**HIST 3318:** AMERICAN LEGAL AND CONSTITUTIONAL HISTORY, 1860 TO PRESENT

Fall 2012

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**Office Hours:** 11:30 a.m.-12:45 p.m., MWF

**Time and Place of Class Meetings:** [BUSINESS BUILDING (COBA)](http://www.uta.edu/maps/map?id=COBA), ROOM 141

10:00 a.m.-10:50 a.m., MWF

**Description of Course Content:** In this course, we will examine the rise of judicial power after the Civil War; the attempts to check judicial discretion that occurred during the White and Taft Courts; the “Rights Revolution” begun by the Hughes Court and brought to its fullest flowering by the “activist” members of the Warren Court; and the schizophrenic judicial policymaking that has characterized the Burger, Rehnquist, and Roberts Courts. The influence of international law, which is cited with ever-increasing frequency as persuasive authority by state and federal courts, will also be discussed.

Over these twelve weeks, you will not only learn about the pastbut also *learn how to learn about the past*. In order to ensure that the latter goal is achieved, we will avoid simplistic monocausal interpretations and instead reason our way to well-supported answers about many of the curious and controversial aspects of American legal history. Groundbreaking cases like *Roe v. Wade* and *Miranda v. Arizona* have been stripped of nuance by the commentators and politicians who sometimes deploy them as buzzwords.

**Student Learning Outcomes:** Each week, we will sort fact from fiction while examining the themes around which this course has been organized:

1. The continuing tension between scholars such as Morton Horwitz who have argued that law has furnished with elites with a means for social control and others, like J. Willard Hurst, who believe that the rule of law has fostered economic growth and limited the authority of government while functioning as a device through which antagonistic interests can resolve their conflicts in a peaceable manner.

2. The increasing attention paid to the Supreme Court of the United States as a public institution, a phenomenon we will study in detail through our close reading of Woodward and Armstrong’s *The Brethren*.

3. The seemingly endless debates that have polarized American judicial culture since the nation’s inception: “state’s rights” versus a “federal system,” “activist” judging versus “restrained” judging, and the demand for popular oversight of judges (as evidenced by the elected state judiciaries that became a common feature of our federal system during the “Age of Jackson” and later by Franklin Roosevelt’s “court-packing” plan) as set against the desire to insulate the judiciary from the caprices of the electorate.

4. The so-called “internationalization” of American jurisprudence, as evidenced by groundbreaking decisions such as *Lawrence v. Texas*.

**Required Textbooks and Other Course Materials:** Hall, Kermit and Peter Karsten. *The Magic Mirror: Law in American History*. Oxford University Press (2nd Edition, 2009).

Woodward, Bob and Scott Armstrong. *The Brethren: Inside the Supreme Court*. Simon & Schuster (1979).

*Note*: With regard to *The Magic Mirror*—the core text for this course—you may, for reasons of cost or convenience, choose to the use an earlier edition of this work. Please be advised that you are doing so at your own risk, as the reading assignments and examination questions will be taken from the most recent edition (i.e., the edition *co-authored* by Peter Karsten).

**Grading:** Your grade will consist of four components:

 **Participation and attendance**: 10%

 **Midterm examination**: 30%

 **Final examination**: 30%

 **Case briefs (5)**: 30%

**Attendance: *Participation and attendance*** may be further subdivided:

*Attendance – 5% of final grade* (for every class that you miss you lose 1%). Arriving 5 minutes late and/or leaving before the end of the class period are equivalent to absences. You may miss **three classes** without having to provide an excuse. Disruptive behavior such as leaving early, reading newspapers, answering cellular phones, text messaging, and insulting classmates will not be tolerated. In general, I expect you to behave in a mature, professional manner.

*Participation – 5% of final grade*. You must participate in discussion during every class. I will score your participation in the following way:

* ½ a point – if your participation consisted of 1-2 brief comments, such as providing a short answer to a question posed in class
* 1 point – if you participated actively in the discussion, making several relevant comments during that week’s class.

Because this is an upper-division course with a heavier reading load, it will only be as successful as the preparation and thoughtfulness of its participants. You are expected to read all of the required readings carefully before each class and come prepared to discuss those readings in class.

**Descriptions of major assignments and examinations:** The **midterm examination** (02/23)and **final examination** (04/27) consist of short-answer and essay questions.

The **case brief** (of which 5 will be turned in during the course of the semester) is a 3-5 page, double-spaced document in which you will address the following points in a systematic manner for that week’s “assigned case”:

1) The relevant *facts* of the case.

2) The specific *holding* of the case, as announced by the writer of the majority opinion.

3) An analysis of the court’s *reasoning* in reaching its decision, making reference to important *precedents* that may have impelled this result.

4) A short discussion of the *dissent*, in situations where I advise you beforehand that such a discussion is warranted.

5) A detailed treatment of the case’s *historical significance*. This section should comprise at least 50% of your brief and consist of a careful summary of the social, political, and cultural impact of the case, as supported by citations from one of the required text for this classic or a scholarly article found using a searchable archive such as HeinOnline.

Since some—though by no means *all*—of you have enrolled in this course as a sort of “introduction” to the course of study offered at a law school, I will attempt to simulate the experience of *thinking like a lawyer* as nearly as I can while nonetheless still accounting for the competing (and certainly no less pressing) demands of *teaching you how to think about the past*.

***UTA NOTE TO STUDENTS****: You are expected to keep track of their performance throughout the semester and seek guidance from available sources (including the instructor) if your performance drops below satisfactory levels. A general rule of thumb is this: for every credit hour earned, you should spend 3 hours per week working outside of class. Beyond the time required to attend each class meeting, you should expect to spend at least an additional 9 hours per week of your own time in course-related activities, including reading required materials, completing assignments, preparing for exams, etc.*

**Make-up Exams**: In the event of a documented medical emergency, I will schedule a make-up examination for you that will take place during office hours.

**Grade Grievances**: Any appeal of a grade in this course must follow the procedures and deadlines for grade-related grievances as published in the current undergraduate catalog. For the full text of this policy, see <http://wweb.uta.edu/catalog/content/general/academic_regulations.aspx#10>.

**UTA Drop Policy:** Students may drop or swap (adding and dropping a class concurrently) classes through self-service in MyMav from the beginning of the registration period through the late registration period. After the late registration period, students must see their academic advisor to drop a class or withdraw. Undeclared students must see an advisor in the University Advising Center. Drops can continue through a point two-thirds of the way through the term or session. It is the student's responsibility to officially withdraw if they do not plan to attend after registering. **Students will not be automatically dropped for non-attendance**. Repayment of certain types of financial aid administered through the University may be required as the result of dropping classes or withdrawing. For more information, contact the Office of Financial Aid and Scholarships (<http://wweb.uta.edu/ses/fao>).

**Americans with Disabilities Act:** The University of Texas at Arlington is on record as being committed to both the spirit and letter of all federal equal opportunity legislation, including the *Americans with Disabilities Act (ADA)*. All instructors at UT Arlington are required by law to provide "reasonable accommodations" to students with disabilities, so as not to discriminate on the basis of that disability. Any student requiring an accommodation for this course must provide the instructor with official documentation in the form of a letter certified by the staff in the Office for Students with Disabilities, University Hall 102. Only those students who have officially documented a need for an accommodation will have their request honored. Information regarding diagnostic criteria and policies for obtaining disability-based academic accommodations can be found at [www.uta.edu/disability](http://www.uta.edu/disability) or by calling the Office for Students with Disabilities at (817) 272-3364.

**Academic Integrity:** All students enrolled in this course are expected to adhere to the UT Arlington Honor Code:

*I pledge, on my honor, to uphold UT Arlington’s tradition of academic integrity, a tradition that values hard work and honest effort in the pursuit of academic excellence.*

*I promise that I will submit only work that I personally create or contribute to group collaborations, and I will appropriately reference any work from other sources. I will follow the highest standards of integrity and uphold the spirit of the Honor Code.*

Violators will be disciplined in accordance with University policy, which may result in the student’s suspension or expulsion from the University.

**Student Support Services**:UT Arlington provides a variety of resources and programs designed to help students develop academic skills, deal with personal situations, and better understand concepts and information related to their courses. Resources include tutoring, major-based learning centers, developmental education, advising and mentoring, personal counseling, and federally funded programs. For individualized referrals, students may visit the reception desk at University College (Ransom Hall), call the Maverick Resource Hotline at 817-272-6107, send a message to resources@uta.edu, or view the information at [www.uta.edu/resources](http://www.uta.edu/resources).

**Electronic Communication:** UT Arlington has adopted MavMail as its official means to communicate with students about important deadlines and events, as well as to transact university-related business regarding financial aid, tuition, grades, graduation, etc. All students are assigned a MavMail account and are responsible for checking the inbox regularly. There is no additional charge to students for using this account, which remains active even after graduation. Information about activating and using MavMail is available at <http://www.uta.edu/oit/cs/email/mavmail.php>.

**Student Feedback Survey:** At the end of each term, students enrolled in classes categorized as lecture, seminar, or laboratory shall be directed to complete a Student Feedback Survey (SFS). Instructions on how to access the SFS for this course will be sent directly to each student through MavMail approximately 10 days before the end of the term. Each student’s feedback enters the SFS database anonymously and is aggregated with that of other students enrolled in the course. UT Arlington’s effort to solicit, gather, tabulate, and publish student feedback is required by state law; students are strongly urged to participate. For more information, visit <http://www.uta.edu/sfs>.

**Final Review Week:** A period of five class days prior to the first day of final examinations in the long sessions shall be designated as Final Review Week. The purpose of this week is to allow students sufficient time to prepare for final examinations. During this week, there shall be no scheduled activities such as required field trips or performances; and no instructor shall assign any themes, research problems or exercises of similar scope that have a completion date during or following this week *unless specified in the class syllabus*.

**Course Schedule:**

*Week of 08/20/2012 (First Class on 08/24)*

**Lectures**: “An Introduction to American Legal History”

**Reading Assignments**: “Natural Law,” Oliver Wendell Holmes, Jr. Available here: <http://teachingamericanhistory.org/library/index.asp?document=1438> (Recommended)

*Week of 08/27/2012*

**Lectures**: “Law, Industrialization, and the Beginnings of the Regulatory State”

**Reading Assignment**: *Mirror*, pp. 208-268

**Case Assignment (Brief #1, Possible Due Dates):**  *Munn v. Illinois*, 94 U.S. 113 (1877) – or – *Lochner v. New York*, 198 U.S. 45 (1905)

*Week of 09/03/2012 (No Class on 09/03,* [*Labor Day*](http://www.dol.gov/opa/aboutdol/laborday.htm)*)*

**Lectures**: “Cultural Pluralism, Total War, and the Formation of Modern Legal Culture”

**Reading Assignment**: *Mirror*, pp. 268-310

Joseph Hutcheson, “The Judgement Intuitive: The Function of the ‘Hunch’ in Judicial Decision” (accessible at http://alh.houseofrussell.com/docs/hutcheson.html)

**Case Assignment (Brief #2, Possible Due Dates):** *Erie v. Tompkins*, 304 U.S. 64 (1938)

*Week of 09/10/2012*

**Lectures**: “Law and Society in the Cold War Years, 1946-1990”

**Reading Assignment**: *Mirror*, pp. 310-340

*Brethren*, pp. 1-109

**Case Assignment (Brief #3, Possible Due Dates):** *Greenman v. Yuba Power Products*, 59 Cal. 2d (1963); also read the Traynor concurrence in *Escola v. Coca-Cola*, 24 Cal. 2d 453 (1944)

*Week of 09/17/2012*

**Lectures**: “The Burger Court: Justice in Transition”

**Reading Assignment**: *Brethren*, pp. 109-273

**Case Assignment (Brief #4, Possible Due Dates):** *San Antonio v. Rodriguez*, 411 U.S. 1 (1973). Pay careful attention to the Marshall dissent, and also read pp. 311-312 in *Brethren*.

*Week of 09/24/2012*

**Film TBA, In-Class, 09/24/2012**

**Review, In-Class, 09/26/2012**

**Midterm examination, In-Class, 09/28/2012**

*Week of 10/01/2012*

**Lectures**: “Equal Rights and the Law, 1960-2000”

**Reading Assignment**: *Brethren,* pp. 273-423

**Case Assignment (Brief #5, optional due date):** *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

*Week of 10/08/2012*

**LEctures:** “The Secret Lives of the Supreme Court Justices”

**Reading Assignment:** *Brethren,* pp. 423-480 (finish whatever you were unable to read last week)

**Case Assignment (Brief #6, Possible Due Dates)**: *Roe v. Wade*, 410 U.S. 113 (1973)

*Week of 10/15/2012*

**Lectures**: “The New Judicial Federalism”

**Reading Assignment**:

*Brethren,* pp. 480-539

William Brennan, “The Bill of Rights and the States” (Handout)

Brennan, “State Constitutions and the Protection of Individual Rights” (J-Stor, will distribute via e-mail)

**Case Assignment (Brief #7, Possible Due Dates):** *Serrano v. Priest*, 5 Cal.3d 584 (1971) – or - *Robinson v. Cahill*, 62 N.J. 473 (1973)

*Week of 10/22/2012*

**Lectures**: “Judicial Politics: Elections and Confirmation Hearings, 1980-2010”

**Reading Assignment**: Chris Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (Will distribute via e-mail)

Jan Greenberg, *Supreme Conflict* (Summary sent via e-mail)

**Case Assignment (Brief #8, Possible Due Dates):** *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

*Week of 10/29/2012*

**Lectures**: “The Supreme Court and the American Elite”

**Reading Assignment**: *Mirror*, pp. 341-384

**Case Assignment (Brief #9 , Possible Due Dates)**: *Kennedy v. Louisiana*, 554 U.S. 407 (2008)

*Week of 11/05/2012*

**Lectures**: “American Legal History in Transnational Context”

**Case Assignment (Brief #10 , Possible Due Dates)**: *Lawrence v. Texas,* 539 U.S. 558 (2003); also see *Dudgeon v. the United Kingdom* (Accessible at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695350&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649)

*Week of 11/12/2012*

**Lectures**: “The Courts and the American People”

**Reading Assignment**: Lynn Mather, “Courts in American Popular Culture”; Gregory Caldeira and Kevin McGuire, “What Americans Know about the Courts and Why it Matters”; Gerald Rosenberg, “The Impact of Courts on American Life” (all from Kermit Hall and Kevin McGuire, *The Judicial Branch*, will be distributed in PDF format via e-mail)

**Case Assignment (Brief #11, Possible Due Dates):** *District of Columbia v. Heller*, 554 U.S. 570 (2008)

*Week of 11/19/2012 (Class meets on 11/19, Class does not meet on 11/21)*

**Lectures**: “Obamacare”

**Case Assignment (Brief #12, Possible Due Dates):** *[National Federation of Independent Business v. Sebelius](http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf)*, 2012 WL 2427810(2012)

*Week of 11/26/2012*

**Lectures**: “Gay Marriage and the Culture Wars”

**Case Assignment (Brief #13, Possible Due Dates):**  *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003) – or – *Varnum v. Brien*, 763 N.W.2d 862 (2009) – or – *Baker v. Vermont*, 744 A.2d 864 (1999)

*Week of 12/03/2012 (Last Class Meeting, 12/05/2012)*

**Lectures:** “The Future of the Judicial Branch: Courts and Democracy in the Twenty-First Century”

**Review for Final Examination**, 12/05/2012

**Final examination, in-class. Relevant Information Can Be Found HERE:** [**http://wweb.uta.edu/ses/recordsandregistration/content/general\_information/registration.aspx**](http://wweb.uta.edu/ses/recordsandregistration/content/general_information/registration.aspx)

**NOTE : *As the instructor for this course, I reserve the right to adjust this schedule in any way that serves the educational needs of the students enrolled in this course. --OLB***