(DRAFT)

PSC 5321 / Seminar in Public Law: Judicial Politics

Spring 2010

Room: xx

Meeting Time: Monday / time

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Overview: Much has been written about the judiciary as a political institution. Indeed, two out of three presentation panels at the most recent APSA meeting were dedicated to study of Public Law from this perspective. This graduate seminar is thus an occasion to study some of the important books and articles within the several branches of this literature. We begin with comparative examination of the basic logic of courts and study different theoretical models accounting for the creation of constitutional courts across the globe. Segueing, we then explore the origins and essence of judicial power in the American case, paying particular attention to the historical and theoretical frameworks within which these debates are framed. Our attention then shifts to the study of judicial behavior, where we confront argument both for and against the highly influential 'attitudinal' and 'strategic' models of prediction. Finally, we close out the semester with brief examination of the empirically based research that questions the role the U.S. Supreme Court has played in securing civil rights. This course should be especially relevant to those with an interest in American political institutions and development, Public Law, and comparative constitutional systems. Furthermore, while normative theory and constitutional interpretation are not the central focus of most of the readings, concern for these topics will always remain part of our weekly discussions. Finally, this seminar will remain relevant to any student looking to deepen their understanding of the methodological aspects of social science research, including: question and theory generation, project design, and hypothesis testing.

Class Discussion: This seminar is emphatically not a lecture class, so you are all expected to come to class prepared to fully participate in the discussion of the readings. Each week a different member of the class will lead discussion, beginning with a brief overview and critique of the readings. All students will post ideas or suggestions for discussion on blackboard and the student responsible for that week's seminar will try to fashion the concerns of the collective into a workable discussion agenda. This agenda should challenge us to a comprehensive discussion of each piece's theoretical framework, the strength of its arguments, and its substantive importance and overall quality. By the end of each discussion we should all know at least the following: what question does this set of readings purport to answer? What explicit and implicit assumptions and theories regarding the nature of courts and law does each author embrace? How good are the arguments and the evidence? What have the authors failed to teach us that they should have included? How do the readings inform and possibly challenge more normatively focused studies of Public Law?

Course Requirements: In addition to "incisive and informed" participation in every discussion, and occasionally leading discussion with "intensely provocative critical reflections and penetrating questions," you will be required to produce: two short, take-home, analytic essays (no more than 1000 words); and one longer paper -- subject and format to be agreed upon by individuals and myself (see some options below). Grades for the seminar will be calculated as follows: participation in class discussion 10%; leadership of assigned discussion(s) 10%; analytic essays 30%; final paper 50%.

The longer paper should be useful to the student within the logic of their particular graduate "journey." (Cue background music… "to everything there is a season… turn, turn, turn.") For first and second year students, I recommend tackling a conference/article quality paper of 20-30 pages on a judicial politics topic of your choice. For more advanced students, options also include: developing a judicial politics related research prospectus for dissertation work; answering a practice comprehensive exam question; writing a 20 page review essay style paper assessing the work of one of the authors we read situated among other works we have not read; or writing a 15 page literature review style essay paper taking an in-depth look at one or more theories we read about and developing an alternative hypothesis to your dissertation thesis from it / them. In all cases, students must make arrangements and sit down with me by the fourth week of the semester to discuss and agree upon your long paper assignment. All are required to arrange a second, progress-check, meeting with me by the eighth week of the semester. Long-papers are tentatively due May 3rd and the practice comp question will be assigned on TBD.

Books to buy, borrow, or otherwise get your hands on:

McCloskey, Robert G. any addition. *The American Supreme Court*. Chicago: U of Chicago Press.

Whittington, Keith. 2008. *The Political Foundations of Judicial Supremacy*

Segal, Jeffery A. and Harold J. Spaeth. 2002. *The Supreme Court and The Attitudinal Model Revisited.* Cambridge: Cambridge University Press

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press: 1-186.

Perry, H.W. Jr. 1991. *Deciding to Decide: Agenda Setting in the US Supreme Court*, Cambridge: Harvard U Press.

Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: UC Press.

Course Packet (available at xxx)

Schedule, Readings and Due Dates:

Date Topic and Readings

Jan 11 **Introduction**

I. The Global Spread and Social Origins of Judicial Power

A. *Historical and Functional models* (readings to be revised)

Tate and Villinder. 1995. *The Global Expansion of Judicial Power*, NY: NYU Press 1-24.

Epstein, Lee, et al. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35: 117-164.

Shapiro, Martin 1981. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press.: 1-64.

Sweet, Stone. 1999. "Judicialization and the Construction of Governance" *Comparative Political Studies*, 32: 147-184

Jan 18 **Martin Luther King Holliday –No Seminar**

Jan 25 **B. *Political models***

Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge U Press: 1-64.

Hirschl, Ran. 2004. *Towards Juistocracy – The Origins and Consequences of the New Constitutionalism.* Cambridge: Harvard University Press:1-17, 30-99.

Moustafa, K. 2003. "Law Versus the State: The Judicialization of Politics in Egypt." *Law and Social Inquiry* 28: 883-930.

Vanberg, Georg 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *AJPS.* 45: 346-361.

Feb 1 **II. The Origins and Essence of Judicial Power in America**

A. *Historical Precepts and Some Doubts*

Gillman, Graber, and Whittington. forthcoming. *American Constitutionalism*. Vol 1: draft chapters 2-3: approx 93 pages.

Graber, Mark. A. 1999. "The Problematic Establishment of Judicial Review." In *The Supreme Court in American Politics: New Institutionalist Interpretations*, eds, Howard Gillman and Cornell Clayton. Lawrence: University Press of KS.

Thayer, James Bradley 1893. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review*.

1st meeting, RE: long paper, must be completed by the end of this week.

Feb 8 **B. *Dualism***

McCloskey, Robert G. any addition. *The American Supreme Court*. Chicago: U of Chicago Press: 1-147. (chapters 1-7).

Feb 15 **C. *Regime Theory I***

Dahl, Robert. 1957. Decision-Making in a Democracy: The Supreme Court as a National Policy Maker." *Journal of Public Law*. 6: 279-295.

Whittington, Keith. 2008. *The Political Foundations of Judicial Supremacy*. : 1-160. (chapters 1-3)

1st Analytic Essay Assigned

Feb 22 **D. ***Regime Theory II***

Analytic Essay Due

Whittington, Keith. 2008. *The Political Foundations of Judicial Supremacy*. Press: 161-296. (chapters 4-6)

Graber, Mark A. "Federalist or Friends of Adams: The Marshall Court and Party Politics," *Studies in American Political Development 12:* .

Gillman, Howard. 2002. "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *APSR* 96: 511-524.

Gillman, Howard. 1997. "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* (1997).

Mar 1 **E. ***Courts and Realignment***

Adamany, David 1980. The Supreme Court's Role in Critical Elections. *In Realignment in American Politics.* Campbell, B and Trilling, R. (eds). Austin: University of Texas Press: 229-259.

Funston, Richard (1975) "The Supreme Court and Critical Elections" APSR 69: 795-811.

Canon and Ulmer (1976) "The SC and CE: A Dissent" APSR 70: 1215-1221.

Beck, Paul Allen (CE and the SC: Putting the Cart After the Horse" APSR 70: 930-932.

Lasser, William 1985. "The SC in Periods of Critical Realignment" JOP 47(4): 1174-1187.

Gates, John. B. 1989. "The SC and Realigning Issues" Social Science History 13(3): 225-276.

Note: If you are unfamiliar with realignment theory, you may first want to read:
Burnham, Walter Dean 1991. "Critical Realignment: Dead or Alive?" In *The End of Realignment?: Interpreting American Electoral Eras*. ed. Byron Shafer. Madison: UW Press: 101-140.

2nd meeting, RE: long paper, must be completed by the end of this week.

Mar 8 **Spring Break: No Seminar**

Mar 15 **III. Judicial Behavior**

A. *The Attitudinal Model I*

Whittington, Keith. "Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics," *Law and Social Inquiry* 25:2 (Spring 2000): 601-634.

Segal, Jeffery A. and Harold J. Spaeth. 2002. *The Supreme Court and The*

Attitudinal Model Revisited. Cambridge: Cambridge University Press: 1-99, 178-278… (skim) 100-177.

Mar 22 **B. ***<u>The Attitudinal Model II</u>***

Segal, Jeffery A. and Harold J. Spaeth. 2002. *The Supreme Court and The Attitudinal Model Revisited.* Cambridge: Cambridge University Press: 279-435 (focus on claims about their model).

Segal, Jeffery A. and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices," *APSR.*

2nd Analytic essay assigned.

Mar 29 **C. ***<u>Behavioral Debates</u>***

Analytic essay due.

Gillman 2001. "What's Law Got to Do With It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making" *Law and Social Inquiry* 26: 465-504.

Segal and Spaeth. 1996. "Norms, Dragons, and Stare Decisis: A Response" AJPS 40: 1064-1082.

Smith, Rogers M. 1988. Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law. *APSR* 82: 89-107.

Barber, Sotirios. A. 1989. "Normative Theory, the 'New Institutionalism,' and the Future of Public Law." *SAPD*. (3) 56-73.

Smith, Rogers M. "Reply to professor Barber" *SAPD* (3) 74-87.

Apr 5 **<u>Easter Holliday – No Seminar</u>**

Apr 12 **D. ***<u>The Strategic Model I</u>***

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make.* Washington, D.C.: CQ Press: 1-186.

Apr 19 **E. ***<u>The Strategic Model II</u>***

Perry, H.W. Jr. 1991. *Deciding to Decide: Agenda Setting in the US Supreme Court*, Cambridge: Harvard U Press. (read) 1-21, 140-292; (skim) 22-139.

Charles Cameron, Jeffrey Segal, and Donald Songer, "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions," *APSR* 94 (2000).

Apr26 **IV. ***<u>Courts and Civil Rights - Does Judicial Power Matter?</u>***

Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: UC Press. (read) 1-169, 336-343

Powe, Lucas A. 2000. *The Warren Court and American Politics*. Cambridge: Harvard University Press. (read) xi-74, 485-501.
(I commend the rest of this book to you.)

May 3 (tentative) *Long-paper due; practice comp assigned.*