Revised syllabus September 26, 2018.

Fall Term 2018

Law 660

The Boundaries of Citizenship:
Inclusion, Exclusion, and the History of Civil Rights under Law

3 Credits

Tuesdays and Thursdays, 1:20 to 2:35

Room 220 LSSH (Law School South Hall)

Prof. Rebecca J. Scott
Office hours: Tuesdays 3:30PM-5PM, 969 Legal Research Building

Note: Law 660 fulfills the law upper-level writing requirement (LUWR) for JD students and the research requirement for LLM students.

This course explores the changing boundaries and content of state and national citizenship, from the period of slavery to the present. The core question is: How has membership in the social and political community been defined for men and women in the United States, and what rights and responsibilities has citizenship carried over time? Conversely, in what ways have the lines drawn between citizen and non-citizen shaped the access to rights by persons explicitly or implicitly defined as “alien”?

We will examine the genesis and meanings of legal freedom and formal citizenship for former slaves, for immigrants, for Native Americans, and for residents of territories acquired or conquered by the United States. We will at several points juxtapose evolving concepts of citizenship in the United States with those developed in France and in the Caribbean colonies (and former colonies) of France and Spain, putting political practices in the United States into a transnational context.

The course will link the methods of historical research with those of legal scholarship, emphasizing the social dynamics that lie behind legal cases, and the legal constraints that operate on social processes. Readings for the course draw on state and federal Supreme Court cases, including attorneys’ briefs and trial court records, as well as legal-historical scholarship. We will give particular attention to the expansion of rights through the period of Reconstruction, and the subsequent erosion of rights
through racial disfranchisement and legally-mandated segregation, as well as the near impunity for the violence that helped maintain these policies. We will also trace the overlapping processes by which policies governing alienage, immigration, and naturalization affected those within and outside the changing boundaries of the nation.

Students will be grouped into six panels to present key post-Civil War legal cases in historical context. These one-hour panel presentations will each explore how competing conceptions of citizenship and its attendant rights emerged, were written into constitutional texts and statutes, and were challenged. We will also look at policies of exclusion, de-nationalization, and deportation. The cases for the panels are *U.S. v. Cruikshank* (1875), *Hall v. Decuir* (1878), *Chae Chan Ping v. United States* (1889), *Plessy v. Ferguson* (1896), *Wong Kim Ark* (1898), and *Gonzales v. Williams* (1904).

Each student will participate in his or her panel’s preparation of a case for oral presentation, and will write a final paper of 12 to 15 pages. There will be a short mid-semester quiz; there is no final exam.

Copies of the following books have been ordered at the usual bookstores:


A course-pack containing the other required readings will be available in mid-September at Dollar Bill Copying. (The essays to be read before the first two meetings are also on the readings website maintained by the Registrar’s office, for consultation by students not yet enrolled.) All readings for the course, including paper copies of the Transcripts of Record for the panel cases, are on reserve at the Law Library, and most are posted on Canvas as well.

*Laptop policy:* To encourage full discussion and avoid distraction, all electronic devices including laptops and tablets should remain off and stowed for the duration of the class. [See below, at the end of the syllabus, for information on exceptions to this policy.] Please plan to bring the readings for each week in paper copies, either as books, course-pack or printout from Canvas.

*Writing assignments and grading:* A 5-page prospectus for your final project will be due on November 2. The project itself should be 3,000 to 4,000 words (approx. 12 to 15 pages), excluding notes and appendix, and is due on Monday, December 10. There are two options for the final project: 1) A research paper that draws on primary sources and builds on a theme related to the historical case you prepared for the panel; or 2) A
“historians’ amicus brief” for a relevant case that has recently been (or is now) before the courts (examples of such amicus briefs are posted on Canvas).

Grades in the course will be based on class participation (including the group panel presentations), the mid-semester quiz, the prospectus, and the final paper.

Schedule of Topics

**Week I.** September 4 & 6. Framing the core questions: What is citizenship? In what ways might the status “citizen” be different from being a national, a denizen, a subject, or a resident? What patterns of vernacular understanding of citizenship can we discern in different settings? Are there “degrees” of citizenship, offering access to different rights and duties?

*Readings:*

**For Tuesday:** Linda Kerber, “The Stateless as the Citizens’ Other: A View from the United States,” *The American Historical Review* (February 2007) 1-34.


U.S. Constitution as ratified, including amendments 1 - 10.

The 1790 Naturalization Act. 1 Stat 103. [note: this Act was subsequently amended several times]

**Assignment** for in-class discussion on Thursday: Bring your copy of the U. S. Constitution and the first ten amendments, having underlined all sections where you think some element of citizenship, nationality, and inclusion in or exclusion from the nation is spelled out or implied.

**Part I. The Worlds Made by Slavery (to 1861)**

**Week II.** September 11 and 13. Constitutional frameworks and the implications of compromises on slavery. The age of Atlantic revolutions and the possibilities for an expanded citizenship.

*Readings:*

Laurent Dubois, *A Colony of Citizens: Revolution and Slave Emancipation in the French Caribbean*, chap. 3

Kunal Parker, *Making Foreigners*, chap. 3. "Logics of Revolution"

**Week III.** September 18 and 20. Defining citizenship.

How did citizenship emerge as a meaningful category in the nineteenth-century United States, given the lack of a formal definition of it in the Constitution? Could women be citizens, and if so, what kind of citizens? What was the legal status of Native American communities and individuals? Could a person of African ancestry be a citizen?

**Readings:**


**Primary source exercise:** I will place on Canvas a folder containing digital scans of individual documents attesting to U.S. citizenship for the purpose of obtaining “seaman's protection certificates” in early nineteenth century New Orleans. Choose any image you like from this batch (or find another one online) and transcribe it. Please post your transcription to the discussion board on Canvas by Monday, Sept. 17 at 4PM, and be prepared to discuss in class the questions it may raise. [The images are primarily drawn from Roll 1, “Proofs of Citizenship Used To Apply For Seamen's Protection Certificates for the Port of New Orleans, Louisiana,” NARA Microfilm publication M1826, Records of the U.S. Customs Service, Record Group 36. National Archives, Washington, D.C. Available online at ancestry.com.]

This week, we will finalize assignments of each student to one of the six panels: *U. S. v. Cruikshank*, *Hall v. Decuir*, *Chae Chan Ping v. United States*, *Plessy v. Ferguson*, *Gonzales v. Williams*, or *Wong Kim Ark*. Full or partial Transcripts of Record for each case—including attorneys' briefs, lower court decisions, and in some cases testimony—are available in paper copies in the Law Library, and in pdf on Canvas (you may find them easier to consult in the paper versions). Various additional sources have also been posted to the individual panel folders on Canvas. Please review enough of the relevant material to decide which case you would like to work on, and post your preference by 4pm, Wednesday, Sept. 19, on the Canvas Discussion Board. (Please
post a first and second choice; we will work out final assignments in class on Sept. 20).

**Week IV.** September 25 and 27. What does it mean to conceptualize law and social/political history in the same frame? How, concretely, can historical evidence inform contemporary judicial decision-making? How can you identify sources for your own research papers or amicus briefs, and what research strategies may be most effective?

*Guest scholar, September 25 session:* We are fortunate to have as a visitor for this session Prof. Sam Erman (J.D/ PhD at UM), Assistant Professor of Law and History, University of Southern California. Prof. Erman is the author of the essay on *Gonzales v. Williams* being read this week by members of that student panel, and co-author of an amicus brief presented to the U.S. Supreme Court in *Tuaua et al. v. United States* (posted on Canvas, in the folder Historians’ Amicus Briefs).

This week we will interrupt our chronological progression in order to preview the cases to be discussed by the panels, and to frame the selection of individual research and amicus brief topics. We will focus on the nature of research in legal history, and modes of analyzing the relationship between popular mobilization of various kinds, constitutional doctrine, and historical/political context.

The members of each panel should begin to review the bibliography related to that case, choosing one member of the panel to present a preview of the case, and another to offer a synopsis and analysis of the selected example of the legal-historical essay related to the case or core issue in question. [see 'Readings for each panel,' below].

On September 25, we will ask two designated members of each of the first three panels to present a very brief (<5 minute each) preview of their cases, and a brief synopsis of the related legal-historical essay; we will ask the members of the remaining panels to present such previews and synopses on Thursday, September 27.

*Reading for everyone:*


*Readings for members of each panel:* Please read the essay or chapter linked to your panel’s case, and be prepared to discuss it in class. [An inspiring note: two of the five articles below originated as research papers when the authors were students at the University of Michigan Law School.]:


Panel 3: Chae Chan Ping v. United States, 130 U.S. 581 (1889) (and Fong Yue Ting v. United States) and precedents for exclusion and deportation.

Panel 4: Plessy v. Ferguson and conceptual frameworks for legal challenges to the white supremacist project.

Panel 5. Gonzales v. Williams and the boundaries of citizenship in a period of overseas expansion.


Part II. Redefining Citizenship through War

Week V. October 2 and 4. The debate over national citizenship: Dred Scott and its reversals.

Readings:

Dred Scott v. Sandford 60 US 393 (1857), excerpts from the decision, dissents, and other documents in Paul Finkelman, Dred Scott v. Sandford: A Brief History with Documents [pages 55-126].

Citizenship of African Americans," *Civil War History* 43 (1997): 279-309. [The last 20 pages are Decision of Attorney-General Bates, November 29, 1862, on the question of the citizenship of the commander of the schooner *Elizabeth and Margaret*.]

The Emancipation Proclamation.

“An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication” 14 Statutes at Large 27 (1866).

**Assignment** for Tuesday October 2: After reviewing the case file and the bibliography relevant to your case, you will want to identify the topic that you wish to explore further in your research paper or your “historians’ amicus brief.” Submit (in class, in paper copy) a **one-page** description of the topic on which you would like to write, accompanied by the sources you have initially located on which to build it. Please make use of the instructor’s office hours as you plan your research.

Reminder: The 2018 mid-term elections are fast approaching. The University of Michigan is participating in the Big Ten Voting Challenge, an effort to boost student voter turnout.

If you are eligible to vote, you may register to vote at home or at your campus address, but you must register in advance. Deadlines vary from state to state, but in Michigan, you must register by October 9th for the November election.

If you intend to vote in Michigan via absentee ballot, you may need to take a few additional steps with your registration:

1. If you have voted in person before (at a primary or other election), and will be away on election day from the address at which you are registered, then you are all set to request an absentee ballot from the clerk of the community where you are registered, and return it by mail (see link below for mailing addresses).

2. If you have not voted in person before, another step is needed: you can visit a Secretary of State office to register in person and have your photo ID verified at the same time; or

3. You can visit a City or County Clerk in the city or county where you are already registered, and have your photo ID verified. After taking either of these steps, you can then request an absentee ballot by mail.

If you are requesting a Michigan absentee ballot, your city clerk must receive the request by 2PM on Saturday, November 3rd. Realistically, however, in order to have time to mail your completed ballot, you should aim to have it in hand in October.
If you are voting out-of-state, you can find additional important information on deadline and eligibility here: http://campusvoteproject.org/studentguides/

You can visit http://umich.turbovote.org/?r=LAW to begin the registration process. Even if you're already registered, TurboVote can provide the appropriate addresses for absentee ballot requests and send you important election info and reminders so you remember to use your vote.

If you wish to participate in the campaign to raise awareness of the importance of voting, you can contact the UM branch of Turn Up Turnout at: https://sites.lsa.umich.edu/tut/

Part III. Reconstruction: Mobilization and Counter-Mobilization

Week VI. October 9 and 11. A Constitutional Moment? The Postwar Amendments, the Freedmen’s Bureau, and the Reconstruction state constitutions.

October 9. At the beginning of class, we will have a short quiz on citizenship in the United States prior to the passage of the Fourteenth Amendment.

Readings for this week’s discussions:


The Fourteenth and Fifteenth Amendments to the United States Constitution.

Week VII. Thursday, October 18. [Note: In the Law School Academic Calendar, Tuesday this week meets as a Monday, so we will meet only on Thursday] Experiments in cross-racial democracy. Vigilante and paramilitary resistance in the South. Federal prosecutions.

Readings:

Civil Rights Act of 1870 (16 Stat 140 [1870])

Second Enforcement Act (16 Stat 433 [1871])

Third Enforcement Act (Ku Klux Klan Act) (17 Stat 13 [1871])

U.S. v. Cruikshank 92 US 542 (1875). Excerpts and supplementary material to be chosen by Panel 1.

**Thursday, October 18. Presentation of U.S. v. Cruikshank 92 US 542 (1875) [by Panel 1]**

*Part IV. The Age of Exclusion?*


**Readings: For Tuesday, October 23:**


Federal Civil Rights Act of 1875.


Hall v. Decuir 95 US 485. Excerpts and supplementary material selected by Panel 2.

**Tuesday, October 23: Presentation of Hall v. Decuir 95 US 485 (1878) [Panel 2]**

**Readings for Thursday, October 25:**

The Chinese Exclusion Act (1882)

Selections on *Chae Chan Ping v. United States* selected by Panel 3.

**Thursday, October 25: Presentation of Chae Chan Ping v. United States 130 U.S. 581 (1889) [Panel 3]**

**Week IX.** October 30 and November 1. The retreat from federal protection. The entrenchment of the “state action” doctrine (and the defeat of the competing “state neglect” doctrine).

**Readings:**

Foner, *Short History of Reconstruction*, chaps. 11, 12.
The Civil Rights Cases (1883), excerpts from the decision.


The Separate Car Act, Louisiana, 1890.


Plessy v. Ferguson 163 US 537 (1896). Excerpts from decision, dissent, and supplementary material from the Brook Thomas book to be selected by Panel 3.

**Thursday, Nov. 1: Presentation of Plessy v. Ferguson 163 US 537 (1896) [Panel 4]**

**Assignment for Friday, November 2:** Submit a five-page prospectus (three pages of prose plus two pages of bibliography, including annotations described below) for your research paper or historians’ amicus brief. The prospectus should indicate the working title, the key questions that you expect to be able to answer (avoid over-general or rhetorical questions).

For a research paper: Identify and annotate at least two substantial primary sources and three secondary sources already located and consulted, indicating how they will enable you to address your central research question.

For a historians’ amicus brief: Identify at least four secondary sources that are directly on point, and annotate them, indicating how they will enable you to develop the argument you anticipate making in the amicus brief.

For both options, indicate additional sources you have identified, even if not yet read, and how you expect to use them.

The prospectus is a graded assignment, to be submitted in paper copy to the instructor’s mailbox on the 9th floor, Legal Research Building, and to the ‘Submit Assignments’ section of the Canvas site. When the graded copy of the prospectus is returned to you with instructor comments, please be sure to **review and retain it**. You will be re-submitting this paper copy, including the instructor comments, along with your final paper at the end of term.

**Week X. November 6.** The assault on voting rights. [Note: We will schedule individual research consultations this week, in lieu of the November 8 class meeting.]

**Readings:**
Reread: Fifteenth Amendment to the United States Constitution

Summary of Lodge-Hoar Federal elections bill (introduced June 14, 1890; was not passed).


We will not meet on Thursday, November 8. Instead, I will hold marathon special office hours on **Wednesday, November 7**, in order to make it possible for all students to discuss their prospectuses and consult about the progress of their research projects/historians’ amicus briefs. Please schedule a 15 minute appointment with me either during regular (but extendable) office hours on Tuesday, October 30; Tuesday, November 6; or during special office hours on Wednesday, November 7.

**Week XI.** November 13 and 15. Constitutional disfranchising initiatives in the states and the creation of “non-citizen nationals.”

*Readings:*


Gonzales v. Williams. 192 US 3 (1904). Selections from the case and supplementary materials to be chosen by panel 4.

**Thursday, November 15, Presentation by the Gonzales v. Williams panel [Panel 5].**

**Week XII.** November 20 [November 22 is Thanksgiving]. Insisting on dignity when dignity is denied. Birthright citizenship and its implications.

*Readings:*


United States v. Wong Kim Ark, 169 U.S. 649 (1898), Excerpts and any additional materials from the Salyer essay or other sources to be selected by Panel 4.

**Tuesday, November 20, Presentation by the Wong Kim Ark panel [Panel 6].**

**Part V. The History of our Present Moment**
Week XIII. November 27 and 29. Twentieth-century struggles over the boundaries and meaning of citizenship. The slow recuperation and expansion of suffrage rights for citizens, along with new forms of restriction. The creation and sharpening of borders and the (ongoing) evolution of policy on immigration.

Readings:


Parker, *Making Foreigners*, chap. 6, “Closing the Gates in the Early Twentieth Century”

Week XIV. December 4 and December 6. Where are we now? Expansions and contractions of rights. The recent rhetorical and regulatory assault on immigrants and immigration. Are there lessons for “impact litigation” in the present that can be drawn from the history of litigation, policy, and social movements in earlier years?

Readings:


[+ Recent case materials t.b.a., which may include cases for which students are writing historians’ amicus briefs.]

Assignment: Final papers are due on Monday, December 10, by 4 P.M., in paper to the instructor’s mailbox (faculty mailboxes are in the lobby of 9th floor Legal Research) and as a file uploaded to ‘Submit Assignments’ through Canvas. Be sure to attach your prospectus (with instructor comments) to the paper copy of your final essay.

Note: The no-laptops rule can be modified to assure access and inclusion, or to accommodate a particular student’s need. Feel free to contact the instructor in the event of such a need. Formal requests for accommodations by students with disabilities may also be made by contacting the University’s Services for Students with Disabilities (“SSD”) Office located at G-664 Haven Hall, 505 South State Street (734-763-3000). Once your eligibility for an accommodation has been determined, SSD will contact Dean Martí in the Law School’s Office of Student Life (734-764-0516, bayrex@umich.edu) with a recommendation, and he will work with you and SSD to finalize and facilitate your accommodations. For more information about this process, please feel welcome to contact Dean Martí.