congress to pass a law setting aside State law if rights are infringed
- o 14th Amendment protects your rights under State law
- o SC says Congress could have passed law protecting AAs but they didn't b/c statute did not refer to them
- o 13th Amendment is about civil rights, not segregation (so 1866 CRA constitutional, but 1875 is not)

Yarborough (1884)

- o Federal criminal prosecution of lynch mob for preventing people from voting in federal election.
- o Statute allowing prosecution is constitutional – inherent power to protect its own democratic processes.

What is motivating these judges?

- o Federalism: they don't want to push the envelope because these protections exist under State law (you can't just take s/o out of jail and string them up); **this was dominant paradigm of legal thought;** Benedict's argument
- o Formalism: Very clear in *Harris* and *Reese*; judges do not want to appropriate power they do not have; courts should let Congress do its job
- o Racism: haven't we reached a time when they stop asking for rights? Paternalistic tone of *Strauder*.
- o Concerned people will question their legitimacy
- o Want to promote reconciliation

	13th	14th	15th
Which rights?	* most narrowly construed * civil (K, property ...) * freedom from bodily peril	* civil * political (<i>Strauder</i> jury duty) * social (no discrim. or seg.)	* political (right to vote)
State action required?	NO (<i>Harris</i>)	YES (<i>Harris</i>) – does not protect against <u>private</u> seg.	YES? (<i>Yarbrough</i>) NO? (refers to fed. elections)
Who protected?	AAs	All male citizens	* in State elections, only AAs (<i>Reese</i>) * fed: all males

PRIVATE LAW IN THE AGE OF FORMALISM

Styles of Judging

- Pre-Civil War
 - Instrumentalism
 - judges consider non-legal factors
 - judges examine and care about non-legal consequences
 - judges not concerned with niceties of pleading or the dictates of precedent
 - major uses of instrumentalism
 - economic development
 - promoting or attacking slavery
- After Civil War
 - Formalism
 - judges do not consider non-legal factors
 - judges do not worry about non-legal consequences
 - judges very concerned about formalities of pleading and adhering to precedent
 - Example of Change: fraudulent inducement in Indiana
 - 1838 *Fowley* case: pig seller promised pigs but 6 months later when he was going to deliver them claimed he had been misled into the K. The court said they must enforce K because *we want to promote economic activity and thus must allow speculators to gain the benefit of their speculation, * we do not want to be paternalistic and coddle people who enter into ks, *policy reasons used to justify outcome
 - 1858 *Newell* case: facts similar - plaintiff claims he was sold a wheat drill for which he has no use. Outcome same as *Fowley*, but based on different legal theory (you can't rescind Ks when a general representation of usefulness has been made). Outcome justified based on doctrinal reasoning –obvious evolution in judicial application of laws
- Significance of the change
 - Locks rules in place based on binding precedent: eliminated instrumentalist flexibility
 - Gives rules Great Authority: they are no longer policy choices made by judges
 - How are new rules created? new way of determining what rules should be.
- Why does the change occur?
 - Morton Horowitz: 1800-60s elites using instrumentalism to manipulate rules for their own benefit; by 1860s they have things the way they want them and try to lock them in. This elite wanted to enshrine rules as legal truths which freeze the dominant paradigm.
 - William Nelson: Civil war gave birth to backlash against instrumentalism - formalists were radical republicans. By the end of the civil war instrumentalist judging was associated with war/pro-slavery; courts seen as agents of slave power, and potential for disaster. Wanted more neutral laws to prevent judges from screwing up, to limit their discretion. Removal of bias and application of scientific principles would accomplish this.
 - Lawrence Friedman: Dramatic increase in post-civil war economic activity and number of cases litigated, as well as in number of judicial appointments (and concurrent decline in quality of judges). Because judges are expected to decide so many more cases, formalism creates an efficient solution. Following precedent is easy and convenient. Because judges may not be as intelligent, formal decision makes their life easy. Finally it gave judges an increasing amount of social prestige – law became more of a science, a search for “truth” – they were not politicians anymore but scientists.

Tort Law in the Late 19th Century

- Pre-Civil War Tort Law (1850s):
 - No law of tort existed before the 1850s and many of the notions were phrased in property law terminology (e.g. trespass).
 - Agrarian sparsely settled society; people did not hurt each other; small insular communities in which these issues were resolved informally.

- Doctrines of nuisance, trespass and intentional torts existed, but negligence did not exist. Liability was absolute but rarely invoked, and this makes sense in context of
- Industrial Revolution, Railroads, and the Problem of Safety:
 - Birth of railroads and steam engines (3,000 miles of RR in 1840s vs. 52,000 in 1870s) which were incredibly dangerous instrumentalities and killed and hurt people all the time.
 - Skyrocketing tort claims against RRs, mines, etc.
- Tort Law Changes to Accommodate the Industrial Revolution
 - Negligence Doctrine
 - Fellow Servant Rule: *Farwell v. Boston and Worcester RR* (Mass. 1848): company is no longer liable if employee hurts another employee unless co. is actually negligent (policy: promote industry, give workers incentive to be safe)
 - Contributory Negligence: no liability for RRs when people are hit by trains when negligently crossing tracks (policy: shielding industry)
 - Tort is “personal:” *Carey v. Berkshire RR* (Mass. 1848): only those injured can sue for injuries – no cause of action if you’re killed.
 - Proximate causation (1880s): if intervening unforeseeable act is proximate cause tortfeasor not liable (RR spills oil but not liable if guy lights match and burns down houses – diff. nowadays)
- Illustrates Move from Instrumentalism to Formalism:
 - Originally, instrumentalist judges create doctrines to limit liability because old paradigm would destroy industry. Judges decide on (inequitable) result that individuals bear the cost – alternative would have been for co. to pay
 - By 1880s judges become metaphysical and no longer instrumental (**Beale quote**); give birth to idea of formalism (e.g. proximate cause cases)
 - Why? Favoring their buddies who own RRs? Genuine belief system? Changes in legal education/intellectual history?

CHANGES IN LEGAL THOUGHT AND LEGAL EDUCATION, 1860-1900

Intellectual Movements of the Late 19th Century

- Scientific Empiricism: After Civil War people turn away from religion and towards science. After Darwin (Origin of Species 1858) people want to classify phenomena and induce principles from them
- Natural Rights: Radical Republican mantra out of slavery opposition – certain rights cannot be taken away. Limiting State interference.
- Social Darwinism: Attempt to apply “survival of the fittest” to society; used to justify not helping poor. Increasing stratification seen as result of Darwinian struggle.
- The last 2 work together: State would interfere with natural rise and fall of individuals in society

Scientific Empiricism and Legal Thought

- Pre-Civil War Legal Theory: In 1844 the first Ks treatise was huge chart with mass of data; to draft a K you looked up prototype fitting your facts
- Post-War theory: “Legal Science”
 - Christopher Columbus Langdell, Selection of Cases on the Law of Contract (1871): Darwin of the Law; said all Ks shared offer and acceptance; consideration; and mutuality or conditionality
 - Inductive Determination of Legal Principles: Lawyer would induce how court would handle a particular K based on general principles above
- Illustrations of the Difference between Pre- and Post-war Legal Thought
 - Casebook comparison: Langdellian casebook cited many fewer cases than old prototype; no hand-holding, just statement of general principle
 - The Mailbox Rule: Old school accepted it; Langdell said promises require communication, impossible until letter is read, therefore no consideration and no K. Geometry – he believes he has found a truth about a platonic thing – a contract.

- “Legal Science” takes over the academy: massive changes in legal education
- Consequences of the rise of “Legal Science”
 - Death of Instrumentalism: neutral scientific principles prevent judges from inserting their biases
 - Rise of categorical thinking

Changing Legal Education

- Pre-Civil War Legal Education
 - few people went to become lawyers; no rigor (no exams, no college req); intellectually uninspiring and deadeningly dull
- Post-War Changes
 - Increased Demand for lawyers creates dramatic growth in law schools
 - Scientific Ideal Comes to Higher Education – changes everything, not just law school. professionalization of all disciplines – med schools, business schools (modeled after Europe)
 - Harvard Law School and Scientific Legal Education
 - Charles Elliot (1869) arrives: Prez of Harvard, chemist, wants rigor and professionalization
 - Langdell (1870) arrives; new dean brought by Eliot; advocates mandatory 1st-year curric. (unchanged today), exams, 3-yr. program, full-time profs., college or entrance exam req., *new style of instruction
 - Institution of the case method: Socratic method to train us to think like “legal scientists” open for discussion to whether judge was right or wrong
- Reaction to the Case Method
 - Critique: not practical, professors hide the ball, produces lawyers without morals (believe scientific truths and don’t think about world), Socratic method would create lack of respect for judges. Some profs left and created BU.
 - Reasons for success: dominated despite objections b/c inexpensive, enhances professional prestige by calling lawyers scientists, explosion in litigation meant a lot more cases out there (West founded 1879) and he was teaching them how to read and digest cases and write briefs, students liked it (less boring; macho appeal to men)

Natural Law, Social Darwinism, and Legal Thought

- Creation of New Legal Rules: Appears scientific, parties believe they’re engaging in science
- Basis for Induced Principles: Effect was to reinforce idea informed by social Darwinism and natural law (e.g. courts should not judge adequacy of consideration); formalism had great weight and carried other social ideas with it

CHANGES IN THE LEGAL PROFESSION, 1860-1900

Effect of Industrialization on the Profession

- Increase in demand: more torts committed, big corporations emerge and need help with business transactions, urbanization leads to more crimes; number of lawyers dramatically outpaces population growth
- Bifurcation of the profession
 - Birth of large corporate law firm – “Wall Street”
 - Nature of work: Specialty lawyers emerge – tax, securities, transactional. Law that is preventative rather than forensic.
 - “The Cravath System:” paid their associates very well (sums of money inconceivable to even the average lawyer; requirements to go to college, attend elite law school, and be on law review/accomplish something; associates expected to specialize upon arrival.
 - Ethno-cultural component: WASP men, no Jews, poor people, etc. However less than 1 percent of attorneys were practicing on Wall Street

- Non-elite practice – “Main Street” open to different religions/immigration status
 - Nature of Work: similar to before civil war
 - Institutional Support: schools for non-elite lawyers open (part-time and night) with non-Langdellian traditional curricula designed for mainstream practice

African-American Lawyers in the 19th Century

- From Elite in Community: had not been slaves, lived in urban areas
- Entrance into the Profession: most restrictions on AA practice were not legal but economic
 - Northern Schools: admitted highly, highly qualified AA students
 - Southern Schools and the founding of Howard (1869): AAs not allowed into most schools: Howard opened mostly for middle-class AAs who lived in DC or South. Looked down on by many AAs b/c admitted women, no admissions requs.
- Nature of practice: limited b/c whites did not hire AA lawyers so could make limited money (blacks were poor). By turn of century elite core of these (secular) leaders began to form.

Women Lawyers in the 19th Century

- The problem of separate spheres: idea that men belonged in commercial sphere and women belonged in home being soft and nurturing. Law was antithesis of this characterization.
- Entering the profession: began after Civil War
 - Belle Mansfield in Iowa: first woman in State, 1869. Atypical.
 - Myra Bradwell in Illinois: Passed bar but SC said she could not be admitted b/c (1) leg. said so; (2) men would attack women in legal practice and not treat them with delicacy they need; (3) “problems with administration of justice” – we would wilt like flowers OR we would wield unfair power. 8-1 opinion right before Slaughterhouse cases said right to practice law not protected by privileges and immunities clause.
- Entering Law schools
 - Eastern v. Western law schools: Eastern (except NYU) did not admit women into the 19th C.
 - Clara Foltz and Hastings: Applied to Hastings 1887, attended 2 days of class, thrown out, sued, won.
 - Women’s law schools begin to emerge
- Nature of Women Lawyers’ Practice
 - Class divisions very few non-elite could afford to go; practiced in trusts and estates, family law, divorce. But most did not practice at all – were from upper class and had mainly political aims (achieve equal rights, suffrage, temperance, etc.)
 - Contrast w/AA practice who were more bread and butter oriented and not political

Conclusion

- By 1900 women and AAs made up only tiny part of profession (2%); immigrants 3%, WASP 95%. By 1900 WASP portion became stratified and conflict between Wall Street and main Street began and main Street became more diverse.

ORIGINS OF MODERN ADMINISTRATIVE STATE - DISCUSSION OF MCCRAW PP. 1-79

This new organ of government applied State power to private action – to some extent replaced the courts

Why did regulation phenomenon come into being when it did? Impulse to regulate railroads.

- Safety (Revere disaster)
- Size and importance (US had never encountered business on this scale)
- Lack of uniformity
- Market forces didn’t work
 - capital-intensive industry naturally yielded monopolies

- competition was inefficient use of resources in society (Adams)

How can regulation be accomplished?

- Legislative oversight: pass laws requiring brakes on trains, etc. Problem: leg. too busy, trouble w/enforcement.
- Agencies: power to enforce law and hold people in contempt
 - coercive reg. was primary method in Midwest and West
 - voluntary reg. was more popular in East. 3 methods:
 - Adams' "stick:" threat that coercion will happen unless they cooperate
 - Cooperative give and take: RRs can influence the leg.
 - expertise
- Courts: Companies can modify safety through tort suits
- Public ownership: European model

What are the advantages of non-coercive regulation espoused by Adams?

- Speed – avoid slow formalistic court process
- Saves money
- No Constitutional problems: no need for due process if you're just persuading, not forcing
- Flexibility: no need to obey precedents (can do case-by-case analysis)
- IT'S AN ALTERNATIVE TO/WAY AROUND FORMALISM (judges hated agencies' power!)
- Expertise: Adams convinced he was "right;" courts knew nothing b/c has not invested time and research
- Doesn't make enemies of RRs – people won't litigate

What are the sources of Adams' regulatory philosophy?

- Hostility towards lawyers
- Hates conflict and sees himself a scientist
- Family heritage: he is "in the club," has good rapport w/RRs
- Expertise: thinks he's brilliant, it's the currency of his family

What are the disadvantages of this regulation?

- Requires high quality administrators/expertise
- Not democratic: elites regulating other elites; conflict of interest (even for publicly-minded Adams, between his interest and the RR). Problem of capture: industry captured by those it regulates.
- Not coercive enough: they could choose to disagree and fight!
- "Confusion inherent in regulatory role" (McGraw): once you stir up public opinion you can't control it and it may bypass you
- *Not all conflicts can be solved by expertise* Political issues – e.g. conflict between unions and RRs

THE CONSTITUTION AND THE ADMINISTRATIVE STATE, PART 1

Emergence of a Modern Industrial Economy

- Economic Growth, 1865-1900: RRs, telegraphs, oil industry, mass production of steel, big corporations dominating particular markets (sugar, flour, meat), consumerism, national network of supply and distribution of goods (farmers no longer grew own crops but grew one and supplied nationwide and bought everything else)
- Problems with growth: big corps taking power from people, taking away local control, immoral behavior by businesses and no gov. control, small businesses/farmers driven out, people can no longer complain to local supplier but dependent on anonymous far-away entity

Reaction: The Reform Impulse 1870s-90s

- Grangers and Populists

- Grangers = Midwestern farmers
- Populists = farmers/workers in South and West most victimized by new economy
 - demand public ownership of RRs, federal income tax, public banks to secure money, loose monetary policy (inflation: print more money so poor people can borrow)
 - demand political reforms promoting “little d democracy:” term limits (idea of citizen legislature), universal suffrage, direct election of Senators (not by State as before)
- Neither is successful at winning election but nonetheless influence democrats and republicans
- Increased Regulation 1870s-80s (result in part of influence of populists)
 - strong, coercive regulation of banks, RRs, etc, emergence of federal regulatory agencies e.g. ICC
 - emergence of laws about food quality and labor conditions; Sherman Antitrust Act (not result of econ. policy but political fear of gynomous business)
 - Cf. Adams who was not a populist
 - Irony: the things creating the problem (RRs, mass media) are the things that allow populism to grow

Legal Challenges to Reform: Regulation attacked as part of “litigation campaign” strategy

- *Munn v. Illinois* (1877)
 - Upholds regulation of grain storage elevators which were monopolized by entrepreneurs; farmers outraged; “granger legislation” regulated price they could charge; owners say 14th Amend. guarantees freedom to use prop. as they see fit (tracks Slaughterhouse dissent). Very sympathetic, pro-regulation SC.
 - Majority Opinion: “Industry Affected with the Public Interest:” regulation must have specific purpose to protect health morals and safety – if so it’s w/in police power. Here state must be able to regulate particular industries esp. if there is a monopoly 9in which case we presume reg. is ok). Public benefit is cheaper food for all.
 - Dissent: Police Power does not extend to “Class Legislation:” This is not about public good but about farmers who have more power – it’s class legislation. Public/private distinction (Field)
- *Wabash v. Illinois Central Railway* (1886). RRs realize they need new strategy b/c SC upholding regs.
 - Upholding law prohibiting “rate discrimination” – RRs charging more for short haul trips screwed farmers who took short haul to grain elevators
 - Local railway regulations violate commerce clause: States can only regulate within their boundaries but not when RRs go beyond State lines (Federalism argument; flipside of race cases where fed. can’t govern State voting)
 - Creation of the Interstate Commerce Commission (1887) says federal gov. can regulate and rates must be reasonable.
- The Rise of Substantive Due Process
 - *Stone v. Farmer’s Loan and Trust Co.* (1886): Court upholds banking reg. but in dicta says there are “limits” to reg. power and an “excessive taking” would violate DP. RRs smell victory on horizon and strategize.
 - *Minnesota Rate Cases* (1890): Set rates provided no hearing or notice; RRs appeal to DP (we don’t get our day before the commission). Slam dunk for RRs. Court says even if there had been procedural safeguards there would be no DP if RR deprived of “reasonable rate of return”
 - Cf. *Brown/Houston* litigation strategy
 - *Smyth v. Ames* (1898): Striking down NB RR rates b/c too low and not reasonable. Sets role for courts as arbiters of justice of a particular rate. Courts become super-commissions to re-examine all the details and determine reasonableness. Seized power from agencies under guise of 14th Amendment – Adams’ fear!
 - highly manipulative: made up rule without precedent and engaged in formalistic reasoning based on their own creation

- *Allgeyer v. Louisiana* (1897): Striking down law requiring LA residents to buy insurance from in-State co. as inhibiting freedom of K and depriving people of Constitutional rights (see quote in HO). Background: 1866 CRA protected freedom of K (to ensure rights of freed slaves).
- **By end of 19th C. DP clause had been filled with meaning about freedom to contract and use property as you see fit – effect is that courts become overlords regulating business.**

Substantive DP args (applied to both fed. and states) allow regulation only under certain circumstances:

YES	NO
<p><u>Must be for public benefit</u></p> <ul style="list-style-type: none"> • legislature acting within police power if it protects health, safety, morals (e.g. prohibition regulates morals) OR • if regulating a monopoly/anything affected with public interest AND if reasonable rate of return (e.g. <i>Munn</i>) 	<p><u>If not within police power, forbidden if:</u></p> <ul style="list-style-type: none"> • “Class Legislation” (for a private benefit – e.g. interest groups) OR • No reasonable rate of return (note: n/a if impacts health, safety or morals)

Laissez-Faire Constitutionalism

- Definition
- Idea of a Constitutional Regime: method of interpretation of 14th Amendment
- Why Does Laissez-Faire Constitutionalism Arise?
 - Class bias: elite judges want to protect the rich (Wall Street lawyers arguing these cases)
 - Ideologies of the time: Laissez-faire, Social Darwinism.
 - Formalism sets up categories the courts love – bright-line rules (see chart above). Boxes “avoid” ambiguity/tension btwn. private interest group politics and public interest.

THE CONSTITUTION AND THE ADMINISTRATIVE STATE, PART 2

1890s, The Chaotic Decade

- People reacted to sudden judicial activism after 30 years of upholding regulations
- Chaotic economic atmosphere: 2 massive depressions (1893 – greatest in US history – and 1897); tons of labor unrest (strikes, violence); populist party attacking notion of big business.
- Pervasive unease, class polarization, sense that things are out of control

The Supreme Court Stirs up the Hornets’ Nest

- *U.S. v. E.C. Knight & Co.* (1895): Company with huge sugar monopoly sued under Sherman Act; SC says it does not reach sugar cos. which are only indirectly related to commerce (so no fed. power; it’s for States to prevent monopolies). Manufacturing is “before” commerce.
 - Sherman Antitrust Act: takes a huge bite out of it.
 - Federalism Limitations – Direct v. Indirect: formal distinction made.
- *In Re Debs* (1895): Debs jailed for refusing to call out strike; SC upholds injunction saying courts have power to promote interest of all – including enjoining strikes and jailing people.
 - Pullman Strike of 1894: Co making RR cars unilaterally cuts wages but refuses to lower rents in “company town.” Huge strikes results in crippling lack of RR traffic in Chicago and therefore West of it.
 - Origin of the Labor Injunction: Very general – unclear what it enjoined (all activity?) and to where it was limited (Chicago? Anywhere?)
 - Courts have set up a way to imprison people without jury trials
- *Pollock v. Farmer’s Loan & Trust Co.* (1895): Declaring income tax unconstitutional – court says it is “class legislation” and is communist

- The Federal Income Tax Act of 1894: Taxes top 1 of earners at the time; result of populist demand b/c of depression and plummeting revenues
- Requirement of Apportionment: law attacked because it taxes someone for the benefit of others/re-distribution

Political Reaction to the Trilogy

- These cases contribute to notion that situation is out of control and SC is furthering it
- 1896 campaign - Bryant v. McKinley (R): Bryant wants to increase SC to 13 judges so *Pollock* can get overruled, wants federal statute adding right to jury trial for civil contempt, wants to abolish life tenure for judges (**Cf. Roosevelt court packing!**). Looses progressive allies by attacking SC.
 - lawyers still uncomfortable tampering with independent judiciary even when their views supported policies being overturned.
 - elite members of bar fearful of regulation, but most lawyers not in that group. Shows that despite this lawyers had faith in rule of law/courts.

What Can Government Do Within the Bounds of Laissez-Faire Constitutionalism? Despite stories we read of new “judicial activism,” a lot of state and fed regulation is being upheld – expansion of federal power.

- Health, Morals and Safety
 - *Champion v. Ames* (1903): Allowing fed to pass a law prohibiting lottery tickets under the commerce clause because it’s a moral issue. **See quotation in printout.**
 - Other miscellaneous regulatory cases: “Pure food” regulation – upholding margarine tax (*McCray*), power to exclude substandard tea, substandard eggs.
 - *Swift & Co. v. United States* (1905): Upholding antitrust regulation to prevent stockyards from conspiring to inflate beef prices. Court rejects the “before commerce” sugar argument (*E.C. Knight*) and says this is commerce – about flow of cows to meateaters.
 - *Holden v. Hardy* (1898): Upholding Utah law saying mine workers can’t work more than 8 hours because it’s within police power to regulate health and safety (rejects freedom of K argument)
- *Lochner v. New York* (1905) Striking down maximum hours legislation for bakers; challenged as violation of DP and interference with freedom of K.
 - Peckam’s majority: This law does not relate to health or safety but meddles with individual rights – “class legislation” for benefit of bakers at expense of their employers.
 - Harlan’s dissent: says police power takes effect in dangerous cases, of which this is one. Lays out boundaries of laissez-faire constitutionalism.
 - Holmes’ dissent: accused majority of ideological bias

What is Laissez-Faire Constitutionalism?

- Taking Federalism Seriously: BUT it chips away at edges – e.g. *In re Debs* where Court can’t resist expansion of power.
- Due Process Clause
 - Liberty to make use of your property
 - Freedom to contract without government interference
- Police Power Exception: Court can allow regulation relating to health, safety and morals.

THE MEANING OF LAISSEZ-FAIRE CONSTITUTIONALISM - DISCUSSION OF PACKET 48-82

	Arnold Paul , <i>Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench 1887-95</i> (1976)	Michael Les Benedict , <i>Laissez-Faire and Liberty: A Re-evaluation of the Meaning of L-F Constitutionalism</i> (1983)
GOALS of L-F Constitutionalism?	<u>Protecting property</u> <u>Preventing class warfare and disorder</u>	<u>Protecting Liberty</u> (focus on individual; freedom of K)

		<u>Protecting democracy</u> (see below)
WHO DEMANDS L-F Constitutionalism?	<u>Conservatives</u> – lawyers (Wall Street); elites of bench and bar; newly emerged wealthy who have gained from industrialization	<u>Academics, Social Scientists</u> → all reformers (note 2 types of reformers at time – activist and intellectuals opposed to reform. The intellectual reformers are different/somewhat marginalized)
SOURCES OF IDEAS of L-F Constitutionalism?	<u>Natural/religious rights</u> (to own one’s property) <u>Bad faith</u> : selfishness; desire to create intellectual model to protect their stuff	<u>Contemporary economic theory</u> (Universities/Social Darwinism: helping the weak draws society down) <u>Commonwealth idea</u> : 17 th C. English objection to gov. interference b/c king gave monopolies to buddies <u>Jacksonian Democracy</u> : anti-elitist
TIMING of L-F Constitutionalism?	<u>Reaction to social unrest and populism</u> (elites afraid of strife); labor violence (by labor and management)	<u>Distributive government becomes re-distributive</u> : Post-Civil-War phenomenon: Before war gov. had land to give away and was doing so freely; 1880s gov. becomes re-distributive – taking from one group and giving to another (critique: that’s because of grossly unequal wealth in US!)
THEORY OF CAUSATION: Does law react quickly or slowly to social context?	Law reacts <u>very quickly and directly</u> to social change – mirrors it	<u>Idea of “lag”</u> → judges deciding substantive DP carried forward ideas from 1840s-50s – Jacksonian democracy

Protecting Democracy

- Even if enacted by majority, class legislation is a threat. Subverting liberty of the rich will cause them to subvert the democratic process because it’s being used to their disadvantage.
- Furthermore when elites act self-interestedly the masses will imitate them

Jacksonian Democracy

- Anti-elitist, anti-government, anti-monopoly: you create a monopoly by putting up bars to becoming a lawyer and we should remove these bars
 - bar exam was class legislation meant to benefit existing lawyers and keep others out (different definition of “class legislation”)
- Stemmed from Commonwealth ideas – king giving power to buddies births monopolies
 - Bank of US: federal money poured into bank run by private individuals - buddies

Who demands L-F Constitutionalism?

- Perhaps we are over-categorizing people as elites – many further down in economic order espoused L-F
- Free labor and freedom of K very appealing to AAs despite their class – they stay loyal to Republican party
- Fear of disorder is pervasive; does not stop at top pf social pyramid

LAW AND THE RISE OF JIM CROW, 1880-1918

Northern Civil Rights Legislation at the end of the 1890s

- Reconstruction ended: court stepped down from helping AAs
- States start passing civil rights leg (deseg. of public accommodations; jury integration)

- Reasons: contests between Democrats and Republicans becoming bitter and tight, vying for voters, very few AAs in North (so no fear of them as in South). Extreme contrast to events in South

The Rise of Jim Crow in the South

- Segregation
 - Timing: In full flower by 1890s
 - Substance:
 - Every detail of life segregated – schools, transportation, fountains, bibles in court, etc.
 - Re-emergence of pre-Civil-War hierarchical customs – AAs recognized by first name and whites by last; AAs must step off street when whites walk by
 - Violence against AAs: aimed at disfranchisement but also lynchings for stepping out of racial norms of subservience; KKK and sheriff are the same; effecting caste system
 - Supreme Court's Role: Had said before that SC could not forbid private action
 - *Plessy v. Ferguson* (1896): Railroads and activists challenge segregation in cars under Equal Protection (there must be separate first-class car for AAs but it's often empty); Court says Constitution guarantees separate but equal; segregation is not discrimination – regulation is reasonable enactment of social order.
 - *Cumming v. Bd. of Educ.* (1899): GA decided to eliminate AA high schools because of less demand, SC upholds 9-0 using reasonableness standard (contradicts *Plessy*)
 - By end of 19th C. Equal Protection means “reasonable” discrimination is allowed
- Disfranchisement
 - Methods of disfranchisement: It's legalized - legislature locks in AA voting pattern:
 - Literacy and understanding tests (reading or understanding clause of state constitution as read by poll person)
 - Poll tax
 - White primary: primaries as private clubs – you can exclude whoever (applies to Democrats who are only party getting voted in)
 - So as not to exclude poor white vote, test administered unequally; grandfather clauses saying you don't have to pay poll tax/take test if father voted before 1865 (when AAs were slaves) or if you served in Confederate army
 - Reasons for disfranchisement: Elite fear of populism – they drove a wedge so AAs wouldn't align with poor whites and poor whites felt somehow superior
 - Effect of disfranchisement: Local sheriff elected by whites; decline in funding for education; enactment of discriminatory legislation
 - Supreme Court's Role: laws are facially neutral; it is just impact that is disparate
 - *Williams v. Mississippi* (1898): upholding literacy tests and poll taxes. There could be a constitutional violation but no proof – each AA would have to bring a case (nobody in their right mind would do this – they'd get killed)
 - *Giles v. Harris* (1903): “What can we do?” attitude – Court can't micromanage every state election

Reasons for Absence of Judicial or Legislative Response

- Senate Rules: South had disproportionate power in Senate; they were all incumbent (not actually going through democratic process like the North); no contested elections in South; northern power unclear
- Immigration: Northerners resistant to immigration of Irish, Jews, etc; poll taxes/disfranchisement appealing to some
- Imperialism: US colony in Philippines (first time); justified with “racial” classification (helping poor foreigners)
- Rise of scientific racism: Social Darwinism, Northern Europeans at top considered most intelligent and therefore should vote – intellectual justification for racism

- Generational shift: racial egalitarianism inspired by civil war has passed; white Americans let Southerners do what they want

Legal Subordination of the Chinese

- Chinese Immigration to the West
 - Brought mostly to CA in 1850s and 60s by mining companies, railroads
 - Hierarchy: whites in safer and higher paying jobs; Chinese prevented from buying mine claims, pushed into subsidiary industries on which mining depended (laundry, demolition, food service)
 - 1869: businessmen have to cut labor costs because things are cheaper; replace white workers with Chinese; result is dramatic rise in anti-Chinese sentiment, mostly by labor unions and populists (pattern of discrimination similar to South)
- Anti-Chinese Legislation
 - California Constitution of 1879: excludes Chinese from voting, public works employment (road, bridge, etc.); segregated schooling
 - Local Ordinances: Mostly in SF, prohibiting business licenses and forbidding corps. from employing Chinese
 - Chinese Exclusion Act of 1882: Feds stop Chinese immigration; violence and riots ensue
- The Mystery of *Yick Wo v. Hopkins* (1886)
 - The decision: Ordinance requiring laundries to be in stone buildings unless they get waiver; waivers always given to whites but not Chinese. Held unconstitutional – facially neutral but not in application
 - Contrast with cases involving AAs:
 - Substantive DP – right to work is at issue (L-F Constitutionalism)
 - Distance: small thing in CA removed from South
 - Hierarchy of rights: freedom of k more important than voting
 - It's a type of anti-labor union legislation

PROGRESSIVE REFORM, LAISSEZ-FAIRE REACTION, 1900-1920

Sources of Reform in the Early Twentieth Century: Populism peters out as main engine of reform and is replaced by more industrial and urban forces

- The Labor Movement
 - Growth of the labor movement: 1880-1920 dramatic rise in labor unions; railroads, mine workers, textile workers; 1886 American Federation of Labor; 1880-1900 employers respond to dramatic rise in activism with violence (*In re Debs*)
 - Labor's legislative strategy: minimum wage, maximum hours, no work Sundays, child labor, pay in US currency and at regular intervals, laws prohibiting "yellow dog" Ks (Ks preventing workers from joining unions. Makes more sense b/c covers every employer.)
- The Progressives: Second round of reform after populism (1900-20)
 - Upper and upper-middle class movement taking class edge off workplace regulation – odd allies of labor movement. Charles Francis Adams (before this time) = great example. A bit paternalistic.
 - Moral quality to reform: pro-prohibition, temperance, environmentalism, women's suffrage, abortion rights/birth control (subtext: white race should be people from Northern Europe)
 - Profoundly anti-immigrant: supported eugenics, disfranchisement
 - Result is electoral success; passing of regulatory legislation (Clayton antitrust act), admin agencies (FTC, FDA); creation of national parks.

Reaction to Reform

- Historiography

- traditional view: *Lochner* era = “the Court’s gone wild,” pro-business ideology striking it all down
- revisionist view (1970s-80s): historians found most of these laws actually upheld by courts
- Pre-WWI Cases: revisionist view seems more correct
 - *Holden v. Hardy* (1898): Upholding maximum hours law under health and safety
 - *Atkin v. Kansas* (1903): Upholding maximum hours on all public works projects
 - *Lochner v. New York* (1907): Striking down maximum hours for bakers b/c “class legislation” – but does not open floodgates. Only one struck down.
 - *Muller v. Oregon* (1908): Upholding legislation
 - *Bunting v. Oregon* (1917): Upholding maximum hours for both men and women in any industrial work, seems to overrule *Lochner*. Courts act like *Locher* doesn’t exist
- Post-WWI Cases: Courts becomes much less sympathetic, especially State courts
 - *Erie RR v. New York* (1914): striking down maximum hours for men
 - *Hammer v. Daggenhart* (1918): striking down federal child labor laws
 - *Adkins v. Children’s Hospital* (1923): striking down regulation of women’s hours
 - *Connally v. General Construction Co.* (1926): striking down legislation
- Cases involving Labor Unions: Courts almost never sympathetic
 - *In re Debs* (1895):
 - *Adair v. US* (1908): Freedom of K approach to anti-yellow-dog statutes
 - *Coppage v. Kansas* (1915): same as above
 - *Traux v. Corrigan* (1921): Anti-injunction statutes are deprivations of DP – people should have access to courts

Protective Legislation	Court sympathetic (upholding regulatory leg. not aimed at workers)	WWII	Less sympathetic
Pure Pro-Union	Not sympathetic		Not sympathetic

- Explanation of case outcomes (not mutually exclusive)
 - Business’ feelings about regulation: By 1910 industry things regulatory leg is ok (political opposition has lessened; no cutthroat competition) but still hates labor regulation (min wage/max hours) because expensive. Court responding to big business/elite desire.
 - Hostility towards militant labor unions (not towards protective legislation): genuine attempts to protect health safety and morals are ok.
 - Free labor ideology: intellectual view of employment K as special/deserving of protection.
- Why increase in conservatism over time?
 - Court reflects tenor of the time; US became much more conservative after WWI b/c of increased prosperity and rise of anti-communism as Bolshevik revolution happens in Europe
 - Change in personnel: 2 conservative judges with very narrow view of “health, safety morals” appointed. Van Devanter, McReynolds (racist/anti-Semite mistakenly appointed by Wilson), Butler less sympathetic.
 - These theories contradictory: are judges isolated from current events or are they responsive to them, like politicians or voters?
 - maybe some are one type and some the other; maybe consistency is bullshit and that’s ok; maybe they aren’t acting in bad faith and just don’t know about new situations

Effect on Labor Movement and Progressivism

- Labor: Court’s activism pushes labor movement away from using politics to achieve its end
 - Radicalized: worker membership in IWW (International Workers of the World) increases; radical socialist quasi-anarchist groups

- End of legislative strategy: Union focuses energy away from politics; rather than expending resources in legislation they become more involved in strikes, pickets, etc. Workplace activity to effect change. Interaction with employers keeps State out.
- Notion that there should be child labor amendment making it unconstitutional to strike down child labor laws
- Hatred of judicial activism/SC; idea that new justices should be appointed
- Progressivism focuses on different issues
 - Focus on environmental and pure food and drug leg., suffrage, stopping immigration, enfranchising AAs (North), prohibition and temperance
 - Reorientation to nonlegal resources
 - Settlement house movement social work, places for poor/homeless
 - Job training
 - Widely available birth control

PROTECTIVE LEGISLATION AND WOMEN’S RIGHTS IN THE EARLY 20TH CENTURY - discussion of Woloch, pp. 108-09, 144-51, 157-85

Muller v. Oregon year?

- Upholding maximum hours legislation for women; not considered “class legislation” b/c social need for healthy women raising healthy children
- Style of opinion: Anti-formalist. Uses lots of science to discuss health, morals, safety.
- Realization that progressives must engage the courts (until now they used leg. and those opposed to reform used courts). Brandeis’ philosophy: lawyer as intermediary between people and court. Why?
 - antagonism to corporate power
 - quintessential progressive idea of EVOLUTION OVER REVOLUTION – helps workers but preserves order
 - social/hard science to make ugly reality of working people understandable to courts.

Bunting v. Oregon year?

- Upholding minimum wage/maximum hours for both women and men: looks like SC is lightening up
- Creates bitter debate among feminists about merits of protective leg aimed at women

PRO PROTECTIVE LEG. FOR WOMEN	AGAINST PROTECTIVE LEG FOR WOMEN
<p><u>Practically, we need it</u></p> <ul style="list-style-type: none"> ○ Ambition and career advancement is ridiculous elite concept – no actual ability to advance ○ Goal is to be in workplace ages 16-25 and then out ○ Some women work whole lives ○ unions don’t organize us b/c sexism, transience of work force, they like fewer workers <p><u>This is about difference, not inferiority</u></p> <ul style="list-style-type: none"> ○ Particularly with reproduction ○ Nothing wrong with legislating appropriately <p><u>We’re just taking small steps</u></p> <ul style="list-style-type: none"> ○ There should be protective leg. for everyone; female protection is just politically and legally easier 	<p><u>Penalizes ambitious women</u></p> <ul style="list-style-type: none"> ○ Gives male employees right not to hire us <p><u>Codification of inferiority</u></p> <ul style="list-style-type: none"> ○ Fails to view women as individuals ○ Women should have same right as men to negotiate their own Ks <p><u>Distracts from real solution</u></p> <ul style="list-style-type: none"> ○ We are dividing workers ○ Codifying inferiority makes big steps impossible

<p>Women <u>already in the worst jobs</u> – how much lower can we go?</p> <p><u>You don't want "race to bottom"</u> – employers undercutting each other with women's jobs</p> <p>You may think we are dividing people, but <u>men don't look out for women</u> – what have they done for us?</p>	<ul style="list-style-type: none"> ○ Unions won't want to help us anyway <p><u>Forces us into worst jobs – hurts working women</u></p> <ul style="list-style-type: none"> ○ If you can only work 8 hours they'll put you in worst job ○ If women more expensive they won't hire us ○ Dragging us down to the weakest by career
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Protective legislation debate

- Depended on which constituency you were with – factory workers liked; feminists concerned w/suffrage (egalitarians) didn't
- Circa 1910, which argument is more effective to promote women's autonomy?
 - Pragmatists say legislation was "opening wedge" – baby steps towards first protecting women and then demanding equality; on the other hand perhaps conceding something to women prevents them from getting more later ("I already gave you plenty!")
 - Infantilizing women: we are protecting women and children
 - Perhaps it keeps the spheres divided – "different roles" as nurturing and moral and not "aggressive." Pragmatists play into this ideology and use science to reinforce idea of separate spheres
- Can you later tailor the legislation to help both groups?
 - Some laws distinguish between hourly and salaried workers but perhaps it's still problematic to tell working women they can't bargain for their own contracts
 - No unions for women to back them up

Atkins v Children's Hospital (hint hint)

- Overturns *Muller* – admin agency sets minimum wage for female workers
 - Calculates appropriate wage for women to lead "moral" and "healthful" life
 - Fascinating from admin. law point of view: amazing administrative undertaking; lots of experts. Subtext: if women don't get this they will lead lives of sin (pseudo-legal-realist)
 - Quintessentially progressive – contains good and bad
- Makes bogus distinction between hours and wages (in reality they affect each other)
- What causes this decision?
 - The passage of 19th Amendment (ironically in DC no one has power) (Cf. AA right to vote)
 - other reasons courts strike down legislation – pro-business, egalitarian
- Thousands of women thanked Brewer for recognizing their equality
 - Strange: seems spontaneous but raises question of good faith in judging – do they believe in freedom of K? Egalitarianism? Or do they just care about big business?

SOCIOLOGICAL JURISPRUDENCE

Scholarly Reaction to Laissez-Faire Constitutionalism: Disagreement between progressives and judiciary, attempts to muzzle court/add new members, increase size, limit J, proposed amendment for referendum every time SC strikes down law

- Law is not value neutral
 - Scholars began to attack Langdellian idea that general principles existed. Attacked formalist legal science, anti-instrumentalist judging (no policy decisions). Judicial neutrality attacked – progressives think they're applying their own views under the guise of science.

- Birth of sociological jurisprudence. Main actor = Roscoe Pound, who in 1907 asks legal profession to stop assuming law is science
- Did not think judges were acting in bad faith, just that they were delusional
- Law should be treated as policy-creation
 - Law is the product of policy and should be treated as such – judges and lawyers should realize this
 - Legal ideas should be treated as legislation – should consult experts and look into how to best serve social ends
 - Law should respond to needs of the people, harmonize with contemporary problems
 - Return to instrumentalism: concern with outcomes
- Use social science to inform legal decision-making
 - Lawyers should give economic and sociological information to judges – tools they need to make a correct decision
 - Profoundly concerned w/expertise: economics, sociology, anthropology.
 - Science provides comfort in chaotic times (industrialization, immigration) and is considered intelligent way to reform.
 - Brandeis brief; quintessential sociological jurisprude. Rejects L-F on one end and socialism on other – says science is middle ground
 - Progressives thought this was brilliant and modern
 - Distinguish from instrumentalism: both asked judges to consider the times, but SJ said they had a BASIS for these claims.

Impact of Sociological Jurisprudence:

- Resistance in profession and on bench
 - Lawyers had become experts at legal science and now are being told it's not “real science.”
 - Clung to prestige of law.
 - These “sciences” were young and didn't yet have much to offer – it's only 1910.
- On litigation: This type of evidence used in cases like *Muller*, but lawyers have good thing going with formalism
- On the academy:
 - Changes in elite law schools in particular – studying economic basis of labor regs, etc.
 - But case method holds forth powerfully – currency remained ability to use and manipulate cases
- Biggest effect not immediate (in 1910s when most potent) but in 1930s when serves as basis for legal realism/New Deal.

CLEANSING THE LEGAL PROFESSION AT THE TURN OF THE CENTURY

Status of the Legal Profession in 1900

- 95% Main Street; 5% Wall Street; Wall Street firms only 10-15 attorneys
- Ethno-culturally homogeneous: 100% Wall Street are WASP males; 95% Main Street WASPs

Immigration Causes Change in the Profession

- Nature and timing of immigration: 1901-14 millions of immigrants; before 1905 75% Protestant from northern Europe/England; increase in immigration from Eastern and Southern Europe - by 1905 75% are from these locations. Dramatic demographic change in US as a whole
- Effect on demographics of legal profession: Mirrors change in population; incredible increase in foreign-born lawyers and lawyers with foreign-born parents; increase in lawyers in urban areas changes profession
 - Sudden overabundance of Main Street lawyers
 - Becomes competitive/hard to make a living. Half attorneys in NY below poverty line
 - Most of demand for immigrant attorneys is criminal

Reaction of Existing Bar

- Objections to diverse profession: In summary, they're "not pleased" with changes
 - "Racial" inferiority: racist science sees Southern Europeans and Irish as lower than WASPs in terms of intellect, stamina and morals
 - Wrong motives for becoming lawyers: Though immigrants simply wanted money rather than serving their clients and the interest of justice
 - Ethical problems with immigrant lawyers: Stereotypes of aggressive Jewish "shyster," ambulance chaser
 - Immigrant lawyers damage democracy: WASPs seen as guardians of liberty; immigrants would not be able to fulfill tradition (not born and raised here)
- Motivations for these fears
 - Romanticized image of the profession:
 - Personal knowledge of small town professional – trust, pat on back, handshakes
 - Ignores Wall Street lawyers making tons of cash; view themselves as performing a service
 - Has not changed
 - Xenophobia/Anti-semitism: Fear of strange people from other countries; Anti-Catholicism (they can lie under oath, confess and go to heaven); Jews seen as greedy
 - Worries about profession's status: Public image of scientists/protectors of liberty tarnished by foreign ambulance chasers
 - Competition: Too many Main Street lawyers to make a living
 - Client interests: Wall Street attorneys don't want their clients challenged and sued (they're mainly defense; immigrants mainly plaintiff-side)

"Solution" to the Problems of Immigrant Lawyers

- The American Bar Association:
 - Created 1878; 1900-20s State bars crop up
 - Excludes women, AAs
 - High membership fees created elite corps to "reform the profession"
- The ABA Canons of Professional Ethics (1908)
 - Theory that law is high calling with importance on character and conduct (not a profession)
 - Prohibits advertising, indicating specialty (personal injury), signs, seeking clients/stirring up litigation, discourage contingency fees and if allowed must be supervised by court
 - States adopt canons as statutes; violation leads to expulsion from practice
 - Informally aimed at immigrants: advertising etc. is n/a to Wall Street or small town lawyer – applies to urban areas and therefore immigrants
 - immigrant bar has income stream controlled by courts (contingency fees) – violation of freedom of K
- Call for Bar Admission Standards
 - Three years of school; bar exam with "teeth," limit access to those w/o education or English as first language. Thanks progressives!
 - By 1940 all States require some schooling and bar failure rates reach 50%
- Reform of Legal Education
 - Unsuccessful attempt to make college pre-requisite
 - American Association of Law Schools accredits schools (only full-time; no night schools/factories for money-grubbers) and maintains standards: 3 years, specific courses, college degree

Effect of These Solutions

- Ultimately excluding immigrants was losing battle – inevitable demographic changes

- But discrimination practiced by big corporate firms and schools remained and stratification didn't change

PRIVATE LAW REFORM AT THE TURN OF THE CENTURY

Types of Private Law Reform: populism, protectionism, SJ → attempts to create law & social policy

- Make private law public:
 - Before Civil War legal system was based on private remedies – torts, Ks, etc. There was no protective leg.
 - Reformers try to correct inequity resulting from increased social complication by making it public – taking issues such as minimum wage or rate regulation out of private sphere
 - Courts are losing power: disputes resolved by agencies or not at all
- Change private law practice: changing the rule and letting courts adjudicate the claim – e.g. reforming contributory negligence to comparative negligence

Reform of Tort Law

- Increasing Complexity: Very few injured workers recovering because of defenses like contributory negligence/fellow servant rule. Doctrines of tort law become increasingly complex.
 - Vice principal doctrine: If the negligent employee was above you then respondeat superior makes him liable
 - Safe tool rule: respondeat superior if your tool was faulty
 - Exceptions to the exceptions make law super complicated
- Legislative Reaction:
 - Piecemeal Reform: States begin to abolish fellow servant rule; by 1908 federally abolished on all RRs. Problem is that most workers still can't afford to litigate.
 - Workmen's Compensation
 - Definition: Employer pays money to State fund in exchange for which he is exempt from all tort suits. Injured worker gets paid out of pool depending on degree of injury and regardless of fault. Abolish negligence torts when there are workplace injuries. mandatory in most States.
 - Why passed: **Media** focused on number of injured workers (typical progressive tactic); 1904 Roosevelt makes it central issue; makes planning business easier and enacted by all but 6 States by 1920.
 - Significance: *Huge at the time*
 - Incredible example of private law becoming public – calculations about social cost replaces private law.
 - Agencies determine how injured you are and pay you – they're replacing courts which are slow, inflexible, expensive. Massive number of cases removed from courts.
- Judicial Reform: Around WWI (at same time) courts soften tort doctrine
 - Expanding the Scope of Negligence: *MacPherson v. Buick Motor Co.* (N.Y. 1916): beginning of idea of product liability; expanding negligence to eliminate need for privity; liability flows to manufacturer, retailer, wholesaler
 - Expanding Scope of Causation: *Palsgraf v. Long Island Railroad* (N.Y. 1928): limits causation defenses so single intervening event can't break chain. Majority opinion about whom you owe duty to.
 - dissent introduces concept that intervening event doesn't matter as long as you could foresee
 - policy considerations of cost-spreading and fault light years away from previous metaphysical idea of cause

Reform of Contract Law (at same time)

- Review of legislative reforms:
 - Maximum hours, minimum wage, anti-scrip, rate reg, anti-yellow-dog. People no longer negotiate ks – government does
- Harshness of traditional consideration doctrine:
 - Langdellian idea leads to harsh results – e.g. clearly a promise was made but there was no consideration. Courts think this is ridiculous.
- Post-WWI modifications of consideration doctrine:
 - Promissory estoppel, DR, implied Ks, partial performance doctrine are ways of eliminating the problem
 - In many ways this was a reaction to formalism

Reaction to Reform: L-F Constitutionalism is reaction to private law becoming public. Less attack on C/L reforms because gradual; more backlash to legislation

- Constitutional Attack on Workmen's Compensation: Corporations attacked statutes on theory of substantive DP and freedom of K
 - *Ives v. South Buffalo Railway Co.* (N.Y. 1911): Holding that imposing liability without fault was a taking. Furthermore it went against freedom of K- why can't worker bear risk if he wants to?
 - Reaction to *Ives*: State amended its constitution to permit workman's comp. as a result
 - *New York Central Railroad v. White* (U.S. 1916): SC upholds worker's comp statutes (another example of permissive Court in *Lochner* era)
- Theoretical Objections to Administrative State: Procedural critiques of administrative state; concern that it could become tyrannical.
 - Due Process: in court you get a jury but in agency you get some "expert;" no rules of evidence; no adjudicator independent of the person prosecuting you; no stare decisis
 - "Rule of Law:" we must have something to tell you when you have broken the law (precedent) – we count on it to restrain judges as well.

THE EMERGENCE OF FREE SPEECH IN THE EARLY 20TH CENTURY

Background: Con law thus far has involved the 14th Amendment as it relates to African Americans and to substantive DP.

Status of Free Speech Doctrine at the Turn of the Century (1865-1900): very little protection under federal and state constitutions

- Federalism: It was unclear whether the federal constitution applied to the states at all
- Prior Restraints and the Bad Tendency Test:
 - At common law it was perfectly legal to punish someone for publishing something – the only restriction you had was from preventing them from publishing in the first place
 - Some states ruled that if the speech had "bad tendencies" – e.g. tended to corrupt morals or to cause disloyalty – then the state had power to punish people engaged in it
- Rights/privileges distinction:
 - You might engage in the RIGHT to free speech, but your job is a PRIVILEGE and the gov can take that away; or you are free to say whatever you want but we are free to exclude you from public property.
 - Baseline of free speech protection is LOW.
- Expertise and free speech:
 - Almost all free speech protection fell into admin law – censoring mail, movies, etc. were seen especially by progressives as administrative issues, no different from any other type of regulation
- Cultural Expectations:
 - Government was not doing that much during this time - society was more homogenous

- Until society got complex and its members started disagreeing (beginning of 20th C), freedom of speech was not such an issue

World War I, the Red Scare, and the Repression of Speech

- 1917-1922 civil liberties are under attack like never before: war, labor unrest, Bolshevik revolution see people worrying that society is crumbling, fear of change. For the first time the federal gov is undertaking a broad ban on political speech
- Wartime sedition laws:
 - 1918, laws passed at state and federal level criminalizing obstruction of war effort, including speaking out against the war in any way.
 - USPS begins censorship of the mails: “unpatriotic” materials (opposing American involvement in WWI) banned
- Anti-immigrant/Anti-radical Hostilities:
 - They were importing communism, socialism, anarchism and foreign ideologies into the US.
 - This is why we have reform of legal profession at the same time.
- “Palmer Raids” and prosecution of Alleged Subversives:
 - Immigrants with leftist political activity sought out and deported as method of speech punishment.
 - Alternative to sedition act (which could punish citizens).
 - 1924 ends unrestricted (except for Asian) immigration to the US; people from approved racial stock (Northern Europe) were most of people getting in afterwards.

The First Sedition Cases

- *Schenk v. United States* (1919): encouraged people to resist the draft (was the only one asking people to engage in what would have been a crime);
- *Frohwerk v. US* (1919): opposed to war;
- *Debs v. US* (1919): anti-war, socialist presidential candidate
- Court upheld all three convictions unanimously (Holmes opinions)
 - Court adopted “bad tendency” test in context of war: if the speech undermines legitimate national interest the government should be able to suppress that speech. Weighs very heavily on gov side (note: all last 2 were saying what they opposed war)
- Response: Most people don’t care.
 - Progressives:
 - Most progressives accept the Holmes rationale that it would have been too activist to act otherwise – due to their repulsion towards activism. (critique: 1st Amendment says Congress can’t suppress speech, so perhaps they were really afraid of opening door for activism in other areas on which Constitution was explicit)
 - Zachariah Chafee and the Political Function of Speech:
 - Freedom of expression was part of our culture. How do you reconcile it with activism and distinguish it from freedom of K/keep passive judiciary in other areas?
 - Chafee says objection to activism is that courts are thwarting will of majority.
 - Political speech is the *sine qua non* of democracy. You cannot have politics, marketplace of ideas, without it. Therefore suppression of speech harms democracy.
 - By striking down laws and protecting speech courts are furthering democracy – just as they are by upholding economic legislation.
- *Abrams v. United States* (Fall 1919): Socialist published pamphlet criticizing Wilson for sending troops into Russia and calling for national strike; sentenced to 20 years in jail. Did nothing illegal.
 - Majority opinion: SC upholds conviction saying his speech is “clear and present danger.”
 - Holmes and Brandeis Dissent: Have changed minds over summer and write pure Z. Chaffee dissent. Activism promotes democratic process – suddenly proponents of free speech!
 - Why did they change? (1) friends with Chafee, caught grief from friends; (2) Felix Frankfurter was Harvard prof. getting in trouble for radical speech – it hit closer to home.

Abrams' Progeny

- Use of the Bad Tendency test: *Gilbert v. Minnesota* (US 1920); *Gitlow v. New York* (US 1925); *Whitney v. California* (US 1927): Worsening of civil liberties in US as Court repeatedly upholds convictions under State “criminal syndicalism” or sedition statutes against any speech that has bad tendencies, including all left-wing commies, anarchists, fascists.
- Holmes and Brandeis Dissent: Z. Chafee repeatedly gets only their 2 votes. Tactics:
 - Attack on merits: Is it really clear and present danger? Isn't it just a guy writing?
 - Chafee policy rationale that speech protects democracy
- Application to the States: Brandeis insists that 1st Amendment applies to States through 14th; by end of 1920s the Court at least agrees on this, although they still uphold the sentences. Big move nonetheless.

The Shift Begins end of 1920s

- *Fiske v. Kansas* (US 1927): Leaders of Kansas IWW (“wobblies”) convicted; their constitution says they want to take control of means of production. First time SC overturns conviction under criminal syndicalism statute. Says there is no evidence they planned any illegal acts. Small victory says you have to prove some bad tendency from the speech.
- *Near v. Minnesota* (US 1931): State closes down anti-Semitic paper under law allowing suppression of scandalous papers. 5-4 decision strikes down entire law. First time a law is unconstitutional; 1st Amendment does not allow restraint from publishing (you could punish after they say the bad speech, maybe). Anti-hate-speech but perhaps not such a big deal as preventive publishing forbidden at C/L. (Cf. other shifts – e.g. *Brown*)
- *Stromberg v. California* (US 1931): Communist summer camp in San Bernadino where kids pledge allegiance to workers' red flag. Citizens for Better America search camp; sheriff arrests counselors who are tried and convicted under CA statute forbidding red flag. SC overturns and holds law unconstitutional – peaceful and orderly opposition to gov. must be protected because it makes democracy work. Signing on to Chafee's idea of judicial activism.

Why the Shift? As we move into the 30s politics shift towards left.

- Personnel: Stone, Roberts and Hughes newly on Court and have broader view of freedom of expression. With Holmes and Brandeis that makes 5 votes.
- Suppression moves to mainstream: Gov. no longer just suppressing fringe speech in 20s: German composers banned in PA, mainstream mags getting banned from mail, progressive reformers (Margaret Sawyer – birth control) getting banned, literary figures (Joyce, Hemingway). Founding of ACLU and money from progressives whose reformers are targeted by the statutes.
 - cynical view: Court starts to respond when elites get screwed
 - optimistic: Court begins to reflect what people are thinking (maybe not so elite)
- Increasing power of labor unions: Many of statutes were used against them. Political support for unions increases; they have money to litigate and appear sympathetic; become more central to dem. party so now we have a major player in politics (the CIO) and not some fringe group.
- End of perception of threat: Threat of WWI and international communism has dissipated and radicals seem more ridiculous.
 - perhaps courts will protect minority interest only when they don't feel threatened
- Rise of Fascism in Europe: Suppression of free speech in Italy and Germany makes Americans re-evaluate commitment to civil liberties. We're democratic – not like those fascists. Judges did not want to mirror freedom-suppressing regimes in Europe.

Conclusion: The change has begun but the change is tiny.

- *Fisk*, *Near* and *Stromberg* are narrow opinions limited to criminal prosecution for political speech

- More mundane areas like radio, movies, post office fall into rubric of administrative expertise. Still a great deal of government censorship. Cities still regulated stuff like parks and courts would not interfere.

LEGAL REALISM

An intellectual movement in 20s and 30s among scholars centered at the east coast elite schools (not Harvard).

Who are the Realists?

- Llewellyn – coined term
- Felix Cohen
- Jerome Frank – Freudian scholar
- Thurmond Arnold – Yale prof and then head of justice dept antitrust division and then judge on 2nd cir
- William O. Douglas – Yale prof, SEC chair and SC justice into the 70s

What is Legal Realism? (not necessarily a single cohesive theory; we as realists have trouble conceptualizing this as “new”)

- Anti-conceptualism: Attack on science and Langdell, rejection of idea of perfect rules “out there.” Legal concepts such as consideration are simply transcendental nonsense – there does not exist out there some scientifically objective truth. Something else is the basis for legal rules.
- Judicial positivism: Law is nothing more than a particular judge says it is – there is no rule of law but only the rule of men. Adjudication is driven by economic and political interests of judges, or their ethical predilections, or psychological factors.
- Mutability of legal rules: An infinite number of meanings can be discerned from any legal rule or concept; judges can manipulate them and come out with any outcome they want. This is not bad instrumentalist motives; it’s just subconscious. Judges convince themselves of the existence of realism out of childish need for security of paternal authority.
- Social scientific empiricism: The study of law should be empirical; when asking what judges do we should apply principles of sociology and psychology to predict outcomes. Legal scholars should be behavioral scientists (particularly psychologists). Arguments on legal forms are meaningless. Instead we should talk to judges about behavioral sciences to convince them of our policy preferences.
 - distinguish from sociological jurisprudence (which itself differs from instrumentalism), which says we should supply data to judges to determine if the “police power” applies. Realists reject the notion of police power altogether – they hate rules! They are engaged in empirical study of judges and not of rules.
- Moral and ethical relativism: Positivist notion of law (law is what the judge says it is) is purposely morally and ethically neutral. The Supreme Court is right because it’s last, not last because it’s right. People may believe in moral absolutes, but these are simply political preferences and “law” or “truth.” It’s all about the commands of the sovereign; moral and ethical absolutes (natural law, freedom of speech, DP) are just abstractions.

Examples of Realist Scholarship

- Wesley Sturgis and Samuel Clark, “Legal Theory and Real Property Mortgages.” (1928): Examining “theories” of mortgages and demonstrating that it has no effect on the outcome of actual cases, not only among different states but also within them. Courts are crafting rules for individual fact situations (exact opposite of what Langdell did)
- Robert Hale, “Coercion and Distribution in a Supposedly Non-Coercive State.” (1923): Attacks abstractions of laissez-faire and private property. It is state power and coercion that creates and invokes the right of private property – in turn ownership of property is the right to invoke state assistance. People are forced into wage labor because they can’t steal under state regulations – others can invoke coercive power of state to prevent people from stealing or trespassing. Therefore wealth = amount of coercive power of state you can invoke. Takes an absolute (private property) and shows it does not

exists at all; deconstructs laissez-faire by showing that property owners have no freedom, it is the state behind them giving them property rights. Deconstructs public/private distinction.

Why does realism come into being when it does?

- Broader Intellectual Trends: 1910-1920 revolt from formalism in various disciplines.
 - Science: if Langdell is the Darwinist of the law, the realists are the Einsteins of the law. Idea that phenomena can only be understood in context – many disciplines are discussing relativity, combating notion of an objective truth “out there.” The guts required to re-examine Newtonian paradigms inspired people to deconstruct the foundational truths they had been fed.
 - Psychology: Influence of Freud, movement towards looking into people’s brains and examining their internal struggles rather than basing human behavior on things like God (Jerome Frank).
- Discovery of Confusion Within the Legal System: Westlaw started in 1870s; by 1910 there are tons of cases available to lawyers. Research revealed that cases were at odds with each other, thus allowing legal realist critique (look, judges just do whatever they want!). ALI’s Restatements created by recognition of this confusion (though to many realists the methodology seemed rather Langdellian)
- The Great Depression: Late 20s/early 30s intellectual vigor of realist movement really kicks in. Public opinion of corporations and big business changes, and questioning our legal and economic system makes sense in the context of such disfunction.

What are the effects of legal realism? In the short term, nothing too revolutionary, perhaps because a lot of the scholarship in the field simply discussed what judges were doing, but there was no transformation of courts until after the ND when these guys become judges, etc.

- Changes in Legal Education: Nowhere near as influential as Langdell. Realists were highly critical of the case method. Teaching materials changed: casebooks started including materials and law review articles. Joint degree programs began to crop up. Law schools began offering seminars and encouraging research. Curricular changes to public law courses such as admin law, legislation, etc. (notion that courts are not the only fora for making law). Clinical education became important. Pushed for increased academic rigor, admission and grad requirements (accomplishing the things Langdell had wanted to do).
- Effect on the New Deal: Legislative policies emanating from Roosevelt administration. Many realists end up working in the Roosevelt administration and influence policies.

THE GREAT DEPRESSION, THE NEW DEAL, AND THE ORIGINS OF MODERN ADMINISTRATIVE STATE - discussion of McCraw 153-216 and packet 87-102

Great Depression:

- Unlike the ones in 1890s, this one lasted incredibly long time – almost a decade.
- Capital markets before the GD: dramatic increase in buying on the margin and in the amount of the margins (as low as 10% down). Number of middle class investing in the market increases dramatically – no longer for the rich. When the collapse occurs, then, it affects a broad range of people.
 - Primary markets for capital –modern-day IPO to raise money in exchange for your idea so you can use money to buy materials for your company
 - Secondary markets for capital – you then sell your piece of stock to someone else.
 - Buying on margin: borrowing money to buy stock, but from the brokers using the stock itself as collateral

Problems with capital markets identified by Landis

- Rebuilding investor confidence by implementing corporate transparency and disclosure requirements, both for purposes of investor knowledge and to get rid of fraud and corruption
 - previously there had been over-the-counter sales by dudes knocking on people’s doors like vacuum cleaner salesmen

- Separation of I-banks from commercial banks: previously there was no distinction, so banks would take your money and do whatever they wanted with it, including risky investments. Creation of FDIC. Re-instilling of confidence in banks.
- Diminishing of margin buying: regulating to judge appropriate degree of margin buying so we don't have this huge pyramid scheme
- Creation of brokers' associations with rules of ethics they had to obey – re-instilling confidence in the middle man
- Regulation of stock market based on rules governing insider trading, etc. (before the markets had been private entities run by a bunch of rich guys)
- His rationale is formed out of crisis – as were European totalitarian movements.

Result: 3 major pieces of legislation.

- Extremely revolutionary, because broadly applied to every little company that issued stock and every bank – not just RRs or large corporations. Put the government everywhere and increased its scale and influence.
- Securities Act of 1933: prospective; required disclosure about your company when offering stock on the public market, must be certified by independent accountants
- Securities Exchange Act of 1934: applied to all stock available to public, not just stock to be offered in future. Established the SEC and gave them power to regulate stock exchanges. Set minimum margins.
- Glass-Steagall Banking Act: strictly regulated what commercial banks could invest in (limiting risk they could take); created FDIC

Landis' techniques

- Politically, he was in a position to do almost anything by 1934. His technique was not coercive (though he liked coercion more than Adams) but more cooperative.
- Regulating within existing structures: This is in part due to the limited resources of Congress – both in terms of money and time. Don't nationalize markets or create huge administrative apparatus.
- Allies within the industry: Accountants, reformers within exchanges, Joseph Kennedy. Easy b/c everyone hated big business. *Question: what happens when the depression ends and people don't want regulation? What happens to a political system when politics fade?
- "Sticks:" subpoenas with BOP on company, stop order to stop issuing stock if they don't get proper info (punitive b/c will tarnish public view), power to set exchange rules, power to define illegal practices

ADVANTAGES to this type of regulation	DISADVANTAGES to this type of regulation
<ul style="list-style-type: none"> ○ efficiency/speed ○ lack of DP (from Landis' viewpoint) ○ avoid courts ○ cheap 	<ul style="list-style-type: none"> ○ political basis for regulation may disappear* ○ capture: when regulating within existing structures you can end up in bed with people you're regulating ○ libertarian concerns – e.g. lack of DP

Landis says courts should judge legitimacy (constitutionality – broad) of rule created by agency and should defer to agency expertise on matters of fact and law. Why?

- evidentiary issue: appellate court won't have info the agency has
- expertise: courts don't know how these things work
- due process is protected by experts: They're experts and they make the wisest rule. Don't care about fairness of adjudication but about "correct" regulation. They will protect huge invasions of liberty but marginal ones may be sacrificed for the good of "proper social goals."
- response to substantive DP: It is the courts who are undemocratic. People gave legislature right to make these calls and leg. delegated it to executive and therefore agencies. Court just don't want to lose power.

Is Landis a Legal Realist?

YES	NO
<ul style="list-style-type: none"> ○ analyzes courts as entities that amass power and want to keep it ○ some leftist realists (law&economics) think you can use social science to get to the “right” answer and this is what he was doing ○ blurs the distinction between fact and law – bright line is Langdellian formalism ○ thinks separation of powers is conceptualist nonsense: the modern state needs more power in one branch, the executive. Adherence to separation results in social disfunction, and court (least democratic) is wielding the power. 	<ul style="list-style-type: none"> ○ committed to absolutes – expert answers – no theoretical or conceptual Freudian thinking ○ some realists (critical legal studies) think there is no right answer ever and are just radical deconstructionists – would disagree with him

RACE AND THE CONSTITUTION, 1918-1940

Status of African-Americans, 1880-1930

- Brief Review of “Jim Crow:” Southern legislatures had Jim Crow regime through segregation and disenfranchisement; SC did nothing about violations of 13 and 14th Amends (e.g. *Plessy, Giles*). Although protective of economic rights they were not protective of AAs
- After 1900, Things Get Worse
 - Legislation for segregated water fountains, bibles for swearing, etc. gets more pervasive; new black-code like labor legislation emerges:
 - criminal anti-inducement laws made it illegal to hire someone away from an employer so that northern employers could not come recruit AAs to their more tolerant states
 - convict lease laws: prisoners were leased to private employers who paid the state (like a chain gang)
 - surety laws: if you committed crime someone could pay fine for you and then you had to work for them to pay it off
 - contract enforcement laws: created criminal penalties for breaching of employment Ks, combined w/laws above you would be fined or imprisoned and then given back to the person who employed you but now they weren’t paying you.
 - This all worked to keep AAs in South, make sure they were bound to stay.
 - “Lynch Law:” organized private violence and murder of AAs without any legal repercussions against white perpetrators. This torture and murder was profoundly public and symbolic activity – tickets were sold, they were advertised. Peak number was between 1890-1920 – about 100/yr in the South. Always there was alleged crime (murder or rape) but mostly it was about social status: AAs who didn’t know their place, tried to organize sharecroppers. To maintain system of subordination, enforce local mores of Jim Crow.
 - Southern Criminal Justice System: torture to extract confessions, juries were white, defense attorneys were biased against clients or nonexistent. Fast trials resulting in convictions.

Supreme Court in the Early 20th Century: Tiny steps as Court starts to enforce equal protection clause

- Peonage laws: *Bailey v. Alabama* (1911): AL statute says if you take a better job offer you intentionally breached K and are liable for penalties plus 160 days’ labor for having to bring the case. Employer seized debtor to pay off. SC holds criminal peonage statute unconstitutional, says this violated the 13th Amendment, particularly presumption that you intended to breach the K.
 - Concerned w/”giving” debtor to employer.
 - Also, freedom of K and *Lochner*-like ideas are in the background.

- Holmes dissents (as he did in *Lochner*). Effect is not huge b/c other States' laws are slightly different
- Housing Segregation Laws:
 - *Buchanan v. Warley* (1917): Kentucky statute forbidding AAs to move into "white" neighborhoods. Segregation housing ordinances popped up a lot in South particularly in border areas as AAs move into city. These laws are unanimously struck down as unconstitutional. Pure L-F: state is depriving people of right to contract with whoever they want to. This ends up as a case under the DP clause and focuses on right of white landowners to sell property to whoever they want to and not on black rights.
 - *Corrigan v. Buckeley* (1926): Private covenants are always ok and do not violate freedom of K, it's just the state that can't create that prohibition.
- Segregation:
 - *McCabe v. Atchison, Topeka & SF Railway* (1914): OK legislature passes ordinance saying you have to have segregation in coach cars, but you can have first-class cars just for whites and decide not to sell first-class tickets to AAs. SC strikes this down under equal protection clause, saying you must have separate but equal and this is not. This is first case doing this, but the effect is not so big.
 - For example, see *Gong Lum v. Rice* (1927): State wants to place Chinese student in AA school; SC upholds and implicitly endorses segregation.
- White Primaries:
 - *Nixon v. Herndon* (1927): Texas passed statute saying AAs could not vote in primary (though they could vote in regular election). This is struck down 9-0 by SC saying equal protection does not allow you to exclude based on race.
 - *Nixon v. Condon* (1932): Texans therefore repeal the statute and pass a new statute saying the executive committee could set eligibility requirements. They say only whites can vote. SC says this is unconstitutional – democratic party is acting as agent of the state.
 - *Grovey v. Townsend* (1935): Texas then lets the parties do whatever they want and the democratic party meets at its convention and decides in its regular capacity that AAs can't vote. SC says that this is now entirely private discrimination, and the constitution allows it. The *Nixon* opinions were huge steps for AAs but the result is nullified by the last case.
- Criminal Justice Decisions: SC begins reversing convictions coming out of criminal justice system. Getting rid of coerced confessions, mobs outside courtrooms, requiring of effective assistance of counsel, prohibiting excluding AAs from juries.
 - First time the SC is willing to look behind state decisions at what actually happened. *Brown*: confession case in which State court said it was not coerced. SC went back and looked at the records below and made independent conclusions – change in doctrine of what should be role of federal courts in review.

Significance and Effect of These Decisions

- Attitudinal Shift: Not a huge impact on lives of AAs but baby steps. People on court are becoming concerned with AAs.
- Parallel to Growing AA Political Strength. Is the Court Counter-Majoritarian?
 - "Great migration:" AAs are leaving the and moving to states where they can vote. Suddenly northern congressmen have to respond to their AA constituencies
 - Anti-Lynching Legislation: Begins to be brought up every year beginning in 1920s on Congress calendar. Northern white congressmen are hearing this from AA constituents
 - Federal Government's Amicus Briefs: Siding with AAs – politicians at federal level are feeling the political power of AAs
 - In sum, the small amount of political power AAs get in 1910s and 20s influences SC to be slightly sympathetic. Looking forward, how does the Court's attitude continue to change with

increased political power? The SC sits in the context of these changes – they are in line with realities and attitudes of time. And, these victories are small.

- Significance to Lives of Southern AAs: These cases make almost no difference as so few AAs are concerned with buying houses or riding first-class trains.
 - They are just as disfranchised.
 - Criminal justice system: 4 or 5 cases of people lucky enough to get communist lawyers or NAACP does not reflect the thousands of cases going on.
 - These cases go unmentioned on by vast majority of Southerners, both white and black. Viewed as nothing more than curiosity. Exception were 2 criminal justice cases where 2 individuals exonerated for crimes they didn't commit.
 - Although insignificant in lives of AAs these cases are profoundly significant in transforming the legal community of AAs – become catalysts for later victories.

Who brings these cases? AA Legal Profession, 1900-1930.

- Status at Turn of Century: AA lawyers are scattered and few; practicing bread and butter transactions within the black community.
- Rise of Local AA Bar Associations and the National Negro Bar Association (1909): Begin to organize at beginning of Century; form AA Bar Associations and in 1909 NNBA. NNBA quickly began to promote civil rights; attorneys began seeing themselves as torchbearers of rights of AAs. They begin bringing cases, such as desegregation cases, even at risk to themselves (previously they had been loath to defend AA criminal defendants b/c they wanted to maintain their status and gain acceptance from whites).
- Founding of the NAACP (1909): Mixed race group, priority was civil rights. Founded in response to lynching, pushed for anti-lynching legislation. Litigation strategy for challenging Jim Crow, in particular criminal defense. Involved in every case discussed above – which elucidates their significance despite the ultimate outcome on remand. AAs were in a position to begin to flex legal and political muscle – change in type of activity within the AA community. Small steps in beginning of a concerted legal strategy for pursuing civil rights. Cases were seen as precedents.

LAW AND THE NEW DEAL

Background: Economic Situation, 1929-1933

- Stock market loses 80 percent of its value (85 billion) in October 29th crash
- Structural problems w/in US: dramatic increase in industrial production without increases in consumption or wages. Overabundance of things being made w/no buyers.
- Lots of suicide and poverty
- Herbert Hoover president – republican progressive. Says depression is mostly psychological – denies problem and takes no active policy.

The New Deal

- The Election of Roosevelt in 1932: notion that he is going to “do something.” Legislative agenda is called the New Deal.
- The First New Deal 1933-34
 - Personal assistance: Political necessity: you must have people think there is hope in their lives by getting them back to work.
 - Civil Works Administration: created 4.2 million jobs in 2 ½ months; Works Progress Administration: employed 5 million people over 4 years. Built libraries, post offices, employed artists.
 - Roosevelt as Fiscal Conservative: Did not wish to run budget deficits; ran very small ones while implementing these programs and by 1938 there was no deficit at all. The goal of these programs was to lessen impact of depression; but the ultimate solution was in expert regulation

- Regulation of Business: in first hundred days of administration
 - Securities Regulation: 1933 SEA and Glass-Steagall Act to restore faith in capital markets
 - National Recovery Administration: worked on theory that there was too much competition in the economy. They wanted to encourage monopoly and then regulate. (1) suspend antitrust laws and encourage formation of industry groups; (2) set prices, quantity of production and wages; (3) make a code setting the rules of these cartels which then becomes law. Self-regulation policed by the government – TOTAL REJECTION OF LAISSEZ-FAIRE which depended a lot on experts figuring out the proper rates, wages, etc.
 - Agricultural Adjustment Administration: problem of overproduction and too much competition among farmers who had been in a depression for a long time. They set limits on agriculture based on expertise

The Supreme Court's Response to the First New Deal: Restrictions being set by government entity – substantive DP and federalism issues.

- Case Law
 - *Nebbia v. New York* (1934): Upholding NY State law setting maximum prices for milk. Court seemingly forgot about DP altogether
 - *Schechter v. US* (1935): 9-0 decision holding NRA unconstitutional. First of series of cases bringing New Deal to its knees. Law struck down because of (1) unconstitutional delegation of power – too much reg. power given to private actors; (2) Commerce clause issue – NRA regulates local activities not within the stream of commerce. The chicken had come to rest.
 - *Morehead v. NY* (1936): Minimum wage law held to violate DP clause
 - *US v. Butler* (1936): No federal power to tax agricultural production, which is within State power and before the stream of commerce. Dual federalism.
 - *Carter v. Carter Coal* (1936): Coal conservation act setting wages and coal prices unconstitutional – no commerce clause power; coal production occurs before commerce.
- Significance of these cases:
 - 3 justices in favor of upholding New Deal legislation (Holmes' idea of passive review of legislation)
 - 4 justices are substantive DP guys: McReynolds, Van Devanter, Butler, Sutherland
 - Swing votes: CJ Hughes and Roberts. 1935-6 Hughes and Roberts are voting with the 4 conservatives, leading to the striking down of legislation
 - NRA failed in what it was going to accomplish. Combined with the striking down of leg, leads to need for a new strategy – the second New Deal.

The Second New Deal (1935-1938): 1935 the Roosevelt Administration, which had been trying to work with business (NRA), changes its tune and becomes confrontational, much more hostile to business. In NLRA encourages unions to organize, prevents unfair labor practices, creates NLRB

- Personal Assistance
 - Social Security Act
 - National Unemployment Insurance
 - Aid to Dependent Children: welfare
 - Fair Labor Standards Act (minimum wage)
- Business Regulation: more punitive
 - Securities Regulation continues
 - AAA re-enacted
 - National Labor Relations Act
- Court Packing: FDR knows cases challenging these acts are going to be heard. Says he will appoint new justice for every justice over 70, which would give him 6 new appointees to the court.

The Legal Profession and the New Deal

- Economic impact of the Depression on the Legal Profession: Blow to lawyers – by 1932 half NYC lawyers making barely subsistence
 - irony: ultimately depression and ND very helpful to non-elites because gov. expands dramatically and creates them jobs.
- Status of the Elite Bar during Great Depression: much less impact b/c they guide people through bankruptcy/all the new regulation. Pop culture hostility, however, b/c business looked at so badly.
 - legal realists attacked notion of altruistic lawyer, said they're all just after money
- The Emergence of Alternative Career Paths for Lawyers: Another group of elite lawyers emerges in gov/public interest. Upwardly mobile ethnic lawyers who would not have been allowed into elite firms and AA lawyers who have success b/c (1) democrats seeking their votes in North; (2) Eleanor Roosevelt is big egalitarian
 - Government Employment
 - Civil Rights Establishment: NAACP, NLG
 - Labor Unions
- Women Lawyers and the New Deal: By the end of 1920s they can be admitted in every state and their numbers are increasing, BUT by 1930s they're still only 1.5% of attorneys. Many with law degrees end up secretaries and clerks.

“A SWITCH IN TIME?” POLITICS AND THE RISE OF NEW DEAL CONSTITUTIONALISM – discussion of packet pp. 103-48. Cushman, *Rethinking the New Deal Court*

Constitutional Revolution

- Idea that court was obstructionist during first New Deal, striking things down, and then changed during second New Deal and began upholding things
- Revolution came in 1937 but there was no change in justices. Popular culture therefore attributes the shift to *court-packing plan, *election landslide of 1936 (court responding to election returns) or *both
 - underlying assumption = law is nothing more than politics veiled. Courts respond to political threat (court packing) in same way as politicians.
- By 1942 Laissez-faire is replaced by New Deal Constitutionalism – judicial passivity. This is what the liberals wanted.

Cushman: Switch was not result of court-packing plan

- Idea of court packing is nothing new, and Court didn't respond to it before
- FDP plan is “dead letter” – never a particular threat
- *West Coast Hotel* (sustaining minimum wage law) was decided 3 months before the plan was revealed – they delayed it only b/c Stone was sick and they needed him to issue the opinion. The plan therefore did not impact this decision. Court also decided to hold opinion a couple more months to avoid notion that plan affected it.
- Starting in 1937 Democrats take over and FDR's popularity declines
- Landslide theory is crap because there had been a landslide in 1934, so 1936 one was not necessarily cause of the shift.
- We can't categorize the justices into “conservative” and “liberal” because there is inconsistency in their actual decisions – shakes up assumption that there are “good” and “bad” guys.
- New Dealers created this story to paint those striking down laws as “bad” or “anti-rights.” When federal gov. gained power and they “won” after the new Deal, they wrote the history.

Cushman's explanation for the shift

- Better legal drafting of latter statutes
- Better lawyering

- Better selection of test cases: facts are essential in creating precedents; good reason to dismiss a case if you see a disaster coming (e.g. *Schechter*)
 - *Schechter*: Part of first New Deal; nightmare for government to defend because it had little to do with commerce. The Schechters were mom and pop operation in Brooklyn that didn't sell chickens outside of Brooklyn.
 - *Jones & Laughlin Steel*: Huge company (4th largest in State) in middle of stream of commerce manufacturing and selling in several states. Opposite of *Schechter*. Court says we can't ignore economic realities. Cushman thinks these are great facts.
 - *Carter Coal* (1936):
 - *Wickard* (1942): Court (Jackson) looks at aggregate effect of small production of wheat on commerce. More informed by facts, less formalist – analyzing economic effects. More deference to Congress.
 - In *J&L* you still need good facts to demonstrate it's in commerce; by *Wickard* the Court is assuming Congress was correct – the facts are not nearly as good but by now there's presumption of Constitutionality.

How convincing is Cushman?

- Maybe denies externalist political influences too much
- Hard to know what justices were “really” thinking. By *Wickard* they were saying it's not the Court's job to judge the law even if it's stupid or makes no sense. It's too formalist to put things in boxes – e.g. “direct” vs. “indirect.” Formalism seriously declines as Court upholds legislation.

FASCISM'S PROGENY: WWII AND AMERICAN LEGAL CULTURE (Packet 149-59)

Significance of the New Deal to Legal Historians

- Creation of New, Alternative Elite
- Political Realignment: Democrats get strong coalition including women, AAs, labor rights people. Shift to party that supports civil rights.
- Changed Conception of the Role of the Federal Government: dramatic expansion and death of dual federalism. By early 1940s states no longer main policymaking actors.
- Growth of the Administrative State: huge increase in regulation, beginnings of welfare state
- Changing Role of the Judiciary: 1930s triumph of expertise; judges appointed by Roosevelt don't believe courts should strike down admin. action.
 - Federal courts' constitutional role is curtailed: no more substantive DP or dual federalism. New Deal Constitutionalism = passivity.

Effect of the Rise of Fascism and the Second World War on American Legal Thought and Doctrine

- Problems Posed by the Success of European Fascism: WWII introduces European totalitarianism. Impacts legal thought and doctrine (but not necessarily all of ND status quo).
 - Americans see totalitarian commies in Soviet Union and fascists in Italy, DE and Spain
 - Ask why there is no fascism in US and how to prevent it from coming.
 - Combatting notion that democracy was a phase and all sophisticated govts. eventually went another way; fear of mass democracy
 - Defenses against fascism: faith in rule of law, civil liberties, personal freedom
- Critique of Legal Realism: Intellectuals trying to uncover moral absolutes and prevent totalitarianism protested realism. By end of 1930s realists on the defensive.
 - Attacks on moral relativism: judges should be “finding” moral law and applying it neutrally
 - Lon Fuller critiques positivism: corrupts polity because law loses moral weight
- Critique of Administrative Expertise: Rapid shift by end of 1930s; people concerned about DP/rule of law and freaked out by expertise

- Expertise and totalitarianism: fascism = administration gone bezerk; Nazi Germany seen as “efficient” so efficiency loses value here
- Louis Jaffe’s change of heart: By 1940s liberal supporters of New Deal passivity fearing “monstrous expressions of administrative power.”
- Remedy: By 1940s they want more judicial review - courts as buffer against totalitarianism.
- Fascism and the Changing Definition of Equality
 - Naziism, Con Law, and the rise of cultural pluralism: Nazi racism impacts con law: idea that democracy flourishes because of its pluralism, or inclusive nature. Judges start to want to take steps towards making that pluralism a reality.
 - Class-based equality becomes race-based equality: Until 1930s equality defined by economics (re-distribution of wealth to help poor and protective leg). By 1938 judges wondering how to get rid of substantive DP while keeping court’s role in enforcing racial equality
 - *United States v. Carolene Products* (1938): Substantive DP challenge to law prohibiting interstate transportation of milk w/added coconut oil.
 - Judicial deference as the norm: Court upholds the law – it’s a New Deal no-brainer
 - Less deference in certain situations: BUT Stone looks at Europe and wants to do the opposite. In FN 4 says Court won’t always defer if:
 - Law impacts on a right enumerated in the Bill of Rights
 - Law restricts the political process: e.g. free speech/expression/assembly (putting Jafee in Constitution)
 - Law motivated by prejudice against discreet and insular minority: e.g. Southern criminal justice system and hatred of AAs
 - Note speed of shift from passivity to activism: this is really a new activism/formalism born of the critique on realism and expertise.

CAROLENE PRODUCTS AND THE EMERGENCE OF A MODERN CONCEPTION OF CIVIL LIBERTIES

Subversive Speech: laws limiting speech are quintessential impediments to political process. Late 1930s/early 1940s Court starts striking them down as Jaffee bludgeons his way into Con Law:

- *Herdon v. Lowery* (1937) and *DeJonge v. Oregon* (1937): criminal syndicalism statute used to arrest communists for making public speeches; convictions overturned’ statutes themselves unconstitutional b/c no “clear and present danger.”
- *Hague v. Congress of Industrial Organizations* (1939): H had refused to give permits to labor union speaker in Jersey City. Result?
- *Thornhill v. Alabama* (1940): T giving speech to organize black workers arrested under law preventing labor picketing.

The Jehovah’s Witness Cases

- Nature of prejudice and legislation against Jehovah’s witnesses: Lynched, murdered, tortured and jailed in 1930s and 40s.
- *Cantwell v. Connecticut* (1940): JW arrested for violating city law requiring applications for solicitation. Court overturns conviction, saying we should let all races/creeds be free (pluralism).

Racial Discrimination: judges worried that we’re treating AAs as Jews treated in Germany.

- Continuation of Criminal Justice Reform
 - Jury cases: *Smith v. Texas* (1940); *Hill v. Texas* (1942): prohibiting discrimination in juries; court will presume unconstitutional when jury has no or very few AAs
 - Coerced Confessions: *Chambers v. Florida* (1940): D held incommunicado; opinion refers to Naziism.

- Voting Rights: *Smith v. Allwright* (1944): even purely white primaries unconstitutional – primaries are integral to election and can be regulated

The Japanese Internment Cases and the Court's "Counter-Majoritarian Function"

- Prejudice against and fear of Nisei: Espionage – they could slip into the US and blend in among Japanese Americans; concern with protecting them from hostile white Americans; Japanese Americans had failed to assimilate and would therefore show sympathy towards Japan
- Executive order 9066 (March 1942): Result of pressure on Roosevelt:
 - establishes curfew for Japanese Americans
 - establishes exclusion zones – places from which JAs will be removed
 - establishes detention camps to get them away from coast (to solve espionage risk)
 - lose property and many detained until 1946.
- Challenges to the Order: under equal protection clause, arguing discrimination based on race, citing *Carolene Products* – discreet and insular minorities needing protection from majoritarian processes
 - *Hirabayashi* (1943): SC unanimously upholds the curfew as reasonable behavior and legitimate use of war powers (reasonableness test).
 - *Korematsu* (1944): SC upholds deportation and internment 6-3. Rejects reasonableness test and says court has a duty to scrutinize potentially racist legislation or executive decisions (strict scrutiny test). Vigorous dissents.
 - Driven by extreme deference given to the military during wartime. There is no military necessity, no evidence presented by the armies, and no apparent danger threatened by these people. But Roosevelt administration is reacting to political pressure, racist white CA, OR and WA politicians.
- Supreme Court as Protector of Discrete and Insular Minorities
 - SC willing to protect major political players (e.g. labor unions, who by late 30s/40s were major constituents in democratic party); AAs (who were garnering increasing political power); unthreatening fringe groups (Jehovah's witnesses).
 - BUT court is not willing to protect the politically powerless group against whom the vast majority is prejudiced, e.g. JAs

The Split in New Deal Constitutionalism: The Flag Salute Cases

- *Minersville School District v. Gobitis* (1940): SC sustained school board rule requiring students to salute the flag each morning in Pledge 8-1, saying need to promote national unity wins over religious liberty.
 - judicial passivity – it is not job of SC to second-guess localities' policies. Courts should not overturn expertise of local school boards. New Deal judicial philosophy.
 - Stone dissent is pure *Carolene products* – small minority entertaining religious belief.
- *West Virginia v. Barnette* (1943): Court says you cannot force someone to salute the flag - has switched in only three years
 - Reaction to *Gobitis* was appalling: violence against JWs, burning down meeting places, statutes removing children from custody of JW parents.
- We see a split in ND constitutionalism. L-F Constitutionalism is replaced by these competing ideas, which are illustrated particularly well in *Barnette*:
 - ACTIVISM: One side rejects idea of expertise (see opinion p. 516) and says we need to protect liberty when it is threatened. Courts cannot be passive when "expertise" results on infringement of free speech, invoking totalitarianism.
 - PASSIVITY: Frankfurter dissents, saying judicial decision-making should not be about personal feelings and Court's role is passive: (1) we should be deferent to legislature because they're democratic entities (2) we should be deferent to administration because they are the experts

FIFTIES CULTURE AND THE LAW I: PLURALISTIC CONSTITUTIONAL LAW AND LEGAL THEORY

Thumbnail Sketch of Postwar America (1945-1962)

- Economics: massive prosperity; depression does not return but GNP increases dramatically; wages and disposable income increase and consumption increases (“repressed demand”)
- Politics: time of consensus; presidents Truman and Eisenhower both moderate; Congress bi-partisan moderate republicans and conservative democrats. Thus there is no dismantling of the New Deal but no extending of it either – equilibrium is achieved.
- Culture: Suburbanization of America – postwar prosperity lets people get their own houses; baby boom; religious culture; extension of values of cultural pluralism (but in reality overdrawn: white ethnics like Jews and Catholics assimilate into society but not AAs, Asians, those outside mainstream)
 - unusual consensus both about politics and culture (suburbanization/religion)

Constitutional Law: Cultural Pluralism and Freedom of Expression

- Background: awareness and fear of Nazi regime informs legal decisions
- Case Law
 - The “Fighting Words” Cases: series of 5-4 decisions upholding or overturning hate speech – e.g. fundamentalist preachers attacking Catholics and Jews, fascists, AAs attacking Caucasians. Court was ruling on arrests for disorderly conduct.
 - Argument for overturning comes out of *Carolene* FN 4: free speech is essential to democracy.
 - Argument for upholding : Jackson says speech that attacks racial groups does not further democracy but subverts it.
 - *Beauharnais v. Illinois* (1952): Challenge to “group libel” statute, which makes it a crime to publish materials deriding certain groups. B. publishes s/t asking whites in Chicago not to rent to AAs. Court upholds the law (Jackson speaks of experience in Nurnberg – very realist)
 - Conflict between *Carolene* and Judicial Passivity: Can you suppress speech to protect discreet and insular minorities? Different arguments:
 - Yes: Pluralistic nature of the US in the 1950s; notion that Bill of Rights is not a suicide pact (it is not ok to uphold free speech at the expense of people); pseudo-legal-realistic approach (it is not worth it to simply uphold speech for speech’s sake – this is formalistic; we must look at the reality of whether it upsets democracy).
 - No: Liberitarian notion of free speech and passive strand of new deal constitutionalism.

Legal Theory and Postwar Culture: The Rise of Process Theory

- Durability of the Lessons of Legal Realism: Positivistic, amoral nature of realism is problematic in context of WWII/totalitarianism/genocide. However, its underlying tenet – that judges make law and there is no “legal science” – remains.
- Process Theory focuses on the *way* institutions work/judges decide, not on substantive law itself.
 - Institutional Competence Theory: Government institutions should do what they are best at.
 - Legislature balances popular values/responds to needs of people
 - Courts should defer to legislature, and should focus on resolving disputes between individuals and reflecting the deeper values of society. When “fundamental values” are at issue it is ok for courts to step in; b/c of their “removal” from political process, they can somehow “discern” values as philosopher-kings.
 - Reasoned Elaboration: Direct attack on realism; says that judicial decision-making is constrained. Judges are forced to adhere to the forms of legal reasoning – they have to use precedent, they have to publish opinions, they are constrained by fear of reversal. Judges attain neutrality by adhering to professional norms of behavior.
- Examples of Process Scholarship

- Henry Hart and Albert Sachs: The Case of the Faithless Fiduciary: Article based on common law case of someone hired to buy stock for another who then just buys it for himself. Q: did requesting s/o to buy s/t for you create a broker relationship?
 - Trial court looks at case law, which says that ordinary people would not be bound by a fid. relationship, but brokers would. Court chooses the latter because it appeals to them more.
 - Hart and Sachs attack the decision, saying that a court has a duty to lay out its reasoning in making such decisions. If the court had engaged in process of reasoning, they may have reached the same outcome.
 - Legal realism has encouraged judges to impose their preference; it's a sort of spiral effect as it encourages judges to not bother looking for the law. If judges and lawyers reason the way they should, by following norms and precedent, then you will have a stable system. We should return to REASONING (this is not about Langdellian “scientific truths,” they claim).
- Alexander Bickel and Institutional Competence: Courts are better than legislatures at interpreting deeply-held values; but legislatures are better at balancing these values.
 - “Avoidance and Admonition:” SC should avoid Constitutional issues at all costs; should always decide on non-Constitutional grounds (even if it could strike down laws). But, it should take the opportunity to admonish the legislature.
 - *Green v. McElroy* (1959): Green lost business b/c he was deemed a “security risk;” argued that this violated DP b/c he had not warning or explanation. SC did not comment on DP but said that State department did not have right to declare him a threat. The Court, in dicta, lectures Congress on importance of DP without explicitly holding on that ground – gives Congress another chance to act now that it knows how the Court feels.
- Process Theory and Postwar Culture
 - Delusional naiveté of institutional competence (legs. are most equipped to make decisions) is characteristic of 1950s but wanes in 1960s

FIFTIES CULTURE AND THE LAW, PART II: ANTI-COMMUNISM AND THE CONSTITUTION

The Policy Manifestations of Anti-Communism

- What is Anti-Communism? Fear of domestic subversion – that commies living in the US would infiltrate labor unions
- Policy Manifestations (starts w/Truman in 1940s)
 - The Attorney General’s list: list of “communist front orgs” - apparently pacifist orgs. and civil rights groups who are “secretly” communist
 - Loyalty Oath Program: Requiring swearing loyalty to US and saying you are no in a communist front group or declaring you are and being subject to scrutiny. Private employers adopted.
 - The House Un-American Activities Committee: most famous comm. investigating whether gov. is infiltrated by commies (McCarthy). Purpose was to have hearings and “get info” – what really happened was to make black lists of potential disloyals.
 - Businesses would not hire those who refused to name names
 - Often people would take the 5th and could not be forced to talk but would go on blacklist
 - Legislation
 - Smith Act (1940): 10 years in jail for advocating violent overthrow of government
 - McCarran Act (1950): creating Subversive Activities Control Board to force alleged communist org members to register with gov. and get special ID card. Not allowed passports or union membership; could be detained without warning.
 - Communist Control Act (1954): making it crime to be member of the Party.
- The Effect of Anti-Communism

- By end of WWII Russia was not spying on us anyway – so it was like taking action when not needed. measures were overbroad
- Effect: chilled progressive thought and politics; many left-leaning orgs. ended up on the lists.

Anti-Communism and the Supreme Court

- The Early Cases
 - *CIO v. Douds* (1950): amendment to NLRA forcing people to sign statements saying they are not communists. Effect of purging communists from labor unions (kicked out for not signing). Court discusses dangers of communism; labels communist infiltration of labor unions as a “clear and present danger.” SC upholds convictions and says the requirement of affidavits stating you do not hold communist beliefs is constitutional (survives First Amendment attack).
 - *Dennis v. US* (1951): Leaders of the Party convicted under Smith Act for planning the overthrow of the government. “Clear and probable danger” standard replaces “clear and present danger.” The greater the threat, the more attenuated the imminence can be. The more of a risk you are, the sooner the government can attack your speech – it’s a sliding scale.
- The Later Cases: Anti-communist see-saw; most virulent anti-communism ends by 1955
 - *Yates v. US* (1957): Holding that conviction under Smith act requires advocating specific action rather than simply revolutionary ideas. (Cf. *Dennis*, where they were not convicted under any specific plan). Makes convictions under Smith Act impossible – you see none after this case.
 - *Watkins v. US* (1957): Contempt case – witness refuses to give names when questioned. SC overturns conviction, saying courts will not sustain when sole purpose of the hearing is to generate a blacklist or obtain contempt conviction, not to further goal of legislation.
 - *Sweezy v. New Hampshire* (1957): Same as Watkins but in State legislature’s own “un-American Activities Committee.”
 - Reaction: The cases above came down on a Monday referred to as “red Monday” by legislators. Huge outcry against; effort to strip SC of jurisdiction to hear such cases.
 - *Barrenblatt v. US* (1959): SC upholds contempt convictions based on legislative hearings.
 - *Uphaus v. Wyman* (1959): Same as above.

Conclusion: Explaining the Court’s Reaction to Anti-Communism (The First Amendment’s scope had been expanding, so why didn’t they continue expanding it to fit this new area they had never addressed?)

- The see-sawing above is comparable to the switch in time: is the Court reacting to the pressures of legislature? Probably not.
- Anti-communism is too strong a force for the court to resist – judges believe in the threat just as most Americans do; we must be skeptical of extent to which Court can perform counter-majoritarian function and stand up for civil liberties in the face of potent political forces; see also *Korematsu*
- Judges afraid of appearing soft on Communism
- Influence of passive strand of ND Constitutionalism remains (discomfort with activism)
- *Carolene* itself does not justify protecting the type of speech at issue here. Idea that you should use the SC to protect speech aimed at undermining democracy is not persuasive - speech that makes the democratic processes work is worthy of protection.
- It’s entirely consistent with previous decisions – this *is* a clear & present danger

FIFTIES CULTURE AND THE LAW, PART III: THE LEGAL PROFESSION AND THE ADMINISTRATIVE STATE IN THE 1950s

The Legal Profession in the 1950s

- Demographics and Structure
 - Decline in Solo Practitioners: drops dramatically in 15 years after WWII – 15% move into firms
 - Merging of the two elites: Wall Street and New Dealer “new parallel elite” merge: New Dealers move from gov. to private practice and set up their own firms composed of Jews, Catholics, etc.

Wall Street firms begin to hire these New Dealers for their vast expertise, thus diversifying the firm make-up.

- This does not include female and AA attorneys who are still pushed to the fringes, and who work in municipal gov. and in civil rights.
- Anticommunism and the Legal Profession
 - Movement to expel Communist Lawyers: disbarring people tied to Communist groups, mandatory oaths, etc. None of these attempts were directly successful, but there is no way of knowing to what degree this kept radicals out of the profession – e.g. due to moral character process.
 - “Guilt by Representation:” Sanctioning of lawyers who represented communists regardless of their own views (see “Kill all the Lawyers”).
 - Consequences: Lawyers are deterred from representing communist defendants for fear of being disbarred. Furthermore this has chilling effect on representation of all people on the left – e.g. civil rights litigants.

Administrative Law and Theory in the 1950s

- Changes in Theory
 - Attack on Expertise: After WWII administrative state is characterized either as “totalitarian” (“efficient,” brutal, anti-democratic and dangerous) or as profoundly political and corrupt (expertise is not the basis of appointment; everyone just appoints their cronies)
 - Call for more Judicial Review: fear of unfettered discretion because of reasons above (they’re corrupt; they’re proto-fascists)
 - Group Pluralist Administration: expertise replaced by “interest group pluralism,” which said the admin. state should simply respond to the desire of public as manifested in clashes of different interest groups, rather than dictating outcomes (note: there was no “capture” issue – no fear that agencies would be controlled by the interest groups, as there is today).
 - Summary: People are very anxious to move away from agency as locus of power – locus becomes (1) the people themselves (interest groups) and (2) the courts
- Change in the Law: to reflect ideas of interest-group pluralism and notion of judicial review
 - The Administrative Procedure Act: provides uniform rules of judicial review for federal agencies; fairly vigorous standard
 - Case Law: Courts respond
 - Rhetoric in the Cases: “Men should be governed by laws;” “Expertise can be a monster.” Former New Dealers want judicial review, are terrified of expertise.
- Why this change? By the 1950s courts are inserting themselves vigorously in the administrative process
 - Reaction to Totalitarianism: limit administrative discretion b/c it is a tool totalitarian govts. use
 - Optimism about the Political Process: 1950s belief that interest group pluralism worked as a solution to totalitarianism – fits in with idealistic nature of the times.
 - Decline in Quality of Administration: New Deal agencies no longer stocked with ecstatic New Dealers; bureaucratic lethargy sets in instead.

DISCUSSION: THE ROAD TO BROWN V. BD. OF EDUC. - McNeil pp. 131-224

Charles Hamilton Houston’s formative experiences

- Connection to family: relatives who had escaped on underground railroad, father had been a self-made man
- Outstanding education: high school, Amherst, HLS
- Combination of privilege (member of DC “black bourgeoisie,” very privileged in high school) and racism (first black student on HLR, not allowed in clubs, so starts his own; alienating undergrad and law school experiences)
- Becomes protégé of Roscoe Pound and other sociological jurists

- Army experience (near-lynching; encountering virulent racism) – emerges knowing exactly who he wants to be. This was not an uncommon experience; often it radicalized AAs
- Travel abroad introduces him to less race-conscious societies – Spain

Charles Hamilton Houston’s success – Why is he so successful?

- NAACP: Succeeds in winning salary in education cases; cases declaring segregation unconstitutional; cases prohibiting discrimination by unions under NLRA (*Steele*); against restrictive covenants (*Shelley v. Kramer*)

(1) Long-term strategies/positional tactics:

- Sociological Jurisprudence – generates data on nature of education for AA kids
- Litigation is only part of strategy – uses it to create political movement
- Creating cadres – Harvardizes Howard law school; raises its reputation and creates social engineers who then continue on in his footsteps (e.g. Thurgood Marshall)
- Litigation strategy – press for enforcement of separate but equal rather than attack it directly (actually making equal is expensive)
- Use of media to publicize among both AAs and whites, esp. northern white liberals
- Recognition of class-based benefits: works with ILD and Communist Party
- Case selection: Smaller steps – salary cases for teachers, professional and graduate schools, transportation cases in MD, OK, MI (not in deep South but in border states).
 - Cases which on their face do not have massive impact and which are not too controversial
 - Cases in states which are relatively progressive
 - Cases which are easy to win - saving resources and efficiently creating precedents. Proving separate but equal in a law school is very simple – there is none – whereas proving it in an elementary school in VA would require a lot of discovery and proof.
 - Cf. early New Deal cases, which were repeatedly stuck down because of lawyers’ stupidity.
 - Cf. strategy of RRs in getting rise of substantive DP

(2) Timing: year?

- Appeals to egalitarianism more successful b/c of WWII and fear of Naziism
- De-colonization of Africa and contest between US and Soviet Union for allegiance of these nations. America wants to increase its prestige among foreign nations and needs to tone down racism problem. Houston very aware of propaganda Soviets are trying to create.
- Urban migration: growth of industry and war industry in urban areas in north creates new class of AAs with political voice, as they have moved to places where they can now vote.
- Federal government more responsive to AAs as a result of their increased political clout
- Creation of FEPB
- Rise of mass media – TV, radio, films, newsreels. Houston is aware of media power.

Is Houston a Legal Realist?

YES	NO
<ul style="list-style-type: none"> ○ Aware of connection between judging and politics: e.g. realized society is not ready for Margolis report’s strategy of attacking separate but equal and that judges therefore would not be ready ○ Uses non-legal materials ○ Psychology of judges: brings the law school case b/c judges will be able to relate and may feel connection with plaintiffs 	<ul style="list-style-type: none"> ○ believes in precedent or the “adoption of legalism” – his valuation of the small steps approach suggests that he thinks judges will follow precedent. ○ Approach to legal education: adopts HLS approach for Howard, which is very in favor of structured, rigorous, elite education created social engineers. Realists hated Langdell, and he sees him as a tool for creating good lawyers.

Reactions to the book – what are the difficulties with writing a biography?

- She does not achieve distance from the subject: she is not critical enough; glosses over his weaknesses
 - Devotes too much time to other causes due to overwork – Howard students protest
 - Relationships with first wife and with second wife and kids (not seeing them)
 - Through ancestry and social position and timing he is incredibly driven, but must pay a cost in his personal life (Cf. James Landis)

BROWN V. BOARD OF EDUCATION

Why Switch to Desegregation Strategy? Houston's protégés who take over NAACP (1) switch from his separate but equal" strategy; (2) switch from grad schools (not controversial) to elementary; (3) bring cases not in border states but in deeper south cases (VA, SC)

- *Sweatt v. Painter* (1950): Court says that you cannot create an equal law school even if you gave it everything the white school had – at least in this case, in order to be equal you must have integration (dicta). Order P's admission to U. Texas law school.
- Generational Shift: New generation of lawyers (lead by T. Marshall) find separate but equal strategy offensive. They want to tackle *Plessy* straight on and fight for desegregation.
- Resource Limitations: Once you are dealing with high schools and elementary the proof for separate but equal is harder – requires a lot of data on each individual school district. But if segregation is unconstitutional regardless of whether it's equal then that's the end of the story – every school is in violation. Constitutional attack seems more efficient.
- Changing Political Climate (in postwar years and by the 50s) makes America seem ready
 - Cultural Pluralism and the Second World War: reaction against totalitarianism, etc.
 - The Cold War: use of Jim Crow as pro-Soviet propaganda gives Americans non-race-related reasons to oppose segregated schooling
 - Increasing African-American Political Power: increasing political power because of migration to the North

Brown: The Internal Deliberations

- First Conference (December 1952): 9 justices sat to discuss the case; Vinson suggests not voting initially but just talking.
 - Votes to End Segregated Schooling: Douglas, Black, Minton, Burton: 4 sure votes to overturn *Plessy*
 - Vote to Allow Segregated Schooling: Reed: sure vote to uphold *Plessy*
 - Votes That are Unsure: Vinson (CJ), Frankfurter, Jackson, Clark: worried about overturning *Plessy*
 - Vinson: 14th Amendment on its own does not support desegregating schools. The Congress that passed this supported segregated schooling; the Northern States who ratified it even had segregated schools.
 - Frankfurter: we don't have a legal hook to lay our hat on; says 14th amendment was about civil and political rights, and schooling is about social rights. But wants to distinguish this case.
 - Jackson: there is nothing in text or history of Constitution and no precedents. Furthermore we must consider the effects – on AA kids and in reaction of the South.
 - Clark: What will the remedy be? What if school districts resist? Implementation should be slow to avoid social chaos.
- Reargument: Justices want to focus on (1) original intent and (2) remedy. Before reargument Vinson dies and Warren (who had advocated Japanese internment) replaces him.
 - John W. Davis for school districts: emphasis on federalism and education being traditionally left to States; need for judicial passivity and deference. The change will happen but letting Court do it would be catastrophe.

- Thurgood Marshall for plaintiffs: classic Brandeis brief using facts and sociology; impossibility of separate but equal – separateness created psychologically damaging effects on AA children.
- Second Conference (December 1953): Warren wants to vote right away
 - The Court is split 5-4: Warren, Black, Douglas, Minton, and Burton want to strike down; Jackson, Reed, Clark and Frankfurter disagree.
 - Warren Brokers a Compromise:
 - Says it is clear that they were all opposed to segregated schools – it is the “politically proper result.”
 - Given the resistance the South will put up, unanimity is crucial.
 - Furthermore, dissenting is highly costly. It will give ammunition to those against the decision – uses this “stick” and focuses on institutional integrity of court.
 - Offers the carrot of remedy: not the immediate ordering of desegregation but instead giving States the chance to try to work things out themselves (preserve autonomy)
 - It’s now 8-1; but Justice Reed still wants to dissent. Warren convinces him on notion of maintaining prestige of court – solely on issue of institutional integrity. Who cares about segregation? What’s important is maintaining integrity of the court.
 - ANTI-FORMALIST, PROFOUNDLY REALIST ARGUMENT: we agree it’s politically correct and by being 9-0 we have to create the myth that it’s legally correct. But he knows that legally they’re on shaky ground!
 - Why such reluctance?
 - The problem of Original Intent: When drafting 14th Amendment it was democrats who were against it, who said if you pass this it will result in desegregated schools. Republicans said “no, no it won’t to anything like that.” Only most radical republicans who were promptly shut up by the moderate ones said it could be about desegregation.
 - The problem of Contemporary Mores: hyperconscious of their opinion vis-à-vis that of most Americans – they don’t want to be too far ahead of the crowd pushing envelope of public acceptance. They want to be riding the crest.
 - The problem of judicial activism: New Deal constitutionalism – Frankfurter and Jackson still retaining lessons of *Lochner* that Court should be passive and that such activism is potentially reactionary. You don’t want to give courts that weapon because who knows how they will use it. If you open the door to activism you can’t guarantee it’s your guys who will be doing it.
 - REALIZE THIS IS NOT AN EXAMPLE OF THE COURT AT HIGH TIDE STRIKING DOWN LEG. It is the FIRST STEP in the Warren Court – the Court is not yet the liberal activist court it becomes. There have been a ton of anti-Communist cases. It’s hardest to take first step than subsequent ones.

The Opinions

- *Brown I* (1954)
 - Holding: Segregated schooling is unconstitutional – violates the equal protection clause of 14th Amendment. Separate but equal does not apply to education, because equality can never be achieved through separate resources. Psychological evidence (self-esteem of children). Court dodges the original intent issue because it has to. Distinguishes *Plessy* by saying education is different than other State activity (but ultimately these other activities are desegregated using *Brown*).
 - Style: Short opinion, few cases cited, plain English – clearly written to be read by the public. Short enough to appear on front page of paper; designed to sway popular opinion.
- *Brown II* (1955)
 - Remedy: victims of segregated schooling must seek remedy in local federal courts. School boards must come up with “compliance plans” subject to local court approval, with “all deliberate speed.”

- Importance of Brown II
 - The Price of Unanimity: in order for Warren to get the votes of the justices on the fence he had to promise such a wimpy (unusually passive) remedy.
 - Establishes Pattern for Other Litigation Campaigns: In the 1960s host of people trying to accomplish similar ends in various policy areas. Idea of having Constitutional right declared with subsequent implementation by federal courts becomes a model & is repeated again and again – e.g. prison reform; children’s rights.

THE LEGACY OF BROWN: DISCUSSION OF PACKET PP. 194-232

Michael J. Klarman, “How Brown Changed Race Relations: The Backlash Thesis” (1994)

What is the effect of *Brown*?

- Minimal effect of school segregation: by 1964 the Southern school districts are NOT desegregated. 1964 CRA Act and Johnson’s decision to condition federal education funding on desegregation are the true motivations. Executive and legislative, not judicial, action.
- Backlash thesis: Before *Brown* Southern politics were more focused on class and economics and not race – politicians riding on coattails of the New Deal focused on re-distribution and creeping racial liberalization (away from Jim Crow). After *Brown* they are replaced by racist “race to the bottom” politicians, many of whom had been more moderate before *Brown*.
- Southern white politicians aligning themselves with white supremacists to further their careers (b/c blacks not voting) – massive resistance. They garnered popular support:
 - racism: fear of little black children sitting next to little white children
 - federalism: idea that federal government and unelected SC was imposing its will on the South
- Although the federal government sent in troops to desegregate schools, there was some degree of collusion: the Southerners benefited by garnering media attention and popular support, and the feds knew that’s what they were doing and went along with it (up to the early 1960s).
- Prince Edwards County in VA closes all of its schools and creates subsidies for all-white “private” schools.

How does the civil rights movement use this backlash?

- Media: images of hosing down AA schoolchildren or unleashing dogs on them looks very bad both to Americans (Northern racial liberals) and foreigners (used by Soviets as propaganda). These images pressure the Johnson and Kennedy administration into passing Civil Rights Acts and implementation bills for de-segregation.
- Counter-reaction: the more brutal the Southerners get the more necessary the Northerners’ reaction becomes.

LEGAL LIBERALISM

Political culture in the 1960s

- Growth of Distrust of Government: vision of government as well-oiled machine replaced by distrust particularly of elected branches from all sides (liberals and conservatives). Attack on interest groups – cynicism takes over.
- Reasons for the Growth of Distrust
 - Decline of Anti-communism by 1962-63: more dissenting voices emerge because more aggressive critique is tolerated
 - Civil Rights Movement succeeds: people wonder about the fantasy land of representative interest groups; realize many are being excluded
 - Affluence: people were not raised in poverty of their parents; prosperity gives time to think about these things. Many student protestors were rich kids from elite schools.

- Courts as the Solution: Judiciary is insulated from political process (corrupt interest groups) and seen as the only non-corrupt agent of reform. Irony: the un-representativeness of courts is what makes them able to represent people!
- Why are Courts the solution?
 - Suspicion of the political branches: distrust of President because of Vietnam; interest group corruption
 - The effect of *Brown*: changed people's conception of what law could do – it was a way to change society (ironic: unclear to what extent it had the desired effect). Young lawyers wanted to do the same: pick policy goal and achieve it through litigation. This led to “test case way of life” after *Brown*.
 - Demographics of the legal profession: Increasing number of AAs and women entering profession; legal interest groups representing minorities and thus empowering them. More interests are being represented by litigation and within the community.

Legal Liberalism and the Constitution: 1960s Warren Court births new Con Law regime; passive strand of ND Constitutionalism is abandoned; active strand from *Carolene* is stretched and ultimately courts even move beyond it.

- Reapportionment: Representation of those who move into urban areas is diluted, hence AAs and poor people are particularly under-represented. Quintessential *Carolene*-type situation. Problem: the rural districts will not vote themselves out of power, so there appears to be no way out.
 - *Baker v. Carr* (1960): “One man, one vote” notion – districts should be about the same size so that each person's vote is equally valued. Court reasons that the political process will not rectify the problem and they will do it (citing *Carolene Products*)
 - *Reynolds v. Sims* (1964): same as above
 - *Lucas v. General Assembly of Colorado* (1964): CO realized post-*Baker* that it is severely malapportioned; decides on leg. composed of lower house (representation by number) and upper house (by districts). Warren Court holds this unconstitutional – does not care that the political process was not broken, or that the point was to ensure that the discreet and insular minority (farmers) stayed represented. Court says voting is an individual right that cannot be taken away – does not let the State protect a minority; they care more about individual rights.
 - It is courts, not legislatures, that manage the re-districting problem.
- Free Speech
 - *New York Times v. Sullivan* (1964): Article published criticizing sheriffs for civil rights abuses; Court holds that public figures cannot sue for libel and slander. About making political process work by allowing critique of politicians. Pure *Carolene* products.
 - *Brandenburg v. Ohio* (1969): protects the advocacy of overthrowing government; again, pure *Carolene* products.
 - *Stanley v. Georgia* (1969): Limiting State ability to regulate pornography. This is about protecting individual liberties, but it is not a *Carolene Products*, functional approach to free speech. It is not about making political process work. It is a much more libertarian notion of free speech; protecting individ. rights to not be interfered with by government.
- Right to privacy: neither of these can be reconciled w/*Carolene* – we're not talking about discreet and insular minorities
 - *Griswold v. Connecticut* (1965): CT statute prohibiting use and sale of contraceptives; Court overturns conviction of planned parenthood for selling to a married couple
 - Douglas: right to privacy not enumerated in Bill of Rights but can be inferred
 - Warren, Goldberg, Brennan: locate right to privacy in 9th Amendment
 - Harlan and White: It's contained in 14th Amendment
 - *Roe v. Wade* (1973): Striking down laws making abortion illegal
 - Blackmun and Stewart place the right within DP clause – “liberty gathers meaning from experience” of living in culture

- Court essentially created a statute (trimesters): archetypical case of legal liberalism b/c it defends a right regardless of the political process
- Legal Liberal Constitutionalism v. New Deal Constitutionalism
 - Legal liberalism: the Court sees its role as protecting the political process and discreet and insular minorities (*Carolene*), but the Court ALSO will protect certain rights regardless of how the political process is functioning
 - privacy, one man one vote, personal fulfillment
 - It's much like L-F Constitutionalism, but a different set of rights are privileged (even use 14th Amendment in both instances)
 - Distinguish amount of detail of Court involvement: here the Court actively formulates standards of behavior
 - e.g. *Roe*, writing little statutes; *Miranda*, creating rule of what cop has to say
 - *Brown*: asking lower courts to retain J and check up on these cases
 - As a result the attack on substantive DP now comes from the right

Legal Liberalism and the Administrative State

- Agency Capture: 1960s, idea of capture is focus of academia and popular articles as well (even Landis). Legal liberals want to give more power to courts/ask judiciary to take more active role.
- Judicial Control of Administration: Courts become mechanisms for protection of individuals in administrative process.
 - “Hardlook” Review: Power of courts to scrutinize agency factual findings and policies. Especially true if suspicion of corruption: we don't believe in expertise anymore; you just care about the interest groups that have captured you.
 - Due Process Explosion: Courts find number of procedural rights when people interact with agencies and impose a number of DP restraints. Courts become much more involved in administrative process.
 - Standing Doctrine: Courts widen doctrine so that agencies must listen to many more voices – e.g. customers, etc. Tries to make them more responsive to individuals.
- Legislative Manifestations
 - Freedom of Information Act 1966: requiring agencies to provide public with documents they use in decision-making. Classic legal liberalism – making the process transparent
 - Citizen Suit Provisions: Statutes passed in the 70s allow any citizen who thinks agency is not doing its job standing to sue the agency in court. Deputizes the entire population; Congress is letting the courts be the people's saviors.
 - note: neither expertise nor efficiency are the goals here; it's about stopping capture and empowering individuals.
 - Cf. *Brown*: taking people excluded from the political process and involving them in it.

THE PROBLEMS AND POSSIBILITIES OF THE PUBLIC LAW REGIME – Davis pp. 1-145

General themes

- Progressive reform
- Sparer and anti-communism
- Changing demographics of legal profession and impact on cases being brought

Poverty law movement

- Mobilization for Youth (MFY) was original org providing direct services; Sparer then created “The Center” to bring test cases. Both connected to NWRO, which is political org/advocacy group (not legal)
 - Cf. civil rights movement: on legal side, NAACP did everything (no division between the MFY and Center contingents); the political side on the other hand was much more diffuse than a single entity (e.g. NWRO)

- Ultimate goal of Center is to establish minimum income level – Constitutional “right to live.”
- Strategy
 - ensuring due process: overcome legal hurdle that welfare was gratuity and define it as property: procedural DP (*Goldberg*, etc.). This where they had most success.
 - financial strategy: like Houston noting the costliness of separate but equal, they try to get as many people on the rolls and have them ask for all sorts of extra grants.
 - creation of precedent: like Houston. They run into the problem of settlement, because they don’t have same virulent ideological resistance
 - choice of location and facts (virtuous poor person)
 - equal protection: poor people treated differently by welfare programs (e.g. people who moved, amount of benefits poor people got as opposed to the elderly and disabled, substitute father regulations treat women with children differently when they have occasional lovers)
 - these get “rational basis” review, unlike race cases
 - benefits: you are more likely to get a substantive result; this is what judges are used to (they are in the South and have encountered this arg. in the context of structural reform litigation; it’s familiar and comfortable)
 - racial overtones in these cases – e.g. disparate impact of substitute father rules on AAs
 - they don’t use substantive DP because it’s a dead resource by this time
 - baby steps
- Results: substitute father and residency requirements struck down (but, on statutory basis and not constitutional basis); procedural success of *Goldberg*. But politically they fail to set up guaranteed minimum income; they fail to enshrine constitutional right (*Dandridge* – every child guaranteed a minimum amount of money).

Why doesn’t it work?

- Political culture views race and poverty differently: distinction that poor people have agency in creating their fates (moral undertone)
- Lack of unity among litigators (ego problems; youth of the lawyers) – Cf. *Brown*
 - lawyers and clients don’t have common experiences
 - competition to get to the SC and “do a *Brown*.” Lawyers as social crusaders.
- Media is not used as it was in *Brown*; they did not create a political movement through publicity
- No groundwork
- Timing: NAACP had litigated for 40 years before *Brown*; here the movement happens incredibly quickly without educating judges and the population enough
 - perhaps they were afraid of political climate especially after Nixon was elected
- Less of a connection to political activism
 - severance of ties with NWRO when Sparer leaves. In *Brown* they brought seemingly petty cases in order to organize political movement

CONCLUSION: THE RISE AND FALL (?) OF THE MODERN LEGAL ORDER

Changes in legal history: when things become recognizable

- Rise of administrative state: beginnings of a very rudimentary administrative state, legal resistance at first, which was overcome during New Deal. Current checks on power – e.g. hardlook review – do not diminish the huge bureaucratic power in this country. That’s the modern legal order: private law has died and become public, swallowed by the administrative state.
- Power of federal government: transformation from being junior to dominant player in people’s lives. Initially, state laws were the ones that affected individuals; as society and economy get more national in scope Congress tries to pass statutes to that effect and con law tries to check that power through dual

federalism. In 1940s dual federalism is disappearing and by 1960 we see it trumping state power in policy areas it never before touched.

- Plural equality: Our definition of citizenship has evolved from the 1865 definition that entitles only white men to benefits of citizenship, to the notion that law must treat men, women and people of different races and ethnicities differently. This is also demonstrated by the change in demographics of the legal profession.
- Individual Rights: Courts have always wanted to protect individual rights, but the type of right protected by Court has evolved from freedom of K/right to use property to emphasis on non-economic personal liberties – e.g. freedom of expression, right to privacy.

Is this legal order “modern” anymore? Difficulty of “periodization” when you’re living in the midst of history

- Administrative state: The number of agencies has continued to increase. However, politically we have moved towards expression of desire for small government (e.g. Bushes, Reagan).
 - 1970s and 80s de-regulation: de-regulation of airlines, telecom, banking, trucking, RRs, death of ICC. Areas such as the environment and consumer safety, however, have resisted the de-regulation impulse.
 - Less vibrant regulation: decreasing vibrancy of regulatory power
 - Rise of hollow agencies: private contractors carrying out functions that once belonged to government entities, e.g. armed forces contracting out people to interview prisoners. More often the agencies simply oversee the private cos. carrying out their functions
- Federalism: 1990s, Supreme Court striking down laws for the first time in 60 years based on federalism principles – e.g. *Lopez*, *Morrison*. Policymakers – both democrat and republican – have been following suit, looking to the states as agents of change. Gay marriage and medical MJ feature hardcore states’ rights arguments being made by people on the left. Although we aren’t regressing to *E.C. Knight* we are moving into an area of diminished federal power – these days federalism is a legitimate argument.
- Plural equality: We’ve obviously moved towards inclusion, but we have problems with inclusion and whether to extend it to certain groups – e.g. gay marriage. Furthermore there are questions about the scope of equality – e.g. affirmative action.
- Individual liberties: the question today is about what the content of those liberties are. To some extent 1st Amendment protection of speech in context of corporations. Movement towards prohibiting regulatory takings. 2nd Amendment right to bear arms may resurface. Wartime exigencies limiting a lot of individual rights these days.