

American Legal History
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History Office: 554 AH

HIST 6377-LAW 5374
Fall 2014

Law Office: 130 TU-II

Course Description:

This course is cross listed between History and Law; the two sides have different expectations and different grading patterns. The primary subject matter of the course is American constitutional history broadly considered: federalism, state and federal constitutional structures, conceptualizations of rights and of popular sovereignty, the relationship between constitutional views and common law change. The chronological coverage is from the American Revolution to the New Deal, 1776 to 1937 (or farther if we manage it). Substantial attention is devoted to the nature of adjudication.

Office Hours: I have office hours in my Law office Tuesdays and Thursdays from 3:15 to 3:50. If you catch me in either office at other times, you are free to talk with me. With notice, I can stay after class to talk for more than the usual few minutes. I answer e-mail rapidly, BUT only if you enter the address as rpalmer@uh.edu; if you use the pull-down Outlook address, it goes to a mail service I access irregularly, so that you may have to wait for a reply. When you use e-mail, use the subject line "Palmer". I actually enjoy talking about this material, so discussing legal history with me is not a hardship (for me).

Course Requirements:

HIST 6377

Those signing up under the graduate History department designation (all History graduate students must do so; law students may do so but must consult me) will write three papers; there is no final examination. All papers are on set topics.

PAPER 1: The first paper examines the way in which early state constitutions and the federal constitution reflect republican and popular sovereignty ideologies in different ways (demonstrating analysis of both federal constitution and state constitutions from 1783 or before).

PAPER 2: The second examines nineteenth century constitutional and common law up to 1850 evaluated from the perspective of individualism.

PAPER 3: The third is an analysis of the two-step transformation from the Civil War through the Great Depression into a new legal system.

Papers are to be 12-15 pages long with notes at end (not counted in the 12-15 page requirement). Ample notes are expected and must show familiarity with the primary documents. Graduate students picking up this syllabus early are warned that the content of the papers depends heavily on matters discussed in the course.

Required Books

Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History*, 8th ed.
Photocopied materials

LAW 5374

Those signing up under the Law school designation (LAW 5374) are required to take a final examination

History Graduate Students

While there are no other required books for the course, the following are books that are largely congruent with the course thesis and would be helpful. Graduate history students who want to develop this perspective on American legal history with any competence would be well advised to read at least the set of books below. Historiographical competence requires exposure to other perspectives.

Austin Allen: **Origins of the Dred Scott Case** (Allen was my student and his book reflects the course thesis reliably. I would assign this as a required book but find I have no time to discuss it.)

Gordon Wood, *Creation of the American Republic* (I like his treatment of republicanism and state government very much; I totally disagree with his overall thesis about the origins of the U.S. Constitution)

Gordon Wood, *Radicalism of the American Revolution* (very good for the late 18th century paternalism to 19th century individualism, although not for causation)

William Nelson: *Americanization of the Common Law*

S. Kutler, *Privilege and Creative Destruction* (for the Charles River Bridge case and the Tawney court)

William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (for the activism of

19th century state governments)

Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (for 19th century individualism and the change to a more active paternalism)

Hendrik Hartog, *Public Property and Private Power* (a study of the development of New York City; it has wider application than the author argues)

Barbara Welke: *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (an insightful view of changes in tort law considered in social context)

Barry Cushman: *Rethinking the New Deal Court*

Preparation in this field would include for Ph.D. qualifying exams would include works illustrating other views. The core of that list would include Levy, ed., *Essays on the Making of the Constitution*; Hurst, *Law and the Conditions of Freedom*; Horwitz, *Transformation of American Law, 1780-1860*; Gillman, *The Constitution Besieged*; Fehrenbacher, *Slavery, Law, and Politics*; Ferguson, *Law and Letters in American Culture*; and the books mentioned above. A survey such as Hall, *The Magic Mirror*, also has some utility. Note for the purposes of this course that I have major disagreements with all these works except Hartog's and those recommended above.

Assignments by week (even though classes are T, Th):

- Aug. 25:** English Heritage: P & Z, Prologue, Sections A and B; Colonial Background: P & Z, Chapter 1, Sections A and B
- Sept. 1:** Republican Ideology: P & Z, Chapter 1, Section D;
State Constitutions: P & Z, Chapter 1, Section E (will in part carry over to following week)
- Sept. 8:** Palmer, 'Liberties as Constitutional Provisions', pp. 55-86 (in materials).
Discussion question: Was their perception of liberty that of a set of limitations on government to protect the individual?
U.S. Constitution, P & Z, Appendix; Palmer, 'Liberties as Constitutional Provisions', pp. 87-148 (in materials)
- Sept 15:** The Federal Judiciary: P & Z, Chapter 2, Section A, Number 1; *Calder v. Bull* (in materials).
Power of the Federal Judiciary: P & Z, Chapter 2, Section A, Number 2 and Section B Number 1;
Judiciary Act of 1789 (in materials); Crime Act of 1790 (in materials).
Treason: P & Z, Chapter 2, Section B, Numbers 2 & 3
- Sept. 22:** Common Law of Crimes: P & Z, Chapter 2, Section C
Seditious Libel: P & Z, Chapter 2, Section D.
- Sept. 29:** Impeachment: P & Z, Chapter 2, Section E
Contracts: P & Z, Chapter 3, Sections A & B
Property: P & Z, Chapter 3, Section C
Pierson v. Post (materials); Reception Statutes (materials)
for those signed up under the Graduate History designation: First Paper due.
- Oct . 6:** Torts: P & Z, Chapter 3, Section D (stop after the notes to Gregory's article)
Corporations: P & Z, Chapter 3, Section E.1
- Oct. 13:** Federal Common Law, Swift v. Tyson: P & Z Chapter 4, Section A; U.S. v. Coolidge (in materials)
Movement for an Elective Judiciary: P & Z, Chapter 4, Section B; Slavery: P & Z, Section C1.
Slavery in the State Courts, P & Z, Chapter 4, Section C2.
- Oct. 20:** The United States Supreme Court on Slavery, P & Z, Chapter 4, Section C3.
Slavery III: Dissents in Scott v. Sandford (in materials); P & Z, Chapter 4, Section D.
Recommended: Austin Allen: Origins of the Dred Scott Case
- Oct. 27:** Women and the Family, Ante-Bellum: P & Z, Chapter 4, Section E (just The People ex rel. Barry v. Mercein and the Seneca Falls Declaration)

Recommended: Michael Grossberg, "Guarding the Altar", 26 *American Journal of Legal History*, 197-226 (1982) [also in Kermit Hall ed., *Law, Society, and Domestic Relations*, pp. 300-29].

Competition: P & Z, Chapter 5, Section A

Labor Law: P & Z, Chapter 5, Section B

Recommended: Tony Freyer, "Reassessing the Impact of Eminent Domain in Early American Economic Development", *Wisconsin Law Review* (1981), pp. 1263-86 [also in Hall, *Land Law and Real Property in American History*]

Nov. 3: Labor Law: P & Z, Chapter 5, Section C.
The Slaughterhouse Cases; Cruikshank (both in materials, at end)

Nov. 10: Women and the Law: P & Z, Chapter 4, Section E (Bradwell v. Illinois and U.S. v. Anthony).
Trusts and the Sherman Act: P & Z, Chapter 5, Section D, Numbers 1, 2 and 3 (in 3, only U.S. v. Knight)
Trusts and the Sherman Act: P & Z, Chapter 5, Section D, the remainder of D, and Section E

Nov. 17: Jurisprudence: P & Z, Chapter 6, Section A
Recommended: G. Edward White, "The Impact of Legal Science on Tort Law, 1880-1910", 78 *Columbia Law Review*, 213-57 [also in Kermit Hall ed., *Tort Law in American History*, pp. 531-75]; "Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920" in *Law & Social Inquiry* 19 (Spring, 1994) (now out in book form, reference to be supplied)
Lochner (in materials)
Holmes and Rights: Schenck; Abrams (in materials);
Recommended: Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919" *Journal of American History* 58 (June 1971), 24-45. Also in Kermit Hall, ed., *Civil Liberties in American History*, vol. 2. Horwitz, 109-43
Gitlow v. New York (in materials)

For those signed up under the Graduate History designation, the Second Paper is due.

Nov. 24 (only Tuesday): Obligations of Contracts: Palmer, 'Obligations of Contracts' (in materials)
The New Deal I: P & Z, Chapter 6, Section B (just Schechter)

Dec. 1 The New Deal II: P & Z, Chapter 6, Section B (just NLRB)
Legal Realism: P & Z, Chapter 6, Section C

Dec. 12: **For those signed up under the Graduate History designation, the Third Paper is due.**

The American with Disabilities Act of 1990 requires that the university make reasonable accommodation to persons with disabilities as defined in the act. Students who feel they need assistance under the ADA guidelines should approach the professor to discuss such consideration.