

<b>TOPICS IN POLITICAL SCIENCE:                      COURTS &amp; PUBLIC POLICY                      POSC 4931                      MARQUETTE UNIVERSITY, FALL 2011</b>			
<u>Instructor Information:</u>	Professor Paul Nolette, J.D., Ph.D. paul.nolette@marquette.edu (414) 288-5821	<u>Class Time:</u>	Mondays & Wednesdays 2:00pm – 3:15pm
<u>Office:</u>	William Wehr Physics Room 402		
<u>Office Hours:</u>	Mondays & Wednesdays 10:00am – noon, 3:30pm – 5:00pm and by appointment	<u>Class Location:</u>	William Wehr Physics Room 212

**COURSE DESCRIPTION:**

In his classic *Democracy in America* in 1835, Alexis de Tocqueville remarked: "There is almost no political question in the United States that is not resolved sooner or later into a judicial question." While this may have been an exaggeration in the nineteenth century, Tocqueville's observation has particular resonance today. Courts are frequently called upon to resolve controversial issues and decide cases affecting important public policies and, by extension, millions of Americans. Some of these decisions are based upon the Constitution; many others upon statutes or the common law.

This course explores the American judiciary's significant role in public policy, with an emphasis on the modern post-New Deal era. Throughout the course, we will explore the major characteristics of the modern judiciary and how and why the courts have become so active in public policy in the United States. We will also examine the courts' relationship with other governmental institutions, including Congress, the president, executive agencies, the states, and political parties. We will also consider whether the courts' interventions ultimately help produce better public policy. Coverage includes a variety of policy areas, including desegregation, bilingual education, disability rights, criminal law, and torts.

**REQUIRED TEXTS:** There are five required texts for this course, available at Bookmarq and Sweeney's:

- (1) Robert Kagan, Adversarial Legalism: The American Way of Law (Cambridge, MA: Harvard University Press, 2001)
- (2) Thomas Burke, Lawyers, Lawsuits, and Legal Rights (Berkeley, CA: U. of California Press, 2002)
- (3) David O'Brien, Storm Center: The Supreme Court in American Politics, 8th Edition (New York: W.W. Norton & Co., 2008)
- (4) Peter Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (enlarged edition) (Cambridge, MA: Harvard University Press, 1987)
- (5) Ross Sandler and David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (New Haven, CT: Yale University Press, 2003)

In addition to these texts, additional required material will be made available on D2L.

**COURSE EXPECTATIONS AND REQUIREMENTS:**

- (1) **Class Participation and Online Comments (20%).** Active participation will be an important component of your grade in this class. I expect everyone to come on time and prepared for class and ready to actively discuss the readings and topics for the day. Quality participation includes engaging with the readings, expressing one's own opinions of relevant issues on the topic (while respecting other students' opinions and experiences), and asking questions when you need additional clarification.

In addition to participation during class, you will also be expected to actively read and participate in the online class discussion I will set up on D2L. It will be to your benefit to check this discussion area frequently, as I will post reading and discussion questions on D2L prior to each class to help focus your reading and the subsequent class discussion. You will also have two types of assignments involving this online discussion. **First**, throughout the semester each student must post at least two entries (no more than approximately 200-300 words) providing your reaction to the readings or a current news event involving the courts. (This is not simply a summary of the reading; rather, you may use these posts to address questions you thought of during the readings, anything you agree or disagree with, things you need more clarification about, etc.). To provide you some flexibility, it will be up to you when in the semester you would like to post. **Second**, in addition to your two discussion entries, students will have an opportunity to comment on these posts as a way to help their participation grade. These comments will be short (no more than 150 or so words) reactions to the discussion questions I post or to the posts of other students. This will especially give students who are less comfortable speaking in class a chance to actively participate in the discussion. I certainly do not expect you to comment on every post, but I do expect that you will keep up with the online discussion. Your online comments will also be an additional way for you to demonstrate that you are engaging with the readings.

- (2) **Two short papers (15% each).** In lieu of a midterm exam, you will be required to complete two short paper assignments. These papers will require you to analyze the central issues we have discussed to that point in the course. Each paper will be approximately 4-5 double-spaced pages in length. Paper #1 will be due on Monday, October 3. Paper #2 will be due on Monday, November 7.
- (3) **One final research paper assignment (25%).** For this assignment, you will pick an area of public policy of interest to you and explore the courts' influence in your chosen policy area. While the area of public policy is open, it must be sufficiently different from the specific cases we cover in class. In the paper, you will want to explain the policy issues involved, mention the courts' role in this policy area, explain how and why the courts became involved, and identify the actors and institutions who were (or should have been) involved in the implementation of the court decision(s). You should rely upon a thorough search of relevant newspapers, magazines, books, and journal articles to help you determine the impact (or lack of impact) the court had on your chosen policy area. You will also want to incorporate the readings from the class into your paper. We will discuss a proper method for selecting a policy area early in the semester. I must approve all paper topics ahead of time, and an approximately 1 page paper proposal will be due by Friday, October 14. The final paper will be approximately 8-10 double-spaced pages for undergraduate students and 15 double-spaced pages for graduate students. This final paper will be due on Friday, December 9.

- (4) **Final Exam (25%).** The final exam will consist of several short essay questions concerning broad themes addressed in the course. The exam will be cumulative and closed-book. It will take approximately two hours to complete. The final exam is scheduled for December 13th at 1PM.

Late assignments:

I expect all students to complete required assignments when they are due. If you are unable to complete an assignment or take an exam for a compelling reason you must contact me **before** the assignment is due. Otherwise, the assignment will be marked down 1/2 of a letter grade for each day past the deadline.

**SUMMARY OF GRADING COMPONENTS:**

<u>Class Participation:</u>	20%
<u>Short Paper #1:</u>	15%
<u>Short Paper #2:</u>	15%
<u>Final Examination:</u>	25%
<u>Final Paper:</u>	25%

**GRADING SCALE:**

<u>Grade</u>	<u>Achievement</u>	<u>Grade Points</u>	<u>Cut-off</u>
A	Superior	4.0	93+
AB		3.5	87-92.9
B	Good	3.0	82-86.9
BC		2.5	77-81.9
C	Satisfactory	2.0	72-76.9
CD		1.5	67-71.9
D	Minimum Passing	1.0	60-66.9
F	Failing	0.0	Below 60

**STUDENTS WITH DISABILITIES:** If you have a disability for which you are requesting an accommodation, you are encouraged to contact the University's Office of Disability Services within the first week of classes. For more information, contact the Office of Disability Services in Marquette Hall, Suite 005 or at (414) 288-1645. If you require any accommodations for exams or other assignments, you must notify me (along with all required documentation) at least one week in advance of the assignment due date.

**ACADEMIC HONESTY:** As noted in the Undergraduate Bulletin, Marquette University demands the strictest honesty and integrity of students in their various academic tasks. **Academic dishonesty of any type, including plagiarism, is completely unacceptable and will result in a failing grade for both the assignment and the course.**

- What is Plagiarism? The Undergraduate Bulletin defines plagiarism in the following manner: "Plagiarism is intellectual theft. It means use of the intellectual creations of another without proper attribution. Plagiarism may take two main forms, which are clearly related: 1. To steal or pass off as one's own the ideas or words, images, or other creative works of another and 2. To use a creative production without crediting the source, even if only minimal information is available to identify it for citation."

- If you use another person’s writings or ideas in your own writing, you must provide a citation to the original material. If you have any doubt about the need to provide a citation to a source, it is better to be on the safe side and provide a citation. If you have any questions about this policy, please discuss it with me.

**CLASS AND READING ASSIGNMENT SCHEDULE:**

**Disclaimer:**

I reserve the right to change this syllabus as necessary throughout the semester. I expect that any such changes will be rare, but in this event I will notify the class of any and all changes well in advance.

**NOTE:**

In this schedule, an asterisk (“\*”) next to a reading indicates material I will post on D2L prior to class.

**PART I. THE COURTS IN AMERICAN POLITICS**

**8/29 (M):** Course Introduction

*No Reading Assignment*

**8/31 (W):** *Reading Assignment:* (1) O’Brien, Chapters 1 and 2

**9/5 (M):** Labor Day (No Class)

**9/7 (W):** *Reading Assignment:* (1) O’Brien, Chapter 3 (pp. 103-141, 152-159) and Chapter 4 (pp. 160-182, 205-230)

**9/12 (M):** *Reading Assignment:* (1) O’Brien, Chapter 5 (pp. 231-240, 248-303) and Chapter 6 (pp. 304-307, 313-359)

**PART II. THE COURTS AT THE CROSSROADS OF LAW AND POLITICS: ISSUES AND QUESTIONS**

**9/14 (W):** *Reading Assignment:* (1) \*Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policymaker,” *Journal of Public Law* (1957)  
(2) \*Jonathan Casper, “The Supreme Court and National Policy Making,” *American Political Science Review* (1976)  
(3) \*R. Shep Melnick, “Congress and the Supreme Court in a Partisan Era,” Policy Brief, Oxford Centre for Socio-Legal Studies (2007)

**9/19 (M):** *Reading Assignment:* (1) \*Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* (1976)  
(2) \*Donald Horowitz, The Courts and Social Policy, Chapter 2 (1977)

**9/21 (W): Reading Assignment:** (1) Robert Kagan, Adversarial Legalism, Preface and Chapters 1-2  
(2) Thomas Burke, Lawyers, Lawsuits, and Legal Rights, Introduction

**9/26 (M): Reading Assignment:** (1) Kagan, Adversarial Legalism, Chapter 3  
(2) Burke, Lawyers, Lawsuits, and Legal Rights, Chapter 1

**9/28 (W): Reading Assignment:** (1) Sandler and Schoenbrod, Democracy by Decree, Introduction and Chapters 1 and 2

### **PART III. THE COURTS AND DESEGREGATION**

**10/3 (M): PAPER #1 DUE**

**Reading Assignment:** (1) \*Stephan and Abigail Thernstrom, America in Black and White, chapter 12 (1997)  
(2) \*Orfield, Must We Bus?, Chapter 1 (1978)  
(3) \*Plessy v. Ferguson (1896), Brown v. Board of Education I (1954) and II (1955)

**10/5 (W): Reading Assignment:** (1) \*Steven Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act, Chapter 3  
(2) \*Green v. County School Board (1968), Swann v. Charlotte-Mecklenburg Board of Education(1971)

**10/10 (M): Reading Assignment:** (1) \*Keyes v. School District No. 1, Denver (1973), Milliken v. Bradley (1974), Parents Involved in Community Schools v. Seattle School District No. 1 (2007)  
(2) \*Armor, Forced Justice, Chapter 1 (1995)  
(3) \*Orfield, Must We Bus?, Chapter 4 (1978)

### **PART IV. BILINGUAL EDUCATION AND TITLE IX**

**10/12 (W): Reading Assignment:** (1) \*Lau v. Nichols (1974)  
(2) \*Rachel F. Moran, "The Story of Lau v. Nichols," in Olivas and Schneider, eds., Education Law Stories (2008)

**10/14 (F): PAPER PROPOSAL DUE (APPROX. 1 PAGE)**

**10/17 (M): Reading Assignment:** (1) \*Gareth Davies, See Government Grow, chapter 6 (2007)  
(2) \*Betsy Levin, "An Analysis of the Federal Attempt to Regulate Bilingual Education," Journal of Law and Education (1983)

**10/19 (W): Reading Assignment:** (1) \*John Skrentny, The Minority Rights Revolution, Chapter 8

- 10/24 (M): Reading Assignment:** (1) \*Earl Dudley and George Rutherglen, “Ironies, Inconsistencies, and Intercollegiate Athletics,” *Virginia Journal of Sports and the Law* (1999)  
(2) \*Cohen v. Brown University 991 F.2d 888 (1<sup>st</sup> Cir., 1993)

**PART V. DISABILITY RIGHTS**

- 10/26 (W): Reading Assignment:** (1) Burke, Lawyers, Lawsuits, and Legal Rights, Chapter 2  
(2) \*Ruth Colker, The Disability Pendulum, chapter 3 (2005) (pp. 69-89 only)
- 10/31 (M): Reading Assignment:** (1) \*R. Shep. Melnick, “The Courts, Congress, and Programmatic Rights” in Harris and Milkis, eds., Remaking American Politics (1989)  
(2) \*Sutton v. United Airlines (U.S. 1999), *PGA Tour v. Martin* (U.S. 2001)
- 11/2 (W): Reading Assignment:** (1) Sandler and Schoenbrod, Democracy by Decree, Chapters 3-4

**PART VI. CRIMINAL JUSTICE AND INSTITUTIONAL REFORM**

- 11/7 (M): PAPER #2 DUE**  
*Reading Assignment:* (1) Kagan, Adversarial Legalism, Chapters 4 and 5  
(2) \*McCleskey v. Kemp (1987), *McCleskey v. Zant* (1991)
- 11/9 (W): Reading Assignment:** (1) \*Cooper, Hard Judicial Choices, Chapters 6 and 7 (1988)  
(2) \*Wyatt v. Stickney (1972) and subsequent orders, *Youngberg v. Romero* (1982)
- 11/14 (M): Reading Assignment:** (1) Sandler and Schoenbrod, Democracy by Decree, Chapters 5-9 and Conclusion

**PART VII. LITIGATION AND ITS DISCONTENTS: THE POLITICS OF TORTS**

- 11/16 (W): Reading Assignment:** (1) Kagan, Adversarial Legalism, Chapters 6 and 7
- 11/21 (M): Reading Assignment:** (1) Schuck, Agent Orange on Trial, Chapters 1-5
- 11/23 (W): Thanksgiving Break (No Class)**

**11/28 (M): Reading Assignment:** (1) Schuck, Agent Orange on Trial, Chapters 6-10

**11/30 (W): Reading Assignment:** (1) Schuck, Agent Orange on Trial, Chapters 11-end

**12/5 (M): Reading Assignment:** (1) Burke, Lawyers, Lawsuits, and Legal Rights, Chapters 3-4

**PART VIII. CONCLUSION**

**12/7 (W): Reading Assignment:** (1) Kagan, Adversarial Legalism, Conclusion

(2) Burke, Lawyers, Lawsuits, and Legal Rights, Chapter 5

(3) \* Christopher Busch, David Kirp, and Daniel Schoenholz, "Taming Adversarial Legalism" *NYU Journal of Leg. & Public Policy* (1999)

**12/9 (F): FINAL PAPER DUE**

**12/13 (T): FINAL EXAM (1:00-3:00 PM)**