

AMERICAN LEGAL HISTORY - I

Rutgers, Newark: Fall 2018

History 21:512:265

Time: Tues. 6-9 p.m.

Location: 102 Hill Hall

Instructor: Stuart Gold

Office Hours: Tues. 5-6 p.m. (Conklin 326)

Contact Information: stuart.gold@rutgers.edu

Course Description:

This is a survey course of selected topics in American legal history from the colonial period through Reconstruction: the development of the legal system in the United States; the Constitution and federalism; and slavery in the legal system. As with any survey course, we cannot cover every issue, nor can we cover even the selected issues in depth. However, I hope that by the end of the semester you will have a good working knowledge of these topics so that you can go on to more in-depth investigations in other courses.

In the segment on the development of the legal system, we will examine the sources of American law, i.e., how American law incorporated and distinguished itself from the English legal system, how law is created and implemented in a democratic republic, the role of the judiciary and the rise and training of the legal profession. In the segment on the Constitution, we will examine the sources from which the framers drew in creating the Constitution, the competing and/or complementary spheres of power for the federal and state governments under the structure created by the Constitution and the role of the federal judiciary in creating a unified nation state. In the last segment of the course, we will examine how the law supported and legitimized the enslavement of Africans, the central role of slavery in the Articles of Confederation and the Constitution, and the court battles over the Fugitive Slave Acts of 1793 and 1850. We will conclude with a close examination of the Supreme Court's infamous decision in Dred Scott v. Sandford and the post-Civil War constitutional amendments dealing with slavery.

There are two basic approaches to the teaching of legal history. The first is the study of how the legal system and particular laws developed. This approach is familiar to those in the legal profession - lawyers, judges and law professors. The second approach focuses on how law functions in and affects society. I plan to incorporate both approaches in the course. You will need some background in the mechanics of the law - both procedural and substantive - in order to appreciate how the law functions in society. However, as students of history, rather than as students of law, we have a strong interest in understanding how the law affected society as a whole, not merely how the law functioned for those who directly involved in the legal system - i.e. the legislators, the judges, the lawyers and last, but all too often least, the individuals whose cases become the grist for the legal mills. We will also examine how historical events shaped the law.

In terms of my teaching method, the classes I will lecture on the assigned reading materials for the day and lead class discussions about the readings. The assigned readings for any week may include original sources, such as statutes and cases, as well as excerpts from the textbook.

Finally, for those of you considering a career in the law please note that this course is not designed to help you get into law school, although many of my students do go to law school after graduation. There is no particular course of study that will help you get into law school. Law school admission committees are primarily interested in the quality of your intellect as demonstrated by your grades and LSAT scores, rather than in the particular course of study you followed as an undergraduate. (It is better to be a good student of art history or accounting than a middling student of jurisprudence.) Nor will this course prepare you for the law school experience. The primary goal of law school education is to teach law students to “think like lawyers” through the use of the Socratic Method. Thus, law school teaching focuses on the analytical tools aspiring lawyers need to understand how judges make law through case law. (Even in statutory courses, the materials focus on cases as much as on the underlying statute.) What law students learn of the substance of law or, worse yet, the actual practice of law, is at best a byproduct of the law school experience.

We will take a very different approach as we will be more concerned with the “why” of law rather than the “how” of law. While you will gain some familiarity with the subject matter of the standard first year law school class on constitutional law, with a smattering of civil procedure, and learn law by reading cases, you will not be subjected to the unnecessary rigors of the Socratic Method - in part because I am not Socrates and in part because mastering the art of legal analysis would distract us from what I see as the goals of the course.

Course Objectives:

1. To become acquainted with the basic themes and developments in American Legal History;
2. To develop critical thinking skills about the interplay of law, politics, and social history;
3. To learn how to read historical legal documents;
4. To provide a historical perspective that facilitates better understanding and analysis of contemporary legal issues by grounding them in the debates of the past.

Course Requirements

1. Attendance. Attendance is mandatory. You must show up for class, *on time*, having read the day’s assigned material and being prepared to discuss it. I will take attendance by having the students sign an attendance sheet. Signing in and then leaving before the end of the class does not count as attendance unless I excuse you. Excusable grounds for leaving before the end of class may include illness or child-care issues. Please note that having a classmate sign

in for you is a form of cheating and may lead to both the absent student and the forger receiving Fs. **Any student who misses four or more sessions through any combination of excused and unexcused absences will not earn credit in this class. If you miss four or more classes, you should withdraw to avoid getting an F.**

2. Participation. I appreciate that some of you may be shy about speaking up in class, but do not be too concerned on this score. Participation includes attendance, attention and preparation, as well as speaking up in class. Cutting class, arriving late or leaving early, and internet use (texting, emailing or general net-surfing) will lower your participation grade because you cannot participate if you are doing those things.

3. Drop and withdrawal deadlines:

The last date for students to drop a course with no penalty: 9/11/18

The last date to withdraw from a course with a "W" grade: 11/5/18

4. Quizzes/Short Writing Assignments. There will be four or five quizzes over the course of the semester. Each quiz will cover the material for the prior two weeks. There is a twofold purpose for the quizzes: (i) to make sure that you are doing the assigned readings and (ii) to prepare you for the mid-term and final as the short answer portion of both of those tests will be based, in part, on the quizzes. There may be short writing assignments – 1-2 pages – in addition to the two major written assignments. The quizzes/short writing assignments will collectively count for 10% of your final grade. I will drop your lowest quiz and average your remaining scores in calculating this component of your grade.

5. Case Analysis Assignment. Due October 14, 2018. I will give you a particular case to read. You are to write a summary of the facts and legal issues in the case (what we used to call in my law school days, briefing the case). The written project summary should be 500-750 words.

6. Midterm exam. Tuesday, October 23, 2018. Closed book.

7. Book Report. Due December 2, 2018. Although most of the weekly readings will be relatively short, I want you to read one complete book as part of the course. You will read the book and write an analytical essay in which you will identify the primary argument made by the author, review the historical evidence that the author used in support of that argument and provide a critical reaction to the book. Feel free to disagree with the author, but be prepared to back up your argument. To assist you, I have posted to Blackboard a guide for writing a book report. The book report should be 1,000 to 1,500 words.

Here is a list of books from which you can choose. All are readily available either through the Rutgers Library system or from booksellers, virtual or brick and mortar. (If you are looking for used books try www.abebooks.com or www.exlibris.com.) Feel free to talk to me after class or send me an email if you have any questions about these choices. (I am open to suggestion if there is a legal history that is not on the list but that you are eager to read.) Please let me know by October 20, 2018 which book you have selected.

Allen, Danielle, Our Declaration: A Reading of the Declaration of Independence in Defense of Equality, New York, Liverwright (2014), a fascinating and highly original interpretation of the Declaration of Independence as a profession of universal equality.

Ellis, Joseph, The Quartet: Orchestrating the Second American Revolution, 1783-1789, New York, Knopf (2015), a very readable account of how the Constitution was drafted as told in the form of biographical sketches of George Washington, Alexander Hamilton, James Madison and John Jay.

Gordon-Reed, Annette, Thomas Jefferson and Sally Hemings: An American Controversy, Charlottesville (VA) and London, University of Virginia Press, 1997. A forensic analysis of the evidence concerning the sexual relationship between Thomas Jefferson and his enslaved mistress, Sally Hemmings. This is a prequel to Prof. Gordon-Reeds multiple award winning The Hemings of Monticello. While perhaps not as well known, this earlier book is a wonderful example of how the lawyer's forensic techniques can be applied to history.

Johnson, Walter, Soul by Soul: Life Inside the Antebellum Slave Market, Cambridge (MA) and London, Harvard University Press, 1999. An award winning history of the Louisiana slave trade which ably demonstrates how historians use legal records to write history.

Mann, Bruce H., Republic Of Debtors : Bankruptcy In The Age Of American Independence Cambridge (MA) and London: Harvard University Press, 2002. An excellent combination of legal and social history focusing on America's first bankruptcy statute, the Bankruptcy Act of 1800.

Waldstreicher, David, Slavery's Constitution: From Revolution to Ratification, Hill and Wang, New York, 2010. A thought provoking study of the critical role that slavery played in the drafting of the Constitution.

8. Final exam. **Tuesday, December 18, 2018, 6:20-9:20 p.m.** – not cumulative. Closed Book.

A note on written assignments. Short writing assignments, case assignment and the book report should all be sent to my Rutgers email address, stuart.gold@rutgers.edu. All written assignments should be emailed to me in Word format, no pdfs, tifs or hard copies.

A note on exams. Both the mid-term and final examinations will be closed book. Each exam will consist of short answer questions and essays. The questions for the short answer portion of the exams will be derived in part from the quizzes - so pay attention to the quizzes, the assigned readings and the materials covered in class. **You are responsible for reading and knowing the assigned materials even if we do not cover the material in class.** In order to perform well on the quizzes and exams you will have to read all the assigned materials, make notes of the important parts of the readings, come to class and take notes of my lectures.

Grading

Your final grade will be based on your performance on the following components of the course:

Midterm: 25%

Final: 25%

Book Report: 25%

Case Assignment: 10%

Quizzes/Short Writings: 10%

Participation: 5%

Your grades are not subject to negotiation. I will adjust grades only if I have made an error. If you feel I have made an error, submit your written argument to me within one week of receiving your grade. If I have made an error, I will gladly correct it. I cannot and will not adjust grades based on consequences, such as hurt pride, lost scholarships, lost tuition reimbursement, lost job opportunities, or dismissals. Do not ask me to do so. It is dishonest to attempt to influence faculty in an effort to obtain a grade that you did not earn, and it will not work.

Required Text: Howard Gillman, Mark A. Graber and Keith E. Whittington, American Constitutionalism. Oxford University Press, New York, 2015, ISBN 978-0-19-934338-6. The book will be available at the University book store. This is a single volume book which combines materials from the author's two volume set also entitled American Constitutionalism. There are review materials available on the web at www.oup.com/us/gillman for the two volume set which may be of use with the single volume book we are using for this class. Please note that I plan to use the same book for American Legal History II in the spring semester.

The other assigned readings, indicated below by an asterisk, will be posted as pdf files on Blackboard.

I will also post on Blackboard, Gold, Stuart, Law for Historians. This is my introduction to the law for the uninitiated. You can use it as a reference and for background but it is not required reading.

Policy on Academic Integrity (Cheating and Plagiarism)

All students are required to sign the Rutgers Honor Code Pledge. To receive credit, every assignment must have your signature under the following phrase: "On my honor, I have neither received nor given any unauthorized assistance on this examination / assignment."

Plagiarism will not be tolerated. Any use of the ideas or words of another person without proper acknowledgment of credit will result in penalties up to and possibly including a course grade of F. Cheating on exams will result in an automatic F. **I use software to test your work for plagiarism.** Note that the uncited usage of uncopyrighted material such as Wikipedia entries still constitutes plagiarism.

Policy on Disabilities

Rutgers University welcomes students with disabilities into all of the University's educational programs. In order to receive consideration for reasonable accommodations, a student with a disability must contact the appropriate disability services office at the campus where you are officially enrolled, participate in an intake interview, and provide documentation: <https://ods.rutgers.edu/students/documentation-guidelines>. If the documentation supports your request for reasonable accommodations, your campus's disability services office will provide you with a Letter of Accommodations. Please share this letter with your instructors and discuss the accommodations with them as early in your courses as possible. To begin this process, please complete the Registration form on the ODS web site at: <https://ods.rutgers.edu/students/registration-form>. For more information please the Office of Disability Services in the Paul Robeson Campus Center, in suite 219 or contact odsnewark@rutgers.edu.

Policy on Classroom Courtesy

- Keep cell phones in silent mode. No web surfing, texting or emailing either.
- As to food and drink, I realize that this is a night class and you may want a snack to keep you going until we finish. Nothing noisy, aromatic or otherwise distracting.
- I look forward to lively but still decorous discussions. No shouting, angry outbursts, interrupting or talking over one another. As I learned in third grade at PS 20 from Mrs. Hall, we can all sing together, but we cannot all speak together. Most importantly, respect the opinions of your classmates. Having strong beliefs is good. Playing devil's advocate for an unpopular position is good. (Please keep in mind that irony is your instructor's favorite mode of discourse, so take what I say in class with a grain of salt.) Heaping invective on those who disagree with you is bad and will have negative consequences.
- As long as you are making a sincere inquiry, there is no such thing as a foolish question. Many of the concepts we cover will be new to you. As I have been practicing law for over thirty-five years I may, wrongfully, assume that you are familiar with certain legal terms and theories. If there is something you do not understand, just ask. Do not assume that you are the only one in the dark. There will probably be a dozen classmates similarly puzzled but who are afraid to ask. You will benefit all of us by asking questions. So, ask away, although I may defer answering your query until a more appropriate point in the class.

Policy on Office Hours

My office hours are for you. Stop by with any questions you have about assignments, readings, classroom discussions, other pertinent topics, or just drop by to chat. If your schedule conflicts with my office hours, we can set up an appointment at a mutually agreeable time as I will be on campus from time to time.

SESSIONS

1. September 4, 2018 – Introduction

An overview of the course. An introduction to the legal system. How to read a legal opinion. The colonial legal experience.

AC Chapter 1 pp. 3-23, Appendix 2 pp. 997-1006

* Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, (3rd Cir. 1997). Just skim the case to see the format of reported decisions.

Homework – Answer questions on the Mayflower Compact and the Virginia Charter

2. September 11, 2018

AC – Ch. 2

* The Mayflower Compact

*The Virginia Charter – Ordinance of 1621

3. September 18, 2018 – NO IN-CLASS MEETING– Religious Holiday

Watch episodes 1 and 2 of the PBS documentary on the American Revolution. The episodes are on Youtube. The links are set forth below. Write a short reaction paper on what you saw – no more than two pages - **and submit by September 23, 2018.**

<https://www.youtube.com/watch?v=wEQx3y1WYsQ&list=PLdKeqdXHJ-Xu7xw1M90aqNdMx1WNYh1TF>

<https://www.youtube.com/watch?v=fFt2rM7TU2c&index=2&list=PLdKeqdXHJ-Xu7xw1M90aqNdMx1WNYh1TF>

4. September 25, 2017 - Prelude to the Constitution.

*Declaration of Independence

*Constitution of Pennsylvania (1776)

*Constitution of New Jersey (1776)

*Articles of Confederation

*Farrand, Weaknesses of the Articles of Confederation

Quiz

5. October 2, 2018 – The Constitution – Drafting and Ratification

AC 71-108

*Constitutional Highlights

Discuss Case Assignment – Review how to read a case

6. October 9, 2018 - The Powers of the Federal Government

AC 133-137

Quiz

7. **October 15, 2017 – Case Assignment Due**

8. October 16, 2018 – Federalism under the Constitution The Bill of Rights – the Powers of the Federal Government and its Relationship with Individuals.

AC 109-129, 142,185, 190-208

The Bill of Rights – Constitution Amendments I-X, AC 990-991

Review for Mid-Term

9. **October 23, 2018 Mid-Term Closed Book**

10. October 30, 2018 – The Development of Private Law: Business

AC 258-264

*Dartmouth College v. Woodward, 17 U.S. 518 (1819)

*McFarland v. Newman, 9 Watts (PA) 55 (1839)

11. November 6, 2018 - The Development of Private Law: Tort

* North Carolina Cases on Corporal Punishment

* Brown v. Kendall, 60 Mass. 292 (1850)

* Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49 (1842),

12. November 13, 2018 - Defining Race in the Law - North and South.

*Virginia Slave Code of 1705

*New Jersey Slave Code of 1798

*Pennsylvania's Act for Gradual Emancipation – 1780

*State v. Mann 2 North Carolina 263 (1829)

AC- 271, 279-280 -Roberts v. The City of Boston, (1850)

Quiz

Pudd'nhead Wilson – watch in class. Homework – write a reaction paper of 2-3 pages, which will be due on November 20, 2018.

13. **November 20, 2018 – Thanksgiving Break – follow Thursday Schedule**

14. November 27, 2018 – Divisions between North and South and the Collapse of Constitutional Compromise

AC – 231-248, 265-279, 323-329

*The Fugitive Slave Act of 1850

*Excerpts from the Cornerstone Speech

15. December 2, 2018 Book Report Due

16. December 4, 2018 - Civil War and the Reorganization of the Federal Government

AC 291-295, 313-319, 333-348, 357-367

Quiz

17. December 11, 2016 (LAST CLASS) – Reconstruction

AC 296-310, 320-322, 350-356, 382-385

13th, 14th and 15th Amendments

Review for Final

18. **December 18, 2018 - 6:20 to 9:20 P.M. – FINAL EXAM – Closed Book**