

Early American Legal History: Writing Seminar
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LAW 7397
Spring 2018

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 Tuesday and Thursdays from 10:30 to 12:30. With notice I can stay after 2:15; if this amount of time each week does not suffice, I will add more. 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". If you are unavailable to meet 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. Simply request the address by email and explain the need. I actually enjoy talking about this material, so discussing legal history with me is not a hardship (for me). If you 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.

The paper tracks almost all the subject matter we will discuss in the class. The central argument will concern the changing conceptualizations of popular sovereignty.

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. You should also examine each returned paper and feel extraordinarily free to discuss grammar and structure comments I have made.

Process for Writing the Paper

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

Preliminary Paper. Regardless of the option you choose for the overall paper, you will submit a paper analyzing republicanism and popular sovereignty in the original Pennsylvania State Constitution on the date assigned. This paper will be no more than four pages in length and will adhere to the stylistic guidelines provided at the end of this syllabus, 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. You will save yourself an immense amount of time and trouble if you revise immediately after getting your paper back.

Segment 1. Segment 1 will incorporate all or part of the preliminary paper and bind the material up through the Alien and Sedition Act into a coherent argument along the lines presented in class. 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 in my comments on the preliminary paper. You will find it both convenient and appropriate to make Segment 1 eventually (not necessarily for first submission) about half of the whole final paper. That means that you can frontload your work to balance the semester.

Segment 2. Segment 2 will cover the constitutional (Not "Constitutional") ideas in common law and constitutional law from the end of Segment 1 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 very relevant.

Segment 3. Segment 3 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 1, 2, and 3 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. If you do not make revisions to the segments after receiving them back, binding the three together into a coherent final paper will be difficult. You will have a difficult time remembering the earlier material sufficiently well to understand what needs to be changed in response to my comments. Moreover, you will have competing, intense demands on your time at the end of the semester. It is much easier to front-load the work.

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 proven 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. They will also not be expert by professional standards, but they will get you into a position that will allow you to assess arguments knowledgeably.

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.

Footnotes

Footnotes are primarily a device to force the author to be accurate; they are not primarily for the reader. You will want to footnote the paper heavily (think at least 4 to 6 footnotes per page) and demonstrate that you can derive the ideas out of the documents and the readings. It is always good to examine the full case rather than just the edited version. If what you think I said about a case is different from what you see in the case, you have found a necessary reason to come see me.

Chronology

For the writing seminar, I have moved the material on slavery to the very end of the semester, so it is out of step chronologically. There is some detriment to dealing with that material only at the end, but there are three large benefits. The first is that no paper I have received has actually had an argument that turned on that material, even though it is necessary for understanding the whole. The second is that that placement will give you effectively more time for preparation of your third segment. The third is that putting the material at the end will provide an occasion for treating it partially as a review, but it will also allow a perception about the importance slavery has had in U.S. history.

Required Books

Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History*, 8th ed. (7th edition would be acceptable)

Photocopied materials

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. Default due dates appear for later sections but individuals can set different schedules *with me* at the beginning of the semester by discussion for good reason, as in the scheduled assignments for other classes or the examination schedule.

WARNING: I will try to move through the material rapidly. Due dates remain the same, but you should adjust the readings by progress through the syllabus actually made. The purpose for moving rapidly is to give you

more time to frame your paper. Discussion slows down progress through the material, obviously, but is far more important than progress through the material: be absolutely sure you understand the material as we move forward: things do not just become more clear on their own.

Dates below are for the beginnings of each week.

- Jan 16* English Heritage: P & Z, Prologue, Sections A and B
Colonial Background: P & Z, Chapter 1, Sections A and B
Republican Ideology: P & Z, Chapter 1, Section D;
- Jan 23:* State Constitutions: P & Z, Chapter 1, Section E Palmer, 'Liberties as Constitutional Provisions', pp. 55-86 (in materials)
- Jan 30:* U.S. Constitution, P & Z, Appendix; Palmer, 'Liberties as Constitutional Provisions', pp. 87-148 (in materials)
- Jan 31: Preliminary Paper due; Late penalty half of one grade step per week at start of week*
- Feb 6:* 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 13:* Common Law of Crimes: P & Z, Chapter 2, Section C
Seditious Libel: P & Z, Chapter 2, Section D.
Feb 19: First Paper Segment Due: Late Penalty of half of one grade step per week at start of week
- Feb 20:* Contracts: P & Z, Chapter 3, Sections A & B
Property: P & Z, Chapter 3, Section C
Pierson v. Post (materials); Reception Statutes (materials)
- Feb 27:* Torts: P & Z, Chapter 3, Section D (stop after the notes to Gregory's article)
Corporations: P & Z, Chapter 3, Section E.1
- Mar 6:* Competition: P & Z, Chapter 5, Section A
Labor Law: P & Z, Chapter 5, Section B
Labor Law: P & Z, Chapter 5, Section C.
Mar 9: Second Paper Segment Due: Late Penalty of half of one grade step per week at start of week
- Mar 20:* Federal Common Law, Swift v. Tyson: P & Z Chapter 4, Section A; U.S. v. Coolidge (in materials)
XIV Amendment: The Slaughterhouse Cases; Cruikshank (both in materials, at end)
- Mar 27:* Women and the Law: P & Z, Chapter 4, Section E (Bradwell v. Illinois and U.S. v. Anthony).
Holmes and Rights: Schenck; Abrams (in materials)
- Apr 3:* 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 10:* The New Deal II: P & Z, Chapter 6, Section B (just NLRB)
Legal Realism: P & Z, Chapter 6, Section C
- Apr 17:* 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.
The United States Supreme Court on Slavery, P & Z, Chapter 4, Section C3.

Apr 23: Third Paper Segment Due: Late Penalty of half of one grade step per week at start of week

Apr 24 Dissents in Scott v. Sandford (in materials); P & Z, Chapter 4, Section D.

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)

FINAL PAPER SUBMISSION: May 7: Late penalty of one grade step except for documented unpredictable disaster

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.

Style Comments; Critique Abbreviations

The classic expository style is the best way to improve your analytical ability. It forces you to ask questions that you would prefer to avoid and forces minds (all of which are lazy) into being much more rigorous. Do NOT accept the superficially obvious distinction between form and substance. The form forces the substance.

I. Overall Structure

A. Papers must have an introduction, body, and conclusion.

Introduction

1. The introduction must lay out the thesis for the paper. [Abbreviation: TS]

The thesis sentence must be substantive. Refer to I.B.3 below: lead sentences and thesis sentences follow the same rules.

2. The first sentence of the introduction must be the thesis sentence for the paper.

3. The introduction must recognize and cover the section subtheses.

4. Although you may have to write the introduction first simply to get started on the paper, you must always revise it last, to make sure it conforms to what you have said.

Body

1. The body of the paper must consist of a few (very few) sections.

2. Each section, whether labeled as a section or not, must consist of introduction, body, and conclusion.

Conclusion

1. The conclusion must tie together what has been done in the sections of the body of the paper.

2. Although necessarily the conclusion will be re-stating the material in the introduction, it cannot simply use the same sentences. It should be somewhat more insightful.

B. Paragraphs must have an introduction (= topic or lead sentence) and body. Paragraphs may or may not have to have a conclusion.

Lead Sentence [Abbreviation: LS]

1. The first sentence of any paragraph is a lead sentence; the lead sentence states the thesis for the paragraph.

2. The lead sentence governs the paragraph, so that nothing in the paragraph goes beyond what is contained in the lead sentence.

3. The lead sentence must be substantive, that is, not generic.

Unacceptable lead sentences:

“The sixteenth century experienced many changes.” (This is generic: it could be said of any year, decade, or century.)

“The changes in state policy toward church governance were significant.” (This likewise is generic, unless countering an author who had specifically argued that the changes were insignificant.)

Acceptable lead sentences:

“The chancellor at the time of the Black Death had broad responsibilities for matters touching the common law and royal rights.”

“The chancellor was a key member of the council, and the council was completely competent to formulate and implement governmental policy.”

4. Lead sentences are appropriately not overly long or complicated. How complicated they are will in fact depend on what kind of job a particular paragraph performs, but writers should take care to make lead sentences easily understandable.

Body

1. Nothing should appear in the paragraph that is not covered by the lead sentence.

2. A paragraph should not be less than three or four sentences. A fourteen-line paragraph is a nice length. By twenty

lines a paragraph is growing too long for a reader.

Conclusion

1. Short paragraphs usually do not need a conclusion; long paragraphs do.
2. A concluding sentence to a paragraph is not the introductory sentence to the next paragraph. A concluding sentence must still fall within the parameters set by the lead sentence.

C. Transitions

Transitions are nice, but a single word or a short subordinate clause in a lead sentence often adequately serves the purpose.

II. Grammatical Notes

A. Passive Voice [Abbreviation: PV]

1. Only in extremely unusual situations should you use a passive form as the main verb in a sentence.
2. Passive verbs are those verbs in which the actor of the sentence appears, explicitly or implicitly, in a “by” or “through” or similar clause: “It was done by him;” “Many changes were accomplished;” “My office was recently painted.”
3. Passive verbs are more acceptable in subordinate clauses.

B. Other weak constructions [Abbreviation: WC]

1. Avoid other weak constructions, such as “There is (are)” or “It is (are).”
2. One (incorrect) method of avoiding the passive voice is weak constructions, : “There were many changes that were brought about by the Black Death.” That structure puts the passive voice into a subordinate clause, but adopts a weak construction as the price. One should only use this corrective in desperation.

C. Split infinitives [Abbreviation: SI]

1. Avoid split infinitives completely. These are never acceptable, even in extenuating circumstances (and even if you find them used in printed work by great authors.) Grammar books over the last couple decades have said that split infinitives are acceptable, but many people still consider them very poor grammar.
2. An infinitive is a verb in the form “to run,” “to change,” “to be,” “to have.” A split infinitive is an infinitive with a word in between the “to” and the root: “to boldly go,” “to efficiently accomplish,” “to quickly accomplish.”
3. To avoid the split infinitive, put the adverb either before or after the infinitive or at the end of the sentence. If necessary, simply reformulate the whole sentence.

III. Spell Checkers

Spell checkers in computer software are wonderful, but are not sufficient. They will not catch inappropriate words that are spelled correctly. If you want the word “from,” a spell checker will not alert you that you have typed the word “form.” You still must proof the paper.

IV. Revision

No one has reached the point that avoids the necessity for revision. Revision goes beyond reading for errors. It requires challenging your thoughts.

V. Footnotes

Footnotes are essential. Overtly footnotes are for readers. In reality, their major benefit is for the author. Nothing makes an author challenge preconceptions better than tracking down the source.

VI. External referents (Abbreviation: ER)

1. Ordinarily, sentences should not refer explicitly or implicitly to the reader, even for the purpose of drawing the reader into the discussion.
2. External referents come in the following forms: “We see that . . .”; “The data indicate [i.e., to us].”

VII. “Evolve”

Avoid the word “evolve” unless you really mean the process of evolution. Most historians use the word “evolve” merely to indicate slow change, while avoiding the vital process of stating what the process of change was. Use of “evolve” substitutes superficial sophistication for substantive thought. The word “develop” can implicate similar problems.

VIII. “However”

The word “however” is very useful, but best takes its place not as the first word in a sentence, but as the second or third grammatical element (like the Latin word “enim.”)

Incorrect: “However, fourteenth-century weather was colder and wetter.”

Correct: “Fourteenth-century weather, however, was colder and wetter.”

[Exception: “However that might be, . . .”]