

The Clough Center Report

Spring 2011

THE CLOUGH CENTER FOR THE STUDY OF CONSTITUTIONAL DEMOCRACY

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From the Director:

The textbook in the Comparative Law course I took in law school divided the world into three legal systems: common law, civil law, and 'the socialist legal tradition.' Even as I was taking the course, the last of these 'traditions' was collapsing. And, in some ways, even more than before, the first two are increasingly blending. The legal world is becoming smaller, and less hermetic.

Thanks to my colleague Kathy Bailey, the Associate Director of BC's Islamic Studies and Societies Program, Judges Frank Bailey and Joan Feeney of the federal bankruptcy courts



in Boston, and Interim Dean of the BC Law School George Brown, the Center's Junior Fellows and BC's faculty got to experience this directly as the Center hosted a day-long visit of a group of Ukrainian judges to campus. During their visit, the judges met with students, attended an American law school class (BC Law Professor Ingrid Hillinger's contracts class), and participated in workshops on legal globalization (by BC Law Professor Vlad Perju), American Legal development (BC Law Professor Mary Bilder), corruption and the law (George Brown), and women and American politics (Political Science Professor Kay Schlozman). These judges are doing their best to break free from the legacy of "the socialist legal tradition" that has by now, I'm sure, disappeared from the textbooks of current law students. It was never much of a 'tradition' – implying, as the term does, deeply-rooted organic development. The 'tradition' was instead the product of revolutionary Marxism. One of its articles of faith was that law was about politics – and power – all the way down. In such a system, the idea of an unbiased, independent judge, enforcing the rule of law was understood

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as bourgeois delusion – part of the ideological superstructure of bourgeois capitalism.

There was – and is – something to this, as anyone who has studied the relationship of law to politics must confess. At the same time, as judges around the world in what are now post-communist and post-dictatorial societies (like our Ukrainian judges) understand, building an independent judiciary under the rule of law is something that is no mere chimera, but a real goal, and immensely desirable for human flourishing and happiness – yes, to capitalism, but to much more besides.

The Clough Center aspires to teach our students about the challenges, dilemmas, and possibilities of this process, and – where we can – to promote it through instruction and discussion of the sort we hosted this fall. Through the cooperation across schools and disciplines at BC, we look forward to hosting other such visitors in the future, thus enhancing our understanding of, and contribution to, the global development of effective popular government under law.



Ken I. Kersch

Clough Center Finds a Home at 10 Stone Ave



HILLARY THOMPSON
GRADUATE ASSISTANT

Since its founding in 2008, the Clough Center for the Study of Constitutional Democracy has been organized out of the director and staff’s scattered offices and homes. As one of the first centers in the emerging Boston College “Center of Centers” rubric designed to streamline administrative support for academic centers at Boston College, the Clough Center is testing this new model. At the start of its third year, the Clough Center and the Center for Centers found a physical home. Now situated in one of Boston College’s newest buildings at 10 Stone Avenue in Chestnut Hill (across Beacon Street from the Merkert Chemistry Center), the new offices will allow substantial growth in the Center’s intellectual life and capacities.

The Clough Center, the Institute for Liberal Arts, and the staff of the Center for Centers share the newly renovated building, which houses an office for Center Director Ken Kersch as well as offices for the Clough Graduate Assistant, the Clough Journal of Constitutional Democracy,

and for visiting faculty affiliated with Boston College Centers.

10 Stone Avenue was formerly a single family home and has been renovated to serve as a multi-purpose academic space. The building contains two conference rooms, carefully renovated to keep the intimate feel of the original house while providing the technology necessary to support a variety of presentation needs. These rooms have already proven excellent venues for Center lunch and dinner events, and are frequently filled with informal meetings of faculty and students before and after Center events.

The mix of offices– occupied by faculty, staff, graduate and undergraduate students– creates a dynamic mix that helps to fulfil the vision of the Gloria and Charles Clough when they generously endowed the Center. The first few years of the Center saw numerous speakers, lunch and dinner colloquia for area students and faculty, and a major conference on President Obama, national security and the law. We look forward to the expanded role the Center can play in the intellectual life of Boston College in our new home.

David Kirp: Bridging the Widest Achievement Gap

BRENDAN BENEDICT
STAFF WRITER

The Clough Center hosted David Kirp, a professor at the Goldman School of Public Policy at the University of California at Berkeley, for a luncheon seminar on November 18.



DAVID KIRP

Kirp, a leading scholar of education policy, gave a lecture entitled, “Bridging the Widest Achievement Gap: African-American Males and Equal Educational Opportunity.”

“The problem is pretty straightforward,” he began. “By any standard, black males do the worst” in comparison to their peers in public schools.

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Kirp dispelled notions that any single factor such as race, gender, or class could explain achievement gaps for black males. Black females, white boys, and those in different income brackets all do better in school than black males, he explained. Kirp also criticized what he called “genetic fatalism,” the belief that blacks were genetically inferior in terms of intelligence, and “environmental fatalism,” the view that systemic issues in the inner city would render school reform useless.

Kirp said that to address the

achievement gap, “there are no magic bullet answers.”

“The smartest decision a kid can make is to pick his parents,” he joked, alluding to overwhelming statistical evidence to show that involvement of parents is one of the chief factors in determining the academic success of a student.

Instead of magic bullets and impossible choices, Kirp outlined a variety of strategies that school administrators could deploy in tandem. He outlined early childhood education as one possibility, saying that it was not a priority for Obama, despite his rhetoric. Early programs should have small classes with highly trained social workers and should provide both work and play. He noted one early education program that also reached out to parents by providing them with adult classes, a way to get families involved in school.

Kirp gave a “golden rule” for districts contemplating changes. “Is this what you want for a kid that you love?” he challenged them to ask.

He continued his discussion by noting that although Head Start (the program that provides early education and skill development for children of low-income families) showed few short-term effects on test scores, its long-term impacts were significant. Head Start teaches children “emotional resilience” to adapt to social situations and to better

deal with adversity in their lives.

Kirp called these “sleeper effects,” and offered other ways to capture them. One problem faced by black males is what he called “stereotype vulnerability,” in which students view their low achievement as an inevitable factor of their race and end up working less to improve. Kirp suggested students undergo a lecture series on the function of the human brain, spread over a period of several days. Research showed such a curriculum led to better grades and attitudes among students because they implicitly learned that gender, race, and class were not holding them back.

The most successful programs

The most successful programs are the ones that have sustained, hands-on involvement by teachers or mentors with black males.

are the ones that have sustained, hands-on involvement by teachers or mentors with black males, Kirp said. While Kirp’s goal would be to have a “cradle to college” mentoring program for disadvantaged youths, he acknowledged the high costs of such a system. Even minimal mentoring could have an effect by keeping kids off the streets after school.

“There are no miracles,” he concluded. But a “system of interventions” may have the chance of closing the black male achievement gap.

Constitution Day Lecture: Gabriel Schoenfeld Speaks on “Necessary Secrets”

CHRISTOPHER FITZPATRICK
UNDERGRADUATE ASSISTANT

The First Amendment protection of speech and the press played a central role in Professor Gabriel Schoenfeld’s September 2010 Constitution Day lecture, “Necessary Secrets: Leaks, National Security, and the Law.” Speaking before a large audience and recorded for Boston College’s Front Row media collection, Professor Schoenfeld presented a case for a balance between security and openness – secrecy and freedom of speech and the press.

Currently a Senior Fellow at both the Hudson Institute and the Center for Strategic and International Studies and a Resident Scholar at the Witherspoon Institute, Schoenfeld has a long history of national security scholarship. Specializing in relations with the former Soviet Union, a state well known for its penchant for confidentiality, his expertise with secrecy in government provided a unique insight into the issue of leaks of state secrets.

Schoenfeld’s lecture topic was eminently topical, occurring just as the nation learned of the “Wikileaks” website and its release

of tens of thousands of classified military documents-- a topic that would come to dominate the news for months. Using this and other examples, Schoenfeld balanced the ideals of the Constitution with the necessities of securing a modern nation. He noted that “secrecy, like openness... is a prerequisite of governance.” He argued that this difficult issue must almost certainly be handled on a case-by-case basis, underscoring the difficulty in reconciling the need for both freedom and security.

Schoenfeld described a common argument for Constitutional protection in cases such as “wikileaks.” Following the First Amendment back to its origins, he noted that secrecy was a part of traditional monarchy, essentially representing the very ideal that the American colonists rebelled against. Tracing the philosophical arguments motivating the founding fathers, he outlined the claim that legitimate power comes only from the informed consent of the people– a principle demanding a high degree of openness in government.

Despite this outline, however, Schoenfeld’s arguments stood against those who leak government secrets. He noted that only those individuals who take an oath of secrecy have lawful access to classified materials. He raised the jurisprudential theory that the First Amendment may not have been a blanket protection for the press to publish whatever it desires (subject only to limits like libel law)– as it is sometimes interpreted, but rather a protection from prior restraint.

Ultimately, Schoenfeld advocated for more stringent security. He noted several ways that leaks

“Secrecy, like openness... is a prerequisite of governance.”

put the American people at risk, suggesting that leaks impair the government’s ability to protect the nation and make foreign intelligence agencies less willing to share information with the United States. Remarking on the role of the press in leaks, he mentioned the need to keep some secrets as a matter of security, but also noted that “openness is an essential aspect of self-governance.” Overall, he concluded that the press and prosecutors must both practice discretion, bearing in mind the need to maintain the delicate balance between freedom and security.

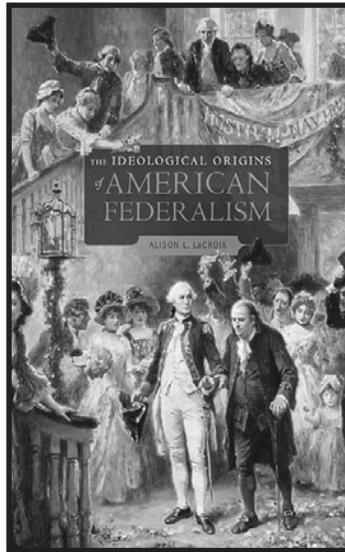
Panel Discusses New Theories on American Federalism

“The Ideological Origins of American Federalism”

HILLARY THOMPSON
GRADUATE ASSISTANT

In October a panel of some of the nation’s most eminent federalism scholars gathered at Boston College to discuss a new book by Alison LaCroix of the University of Chicago Law School. LaCroix’s book, *The Ideological Origins of American Federalism* (Harvard University Press, 2010), seeks to revise traditional approaches to federalism. Political science and history departments tend to see federalism as the inevitable result of the colonial and British tradition, which the founders had no choice but to incorporate into the structure of the new nation. Law schools, by contrast, often treat federalism as a philosophical innovation discovered by the founders at the Constitutional Convention. LaCroix argues that the truth is somewhere in between.

Federalism, her book argues, was an idea that had its roots in the history of the nation, but that gained a philosophical and ideological life as the founders gave it more intellectual attention. The ideas existed, but the exigencies of political circumstance and reaction to the events of 1760 through the 1780s with Great Britain caused the ideas



to change in important ways to create a uniquely American federalism.

In the 1760s in the colonies, the colonists carried on a public discourse seeking to create a subject matter division of sovereignty, with precipitating events such as the Stamp Tax. Divided sovereignty was seen as an opposition strategy, a way of protecting the colonies from Parliament. In the early 1770s, the idea of multiple sovereigns became commonplace, sovereignty was being shifted to the people, and it began to be seen not just as practical, but as desirable. Finally, LaCroix argued, in the 1780s federalism

became an ideological-intellectual effort to make sense of the world—ideas of judicial review begin to gell in subject matter distinctions.

The ideological origins of federalism, LaCroix claims, reached their height with the defeat of Madison’s proposal for a federal veto over state legislation, and the replacement of this proposal with the oath clause and the supremacy clause. This move, she argues, shifted the ability to veto state laws from federal legislation (where Madison would have put it) to the courts, and gave the judiciary an essential role in determining subject matter sovereignty in the new republic. Under the Court’s influence, in the 1790s the ideology of divided sovereignty declined and was replaced by the rise of federalism as jurisdiction.

Discussing the contributions of LaCroix’s book, Edward Purcell of New York Law School praised her description of federalism as an ideology, an intellectual effort to make sense of the world, but which is not purely philosophical. He applauded LaCroix’s description of federalism as suffused with practical values and normative judgments that makes federalism instrumental. The ideas are too vague and evolving to be pointed to as a single philosophy that can be determined by looking at the intentions of the founding fathers.

Steven Calabresi of Northwestern University Law School and cofounder of the Federalist Society outlined a

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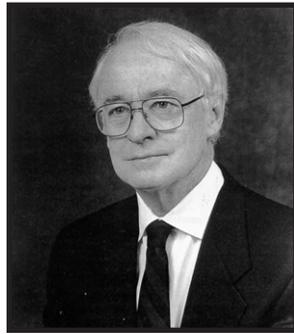
Two Seminars with Senior Fellow James Q. Wilson Discuss Unemployment, Crime, and Immigration

BRENDAN BENEDICT
STAFF WRITER

James Q. Wilson, the senior fellow at the Clough Center for the Study of Constitutional Democracy and one of the nation's leading political scientists, gave two luncheon seminars this fall. As always, these seminars were standing-room-only crowds of faculty, students and staff.

On October 7th, Wilson gave a lecture entitled, "With the Unemployment Rate Over 10 Percent, Why Has the Crime Rate Not Gone Up?" He began by drawing a historical parallel to levels of crime during other times of economic stagnation.

"Why did crime go down during the Great Depression?" he asked, noting that unemployment was at 25% during the worst periods. By contrast, crime increased during the 1960s, but decreased during the 1990s, both periods of sustained economic growth. Wilson gave a number of statistics that showed that common crimes such as grand theft auto, homicide, and larceny decreased in multiple urban areas during the current recession.



JAMES Q. WILSON

Wilson articulated several reasons for why crime may be decreasing now. "First, more people are in prison," he said, which should have downward pressure on crime rates. Additionally, more homeowners have security systems than ever before.

Wilson also praised police departments for patrolling hot spots, which he acknowledged

was politically difficult given the controversy surrounding his broken windows theory. He pointed to the "comstat" system, which holds precinct commanders directly responsible for crime rates, as an incentive to get the job done. Police departments have also worked more closely with the communities they protect, gaining critical insights into crime organizations.

Finally, Wilson said, "The culture of self-expression has been replaced by some degree with a culture of self-control." The hippie drug culture is long gone, with young people more acutely aware of the consequences

of their decisions, he argued.

On December 2, Wilson discussed a topic making daily headlines. "The Politics of Immigration Policy" began by dispelling what he called the "myths of immigration." Wilson criticized the use of the word "amnesty," calling it a "deeply mistaken debate" because the overwhelming majority of immigrants are not criminals. He said welfare was not a magnet for Mexican immigrants and found no dramatic adverse effect on white employment or income levels.

Next Wilson outlined several possible reforms for the nation's immigration policy, chief among them to attract more high-skilled workers by auctioning off additional H-1B visas to employers. He also stressed the need for temporary low-skilled workers for the agricultural industry in the Southwest, but cautioned that any such proposals should include "E-Verify," a national identification system that tracks Social Security numbers. E-Verify would help prevent employers from hiring illegal immigrants, he reasoned.

Moreover, Wilson proposed limiting family visas intended for reunification to spouses and minor children of citizens only, dubious of the large four tier preference system. Most tellingly, Wilson presented evidence that the word "amnesty" has a strong negative effect on

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source of federalism that much more closely tracked the traditional view of the “inevitability” of federalism falling out of the British intellectual and political tradition. The separation of powers and division of sovereignty ideas grew out of the colonial mimicking of the British structure of King, the House of Commons, and the House of Lords. The efforts of the Constitutional Convention were to enshrine this mixed regime and the separation of powers. For Calabresi, where the American experience separated from its British lineage, however was that “we the people” were the only authority vested with the power to change the Constitution. “American Federalism” he claimed, “is an indestructible union of indestructible states in which neither the national government nor even

the Supreme Court has the last word— it is “we the people” who are the last arbitrators of federalism.”

Finally, Boston College professor of Political Science R. Shep Melnick claimed that American constitutionalism does not actually divide sovereignty, but it hides it in the federal judiciary. What the development of federalism provided, Melnick argued, was the American love of multiplicity— the uncountable multitude of various authorities in the American system, where only the federal courts are the final arbitrator. He pointed to and extended LaCroix’s final chapter, arguing that what has been described as the “arbitration and mediation” done by the Courts is actually the vesting of sovereignty in the Courts, which do not respond coherently.

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the public’s support of reform of illegal immigration, what he called “a political minefield.”

His advice to legislators with serious goals of changing policy is to “build the wall across the southern border of the United States.” This would provide them with political cover to say they take the amnesty issue seriously and propose expansions of the visa system simultaneously. “By doing nothing, we are in effect giving [illegal immigrants] amnesty,” he said.

After Wilson’s immigration remarks, Boston College professor and immigration policy expert

Peter Skerry offered comments, often at odds with Wilson’s own conclusions. A spirited discussion between the two experts followed.

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**FALL, 2011:
A SYMPOSIUM ON
CONSTITUTIONALISM,
SECULARISM, AND DEMOCRACY
IN THE MIDDLE EAST**

**DETAILS AT: [BC.EDU/CENTERS/
CLOUGHCENTER/CONFERENCES](http://BC.EDU/CENTERS/CLOUGHCENTER/CONFERENCES)**

CLOUGH CENTER SPRING 2011 EVENTS

February 9, 2011
4:30 PM

Pauline Maier: "Citizen Founders: Americans Debate the Constitution, 1787-1788" based on her new book (Simon and Schuster, 2010).

March 2, 2011
4:30 PM

Roundtable Discussion: "Is Partisanship a Bad Thing?" with Nancy Rosenblum, Russell Muirhead, and R. Shep Melnick

April 5, 2011
4:30 PM

Margot Canaday, "The Straight State: Sexuality and Citizenship in Twentieth Century America"

April 16, 2011
Time: TBD

Screening of Frederick Wiseman's film *State Legislature* (2006), with a discussion led by the filmmaker.

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For more information on Clough Center events, please see the Center's website.

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