

American Legal History

Winter Term 2005
Professor Kris W. Kobach

Course Syllabus

Required texts:

Stephen B. Presser and Jamil S. Zainaldin, *Law and Jurisprudence in American History*, 5th Ed. (St. Paul: West Publishing, 2004) (“Presser,” below).

Lawrence M. Friedman, *A History of American Law*, 2nd Ed. (New York: Simon & Schuster, 1985) (“Friedman,” below).

Additional readings indicated below **(are now available on [TWEN](#))**.

Course objectives:

This course is intended to provide students with a broad view of how and why the institutions and principles of American law developed into their present forms. It seeks to cultivate an understanding of important trends in American legal history. This understanding of past movements will enable students to place present legal principles and practices into context and to evaluate them with a critical eye.

Grading and course requirements:

Grades will be partially based on an in-class multiple-choice examination and partially based on a written essay. To satisfy the essay requirement, students must complete a research paper, of 3,000 – 4,000 words in length. Grades may also be adjusted to reflect quality and quantity of participation in class discussions.

(1) The Judicial Institutions of Colonial America.

The structure of colonial institutions.

- Friedman, pp. 33-58.
- Joseph H. Smith, “The Massachusetts Bay Judicial System.”
- Michael Dalton, “Justices of the Peace.”

The *Zenger* trial and the *Parson’s Cause*.

- Presser, pp. 29-56.

(2) American Reception of the English Common Law

- Friedman, pp. 107-15.
- William Blackstone, “Commentaries” (excerpt).
- Reception statutes.

(3) Shifting Sources of Law

English common law and natural law.

- Magna Carta
- *Calder v. Bull*.
- *Giddings v. Brown*.

Instrumentalism in the American common law.

• Morton Horwitz, “The Emergence of an Instrumental Conception of Law.”

- *Pierson v. Post*.

The mid-nineteenth-century shift to formalism; *Swift v. Tyson*.

- Presser, pp. 358-71.

The codification movement and the simplification of pleadings.

- Friedman, pp. 90-93.
- David Field, “What Shall Be Done With the Practice of the Courts?”

(4) The Evolution of the Jury

From early English origins to modern American practice.

- Theodore Plucknett, “A Concise History of the Common Law” (excerpt).
- “The Evolution of the American Jury.”
- Friedman, pp. 152-56.
- *Duncan v. Louisiana*.
- *Ballew v. Georgia*.

(5) Criminal Law and Criminal Procedure

Seventeenth century criminal law and procedure in Massachusetts.

- Joseph H. Smith, “Criminal Jurisdiction” and “Criminal Procedure.”
- *The Salem Witch Trials*.

Nineteenth-century punishment of criminals.

- Presser, pp. 479-526.

The twentieth-century federalization of criminal law.

- Lawrence Friedman, “A National System.”

- (6) **Changing Conceptions of Property**
- William Blackstone, “Commentaries” (excerpt).
 - *Mansfield v. Newhall*.
 - Morton Horwitz, “The Transformation in the Conception of Property.”
 - *Cary v. Daniels*.
 - *Irwin v. Phillips*.
- (7) **The Rise and Fall of the Unfettered Right to Contract**
- Morton Horwitz, “The Triumph of Contract.”
 - *Seixas v. Woods*.
 - *Seymour v. Delancey*.
 - Presser 279-80, 288-90, 856-68, 886-91.
 - Arnold M. Paul, “Legal Progressivism, the Courts, and the Crisis of the 1890s.”
 - The Fair Labor Standards Act of 1938.
- (8) **The Growth of the American Regulatory State**
- The scope and purposes of the early regulatory state.
- Friedman 177-201.
- The proliferation of regulations governing American business.
- Friedman 337-45, 439-66.
- Judicial reactions to the expansion of the regulatory state.
- Presser 664-94, 781-95.
 - *Allgeyer v. Louisiana*.
 - *Holden v. Hardy*.
 - *Lochner v. New York*.
- (9) **Guns in American Law**
- The evolution of the American gun culture and the role of law in its development.
- David Hardy, “Origins and Development of the Second Amendment”
 - Joyce Malcolm, “To Keep and Bear Arms: The Origins of an Anglo-American Right”
 - *The Economist*, “Arms and the Man.”
 - Gordon Witkin, *et al.*, “The Fight to Bear Arms.”
 - Stuart Taylor, Jr., “Let’s Get Serious: Ban All Handguns.”
- (10) **Immigration Regulation: The Rise and Fall of the Rule of Law**
- “An Immigration Nation: United States Regulation of Immigration, 1798-1991”.
 - Michael Lemay & Elliott Barkan, “U.S. Immigration and Naturalization Laws and Issues: A Documentary History” (selected immigration statutes)
 - Samuel Huntington, “The Hispanic Challenge”
 - Steven Camarota, “Economy Slowed, But Immigration Didn’t: The Foreign-Born Population, 2000-2004”
 - *Center for Immigration Studies*, “Costs of Illegal Immigration: Illegals Cost Fed \$10 Billion a Year; Amnesty Would Nearly Triple Cost”
 - Kris Kobach, “State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists.”

(11) Taxation: From “No Taxation Without Representation” to the Modern Internal Revenue Code

- W. Elliot Brownlee, “The Formative Tax Regimes, 1789-1916.”
- John F. Witte, “The Income Tax through World War I.”
- Boris I. Bittker, “History and Constitutional Limitations.”
- *Pollock v. Farmers’ Loan and Trust Company*.
- W. Elliot Brownlee, “Taxation and National Emergencies.”

(12) Jurisprudential Philosophy—From Legal Science to Legal Realism

- Presser, pp. 740-63, 795-824.
- Morton Horwitz, “The Rise of Legal Formalism.”
- *West River Bridge Co. v. Dix*.
- *Hitchman Coal v. Mitchell*
- *Riggs v. Palmer*.

(13) Jurisprudential Philosophy—From Legal Realism to Critical Legal Studies and Economic Analysis of Law

- Presser 824-29, 976-98.
- Richard A. Posner, “The Skin Trade.”
- Richard A. Posner, “Economic Analysis of Law” (excerpt).
- *Orchard View Farms, Inc. v. Martin Marietta Aluminum, Inc.*

(14) Legal Education and the Practice of Law

Law schools, bar examinations, bar associations, and the practice of law from colonial times to the present.

- Friedman 94-104, 303-33, 606-54.
- Alexis de Tocqueville, “Democracy in America” (excerpt).