

POSC 646 (SPRING 2016)
SPECIAL TOPICS IN LAW & POLITICS:
COURTS, JUDGES, AND AMERICAN DEMOCRACY
Wednesdays, 6:30-9:15 pm
SSPA 102

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Regular Office Hours (SSPA 251): M, 10:30-12; W, 11:30-12. Appointments are not required but are advisable. Book your own appointment at:

<http://www.cla.csulb.edu/departments/polisci/advising/dr-jason-whitehead-advising-booking-calendar/>

“The government of the United States has been emphatically termed a government of laws, and not of men.” Chief Justice John Marshall

“We are under a Constitution, but the Constitution is what the judges say it is.” Chief Justice Charles Evans Hughes

Course Description and Goals. This seminar provides an intensive examination of the literature in political science and other related disciplines relating to the role of law, courts, and judges in the American political system. Along the way, we will be considering such issues as: the nature of law and judicial politics; the function of courts in the organization of American political power; the role of law in the organization of American society; the relationship between different social structures (class, gender, race, etc.) and law; and the determinants of judicial decision making. The literature on these subjects is extremely diverse and wide-ranging. No one seminar could possibly survey all that is going on. However, this seminar will introduce you to some of the most provocative and fruitful debates on these issues.

As a result of grappling with this material, I hope that you will be able to:

- Describe and critically analyze American cultural, social, and public perceptions of law, courts, and judges.
- Analyze the relationship between legal doctrine, political organizations, and legal institutions.
- Summarize and compare the processes and dynamics of courts to those of other branches of government.
- Describe and critically analyze debates over legal interpretation, especially constitutional interpretation, and the role of courts in American democracy.

- Compare and assess various strategies available to groups and individuals seeking to affect public policy through the courts.
- Explain and analyze how and why some policy issues get “judicialized” and others do not.
- Summarize and analyze empirical studies by judicial politics scholars related to all aspects of the work of courts and judges, especially judicial decision making.
- Assess the practical effectiveness of court decisions on various public policies and social movements.

Required Readings:

- *Books:*
 - Bickel, Alexander M. *The Least Dangerous Branch*
 - Epp, Charles R. *The Rights Revolution*
 - Ewick, Patricia & Susan L. Silbey. *The Common Place of Law*
 - McCann, Michael. *Rights at Work*
 - Peretti, Terri Jennings. *In Defense of a Political Court*
 - Rosenberg, Gerald N. *The Hollow Hope*
 - Segal, Jeffrey A. & Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*
 - Shapiro, Martin. *Courts: A Comparative and Political Analysis*
- *Various Book Chapters* available on BeachBoard
- *Various Journal Articles* available on JSTOR, Westlaw, and Lexis-Nexis (Log in through CSULB library website, using student account).

Assignments and Grading:

- **Class Participation (30%).** You will be expected to attend all class sessions and participate on a regular basis in class discussions. See appendix for course policy on excused absences. If for some reason you are attending class but are not prepared to participate in the discussion, please let me know before class begins. I will grade you on both the quantity and quality of your participation.
- **Two Analytic Essays (40% -- Each worth 20%) – Due online Mar. 6 and May 8, both at 11:59 PM.** These are 6-8 page papers analyzing the readings at a deeper level than we have a chance to do in class. See instructions posted on BeachBoard.
- **Term Paper (30%) – Due online, May 11, 9:15 PM.** This is a 12-15 page paper in which you delve more deeply into research related to one section of the course and apply it to an actual legal issue. See instructions posted on BeachBoard.

The following are the department’s grading standards for graduate students. Note that these standards are higher than the grading standards that are typical for undergraduates.

A = student demonstrates *outstanding proficiency* in relevant course objectives

B = student demonstrates *proficiency* in relevant course objectives
C = student demonstrates *partial proficiency* in relevant course objectives
D = student demonstrates *little proficiency* in relevant course objectives
F = student demonstrates *no proficiency* in relevant course objectives

Your Responsibilities as a Graduate Student. At a minimum, each week, you should read the assigned texts and be ready to discuss them intelligently in class. This means knowing the basic structure and arguments in the texts, but also interrogating the assumptions, logic, and evidence of the various authors. It also means developing a point of view, or at least a set of thoughtful questions, about the texts. You should be an active, critical, and tenacious reader. At the same time, remember that it is always easier to find the weakness of an argument than to appreciate its strength. You should always make a special effort to understand the author's point of view.

You must also spend a *significant* amount of time outside class working on the essays and term paper. I will give you as much feedback as I can by e-mail or during office hours. However, it is *your responsibility* to understand the written instructions, find appropriate sources, digest the information, and put together an accurate, insightful, and persuasive analysis.

However, your primary responsibility as a graduate student is not merely to complete the assigned work, but to train yourself as a professional. The assigned readings and class discussions are only a gateway into a vast landscape of literature that you will need to master on your own if you want to be proficient in this sub-field. Part of becoming a professional might also mean becoming a member of relevant professional organizations and subgroups that focus on public law and judicial politics. The major ones are: the American Political Science Association (www.apsanet.org), including APSA's "Law and Courts Section" (<http://lawcourts.org>), the Western Political Science Association (www.wpsanet.org), and the Law & Society Association (www.lawandsociety.org). There is always a significant student discount on membership dues, and membership usually comes with a subscription to the journals associated with these organizations. In addition to journals, you might also consider subscribing to the official e-mail discussion list of the APSA law and courts section, the official newsletter of the section; and the law and politics book review. All of these are available electronically at: <http://lawcourts.org> Reading these journals carefully can keep you up to date on the cutting-edge research being done in the field. Finally, especially if you are interested in advanced graduate study, you should begin attending professional conferences and think about presenting your own research at those conferences.

Specific course policies regarding paper submission, exceptions, makeups, late assignments, cheating and plagiarism, students with disabilities and course withdrawal can be seen in the appendix at the end of this syllabus.

Course Outline and Reading Schedule

I. The Purpose and Function of Courts in General

- Jan. 20:** Brian Tamanaha, “Three Themes,” from *On the Rule of Law: History, Politics, Theory* (BeachBoard)
- Ronald Dworkin, “Political Judges and the Rule of Law,” from *A Matter of Principle* (BeachBoard)
- Jan. 27:** Martin Shapiro, *Courts*

II. The Purpose and Function of U.S. Courts

- Feb. 3:** U.S. Constitution, Articles 3 and 6
- Alexander Hamilton, “Federalist #78” (BeachBoard)
- Marbury v. Madison* (BeachBoard)
- Cass Sunstein, “A Republic of Reasons,” from *The Partial Constitution* (BeachBoard)
- Feb. 10:** Alexander Bickel, *The Least Dangerous Branch*
- Feb. 17:** Terri Jennings Peretti, *In Defense of a Political Court*

III. Constitutional Interpretation and U.S. Judicial Power

- Feb. 24:** William H. Rehnquist, “The Notion of a Living Constitution,” *Harvard Journal of Law and Public Policy* 29: 401 (BeachBoard)
- Antonin Scalia, “Originalism: The Lesser Evil,” *University of Cincinnati Law Review* 57: 849 (1989) (BeachBoard)
- Robert Bork, Introduction to *The Tempting of America* (BeachBoard)
- Ronald Dworkin, “The Moral Reading and the Majoritarian Premise,” from *Freedom’s Law: The Moral Reading of the American Constitution* (BeachBoard)
- David Kairys, Introduction to “*The Politics of Law: A Progressive Critique* (BeachBoard)
- Richard Posner, “A Pragmatist Manifesto,” from *The Problems of Jurisprudence* (BeachBoard)

Stanley Fish, “Almost Pragmatism...” in Brint and Weaver, eds.,
Pragmatism in Law and Society (BeachBoard)

IV. The U.S. Supreme Court, Majority Will, and National Policy Making

Mar. 2: Robert Dahl, “Decision Making in a Democracy: The Supreme Court as a National Policy Maker” (BeachBoard)

Richard Funston, “The Supreme Court and Critical Elections,” *American Political Science Review* 69: 793 (1975) (JSTOR).

Jonathan D. Casper, “The Supreme Court and National Policy-Making,” *The American Political Science Review* 70:50-63 (1976), (JSTOR).

Richard H. Pildes, “Is the Supreme Court a ‘Majoritarian’ Institution?” (BeachBoard).

Sunday, Mar. 6, 11:59 PM: Analytic Essay #1 Due

V. Legal and Political Influences on U.S. Court Decisions

Mar. 9: Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*.

Mar. 16: “Symposium: *The Supreme Court and the Attitudinal Model Revisited* – Author Meets Critic” (BeachBoard)

Rogers M. Smith, “Political Jurisprudence, the ‘New Institutionalism,’ and the Future of Public Law,” *American Political Science Review* 82:89 (1988) (JSTOR)

Keith Whittington, “Once More Unto the Breach: PostBehavioralist Approaches to Judicial Politics,” *Law and Social Inquiry* 25:601-34 (2000) (JSTOR).

Howard Gillman, “What’s Law Got to Do With it?” *Law and Social Inquiry* 26:465 (2000) (JSTOR).

Mar. 23: Lee Epstein and Jack Knight, “Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead.” *Political Research Quarterly* 53: 625-661 (2000) (JSTOR)

Forest Maltzman, James F. Spriggs and Paul J. Wahlbeck, "Introduction" to *Crafting Law on the Supreme Court: The Collegial Game* (BeachBoard).

Lee Epstein and Jack Knight, "A Strategic Account of Judicial Decisions," in *The Choices Justices Make* (BeachBoard).

Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in Clayton & Gillman, eds., *Supreme Court Decision Making: New Institutional Approaches* (BeachBoard).

Mar. 30: No Class -- Spring Break

VI. Law, Courts and Social Movements

Apr. 6: Charles Epp, *The Rights Revolution*

Apr. 13: Gerald Rosenberg, *The Hollow Hope*

Apr. 20: Michael McCann, *Rights at Work*

Apr. 27: Michael McCann, "Reform Litigation on Trial," *Law and Social Inquiry* 17: 715-43 (1992) (JSTOR)

Gerald Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann," *ibid.*, pp 761-778 (JSTOR)

Gerald Rosenberg, "Positivism, Interpretivism, and the Study of Law," *Law and Social Inquiry* 21:435-55 (1996) (JSTOR)

Michael McCann, "Causal versus Constitutive Explanations (Or, on the Difficulty of Being so Positive...)" *ibid.*, pp. 457-82 (JSTOR)

VII. The Social Construction of American Legalism

May 4: Ewick & Silbey, *The Common Place of Law*

Sunday, May 8, 11:59 PM: Analytic Essay #2 Due

Tuesday, May 11, 9:15 PM: Term Paper Due

Appendix: Miscellaneous Course Policies

Paper Submissions. You must upload your assignments to the appropriate electronic “dropbox” on BeachBoard in one of the following formats: .doc, .docx, .txt, or .pdf. *I will not accept assignments submitted in any other way. I will not accept papers submitted in any other way.* You must save a copy of the electronic notification you receive when you successfully upload your papers to BeachBoard. In the event of a discrepancy as to whether or when you submitted your paper, this electronic notification is the only proof I will accept. You must also keep an electronic or paper copy of your paper.

Exceptions, Make-ups, and Late Assignments. Exam Dates and Paper Deadlines are firm! It is your responsibility to arrange your schedule around your academic responsibilities. In general, **exceptions will only be made for the following reasons, for which satisfactory documentation must be provided:** (1) Illness or injury to the student; (2) Death, injury, or serious illness of an immediate family member or the like; (3) Religious reasons (listed in California Education Code section 89320); (4) Jury duty or government obligation; or (5) University sanctioned or approved activities, such as artistic performances, forensics competitions, participation in research conferences, intercollegiate athletic activities, student government, required class field trips, etc.. **To be excused under #1 or 2, you must provide BOTH satisfactory documentation as soon as possible AND evidence of work completed on the assignment at the time of sickness or illness. To be excused under #s 3-5, however, you must provide me with satisfactory documentation at least 1 week prior to the exam or deadline.** If you have a legitimate excuse for missing an exam, I will arrange for an appropriate make-up exam. If you have a legitimate excuse for missing a paper deadline, we will work out an appropriate alternative deadline AS LONG AS you can demonstrate that you have already completed an appropriate amount of work on the assignment.

Grade Reduction for Late Papers. Written assignments are due at the *beginning* of the class period on which the deadline falls. **In the event of an unexcused late paper, I will immediately mark it down by a third of a grade for being late on the day it is due. I will then mark it down another third of a grade for every 24-hour period in which it is late.** For example, a paper due on Tuesday but not turned in until Thursday will be reduced by two-thirds of a grade -- a “B” paper would receive a “C+.” Note, however, that this does not apply to the required case briefs, which will only receive credit if they are turned in by the deadline. *You will not receive any credit for late briefs.* Make the most of the time you have to complete written assignments; no allowances will be made for last-minute problems with computers, networks, etc..

Cheating and Plagiarism. It is my policy to deal with any form of cheating and/or plagiarism by immediately giving a failing grade on the assignment and reporting you to the department and other administrative authorities for other possible sanctions. If you are having problems with the course material, please come and see me before doing something that could put your academic career in jeopardy.

Please note that “plagiarism” includes *any use* of the ideas or work of others as if they were one’s own, without giving appropriate credit. That means that *failing to cite your sources* is more than just a technical glitch -- it is plagiarism and will be handled as such. See separate paper instructions for citation guidelines and please see me if you are having difficulty understanding what is required in this area.

Students with Disabilities. I am completely committed to providing reasonable accommodations for any student with a verifiable physical or other disability. This may include alternative testing or note-taking arranged through Disabled Student Services. However, it is your responsibility to notify me in advance of the need for such an accommodation.

University Withdrawal Policy. It is your responsibility to withdraw from class if you wish to do so. I have no obligation to withdraw registered students who stop attending or completing assignments. **The deadline to withdraw from a class without a “W” for this semester is February 1, 2016.**

Withdrawal from a course after that date requires the signature of the instructor and the department chair, and is permissible only for serious and compelling reasons. For example, severe or extensive medical problems would be serious and compelling, but fear of receiving a final grade lower than desired, or a change in one’s work schedule would not be considered serious and compelling. If withdrawal is allowed, a “W” will appear on your transcript.

DURING THE FINAL THREE WEEKS OF INSTRUCTION (AFTER April 15, 2016) WITHDRAWALS ARE NOT PERMITTED EXCEPT IN CASES SUCH AS ACCIDENT OR SERIOUS ILLNESS WHERE THE CIRCUMSTANCES CAUSING THE WITHDRAWAL ARE CLEARLY BEYOND THE STUDENT’S CONTROL. THE CAUSE MUST BE DOCUMENTED. ORDINARILY, WITHDRAWALS IN THIS CATEGORY INVOLVE TOTAL WITHDRAWAL FROM THE UNIVERSITY. YOU WILL NEED THE APPROVAL OF THE COLLEGE DEAN AS WELL AS THAT OF THE CLASS INSTRUCTOR AND THE DEPARTMENT CHAIRPERSON FOR EACH COURSE FROM WHICH YOU WISH TO WITHDRAW.