

**THE LONG COLD WAR:  
AMERICAN SOCIETY FOR LEGAL HISTORY ANNUAL MEETING 2009  
PANEL PROPOSAL<sup>♦</sup>**

Though fears of communism stalked American law for most of the Twentieth Century, many questions remain about the role that communists and their foes played in shaping the course of legal development in the United States. How, for example, did communists shape judicial interpretations of the Constitution, if at all? Were judicial postures towards communists consistent or ambivalent over time? If they were ambivalent, is it possible to say that the courts fought their own, erratic Cold War? If not, to what extent have courts played a more subtle role, using law to grant concessions to the Left, hoping perhaps to absorb more radical politics?

This panel builds on the work of Mary L. Dudziak, G. Edward White, and others who have looked at the impact that communism and anti-communism have had on American law, focusing on the Supreme Court. Jennifer Uhlmann will present a paper on the work of the Communist International Labor Defense in the 1920s and 1930s, showing how even as courts aligned themselves “against labor” to borrow from Dan Ernst, communist-affiliated litigators still helped shape First and Sixth Amendment Doctrine. Brad Snyder will focus on judicial ambivalence, showing how individual Justices responded, and contended with one another over the outcome of the Rosenberg case. Anders Walker will recover the influence that Lewis F. Powell’s 1958 trip to the Soviet Union had on his legal thought, including his work for the American Bar Association and his Supreme Court jurisprudence.

Reuel Schiller has agreed to comment and Laura Kalman has agreed to chair.

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<sup>♦</sup> Submitted by Anders Walker, Assistant Professor of Law, Saint Louis University School of Law, awalke16@slu.edu, (314)-977-7447

# THE COMMUNIST CONTRIBUTION TO CONSTITUTIONAL LAW

Jennifer Uhlmann

## ABSTRACT

In the main, historians of labor law (Atleson, Forbath, Tomlins, Ernst) have highlighted how and why the law and judicial system worked against labor. Judges repeatedly used their power of judicial review to stymie reform efforts by labor's advocates in state legislatures. They also widely issued injunctions during strikes, crippling union efforts and constricting the types of actions workers could take. The conservative judiciary in the late nineteenth and early twentieth centuries played a critical part in narrowing the agenda of the organized labor movement away from broad politics and toward "bread-and-butter" unionism. Even with the advances of the 1930s, the new labor laws and New Deal regulatory apparatus constricted unions with ill effects.

Yet the Communist-led radical wing of the labor movement, operating within severe limits and constraints, was able to influence, shape and at times transform both law and government. In countless appearances before the US Supreme Court, Communist lawyers and legal strategists brought to life the Fourteenth Amendment and won the extension of First and Sixth Amendment freedoms to state residents, helping to broaden the Supreme Court's interpretations of what those freedoms meant in practice. Through cases such as *Gitlow v. New York* (1925), *Stromberg v. California* (1931), *Powell v. Alabama* (1932), *Norris v. Alabama* (1935), *De Jonge v. Oregon* (1937), *Herndon v. Lowry* (1937) and *Schneider v. State* (1939), the Communists left an enormous Constitutional legacy. My paper recovers and charts this legal legacy and the social movement that went along with it.

**CV/Biography:** Jennifer Uhlmann received her PhD in History in 2007 from the University of California, Los Angeles. Her dissertation, "The Communist Civil Rights Movement: Legal Activism in the United States, 1919-1946" won her a Littleton-Griswold Grant in Legal History from the American Historical Association and the Paul L. Murphy Award from the American Society for Legal History. In 2008 Jennifer was a Post-Doctoral Fellow at the Center for Cold War Studies, New York University. She is currently lecturing at Washington University in St. Louis.

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**A GREAT CASE NOT TAKEN**  
**THE FORGOTTEN HISTORY OF THE *ROSENBERG* CASE**

Brad Snyder

ABSTRACT

More than fifty years after they died in the electric chair for passing atomic secrets to the Soviet Union, Julius and Ethel Rosenberg recently made headlines as new evidence raised lingering questions about the fairness of their trial. During the early 1950s, the *Rosenberg* case dominated the news and divided the country. It also divided the Supreme Court, which repeatedly refused to hear claims that the Rosenbergs had not received a fair trial. Instead, Justice Douglas granted a last-minute stay about whether they had been tried under the wrong federal statute, the Court quickly vacated the stay, and the Rosenbergs were executed the next day. In a new primary-source based account, this paper explains why the Court refused to grant cert in the most famous spy case in American history. It explores the internal conflict among the Court's four most dynamic justices – Black, Douglas, Frankfurter, and Jackson – that prevented the Court from hearing the case. It relies on newly-discovered, unpublished draft letters in Douglas's papers to provide the first explanation, in Douglas's own words, of his votes to deny cert. This Article also reorients the legal scholarship about the *Rosenberg* case and argues that there is a forgotten legal history surrounding the Court's involvement. Most scholars have focused on Douglas's last-minute stay of execution. But new evidence suggests that legal scholars ought to refocus their attention on the Rosenbergs' contemporaneous allegations of prosecutorial misconduct and knowing use of perjured testimony. Based on newly-discovered archival material and interviews with key participants, the Article highlights evidence of prosecutorial misconduct and perjury presented to the Court during the 1952 Term, explains how and why the Court failed to grant cert, and argues that, when in doubt, the Court should take certain types of great cases.

**CV/Biography:** Brad Snyder received his J.D. from Yale Law School in 1999. Currently on the faculty at the University of Wisconsin Law School, Snyder has authored several articles and two books, including *A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports* (Viking/Penguin, Oct. 2006, paperback Plume, Oct. 2007), and "How the Conservatives Canonized *Brown v. Board of Education*," 52 RUTGERS L. REV. 383 (2000).

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**“THE END OF AMERICA”**  
**LEWIS F. POWELL’S RUSSIAN REVELATION**  
Anders Walker

ABSTRACT

In July 1958, Lewis F. Powell traveled with the American Bar Association to the Soviet Union, interviewing English speaking students in Soviet schools. Powell’s journey had a profound effect on his view of education and the Cold War, convincing him that the Soviets were distorting American History by emphasizing segregation, out-competing the United States in literature, math, and science, and doing a better overall job of training its youth for “world domination.” Upon his return, Powell engaged in a vigorous campaign opposing public school closures and massive resistance to *Brown*, meanwhile emphasizing honors programs and other modalities for separating the “ablest” students from their more average peers. By 1961, Powell had become so convinced of Soviet superiority that he feared the “underprivileged peoples” of the world had begun to unite together against America, reducing the white race to a global minority.

Drawing from previously unexamined archival data, this paper will situate Powell’s moderate position on civil rights in the context of his anti-communism, positing that while he rejected formal racial segregation, he also began to develop a new vision of education different from that articulated in *Brown*. While *Brown* focused on black uplift, including the improvement of the psychological and cultural development of African American children, Powell became more interested in producing an educated elite, placing racial equality second to talent identification. Though many see Powell’s invocation of racial diversity in *Regents v. Bakke* as a continuation of *Brown*’s promise, this paper maintains that Powell’s notion of diversity actually had a very different pedagogical connotation, stemming from his engagement in the Cold War.

**CV/Biography:** Anders Walker received his J.D. from Duke Law School in 1998 and his PhD in African American Studies and History from Yale University in 2003. Currently on the faculty at Saint Louis University School of Law, Walker’s forthcoming publications include *The Ghost of Jim Crow: How Southern Moderates Used Brown v. Board of Education to Stall Civil Rights* (Oxford 2009); and *The Violent Bear It Away: Emmett Till and the Modernization of Law Enforcement in Mississippi* (forthcoming SAN DIEGO L. REV. 2009).

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Professor Kalman attended Pomona College and then went on to UCLA Law School. She received a PhD from Yale in 1982 and is a member of the History faculty at the University of California Santa Barbara. Her books include *Legal Realism at Yale: 1927-1960* (1986), *Abe Fortas: A Biography* (1990), *The Strange Career of Legal Liberalism* (1996); and *Yale Law School and the Sixties: Revolt and Reverberations* (2005).

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Reuel Schiller received his B.A. in history from Yale University in 1988 and his JD and PhD in History from the University of Virginia. He is currently on the faculty at the University of California Hastings College of Law. His publications include *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 LAW & HIST. REV. 415 (2008); *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); and *"Saint George and the Dragon": Courts and the Development of the Administrative State in Twentieth-Century America*, 17 J. POL'Y HIST. 110 (2005).

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\* Professor Schiller has already agreed to chair, but not comment on another panel at the 2009 meeting.