

PO 304 – Spring 2014
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Office hours: Wednesdays 1:00-3:00 and by appointment

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:

Murphy, Pritchett, Epstein and Knight (“MPEK”), - *Courts, Judges, and Politics*, 6th Edition

Lief Carter and Thomas Burke, *Reason in Law*, ***Eighth Edition***, Longman Press, 2010

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
 - Margaret Talbot. “A Risky Proposal: Is it Too Soon to Petition the Court on Gay Marriage?” *New Yorker*. January 18, 2010
 - L. Carter & T. Burke, Reason in Law, 7th ed. (2007), pp. 163-187 (“Law and Politics: The Case of Terry Schindler Schiavo”) – **THIS IS ON BLACKBOARD – FROM DIFFERENT EDITION**

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
 - Abby Goodnough, “Making it Clear That a Parking Space Isn’t,” *The New York Times*, 12/28/10 <http://www.nytimes.com/2010/12/29/us/29boston.html>
 - M. Puzo, *The Godfather* (1969), pp. 1-2
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?
 - William Felstiner, Richard Abel, and Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming,” *Law and Society Review* 15 (1980-1981): 631 - Can skim parts – but make sure you get the main terms and ideas
 - 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)
 - Lisa Bernstein, “Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry,” *The Journal of Legal Studies*, 1992 – **Read to Page 135 then skim from 135 to the end**

7. 1/31 Lawyers, Disputes, and Social Control

- MPKE Chapter 5
- MPKE 5.4, 5.5
- Lynn Mather, Craig A. McEwen, and Richard J. Maiman, "Divorce Lawyers at Work: Varieties of Professionalism in Practice," (2001) in Macaulay, Friedman and Mertz, *Law in Action*, 2007
- Josh Barro, "Why Becoming A Banker Instead Of A Lawyer Was The Best Life Choice I Ever Made," *Business Insider*, <http://www.businessinsider.com/why-becoming-a-banker-is-the-best-life-choice-i-ever-made-2013-7#ixzz2q0gv9wks>
- Segal, David, "Law School Economics: Ka-Ching!" *New York Times*, July 16, 2011, <http://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html?pagewanted=all>
- Feuera, Alan, "A Study in Why Major Law Firms Are Shrinking," *New York Times*, July 5, 2009, <http://www.nytimes.com/2009/06/07/nyregion/07law.html>

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

- Devah Pager. 2003. "The Mark of a Criminal Record." *American Journal of Sociology* 108(5): 937-75 – **Read Carefully and pay attention to the choices the research makes**

9. 2/5 – Why do People Comply with the Law? Deterrence and Legitimacy

- Tom Tyler, *Why People Obey the Law*, 1990, Chapter 4
- Steven Levitt, "White-Collar Crime Writ Small: A Case Study of Bagels, Donuts, and the Honor System," *The American Economic Review*, Vol. 96, No 2. (2006) pp. 290-294
- Katie Hafner, "Wrestling With the Gift of Grab," *NY Times* 6/14/05, <http://www.nytimes.com/2005/07/14/fashion/thursdaystyles/14THEFT.html?8dpc>

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

Assignment

- Mark F. Schultz, "Fear and Norms," "What Jambands Can Teach Us About Persuading People to Obey Copyright Law," in Macaulay, Friedman and Mertz, *Law in Action*, 2007

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*

- Lawrence Friedman, *American Law: An Introduction*, 1998, Chapter 10
- Richard Cortner, “The Nationalization of the Bill of Rights in Perspective,” in the Lanahan Readings in Civil Rights and Civil Liberties (David O’Brien ed), 2010

13. 2/14 Law, Government and Business

- Charles Wheelan, *Naked Economics*, Chapter 3 “Government and the Economy”
- Farah Stockman, *Red Tape Stifles Neighborhood Revitalization*, The Boston Globe, 10/29/13, <http://www.bostonglobe.com/opinion/2013/10/29/boston-restaurant-permits-red-tape-stifles-neighborhood-revitalization/qa1EW4P90K4ZoJdCu9NhqI/story.html>
- David Bates, “Lord of the Sties,” Boston Magazine, January 2014, <http://www.bostonmagazine.com/news/article/2013/12/31/anwar-faisal-worst-landlord-boston/>

14. 2/19 – *Trials and Litigation*

- Robert Kagan, *Adversarial Legalism*, Chapter 5
- MPKE Chapter 9
- MPKE 9.4, 9.5

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

- Robert Kagan, *Adversarial Legalism*, Chapter 7
- Myron Levin, “Saws Cut Off 4,000 Fingers a Year. This Gadget Could Fix That,” *Mother Jones*, May 16, 2013, <http://www.motherjones.com/politics/2013/05/table-saw-sawstop-safety-finger-cut>

16. 2/24 – Litigation and Policy Making Case Studies – Tobacco and Obesity

- Martha Derthik, *Up in Smoke*, Chapter 11
- Richard Epstein, What (Not) to do About Obesity: A Moderate Aristotelian Answer. *Georgetown Law Journal* 93 (4), 1361-1386.

III. Courts and Judicial Power

17. 2/26–*Judicial Review?*

- Robert McCloskey, (1960) *The American Supreme Court*, **Chapter 2**
- Marbury v. Madison
- Carter and Burke, Chapter 6

18. 2/28 - *Judicial Power and Independence?*

- Federalist 78
- MPEK Chapter 8
- MPEK 8.10
- James L. Gibson and Gregory A. Caldeira, “Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court,” *The Journal of Politics*, Vol. 71, No. 2 (2009)

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

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**

24. 3/21 – *Judicial Decision Making – Legal Reasoning and Statutory Interpretation –*

- 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
- *Gruiter v. Bollinger* (2003)

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
 - <http://www.scotusblog.com/2011/11/analysis-why-a-health-care-law-anyway/>
- Scotus Blog on the Mandate – Parts I, II, and III
 - <http://www.scotusblog.com/2011/12/analysis-health-cares-mandate-part-i/>
 - <http://www.scotusblog.com/2011/12/analysis-health-cares-mandate-part-ii/>
 - <http://www.scotusblog.com/2011/12/analysis-health-cares-mandate-part-iii/>
- Scotus Blog – Health Care’s Legal/Political fate
 - <http://www.scotusblog.com/2011/12/analysis-health-cares-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*

- *McColloch v. Maryland* (1819)
- *Wickard v. Fillburn* (1942)
- *Lopez v. US* (1995)
- *Gonzales v. Raich* (2005)

28. 3/31 - *The Process of Judicial Decision Making – The Agenda*

- MPEK Chapter 6
- MPEK 6.6
- MPEK Chapter 13
- MPEK 13.5

- Linda Greenhouse, “Bring me a Case,” The New York Times, <http://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html>
- Scotus Blog, Granting Cert....
 - <http://www.scotusblog.com/2011/08/examining-the-potential-for-certiorari-grants-to-aca-challenges/>

29. 4/2 - *The Process of Judicial Decision Making Continued* – Oral Arguments

- Timothy Johnson, Paul Wahlbeck and James Spriggs, (2006) “The Influence of Oral Arguments on the U.S. Supreme Court,” *American Political Science Review*, Vol 100
- Randy Barnett on Why the Mandate is Unconstitutional
 - <http://www.volokh.com/2012/03/09/understanding-justice-scalias-concurring-opinion-in-raich/>
- Marty Lederman in response
 - <http://www.volokh.com/2012/03/09/understanding-justice-scalias-concurring-opinion-in-raich/>
- Scotus Blog Preview
 - <http://www.scotusblog.com/2012/03/argument-preview-health-care-part-ii-fate-of-the-mandate/>
- **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
- Sarah Shullman, “The Illusion Of Devil’s Advocacy: How The Justices Of The Supreme Court Foreshadow Their Decisions During Oral Argument.” *Journal of Appellate Practice and Process*. 2004
- Predicting the Health Care Cases From the Oral Arguments, The Monkey Cage blog, <http://themonkeycage.org/blog/2012/03/29/predicting-the-health-care-decision-from-the-oral-arguments/>
- Scotusblog analysis of oral arguments
 - <http://www.scotusblog.com/2012/03/argument-recap-it-is-kennedys-call/>
 - <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
- Patrick Egan, Nathaniel Persily, and Kevin Wallsten, “Gay Rights” in *Public Opinion and Constitutional Controversy*, (Persily, Egan, and Citrin Eds), 2008

32. 4/9 Thu. 4/7 – *Judicial Decision Making – Attitudes, Policy Preferences, and Background*
- MPKE 10.6, 10.8, 4.7
 - Theodore Ruger, Pauline Kim, Andrew D. Martin and Kevin Quinn, “The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking,” *Columbia Law Review*, Vol. 104, No. 4 (2004)
33. 4/11 – *Judicial Decision Making – Rational Choice / Strategic*
- Franklin Roosevelt, *Undelivered Gold Clause Speech*
 - MPKE 13.3, 13.7
 - National Federation of Independent States v. Sebelius (2012)
 - Jeffrey Toobin, *The Oath*, (2012), Chapter 23
 - Jan Crawford, “Roberts switched views to uphold health care law,” CBSnews.com, http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/
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*
- Christina Boyd, Lee Epstein and Andrew Martin, “Untangling the Causal Effects of Gender on Judging,” *American Journal of Political Science*, 2010

- Adam Glynn and Maya Sen, “Identifying Judicial Empathy,” <http://scholar.harvard.edu/files/msen/files/daughters.pdf>
 - 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
- Charles Epp, (1998) *the Rights Revolution*, 1-25
- 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 Enforcement in US Labor Unions, 1935-85,” *American Political Science Review* 97: 483-99 (August 2003)

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