

LAW 218.3: INTRODUCTION TO U.S. LEGAL AND CONSTITUTIONAL HISTORY

Professor Karen Tani

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Office Hours: Tuesdays, 3:00-5:00 p.m., and by appointment

Description

This course is designed to place the American legal system and its laws in context by exploring basic themes and events in U.S. legal and constitutional history from the American Revolution to the present. Because of the richness of the subject matter and the wealth of materials available, the course will necessarily be selective. It will focus on four major areas of legal and constitutional development:

1. The state: including topics such as war and other state-sanctioned violence, regulation, protection of individual rights, citizenship, and federalism;
2. The economy: including immigration, racially-based servitude, industrialization, and market development and regulation;
3. Property: including property in persons, land, business, money, and government benefits;
4. "Private" spaces: including family, sexuality, gender, and domestic relations of authority.

Two large questions provide the connective tissue between these topics: (1) What is the relationship between law and society, or between official law and lived experiences? (2) What do we learn about law by studying its history? All of us have a particular picture of law, derived from our own background, experiences, and training. How does the historian's perspective complicate, complement, or contradict that picture?

Students will gain purchase on these questions throughout the course. Students will also derive from the course a deeper understanding of important laws and legal principles, as well as a rich sense of law's constraining and liberating possibilities.

Class Meetings

Our class will meet **Monday and Tuesday** from **11:20 a.m. to 12:35 p.m.** in Boalt 130. Because of the large amount of material that we cover during class time, attendance is required. Please contact me if you will be unable to attend a class meeting.

Exceptions/special sessions:

- We will **not** meet on Monday, **January 21** (Martin Luther King, Jr. Day); Monday, **February 18** (Presidents Day); or Tuesday, **March 19**.
- We will have three make-up sessions. All sessions will be held in Boalt 130.
 - Friday, **March 15**, from 3:35-4:50 p.m.
 - Monday, **April 22**, from 11:20 a.m.-12:35 p.m.
 - Tuesday, **April 23**, from 11:20 a.m.-12:35 p.m.
- On Friday, **April 26**, I will hold an optional review session, from 10:00-11:15 a.m, in Boalt 134.

Materials

All the materials for this course will be uploaded to bSpace. For students desiring a “refresher” on U.S. history, I recommend Eric Foner, *The Story of American Freedom* (W. W. Norton & Co., 1999). For an overview of American legal history, I recommend *A History of American Law* (any edition will do) and *American Law in the 20th Century*, both by Lawrence Friedman.

Evaluation

Evaluation will be based on either a 10-hour essay-style take-away exam (5000 words) or a 20-25 page historiographical essay (student’s choice). *Students must inform the professor of their choice no later than Friday, March 22*. Students who prefer to write a historiographical essay must clear their topic with the professor before selecting this option.

Assignments

- Jan. 7: Introduction
Robert W. Gordon, “The Struggle Over the Past,” *Cleveland State Law Review* (1996)
- Jan. 8: The Laws of Empire
Letters Patent to Sir Humfrey Gylberte (1578)
Proclamation of George III (1763)
William Blackstone on the Imperial Constitution (1765)
The Stamp Act (1765)
Memorial of the Stamp Act Congress (1765)
- Jan. 14: The Rebellion in Law
The Declaration and Resolves of the Continental Congress (1774)
The Declaration of Independence (1776)
[James MacPherson], *The Rights of Great Britain Asserted against the Claims of America* (1776) (excerpt)

- Jan. 15: Confederation and Constitution
The Articles of Confederation (1781)
Constitution of the United States (1787)
Speech of James Wilson (1787)
The Virginia and Kentucky Resolutions (1798-99)
- Jan. 22: Law, the State, and Economic Development in Antebellum America
Palmer v. Mulligan (1805)
Dartmouth College v. Woodward (1819)
Gibbons v. Ogden (1824)
Willard Hurst, "The Release of Energy" (1956) (excerpt)
- Jan. 28: Labor and Employment in Antebellum America: The Law of Master and Servant
Christopher Tomlins, "Master and Servant in Republican America," from *Law, Labor, and Ideology in the Early American Republic* (1993), 259-92.
Commonwealth v. Pullis [The Philadelphia Cordwainers Case] (1806)
Farwell v. Boston & Worcester Railroad (1842)
- Jan. 29: How Did Lawyers Wind Up Running Things?: The Growth of the Legal Profession
Honestus, "Observations on the Pernicious Practice of Law" (1786)
James Kent, "Lecture in Law" (1824)
Alexis de Tocqueville, *Democracy in America* (1840) (excerpt)
- Feb. 4: Antebellum Family Law
D'Hauteville Case (1840)
Review of the D'Hauteville Case (1841)
Hendrik Hartog, "Being a Wife," from *Man & Wife in America* (2000), 93-135.
- Feb. 5: The Law of Slavery
State v. Mann (N.C. 1829)
Record, State v. Celia (Missouri, 1857)
Optional: Eugene D. Genovese, "The Hegemonic Function of the Law," from *Roll, Jordan, Roll: The World the Slaves Made* (1972)
- Feb. 11: The Problem of Slavery in the Federal System
Commonwealth v. Aves (1836)
Prigg v. Pennsylvania (1842)
American Anti-Slavery Society, "The Fugitive Slave Law, and Its Victims" (1856)
Scott v. Sandford (1857)
- Feb. 12: The Break Up
Confederate Constitution (1861)
Lieber Code (1898)
- Feb. 19: Reconstruction

Alabama and Mississippi “Black Codes” (1865)
Civil Rights Act of 1866
U.S. Constitution, Amendments 13, 14, 15 (1866)

Feb. 25: Reconstruction in the Courts

Sharecropping contract (1879)
Slaughter-house Cases (1873)
Brief for the Plaintiffs, Butchers Benevolent Association (1873)
The Civil Rights Cases (1883)

Feb. 26: “Problem” Populations and Federal Power

President Franklin Pierce, Veto Message, Ten-Million Acre Bill (1854)
Reynolds v. United States (U.S., 1879)
George F. Edmunds, “Political Aspects of Mormonism,” *Harper’s Monthly* (1881)
Dawes Act (1887)

Mar. 4: Exclusion and Segregation

Trial records: United States v. Jung Ah Lung and United State v Kam Toy

Mar. 5: The Law of Industrial Accidents

Crystal Eastman, “Work Accidents and the Law” (1910) (excerpt)
Ives v. South Buffalo RR (NY 1911)
New York State Constitutional Amendment (1913)

Mar. 11: The Progressive Ideal: Reform, Social Control, and Sociological Jurisprudence

Florence Kelley, “Some Ethical Gains through Legislation” (1905) (excerpt)
The Brandeis Brief (1908) (excerpt)
Muller v. Oregon (1908)

Mar. 12: Policing Americanism in World War I and after

Paul Murphy, “World War I and the Origins of Civil Liberties in the United States” (1979) (excerpt)
Meyer v. Nebraska (U.S. 1923)
Moore v. Dempsey (1923)

Mar. 15: The First “New Federalism”

U.S. Constitution, Amendment 18
Massachusetts v. Mellon (1923)
Olmstead v. United States (1928)
The Social Security Act of 1935

Mar. 18: The New Deal and the “Constitutional Revolution”

William E. Leuchtenburg, “The Constitutional Revolution of 1937” (1987)
Felix Frankfurter, “Mr. Justice Roberts,” *University of Pennsylvania Law Review* (1955)
Erwin Griswold, “Owen J. Roberts as a Judge,” *ibid.*

- Apr. 1: World War II and Civil Liberties
Wartime Civil Control Administration, Interior Security Regulations (1942)
Dillon S. Myer, "Evidences of Americanism Among Japanese-Americans" (1943)
Korematsu v. U.S. (1944)
West Virginia Board of Education v. Barnette (1943)
- Apr. 2: The Cold War, the "Rule of Law," and Desegregation
Brief for the United States as Amicus Curiae, Brown v. Board of Education (1952)—Parts I, III, and Conclusion (pp. 1-8, 18-26, 31-32)
Southern Manifesto on Integration (1956)
Michael J. Klarman, "Race and Rights" (2008) (excerpt)
Optional: Mary Dudziak, "Desegregation as a Cold War Imperative," *Stanford Law Review* (1988)
- Apr. 8: The "New Property"
Flemming v. Nestor (1960)
Charles Reich, "The New Property," *Yale Law Journal* (1964)
- Apr. 9: The "Rights Revolution" and Its Discontents
Alexander Bickel, "Is the Warren Court Too 'Political'?", *New York Times*, Sept. 25, 1966
Transcript of the President's Announcement on Two Nominees for Supreme Court (1971)
Matthew D. Lassiter, "The Suburban Origins of 'Color-Blind' Conservatism: Middle-Class Consciousness in the Charlotte Busing Crisis" (2004)
- Apr. 15: Abortion as a Constitutional Question
American Medical Association Policy Statements (1967, 1970)
Betty Friedan, "Abortion: A Woman's Civil Right" (1969)
Linda Greenhouse, "Constitutional Question: Is There a Right to Abortion?" *New York Times*, Jan. 25, 1970
Justice Harry Blackmun, Hand Down, Roe v. Wade (1973)
- Apr. 16: Incarceration, Capital Punishment, and Victims' Rights
Laurie Woods, Litigation on Behalf of Battered Women, *Women's Rights Law Reporter* (1978)
Frank Carrington and George Nicholson, "The Victims' Movement: An Idea Whose Time has Come," *Pepperdine Law Review* (1984)
Deborah P. Kelly, "Victims' Perceptions of Criminal Justice," *ibid.*
- Apr. 22: Same Sex Marriage
Baker v. Nelson (Minn. 1971)
Note, The Legality of Homosexual Marriage, *Yale Law Journal* (1973)
Singer v. Hara (Wash. 1974)

Apr. 23: Law and the War on Terror
Mary Dudziak, "What Is a War on Terror?" (2012)
TBD

Apr. 26: Optional review session