I Lecture 1--England's Legal Landscapes

A The Centrality of Law in English Culture

i Myth #1: That there was an orthodox common law that reached to all corners of the Kingdom.
ii English law was a very highly developed form of law that did not change at the time.
iii Myth #2: The colonists who brought English law to America were simple rustic farmers who didn't understand the law and thus the law became more simplified and there was a degeneracy when the law was brought to North America.
iv Myth #3: Because of the simplification of the law it became pretty much the same across geographic boundaries in the colonies because of the desperate frontier situation.

A The "moments" of legal creativity: three paradigms to project across the sea. The settlement of North America was conducted by different people at different times in different places.

i A “vexed and troubled” people—
   a deep economic crisis of collapse, social disorder, political instability, paranoia, “wandering folk,” shattered families, and high birth rates all characterized England at the time. The law made them superior to the Popish Roman Catholics and their corruptions. The law made them superior to the heathen Africans. Law made them superior to the savage American Indians.
   b This ideology was responded to with strict law disciplining and repressing the lower classes. They viewed the lower classes as a lesser race than the gentry. The poor could only be trusted if they were highly disciplined and subject to a great deal of labor. This degradation of labor eventually led to slavery.

i A “godly” people (New England/Puritans)
   a This is not a theocracy. Godliness was a social agenda as well as a legal agenda. Respond to the disorder and atomization of society with a communal interdependence and mutual responsibility approach.
   b Posited that many human beings could be “saved” and that distributed justice that greed, selfishness and materialism could be reversed.

i A trading people (1670s) (NY and PA)
   a Economic relations were seen as an answer
   b Huge changes in English Commercial law

A England's varied legal landscapes

i Uneven force of the common law
   a Common law is the law that was applied at the Central Courts in Westminster when litigation took place there. It is not a uniform commercial code.
   b When a guy had a question about contracts or property, the question wasn't “what is the law,” it was “what court has jurisdiction over me and over the subject matter of this case?”
   c New England accent is from West England. Southern accent is from Irish colonization efforts. Law had its own dialects.
   d Thousands of different court systems in England at this time.
   e Common-law courts were inadequate to many of the needs of society on all levels.

i Alternatives and rivals to the common law
   a “The prodigious variety of courts”--Blackstone
   b “the policy of our ancient constitution, as regulated and established by the great Alfred, was to bring justice to every man's door, by constituting as many courts as there are manors and townships in the kingdom . . . “--Sir William Blackstone, Commentaries on the Laws of England (1765)
   c Goal is to make the law accessible

A The Tudor revolution in law

i Star Chamber --> created to crush the enemies of the Tudors under the color of law. Tudors insisted they were authorized under color of law. For example, to destroy enemies of the state, the star chamber was not confined by common law rules of procedure. No protection against self incrimination, so torture was used. No jury. Much worse punishments including mutilations. We'll see this in the Chesapeake colonies.

ii Conciliar Courts
   a Included Star Chamber
   b These were mostly in the outlying areas of the realm, like Whales and County Durham.
   c This is how VA is run in its first few years.
   d They were councils so they didn't have the same protections as the common law courts

i High Commission--Purpose was to find and punish religious heterodoxy.

ii Exchequer Chamber—skipped it
iii Chancery—The courts of Equity.
   a Court of Conscience—a court that was created to mitigate the rigors of the common law. Common law was too formal and inadequate.
   b Chancery would created equitable deeds because the courts at law couldn't do. Common law courts couldn't subpoena documents, Chancery courts
   c The Chancery created the injunction, which is an in personam order to a person to do something.
   d “Creolean degeneracy” or a “strange sort of Proteus capable of putting on all shapes and figures as occasion requires?
      • Subpoena
      • In personam remadies
      • The influence of equity
      • Court of Requests

A The reformist impulse—The idea that the law needs reforming. If its going to respond to these desperate problems it needs to be changed. These were delayed in England, but flourished in America.
   i Law French? The Central Courts were conducted in 11th Century French! The law must be accessible, so it should be in English.
   ii Court hand—Formal florid handwriting that was required for a document to be official. It was very expensive.
   iii “Norman yoke”—dismantling of feudal law.

A Lay participation—
   i Justices of the peace as “men of all work”—backbone of English law. They were rarely trained lawyers. They were trained because they understood the norms of the community and they understood property.
   ii Juries—were far more common then we tend to think. There are many kinds. Juries to inspect fences, access tax rates, etc. Way more than our 2 types.
   iii Custom and Usage

I Lecture 2: Law as Instrument of Conquest and Control; or, Marchland (border or frontier far from the center of a political unit that is often contested and under threat of both invasion and disorder within because it is at odds with the center) Justice in the Conquest of Ireland and Virginia

A Center and Periphery in an Age of Expansion and Insecurity
   i England’s internal frontiers:
      a The Threat of Subversion:
         • Pilgrimage of Grace (1537)—religious uprising against the church of England by a peasant catholic group
         • Northern Rebellion (1569-70)—rebellion of the northern counties
         • Spanish Armada (1588)—threat of invasion from without
      b The Threat of Disorder: Economic collapse and “terror of the tramp”
         • wool industry collapsed
         • massive inflation
         • groups of homeless and uprooted “tramps” were a threat from within
         • Age of out of control crime, illegitimacy, drunkenness (triple distillation is invented at this time—keep and getting more of the non-alcohol out of the booze) as gin becomes the national drink
   i Response: Repression
      a Poor Laws (1540s-90s)—responded to unemployment w/repression
         • 1547 Vagrants and unemployed deviants started to be branded, usually on the forehead
         • Mutilation is used as a punishment to make a permanent pariah class
         • “House of Correction” (Bridewell was the worst)—worked to reform people by giving them the choice of “work or starve”.
         • You had to work in the town in which you were born. You were whipped from town to town. This comes up in disputes over who is entitled to welfare benefits in a given state
         • William Lambarde (wrote a handbook for justices of the peace): “It is an ancient truth … that no man can live comfortably without the fellowship of men so no fellowship can stand without law and discipline. Obedience is the end of law.”
      b Expansion of felony (execution + forfeiture of all your property to the state) and trial at the Assizes
         • Sample List of felonies
            • Riot is a felony (3 or more people who don't disperse)
            • Bigamy or bestiality or sodomy or statutory rape (age of consent was 10)
            • Witchcraft
            • Counterfeiting
            • Fishing on private property at night or killing dear in a private park at night

2
* Assizes were the central courts of London on circuit in the counties (felony trials averaged 5 minutes)
  * Martial law; provost-marshal (military official in every county)
  * Banishment “beyond the seas” (being sent to Ireland for forced labor)
  * Conciliar trials

A Ireland as proving ground

i Ireland is Catholic and is a threat to England because it does not recognize the English Crown. The papacy put a death sentence on Elizabeth's head.

ii Social hierarchy goes: Monarchy, Aristocracy, Yeomanry (property owners who are not nobility) and finally “Fourth sort of men who do not rule” (children, women, tenants, non-landowners)

iii Fourth sort of men got shipped off to Ireland to be disciplined and disciplined and disciplined.

iv The fifth sort of men are Bondmen. They used to be surfs (men who's labor was owned and tied to a plot of soil) Bondmen were below the low and were conscripted from the local Irish population. Bondmen: that “the countrie being evil, unwholesome, and otherwise barren, should not be desolate.” This meant that Irish were drug to North Ireland. – Sir Thomas Smith, De Republica Anglorum

v This made Ireland the proving ground for the North American Colonies

vi Company rule (Ironmongers, Skinners, Drapers)--manufacturing corporations given charters in Ireland. They were the same people as the one's doing the colonies in VA.

vii Native Americans were depicted as Irish.

A Virginia as proving ground (and legal hearth)

i Charter (1606) and subject: “Liberties, franchises, and immunities”
   a MYTH ALERT--Its meaning: Whig interpretation—interpretation that the first American settlers were here for idealist reasons. That is totally taking the word liberties out of context. Liberties in this case meant “exemption from certain general rules for the company and its owners.” They would have autonomous internal control, the right to make their own bylaws, and so forth. Its the same basically as a corporate charter today.
   b Freedom is defined by what it gives people and what other people don't have. This means that the fourth sort of men have nothing.
   c Jury of one's peers means that if you are a property holder, you are entitled to a jury of property holders. If you are an aristocrat, you are entitled to your literal peers—the house of lords.

   i Calvin's Case, 1608 (7 Co. Rep. 1)
      a Example of originalism. In the 1760s it became the most debated case amongst American scholars
      b 1603: Queen Elizabeth I died. No heir to the thrown. James VI of Scotland is the closest heir. But Scots and the English don't get along. English viewed Scots like Texans view Mexicans. So if James VI of Scotland is King should the Scots be citizens? If they are citizens then they can own land, trade in England, etc.
      c So James VI of Scotland starts calling himself James I in England. James wants blanket subject-ship for all Scots. Parliament won't pass this. The conflict gets tossed to the courts through a collusive action.
      d Baby Robert Calvin (b. 1605) sought to inherit land in England that was bequeathed to him. But he was a Scot, so he couldn't.
      e Goes to the Court of Exchequer Chamber (very high court)
      f Ante-nati, post-nati (born before 1603 v. born after 1603)
      g Exchequer Chamber decision
         • Sir Edward Coke (1552-1634)--fired by James I because he had the audacity to tell the king that the courts have a role in the law
         • natural allegiance—subject-ship is a natural relationship between the king and his subjects. So anybody born in England after 1603 is English, those before 1603 still Scots.
         • Significance for us? This is the first case of originalism in American Constitutional Debate.
            • English tried to keep to a strictly originalist reading of this case based on an obiter dicta that said James I can't change the laws of England w/out Parliament's consent. Scotland couldn't be changed without Scottish Parliament's consent, because the two were joined by inheritance, not be conquest.
            • So either England had conquered North America or inherited it, and they obviously didn't inherit it, so since it was conquered the king can do whatever he wants with it.
            • American's reject this position. They assert that this is a bad originalism and that the categories that are being used no longer applied and were obsolete, because a new category was created: settlement.
            • The irony is that the crises that lead to the American revolution was really a crises of originalism. Obsolete categories wouldn't serve the present.
            • Coke's Mything making and the “Ancient Constitution”
            • Americans used Coke's holding and his dicta differently. They changed it and added migration & settlement as a third category.
            • So they came up with their own myths
- Myth #1: Saxon origins of English Liberties
- Myth #2: When the colonists got here, North America was a vacant land. The Indians were not sedentary settlers who establish adverse possession. They never established title.
- VA myth: They said they conquered the land from the Native populations.

i Charter; “…you may in your discretion departe and Dissent from them and change alter or establish, execute, and doe all ordinances or acts whatsoever that may conduce the glory of God, the honor of our King and nation and the good and perfect establishment of our Colony.”

a Written by Attorney General Sir Edward Cook
b You can do whatever you need to to get the job done.
c This was a corporate quazi-governmental agency that was allowed to run their own internal affairs as they wish to get the most pecuniary benefits for their stockholders. Stockholders become a quazi-governmental counsel in the first years of the colonies. They had to get out of the soil whatever they could.
d Winter of 1609-1610 Starving Time

- Population went from 490 to 60
- Produced complete social breakdown including cannibalism, murder, theft, etc
- Gave validity to the philosophy bashing the 4th class of people

i Massacre of 1622 and royalization
ii A Hobbesian laboratory for the law

a Labor control: indenture and “headright”

- headright was an award of land. To attract more labor, the company said “anyone who comes to VA and brings a servant with him will get 50 acres of land for free.” They gave out headrights to themselves over and over again.
- Indentured servitude was different. An English indenture was an adult for one year. Children were indentured for 7 years and it was considered a type of apprenticeship. In VA they made kids and adults 7 year indentures. 60-70% were all that survived indentured servitude.
b The road to slavery—Degradation from human to non-human.
c

I Lecture #3: Puritanism and the Law; or, Why We Love to Hate the Puritans

A Puritanism: some definitions

i --H. L. Mencken—“fear that someone somewhere might be happy.”
ii D.H. Lawrence--“such killjoys that they outlawed bear baiting not because it was cruel to the animal, but because it was too much fun.”
iii Koenig—the original originalists. Their originalism was based on original sin. Mankind is fallen and needs redemption. Man is inclined to evil, but can be redeemed. This principle guided their laws.

A The Puritan Paradigm: A Godly Society on the Ruins of Mankind’s Corruption

i Purity and the “Establishment”—wanted to import grace (purity of man) to government.
ii Radical reform, “root and branch”—want to get rid of the corruption in English life
iii Individual is ultimately responsible for his own spiritual quest and path to godliness. No priest can do it for you. Who can save your soul? You can save your soul. Puritans taught that the state can be corrupt and you should be more dedicated to truth than to the state.
iv If this is true, what is to prevent society from becoming an anarchy? Well, you have to distrust human nature and stress conformity because you never know who's a saint and who's a sinner. This leads to repression, but its also equality. This means, unlike England, everyone goes to the same courts.
v Rule by the “elect”—those who are chosen by god. Used the word “congregation” instead of the corrupt word of “Church.” They read the Hebrew bible.
vi Covenant theology—how they resolved the conflict between radicalism and Conformity/Repression
vii Mutual watchfulness against sin
viii Form and substance: Law as metaphor and paradigm—in Winthrop's sermon we have legalism of mutual obligation—mutually agreed upon terms of offer an acceptance.

a …In such cases as this, the care of the public must oversway all private respects by which not only conscience but mere civil policy doth bind us: for it is a rule that particular estates cannot subsist in the ruin of the public.

Thus stands the cause between God and us: we are entered into covenant with Him for this work; we have taken out a commission, the Lord hath given us leave to draw our own articles. We have professed to enterprise these actions upon these and these ends; we have hereupon besought Him of favor and blessing. Now if the Lord shall please to hear us and bring us peace to the place we desire, then hath He ratified this covenant and sealed our Commission [and] will expect a strict performance of the articles contained in it. But if we shall neglect the observation of these articles which are the ends we have propounded, and dissembling with our God, shall fail to embrace this present world and prosecute our carnal intentions, seeking great things for ourselves and our posterity, the Lord will surely break out in wrath against us, be revenged of such a perjured
people, and make us know the price of the breach of such a covenant. -- “A Model of Christian Charity,” by John Winthrop, a lawyer and former judge who served as first governor of the Massachusetts Bay colony, delivered aboard the “Arbella” in mid-Atlantic, 1630 (legal allusions underlined, added)

b They took their laws and put them in religious terms to rhetorically resonate with the way average puritans thought. They made law and religion the same but not the same.

A The Puritan Legal Project
i Sumptuary laws (“Blue laws”) --> laws that regulate personal luxury—clothing regulations (who could wear what—you didn't want the lower classes wearing bling, AND puritans didn't want to waste the poor people's money), drunkenness (harsh penalties for drunkenness, but alcohol is ok—wine is from god, but the drunkard is from the devil), gambling (waste of money, and it might make rich men out of poor men with no work at all), bear bating (the unleashing of baser human emotions is a bad thing—totally didn't care about the animal, though), sex (average puritan family had 12-14 live births, so they were going at it a lot . . . but promiscuous sex outside of marriage was not ok because the family was the center—sex/promiscuity = wine/drunkenness.)

ii Enforcing communalism
a People were responsible for one another
b Everyone spied on one another, and nagged their neighbors to shape up
c Encouraged narcs
d Notion of ancient independent community
e No single person was allowed to live alone. The household government will discipline you and keep you in line. Punishment was with the stocks, pilloring—public shaming of deviant individuals. You don't see whippings in New England.

i Distributive justice—normative principles that allocate resources and principles according to a particular goal (in VA it was individual self-aggrandizement, in New England it was the survival of the community)
a Assumpsit and the common counts: an introduction to the writ system of common law pleading
   • Assumpsit allowed a jury deciding damages and impose its notion of norms and obligation onto contractual obligations, as opposed to the english system that only allowed you to sue for a certain amount.
b Property is considered socially useful, not individually satisfying.
c Couldn't settle more than a half mile from the meeting house so you were part of the community. Sale of the land on which you built your house had to be approved by the town meeting. Outsiders had to pass muster. Land had a communal, social meaning. You had an allocation in the town common (tenancy in common), all deeds had to be registered, and in a huge departure from england, the law of inheritance changed.
   • Wills were uncommon.
   • Common law had rules of decent.
      • In england it was primogeniture
      • In New England there was partable inheritance so everyone kept their stake in the community. The eldest son still got 2 shares, but all the other sons got a share, and if no sons, it went to daughters.
   • Not complete freedom of contract
   • Public trust doctrine --> limits on how much timber you could cut, how many fish you could take-->things like this get placed front and center in how they set up distributive justice

A Limitation of earthly power: --> Power of state over individual (roots of a libertarian streak because government is not to be fully trusted when it comes to individual rights)
i “…what desperate deceit and wickednesse there is in the hearts of man” – John Cotton
ii “It is necessary, therefore, that all power that is on earth be limited, Church-power or other ….” – John Cotton
iii Even the church is to be limited because it is an institution of men
iv Written guarantees: (efforts to right down what law should be for the obedience of the masses and the limitation of those in power)
a Charter government (1629)
b Moses His Judicials (1636)
c Body of Liberties (1642)
d Laws and Liberties (1648)

i Massachusetts on Lawes and Liberties
a Romans 13 is written for the Christians telling them to obey earthly government because it gets its powers from God.
b Introduces a couple of dilemmas
   • Is it written for Christians or Gentiles?
      • Only certain people could vote. Why should non-voters have to obey the law?
      • Laws are made with respect to the whole people, and so for the common good you have to obey the law and be disadvantaged, because others will be disadvantaged for your sake because of other laws.
General principles vs. specifics?

- "nor is it sufficient to have principles . . .
- If rules are too general then power will be abused. You need to have specific expressed rules, or vagueness will place too much power in the state.

c There is a relation between nature and religious laws.
d Don't expect those in the future to interpret their laws. Say that laws have to be adjusted and adapted to the times.
e “Crecfit in Orbe dolus” = The reason the worlds sucks is because there is so much law, and the reason for that is that “mischief flourishes in the world.”
f Evidence that they realized that a legal system can't be perfect and it needs to be adapted.
g Good for quotations for final exam

I Lecture #4 – Puritanism and the Reform of Marriage: From Baron and Feme to Husband and Wife
A The Lessons of History
i “Coverture” according to Blackstone (1765 )
  a Husband and wife are one person in law. The legal existence of the woman is suspended during marriage or at least consolidated into that of the husband.
  b In marriage man and woman become one person at law, and that person is the husband/baron
  c The feme is under the wing/protection/cover of the male (first her father, then her husband) so she is said to be feme covert.
  d This means that a husband and wife can make no post-nuptual contract, because you can't make a contract with yourself. Also, a pre-nup is voided when the two parties are married and become one. If a woman suffers a personal injury, her husband must bring the action on her behalf. If she suffers a personal injury, then HE has suffered an injury, because he has an interest in her in several ways. Its not that the husband “owns” the wife as chattel. However, he has a property interest in her. So, if she is harmed, he has suffered the trespass. If she has sex with another man, he has a civil action for criminal conversation (crim con) because he has been trespassed upon.
  e Blackstone justifies this at the end by mentioning that the husband can give “domestic moderate correction” to the wife (wife beating is ok) as he can a child or servant. A man is the sheriff of his own home.
  f Pay attention to footnotes
  g Last line is interesting. Disabilities are intended for her protection and benefit. “So great a favorite is the female sex of the laws of England.” How can he write that with a straight face? This is a social constructed doctrine of the period.
i What is “tradition”? What is “natural”?
  a Often family law is alleged to be “timeless”
  b This is really a social construction of a particular historical time/place/and population w/in that place.
A Medieval Christian Marriage (“contract marriage,” “clandestine marriage”) -- Innocent III
  i NOT LIKE TODAY!!!
  ii Marriage “in the eyese of God” (Romeo and Juliet syndrome”) = Contract Marriage
    a Jan van Eyck, Arnolfini Wedding Portrait, 1434
  i In 13th Century Innocent III (brought the Inquisition) reformed marriage. He ratified current practice.
    a The requirements of marriage from here 'till 1500s are
      • free consent of the parties given in the present tense (I take thee , not I will take thee)
      • had to be done before two witnesses (in mirror in portrait)
      • Legal capacity to marry
        • age (varied across the continent, usually female 14, male 16)
        • no consanguinity (no blood relationship)
        • not married already
      • Must be consummated (represented by lit candle in portrait)
    b Not required to be in a church. Doesn't require parental permission. Doesn't require a clergyman.
A Imposition of control by family, state, and church
  i Pressure through common law
    a Dower IS ENTIRELY DIFFERENT FROM DOWERY. Dower is a common-law right a widow possesses to a life estate in 1/3 of her husband's property after his death. It is the backbone of support for widows.
    b So because of property issues we begin to see a greater imposition of control by family, state, and church. So
its no longer what the individuals want to do, but what the state wants to allow that is more important. Ring any bells?
c There's a struggle between the individual and the state/family. Romeo and Juliet was written in this period and was wildly popular because it was current events.
d There is a paradigm shift from love/romeo and Juliet to property being the point of marriage. Parents start playing a larger and larger role. Parents controlled their kids marital choices through their wills, saying that they would cut you out if you didn't marry the right person.
e Birth of Betrothal. It was a public announcement of the marriage before it happens, on successive Sundays before the wedding. This was called the “bans”. This allowed people to come forward and object if there is some reason they can't legally be married. Weddings started being in public churches. The free consent of the parties doesn't matter.
i Council of Trent (1563); Lord Hardwicke's Marriage Act (1753)--ceremony has to be in a church with an ordained priest, two weeks of the bans being posted.

A Dissolving Marriage—you can't undo a sacrament
i The double standard of adultery
a defined at common law as a man, married or not, having sexual intercourse with a married woman not his wife.
b If the man is married and the woman is not, its not adultery, its fornication, which is a much lesser crime.
c Adultery is not a crime at common law, it can only be prosecuted by the church through excommunication
d It is a way of separating a married couple.
i Separation from bed and board (divortium a mensa et thoro)--not a divorce. Neither of the couple can remarry. Its like a legal separation. Custody invariably goes to the husband. The woman has no right to see her own children, because the husband has a property interest in the children. The problems are manifest and obvious but aren't enough to cause a change.
ii Annulment—the marriage is void abinitio—it never existed to begin with. You've got to prove that one of the requirements have not been satisfied. One escape hatch is that if you are betrothed to a person, that gets broken up, and then you marry your relative, its incest and you can get out of the marriage.

iii Parliamentary divortium a vinculo – 1692 (Mrs. Moffatt's Case, 1832)
a A bill in parliament can be passed dissolving the marriage.
b A husband can sue a wife for divorce for simple adultery. The wife can only sue for divorce if there is aggravated adultery. Aggravated adultery is incest, lewd adultery. 1801 was the first time a woman actually succeeded at getting a divorce. 1923 is the first time the same grounds for divorce apply to men and women. This is 300 years behind North America.
i Judicial divorce a vinculo – 1857 (in a court)

A Changes in the New World
i New England: Theology and Ideology
a “Women are Creatures without which there is no comfortable living for man; it is true of them what is wont to be said of Government, 'That bad ones are better than none'; [but] they are blasphemers then who despise and decry them, and call them a necessary Evil, for they are a necessary Good; such as it was not good that man should be without.”
b “There must be a knitting together of hearts before a striking of hands.”
c Changes re: Marriage and divorce
• Marriage is more important, so its harder to get married. The Romeo and Juliet marriage is gotten rid of because they don't want women to be seduced and abandoned. So weddings have to be before a secular official—a justice of the peace. Bans must be posted 14 days before the ceremony.
• Parental approval is required, but you can petition the court to get married w/out parental consent.
• A bad or abusive marriage is an affront to god, so they make divorce easier. In fact, they make it POSSIBLE when its not in England. The wife got custody AND she and the kids got the man's property.
• Grounds for divorce were pretty much equivalent.
d The Puritans view women differently than the English. Man and women are partners in establishing a functioning social unit. Man and woman are spiritual equals, so women aren't some sort of weaker, less valuable, people. They couldn't have gotten away with this in Old England.

i Distance and Demographics
a Frontier and Chesapeake
b Distance—settlement is spread out in the Chesapeake. There is no way that a parish can function the way it did in England. You'd only see a preacher once a year. So they did Romeo/Juliet marriage.
c Demographics—in the first decades was overwhelming male (6:1 ratio). So women, by virtue of their scarcity, are able to demand a better deal. So the courts would recognize prenuptial contracts. People were dropping like flies, so women had lots of property.
d 1/3 of all marriages lasted 10 years or less because of the death of a partner.
e ½ of all marriages ended within 7 years by death
f
I Lecture #5: The Salem Witchcraft Trials; or Themes in American Subversion
A Puritan Dilemma—between individual relationship with god and the solidarity of the community.
   i Conformity and the “Errand into the Wilderness”
      a Massachusetts became a mecca for all non-conformists. This included sexual libertines whose “frisking with
         the squaws and Religious fanatics who believed they had a direct pipeline to God and didn't need societal
         stability were there. Kind of hard to run a society with all these weird groups. Then there were those
         disruptive Quakers.
   i Individual Fulfillment and Grace
      a Antinomians (1637)—anti-state
      b Quakers (1650s)
         • In England: Bushell’s Case, 124 Eng. Rep. 1006 (1670)—William Penn is arrested for preaching on a street
           corner in England. Legal team gets him acquitted (charges of sedition) by the jury. The judge instructed
           the jury that they had to find Penn guilty. They refused. So the judge threw the jury in jail for contempt.
           One of those jurors was Bushell. Bushell sued, and this established the precedent that a judge can't throw a
           jury in jail for disagreeing with him.
         • In Massachusetts
         • The Quakers would go into Churches and disrupt the services. They walked naked in Boston.
         • Legal defense fund
A A “Perfect Storm” of Factors, 1692
   i Definitions
      a “Witch Hunt”—carries a connotation of illegitimacy
      b The “Witch Craze”
   i Instigators
      a Political or Religious elite can instigate. A modern example is McCarthy-ism
      b Grass roots from populace at large that may not have any leader. It may not have a leader. It is propelled by a
         frenzy of the masses. Political elites may take advantage of it, but they don't cause it. A modern example is the
         child molester frenzy.
   i Prosecutorial Behavior
      a Syndrome Evidence—infer a crime from outward behavior. So if a kid wets its bed and screams at night, we
         assume its been sexually victimized. Where there's smoke there's fire.
      b Profile Evidence—the usual suspects. That there are certain categories of people that are associated with
         certain categories of crimes. This goes beyond racist/ethnic boundaries. Police in VA stopped every car with a
         Blue Oyster Cult sticker, and in like 75% of cases they found illegal drugs or booze. One infers something
         about the nature of a person because of their behavior.
   i Magic, Black and White
      a There were 100 complaints of individuals using black magic. Very few of them were prosecuted. Most of the
         time they were really just complaints of a dispute with a neighbor. There was a complaint in Massachusetts
         where there were 15 executions for Witchcraft from 1648-63. They were hanged.
      b Black magic is magic with malice intended as the result.
      c Magic was practice widely in this period. White magic was for good/healing. Both invoked natural forces.
         White magic was used by women more than men, because it is a tool of the powerless and it was a form of
         healing.
      d Magic for evil purposes requires the twisting of god's creation with help from the devil. Like voodoo dolls.
   i Background/Interesting Facts
      a Women in Europe were burned, men were disemboweled and drawn and quartered. The reason for this is that
         witchcraft was “petty treason.”
      b Treason is the murder of your superior.
         • High treason is treason against the state
         • Petty treason is treason against your master. The head of the household has great authority because the
           household is like a mini kingdom. When a servant commits a crime against his master, therefore, we have
           petty treason.
         • Since there is no aristocracy, witchcraft was not “treason” in the colonies. It was just a felony. So that's
           why you were only hanged.
   i Social Setting—Salem as a town was divided up into two settlements
      a Salem Village—the more cosmopolitan one, more commercial, contacts w/outside world, outward looking
         settlement. More influenced by non-traditional forces.
      b Salem Farms—This is now Danvers. This was much poorer, backward, peasant ridden, etc. There was a lot of
resentment between the two.

c Witchcraft was often used by the weak in this conflict
  • servants would threaten their masters with black magic
  • servants would say suddenly the plow just broke so the devil must have done it.
  • It was a way to cover theft. You catch me stealing, I'll put a curse on you.
  • Beggars would threaten people—aggressive panhandling
  • Idea is that nothing is random, and all harm is caused by something or someone

i Witchcraft as Subversion/inversion
  a Teen/pre-teen girls were using an egg white as a crystal ball to predict who they were going to marry. One of them sees a coffin in the egg white, freaks out, thinks they called the devil.
  b The girls start having physical fits and they start lying and accusing other people. They start pointing out the usual suspects in the community and accuse them of bewitching them.

i Variant Interpretations for the frenzy:
  a misogyny—female irrationality
  b biology (ergot, encephalitis)—ergot is related to LSD and it can often be produced as a mold of grain. So some people blame acid for the craziness. Or encephalitis was carried in by birds.
  c Psychology—young girls accusing post-menopausal women.

A The Prosecutions
  i Special Court of oyer and terminer
  ii Syndrome Evidence
  iii Profile Evidence
  iv Spectral Evidence; critique by Thomas Brattle—saw all of the irrational violations of due process that emerged and are found in this episode. The horror of this episode did have a good side, though. It highlighted the horror of hearsay evidence.

A Collapse of the frenzy
  i Statistics
    a Overall, 156 people were accused of harmful witchcraft.
    b 55 confessed.
      • If you confessed, you weren't executed.
    c 19 were hanged.--most of them were openly defiant in court.
    d One man was pressed to death for his refusal to enter a plea. --peine forte et dure
  i In 1686 the charter of Massachusetts was revoked. In 1689 the colony rose in rebellion against the Stuarts in the Glorious Revolution. This lead to a power vacuum, so there were no courts until 1692. Plus you have the external threat of the French and Indians. So the leadership instigates the witch-hunt to suppress subversion.
  ii It ended abruptly when a new governor arrived and established a new court system, but the damage had already been done.

A I Lecture #6: Creating a property Regime/The Americanization of John Lock; or, This land is my land, not yours

A “Property” – Its Multiple Meanings in American Jurisprudence
  i Property is moving from a feudal system to a modern system, so that property becomes more secure in the individual, more freely exchangeable, and the tension between property as private and property as communal comes to light.
  ii James Madison's Definition:
    a Property is, “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”
    b But there is “a larger and juster meaning” which “embraces every thing to which a man may attach a value and have a right; and which leaves to every one else a like advantage.” (e.g., the right to one’s religious opinions and their exercise, or to “the safety and liberty of his person.”
    c “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses.”
    d “If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights.”

A Background: “Age of Acquisition” and the fig-leaf of “Natural Law.” (132 different definitions of Natural Law)
  i Two goals
    a Protect property from within (from Indians)
    b Protect property from without (from European countries)
  i Spain:
    a It all goes back to fighting the Muslims, which was justified through crusade/jihad.--Reconquista
    b Their process of taking control was “The Requirement.” This was a request of the people of a land to respect
their lord as sovereign, and if you didn't do this, then there would be hell to pay. Native peoples were marched
to a priest or military official who would read them the following requirement.

c “The Requirement:” “…Therefore I beg and require you as best I can … [that] you recognize the church as lord
and superior of the universal world, and the most elevated Pope … in its name, and His Majesty in his place as
superior and lord and king…. But if you do not do it … with the help of God, I will enter forcefully against
you, and I will make war everywhere and however I can, and I will subject you to the yoke and obedience of
the Church and His Majesty, and I will take your wives and children, and I will make them slaves… and I will
take your goods, and I will do to you all the evil and damages that a lord may do to vassals who do not obey or
receive him. And I solemnly declare that the deaths and damages received from such will be your fault and not
that of his Majesty, nor mine, nor of the gentlemen who came with me.”

d This was tailor-made to the fights in the Iberian peninsula. It was a reflection of their society.

i France: French royal coronation ceremony
   a Every time a new French monarch ascended the thrown they would have an elaborate coronation ceremony.
   b Basically, whenever a new chunk of modern France joined France, they would have one of these ceremonies.
   c Once they got here, they would plant a cross and dress the Indians up in fancy French coronation clothes and
      would then ask the Indians not to take the cross down. By their not taking it down it was an acknowledgment
      of French sovereignty over the Indian lands.

i Portugal: navigation
   a Not even a kingdom. Its a principality with little or no military authority of its own.
   b So its sovereignty declarations are based in navigation. They assert that sovereignty depends on the ability to
      establish exact longitude and latitude description of the location of a site.

i The Dutch Republic:
   a Grotius -- challenge to the “imaginary line” doctrine: mapping, naming and describing
   b They also required a naval blockade. For a blockade to be legally valid and cross the threshold to seek redress
      under a blockade it must be effective.

i England: fencing, permanent structures, or planting a crop (“mixing one’s sweat with the soil of Blackacre”)
   a The English kind of suck. They don't really have much of a navy until the 1670s that the English pass the
      Dutch in Naval power. So they develop this myth that the New World is vacant. They combine the notion of
      vacant land (vacuum domicilium) with a requirement of cultivation (mix your sweat with the soil of Blackacre)
   b Shift from leasehold to freehold--the notion of owning real estate is a dream of peasant populations, and there
      were billions of acres available in North America. Going from being a tenant at will to having a freehold estate
      was huge and impacted things dramatically. This was convenient for the aristocracy and great for the peasants.
   c John Smith: so “that every man may be master and owner of his owne labor and land.”
   d John Winthrop: “The whole earth is the Lord’s garden, and he hath given it to the sons of Adam to be tilled and
      improved by them.”
   e John Cotton: “…in a vacant soyle, he that taketh possession of it, and bestoweth culture and husbandry upon it,
      his Right it is.”
   f Coke: for “a man to be tenant at will of his liberty.”
   g Blackstone (1765): “And the art of agriculture, by a regular connexion and consequence, introduced and
      established the idea of more permanent property in the soil…. It was clear, that the earth would not produce her
      fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if
      another might watch an opportunity to seise upon and enjoy the product of his industry, art, and labour?”
   h Part of a unique convergence of historical factors.

   a Statute of 13 Eliz. c. 5 (1571) against fraudulent conveyances intended to “delay, hinder, or defraud creditors
      and others…. ”
   b Twyne’s Case, 3 Co. Rep. 80b (1601) and the “badges of fraud”
      • shows the need to modernize common law to keep up with modernity of the market place
      • Before this case the common-law had no tort for fraud or deceit. The only remedy was for breach of
         contract, which meant that there was very little you could get in the way of damages. So there wasn't a lot
         of incentive NOT to be fraudulent.
      • A debtor named Pierce was trying to evade his creditors. One way of doing this is to transfer your assets in
         a fraudulent way to someone else. He conveyed his property to Twyne. It was impossible to prove his
         intent in doing this.
      • The result was that Cook said that its not necessary to prove intent. What we will do is look backward at
         the transaction and look for “the badges of fraud.” Then you get an action for damages for the fraud itself.
      • So from this point on, courts are allowed to look backward in a way they never had been before. This
         world gave birth to John Locke's theories.
   c Emphasis on the security of title, which can only come by converting it to freehold. Also, when you've got lots
of money circulating you have lots of opportunity for fraud.

A John Locke (1632-1704)—son of a comfortable landowner who becomes a leisured independent scholar. He develops a theory of property.

i Problem with Locke is that he writes so much and contradicts himself so much that there is no such thing as “pure Locke”

ii Key terms and concepts:
   a **Right to Use—all land is held in common and people are allowed to take from common-age except for in two circumstances:
      • the “spoilage” exception—can't take more than you can use because it would spoil
      • “sufficiency”—you need to leave enough for others to use
   b **Right to Title:
      • “…though the things of Nature are given in common, yet Man (by being Master of himself, AND PROPRIETOR OF HIS OWN Person, and the actions of Labour of it) had still in himself the great Foundation of Property; and that which made up the great part of what he applied to the Support or Comfort of his being, when Invention and Arts had improved the conveniencies of Life, was perfectly his own, and did not belong in common to others.” Second Treatise of Government, sec. 44
   c **Money:
      • “Thus in the beginning all the world was America, and more so than it is now; for no such thing as Money was any where known. Find out something that hath the use and Value of Money amongst his neighbours, you shall see the same Man will begin presently to enlarge his Possessions.” –Second Treatise of Government, sec. 49
      • This is how you convert spoil-able property to a permanent commodity. This creates an incentive to acquire wealth

i Locke and Ideas of Property in North America
   a New England:
      • Freehold
      • “Township” model—it is allocated according to groups and only to groups and the groups distribute it to individuals
      • Joint tenancy—to balance individual and society
   b Virginia:
      • shareholder ownership: “headright” of 50 acres—everyone who brings a servant gets 50 acres
      • "boom town" --mad scramble for as much property as possible. Lots of exploitation.
      • Scattered “plantations” --Communitarian notion of property can't work here. Settlement was so spread out along the HUGE coast line that the distribution and regulation of property couldn't be as restrained.

i Locke and Slavery
   a No matter how much land you own in the New World or how you accumulate it, you need one other element to get rich: Labor. England, despite its surplus population, could not supply its own colonies with the labor its system demanded. Locke said two irreconcilable things:
   b “…every man has a property in his own person.”
   c every free man “shall have absolute power and authority over his negro slaves.”--Charter for Carolina Colony

d I Lecture #7: Property in People: Creating an American “Law” of Slavery

A Quotes/Notes
   i T.R.R. Cobb, Inquiry into the Law of Negro Slavery (1858)
   ii William Goodall, American Slave Code (1853):
      a …in speaking of the ‘legal relation’ of slavery and of slave ‘owners,’ we must not be understood to concede the ‘legality’ of such laws, or the reality of such ‘ownership,’ in the proper meaning of those terms. The ‘law of sin and death’ is not obligatory law.”
      • Full frontal attack on slavery by denying its legality
      • Rather than a law of slavery, a more accurate statement might be that the law in several states RECOGNIZED slavery
   i Slavery was contradictory of common law, so there was no real “law”
   ii Each slave had a different slave “code”—English common law had never recognized slavery.
   iii The “law” of slavery is an ad hoc combination of principles.
   iv A lot of people thought slavery was so weird that it wouldn't last.

A Pervasive Influence of Slavery on American Law
   i Federalism is very much imprinted with the legacy of protecting slavery. States rights were so protected in the constitution because of the protection of slavery. Slavery was THE factor. Slavery is NOT commerce.
Necessary and Proper Clause was limited to protect slavery at the very beginning.

McCullough v Maryland—anti-bank position is all about slavery. If the fed had the authority to create a bank then slavery would be the next attack the fed made.

Dred Scott—(1857)—one reason for MO compromise being unconstitutional is that its a taking of property contrary to the 5th Amendment.

Civil Rights Movement—State's rights responses

A Legal-Historical Foundations

I Iberian Conflict and Expansion

- Portuguese had started the trade of human beings, so . . .
- Papal bull of Nicholas V, 1452 – declared slaves legally dead to allow slavery.
- Portugal and Spain pretty much run the slave trade. The monopoly of the slave trade was called Asiento.
- English are late players and don't enter until 1600. Why do they enter?
  - English and Dutch smash the Spanish naval domination.
  - Slave trade is so lucrative that there is a great supply of slaves. Sugar industry had huge demand, because its very deadly. Same with mines. The supply increase allows the price to drop.
  - English entrepreneurs created the Carolina province. All of the labors that were squeezed out of sugar islands move her. John Locke was involved in this, so he has to deal with the legal justification of something that is foreign to English law. He does this by falling back on the idea of legal death from conquering.

Transplantation to North America

- New World was untouched by slavery for the first 100 years or so. Irish were “unfree,” not slaves.
- The Chesapeake was a death pit and there wasn't enough white labor to import.
- 1500-mid 1800s—9.5 million Africans were forcibly removed to enslavement in the New World. Of that number, 4.5 million went to South America (especially Brazil). Another 4 million were taken to the West Indies. 400,000 went to North America.
- White laborers in Maryland growing tobacco rise up to complain about exploitive practices. So the landowners decided they needed a docile form of labor. So they go get slaves.
- From “unfree” to “slave” (Maryland, 1639; VA, 1660s)—unfree = indentured. Indentured employee didn't get paid until the end of the year and was subject to criminal corporal punishment if he quit.
  - durante vita—lifetime service. This was slavery. This is different from unfree labor that was for a certain term of years.
  - Heritability—unfree status was not inheritable, slavery was. There's no way out of slavery.

A The Contradictions of Slave “Law”

The slave as “thinking property” (Aristotle) – law has to treat the slave as a non-thinking chattel, while on the other hand, such a classification possess problems that had not been anticipated, like that property can't be held responsible for its actions. How does one punish property for a crime or act of disobedience. So Aristotle called the slave “thinking property."

Corruption of English Principles and Procedures

- “partus sequitur ventrem"
  - At English law, one's status is the same as his/her father. So in practice, this would mean that under English law the children of masters and their female slaves would inherit status of fathers and would be non-white free men who inherited white men's property.
  - This of course is no good. So they go for a continental idea where livestock go to the owner of the mother livestock, and reverse.

- “In favorem libertatis discernere per legem quid sit justum"
  - The presumption in favor of liberty in order to accomplish justice—rough translation
  - This principle is rejected with regard to status. If someone is of mixed race, it is assumed the mother was of color. Presumption is in favor of servitude, not liberty.

A The clash of personhood and property

Jourdan v. Patton (La., 1818)

- Fight between the slaves of two different owners. In the fight, Patton's slave blinds Jourdan's slave. This rendered Jourdan's slave “blind and useless.” So Jourdan sued for damages—the value of the slave ($1200) and related expenses (lump sum of $200 for loss of productive value, medical bills, monthly payment of $25 for the slave's support).
- Judge's instructions and jury's verdict are that she shall recover. “The considerations of humanity dictate concern for the care of the slave as an invalid.”—The slave as a person is the issue here.
- Patton appeals on the grounds that the slave is a chattel property, that if he were to lose the case that under the principle of “you broke it you bought it” he should get title to the invalid slave. He of course would not care for the slave. On appeal, the judge reverses the trial verdict and grants the slave to Patton.
d “The principles of humanity that would lead us to suppose that Jourdan would treat her slave better than the defendant will cannot be taken into consideration in this case.” (paraphrase)

i Fellow servant rule

ii State v. Mann – 13 NC (2 Dev.) 263 (1829): Thomas Ruffin: “The struggle, too, in the judge’s own breast between the feelings of the man and the duty of the magistrate is a severe one…. It is useless, however, to complain of things inherent in our political state…. The difference is that which exists between freedom and slavery – and a greater cannot be imagined. In the one, the end in view is the happiness of the youth, born to equal rights with the governor…. With slavery it is far otherwise. The end is the profit of the master, his security and the public safety…. The power of the master must be absolute to render the submission of the slaver perfect.”

iii

1 Lecture #8 – The (Failed) Early Challenge to Slavery

A Antislavery: its many meanings:

i “Antislavery” is a vague and flexible concept. It has been used to describe an organized social force; political activity aimed at eradicating the slave trade or slavery itself; a set of moral and philosophic convictions that might be held with varying intensities; or simply the theoretical belief that Negro slavery is a wasteful, expensive, and dangerous system of labor which tends to corrupt the morals of white Christians. The risk of homogenizing these meanings accompanies, at the other extreme, the risk of becoming distracted by an elaborate and artificial taxonomy. Any evaluation of antislavery thought or action must take account of specific social and historical contexts. – David Brion Davis, The Problem of Slavery in the Age of Revolution 1770-1823

ii Racism?

A Early Religious Attack in North America

i The Religious Attack

a Samuel Sewell, The Selling of Joseph (1700)

b Cotton Mather

c Quakers: Anthony Benezet

A Strengthening Slave Codes, 1690s-1720s

B Early Legal Attacks (Westminster)

i Butts v. Penny (KB, 1677): Property in humans?

ii Chamberlain v. Harvey (KB, 1697)

a Per quod servitum amisit

b Lex loci?

iii Smith v. Brown and Cooper (KB, 1701)

ii The Yorke-Talbot Doctrine (1729)

iii Somerset v. Stewart (KB, 1772) and Lord Mansfield

a “new and dangerous questions”

b “without having it in their power to attend to the ideas of compassion on the one side, or the danger of precedent on the other, fiat justitia ruat coelum

c Conflict of laws: lex loci or lex fori?

d Natural law or positive law?

e “…the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law…. It is so odious, that nothing can be suffered to support it, but positive law…. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed by the law of England; and therefore the black must be discharged.”

A Post-Somerset Responses: Britain

i Which report?

ii “neo-Somerset” doctrine

iii The case of The Slave, Grace (1827)

A The American Revolution:

i Ambivalence and Temporizing

ii The Lure of Gradualism

iii Colonization

iv

1 Lecture #9, Outline: Creating a Culture of Appeal; or, Toward a Substantive Theory of Appellate Justice


i Why no substantive theory of appellate justice

A Precursors

i Nisi prius (prius = “until”) through the Assizes

ii Writ of Error
A Prerogative Writs
  i Writ of Prohibition
  ii Writ of Quo Warranto (“By what authority?”)
  iii Writ of Mandamus (“We command”)
  iv Writ of Procedendo
  v Writ of Certiorari
  vi Writ of Habeas Corpus (“that you have the body”)
      a Five Knights’ Case (KB, 1627)
      b Petition of Right (1628): “that the writ of habeas Corpus may not be denied”
      c Statutory enactment: 1640, 1679

A Early Theories
  i Thomas à Becket, 1164; Katherine of Aragon, 1533

A Colonial Connections with Appellate Review
  i Privy Council: Appeal from Plantations
  ii Chancery appeal from maritime and martial courts
  iii Ecclesiastical and Theological
  iv Colonial governance: franchise and corporation courts

A Revolution: The Appeal to Heaven and Earth
  i “vox populi (sovergnity lies with the people) vox dei

I Lecture #10: The Ambiguities of “We, the People”; or Six Episodes in the Making of American Constitutionalism

A English Civil War.
  i “This Army are truly the people of England, and have the nature and the power of the whole in them…. [They are] unquestionably to be entitled the people of England…truly the people, not in a grosse heape, or in a heavy, dull body, but in a selected, choice way: They are the people in virtue, spirit, and power, gathered up into the heart and union….The people, in grosse, being a monster, an unwieldy, rude bulke of no use.”
  ii Hobbes, Leviathan (1651)
  iii The triumph of “not vox populi, but salus populi”

A Glorious Revolution (1688) and Whig Victory—rendered the king a rubber stamp for the acts of parliament
  i Bill of Rights—English Bill of Rights protected Parliament.
  ii Hanoverian (Protestant) Succession—
      a English Monarch must be a Protestant
      b Everything can be sacrificed to keep England Protestant—wind up bringing in distant idiot relative to be a figurehead king. Parliament would have all the power and still be able to be called a constitutional monarchy and not be tainted by the stain of radicalism that was republicanism. Queen Anne was the last one to veto an act of Parliament. Its a very legalistic change.
  i Sir Robert Walpole—first Lord of the Treasury (first Prime Minister), basically created the Whig Oligarchy

A Whig Oligarchy
  i “Corruption”: “pocketboroughs” and “rottenboroughs”
      a Corruption wasn't a bad word—it was embarrassing, but seen as necessary to make parliament work. It was a way in which the oligarchy was able to establish a system under with 3/5 of parliament could be picked by a VERY small part of the population...
      b Pocketboroughs are the ones that shrink to the point that they can be easily bought off
      c Rottenboroughs were districts that were so depopulated that they had no one living in them. Several coastal parliamentary districts had been washed away by the ocean—seriously, they were under water...made up of fish
  i 1793: 354/558 seats chosen by 15,000 voters
      a Theoretically the House of Commons was supposed to represent the people.
      b But there was an outright exchange of government jobs for seats in parliament.
      c At this time, there was never parliamentary redistricting of the districts. So the cities had ZERO seats in parliament (although their county might have seats)
  i Justification--prevent a Catholic take-over/maintain the Protestant succession

A “Virtual representation”: Edmund Burke, Speech to the Electors of Bristol (1774): “Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect; their business unremitted attention…. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living…. Your representative owes you, not his industry only, but his judgment; and betrays, instead of serving you, if he sacrifices it to your opinion.”
  i Contrast with colonial experience of “actual representation” and mandated instructions
      a reflected the mobility of colonists. Inland districts had different needs than coastal districts
Mandates are written instructions.

The number of seats offered to the colonists was grossly out of proportion as to what it would need to be... 25 was not enough in a Parliament of 558 members when America was growing exponentially.

A The first state constitutions: embodying the people—an effort to make real the notion of vox populi.

i Characteristics:

a Executive weakness—
- reaction to English appointed governors who tried to corrupt the legislatures.
- In PA there was no governor. There was an executive council of 12 members directly elected by the people, the leader of which was called the President because he presided and did nothing else.

b Judicial vulnerability—
- Judiciary was elected in the early states with fixed non-renewable terms usually.
- There was routine legislative review of judicial decisions.

c Legislative supremacy—
- Purified by its responsiveness to the people.
- Some states had annual elections.
- Frequent term limits, or perhaps two terms.
- Suspicion of state government and of state capitals—don't want to have the capital in one fixed location and it might become like Paris or France.

i Theoretical justifications:

a Montesquieu—“Spirit of Laws”—a republican government can only thrive in a small geographical location—if it gets too big it will have to become despotic as a matter of necessity—it can only be responsive to the people if its small. (Points to France, Spain, and especially Russia)

b Aristotle—aristocracies, monarchies, and democracies. Each has a potential for degeneracy.
- Monarchies degenerate into despotism.
- Aristocracies degenerate into faction.
- Democracies degenerate into chaos and anarchy (least tyrannical)—can't screw yourself.

i Reality of politics:

a State bills of rights?
- Often called Declarations of Rights.
- Were not going to demonstrate in practice any practical ability to protect rights.
- See page 116 in casebook for Declaration of the Right of the Inhabitants of to Commonwealth or State of Pennsylvania—"all elections 'ought' to be free"
- There's a wishfulness in these bills of rights. Page 119 Sec 7.
- Exortatory constitutional provisions that were assumed to be a guide that the voters would unquestionably follow—MA constitution says that representatives should be chosen for "good humor".

b Shays’s Rebellion, 1786:
- Rebellion of people who feel oppressed by a majority of which they are not a part.
- MA is pretty small at this point.
- Pretty shocking that a small democratic state could still wind up with an oppressive government—the people figured out how to screw themselves.

A The Constitutional Reaction:

i Jefferson on page 129 talks about untrammeled legislative supremacy which he would theoretically accept, but VA should be criticized for letting the legislature be in complete control in practice.

ii The federal constitution was not a counter-revolution. It was really just what was going on in the states themselves, trying to figure out how to properly enact vox populi.

iii "At the commencement of the revolution, it was supposed that what is called the executive part of a government was the only dangerous part; but we see now that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature."—Benjamin Franklin (Notice he left out the judiciary. Vox populi gets judicialized).

i Lectures #11, #12 – Judicializing Vox Populi: or, Who were “the people themselves,” originally?

A Toward a Theory of Judicial Review:

i Coke’s intriguing suggestion:

a “…in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it, and adjudge such act to be void.”—Dr. Bonham’s Case (1610) (this was a commercial case)

i Blackstone’s 18th-century doctrine:
A American Challenges:

i James Otis’s ambiguous doctrine—when parliament had the ability to issue blanket search warrants, Otis of the MA courts refused to acknowledge these warrants, because what parliament was doing was unconstitutional although legal. Locke’s solution is revolution through breaking the law and violating the social contract. But a revolution is a pretty hard core way to do things every time you disagree about constitutionality.

ii Rutgers v. Waddington (NY, 1784)

a about a NY citizen who had fled his property during the British occupation of NY, and his land/property was occupied by a Tori named Waddington. Waddington's occupancy was approved by the occupying British military authority in NY. After the British evacuated NY and the Treaty of Paris was signed, Rutgers brought suit for damages under a NYC law that allowed anyone who had fled during the occupation to bring suits for trespass damages.

b Argument of Defendant (Counsel: Alexander Hamilton)-- the Peace treaty of 1783 had recognized in it the operation of the law of nations (international law) and that the law of nations recognizes the legal authority of an actual, in fact, occupying authority. So British law would operate under the law of nations.

c Mayor’s Court, opinion by Mayor James Duane: quotad hoc denial—> the very notion of a higher (international) law superseding a local ordinance is new. So the mayor didn't flat out say that one law overturned the other. Instead he backs into a notion of judicial review of legislation by clocking it and saying that where the language is clear, a judge cannot reject it, but in this case, the language was general (in the peace treaty recognizing the law of nations) and here was a case where an unforeseen collateral matter had arisen, and because it was unforeseen, you can cabin off this one area and disregard what the city assembly had done. This is not an overturning of the law, it is a quotad hoc denial—with respect to this part only.

d Popular backlash—this created outrage at the mayors court for doing this. A tori was being upheld against a patriot. The assembly passed a resolution comparing it to the way the crown would exercise its dispensing power. The dispensing power was a power was the procedure by which the king would say “I do not want to enforce this law. I won't veto it, but I will not enforce it.” Like a presidential signing statement.

e First reported case of a state/municipal law being overturned for disagreeing with a national constitution. (treaty of Paris/articles of confederation)

i Trevett v. Weeden (RI, 1786)

a Paper money act passed by the RI assembly. RI was notorious for its monetary scams. (Rhode Island and Providence Plantations) RI passed a legal tender law making its paper money legal tender for all debts public and private. So since the money is worthless, this pisses off creditors. Legislature prohibited jury trials for damages caused by this law. Also, no appeal allowed.

b Contrary to “fundamental, and constitutional right” and thus “repugnant and unconstitutional” (what judge says because jury trial is important rights)

c this state had no bill of rights, so it had no express guarantee of the rights the judge was articulating. So the assembly declares that the decision was “unprecedented, and may tend directly to abolish the legislative authority.” So they summon the judges to explain themselves. The next election (the judge were elected officials) all of the judges who held the statute unconstitutional were thrown out of office and replaced with a pro-paper money slate.

A The Federalist (October 1787-April 1788) as Canon? (not called the federalist papers until the 1950s.)

i Doubts and Suspicions—suspicions about the motivations of those who push for ratification because things were so secretive

ii “Men of Little Faith”: Who? The term was applied to anti-federalists. Many of the anti-federalists (those who opposed ratification) came up with wild conspiracy theories, like saying that there is nothing in the constitution preventing the pope from being elected president, or that there is nothing in the constitution preventing the capital from being in Peking. Or god forbid, there's nothing preventing a Muslim or a Jew from being president. NY is a pivotal state for ratification. Every state had a constitutional convention. Anti-federalists held a majority in the NY convention. So it became imperative for people like Jay and Madison to campaign hard.

iii Authorship? (The virtue of anonymity)--written by Publius (named for guy who established to roman republic and
destroyed the roman monarchy)
a Jay: 5-->the ones on international affairs
b Madison: 26 or 28? (35.59 words per sentence)
c Hamilton: 54 or 56? (34.55 words per sentence)-->the day before he left to dual Aaron Burr he left a not saying which ones he wrote, and its demonstrably incorrect :-)
i Impact? (Publius superior to Blackstone “for his extensive and accurate knowledge of the true principles of
government” – Samuel Chase, *Calder v. Bull* (1798)
a shouldn't be considered “cannon”
b Not as big as “Common Sense”
c There was a lot of backlash, and newspapers quite publishing it because they got sick of it. The work was too
learned for ignorant and of no use to to well informed according to a French guy.
d It worked for Madison in VA. Washington said it was wonderful

**Federalist #78 and A Theory of Judicial Review (Hamilton wrote this one)**
a Judiciary as “the least dangerous” branch… “beyond comparison the weakest of the three departments of
power”
b “Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the
constitution…”
c “A constitution is in fact, and must be, regarded by the judges as a fundamental law…. in other words, the
constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor
does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only
supposes that the power of the people is superior to both….” The government is the agent of the people. The
people and the government are NOT the same. This is what separates us from Hobbes, who said the crown was
the embodiment of the people.
i **Federalist #37 and the Problems of Intent and Interpretation** (Konig's favorite, written by Madison) About the
human incapacity for absolute precision in expression and interpretation.
a “that spirit of moderation”[?]
b “…our situation is peculiarly critical”
c “…a faultless plan was not to be expected”
d “…a pregnant source of ingenious disquisition and controversy”
e “the imperfection of human faculties”
f “indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas”

i *Marbury as Athena, Marshall as Zeus?* Marshall as target of contemporary scholarship and lightning rod for
criticism of the Court
a Marbury did not spring from Marshall fully formed. This is a myth. Marshall is very much under attack from
both left and right by con law profs. That's silly, though, because there are stronger reasons to look at strength
of judicial review.
b Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (1962):
• “This time was 1803; the act was the decision in the case of *Marbury v. Madison.*”
• Talks about the Constitutional justification of judicial review.
• Article 3 is very vague. The authority to determine the meaning and application is no where defined or
mentioned in the constitution. This is not to say that the power of judicial review cannot be placed in the
constitution, merely that it cannot be found there.
• The institution of the judiciary needed to be summoned up out of constitutional vapors, shaped, and
maintained, and Marshall (not single handed, but first and foremost) was there to do it and did.
• Most scholars would not agree with Bickel that Marshal was first.

i Madison and the Congressional Negative
a Marbury wasn't a shooting match between the court and congress. It was about federalism.
b Holmes said that if the Supreme Court lost the power to review acts of Congress, it would not be the end of our
constitutional system, BUT if the court lost the ability to review state decisions and statutes, THAT would be
the end of our constitutional system. Holmes captured Marshall's intent.
c The child Madison didn't get was the right in the constitution for the federal government to review all state
statutory action. He was appalled by what he saw in the VA legislature (chaos and tyranny).
d After Marbury, the next time the Supreme Court overturned an Act of Congress was Dred Scott in 1857. So its
54 years before Congress gets overruled by the Supreme Court again. In the meantime, there are numerous state
laws that the Supreme Court overturns.

i *Hylton v. US*, 3 US (3 Dall.) 171 (1796)
a Congress, to test the constitutionality of an act of Congress, set up this test case.
b Congress passed a federal luxury tax on carriages. The problem with this is that it has to do not only with an
act of congress, but an act of congress that violated federalism. This a violation of the constitution (the part about direct taxes having to be apportioned to the states according to population) Unfortunately, no one knows what “direct tax” means. (Not unconstitutional anymore because of 16th amendment/income tax)

c VA supreme court justices refused to pay the tax. But the Supreme Court upheld this tax and constitutional.
d The point is, NO ONE QUESTIONED THE ABILITY OF THE SUPREME COURT TO HEAR THIS CASE 7 YEARS BEFORE MARBURY (Marshall wasn't even on the Court yet!)
i Three Counter-factual Hypotheses—diffuse ways of showing that Marbury isn't the reason why we have judicial review.
a Suppose the Court had overturned the carriage tax. This would have been accepted. No one would have been up in arms about the Supreme Court declaring it unconstitutional.
b Suppose the Alien and Sedition Acts had come up for review by the Supreme Court. This gave the president the power to throw someone out of the country without so much as a hearing for being a dangerous alien. This violates separation of powers and the sedition act arguably violates free press clause of 1st amendment. Court could have gotten away with overturning them.
c Suppose Marbury had died before the case got to court. His case would be moot and never decided. Does that mean we would never have judicial review? Of course not.

i Three Contexts
a Role of restraining state legislation
b In the 18th Century, legislation was seen to be omnipotent. The context in Philadelphia was a backlash against that omnipotent and a search for a way to restrain the legislature.
c Vastly changed roll of the jury in American law compared to the jury in English law. American juries are empowered to a degree that the English would find unthinkable.
i Founders intent is BS because we don't have good notes from the Philadelphia convention. Madison's notes are the most used. He was not called the father of the constitution until the 1830s. He demanded that his notes not be released until the last convention member died (so they wouldn't be used as cannon). But, he was the last one to die. He didn't want to be a Zeus character for the constitution. He regarded many clauses in the constitution as place holders for future interpretation.
ii We can't just look to Philadelphia for intent. We also have to look at each of the 13 state ratifying conventions. Out of those came so much disagreement that there had to be a provision for amendments immediately after ratification.

I Lecture #13—Bill(s) of Rights and Original Meanings: Freedom of the Press

A The Common Law of Seditious Libel
i Blackstone’s doctrine: “no prior restraint”--British conception of the free press.

A State Bills of Rights—only 8 of the first 14 states had bills or declarations of rights.

i Omissions
a Banning Bills of attainder? (9 omitted this) –legislative enactment condemning someone to death and taking all their property
b Promise of Habeas corpus? (7 omitted)
c Banning Excessive fines or bail? Self-incrimination? General search warrants? (4 omitted)
d Promising Assembly and petition? (5 omitted)
e Promising Right to counsel? (5 omitted)
f Promising Civil jury? (5 omitted)
g Promising Grand jury? (9 omitted)
h  Ex post facto? (7 omitted)
i  Establishment of religion? (allowed in 5) – 5 states expressly established religion

i  Northwest Ordinance (1787) – organized government in the northwest territory.
   a  “Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”
   b  Rights “forever ... unalterable”
   c  Northwest ordinance, because the states are scared of federal government, there are way more rights against the federal government than there are against the states. States can deny counsel, but fed can't, etc.
   d  States are banning the federal government from doing what the states themselves are doing.

A Rights and the Federal Constitution
   i  Opposition in Philadelphia
      a  Enumeration and exclusion? -- Madison said that an enumeration of rights by implication excludes those rights that are not enumerated.
      b  Political cunning — Article I Section 9 was inserted at the last minute — these were the limitations on Congress. Including a free religion part of this was rejected in Philadelphia. Those who wanted the bill of rights thought if they left one out the constitution wouldn't be ratified. They were all attuned to what would play back home.
   i  The “nauseous project of amendments”: -- Madison's words. He only came around to supporting the bill of rights to protect and save his political career. In 1788 it became clear he would lose if he didn't support a bill of rights. He barely hung on to win a seat in the House. VA legislature wouldn't even put him in the senate because they wanted ardent anti-federalists. In Federalist 37 he talks about how difficult linguistic problems will be.
   ii  “parchment barriers”? -- Hamilton's words. He was a strong supporter of judicial review of legislation, because he thought only that could protect the rights of the people.

A Rights on Trial: The Sedition Act (1798) as progressive? (Casebook page 227)
   i  Background
      a  State of MA says expressly in its constitution that it guarantees a free press, but it had a tax on newspapers, and in defining a free press it defined it as “no prior restraint.”
      b  Jefferson's Virginia and press freedom
         •  Jefferson's VA said that the free exercise of religion should not be held to justify seditious preaching or conversation against the authority of the government. In 1783 VA modified this by staying that there should be no restraints on the press except liableness to legal prosecution for false facts. Content was strictly regulated. It was a crime to politically advocate for the separation of West Virginia.
         •  “Overt acts” is written into the VA code in 1792 as a requirement for seditious libel. But it becomes subject to judicial interpretation. An overt act was held by the VA courts to include the much broader category of “bad tendency”
         •  “Act Against Divulgers of False News” eventually becomes the law.
      c  Revolution did not create a repudiation of the common-law notion of seditious libel.
         i  Truth as defense is allowed. This is a significant step away from the common law.
         ii  Allows Jury determination of truthfulness — this allows a jury to make judgments about political truth, rather than the government making those determinations.
         iii  Allowed Jury determination of libelous nature — does this bring the president or congress into disrepute? Jury was given authority they were never given at common law.
      iv  Expiration in 1801 — sunset provision.
      v  Bad news — it was a trust me law. The question isn't the statute, it is the enforcement of the statute by the government. Its enforcement is intensely partisan. It protects the President (John Adams) but not the Vice-President (Thomas Jefferson). It protects Congress, which is federalist like Adams. So its illegal to criticize federalists, but not republicans.
   vi  The Prosecutions of William Duane (1799) — reveal the partisan nature of what's going on here.
   vii  Virginia and Kentucky Resolutions (1798) — attempts to negate the Act
   viii  There were 14 prosecutions and convictions. The act expired, and then some of those fined under the law were reimbursed.
   ix  The Trial of Harry Croswell (1804):
      a  State trial of guy who published a newspaper in upstate NY that criticized the Jeffersonians. Republicans became the oppressors of free speech and the federalists become champions of free speech. The act had expired, so the Republicans used state laws against the press. Croswell called Washington a traitor, a murder, and a perjurer.
      b  NY used common-law notion of seditious libel, under which truth would be no defense. So Croswell picked an attorney who supported the sedition act — > Alexander Hamilton.
      c  Hamilton argues for “the right to publish, with impunity, truth, with good motives, for justifiable ends, tho’ reflecting on government, magistracy, or individuals.” The trial judge refused to admit truthfulness as a
defense. All the jury was supposed to decide was whether Croswell published the material. The jury did not
defy the judge and followed the instructions the Zenger jury had earlier ignored.
d  The case was appealed to the highest court in NY and dragged on for 2 years. The prosecutor at the trial level
was elevated to the supreme court, so he had to recuse himself. So the four remaining justices divided 2:2,
which means Croswell loses. The prosecutors dropped the case and did not act for judgment.
e  The NY legislature then wrote Hamilton's argument into law, and then the others states followed. Its a truth +
good intentions for justifiable ends test. Its a burden of proof on the defendant to prove good motive. At the
time good motives were something that fit into the political discourse of the time, and not simply defamatory of
a public officer. So stuff about the private life is still out of bounds, even if its true. This is different from the
sedition act, under which truth was an absolute defense.

I  Lecture #14 – The Establishment Clause as a Problem of Originalism

A  The Problem of Language:
i  “All new laws, though penned with the greatest technical skill and passed on the fullest and most mature
deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained
by a series of particular discussions and adjudications. … But no language is so copious as to supply words and
phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. … And
this unavoidable inaccuracy must be greater or less according to the complexity and novelty of the objects defined.”
– James Madison, Federalist #37.
ii  “Upon this point a page of history is worth a volume of logic.” – Oliver Wendell Holmes, Jr., New York Trust Co.

A  Background: some definitions
i  Establishment (European tradition)—(was seen as the church of England in England)—had the following
characteristics
   a  Compulsory attendance
   b  Only creed that can be publicly worshiped or taught.
   c  Received financial support from the state
i  Latitudinarianism—there's not a strict enforcement of the attendance requirement, people were willing to pay fines
to not have to go, that sort of thing.
ii  Toleration (Declaration of Indulgence and Trial of the Seven Bishops, 1688)—King in 1688 is Catholic so he issues
the Declaration of Indulgence saying that its ok to be Catholic, this pisses of Parliament and they through him out.
Then there's a toleration act of 1689 that allows non-conforming Protestants to publicly worship. They cannot be
Roman Catholic, non-Christian, or non-Trinitarian. And you had to take a loyalty oath to the crown, on the
assumption that if you weren't a member of the Church of England you might not be loyal. But you still aren't
allowed to have a military commission, run for parliament, or teach in a university.
iii  Emancipation (Roman Catholics, 1828; Jews, 1859)—Tolerates these people and allows them the rights listed about
(military office, etc)
iv  Multiple or “General” Establishments (Non-preferentialism)—several different churches are equally the established
religion. Sounds good in theory, but doesn't work in practice a lot better than the free press idea did.
v  Separation—1789

A  Colonial Innovation:
i  New Netherlands and New York
ii  Massachusetts (“Presbygationalism”?)

A  Colonial Colleges

B  Independence: A Clash of Traditions
i  Religion and citizenship
ii  Enlightenment Anticlericalism and Separationism
iii  Evangelical Separationism

A  The Meaning of “Establishment” in the New States

B  The Federal Level?
i  Ironies
ii  The tortured twists of language: “Congress shall make no law respecting an establishment of religion….”
iii  Misquotation(?):
   a  Madison: “religious establishments”
   b  Isaac Backus: “Congress shall make no law, establishing articles of faith, or a mode of worship…..”

A  Preferred Amendments:
i  VA: that “no particular religious sect or society ought to be favored or established by law, in preference to
others…..”
ii  NH: “Congress shall make no law touching religion, or to infringe the rights of conscience.”
A Drafts in Congress, 1789:
  i “…nor shall any national religion be established”
  ii House Select Committee: “No religion shall be established by law….”
  iii Senate: defeat of three nonpreferential clauses:
    a Congress must not establish “one religious sect or society in preference to others”
    b “… any religious sect or society”
    c “… any particular denomination in preference to another”
A Senate proposal: “Congress shall make no law establishing articles of faith or a mode of worship.
B
I Lecture #15—Outline: The Second Amendment and Originalism
A The “Individual” versus “Collective” Debate: An Ahistorical Dichotomy
  B Importance of the Colonial Militia and the “No Standing Army!” Tradition
  i “America will never submit to the claims of parliament and administration. New England alone has two hundred thousand fighting men, and all in a militia, established by law; not exact soldiers, but all used to arms.” – John Adams
  ii “Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins.”--Elbridge Gerry
  iii “a well regulated and disciplined militia” – Articles of Confederation
A Insurrection in the New Nation: “Combustibles in Every State”
  i New Hampshire, 1786
  ii Shays’s Rebellion (MA), 1786
  iii Carlisle, PA, 1787
A State Control Over Militia?
  i Article I, secs. 15, 16
  ii “a select corps of moderate size” – Hamilton, Federalist #29
  iii “The mind that aims at a select militia must be influenced by a truly antirepublican principle.”--“Federal Farmer”
  iv Madison and a universal militia, Federalist #46
  v “The State legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away.” – John Marshall, Richmond, 1788
A The Transatlantic British Legacy
  i “[W]hat attention has been paid to the militia of Scotland and Ireland, since the Union; and what laws had been made to regulate them? They have 30,000 select militia in England. But the militia of Scotland and Ireland are neglected.” --William Grayson, Richmond, 1788
  ii Bill of Rights?
  iii Jacobite Rebellions (1715, 1745)
  iv Disarming Acts
  v Act of Union (1707) and Constitutional Equality? The Crown’s last veto (1708)
  vi English Militia Act of 1757 (30 Geo. II, c. 25): “Whereas a well ordered and well-disciplined militia is essentially necessary to the safety, peace and prosperity of this kingdom…”
A Insurrection in the New Nation: “Combustibles in Every State”
  i New Hampshire, 1786
  ii Shays’s Rebellion, 1786
  iii Carlisle, PA, 1787
A Fears of Congress and the Federalized Militia Problem
  i “… under Colour of regulating, they may disarm or render useless the Militia.” – George Mason to Thomas Jefferson
  ii An individual right exercised collectively
  iii State militia efforts: Did “all” mean “all”? The meaning of “well regulated”
  iv An individual right exercised collectively
A Drafting the Amendment
  i The problem of preambles: purpose or justification?
  ii “Thus the proeme, or preamble, is often called in to help the construction of an act of parliament.” – Blackstone, Commentaries
  iii “The Preamble of a Statute which is the beginning thereof, going before, is as it were a Key to the Knowledge of it, and to open the Intent of the Makers of the Act; it shall be deemed true, and therefore good Arguments may be drawn from the same.” – Giles Jacob, Dictionary
  iv Why a preamble at all? Roger Sherman
  v Declaratory statutes: “… in perpetuum rei testimonium [“for eternal proof of the thing”], and for declaring avoiding all doubts and difficulties, to declare what the common law is and ever hath been.”
Lecture #16 – Originalism and the Adversarial Criminal Trial

A The Adversarial Criminal Trial at Common Law: Its Characteristics

B The Trial as “Altercation”
   i Absence of Lawyers: “… and so they stand a while in altercation” – Sir Thomas Smith, *De Republica Anglorum* (1565)
   ii Speed of Trial – Lack of Modern Rules
   iii The “accused speaks”

A Grievances Leading to the Adversarial System
   i The Popish Plot Trials (1678-80) and the anti-Catholic reaction
      a Titus Oates’s perjury
      b “They eat their God, they kill their King, and [they] saint the murderer!” – Chief Justice William Seroggs, at trial
   i Judicial removals
   ii Monmouth’s Rebellion (1685) and the “Bloody Assizes” of Chief Justice George Jeffries
   iii *Rex v. Lady Alice Lisle*, 11 St. Tr. 297 (Winchester Assizes, 1685): “I have been told, the court ought to be counsel for the prisoner, instead of which, there was evidence given from thence.”
   iv *The Seven Bishops’ Case*, 12 St. Tr. 183 (KB, 1688)
   v Enhancement of Prosecutions
      a Institutional prosecutions
      b Thieftaking statutes
      c Associations for prosecuting felons

A Lawyerizing the Trial: Toward the Adversarial System
   i The English Bill of Rights
   ii Good behavior judicial tenure
   iii Treason Trials Act of 1696 – 7 Wm. III, c. 3 (1696)
   iv Judicial Involvement
   v Use of modern rules
      a Evidence
      b Self-incrimination
      c Addressing the jury
      d The jury and fact-as-law

A The Colonial Jury: Theory and Practice at Odds

B The Campaign Against the Law-finding Jury
   i Battiste v. U.S., 24 Fed. Cas. 1942 (1835), Opinion by “Story Circuit Justice, in summing up to the jury, said:
      Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law.”
   ii Sparf and Hansen v. U.S. 156 U.S. 51 (1895), Dissent by Gray: “It is our deep and settled conviction, confirmed by a reexamination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.”
   iii

Lecture #17 – Order and Liberty: Creating the Federal Judiciary

A Creating a Federal Judiciary (without model or precedent)
   i “There is nothing more common than to confound the terms of the American Revolution with those of the American War. The American War is over: but this is far from being the case with the American Revolution. On the contrary, nothing but the first act of the great drama is closed. It remains yet to establish and perfect new forms of government; and to prepare the principles, morals, and manners of our citizens, for these forms of government, after they are established and brought to perfection.” --Dr. Benjamin Rush, 1786
“The expediency of carrying justice as it were to every man’s door was obvious; but how to do it in an expedient manner was far from being apparent.” – Chief Justice John Jay, to federal grand jury on circuit, 1790

No single state had the guarantees of impeachment/lifetime appointments for their judiciaries that Article III provides

A Article III Courts; Judiciary Act of 1789 (SB 1 of first session of Congress)

i Context:
   a House accepted the final Senate version in September of 1789, so there is no federal court system for the first sixth months. Three days after the judiciary act is passed, the bill of rights passed congress.
   b 5 of the amendments proposed in bill of rights mention the judiciary.

i District Courts
   a Rhode Island and North Carolina hadn't ratified yet
   b KY and ME areas were being populated, so these areas demanded having district courts
   c Every district court is staffed by a judge from that state.

i Circuit Courts
   a Circuit Court was staffed by the district court judge from that state and two supreme court justices. The supreme court justices swore to do appellate work, though, not trial work. (was eventually set up so only one sup ct justice per circuit)
   b Membership(?) “[P]ractice and acquiescence under it for a period of years, commencing with the organization of the judicial system affords an irresistible answer, and indeed a fixed construction.”–Stuart v. Laird 5 US 299, 309 (1803)
   c Circuit responsibilities: “I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due respect to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.” – John Jay, on refusing re-appointment, 1800
   d So they created a Court of appeals to solve the circuit riding problem.

i Supreme Court --
   a Seen as judicial wanderers (riding circuit)
   b Why six justices? --Geographic balance to reflect the political balance they wanted to confer upon the court to enhance its legitimacy
     • Jay (NY)
     • Wilson (PA)
     • Blair (VA)
     • Rutledge (SC)--
       • never heard a Supreme Court case as an associate justice because the court didn't hear any in 1789-90, and he was so put off by riding circuit that he quit.
       • Then gets appointed Chief Justice when Jay resigns. He was a recess appointment. But then, when Congress goes back into session, his nomination to be chief was rejected by the Senate because he had spoken out on a partisan political issue (re: Jay's Treaty).
       • Then he tried to commit suicide, and became an alcoholic nut job.
     • Cushing (MA)
     • Iredell (NC)

A Applicable law?
   i The “discovery” of regionalism
      a The fear that a criminal defendant could be drug off to some far off court leads to “trial in the visonage (neighborhood)”
      b Establishing a federal court system with federal law prompted a closer attention to regional variations
      c St. George Tucker’s Blackstone (1803)
        • Blackstone was filled with Tory sympathies with the notion of parliamentary omnipotence
        • So Tucker edited the 4 volumes of Blackstone and wound up with 5 heavily annotated volumes
        • It is also a celebration of regional law. Long passages about how MA and GA could never have the same legal systems.
      d “With the Lay Gens … [with the popular lay public]it will be hard to make them alter their old habits.” –Robert Treat Paine

i Section 34 of the Judiciary Act of 1789—
   a Laws of the several states, except where US statutory, treaty, or constitutional laws otherwise provide, shall be regarded as the rules of decision in US federal courts. -> no federal common law
   b Section 34 got left out when the official government printer printed the Judiciary Act :)
   i Federal procedure? (no two states before Judiciary Act had the same Civ/Crim Pro)
To 1872
- Process Act of 1789 said that the federal courts use state procedure
- What if a state changes its procedural rules? Does the fed change too? You would think so, but NOPE. No changes in state procedure were followed in the federal courts following state procedure.

1872-1934—Allows the Fed Courts to change procedures along with the states

1934-present—Federal Rules of Procedure are invented during the New Deal

Federal Common Law?
- “...they would have broken in upon the legal code of every state in the most material points...a thousand heterogeneous and antirepublican doctrines, and even the ecclesiastical hierarchy itself....” -- Madison to Washington

Not until 1812 (Crim) and 1837 (Civil) is federal common-law recognized

States sued in federal courts?
- Chisholm v. Georgia (1793)--
  - Chisholm was a resident of SC
  - Went to Supreme Court on Article III challenge.
  - Wilson's opinion is important. It scared the hell out of state's rights advocates. He said that the language in the constitution should not be confused and that a state is not sovereign for sovereign immunity purposes. The only sovereign are the people of the state. God makes people. People make states. States are an inferior contrivance of man, an administrative convenience. They are useful and valuable, but only derivative of the sovereignty of the people.
  - GA was not a sovereign state.
  - The GA assembly made it a capital offense to try to enforce a federal judgment against the state.
  - And thus, the 11th Amendment.

During the ratification, federalists assured everyone that the suits between states and citizens of other states clause only applied where states were the plaintiffs (not when they were defendants). So a state could never be dragged into federal court. (Check's in the mail Syndrome).

Protecting the Court through Separation of Powers
- Advisory Opinions?
  - Washington wanted an advisory opinion on his right to create a Neutrality Proclamation.
  - Court decides to never do advisory opinions
  - State courts often do advisory opinions (MA and gay marriage.)
  - Staying with cases and controversies allows the court to avoid political issues

Hayburn's Case (1792)
- In the first 10 years post constitution the judiciary worked really hard to stay out of politics, as they were highly distrusted by the public (especially b/c they were federalists). This was because they needed to build some legitimacy to become as important as the other branches.
- Congress passed a pension bill for veterans of the revolutionary war. The Pension Act provided the following procedure: When a veteran wanted to make a claim to the a federal pension the claim is presented to the circuit court where the supreme court justices on the supreme court, because they are going back to the capital, hear and rule on the pension claim by the veteran. The claim is then taken back to the capital and given to the Secretary of War to be reviewed. If the Secretary of War approves it, he sends it to Congress for an appropriation, and Congress decides if they want to fund it.
- Court didn't want to touch this act. 5 of the 6 justices refused to hear pension claims, because they believed that the act was unconstitutional. Why?
  - (1) Separation of powers issue that the court's decisions should not be reviewed by the other branches.
  - (2) Justifiability question. Hearing a pension claim is not a justiciable matter. Cases and Controversies Clause.
- Congress amends the act, so this case becomes moot.

I Lecture#18: Challenging the Federal Judiciary: Jefferson, Marshall, and the Contest for American Law
A The Jeffersonian Project and the Law—Jeffersonian Republicans (republican vs. monarchical)
- Eliminating “lawcraft and priestcraft”
  - Jefferson is intensely anti-clerical and against lawyers mystifying the people with legal mumbo-jumbo that renders normal people unable to understand and use the law.
  - Lawcraft and Priestcraft both throw sand in the eyes of the people
- Embodying the people
  - Emphasize statute law over common law
b Statute law, where the legislature is representative, is the will of the people
c Common-law judges abuse their power. The interpretive latitude judges apply to gain more power for vested
economic interests and the state is bad.

i Vested privilege: primogeniture (1776) and entail (1785)
a Thought revising the code of VA would be key.
b Wants to create a legal system by which every fiber of ancient or future aristocracies would be eradicated.
c So he decides to go for laws to get rid of primogeniture and entail to prevent an aristocracy by birth.
d He was called a mid-day drunkard for wanted to abolish these practices.

i Codification and reform of the common law
a A federal common law?--the most terrifying. Jefferson saw the common law as the way in which English had
incorporated Christianity into the law.
b *ubi jus, ubi remedium* (where there is a right, there is a remedy): legal fictions and the corruption of law
   • Legal fictions are non-rebuttable presumptions that are created for the purpose of giving the court
     jurisdiction where it otherwise would not have jurisdiction.
   • John Doe, Richard Roe, John Den, Richard Fen, Fairclaim, Shamtitle --> Actual names used in pleadings
     in English courts to get within the jurisdiction of a particular court.
   • “force and arms”--applied to expand the king's courts' jurisdiction. For example, a K dispute over a barrel
     of wine where it was alleged that with force and arms the defendant had smashed the barrel and drawn off
     wine.
   • Holmes, “affected with a public interest” --Tyson and Brothers v. Barton 273 US 418, 446 (1927) -->
     fiction to beautify what is disagreeable to the sufferer.
   • Jeremy Bentham:
     • “…what is the common Law? What, but an assemblage of fictitious regulations feigned after the
       images of these real ones that compose Statute Law.”
     • --legal fictions are to justice as swindling is to trade.
     • Coined two terms: “codification” and “international law” (used to be law of nations)
   • Mansfield: Court decisions are “rules drawn from the fountain of justice” and are “superior to an act of
     parliament”
     • famous or infamous for introducing into the common-law many of the remedies and principles of
       maritime law and equity
     • Important because he modernized English commercial law to enhance the commerce of 18th Century
       England, enhance the mercantile class, and allowed England to become the economic world power that
       she was.
     • Marshall was a huge fan, Jefferson despised him.
     • Mansfield said the real justice comes from the courts.

i Jefferson:
   a “A body politick is a body in fiction of law that endureth in perpetual succession.”
   b Feudal burdens and “Norman lawyers”

A The “Revolution of 1800”--election of 1800 is a constitutional crises because of the provision in the constitution for
the manner in which presidents are elected which doesn't take political parties into account. Jefferson's party is so
successful that Jefferson's running-mate, Aaron Burr, gets as many votes as Jefferson. So there's a tie. Burr is jazzed,
and begins to lobby behind the scenes for federalist support. Jefferson is pissed. Tie in the house over and over and
over. Eventually Jefferson is elected, but he saw this as a coup against the will of the people.

i “The reign of witches” ended—Jefferson's inauguration speech.

ii Marshall and “honeyed Mansfieldism”/ “Federalism and Marshallism”--the two were the same according to
Jefferson. He called the federal judiciary a partisan institution. He believes the federalists have been repudiated by
the people but have used the court for their purposes.

iii The Lame-Duck Judiciary Act of 1801
   a Created a layer of appellate circuit courts to prevent the supreme court from having to ride circuit.--This saw
     the appointment of objectionable people to the court of appeals.
     • James Marshall, John Marshall's brother
     • William Cranch, John Adams nephew
   b Expanded federal jurisdiction by defining federal questions broadly, going beyond Article III
   c Changed the size of the Supreme Court. They said, “we need an odd number” so they reduced it to five. So as
     soon as someone leaves the court there will be no opportunity for Jefferson to appoint a justice.

i Twelfth Amendment
ii Removal of Federalist Appointees
iii Repeal of Judiciary Act of 1801

25
a) Removal of James Marshall and William Cranch
b) Attempted Common Law prosecution of *The National Intelligencer* (a republican newspaper) It had said that when the Judiciary Act of 1801 had been passed that the asylum of justice was now impure.
i) Alteration of SCOTUS sessions
ii) The Assault on the Federal Judiciary
   a) “We want your offices…” – William Branch Giles
   b) “…dismissing the Judges, when they cease to possess the publick confidence” – James Monroe

A The Marshall Court
i) Marshall’s political astuteness
ii) *Marbury v. Madison*
iii) Impeachment of John Pickering, 1803: “guilty as charged”
iv) Impeachment of Samuel Chase
   a) Trial of John Fries, 1800 (*LJAH*, 171-83)
   b) Trial of James Callender, 1800 (*LJAH*, 215-25)
i) Trial of Aaron Burr, 1807

I Lectures #19, 20: Marshall, Kent, and Story: The Judge as Oracle
A The People’s Courts? John Marshall and the Defining of Judicial Authority
i) “We are all federalists, we are all republicans”
ii) “In America the law is king”
iii) “These seem to me to be the conclusions to which we are conducted by the reason and spirit of the law. Brother Story will furnish the authorities.”—John Marshall
iv) “The decision is a masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another -- Robert McCloskey, *The American Supreme Court* (1940).

A Marshall’s four basic principles to advance federal authority:
   i) Discretionary power of govt:
      a) Marshall did not think that the Sedition Act was unconstitutional
   ii) States had surrendered certain enumerated powers, but… the Supreme Ct. would define the nature of those powers
      a) *Gibbons v. Ogden* 9, Wheat 1 (1824)--the states HAD given up power to regulate interstate maritime commerce
      b) *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829)--retreat from *Gibbons* which held that congressional authority was always exclusive. This case says it is unless the states can and do exercise concurrent jurisdiction
   i) Sovereignty of the “people” is exercised through institutions
   ii) Balancing of powers mediated by judiciary

A Marshall’s syllogisms
i) *McCulloch v. Maryland*, 4 Wheat. 316 (1819)
   a) “great outlines” and “important objects,” leaving “the minor ingredients which compare these objects [to] be deduced from the nature of the objects themselves.”
   b) “it would probably never be understood by the public.”--Because the founders were aware of this -->(next line)
ii) *Fletcher v. Peck*, 6 Cranch 87 (1810)
   a) In 1795 the corrupt GA legislature had granted millions of acres of land to its friends (much of what became Alabama and Mississippi) and in many cases took bribes for these land grants. When this news became known, a new legislature was elected, and that new legislature rescinded the land grants. There was even a symbolic burning of the recorded grants. In the meantime, many of the initial grants had been sold off in sales to other innocent, good faith purchasers.
   b) Marshall approaches the decision by saying the courts have no authority to review the motives of a state legislature. But,
   • “certain great principles of justice” ought “not to be entirely disregarded.”
   • among these are “rules of property” “common to all the citizens of the US” and under the “principles of equity.” Mansfield was the one who brought equity into English jurisprudence.
   • So there are are “some limits to the legislative power”: Where, “if the property of an individual, fairly and honestly acquired, may be seized without compensation”
   • The state of GA was not a “single unconnected sovereign”? It was a part of the Union, and the grant of land was a contract. Every contract contained a warrant that the obliger would not reassert rights to property granted. So here he is upholding the sanctity of contract.
   • “the words are general, and are applicable to contracts of every description.”
   • The state of GA is restrained “either by general principles which are common to our free institutions,” or
by “the particular provisions of the constitution of the United States.”

- The vested rights of the purchasers are important, no matter how corrupt the legislature's motives were

**McCulloch v. Maryland**—the National Bank case.

- Marshall states some important principles
- Was the constitution a compact between states, or between individuals? The people, of course! The people are not prevented from delegating other powers to the government. The federal government in establishing the bank acted on the behalf of the people, not the states. So the states can't tax/destroy the bank, because the bank is an act of the people and the people are above the states.

- “It is the government of all, its powers are delegated by all; it represents all, and acts for all.”--Sounds like Lincoln's “of the people, by the people, for the people”
- “the power being given [to the federal government], it is the interest of the nation to facilitate its execution.”--it is implicit that if the fed has a power, they have the power to facilitate execution
- “We must never forget that it is a constitution we are expounding.”--
- “the great principle … that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.”

- What Marshall is doing at the federal level is going on all over, both at the state and local levels. So don't see Marshall as acting alone.

**A JAMES KENT (1763-1847)**

- Powerful proponent of a Hamiltonian view of law, in the way that Marshall championed Mansfield. Hamilton was concerned with the necessity of property rights and economic development.
- Kent on Hamilton: “His arguments on commercial, as well as on legal questions, were remarkable for freedom and energy; and he was eminently distinguished for completely exhausting every subject which he discusses, and leaving no argument or objection on the adverse side unnoticed. He traced doctrines to their source, or probed them to their foundations, and at the same time paid the highest deference and respect to sound authority…. We may truly apply to the efforts of his mind … that principles were stated reasoned upon, enlarged, and explained, until those who heard him were lost in admiration at the strength of the human understanding.”
- Its important to give scholarly authority to judicial opinions. Marshall did a shitty job of citing and having positivist support. Kent was really good at it though, even though he wasn't on the supreme court.
- This period is to blame for footnotes and blue-booking!
- Kent's career as a lawyer was not distinguished. Think Rip Van Winkle. He didn't like practicing law because he didn't like clients, didn't like rainmaking, didn't like coddling, didn't like currying favor. He got into the NY Assembly, but he lost his seat b/c he didn't want to campaign. SO he became a law professor. The first one at Columbia. He was a flop there as well because he didn't like students, either. SO, the perfect position for him was the Court. So Governor Jay appointed him to the NY Supreme Ct. And then he became chief justice in 1804, and Chancellor in 1814-1823. He was so disliked by the radical democrats in the legislature that they created a mandatory retirement age of 60 to get rid of him.
- William Johnson, Chancery Reports –Kent got some cases published, but made sure what got published reflected his views. By 1821, 7 years after Johnson began publishing, they were quoted across the whole US. Emphasized the importance of case law. Strong on bring equity into the law. He made the argument that equity purifies the arbitrariness of the common-law. There was vast erudition in his opinions to give legitimacy.
- He was appalled at the invasion of the legal profession by ordinary individuals who were barely literate and thought they could become lawyers. He thought you had to know Latin. He spoke it, and corresponded in Latin with Justice Story.
- Kent’s Commentaries on American Law (1826-30)
- Vested property rights: “The tendency of universal suffrage, is to jeopardize the rights of property, and the principles of liberty.” He sees a conflict between democracy and property rights.
- He is powerfully opposed to Retroactivity in property law. “This would be … divesting [plaintiff] of a right previously acquired under existing law. Nothing could be more alarming than such a subversion of principle…. The lawgiver cannot alter his mind to the prejudice of a vested right.” (Its like GA and the land claims)
- He would go back to Roman law if he had to if it was necessary to show the long-standing nature of property rights.

**Kent and Natural law?**

- There are over 100 definitions of Natural Law—the idea that nature intends something. Everyone insists on natural law, but everyone has their own definition.
- Kent had his own way of addressing natural law, but it wasn't pretty. For example, if you talk about the notion of a simple world of natural law before the corrupting influence of the state, he has to test it. A lot of people say man was born uncorrupted and then (fill in the blank) created all the world's problem, and if we could
revert to a simple form of nature (voice of people in democracy) everything would be fine. This didn't work in the 1770s and 80s.

c “It has been truly observed, that the first man who was born into the world, killed the second. And when did the times of simplicity begin?” (Cain and Able story) The notion of a pre-lapse era of peace and harmony is nonsense. If we want to look at nature, we have to look at something different: property rights are natural law.

d “The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from feeble force in the savage state to its full vigour and maturity among polished nations, forms a very instructive portion of the history of civil society.”

e “A state of equality as to property is impossible to be maintained” and violates law of nature.

f “…a question of the highest moment, how the property-holding part of the community may be sustained against the inroads of poverty and vice.”

g The “sense of property” for the “purpose of rousing us from sloth, and stimulating us to action.” Secure property rights are an incentive to civilization.

h Rules of commerce need to be uniformly adhered to, as do contractual obligations, so a reliable expectation can be placed upon them.

i Kent and a National Jurisprudence:

a “My object will be to discuss the law … as known and received at Boston, New York, Philadelphia, Baltimore, Charleston, etc. and as proved by the judicial decisions in those respective states. I shall not much care what the law is in Vermont or Delaware or Rhode Island…..I shall assume what I have to say to be the law of every state.” So Kent wants a jurisprudence that will develop property rights.

b “Society is an association for the protection of property as well as of life, and the individual who contributes only one cent to the common stock ought not to have the same power and influence in directing the property concerns of the partnership as he who contributes his thousands.” This is an easily applied maxim to his views on democracy. Someone with little property should not have the political power of someone who has a lot. So he starts to articulate contract law that reflects this ideology. The idea is that parties should have an assured expectation.

c Blackstone only has a few paragraphs on contracts, while Kent's commentaries has an entire volume dedicated to contracts where the plain intent of the parties is to be elevated—He's the one that came up with caveat emptor—it isn't that old. Common law idea is that a sound price warrants a sound commodity. But he says that ethical issues shouldn't interfere with the freedom to contract of the free individual. The state should not meddle with the freedom to contract. We think caveat emptor is old because its Latin, but in the olden days it was the opposite of caveat emptor. It didn't get big until the 19th Century.

d “plain intent” of parties…

• State legislatures are the great threats and they are less refined then the federal government.

e Echoes of Marshall’s Laidlaw v. Organ, 2 Wheat. 178 (1817) on rules

• Has to do with the end of the War of 1812. Port of New Orleans was shut down. American commodities shipped through NOLA are depressed in price. Then end of war makes it obvious demand and price will go up. Guy who knew the war had ended made big tobacco deal. When delivery date came everyone new war was over. So the seller insisted on market price at time of delivery. Buyer said “no way.”

• “well calculated to bring dormant capital into active and useful employment.”

• "The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated to him to the vendor. The court is of opinion that he was not bound to communicate it.” (Marshall)

• Slips into all the other courts via NY.

i Points Kent gets in the reporters

a Legislatures can't disrupt contracts, and if they do, they must compensate

b Balance of Police Power—Police Power is necessary for the regulation of safety and health. How do you balance contracts vs. police power? The courts have the power to determine what is a legitimate exercise of police power and what is a violation of contract entered into by the state or a taking.

i Kent and Professionalization of the Bar

a Kent used his influence to professionalize the bar. He thought the bar was being invaded by lower class people. So Kent, along with others, is part of the movement to raise the bar by making entry to the bar more difficult, insisting on education as a prerequisite for admission to the bar, and emphasizing longer periods of training. The result was to make admission to the bar less open to those of the lower class and made the bar an elite well to do demographic, and thus a demographic more interested in protecting property.

b “a neglect of appropriate averments, who not only deprive our pleadings of just pretension to elegance and symmetry, but subject them to the coarser imputation of slovenliness.”

c To “rest satisfied with mediocrity, when excellence is within our reach.”?
A JOSEPH STORY (1779-1845)

i Background

a Story's biggest impact was in private law.

b Attorney who argued and won *Fletcher v. Peck*

c Madison went through 5 attempted appointments to the supreme court before he got to Joseph Story, who was appointed at the age of 32. He's the youngest ever.

d To Madison's disappointment, he becomes a strong ally of Marshall, and a huge fan of the federal government and of vested rights

i *Swift v. Tyson*, 16 Pet. 1 (1842) [*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)]

a Federal common law of commerce

b The pre-Erie Doctrine ideology

c Produces firmer expectation of upholding contracts and commercial notes in federal courts

i *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816): Constitution “not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declared, by ‘the people of the U.S.’”

a Marshall really wrote it

b Land claims in VA. Land had been granted by the British Crown to an owner, and which grant was guaranteed by the peace treaty of 1783. That land, ultimately however, is in many states confiscated Loyalist property. In 1789 a blanket act of eschet (forfeiture to the sovereign because of treason against VA) was enacted.

c State act of 1789 conflicts with treaty of 1783. Treaty wins.

d The British claimant had passed title to a group of VA land investors that included John Marshall and his brother James Marshall and other VA federalists. So they have a bit of a bias in saying the treaty trumps.

e VA supreme court supports the act of eschet. And the VA Supreme Court holds that its holdings are definitive when it comes to VA law.

f Writ of err to Sup. Ct. Had to be certified. The losing party applies to the VA Sup. Ct. to certify a petition to the U.S. Sup. Ct. to sign the petition. The problem is that the U.S. Sup. Ct. has to send a command to the VA to certify officially the record and send it up. Marshall was on circuit in VA, but he had to recuse himself. No one else wanted to do it, but Marshall conned Bushrod Washington (nephew of the original GW) into doing it. If you look at the command, the handwriting is not Bushrod Washington's. The handwriting is Marshall's. AND NO ONE SIGNED IT. And the wording is very condescending. The command isn't even accepted by the VA Sup. Ct. SCOTUS gets around it by getting a make-shift copy of the record signed by a clerk of the VA court on which the decision is ultimately rendered. Marshall then wrote the decision and had Story sign it.

g Story later says, If we are ever to be a great nation, it must be by giving vital operation to every power granted to the government. The government of the US is intrinsically to weak, and the power of the state governments too strong. The danger of anarchy of the parts is a lot scarier than tyranny of the head.

i *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819)--notion of contract where Marshall and Story interpret the grant to Dartmouth college as a private contract. This elevated the notion of the sanctity of private K.

ii *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. 420 (1837)--

a Story refused to go along with this because it destroyed a vested right. He was the lone dissenter.

b The question of vested rights runs into conflict with developmental imperatives.

c Economic/Property rights were seen as under attack, with the state legislatures doing the attacking

i *Sturgis v. Crowninshield*, 4 Wheal. 122 (1819)--

a Bankruptcy is the state allowing contractual obligations to be modified, so the opposition to bankruptcy legislation is fierce. There was not a federal bankruptcy law until 1898.

b Commercial states created their own bankruptcy laws.

c Boston merchant moves to NY and makes a lot of money. To make money, he had borrowed a lot of money from Sturgis. After Sturgis loaned him the money, NY passed a bankruptcy law. Sturgis sues Merchant, Merchant files for bankruptcy. Merchant moves back to MA, makes a lot of money again, and Sturgis sues him again, saying that the NY bankruptcy law was an unconstitutional interference with contract.

d Congress WAS given authority to enact bankruptcy legislation, but was that authority exclusive? If so, all state bankruptcy laws are unconstitutional.

e If these laws were part of a concurrent authority, were they retroactive? The merchant's debt was created before the enactment of the bankruptcy law.

f Marshall decides *Sturgis* by saying (1) Federal bankruptcy authority is not exclusive, but if someday Congress passed a Federal Bankruptcy act it would preempt state acts, and (2) No retro-activity.

i *Ogden v. Saunders*, 12 Wheat. 213 (1827):
a “The rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, and the state decides how far the social exercise of the rights given us over each other can be justly asserted.” – William Johnson, for the majority
• Marshall and Story are appalled by this.

b What about prospective bankruptcy law? Would that be an impairment of contract? Nope, a state can totally do that.

c Pivotal for the following manner
• Only dissent by Marshall in a major constitutional case
• Story also dissented. They were both so concerned with vested property rights that they did not approve of bankruptcy.

i Van Ness v. Packard, 2 Pet. 137 (1829)
a “a restraint upon the improvement of real property; and have a general tendency to lessen the amount of its productions and profits.”

b “The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”

c Common-law says that if you rent land and you build on that land that the buildings and profits from them belong to the landlord—fixtures.

d This decision says that if common-law were upheld that it would be a restraint upon the improvement of property and would decrease profits.

i Bank of United States v. Dandridge, 12 Wheat. 64 (1827)
a “the acts of artificial persons afford the same presumptions as the acts of natural persons.”

i DelLvio v. Bolt, 7 Fed. Cas. 418 (1815)
a “It is obvious that the law must fashion itself to the wants, and in some sort to the spirit of the age.” It “must … expand with the exigencies of society.”

b “I have no doubt that its jurisdiction rightfully extends over every maritime contract and tort.”

c “Brother Story here … can give us the cases from the Twelve tables down to the latest reports.” -- Marshall

d

I Lectures #21, 22, 23: Capital and Labor in a New Age of Enterprise
A Reconception of the “Corporation”
i Origins
a Personal, individual liability
b Strictly limited by terms of incorporation

i Continuity in US: Problems in a Changing Economy
a Example: Salem & Danvers Acqueduct
b Limits in activities

c Banking? J. Adams: “Every dollar of a bank bill that is issued beyond the quantity of gold and silver in the vaults represents nothing and is therefore a cheat upon somebody.”
• Aaron Burr’s Manhattan Company…

d Personal liability of stockholders—The US was the foundation of limited liability for shareholders in corporations. This grew steadily and cumulatively. There wasn't one landmark case.

i Responses?
a Voluntary forfeiture of stock
b Specific grants

A Statutory clarification (?) in 1804, owing to “increasing distrust in the community of these corporations.”
i Challenge: Spear v. Grant, 16 Mass 9 (1819):
a Hallowell And Augusta Bank

b Chief Justice Theophilus Parsons:
• “If a promise can be supposed to have been made by the defendant, or created by law, what party is the promisee? Can it be that each stockholder has promised each holder of the notes, to pay his demand, if the bank should become unable and unwilling?”
• “If so, which creditor shall have it? He who is the sharpest, and has made the first demand? Or he who has been more modest, and perhaps more meritorious?”
• “For a stockholder, wholly innocent and ignorant of the mismanagement, which has brought the bank into discredit, might be ruined by reason of owning a single share in the corporation.”
• “… the public opinion, that individuals were not answerable by the common law”
• “Surely public opinion ought not to be quoted as law.”

• Equitable remedy?
A LABOR LAW

i Master and servant:
   a “A Little commonwealth”
   b Journeyman labor (“journée man”):
   c Master’s authority:
   d Jurisdictional: to “observe the order of my house”
   e Property interest in servant’s labor: doctrine of “revolution of the seasons”

i Impact of the American Revolution:
   a On Masters
   b On Laborers (the “turn out” and common law of criminal conspiracy)

i Commonwealth v. Pullis, Mayor’s Court of Philadelphia (1806)
   a Common law of criminal conspiracy
   b Saw the maintenance of the English idea of criminal conspiracy as criminalizing efforts by laborers to organize themselves into unions.

i Lemuel Shaw (1781-1861) and the Police Power:
   a “America’s greatest magistrate” – Holmes
   b Common law definition
   • Grist Mill Acts
   • Industry (“manufacturing purposes”) and “the public interest”
   i “public interest”: “manufacturing has come to be one of the great industrial pursuits of the commonwealth”
   ii “nature of a well-ordered civil society”: “… every holder of property, however absolute and unqualified his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious … to the rights of the community.”

i Commonwealth v. Hunt, 45 Mass. 111 (1842)
   a Robert Rantoul, for defendants
   b Opinion by Lemuel Shaw
   • See casebook for comprehensive view of case
   • What is important to see is his awareness that the economic marketplace has winners and losers, and if the effect of the unionization was to damage a business in particular, that the over all good of the marketplace is served by allowing the union to organize.
   c About shoemakers wanting to organize themselves into a union

i Farwell v. Boston and Worcester Rail Road Corp., 45 Mass. 49 (1842)
   a Respondeat superior and the fellow servant rule
   b About freedom of contract
   c Farwell is a RR employee. His fellow employee is negligent and fails to properly turn a switch that would have diverted a RR car from its path. That employee's negligence led to Farwell losing his hand.
   d So who is liable for the damages?
   • Today we would look to workers compensation.
   • Farwell argues here for respondeat superior, as would have been the case in England
   • The RR says that the paternalism of master/servant is inappropriate for the modern 19th century, although it was suited to feudalism. Claim that Farwell was a freely contracting individual capable of assuming the risk he knew would be entailed in working on the RR.
   • So the RR argues the other employee who was negligent is who should be held liable.
   e Shaw and the Court agree with the RR. They assign liability away from the deep pocketed employers to subsidize industrial development. The only exception is where there is a defective piece of equipment that the employer had been told about that causes the injury.
   f This had a huge impact, while Hunt had very little impact (b/c Hunt was attacked by the legislatures that banned labor unions)
   g Took the NLRB in 1937 to fix this
   h Working man is liberated from the paternalistic controls of master/servant, but is also robbed of the paternalistic protections master/servant provided.

I Lectures #24, 25: Gender and the Constitution of Marriage

A From the Bonds of Empire to the Bonds of Matrimony

i Two quotes that are emblematic of the two legal cultures:
   a “Law is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.” – Blackstone Commentaries (1765)---18th Century English Jurisprudence---this is what the American Revolution is fought against.
   b “In its place I introduce – the consent of those whose obedience is required.”--James Wilson, Lectures on Law
Response to Blackstone. Does not deny that law requires obedience, it just requires that the obedience has initial consent.

The protection of dynastic property interests is the reason for the changes we see to marriage that make marriage not about love. This includes things like breach of contract for failure to marry!

Marriage ala Mode (The fashion of marriage) collections of pictures
a Earl of Squanderfield is trying to erect a mansion and he's run out of money—you can see it in the window. His foot is wrapped for gout, which is a symbol of being rich. He has a family tree that goes back to some knight, probably Charlamagn. He's got all these pictures of ancestors. Father of the groom.
b Father of the bride is dressed as a rich merchant.
c Bride is being spoken to by attorney who's trying to convince her of attractiveness of new spouse.
d Groom is staring at himself in the mirror.

Sources of Change:

Enlightenment Reformism: Political Independence and Personal Autonomy
a “When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.”

Jefferson plugs in marriage/spouse in place of government to justify marriage law including divorce.

Purpose of divorce is to allow people to re-marry. Marriage is so important that a good marriage must not be prevented by the maintenance of a bad marriage.

This was not common-place at Jefferson's time. Especially in England, where marriage was still seen as a property contract in which sentiment is only an afterthought.

“No partnership can oblige continuance in contradiction to its end and design.”--Jefferson

Proposed Virginia Code would allow divorce for the following grounds: cruelty, perpetual disease, physical incapacity, immorality, “obstinate unkindness in the affair of the bed.” This would still be legislative divorce. This bill did not pass, and it wasn't until 1803 that the VA legislature began to embody these kinds of ideas and grant legislative divorces on these kinds of grounds. The South is very very very slow at adopting these types of ideas/practices.

“The right to start all over again.” America is seen as a place to start all over again, and every person has that right. This is a rejection of the English notion of “where you're born is where you are, both physically and status-wise.”

Higher Expectations: Ideal of Companionate Marriage-->

The notion of marriage change. The rise of Romanticism and the notion of emotions and self-realization play a role. Do not insulate those ideas from law.

This raises the expectations of what is is to be married. In some ways this is a return to the traditional Romeo & Juliet notion.

Companionate Marriage is an 18th Century notion.

Hypocrisy of existing system:

“irresistible temptation to the commission of adultery,” proper only for those possessing “more frigidity or more virtue than usually falls to the share of human beings.” -- Zephaniah Swift, 1795 [HAL, 145]

Existing marriage that makes divorce impossible and makes sex illegal in case of legal separation is hypocritical.

There are human impulses for sexual gratification that aren't going to go away and can't be resisted.

Expanding judicial control of divorce, 1820s:

North v. South

New England has always allowed for judicial divorce. But they weren't really sure they had to jurisdictional right to do this. By 1800 all New England states had judicially granted divorce, and the grounds were being expanded.
b The South just sucks, though. It took until 1850 for them to allow divorces, and even these were legislative. South Carolina never granted a divorce until the 20th century.

i Application of Equitable Remedies
   a “And here, on the subject of married women as well as in the exercise of the jurisdiction in regard to infants and lunatics, we can not fail to observe the parental solicitude with which the Courts of Equity administer to the wants and guard the interests, and succor the weakness of those who are left without any other protectors, in a manner which common law is too rigid to consider or too indifferent to provide for.” – Joseph Story, 1834.

i Broadening grounds for divorce through judicial interpretation beyond just adultery
   a "life threatening"
   b “inhuman”
   c “cruelty”

i Legislative Reforms
   a Virginia Revised Code of 1850: adultery, impotence, confinement in penitentiary, conviction of infamous offense prior to marriage, willful desertion, for five years, pregnancy at time of marriage by other than husband, working as prostitute before marriage without husband’s knowledge

A Freedom to Marry?
   i New England and Old South: affines or cousins?
   ii Impact of the West
   iii Miscegeneation: “God made marriage, but the white man made the law.”
   iv Threshold of competency?
   v Breach of contract to marry?
      a Wightman v. Coates, 15 Mass. 2 (1818)
         • “Common Law Marriage”?
      b Fenton v. Reed, 4 Johns. 52 (NY 1809)
         • Woman thinks husband is dead so she remarries. Then supposedly dead husband shows up, not dead. He is happy she doesn't want anything of his. Both husbands die. She tries to get second husband's life insurance which lists the wife as beneficiary
         • Insurance Co. won't pay because the marriage wasn't valid.
         • Court allowed that the church ceremony wasn't valid. The question then became, “was the subsequent period of cohabitation sufficient to establish a marriage in the eyes of the law?” Kent says yes (think SC test from LRW memo)
         • This hearkens back to the middle ages—marriage validated by open exchange of promises, cohabitation and sex
         • Should Kent's opinion be honored in other states? What was driving Kent? He was a wild-eyed conservative.
         • He is driven by:
            • He is a pragmatist. It is a pragmatic thing to except such a widespread practice and it is pragmatic because marriage is a stable and stabilizing social institution in a society that serves as a bedrock for a democratic society lacking stability.
            • He distrusts fickle legislatures that represent the worst in society and are too democratic (reflect society's fickle whims too closely)
      c By 1900 most states have courts that are accepting and conferring legitimacy on common-law marriages. The legislatures had very little to do with this. This feeds into a fear of democratic society and also play to natural law.
         • VT high court speaks of marriage as one of the “natural rights of human nature.”
         • OH high court says that nuptial rights are individual private rights—private matters, not public matters, and the bureaucratic details do not confer a right to marry—they only regulate the expression of that right. They are directory, not mandatory.
         • The main reason that states wouldn't accept these unions was b/c of property. The lack of public records leads to indefinite property rights.
         • In England there were also movements to acknowledge common-law marriage. 1844--House of Lords rejected the notion of common-law marriage, though, departing sharply from the American Pattern. Their rationale was history, but their history was wrong. The claimed that it had always been the law in England that you needed a clergyman for a marriage. But this was less than 100 years after Lord Hardwick's marriage act!
         • Backlash starts in early 1900s, and hits its stride in the 1920s, where state after state enact statutes requiring ceremonial marriage. There are concerns about property rights, fraud, and sexual exploitation of women who are weak and need protection. There's also a very power racism involved in the 1920s.
was a fear of interracial marriage being allowed by common-law marriage. There is also the racism against
the black family. There are also concerns about undue burdens on administrative agencies and courts.
• 1960s there was another backlash. There were several notorious palimony cases involving celebrities who
would repudiate their common-law marriages. “Gold-digger phenomenon.” Also there was a resentment
of youth culture. Young people would live together. There was a resentment of a more sexually free
culture. If people want to screw, the ought to get married! The failure to require ceremonial marriage
would endorse free love (ass, grass, and amnesty!).
• Today there are only 11 states and D.C. that allow common-law marriage.

A Theory and Practice in Conflict
i What does love have to do with it?” --Coverture (both theories are motivated by conservative, paternalistic ideas in
the 19th Century)
   a Pro-reform: “When the husband eats, it satisfies the hunger of the wife – when he puts on his garments, of
course, in virtue of this unity, it clothes the wife – or if he even deserts her and finds a shelter for his own head,
hundreds of miles distant, the shelter protects the wife and her babes!”--This is what is assumed without reform.
   This is the legal fiction of coverture.
   • Protect women from equality.
   • Husbands were squandering family resources, particularly in the first part of 19th Century when temperance
becomes a big concern. Husband would spend their checks at the tavern, and women couldn't make money
on their own, so they have to have access to the resources they brought into the marriage.
   b Opponents: “If.. a man and wife [were] converted as it were into mere partners, … a most essential injury
would result to the endearing relations of married life.”
   • Fear the dreaded specter of womens' equality and marriage become purely a contractual relationship.
   • Married life would be converted into a merely financial relationship if we allow women to keep their
property and reform marriage laws.

i Hence, Conflict of Protection v. Equality; separate estate trusts:
   a Traditional (Protective) Trusts
   • equitable entity (not a common-law/legal entity).
   • Bars the trustee from paying anyone but the beneficiary. Requires the dispensing of funds be done for the
sole benefit of the beneficiary. Correlatively of this is that the wife could convert her equitable right to a
future stream of income into a fixed capital sum she could transfer. This lead to greater control of assets by
wife
   • Parents set up a trust for their daughters so daughters would get screwed by their husbands. Started in
England to protect wealthy daughters from drunken English aristocrats.
   b Methodist Episcopal Church v. Jaques, 3 Johns. Ch. 77 (NY Ch. 1817); Jaques v. Methodist Episcopal Church,
17 Johns. 548 (NY Ct. Err. 1817):
   • Wealthy widow Mary Alexander orders a poor physician named Jaques (19th Century). Before the marriage
took place Mary set up a separate use trust. On her marriage, her husband could not gain control of her
assets. He was expressly barred from doing so. The idea of the trust was to take the profits of her land free
from the control of the husband. She also wrote a will and provided that upon her death the estate should
be divided in three ways
   • 1/3 to Jaques
   • 1/3 to her other legal heirs in her family
   • 1/3 to the Methodist Episcopal Church
   • At her death there was very little left in the estate. The Church got very little and so they suspect a rat. So
they demand an equitable accounting of the assets. The court does this and finds that over the course of the
years Jaques has gotten large amounts of money from the estate and converted it to assets in his own name.
Clearly, this was not to the benefit of Mary. He claims he did it because she approved it as compensation
to him for all of the family burdens he assumed and his expenditures in support of the family
   • Issue 1: Does Jaques have no common-law responsibility as a husband to maintain his wife? If he does,
he has no right to compensation just for fulfilling his legal obligation.
   • Did the trust that Mary set up create a legal incapacity that would prevent her from taking the money
that was hers for whatever purpose she wished? Did it prevent her therefore from spending it on
anything other than her separate use, benefit, and disposal, or was she free to disburse the money as
she wished, minus more express language. Did she have the right to spend the money by giving it to
her husband. Kent had no doubt that this guy is a gold-digger who pretended to act on behalf of his
wife and shirked his common-law husbandly duty to provide for his wife's support. Allowing this to
happen would subject wives “to the acts . . . and undue influence which the general dominion and
power of husbands must facilitate.” Because of power schemes, equity needs to protect women from
their husbands' power. Court needs to protect weak women. His conveyances had violated the law, according to Kent. Any formal equality in marriage is a sham.

- Appealed to NY Ct. of Errors. That court reversed. They did so correctly according to what the law said. But they were outraged by the way the law conferred economic autonomy on a woman. They said that this would turn marriages into financial relationships. They wrote:
  - “A wife, in the independent enjoyment of her separate state, armed with distrust of her husband, and shutting out his affections and confidence, by refusing to give her own in mutual exchange, is an object of compassion and disgust. Legal chastity cannot be denied her; but there is danger, that the sacred institutions of marriage may degenerate into mere form. It is sometimes, in practice, little more than legalized prostitution; and the parties seem to have no higher object than sexual intercourse, and the sanction of legitimacy for their offspring.” – Platt, J
- Leads the court of equity to recommend a change in the law.

i Stages of Reform in Married Women’s Property Acts—slow, paternalistic, but confers more property rights on American women
   a To 1840: exempt property legislation
      - statutory
      - protects wives of debtors from creditors
      - following Platt's outrage above, it statutorily defines that a husband cannot dispose of income from a separate estate and trust.
      - Arkansas in 1835 and Mississippi in 1839 were the first states to enact these laws. Attests to women's pedestal. Also, 1837 was the first major economic depression in the US and it exposed many families to economic hardship and homelessness.
      - Brought about by notion to protect women's property.
      - Elective share law—allows a wife to choose between what a husband provides her by will, and what she is entitled to by right of dower (1/3 chattel, life estate in 1/3 real property)
   b 1840-1860: By statute, converted equitable right to legal right
      - Leading up to Civil War
      - Conversion of equitable rights into a stream of legal rights—wife has legal right to dispose of her property as she wishes
   c Late 19th century: abandonment of special status of wife’s property
      - Good news and bad news. Bad news is that her property is then exposed to exploitation.
      - There is a backlash generated by this. IL case is good example. A farm was legally the property of a wife. She sells the farm. The husband sues to nullify the contract. The court upholds his right to do so. It calls her sale of the family farm a de facto form of getting a divorce.

I Lectures #26-28: Meeting the Challenge of Slavery and the Law’s Civil War

A The Great National Division
   i Most people didn't think there would be a civil war. Compromise had lead to a temporary fix and evasion of the hard issues of slavery and its progeny
   ii Democrats nominated Lewis Cass to appeal to both north and south with regards to the protection and extension of slavery. His campaign managers wrote and distributed two totally different campaign biographies.
   iii Whigs nominated Zachary Taylor who had never voted. He was a career army officer. They didn't even have a party platform in 1848.
   iv Fear wasn't that the union would split. It was that if the compromises fell apart America would be all slave or all free.
   v There were two camps:
   vi Pro-Slavery South: The Nightmare of Garrisonian Abolitionism: William Lloyd Garrison’s The Liberator, 1831 (Garrison had been a gradualist but became an immediatist abolitionist who founded a radical abolitionist newspaper, The Liberator-- “I will be as harsh as truth.”)
      a Denmark Vesey, 1822—
         - failed rebellion against slavery; was so frightening that it discredited the gradual emancipationists in WV
         - 37 slaves executed
      b David Walker’s “Appeal,” 1829—direct incitement to the enslaved to rise up and take up arms against slavery. Fed the notion that northerners were unlawful incendiaries who would allow southerners to be burned alive in their homes, and in fact encouraged such behaviors. “Slaves of America, unite and rebel, you have nothing to lose.”
      c Nat Turner, 1831--
         - Rebellion that resulted in 100 blacks being executed
• 57 whites were executed also as accessories to the insurrection
• claim is that Nat Turner was responding to *The Liberator*

d  NE Anti-Slavery Society, 1831 founded
e  American Anti-Slavery Society, 1833 founded

i  Anti-Slavery: The Implications of National Slavery

a  John Quincy Adams

  • “It is for the sacredness of the right of petition that I have adopted this course.” --why he was anti-slavery.
  • Southerners considered him an arch villain
  • But he didn't support immediate abolition—said god and practical politics wouldn't allow it
  • He was a super-racist.
  • So what animated him and those like him? Ideas about the rule of law that they would gradually come to accept as endangered by slavery. For example, it is a fear of a corruption of the rule of law and its replacement by a regime of force and arbitrary private power. Fear that slaveholders would resort to breaking the law to support slavery.

b  Attack on free speech--

  • Southerners were suppressing free speech by restricting the US Mail. Starting with Jackson the mail was censored and there was a ban on anti-slavery mail being sent, so it was censored.
  • 1836 there was an increase in petitions to the House. Congress had unquestioned authority to abolish and/or regulate slavery in DC. People thought it was disgusting the have the slave trade going on within sight of the capital. This REALLY pissed off the pro-slavery folks. Figured the west would be next, and then them. So the solution was to table all petitions regarding the issue, to cut off debate. A group of free black women brought such a petition, and a southern congressman called them prostitutes and said they shouldn't listen to prostitutes. JQA then asks how the congressman had such intimate knowledge.

  • “Gag rule,” 1836-44—dictates that there is no discussion of slavery in DC by the elected representatives of the US.

c  “… the whole right of petition is but a vain illusion and a mockery.” –Daniel Webster on the gag rule, and he was far from an abolitionist and was a true compromiser

d  Lynching--Before the civil war it was directed at subversive pro-slave whites

A  The Range of Anti-Slavery Constitutionalism

i  Most radical: Garrisonian—Constitution as a “covenant with death”

  a  Garrison was a radical who was critical of the constitution itself and was very driven by his Christian faith.
  b  When he read Madison's notes it became clear that the protection of slavery in the constitution (under their reading) was there for a covanent with death. There was no legitimacy for slavery under the constitution, and if people insisted the constitution was legitimate, they were wrong. He burned it in public.
  c  So violent breaking of the law is legitimized by a higher law.

i  Slavery unconstitutional, but …

  a  Constitution was not intended to preserve slavery forever, but that it had been politically corrupted by the slavocracy.
  b  They thought the fed had the right to abolish slavery--5th Amendment Due Process grounds, as well as a penumbra of other rights that could be adduced to show that the constitution was a legit document in which you could find justification for the federal abolish of slavery.
  c  Fredrick Douglas fell into this camp (he really didn't get along with Garrison).

i  “Free Soil” (“Free Soil, Free labor, Free Men”): no Federal authority, but …

  a  Congress had no authority to end slavery in the states but that it did have the authority to prohibit slavery in the territories of the west.
  b  This group gradually merges with the second group to build a broader coalition

A  Judging and the Rule of Law--

i  The Rule of Law is the Rule of Slavery--Pro-slave saw anti-slave movements as an attack on the rule of law

  a  First, the federal compact is supposed to be a loose compact of states that doesn't have anything but the loosest authority over the states.
  b  Second, Slavery is property PERIOD, and the fifth amendment protects property under due process, and therefore property rights (the most sacred rights) are being attacked.
  c  Third, slavery is a domestic/private institution of the household, and an owners authority over his slaves is basically the same as his authority over his kids/wife/servants. So abolition is a dangerous social phenomenon. The parallel women's suffrage movement? “If you are opposed to slavery you should not let your husband silence you.”

  i  The question of how the rule of law applies is tossed into the hands of judges.

    a  *Commonwealth v. Aves*, 35 Mass. 193 (1836) (“Med’s Case”)
• Woman from NOLA travels to Boston for the summer to visit her father, Aves. She brings with her a six year old slave girl named Med. Boston Female Anti-Slavery Society finds out about this. One day a member of the society asks for a writ of habeas corpus to free Med from illegal slavery. Application says Med is free by the laws of MA. Aves says Med is a slave under NOLA law, and comity requires MA use NOLA law since she's only there temporarily. Comity is the doctrine that one jurisdiction will recognize another's law as a courtesy to facilitate communication/trade/etc btwn the states.

• Habeas Corpus? Lemuel Shaw, CJ Shaw decides for Med.

• Somerset?–British West Indies slave case
• Comity? Its a courtesy and can't apply in this type of case. It applies to property rights and commodities only.

b The Retreat into Formalism—ironic since normally formalism is immoral; but it cuts both ways. Both sides of the issue used formalism to avoid the larger moral issues.

• “However abhorrent it may be to keep these persons in prison, or to view them in the light of property, and however desirous the court might be that they should all be set at liberty, they must not permit their private feelings to govern them in deciding the case before them.” – Thompson, J, in refusing habeas corpus to Amistad rebels, 1839, at US Circuit Court.

• Anti-Slavery States’ Rights and Strict Construction: Fugitive Slave Clause (Art. IV, Sec. 2, cl. 3) Any person escaping from one state into another. Opponents would say the word “escape” should be very narrow. So it shouldn't apply if they didn't have to exercise force to escape.

• expresio unis est exclusio alterius
• Matilda’s Case (1836)
  • Walked off a vessel into Cincinnati, so they argued that she hadn't escaped.
  • Argument didn't fly in court, and it couldn't be appealed to the federal level, because she was quickly sold to someone in NOLA.

A Prigg v. Pennsylvania, 16 Pet. 539 (1842)

i Margaret Morgan, Edward Prigg
  a Margaret's owner allowed her to wander off and escape from MD to PA.
  b Crosses the border into PA to marry a former slave, and gives birth to 2 children.
  c 1842 the family changes its mind and wants their slave back. So they send Prigg, a slave catcher, after her.
  d Pennsylvania Personal Liberty Law of 1826—Is it constitutional? Does it place an undue burden on recaption? Is there an issue of exclusive federal jurisdiction in this subject area? Does federal law preempt?
  e MD agrees to extradite Prigg back to MD to stand trial under the PA Personal Liberty Law, b/c they want to quickly get to SCOTUS to settle the matter once and for all.
  f There are seven separate SCOTUS opinions. Majority was basically saying it was ok to take Margaret back, but on what ground we don't know.

g Bottom Lines Constitutionally
• Story as “Slave-Catcher-in-Chief” of New England?
• Taney’s concurring opinion—took Story's opinion, distorted it, and extended it.
• Federal Fugitive Slave Act of 1793 declared constitutional
• PA Personal Liberty Law is unconstitutional as interfering with the operation of federal law
• Other states ought to aid in recapture, but the federal government can't compel a state official to participate in state recaption if the state does not want him to.
• States can bar their officials from taking part in the recaption of slaves.
• The whole structure of Fugitive slave recapture will collapse if there is not a vast federal mechanism of slave recapture in the states paid by the federal government not dependent on the states and in defiance of the states wishes.
• So of course states started to ban their officials from participating

A Fugitive Slave Act of 1850

i “This filthy enactment was made in the nineteenth century, by people who could read and write.” – Ralph Waldo Emerson (how could anyone who wasn't an illiterate barbarian pass this?)
ii “There is a higher law than the Constitution!” – William S. Seward
iii “There is no higher law.” – Daniel Webster
iv In the northern states this was 10xs more outrageous than anything that has ever been said about the PATRIOT Act is today.
v Any white person could pick up any black person and send them back to slavery. No warrant is required, and the captive can't offer any evidence of freedom. No habeas corpus could be brought. It was expressly denied.
vi The Act does begin to create federal officials to enforce the fugitive slave act who could come to the aid of a slave recaptor and command the formation of a posy among bystanders to assist.
Obstruction of recaption or rescue of a slave was punishable about a fine of $1000 and 6 months in jail.

The Commissioners did have to certify the recapture, and if they did so, they were given a $10 fee for doing so. If upon application they refused a certificate they get $5. So if they call him/her a slave, $10, if they say no, they get $5.

A Dred Scott v. Sandford, 19 How. 393 (1857)

i Dred Scott’s personal odyssey; sale by Peter Blow to Dr. John Emerson; marriage to Harriet Robinson, 1836. Dred Scott is sold to Emerson. Emerson leaves for his military posting in IL (free state); then to what is now St. Paul, MN and well he’s there he meets another slave (Harriet Robinson) and they marry. This area was a free territory according to the MO compromise.

ii 1843: death of Dr. Emerson, had brought the Scotts to St. Louis, MO. His widow is Irene Emerson.

iii Dred and Harriet then sued for their freedom. They sue under the common-law precedent: “once free, always free.” In Rachel v. Walker, Walker took Rachel to free soil, and by legal domicile on free soil Rachel was a free person. Comity would only apply for transients.

iv 1846: Scott v. Emerson, 1846 (St. Louis [County] Circuit Court; mistrial)

a Disease Pandemic leads to a ton of delay after the mistrial

b i 1850: Scott v. Emerson, 1850 (St. Louis [County] Circuit Court)

A Beginning of elected judges in MO is in 1850

b i 1852: Scott v. Emerson, 15 Mo. 576 (1852) (Missouri Supreme Court);

a “Times are not now as they were….Since then not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequence must be the overthrow and destruction of our Government. Under such circumstances, it does not behoove the state of Missouri to show the least countenance to any measure which might gratify this spirit.” -- William Scott

b This is because the Mo. Sup. Ct. was elected. They completely ignored the Rachel precedent

i Appeal to USSC? Strader v. Graham, 10 How. 82 (1851) is a freedom suit involving black musicians who got off a boat in OH and just kept on walking, and the owner of the boat was sued. This suit was settled with comity. The KY court was justified in its rejection of comity that would have conferred freedom on the black musicians. So the Scotts would lose if they appealed to SCOTUS.

ii 1854: Scott v. Sandford (Federal Circuit Court); Robert Wells, J.

iii Political Atmosphere, 1856

iv Attorneys for Sanford: Reverdy Johnson, Henry Geyer

v Attorneys for Scott: Montgomery Blair, George Curtis

vi Use of Strader? Draft opinion by Justice Samuel Nelson

vii Strategy of Justice James Wayne

viii Justice John Catron and President-elect Buchanan

ix Decision, 6-7 March 1857: the bombshell

a “A conspiracy has been entered into of the most treasonable character; the justices of the Supreme Court and the leading members of the new administration are parties to it…. The moment this conviction takes possession of the public mind, there is an end of the Supreme Court; for a judicial tribunal, which is not rooted in the confidence of the people, will soon be regarded as an authority overturned…..” --- New York Evening Post, March 7, 1857.

b “It is true that Dred Scott is descended from Africans and is black, while we are descended from Europeans and are white; but ‘the rights of Human Nature’ know no distinction founded on this difference of origin and color…. We rest for the security of our rights, then, not on the fallible and fickle breath of any casual majority, whether embodied in a constitution or not, but on the firm basis of Eternal Justice…..” -- New York Tribune, March 25, 1857.

i The Rule of Law in Crisis: “…our progress in degeneracy”

ii “A house divided against it self cannot stand.’ I believe that this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved—I do not expect the house to fall – but I do expect it will cease to be divided. It will become all one thing, or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward till it shall become alike lawful in all the states, old as well as new, North as well as South.” -- Lincoln, at Republican State Convention, Springfield, June 16, 1858

A Despotism or Anarchy?

B Fear of “Slavocracy”

i “I am not a Know-Nothing…. How could I be? How can anyone who abhors the oppression of Negroes be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation we began by declaring that ‘all men are created equal.’ We now practically read it ‘all men are created equal, except
Negroes.’ When the Know-Nothings get control, it will read ‘all men are created equal, except Negroes and foreigners and Catholics.’ When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty – to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.” -- *Lincoln, to Joshua Speed, August 24, 1855.*

ii “There is no grievance that is a fit object of redress by mob law.”--Lincoln, 1838

A Preston Brooks and Charles Sumner, 1856

i “I shall arrange for emigration to some country where they have a government. I would rather join the Comanches; I will never live under a government that has not the power to enforce its laws.” -- *A Congressman, at secession*

A An “Excess of Democracy” in the Free States?

i “It has long been a grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies.” – *Lincoln, to a group of well-wishers, November 10, 1864*

ii “Individualism” (Tocqueville)

iii Urban growth and disorder, 1830-60

 a Boston: 40,000 to 178,000
 b NY: 515,000 to 805,000

i Social Institutions? “… no sovereign, no court, no personal loyalty, no aristocracy, no [established] church, no [established] clergy, no army, no diplomatic service, no country gentlemen, no palaces, no castles, no manors,… no great universities nor public schools… no literature, no museums, no political society.” – *Henry James*

A Recourse to Revolutionary Recommitment

i “Fellow citizens, we cannot escape history. We of this Congress and this administration will be remembered in spite of ourselves…..In giving freedom to the slave, we assure freedom to the free…. We shall nobly save or meanly lose the last, best hope of earth.” – *Lincoln, Second State of the Union Address, December 1, 1862*

ii “Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.” – *Lincoln, Gettysburg Address, November 19, 1863*

A Constitution as Permanent: “It is safe to assert that no government proper ever had a provision in its organic law for its own termination.” – *Lincoln, First Inaugural, March 4, 1861* [Texas v. White, 74 US 700 (1869)]

B The Contest for Legitimacy: “In war, the laws are silent.”

C Reorganization of Supreme Court?

i Abolition? (Sen. John Hale, NH)

ii Expansion?

iii SCOTUS as “the most enlightened judicial tribunal in the world” – *Lincoln*

iv SCOTUS as “the last entrenchment behind which Despotism is sheltered ” – *Chicago Tribune*

v Judicial Reorganization Act of 1862

 a 9th Circuit (MS and AL) population 2 million; 7th Circuit (OH, IN, IL, MI) population 6 million.
 b 2nd Circ: NY, CT, VT, compared to all 5 Southern Circuits combined

i 10 Circuits organized

A Appointment of Justices?

i John Campbell (AL)

ii James Wayne (GA) and John Catron (TN)

iii Peter Daniel (VA) and John McLean (PA)

iv Noah Swayne (OH), David Davis (IL), and Samuel Miller (IA)

v Stephen J. Field (CA)

vi Salmon P. Chase (OH)

A The “self-inflicted wound”? (Hughes)

B Claiming the high ground of legitimacy: *[See Davis’s Address to Provisional CSA Congress and Lincoln’s Address to US Congress, on Reserve]*

C Chronology:

i February 7, 1861: CSA provisional Constitution

ii March 11, 1861: Permanent CSA Constitution

iii April 11-13: Attack on Ft. Sumter

A War Powers – Blockade of South after attack on Ft. Sumter

i Lincoln declares “insurrection,” April 15, 1861, and blockade April 19

ii Congress declares state of insurrection, July 13, 1861.

 a *Prize Cases*, 67 US 635 (1863)

 * Taney: Lincoln’s “personal war, not a legally declared war”
 * Majority opinion by Robert Grier
 * War: de facto or de jure?
• “... civil war is never proclaimed \textit{eo nomine} against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know”

A War Powers: Habeas Corpus.

i Uncertainty about “rules of war”
   a International law?
   b “Martial law” or “military law”?
   c Application only in seceded states?
   d Baltimore, 1861:
      e John Merryman’s recruiting: “treason”?
         • Article I, sec. 9, cl. 2: “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.”
         • \textit{Ex parte Merryman}, Fed. Case No. 9487 (1861)
         • Merryman in May of 1861 had been recruiting insurgents to fight the US soldiers who were on their way to rescue Washington DC. He was imprisoned. His lawyer applies for a writ of habeas corpus, which Lincoln had suspended. Tawny issues the writ. The writ was taken to the fort and rejected by the military officer in charge, who had been telegraphed by Lincoln. The point Tawny makes is that the suspension of habeas corpus is unconstitutional. This is before Congress declared a state of insurrection in July of 1861.
         • “Privilege shall not be suspended” unless rebellion or invasion. Its in Article I, so its a congressional power and the president doesn't have the right to suspend habeas corpus.
         • Ultimately Merryman was indicted for treason, he was released on bail, and the case was dropped after the war.


i MO had various military commissions and a bloody guerrilla war between southern sympathizers and union purists.
ii Plotted to assault a prison where southern soldiers were being held prisoner and free them.
iii Was arrested by the military, who refused to give him up.
iv Issues are:
   a Did the military have jurisdiction over Milligan in Indiana where civil courts were functioning?
   b Would reconstruction have to entrust to civilian courts the responsibility to enforce civil rights legislation?
   c 9-0 vote says the military doesn't have jurisdiction.
   d Davis, J: Constitution as “a law for rulers and people, equally in time of war and peace” (concurring opinion)
ii Chase, J: Statutory authority of Congress—habeas corpus act did provide that you have to release individuals to civilian courts and you could only hold them with grand jury indictment. If Congress wanted to allow military jurisdiction and trial of people for treason and making war against the United States it has the authority.
   - Context: Reconstruction Act of 1867?
iii

I Lecture #30 -- The Law of Self-help: Vigilantism And Self-Defense

A The Reconstruction of Law and Order

i Wartime Guerilla Conflict
   a Lee rejected this firmly, completely, and immediately, but his voice was not the only voice.
   b Ineptitude of officers
      a When you study the battlefield operations of the Union army it is unbelievable how many young people died because the commanders were corrupt idiots. Look at Fredricksburg. It was a killing field.
      b Don't forget, this was the first war where photography was available. Most photography required people to be still. Well, the dead are the most still. So most of the photos are of the dead. This got to the public awareness and created disillusionment. Somewhere around 600,000 dead.
   i Corruption and Profiteering
      a Haliburton has a long line of predecessors.
      b Tons of people died from poison meat.
   i Panic of 1873
      a huge economic collapse
      b adds to the sense of urban disorder
      c called the first great depression
      d gets worse because the industrial order makes people dependent on wages and salary. This leads to terrible labor violence.
   i Collapse of Law and Order?
      a Demobilized norther soldiers found it impossible to get jobs after the war.
      b 1866 2/3 of all the men in jail in the northern states were union army veterans.
      c Veterans know how to shoot a gun and how to live off the land, so they become a wandering population of
Huge problem sprang from the fact that many people went into the army straight off the boats from places like Ireland, and never had a regular life to go back to. So there was a creation of private police forces. Think rent-a-cops with heavy artillery, who protected factories. In the South you got a renewed support for vigilantism, especially in the form of the KKK. Lynchings went WAY up, of both blacks and whites.

A The West: Cultural Baggage and the Moral Economy of Justice

i Historical Figures

a James Butler Hickok (1837-76) “Wild Bill” (name given to him by a woman)
- Grew up in northern Illinois in an abolitionist family
- Father aided and assisted in the underground railroad.
- Worked in the 1850s before the war with a stagecoach company as security
- was a union spy in the west during the war
- After the war he became a lawman who was involved in an episode in Springfield, MO in a walk-down (gun dual) against a confederate veteran. When brought to trial for murder, the judge instructed the jury in the law that if they found that Hickok had not avoided the fight, he was guilty. No self-defense. But, they acquit anyway.
- Then goes out the Abaline, KS, becomes a lawman, and helps a the town with their problem of confederate vets turning the town into a town of brothels and beer halls. Another walk-down where he killed a confederate vet.
- He represents this new commercial business order against a society in the west that had been attractive to Southerners.

b Wyatt Earp (1848-1929)
- Youngest of four brothers—Virgil, James, & Newton all fought in the Union army and were from N. Illinois. One of them was wounded.
- Goes to Lamar, MO and becomes the town policeman. Wife died tragically and suddenly and he went on a one year drinking binge, and woke up in Tombstone, AZ.
- Remarries in Tombstone. Meets the founder of the newspaper who was a graduate of Rutgers. He met Indicot Peabody who was a Harvard grad who eventually founds Groton Academy and taught Theodore Roosevelt. The head of the grand central mine was a dartmouth grad, and there was another yale grad in charge of a mine.
- 1881—Gunfight at the O.K. Corral. Earp and his brothers try to disarm a group of anti-business gunmen.
- Earp leaves Tombstone and goes to Alaska and makes a fortune in real estate and classy saloons (think dude ranch spas). Befriends Tex Ricard who eventually goes back to NY and builds Madison Square Garden.
- Earp gets involved in the movie industry in the 1920s (Tom Micks).

c Jesse James (1847-82)
- Was involved in train robberies at the age of 15
- Was from MO
- Never got convicted of anything, and neither did his brother because he was seen as a hero to southerners.

i Kernan, “The Jurisprudence of Lawlessness” (1906)--WILL BE ON THE FINAL

a This is all about the conflict between the common-law idea that self-help should be ignored and the notion of self-help/personal honor/exercise of personal violence in defense of one's own rights, either in competition with or in defiance of the State.

b Writes about this as a lawyer concerned about the erosion of the rule of law, but as a Southerner he recognizes and is sympathetic to those who result to personal violence. He calls it an unwritten law.

c Juries seem to adhere to the jurisprudence of lawlessness via jury nullification. This law is recognized by courts because juries acquit when they should be convicting.

d Male honor

e 10 Laws
- Any man who commits rape of a chaste woman should be killed by his captors, so long as there are three of them, and they may use a cruel and unusual method.
- Any man who commits adultery may be put to death with impunity by the injured husband, who gets to pick the method of execution.
- Any man who seduces an innocent girl may be shot or stabbed to death by her or any near relative, and it may be done in the back.
- If you say something against a woman's chastity she can shoot you, her husband can, or her family. He
gets the opportunity to apologize or prove he didn't say it.

- Code of honor
- Fair fights = acquittal
- Presumption of innocence of livestock.
- In all civil suits by natural persons against corporations, the corporation is presumed liable and can only overcome this by preponderance of evidence.
- Employee suing employer for personal injury shall always recover damages unless employer shows want of liability beyond a reasonable doubt.

f Points out that law number one was necessary so the victim wouldn't have to testify in gory detail about the sexual assault. His solution is that the victim should be allowed to testify *in camera* just with the judge and two attorneys.

i Rejecting the Common Law

a *Erwin v. State*, 29 Ohio 186 (1876)
   - Under common-law in order for a killing to be justifiable in self-defense there are two requirements
     - (1) must be to prevent the death or serious injury of the person who uses the force in defense
     - (2) Duty to retreat (retreat to the wall)
   - Landowner who's land is being sharecropped by his son-in-law. Erwin won't let son-in-law enter a tool shed. Son-in-law is carrying a farm implement and refuses to obey. Erwin shoots the son-in-law.
   - Judge gave the common-law instruction to the jury. The jury convicts of capital homicide, but the case is reversed on appeal because the instructions given were incorrect.

b *Runyan v. State*, 57 Ind. 80 (1877):
   - Disabled Civil War vet/democrat
   - Election of 1876 was very close. Tilden got more votes than Hayes, but Hayes wins. While the election returns were coming in, Runyan got into a conflict. His cheering for the democrats got his republican neighbor the strike him. Runyan pulls out his gun and shoots the neighbor.
   - Stands trial for murder and is found guilty of manslaughter, & sentenced to 8 years for not retreating. This is fine under common-law, and is how the judge instructed the jury.
   - Overturned at Indiana Supreme Court. Reason is that the trial court was wrong on the law as it is now recognized by the general drift of American authorities.
     - "ancient" common law as "greatly modified in this country, and has with us a much narrower application than formerly…. Indeed, the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed."
     - defending one's honor and dignity as an individual is the cultural drift.

c "Texas Rule": Penal Code of 1856
   - Enacts statutory rule on justifiable homicide.
   - Removes the duty to retreat.
   - Removes the fear of death or serious bodily harm requirement and reduces the threshold at which a person can use deadly force in self defense. Protection of property is also good enough. Law doesn't specify the amount of property.

d Criticism? Joseph H. Beale (dean of HLS)
   - "no duty" doctrine as "brutal doctrine" and "hip-pocket ethics" or "ethics of the duelist"
   - hip pocket defense is that if the defendant sees the other person reach for his pocket it is considered justifiable to kill in self defense. There is no way of disproving this.

e *State v. Gardner*, 104 N.W. Rep. (1st Ser.) 971 (1905)--
   - "The doctrine of 'retreat to the wall' had its origin before the general introduction of guns. Justice demands that its application have due regard to the general use of and to the type of firearms. It would be good sense for the law to require, in many cases, an attempt to escape from a hand encounter with fists, clubs, and even knives, as a condition for killing in self-defense; while it would be rank folly to require when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to do great bodily harm."

f *Brown v. US*, 256 U.S. 335 (1921)
   - homicide committed in territories or on federal property is a federal issue. This is why federal marshals become so important.
   - Oliver Wendell Holmes, Jr. gets to write this opinion.
• Site of construction of a US post-office in TX. Brown has words with employee. He brought a gun with him and left it in his jacket. Got into another argument. The employee pulled a knife at Brown. Brown gets his gun out of his jacket and shoots knife guy dead. Gets convicted.
• Holmes’s opinion overturns the conviction.
• “Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in Coke … and elsewhere have a tendency to ossify into specific rules without much regard for reason…. The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with nature. Many respectable writers agree that if a man reasonably believes that he is in imminent danger of death or grievous bodily harm from his assailant he may stand his ground and that is he kills him he has not exceeded the bounds of lawful self-defense….Detached reflection cannot be demanded in the presence of an uplifted knife.”
• Holmes makes a social darwinist/natural law argument.
• Self help that reflects a distrust of the state.
• TX rule applied

Oliver Wendell Holmes, Jr. (1841-1935)

The Common Law (1881): “The life of the law has not been logic; it has been experience”
Suicide special—spurned male lover will confront his former girlfriend and her new lover/husband, and would kill both of them and himself. The six-shooter made this possible.

I Lecture #30: Attorneys and Physicians at Odds: Expert Testimony, Medical Malpractice, and the Question of Mental Competency

A Clash of Professional Goals in Forensic Medicine: Attorney v. Physicians
i “Whole truth” v. Complexity: “…medicine is not an exact science.” – JAMA, 1892
ii “Regulars” v. “Irregulars”
iii “feelings of animosity” to “usurp the place of a conscientious regard for the truth, and the witness-stand becomes the scene of professional collisions in which ignorance generally triumphs.” -- American Jurist, 1841.
iv “It is a duty of a witness on the stand to state the truth. It is the business of legal counsel to distort and suppress the truth, except so far as it suits their own purpose.” – a Boston physician, on murder testimony, 1851
v “The medical man alleges that, on the stand, he is liable to be browbeaten by ingenious and unprincipled counsel – to have his opinions misrepresented by the demanding of a degree of accuracy which is impossible --- or be entrapped into statements seemingly contradictory by artfully devised questionings …. The lawyer is regarded by the medical practitioner as a species of grand inquisitor …. In a word, a doctor is apt to look upon a lawyer as his natural enemy, against whom his only defence is that of the hare against the hound, viz., flight.”

A A Pro-Plaintiff Culture?
i The force of religion in politics
ii Acceptance of the Contingency Fee Contract
   a Champtery and “oppressing possessors”
   b Doctrinal changes: exceptions to common law rules
A The Rise of Medical Malpractice
i English common law: “neglect or unskillful management”
ii 1830-60: 950% increase: why?
iii Tort or contract?

A Mental Competency:
i Testation
   a Richard “Crazy” Norton, 1732
   b John Randolph of Roanoke, 1833
   c Henry Parish, 1856
A Involuntary Commitment: Elizabeth Ware Packard
i “Married women and infants, who, in the judgment of the medical superintendent (meaning the Superintendent of the Illinois State Hospital for the Insane) are evidently insane or distracted, may be entered or detained in the hospital on the request of the husband of the woman or the guardian of the infant, without the evidence of insanity required in other cases.” – 1851 Ill. Laws 98, (“Charities”)
ii “…I will that you know, that Christ is the head of every man: & the man is the woman’s head.” -- Corinthians
iii “Yes, to all citizens it does defend this right. But you are not a citizen: while a married woman you are a legal nonentity, without even a soul in law. In short, you are dead as to any legal existence, while a married woman, and therefore have no legal protection as a married woman.”
iv “mailbox laws, due process”
A Criminality: actus reus, mens rea.
i Bracton (13th C): “wild beast (furiosus) test: “not far removed from the brutes.”
Coke (17th C): mens rea as “no power of mind at all”

“Moral Insanity” -- Isaac Ray, *A Treatise of Medical Jurisprudence* (1838): “The existence of insanity is not always proved by the presence of any particular symptom, or even any group of symptoms, but rather by changes of mind or character, which can be explained on no other hypothesis than that of disease…. I have no wish to conceal any difficulty which the subject may present. Science is full of difficulties…”

1843--Sir Robert Peel, PM; Robert M’Naghten
a The Queen against Daniel M’Naughton, 4 *State Trials* 847 (1843)

b Forbes Winslow, of *Plea of Insanity in Criminal Cases*: evidence as “sufficient to show that this unfortunate man at the time he committed the act was labouring under insanity”?

c “McNaughton Rules”: “at the time of the committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”

A American Reception and Extension:

i *Commonwealth v. Rogers*, 7 Metc. 500 (1844): “…the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.” – Lemuel Shaw

ii The Daniel Sickles Murder Case, 1859
a Philip Barton Key
b Edwin M. Stanton – “…the killing was the result of an uncontrollable frenzy.”

c “…the jury are to judge how far insanity exists, strengthened by evidence of acts such as usually characterize derangement of mind, if proved.”

d “We mean to say not that Mr. Sickles labored under insanity in consequence of an established mental permanent disease, but that the condition of his mind at the time of the commission of the act in question was such as would render him legally unaccountable, as much so as if the state of his mind had been produced by a mental disease. In other words, the proposition we argue to the Jury is this: It is no matter how a man becomes insane; Is he insane? That is the question. Whether it results from disease of the mind or body or sudden provocation, it is perfectly immaterial, and the privileges of accountability attach as much in the one case as in the other.”

i The Laura Fair Murder Trial (1871)

a A.P. Crittenden

b “temporary insanity”: mind in a “state of semi-unconsciousness,” and thus a “nonvolitional” act caused by “hysterical mania” due to “anteversion of the womb”

i *State v. Pike*, 49 NH 399 (1869)

a “…insanity has been for the most part, a growth of the modern state of society. Like many other diseases, it is caused, in a great degree, by the habits and incidents of civilization.” – Charles Doe

A Conflict: Etiology or Responsibility?

i Social conservatives

ii Social progressives/liberals: biological determinism of “criminal anthropology” (Cesare Lombroso)

iii The “insanity dodge”?

a Defendant as “cunning, shrewd, active; he may deceive the best of men constantly; he may have no delusion whatever, no disease, only this propensity, this thieving; and out of all this shall we originate the word kleptomania, and call him a lunatic?” – John Gray, editor, *American Journal of Insanity*, 1878

b Intra-profession conflict

A Let the jury decide(?): The Jury, Expertise, and the Adversarial System

i Early jury concept: “self-informing” – “It is not only … [a juror’s] right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.” – John Adams, 1771

a *Georgia v. Brailsford*, 3 US 1 (1794)

b *Sparf v. US*, 156 US 51 (1895)

A The place of the “expert”

B Limiting the jury

i For “the jury to decide, where doctors disagree”? “It is just because they [jurors] are incompetent for such a task that the expert is necessary at all.” – Learned Hand, 1900

A Jury as “the very palladium of free government” – *The Federalist*, #83 (Hamilton)

B “I do not know what a palladium is, having never seen a palladium, but it is a good thing no doubt at any rate.” – Mark Twain, *Roughing It* (1872)

C “The jury system puts a ban upon intelligence and honesty,” preferring “idiots, blacklegs, and people who do not read
“...the process of impaneling a New York jury, in a notorious case, is apt to consist in a search for twelve extremely illiterate or half-witted men.” — The Nation, 1895

“... the jury find themselves suddenly raised to an exalted position with no other qualification than that of profound ignorance of the case in court, coupled with general stupidity on all other questions.” — JAMA, 1906

Solutions?

a Abolition: “You might as well call twelve men to the bedside of a sick man....”
b Tests
c Special jury: “of good character; of approved integrity; intelligent; of sound judgment; able to read and write the English language understandingly; and well informed” — Laws of the State of New York, 1896, Ch. 378. Panel of judges
d Majority of 8 or 9

Reform of Expert System

a Continental Procedure: Neutral commissions
b Judicial gatekeeping
c “Leeds method”
d L. Hand proposal
e Experts limited to 3 per side (Mich, 1905)
f Experts with NO JURY present; panel’s assessment to jury, “as a ruling, parallel to that of a judge on a point of law.”
g No cross-examination of experts: “the whole effect of the of the testimony of an expert witness may sometimes effectually destroyed by putting the witness to some unexpected and offhand test at the trial, as to his experience, his ability and discrimination as an expert, so that in case of his failure to meet the test he can be held up to ridicule before the jury, and thus the laughter at his expense will cause the jury to forget anything of weight that he has said against you.” – Francis L. Wellman, The Art of Cross-Examination (1904)

a “psychopath” and “sociopath” both acceptable as defenses
b “…an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”
c Common understanding: “product” ~ “proximate cause” in civil cases
d DC local courts: % of successful pleas:
   • 1954: 0.4%
   • 1960: 6.1%
   • 1961: 14.4%
i Backlash: US v. Brawner, 471 F. 2d 969 (1972)
a ALI Model Penal Code: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.”
b “…the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.” – ibid.


1984: Insanity Defense Reform Act

State Responses

I Lecture #32: The Medical Jurisprudence of Sexuality and Reproduction

A Shared Optimisms, Physicians and Attorneys

i “judicial medicine” --medical knowledge that is used in the courtroom.
ii “medical police” --police power applied to medical questions (public health, sanitary regulation, quarantine, etc)

A Thomas Cooper, University of Pennsylvania: Tracts on Medical Jurisprudence (1819)

i English trained barister who flees to the US during English revolution b/c of his radical politics
ii Made a judge right away, but he resigns to become a professor of chemistry and mineralogy at U Penn. He then goes to U of VA to teach medical jurisprudence, and creates this tract.

A James Stringham, Columbia University Prof. Of Chemistry. When his class notes are organized and published, it is dedicated to James Kent. This is because Kent deals with chancery, which deals with the weak and powerless. So this is natural. He deals with the following issues

i Virginity/Impotence
ii Rape
A Theodoric Romeyne (T.R.) Beck:

i. *Elements of Medical Jurisprudence* (1823);

ii. *An Inaugural Dissertation on Insanity* (1811).

iii. Goal of these works is the enhancing of individual personal liberty by confronting those forces that impose a loss of liberty on an individual. Death is biggest deal, so he spends a lot on homicide.

a. Challenging the law of homicide:
   - Originally was a question of whether a particular wound was the cause of death.
   - Coke: “when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being and under the king’s peace, with malice aforethought, either express or implied.”
   - Blackstone: “that the party die within a year and a day after the stroke received, or death administered”
   - Beck says this is all wrong. Thanks to him and others we see the abolition or replacement of the “coroner” with a “medical examiner.”

b. Challenging the law of rape:
   - Common Law rule: emission by male; physical resistance by female.
   - If a pregnancy resulted, it was proof that she consented. There was a medical belief that a woman cannot conceive unless she is a willing participant in the sexual act. And if there is no pregnancy, its hard to prove emission. So no one hardly ever got convicted.

b. Beck: “The forcible use of another’s body was the real crime.”

c. “Attempted rape” --Prosecutors started doing this, b/c it was a lesser charge that was easier to prove.

d. Amos Eaton, 1820s (doctor/medical writer)
   - Penetration as act of force in itself a crime
   - Shouldn't have to be Physical proof of struggle
   - Poisons and opiates and intoxicants are more common and can be used to render a person unable to resist and unaware of the need to resist. “Roofies.”
   - “[F]ear or terror may operate on a helpless female – she may resist for a long time, and then faint from fatigue, or the dread of instant murder may lead to the abandonment of active resistance.”

e. Success at reform?
   - Illinois, 1819: “…that so much of the law regulating the evidence incase of rape, as makes emission necessary, is hereby repealed.”
   - Indiana follows. Other jurisdictions the courts solve this problem. And more and more states were prosecuting attempted rap.

A Pregnancy and Paternity

i. Stringham, 1815: “…we know little of the Phenomenon of Pregnancy.”

ii. Posthumous legitimacy? “It is well known that in cases of pedigree, the rules of evidence have been relaxed, to an extent far beyond what has been applied to other cases. This relaxation is founded upon principles of convenience and necessity.” – Joseph Story, in *Chirac v. Reinecker*, 2 Pet. 613 (1829).

iii. Some Hypotheticals

A Conception, Contraception, and Abortion

i. Contraception became successful for the first time in the 19th Century.

ii. US birth rate:
   - a. 1800—7.04 births/female
   - b. 1860, 5.21 births/female
   - c. 1900, 3.56 births/female

i. Why the decline?
   - a. Coitus Interuptus starts being used. But there are lots of negative externalities
   - b. French envelope—sheep intestine, or a boric acid soaked sponge were used before this time
   - c. 1837—FIRST COMMERCIALLY USABLE CONDOM—WOO HOO—Thanks Charles Goodyear! First ones were comparable to a snow-tire in texture
   - d. 1846 invention of cold cure of rubber makes condoms a lot better.
   - e. 1850s we see people talk about the rise of sales of “questionable rubber goods.”
   - f. Infanticide was big too.
   - g. And then, there was abortion, which became much more common in the 19th Century. Herbals were used to induce violent abdominal cramps that would terminate a pregnancy.
Backlash against declining birth rate--Charles Knowlton,
   a  *The Fruits of Philosophy; or, the Private Companion of Young Married People* (1832)--taught people how to use various forms of birth control
   b  Writes this for married couples, because they were using contraception more than anyone.
   c  He was prosecuted for obscenity.
   d  Jury instructions were “did he publish this? If so, then guilty.”
   e  Convicted and served 23 months hard labor.
   f  The judge then ordered a copy of the book for his own family planning purposes.
   g  He was then prosecuted twice more, but the prosecutors gave up.

A  War on Contraception: The Comstock Law, 1873:
   i  This occurred in part because of who was using contraception and who was getting abortions. There is a growing fear that the white protestant population is not reproducing fast enough to keep pace with other groups in American society. Sex is for procreation, not recreation. Religious ideas fuck everyone again.
   ii  Anthony Comstock,
      a  “special agent” for USPS
      b  made it his personal crusade to stamp out birth control in the United States.
      c  Traveled all over the US doing sting operations. Got people to order contraception through the mail. The use of the mails for the sending of information about contraception was illegal.
      d  In one year he made 55 arrests, got 22 convictions. He would entrap physicians as well.
   i  “Sell or lend, or give away, or in any manner exhibit … publish or offer to publish in any manner, or … have, for any purposes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing illegal abortion, or … advertise same for sale….” – *Congressional Globe*, 1873, p. 297.
   ii  State laws
      a  by 1924, 24 states had laws modeled on the federal act.
      b  In 22 other states state courts interpreted obscenity as embracing contraception.
      c  It wasn't until 1930s that courts began to refuse this law (and then it was because of the depression)
   i  Repeal, 1971--Very prominent wealthy NY woman entered the port of NY and was told she couldn't enter the US because she was carrying a diaphragm in her suitcase. She wrote to her congressman, and the law was repealed.

A  Abortion: Stages of criminalization
   i  Common Law: no crime before quickening (quickening is the point at which the mother can feel the kicking of a child; usually occurs a little after 3 months)
   ii  Connecticut, 1821:
      a  anti-poisoning statute
      b  penalty was to protect women from quacks and irregulars
      c  so they only protected the life of the mother. This is the original reason for any outlawing of abortion.
      d  Other states follow this in the 1820s and 30s.
   i  Maine, 1840:
      a  removes the requirement of quickening from the criminal law against abortion
      b  This is because there was a declining birthrate in Maine, which was seen as a serious danger.
      c  There is also the issue of married couples getting abortions, and this is it. FUCKING DEFENSE OF FAMILY ASSHOLES.
      d  Professional rivalry—attack by the regulars (medically trained physicians) on irregulars, who the regulars see as abortionists.
      e  Once you have a stethoscope, the bright line of quickening is erased because it is harder to say you didn't know you were pregnant. (1920s)
   i  Why the changes?
      a  1800-30: 1/25-30 pregnancies terminated by abortion
      b  1850s-60s: 1/5-6 pregnancies terminated by abortion
      c  1860-80: 40 states and territories eliminate the requirement for quickening and Common law immunity for female gets dropped and she is subject to criminal penalties

I  Lectures #33-35: Reconstructing (and Reconstituting) the Family
   A  Cultural construction of terminology:
      i  “adolescence” – G. Stanley Hall, 1904
         a  First time adolescence was discussed
         b  gray area between childhood and adulthood
      i  “emerging adulthood” – 1990s
prolonged adolescence

think college—your an adult but not economically self-sufficient

c for a while was called adultolecence

i The law attempts to draw bright-lines where society refuses to.

A What is a “child”?

i Historically, before the Revolution, the notion of what a child was was before a kid was dressed as an adult (before they wore britches. Basically, when they were toilet-trained.

ii The younger person was a younger adult who was dressed like adults (no kids clothes, no granimals)

iii For the purposes of the law this was important because being a child gave a dependent status under the authority of parents, and kids couldn't have criminal responsibility.

A What is a “family”?  

i Colonial, Revolutionary America: “The Little Commonwealth”

a To age 6: “the nurturing years”—non-rebuttable presumption of no mens rea, so no criminal responsibility.

b 7-13: “incapable, but only prima facie so”—if a person in this age group was rational and knew what he or she was doing, it was only a rebuttable presumption of no criminal liability.

c If you are going to empower and give individuals rights and responsibility, the person has to be capable of making decisions for him or herself in their self interest. The more rights the citizen has, the more you have to restrict citizenship.

A The Nineteenth Century

i Acknowledgment that the family is not always capable of protecting and caring for those who need nurturing, protection, and care, because of

a Urbanization—family is undergoing stresses in the industrialized cities because parents are removed from the household. It also means a removal from a supportive family network. In traditional small towns, children were educated in households as apprentices (boys and girls). This is fine in a homogeneous town where values/religion are shared one family to the next. However, starting at this point, American community isn't divided between various protestant religions anymore. Instead there is a protestant/catholic gap, which is HUGE. A protestant family would never dream of letting their kid be apprenticed to a Catholic household (Pope is a tyrant). Goes both ways. This makes the older system of apprenticeship unworkable in the new society.

b Romanticism

Parens patriae expanded—The sovereign has a parental relationship with the people. This used to apply to adults, and then was killed at the Revolution. But then it is applied to those who aren't citizens, like kids.

a “Common School” (Massachusetts, 1852: age 7-14 compulsory education)—Education is vital for citizenship.

b New York, 1824: “house of refuge”—The wayward child/orphan had a place of refuge against the dissociating and corrupting influence of society around him or her. Abandonment placed children here.

c Massachusetts, 1847: “State Reform School for Boys”—Boys under the age of 16 were sent here. Prisons only incarcerated people age 16 and over up until this point. This was the first Juvy.

b Massachusetts, 1855: “State Reform School for Girls”—half prison/half school. Kids don't have rights, they have duties. Goals were:

• rehabilitation
• humiliation
• submission

e Progressive era—reformers were enlarging the role of the state to protect American ideals.

f 1960s are the first time we see children's rights.

i Age of consent

a Common law: 14/12 for sexual behavior for centuries

b Indiana,

• 1843: 17/14;
• 1877: 18/16

c “Little Mary Ellen” case (1874)

• Under the care of a legally appointed guardian (like a foster parent) but the guardian was physically abusive of Mary Ellen.

• There was no organization to plead her cause. All that could be done when her guardian was prosecuted for felonious assault was to look all over for representation. The only organization that could do it was the SPCA . . . society for the protection of animals. . . wow.

• 1882 a private child protection agency was created to take care of people like her.

i Juvenile Court movement

a Cook County, IL was the first place to create one.

b There was a special judge who was trained to be sensitive to these issues
c No juries
d Not called a defendant
e Separate records
f Kid didn't have any rights, though . . . no right to confront, no right to jury, etc. because a child is incapable of the rationale presentation of a defense. Its like insanity.
g Special jail arrangements were created-- “Reformatory” People between the ages of 16-30 who have no priors.
i Legitimacy
a Filius nullius—child of no one. Illegitimate child didn't have any inheritance rights at common law.
b By the colonial period VA and RI had given certain inheritance rights
c by 1850 17 states were giving bastards inheritance rights
d At common law, if a couple had a kid before they were married, the kid was always a bastard. But states started enacting statutes that conferred legitimacy if the parents eventually got married. Also made more common the retention of legitimacy for kids who's parents got annulments. This is particularly important for Catholics, who can't divorce.
n Parental custody
a Common law rule—custody is held by the father, with no way to challenge this—Its all about economic patriarchy. This is incompatible with American legal change in the 19th Century.
b “Best interests” standard: “The rights of the parents to their children, in the absence of misconduct, are equal and the happiness and welfare of the child are to determine its care and custody.”
c “Tender years”--certain age of children in which their tender nature requires special solicitude in such decisions
d Lee v. Addicks, 1813
  • The Lees got divorced. They had two young girls (7 and 10) and the cause of the divorce was the wife's pregnancy by Addicks.
  • Joseph sued Barbara for divorce based on adultery, and was initially given custody of the two daughters.
  • When Barbara gave birth, she wanted to unify her kids, so she petitioned for custody on the grounds of the tender years doctrine. Considering their age they stand in need of the assistance that can be afforded best by a mother. Little girls need their mom. The court grants the petition.
  • Joseph Lee, in 1816 petitions for custody, claiming that the girls are older and reaching adolescence, and that tenderness toward them demands that they not be raised by an adulteress like Barbara (think bad role model), and the court agrees.
  • The consistent thread is the best interests of the girls.
e Backlash: “The attainment of women’s rights will prove the establishment of babies’ wrongs.”
  • Giving women rights is dangerous because they are incapable
  • Giving women rights is dangerous to the family
  • Women are elevating their own self interest over the needs of babies. They need to be denied citizenship so they can fulfill their maternal role.
n Adoption
a Common law rule: “Only God can make an heir, not man.”--aristocratic line of decent is the concern.
b American reforms—allowing a legally sanctioned stable relationship is a good thing.
  • Early use of French civil law model—Adoption was allowed but it had a high threshold. The adopting parent had to be age 50 and the adults could not have any legitimate heirs of their own, and before proceedings could be commenced the adoptive parent had to have cared for the child for 6 years.
  • “Sufficient ability” standard was then adopted. Basically, can you care for the child?
n Who may marry whom?  Racial purity and anti-miscegenation laws
i Common law rule? “Limping marriage” in British Empire
a Had to address interracial marriage because of control of Indian Subcontinent
b English whites who married an Indian would have their relationship recognized in India, but not in the British Isles.
c This is the first time the common law recognized race when it comes to marriage.
i Laws were on the books from the 1660s banning interracial marriage. But not all slave states bothered enacting such laws, because social pressures prevented such marriages.
ii Civil Rights Act of 1866
a Its only in this period we first here of misigination. Emancipation allowed this to become a reality.
b Alabama judge said anti-misiginiation law was a violation of equal protection under Civil Righs Act of 1866
c But he was overturned by a white supremacist judge who talked about the evil of introducing heterogeneous elements to a family to cause shame, discord, etc.
d The challenges to the act of 1866 led to the need for 14th Amendment.
i Fourteenth Amendment? There is supposed to be equality before the law.
ii “full faith and credit”?  
iii “Interracial marriage between Negroes or persons of color and Caucasians ... is forever prohibited.” – proposed Constitutional Amendment, 1912, by U. S. Sen. Seaborn Roddenberry (Ga.). 
iv State laws: 30, by 1952  
v *Pace v. Alabama*, 106 US 583 (1882): “The punishment of each offending person, whether white or black, is the same.” -- opinion by Stephen J. Field 
vi *Loving v. Virginia*, 388 US 1 (1967) “Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.” -- opinion by Earl Warren

A How many may marry? The Mormon challenge of polygamy  
i Church of Jesus Christ of Latter Day Saints: the “new covenant” 
ii Joseph Smith, 1830: “new revelation” and “New Dispensation” 
iii From Missouri to Nauvoo, Illinois; Smith killed, 1844 
iv 1847: Migration to Great Salt Lake Basin 
v 1849: Request for “Deseret” statehood 
vi 1850: Utah Territory—a “Theo-Democracy” 
vii 1852: Announcement of “Celestial Marriage” and “spiritual wifery”

A Other challenges to traditional marriage  
i Religious perfectionism 
ii Enlightenment anti-clericalism: “Polygamy, as I take it, is the legitimate offspring of the union of Church and State. The Church is more ... tender of the interests of believers, than the State, divorced from her, could ever be...” 
iii Communitarian free-love utopias: Brook Farm; Owenites; Fanny Wright, “the Red Harlot of Infidelity” and “voluptuous priestess of licentiousness” 
iv Anti-Catholicism and the elevation of mainstream Protestantism 
v Maria Monk “exposures” 
vi Debates over affinity marriage 
vii Parallels to the tyranny of slavery 
 a Alliance with slaveholders 
 b Republican criticism

A Morrill Act for the Suppression of Bigamy (1862)  
B Mormon defiance 
 a Legal 
 b Female suffrage: Women will “never desert the colors of the church ... In some great political crisis the two present political parties will bid for our support. Utah will be admitted as a polygamous state, and the other territories we have peacefully subjugated will be admitted also. We will then hold the balance of power, and will dictate to the country.” 
 i Poland Act (1874) 
 ii *US v. Reynolds*, 1 Utah 266 (1875) 
 a Reynolds didn’t fit the stereotype. He only had two wives that were close to his age. 
 b This case was dismissed b/c of grand jury problems. 
 i *US v. Reynolds*, 1 Utah 319 (1876) 
 a Wife who testified the first time disappeared. 
 i *Reynolds v. US*, 98 US 145 (1879) 
 a “Polygamy has always been odious among the western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of life of Asiatic and of African people.” – Waite, CJ 
 b 14th Amendment was being curtailed at this point. 
 c George Washington Biddle represented the defense. He was saying that the Morril Act, which prohibited polygamy, was unconstitutional (not because of free exercise, but b/c of Tawny's opinion in Dred Scott said the MO Compromise was unconstitutional.) 
 d Gov't argued a parade of horribles—If Reynolds were not convicted then Hindu widows would hurl themselves on the funeral piers of the dead husbands and be protected by freedom of exercise. 
 i Edmunds Act (1882) 
 a LDS were claiming “we're not married, we're not polygamists, we're just cohabiting” 
 b So this law banned the cohabiting 
 i Tucker-Edmunds Act (1887) 
 a Tried to attack the political and legal power of LDS 
 b Banned female suffrage 
 c Seized the LDS assets and applied it to public education 
 d Required you had to swear an oath not to be a member of a polygamy church to be a citizen. 
 i *Davis v. Beason*, 133 US 333 (1890)
a Probably never before in the history of this country has it been seriously contended that the punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance...” ---Field, J
  
  - Sect is like a cult, so it isn't constitutionally protected like a religion is.

i Late Corporation v. US, 136 US 1 (1890)
  
am No more polygamy for LDS.

b I Lecture#36: Race and Reconstruction, 1865-1896

A Extra-legal Violence: The Background
  
i “Regulators” in NC, Va.
  
ii Col. Charles Lynch (Beford Co., VA, 1780s): “regular though illegal trials”
  
iii “Gentlemen of property and standing” led anti-abolitionist mobs

A Aftermath of Civil War
  
i “Whitecapping” in east and Midwest, thru 1890s—way of enforcing social norms violently by non-governmental officials (beginnings of KKK). This began in small mid-western communities that had no constabulary. They would attack drunkards and wife beaters and lazy/shiftless men.
  
ii In Oseola, NE in 1893 the town was annoyed by certain young ladies, so a group of 12 people with pillow cases over their heads and they flogged the girls. All 12 were women, including the wife of the bank president.

A Differences in South: “white people’s courts”
  
i Extent: 1880-1930:
    a NE: 2 whites, 7 blacks
    b Midwest: 181 whites, 79 blacks
    c Far West: 447 whites, 38 blacks
      - cattle rustlers, felons that the small amount of law enforcement can't handle
    d South: 732 whites, 3,220 blacks
  
ii Reasons given. The Georgia example, 1882-1930:
    a The NAACP looked at why these lynchings were happened.
    b capital execution of blacks vs. number of blacks lynched:
      - Court-ordered executions: 88% for murder; 12% for rape
      - Lynchings: 41% for alleged rape; 34% for alleged murder

A Southern Resistance to Civil Rights
  
i Black Codes, 1865-66
    a Discriminatory laws stripping blacks of their civil rights, like very harsh penalties for vagrancy (if you didn't own property and have a fixed address), criminal punishment for blacks was way worse than it was for whites, etc.
    b Carl Schurz report—detailed the black codes and their effects and the degree of white resistance in the south. It was given to president Andrew Johnson (who could barely read) who refused to read it.
    c Grant's “General Order 3”: protection of “colored persons from prosecution … [for] offenses for which white persons are not prosecuted or punished in the same manner or degree”
      - President wanted to fire Grant for this, but Grant's popularity was so overwhelming that Johnson had to back down.
  
i Freedmen’s Bureau Bills, 1866—supervise transition to freedom
    a Sen. Lyman Trumbull (R, IL)--Passed a bill punish in military courts those who violate the rights of freedmen and aren't prosecuted in the state courts. It was vetoed twice, and on the third time they overcame the veto.
  
i Civil Rights Bills, 1866
    a Black Codes as having made freedmen’s civil rights “a mere abstraction recognized technically, but utterly inoperative to secure them in the exercise of the cardinal right of a freeman or citizen” – Gen. Oliver O. Howard (Howard University is named for him)
    b First time the Fed Gov't takes a role in guaranteeing the rights of individuals
  
i Fourteenth Amendment
    a Slaughterhouse Cases Limit the shit out of this
  
i Executive Complicity
    a Johnson refuses to enforce
    b Henry Stanbery, Attorney General
      - Gives an order to all law enforcement and military officers to ignore the enforcement of the Civil Rights Bills,
      - Planted news stories to generate opposition to the civil rights bills
• Interpreted the law to allow Confederate officers to rejoin the political system.

Reconstruction in the Courts?

a Court was being reconstructed too.

b Republican proposals

c Democratic proposals

d The Changing size of the Supreme Court

- 1863: 10 justices.
- 1866: 7 Justices had started to die. Johnson opposed reconstruction and was going to get the right to nominate. He nominated Stanbery. Congress responded by proposing the reduction of the court to 7. It never got down to seven.
- 1869: 9 On the last day of Johnson's term they set it at 9. Johnson vetoed it, but it ultimately passed obviously.

Ku Klux Klan Acts, 1870-71: Criminal “to band together, or go in disguise upon public highways … with intent to … injure, oppress, threaten, or intimidate,” or to prevent exercise of civil rights.

a Dead letter because of removal of federal troops from the South.

i The Civil Rights Cases, 109 US 3 (1883)

a Civil Rights Act of 1875; “Thank God slavery is abolished, but the Negro is not, and can never be the equal of the White. He is of an inferior race and must always remain so.” – Gideon Welles, Secretary of the Navy

b Dismantling of the Civil Rights Acts.

c Majority opinion by Joseph Bradley—13th Amendment—badge of inferiority does not exist; 14th Amendment is only against state action

d Dissent, John Marshall Harlan

ii Hall v. DeCuir, 95 US 485 (1878)

iii Louisville, New Orleans, & Texas Railway v. Mississippi, 133 US 587 (1890)

iv Plessy v. Ferguson, 163 US 537 (1896)

a Majority opinion by Billings Brown

• The constitution and 14th Amendment could not have been intended to abolish distinctions on color, or to mandate co-mingling. Whites are equally discriminated against by segregation laws.

b Dissent, John Marshall Harlan

• The destinies of the two races are linked, and the seeds of race hate can't be planted under the sanction of law.

Wont be responsible for anything after Part 4, race and reconstruction, so don't worry about reading. Class 36 is the last one we are responsible for. One long question 75%, identifications are 25%. Ten page total limit, double spaced.