Course Description:
The primary subject matter of the course is American constitutional history broadly considered: federalism, state and federal constitutional structures, conceptualizations of rights and of popular sovereignty, the relationship between constitutional views and common law change. The chronological coverage is from the American Revolution to the New Deal, 1776 to 1937 (or farther if we manage it). Substantial attention is devoted to the nature of adjudication.

Learning Outcomes:
$ Understanding of the basic historiographical debates about American legal history.
$ Development of the ability to analyze in coherent written form the primary sources in legal history and to evaluate secondary sources.
$ Acquisition of a coherent approach to American legal history that will enable research and publication.

Office Hours: I have office hours in my office in the History department on Tuesday, 12:00 to 5:00 (open also for law students in this class). I am also available in my Law Center office for a couple hours before class and for awhile after class if you tell me. If you catch me in either office at other times (that would primarily be Wednesday), you are free to talk with me. I answer e-mail rapidly, BUT only if you enter the address as rpalmer@uh.edu; if you use the pull-down Outlook address, it goes to a mail service I access irregularly, so that you may have to wait for a reply. When you use e-mail, use the subject line “Palmer”. I actually enjoy talking about this material, so discussing legal history with me is not a hardship (for me).

Course Requirements:
HIST 6377
Those signing up under the graduate History department designation (all History graduate students must do so; law students may do so but must consult me) will write three papers; there is no final examination. All papers are on set topics.

PAPER 1: The first paper examines the way in which early state constitutions and the federal constitution reflect republican and popular sovereignty ideologies in different ways (demonstrating analysis of both federal constitution and state constitutions from 1783 or before).

PAPER 2: The second examines nineteenth century constitutional and common law up to 1850 evaluated from the perspective of individualism.

PAPER 3: The third is an analysis of the two-step transformation from the Civil War through the Great Depression into a new legal
Papers are to be 12-15 pages long with notes at end (not counted in the 12-15 page requirement). Ample notes are expected and must show familiarity with the primary documents. Graduate students picking up this syllabus early are warned that the content of the papers depends heavily on matters discussed in the course.

Required Books
Austin Allen, Origins of the Dred Scott Case
Photocopied materials

LAW 5374
Those signing up under the Law school designation (LAW 5374) are required to take a final examination. Law students may substitute for the test the three papers, but only after consultation with me. This is a more difficult option, although one in which you actually learn more.

History Graduate Students

While there are no other required books for the course, the following are books that are largely congruent with the course thesis and would be helpful. Graduate history students who want to develop this perspective on American legal history with any competence would be well advised to read at least the set of books below.

Historiographical competence requires exposure to other perspectives.

Gordon Wood, Creation of the American Republic (I like his treatment of republicanism and state government very much; I totally disagree with his overall thesis about the origins of the U.S. Constitution)
Gordon Wood, Radicalism of the American Revolution (very good for the late 18th century paternalism to 19th century individualism, although not for causation)
William Nelson: Americanization of the Common Law
S. Kutler, Privilege and Creative Destruction (for the Charles River Bridge case and the Tawney court)
William J. Novak, The People’s Welfare: Law and Regulation in Nineteenth-Century America (for the activism of 19th century state governments)
Robert H. Wiebe, Self-Rule: A Cultural History of American Democracy (for 19th century individualism and the change to a more active paternalism)
Hendrik Hartog, Public Property and Private Power (a study of the development of New York City; it has wider application than the author argues)
Barbara Welke: Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920 (an insightful view of changes in tort law considered in social context)
Barry Cushman: Rethinking the New Deal Court
Preparation in this field would include for Ph.D. qualifying exams would include works illustrating other views. The core of that list would include Levy, ed., *Essays on the Making of the Constitution*; Hurst, *Law and the Conditions of Freedom*; Horwitz, *Transformation of American Law, 1780-1860*; Gillman, *The Constitution Besieged*; Fehrenbacher, *Slavery, Law, and Politics*; Ferguson, *Law and Letters in American Culture*; and the books mentioned above. A survey such as Hall, *The Magic Mirror*, also has some utility. Note for the purposes of this course that I have major disagreements will all these works except Hartog’s and those recommended above.

**Assignments**

**Aug. 24:** English Heritage: P & Z, Prologue, Sections A and B; Colonial Background: P & Z, Chapter 1, Sections A and B

**Aug. 31:** Republican Ideology: P & Z, Chapter 1, Section D State Constitutions: P & Z, Chapter 1, Section E; Palmer, 'Liberties as Constitutional Provisions', pp. 55-86 (in materials).

Discussion question: Was their perception of liberty that of a set of limitations on government to protect the individual?

**Sept. 7:** Massachusetts Constitution (in materials)

Discussion questions: (1) How republican was this constitution? (2) Was this a stepping-stone to the U.S. Constitution?


For those signed up under the Graduate History designation: First Paper due.


**Oct. 5:** Torts: P & Z, Chapter 3, Section D (up to p. 353)
Corporations:  P & Z, Chapter 3, Section E (pp. 327-348)
Discussion: What is the importance of Dartmouth College?

Movement for an Elective Judiciary:  P & Z, Chapter 4, Section B; Slavery:  P & Z, Section C1.

Oct. 19:  Slavery in the State Courts, P & Z, Chapter 4, Section C2.
The United States Supreme Court on Slavery, P & Z, Chapter 4, Section C3.
Slavery III:  Dissents in Scott v. Sandford (in materials);  P & Z, Chapter 4, Section D
Allen, Dred Scott Case, Pt. 3 and Epilogue.

Competition:  P & Z, Chapter 5, Section A
Labor Law:  P & Z, Chapter 5, Section B

Nov. 2:  Labor Law:  P & Z, Chapter 5, Section C.
The Slaughterhouse Cases; Cruikshank (both in materials, at end)
Discussion: Which construction of the Privileges or Immunities Clause makes the most sense?

Trusts and the Sherman Act:  P & Z, Chapter 5, Section D, Numbers 1, 2 and 3 (in 3, only U.S. v. Knight)
Trusts and the Sherman Act:  P & Z, Chapter 5, Section D, the remainder of D, and Section E
Jurisprudence:  P & Z, Chapter 6, Section A
For those signed up under the Graduate History designation, the Second Paper is due.

**Nov. 16**

Lochner (in materials)

Discussion: After reading Holmes’s dissent *carefully*, are you more comfortable with the majority opinion or the Holmes dissent in regard to enforcement of individual rights?

Holmes and Rights: Schenck; Abrams (in materials);


Gitlow v. New York (in materials)

Obligations of Contracts: Palmer, 'Obligations of Contracts' (in materials)

**Nov. 23** (break)

**Nov. 30:**

The New Deal I: P & Z, Chapter 6, Section B (just Schechter)

The New Deal II: P & Z, Chapter 6, Section B (just NLRB)

Legal Realism: P & Z, Chapter 6, Section C

**Dec. 7:**

For those signed up under the Graduate History designation, the Third Paper is due.

**Dec. 7:** For those signed up under the Law designation, final examination.

The American with Disabilities Act of 1990 requires that the university make reasonable accommodation to persons with disabilities as defined in the act. Students who feel they need assistance under the ADA guidelines should approach the professor to discuss such consideration.
Style Comments; Critique Abbreviations

I. Overall Structure

A. Papers must have an introduction, body, and conclusion.

Introduction
1. The introduction must lay out the thesis for the paper.
   [Abbreviation: TS]
   The thesis sentence must be substantive. Refer to I.B.3 below: lead sentences and thesis sentences follow the same rules.
2. The first sentence of the introduction must be the thesis sentence for the paper.
3. The introduction must recognize and cover the section subtheses.
4. Although you may have to write the introduction first simply to get started on the paper, you must always revise it last, to make sure it conforms to what you have said.

Body
1. The body of the paper must consist of a few (very few) sections.
2. Each section, whether labeled as a section or not, must consist of introduction, body, and conclusion.

Conclusion
1. The conclusion must tie together what has been done in the sections of the body of the paper.
2. Although necessarily the conclusion will be re-stating the material in the introduction, it cannot simply use the same sentences. It should be somewhat more insightful.

B. Paragraphs must have an introduction (= lead sentence) and body. Paragraphs may or may not have to have a conclusion.

Lead Sentence [Abbreviation: LS]
1. The first sentence of any paragraph is a lead sentence; the lead sentence states the thesis for the paragraph.
2. The lead sentence governs the paragraph, so that nothing in the paragraph goes beyond what is contained in the lead sentence.
3. The lead sentence must be substantive, that is, not generic.

Unacceptable lead sentences:
“The sixteenth century experienced many changes.”
(This is generic: it could be said of any year, decade, or century.)
“The changes in state policy toward church governance were significant.” (This likewise is generic, unless countering an author who had specifically argued that the changes were insignificant.)

Acceptable lead sentences:
“The chancellor at the time of the Black Death had broad responsibilities for matters touching the common law and royal rights.”
“The chancellor was a key member of the council,
and the council was completely competent to formulate and implement governmental policy.”

4. Lead sentences are appropriately not overly long or complicated. How complicated they are will in fact depend on what kind of job a particular paragraph performs, but writers should take care to make lead sentences easily understandable.

Body

1. Nothing should appear in the paragraph that is not covered by the lead sentence.
2. A paragraph should not be less than three or four sentences. A fourteen-line paragraph is a nice length. By twenty lines a paragraph is growing too long for a reader.

Conclusion

1. Short paragraphs usually do not need a conclusion; long paragraphs do.
2. A concluding sentence to a paragraph is not the introductory sentence to the next paragraph. A concluding sentence must still fall within the parameters set by the lead sentence.

C. Transitions

Transitions are nice, but a single word or a short subordinate clause in a lead sentence often adequately serves the purpose.

II. Grammatical Notes

A. Passive Voice [Abbreviation: PV]

1. Only in extremely unusual situations should you use a passive form as the main verb in a sentence.
2. Passive verbs are those verbs in which the actor of the sentence appears, explicitly or implicitly, in a “by” or “through” or similar clause: “It was done by him;” “Many changes were accomplished;” “My office was recently painted.”
3. Passive verbs are more acceptable in subordinate clauses.

B. Other weak constructions [Abbreviation: WC]

1. Avoid other weak constructions, such as “There is (are)” or “It is (are).”
2. One (incorrect) method of avoiding the passive voice is weak constructions: “There were many changes that were brought about by the Black Death.” That structure puts the passive voice into a subordinate clause, but adopts a weak construction as the price.

C. Split infinitives [Abbreviation: SI]

1. Avoid split infinitives completely. These are never acceptable, even in extenuating circumstances (and even if you find them used in printed work by great historians.)
2. An infinitive is a verb in the form “to run,” “to change,” “to be,” “to have.” A split infinitive is an infinitive with a word in between the “to” and the root: “to boldly go,” “to efficiently accomplish,” “to quickly
accomplish.”
3. To avoid the split infinitive, put the adverb either before or after the infinitive or at the end of the sentence. If necessary, simply reformulate the whole sentence.

III. Spell Checkers
Spell checkers in computer software are wonderful, but are not sufficient. They will not catch inappropriate words that are spelled correctly. If you want the word “from,” a spell checker will not alert you that you have typed the word “form.” You still must proof the paper.

IV. Revision
No one has reached the point that avoids the necessity for revision. Revision goes beyond reading for errors. It requires challenging your thoughts.

V. Footnotes
Footnotes are essential. Overtly footnotes are for readers. In reality, their major benefit is for the author. Nothing makes an author challenge preconceptions better than tracking down the source.

VI. External referents (Abbreviation: ER]
1. Ordinarily, sentences should not refer explicitly or implicitly to the reader, even for the purpose of drawing the reader into the discussion.
2. External referents come in the following forms: “We see that . . .”; “The data indicate [i.e., to us].”

VII. “Evolve”
Avoid the word “evolve” unless you really mean the process of evolution. Most historians use the word “evolve” merely to indicate slow change, while avoiding the vital process of stating what the process of change was. Use of “evolve” substitutes superficial sophistication for substantive thought. The word “develop” can implicate similar problems.

VIII. “However”
The word “however” is very useful, but best takes its place not as the first word in a sentence, but as the second or third grammatical element (like the Latin word “enim.”)
Incorrect: “However, fourteenth-century weather was colder and wetter.”
Correct: “Fourteenth-century weather, however, was colder and wetter.”
[Exception: “However that might be, . . . .”]