

AMERICAN LEGAL HISTORY II

Rutgers, Newark: Spring 2018

History 21:512:266

Time: Tues. 6-9 p.m.

Location: 102 Hill

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 on selected topics in American legal history from the late nineteenth century to today, with stops in the Progressive Era, the Depression and the Civil Rights Era. For the most part we will focus on constitutional law and how the Supreme Court had dealt with critical issues of race, class and gender. 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 investigation in other courses.

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 affects society as a whole, not merely how the law functions for those 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.

In terms of teaching method, the classes include lectures on the assigned reading materials for the day and class discussions about the readings. The assigned readings for any week will combine readings from our text, American Constitutionalism, supplemented by original sources, such as statutes and cases.

Finally, please note that for those of you considering a career in the law, this course is not offered as a pre-law course because 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 is this course designed to 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 as much as 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 take 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 be 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. Such students 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 be participating if you are doing those things.

3. Quizzes/Homework. There will be four 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 will also be homework in the form of short writing assignments or questions

directed to that week's assigned readings. The quizzes and homework will collectively count for 10% of your final grade. I will drop your lowest quiz grade and use your remaining grades in calculating your grade for this part of the course.

4. Drop and withdrawal deadlines:

The last date for students to drop a course with no penalty: 1/23/18

The last date to withdraw from a course with a "W" grade: 3/26/18

5. Civil Rights Assignment. Due February 25, 2018. Attend either the morning or afternoon session of the Marion Thompson Wright Lecture on February 17, 2018 at Robeson Hall. (You could attend both sessions but there is no extra credit for that.) If you cannot make the lecture, watch a documentary or film about the Civil Rights Era such as "Selma", "Loving" or an episode of Eyes on the Prize – other than episode one which we will watch in class. Write a paper of 500-750 words about what you saw, what you learned that was new to you and how you reacted to what you saw and learned.

6. Midterm exam. March 6, 2018. Closed book.

7. Book Report. Due April 15, 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 uses 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. The book report should be 1,000 to 1,500 words. I will post to Blackboard a guide for writing a book report.

You may choose one of the following books. If there is another book on legal history that you might want to read, I am open to suggestions. Please keep in mind that the book must involve some aspect of legal history covering the period 1876 to 2018.

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness, New Press, 2010. The book addresses how America's draconian drug laws have led to the mass incarceration of African-American males and socio-economically disadvantaged populations. Alexander's argues that "mass incarceration is, metaphorically, the New Jim Crow."

Margot Canady, The Straight State: Sexuality and Citizenship in Twentieth-Century America (Politics and Society in Twentieth-Century America), 2009. An innovative and award winning study of oppression of homosexuality in the federal bureaucracies regulating the military, immigration and welfare. It is a short book, but a dense one.

Paul Kens, Lochner v. New York: Economic Regulation on Trial, University of Kansas Press, 1998. A traditional, straightforward legal history of the Lochner decision that explores both the background and subsequent history of this landmark decision. It is geared to the general and college level reader.

Michael Klarman, Brown v. Board of Education and the Civil Rights Movement, 2007. Get the abridged edition, rather than the much longer 2005 edition. This is a groundbreaking study of the seminal civil rights case of the 20th century. Klarman argues that it was the white southern violent backlash to the Supreme Court's decision, rather than the decision itself, that led to white northern support for the legal advances in civil rights attained in the 1960s.

Peggy Pascoe, What Comes Naturally: Miscegenation Law and the Making of Race in America, Oxford University Press, 2010. A thorough and very readable study of laws prohibiting mixed race marriages and how those laws were declared unconstitutional in the Supreme Court's decision in Loving v. Virginia.

Jeremy Waldron, The Harm in Hate Speech, (Harvard University Press, 2012). A very interesting analysis of the limits of free speech under the First Amendment. Waldron argues that there is a governmental and societal interest in controlling hate speech directed to racial, ethnic, religious, national and gender minorities.

Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America, (W.W. Norton 2011). For those interested in the Second Amendment, you will find this a very thorough and thoughtful examination of gun control legislation since the founding of the republic through the Supreme Court's decision Heller v. District of Columbia.

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

A note on written assignments. The case assignment and the book report should 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 the short answer questions (75%) and an essay (25%). 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

Midterm: 25%

Final: 25%

Book Report: 25%

Case Assignment – 10%,

Quizzes/Homework – 10%

Participation: 5%

Your grades are not subject to negotiation. If I have made an arithmetic error in calculating your grade, bring that to my attention immediately so I can correct it. If you feel I have made a substantive error in evaluating your work, submit your written argument to me within one week of receiving your grade. I will adjust grades only if I have made an error. I cannot and will not adjust grades based on consequences, such as hurt pride, lost scholarships, lost tuition reimbursement, lost job opportunities, diminished chances for admission to professional or graduate school 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. The textbook starts with the colonial period and goes to the present day, but we will be using the second half of the book. Please note that I plan to use the same book for American Legal History I in the fall 2017 semester, which covers colonial America through Reconstruction. If you come back for the fall semester, you will already have the book; if not there will be a market for the used textbook come the fall.

Any other assigned readings 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. I offer it as a reference, not as 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.

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 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 years I may, wrongfully, assume that you are more familiar with legal terms and theories than I have a right to do. 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 be benefitting all of us by raising your 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.

CLASS ASSIGNMENTS

***A note on assigned readings. Items with an asterisk will be available on Blackboard.**

1. January 16, 2018 – Introduction

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

Readings:

American Constitutionalism (“AC”) Chapter 1 pp. 3-23, Appendix 2 pp. 997-1006
(Please note that you do not have to read the authors’ suggested reading at the end of each chapter.)

* Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, (3rd Cir. 1997). Just skim the case in order to get an idea of the format of a reported case. You do not have to read the case for content.

2. January 23, 2018 – Reconstruction and Jim Crow

AC – 295-309, 382-386, 393-394, 453-460

3. January 30, 2018 - The Progressive Era – Government as Agent for Change

AC – 369-382, 390-418

Quiz

*Selections from the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 – 7 and the Clayton Act, 15 U.S.C. §§ 12 – 27.

4. February 6, 2018. Individual Rights as Limitation on Government Regulation

AC 420-451, 464-470

5. February 13, 2016. The New Deal – What government can do for us.

AC 477-488, 500-505, 516-525, 531-550

6. February 17, 2018 – Marion Thompson Wright Lecture – Attend One of Two Sessions. Alternative – watch and review a movie or documentary about the Civil Rights era. **Write 2-3 page reaction paper which is due on February 25, 2018.**

7. February 20, 2018. The contemporary Civil Rights Era begins - Brown

AC 494-495, 505-509, 586-602

View Excerpt from Eyes on the Prize

Quiz

8. February 27, 2018 – Civil Rights continued – The gains of the 1960s. The Civil Rights Act of 1964 and the Voting Rights Act of 1965.

AC - 526-530, 574-585, 673-677

Review for mid-term

9. **March 6, 2018 – MID-TERM – Closed Book**

10. March 13, 2018 – No class - Spring recess.

11. March 20, 2018 – The Warren Court – Moderate Republican turns judicial activist. The Supreme Court finds rights in the Constitution that no one knew existed.

AC 509-515, 553-555, 561-574, 603-614

Review Mid-Term

12. March 27, 2018 – The Burger Court – Cutting back on judicial activism

AC 643-666, 673-694

13. April 3, 2018 –The Rehnquist Court – The Right strikes back.

AC 722-731, 754-786

Quiz

14. April 10, 2018 – Civil Rights in the Roberts Court Era

AC 901-921, 935-955

*Fisher v. Texas

*Obergfell v. Hodges

*Holder v. Shelby County

15. **April 15, 2018 Book Report Due.**
16. April 17, 2018 –Second Amendment/Originalism
AC 846-850, 909-915
*MacDonald v. City of Chicago

Quiz
17. April 24, 2018 – Supreme Court on Politics – political contributions as free speech and one person/one vote

AC 509-516, 922-934
*Evenwell v. Abbott
*Harris v. Arizona
Wisconsin gerrymandering case
Review for Final
18. May 8, 2018, 6:20-9:20 p.m. Final exam – not cumulative. Closed Book.