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Thomas Jefferson, founder of the University of Virginia, believed that the study of law was an integral part of any great university, and he included a law school among the eight independent schools he originally proposed for the University. In adding law to the list of learned disciplines, Jefferson was motivated by his conviction that a great university law school must serve two central missions. First, he believed that a law school must serve the public interest by training distinguished members of the bar. This mission, though critically important, was perfectly conventional and required no particular elaboration. But Jefferson was also a radical theorist and nothing was quite as radical as the second mission he proposed for the law school: to serve as a laboratory for the incubation of ideas about law and political theory.

In implementing this second mission, Jefferson was joined by James Madison, his friend and collaborator for over fifty years. Indeed, one of Jefferson and Madison’s most successful and least recognized collaborations led directly to the establishment of the School of Law.1

In the early 1820s, when the time came to open the doors of this University, Jefferson, with Madison’s active assistance, set out to recruit a faculty. They both agreed that in order to ensure a first-rate faculty, the professors who would hold the first chairs at the University had to be recruited from Europe. But a European lawyer would simply not do for the chair in law, given the bold experimentation with radical legal and political arrangements under way in the new nation. Thus, they also agreed that the chair in law could only be held by an American. The selection of the first law professor was inextricably bound to the delicate question of the curriculum. Jefferson wrote to Madison and suggested that ordinarily he would prefer leaving the selection of textbooks to each professor, but in the area of law and political theory he feared the distinct possibility that a Richmond lawyer (by which he meant a Federalist) might be chosen to be professor of law. “I think,” he wrote, “it is a duty to guard against danger by a previous prescription of the texts to be adopted.”2 In his reply, Madison disagreed, not in the nature of the duty but in the manner of its implementation. He preferred to put his trust in character, rather than rules. He wrote Jefferson that “an able and orthodox professor, whose course of instruction will be an example to his successors,” was the most effective safeguard against “heretical intrusions into the School of Law and Politics.”3 Jefferson subsequently concurred and the course of study at the Law School was left free from prescribed regulation.

The appointment in law was finally extended to John Tayloe Lomax, a friend of Madison, but unknown personally by Jefferson. To allay his friend’s fears that Lomax might prove too narrow in his intellectual reach, Madison wrote Jefferson and reassured him that Lomax’s academic studies in preparation for the chair in law were extensive; that he had “extended his studies beyond the ordinary municipal law to the law of nations and to the more philosophical view of the general subjects.”4 With that, Lomax was offered the appointment, accepted it in August of 1826, and within months the students began to arrive.

In the 174 years since it was founded, the University of Virginia School of Law has enjoyed a rich tradition of excellence. That excellence, in no small measure, can be attributed to the collective genius of Madison and Jefferson. For as long as anyone can remember, the Law School has honored its founders’ injunction that it pursue preeminence in both of its central missions of teaching and research, and these dual missions are inextricably linked to the core notions of free and unfettered inquiry, critical analysis, and the search for truth. Charismatic and inspirational classroom teachers have been the hallmark of our law school for generations. At the same time, the faculty’s commitment to the scholarly mission has never wavered. In this way, the institutional obligation to take seriously the pursuit of truth continues to be integrally linked to the commitment to excellence in the classroom.

As we prepare to celebrate our 175th anniversary in
2001, it is natural to pause and reflect upon the unique history and legacy of the Law School. Throughout its history, scores of gifted teacher-scholars have prepared generations of lawyers for a wide variety of distinguished careers, and, through their scholarship, have informed the debate about what law should be. This tradition continues. In recent years, the Law School has welcomed a number of wonderfully talented young teacher-scholars to the faculty. Barry Cushman, one of the three faculty members profiled on the pages that follow, joined the faculty in 1998. He won the American History Association’s 1998 Littleton-Griswold Prize, the most prestigious book prize in the field of legal history, for his book *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford University Press, 1998). Caleb Nelson, who also joined the faculty in 1998, was the winner of the 15th annual Scholarly Papers Competition, sponsored by the Association of American Law Schools, for his article entitled “Preemption” (86 *Virginia Law Review* 225 (2000)). Barry and Caleb are merely exemplars of a larger group of younger colleagues that have joined a cohort of prominent senior faculty whose outstanding teaching and influential scholarship have already earned them national recognition.

Our history has much to say about why Virginia has such a unique academic community. We have remained committed both to teaching law and to ideas about law. There exists here no dichotomy between our two missions: we write what we teach, and we teach what we write. This symbiosis between scholarship and teaching brings a synergy to the Law School, exposing our students to contemporary ideas about law as well as providing an important laboratory for the development and testing of new ideas for policymakers.

We are proud and fortunate to count as members of our faculty the three exceptionally talented legal scholars and teachers featured in the pages that follow. Lillian BeVier is a First Amendment expert whose scholarship has often staked out and defended unorthodox positions in the areas of telecommunications policy, campaign finance reform, and standard free speech controversies. Legal historian Barry Cushman is the leading revisionist historian about the Supreme Court crisis of the 1930s. Paul Stephan’s expertise in two normally disparate fields, tax and international law, has made him an influential scholar and a valued advisor to foreign nations and multilateral organizations. These three faculty members, while exemplary, are emblematic of the 65 members of the faculty who teach, research, and write at the University of Virginia School of Law.

Robert E. Scott  
Dean  
Lewis F. Powell, Jr., Professor of Law  
Arnold H. Leon Professor of Law

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2 Id at 276 (quoting a letter from Thomas Jefferson to James Madison (Feb. 1, 1825)).

3 Id at 278 (quoting a letter from James Madison to Thomas Jefferson (Feb. 8, 1825)).

4 Id at 280 (quoting a letter from James Madison to Thomas Jefferson (Aug. 4, 1825)).
An Inclusive Approach to the Regulation of Free Expression

I did not even dream of life as an academic during law school,” said Lillian BeVier. There were no female professors to serve as role models during BeVier’s student years at Stanford Law School. “There were but five women in my law school class. I think each of us was convinced that she could do anything she wanted in the profession if she worked hard enough—anything, that is, except teach.”

Nevertheless, when, after a few years in practice, BeVier sought career advice from one of her former professors, he suggested she consider teaching. She took the advice and embarked on a career that soon led her to the University of Virginia, where she became a prolific and original First Amendment scholar.
BeVier's talent for staking out and defending unorthodox positions was evident from the first article she wrote as a member of the Virginia faculty, "The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle," 30 Stanford Law Review 299 (1978). The article responded to a critical conundrum in First Amendment theory. The dominant view, under which "speech" is broadly defined, recognizes that First Amendment protection cannot be absolute and requires constant assessment of the strength of the governmental interest in restricting certain forms of speech. The most well-known contrary view, associated with Robert Bork, is that only "political" speech is protected. Political speech, in this view, is limited to speech that participates in the process of representative democracy. Thus advocacy of the forcible overthrow of the government, for example, falls outside the protected sphere by definition. This approach makes it possible to extend almost complete protection, but to a narrow category of expression.

BeVier took a novel approach. She argued that restriction of the First Amendment to political speech was correct as a matter of principle, but rejected the conclusion that any judicial scrutiny of restrictions on non-political speech is therefore illegitimate. Instead, introducing a theme to which her scholarship has often returned, she contended that pragmatic and institutional considerations play a role in crafting appropriate rules of decision. The difficulty judges and juries would have, for example, in determining when speech strongly critical of the government is an attempt to participate in representative democracy or overthrow it, together with the institutional need for clear guidance, argue for rules that protect beyond the narrow field of political speech. Thus BeVier advocated a change in the normal default rule of First Amendment analysis of non-political speech—rather than asking whether a restriction could be justified by government necessity, courts should ask whether the need for a workable rule justified broadening coverage beyond political speech.

In subsequent articles, BeVier engaged many of the thorniest issues in First Amendment theory. She wrote on press access to criminal trials ("Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers," 10 Hofstra Law Review 311 (1982)), indirect burdens on religious practice ("The Free Exercise Clause: A View from the Public Forum," 27 William & Mary Law Review 963 (1986)), and the public forum doctrine ("Rehabilitating Public Forum Doctrine: In Defense of Categories," 1992 Supreme Court Review 79). She has returned frequently to the regulation of campaign financing, becoming one of the country's foremost advocates of the view that such regulation is generally inconsistent with the First Amendment (more on page 9).

Recently, BeVier was invited to give a lecture to the Supreme Court Historical Society on "Free Expression in the Warren and Burger Courts" (excerpt follows, on page 11). Apart from the considerable scholarly distinction it conveys, the invitation presented BeVier with an opportunity that scholars prize—the chance to reflect broadly on the changes in her chosen field over roughly the last half-century. BeVier found that stepping back and surveying the whole of First Amendment doctrine as it evolved over that period provided many surprises, even to a teacher and scholar daily steeped in the nuances of speech and press clause jurisprudence.

BeVier's speech begins by noting the dramatic expansion in First Amendment doctrine from 1953 to the present—a growth all the more remarkable because the incremental style of the changes made it easy to miss the fact that a revolution of sorts was taking place. As BeVier puts it, when Chief Justice Warren took office in 1953, the First Amendment was a flimsy set of restrictions on government regulation of speech, a "98-pound weakling" that, by the time of Chief Justice Burger's retirement in 1986, had grown into "the Jesse Ventura of constitutional amendments."

Two features of First Amendment jurisprudence, BeVier notes, typified its relative toothlessness in 1953. When confronted with a regulation of speech, the Supreme Court's dominant methodology was to balance the governmental interest served by the regulation with the challenger's expressive interests. The latter, moreover, was limited to the interest of the individual defendant, not expanded to embrace a public interest in free expression. Put that way, the government's more far-ranging purposes tended easily to prevail. A second feature was a tacit understanding that certain types of speech—"fighting words," obscenity, libel, commercial speech, and so on—were wholly outside the protective cloak of the First Amendment.
By 1986, the landscape had changed beyond recognition. The Court developed a “strict scrutiny” test that requires the government to demonstrate it has chosen the least restrictive means to further its purposes. Ancillary rules, such as the vagueness and overbreadth doctrines, aim to assure that regulations prove minimally restrictive in practice by disallowing laws that may deter protected speech, even though not expressly prohibiting it. The Court, moreover, has extended First Amendment protection to commercial speech, as well as some speech that is libelous, insulting, or lewd.

BeVier offers insight into the forces that caused the shift. One is the lack of a stable political or academic constituency arguing in favor of limiting the First Amendment’s reach. By contrast, the academic world is filled with theorists vying to champion the most capacious right of free speech. In the political realm, the most visible player in the First Amendment scene—the press—has an obvious incentive to advocate the enlargement of First Amendment rights, while the ACLU, another repeat player, is a longtime champion of free speech.

Another factor is an internal, methodological shift in the Supreme Court’s approach. Early in the Warren years, the Court, led by Justices Brennan and Harlan, began to analyze the First Amendment’s prohibitions not merely in terms of the constraints they put on government, but in terms of the incentives they provide for citizens to engage in expressive activity. By considering not only the formal prohibitions a challenged regulation embodies, but also its potential to deter non-prohibited speech, the Court set the stage for the First Amendment’s expansion. Today, less than a half century later, the First Amendment occupies a place of primacy among the civil liberties enshrined in the Constitution, even though that status was far from inevitable viewed prospectively.

Although the First Amendment has been the mainstay of BeVier’s scholarship, her writings also draw on her experience as an intellectual property teacher. She has produced an incisive article on false advertising suits under federal law, “Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception,” 78 Virginia Law Review 1 (1992). BeVier notes that while such suits are described as involving “deceptive” or “fraudulent” advertising, the facts of reported cases inevitably involve garden-variety negligence. Thus, she argues, these suits are unlikely to produce sufficient benefits to consumers to outweigh the associated enforcement costs.

As BeVier describes it, her work in intellectual property has helped her to see First Amendment issues from a fresh
perspective. Teaching and writing about false advertising led her to think about the First Amendment's commercial speech doctrine in the context of the substantive law of advertising. As a consequence, she has come to question the rationale for the starkly different First Amendment treatment of false or misleading commercial advertising, on the one hand, and false or misleading political speech, on the other.

BeVier expands on this theme in a chapter she is preparing for a book of essays on the First Amendment at the end of the twentieth century. Her chapter, "The Invisible Hand of the Marketplace of Ideas," considers the market metaphor so common in First Amendment discourse. On the surface, it is quite surprising that commercial advertisers and newspapers, who provide information to educate the public about products and political issues, respectively, operate under wildly different liability regimes. If market forces cannot be trusted to keep advertisers honest, and their falsehoods impose considerable harm on consumers that must be corrected by stringent liability rules, why wouldn't the same analysis support similarly stringent liability for the press's misstatements? A reporter might argue that she is acting disinterestedly for the public's good, in contrast to a profit-making business. To accept that argument, however, is to ignore what we know about human nature. If there is a justification, BeVier argues, it must lie elsewhere.

Instead of arguing for a sharp difference between the two contexts, BeVier contends that the marketplace of political ideas functions more effectively than we recognize. There are many decentralized and informal correctives for misleading political information, making stringent regulation through liability rules unnecessary for the purpose of protecting the public's interest in accuracy. These arguments elegantly echo those she made against expansive liability rules for advertisers.

Even as she reflects on the state of free speech at the end of the century, BeVier is also analyzing the impact of new technologies on the conflict between the privacy of individual communications and the needs of law enforcement. In "The Communications Assistance for Law Enforcement Act of 1994: A Surprising Sequel to the Break Up of AT&T," 51 Stanford Law Review 1049 (1999), she examined a statute requiring telecommunications carriers to use equipment that facilitates interception of communications by law enforcement agencies. Congress and the FBI described the act as a return to the pre-telecommunications revolution status quo that would enable law enforcement to keep pace with technological change. BeVier points out, however, that "in terms of the extent to which it purports to coerce private sector solutions to public sector problems, and in terms of the foothold it gives government to control the design of telecommunications networks, the act is a paradigm shift." She locates the reasons for that shift within interest group conflict among law enforcement, the telecommunications industry, and advocacy groups.

It is this determination to see the intersection of government policy and communication as a broad set of interrelated problems, rather than a group of stand-alone issues under headings like "speech," "copyright," "broadcast regulation," and so on, that keeps BeVier's scholarship timely and original. The combination of intellectual property, telecommunications policy, campaign finance reform, and standard free speech controversies will continue to provide ample raw material for her inclusive approach to the regulation of expression.
Lillian BeVier entered the field of constitutional scholarship with considerable trepidation. “The field has always seemed to attract more than its fair share of scholarly giants, even when their theoretical ambitions were, by today’s standards, relatively constrained,” she said. But enter it she did, and she’s never turned back.

Over the years, most of BeVier’s scholarship has focused on the First Amendment. Never tiring of her topic, BeVier’s interest in the First Amendment has been sustained for a number of reasons. Like most of her colleagues, BeVier enjoys the challenge of achieving a sense of doctrinal and theoretical mastery. In addition, “The First Amendment now covers much more territory than it did when I started to study it, so both doctrinal and theoretical changes are constantly presenting themselves,” she says, “and they cry out to be accounted for somehow.” She also has found over the years that the other courses she teaches provide her the opportunity to see the First Amendment from a variety of fresh perspectives.
A fourth reason may, according to BeVier, seem somewhat perverse, since “it has to do with the fact that, quite without intending to, I have turned out to be rather a contrarian, not so much in my attitude to what the Court has done, but rather with respect to my perspective on doctrinal developments in comparison to many in the legal academy.” Perhaps the most prominent example of this has been her attitude toward campaign finance regulations.

When BeVier began to study the First Amendment implications of campaign finance regulations, she had no idea what she would end up concluding. She had only one reason for deciding to write about the issue, and it was not to defend a preconceived position. Instead, it was the result of her efforts to achieve a deeper understanding of the campaign finance cases she was teaching in her First Amendment course. BeVier did a lot of reading, studying, and thinking about the issue before she reached any conclusions, but what she concluded was that the First Amendment’s protection of political freedom embraced the freedom to make political contributions and expenditures.

At first BeVier had found herself attracted by the arguments made by the campaign finance reformers who said that giving and spending money on political campaigns is “action” and not “speech,” and, as she explains, “I was intuitively slightly repelled by the notion that political giving and spending ought to be protected as speech for the crude reason that ‘money talks.’” However, she soon became convinced that contributing and spending money to support political candidates and political causes is core First Amendment activity, because the political communication that is purchased with expenditures and the support that is communicated with contributions are vital to democratic self-government, “and that is principally what the First Amendment is about.”

In addition, BeVier has argued that the Court should scrutinize strictly legislative efforts to “reform” the political process, not only because most campaign finance reforms turn out to be strongly incumbent protective, but also because legislators are at their least reliable as guardians of the broad public interest when they are attempting to redistribute political power. “I do not find the current political scene to be without flaws,” BeVier says, “but much of my support of the First Amendment with respect to campaign finance regulation stems from a conviction that any legislative cure is likely to be worse than the disease.”

The position BeVier has staked out has placed her outside the main body of campaign finance regulation scholarship. “I found myself swimming against the academic tide because I have defended the position that the First Amendment is and ought to be a powerful barrier to most of the reforms that have been on the legislative agenda since Buckley v. Valeo (424 U.S. 1 (1976)) was decided.”

Several scholars have begun to embrace views similar to her own. While she enjoys the company, BeVier has never shied away from championing unorthodox positions, and as she continues to tackle some of the First Amendment’s thorniest issues, she is sure to find herself on the outside again—or perhaps she is simply leading the way.
Free Expression in the Warren and Burger Courts

by Lillian R. BeVier

Despite seeds of doctrinal growth, the overall picture of pre-Warren Court First Amendment doctrine is of rules and methodologies that offered fragile and undependable protection to a far-from-inclusive set of expressive activities. Sensitive though the Court claimed to be, and occasionally was, in weighing conflicting interests, its decisional tools lacked analytical subtlety, rested on a narrow view of what the stakes were in free speech cases, and avoided having to confront difficult theoretical issues by unquestioningly embracing the apparently conventional wisdom embodied in the categorical exclusions.
Contrast this with the First Amendment in 1986, when Chief Justice Burger retired. A transformation had occurred. The 98-pound weakening of 1953 had become the Jesse Ventura of constitutional amendments. Look at just four examples of where the First Amendment had got to.

First, the Court no longer engaged in ad hoc balancing in First Amendment cases. Instead, when a challenger was able to persuade the Court that legislation burdened First Amendment rights, the Court engaged in strict scrutiny, requiring the government to defend the law by demonstrating that it served a compelling state interest by the least restrictive means. Second, in place of an implicit conception of law as a “transparently ideal set of commands or regulations” that constitutional doctrine could assume operated within a frictionless and error-free world, the Court had adopted an approach that impelled it to try to craft rules explicitly to accommodate and correct for law’s opacity, officials’ temerity, and citizens’ failures of nerve. For example, it had firmly and self-consciously put in place techniques of adjudication and substantive doctrines, such as vagueness and overbreadth, that attempted to avert the danger “of tolerating, in the area of [delicate, vulnerable and precious] First Amendment freedoms, the existence of ... penal statute[s] susceptible to sweeping and improper application, to prevent substantive First Amendment violations by erecting procedural barriers to speech regulation, and to craft rules that, by giving freedom of expression “breathing space,” would foster “uninhibited, robust, and wide-open public debate.” Moreover, the Court had begun to link its results directly to rationales that took account of the foibles of both private and legal actors and that tried to implement a disparate array of instrumental First Amendment theories. Third, the shifting, open-ended, unpredictable and unreliably protective clear-and-present danger test had given way to a considerably harder and faster Brandenburg rule that “the constitutional
guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” And fourth, the Court had rejected in principle the idea that the First Amendment excluded entire categories of speech. It announced, in Police Dept. of Chicago v. Mosley, that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” Specifically, it had explicitly absorbed two of the formerly excluded categories within the First Amendment’s protective mantle. Libel’s “talismanic immunity from constitutional limitations” yielded to the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” And the First Amendment exception of commercial speech had succumbed to society’s “strong interest in the free flow of commercial information.” Two of the other excluded categories had been confined within narrow boundaries, both procedural and substantive. Fighting words could apparently only be punished pursuant to very precisely drawn statutes limited in their reach to the use of “insulting and provocative epithets that describe a particular individual and are addressed specifically to that individual in a face-to-face encounter.” Significant procedural requirements constrained the control of obscenity; in addition the Court had “carefully limited” the permissible substantive scope of regulation under the obscenity rubric to “works which depict or describe sexual conduct [that is] specifically defined by the applicable state law.” Indeed, it had even concluded that nude dancing was “not without its First Amendment protections.”

The Court had “carefully limited” the permissible substantive scope of regulation under the obscenity rubric to “works which depict or describe sexual conduct [that is] specifically defined by the applicable state law.” Indeed, it had even concluded that nude dancing was “not without its First Amendment protections.”

Excerpted from “Free Expression in the Warren and Burger Courts,” forthcoming in the Journal of Supreme Court History.
Publications of Lillian R. BeVier


Campaign Finance "Reform" Proposals: A First Amendment Analysis (CATO Institute, 1997).


BARRY CUSHMAN:

A Revisionist View of Constitutional History

Barry Cushman's appreciation for the subtle interconnections among constitutional doctrines and his commitment to take legal ideas seriously as a causal force have made him one of the country's most prominent young legal historians. This is not to say, however, that he planned it that way. Cushman studied philosophy as an undergraduate. Only as graduation approached did he realize that he was less interested in solving philosophical problems than in understanding the history of others' efforts to do so. This recognition resulted in a decision to study the history of ideas, or intellectual history, at the graduate level.

At Virginia, it was easy for Cushman to combine his interests in the study of history and law. The University of Virginia was (and is) among the country's best in both fields. Cushman came to Virginia planning to pursue a J.D. and an M.A. By the time he graduated from the Law School,
however, he had decided to complete the doctorate in history and to pursue an academic career as a legal historian.

Cushman’s dissertation topic, selected with the advice and encouragement of his advisor, Charles McCurdy, associate professor of history and law, was the development of constitutional thought and culture during the 1920s. The original idea was to show how the contours of contemporary thought concerning the commerce power, the spending power, and substantive due process on the eve of the depression decade set the stage for the Supreme Court’s constitutional innovations during the New Deal. The project, however, became much more sweeping as Cushman began to recognize that the “revolution” in constitutional law during the New Deal took on a different aspect when one better understood the evolution of commerce and due process doctrine in the late nineteenth and early twentieth centuries.

The result was a series of articles that culminated in a book, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998). The book is a major challenge to the received New Deal legal history. It has garnered substantial attention as well as the American History Association’s 1998 Littleton-Griswold Prize, the most prestigious book prize in legal history. The book also led to an invitation to give a lecture on the Hughes Court to the Supreme Court Historical Society, a remarkable honor for a young scholar.

We can appreciate the scope of Cushman’s achievement only by first reminding ourselves what we, as lawyers, think we know about the constitutional revolution of the 1930s. Prior to the 1930s, according to the traditional story, American constitutional law was mired in the Lochner Era. *Lochner v. New York* has become a symbol of a politically inspired rear-guard action by judges who used substantive due process and federalism doctrines to block progressive policies such as wage and hour restrictions, child labor laws, and health and safety regulation. The 1932 election marked a sea change in public attitudes toward these reactionary readings of the Constitution—a “constitutional moment,” to use a phrase coined by Yale Law School professor Bruce Ackerman.

The New Deal took decisive action to bring the progressive program to fruition, only to see early efforts thwarted by the Supreme Court. The anti-New Deal charge was led by the Four Horsemen—arch-conservative Justices Van Devanter, McReynolds, Sutherland, and Butler. The Four Horsemen were joined in opposition to the New Deal by the Court’s pro-business center, Chief Justice Hughes and Justice Roberts. The Court’s liberal wing (Justices Brandeis, Stone, and Cardozo) was too small to save progressive legislation from judicial veto.

Roosevelt believed that his landslide re-election in 1936 provided a mandate to get the Court out of the way of the New Deal. His court-packing plan was a tactical error—Congress and public opinion recoiled at the thought of tampering with the Supreme Court—but a strategic victory. Faced with the prospect of forced irrelevance, Justice Roberts abruptly departed from his earlier opposition to economic regulation and voted to uphold a minimum wage law in *West Coast Hotel v. Parrish*. Decided in early 1937, *West Coast Hotel* was promptly followed by cases upholding collective bargaining and Social Security legislation. This “switch in time that saved nine” was a decisive moment in American constitutional history, simultaneously assuring that the Supreme Court would not undergo significant structural change and that it would no longer use an outdated reading of the Constitution to hamstring the government’s attempts to deal with the complex regulatory issues created by a modern industrial economy.

As this conventional narrative makes clear, both political and legal historians typically describe the relationship between the New Deal and the Supreme Court in exclusively political terms. Judges interpreted the Constitution as they did because they were ideologically opposed to government interference in markets, especially the labor market. The Court backed down only because of political pressure generated by the 1936 election and the Court-packing plan. Entirely absent from the debate is a sensitive reading of the Court’s prior commerce and due process jurisprudence. Indeed, for most early-twentieth-century constitutional historians, such a reading would be evidence of naiveté.

The central argument of Rethinking the New Deal Court, by contrast, is that we can best understand the “constitutional revolution” of 1937 as an episode in the history of ideas. Cushman shows that the Court’s pronouncements of that year were not a sudden, discontinuous shift, but rather predictable steps in an evolving line of constitutional thought. The Court, after all, had long recognized the
authority of the federal and state governments to regulate business. The Court’s substantive due process jurisprudence sought to limit this authority to legislation that was public-regarding, as opposed to that benefiting only a particular interest group. The doctrinal tool the Court used for this purpose was the public/private distinction. For half a century, the Court upheld dozens of stringent regulatory statutes, but only when the target businesses were “affected with a public interest,” such as railroads and utilities. Outside this area, similar regulatory statutes were thought to be invalid attempts to further private interests.

As Cushman describes it, the public/private distinction was consistently problematic and the Court struggled greatly to delineate its boundaries throughout the first three decades of the twentieth century. In the 1934 case Nebbia v. New York, the Court decided that the effort was no longer worthwhile. It abandoned the public/private distinction while upholding regulations designed to support the price of milk in New York state. If there was a revolution in due process jurisprudence, Cushman contends, it occurred in 1934, not 1937. But even Nebbia is an acknowledgment of analytical failure rather than a political shift.

On nearly all counts, Cushman’s reinterpretation fits the detailed facts of the New Deal Court’s actions better than the traditional political histories. This can be seen in small ways—such as the fact that the vote on West Coast Hotel was taken before anyone on the Court could plausibly have known about the Court-packing plan. But it is true in larger ways as well. Cushman accounts not merely for the central tendency of the case law—relatively more statutes were struck down before 1937 than afterward—but for its variability as well. Many regulatory statutes survived constitutional scrutiny before the New Deal, and the modern contours of commerce clause jurisprudence took shape only after massive personnel changes on the Court. Cushman presents in his book and in a subsequent article, “Lost Fidelities,” 41 William & Mary Law Review 95 (1999), a tale of gradual change, continuity, and jurisprudential integrity. He examines the erosion of constitutional restraints on economic regulation before 1937 that brought much of the New Deal within the realm of constitutional possibility, as well as the persistence of some such restraints in the jurisprudence of Chief Justice Hughes and Justice Roberts even after the landmark decisions of that year.

Perhaps most significantly, in Cushman’s evaluation of the events of 1933–42, the structures of constitutional thought inform and discipline the deliberations and decisions of Supreme Court justices. They also shape and channel both the drafting strategies of members of the legislative and executive branches and the litigation strategies of govern-
ment lawyers defending those reforms from constitutional challenge. Cushman thereby enables us to see the justices, congressional draftsmen, and government and private lawyers engaged in a genuine professional and analytical exercise rather than an elaborate and cynical charade.

Indeed, part of the difference between the fate of many of the initiatives of 1933–34 and those of 1935 and later can be attributed to superior lawyering in the latter period, a theme Cushman expands on in “The Hughes Court and Constitutional Consultation,” 1998 Journal of Supreme Court History 79. The article reveals how members of the Supreme Court, both through formal judicial opinions and occasionally through informal behind-the-scenes consultation, successfully “coached” the Congress and the Roosevelt administration on how to frame regulatory schemes that would both attain their objectives and pass constitutional muster. At the same time, the Roosevelt administration relied less on ideologues and more on legal craftsmen to write and defend the programs of the “Second” New Deal. Once again, Cushman’s reinterpretation is consistent with contemporary criticisms of the sloppy lawyering of the “First” New Deal and the accolades given to the legal giants of the second.

Cushman believes attempts to explain judicial behavior solely in the conventional vocabulary of political discourse will necessarily overlook and obscure important dimensions of the intellectual enterprise. He elaborates on this idea in “The Secret Lives of the Four Horsemen,” 83 Virginia Law Review 559 (1997), while displaying the ironic wit his students and colleagues prize. The article is a satirical *reductio ad absurdam* that takes an entrenched historiographical posture and derives from its methodological prescriptions conclusions at war with its descriptive claims. The Four Horsemen are conventionally portrayed as reactionary apostles of Social Darwinism and laissez-faire who constructed a jurisprudential theory in service of their ideological agendas. This claim is perfectly plausible if one looks only at the handful of cases that conventional treatments marshal in support of it. Cushman points out, however, that if one surveys all of the cases in which these justices participated, one can just as easily construct a portrait of them as closet Warren Court liberals, surreptitiously nurturing the emergence of a vast taxing and spending regulatory apparatus and quietly championing the rights of convicted criminals, aliens, and political dissenters.

Surely, the unspoken message reads, it is more plausible to conclude that legal ideas actually matter—that they operate as mediating forces between political impulses and judicial behavior. Law is not merely a dependent variable determined by social and political forces, but is itself constitutive of political and judicial ideology.

Another recurrent theme of Cushman’s work is structuralism. He contends that constitutional doctrine must be approached not as a series of independent lines, but an interconnected web. Consequently, one can understand the meaning of one constitutional doctrine only if one understands the context of related doctrines in which the doctrine operates and by which its scope is defined. This integration renders disparate areas of constitutional doctrine developmentally interdependent—change in one area invariably has ripple effects in structurally related domains. The usual technique of teaching and writing about constitutional law—following a particular area of doctrine through the process of evolution—can thus produce misinterpretation of important developments by failing to see these larger structures of doctrinal coordination whole. Cushman expands on the deep connection between commerce and due process jurisprudence in a forthcoming article “Formalism and Realism in Commerce Clause Jurisprudence,” 67 University of Chicago Law Review (forthcoming 2000).

Cushman’s current scholarly agenda includes tying these articles, along with other works in progress, into a collection of essays on early-twentieth-century constitutional development. Having firmly left his mark on early-twentieth-century legal history, however, Cushman also plans to turn his attention to the nineteenth century. We can expect to come away from that work with a new appreciation for the complex evolution of legal and constitutional doctrine in the century following the Constitution’s adoption.
Seeing the
New Deal
in a New Light

When Barry Cushman delivered a lecture in November 1997 to the Supreme Court Historical Society, he asked his audience to forget much of what they had learned about the Supreme Court of the United States under Chief Justice Charles Evans Hughes.
A leading revisionist historian of the Supreme Court crisis of the 1930s, Cushman asked his listeners to "Forget for a moment ... that the justices invalidated New Deal initiatives because they thought them unwise social policy; forget that they later upheld federal regulations only because the Court-packing plan put the fear of God into them; forget that they continued to do so only because they had seen the light. Forget that the Court's role under Hughes was entirely reative: first obstructing, then surrendering to, the political branches." Acknowledging that all this forgetting might be disorienting to his listeners, Cushman suggested that it ultimately might enable them "to see the Hughes Court and its role in the New Deal saga in new light."

In early 1933, Cushman explained, President Roosevelt had sought to engage Chief Justice Hughes as a consultant to the New Deal. The president wanted the benefit of the Court's views on his plans for the federal government's response to the Great Depression. Hughes had declined this request for advisory opinions, informing the president that "the Supreme Court is an independent branch of government." The Hughes Court would in due course invalidate much of the first New Deal, and Roosevelt later related this story while defending his Court-packing plan to a doubtful senator. "You see," the president sighed, "he wouldn't cooperate."

There was, Cushman observed, "no little irony in this defense of the effort to pack the Court." For, as Cushman found, the justices went to considerable lengths to offer valuable counsel to the draftsmen of second-generation New Deal legislation. These suggestions, offered principally in Court opinions but also in occasional behind-the-scenes consultations, sought to channel the meliorative impulses of the second New Deal into prescribed forms that would comply with the requirements of the Constitution. The justices were not simply opposing the administration concerning the permissible ends of government; instead, they were in fact cooperating with Roosevelt and Congress in their efforts to formulate programs addressing the economic crisis of the 1930s through constitutionally permissible means. Rather than simply obstructing reform, the Court shaped it. "The Hughes Court," Cushman concluded, "offered the Roosevelt administration a distinctive form of consultative relationship."

Cushman's invitation to speak before the Supreme Court Historical Society is an honor rarely bestowed upon young scholars. The annual lecture series presented by the society features distinguished scholars from around the country who address a wide variety of topics relating to the history of the Supreme Court. The lectures, like the recent lecture series on the chief justiceship in which Cushman participated, are open to the public and to society members. Each year, the society presents a different lecture series. In addition to Cushman's lecture, the 1997 Chief Justiceships series included lectures about Chief Justices
John Marshall, Roger B. Taney, Melville W. Fuller, William H. Taft, and Earl Warren. Each lecturer is introduced by a member of the Court; in Cushman’s case, Justice Ruth Bader Ginsburg did the honors.

The lecture series serves as the basis for a number of special publications produced by the society. Past publications include *The Jewish Justices of the Supreme Court Revisited: Brandeis to Fortas* (1994), *The Supreme Court in the Civil War* (1996), and *The Supreme Court in World War II* (1996). In addition, the society publishes the semi-annual *Journal of Supreme Court History*, which contains articles written by Supreme Court justices, noted academicians, and other respected contributors.

In the 26 years since its founding by Chief Justice Warren E. Burger, the Supreme Court Historical Society has remained true to its mission of preserving and disseminating the history of the Supreme Court of the United States. Accomplished through public and educational programs, support for historical research, and the publication of a number of books designed for scholars and general audiences, the society’s goal is to increase public awareness of the heritage of the Supreme Court.

Cushman is one of two Law School professors invited recently to lecture before the Supreme Court Historical Society. In 1999 Lillian BeVier (featured on page 5) delivered a lecture on free expression in the Warren and Burger Courts (an excerpt appears on page 11) which will be published in a forthcoming issue of the *Journal of Supreme Court History*.

The justices were not simply opposing the administration concerning the permissible ends of government; instead, they were in fact cooperating with Roosevelt and Congress in their efforts to formulate programs addressing the economic crisis of the 1930s through constitutionally permissible means. Rather than simply obstructing reform, the Court shaped it.
Rethinking the New Deal Court: The Structure of a Constitutional Revolution

by Barry Cushman

The story of the "switch-in-time" is among the most enduring chapters of our constitutional history. It is repeated every year in countless courses in government, history, and constitutional law in our nations' high schools, colleges, and law schools. One of the great morality plays of American civics, it is both celebratory and cautionary. A vast and remarkable homogenous literature built by legions of lawyers, historians, and political scientists recounts and reiterates the story with varying degrees of subtlety and sophistication. In truncated, composite, and only mildly caricatured form, it goes as follows:
Once upon a time in the dark days of the Great Depression, there was a great liberal president (Franklin Roosevelt) who fought valiantly against rich and powerful economic royalists in a noble effort to better the lot of the common man and save the country from economic ruin. His plan, which he called the New Deal, enjoyed widespread public support but was repeatedly rejected by the Supreme Court. The president was aided in this crusade by three wise and visionary liberal justices (Brandeis, Stone, and Cardozo), who generally supported his program and voted accordingly in the cases that came before the Court. Their efforts were frustrated, however, by four reactionary conservative justices (the “Four Horsemen”—Van Devanter, McReynolds, Sutherland, and Butler), whose jurisprudence was driven by their devotion to the anachronistic tenets of laissez-faire economics and their sympathetic subservience to the interests of rich and powerful people and institutions. The conservatives were too frequently aided in their obstructionist enterprise by two waffling moderates (Hughes and Roberts), whose business-class origins likewise disposed them against the New Deal. In the general election of 1936, however, the American people forcefully repudiated the jurisprudence of the Court’s majority and wholeheartedly embraced the constitutional theories of Franklin Roosevelt. Emboldened by his landslide victory, Roosevelt soon thereafter announced his plan to pack the Court. Fearing institutional evisceration, the moderates, in an act spurred by a mixture of cowardice, “statesmanship,” and newfound constitutional enlightenment, decided to switch rather than fight. Upholding the National Labor Relations Act, the Social Security Act, and the minimum wage, they pledged their allegiance to the liberal cause. Thus was a new constitutional order born.

The staying power of this story is truly remarkable. Despite recent substantial and successful revisions of long-standing accounts of the Gilded Age and Lochner Era Courts, the conventional wisdom on the New Deal Court persists. Even as these exciting reappraisals of earlier Courts have been emerging, the constitutional history of the New Deal Court has remained almost moribund.

The dominance of the conventional wisdom is itself an historical artifact and is largely inertial. The “Constitutional Revolution of 1937”—the Court’s decisions in West Coast Hotel v. Parrish, the Wagner Act cases, and the Social Security cases—occurred at a point in American history when the field of constitutional commentary was dominated by scholars inclined to predominantly political explanations of judicial behavior. Their accounts of the revolution, written in its immediate wake, quickly erected a virtually monolithic externalist interpretation that persisted in the postwar era of New Deal consensus culture. New Left historians of the 1960s and 1970s offered extensive reappraisals of various aspects of the New Deal, but seldom focused their attention on its constitutional dimensions. A few commentators of a generation ago expressed some dissatisfaction with this conventional historical wisdom, but their critiques were neither adequately sustained nor sufficiently powerful analytically to blunt the withering counterattacks of their professional foes. As a consequence, the reign of the received account has now spanned more than two generations.

This conceptualization of the decisions of 1937 in externalist terms, as a political response to political pressures, has deflected scholars from inquiry into the plausibility of an internal—legal and intellectual—component to a more comprehensive explanation of the actions of the New Deal Court. Moreover, the externalist account has obscured interesting lines of development in constitutional thought and doctrine. The plausibility (indeed hegemony) of the externalist explanation rests on the assumption that no plausible internal account might be forthcoming. This view is crystallized in the image of a “switch” in time, suggesting a simple binary system of constitutional law. Before 1937, the Court was “anti-regulation” and opposed to “activist national government,” constructing a “doctrinal defense of laissez-faire capitalism”; from 1937 on, however, “the Court accept[ed] liberal nationalism,” and “began to build new constitutional foundations for activist national government.” Such abstract terms hardly begin to capture the complexity of the
positions taken by the justices on a wide variety of issues. Moreover, to think about constitutional issues in these terms is to substitute the language of political science for the legal language in which the justices discussed these issues in conference, in which they wrote about them in their opinions, and which, we may presume, played at least some role in the ways in which they actually thought about the cases that were brought before them. To embrace the thoroughgoing externalist account as the last word on the New Deal Court is to deny the constitutional jurisprudence of the period any status as a mode of intellectual discourse having its own internal dynamic. It is to dismiss the efforts of the lawyers defending the constitutionality of New Deal initiatives as irrelevant and redundant, to deprive Hughes and Roberts of a substantial measure of intellectual integrity and personal dignity, and to suggest that sophisticated legal thinkers casually discard a jurisprudential worldview formed over the course of a long lifetime simply because it becomes momentarily politically inconvenient.

The conventional wisdom is therefore long overdue for some serious scrutiny, for two reasons. First, there is good reason to doubt that it offers an accurate account. The nature of the external account and the evidence available preclude it from being conclusively disproved in its entirety. There is no utterly irrefutable smoking gun: both the conventional wisdom and its critique necessarily rest on circumstantial evidence. Nevertheless, there is ample evidence to suggest that the external account is not nearly as compelling as has conventionally been thought, that it certainly has been overstated, and that it may very well be just plain wrong. Second, the conventional account of the "revolution" requires reexamination because it is certainly not a complete account, insofar as it neglects serious exploration of the internal dimensions of the phenomenon. ...

The objective, however, is not to deny that the New Deal era witnessed dramatic changes in constitutional jurisprudence. It is instead to recharacterize both the jurisprudence that changed and the mechanics by which it changed, approaching the phenomenon examined as a chapter in the history of ideas rather that as an episode in the history of politics.

Excerpted from the introduction to Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998).
Publications of Barry Cushman


“Lost Fidelities,” 41 Wm. & Mary L. Rev. 95 (1999).

Rethinking the New Deal Court: The Structure of a Constitutional Revolution (Oxford University Press, 1998).


“Rethinking the New Deal Court,” 80 Va. L. Rev. 201 (1994).


Where Tax and International Law Converge

Paul Stephan’s academic interests lie in two normally separate fields, tax and international law. That unusual combination, together with Stephan’s analytical, institutional approach, have made him not only an incisive and influential scholar but a valued advisor to foreign governments, the United States Treasury, and multilateral organizations.

Much of Stephan’s early work applied economic insights to tax law. In “Human Capital and the Federal Income Tax,” 70 Virginia Law Review 1357 (1984), he noted that some features of tax law that were traditionally viewed as departures from taxation of economic income—such as medical expense deductions and the exclusion of personal injury compensation—can actually be understood as rough adjustments for gains and losses in human capital, and therefore are consistent with taxation of income. His article “Nontaxpayer Litigation of Income Tax Disputes,” 3 Yale Law & Policy Review 73 (1985), analyzed the costs and benefits of standing rules in the tax
area. Courts have been very reluctant to give standing to an individual to challenge a decision to impose, or not impose, a tax on someone else. This contrasts with more capacious standing rules in other regulatory contexts, and the distinction has drawn criticism. Stephan argues, however, that the complexities and ubiquity of the tax context makes such standing rules particularly costly and the distinction therefore makes sense.

While dealing with the intricacies of tax law, Stephan never abandoned his first academic interest—Soviet politics. He is a particularly astute observer of the internal conflicts that central planning creates. Mixing this interest with law, he became one of this country’s foremost experts on Soviet law. During the 1980s and early 1990s, his teaching partnership with Herbert Hausmaninger, University of Vienna professor of Roman law, legal history, and comparative law, made Virginia one of the few U.S. law schools to offer a course on Soviet law and institutions.

This teaching and research interest necessarily drew Stephan into international law, which was one of many battlegrounds between the West and the Soviet Union during the cold war. The Soviets developed a distinctive approach to international law that emphasized state consent as a prerequisite to the development or enforcement of norms. Meanwhile, part of the Western critique of the Soviet system was the claim that Soviet suppression of free expression and denial of public participation in political life amounted to violations of international law. The Soviets developed their own set of responses to these charges. Together with a Russian academic, Boris Klimenko, Stephan edited a collection of essays in 1991 on these conflicting visions of international law. The book, *International Law and International Security—A U.S.-Soviet Dialogue on the Military and Political Dimensions* (M.E. Sharpe, 1991), was published in English and Russian in both the West and the Soviet Union.

Approaching international law from a non-traditional background, Stephan was able to bring a fresh perspective to bear on what can be an insular field. In particular, he found the dominant themes in the literature insufficient to shed much light on the realities of the cold war world order. International law scholars discussed norms that supposedly governed state behavior with minimal attention to where the norms came from and without apparent concern for the fact that actual state behavior routinely failed to conform to those norms. Thus, Stephan’s relationship with international law changed from that of a consumer to that of a reformer. He came to be in the forefront of a movement in international law scholarship that applies the tools of political economy, in particular the theory of public choice, or interest-group politics, to the creation and maintenance of international law.

An early article in this vein, “International Law in the Supreme Court,” *1990 Supreme Court Review* 133, staked out a position at odds with the dominant theme of public international law scholarship. The point of departure was a trilogy of much-disparaged Supreme Court cases with an international law component: *Argentine Republic v. Amerada Hess Shipping Corp.*, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, and *United States v. Verdeguer-Urquides*. Each case rejected a claim of the primacy of an international norm to a question of domestic statutory or constitutional law, and each was accordingly criticized by public international law scholars.

Stephan notes that the real significance of these cases lies not in their holdings but in the conception of international law that they appear to adopt. Much of the international law community regards international law in largely normative terms. Under that view international law is, as Stephan puts it, “a species of natural law—a morally unified body of precepts emanating from a basic conception of justice.” Stephan argues that the Court’s recent cases advance a different, and more realistic, view. International law is an outgrowth of bargaining and cooperation between governments, not an exogenous body of normative principles.

In the course of providing an insightful critique of the Court’s treatment of international law, Stephan set out a vision of what one might call the “Virginia School” of international law—international law as a system of self-enforcing restraints on sovereign decision making that exists because it is in the best interests of states to recognize those restraints. This view is also prevalent in the work of Virginia international law scholars Curtis Bradley and John Setear, as well as former Virginia professor Jack Goldsmith, who now teaches at the University of Chicago.

While pondering the nature of public international law, Stephan began teaching International Business Transactions, a course that led him to think more deeply
about private international law and those institutions—the GATT/World Trade Organization, the World Bank, the International Monetary Fund, and the Organization for Economic Cooperation and Development, just to name a few—that support the global economy. This led him to recognize that the nature of international law itself was undergoing rapid change. Where international law had once been a set of norms governing state-to-state interactions, international institutions today create regulatory and commercial law that directly affects citizens as they transact. Stephan commented on this phenomenon in “The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order,” 70 University of Colorado Law Review 1555 (1999). The article points out that as international law begins to resemble domestic economic regulation, it is all the more important that we employ the same tools of analysis that we apply to domestic regulation.

Thus one of Stephan’s current research interests is providing a careful political economy of international organizations. While applauding the accomplishments of these institutions, Stephan also explores their shortcomings, their tendency toward self-interested bureaucratic behavior, and the opportunities they present to well-organized interest groups to further their agendas on a global stage.

Stephan argues, in “Barbarians Inside the Gates: Public Choice Theory and International Law,” 10 American University Journal of International Law & Policy 745 (1995), that public choice theory provides a useful methodology for analyzing international law. Although, as he puts it, a theory that puts self-interest at the heart of lawmaking seems excessively pessimistic or wrongheaded to many critics, it has proven its usefulness as a positive account of what lawmakers do.

Having defended his methodological commitments, Stephan’s subsequent work applies them to particular international law problems and institutions. In “The Futility of Unification and Harmonization in International Commercial Law,” 39 Virginia Journal of International Law 743 (1999), for example, Stephan analyzes the popular arguments contending that nations should conform their systems of commercial law to a uniform standard. There is a substantial literature on international harmonization, almost all of it describing the issue as the benefits or detriments of competition among regulators. Stephan takes a novel approach to the issue by looking at the institutional details of international lawmaking rather than trying to refine further the theoretical arguments about regulatory competition.

The article draws on work done by Robert Scott, Law
School dean, Lewis F. Powell, Jr., Professor of Law, and Arnold H. Leon Professor of Law; and Professor Alan Schwartz, Sterling Professor of Law at Yale Law School on the political economy of private lawmakers (a classic example in the domestic context is the American Law Institute). A standard feature of such bodies is the existence of a long-lived body to which governmental actors look for legislative drafting, which in turn delegates specific projects to working groups of academic or technical experts. The set-up is intended to eliminate political pressures from the process, but instead creates an opening for well-organized interest groups to exert substantial influence. This is so because the experts on working groups tend to be self-selected critics of the status quo who wish to see reform. The larger group, by contrast, recognizes this tendency and wishes to counteract it, but lacks the technical expertise of the working group. The result is that interested industries provide counterbalancing expertise and arguments to the larger group, and their interests are often furthered in the final product. Stephan looks at several international commercial conventions and demonstrates that the process and results are consistent with the predictions of this model of private lawmaking.

The collapse of the Soviet Union provided another field for analysis to which Stephan’s multifaceted interests and expertise are perfectly suited. He has had a front-row seat from which to study legal reform in transitional economies, acting as advisor to former Soviet republics through the auspices of U.S. and multilateral agencies.

In an extraordinary pair of articles, “The Fall—Understanding the Collapse of the Soviet System,” 29 Suffolk University Law Review 17 (1995), and “Toward a Positive Theory of Privatization—Lessons from Soviet-Type Economics,” 16 International Review of Law & Economics 173 (1996), Stephan began the process of a micro-level explanation of the collapse of the Soviet system. In the first article, he argues that broad ideological accounts of the collapse of communism give too much credence to the concept of a genuine struggle between ideas that, in practice, had little bearing on how Soviet society was organized. As in all of his work, Stephan argues that attention to institutional detail provides a more secure base for analysis.

The second article exploits that base. Stephan looks at the basic organizational tool of Soviet society—the nomenklatura system—and argues that it broke down beyond repair in the 1980s. A command economy is set up, Stephan argues, to serve the interests of the governing group. In order to keep rents flowing to the top of the pyramid, those at the top must be able to control the activities of actors lower in the hierarchy. Those on the lower rungs, however, have a strong incentive to divert rents to themselves. Over the course of the Soviet experiment, two forms of control were used to minimize rent diversion. The first and most effective was terror. In the 1950s, however, Soviet leaders ceased using the routine threat of violent death to reinforce their commands. A feudal system of patronage and protection accordingly grew to serve the same purpose. The latter, however, offered too many opportunities for low-level actors to cheat. By the 1980s, the system had eroded to the point where most of the fruits of productive activity were enjoyed directly at lower levels of the nomenklatura rather than flowing to the top to be distributed on the basis of loyalty to the leadership.

Stephan thus paints the end of the Soviet system not as a triumph of free-market ideas, but as a gradual and uncoordinated coup carried out by actors who used their physical control over productive assets to divert most of the value produced before it could make its way up to the governing group. As a consequence, membership in the governing group (and by extension, maintenance of central planning) was no longer worth the effort. Privatization, by contrast, was a means by which the lower echelon could seize assets outright and circumvent the increasingly feeble attempts by the center to extract some of their value.

Both of Stephan’s ongoing projects, then, involve a focus on legal, political, and economic institutions. The methodology has proven fruitful in tasks as disparate as understanding corruption as a rational response to institutional change (“Rationality and Corruption in the Post-Socialist World,” 14 Connecticut Journal of International Law 533 (1999)), and determining the extent to which U.S. domestic policy shapes, and is shaped by, the World Trade Organization (“Sheriff or Prisoner? The United States and the World Trade Organization,” 1 Chicago Journal of International Law 49 (2000)). It will undoubtedly offer future insights into the rapid institutional changes that characterize the world of the immediate past and foreseeable future.
Paul Stephan '77 did not plan to be in Moscow when the Soviet Union crumbled. No stranger to the city, he had visited frequently since the early 1980s, helping to plan a series of annual conferences featuring U.S. experts and reform-minded Soviets. December of 1991 found Stephan in Moscow taking part in a conference on federalism. While he was there, the leaders of the component republics effectively ended the central government.
"What I believe I contribute is a sensitivity to the past, and a desire to make reforms responsive to the needs that have evolved out of a country’s history."

“We were meeting with officials in the central government who told us they were cleaning out their desks and would turn out the lights and depart as soon as we left,” he said. “One official commented wryly that at least he was leaving office by the stairs, rather than being flung out the window, as had some others in the Kremlin’s past.”

Stephan and his colleagues managed to organize their meeting. They did so in a land where the central government had been declared inoperative but a replacement had not yet emerged, and in a city where the mayor had resigned but not left office. Describing the mood in Moscow at the time as “alternately elegiac and anxious,” Stephan notes that upheavals of this sort were really nothing new. “Muscovites had been experiencing changes like this since Gorbachev came to power and began to overturn the bedrock of the old order.”

In the weeks and months that followed the end of the Soviet Union, the old order collapsed, a commonwealth of states rose to take its place, and change became a daily occurrence. Stephan, long respected for his expertise in tax law and his knowledge of Soviet affairs, was called to play a role in the resulting reform efforts. He returned to Moscow in 1992 to help the American Bar Association expand its Central and East European Law Initiative (CEELI) into the fledgling republics, serving on CEELI’s advisory board from 1992 to 1995. In 1993 he started serving as a consultant and employee of the U.S. Department of Treasury in its efforts to promote tax law reform. In 1994 he began to work for the International Monetary Fund (IMF) as well. He advised Russia, Azerbaijan, and other former Soviet states “ready to commit to change” on the development of workable taxation structures.

He co-chaired an international working group to develop model commercial and business laws for the supreme court of the Republic of Georgia, and he observed the Georgian parliamentary elections. Stephan organized workshops on tax dispute resolution in Central and East European governments for the Organization for Economic Cooperation and Development. In addition to lecturing to the CIA and the FBI on matters relating to Soviet politics, international law issues, and international organized and white-collar crime, he served as a consultant on Russian law to a number of American and international law firms. Most recently, he was an “armchair advisor” to the World Bank on the drafting of a tax code in Turkmenistan.

Stephan’s knowledge of the former Soviet institutional environment has been an important asset in his role as consultant. “The specific competence of lawyers often lies in their respect for institutions,” he said. “What I believe I contribute is a sensitivity to the past, and a desire to make reforms responsive to the needs that have evolved out of a country’s history.”

For example, Stephan believes that trying to import tax systems from other nations into the ex-socialist republics is a mistake. “Many of the economists who have tried to implement a tax policy assume that any rules they introduce will be obeyed.
In fact, individuals in Central and Eastern Europe have long been deeply suspicious of their legal institutions and law enforcement agencies because they are often corrupt," he explained. "I leave it to my colleagues to draft the tax codes, while I devote more of my energy to determining what the enforcement policies should be, working with judges so that the tax programs that are ultimately introduced are both comprehensible to citizens and legally enforceable."

In addition to publishing extensively on Soviet legal issues, Stephan carries his familiarity with Soviet institutions and operations into his Law School classroom. "I want to be sure that my students understand how complicated it is to translate a rule into human behavior," he said. "It's important for them to see the relationship between the legislative process and how a statute is actually interpreted by the courts."

Stephan has had many years to hone his craft as a teacher. Since joining the Virginia faculty in 1979, he has taught International Business, Taxation, Contracts, and Property Law to a generation of Law School students. Since 1993 he has teamed with his longtime colleague and friend Richard Dean '80, a partner with Covington & Burling, to teach Emerging Markets: Principles and Practice. This popular seminar course explores the legal and regulatory structures affecting foreign investors seeking to participate in developing emerging markets and re-structuring formerly socialist economies.

Paul Stephan's real-life experiences have helped shape the emerging post-Soviet nations as they have informed his scholarship and teaching. The result is a richly nuanced, reality-based approach to the law and how it works that will no doubt continue to be of benefit to those interested in tax and international law—as students, practitioners, or policymakers—for years to come.
International Governance and American Democracy

by Paul B. Stephan III

DOES INTERNATIONAL GOVERNANCE threaten to crowd out American democracy? Many public figures and scholars think so. The street theater in Seattle last fall and Senator Dole's effort to establish a national tribunal to review World Trade Organization (WTO) dispute resolution decisions both attest to the extent of the concern. As international institutions burgeon in number and significance, the residuum of authority left in our national government seems an ever diminishing domain. Extrapolating into the future, one can envision a time when the United States retains only as much sovereignty as, say, the members of the European Union or the several States in our own federal system. The diminution of sovereignty brings with it a loss in democracy, as the distance between our citizens and the institutions that make the most meaningful decisions grows greater.
I take this concern seriously but believe its popular formulation is too simplistic and somewhat misplaced. International governance entails not only the formal institutions and explicit agreements that generate what I have called the “new international law.” It also embraces a system of formulating and imposing norms on state and individual behavior that operates outside of any publicly accountable institution. A debate recently has arisen in the United States over the legitimacy of customary international law, with fierce arguments on each side. One dimension of this debate is the tension between American democracy and the adoption of customary norms through the courts.

Both kinds of international law—the rules derived by courts in response to perceptions of international custom and foreign affairs complications, and the rules generated by international institutions such as the WTO, NAFTA and the IMF—pose problems for a democracy. Each involves the imposition of a legal outcome without the direct participation of the national lawmakers in the law’s formation. The distance between lawmaking and law enforcement presents a difficulty for a society that presumes the consent of the governed. Because it comes from the outside, international law does not go through the normal filters that a democratic system uses to thwart undesirable or harmful, as well as unwanted, laws.

But the two types differ in how they become law, and these differences have distinct implications for democracy. Court-created international law relies fundamentally on a principle of authority that leaves no room for popular decisionmaking. Neither voice nor exit play a role in its development or application. Institutional international law, at least for the United States, entails both. The Executive, and to a limited extent Congress, has a voice in developing the content of the international agreement that an institution will administer, each has a role in deciding how to implement the mandate of international institutions in domestic law, and both can agree to withdraw the United States from a commitment that has become unacceptable. These checks may not be enough, but they are greater than what applies to court-created law.

The distance between lawmaking and law enforcement presents a difficulty for a society that presumes the consent of the governed. Because it comes from the outside, international law does not go through the normal filters that a democratic system uses to thwart undesirable or harmful, as well as unwanted, laws.

Court-made international law. Most advocacy of customary international law depicts it as a body of norms that are “out there,” already formed and waiting for enforcement, much like the common law of the late nineteenth century. Even the more finely grained accounts of how a norm gets to become customary international law tend to glide over certain important distinctions. One factor that is said to play a crucial role in determining international custom is “state practice.” This assertion makes sense: It is hard to conceive of custom as anything other than commonly exhibited behavioral norms. But specialists then assert that state practice entails not the observable behavior of states, which is messy and often lawless, but rather what states assert as norms. By practice, in other words, they mean not what states and their agents do, but rather what they say. Practice becomes a matter of rhetorical style, not of preferences revealed by conduct.

This move is critical, because it shifts the authority to
decipher state practice from those who observe state behavior to those who interpret statements of intent. In practice this means that the academic community’s hermeneutic monopoly comes into play. To know what constitutes customary law, we need to know what states believe their obligations to be. But because states tend to speak in open-ended, if not vacuous terms, someone has to explain what those statements really mean. We look to scholars to perform this task. So even though, as a formal matter, authorities such as the Statute of the Permanent Court of Justice rate academic opinion last in a list of sources of international law, in reality international jurists play the primary role in determining the content of customary international law.

In what way is the process by which the community of international law scholars forms a consensus undemocratic? To join this community, a person must pass two hurdles. First, he or she must obtain an academic position of some distinction, in law or international relations. Second, the other members of the community must accept that person as a genuine contributor to the conversation, rather than as an uninformed outsider. Both processes involve cooption by a group that faces little or any outside pressure or accountability and tends toward insularity. Limiting decisionmaking to such a group seems the antithesis of democracy.

But this observation may prove too much. Any realistic conception of a flourishing democracy must save room for institutions that do not respond readily to the popular will. One of the foundations of American democracy is a conviction that popular sovereignty expressed through public institutions must coexist with structures that constrain what the popular will can do. Our judiciary, exercising both the August power of judicial review and the more mundane but critical function of constructing common law rules that fill in where the legislature has not spoken, checks popular excesses and keeps the system in good operating order. Our First Amendment, which recognizes specific spheres of civil society that operate independently of the state (the press, religion, and other expressive communities) implies a further constraint on popular decisionmaking. These limitations are not so much antidemocratic as definitional. Isn’t the lawmaking power of the international law scholarly community simply an extension of the academic freedom that bolsters and defines the peculiarly American form of democracy?

What I will call the civil society argument reflects confusion about the role of academic freedom in democratic decisionmaking. The academic community, as well as other elements of a civil society such as human rights activists, contributes to a flourishing public space through shaping the debate. It produces research, arguments and values that inform discussion and mold views on issues of the day, including fundamental conceptions of decency and humane treatment. But giving such a group lawmaking power both displaces public discussion with a form of raw authority, and may have a corrupting influence on the group’s civic function. The displacement occurs when academic judgments about the content of particular norms substitute for the normal process of promulgating norms. The risk of corruption follows from the power implicit in the group’s authority to declare binding rules. Knowing that their conclusions will have direct effect on people’s lives, a strain of self-consciousness and self-censorship may enter into the community’s discourse, distorting its arguments and judgments.

If the principle equating customary international law with federal common law presents democratic problems, what is the solution? A modest proposal would direct the judiciary to look to international custom and practice for potential sources or models in cases where Congress, by mandate or inference, has indicated that the courts should come up with a rule, but not to do anything more. Courts do not have to regard customary international law as something that independently determines federal common law, and, if democratic values matter, they should not. Courts can listen respectfully to the scholarly community when they have a need to search for international law, but do not have to regard the sentiments of that community as binding on them.

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