

LEGAL HISTORY

The teaching of legal history at the Law Center dates from 1875 when Martin F. Morris, a founder and dean, offered lectures on the subject. Morris, a self-described "philosophic historian," studied the past to discern "a purpose and a continuity in human history," namely, the steady progress of civilization and civil liberty from antiquity to his day. Although Georgetown's present legal historians are not likely to join in a search for an unfolding purpose in the past, all share his conviction that a first-rate law school owes its students more than instruction in the canons of legal reasoning and aspects of legal practice. It should also provide students with perspectives on the legal acumen they acquire, so that they can use their new power wisely and with self-mastery. As different as Georgetown's offerings are, they all consider legal history an engaging way to acquire this self-awareness.

Of course, judges, lawyers and law students have sometimes asked legal history to do more. In particular, some study the legal past to discover information that courts can use in deciding cases. Some of Georgetown's courses and seminars do permit students to search out the origins of a doctrine, to revisit landmark precedents, or to explore the legislative intent behind particular statutes. But this view of the utility of legal history is not the dominant approach of the school's offerings. More common is a concern for revealing how law has changed over time. Students should not expect to find authoritative lessons in the past, only analogies whose aptness are for us in the present to decide. They should also expect their teachers to stress differences between the past and present as often as they note similarities.

Two courses offer background and overviews of substantial portions of the Anglo-American legal past. In his *English Legal History Seminar: Foundations of American Law*, Professor James Oldham uses original trial manuscript sources to introduce students to the 18th-century English common law system, much of which was transplanted to the colonies. *American Legal History*, taught by Professor Daniel Ernst, takes up the years since Reconstruction with special concern for the development of the U.S. state.

The rest of the offerings allow students to conduct their own research in areas of their professors' special expertise, including the history of the jury, the history of ideas, the social history of gender and the family, and the constitutional history of speech in the United States.

Many of these seminars require that students work in the unusually rich sources available at or within walking distance of the Law Center. These include the Edward Bennett Williams Library's microform edition of English Legal Manuscripts, the Folger Library, the National Archives, the Library of Congress, and the libraries of the federal departments.

Search Legal History Courses (http://curriculum.law.georgetown.edu/course-search/?cluster=cluster_19)

LAW 1265 v00 Advanced Constitutional Law Seminar: The Framing and Ratification of the Constitution (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201265%20v00>)

J.D. Seminar | 3 credit hours

Few events have had as much impact on the history of American law as the framing and ratification of the U.S. Constitution. This seminar is designed to offer upper-level students with serious interests in American history, political theory, and constitutional law an opportunity to learn more about these events by becoming intimately acquainted with some of the best and most sophisticated historical scholarship on the origins of the Constitution and by writing an original research paper on a relevant topic of their own choosing. Themes and topics covered in the course will likely include most or all of the following: the Declaration of Independence, the Revolutionary War, the Continental Congress, the Articles of Confederation, the History of American Public Finance, the Bank of North America, the Origins of American Federalism, the Problems of Union and Sovereignty, Implied Powers, Natural Rights, Slavery, Indian Affairs, Western Lands and Interstate Jurisdictional Disputes, the Annapolis Convention, the Virginia Plan, Madison's Notes, Farrand's Records, the Committee of Detail, the Committee of Style, the State Ratification Conventions, the Anti-Federalists, the Federalist Papers, the "Other" Federalists, and the Bill of Rights. Some attention will also be given to originalism as a method of constitutional adjudication, but the primary focus of the seminar will be on constitutional history rather than constitutional originalism. Guest lecturers with special knowledge of the foregoing topics will be invited to share their recent scholarship and critical perspectives on the history and historiography of American constitutional law.

Prerequisite: Constitutional Law I: The Federal System (or Democracy and Coercion).

LAW 015 v02 American Legal History (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%20015%20v02>)

J.D. Course | 3 credit hours

The defining characteristic of American legal history in the twentieth century, wrote the great legal historian James Willard Hurst, was the emergence of unreviewable, "prerogative" power in executive officials. Americans needed a state, but they also needed it to respect individual freedom and a diverse civil society. They wanted not Leviathan but a democratic and liberal state, and they looked to lawyers and the rule of law to create it.

Through a series of case studies, interspersed with histories of the American legal profession, political parties, and public bureaucracies, this course looks to the past for insight into our present. The case studies include the Cambridge smallpox vaccine controversy of 1902-1905; lawyering at Ellis Island and within the immigration bureaucracy; Charles Evans Hughes on commission government and the draft in World War I; legal realism and legal radicalism in New Deal farm policy; FDR's Court-packing plan; Japanese American internment and price control in World War II; and McCarthyism. Topics on the legal profession include the nineteenth-century, court-centered bar as an "inner republic"; the emergence of the corporate bar; ethnicity, gender and race within the bar; New Deal lawyers; and the "Washington lawyers" of postwar America. Theoretical topics include the professions, bureaucracy, party strategy, state autonomy, and professional authority.

LAW 1518 v00 Doing Justice: Trial Judges Explain How Tough Decisions Are Made (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201518%20v00>)

J.D. Seminar (cross-listed) | 2 credit hours

As any judge who has served on a busy trial court can attest, there are many assignments where the cases come at you so hard and fast that there is barely time to step into the box and take your stance before the next one comes zooming in. And that is true of the “easy” cases. In addition, there are cases where the judge has to wrestle with a problem so complex, or so emotionally draining, as to test the fortitude and impartiality of even the most competent and experienced jurists. These might be called “go to the mountain top” cases.

In busy trial courts, “mountain top” cases can appear in the garb of criminal, civil, probate, or family cases. Often the judge is unable to find any guiding legal precedent and is forced to navigate uncharted waters in search of the “just” result. Sometimes controlling legal precedent exists, but following it will lead to an unjust result. And then there are cases where the judge has very wide discretion to apply a vague legal standard, like “the best interest of the child” in contested child custody proceedings, or finding the “right sentence” in a criminal case, where the statutory range might run from no prison time at all to life in prison.

Some cases are hard not only because of the subject matter, but also because they capture the attention of the entire community and become highly politicized. This can be especially challenging for elected judges, who know that whatever decision they make may become the fodder for an opposition campaign when they next stand for election, and may ultimately cost them their judgeship. These political realities do not lessen the judge’s duty to decide each case in accordance with the facts and the rule of law, by reference to neutral principles. But these requirements can make the exercise of that duty more agonizing, knowing that the decision is likely to be unpopular with at least one large segment of the population.

This seminar will provide students with a ring side seat in the arena of judicial decision-making. Students will not only have the benefit of reading 13 trial judges’ stories, but they will also have the opportunity to dialogue with each author who will appear in the class that focuses on her/his story.

Learning Objectives:

By analyzing thirteen poignant stories written by trial judges who struggled with difficult cases, seminar participants should come away with valuable insights about the litigation process and the art of judging. Hopefully too, students will become enthused and empowered to become effective trial advocates and perhaps judges. Besides reading 13 stories written by judges about real life difficult cases, each student will select a judge and interview that jurist about his or her decision making process in a tough case or class of cases. The semester will culminate with students drafting a paper describing not only the issues requiring judicial decision, but also how the interviewed judge sets about deciding those issues.

Prerequisite: Civil Procedure (or Legal Process and Society) or Criminal Justice (or Democracy and Coercion) or Criminal Procedure.

LAW 1067 v01 English Legal History Seminar: Foundations of American Law (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201067%20v01>)

J.D. Seminar | 3 credit hours

This seminar emphasizes the development of the common law during the 18th Century—the age of Blackstone and his Commentaries. This was an era of rapid growth in the law, and English procedures and precedents were the foundation upon which much of the law of the early American republic was built. A central focus is on the role of Lord Mansfield as Chief Justice of the Court of King’s Bench in creating a modern approach to doctrine and practice. Mansfield was a strong influence on leading American jurists and scholars of the 19th and 20th centuries, such as Joseph Story and Karl Llewellyn. Also studied is the role of the jury in 18th-century English courts—a role that continues to govern the scope of the right to jury trial in the United States under the Seventh Amendment. Special juries will be discussed, including the jury de medietate linguae (“of the half tongue”) and the jury of matrons. Attention is given to the problem of crime in the 18th century, to the conduct of the criminal trial, and to the early history of the law of evidence. Students examine and discuss original documentary evidence discovered by recent research. A substantial paper is expected.

LAW 1523 v00 Judicial Biographies Seminar (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201523%20v00>)

J.D. Seminar | 2-3 credit hours

In this seminar, students will analyze Supreme Court justices’ doctrinal tendencies and judicial philosophies in light of each justice’s personal history and early career. The course will focus on twentieth-century justices who no longer serve on the Court. Throughout the course of the semester, each student will write an original paper that aims to identify key elements of a justice’s life and core values and discusses the extent to which the justice’s history contributes to his or her judicial opinions (or fails to). After an introductory/overview class, each week two students will lead discussions on their selected justices based on the materials the students assemble—primarily the students’ papers and 2-3 key opinions by each selected justice. The professors will work with students to review their papers and materials prior to their presentations. Students also will have the opportunity to discuss various issues related to judges’ lives and their decision-making. We plan to invite a member of the judiciary to one of the classes to discuss his or her insights on these issues with the students. Evaluation will be based primarily on the student’s paper and presentation, plus contribution to the class discussions.

Prerequisite: Constitutional Law I: The Federal System (or Democracy and Coercion).

Note: This course will be enrolled via waitlist.

FIRST CLASS ATTENDANCE IS MANDATORY. All enrolled and waitlisted students must be in attendance at the first class session in order to be eligible for a seat in the class.

LAW 394 v02 Jury Trials in America: Understanding and Practicing Before a Pure Form Democracy (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%20394%20v02>)

J.D. Seminar (cross-listed) | 2 credit hours

The seminar will examine:

- The history of the U.S. jury trial system
- Jury selection dynamics
- Factors affecting juror performance during the trial
- Jury management challenges such as increasing juror comprehension in complex litigation and juror privacy
- Current policy debates concerning the jury.

Learning Objectives:

By participating in class discussions and role-plays and critically observing a real jury trial, students should better understand the nuances of trial by jury and feel more comfortable about appearing before a jury. By studying the assigned readings and writing an observation report on the jury trial they attended, students will come to understand the do's and don'ts of communicating with juries and the dynamic efforts occurring across the country to bring about improved jury trial management.

Prerequisite: Civil Procedure (or Legal Process and Society) and Criminal Justice (or Democracy and Coercion) or Criminal Procedure.

LAW 1388 v00 Law and Social Change Seminar (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201388%20v00>)

J.D. Seminar (cross-listed) | 2 credit hours

This course will explore the contemporary strategies used by movements seeking law and social change. An early wave of critique in the analysis of law and social change centered on the distinction between rule change and culture change, and stressed the shortcomings of litigation and reliance on courts in bringing about deep or lasting change. Today, most legal rights organizations have significantly modified the litigation-centric model to adopt a strategy more consistent with multi-dimensional advocacy, an approach to social change that self-consciously uses multiple strategies for change, including litigation, legislation, administrative and policy advocacy.

This class will analyze the role of law in achieving social movement goals. Topics will include both practice-grounded and more abstract questions. In the former category, the class will study the advantages and disadvantages of different institutional venues, approaches to communications, how framing decisions are made and with what consequences, working with allies, and the process of anticipating and responding to limitations of working within the law.

The class will meet as a once-a-week seminar. Students working in teams will take responsibility for proposing discussion questions in advance of class and introducing the material assigned for a given week.

In addition to interviewing one guest speaker, each student will write a paper of approximately 5,000 words in length analyzing how a particular legal campaign has used and/or is using some of the strategies discussed in class and with what results. Papers should

- Situate the legal campaign in the broader legal/political landscape in which it is engaged;
- Describe the strategic and tactical choices being undertaken and the results; and
- Analyze how its experiences illustrate or refute (or both) arguments in the theoretical or social science literature.

Students may select a campaign for either progressive or conservative change, or will be assigned to a particular movement.

Final grades will be based on class participation, including discussion leader sessions, and the paper. (The paper for this course will not satisfy the UCWR.)

Students should leave the course with a much more nuanced understanding of what is involved in working as a lawyer toward "making the world a better place." They will learn how some challenges recur across issues; how social movements affect law as well as the other way around; and how to bring theoretically informed critical thinking to practice.

Note: THIS COURSE REQUIRES PROFESSOR PERMISSION TO ENROLL. Please email Professor Nan Hunter (ndh5@law.georgetown.edu) by 3:00 pm on Monday, August 3, 2020 expressing your interest in taking the seminar.

LAW 1664 v00 Legal History of the Early Republic: The Age of Marshall (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201664%20v00>)

J.D. Seminar | 2 credit hours

Students will read the leading cases of the Marshall Court in their social, economic, and political context. They will also examine major legal topics in the period 1790-1825, including the Alien and Sedition Acts, the trial of Aaron Burr, state slavery legislation, and the Missouri Compromise. Requirements include a 2-4 page reading response paper, to be posted the day before class.

Student learning goals: This course will introduce students to the major legal concepts and debates of the late eighteenth and early nineteenth century. It will familiarize them with the jurisprudence of John Marshall and how that jurisprudence fits into the legal thought of his day. Students should leave the course with a good grasp of major legal events of 1790-1825, and a high-level understanding of the political, social, and economic context of those events.

LAW 626 v00 New Deal Legal History Seminar (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%20626%20v00>)

J.D. Seminar | 3 credit hours

The deep recession that commenced in 2007 encouraged many in the United States to look to the past for insight on how the American legal order should respond to severe economic dislocation. Many turned to the first two presidential administrations of Franklin D. Roosevelt. For many years, the New Deal had been Old Hat, reviled by conservatives for its statist excesses and deplored by reformers for its bureaucratic rigidities. Suddenly, the Roosevelt administration's seemed to speak directly to the present. Then, in November 2016, the election of Donald Trump suddenly provided a new, less flattering perspective on Roosevelt, from which his impatience with legal and constitutional proprieties and his ability to galvanize public opinion through a relatively new medium (radio in FDR's case; Twitter in Trump's) suggested disturbing parallels.

This seminar takes up many legal developments from the years 1933-1941: the creation of new federal programs of social insurance, regulation, and public investment; the blazing, by a generation of young law graduates, of a new path into the profession through what had previously been considered a wasteland of government employment; the birth of modern administrative law; a reorientation of judicial activism from the defense of free markets and private property to the safeguarding of civil rights and civil liberties; and a great duel between President Roosevelt and Chief Justice Charles Evans Hughes, known to history as the "Court-packing" plan of 1937. Over the course of the semester, students will read nine historical monographs as well as articles and book chapters. They will write a Review Essay that evaluates one of the books assigned in the course. Most importantly, they will write a research paper that fulfills the Upperclass Legal Writing Requirement. Class meetings will be devoted to lectures, discussions of the assigned readings, progress reports on students' research and writing, and a concluding, roundtable discussion of the first drafts.

Note: Non-degree students must seek professor permission to enroll in this seminar. Please contact Professor Ernst at ernst@law.georgetown.edu to request permission.

LAW 586 v00 Race and American Law (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%20586%20v00>)

J.D. Course | 4 credit hours

With such watershed events in the civil rights movement as *Brown v. Board of Education* (1954) and the civil rights acts of the 1960s, the eradication of racial subordination in America seemed an achievable goal. Yet, in America today, racial minorities continue to experience social and economic disadvantages, and race relations remain strained in many respects. Whether law has aided or impeded the cause of civil rights in the past and the extent to which law can help to resolve racial issues in the present and future are questions of considerable controversy. This course will examine the response of law to racial issues in a variety of legal contexts. Topics will likely include the meaning of race and racial discrimination, intimate relationships, child placement, employment, education and integration, policing and criminal punishment, free expression, and political participation. Classes will center on candid discussion and participatory exercises about the issues raised by the assigned material. The course will cover most of the seminal "race" cases decided by the U.S. Supreme Court.

Recommended: Constitutional Law II: Individual Rights and Liberties.

Note: Laptops may not be used during class sessions.

LAW 382 v00 Roman Law (<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%20382%20v00>)

J.D. Course (cross-listed) | 2 credit hours

The subject matter is classical Roman law as it was born, developed, and reached maturity by about 160 CE. The first half of the semester focuses mainly on constitutional structures; the second part on contracts and tort, including practical exercises on reported ancient cases. Whenever is possible and useful, the expositions and explanations are given in a comparative manner vis-à-vis the common law of English origin. A student who completed this course should have enough knowledge and skill to begin a career of *jurisprudens* (wise person of the law); that is, they should be considered qualified to assist the Magistrate in his daily work at the Roman Forum; a position similar to that of clerking for an American judge.

LAW 1361 v00 Supreme Court History from John Jay to John Roberts

(<http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201361%20v00>)

J.D. Seminar | 2 credit hours

This seminar examines the history of the Supreme Court as an institution from its origins to the present day. Beginning with the design for the Supreme Court in the Constitution itself, we will study the Court as it has developed chronologically, from its first meeting on February 2, 1790 in the Royal Exchange building in New York City to its current occupants on One First Street. Each week we will move forward from one period to the next, organizing our study around the 17 Chief Justiceships of John Jay through John Roberts. We will rely principally upon two single volume histories of the Supreme Court and supplement these narratives with selections from some of the defining cases from each of these periods. Our goals throughout will be to think through the dominant jurisprudential questions and trends of each era, the personalities that shaped the Court at different moments, and the changes in the powers and internal operating procedures of the Court itself.

Students will be expected to prepare an outline, draft, and final version of a 20-25-page paper on a topic covered in the seminar and chosen in consultation with the instructor. Participation in class discussions will factor into final grades.

LAW 1338 v00 Think Like a Lawyer: Elements for American Legal Analysis Seminar

([http://curriculum.law.georgetown.edu/course-search/?](http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201338%20v00)

[keyword=LAW%201338%20v00](http://curriculum.law.georgetown.edu/course-search/?keyword=LAW%201338%20v00))

J.D. Seminar | 2-3 credit hours

A distinctive set of political, philosophical, and economic ideas underwrites American law. These provide elements for thinking like a lawyer, especially when one must come up with creative legal arguments, understand new areas of doctrine, or broach new areas of practice. This seminar aims to equip students with an introduction to a selection of elemental ideas that underpin American law, including *liberty and tyranny*; *sovereignty*; *trade and commerce*; and *democracy*. We will explore these ideas within a broadly historical framework, concentrating especially on their development in England and then the United States in the 17th, 18th, 19th, and 20th centuries. No prior study of history, philosophy, or political theory is necessary to join or to succeed in the course.

Students will write papers that select a current (21st century), significant legal question and to analyze it using one element covered in the course. The legal question may come from any area of American law, including but not limited to corporate law, constitutional law, securities law, tort law, family law, immigration law, bankruptcy, consumer protection, labor and employment law, and civil rights law. Students will submit rough drafts for comments from the professor. They will also have an opportunity to receive peer feedback on their work-in-progress. Final papers will be evaluated with consideration for originality, creativity, quality of writing, and the ability to absorb and constructively use feedback. Seminar grades will be based on the paper grade, the quality of class participation, and the quality of constructive feedback given to fellow students. The technical requirements for the paper (e.g. minimum length, citation format, submission for WR credit) are given in the in the Student Handbook (<https://www.law.georgetown.edu/academics/academic-resources/registrar/student-handbook>).

Many of the assigned readings will be available via a web portal designated by the professor. Some books (e-format fine) worth obtaining likely to be discussed include:

- John Locke, *Two Treatises on Government*
- Blackstone's *Commentaries*, Book 1
- Thomas Paine, *Common Sense*
- Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (this book is out of print, so must be borrowed from a library or purchased used)
- John Stuart Mill, *The Subjection of Women*

Note: This seminar requires a paper. J.D. students must register for the 3 credit section of the seminar if they wish to write a paper fulfilling the Upperclass Legal Writing Requirement. The paper requirements of the 2 credit section will not fulfill the J.D. Upperclass Legal Writing Requirement.

Full-time and Visiting Faculty

Kevin Arlyck
Daniel R. Ernst

James C. Oldham
Ladislav M. Orsy