

Draft of 15 April 2018. TENTATIVE. This draft is fine for book orders and the general shape of the course; use the final draft for due dates and precise assignments.

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 3PM-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 panels to present key post-Civil War legal cases in historical context. These presentations will explore how competing conceptions of citizenship and its attendant rights emerged, were written into constitutional texts and statutes, and were challenged. The cases to be studied include *U.S. v. Cruikshank* (1875), *Hall v. DeCuir* (1878), *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:

Eric Foner, *A Short History of Reconstruction: Updated Edition* (paperback, 2015).

Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600 - 2000* (paperback, 2015).

A course-pack containing the other required readings will be available at Dollar Bill Copying. (The essays to be read before the first meeting are on Canvas.) 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. 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 October 26. The project itself should be 3,000 to 4,000 words (approx. 12 to 15 pages) and is due on December _____. There are two options for the final project: either a research paper based on primary sources that builds on a theme related to the historical case you prepared for the panel; or 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 being a citizen be different from being a national, a denizen, a resident or a subject? Can there be “degrees” of citizenship, offering access to different rights and duties? What are the links between formal citizenship and day-to-day struggles over its meaning?

Readings:

Richard Primus, “The Riddle of Hiram Revels,” *Harvard Law Review* 119 (2006): 1680–1733.

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

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

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:

Declaration of the Rights of Man and of the Citizen (Paris, 1789). Translation posted on Canvas; French original at <http://www.assemblee-nationale.fr/histoire/dudh/1789.asp>.

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:

William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Jacobs, Novak, and Zelizer, eds. *The Democratic Experiment*, pp. 85-119.

Kunal Parker, *Making Foreigners*, chap. 4, "Blacks, Indians, and Other Aliens in Antebellum America."

Primary source exercise: I have placed 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, post it 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, each student will be assigned to one the five panels: *U. S. v. Cruikshank*, *Hall v. DeCuir*, *Plessy v. Ferguson*, *Wong Kim Ark*, or *Gonzales v. Williams*. 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. Review enough of the relevant materials 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).

Week IV. September 25 and 27. What does it mean to conceptualize law and social/political history in the same frame? What kinds of research strategies might this approach suggest, and how can you identify sources for your own research papers?

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 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 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 members of the first two panels to present brief previews of their cases, and synopses of the legal-historical essays; we will ask the members of the remaining panels to present such previews and synopses on Thursday, September 27.

Reading for everyone:

Ariela Gross, *What Blood Won't Tell*, Chap.2, "Performing Whiteness,"pp. 48-72.

Readings for each panel: The members of each panel should read the essay or chapter linked to their 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 1: *U.S. v. Cruikshank*, vigilante violence, and the protection of rights:
Michael A. Ross, "Obstructing Reconstruction: John A. Campbell and the Legal Campaign against Reconstruction in New Orleans, 1868-1873," *Civil War History*, 49(September 2003): 235-253.

Panel 2: *Hall v. DeCuir* and the assertion of public rights during Reconstruction.
Beth Kressel Itkin, "Creating 'What Might Have Been a Fuss'" The Many Faces of Equal Public Rights in Reconstruction Louisiana," *Louisiana History* (Winter 2015): 42 - 74.

Panel 3: *Plessy v. Ferguson* and conceptual frameworks for legal challenges to the white supremacist project.
Mark Elliott, "Race, Color Blindness, and the Democratic Public: Albion W. Tourgee's Radical Principles in Plessy V. Ferguson," *Journal of Southern History* 67 (2001).

Panel 4. *Gonzales v. Williams* and the boundaries of citizenship in a period of overseas expansion.
Sam Erman, "Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905," *Journal of American Ethnic History* (Summer 2008).

Panel 5. *Wong Kim Ark* and the question of birthright citizenship.
Lucy E. Salyer, "Wong Kim Ark: The Contest over Birthright Citizenship," in David A. Martin & Peter H. Schuck eds., *Immigration Stories* (New York: Foundation Press, 2005), 51-85.

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 t.b.a.]

James P. McClure, Leigh Johnsen, Kathleen Norman, and Michael Vanderlan, eds., "Circumventing the Dred Scott Decision: Edward Bates, Salmon P. Chase, and the 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.

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.

Readings:

Foner, *A Short History of Reconstruction*, "Introduction to the 2014 Anniversary Edition," and Chap. 1–3 (pp. xvii- xxx, 1–54).

The Louisiana Constitution of 1868. Bill of Rights and Article 13.

The Fourteenth and Fifteenth Amendments to the United States Constitution.

Primary source exercise: In a folder on Canvas you will find a selection of documents from the papers of the Freedman's Bureau, as edited and transcribed by members of the Freedom History Project at the University of Maryland. Select one of the documents, print it out, read it carefully, and be prepared to talk about it in class on Thursday.

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])

Foner, *Short History of Reconstruction*, pages t.b.a. [chaps. 5–7, 9?].

U.S. v. Cruikshank 92 US 542 (1875). Transcript of Record and Decision. Excerpts and any 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?

Week VIII. October 23 and 25. Public accommodations, “public rights,” and claims-making under state and federal laws. The emergence of claims to women’s voting rights. The introduction of restrictions on immigration: The Chinese Exclusion Act (1882).

Required Readings:

Foner, *Short History of Reconstruction*, chap. 10.

Bill of Rights and Article XIII of the 1868 Louisiana Constitution.

Federal Civil Rights Act of 1875.

Minor v. Happersett 88 US 162 (1875).

The Chinese Exclusion Act (1882)

Hall v. Decuir 95 US 485 (1878) Decision and Transcript of Record. Excerpts and any supplementary material to be selected by Panel 2.

Thursday, October 25: Presentation of Hall v. Decuir 95 US 485 (1878) [Panel 2]

Assignment for **Friday, October 26**: 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), and careful descriptions of at least two substantial primary sources and three secondary sources already located and consulted, for a research paper; or at least four secondary sources for an amicus brief. Indicate additional sources you have identified, and how you expect to use them.

The prospectus is a graded assignment, to be submitted in paper copy to the instructor [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 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). What is left of the 14th Amendment by 1890? The development of a federal immigration order.

Readings:

Foner, *Short History of Reconstruction*, [chaps. 11, 12?].

The Civil Rights Cases (1883)

Pamela Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, chap. 6. "The Civil Rights Cases and the Language of State Neglect," 161-183.

Kunal Parker, *Making Foreigners*, chap. 5, "The Rise of the Federal Immigration Order."

Week X. November 6 and November 8. The assault on public rights.

Readings:

The Separate Car Act, Louisiana, 1890.

Charles W. Chesnut, "The Courts and the Negro," in Brook Thomas, *Plessy v. Ferguson: A Brief History with Documents*, pp. 149-160.

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, November 8: Presentation of Plessy v. Ferguson 163 US 537 (1896)

[Panel 3]

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

Readings:

Reread: Fifteenth Amendment to the United States Constitution

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

Selections from the Louisiana Constitutional Convention of 1898, and excerpts from the text of the 1898 Louisiana Constitution.

Giles v. Harris, 189 U.S. 475 (1903) and Giles v. Teasley 193 U.S. 146 (1904). Excerpts.

Richard Pildes, “Democracy, Anti-Democracy, and the Canon,” *Constitutional Commentary* 17 (2000): 295-319.

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

Thursday, November 14, Presentation by the Gonzales v. Williams panel [Panel 4].

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

Readings:

Thomas C. Holt, *Children of Fire: A History of African Americans*, chap. 5. “Ragtime: Race and Nation at the Dawn of the Twentieth Century.” (pp. 185-236)

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 5].

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. The creation and sharpening of borders and the evolution of policy on immigration.

Readings:

Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America*, pp. xix-20, and notes (pp. 275-281).

Gross, *What Blood Won't Tell*, chap. 7, "Racial Science, Immigration, and the 'White Races,'" pp. 211-252.

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 assault on immigrants and immigration.

Kunal Parker, *Making Foreigners*, chap. 7, "A Rights Revolution?"

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

Assignment: Final papers are due on December ____, in paper *and* as a file uploaded to the 'Submit Assignments' through Canvas. Be sure to **attach your prospectus** (with instructor comments) to the paper copy of your final essay.