Judicial Politics and Process

We all interact with the American legal system in a variety of ways. In this class we explore the realities and politics of law broadly construed. We will investigate everything from the role of law in our every day lives to the work of the Supreme Court. We will also think about the role that legal institutions, particularly courts, judges, and lawyers, play in the political system. We will consider the similarities and differences between courts and other political institutions. Sometimes we will study courts just like we would study Congress or the Presidency, but at other times we will not because law and politics are not the same thing. We will ask questions such as: How can groups use courts to pursue public policy change? What roles do courts play in the US system? How do they connect to the other branches? How much impact do courts and judges have on policy outcomes on the ground? How does one become a judge? What role do lawyers play?

Readings and Discussion: On most days, you will read a mix of textbook type materials and academic analysis. We will learn basics and facts, but we will pay special attention to how scholars study law and courts from a social scientific perspective. Our job will be to take it all apart and put it all together in interesting ways and to apply the general ideas to a broader set of contexts and topics.

Even though the class is reasonably large, I expect you to engage. I will ask questions and keep you involved. I do not plan to just speak at you for 50 minutes at a time. Rather than use short reading quizzes, I will freely call on people and expect you to have something to contribute. To help, I may send out a few questions the night before class to guide your thinking and reading. On those days, I will expect you to be able to offer answers to these questions if called upon at an absolute minimum. If you cannot, I will consider you unprepared that day.

Books for Purchase:


All other readings will be posted on Blackboard
Assignments and Grade Components:

There will be a short midterm (in class) and a final exam. Both will be open note and designed to test both your understanding of basics and your ability to put course ideas together in interesting ways.

The other major piece of work is an actual group research paper to address an unanswered question related to course materials. You will summarize the literature, explain the important question “we” do not have an answer to, and then explain how you address the problem and what your evidence shows. You will work with at least one other person and some projects may justify groups as large as four.

Your grade for the course will be based on your performance on the above assignments, as well as your preparedness for and participation in class.

- Midterm Exam 22%
- Final Exam 35%
- Research Project 35%
- Participation 8%

Grades for Written Work and Exams: For written work, the A range will comprise only work which features strikingly original thinking and/or argumentation, expressed in clear, cogent, error-free writing. Only students that go well beyond class materials and discussions (in thought, not extra research) will be considered for an A grade. Papers and examinations in the B range exhibit mastery of the course materials and discussions, expressed in clear, cogent, error-free writing. Papers and examinations in the C range exhibit inadequate understanding of the course materials and discussions and/or deficient, error-plagued writing. Papers and examinations in the D range exhibit wholly inadequate understanding of the course materials combined with deficient, error-plagued writing. Hopefully the D range and worse will not be an issue. Pluses, minuses, or flat grades within any of these ranges reflect the instructors’ judgment of the merits of the paper or examination relative to other papers in the same range. All late assignments will be reduced 1/3 of a grade for every day they are late. Students may appeal grades they feel they received in error but we reserve the right to increase or decrease their grade upon reconsideration. To appeal you must explain, in writing, why you believe your grade is incorrect before coming to talk to one of us.

I am willing to give As when deserved but I am also willing to use the other parts of the grading spectrum to make sure that those whose work is truly outstanding truly stand out. Your work does not start at “A” level with subtraction for things wrong with it. I frequently give Bs to work that is very good and without obvious shortcoming, and which only has the flaw of not being A quality work.
Other Practical Matters:

Email: The most efficient way to reach me is via email. No promises, but I’ll try to respond quickly. If you write and don’t hear back in 24 hours, please write again.

Office Hours: My official office hours are listed at the top of the syllabus, but I aim to be around and as accessible as possible. If you cannot make it to the scheduled office hours, email with some times that work for you. I’d rather you come to office hour and say you don’t understand a reading before class, than to sit through class without contributing or learning because you didn’t understand the reading.
I. Introduction

1. 1/15 Introduction – Some Themes – Law, Politics, Law and Politics, the Politics of Law
   ● No Reading Yet

2. 1/17 Studying Courts and Politics – Where’s the Law, Where’s the Politics?
   ● MPKE Chapter 1

Part I: Law in Our Lives

3. 1/22 What is Law? What Does a Legal System Do?
   ● Carter and Burke, Chapter 1
   ● MPEK Chapter 2

4. 1/24 Disputes, the Rule of Law, and its American Variant?
   ● Robert Kagan, Adversarial Legalism, 2003, Chapters 1 and 6

5. 1/27 – Legal Disputes: Are Americans Adversarial and Litigious?
   ● Michael McCann, William Halton, and Anne Bloom, “Java Jive, Genealogy of a Juridical Icon,” in Macaulay, Friedman and Mertz, Law in Action, 2007

6. 1/29 Disputes Without Law
   ● Robert Ellickson, Order Without Law, 1991 (excerpts)
7. 1/31 Lawyers, Disputes, and Social Control
   - MPKE Chapter 5
   - MPKE 5.4, 5.5

8. 2/3 – Criminal Law - The System’s Effects on People (Also, how to read a research paper)

9. 2/5 – Why do People Comply with the Law? Deterrence and Legitimacy
   - Tom Tyler, Why People Obey the Law, 1990, Chapter 4

10. 2/7 - Social and Cultural Bases of Compliance – Introduction of Research Paper
    Assignment

II. Law, Politics, Policy, and The American Legal System

11. 2/10 The Structure of American Law
    - MPEK Chapter 3
12. 2/12 The Development of American Constitutional Law

13. 2/14 Law, Government and Business

14. 2/19 – Trials and Litigation
   ● MPKE Chapter 9
   ● MPKE 9.4, 9.5

15. 2/21 - Torts, Safety, and Variations of the Rule of Law Revisited

16. 2/24 – Litigation and Policy Making Case Studies – Tobacco and Obesity
   ● Martha Derthik, *Up in Smoke*, Chapter 11
III. Courts and Judicial Power

17. 2/26 - Judicial Review?
   - Marbury v. Madison
   - Carter and Burke, Chapter 6

18. 2/28 - Judicial Power and Independence?
   - Federalist 78
   - MPEK Chapter 8
   - MPEK 8.10

19. 3/3 Catch-up and Review

20. 3/5 In Class Midterm I

21. 3/7 How To Read a Case (and It’s a Big One)
   - Citizens United v FEC (2010)
   - Jeffrey Toobin, “Money Unlimited,” The New Yorker 5/21/12
     [http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin](http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin)

*Spring Break*

22. 3/17 – Legal Reasoning and the Common Law –
   - MPEK Chapter 10

23. 3/19 – Legal Reasoning and the Common Law part II
   - Carter and Burke *Chapters 2 and 3*

   - MPEK Chapter 11
   - MPEK 11.2, 11.4
   - Carter and Burke *Chapter 4*
25. 3/24 Thu. 4/7 – Judicial Decision Making – Constitutional Interpretation?
   ● Carter and Burke Chapter 5
   ● MPEK Chapter 12
   ● MPEK 12.2

IV - The Supreme Court, Law and Politics – Also, An Extended Case Study of the Health Care Law and Same Sex Marriage

26. 3/26 The background – Affordable Care Act and Legal Issues
   ● Scotus Blog – Why a Health Care Law
   ● Scotus Blog on the Mandate – Parts I, II, and III
   ● Scotus Blog – Health Care’s Legal/Political fate
   ● Ezra Klein, “Unpopular Mandate,” The New Yorker, 6/25/12
   ● Jeffrey Toobin, The Oath, (2012), Chapter 21

27. 3/28 The ACA Legal Background – Mostly Cases
   ● McCulloch v. Maryland (1819)
   ● Wickard v. Fillburn (1942)
   ● Gonzales v. Raich (2005)

   ● MPEK Chapter 6
   ● MPEK 6.6
   ● MPEK Chapter 13
   ● MPEK 13.5

29. 4/2 - The Process of Judicial Decision Making Continued – Oral Arguments
● Randy Barnett on Why the Mandate is Unconstitutional o http://www.volokh.com/2012/03/understanding-justice-scalias-concurring-opinion-in-raich/
● We’ll listen to some of the ACA arguments in class

30. 4/4 Discussion of Oral Arguments and Transition to Judicial Conference
● Jeffrey Toobin, The Oath, (2012), Chapter 22
● Scotusblog analysis of oral arguments o http://www.scotusblog.com/2012/03/argument-recap-it-is-kennedys-call/
o http://www.scotusblog.com/2012/03/today%E2%80%99s-argument-in-plain-english-will-the-mandate-squeak-by/
● MPKE 13.6

31. 4/7 Catch-up and Workshop on Research Design – Does the Supreme Court Affect Public Opinion?
● MPKE 14.7
32. 4/9 Thu. 4/7 – Judicial Decision Making – Attitudes, Policy Preferences, and Background
   ● MPKE 10.6, 10.8, 4.7

33. 4/11 – Judicial Decision Making – Rational Choice / Strategic
   ● Franklin Roosevelt, *Undelivered Gold Clause Speech*
   ● MPKE 13.3, 13.7
   ● Jeffrey Toobin, *The Oath*, (2012), Chapter 23

34. 4/14 – Judicial Independence, Legitimacy, and the Public Revisited
   ● Dino Christenson and David Glick, “Roberts's Health Care Decision Disrobed: The Micro-Foundations of the Court's Legitimacy”

35. 4/16 In Class Workshop on Research Design and Your Research Papers – One Page Outline Due

36. 4/18 – No Class – Professor Away

37. 4/23 - Judicial Appointments
   ● MPEK Chapter 4
   ● Lee Epstein and Jeffrey Segal (2005), *Advice and Consent: The Politics of Judicial Appointments*, PP 1-5, 17-27
   ● MPEK 4.2, 4.3, 4.6
   ● Toobin, Jeffrey, “Advice and Dissent: The Fight Over the President's Judicial Nominations,” *The New Yorker* (http://www.newyorker.com/archive/2003/05/26/030526fa_)

38. 4/24 - Judicial Backgrounds and Appointments
• Adam Glynn and Maya Sen, “Identifying Judicial Empathy,”
  ○ THESE PAPERS ARE BOTH TECHNICAL – SKIM OVER THOSE PARTS
    BUT YOU SHOULD BE ABLE TO GET THE MAIN IDEAS
• Lithwick, Dahlia and Sonja West, “The Unsung Empathy of Justice Stevens: Justice John
  Paul Stevens is the Model for Why Empathy Matters,” Slate Magazine (http://www.slate.
  com/articles/news_and_pol

39. 4/25 - State Judges and Judicial Selection Methods
• MPEK 4.8, 4.9, 13.4,
• Epstein, Lee, Jack Knight, and Olga Shvetsova. 2001. "Comparing Judicial Selection
  Systems." William & Mary Bill of Rights Journal

40. 4/28 – Organized Interests and the Courts
• MPKE Chapter 6
• MPKE 6.4-6.6
• Steven Teles (2007). “Conservative Mobilization Against Entrenched Liberalism,” in The
  Transformation of American Politics: Activist Government and the Rise of Conservatism
  (Paul Pierson and Theda Skocpol editors). (Intro and Law Section only)

41. 4/30 – Impact on Politics and Policy –
• MPKE Chapter 14
• MPKE 14.5-14.7
• Paul Frymer. “Acting When Elected Officials Won’t: Federal Courts and Civil Rights
  (August 2003)

Sunday night May 4th – Research Papers Due at 11:59 PM