

Early American Legal History: Writing Seminar  
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LAW 7397  
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Law Office: 130 TU-II

### Course Description:

The primary object of the course is writing; the subject matter of the course happens to be 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. Within the subject matter, the overwhelming interest is on American legal history up to and including the Fourteenth Amendment.

### Contact with me:

I have office hours in my Law office Mondays and Wednesdays from 4:00 to 5:45. I have a preceding class on those days from 2:00 to 3:45 and can be available before that class by arrangement. 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](mailto: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". If you are unavailable at the office hour times or otherwise prefer it, I have no problem talking by Skype. I prefer not to disseminate that address without need, but will willingly provide it to students who want to use it in response to a simple email request. I actually enjoy talking about this material, so discussing legal history with me is not a hardship (for me). If you are want to talk about a textual problem, it is best to e-mail me the passage in advance: don't assume I have memorized everything.

### Course Requirements:

The writing objective of this course trumps the content. You are essentially creating a writing sample for the job application process. While it is possible to write an excellent lengthy paper in which you are disinterested, such a project is hard. I prefer you to be at least somewhat interested in the subject matter on which you are working. There are thus two different broad ways you may proceed; they are all equal in my perspective even though some are more difficult than others. Opting for a harder option is counterbalanced by the higher interest level. I will want to know early on which option you choose, but that choice is not definitive: you may change at any point by notifying me.

**Option A: Overview.** The overview option tracks almost all the subject matter we will discuss in the class, so that in terms of subject matter this is the easy option and the overwhelmingly best option for those who have no background in this historical time period. It would neither surprise nor disappoint me if everyone took this option. The various overview foci, of which you would have to choose only one, are federalism, popular sovereignty, rights and federalism, liberty and liberties, transformation and "evolution" in American constitutional law, assessment of original intent/meaning (not a conservative, liberal, or libertarian topic, surprisingly). These five foci are actually virtually the same but with slightly different emphases. The emphasis allows you to concentrate on matters that are of more interest to you.

**Option B: Specialization.** This option allows you to emphasize strongly a particular theme, but not by limiting the time period covered or by ignoring the context. Thus you could highlight First Amendment speech and press issues over the time period, but allowing for the context will produce a paper that has some rough similarity to the papers under Option A. You can orient the paper much more to the early side as long as you include coverage more briefly of the later material. The later material is necessary to relate the earlier material to modern law and will make the paper substantially more interesting. Selection of a specialization must be approved, since a successful paper will have to have a clear, defensible thesis. I don't believe there is such a thing for the Second Amendment, so a specialization there would not be permitted: I do not purposely set students up for failure. We do not actually discuss the Fourth Amendment in class, and the issues there are difficult to track through the nineteenth century: it would take a strong student argument for me to allow this specialization and then only under strong warnings. I am readily available by email and then by meeting if desirable to discuss the viability of a specialization at any point prior to the semester (and of course during the semester).

Regardless of the option you choose, you should feel very free to discuss particularly the conceptual problems you find in writing the paper. That offer means that you can actually ask how segments fit together into a coherent argument, as long as you are sufficiently prepared to carry your side of the discussion. Once the class sessions have got beyond the U.S. Constitution, you must schedule an in-person or Skype session with me to discuss the direction in which you suspect you are going to develop your paper. You should not feel that that one session exhausts my availability.

### Process for Writing the Paper

You must write the paper in segments, not all at the end of the semester.

**Segment 1.** Regardless of the option you choose for the overall paper, you will submit a paper analyzing republicanism in the original Pennsylvania State Constitution after we have completed that and the Virginia Constitution in class. This paper will be only four pages in length and will adhere to the stylistic guidelines to be provided, which are only the classic elements of expository style. In this kind of matter, however, style and substance are not distinguishable: rigid adherence to the classic expository style is the single best way to improve your practical analytical ability and to isolate problem conceptual areas and new questions. I will return those papers rapidly and with elaborate commentary that I expect to be read and implemented. Implementation should not be mindless: if you find you disagree with *anything* or are puzzled you must seek clarification from me. Mindless implementation will not result in any improvement and is thus destructive.

**Segment 2.** Segment 2 will incorporate all or part of segment 1 and bind the material up through the Alien and Sedition Act into a coherent argument related to the choice you have made between options 1 and 2 and within those options. This segment will allow me to assess not only your understanding of the material but also the degree to which you have incorporated the substantive and stylistic (to the extent that those are actually different) criticisms made to your segment 1.

**Segment 3.** Segment 3 will cover the constitutional (Not “Constitutional”) ideas in common law and constitutional law from the end of Segment 2 up to the Civil War. This segment will be longer or shorter, more or less elaborate depending on the precise focus of your overall paper. Regardless of the topic, however, and despite the fact that at the beginning it might look like this segment will be irrelevant, it will be relevant.

**Segment 4.** Segment 4 will cover at minimum the Fourteenth Amendment and the ideas and cases culminating in the constitutional transformation in 1934.

**Submission of Final Paper.** If segments 2, 3, and 4 have been properly done and my criticisms incorporated on the way through, the final paper will only require very modest further revision to fit together into the overall paper and a coherent argument. I will try to make this happen by requiring second submissions of early segments if it seems helpful in the individual situation. For those who have made sufficient progress, a separate submission of Segment 4 will not be required, but is highly recommended, since this paper would ordinarily be your writing sample that you would use in job applications.

### Note on Research versus Advocacy

Although research does indeed involve gathering data to support a thesis, proper research is more about trying to see how the data best fits together and produces a thesis. That means that you always have to be searching for material that works against your initial perspective and be open to altering that perspective. The end result will be a better understanding of whether your initial assumption (not thesis) is probably correct or false. Most of the initial propositions in which you are initially interested (such as whether *Citizens United* has valid historical roots) cannot be answered in this form and with the amount of information you are going to have. Still, writing your paper will put you in a better position to assess such things or put you in a position to go further. So you may indeed note a particular problem in your introduction (for me it is neither here nor there), do not think that you can solve that problem or that you can make that a thesis for your paper. You may also reflect on the problem in your conclusion, but the overall warning stands. These papers will be research papers, not advocacy papers. By the nature of the subject matter, by the way, you will not be able to predict how your initial assessments will turn out, but my experience is that no student over my academic career (more than three decades) has ever changed political views because of this course, although they have had to develop more textured positions and a better appreciation of other arguments.

### Length

The Law Center requirement is that the writing seminar paper must be at least 10,000 words. We will abide by that requirement as the minimum; reaching the minimum by being verbose is not acceptable. If you find yourself short, add substantive content, not verbiage. It is also expected that the paper will be revised, an expectation taken into account by the specifications for the segments above.

### Additional Readings

Depending completely on what your selected focus is, you should expect to branch out in your readings beyond what is assigned. For works in legal history prior to 1980, *Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979* by Kermit Hall is useful. The works cited by Presser can be helpful for more modern material. You may find that reading other state constitutions, *The Federalist*, *The Documentary History of the Ratification of the Constitution* (digital version at <http://rotunda.upress.virginia.edu/founders/RNCN>), obviously state and federal reported cases, etc., will be necessary. The more specialized your focus, the more additional reading will usually be necessary.

**Regardless of your topic, you will have to go back from the text to the original sources for the sources you read in Presser.**

#### Required Books

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

Photocopied materials

There are not many works in American legal history that I find acceptable. Much that is written uses very questionable assumptions, is advocacy, conscious or well-intentioned, or despite appearances and assertions is more philosophy than historical legal research. Do not assume that your favorite authors, even if they appear to be extremely well versed in the eighteenth century and/or nineteenth centuries, are going to be good guides in this course. The following books, however, are particularly useful.

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 18<sup>th</sup> century paternalism to 19<sup>th</sup> 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 19<sup>th</sup> century state governments)

Robert H. Wiebe, ***Self-Rule: A Cultural History of American Democracy*** (for 19<sup>th</sup> 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***

Influential works that have some value but which, from my historical perspectives are deeply flawed, 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 the works in this paragraph.

#### Assignments by week

**CAUTION: Depending on the vigor of class discussion, I may delete portions of the coverage here described.**

**Writing Assignment Due Dates: Due date for the first segment is noted below. Because the papers are going to diverge, the schedule for the other segments is open and will be fixed individually. They cannot, however, be bunched up at the end, because then you would get no benefit from the revision process.**

**Jan 21:** English Heritage: P & Z, Prologue, Sections A and B

**Jan 26:** Colonial Background: P & Z, Chapter 1, Sections A and B  
Republican Ideology: P & Z, Chapter 1, Section D;  
State Constitutions: P & Z, Chapter 1, Section E Palmer, 'Liberties as Constitutional Provisions', pp. 55-86 (in materials): hopefully we will get into this material this week

**Feb 2:** State Constitutions: P & Z, Chapter 1, Section E Palmer, 'Liberties as Constitutional Provisions', pp. 55-86 (in materials), concluding.

#### **FIRST SEGMENT DUE**

U.S. Constitution, P & Z, Appendix; Palmer, 'Liberties as Constitutional Provisions', pp. 87-148 (in materials)

- Feb 9:** 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).
- Feb 16:** Common Law of Crimes: P & Z, Chapter 2, Section C  
Seditious Libel: P & Z, Chapter 2, Section D.
- Feb 23:** Contracts: P & Z, Chapter 3, Sections A & B  
Property: P & Z, Chapter 3, Section C  
Pierson v. Post (materials); Reception Statutes (materials)
- Mar 2:** Torts: P & Z, Chapter 3, Section D (stop after the notes to Gregory's article)  
Corporations: P & Z, Chapter 3, Section E.1
- Mar 9:** 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.
- Mar 23:** 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
- Mar 30:** 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*]
- Apr 6** Labor Law: P & Z, Chapter 5, Section C.  
The Slaughterhouse Cases; *Cruikshank* (both in materials, at end)
- Apr 13:** Women and the Law: P & Z, Chapter 4, Section E (*Bradwell v. Illinois* and *U.S. v. Anthony*).
- Apr 20:** 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)  
Obligations of Contracts: *Palmer*, 'Obligations of Contracts' (in materials)  
The New Deal I: P & Z, Chapter 6, Section B (just *Schechter*)
- Apr 27** The New Deal II: P & Z, Chapter 6, Section B (just NLRB)  
Legal Realism: P & Z, Chapter 6, Section C

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.