

American Legal History Seminar
Scalia Law School | George Mason University
Fall 2023
LAW 667 | CRN 80232 | SEC 001
2 credit hours
Wednesday 9:50 a.m. - 11:50 a.m.

Instructor: Distinguished Visiting Professor Daniel W. Hamilton

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Office Hours: Mondays and Wednesdays from 2-4 pm or by appointment. My office is in Hazel Hall, Room 311.

Course Overview: This seminar will explore the development of American law and legal thought from the founding of the United States through the Warren Court. Topics include the Revolution and the creation of the Constitution, the law of slavery, the Civil War and Reconstruction, race and the law, immigration and industrialization, the challenge of Progressivism, the Red Scare, gender, legal realism, the New Deal, World War II and the Civil Rights movement. We will consider the way changes in American social and political life helped drive legal change, and also how changes in legal doctrine and legal thought helped shape American history. Substantial time will be devoted to discussing alternative historical methodologies and competing interpretations of legal history. Throughout, we will be concerned with the ways law, legal institutions and legal thought both reflect social and political change, and also create change in American history. The seminar will rely on primary sources and secondary materials that help highlight different historical interpretations and schools of thought. Students will write a seminar paper and the course will rely on extensive class discussion.

Learning objectives for the course include:

- Students will deepen their knowledge of the development of American law and legal thought.
- Students will understand the interactions between social and political history and changes in the law and legal institutions.
- Students will gain an appreciation for alternative historical methodologies and competing interpretations of history.
- Students will be able to communicate their knowledge about this subject orally and in writing

Required Text: The following is a required textbook for the course:

Kermit L. Hall, Paul Finkelman and James W. Ely, American Legal History: Cases and Materials (New York: Oxford University Press, 5th ed. 2017)

I will also post supplemental readings on TWEN. Please be sure to check the course page on TWEN at least once a week.

Class Format: The class meets on the Arlington Campus from 9:50 to 11:50 a.m. on Wednesdays. Please read all of the assigned material and be prepared for active class discussion. I will rely on volunteers and may call on students who aren't volunteering regularly.

Communication Policy: In addition to office hours, I'm glad to meet with you to discuss potential topics for your final paper, to talk about potential sources, and to read and respond to your drafts or partial drafts. I'm also glad to respond to student emails within 24 hours. You should also feel free to email me on nights and weekends.

Attendance: Students are expected to attend class. Per the law school's attendance policy, a student is not eligible to receive credit for a class if they miss more than 20 percent of the class sessions. For a class like this, that meets once a week, this means a student may not miss more than three classes.

Grading: The grade in this course will be based 80% on the final paper and 20% on class participation. It is important that student do the reading for each assignment and be prepared to discuss on a weekly basis.

The law school's Academic Regulation 3-3.2(b) states that "[s]tudents who are not enrolled in a specialty track must take one graded 400- or 600-level seminar course requiring a major paper, and must also complete either an additional such seminar or a course designated as a writing course." American Legal History Seminar is a 600-level seminar course requiring a major paper. The final paper must be between 20-30 double-spaced, typewritten pages, footnotes included. The topic must be approved in advance by me before the end of day on October 6, 2023. Please schedule an appointment with me to talk about your paper topics before then. The final paper is due by end of day on November 28, 2023. Please note that, per law school policy, the professor cannot grant deadline extensions for final papers; requests must be submitted to the Director of Student Academic Affairs.

Helpful Texts: This seminar assumes some general knowledge of the basic events and interpretations of American history but does not assume that everyone taking it was an undergraduate history major. Some helpful texts for those who want to brush up on their

U.S. history and legal history are listed below.

- The class survey of the field remains Lawrence M. Friedman, *History of American Law*. Among other things, it has a wonderful index. Friedman's book works best as a guide to an older generation of literature.
- For other excellent survey accounts of legal history, consult Kermit Hall, *The Magic Mirror: Law in American History*, and Melvin I. Urofsky and Paul Finkelman, *The March of Liberty: A Constitutional History of the United States*.
- If you want help with American history, consult Eric Foner, *The Story of American Freedom*.

I'm also happy to suggest additional readings for those who have a special interest in particular topics.

Student with Disabilities: Students with disabilities may request academic accommodations as provided by federal law. Please contact George Mason University's Office of Disability Services (ODS) to request services (ods@gmu.edu, 703-993-2474).

Campus Closure or Emergency Class Cancellation/Adjustment Policy: If the campus closes, or if a class meeting needs to be canceled or adjusted due to weather or other concern, students will be contacted by email for updates on how to continue learning and for information about any changes to events or assignments.

COURSE OUTLINE

1. Aug. 23 — Approaches to Legal History
Popular Sovereignty, Natural Law and the Legitimacy of American Independence
2. Aug. 30 — Creating a National Constitution: The ‘Repudiation of 1776’?
3. Sept. 6 — Property, Contract and Justice Marshall: Law in the Market Revolution
4. Sept. 13 — Gender, Marriage and Family Law in Antebellum America
5. Sept. 20 — The Law of Slavery
6. Sept. 27 — The Civil War and the Second American Revolution
7. Oct. 4 — The Success and Failure of Reconstruction
8. Oct. 11 — Race, Labor and Citizenship in Industrial America
9. Oct. 18 — The *Lochner* Court and the Challenge of Progressivism
10. Oct. 25 — Red Scare: Civil Liberties, Criminal Justice and the Great War
11. Nov. 1 — Legal Realism
12. Nov. 8 — The New Deal, Legal Liberalism and the Administrative State
13. Nov. 15 — The Warren Court and Democracy: Debating Rights in Post-War America

Thanksgiving Recess begins on Nov. 22, 2023.

CLASS 1 (August 23): Popular Sovereignty, Natural Law and the Legitimacy of American Independence

- Readings: Hall, *American Legal History*
Ch. 1 pp. 14-15, 40-41, 41-42
Ch. 2, pp.82-84, 86-87, 88-89, 89-90, 90-91, 91-92, 92-95, 96-97, 97-99, 104-107
 - John Winthrop, “A Model in of Christian Charity” (1629)
 - The Sources of Law in America
 - Note: “Reception of the Common Law”
 - Note: “Law in a Republican Revolution”
 - James Otis, “The Rights of the British Colonies” (1764)
 - William Blackstone, “The Imperial Constitution” (1765)
 - The Declaratory Act (1766)
 - The Declaration and Resolves of the Continental Congress (1774)
 - Tom Paine, “Common Sense” (1776)
 - The Declaration of Independence (1776)
 - The Virginia Declaration of Rights (1776)
 - Anonymous, “The People the Best Governors” (1776)

CLASS 2 (August 30): Creating a National Constitution: The ‘Repudiation of 1776’?

- Readings: Hall, *American Legal History*
Ch. 2 pp.111-112, 112-113, 113-120, 120-121, 711-726
 - Note, “Republican National Constitutionalism”
 - The Articles of Confederation (1781)
 - The Philadelphia Convention (1787)
 - Elbridge Gerry, “Report on the Constitution: (1787)
 - Appendix: The Constitution of the United States

CLASS 3 (September 6): Property, Contract and Justice Marshall: Law and the Market Revolution

- Readings: Hall, *American Legal History*
Ch. 3, pp. 151-155, 158-162, 162-167, 175-179, 179-185
 - Note: “The Active State and the Mixed Economy”
 - Gibbons v. Ogden, 11 U.S. 1 (1824)
 - McCulloch v. Maryland, 17 U.S. 316 (1819)
 - Dartmouth College v. Woodward, 17 U.S. 518 (1819)
 - Charles River Bridge Company v. Warren Bridge, 36 U.S. 429 (1837)

CLASS 4 (September 13): Gender, Marriage and Family Law in Antebellum America

- Readings: Hall, *American Legal History*
Ch. 5 pp. 322, 322-324, 324-326, 328-332, 326-327, 340-342, 342-343
 - Note: “Gender and Domestic Relations”
 - The Seneca Falls Declaration of Sentiment (1848)
 - The New York Married Women’s Property Acts (1848)
 - *Minor v. Happersett*, 88 U.S. 162 (1875)
 - *Bradwell v. Illinois*
 - Birth Control and Abortion, *State v. Slagle* and Note
 - *People v. Sanger*

CLASS 5 (September 20): The Law of Slavery

- Readings: Hall, *American Legal History*
Ch. 4 pp. 227-230, 236-238, 238-242, 242-248, 222-225, 248-249
 - *State v. Mann*, 2 Devereux 263 (N.C. 1829)
 - Note: “Slavery and the Constitution”
 - *Prigg v. Pennsylvania* 41 U.S. 539 (1842)
 - *Dred Scott v. Sandford* 60 U.S. 393 (1857)
 - Slavery, the Civil War, Reconstruction, and Segregation, pp. 222-225
 - Abraham Lincoln’s “House Divided” Speech, pp. 248-249

CLASS 6 (September 27): The Civil War and the Second American Revolution

- Readings: Hall, *American Legal History*
Ch. 4 pp. 250, 250-252, 252-257, 258-260, 260-263, 264, 265-266
 - Note: “Nullification, Secession and Constitutional Theory”
 - South Carolina Ordinance of Nullification (1832)
 - President Jackson’s Proclamation Regarding Nullification
 - “Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina” (1860)
 - Abraham Lincoln: First Inaugural Address (1861)
 - Abraham Lincoln: The Emancipation Proclamation (1863)
 - Abraham Lincoln: Second Inaugural Address (1865)
- [The Gettysburg Address](#) (not in the case book but available via this link)

CLASS 7 (October 4): The Success and Failure of Reconstruction

- Readings: Hall, *American Legal History*
Ch. 4 pp. 266-267, 269-270, 271-272, 273, 274-275, 275-279, 279, 279-281, 281-282, 284-286, 286, 286-287
 - Reconstruction and Its Aftermath: Political Change, Black Freedom, and the Nadir of Black Rights
 - Note: “The Courts and the Politics of Reconstruction”

- The Mississippi Black Codes (1865)
- “An Act to Protect All Persons in the United States” (1866)
- “Notes” ending with “The End of Civil Rights”
- *The Slaughterhouse Cases* (1873)
- Note: *The Slaughterhouse Legacy*
- Note: *Civil Rights Cases*, 109 U.S. 3 (1883)
- Note: Responses to the Civil Rights Cases
- *Roberts v. The City of Boston* (1850)
- Note: The Response to *Roberts*
- Note: Free Blacks and the Law

Please also read Amendments 13, 14, and 15.

CLASS 8 (October 11): Race, Labor and Citizenship in Industrial America

- Readings: Hall, *American Legal History*
Ch. 5 pp. 292-296, 296-299, 299, 303-306, 306, 319-322, 336-338
Ch. 4 pp. 287-291, 291
 - Nineteenth-Century Law and Society (1800-1900), including sections on Race and Native Americans
 - *Cherokee Nation v. Georgia* (1831)
 - Note: The Federal Government and Native Americans
 - *Yick Wo v. Hopkins* 118 U.S. 356 (1886)
 - Note: “The Chinese and Jim Crow”
 - *California ex rel. M. M. Kimberly v. Pablo de la Guerra* (1870)
 - *Reynolds v. United States* (1879)
 - *Plessy v. Ferguson*, 163 U.S. 537 (1896)
 - Note: “Separate But Equal in the North”

CLASS 9 (October 18): The *Lochner* Court and the Challenge of Progressivism

- Readings: Hall, *American Legal History*
Ch. 6 pp. 388-389, 389-391, 391-392, 402-405, 414-417, 417-419, 384-386
 - Note: “Federal Regulation and the Public Interest”
 - The Interstate Commerce Act (1887)
 - The Sherman Anti-trust Act (1890)
 - *Munn v. Illinois* (1877)
 - *Lochner v. New York* 198 U.S. 45 (1905)
 - *Muller v. Oregon* 208 U.S. 412 (1908)
 - *Ives v. South Buffalo Railway Co.* 201 N.Y. 271 (1911)

CLASS 10 (October 25): Red Scare: Civil Liberties, Criminal Justice and the Great War

- Readings: Hall, *American Legal History*
Ch. 7 pp. 423-425, 425-429, 429-431, 431-432, 433-434, 434-437, 437-439, 439-441

- Note: “Individual Rights in a Changing Culture”
- Brandeis & Warren, “The Right to Privacy”
- Note: “World War I and Civil Liberties”
- Murphy, “World War I and the Origins of Civil Liberties”
- *Schenk v. U.S.* (1919)
- *Abrams v. U.S.* (1919)
- Note: “Radicals and Civil Liberties”
- *Whitney v. California* (1927)

CLASS 11 (November 1): Legal Realism

- Readings: Hall, *American Legal History*
Ch. 6 pp.367-368, 369, 373-375
Ch. 8 pp. 477-479, 482-484, 484
 - Christopher C. Langdell, “A Selection of Cases on the Law of Contracts” (1871)
 - Note: Critics of Langdellian Assumptions
 - Oliver Wendell Holmes, “The Path of the Law” (1897)
 - Louis Brandeis, “Brief for the Defendant in Error,” *Muller v. Oregon* (1907)
 - Jerome Frank, “Law and the Modern Mind” (1936)
 - Note: “Legal Realism”

CLASS 12 (November 8): The New Deal, Legal Liberalism and the Administrative State

- Readings: Hall, *American Legal History*
Ch. 8 pp. 485-486, 486-487, 487-489, 489-492, 499-502, 502-503, 503-505, 505-506
 - Note: “The New Deal and the Rise of Legal Liberalism”
 - “The State and Federal Legislative Responses”
 - “The Supreme Court and the New Deal”
 - *Schechter v. U.S.* 295 U.S. 495 (1935)
 - *West Coast Hotel v. Parrish* 300 U.S. 379 (1937)
 - Note: “The Decline of Substantive Due Process”
 - *Palko v. Connecticut* (1937)
 - *U.S. v. Carolene Products* 304 U.S. 144 (1938): Footnote Four

CLASS 13 (November 15): The Warren Court and Democracy: Debating Rights in the Post-War America

- Readings: Hall, *American Legal History*
Ch. pp. 507-509, 509-512, 512-514, 514-515, 515-516, 530, 530-532, 532-536
 - Note: “Rights, Liberty and Science in Modern America”
 - *Brown v. Board of Education of Topeka, Kansas* (347 U.S. 483) (1954)
 - The “Southern Declaration on Integration” (1956)
 - Note: “Race and the Constitution”
 - King, “Letter from Birmingham City Jail” (1963)

- Note: Gender
- *Griswold v. Connecticut* 381 U.S. 479 (1965)
- *Roe v. Wade* 410 U.S. 113 (1973)