

# HISTORY LAW (HSGL)

## HSGL 0202. Great Books in American Law. (2 Credits)

Students in this seminar will read the following six books, plus reviews and commentary on each of the books: Oliver Wendell Holmes, *The Common Law*; Benjamin N. Cardozo, *The Nature of the Judicial Process*; Adolph Berle and Gardiner Means, *The Modern Corporation and Private Property*; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*; and Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*. Students will be expected to write twelve 2-3 page response papers on the books and materials circulated for the twelve classes discussing the books and commentary. The first class will be introductory. There will be no final exam.

## HSGL 0203. United States Constitutional History: The Warren Court. (2 Credits)

The main work in our workshop is reading forthcoming scholarship (work in progress) or recent books in constitutional history and then meeting with the authors to ask them questions and constructively critique their work for their benefit. Authors benefit tremendously from these workshops in getting feedback, and students learn from how historians engage legal questions and how history can be relevant to contemporary legal arguments. These workshops also add to Fordham's intellectual and scholarly life. We will have a few weeks in the beginning of the semester on foundational work on originalism and its critics, as well as background on the Founding era.

**Attributes:** INLJ, LLM, PIF.

## HSGL 0204. Recent Books in Constitutional Theory. (2 Credits)

The purpose of this course is to give students an opportunity to read, discuss, and write about important recent books in constitutional and legal theory, and to meet and engage with the authors of those books. We will cover each book in two class sessions. For each book, in week one, students will write 5 page response papers, and the students and I will meet to discuss the book. In week two for each book, the author will come to class and discuss the book with the students and me. The grade is based on the response papers and class participation. There is no final paper or final exam. Although I am assigning all six books described below in full, I will provide guidance regarding parts of each on which students may focus. Here are the books we will read: Weeks 1 and 2 (1/18 and 25): John McGinnis and Michael Rappaport, *Originalism and the Good Constitution* (McGinnis, from Northwestern University, will come to class). This book argues in favor of originalist methods of interpreting the Constitution, largely from a consequentialist framework, i.e., that we are better off as a nation following originalist methods. The book also advances a distinctive originalist argument focusing on the supermajoritarian nature of our Constitution. (Note that the response paper for this first book is due 1/16, so students will be reading the book over winter break. Response papers are due the Monday morning before the first Wednesday session for each book.) Weeks 3 and 4 (2/1 and 8): James E. Fleming, *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*. The title well describes the book. Fleming (a former Fordham Law School professor, now at Boston University) is one of our leading anti-originalists and pro-Dworkinian constitutional scholars. He claims moral readings of the Constitution are both best and unavoidable. Weeks 5 and 6 (2/15 and 22): Frederick Schauer, *The Force of Law*. Schauer (University of Virginia) is one of our leading legal theorists and First Amendment scholars. This book challenges a leading legal theory account (H.L.A. Hart's notion of people following the law just because it's the law, i.e., internalizing a sense of legal obligation) and argues instead that coercion – the force of law – is central to understanding the core of law and its efficacy. Weeks 7 and 8 (3/1 and 8): Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits*. This book is a nice counterpoint to Schauer's book. Conventional accounts of legal compliance focus on deterrence (Schauer's approach) and legitimacy. McAdams (University of Chicago) adds that law has an expressive mechanism that generates compliance, as well, through a coordinating function and an information function. In part through game theory, McAdams advances both descriptive and normative claims supporting his thesis. Weeks 9 and 10 (3/22 and 29): John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference*. Whereas the first four books provide general constitutional and then legal theory approaches, the final two books focus on more specific areas. Inazu (Washington University in St. Louis) advances a deeply pluralistic theory of our constitutional order, analyzing freedom of speech, religion, assembly, and association arguments. Weeks 11 and 12 (4/5 and 12): Heidi Kitrosser, *Reclaiming Accountability: Transparency, Executive Power, and the U.S. Constitution*. Kitrosser (University of Minnesota) challenges standard defenses of presidential power, especially "supremacy" and "the unitary executive." She argues that presidential power need not be as centralized as unitary theories maintain, and that secrecy of information and programs within the executive branch are antithetical to proper understandings of accountability. She also discusses First Amendment issues surrounding prosecution of leakers and publishers of classified information. Week 13 (4/26): Wrap-up discussion and I hope some kind of party #. Note: I am trying to keep costs reasonable for students, and have figured out a way to reimburse you if total book costs per student go over \$200.

**Attribute:** INLJ.

**HSGL 0293. History of Competition/Antitrust Law. (2 Credits)**

This seminar examines the history of competition laws in four periods: <p> 1. pre-modern era before 1890 (Mesopotamian cities, classical Athens, Rome, medieval Europe and early modern Europe, imperial China, the Islamic world and pre-British India)<br> 2. U.S. antitrust law <br> 3. EU competition law <br> 4. post-1990 competition laws around the world, notably in transition and developing countries <p> The seminar will examine the political, social and intellectual contexts, the underlying economic and non-economic policies, and the enforcement institutions in these various societies and periods. Continuities, innovations and recurring legal and economic issues will be explored, together with their relevance to today's competition law issues.

**Attributes:** ICE, LAW, LAWI, LLM, LWR.

**HSGL 0308. American Legal History. (3 Credits)**

This course examines the tension between individual liberty and governmental authority expressed in law from the seventeenth century to contemporary debates among modern political and legal conservatives, liberals and moderates. The specific issues and details of the conflict between liberty and authority have changed over time, but they have involved questions regarding the specific rights in which freedom consists, the manner in which personal liberties should be enjoyed and exercised, who should enjoy them, and how law and public policies can best facilitate, protect, and regulate the exercise of personal freedom. This course explores how events and ideas have influenced the evolution of law relating to these subjects over the course of American history.

**Attributes:** JD, LLM, PIF.

**HSGL 0311. Laws of War and Peace. (3 Credits)**

This course will address the important field historically called The Laws of War. While we focus principally on constraints on the conduct of war (jus in bello) inevitably we will discuss the limits societies have placed on going to war (jus ad bellum). As long as people have waged war, some have sought to civilize it, to make it more humane. They have sought to limit the destruction by time, place, means and targets. Limiting it by time means requiring wars have a moment of beginning (presumably with a justification for initiation) and an end (presumably with a formal agreement). To instantiate these limitations, societies have constructed norms, international rules and military codes. And starting with Nuremberg, they have also attempted to punish transgressions with international tribunals – a movement that gained momentum in the late 20th Century. <p> And as long as people have sought to civilize warfare, others have transgressed, sometimes as policy, like William T. Sherman who infamously observed that “War is hell. You cannot qualify war in harsher terms than I will. War is cruelty, and you cannot refine it.” And often, atrocities have occurred on account of a failure to exercise command authority or take adequate precautions. Either way, the struggle continues to “save succeeding generations from the scourge of war” (as the UN Charter demands). This course will introduce students to this long, tragic history and engage them in research to develop their own insights.

**Attribute:** INLJ.

**HSGL 0322. Natural Law and Social Justice. (2 Credits)**

Natural Law reasoning can be found woven throughout the fabric of American legal culture. Many Founders believed that the American Constitution derives its legitimacy from natural law. Senator William Seward, in his influential anti-slavery speech of 1850, argued that “there is a higher law than the Constitution” which can be used to assess and critique the Constitution itself. Figures within the American abolitionist, labor, and civil rights movements have relied on natural law reasoning in order to advance their claims about social justice and progress. Martin Luther King, Jr., famously invoking the natural law perspective of St. Augustine, proclaimed that “unjust law is no law at all.” This course will examine the theoretical foundations and practical implications of natural law reasoning, with the aim of showing how such reasoning can provide us with critical, realistic leverage for understanding, assessing, and reforming our prevailing legal structures. Some key questions that we will consider are the following: “What is the nature of justice, and are there different kinds of justice?” “What does it mean to have a right, and why are rights said to be inviolable?” “How can rights be inviolable, if the social and material conditions which sustain actual rights are always evolving?” “Is there a necessary connection between law and morality, as some natural theorists have claimed?” “How can one justify the claim that unjust law is no law at all?” “Is it possible to explain why there is a prima facie obligation to obey the law, while at the same time explaining the legitimacy of civil disobedience?” “Is there a sound basis for distinguishing between private law (e.g., property, contract, and tort law) and public law (e.g., administrative and criminal law)?” “Is private law merely private, or does it bear some intrinsic connection to social justice and the common good?” “What is the essence of crime, and what are the justifications and limits of punishment?” “How might natural law reasoning inform ongoing debates about inequality and social justice, constitutional interpretation, judicial review, religious liberty, private property, human rights, and civil disobedience?” The course will examine arguments from classical natural law thinkers (e.g. Aristotle, Augustine, and Aquinas) and will draw such arguments into “dialogue” with the claims of American social justice visionaries (e.g. Frederick Douglass, Henry George, and Martin Luther King, Jr.) and the ideas of Anglophone legal theorists (e.g. Lon Fuller and Ronald Dworkin). The ultimate aim of the course will be to achieve an understanding of natural law reasoning and its relevance for addressing contemporary legal and social problems. No prior acquaintance with legal history or legal theory is assumed; the relevant concepts will be developed in class. Students will have a choice between taking an open book take-home exam or submitting a written paper.

**Attributes:** CEED, CEMP, HECH, INLJ, LWR, PIF.

**HSGL 0511. Crime and Punishment in American History. (2 Credits)**

Why do we punish? The answer to this question has changed dramatically over the course of American history. As the reasons behind punishment shifted, so did its methods change. Sometimes these developments occurred amidst great public debate and scrutiny; at other times, they proceeded almost without notice. This seminar challenges students to think critically about the relationship between laws on crime and punishment on one hand, and American society, politics, and culture on the other. What did it mean to be “criminal” at various points in American history? How have criminal laws both reflected and shaped their times? And what does this history mean for modern crime control and its reform? .

**HSGL 0614. Law, Gender & History. (2 Credits)**

This is an interdisciplinary seminar examining controversies about sex and gender roles in the family, the workplace, education, and constitutional law from 1970 to the present. Students will read seminal texts and hear prominent historians and legal scholars presenting works in progress on topics in the law and history of gender. Weekly short response papers commenting on the paper to be presented each week will be required along with a final paper requiring legal or historical research on a specific question of the student's interests, to be approved by the instructors.

**Attribute:** LLM.

**HSGL 0780. Monopoly and Antitrust Law. (2 Credits)**

This seminar examines monopoly and antitrust laws from an historical perspective. Discussion will focus on the economic, political and social concerns about monopoly reflected in laws in pre-industrial societies, in America from the earliest English settlements to the present U.S. antitrust law, in Europe after 1945, and in emerging and developing countries after 1990. For example, today's legal challenges to large firms like Amazon and Google will be examined in this historical context.

**Attribute:** LLM.

**HSGL 0799. American Indian Law. (2 to 3 Credits)**

This course examines the legal relationship between American Indian nations and the United States, including implications for states and individual citizens. Indian tribes have a legal status that is unique both within our legal system and throughout the world. This complex legal framework affects not only tribes and individual tribal members, but non-Indians as well. To understand the complexities of the present, it is necessary to have some understanding of the historical situation that brought us here. The course will begin with historical materials, followed by an overview of federal Indian policy periods, and then will proceed to examine the legal framework chronologically at first, and then by subject matter. In addition, effective advocacy in Indian Country, whether on behalf of tribal communities or individual Indians, necessarily entails some understanding of tribal cultures and community lifeways. Therefore, the course will also serve to provide students with cultural context for the application of legal principles.

**Attributes:** INLJ, JD, LAWJ, LLM.