“The judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.”


“I think it’s bad, long-term, if people identify the rule of law with how individual justices vote.”

-- Chief Justice John Roberts, 2007

This seminar explores the historical development of scholarship on law and courts. We will examine the various schools of thought that have dominated the literature from sociological jurisprudence to legal realism and critical legal studies in the legal academy and from behavioralism to rational choice and new institutionalism in political science. Have these approaches been successful in furthering our understanding of judicial behavior and the role of law in society? Do contemporary approaches provide sufficient explanations or is something missing? To this end, students are required to vigorously participate in weekly seminars and write a series of thought papers about the issues discussed. Students with an interest in doing research on law and courts may substitute a longer writing project for the thought papers.

You are required to do the assigned reading and come to class prepared to actively discuss the material. Because this course is a seminar, I will endeavor to speak as little as possible. You should be prepared to discuss the assigned works in depth and respond to the remarks of your colleagues. I recommend coming to class with multiple questions and comments for each seminar. You should aim for 3-5 quality questions/comments each meeting. That said, there is such a thing as too much participation. Be respectful of the other seminar participants and give others a chance to join the conversation. Class participation is crucial in graduate courses and will account for a substantial part of your course grade. If you miss classes, generally do not come prepared and/or do not regularly participate, you will fail this part of the course.

Spring 2014
Mondays 3:30-6:10
Swen Parson 258

Instructor: Artemus Ward
Office: 405 Zulauf Hall
Office Phone: 815-753-7041
E-mail: aeward@niu.edu
Office Hours: M W 1-3pm & by appointment.

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**Grading**

Written Work: 70%

There are two options:
1) You are required to write 4 short 5-6 double-spaced-page thought papers on issues relating to course topics throughout the semester. You should choose your 4 topics from those listed in the syllabus. Your papers should be very specific about the course readings. Careful and detailed reading and writing is essential at the graduate level. As you may know, unlike undergraduate work, graduate level writing must go beyond merely summarizing the readings. Everything you write at the graduate level should include some kind of original contribution—argument, analysis, approach, etc. Failure to cite and discuss relevant course readings and failure to meet the five-page minimum requirement will hurt your paper grade. Similarly, exceeding five pages will also affect your grade as concise yet thorough arguments are the hallmark of academic writing.

OR

2) You may write one final course paper (between 20-35 pages) on a topic of your choice relating to law and courts, broadly defined. If you choose this option, discuss your plans with me as early in the semester as possible. I highly recommend this option for students who wish to pursue a career in academia, particularly if you are planning to continue studying law and courts. Your goal should be to produce a paper for publication in an academic journal. Note: students enrolled at the law school may use this paper to satisfy their upper-division writing requirement. Those papers should be 30-35 pages and in the form of a law review comment that demonstrates the ability to articulate legal analysis. Law students who do not wish to use this paper/class to satisfy their upper-division writing requirement may choose a shorter final paper or the first, short-paper option.

Seminar Participation: 30%

<table>
<thead>
<tr>
<th>Grade</th>
<th>Percent</th>
<th>General Grading Definition</th>
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</thead>
<tbody>
<tr>
<td>A</td>
<td>90-100</td>
<td>High participation: 3-5 quality questions and/or comments EVERY seminar. Note: regularly exceeding 5 may hurt your grade.</td>
</tr>
<tr>
<td>B</td>
<td>80-89</td>
<td>Good participation: 1-2 quality questions and/or comments EVERY seminar.</td>
</tr>
<tr>
<td>C</td>
<td>70-79</td>
<td>Average participation: 1-2 quality questions and/or comments every other seminar.</td>
</tr>
<tr>
<td>D</td>
<td>60-69</td>
<td>Below average participation: 1-2 quality questions and/or comments every three or four seminars.</td>
</tr>
<tr>
<td>F</td>
<td>0-59</td>
<td>Failing participation: Rarely if ever providing quality questions/comments.</td>
</tr>
</tbody>
</table>

Required Books


Selected readings on electronic reserve via Blackboard.

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**Course Calendar**

**Introduction**

**Week 1. Introduction to the Study of Law & Courts**

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**Week 2, MLK Day – No Class.**

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**The Lasting Legacy of Legal Realism**

**Week 3. From Classical Legal Thought to Sociological Jurisprudence to Legal Realism**

**Required:**
- *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798), Chase and Iredell only.
- *Marbury v. Madison*, 1 Cr. 137 (1803).
- *Brandeis Brief* (1907). Do NOT read the entire brief. Just get a sense of it.
- *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). Sutherland, Taft, and Holmes only.
Paper Topic: What is the relationship between legal realism and legal reasoning? Do legal realists pose a threat to the legal reasoning model?

Week 4. Modern Legal Realists: The Critical Legal Studies Movement

Required:
- Legal Information Institute, “Critical Legal Studies: An Overview.”
- Legal Information Institute, “Feminist Jurisprudence: An Overview.”

Recommended:
Week 5. Contemporary Post-Realist Scholarship: The Liberal Principlist Attempt to Rescue Judicial Review from Realism and Its Relationship to Political Science

Required:


Recommended:

Paper Topic: Discuss the legacy of legal realism. Compare and contrast the CLS movement to liberal principlist scholars such as Dworkin and Ackerman. Which argument do you find more attractive? Why?

Paper Topic: What is the relationship between activism and principlism? Discuss how liberal principlist arguments like those from legal theorists Dworkin and Ackerman relate to the data provided by political scientists such as Howard, Segal, and Keck.

The Contribution of Political Science

Week 6. Behavioralism: Attitudinalists

Required:
- Segal, Jeffrey A. and Harold J. Spaeth, The Supreme Court and the Attitudinal Model (New York: Cambridge University Press, 1993) Ch.6 "The Decision on the Merits" and Ch.10 "Conclusion: Responses to Criticisms of the Attitudinal Model." On e-reserve.

Recommended:
Week 7. From Behavioralism to New Institutionalism: The Strategic Approach

Required:

Recommended:

**Paper Topic:** Is behavioralism is law and courts research, as exemplified by both attitudinal and strategic approaches, predicated on legal realism? How useful is behavioralism for studying public law?

**Paper Topic:** What is the relationship between the attitudinal model and the strategic or rational choice approach to studying law and courts? Are they compatible, different, etc.? Which approach is most useful for studying public law?

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**Week 8. New Institutionalism: Origins of Historical Institutionalism (“Old” Institutionalism?)**

**Required:**

**Recommended:**
Week 10. Judicial Elections

Guest Seminar Participant: Professor Matthew J. Streb will lead the seminar.

Required:

Recommended:

**Paper Topic: Why should we study judicial elections? What methodological approach is best for research on this topic? Why? What are the most important findings of the research on judicial elections?**

Week 11. Law & Doctrine as Both Constraint and Opportunity I

Required:

Recommended:
- Kahn, Ronald and Ken I. Kersch, eds., The Supreme Court and American Political Development (Lawrence, KS: University Press of Kansas, 2006).
Paper Topic: What is the relationship between the attitudinal model and new institutional scholarship? Are the rational choice and historical institutional approaches compatible? Are they different? Which approach is most useful for studying public law?

Week 12. Law & Doctrine as Both Constraint and Opportunity II

Required:

Paper Topic: Does law matter in the judicial decision making process?


Required:


Required:

Recommended:
Paper Topic: What do the alternate explanations of judicial behavior (such as elite influence, approval-seeking, reputation-enhancing, and the judgment of history) tell us about the more mainstream theories of judicial behavior such as the attitudinal and strategic models? Are they compatible? If not, why not? If so, how so?

Week 15. Law & Courts in the Political Regime I
Required:

Recommended:

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**Week 16. Law & Courts in the Political Regime II**

**Required:**

**Paper Topic:** What have been the most important successes of law and courts scholars? What have been their most serious shortcomings? In answering this question you may want to think about how your own research (or future research) fits into the field.

**Final research papers due at final class meeting.**

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**Additional Topics of Interest**

**Courts and Social Change**


Sarat, Austin and Stuart A. Sheingold, eds., Cause Lawyers and Social Movements (Stanford, CA: Stanford University Press, 2006).

Pinello, Daniel R., America’s Struggle for Same-Sex Marriage (New York, NY: Cambridge University Press, 2006).


Paper Topic: To what extent can and/or should public law scholars study social change? What are the obstacles and benefits of doing legal research on social change? How does the political regimes literature relate to law and courts research on social change?

Comparative Courts

**** Tate, C. Neal, “The Literature of Comparative Judicial Politics: A 118 Year Survey,” Paper presented at the Triennial World Congress of the International Political Science Association, Fukuoka, Japan, 2006. An extensive review with bibliography of the literature of comparative judicial politics over a 118 year period. It is available in Word format on Professor Tate’s website.

*** http://www.comparativeconstitutions.org/ - Information on comparative constitutional design and implementation.

- Sweet, Martin J. Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court (Charlottesville, VA: University of Virginia Press, 2010).
- Paper Topic: To what extent can and/or should public law scholars study social change? What are the obstacles and benefits of doing legal research on social change? How does the political regimes literature relate to law and courts research on social change?

- Jackson, Vicki C. and Mark Tushnet, eds., Defining the Field of Comparative Constitutional Law (Westport, CT: Praeger, 2002).
Paper Topic: Is there an advantage to studying law and courts comparatively? What are the pros and cons of such an approach?

Trial Courts

- Priest and Klein, “The Selection of Disputes for Litigation,” *Journal of Legal Studies* 13 (1984): 1. Briefly, Priest and Klein argue that, you cannot make inferences about legal rules from the decisions that get resolved at trial, as these decisions will almost always be a nonrepresentative sample of the possible disputes, and the cases that
do get resolved at trial are those where the facts are close to the legal rule. Under certain limiting conditions that may rarely if ever be met, they find that plaintiffs will win about 50% of the cases that get resolved at trial regardless of the judge, jury, or legal rule.


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**Organized Interests and the Courts**

- Washby, Stephen L., *Race Relations Litigation in an Age of Complexity* (Charlottesville, VA: University of Virginia Press, 1995). In particular: Ch. 7, “The ‘Planned’ in Planned Litigation,” pp. 141-169; Ch. 11,


**Appellate Courts**

State Courts


Courts and Legislatures


**Agenda-Setting**

• Free Press, 111–32.
• Provine, Doris Marie, *Case Selection in the United States Supreme Court* (Chicago, IL: University of Chicago Press, 1980).
• Baird, Vanessa A., *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court’s Agenda* (Charlottesville, VA: University of Virginia Press, 2007).

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**Judicial Succession: Departures, Appointments, and Elections**

• Atkinson, David N., Leaving the Bench: Supreme Court Justices at the End (Lawrence, KS: University Press of Kansas, 1999).


• Kenney, Sally, Gender and Justice: Why Women in the Judiciary Really Matter (Routledge, 2012).

Judicial Support Staff

• Peppers, Todd, Courtiers of the Marble Palace (Stanford, CA: Stanford University Press, 2006).
Law, Politics and the Media

- Newland, Chester, “Press Coverage of the United States Supreme Court,” *Western Political Quarterly* 15 (1964).

Courts, Public Opinion and Legitimacy


The Legal Profession: Law School, Lawyers, and Law Practice


• Sarat, Austin and Stuart A. Scheingold, eds., *Cause Lawyers and Social Movements* (Stanford, CA: Stanford University Press, 2006).

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**Qualitative Approaches to Studying Law & Courts**


**Interviewing Judges and Legal Actors:**