

Judicial Politics, POSC 323/423
Fall Semester 2005
T,R, 10-11:15, Sears 541

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T, 12-1, Th, 9-9:30, 12:45-1:45;
& by appointment

Course Description and Goals

In the broadest terms, this course is principally concerned with exploring the points where law and politics meet in the United States and the role that judges and ordinary citizens perform at that intersection. We will examine the confirmation process for federal judges, particularly at the level of the U.S. Supreme Court (a timely subject right now, with President Bush's nomination of John Roberts!); the different methods that judges use to decide cases and to justify their rulings; the important place of the jury system in the American system of justice; and how the courts interact with other branches of government and with a vast array of political actors, including grassroots political activists and advocacy groups. In addition to these "process"-based questions, we will consider the courts' role in social policy and in the debates over the rights and obligations of democratic citizenship.

The *topics and readings* reflect a particular interest in the historical evolution of political institutions and in the use of litigation as an instrument of social reform. Although the focus of this course is on *judicial* policymaking, the larger phenomena of institutional development and of the courts' place within it are of special concern. As the great French chronicler Alexis de Tocqueville observed of the U.S. as early as the 1830's, *social conflicts* tend to get turned into *legal grievances* that are handled in the courts. If anything, what Tocqueville described during the antebellum period of American history has become even more pronounced since World War II. Indeed, the courts play a much more prominent role in policymaking in the U.S. than they do in some other advanced industrial democracies. In addition, then, to understanding why the courts are such central actors in American policymaking, we will look at the courts' relations with other governmental institutions; how interest groups and social-reform movements conceptualize and "mobilize" the law in pursuit of their policy goals and political visions; how ordinary citizens effect American justice through service on trial juries; the impact of court rulings on public policy and on "politics,"; and the "constitutive" role of law in American politics. Time constraints make it impossible to cover many important topics concerning judicial politics, but the hope is that this course will make students attentive to the complex interplay of law and politics during this semester and throughout their lives as citizens.

The course readings are deliberately rigorous and heavy in volume, designed to prepare students for advanced academic study regardless of the particular career paths they

pursue after Case. The readings are organized mostly (but not completely) in chronological and/or topical order; in most instances, we will pay close attention to historical context – in terms of what was going on within both the American legal system and the broader polity with respect to our course topics.

The main *course objectives* for students are: 1) the acquisition of, and ability to interrelate, different theories of judicial decision-making to different areas of law; 2) the development of analytical skills enabling students to comprehend and to evaluate different scholarly arguments; 3) the honing of students' oral and written communication skills; and 4) the gaining of an understanding of the historical, political, philosophical, and even psychological dimensions of constitutional and statutory law as judges have come to define it. The overarching goal is for students to stretch their minds in new directions and to reflect deeply on the issues raised in our readings and during class discussions. The course objectives will be advanced through careful reading and discussion of the assigned scholarly readings; through the conduct of each class session, which, among other things, will entail the application of different theories of law and the courts to the assigned readings and topics (this will be done as a class, sometimes in small groups, and sometimes in individual oral presentations); and through the constant use of synthesis and analysis in our class discussions and in students' preparation for the in-class examinations and the required paper. To enhance class discussion and knowledge of contemporary issues with which the courts are grappling, students are encouraged to read a major daily national newspaper. The *New York Times* tends to have the most comprehensive coverage of actions and issues concerning the U.S. Supreme Court and the lower federal courts.

This course is a *seminar* in which the class of students and faculty – a community – works *together* towards a depth and clarity of understanding that each of us might not achieve by working alone (this harkens back to Aristotle's notion of the value of "collective wisdom"). The success of any seminar depends directly on the preparation and cooperation of every one of us; thus, students must arrive at class having read and reflected on the reading assignments and questions posed in class. We want to promote the full participation of every member of the class, since only then will we be able to benefit fully from our group effort. So, be prepared to respond to ideas presented by others, not just always offering your own view. Be prepared, as well, to defend your claims with evidence and reasoned argument, but also be open to the persuasive arguments of others and, even, to change your mind. Don't hesitate to disagree with members of the seminar, but always express disagreements in civil terms, without personal attacks.

Readings

The following books can be purchased at the University Bookstore:

-Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (Cambridge; Harvard University Press, 2000). In paperback.

-Cornell W. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999). In paperback.

-Michael Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence: University Press of Kansas). In paperback.

-Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* (New Haven: Yale University Press, 1993). In paperback.

-John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980). In paperback.

-R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, D.C.: The Brookings Institution, 1994). In paperback.

-Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* (Philadelphia: Temple University Press, forthcoming October 2005).

-Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991). In paperback.

Note: The books by Clayton and Gillman, by Comiskey, and by Rosenberg are also on reserve at the Kelvin Smith Library (for a take-out period of 3 hours at any one time). When the book by Jason Pierceson has arrived, I will let you know, and we will determine whether we have sufficient time to include it in our study. His subject matter, on gay rights, falls late in the semester. Also, two readings from *The Federalist Papers* can be accessed on line, simply by typing in "Federalist Papers" and scrolling down to the appropriate number listed on the syllabus. Moreover, from time to time, I may assign a very short reading, whether from a newspaper or on line source, in order to enrich our discussions.

Undergraduate Course Requirements in a Nutshell

- class participation (worth 20%)
- in-class midterm exam, on Thursday, October 20 (worth 20%)
- 10-12 page analytical paper, due in class on Thursday, December 1 (worth 30%)
- final exam, to be held during final-exam week, TBA (worth 30%)

Graduate Course Requirements in a Nutshell

- class participation (worth 20%)
- one formal oral presentation (worth 10%)
- a 20-25 page research paper, due December 8 (worth 40%)
- in-class final exam, to be held during final-exam week, TBA (worth 30%)

Note: Be sure not to make any travel plans for the December holiday until you know your final-exam schedule! (For information regarding Case's strict final-exam policy, see the *Handbook for Undergraduate Students, 2005-06*, p. 76.)

Course Requirements and Assignments

Class Participation (20%)

Consistent attendance and active participation are indispensable to the success of any seminar, hence the one-fifth grade component. One cannot get the most out of the course readings without discussing them face-to-face with both classmates and professor. Seminar members will prod each other to think more deeply, more critically, and, hopefully, more creatively about the authors' arguments. Further, there is something about having to put into words and to *voice* one's silent thoughts that often brings about greater analytical sharpness and insight. Moreover, the collective health of the seminar depends on regular and informed participation; it is by collaboratively puzzling over the various contradictions, paradoxes, and ambiguities found in the world of judicial politics that intellectual energy will be generated in the seminar. An assessment will be made of both the frequency and quality of class contributions. Keep in mind that often times the most important form of class participation is the posing of questions -- including those that suggest one is utterly stumped (because chances are good that other students are, too!). Moreover, the more meaningful contributions tend to be those that are based on the use of good listening skills. After all, one cannot effectively respond to another person's claims without really understanding exactly what it is s/he is saying. To render our discussions as substantive and sharp as possible, students are expected to *bring the assigned readings to class* (i.e., those assigned for any given session).

As part of class participation, both undergraduate and graduate students will also be expected at some point to lead a discussion of a particular reading or topic. While the seminar atmosphere will be one where we are, in essence, engaging in an intellectual conversation, developing more formal public-speaking skills is an asset in today's world.

One Formal Oral Presentation by Each Graduate Student (worth 10%)

Graduate students will each make one formal oral presentation on an outside reading that helps to illuminate one of our topics (to be decided in consultation with me). This requirement is due to the fact that good presentation skills are important in order to perform well at academic conferences as well as in the role of a teacher. The presentation must be made before December 1st (since there is always a mad rush to finish the syllabus during the last week of classes).

In-Class Midterm and Final Exams (worth 20% and 35%, respectively)

The midterm and final will be closed-book, closed notebook exams. The midterm will address readings and relevant lecture material covered up until one week before the scheduled date of the exam. (As noted, graduate students are not subject to the midterm-

exam requirement.) While the final exam will focus on readings drawn roughly from the second half of the course, it will, to some extent, be cumulative. Both exams will consist of a choice of one essay out of two, each with multiple parts. Well in advance of each exam, a study sheet will be provided, identifying the relevant readings, concepts, theories, and so forth. A proctored make-up exam will be given only under the most extenuating circumstances, with prompt notification and documentation provided to me. *Note:* The make-up exam tends to be harder than the regularly scheduled exam for the simple reason that the more obvious questions tend to get asked on the regularly scheduled exam. Furthermore, the final exam for graduate students is pitched at a higher level of intellectual sophistication than it is for undergraduates (although I always aim for rigor for both).

Analytical Paper for Undergraduates (worth 30%)

A 10-12 page analytical paper is required of undergraduate students, and it will *either* be on an assigned topic drawn from the course readings *or* on a topic that the student chooses in consultation with me (with perhaps a mix of course readings and outside readings). This assignment is not a research paper per se; the purpose is to have you engage in important intellectual processes, such as synthesis, comparison and contrast, analysis of assumptions and evidence, evaluation of conclusions, and so forth. However, it could have a very strong empirical bent, even as it would draw heavily on theoretical material gleaned from the course. For example, you could have a strong “field work” component where you spend time observing jury trials, interviewing lawyers and those advocacy groups and interest groups that make use of the courts to promote their goals, or examining the voting records of local judges. Once undergraduate students are settled into the course, we will discuss what form you as individuals feel the paper ought to take – that is, what form you will individually most benefit from, given your educational interests and goals. Perhaps the paper might be the launching pad for a senior honors thesis or, eventually, a M.A. or doctoral thesis. Your papers are due at the start of class on December 1; only hard copies will be accepted (no electronic papers). To preserve equity, late papers will be penalized; the grade will be reduced by 1/3 for each day a paper is late (e.g., a “B+” paper would be given a “B” if submitted one day late). Late papers must be signed and dated by Department staff and placed in my Department mailbox (or, if it fits, under my office door).

Given the importance of strong writing skills to success in and beyond college (and graduate or professional school, for that matter), students are encouraged to consult *The Everyday Writer* as an excellent reference tool. (The Writing Center likely has a copy, as does the SAGES office in Crawford.) If helpful, students should also make use of the staff at the Writing Center at Case (which will hold both daytime and evening hours), of the Peer Writing Crew (see <http://tutortrac.case.edu>), and of any on line resources posted on the University’s Blackboard site. I am also happy to review drafts of papers so long as you give me ample time to provide feedback. (I am maintaining responsibilities to undergraduate honors-thesis students and doctoral students at my home institution, the University of Massachusetts/Boston; I am also teaching in SAGES First Seminar this

term, which is writing-intensive for both students and faculty. As such, I need sufficient advance notice if feedback is desired!)

Research Paper for Graduate Students (worth 40%)

The 20-25 page research paper, due at the start of class on our last day of classes, will be on a topic of your choice, albeit decided in consultation with me. I will schedule individual appointments so that we can discuss the most useful sort of research paper, given your career trajectory. Also, be sure to read the above paragraph regarding writing resources, should they prove useful. Academic writing is, of course, a very special breed!

Course Policies

Seminar obligations: Students must always remember that this course is a *seminar*, in which students carry heavier obligations to each other as individuals and to the class as a whole than they do in large lecture classes (in which a student's absence may well go unnoticed). One of those obligations is to arrive at class having completed and reflected on the assigned readings and any "thought" questions posed in class.

Arrive and depart on time: Students are expected to make a regular habit of arriving at, and departing from, class sessions *on time*. Apart from the educational benefits, arriving at – and departing from -- class on time prevents the inevitable distraction and obstruction to the flow of the class. Penalties will be imposed for unexcused lateness and absences, since they affect "class participation" and disrupt group dynamics.

Turn off electronic devices: To (further) minimize disruption to the class, students must turn off all electronic devices for the duration of each class session.

Civility: A basic requirement in all classes is that differences of viewpoint be stated in civil terms and not in the form of a personal attack or derision. A failure to maintain civility will result in a serious penalty to the course grade (since it tends to have a chilling effect on class discussion). It may be helpful to think of the seminar as a *continuing conversation*. It is not "talk radio," which thrives on humiliation as a form of entertainment!

Regarding papers: As noted, papers are due at the *beginning of class* on the relevant due date and in hard copy; electronic versions will not be accepted unless a hard copy is also provided to me on time. The paper format should be in 12 point Times New Roman font, 1-inch margins, all around and double-spaced throughout. I reserve the right to grant extensions in truly extraordinary circumstances, with proper documentation required (although the student will have to accept the possibility of not receiving a grade on the assignment until after the semester has ended).

In case of disability: If you have any sort of disability that inhibits your learning under usual circumstances, please inform your instructors in all classes, including this one. You should contact Susan Sampson, the Coordinator of Disability Services (Kelvin Smith

Library, Room 105, 368-5230, sms17@cwru.edu). Her office handles the relevant documentation of disabilities and provides guidance to faculty and students on whatever adjustments are necessary.

Academic Dishonesty: Academic Dishonesty in any form is not tolerated, and that includes plagiarism. It is a breach of ethical standards upon which universities depend; therefore, it will be dealt with severely, in accordance with the policies and procedures set forth in the *Handbook for Undergraduate Students, 2005-06*, pp. 73-75. Students are expected to read this section of the Handbook especially carefully. Since plagiarism is the most common offense, you should not hesitate to ask me any questions you may have regarding the difference between legitimate, documented paraphrasing and plagiarism. For a quick review, visit www.plagiarism.org

My Accessibility is to you is important to me: If you have any questions or concerns, please be sure to talk with me, preferably face-to-face. Even if you don't have a problem, though, I hope you will use me as a sounding board as you formulate course-related ideas as well as career possibilities. If you cannot see me during office hours, do not be bashful in requesting an alternate time. Talking with students outside of class is not only a part of my professional responsibility, but also a source of genuine fulfillment for me. *Note:* I will be asking students to initiate the conversation with me, early in the semester, about what type of paper they would like to do. Conversations can then be ongoing, of course, about the topic, approach, methods, relevant literature, and so forth.

Use e-mail for administrative or advising matters only: I prefer to reserve class time and office hours, not e-mail, for dealing with substantive course material (e.g., the explanation of concepts). Given the large volume of professional e-mail that I field each day, it is more efficient for me to go over course material face-to-face than through e-mail. And I'm more apt to explain things more clearly that way, anyhow!

Finally... have fun! Although not a "course policy," try to lead a fairly balanced life, with time given to recharging and refreshment. One simply cannot study all the time and be effective – or very happy. Moreover, keep your grades in perspective. While a disappointing grade on an assignment or test might seem at the time to be a real cause for dismay, try to take the long view. You're really smart, and you will rebound. And later in life, a poor grade on an assignment at Case will pale in importance to the fulfillment you will derive from (or may now derive from) your career, from your kids, from your friends and community, from your travels, and whatever else that brings you satisfaction and pleasure. Have faith that *that* will be the case.

Course Schedule

PART I: JUDICIAL POLITICS: HISTORICAL AND THEORETICAL DIMENSIONS

Week 1- Introduction to the Course; Historical Background on U.S. Constitution

Tuesday, August 30: Seminar-Members' Introductions and Course Overview.

Thursday, September 1: Discuss: Is “judicial politics” an oxymoron? Also, start on historical background on the U.S. Constitution. Gillman and Clayton, “Introduction,” pp. 1-7; James Madison, *Federalist Papers* #10 (in Google, type in “Federalist Papers” and scroll down to #10).

Week 2 – History, cont.; Normative Issues Concerning the Courts and Democracy

Tuesday, Sept. 6: Alexander Hamilton, *Federalist Papers* #78 (available via internet; follow instructions for Madison but scroll down to #78); Rosenberg, pp. 1-8; Melnick, pp. 3-22; Abramson, pp. 1-13.

Thursday, September 8: Ely, pp. 1-8; Melnick, pp. 23-40; Comiskey, pp. 1-18.

Week 3- Theoretical Perspectives on Courts and Politics

Tuesday, September 13: Rosenberg, pp. 9-36; Melnick, pp. 41-61; Ely, pp. 11-41.

Thursday, September 15: Clayton, “The Supreme Court and Political Jurisprudence: Old and New Institutionalisms,” in Clayton and Gillman, pp. 15-41.

Week 4- Theoretical Perspectives, cont.

Tuesday, September 20: Lee Epstein and Jack Knight, “Mapping out the Strategic Terrain: The Informational Role of *Amici Curiae*,” in Clayton and Gillman, pp. 215-36; Howard Gillman, “The Court as an Idea, Not a Building (or a Game)...,” in Clayton and Gillman, pp. 65-87; Sue Davis, “The Chief Justice and Judicial Decision-making: The Institutional Basis for Leadership in the Supreme Court,” in Clayton and Gillman, pp. 135-54.

Thursday, September 22: Critical Legal Studies, Critical Race Theory, and Feminist Jurisprudence (no assigned reading but important lecture material and class discussion).

PART II: THE PROCESSES OF JUDICIAL POLITICS

Week 5- The Politics of Judicial Selection

Tuesday, September 27: Comiskey, pp. 20-103.

Thursday, September 29: Comiskey, pp. 103-33; Baum, “Recruitment and the Motivations of Supreme Court Justices,” in Clayton and Gillman, pp. 201-14.

Week 6- Judicial Selection, concluded; The Politics of Jury Selection

Tuesday, October 4: Comiskey, pp. 134-94.

Thursday, October 6: Abramson, pp. 99-176.

Week 7- The Law and Politics of Constitutional Interpretation

Tuesday, October 11: Ely, pp. 43-134.

Thursday, October 13: Ely, pp. 135-83.

Week 8- The Law and Politics of Jury Decision-Making

Tuesday, October 18: Abramson, pp. 17-95

Thursday, October 20: **In-Class Midterm Exam.**

Week 9- Finish the Law and Politics of Jury Decision-Making

Tuesday, October 25: **Fall Break – No Classes!**

Thursday, October 27: Abramson, pp. 179-250.

PART III: THE COURTS' ROLE IN SOCIAL POLICY

Week 10- Mandatory School Busing for Racial Integration

Tuesday, November 1: Rosenberg, pp. 39-106.

Thursday, November 3: Rosenberg, pp. 107-56.

Week 11- Special Education Policy; Start on Welfare Policy

Tuesday, November 8: Melnick, pp. 135-79.

Thursday, November 10: Melnick, pp. 41-61; Davis, pp. 1-5.

Week 12- Welfare Policy

Tuesday, November 15: Melnick, pp. 41-111; Davis, pp. 6-39.

Thursday, November 17: Melnick, pp. 112-132; Davis, pp. 40-145.

Week 13- The Law and Politics of Sexual Matters: Abortion

Tuesday, November 22: Rosenberg, pp. 173-270.

Thursday, November 24: **Happy Thanksgiving – No Classes!**

Week 14- The Law and Politics of Sexual Matters: Gay Rights

Tuesday, November 29: Excerpts from Pierceson (TBA).

Thursday, December 1: Finish Pierceson. **Undergraduates' Papers Due.**

Week 15- Assessing Judicial Politics and Discourse

Tuesday, December 6: Rosenberg, pp. 336-43; Melnick, pp. 235-83. **Graduate Students' Papers Due.**

December 8: Select two articles of your choice (but not my piece!) from Clayton and Powell to bring to the final discussion.

December 13-21: Final Exam Period. Date and time of exam TBA.

HAPPY HOLIDAYS!