

The Constitution: A Cosmopolitan Examination
Seminar: New-York Historical Society
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This seminar will examine the ways in which the Constitution and constitutional law has drawn upon international ideas and responded to international legal/political issues. These engagements and entanglements with the larger world have played a role in its making and in the development of Constitutional Law. Indeed, the cosmopolitanism of constitutional interpretation has created important moments of constitutional invention, beginning with the Constitutional Convention and in many subsequent moments of constitutional creativity in framing and argument in respect to both domestic and international affairs. The discussions will also include occasional international comparisons. The seminar will proceed by case studies, including the Revolution and the Eighteenth Century Constitution, slavery and the Constitution, the Civil War, The War of 1898 and Imperialism, and the constitutional issues involved in the League of Nations and the United Nations. Readings will include both legal texts and relevant general historical texts as well as relevant historiography. All readings will be available online.

Week I: The Founding

What is Cosmopolitan?
Cosmopolitanism and Parochialism
 As Constitutional Interpretation
 As Historiography
The Travels of the Constitution and Federalist Papers

In this session, we will investigate various meanings of the terms cosmopolitanism and parochialism and their use in connection with constitutionalism as a political and legal phenomenon. This will help focus and clarify our subsequent studies and discussions. We will also introduce the historical context out of which the Constitution emerged and which explains its cosmopolitan foundations. Pragmatic lessons learned from the failures of the Articles of Confederation and wider ideological commitments to cosmopolitan ideals of the Enlightenment led the Framers of the Constitution to adopt innovative constitutional mechanisms designed to integrate the new nation into the European order of states and ensure its observance of the law of nations.

Readings: Thomas Bender, *A Nation Among Nations* (2006), pp. 3-14.
The Declaration of Independence
The Constitution of the United States of 1787
David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review*, 85 (2010), pp. 952-61, 970-79, 980-1015
Federalist Papers, Nos. 3, 22, 63, 64, 75 (Jay, Hamilton, and Madison)

(excerpts)
David C. Hendrickson, *Peace Pact: The Lost World of the American Founding*
(2003), Introduction, 3-29
James Madison, "Universal Peace" (1792)

Week II: International Affairs in the Washington Administration

The Neutrality Crisis of 1793
The Jay Treaty Controversy of 1795-96

In this session, we will consider the two major foreign policy crises of the Washington Administration – the Neutrality Crisis of 1793 and the Jay Treaty Controversy of 1795-96 - and how these events helped shape the early development of cosmopolitan constitutional ideas and also gave birth to the Federalist and Republican parties despite the uniform aversion to political parties among the Founding generation. The Wars of the French Revolution sharply divided the new nation and revealed the radically different political and constitutional strategies that Federalists and Republicans believed necessary to reconcile popular sovereignty with cosmopolitan ideals. The continuing strength of more parochial movements also became evident. Yet, in the midst of intense controversy and crisis, most of the political leadership on both sides remained committed to many of the cosmopolitan elements of the Constitution, including the status of the law of nations under the Constitution and the duty of the executive to uphold the nation's international obligations.

Readings: Thomas Bender, *A Nation Among Nations*, pp. 105-112
Stanley M. Elkins & Eric McKittrick, *The Age of Federalism* (1995),
pp. 308-11, 356-65, 375-449
David M. Golove and Daniel J. Hulsebosch, "A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition," *New York University Law Review*, 85 (2010), pp. 1019-1061
Pacifcus-Helvidius Debates of 1793
Pacifcus (Hamilton), numbers 1 and 4
Helvidius (Madison), numbers 1, 2, 4
Ware v. Hylton (1796) (excerpts)

Week III: Supremacy Clause, South Carolina, and the "Negro Seamen Act Controversy"; the Law of Nations, Slavery, and Antebellum Constitutional Law

Constitutional and Diplomatic Controversies over South Carolina's Negro Seamen Act
Intensifying International Skepticism about Slavery, and Consequent Antebellum Resistance to the Law of Nations

In this session, we will skip forward to the early the Antebellum period, and explore how localist (States Rights) movements, centered in the South, intensified their challenges to national authority in part to resist growing global pressure on the slavery issue. As usual, South Carolina took the lead by enacting the first Negro Seamen Act, which directed the imprisonment of any free blacks found onboard ships coming to port within the state. This law conflicted with treaty obligations the United States had concluded and became the subject of constitutional, political, and diplomatic controversy. On the constitutional front, the ability of the nation to uphold international standards was placed under severe strain, as South Carolina effectively nullified the treaty commitment and justified its measure in a distinctly parochial idiom. Moreover, as the law of nations became increasingly hostile towards slavery, Southern resistance to the law of nations intensified.

- Readings: William Freehling, *Prelude to Civil War* (1966), 53-61, 106-116
Philip Hamer, "Great Britain, the United States, and the Negro Seamen Acts, 1822-1848," *Journal of Southern History*, 1 (1935), 3-28
David M. Golove, "Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power," *Michigan Law Review*, 98 (1999-2000), 1210-37
Elkison v. Deliesseline (1823)
United States v. The La Jeune Eugenie (1822) (excerpts)
The Antelope (1825) (excerpts)
Dred Scott v. Sandford (1857) (excerpts)

Week IV: Civil War: Confiscation and Emancipation

The Wider Global Context: Emancipation of Slaves and Serfs
The Internationalist Dimensions of Civil War Constitutionalism
The Constitutional Theory of the Civil War
The Second Confiscation Act and the Constitution
The Emancipation Proclamation

In this session, we will examine the continuing influence of global ideas and practices on U.S. constitutional law during the Civil War. Perhaps ironically, international law and standards played a central role in the legal/constitutional conceptualization of the Civil War. This entanglement between constitutional and international law meant that the great constitutional issues of the war – including real property confiscations and emancipation – were debated as questions of international law. Moreover, this greatest of internal conflicts was actually part and parcel of global trends taking place in many other parts of the world. Our discussion of this topic will continue in Week V, when we will focus on the constitutional aspects of the Emancipation Proclamation.

- Readings: Thomas Bender, *Nation Among Nations*, pp. 122-64, 175-81
Peter Kolchin, "After Serfdom: Russian Emancipation in Comparative

Perspective,” in Stanley L. Engerman, ed. *Terms of Labor: Slavery, Serfdom, and Free Labor* (1999), 87-115

Thaddeus Stevens, Lancaster, PA Speech, September 7, 1865 (excerpts)
O.H. Browning, *Congressional Globe* (April 29 and June 25, 1862) (excerpts)
Charles Sumner, *Congressional Globe* (June 27, 1862) (excerpts)
The Prize Cases 1863 (excerpts)
Emancipation Proclamation
O.H. Browning-Abraham Lincoln Correspondence, September, 1861
Letter from Abraham Lincoln to James C. Conkling, August 26, 1863
B.R. Curtis, *Executive Power* (1862) (excerpts)
Grosvenor Lowery, *The Commander in Chief* (1863) (excerpts)

Week V: 1898: Empire and the Constitution

Continuing Discussion of the Emancipation Proclamation
Imperialism and Anti-Imperialism
Does the Constitution Follow the Flag?: The Cosmopolitan Constitutional Foundations of American colonialism

In this session, after finishing our discussion of the Civil War, we will skip forward to the Age of Imperialism and the constitutional consequences of the Spanish-American War of 1898. The acquisition of new non-contiguous territories gave rise to grave constitutional questions about the nature of the American republicanism. The ensuing debates reflected alternating commitments to cosmopolitan and parochial constitutional ideologies, with racism playing a large role on both sides. Indeed, in the context of imperialism and anti-imperialism, the morally equivocal character of cosmopolitan constitutionalism is starkly revealed.

Readings: Thomas Bender, *Nation Among Nations*, 182-86, 206-23
Harvard Law Review Forum on Whether the Constitution follows the Flag (1899-1900)
Carl Schurz, *American Imperialism* (1899) (excerpts)
Downes v. Bidwell (1901) (excerpts)

Week VI America as a Great Power; Internationalism v. Isolationism in Constitutional Law; Constitutional Dilemmas of the United Nations Charter

In this session, we will consider some important trends in constitutional jurisprudence that arose as the United States emerged as a Great Power in the late 19th Century and culminated in the ratification of the United Nations Charter in 1945. During this period, there was a great expansion in the scope of executive power over foreign affairs, a development closely connected with imperialism and Great Power status. At the same time, the ongoing struggle between internationalists and isolationists (and imperialists and anti-imperialists) had important manifestations in constitutional law. We will

examine how these explosive controversies helped defeat the Versailles Treaty and U.S. participation in the League of Nations and how FDR managed to move constitutional thinking in new directions in the period leading up to the Senate debate over the U.N. Charter.

- Readings: Emily Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930* (1999), 39-47, 52-60
Arthur M. Schlesinger, Jr., *The Imperial Presidency* (2004) (excerpts)
Edward Corwin, *The President's Control of Foreign Relations* (1917) (excerpts)
John Bassett Moore, "Treaties and Executive Agreements," *Political Science Quarterly* 20 (1905) (excerpts)
David Golove, "From Versailles to San Francisco: The Revolutionary Transformation of the War Powers" *University of Colorado Law Review*, 70 (2002) 1491-1524
United Nations Charter (excerpts)