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Office: 418 Zulauf Hall  
Hours: M 1:00-1:50 p.m. and 3:20-4:40 p.m.  
W 1:00-1:50 p.m.

Political Science (POLS) 619  
NIU Spring 2009  
Wednesdays 3:30-6:10 p.m.  
DuSable 464

Topics in Public Law:

## **Judicial Policymaking and U.S. Legal Institutions in Comparative Perspective**

### **Seminar Overview**

In this seminar, we will study cause-based, high impact, public interest litigation - including suits to advance civil liberties, women's rights, labor rights, gay marriage, and environmental and health protection - and attempt to identify the conditions for successful and unsuccessful litigation campaigns. We will also attempt to understand the distinctive features of the U.S. legal system that give courts, lawyers, and litigation a uniquely prominent role in shaping public policy by comparing our civil, criminal, and regulatory systems to those found in Britain, Germany, France, and Japan.

### **Seminar, Participation, and Research Requirements**

Two books are required and available for purchase at the Holmes Student Center bookstore:

Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Second Edition. (University of Chicago Press, 2008).

Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001).

Additional required readings are available on e-reserves through a link on the course webpage.

As you know, in graduate seminars learning is advanced by critically reflecting upon our readings and sharing your thoughts with seminar colleagues. In this seminar, we will do this in two ways. First, you will be expected to read assigned materials and to take turns writing short papers (2-3 pages) discussing the readings (for 25% of seminar grade). Second, you

will be asked to take turns leading discussion of the week's readings, and when you're not leading discussion to participate in it (for 20% of seminar grade). You will also be asked to present research results from your research paper to the seminar. Almost half (45%) of your seminar grade will be determined by actively participating in the seminar in these ways.

As you also know, most graduate seminars also seek to advance learning by requiring you to research and write longer analytical papers. In this seminar, you will be expected to research and write a paper of 25 or more pages that seeks to contribute to scholarly understandings of a topic related to this seminar. If you are interested, we can discuss how your research paper may be designed to contribute to research projects on judicial policymaking and risk assessment and regulation that I am undertaking with students. These projects will be described in seminar.

Research papers will be written in two installments: a five page "down-payment" allowing me to give you direction (worth 15% of your seminar grade) and a 25 page or more final paper incorporating that direction and expanding upon it (worth 40% of your seminar grade). Consequently, more than half (55%) of your seminar grade will be determined by your research paper.

### **Due Dates for Discussion and Research Papers**

I will email you some questions every week to guide writing of discussion papers and reflection on readings. Discussion papers are due the Monday night before the Wednesday meeting at which the week's readings will be discussed. Please paste them into the discussion board dialogue box I will create for that purpose. Discussion papers can be posted earlier than Monday night, but will be considered late if posted later than 5 a.m. Tuesday morning. This is to allow time for your colleagues to read and me to grade your papers. Because discussion papers are designed to support discussion of the week's readings, late discussion papers will not be accepted and will receive F grades.

March 25      Research Paper Installment #1 Due  
(5 pages; 15% of grade), due at beginning of seminar, Wednesday

May 4          Final Research Paper Due  
(at least 20 pages added to a revised version of your second short research paper; 40% of grade), due at beginning of final meeting during final exam period, Monday, 4-5:50 p.m.

#### **Please do not...**

- ask for extensions on turning in your research papers. *Research papers will be graded down one third of a grade per day that they are late.* Late discussion papers will not be accepted and will receive F grades (see above).
- ask for an incomplete in the seminar unless you have a very, very compelling reason to do so.

### **Definitely do not...**

- engage in “academic misconduct,” defined by the NIU *Student Judicial Code* as the “receipt or transmission of unauthorized aid on assignments or examinations, plagiarism, unauthorized use of examination materials, or other forms of dishonesty in academic matters.”

## **Department of Political Science Announcements**

### **Statement Concerning Students with Disabilities**

Under Section 504 of the Rehabilitation Act of 1973, NIU is committed to making reasonable accommodations for persons with documented disabilities. Those students with disabilities that may have some impact on their coursework and for which they may require accommodations should notify the Center for Access-Ability Resources (CAAR) on the fourth floor of the Health Services Building. CAAR will assist students in making appropriate accommodations with course instructors. It is important that CAAR and instructors be informed of any disability-related needs during the first two weeks of the semester.

### **Reading Assignments and Discussion Topics**

#### **I. U.S. LAW, LITIGATION, AND POLICY AND SOCIAL CHANGE, PART 1**

##### **WEEK 1 Introductions and Seminar Overview**

G. N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Second Edition. (University of Chicago Press, 2008):

“Introduction” 1-8

“The Dynamic and Constrained Court” 9-36

##### **WEEK 2 *Brown* and the Civil Rights Revolution**

“Introduction” 39-41

“Bound for Glory? *Brown* and the Civil Rights Revolution 42-71

“Constraints, Conditions, and the Courts” 72-106

“Planting the Seeds of Progress?” 107-156

“The Current of History” 157-169

M. J. Klarman, “*Brown*, Racial Change, and the Civil Rights Movement, 80 *Virginia Law Review* 7-150 [but you only are required to read 75-150] (1994)

G. N. Rosenberg, “*Brown* is Dead! Long Live *Brown*!: The Endless Attempt to Canonize a Case,” 80 *Virginia Law Review* 161-171 (1994)

### **WEEK 3 Abortion and Women’s Rights**

G. N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Second Edition. (University of Chicago Press, 2008):

“Introduction” 173-174

“Transforming Women’s Lives? The Courts and Abortion” 175-201

“Liberating Women? The Courts and Women’s Rights” 202-227

“The Court as Catalyst” 228-246

“The Tide of History” 247-265

M. McCann, “Reform Litigation on Trial,” 17 *Law & Social Inquiry* 715-43 (1992)

G. N. Rosenberg, “Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann,” 17 *Law & Social Inquiry* 761-778 (1992)

G. N. Rosenberg, “Review: Positivism, Interpretivism, and the Study of Law,” 21 *Law & Social Inquiry* 435-455 (1996)

### **WEEK 4 Same-Sex Marriage Rights**

G. N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* Second Edition. (University of Chicago Press, 2008):

“Introduction” 339-341

“You’ve got that *Loving* Feeling? The Litigation Campaign for Same-Sex Marriage” 342-354

D. R. Pinello, “The Roles of Courts and Legislators,” in Daniel R. Pinello, *America’s Struggle for Same-Sex Marriage* (Cambridge: Cambridge University Press, 2006) pp. 172-193

“Confusing Rights with Reality: Litigation for Same-Sex Marriage and the Counter-Mobilization of Law” 355-419

“Conclusion: The Fly-Paper Court” 420-429

“Epilogue” 430-431

### **WEEK 5 Other Studies, Different Answers, to Rosenberg’s Question**

B. C. Canon, “The Supreme Court and Policy Reform: The Hollow Hope Revisited,” in David A. Schultz, ed. *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998) pp. 215-249

G. N. Rosenberg, “Knowledge and Desire: Thinking about Courts and Social Change,” in David A. Schultz, ed. *Leveraging the Law: Using the Courts to Achieve Social Change* (New York: Peter Lang, 1998) pp. 251-291

D. Reed, "Twenty-Five Years after *Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism," 32 *Law & Society Rev.* 175-220 (1998)

B. Swedlow, “Reason for Hope? The Spotted Owl Injunctions and Policy Change,” *Law & Social Inquiry*, forthcoming. Typescript, 87 pages

### **WEEK 6**

## **II. SOCIO-LEGAL STUDIES: CHALLENGES AND OPPORTUNITIES**

R. Kagan, "What Socio-Legal Scholars Should Do When There is Too Much Law to Study," *J. of Law & Society* 22: 140-146 (1995)

### **A. NIU Project on Risk Regulation Regimes in Illinois, the U.S., and Europe**

M. S. Kaplan, R. Donkers, M. Purvis, E. Rosenberg, J. B. Wiener, “Who’s Ahead In Environmental Protection: The United States or the European Union?” *The Environmental Forum*. Washington, D.C.: Environmental Law Institute. pp. 46-52. (2006)

B. Swedlow, D. Kall, Z. Zhou, J. K. Hammitt, and J. B. Wiener. “Theorizing and Generalizing about Risk Assessment and Regulation through Comparative Nested Analysis of Representative Cases.” *Law & Policy*. (forthcoming 2009)

Please Note: This week we will also read one or more student research papers (from previous courses) on risk regulation in the U.S. and Illinois. One or more students may also present their papers in seminar.

## **B. Risk Regulation Regimes in Britain**

C. Hood, H. Rothstein, and R. Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes*. Oxford: Oxford University Press (2001).

“What Are Risk Regulation Regimes? Why Do They Matter?” 3-19.

“The Comparative Anatomy of Risk Regulation Regimes,” 20-35.

“Nine Risk Regulation Regimes Compared,” 36-58.

## **III. U.S. LAW, LITIGATION, AND POLICY AND SOCIAL CHANGE, PART 2**

### **WEEK 7 Courts and Policymaking: Other Studies, Questions, and Answers**

D. Gaiter, “Eating Crow: How Shoney’s, Belted by a Lawsuit, Found the Path to Diversity,” *Wall Street Journal*, April 16, 1996

P. Burstein & M. Edwards, “The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings,” 28 *Law & Society Rev.* 79-85, 90, 105-08 (1994)

P. Frymer, “Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-1985,” *American Political Science Review* 97, 3: 483-499 (2003).

L. Mather, “Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation,” 23 *Law & Social Inquiry* 897-940

R. S. Melnick, “Federalism and the New Rights,” *Yale Policy Review/Yale J. on Regulation* (Symposium Issue, 1996), pp. 325-354

### **WEEK 8 Legal and Regulatory Impact: Compliance, Deterrence, and Rights Practices**

J. Barnes and T. F. Burke, “The Diffusion of Rights: From Law on the Books to Organizational Rights Practices,” *Law and Society Review* 40, 3: 493-523 (2006).

R. Kagan, N. Gunningham, and D. Thornton, “Explaining Corporate Environmental Performance: How Does Regulation Matter?,” *Law and Society Review* 37, 1: 51-89 (2003).

D. Thornton, N. Gunningham, and R. Kagan, “General Deterrence and Corporate Environmental Behavior,” *Law & Policy*, 27, 2, 2005, 262-288

R. A. Kagan, “Visibility of Violations and Income Tax Law Noncompliance” in Jeffrey Roth & John Scholz, eds., *Taxpayer Compliance. Vol. 2, Social Science Perspectives*. Univ. Pennsylvania Press, 1989, pp. 76-102 (plus notes)

R. A. Kagan & J. Skolnick, "Banning Smoking: Compliance without Coercion," in Robert Rabin & Stephen Sugarman, eds. *Smoking Policy: Law, Policy and Politics*. Oxford Univ Press, 1993

**WEEK 9 NO CLASS MARCH 7-15<sup>TH</sup>, SPRING BREAK**

**IV. U.S. LEGAL INSTITUTIONS IN COMPARATIVE PERSPECTIVE**

**WEEK 10 Adversarial Legalism: The American Way of Law**

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

"The Concept of Adversarial Legalism," 3-17.

"The Two Faces of Adversarial Legalism," 18-33.

"The Political Construction of Adversarial Legalism," 34-58.

T. Burke, "On the Rights Track: The Americans With Disabilities Act, " in Pietro Nivola, ed., *Comparative Disadvantages? Social Regulations and American Adversarial Legalism* (Brookings Inst. 1997) pp. 242-92

**WEEK 11 Bureaucratic Justice & Adversarial Legalism in Regulatory Settings**

**\*\*Please Post Research Paper Installment #1 to Discussion Board and please also Bring a Hard Copy to Seminar\*\***

**Research Presentations**

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

"Economic Development, Environmental Protection, and Adversarial Legalism," 207-228.

R. A. Kagan, "Inside Administrative Law: Review of Jerry L. Mashaw, *Bureaucratic Justice*, Columbia L. Rev. 84: 816-832

J. Badaracco, *Loading The Dice: A Five Country Study of Vinyl Chloride Regulation* (Harv. Business School Press, 1985) pp. 5-18, 40-59, 70-81, 113-125.

## **WEEK 12 Rules, Ritualism, and Discretion in Administration and Regulation**

### **Research Presentations**

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

“Adversarial Legalism and Regulatory Style,” 181-206.

R. A. Kagan, *Regulatory Justice* (Russell Sage Foundation, 1978) pp. 5, 37, 85-97.

J. Braithwaite, "The Nursing Home Industry," in Tonry & Reiss, eds, *Crime and Justice* (Univ. Chicago Press, 1993) 18: 11-54

E. Bardach & R. A. Kagan, *Going by The Book: The Problem of Regulatory Unreasonableness* (Temple Univ. Press 1982) pp. 123-151

## **WEEK 13 U.S. Criminal Courts and Procedure**

### **Research Presentations**

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

“Adversarial Legalism and American Criminal Justice,” 61-81.

“Deciding Criminal Cases,” 82-96.

C. Foote, "Vagrancy-Type Law and Its Administration" (1956), excerpts from W. Chambliss, *Crime and the Legal Process* (1969) pp. 295-300

M. Feeley, *The Process is The Punishment: Handling Cases in a Lower Criminal Court* (1979) pp. 3-4, 154-55, 178-85, 199-201, 235-43, 290-91

H.L. Ross & J. Foley, "Judicial Disobedience of the Mandate to Imprison Drunk Drivers," 21 *Law & Soc. Rev.* 315-22 (1987)

M. Levin, "Urban Politics and Judicial Behavior," [excerpted version, J. Robertson, ed., *Rough Justice: Perspectives on Lower Criminal Courts* (Little Brown, 1979) pp. 192-210

## **WEEK 14 Criminal Court Procedure in the U.S., Europe, and Japan**

### **Research Presentations**

J. Langbein, "Money Talks, Clients Walk," *Newsweek*, April 17, 1995, pp. 32-34

M. Damaska, "Structures of Authority and Comparative Criminal Procedure," 84 *Yale L.J.* 480 (1975), excerpted version from R. Cover & O. Fiss, *The Structure of Procedure* (Foundation Press, 1979) pp. 292-300

J. Langbein, "Land Without Plea Bargaining: How the Germans Do It." 78 *Mich. L. Rev.* 204-225 (1979)

G. Hughes, "English Criminal Justice: Is It Better Than Ours?" 26 *Ariz. L. Rev.* 508, 559-60, 587-614 (1984)

D. Johnson, "The Organization of Prosecution and the Possibility of Order," 32 *Law & Society Rev.* 247-308 (1998)

## **WEEK 15 Civil Litigation**

### **Research Presentations**

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

"Adversarial Legalism and Civil Justice," 99-125.

"The Tort Law System," 126-155.

D. Bok, "A Flawed System of Law Practice and Training." *Harvard Magazine* (May/June 1983) pp. 38-44

O. Fiss, "Against Settlement" 93 *Yale L.J.* 1073 (1984) [from Cover et al, *Procedure* (1988) pp. 719-728]

*Reducing Litigation: Evidence from Wisconsin.* Workers Comp. Research Institute. Vol. 4, No.12 Dec. 1988.

R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001):

"Conclusion: Can the United States Tame Adversarial Legalism?," 229-252.

## **WEEK 16 Research Presentations**

**WEEK 17 Research Presentations, and Final Research Paper Due May 4, beginning of Final Exam Period, Monday, 4-5:50 p.m.**