

## Law and the Political Process (POLS 3120)

Professor Law (not a typo)

Office Hours: M 2:15-3:45, W 2:15-3:45, and by appointment.

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The main purpose of this course is to better understand the operation of the American judiciary not as a legal institution, but also as a *political* institution. We will not focus on the judiciary in isolation, but as one institution among several operating in a larger government system and in an even broader society. The course will focus mainly, although not exclusively, on the Supreme Court. We will seek to understand how other branches of government, public opinion, state government/local authorities, and other external forces influence the courts and the judges' judicial behavior (how judges decide cases). From this perspective, law is not an autonomous force; it is the product of conflict and negotiation between numerous political actors within a distinctive society with its own history and cultural values. In addition, judges do not just apply and interpret the law; they are political actors too. They have policy preferences as well as engage in strategic behavior to pursue those preferences.

The second goal of the course is to assess the impact of Supreme Court decisions on public life. In effect we are turning the question of what factors affect judicial behavior around by asking whether and how court decisions influence society. Because federal judges are not elected officials and because they basically serve for life, the judiciary has been charged as being "counter-majoritarian" and therefore an undemocratic institution. When studying the impact of the courts on society, we weigh the benefits and drawbacks of the unique institutional features of the Court, particularly its political independence and insulation from electoral politics.

To better understand the external forces operating on the courts as well as the impact (or lack thereof) of legal decision on society, we turn to the example of the American Civil Rights Movement. The Civil Rights Movement, particularly the efforts to desegregate schools and public accommodations, remains the most stark and prominent example of judicial intervention into a political debate. Using examples from Civil Rights, we will study how the law facilitates or impedes social progress. In addition, we study the limitation of law in producing social and political change among the public and local officials. The readings from the Civil Rights struggles place the study of the courts in a particular historical context but are intended as one illustration of judicial politics. I should note however, that this is *not* a course on Civil Rights. Students are expected to gain from the Civil Rights example a better understanding of the operations of the courts within the political system in general.

In the final section of the course we assess what ordinary Americans expect from their legal system, where these expectations come from, and why American life and culture is so law obsessed (e.g. how many TV shows are about lawyers?).

## **Texts**

There are 3 required books that can be purchased at the bookstore:

Lawrence Baum, *Supreme Court* (12<sup>th</sup> ed), Congressional Quarterly

Lawrence Friedman, *Total Justice*, Russell Sage Press

Mary Ann Glendon, *Rights Talk*, The Free Press.

There are also a number of required readings on Blackboard under the “Assignments” tab. These readings will be preceded by \*\* below.

As a general rule, all readings should be completed before the class meets. This is especially important for the first section of class where my lectures will address some of these more difficult readings and if you have actually done the readings before class meets, the lecture will make a lot more sense. At the beginning of each week on the syllabus, I have also included some guide questions that you should keep in mind as you do the readings for that week.

## **Requirements**

You will not pass the class if you fail to hand in all major assignments (any test or writing assignment).

Your final grade will be calculated as follows:

Midterm	3/18	25%
5 page paper	5/4	25%
Final	5/18, 8-10am	30%
Participation		20%

Attendance is mandatory. I will take attendance at every class. You are allowed 2 absences on days where there is no assignment due or no exam. Beyond 2 absences and you start losing a third of your participation grade for each additional absence. Your participation grade is not only based on attendance; you don't need to speak up in every single class, but you need to ask a question or contribute to discussion at least twice during the semester.

## **\*\*Grading criteria**

I use a standard curve: **A 90-100, B 80-89, C 70-79, D 60-69, F below 60**

## **Administrative Policies**

- 1) A word about basic classroom decorum. Please turn off cell phones (unless you have a sick family member you need to check on) and leave them off for the duration of the class.
- 2) There will be no make-up exams for un-excused absences. Excused absences for a make up exam require official documentation. If you miss an exam and have a

legitimate reason for doing so, it still remains your responsibility to contact me as soon as possible to arrange a make- up.

The due dates of assignments and attendance for exams with respect to religious holidays is governed by NY state law and those policies can be found here:  
<http://www.brooklyn.cuny.edu/web/about/initiatives/policies/nondiscrimination.php>

3) The faculty and administration of Brooklyn College support an environment free from cheating and plagiarism. Each student is responsible for being aware of what constitutes cheating and plagiarism and for avoiding both. The complete text of the CUNY Academic Integrity Policy and the Brooklyn College procedure for implementing that policy can be found at this site:  
<http://www.brooklyn.cuny.edu/bc/policies>. If a faculty member suspects a violation of academic integrity and, upon investigation, confirms that violation, or if the student admits the violation, the faculty member MUST report the violation.

4) In order to receive disability-related academic accommodations students must first be registered with the Center for Student Disability Services. Students who have a documented disability or suspect they may have a disability are invited to set up an appointment with the Director of the Center for Student Disability Services, Ms. Valerie Stewart-Lovell at 718-951- 5538. If you have already registered with the Center for Student Disability Services please provide your professor with the course accommodation form and discuss your specific accommodation with him/her.

5) If you are having difficulty in the class, come see me at my office hours at the earliest sign of difficulty, not toward the end of the semester. If you are not pleased with your performance on an assignment or unclear about the readings, come see me as soon as possible so that we can talk about some study skills and test taking strategies. I can't do much to help you if you come see me only at the end of the quarter.

6) If you've read carefully this far, thank you. Please email me a picture of dinosaur by the next class.

## SCHEDULE OF ASSIGNMENTS

**Week One:** What is political about the courts?

What is the impeachment process for and why do we have it? Why did Madison think the judiciary would be the “least dangerous branch?” How specific is the Constitution about what the judiciary is supposed to do in the American political system? How do the powers of the federal judiciary compare to the powers of the Congress and Presidency?

Readings: \*\*The U.S. Constitution (focusing on Articles I, II, III), and the *Federalist Papers* No. 78

**Week Two:** *Marbury v Madison* and judicial review

What are “judicial review”, and “judicial supremacy”? How does judicial review enhance the power and political stature of the federal courts? What are the legal and political controversies at stake in *Marbury v Madison*? What were the legal and political results of the Supreme Court’s famous *Marbury v Madison* decision?

Readings: \*\*Re-read *Federalist 78* \*\* Read Eric Black, “How the Supreme Court has come to play a policy making role” MinnPost, 2012

**Week Three:** What considerations are permissible and appropriate for judges in deciding cases? Put differently, what factors can a judge use or not use in coming to his/her decision in a case? Put differently, consideration of what factors for a judge in deciding a case are out of bounds, illegal, or unethical? Why?

Read: Lawrence Baum, *The Supreme Court*, Chapter 1

**Week Four:** What factors constrain judicial decision making, in other words, what institutional rules and factors outside the federal courts constrain how judges decide cases? What is *stare decisis*?

Read: Lawrence Baum, *The Supreme Court*, Chapter 2, \*\*Anna O. Law, *The Immigration Battle in American Courts*, pgs 54-68.

**Week Five:** The counter-majoritarian problem.

Aren’t the federal courts un-democratic? Why? How do we justify giving 9 un-elected people authority to overturn decisions made by democratically elected bodies and officials?

Read: \*\*Blog post: “Legal Theory Lexicon: Counter-Majoritarian Difficulty”

**Week Six:** Judicial Independence

What is formal definition of “judicial independence”? Is the judiciary actually independent from the other branches of government? Under what conditions can the Supreme Court operate more independently from the Congress and the Executive?

Read \*\*Ian Millhiser, Vox, “What Trump Has Done to the Courts, Explained” and \*\*, Salman Masood, *New York Times*, “Furor over Musharraf’s suspension of Pakistan’s Chief Justice”

**Week Seven:** Supreme Court Agenda Setting

With 7000+ appeals to the high court each year, how does the Supreme Court pick which cases to hear? What factors help “red flag” cases for the Justices? What is the role of amicus curie?

Read Lawrence Baum, *The Supreme Court*, Chapter 3.

**Week Eight:** Decision making

What personal attributes of the judges’ backgrounds might influence their judicial behavior? How does this process happen? Why have judicial appointments become so politicized in recent years?

Read Lawrence Baum, *Supreme Court*, Chapters 4 and 5, and \*\*Colby Itkowitz, *Washington Post*, “1 in 4 circuit court judges is now a Trump appointee”

**Week Nine:** Strategic Behavior on the Supreme Court

What kinds of strategies do judges use to pursue their preferences? What kinds of tools, both formal and informal can judges employ to strategically pursue their goals?

Read \*\*H.W. Perry, *Deciding to Decide*, Chapter 7 “Strategy” and \*\*Joan Biskupic, CNN, “The inside story of how John Roberts negotiated to save Obamacare”

**Week Ten:** The Historical Context of Civil Rights Litigation

What was the NAACP’s strategy in pursuing desegregation? How did local officials respond to the Supreme Court rulings to desegregate? What role did President Dwight D. Eisenhower play in the struggle?

\*\*Read Richard Kluger, *Simple Justice*, Chapter 14: “The Doll Man and other Experts”, also Mary Ann Glendon, *Rights Talk*, Preface through Chapter 3, concentrating especially on Chapters 1 and 2.

**Week Eleven:** Impact of Judicial Rulings

What role, if any, did the legal decisions play in the Civil Rights movement? What kinds of negative consequences resulted from the decisions? Why did the NAACP pursue a litigation strategy instead of working for social change through the other branches of government?

Read Lawrence Baum, *The Supreme Court*, Chapter 6 “The Court’s Impact” and Mary Ann Glendon, *Rights Talk*, Chapter 4 through Conclusion, focusing especially on Chapters 4 and 6.

**Week Twelve:** American Legal Culture

What do ordinary Americans expect from their justice system and why? What are the consequences of framing all disputes in the language of rights?

Read: Lawrence Friedman, *Total Justice*, first half of book.

**Week Thirteen:** What are the consequences of the disconnect between people's expectations of the justice system and the reality of politics? Is there a way to reconcile the disconnect?

Read Lawrence Friedman, *Total Justice*, entire.

**Week Fourteen: Conclusion and wrap up of Lawrence Friedman's *Total Justice***

Catch up, conclusion, wrap up, and in-class review session.