

**History 386: History of American Law**  
**Units: 4**  
**Spring 2020**  
**Tues, Thurs 9:30 a.m. – 10:45 a.m.**

**Professor Ariela Gross**  
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**COURSE DESCRIPTION:** This course will explore the interaction of law, culture, and politics in American society from the Revolution through the New Deal. It is not a survey course, but rather an introduction to the study of law from a historical perspective. The course will be divided into four topical sections, including (1) law and the economy in the nineteenth century; (2) marriage, gender, and the family in the nineteenth century; (3) race, slavery and Reconstruction; and (4) law and labor in the twentieth century. The course will emphasize reading primary materials -- cases as well as other legal and social history sources -- with a critical eye; and it will introduce students to the contrasting approaches taken by legal historians to those materials.

**No prerequisites or co-requisites.**

**COURSE OBJECTIVES:** This course aims to teach students legal and historical approaches to analyzing important social problems. Students will learn the history of key institutions in the United States: slavery, marriage, the corporation, labor unions, and government agencies. Students will learn how to read trial transcripts, appellate legal opinions, statutes, and other primary sources, and to use those sources as evidence for legal and historical arguments. The course aims to engage students in thinking critically about the relationship of legal developments to social, political, economic, and technological change, to understand the ways in which ideologies of race, gender, and politics have developed through legal and cultural practices, as well as the role of law and “rights” in shaping the public and private spheres. Students will learn to distinguish between legal advocacy and historical interpretation, and think critically about the appropriate uses of history in legal argument.

**EVALUATION AND EXAMINATION:**

**Participation/Blackboard (20% of grade):** All students will be required to attend class, to read the assigned readings, and to participate in classroom discussion as well as discussion on Blackboard. By 8:00 a.m. on either Tuesday or Thursday, students should post *two* discussion questions of their own devising, based on their reaction to the reading assignment, to the Blackboard discussion forum; these two questions should total no more than one typed page. These questions can consider any part of the week's reading. You may use the posted "notes and study questions" to jog your own thinking, but do not simply adopt the posted study questions as your own. The questions will be graded only “check” or “check plus.” They are designed to motivate class discussion. Participation will be evaluated by students’ preparation, thoughtfulness, respect for others, and performance on these short reflections.

**Examinations and paper:** There will be an in-class midterm based on the reading (20% of the final grade), a 5-7 page paper based on the reading (20% of the final grade), and a take-home final examination (40% of the final grade) due according to the day and time published in the Schedule of Class. Students with documented learning disabilities can be accommodated for examinations (as needed) by the University's Office of Disability Services and Program (DSP), located in Student Union 301, Mon-Fri 8:30 a.m. - 5 p.m., 740-0776.

### **COURSE MATERIALS:**

*Books.* There are three (3) required books, available for purchase at the Bookstore at USC:

Cott, Nancy F. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, paperback edition, 2002.

Kutler, Stanley I. *Privilege and Creative Destruction: The Charles River Bridge Case*. Baltimore: Johns Hopkins University Press, paperback reprint edition, 1989.

Woloch, Nancy. *Muller v. Oregon: A Brief History With Documents*. Bedford Books, 1996.

*Materials on the class web page:* Most of the assigned materials, aside from the aforementioned books, will be posted on the class Blackboard page, under "Course Documents." These materials fall principally into two categories: (1) Primary and other uncopyrighted materials, such as cases, statutes, and other original documents. These will be freely available. (2) Secondary sources, such as journal articles and excerpts from articles and books. These will be password-protected, in order to comply with the requirements of the copyright laws. With respect to all such copyrighted material, please respect the legal rights of the copyright owners by not making or distributing any copies of the material beyond that which you use for yourself. The password is always the author's last name, all in lower case.

Students occasionally seek recommendations for more general overviews or reference works on American legal history, as well as on American history more generally. On reserve at the law library are Kermit Hall, *The Magic Mirror* (2<sup>nd</sup> ed., 2008) and Lawrence Friedman, *A History of American Law* (4<sup>th</sup> ed., 2019). For those who feel in need of more basic background in U.S. history, I have also placed on reserve Brands *et al.*, *American Stories* (4<sup>th</sup> ed. 2019), an excellent U.S. history textbook (of which I'm a coauthor ☺). I am also happy to discuss individually with students other sources that may be of help.

## **COURSE SCHEDULE AND READING ASSIGNMENTS:**

### **Introduction**

#### **Tues., Jan. 14: What is Legal History? What is it good for?**

Hendrik Hartog, "Pigs and Positivism," *Wisconsin Law Review* (1985): 899–935.

"Historians in Court: A Roundtable." <https://tah.oah.org/november-2017/historians-in-court-a-roundtable/>

### **I. Law and the Economy in the Antebellum Period**

#### **A. Land Policy and Conceptions of Property in the Early Republic**

##### **Thurs., Jan. 16: Taking Land from the Indians**

William Cronon, "Bounding the Land," chapter 4 of *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983), 54-81

Speech of Tecumseh at Vincennes (1810)

Johnson v. M'Intosh, 21 U.S. 543 (1823)

##### **Tues., Jan. 21: Water**

Merritt v. Parker, 1 Coxe's L. Rep. 460 (N.J. 1795)

Palmer v. Mulligan, 3 Cai. R. 307 (N.Y. 1805)

Cary v. Daniels, 49 Mass. 466 (1844)

#### **B. The Shifting Boundary Between Public and Private: Business and Labor**

##### **Thurs., Jan. 23: Origins of the American Business Corporation and the Charles River Bridge Case**

*Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)

Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Baltimore: Johns Hopkins University Press, 1990; originally published 1971), esp. chaps. 1-3, 5, 7, 9, 11

**Tues., Jan. 28: Artisans into Workers: Law, Labor, and Conspiracy in the Antebellum Period**

Excerpts from the Trial of the Journeymen Cordwainers of Philadelphia (*Commonwealth v. Pullis*), 1806

Robert J. Steinfeld, "The Philadelphia Cordwainers' Case of 1806: The Struggle Over Alternative Legal Constructions of a Free Market in Labor," in Christopher L. Tomlins & Andrew J. King, eds., *Labor Law in America: Historical and Critical Essays* (Baltimore: Johns Hopkins University Press, 1992), 20-43

Anniversary Meeting of the New York Cordwainers Society, 1809

Constitution of the New York Cordwainers Society

**Thurs., Jan. 30: Railroads, Industrial Accidents, and the Developing Law of Master and Servant**

*Commonwealth v. Hunt*, 45 Mass. 111 (1842)

*Farwell v. Boston and Worcester Railroad Corp.*, 45 Mass. 49 (1842)

**II. Marriage, Gender, and Citizenship in the Nineteenth Century**

**Tues., Feb. 4: Marriage, Coverture, and Divorce**

Nancy Cott, *Public Vows*, 1-76, 156-79

Excerpt from Blackstone's Commentaries on Husband and Wife

Maine Divorce Statutes, 1847, 1849

**Thurs., Feb. 6: Feminism and Marriage**

Seneca Falls Declaration of Sentiments (1848)

New York Married Women's Property Law (1848, 1849)

New York Married Women's Earning Act (1860, 1861))

*Reynolds v. Robinson* (1876)

**Tues., Feb. 11: Marriage, Gender and Citizenship**

Nancy F. Cott, *Public Vows*, 132-55, 180-99

*Minor v. Happersett*, 88 U.S. 162 (1875)

### **III. Slavery and Reconstruction**

#### **A. Slavery and Law**

##### **Thurs., Feb. 13: The Criminal Law of Slavery**

Slave Code of North Carolina (1854) (excerpts)

T.R.R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America* (1858), 36-41, 97-101

##### **Tues., Feb. 18: Slavery and Sexual Violence**

*State v. Celia*, trial transcript and online materials.

Harriet Jacobs, *Incidents in the Life of A Slave Girl* (excerpts).

Adrienne Davis, “Don’t Let Nobody Bother Yo’ Principle’: The Sexual Economy of Slavery”

##### **Thurs., Feb. 20: Slavery and Commercial Law**

Ariela J. Gross, “Slavery, Anti-Slavery, and the Coming of the Civil War,” *Cambridge History of American Law*, 280-98.

*Johnson v. Wideman*, 24 S.C.L. 325 (Rice 1839)

*Icar v. Suares* (transcript)

Henry Bibb, *Narrative of the Life of Henry Bibb, an American Slave*, 101-11 (Chapter IX)

Solomon Northup, *Twelve Years a Slave* (1853), 78-88 (Chapter VI)

##### **Tues., Feb. 25: Slavery and the U.S. Constitution**

Slavery-Related clauses of the U.S. Constitution

Frederick Douglass, “The Dred Scott Decision: Speech at New York  
Ariela Gross, “Slavery, Anti-Slavery and the Coming of the Civil War,” *Cambridge History of American Law*, 298-312.

*Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857)

##### **Thurs., Feb. 27 Midterm Review**

**Tues., March 3      Midterm Exam**

**B.      Reconstruction and Jim Crow**

**Thurs., March 5:      From Bondage to Freedom – The Freedmen’s Bureau  
and The Black Codes**

Mississippi Black Code (1866)

Congressional Joint Committee on Reconstruction (1866)

Leon F. Litwack, *Been In The Storm So Long: The Aftermath of Slavery*  
(New York: Vintage Books, 1980), 251-91

A Sharecrop Contract (1882)

**Tues., March 10:      African American Marriage and Citizenship during  
Reconstruction**

Nancy F. Cott, *Public Vows*, 77-104

Tera Hunter, *Bound in Wedlock*, Chap. 6: Reconstructing Intimacies.

**D.      Coerced Labor and Regimes of Terror in the Postbellum South**

**Thurs., March 12:      Varieties of Unfree Labor in the Southern Labor  
System**

David M. Oshinsky, "American Siberia," Chapter Three of *Worse Than  
Slavery": Parchman Farm and the Ordeal of Jim Crow Justice* (New  
York: Free Press, 1996), 55-84

Walter F. White, "'Work or Fight' in the South," *The New Republic*, 18  
(March 1, 1919), 144-46

Optional: Pete Daniel, "The Vortex of Peonage," in *The Shadow of  
Slavery: Peonage in the South, 1901-1969* (Champaign-Urbana: Univ. of  
Illinois Press, 1972), 19-42

**March 15-22 Spring Break**

**Tues., March 24:      Lynch Law and Disfranchisement**

Ida B. Wells-Barnett, *Southern Horrors: Lynch Law in All Its Phases*  
(1892), reprinted in Trudier Harris, comp., *Selected Works of Ida B. Wells-*

*Barnett* (New York: Oxford University Press, 1991), 14-45, and in Jacqueline Jones Royster, ed., *Southern Horrors and Other Writings: The Anti-Lynching Campaign of Ida B. Wells, 1892-1900* (Boston: Bedford Books, 1997), 49-72

Robert M. Goldman, "Massacre at Colfax Courthouse," Chapter 3 of *Reconstruction and Black Suffrage: Losing the Vote in Reese and Cruikshank* (Univ. of Kansas Press, 2001), 42-51

Narrative of Leon Alexander, in *Remembering Jim Crow*, William Chafe *et al.*, eds. (New York: New Press, 2001)

**Thurs., March 26: Citizenship and The Supreme Court**

Plessy v. Ferguson

The Civil Rights Cases

Rebecca Scott, "Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge"

**Tues., March 31: Movie: The Scottsboro Boys**

**Thurs., April 2: Discuss movie; *Stories of Scottsboro***

**V. Labor and the Law in the Twentieth Century**

**Tues., April 7: Class cancelled**

**Thurs., April 9: The Industrial Revolution and "Government by Injunction"**

William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wisconsin Law Review* 767, 801-12

The Labor Injunction: An Example

The "Yellow-Dog Contract": An Example

*Coppage v. Kansas*, 236 U.S. 1 (1915)

**Tues., April 14: The Changing Law of Industrial Accidents**

Materials on the Triangle Shirtwaist Co. Fire of 1911,  
<http://www.ilr.cornell.edu/trianglefire/>

New York Workmen's Compensation Statute

*Ives v. South Buffalo R.R. Co.*, 94 N.E. 431 (N.Y. 1911)

**Thurs., April 16: The Emergence and Ambiguities of Protective Labor Legislation**

Nancy Woloch, *Muller v. Oregon, A Brief History With Documents* (Boston: Bedford Books, 1996), 3-26, 99-105, 109-33, 144-45, 157-77

**Tues., April 21: The New Deal and Labor**

The Wagner (National Labor Relations) Act

The Taft-Hartley Act

Michele Landis Dauber, "The Sympathetic State," *Law & History Review* 23 (2005): 387-442.

**Thurs., April 23: Decline of the New Deal Order**

Alan Brinkley, "The New Deal and The Idea of the State," in Steve Fraser & Gary Gerstle, eds., *The Rise & Fall of the New Deal Order* (Princeton University Press, 1989), 85-121

**Tues., April 28: Labor & Civil Rights**

Risa Goluboff, "Let Economic Equality Take Care of Itself": The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, *UCLA L. Rev.* (2005)

**Thurs., April 30: Conclusion: Race, Law and the Economy in U.S. History**