

The Catholic University of America, Columbus School of Law  
**CUA Law Scholarship Repository**

---

Scholarly Articles and Other Contributions

Faculty Scholarship

---

2013

## The Fun of Teaching American Legal History

Geoffrey R. Watson

*The Catholic University of America, Columbus School of Law*

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Legal Education Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Geoffrey R. Watson, *The Fun of Teaching American Legal History*, 53 AM. J. LEGAL HIST. 426 (2013).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# The Fun of Teaching American Legal History

by GEOFFREY R. WATSON\*

## I INTRODUCTION

I teach a pair of two-credit legal history courses: History of Early American Law and History of Modern American Law. I teach a variety of other courses, but none is more fun to teach than legal history.

## II METHODOLOGY

I suppose there are intrepid souls who teach legal history without a casebook, but I'm not one of them. Until recently, I'd been using Presser & Zainaldin's excellent *Law and Jurisprudence in American History*, but this year I switched to Hall, Finkelman & Ely's *American Legal History*. Michael Les Benedict calls the latter text a "source-book rather than a casebook,"<sup>1</sup> but that is part of the reason I made the switch: I wanted a book that put primary materials front and center, with few "notes," and I liked the idea of a text that gives the course more of a History Department vibe.

The choice of text is related to a deeper choice of teaching methodology: does one teach what Alfred Brophy calls "applied legal history," emphasizing the uses of history in modern legal practice and theory, or does one teach "pure legal history," learning history for the sake of it, even if there's no obvious practical appli-

---

\* Professor of Law, The Catholic University of America (watson@law.edu). B.A., Yale University; J.D. Harvard University.

<sup>1</sup> Michael Les Benedict, *Thoughts on Class Materials for American Legal History Courses*, Mar. 30, 1995, at <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-law&month=9503&week=e&msg=0Nm17w4HU3nmbRIgO%2BLnsA&user=&pw=>.

cation?<sup>2</sup> I have always taught a mix of the two, but in recent years I have moved toward a slightly more “pure” approach.

To be sure, my students love applied legal history: their eyes light up when they see connections between what we’re studying and what’s on the docket at the U.S. Supreme Court. But often they’ve heard those arguments before, as for example in constitutional law, where they may have read competing arguments about, say, whether colonial America accepted gun control. Of course, an “applied” legal history course can add depth to that understanding. But I may contribute more to my students’ formation when I expose them to materials they’ve never read closely before, to history less likely to be found in a modern legal brief—e.g., accounts of the Salem witch trials, or Jefferson’s *Notes on the State of Virginia*, or Lincoln’s arguments against the legality of secession.

### III COVERAGE

Another problem in American legal history is where to start. How much attention should one pay to English legal history and to the colonial period? Fortunately, I have four credits, so I have the time to present the text of the Magna Carta, then materials on both American and English law in the 17th and 18th century. Even if I had to make cuts, I’d insist on some attention to the English legal tradition—if nothing else, the trial of the Seven Bishops.

A related problem is where to stop. That’s easy for my “early” history course: it ends with the Civil War. But where should I end the “modern” course? Casebooks on American legal history march all the way up to the 21st century, presenting cases like *Bush v. Gore*<sup>3</sup> and *Boumediene v. Bush*.<sup>4</sup> If I have to choose between covering those cases and the Seneca Falls Declaration of 1848, I lean toward the earlier materials. I can safely leave the most recent developments to my colleagues teaching constitutional law.

Often I end the course with *Brown v. Board*.<sup>5</sup> To me, it is essential to teach *Brown*, as it caps a year-long discussion of race and slavery,

---

<sup>2</sup> Alfred Brophy, *What is Applied Legal History?*, July 10, 2012, at <http://www.thefacultylounge.org/2012/07/what-is-applied-legal-history.html>.

<sup>3</sup> 531 U.S. 98 (2000).

<sup>4</sup> 553 U.S. 723 (2008).

<sup>5</sup> 347 U.S. 483 (1954).

and it may not get full attention in a course in constitutional law. But this year I plan to end with *Roe v. Wade*.<sup>6</sup> Yes, *Roe* already gets exhaustive treatment in any course on constitutional law, especially at my law school. But there is nonetheless a strong case for covering *Roe* in a legal history course too, not only because of its notoriety, but also because the majority opinion draws so explicitly on legal history.

I don't mean to leave the impression that I focus on constitutional law above all. If anything, I'm moving toward a smaller proportion of constitutional law in my legal history courses, and a correspondingly greater attention to contract law, tort law, property law, criminal law, administrative law, antitrust law, labor law, and even public international law. I often find that students prefer the history of subjects less glamorous than constitutional law. The teacher wins the war of expectations with a subject like contracts: students expect it to be boring, and they are pleasantly surprised to find it's full of goofy facts and moral dilemmas. By contrast, students expect constitutional law to be sexy, and they deflate a bit when they encounter mud flaps.

#### IV CLASS PROTOCOL

I run my class like a hybrid of a traditional law class and a history department discussion section. I assign "panels" of students each week, so that I have a few "experts" on whom I can call to recite the day's material. In smaller legal history classes, with fewer than 20 students, I conduct things like a seminar. I'll sit rather than stand, and I'll moderate discussion, allowing students some freedom to comment without being called on, although I will take the reins if things veer out of control. I have occasionally tried role-playing exercises, most notably with the impeachment trials of Samuel Chase and Andrew Johnson. Whether they work depends on the personality of the students in the class.

This semester I have a larger class, with more than 30 students, and it's a bit more like a traditional law class: I stand rather than sit, and to maintain order, I have to call on one student at a time, in a

---

<sup>6</sup> 410 U.S. 113 (1973).

somewhat more Socratic style. I miss the more free-flowing discussion that comes with a smaller class, but there's something to be said for a larger group, which generates a larger amount of energy. And I'm certainly delighted to have so many students interested in a course that is completely optional. (As I tell students the first day, the course is not required for graduation, but it should be.)

I don't permit the use of laptops or electronic devices in any of my classes. I find this makes students more attentive and it removes the physical barrier of the laptop screen that otherwise separates me from the students. Disabling internet access in the room doesn't solve the problem. Even if all they do is take notes on the laptop, students tend to focus on that magnetic screen, and they act like stenographers, typing every word uttered in class. Consider experimenting with a "topless" class for a semester. You might be pleasantly surprised at how much better discussion flows.

Class preparation is particularly challenging for legal history. When I started teaching, I read a useful piece of legal advice for new law professors: study at least one law review article on the topic of the day. I still follow that advice for my other courses. But for legal history, I typically read several law review articles for one class, since I'm usually covering a half-dozen different historical topics. I also try to keep up with periodicals in the field, not to mention the latest books on the topic. Even after several years of teaching legal history, I still find it takes more time to prep than my other courses.

A final pedagogical issue is how to grade the course. I may be in the minority, but I use a closed-book final exam, not a paper. I find that an exam gives the students more incentive to keep up with the reading than does a paper. My test, though, is hardly a typical law school exam. It would be hard to construct an issue-spotter that works for legal history. ("Joe Colonial walks into a tavern and starts negotiating a contract with Jane Tory, who insists on placing a stamp on the contract, thereby angering Joe, who aims a punch at her and mistakenly hits Thomas Jefferson. Discuss Tom's legal rights.") My questions are more like college history tests: about a half-dozen questions, about two or three sentences long, with 20-30 minutes per question. "Was *Dred Scott* rightly decided, given the state of the law at the time?" Or: "Are you persuaded by Lincoln's arguments on secession? Please explain."

## V CONCLUSION

As I said at the outset, no law course is more fun to teach than legal history. The students are there because they want to be there, not because the subject is required for graduation or the bar. I get to spend a couple hours a week talking with intelligent people about the Declaration of Independence, or the legal basis for the Emancipation Proclamation, or FDR's conduct of World War II. Law teaching doesn't get much better than that.