

Penultimate draft, 21 December, 2015. Fine for book purchase, planning. Use January draft for exact page assignments.

Winter Term 2016

Law 660

The Boundaries of Citizenship:

Inclusion, Exclusion, and the History of Civil Rights under Law

Mondays and Wednesdays, 10:20-11:45

Room 236 Hutchins Hall

Rebecca J. Scott

Office hours: Wednesday 2–4PM, 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 twentieth century. The core question is: How was membership in the social and political community defined for men and women in the United States, and how were those definitions changed over time? 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 thought in the United States into an Atlantic 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 the attorneys' briefs and trial court records. We will also read interpretive works of history and law, Congressional testimony, and 19th century newspaper reports.

Students will be grouped into panels to take responsibility for presenting a key post-Civil War legal case 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 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 midterm exam; there is no final exam (see below for information on the final writing assignment).

Copies of the following book have been ordered at the usual bookstores, including Ulrich's and the Barnes and Noble in the Michigan Union.

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

A course-pack containing the other required readings will be available at Dollar Bill Copying.

All books used in the course are also on reserve at the Law Library. Full transcripts of record for the Supreme Court Cases can be accessed through the Law Library web portal; most will also be on reserve in paper copies. A bibliography of sources for each panel, which can also help you get started with research papers, will be available on the Canvas site.

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 March 18. The project itself should be 3,000 to 4,000 words (approx. 12 to 15 pages) and is due on April 21. There are two options for the final project: either a research paper building on a theme related to the historical case you prepared for the panel; or a "historians' amicus brief" for a case that has recently been (or is now) before the courts (examples of such amicus briefs are available on Canvas).

Grades in the course will be based on a combination of class participation (including in-class discussions and the group panel presentations), the midterm quiz, the prospectus, and the final paper.

Schedule of Topics

Week I. First class. Wednesday, January 13. Introduction to the course and its procedures. Framing several 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. [Available on the Canvas site; not in the course-pack.]

[A pdf of the Primus article is available in the Week 1 folder on the Canvas site, and on electronic reserves in the Law Library; please read it before the first meeting of class.]

Monday, January 18. Martin Luther King Day. No class; you are encouraged to attend the lecture by Thomas Holt, in the Department of History (noon to 2PM, 1014 Tisch Hall), or the Law School's Martin Luther King day program.

Week II. Wednesday, January 20.

Spoken and unspoken citizenship: The Constitutional framework and the compromises on slavery. The age of Atlantic revolutions and the possibilities for an expanded citizenship.

Readings:

U.S. Constitution.

Declaration of the Rights of Man and of the Citizen (Paris, 1789). Translation 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

David Waldstreicher, *Slavery's Constitution*, pp. 1-19.

Assignment for in-class discussion on Wednesday: Please bring a copy of the U. S. Constitution and the first ten Amendments, having underlined all sections where you think some element of citizenship or nationality is spelled out or implied. Based on this document alone, how would you define the boundaries of citizenship, both in terms of inclusion and in terms of content?

Week III. Monday, January 25, and Wednesday, January 27.

How did citizenship emerge in the early nineteenth-century United States, given the lack of a formal definition of it in the Constitution? Were women citizens, and if so, what kind of citizens? What was the legal status of Native American communities and individuals?

Required 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.

Linda Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship*, chap. 1.

Stephen Breyer, *Making Our Democracy Work*, pp. 22-31.

Week IV. Monday, February 1, and Wednesday, February 3.

The extension of territory; the era of (nearly) unrestricted immigration. The Fugitive Slave Law. Were free persons who were categorized as "of color" construed as citizens of individual states, of the United States, or of neither?

Readings:

H. Robert Baker, *Prigg v. Pennsylvania: Slavery, The Supreme Court, and the Ambivalent Constitution*, pp. 101 - 151.

Treaty of Guadalupe Hidalgo (1848).

Fugitive Slave Law of 1850.

Assignment: On Wednesday, February 3, students will select among the five panels: *U. S. v. Cruikshank*, *Hall v. DeCuir*, *Plessy v. Ferguson*, *Wong Kim Ark*, *Gonzales v. Williams*. The full Transcripts of Record for each case—including attorneys' briefs, testimony, and lower court decisions—are available on-line through Electronic Resources at the Law Library. Paper copies of the Transcripts of Record can be found in the Law Library, and various additional sources have also been posted to the individual panel folders on Canvas. Briefly review enough of the relevant materials to decide which case you would like to work on, and convey your preference to the instructor by email by 5pm on Monday, February 1. (Please make a first and second choice).

Week V. Monday, February 8, and Wednesday, February 10. Previews of the cases for discussion by panels in subsequent weeks. Preparation for selection of research topics.

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 doctrine and 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 Monday 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 Wednesday.

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?

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 Face 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. *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.

Panel 5. *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).

Assignment for Monday of **next** week: Review the case file and the bibliography relevant to your case, and decide which aspects of your case and its context you wish to explore further in your research paper. On Monday, **February 15**, please submit (in class, in paper copy) a **one-page** description of the questions you would like to explore in your research paper, accompanied by the sources you have initially located that can help you find ways of addressing them. *Please make use of the instructor's office hours as you plan your research.*

Week VI. Monday, February 15, and Wednesday February 17.

The debate over national citizenship: Dred Scott and its reevaluation during the Civil War.

Required 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.

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. [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*.]

Week VII. February 22 and 24. 1867-70. A Constitutional Moment? Reconstruction, the Postwar Amendments, 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).

"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)

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution

Wednesday, February 24: Midterm Quiz.

February 26- March 6. Winter Recess

Week VIII. Monday, March 7 and Wednesday, March 9. 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*, chaps. 5–7, 9.

U.S. v. Cruikshank 92 US 542 (1875). Transcript of Record and Decision. [Pages to be chosen by the Cruikshank panel]

Other readings on Cruikshank may be chosen by the panel.

Wednesday, March 9: Presentation of U.S. v. Cruikshank 92 US 542 (1875) [by Panel 1:]

Week IX. Monday, March 14 and Wednesday, March 16. Public accommodations 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. [Selections to be assigned by Panel 2]

Wednesday, March 16: Presentation of Hall v. Decuir 95 US 485 (1878) [Panel 2]

Assignment for **Friday, March 18:** Submit a five-page prospectus (three pages of prose plus two pages of *annotated* bibliography) 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 annotations of at least two substantial primary sources and three secondary sources

already located and consulted, for a research paper; or at least five secondary sources for an amicus brief, as well as an indication of 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], in MSWord to the 'Assignments' section of the Canvas site. When the graded paper copy 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. Monday, March 21 and Wednesday, March 23. The retreat from federal protection. The evolution of the "state action" doctrine (and the competing "state neglect" doctrine). What is left of the 14th Amendment by 1890?

Readings:

Foner, *Short History of Reconstruction*, chaps. 11, 12.

Civil Rights Cases 109 US 3 (1883). Excerpts: pages

Yick Wo v. Hopkins 118 US 356 (1886).

Louisville, N.O. & Texas R. Co. V. Mississippi 133 US 587 (1890).

Week XI. March 28 and March 30.

The attack on suffrage and on public rights.

Readings:

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

The Separate Car Act, Louisiana, 1890.

Plessy v. Ferguson 163 US 537 (1896). Decision, dissent, brief by Albion Tourgée and other texts are excerpted in Brook Thomas, *Plessy v. Ferguson: A Brief History with Documents*. [pages from this and from the Transcript of Record of the case to be assigned by Plessy Panel].

Charles W. Chesnutt, "The Courts and the Negro," in Thomas, *Plessy*, pp. 149-160.

**Wednesday, March 30: Presentation of Plessy v. Ferguson 163 US 537 (1896)
[Panel 3]**

Week XII. Monday, April 4, and Wednesday, April 6. Birthright citizenship and the implications of territorial expansion. Comparative perspectives: what kinds of post-slavery arrangements yield broad suffrage rights, and why do other circumstances allow disfranchisement?

Readings:

Louisiana Constitution of 1898. [Excerpts on eligibility to vote.]

Rebecca Scott, *Degrees of Freedom: Louisiana and Cuba after Slavery*, chap. 6.

United States v. Wong Kim Ark, 169 U.S. 649 (1898), Excerpts.

Monday, April 4, Presentation by the Wong Kim Ark panel [Panel 4].

Wednesday, April 6. Special guest, Prof. Sam Erman (University of Southern California Law School). Professor Erman will discuss the interaction between domestic disfranchisement and territorial expansion, and the use of historical evidence in constitutional reasoning. He will also be available for consultation with the members of the panel preparing *Gonzales v. Williams*.

Week XIII. April 11 and April 13. Constitutional disfranchising initiatives in the states; the creation of “non-citizen nationals”?

Readings:

Reread: Fifteenth Amendment to the United States Constitution

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

Giles v. Harris, 189 U.S. 475 (1903) and Giles v. Teasley [selections on Canvas]

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

Gonzales v. Williams. 192 US 3 (1904). [Selections to be chosen by panel 5].

Wednesday, April 13, Presentation by the Gonzales v. Williams panel [Panel 5].

Week XIV. April 18 and 20. Epilogue: Twentieth century struggles over the boundaries and meaning of citizenship. The slow recuperation and expansion of suffrage rights for citizens. The 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.

National Origins Act of 1924.

Final Assignment: Final papers are due Thursday, April 21. Be sure to **attach your prospectus** (with instructor comments) to the final paper.

[This course will not have a final exam.]