

Fall Semester, 2013

Legal Studies 177

**American Legal and Constitutional History**

MWF 10-11A, 102 WURSTER

Prof. Charles McClain  
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*GSI: Sara Ludin*

4 Units

Three hours of lecture,  
One hour of discussion each week.

This course explores the development of American legal doctrines and institutions in their social and political contexts. It deals as well with the evolution of constitutional jurisprudence. It presumes a basic knowledge of American history. Required texts are Robert McCloskey, *The American Supreme Court*, 5<sup>th</sup> edition; a book of readings prepared by the instructor.

Students are expected to attend all lectures and to attend and participate in weekly discussion sections.

**Topics and Readings**

(1) The European Legal Background / General Themes in U.S. Legal History

From Instructor's Materials:

Harry N. Scheiber, "American Constitutional History and the New Legal History"

(2) American Law in the Colonial Period

From Instructor's Materials:

George Haskins, "The Legal Heritage of Plymouth

Colony"

Morals

David Flaherty, "Law and the Enforcement of  
in Early America"

The Laws and Liberties of Massachusetts (1648)

The Charter of Maryland

*Winthrop v. Lechmere*, Conn. (1727-28)

W.B. Stoebuck, "Reception of English Common Law  
in the American Colonies"

(3) The Foundations of American Constitutionalism

From Instructor's Materials:

The United States Constitution of 1787 and the  
Bill of Rights

Federalist Papers, Nos. 78, 81  
accessible at:

<http://thomas.loc.gov/home/histdox/fedpapers.html>  
and other internet sites

Brutus, Essay XV (Antifederalist papers)

Charles McClain, "Civil Rights and Liberties in  
the Ratification Debates"

Gordon Wood, "Interests and Disinterestedness in  
the Making of the Constitution"

(4) The Early History of the Supreme Court

Robert McCloskey, *The American Supreme Court*, pp. 1-  
52

From Instructor's Materials:

*Marbury v. Madison*, 5 U.S. (2 Cranch) 137 (1803)

(1819)

*McCulloch v. Maryland*, 17 U.S.(4 Wheat.)316

*Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.)  
518 (1819)

*Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833)  
R. Kent Newmeyer, "John Marshall As An American  
Original: Some Thoughts on Personality and  
Judicial Statesmanship"

- (5) The American Common Law in the Antebellum Period With Special Emphasis on the Law of Property

From Instructor's Materials:

South Carolina Reception Statute (1712)

*Guardians of the Poor v. Greene* (Penna., 1813)

California Reception Statute (Civil Code, §22.2)

Morton Horwitz, "The Emergence of an Instrumental  
Conception of American Law, 1780 - 1820"

*Palmer v. Mulligan*, New York (1805)

J. Willard Hurst, "The Release of Energy"

- (6) Crime and Criminal Justice

From Instructor's Materials:

Charles McClain, "Criminal Law Reform: Historical  
Development in the United States"

(7) The Post-Civil War Constitutional Order - Business Regulation

Robert McCloskey, *The American Supreme Court*, pp. 67-119

From Instructor's Materials:

U.S. Constitution, The 13<sup>th</sup>, 14<sup>th</sup> & 15<sup>th</sup> Amendments

*The Slaughter-House Cases*, 93 U.S. 36 (1873)

*People v. Marx*, New York Ct. of Appeals (1885)

*Powell v. Pennsylvania*, 127 U.S. 678 (1888)

*Lochner v. New York*, 198 U.S. 45 (1905)

*Meyer v. Nebraska*, 262 U.S. 390 (1923)

Charles W. McCurdy, "The `Liberty of Contract' Regime in American Law"

(8) The Post-Civil War Constitutional Order - Race

From Instructor's Materials:

*Strauder v. West Virginia*, 100 U.S. 303 (1880)

*The Civil Rights Cases*, 109 U.S. 3 (1883)

*Plessy v. Ferguson*, 163 U.S. 537 (1896)

*Buchanan v. Warley*, 245 U.S. 60 (1917)

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

Benno Schmidt, "The Supreme Court and Race Relations in the Progressive Era"

Charles McClain, "The Laundry Litigation of the 1880's"

(9) Women and the Law - Some Nineteenth-Century Developments

From Instructor's Materials:

*Bradwell v. State*, 83 U.S. 131 (1873)

*Minor v. Happersett*, 88 U.S. 162 (1874)

*George v. Ransom*, 15 Cal. 322 (1860)

Carl Tobias, "Interspousal Tort Immunity"

Carole Shammas, "Re-assessing the Married Women's Property Acts"

(10) The Development of Modern American Tort Law

From Instructor's Materials:

*Brown v. Kendall*, Mass. (1850)

*Macpherson v. Buick Motor Co.*, New York (1916)

O. W. Holmes, Jr., *The Common Law*

Lawrence Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents"

(11) The Emergence of the Modern Constitutional Order - First Amendment Jurisprudence

From Instructor's Materials:

*Shenck v. United States*, 249 U.S. 47 (1919)

*Abrams v. United States*, 250 U.S. 625 (1919)

G. Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence"

(12) The Emergence of the Modern Constitutional Order - Due Process, Equal Protection Jurisprudence

Robert McCloskey, *The American Supreme Court*, pp. 120-195

From Instructor's Materials:

*West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)

*United States v. Carolene Products*, 304 U.S. 144 (1938)

*Duncan v. Louisiana*, 391 U.S. 145 (1968)

*Griswold v. Connecticut*, 381 U.S. 479 (1965)

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*Sweatt v. Painter*, 339 U.S. 629 (1950)

*Westminster School Dist. v. Mendez*, 161 F.2d 774 (1947)

*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

Charles L. Black, "The Lawfulness of the Segregation Decisions"

(13) Federalism: the Evolution of a Modern Doctrine

From Instructor's materials:

*Hammer v. Dagenhart*, 247 U.S. 251 (1918)

*Wickard v. Filburn*, 317 U.S. 111 (1942)

*United States v. Lopez*, 514 U.S. 549 (1995)

(14) The History of Legal Education and the Legal Profession

From Instructor's Materials:

C.C. Langdell, "Preface to Casebook on Contracts"

Robert T. Swaine, "The Cravath Firm"

(15) Modern American Legal Theory

From Instructor's Materials:

Oliver Wendell Holmes, Jr., "The Path of the Law"

Jan Vetter, "The Evolution of Holmes, Holmes and Evolution"

A. W. Alschuler, "A Power-Focused Philosophy"

Edward Purcell, "American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory"