Political Science 212: Law, Lawyers, and Litigation

Dr. Patrick Schmidt
Fall 2008, MWF 2:20 – 3:20 p.m.
Location: 206 Carnegie Hall
Office Hours: MWF 3:30 – 4:30, T 1:15 – 2:15
or by appointment

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http://moodle.macalester.edu

Course Description:

Many people think of law as something different from politics, and there are certainly ways in which that is the case. However, litigation plays such an important role in America—from public policymaking to popular culture—that a more useful starting point is to approach law as a form of politics, one that then competes with other options (such as legislative politics or bureaucratic politics) for how “things get done”. Litigation is a social and political institution, a manner of resolving disputes but also doing much more. In this course, we will examine the phenomenon of litigation in America from many (though not all) perspectives, asking questions such as: how does litigation work? What place does it play in the American political system (broadly conceived)? What are its promises and problems? These are, in some ways, very simple questions, though in order to arrive at answers that capture the complexity and nuance, we will explore a variety of related issues, with special attention to the roles of lawyers, law firms, and law schools in this process. Much of our day-to-day focus will be on individual movements, from the NAACP’s campaign against segregation to recent major tort litigation.

Course Objectives:

At the conclusion of this course, you should be able to:

1) outline the origins of litigation as a significant social and political practice in the United States
2) explain the strategic choices facing the litigation movements of the 20th and 21st centuries, and
3) analyze strengths and weaknesses of politics-by-litigation, vis-à-vis its institutional alternatives.

Beyond this rather formal rendering of the course objectives, the most important thing we will do here is to practice our ability to see American politics with a sense of distance and perspective, to see how fundamentally law and litigation is a part of the national political consciousness, to ask “why?” and “so what?” and to contemplate, “how else could it be?”

Readings:

The following books will be read in their entirety:


Many other readings, mostly articles and book chapters, appear on the syllabus as required readings. With a few exceptions, these are available via Moodle. I reserve the right to add to or subtract from the readings during the course of the semester.

On Moodle I will provide links to recent articles or current events (usually one or two per week) and there will be opportunity for discussion of such things on Moodle’s discussion pages. These are considered required reading, in the sense that I may presume your knowledge of them on exams. More generally, as is true for all political science courses, one of the most important things you should be doing (now and for the rest of your life) is to read at least one newspaper a day. I recommend hitting a daily survey of views from across the political spectrum.

Course Requirements:

There are four basic components of this course. Their weights are as follows:

<table>
<thead>
<tr>
<th>Component</th>
<th>Points</th>
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<tbody>
<tr>
<td>Two Essays</td>
<td>320</td>
</tr>
<tr>
<td>Four Short-form Writing Assignments (variable weight)</td>
<td>160</td>
</tr>
<tr>
<td>Oral Presentation</td>
<td>210</td>
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<tr>
<td>Final Exam</td>
<td>310</td>
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The two essays, the presentation, and the final exam must be completed in order to pass this course.

Grading: Your point total for the semester will be converted to a letter grade with the following scale:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Grade</th>
<th>Points</th>
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<tbody>
<tr>
<td>A</td>
<td>933 or more</td>
<td>C+</td>
</tr>
<tr>
<td>A-</td>
<td>900 – 932</td>
<td>C</td>
</tr>
<tr>
<td>B+</td>
<td>867 – 899</td>
<td>C-</td>
</tr>
<tr>
<td>B</td>
<td>833 – 866</td>
<td>D's</td>
</tr>
<tr>
<td>B-</td>
<td>800 – 832</td>
<td>F</td>
</tr>
</tbody>
</table>

There is no rounding.

What do the numbers mean? That’s the essential thing, but it’s difficult to put into words. Broadly speaking, a grade of “A” is assigned to work that achieves “excellence,” meaning showing originality, insight, or outstanding effort while avoiding “avoidable” errors. A grade of “B” is awarded to “solid work” that displays consistency, thoroughness of preparation, and a grounded understanding of the topic, though either missing the attributes of excellence or containing notable, avoidable errors of substance or style. A grade of “C” attaches to work that is “significantly flawed” in some respect, such as research/preparation, analysis, or writing. Grades of “D” and “F” are reserved for cases that are “unacceptable as college-level work”. While with most written assignments I designate in advance a component score for writing, I may give a D or F to essays containing severe flaws of writing, even if a component score of zero would not drop the total grade that far on its own.

Essays/Presentation: Your written work is the core vital component of this course. The expectation for the papers is that they will reflect thoroughness of preparation, thoughtfulness in approach, and acuity of reasoning. Students will also make an oral presentation during the semester.

Exams: There will be a final exam, which may be mixed-format, involving short answer/identifications or essays, or exclusively one or the other. I have not decided whether this exam will sit as an in-class
exam or whether this will be the due date and time for take-home essay. I will decide based on
"conditions on the ground" as the semester develops. Students with medical or other extremely well
documented excuses for missing the exam or due date—car accident, death of immediate family member,
etc.—should contact me as soon as practicable. No early exams will be given.

Attendance, Discussion, and Participation: Regular attendance and participation are essential parts of
this course. Though no "participation score" has been designated per se, I reserve the right to factor it
into ultimate grading decisions to reflect your overall level of work for the course. After the first week of
class, attendance will be taken. Every student will be allowed three unexcused absences (beyond the two
general policies set out below), after which a penalty of ten points per day will be taken. Documentation
is not necessary for absences. When you know in advance of an absence for reasons of religious
observance or any other foreseeable reason, please speak with me at the beginning of the term or as early
as otherwise possible. I welcome your questions and active discussion of it. Positive participation may
be considered in assigning course grades.

Late Penalty: The penalty for unexcused lateness on papers is 3% of the point total for the remainder of
the day (i.e. after the class period) on which it is due, and 5% of the point total per 24 hour period (or part
thereof) beyond that. Written work will not be accepted after one week. Please be aware that if you are
in a late situation, a paper counts as "in" when an email copy has been received in my inbox or in the
course electronic drop box (with email sent notifying me), although a paper copy is still required.

Incompletes: A grade of "I", meaning Incomplete and allowing for course work to be completed beyond
the scheduled end of the course, will be contemplated by me only in the most remarkable cases of dire
emergency, loss of adequate health, or extraordinary family crisis. Incompletes must be negotiated with
me before the end of the course and should not be presumed available solely in light of your interpretation
of "remarkable".

Plagiarism and Cheating: Academic dishonesty is not tolerated in this course and will be considered
grounds for partial or full reductions in grades and recourse to the college’s disciplinary processes, as
described in the Student Handbook, available at: http://www.macalester.edu/deanofstudents/. In the past
ten years, I have never been more angry—including my personal as well as my professional life—than
when I have discovered clear cases of plagiarism and cheating.

Disabilities and Learning Accommodations: Students needing academic accommodations for a
documented disability must first contact the Office of Student Affairs to schedule a meeting with Ms. Lisa
Landreman, the Disability Student Services Coordinator, 119 Weyerhaeuser Administration Building,
651.696.6220 to verify the disability and establish eligibility for accommodations. Then you should
schedule an appointment with me to make appropriate arrangements.

Religious Observance: Religiously observant students wishing to be absent on holidays that require
missing class should notify me in writing at the beginning of the semester, and should discuss with me, in
advance, acceptable ways of making up any work missed because of the absence. Absences for religious
observance do not count against your allotment of "free" unexcused absences.

Excused Absences for University Extracurricular Activities: Students participating in an officially
sanctioned, scheduled University extracurricular activity, or an ad hoc activity or field trip for another
course (with communication from that course’s instructor), will be given the opportunity to make up class
assignments or other graded assignments missed as a result of their participation. It is the responsibility
of the student to make arrangements with me prior to any missed scheduled examination or other missed
assignment for making up the work. Such absences do not count against your allotment of "free"
unexcused absences.
Course Outline:

Part I: Beginnings

September 8: Introduction to the Course and to the Big Questions

September 10: The Litigation Crisis in America, They Wrote

*Most people, especially Americans, arrive at a discussion of lawyers and litigation with some cultural background or baggage about what they think, or what they think they think. The first thing, which we simply must do, is to bring that to the table.*


![Cartoon Image]

**THE NEXT FEW YEARS WOULD BE VERY LITIGIOUS.**

September 13, 15, 17: What is a Lawsuit? Disputing Laid Bare
If you look at the syllabi of a law school courses on litigation, you will usually find the mechanics of litigation broken down into its component parts, with the cases that illustrate that stage. Rather than emphasize those particulars of civil litigation in America (though we will touch upon the essential elements and terms necessary for going forward), our approach here will be to understand the basic functions that litigation can provide across jurisdictions and cultures.

Important note: On one of these days, either Sept. 13th or 15th, a video of approximately 10 minutes will be screened. The substance and the style of the video includes some mildly graphic images and significant language of a sexual nature (including double entendre and description of sexual practices). Any student who may be offended or embarrased by such material may be excused from class and may, if they wish, borrow the video to watch in private.


Assignment Due September 10th: Fieldwork - Court Evaluation

Part II: America's Way of Disputing

What perspective can we have on the role and significance of litigation as a political and social tool in American culture? Is American legal culture unique? What shaped the development of American legal culture?

September 20: Historical and Cultural Foundations I: The Medieval and the Modern
How far back should we begin in order to understand the origins of American (or Anglo-American, or Common Law, or Western) legal culture? The consideration of antecedents to the American legal system is its own reward, but the search gives us a glimpse at limits of legal history.

Readings:


September 22: Historical and Cultural Foundations II: Early America

Readings:

Required: Excerpt from Alexis de Tocqueville “On Lawyers and Judges”; Graham, Ch. 1.


September 24: The Evolution of Legal Ideas

*Cultural assumptions about law are not constant. One factor thought to drive societal views on law are the elite discussions about law. The comparison between positivism and legal realism connects closely to our later discussion about legal training. What is it that lawyers, and by extension, their clients, believe about the potential of law?*


September 27: The Legal Profession as Explanation
The oldest argument in the book is that lawyers are to blame. That argument needs critical evaluation: what kinds of effects might “lawyers” explain? What are the problems with the argument? Where does it come from?


September 29: Political Forces I: Regime Changes

Reading: Teles, Chs. 1 & 2.

October 1: Political Forces II: Politics and Adversarial Legalism

Short Form Assignment #1 Due


Part III: On Lawyers and the Legal Profession

The Legal Profession is laced throughout the readings of the course. They are portrayed in every light: noble ideals, crass motivations, warriors for just causes, unhappy slaves. Before the course presses onto case studies and contemporary issues; we focus specifically on the meaning of “the legal profession” and some recent reflections on what it means to be a lawyer.

October 4: Professionalism: Origins and Meanings

October 6: Legal Education


October 8: Problems in the Profession I: Law Firms and Professional Culture


October 11: Problems in the Profession II: Happiness and Satisfaction

Short Form Assignment #2 Due


Part IV: Litigation Movements in America

Earlier debates considered the extent to which litigation itself has changed or finds earlier models in history. Another level for examination is the social and political organization of litigation. Beginning in the Industrial Revolution, and carrying it to the 21st Century, we examine the ways that individuals and movements have conceived of litigation as a strategy for policy change.

October 13: The Birth of Litigation as a Political Strategy

Reading:

Required: None – but begin Tushnet.

Assignment Due: Project Statement and Preliminary Directions

October 15: No Class – Professor Schmidt at MAPLA

October 18, 20: At the Forefront: The NAACP

Essay #1 Due October 20th

Reading: Tushnet, Chs. 1 – 8 (everything except the epilogue).

October 22: Flex Day – Wrapping up NAACP and/or Workshop on Presentations

October 25: In their Wake: Succeeding and Contemporary Movements (beginning)

Presentations

October 27: Guest Speaker – Richard Voelbel '71

Reading: To be assigned.

October 29: No Class – Fall Break

November 1, 3: In their Wake (continued)

Presentations

Part V: Impact and Connections

Legal Liberalism has at its core a faith: the assumption of its own relevance. Law is not autonomous, however. It exists in a social and political system that has different priorities, logics, and demands. Thus, a difficult but essential inquiry concerns the impact of litigation. When does law work to shape society? When does it fall mute? Why? Is there something inherent to the notion of law that produces those answers?
November 5: Impact I: Assaulting the Faith

Readings:

Required: Gerald Rosenberg, two excerpts/chapters from The Hollow Hope (Chicago: University of Chicago Press, 1990); Interview with Gerald Rosenberg, from Simon Halliday and Patrick Schmidt, Conducting Law and Society Research: Reflections on Methods and Practice (New York: Cambridge University Press, 2009); Tushnet, "Epilogue".


November 8: Impact II: Structure and Agency, Dominance and Creativity

Short Form Assignment #3 Due


November 10: Impact III: Normative Views?

Readings: Carl T. Bogus, Why Lawsuits are Good for America (New York: NYU Press, 2001), Ch. 8; Stephen D. Susman, "Class Actions: Consumer Sword Turned Corporate Shield?" University of Chicago Legal Forum (2003).

November 12, 15: Backlash, Change, and What Now?

Readings: Teles, Chs. 3 – end.

Part VI: The Institutional Politics of Contemporary Tort Litigation

The many issues explored already in the course resolves itself, in the political scientist’s mind, to an institutional one: how should the pressures for “justice” (broadly understood), as embodied in contemporary litigation, best be articulated in the political system? Looking at mass torts in particular, what are the benefits of resolving disputes through adjudication (and settlement, sometimes called “litigationization”)? Does such an approach lack accountability or display other democratic deficits? What clarity can we bring to the analysis of the institutional question?

November 17: Mass Torts and Class Actions

Short Form Assignment #4 Due


November 19, 22, 24, 29: Contemporary Tort Movements

Presentations

November 26: No Class – Thanksgiving Holiday

December 1: Mass Torts and Their Alternatives.
Reading:


Part VII: Access and Ethics: The Gadfly to Contemporary Litigation

As we reach the end of the course, we have yet to consider some of the most fundamental choices that exist within the operation of the legal system and that affect our ability to assess the desirability and appropriateness of the institutional form. These complex questions likely cannot be resolved, but they can be understood as problems of ethics—concerning individual behavior, but also with structural components.

December 3: Access, Mobilization, and Equality I: Gatekeepers

Essay #2 Due December 3rd


December 6: Access, Mobilization, and Equality II: Not You, Too? Pro Bono and Legal Aid

Reading:


December 8: Lawyers and Ethics I: The Litigator

Reading:

Required: Graham, Chs. 3 – 5.


December 10: Lawyers and Ethics II: Case Study

Reading: Kate Troy, "From a Hostile Work Environment to a Hostile Courtroom", Case Study, Hubert H. Humphrey Institute of Public Affairs, Center on Women and Public Policy, University of Minnesota.

December 13: Conclusion and Review

Final Exam: Thursday, December 16, 10:30 a.m. – 12:30 p.m.

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I flunked a test today, but I don't mind.

No? It's a question of priorities. Hobbies. A man's got to make room for what he cares about.

These days are precious. And I'd rather spend them goofing around than studying.

I never really thought of ignorance as a quality of life issue.

Apparently, neither has Dad.