

## **POLSCI 688/489 -- Law and Institutions**

University of Michigan  
Fall 2023, Tuesdays 2-5pm  
5664 Haven Hall

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The political scientist Harold Lasswell famously defined politics as “Who Gets What, When, and How,” tying politics to power, and power to elites, but offering little in the way of institutional analysis. This course examines law and American political institutions (courts, legislatures, the presidency), taking up the ways in which these institutions shape distributions.

In addition to examining how law and legal institutions are related to politics, the course introduces students to various approaches to institutional analysis, taking the conceptualization of an “institution” as an object of examination. What are the benefits and disadvantages of understanding institutions as rule platforms for the pursuit of individual-level policy preferences? How is rational choice institutionalism different from historical-interpretive institutionalism? How do we study interaction among institutions? How do we study institutions and power, where power is tied to systems of race, gender, and labor? Is a single conservative-liberal scale adequate for studying the ideologies of institutional actors?

Course themes include state-building and political development; inter-branch dynamics; power; race and ethnic politics; regime politics; and ideological systems. Substantive topics include racial state formation; the dynamics of constitutional leadership and the political foundations of judicial supremacy; statutory design and civil rights enforcement; crime and punishment in Black America; and the rise of the conservative legal movement.

The course begins with conceptual material, which provides a touchstone for the remainder of the course. The studies that follow will be explored for substantive content and animating theoretical commitments as reflected in evidence, methods, and standards for falsification or counterargument.

Materials: All required course materials are on Canvas

An Optional Resource: K. Whittington, D. Keleman, and G. Caldeira, eds., 2008. *Oxford Handbook of Law and Politics*. Oxford Handbooks Online.

Aug. 29      **Introduction**

Sept. 5      **Approaches & Conceptualization, Part I**

Shepsle, Kenneth. 1995. “Studying Institutions: Some Lessons from the Rational Choice Approach,” in Farr, Dryzek, & Leonard, eds. *Political Science in History: Research Programs and Political Traditions*, 276-295.

Clayton, Cornell. 1999. "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms," in Clayton and Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches*, 15-41.

Gillman, Howard. 1999. "The Court as an Idea, not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in Clayton and Gillman eds. *Supreme Court Decision-Making*, 65-87.

Recommended:

Gillman, Howard. 2015. "Courts and the Politics of Partisan Coalitions," in K. Whittington et. al., *Oxford Handbook of Law and Politics*, 1-22.

Graber, Mark. 1993. "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary." *Studies in American Political Development* 7: 35-73.

Sept. 12

**Approaches & Conceptualization, Part II**

Moe, Terry 1985. "Control and Feedback in Economic Regulation: The Case of the NLRB." *American Political Science Review*. 79: 1094-1116.

Orren, Karen and Stephen Skowronek. 1996. "Institutions and Intercurrence: Theory Building in the Fullness of Time, In *Political Order*, Shapiro and Hardin eds., (NYU Press), 111-146.

Epstein, Lee and Knight, Jack. 2013. "Reconsidering Judicial Preferences." *Annual Review of Political Science*. 16: 11-31.

In case you're curious, given Orren & Skowronek's critique:

Fiorina, Morris P. 1986. "Legislator Uncertainty, Legislative Control, and Delegation of Legislative Authority," *Journal of Law, Economics, and Organization* 2: 33-51.

Sept. 19

**Approaches & Conceptualization, Part III**

Dawson, Michael and Cohen, Cathy. 2002. "Problems in the Study of the Politics of Race." In Katznelson and Milner, eds. *Political Science: State of the Discipline*, 488-510.

Moe, Terry 2005. "Power and Political Institutions." *Perspectives on Politics* 3: 215-33.

Ball, Terence. 1997. "New Faces of Power" in Wartenberg, ed. *Rethinking Power*, 14-31.

Lovell, George 2012. "The Myth of the Myth of Rights." *Studies in Law, Politics, and Society*. 59: 1-30.

Sept. 26

### **Racial State Building**

*Johnson v. M'Intosh*, 21 U.S. 543 (1823), excerpts.

Edwards, Laura F. 2015. "The Federal Government and the Reconstruction of the Legal Order" in *A Legal History of the Civil War and Reconstruction*, 90-119.

Frymer, Paul. 2014. "A Rush and a Push and the Land is Ours": Territorial Expansion, Land Policy, and U.S. State Formation," *Perspectives on Politics* 12 (1): 119-136.

Novkov, Julie. 2006. "*Pace v. Alabama*: Interracial Love, the Marriage Contract, and the Postbellum Foundations of the Family." In Kahn and Kersch eds. *The Supreme Court and American Political Development*, 329-361.

Oct. 3

### **Interbranch Dynamics (Executive-Court), Departmentalism, and Constitutional Authority**

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

Whittington, Keith. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership* (Princeton), 1-81 (Chapters 1 and 2).

Oct. 10

McMahon, Kevin. 2011. *Nixon's Court: His Challenge to Judicial Liberalism and its Political Consequences* (Chicago), 1-13, 37-62, 65-82, 146-66.

Oct. 17

Study Break

Oct. 20

Short Exercise Due, 10am

Oct. 24

### **Private Enforcement of Rights: Job Discrimination Litigation**

Farhang, Sean. 2009. "The Political Development of Job Discrimination Litigation, 1963-1976." *Studies in American Political Development*. 23: 23-60.

Lovell, George, McCann, Michael, and Taylor, Kirstine. 2016. "Covering Legal Mobilization: A Bottom-Up Political History of *Wards Cove v. Atonio*." *Law & Social Inquiry* 41: 61-99.

Oct. 31

Farhang, Sean. 2010. Ch. 6 & 7. *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton), 172-234.

Nov. 7

### **The Carceral State**

Alexander, Michelle 2010. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press), 1-19, 40-94, 180-208.

Forman, James Jr. 2012. "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," 87 *New York University Law Review* 21.

Incarceration Data, Prison Policy Initiative 2019

Nov. 14      Forman, James Jr. 2017. *Locking Up Our Own: Crime and Punishment in Black America*. (Farrar), 3-14, 119-150, 217-239.

Nov. 21      No Class; Happy Thanksgiving!

Nov. 21      Draft Final Paper due, 10:00am, if you are taking this option!

Nov. 28      **Rise of the Conservative Legal Movement**

Teles, Steven M. 2008. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton), 1-57.

Dec. 5      Teles, Steven M. 2009. "Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment." *Studies in American Political Development* 23: 61-83.

Robert Tsai and Mary Ziegler, "Why the Supreme Court Killed Roe v. Wade: Don't Blame Partisan Judges. The Real Reason is Movement Judges." *Politico*. June 25, 2023.

Linda Greenhouse, "What John Roberts and his Court Have Wrought Over 18 Years." *New York Times*, July 9, 2023.

Final Paper Due: Tuesday, December 12, 10am

### Assignments and Grading

Class Participation: 40%

Short Exercise: 25%

Final Paper: 35% (Optional: a graded draft [15%], due Nov. 21 at 10am, and final version [20%])

### ***Class Participation* (40%)**

This course is a seminar and so it revolves primarily around discussion. Each week, you need to come to class prepared to discuss the readings. To be well-prepared means thinking about and "digesting" the readings before class. The quality of your contributions to class discussion counts, and contributions come in many forms, including answering and asking questions; responsiveness to others (e.g., elaborating or building upon others' comments) and making connections among readings. The success of the class will depend heavily on your preparation and willingness to contribute your ideas to the discussion.

For each reading, you should arrive ready to (1) identify the scholarly debate or “scholarly conversation” that an author is joining; this involves locating the reading within a literature or literatures, and (2) identify how the author is “breaking into” a scholarly conversation/literature: what claims or arguments does the author make within that scholarly landscape? and (3) offer comments/observations regarding the reading. There is lots of room here, and comments might address course themes, connecting the reading to the conceptual material of the first three weeks; comments might also connect the reading to a prior substantive reading.

Regarding the notion of “breaking into” a scholarly conversation, see Mark Gaipa (2003) “Breaking Into the Conversation: How Students Can Acquire Authority for their Writing” *Pedagogy: Critical Approaches to Teaching Literature, Language, Composition, and Culture*, 4: 419-437. This article is in Canvas.

Facilitation of Discussion: You will be asked to sign up **twice (2x)** to help lead discussion of a particular reading. This includes giving a short (**5 minute**) presentation to the class, as well as facilitating discussion of that selection. Your presentation must address (1), (2) and (3) above. You may not sign up for consecutive weeks. You will be asked to turn in a written version of your presentation (1-page max), graded check; check plus; check minus.

Regarding your role as facilitator: In general, facilitating discussion means focusing and guiding the group’s exploration of that material. It means staying attuned to the flow of discussion throughout the class meeting, and bringing attention back to the material as you think appropriate. Think of it as having the “lead” on a specific chunk of material.

### ***Short Written Exercise*** (1200-1300 words) (25%)

This exercise asks you to consider one concept, as elaborated in readings on Approaches & Conceptualization – institution, multiple orders, power, political regime – as it applies and relates to one substantive study: Frymer, Novkov, Whittington, or McMahon. You should present and elaborate a claim (a thesis) regarding the payoff of applying your chosen concept to your chosen study.

Your overall job is to demonstrate understanding of your chosen concept via the application of that concept to a substantive study: What features of the study are illuminated via your chosen concept? How might you further elaborate or explore your chosen concept given the particulars of that study? Your essay must clearly relate course material on your chosen concept (which will likely involve multiple articles!) with details and particulars from your chosen substantive study. Quotes from the readings are essential in that regard.

### ***Final Paper*** (1800-1900 words, not including references) (35%)

You have the option to write a graded draft (15%), due Nov. 21 at 10am, and a final version (20%)

The final assignment asks you to formulate and begin pursuit of a research question involving law and institutions. You must explain how you are “breaking into” a scholarly conversation/debate; how you are applying a specific approach to institutional analysis that will enable you to explore that research question; and how you are pursuing your research question in preliminary ways. You must draw on course materials to frame and explore your research question, especially material from the first three weeks.

Your options here are wide open, but *you must make an appointment with me in **early November** to discuss your topic.*

Keep in mind: you must clearly identify your specific approach to institutional analysis, using sources such as Moe, Clayton, Orren and Skowronek, Gillman, Dawson & Cohen, etc. You must elaborate the components of your approach, which might well be a blend! Don't simply name an author and assume that is sufficient to designate an approach.