

Judicial Power and Judicial Politics in the Early Nineteenth Century

Panelists: Alison LaCroix, Kristin Collins, Jed Handelsman Shugerman

Commentator: Maeva Marcus

Chair: Philip Hamburger

This panel considers three episodes in the development of state and federal judiciaries in the early nineteenth century, inviting a fresh look at some of the most pressing issues concerning judicial power: the meaning of the 1789 Act, federal judicial lawmaking, the relationships between federal and state courts, and the origins and meaning of judicial review. In so doing, they demonstrate the importance of this period to the development of judicial power in the United States.

Alison LaCroix's paper will examine the connections among the Judiciary Acts of 1789 and 1801, the election of 1800, and the Marshall Court's jurisprudence -- specifically, the centrality in this period of jurisdiction-centered approaches to federalism. The paper suggests that these approaches endured despite the defeat of the Federalist vision of broad judicial power upon the repeal in 1802 of the 1801 act, and that the Marshall Court continued earlier, congressional efforts to use federal courts to address the puzzle of divided authority.

Through an examination of federal courts' equity powers, Kristin Collins's paper will also consider how the federal courts navigated the competing demands of federalism in the early nineteenth century. Interpreting the directives of Section 16 of the 1789 Judiciary Act and the Process Acts of 1789 and 1792, federal courts sitting in equity developed a corpus of uniform national equity standards -- standards that offended some as "foreign law." This paper demonstrates how federal equity power functioned as a site of contest over the proper scope of federal judicial power throughout the period.

Finally, turning from federal courts to state courts, Jed Handelsman Shugerman's paper will examine the explosion of judicial review in state courts in the 1840s and 50s, and its connection to the rise of judicial elections, the decline of respect for legislatures, and the surprising turn to countermajoritarian arguments in light of these developments. His paper argues that this era was the key turning point in the establishment of judicial review as a broadly accepted institution.

"Federalists, Federalism, and Federal Jurisdiction, 1802-1835"

This paper builds on earlier work in which I argued that the period between 1787 and 1802 witnessed a transformation in American federal theory: from the focus on legislative authority that had occupied thinkers since the colonial period to a new emphasis on jurisdiction and a corresponding intellectual and institutional preoccupation with courts. Central to this narrative is the revival in the Judiciary Act of 1801 of colonial ideas of subject-matter jurisdiction. The act established broad federal jurisdiction, with its grant of "arising under" jurisdiction to the federal courts, and eased the requirements for removal of cases from state to federal court. The repeal of the 1801 act in 1802, however, curtailed these efforts to use Congress's power over lower federal courts' jurisdiction to sharpen the lines between federal and state matters.

This earlier story is one of temporary Federalist triumph. But conventional portrayals of the repeal of the 1801 act as a complete victory for the Jeffersonian-Republicans overlook the alternate path that the

Federalist vision of the federal judicial power followed after 1802. This paper seeks to correct that oversight by arguing that the jurisdiction-centered approach to federalism represented in the 1801 act not only survived the “revolution of 1800” but found a new outlet in the decisions of the Marshall Court. Marshall himself had been a key player in the debates leading up to the passage of the 1789 and 1801 acts. By 1803, with the prospects for congressional endorsement of broad federal jurisdiction all but foreclosed, the structural imperative to define Article III’s judicial power of the United States moved, with Marshall, to the Supreme Court itself. The paper thus reconceives the repeal of the 1801 act and the shift of the Federalists’ focus to the courts as neither a failure nor (only) a political realignment, but as an ongoing effort to operationalize the subject-matter-centered approach to divided authority that had preoccupied Americans since the colonial period.

Alison L. LaCroix
Assistant Professor, University of Chicago School of Law

“Federal Equity Power, Judicial Lawmaking, and the Process Acts”

Most investigations of federal judges’ lawmaking powers in the early nineteenth century focus on Section 34 of the Judiciary Act of 1789 and, specifically, the significance of *Swift v. Tyson*. This paper examines federal judicial lawmaking, but shifts attention away from Section 34, focusing instead on early nineteenth-century federal courts’ exercise of equity powers as provided in Article III, Section 16 of the Judiciary Act, and the Process Acts of 1789 and 1792.

Contrary to existing modern accounts of federal equity practice during this period, this paper argues that federal courts exercised procedural, remedial, *and* substantive lawmaking power in equity. In the devilish details of early federal equity jurisprudence, and in the rules for equity practice promulgated by the Supreme Court in 1822 and 1842, we can detect a Court that was insistent on establishing national uniform equitable norms. One way to make sense of these cases and rules is to map them on to an explanation frequently given for the development of the general federal common law during this period: the pro-commercial, pro-creditor bias of federal judges. But for several reasons this explanation fails to adequately account for the development of uniform federal equity principles, which were applied in cases involving all manner of subjects -- from fraud to charitable trusts to dower. Instead, this paper argues that the development of uniform federal equity principles should be understood partially as an effort to embolden the institutional importance of the federal courts in the expanding geographical territory of the United States -- a point that is amply demonstrated in judicial and legislative debate concerning the status of federal equity in Louisiana.

Application of uniform equity principles in federal court did not escape criticism. Despite, or because of, the Supreme Court’s repeated insistence on the application of uniform federal equity principles, detractors complained that federal equity practice imposed “foreign law” on the states (even in those states in which equity was available in the local tribunals). As such, both inside and outside the courts, federal equity became a site of contest concerning the jurisprudential and geographical scope of federal judicial lawmaking power.

Kristin Collins
Associate Professor, Boston University School of Law

“Panic and Judicial Power: Financial Crisis, Judicial Elections and Judicial Review, 1837-1860”

This paper offers a complete list (from the Founding through the Civil War) of state supreme court cases striking down state statutes. Judicial review was rare before 1840, but after an initial spike in the 1840s, particularly in New York, Pennsylvania and Ohio, there was a boom in a large number of states in the 1850s. This pattern overlaps with the sweeping adoption of judicial elections, beginning with New York in 1846 (the first major state to elect judges), and a dozen states following through 1851. The spike of judicial review precedes New York's adoption, and the boom follows it. I suggest that this era was a critical turning point in establishing the widely accepted practice of judicial review.

I argue that judicial elections and judicial review were closely related. In the 1830s and 1840s, state legislatures made disastrous spending decisions and were increasingly viewed as corrupt after the Panic of 1837 and the long depression that lasted until 1842. In the wake of this financial crisis, nineteen states called constitutional conventions to adopt new limitations on legislative power -- what I label the “American Revolutions of 1848.” One solution (begun by appointed judges) was a stronger judiciary imposing more limits on the legislature. Following this solution, another answer was a more independent judiciary, with “judicial independence” as independence from the legislature (and not from the people). Many reformers favored judicial elections precisely because elected judges would have more power and would be more likely to strike down legislation. Both solutions -- judicial elections and judicial review -- gave the court a majoritarian role in defending the people against the abuse of legislative power.

Oddly enough, it is during this period that elected judges increasingly turned from majoritarian arguments to more individual rights arguments and the rule of law. The paper will offer an explanation for this counterintuitive turn to countermajoritarianism. First, the constitutional conventions of the 1840s and 1850s turned to natural rights and rule of law arguments. Second, elected judges may have been compensating for the manner in which they were selected in order to justify their unique power. Third, I also suggest that the tensions over the professionalization of bench and bar also contributed to countermajoritarian arguments.

Jed Handelsman Shugerman
Assistant Professor, Harvard School of Law

ALISON L. LACROIX
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
773-834-7687 • lacroix@uchicago.edu

EDUCATION

Harvard University, Ph.D., History, 2007; A.M., History, 2003
Honors: John Thornton Kirkland Fellowship, Harvard University, 2005-06
Artemas Ward Fellowship, Harvard University, 2005
Charles Warren Center Term-Time and Summer Fellowships, 2004-05
Mark DeWolfe Howe Fund Grant, Harvard Law School, 2004
Richard A. Berenson Fellowship, Harvard University, 2003-04
Andrew W. Mellon Fellowship in Humanistic Studies, 2001-02

Yale Law School, J.D., 1999
Activities: *Yale Law Journal*, Essays Editor
Yale Journal of Law & the Humanities, Managing Editor

Yale University, B.A., History, *summa cum laude*, 1996
Honors: Phi Beta Kappa, distinction in the major
Activities: *Yale Daily News*, Managing Editor

EXPERIENCE

University of Chicago Law School, July 2006 – present
Assistant Professor of Law.

Samuel I. Golieb Fellowship in Legal History, New York University School of Law, 2005-06
Fellow.

Harvard University, Department of History/Core Program, spring 2004 and 2004-05
Head Teaching Fellow and Senior Thesis Advisor.

Debevoise & Plimpton, New York, N.Y., 1999-2001 and summer 1998
Associate, Litigation Department.

National Endowment for the Humanities, Washington, D.C., summer 1997
Law Clerk, Office of the General Counsel.

PUBLICATIONS

Book

A Well-Constructed Union: The Ideological Origins of American Federalism (under contract with Harvard University Press)

Articles & Essays

The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology (forthcoming, LAW AND HISTORY REVIEW)

Drawing and Redrawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty, in *Transformations in American Legal History: Essays in Honor of Morton J. Horwitz* (Harvard University Press, 2008)

Entries on *Dartmouth College v. Woodward* and *Ogden v. Saunders*, ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (5 vols., Macmillan Reference, 2008)

Drawing and Redrawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty, University of Chicago Law School Occasional Papers Series (January 2008)

The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic, 2007 SUPREME COURT REVIEW 345

A Singular and Awkward War: The Transatlantic Context of the Hartford Convention, 6 AMERICAN NINETEENTH CENTURY HISTORY 3 (2005) (peer-reviewed journal)

"Bound Fast and Brought Under the Yoke": John Adams and the Regulation of Privacy at the Founding, 72 FORDHAM LAW REVIEW 2331 (2004)

To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code, 33 HOFSTRA LAW REVIEW 501 (2004)

Book Reviews

Review of STEPHEN L. ELKIN, RECONSTRUCTING THE COMMERCIAL REPUBLIC: CONSTITUTIONAL DESIGN AFTER MADISON (2006), 26 LAW & HISTORY REVIEW 203 (2008)

Shooting Alone?: The Decline of the Civic Vision of the Second Amendment, H-LAW (www.h-net.org/~law/), February 2007 (reviewing SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2006))

WORKS IN PROGRESS

Federalists, Federalism, and Federal Jurisdiction, 1802-1835
Theories of Time and History in Constitutional Adjudication
“A Positive Passion for the Public Good”: Speech and Privacy in the Early American Republic

SELECTED PRESENTATIONS

Faculty Work-in-Progress Workshop, University of Chicago Law School, April 2008
“The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic”

American Bar Foundation Research Seminar, Chicago, Ill., January 2008
“The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic”

Columbia Seminar on Eighteenth-Century European Culture, Columbia University, September 2007
“A Positive Passion for the Public Good: Speech and Privacy in the Early American Republic”

Faculty Work-in-Progress Workshop, University of Chicago Law School, May 2007
“Theories of Union: Constructing Confederations, 1774-1777”

American Society for Legal History Annual Meeting, Baltimore, Md., November 2006
“Drawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty”

Chicago Legal History Seminar, Chicago, Ill., November 2006
“Drawing the Line: The Pre-Revolutionary Origins of Federal Ideas of Sovereignty”

University of Chicago Constitution Day Seminar, September 2006
“An Imperial Presidency? The U.S. Supreme Court and the Extent of Executive Power”
(panelist)

Colonial Society of Massachusetts, Boston, Mass., April 2005
“Imperial Precedents for Federalism in America”

Harvard University Nineteenth-Century American History Workshop, October 2002
“The Transatlantic Context of the Hartford Convention”

PROFESSIONAL AFFILIATIONS

Bar admissions: New York, United States District Court for the Southern District of New York

Memberships: American Society for Legal History, American Historical Association,
Organization of American Historians

KRISTIN A. COLLINS
BOSTON UNIVERSITY SCHOOL OF LAW
765 COMMONWEALTH AVENUE
BOSTON, MA 02215
617.353.3126 / collinsk@bu.edu

EDUCATION

YALE LAW SCHOOL, J.D., June 2000

Activities: Yale Law Journal, Editor
Coker Fellow
Yale Law Women, Executive Committee
Community Legal Services, Student Attorney
Global Constitutional Law Project, Editor

COLUMBIA UNIVERSITY, M.A. English Literature, May 1996

Scholarship: Marjorie Hope Nicholson Fellowship (full funding for Ph.D.)

OXFORD UNIVERSITY, M.LITT., English Literature, 1995

Dissertation: *Merchants, Moors and the Politics of Pageantry*
Scholarship: Shapiro Graduate Scholarship

GEORGE WASHINGTON UNIVERSITY, B.A., *magna cum laude*, English Literature, June 1992

Honors: Distinguished Scholar (faculty-voted award to top student in graduating class)
Phi Beta Kappa
University Scholar-Athlete Award
Department Prize in Literature

Scholarships: National Endowment for the Humanities Younger Scholar (1990)
Several merit-based scholarships

SELECTED EXPERIENCE

Boston University School of Law, Boston, Massachusetts 2006-present
Associate Professor & Peter Paul Development Professor. Teach first-year and upper-level courses concerning legal history, civil procedure, and gender and law. Principal areas of research include the history of family law and policy, administrative law, federalism, and federal courts.

University of Colorado School of Law, Boulder, Colorado 2005-2006
Research Fellow. Taught upper-level course on complex civil procedure.

Emery Celli Brinckerhoff & Abady, New York, New York 2003-2005
Associate. Attorney at civil rights litigation firm with national practice. Responsible for all aspects of litigation involving constitutional and statutory civil rights protections. Practice focused on First Amendment law, takings violations, prisoners' rights, employment discrimination, and legal ethics.

- Chief Judge John M. Walker, Second Circuit Court of Appeals** 2002-2003
Law Clerk.
- Judge Kimba M. Wood, U.S. District Court for the S.D.N.Y.** 2001-2002
Law Clerk.
- Institute for Democracy in South Africa (IDASA), Cape Town, South Africa** 2000-2001
Senior Fellow. Researched and designed publication concerning the role of the courts in South Africa's ongoing process of democratization for prominent South African human rights organization.
- Yale Law School** 1998-2000
Research Assistant, 1998-2000, in legal history to Professor Reva Siegel.
Teaching Assistant, Spring 2000, Citizenship, Gender and the Law, Professors Judith Resnik and Reva Siegel.
Coker Teaching Fellow, Fall 1999, Contracts, Professor James Whitman.

PUBLICATIONS

- Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, __ VANDERBILT L. REV. __ (forthcoming 2009).
- "Hoyt v. Florida," in *Encyclopedia of the Supreme Court of the United States* (2008).
- "Taylor v. Louisiana," in *Encyclopedia of the Supreme Court of the United States* (2008).
- Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005).
- Terms of Art: Et Ux*, LEGAL AFFAIRS (April 2003).
- When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L. J. 1667 (2000).
- White-Washing the Black-a-Moor: Othello, Negro Minstrelsy, and the Parody of Blackness*, 19 J. OF AM. CULTURE 87 (1996).
- Book Review: *Horrible Prettiness: Burlesque and American Culture*, by Robert Allen, 30 AM. STUD. INTERNAT'L (1992).

WORKS IN PROGRESS

- Citizen Soldiers and Weeping Widows: Reconsidering the Two-Channel Theory of American Welfare Policy
- Federal Equity Power, Judicial Lawmaking, and the Process Acts

SELECTED PRESENTATIONS

Boston University School of Law Faculty Workshop, October 2007

“‘Let the Government become their guardians:’ Early-Nineteenth-Century Family Military Entitlements and the Gendering of Administrative Law”

Annual Meeting of the American Society for Legal History, Tempe, Arizona, October 2007

“‘Let the Government become their guardians:’ Early-Nineteenth-Century Family Military Entitlements and the Gendering of Administrative Law”

Boston University School of Social Work, Social Welfare Analysis Colloquium, February 2008

“Citizen Soldiers and Weeping Widows: Military Subsidies and the Two-Track Welfare System Reconsidered”

University of Texas School of Law, Faculty Colloquia Series, April 2008

“‘Let the Government become their guardians:’ Administrative Law, Social Provision, and the Legal Construction of the Family in the Early Nineteenth Century”

Law and Society Annual Meeting, Montreal, Canada, May 2008

“Citizen Soldiers and Weeping Widows: Military Subsidies and the Two-Track Welfare System Reconsidered”

PROFESSIONAL ASSOCIATIONS

Memberships:

American Society for Legal History
Law and Society Association

Bar Admissions:

New York
United States District Court for the Southern District of New York

JED HANDELSMAN SHUGERMAN

Assistant Professor, Harvard Law School

1563 Massachusetts Ave. • Cambridge, MA 02138 • (617) 496-9576 • jshugerman@law.harvard.edu

Current Employment

Harvard Law School, Assistant Professor, 2005-present

Courses: Torts; Legal History Workshop; Judging and Democracy (legal theory and history)

Service: Co-chair, Climenko Legal Research and Writing Program (2006-present)

Chair, Legal History Colloquium (2006-present)

Co-founder, Summer Fellows Program (2006)

Admissions Committee (2005-06)

Education

Yale University, Ph.D. in History, 2008

Dissertation: “The People’s Courts: The Rise of Judicial Elections and Judicial Power in America”

Committee: Robert Gordon, Glenda Gilmore, David Blight

Orals Fields: American Legal History; American Political History from Jackson to Reagan;

English and Canadian Legal History. Awarded distinction.

Yale Law School, J.D. 2002

Yale Law Journal, Book Note-Case Note editor (2000-01); Senior Editor (2001-02)

Yale Journal of Law and the Humanities, Managing Editor (1999-2000), Lead Editor (1999-2000)

Joseph Parker Prize (2000) jointly awarded for the best paper in legal history

Israel Peres Prize (2001) for the best student note in the *Yale Law Journal*

Coker Teaching Fellow, 2001

Jerome Frank Legal Services Organization, Yale Law School, May-Sept. 2000

Death Penalty Advocacy, Yale Law School, Jan. 1999-2001

Wrote a petition for certiorari to the U.S. Supreme Court for Alton Coleman from *Coleman v. State*, 703 N.E.2d 1022 (Ind. 1998) on ineffective assistance of counsel. The U.S.

Supreme Court granted certiorari, and vacated and remanded, 120 S.Ct. 1717 (2000).

Yale College, B.A. in History, May 1996

Magna cum laude, Phi Beta Kappa and Distinction in History

Publications

“Dumb Luck: The Contingency of Judicial Elections” (in progress)

“The People’s Courts: The Rise of Judicial Elections and Judicial Power in America” (in progress)

Selected for the Stanford-Yale Junior Faculty Forum, June 2008

“The Twist of Long Terms: Disasters, Elected Judges, and American Tort Law” (to be submitted for publication, Spring 2009)

Selected for the Stanford-Yale Junior Faculty Forum, May 2007

“A Watershed Moment: Reversals of Tort Theory in the Nineteenth Century,” *Journal of Tort Law* (2008)

Selected in the Junior Faculty Competition, “Tort Law and the Modern State” Conference, Columbia Law School, 2006

“Affirmative Duties and Judges’ Duties: *Stockberger v. United States*,” 120 *Harvard Law Review* 1228 (2007)

“A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court,” 37 *Georgia Law Review* 893 (2003)

“*Marbury* and Judicial Deference: The Shadow of *Whittington v. Polk* and the Maryland Judiciary Battle,” 5 *University of Pennsylvania Journal of Constitutional Law* 58 (2002)

“The Louisiana Purchase and South Carolina’s Reopening of the Slave Trade in 1803,” 22 *Journal of the Early Republic* 263 (2002) (peer-review history journal)

“The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of *Fletcher v. Rylands* in the Gilded Age,” 110 *Yale Law Journal* 333 (2000)

Shorter Pieces

“Francis Hilliard,” in Roger Newman, ed., *The Yale Biographical Dictionary of American Law* (forthcoming 2009).

Book Note, “Rights Revolutions and Counter-revolutions,” 13 *Yale Journal of Law & Humanities* 531 (reviewing Richard Primus, *The American Language of Rights* (1999) and Mary Dudziak, *Cold War Civil Rights* (2000)).

Case Note, “Unreasonable Probability of Error, *Coleman v. State*,” 111 *Yale Law Journal* 435 (2001)

“Perfection in Everything but the Opponent,” *New York Times*, July 24, 1999 (letter to the editor about David Cone’s perfect game against the Montreal Expos)

Works in Progress:

The People’s Courts: The Rise of Judicial Elections and Judicial Power in America (book manuscript)

“Empire of Liberty: The Louisiana Purchase and the Emergence of Republican Expansionism”

Presentations and Talks

“Rising Stars: New Scholarly Directions in Civil Justice,” Clifford Symposium,
DePaul University, April 2-3, 2009

“The People’s Courts,” presented at NYU Law School, Yale Law School, and Princeton University,
Fall 2008

“Localism in the Wave of Judicial Elections, 1846-1851”
Law and Society Association, Montreal, Quebec, May 2008

“The Twist of Long Terms,” Conference of Empirical Legal Studies, New York University Law
School, November 2007; Boston University Legal History Colloquium, February 2008

“The Wave of Judicial Elections, 1846-1851”
American Society for Legal History, Tempe, Arizona, October 2007

Panelist on Roundtable, “Whither Constitutional History: An Intergenerational and Interdisciplinary
Conversation,” Institute for Constitutional Studies and American Political Science Association,
Chicago, September 2007

Chair, “Democracy and the Continuing Battle for Free and Fair Elections,” Plenary Panel, Harvard
Law School World Alumni Congress, Washington, DC, June 2007.

“The Second *Dred Scott*,” Historical Panel on the 150th Anniversary of Dred Scott, Harvard Law
School, April 2007.

Chair and Discussant, “Contested Values and Authority in Nineteenth-Century America,”
Organization of American History Annual Meeting, Minneapolis, MN, April 2007.

“Free Soil, Free Courts, Free Men: New York’s Adoption of Judicial Elections in 1846”
American Society for Legal History, Baltimore, Maryland, November 2006;
University of Alberta Law School, Edmonton, Alberta, August 2007

“A Watershed Moment: The Impact of Floods and Judicial Elections on Tort Law”
“Tort Law and the Modern State” Conference, Columbia Law School, 2006;
University of Alberta Law School, Edmonton, Alberta, August 2006

“‘Aristocrats’ vs. ‘Whole Hogs’: Mississippi’s Anti-Natchez Backbencher Adoption of Judicial
Elections in 1832”

American Society for Legal History, Cincinnati, Ohio, November 2005

“Theories of Morality and Economics in the Strict Liability Debate, 1870-1940,”
American Society for Legal History, San Diego, November 2002

“A Six-Three Rule: Balancing American Judicial Supremacy,”
University of Alberta Law School, Edmonton, Canada, March 2002

Experience and Fellowships:

The Honorable John M. Walker, Jr., Chief Judge, Second Circuit Court of Appeals, 2002-2003
Law Clerk, Sept. 2002-Sept. 2003

Golieb Fellow in Legal History, New York University, 2004-2005

William Nelson Cromwell Fellowship in Legal History, 2005-2006

Yale Legal History Fellow, 2003-04

Olin Fellow in Law and Economics, Yale Law School, Summer 2001.

Milah Fellowship, Jerusalem, Israel, Aug. 1997- June 1998
The Conservative Yeshiva. Studied Talmud, Bible, and philosophy

Dorot Fellowship, Jerusalem, Israel, July 1996- June 1997
The Pardes Institute. Studied Jewish law, Bible, Jewish history and ethics.
Rabbis for Human Rights, Intern. Advocated for Palestinians’ and Israeli Arabs’ rights
Coached a Little League baseball team of Israeli and American eleven-year olds.

Other Service:

Administrative Committee, Charles Warren Center for Studies in American History, Harvard University

American Society for Legal History:
Surrency Prize Committee (2009)
Committee for the American Council of Learned Societies legal history database project (2008-09)

Dorot Foundation fellowship selection committee, 2000-02

Newton Center Minyan, sermon/drash committee

Other Teaching:

Constitutional Law I, Yale Law School. Professor Kenji Yoshino's first-year small group

The Civil War and Reconstruction, 1848-1877, Yale College. Professor David Blight

Making the British Empire, 1660-1867, Yale College. Professor Brian Cowan

American Legal History, Yale College. Professor Robert Gordon

Maeva Marcus

- ADDRESS:** Home: 5600 Harwick Road, Bethesda, Maryland 20816
Office: Institute for Constitutional Studies, George Washington University Law School
2000 H Street N.W., Washington, D.C. 20052
- PHONE:** Home: 301 320-4219
Office: 202 994-6562
Fax: 202 994-1684 E-mail: maevamarcus@verizon.net
- EDUCATION:** B.A. -- Brandeis University, 1962, *magna cum laude* with honors in Spanish Literature.
Ph.D. -- Columbia University, 1975, with distinction in history
- EXPERIENCE:** Supreme Court Historical Society: 1993 - 2006
Director, Institute for Constitutional Studies, 1999 - 2003
Director and Editor, Documentary History of the Supreme Court of the United States,
1789-1800, January 1993 - 2006
- The George Washington University Law School:
Director, Institute for Constitutional Studies, 2004 -
Research Professor of Law, 2006 -
- Supreme Court of the United States: 1976 - 1993
Director and Editor, Documentary History of the Supreme Court of the United States,
1789-1800, January 1977 - 1993
- University of California, Berkeley:
Faculty, Summer Institute on Constitutionalism 1986, 1987, 1988, 1989
- Georgetown University Law Center:
Visiting Professor of Law, 1983-1987
- University of Connecticut, Waterbury Branch:
Lecturer in History, February 1964-June 1964
Instructor in History, September 1964-June 1965
- PUBLICATIONS:** *Truman and the Steel Seizure Case: the Limits of Presidential Power* (Columbia University Press, 1977; paperback, 1979; reprinted by Duke University Press, 1994). Nominated for the Bancroft Prize, the Pulitzer Prize, the Frederick Jackson Turner Award, the Albert J. Beveridge Prize, and the David D. Lloyd Prize.
- The Documentary History of the Supreme Court of the United States, 1789-1800*, Volume 1 (in two parts), co-edited by James R. Perry, Columbia University Press, 1985; Volume 2 (Maeva Marcus, editor), 1988; Volume 3 (Maeva Marcus, editor), 1990; Volume 4 (Maeva Marcus, editor), 1992; Volume 5 (Maeva Marcus, editor), 1994; Volume 6 (Maeva Marcus, editor), 1998; Volume 7 (Maeva Marcus, editor), 2003; Volume 8 (Maeva Marcus, editor), 2007 .
- “Falling Under the Brandeis Spell,” Review essay, *Yale Law Journal*, (November, 1985).
- “The Supreme Court: The First Ten Years,” in *The Blessings of Liberty: Bicentennial Lectures at the National Archives*, Robert S. Peck and Ralph S. Pollock, eds. (Chicago: American Bar Association Press, 1986). Reprinted in New York State Bar Association, *Law Studies*, Spring/Summer 1987.

- PUBLICATIONS:** “The Birth of the Federal Court System,” with David Eisenberg, Christine Jordan, and Emily Van Tassel, *This Constitution*, Winter, 1987. Reprinted in *this Constitution: From Ratification to the Bill of Rights* (Congressional Quarterly, Inc., 1988) and in *Well Begun: Chronicles of the Early National Period*, Stephen L. Schechter and Richard B. Bernstein, eds. (Albany, New York: 1989).
- “*Marbury v. Madison*: John Marshall’s Selective Use of History,” with Susan Low Bloch, *University of Wisconsin Law Review* (Number 2; 1986). Reprinted in Supreme Court Historical Society, *Yearbook*, 1987.
- “The Constitution and the Court,” with Christine Jordan, *Manuscripts* (Volume 39, 1987).
- “Judges and Legislators in the New Federal System, 1789-1800,” with Emily Van Tassel, in *Judges and Legislators: Toward Institutional Comity*, Robert A. Katzmann, ed. (The Brookings Institution, 1988).
- “*Hayburn’s Case*: A Misinterpretation of Precedent,” with Robert Teir, *University of Wisconsin Law Review* (Number 4; 1988).
- The Constitution and American Life*, a special issue of the *Journal of American History*, December, 1987, member of editorial advisory board with Hendrik Hartog and Harry Scheiber; reprinted as book by Cornell University Press.
- “Separation of Powers in the Early National Period,” *William and Mary Law Review* (Volume 30, 1989).
- “Poder Judiciário na Constituição dos Estados Unidos,” *Revista de Direito Público* (April-June 1988).
- “Judicial Power under the Constitution,” in *Hogsta domsmakten i Sverige under 200 ar*, Rolf Nygren, ed. (Stockholm: 1990).
- Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, Maeva Marcus, editor and contributor, Oxford University Press, 1992.
- “Louis D. Brandeis and the Laboratories of Democracy,” in *Federalism and the Judicial Mind*, Harry Scheiber, ed., University of California, Berkeley (1992).
- “The Adoption of the Bill of Rights,” *William & Mary Bill of Rights Journal* (Volume 1, Spring 1992).
- “Suits Against States,” with Natalie Wexler, *Journal of Supreme Court History*, 1993.
- “Judicial Review in the Early Republic,” in *Launching the “Extended Republic”*: *The Federalist Era*, Ronald Hoffman, ed., University Press of Virginia (1997).
- “The Founding Fathers, *Marbury vs Madison* -- And So What? in *Constitutional Justice under Old Constitutions*, Eivind Smith, ed., Kluwer Law International, 1995.
- “Documenting Judicial History: The Supreme Court of the United States, 1789-1800,” *Journal of Supreme Court History*, 1996.
- PUBLICATIONS:** “Georgia v. Brailsford,” *Journal of Supreme Court History*, 1996.

“George Washington’s Appointments to the Supreme Court.” *Journal of Supreme Court History*, 1999.

“Federalism to the Civil War,” in *The New Federalism: Structures and Infrastructures, American and European Perspectives*, Kjell Ake Modéer, ed. (Sweden: FRN, 2000).

“Is the Supreme Court a Political Institution?” *The George Washington Law Review*, Vol.72, number 1/2, December 2003.

“Will *Youngstown* Survive?” *Duquesne Law Review*, Vol. 41, number 4, summer 2003.

“Presidential Power in Times of Crisis: *Youngstown Sheet & Tube v. Sawyer* (1952),” in *Creating Constitutional Change: Clashes over Power and Liberty in the Supreme Court*, Gregg Ivers and Kevin T. McGuire, eds. (University of Virginia Press, 2004).

“Federal Judicial Selection: The First Decade,” *University of Richmond Law Review*, Vol. 39, number 3, March 2005.

“The Earliest Years (1790-1801): Laying Foundations,” in Christopher L. Tomlins, ed., *The United States Supreme Court: The Pursuit of Justice* (Houghton Mifflin, 2005).

ACTIVITIES:

American Historical Association:

Member advisory board of AHA’s conference series on the teaching of the Constitution in the schools, 1982-1984; member of the Littleton - Griswold Prize Committee (best book in legal history published in current year), 1989-1990, chair, 1991; delivered paper, “The Documentary Approach to Supreme Court History,” at AHA annual meeting, December, 1989.

Organization of American Historians:

Member of the Pelzer Award Committee, 1979-1983; referee articles for the *Journal of American History*; member of 1987 Program Committee; representative of the OAH to the History Teaching Alliance Oversight Committee, 1985-1987; member (with Gordon Wood, Harry Scheiber, and Hendrik Hartog) of the editorial advisory board for the Bicentennial of the Constitution special issue of the *Journal of American History*; chair and commentator at the session “Quarrels on the Supreme Court,” at the 1988 Annual Meeting; chair, Richard Leopold Prize Committee, 1988-1990; co-chair 1992 Program Committee; member, International Committee, 1992-2000; delivered paper, “The State and the Judiciary.” at OAH annual meeting, April, 1997; recipient of the OAH Distinguished Service Award, April, 2001.

American Society for Legal History:

President-elect. 2005-2007; President, 2007-2009
Board of Directors 1987-1990, 1996-1999; editorial board *Law and History Review*, 1991-1994; publications committee, 1992-1995; committee on documentary preservation, 1988-present.

Council for International Exchange of Scholars:

Member of Discipline Screening Committee for Fulbright Senior Scholar Awards in American History, 1983-1986.

ACTIVITIES:

Georgetown University, Judicial Conference of the United States' Committee on the Bicentennial of the Constitution, and the Supreme Court Historical Society: Organized bicentennial conference on the Judiciary Act of 1789 (funded by the National Endowment for the Humanities) and presented paper at that conference with Natalie Wexler, "'Carrying Justice...to Every Man's Door': Commentaries on the Judiciary Act of 1789," September 21, 1989.

The Woodrow Wilson Center: Member (with fifteen other scholars in history, jurisprudence, and philosophy) of workshop on bicentennial of the Bill of Rights, 1989-1991.

The Historical Society of the District of Columbia Circuit, Historian, 1990-present.

Sixth Judicial Circuit of the United States, Annual Conference: presented paper, "History of the Adoption of the Bill of Rights," June 13, 1991.

International Conference of Law and Society, Amsterdam, The Netherlands: presented paper, "The Bill of Rights in the Eighteenth Century," June 27, 1991.

Judicial Conference of the United States, Bicentennial Conference on the Bill of Rights: presented paper, "The Origin of the Bill of Rights," October 21, 1991.

Federal Judicial Center, guest faculty, ethics and values seminar for federal judges, "Decisions, Dilemmas, and Values: Problems of Justice in Contemporary Society."

International Conference on Constitutional Justice under Old Constitutions, Oslo, Norway: presented paper, "The Founding Fathers, *Marbury v. Madison*, and so what?" September 7, 1992.

American Council of Learned Societies: American Studies Academic Advisory Committee, 1993-1996.

Supreme Court Historical Society: member, Board of Editors, *Journal of Supreme Court History*, 1993-2004.

Swedish Council for Planning and Coordination of Research, Conference on the New Federalism, Stockholm, Sweden: presented paper, "Federalism to the Civil War," September 22, 1997.

Permanent Committee for the Oliver Wendell Holmes Devise, member 2001-2009.

Annenberg Foundation Trust at Sunnylands and The Annenberg Public Policy Center of the University of Pennsylvania, The Institutions of Democracy, Commission on the Judicial Branch member, 2003-2006.

Cambridge University Press, co-editor of the series, Cambridge Studies on the American Constitution.

American Philosophical Society: presented paper, "John Marshall Was Not the First Chief Justice," November 8, 2007.

PHILIP HAMBURGER

Columbia Law School
435 West 116th Street, New York, NY 10027
hamburger@law.columbia.edu
(212) 854-6001

Publications

Books

Law and Judicial Duty (Harvard University Press 2008)
Separation of Church and State (Harvard University Press 2002)

Articles

- “Getting Permission,” 101 *Northwestern Law Review*, 405 (2007)
“Religious Liberty in Philadelphia,” 54 *Emory Law Journal* 1603-31 (2005)
“The New Censorship: Institutional Review Boards,” 2004 *Supreme Court Review*, 271-354 (2005)
“More is Less,” 90 *Virginia Law Review* 835-892 (2004)
“Liberality,” 78 *Texas Law Review* 1215-85 (2000)
“Revolution and Judicial Review: Chief Justice Holt’s Opinion in *City of London v. Wood*,” 94 *Columbia Law Review* 2091-2153 (1994)
“Trivial Rights,” 70 *Notre Dame Law Review* 1-35 (1994)
“Natural Rights, Natural Law, and American Constitutions,” 102 *Yale Law Journal* 907-60 (1993)
“Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights,” *Supreme Court Review* 295-392 (1992)
“A Constitutional Right of Religious Exemption: An Historical Perspective,” 60 *George Washington Law Review* 915-48 (1992)
“Natural Rights and Positive Law: A Comment on Professor McAfee’s Paper,” 16 *Southern Illinois University Law Journal* 307-12 (1992)
“The Constitution’s Accommodation of Social Change,” 88 *Michigan Law Review* 239-327 (1989)
“The Development of the Nineteenth-Century Consensus Theory of Contract,” 7 *Law and History Review* 241-329 (1989)
“The Development of the Law of Seditious Libel and the Control of the Press,” 37 *Stanford Law Review* 661-765 (1985)
“The Conveyancing Purposes of the Statute of Frauds,” 27 *American Journal of Legal History* 354-85 (1983)

Conference Papers & Occasional Pieces

- “Two-Dimensional Doctrine and Three-Dimensional Law: A Response to Professor Weinstein,” 101 *Northwestern Law Review Colloquium*, 563 (2007)
“Ingenious Arguments or a Serious Constitutional Problem? A Comment on Professor Epstein’s Paper,” 102 *Northwestern Law Review Colloquium*, 102 (2007)
“Against Separation,” 155 *Public Interest* 177-92 (2004)
“Law and Judicial Duty,” 72 *George Washington Law Review* 1 (2003)

“Separation and Interpretation,” 18 *Journal of Law & Politics* 7-64 (2002)
(replacing erroneously printed version published under same citation)
“Illiberal Liberalism: Liberal Theology, Anti-Catholicism, & Church Property,” 12
Journal of Contemporary Legal Issues, 693-725 (2002)
“Marginalia,” 61 *Yale University Library Gazette* 66-67 (1986)

Education

Princeton University, B.A. summa cum laude (History), 1979
Hall History Prize, 1979
Phi Beta Kappa, 1979

Yale Law School, J.D., 1982
Colby Townsend Prize, 1982
for “best individual research done for academic credit by a member
of the second-year class”
Connecticut Attorneys’ Title Guaranty Fund Prize, 1982
for “best paper on the subject of real property”

Employment

Columbia Law School,
Maurice and Hilda Friedman Professor of Law, 2005-

University of Chicago Law School
John P. Wilson Professor, 2000-05
Visiting Professor, Winter Quarter 2000

Northwestern University School of Law
Jack N. Pritzker Distinguished Visiting Professor of Law, Fall 1999

George Washington University National Law Center
Oswald Symister Colclough Research Professor of Law, 1995-2000
Professor of Law and Legal History, 1992-95
Visiting Professor, 1991-92

University of Connecticut School of Law
Professor, 1988-92
Associate Professor, 1985-88

University of Virginia Law School
Visiting Associate Professor, Fall 1986

Schnader, Harrison, Segal and Lewis, Philadelphia

Associate, 1982-85

Academic Affiliations

Association of American Law Schools
Provisional Section on Scholarship, Chair, 1995

American Society of Legal History
Advisory Committee on the Cromwell Prizes, 2007-
Board of Directors, 2004-06
Nominating Committee Member, 1998-2001
Program Committee Chair, 1993-94
Member, 1992-94
Sutherland Prize Committee Member, 1992-94

Honors

Sutherland Prize, 1994 (awarded 1995)
for “the article deemed the most significant contribution to English legal history published in the past year”--awarded by the American Society for Legal History for “Revolution and Judicial Review: Chief Justice Holt’s Opinion in City of London v. Wood”

Prompter Honoris Respectum, 1994
a forum in the Notre Dame Law Review for “scholars whose work has demonstrated ‘a partisanship for justice, a commitment to explore the moral questions raised in legal studies, and an effort to response to human need”

Sutherland Prize, 1989 (awarded 1991)
awarded for “The Development of the Nineteenth Century Consensus Theory of Contract”