

## AMERICAN LEGAL HISTORY

Rutgers, Newark: Fall 2016

History 21:512:265

Time: Tues. 6-9 p.m.

Location: 352 Conklin

**Instructor:** Stuart Gold

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

**Contact Information:** [stuart.gold@rutgers.edu](mailto: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 investigation 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.

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 may include 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 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. 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. Drop and withdrawal deadlines:

The last date for students to drop a course with no penalty: 9/13/16

The last date to withdraw from a course with a "W" grade: 11/7/16

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 16, 2016**. 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 25, 2016**. Closed book.

7. Book Report. **Due December 4, 2016**. 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](http://www.abebooks.com) or [www.exlibris.com](http://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 22, 2016 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 20, 2016, 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](mailto: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

Midterm: 25%

Final: 25%

Book Report: 20%

Case Assignment: 10%

Quizzes/Short Writings: 10%

Participation: 10%

Your grades are not subject to negotiation. 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 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, 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](http://www.oup.com/us/gillman) for the two volume set which may 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.

Note that the uncited usage of uncopyrighted material such as Wikipedia entries still constitutes plagiarism.

### Policy on Disabilities

**This course is open to all students who meet the academic requirements for participation.** Students with disabilities, including learning disabilities, requiring assistance and/or accommodation should speak with Disability Services in a timely manner.

### 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 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. My law office is only ten minutes from central Newark and I will be on campus from time to time.

## SESSIONS

1. September 6, 2016 – Introduction

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

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

\* Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, (3<sup>rd</sup> Cir. 1997).

2. September 13, 2016 – The Colonial Era

AC – Ch. 2

\* The Mayflower Compact

\*The Virginia Charter – Ordinance of 1621

3. September 20 2016 - 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

4. September 27, 2016 – The Constitution – Drafting and Ratification

AC 71-108

\*Constitutional Highlights

5. October 4, 2016 - The Powers of the Federal Government and its Relationship with the State Governments

AC 133-137, 142-185

Discuss Case Assignment – Review how to read a case

### Quiz

6. October 11, 2016 – No in-class meeting. Work on Case Assignment.

7. **October 16, 2016 – Case Assignment Due**

8. October 18, 2016 – The Bill of Rights – the Powers of the Federal Government and its Relationship with Individuals.

AC 109-129, 190-208

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

Review for Mid-Term

**9. October 25, 2016 Mid-Term Closed Book**

10. November 1, 2016 – 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 8, 2016 - 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 15, 2015 - 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.

13. **November 22, 2016 – Thanksgiving Break – follow Thursday Schedule**

14. November 29, 2016 – Divisions between North and South and the Collapse of Constitutional Compromise

AC – 231-248, 265-272, 323-329

\*The Fugitive Slave Act of 1850

\*Excerpts from the Cornerstone Speech

15. **December 4, 2016 Book Report Due**

16. December 6, 2016 - Civil War and the Reorganization of the Federal Government  
AC 291-295, 313-319, 333-348, 357-367

**Quiz**

17. December 13, 2016 – Reconstruction  
AC 296-310, 320-322, 350-356, 382-385  
13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments

Review for Final

18. **December 20, 2016 6:20 to 9:20 – FINAL EXAM – Closed Book**