

American Legal History Section 319
Professor Meyerson
Spring 2018

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COURSE INFORMATION AND SYLLABUS

Meeting Times: Tuesdays and Thursdays: 10:30AM – 11:45AM

Location: Room assignments are available through MyUB.

Class Attendance, Preparation, and Participation: You are required to attend class regularly and be prepared for class; adequate class attendance, preparation, and participation are also essential if you wish to understand the material.

To conform with ABA and law school guidelines, you are entitled to 5 absences per semester. A student with more than 5 unexcused absences will not be permitted to take the final.

Unless told otherwise, for each class, you are responsible for: 1) any unfinished material from the preceding assignment: **PLUS** 2) the assignment following the one discussed in the preceding class. If you miss a class, you must obtain the class notes from the missed class *before* attending the next class.

Class participation is an essential part of process of becoming a lawyer. All students are expected to be prepared to participate in each class session, as I will call on students randomly and solicit volunteers. If you are not prepared to discuss the day's reading and the questions for the day's assignment, please give me a note prior to class. This will avoid embarrassment for both of us.

You must prepare written answers to the questions in the syllabus which accompany each assignment. Details on how your answers will be handed in will be provided in class.

Use of the Internet during class (This is huge.)

Repeated studies, as well as my own experience, prove that using the Internet or texting during class lowers class performance and exam grades. The fact that this may not have occurred in college for you is not relevant at all. I will ask you all to turn off your access to wireless Internet and put away your cell phone before the start of class. We will discuss this more on the first day. Suffice to say- texting or internet use during class will be prima facie evidence of unsatisfactory class participation.

I reserve the right to decrease a grade for unsatisfactory class participation or preparation.

Materials

Urofsky & Finkelman, **Documents of American Constitutional and Legal History**, Volume 1 & Volume 2 (3rd ed. 2008)

There will also be material posted on the course TWEN site. Please make sure you are enrolled before class begins.

Course Website

This course has a TWEN page that links to this syllabus, announcements, the class assignments, and other class materials. You are responsible for self-enrolling in the TWEN page and for checking it regularly for course information.

Grading

Your grade will be determined as followed:

80%: Three-hour, closed-book final examination.

As stated above, I reserve the right to lower grades for inadequate class attendance, preparation, and participation.

Course Expectations

American Bar Association Standards for Law Schools establish guidelines for the amount of work students should expect to complete for each credit earned. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work for each credit earned in a class in order to obtain a *minimum* passing grade. Far more time is needed for a good or excellent grade.

You are also expected to complete all reading and written assignments before class, to participate consistently in class discussion, to work collaboratively on all group assignments, and to be able to demonstrate that you have read and reflected on the issues raised in each assignment.

Student Learning Outcomes

Students will learn: how legal and constitutional rules were created and evolved over time; will how to use the lessons of legal history to make effective modern legal arguments; how great legal advocates have used language and storytelling to make convincing arguments; and how to work collaboratively to solve legal problems.

Office Hours

My scheduled Office Hours for Spring, 2018 are:

Tuesdays: 9:30- 10:20, 5:00 – 6:10 (except for certain faculty obligations)

Thursdays: 9:30- 10:20, 5:00 – 6:10

IMPORTANT: Please let me know if you want to make an appointment. That will ensure that we will have time to talk. If you cannot find a convenient time, *please* let me know and we will find a mutually convenient time to meet or talk on the phone. You should be assertive in making appointments.

Class Cancellation:

If I must cancel a class, I will either let you know ahead of time or, if need me, notify you via email. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.

Academic Integrity:

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at http://law.ubalt.edu/academics/policiesandprocedures/honor_code/.

If you have even the slightest doubt about whether certain actions would violate the Honor Code, please contact me or Associate Dean Dionne Koller.

Title IX Sexual Misconduct and Nondiscrimination Policy:

The University of Baltimore's Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the university any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

Disability Policy:

If you are a student with a documented disability who requires an academic accommodation, please contact Leslie Metzger, Director of Student Services, at 410-837-5623 or lmetzger@ubalt.edu.

CLASS ASSIGNMENTS

I have given the first two class assignments below. The other assignments represent my tentative plan but the later assignments are subject to change. The official assignments from Class 3 on will be posted on the class TWEN site.

NOTE: When an assignment has a “Reading,” it refers to material posted on the TWEN site. When an assignment is terms “Document,” it refers to material in **Documents of American Constitutional and Legal History**

You do not need to hand in your answers to the questions. You must, however, have thought about them and be prepared to answer them in class.

Class 1: The Boston Massacre

1. Reading I and II. What lessons does John Hancock want his listeners to derive from his version of the story of the Boston Massacre?
2. Reading III. Why does John Adams agree to represent the British soldiers? Would you?
3. Reading IV. What does Adams mean by “facts are stubborn things”?
4. Reading V. According to Justice Oliver, what standard should the jury use in deciding the guilt of the soldiers? Why do you think that is the standard?

Class 2: Magna Carta and the Case of the Seven Bishops

I. Read Document I [as best you can] and Document 11 [up until the word “frequently” on page 25] and say which parts of our Constitution were derived, at least in part, from either Document.

II. After reading all of the TWEN readings, please describe which parts of the story would implicate the following parts of the U.S. Constitution:

1. Art. I, §7
2. 1st Amendment [Hint: Many different parts of the 1st Amendment would be implicated by various parts of the reading]
3. 6th Amendment

Tentative Future Topics

[THE FINAL CLASS ASSIGNMENTS WILL BE POSTED ON TWEN]

Class 3: Law and Religion in the New World

1) Read Documents 3 & 5

- a) What do these documents say about the role of religion at the early stages of U.S. history?
- b) What sections of the Virginia Rules seems particularly noteworthy to you, and why?

2) Documents 7: How does “The Bloody Tenent of Persecution” reflect a different view of the relationship between religion and government than the earlier documents?

Class 4: Slavery in the New World

- 1) How is the American view of slavery changing throughout the 1600's?
- 2) What is the basis for the Germantown protest?
- 3) What does Somerset say about English law of slavery? Why do you think it is different from the American system?

Class 5 Developing an American Perspective on Government and Rights

1) [Document 16] How does Blackstone’s view of Parliament reveal the weakness of Somerset?

2) [Document 13]

- a) How is Zenger’s case similar to and different from the Seven Bishops?
- b) What is the relevance of references to i) the Star Chamber; ii) horses and cows?

3) [Documents 17 & 18] What were the differing views concerning the rights of Americana vis a vis England prior to the Revolutionary War as expressed by the Virginia Stamp Act Resolutions and the Stamp Act Congress?

4) Document 22 “Common Sense”

- a) What is Paine’s view of Government in general, and Monarchy in particular?
- b) How does Common Sense foreshadow and differ from the Declaration of Independence?

Class 6: Revolution and Confederation

1) [Document 24]

a) What is the basic “legal” argument Jefferson makes in the “Declaration of Independence”?

2) [Document 27]: How were the following dealt with under the Articles of Confederation [Think about how it differed from the U.S. Constitution]

- a) What is the relationship between Congress and the States [Art II and Art VI]
- b) How Congress is organized Article V p 75
- c) What is the meaning and importance of the last full paragraph of p 78 [beginning “The United States in Congress assembled shall never. . .”?
- d) What is needed for an Amendment? [First paragraph Article 13 p79]

3) [Document 32]

a) What do you think were the most important provisions of the Northwest Ordinance and why?

Class 7: Creation of an American Understanding of Church/State Relations

I. Early Thanksgiving Proclamations and Treaties

a) How do the Thanksgiving Proclamations and Treaties that preceded 1785 differ from those that follow?

b) What is the historical relevance, if any, of these Proclamations and Treaties?

II. “Religious Freedom in Virginia” and “Virginia Statute for Religious Freedom”

- a) What was the purpose and goal of Patrick Henry's proposal?
- b) Of Madison's arguments in his Memorial and Remonstrance, which, if any, do you think have the most relevance today?
- c) What did the Va. Statute provide for Religious Freedom? What are its rationales?
- d) Does this statute involve principles of Free Exercise, Establishment, or both?

Class 8: Drafting the Constitution

- 1) Did the framers exceed their authority? Does the proposed Constitution [See Art VII p 106] violate the Articles of Confederation [compare the language of Art XIII p 79, with Madison's speech of June 19]? Should we care today?
- 2) What was the difference between a federal and a national government?
- 3) What is the significance of [and possible disagreement with] the phrasing "We the People"?
- 4) What were the major justifications for a) Not limiting the selection of members of the House of Representatives to "freeholders" ie property owners; b) Having State Legislators choose U.S Senators?
- 5) What is the framers' view of democracy?
- 6) What is the significance of using the phrase "declare war" rather than "make war"?

Class 9: Ratifying the Constitution

I. George Mason's Objections to the Constitution

1. Identify two of Mason's objections that, with the benefit of 223 years' experience, seem most valid to you.

II. Brutus, no. 1

2. What is Brutus's argument against creating a country as large as the United States?

III. Federalist 10

3. How does Madison answer Brutus's argument and argue that one large nation is "better" than 13 state-sized countries?
4. What does Madison mean by "faction"?

IV. Federalist 51

5. What is meant by the phrase "Ambition must be made to counter-act ambition"?
6. What is meant by the phrase "double security"?
7. Madison writes: "In a free government the security for civil rights must be the same as that for religious rights". In what way are they the same?

Class 10 Early Battles over the Constitution

I. Documents 39 and 40

- 1) How do Jefferson and Hamilton understand the Commerce Clause?
- 2) Whose opinion ultimately prevailed in the U.S. Supreme Court?

II. Documents 42 and 43, and Readings I, II, and III

3) How do Madison and Hamilton understand the respective roles of the President vs the Congress in matters of war, peace, and neutrality?

III. Documents 46 (d)

4) What did the Sedition Act prohibit?

Class 11 Entering 18th Century

a) Document 50 Jefferson's First Inaugural

1. What were Jefferson's views of the conflict between the political parties?
2. What did he see as the "essential principles" of government?

b) Review your con law notes from *Marbury v Madison* and read both Federalist 78 (Document 36 b) and Reading I [Jefferson's letter to Judge Johnson]

- 3) What is the best argument for judicial review?
- 4) What is the best argument against judicial review?

c) Review your con law notes from *McCulloch v Maryland* and Reading II [Madison's letter to Spencer Roane]

- 5) What different interpretative techniques does Marshall use to rule in favor of the constitutionality of the national bank?
- 6) Why does Madison disagree?

Class 12 Evolution of Contract Law

Reading I. *Dean v. Mason*

- 1) The dissent gives the then-traditional view of the "sound price" doctrine, that paying a fair price implies that the goods are of decent quality. Why does the dissent think this is a good rule?
- 2) The majority announces a "new rule" of caveat emptor. Why does the majority reject the sound price doctrine and what rule replaces it?

Reading II. *Laidlaw v Organ*

3) What rule does the Court announce concerning disclosing information during contract negotiations? What is its rationale?

Document 86 *Charles River Bridge*

4. What is the contractual argument made by the Charles River Bridge Company for keeping their monopoly?
5. What policy arguments did the Court use in rejecting it?

Class 13 Slavery

A) Reading I and Documents 100 and 106 Fugitive Slave Act and Mass. Personal Liberty Act

1) What was the purpose and effect of these three laws?

B) Reading II [Narrative of the Life of Frederick Douglass, an American Slave]

2) What message does Douglas want his readers to take from the excerpt of Chapter I?

3) At the start of Chapter X, Douglass writes, "You have seen how a man was made a slave; you shall see how a slave was made a man"; at the end he writes, "I now resolved that, however long I might remain a slave in form, the day had passed forever when I could be a slave in fact." What lesson does he want he reader to draw from this part of his autobiography?

C) Dred Scott [Document 107 and Reading III]

4) What are the major legal issues in Dred Scott?

5) Is Dred Scott a racist opinion?

6) Does Justice Curtis in his dissent refute the legal arguments of Taney's opinion?

*7) What is the lesson one should take about the value of originalism after reading Dred Scott?

Class 14 Lincoln the Lawyer

Reading I [Lincoln Douglas Debates] and Documents 115, 118, 121, and 125 [First Inaugural; Emancipation Proclamation; Gettysburg Address, and Second Inaugural]

1) What is your opinion of Lincoln after reading the excerpts from the Debates?

2) In the First Inaugural: What is Lincoln's legal analysis of a) Slavery and b) The role of the Supreme Court?

3) How does the Gettysburg Address contrast with the Emancipation Proclamation?

4) As a lawyer, what do you think are the strengths of the Gettysburg Address and the Second Inaugural?

Class 15 Birth of the 14th Amendment

Document 126 Black Codes

1. What do you think was the purpose of these laws?

2. Pick one specific section that jumps out at you as particularly noteworthy and tell why.

Reading I. Drafting the 14th Amendment

3. What was the purpose[s] of the 14th Amendment?

Document 135 Slaughterhouse Cases – both the portion in book, Document 135 and the portion in Reading II, which contains an excerpt that the book edited out:

4. Did the Slaughterhouse Cases view of the purpose[s] of the 14th Amendment get it right?

Why or why not?

Class 16 Plessy

Reading I: "Freedman's Bureau"

1) What was the role of the Freedman's Bureau? Was it successful?

Reading II. "Why the Klu Klux"

2) What can be learned from reading "WHY THE KU KLUX"?

3) Should I have taken class time to assign it? Why or why not?

Document 152 Plessy v Ferguson

4) How did the Plessy majority justify upholding a law mandating segregation? How does Harlan answer?

Reading IV. "Jim Crow Laws"

5) What seems to be the purpose of the Jim Crow laws? Which ones do you find most notable?

Class 17 The Fight for Gender Equality

Reading I: Sarah Grimké, Legal Disabilities of Women, plus Documents 96, 136, 137, 160

1) What was the legal and social status of women in the 19th Century?

2) What was the purpose and likely effect of the Seneca Falls Convention?

3) Why does the Court uphold the law in Muller despite having previously struck down maximum-hour labor laws? What sources does the Court rely upon [look at note 1]? [Note that Document 160 is in Volume II]

Class 18 The Evolution of Legal Education

Questions for Reading I: Langdale v Holmes [on Common Law]

How do their views of legal education differ?

Which is more prevalent at this Law School?

Reading II: The Path of the Law

As you read this, consider the following questions [you do not have to answer any but those that are starred]

What does Holmes mean that the "meaning of every new legal thought" is to improve "prediction"?

Do you agree with Holmes that there is unfortunate confusion between morality and law?

Do you agree with Holmes' definition of "duty to keep a contract" and "Meeting of the minds"?

Holmes says that reliance on "Logic" is the "natural error of the schools" Do you agree, and if so, what should we do about it?

Holmes says that "The rational study of law is still to a large extent the study of history." Do you agree? What do you think of the "dragon" metaphor?

Should law schools require study of "economics" and "Jurisprudence," as Holmes uses these terms?

What is the difference between teaching theory to the "competent" and the "incompetent"?

**What does Holmes mean when he says, "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it--and nothing else."

**What does Holmes think is necessary for lawyers to find happiness? 23 Do you agree?

In Document 181 *Buck v Bell*

What is the basis of Holmes' decision in *Buck v Bell*? Is it correct?

Class 19 Creation of a Theory of Free Speech

Schenck; Abrams; Whitney; N.Y. Times v Sullivan; and Brandenburg

How does the doctrine of freedom of speech change over time ?

What are the rationales given for an expansive view of freedom of expression?

Class 20 Creation of a Theory of Freedom of Religion

Reading I *Scopes Trial* and Reading II *McCreary*

Reading I: How do the arguments of Darrow and Bryan reflect modern debates surrounding science, religion, and law?

What was the final Tennessee court ruling on the *Scopes* case?

Reading II. What is the current state of the law on establishment?

Whose version of history, the Majority's or Dissent's, do you think is correct and why?

Class 21 The New Deal Revolution

Lochner, Schechter, Butler, Court Packing, West Coast Hotel, Jones & Laughlin Steel & Lopez

What is the holding of each of the six cases?

Based on these cases, what is the "modern law"?

Do you think the Court Packing Plan was unconstitutional?

Class 22 World War II and War Powers

A) Document 168 *Ex Parte Merryman*, Reading I [Lincoln's Address to Congress], and Reading II, *In re Yamashita*

1) What is the legal argument in *Merryman* that Lincoln's suspension of the writ of habeas corpus was unconstitutional? What was Lincoln's response?

2) Why did the majority in *Yamashita* find the tribunal constitutional? Why did the dissent disagree?

3) Based on the above, what effect do you think the state of war should have on constitutional structure and rights?

B) Review your Con Law notes on *Korematsu* -[the case is also in Document 204] and Reading III *Hohri v. United States*

1) Explain how the facts in *Hohri* can be argued to show a) the *Korematsu* case was incorrectly decided as a matter of law and b) was correctly decided?

Class 23 The Vietnam War Era

Reading I: Holtzman v Schlesinger a) District Court and b) Court of Appeals

1. Was the Vietnam War a “declared” war? Why?
2. What is the District Court’s argument in Holtzman that a) the constitutionality of the Cambodia bombing is for the courts to decide and b) the bombing was unconstitutional?
- 3) Why did Court of Appeals find this to be a “political question”?

Class 24 The Civil Rights Era

Brown I and II (Documents 211 + 212); Southern Manifesto [Document 213]; Cooper v Aaron [Document 215]; Letter from a Birmingham Jail [Reading I]; and the Civil Rights Act of 1964 [Document 223]

1. What is the “holding” in Brown I and what standard or test does the Court use? What is the “holding” in Brown II?
2. How would you “answer” the Southern Manifesto?
3. Why was Cooper v Aaron necessary?
4. Martin Luther King’s Letter from a Birmingham Jail was an open letter addressed to eight members of the clergy. What lessons should lawyers draw from it?
5. What is Congress’s constitutional authority for enacting the Civil Rights Act of 1964?

Class 25: How Law Responds to Changing Technology
[TBA]