

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

University of Michigan

Winter 2019

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Office Hours: Thursdays, 2-4pm

Thursdays, 10-12p  
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### Description

This mini-course on the “new institutionalisms” introduces graduate students to a variety of approaches to the study of American political institutions. Putting front and square the matter of conceptualization – what is an institution? – the course offers students a means of engaging the multiple and competing approaches to the study of institutions that circulate in political science. Whereas rational choice institutionalism is the dominant approach in the discipline, the conception of an institution built into that approach remains typically uninterrogated. Likewise, the features of institutions obscured by rational choice institutionalism usually remain unexplored.

And so differently put, this course puts rational choice institutionalism into conversation with a range of historical-institutional approaches. Course themes include: the conceptualization of an institution; the conceptualization of order, time, power, ideology, and strategy in the study of political institutions; and the place of history in the study of political institutions and political systems. Law is a unifying theme as it offers a way of examining the Supreme Court (the interpretation of law), Congress (the passage of law), and the Presidency (the enforcement of law), as well as inter-branch dynamics and relationships.

We will begin with an introduction to the “new institutionalisms,” which include rational choice institutionalism and a variety of historical institutionalisms. These introductory materials will be a benchmark for our examination of four book-length studies: on the rise and demise of police powers jurisprudence of the *Lochner* era; on interbranch dynamics (Executive-Court) and the political foundations of judicial authority; on statutory design, Congress’s construction of a private enforcement regime for civil rights, and Congress-Executive conflict; and on organizational mobilization and the rise of the conservative legal movement as a response to an entrenched liberal order. While the content of these studies will be a platform for discussion, our primary focus will be excavating their animating theoretical commitments regarding the study of institutions as reflected in the content of their arguments, the forms of evidence they use, their methods, and their standards for falsification or counterargument.

### Books:

Farhang, Sean (2010) *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton, N.J: Princeton University Press.

Gillman, Howard (1993) *The Constitution Beseiged: The Rise and Demise of Police Powers Jurisprudence.* Durham, N.C: Duke University Press.

Teles, Steven M. (2010) *The Rise of the Conservative Legal Movement: Battle for Control of the Law.* Princeton, N.J: Princeton University Press.

Whittington, Keith E. (2007) *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership.* Princeton University Press.

January 10      **Introduction**

January 17      **The New Institutionalisms (Plural)**

Hall, Peter A., and Rosemary Taylor (1996) "Political Science and the Three New Institutionalisms." *Political Studies* 44: 936-957.

Maltzman, Forrest, James Spriggs, and Paul Wahlbeck (1999) "Strategy and Judicial Choice," in Clayton and Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press. 43-63.

Bailey, Michael A. and Forrest Maltzman (2012) *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton University Press. 1-16.

Orren, Karen and Stephen Skowronek (1995) "Order and Time in Institutional Study," in Farr, Dryzek, & Leonard, eds., *Political Science in History: Research Programs and Political Traditions*. Cambridge University Press. 296-317.

Brandwein, Pamela (2011) "Law and American Political Development." *Annual Review of Law and Social Sciences* 7: 187-216.

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

Ball, Terence (1997) "New Faces of Power" in Thomas Wartenberg, ed., *Rethinking Power*. SUNY Press. 14-31.

Recommended:

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*. Chicago. 15-41.

Graber, Mark (2015) "Constitutional Law and American Politics," in Caldeira, Kelemen, and Whittington, eds., *Oxford Handbook of Law and Politics*. Oxford Handbooks Online.

January 24      **New Historical Institutionalism and the Study of "Lochner-Era" Constitutionalism**

Gillman, Howard (1993) *The Constitution Beseiged: The Rise and Demise of Police Powers Jurisprudence*. Duke University Press.

January 31      **Interbranch Dynamics (Executive-Court), Departmentalism, and Constitutional Authority**

Bailey, Michael A. and Forrest Maltzman (2012) "Causes and Consequences of Diverse Legal Values," *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton University Press. 80-92.

Whittington, Keith E. (2007) *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership*. Princeton University Press. 1-160.

Recommended:

Bailey, Michael A. and Forrest Maltzman (2012) "Signals from the Executive," *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton University Press. 121-139.

Gillman, Howard (2015) "Courts and the Politics of Partisan Coalitions," in Caldeira, Kelemen, and Whittington, eds., *Oxford Handbook of Law and Politics*. Oxford Handbooks Online, 1-22.

February 7      **Statutory Design, Private Enforcement Regimes, and Interbranch Conflict (Congress-Executive)**

Farhang, Sean (2010) *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* Princeton University Press. 1-171.

February 14      **Organizational Mobilization and the Conservative Movement in Law**

Edelman, Lauren, Gwen Leachman, and Doug McAdam (2010) "On Law, Organizations, and Social Movements." *Annual Review of Law and Social Science*. 6:653-685.

Teles, Steven M. (2010) *The Rise of the Conservative Legal Movement: Battle for Control of the Law*. Princeton University Press. 1-134.

February 21      Teles, *The Rise of the Conservative Legal Movement*, 135-180, 220-281.

Montgomery, David (2019) "Conquerors of the Courts: Forget Trump's Court Picks, the Federalist Society's Impact on the Law Goes Much Deeper," *Washington Post*, January 2, 2019.

Final Paper: Due Monday, March 11, 9:00am on Canvas

Assignments and Grading

Your grade for this course will be based on four factors:

Class Participation: 30%

In-Class Assignments: 20%

Short Written Exercise: 20% (due: Monday, Feb. 18, 12:00noon on Canvas)

Final Paper: 30% (due Monday, March 11, 9:00am on Canvas)

**Class Participation:** 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 article or book, you should arrive ready to (1) identify the scholarly debate or “conversation” that an author is joining; (2) identify how the author is “breaking into” that scholarly conversation: what claims or arguments does the author make within that scholarly landscape? and (3) offer two questions or criticisms regarding the reading. You may be asked, regarding the book-length studies, to write down your two questions/criticisms and hand them in.

For help in this regard, 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.

**In-Class Assignments:** You will be asked to sign up (twice) to lead discussion of a particular article or book chapter. This includes giving a short (5 minute) presentation to the class, as well as facilitating discussion of that article or chapter. If you sign up for an article or book introduction, your presentation must include (1) and (2) above, but you should go beyond that to identify issues and questions you perceive as important. If you sign up for an “internal” book chapter, your presentation should focus on how that chapter contributes to the arguments of the book vis-à-vis scholarly “conversations.” You may not sign up for two chapters within a single book.

Regarding your role as facilitator: In general, facilitating discussion on “your” material means providing analytic structure for the discussion, as well as focusing and guiding the group’s exploration of that material. Your role as facilitator will require you to stay attuned to the flow of class discussion throughout the two hours, and to bring attention back to your article or book chapter as you think appropriate. Think of it as having the “lead” on a specific chunk of material.

**Short Written Exercise** (1200-1300 words): This exercise asks you to consider one concept, as elaborated in readings from January 17<sup>th</sup> (e.g., order, time, power, ideology, etc.) as it relates to one book-length study (Gillman, Whittington or Farhang). This is a meta-level task that requires you to relate your chosen concept to your chosen study. You should consider the following questions: What features of the institution(s) under examination in the book-length study are illuminated with and through 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* with details and particulars from your *chosen study*. Quotes from the readings are essential in that regard. Due: Monday, February 18, 12noon.

**Final Paper** (1800-1900 words, not including references): The final assignment asks you to formulate and begin pursuit of a research question involving a political institution. This entails explaining how you are “breaking into” relevant scholarly conversations; choosing one or two of the “new institutionalisms” you think will best enable you to explore that research question, and justifying your choices; and pursuing

your inquiry in preliminary and tentative ways. This assignment gives you the opportunity to begin or explore a research or dissertation subject.

In choosing one or two of the “new institutionalisms,” you are not limited to the three “ideal types” laid out by Hall and Taylor. Alternative and more nuanced varieties can be found in Orren and Skowronek; in Gillman; in Ball, and even in Moe, as his conception of power pushes the edges of rational choice institutionalism. In engaging one or two “new institutionalisms,” therefore, you must elaborate the components of the approach. Don’t simply name the author to designate the approach. To explicate the components of your chosen institutionalism(s), you can, for example, explicitly compare and contrast your chosen institutionalism(s) with the “ideal types” laid out by Hall and Taylor.

You must make an appointment with me in February to discuss your final paper. Due: Monday, March 11, 9:00am.