

Saint Joseph's University
LAW AND SOCIAL CHANGE
Political Science 2181 WRI– Spring 2006
Tuesday, Wednesday, Friday, 1:00-1:50 p.m.
Barbelin 112G
Dr. Susan P. Liebell

Office: Barbelin 105
Office Hours: Weds, 10-12:00 pm;
Fri, 10-1:00 pm; and by appointment

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*"...lawyers, through their everyday work in the courts, may become social reformers."
-Thurgood Marshall, as Solicitor General*

*"Of the three powers [executive, legislative, judicial]...the judiciary is in some measure next to nothing"
-Montesquieu, The Spirit of the Laws*

Course Description

Can courts effectively generate social change? What are the advantages and limits of using the law to effect social change? This class uses cases and case studies to examine the relationship between law and society. In the last fifty years, groups attempting to affect social change have turned to the courts as a source of authority when they believe they are disadvantaged by the larger political system. To what extent has this approach been successful? While constitutional law exclusively emphasizes the logic of the opinion, this course will look at *both* the decisions of the Supreme Court and problems of implementation, the actual benefits received by affected parties, and the relationship between the federal government, the states, and public opinion. Case studies will include: school integration, abortion, pay equity for women, death penalty, and single-sex unions and marriage.

Learning Goals and Means of Achievement

- In order to have a first hand experience of competing paradigms in the social sciences, students read and critically assess four major schools of thought regarding courts and social change.** In order to achieve this goal, students read four major case studies, write a critical comparison of two of the four schools or thought, and write a final paper assessing the strengths and weaknesses of all four paradigms using the case studies.
- Students develop writing skills including the ability to: 1) write an introduction that culminates in a crafted thesis sentence; 2) marshal evidence from multiple sources to defend a thesis; and 3) carefully self-edit and proofread.** After being coached through lectures, conferences, handouts, and comments on their written work, students write multiple papers of varying lengths.
- Through the rewriting of papers, students have the experience of developing their ideas and changing their minds.** The course begins with a "first cut" comparison of the two major paradigms (Rosenberg and McCann) that requires students to take a provisional stand on which author best explains how courts affect social change. However, the final paper requires them to revisit these early impressions incorporating two additional paradigms (Epstein/Kobylka and Eskridge) and three additional case studies.
- Students learn to 1) give short oral presentations and 2) critically react to oral presentations given by others.** Using the death penalty cases, students represent and defend the ideas of a particular justice by giving a short oral presentation. Students are required to present questions to each "justice" in a modified moot court exercise.

□ **Students learn to read Supreme Court cases, scholarly review articles, and full-length academic monographs.** Students demonstrate their command of the material through the writing of legal briefs and papers and oral presentations and moot-court questioning. In addition, exams test their basic knowledge of case studies, basic concepts, and comparisons of paradigms.

Texts and Internet Resources

We will simultaneously use two sets of texts in this class. First, we examine scholarly accounts of groups using the courts to bring social reform. All these works are available as paperbacks for sale at the campus bookstore or online through Amazon or used-book websites. Second, we will use Supreme Court decisions downloaded from Blackboard or www.Findlaw.com. Some decisions include all the concurring and dissenting opinions. Most decisions will be available in a shortened version on Blackboard.

Justice Hugo Black always carried a copy of the Constitution with him and he reread it often. One of your first assignments will be to read the entire Constitution. Periodically, I will ask you to reread the Constitution and you should do so whenever you feel that your own understanding of the Constitution and the Court's doctrines are changing. We will also read material that focuses on the intellectual origins of the constitution (notes from the Constitutional Convention, state ratifying debates and Federalist and Anti-Federalist writings).

Because we will be meeting at a time when the Court will be hearing cases, students will be responsible for monitoring a Supreme Court Web site (see list below). *Once a week*, log on and browse. It is also required that you read *The New York Times* paying particular attention to issues before the Court (and other lower courts), summaries of new decisions, Presidential appointments and Congressional confirmation of other Federal judges, and discussions of possible Supreme Court appointments. Pay particular attention to groups attempting to use the courts for social change. The *Times* is available delivered at a student discount and free online. Articles can be downloaded through www.Nytimes.com as WORD documents within two weeks of an item's printing. *New York Times* articles are permanently available as PDF files through the SJU library using ProQuest.

The following books are available at the bookstore:

Lee Epstein and Joseph Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (Chapel Hill: University of North Carolina Press, 1992).

William Eskridge, *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002).

Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, University of Chicago Press, 1991).

Michael McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

The language of the Supreme Court requires both an understanding of Constitutional doctrines and a good command of the English language. You must look up all words with which you are unfamiliar. *Black's Law Dictionary* is helpful for legal terms and is available in the library. Online, there are several law dictionaries that may be of help (though they are **not** as good as *Black's*). Use the advanced search option of Google.com, enter your term in the "exact" box and the words "law dictionary" in the "all the words" box.

In an effort to improve your own writing, I recommend reading *The Elements of Style* by William Strunk and E.B. White and *A Rulebook for Arguments* by Anthony Weston. If you have never read Strunk and White (a VERY SHORT book), it can help you explore ways to make your writing clearer and more effective. Remember that an argument's *substance* is inextricably connected to its *writing style*. Weston outlines the various types of arguments and this is an invaluable resource for beginning a larger work, such as an honors' thesis or a seminar paper. Several copies of both works are available at the bookstore.

You must also familiarize yourself with downloading information from the following websites. I highly recommend that you download material for assignments in advance:

findlaw.com/casecode/supreme.html

Go to "law for professionals," select "cases and codes," and then select "Supreme Court cases." Generally, you should be able to get the case by entering the case name (e.g. *Lochner v. New York*). In rare cases, you may need to find the case number (e.g., 198 U.S. 45) by referring to the syllabus. Occasionally, you may need to search by year. Within the text of the case, small, black capital letters in brackets [198 U.S. 45, 124] indicate the case number followed by the page number. Blue case codes are links to the text of other cases.

Press-pubs.uchicago.edu/founders/

The Founders Constitution edited by Philip Kurland and Ralph Lerner (Chicago and London: University of Chicago Press 1987) is a collection of historical documents arranged by subject (volume 1) and clause (volumes 2-5 of the Constitution). In the first weeks of the course, I will ask you to read some of the arguments for (e.g., *The Federalist Papers*) and against (e.g., *Brutus*) the ratification of the proposed Constitution. Assigned readings are grouped as a course document. However, you may find this resource helpful for papers and briefs. Find the piece (see table of contents), then scroll to bottom for "print" version. You may copy this into a text file of your choice. The five-volume set is also available at the library.

In order to keep up with the Court's fall term, check one of these Court sites once a week:

<http://www.law.cornell.edu/> → navigate to → www.supct.law.cornell.edu/supct/
www.oyez.nwu.edu

The Supreme Court's website is helpful for answering general questions:

www.supremecourtus.gov

Please see our Blackboard's "external links" section for additional websites. Please feel free to forward relevant links to me and I will post them at my discretion.

Requirements and Grading:

Grades will be based upon class participation and attendance (25%); written work (book review, briefs, and final paper) (50%); and two exams (25%).

Attendance

You are expected to be in attendance and on time for every class. There will be a sign-in sheet that will circulate at the start of every class. If you are late, it is your responsibility to get the sheet and mark your attendance. **If you miss more than nine times, you will fail the class** unless there are special circumstances, verified **in writing** by the Associate Dean. You should attend class unless you are ill or you are experiencing an emergency. Attending class helps boost your participation grade. If you are not in class, it is your responsibility to get notes from at least one other student.

Participation

You must come to class with the readings complete and with your own questions to pose. You should be prepared to explain the author's objectives; to summarize the main arguments and how they are developed; and, finally, to raise questions about the validity of the assumptions and the logic of the argument. CLASS PARTICIPATION WILL BE A MAJOR PART OF YOUR FINAL GRADE. Please remember that class participation depends on quality not quantity – you need not feel obligated to participate every session or every ten minutes. Class participation means attending class prepared, listening to the arguments of others, and contributing when appropriate. You should seek to further your understanding of the text – thus furthering the class discussion.

The following are guidelines for participation grades:

"A"= Excellent attendance; contributions that consistently reflect a careful reading and analysis of the reading, attention to former lectures and comments made in class by other students.

"B" = Excellent attendance; contributions that demonstrate you have done the reading and assessed *some* of the reading, lectures, and class discussions

"C" = Excellent attendance with little or no class contribution OR sporadic attendance with good class contributions.

"D" = Sporadic attendance; infrequent contributions or contributions that demonstrate that you have not read the assigned materials.

"F" = Infrequent attendance, no contributions or contributions that demonstrate that you have not read the assigned materials.

□ Writing Assignments

BRIEFS:

Briefs are used by lawyers and scholars to summarize the key points in any court's opinion. Please see the guide to writing briefs on Blackboard.

You will be asked to brief 2 cases. The first brief (*Brown v. Board of Education*) will be 2 pages long. The second brief (*Griswold v. Connecticut*) will be 3 pages long. Put your name on the *back* of the last page. I grade papers blindly.

Optional Final Brief: For those of you who are not happy with one of your brief grades, you have the opportunity to brief one more case: *Romer v. Evans* (available on Blackboard). Follow the *Griswold* format, carefully attending to the comments section. In this case, the works of Epstein/Kobylka and Eskridge may be relevant. Brief is due the last day of class, Friday, April 28th. If your grade on this brief is better than one of your earlier briefs, this grade will completely replace the *lowest* brief grade.

COMPARATIVE BOOK REVIEW:

Students will write a five-page book review comparing the arguments made by Gerald Rosenberg and Michael McCann. First, *briefly* present the main arguments of each author noting their case, evidence, and general methodology. Please use the two books you have read *and* McCann's review of *The Hollow Hope* and Rosenberg's response (both on Blackboard). Second, evaluate their strengths and weaknesses. Third, evaluate which paradigm is more compelling and provide evidence for your claim. Your thesis sentence (located at the end of your introduction) should indicate which paradigm you believe best describes the dynamics of social change in the judiciary.

Be sensitive to the authors' understanding of crucial theoretical questions (i.e., what is the role of the law? the legislature? the courts? in forcing social change). What does each work contribute to our understanding of the law, courts, social change?

Your review should *not* emphasize writing style or whether you enjoyed it. Rather, you should engage with arguments and evaluate their strengths and weaknesses. You are providing an overview of an important debate and developing your own understanding of the role of courts, legislatures, and advocacy groups in fostering social change. Your evaluation of these arguments should evolve over the course of the semester as you consider alternative approaches and different case studies. This book review serves as *both* a paper in and of itself AND a memo for your final paper – one that marks out the fundamental theoretical issues. Your final paper must contain a section in which you synthesize these modern debates with the earlier arguments concerning the balance of power in a constitutional regime, staking out a position about the proper role of the courts in creating or facilitating social change.

FINAL PAPER:

The final paper is due Monday, April 25th before 4:00 p.m. Please bring the paper to the department of political science in B/L 105 and put it in the marked box.

Students will write a ten-page paper that answers the following question: "*Brown v. Board of Education* is celebrated as an example of the judiciary affecting social change. According to your analysis of the five cases we have considered (integration, pay equity for women, death penalty, abortion, and same-sex unions), **WHAT ROLE DOES THE COURT HAVE IN CREATING SOCIAL CHANGE?** What role **SHOULD** the Court have in creating social change? *Your thesis should take a stand on BOTH these questions.*

Questions to think about: (How) does the Court affect social change? Under what conditions **CAN** courts generate social change? Does such action by the judiciary violate democratic principles? Is it effective in accomplishing social change?"

In your paper, you must: 1) take a stand on the paradigms offered by the scholars we have considered; 2) state *both* the positive and negative aspects of courts ruling on issues involving social change; and 3) cite specific examples from the cases covered to support your claims regarding courts and social change.

However, you need not include a section "McCann/Rosenberg debate" unless you think it furthers your paper's goals. In other words, you can feel free to their ideas in *any way* that you feel works for your arguments regarding social change.

This is a 2000-level writing-intensive course and I expect a paper that is thoughtful, proofread, highly organized, and meticulously documented.

Papers must include a Chicago-style bibliography and footnotes. For political science majors, dust off your Research Seminar notes. For all others, the *Chicago Manual of Style* is in the reference section of the library and you need only figure out how to cite books, articles (for the McCann review and Rosenberg response), and Supreme Court cases.

Papers must be well organized, possessing of a clear progression of ideas and evidence from introduction through to conclusion. Each paragraph should have a clear purpose and an easily identifiable role within the larger argument being developed. All papers must have page numbers, reasonable margins and font sizes, and be double-spaced. Please include a meaningful title and clearly written thesis statement. You are expected to **BOTH** run a spelling check on the computer **AND** proofread your paper. I grade on a 100 point scale and I subtract one point for each typo, citation error, punctuation mistake, etc. Although it is not required, I strongly encourage that you print on **BOTH SIDES**.

YOU MAY TAKE ANY POSITION YOU CAN DEFEND AND YOU SHOULD USE LANGUAGE THAT YOU BEST EXPRESSES YOUR BELIEFS ON THE TREATED TOPICS.

YOU MUST DEMONSTRATE A COMMAND OF THE MATERIALS TREATED IN THIS CLASS BY USING EXAMPLES FROM THE TEXT.

LATE PAPERS WILL BE PENALIZED. PROBLEMS WITH DEADLINES SHOULD BE DISCUSSED ONE WEEK PRIOR TO THE DEADLINE.

□ Exams: The midterm and the final exam will focus on the five cases and how they compare to each other. They will focus on the texts and the cases. Because this is a writing-intensive course, exams will include both multiple-choice and short essays.

Academic Honesty Policy: The Academic Honesty Policy and the Course Contract are available on Blackboard under Course Documents. You are required to read the policy, sign the Contract, and return it to me. If you have any questions regarding the Policy, please see me in office hours. Writing and test-taking are part of the learning experience. Your learning is compromised if you steal the ideas or words of other students or other authors. If you violate the Academic Honesty Policy, you will fail the assignment and the course.

A WORD OF CAUTION ABOUT THE INTERNET: University policies concerning plagiarism apply to copying materials from the internet. If you block copy text into a document, remember to put that material in quotation marks and copy the source into your document. Two warnings. First, the internet is a source of both excellent information and false drivel. Second, I enjoy browsing and I love Google. Please do your own work.

Communication: All announcements, documents, and exam dates for this class will be listed on our Blackboard website. YOU ARE RESPONSIBLE FOR CHECKING BLACKBOARD AND YOUR E-MAIL DAILY. If you do not check your SJU account, it is your responsibility to have mail from this account forwarded to the account that you check regularly. I will make all changes to the syllabus and schedule on Blackboard. You should also feel free to post comments on the readings and discussions using Blackboard.

Accommodation for Disabilities: If you have a disability (learning, physical, psychological) for which you are or may be requesting reasonable academic adjustments, you are encouraged to contact Services for Students with Disabilities, 113 Science Center, 610-660-1774 or 1620 as early as possible in the semester. I will meet with students with any questions or concerns. Requests for academic adjustments (such as extended time for tests) must be discussed with me at least one week in advance.

Extra Credit: I will offer two types of extra-credit. First, I will frequently announce talks that are taking place on the campus. If you attend a talk and write a one-paragraph summary of the main point, I will give you extra credit. You may also propose a talk/event on *any* subject. This form of extra credit helps you when you are *between* grades at the end of the semester. You get the benefit of the doubt if you have attended a talk or two. Second, I will be giving extra-credit if you read the SJU READS book *The Things They Carried* by Tim O'Brien and attend one of the campus events. For this extra credit, you must write a three-page comment on the book and the event you attended and you will have points added to your final exam grade.

Wed, Feb 8 at 4:00, presentation by Dr. Joes with Dr. Moody as moderator.

Tues, Feb 21 during Free period Panel of faculty Vietnam Vets: Dr. Gilman, Dr. Haverty, Dr. Coyne, and Dr. White.

Film series 6 films, titles and times to be announced.

ALL POINTS OF VIEW – THAT ARE ARGUED CAREFULLY AND PERSUASIVELY – ARE ENCOURAGED IN YOUR PAPERS AND CLASS COMMENTS.

Course Outline and Assignments

Overview of Course and Review of Constitutional Documents

Week 1

Read: The Constitution of the United States of America (including the amendments)

[www.law.emory.edu/FEDERAL/usconst.html], the syllabus, and University Plagiarism rules (posted on Blackboard). Sign course contract available on Blackboard (Weds).

- 1) The debate over social reform: can courts reform society? Should courts reform society?
 - a. Political v. judicial policy making
 - b. Rosenberg v. McMann
- 2) A Primer on the American Judicial system.
- 3) A Primer on Supreme Court interpretation and legal reasoning.
- 4) The requirements of the class

Film on *Brown v. Board of Education*: "The Road to Brown." Location to be announced. (Fri)
Return signed course contract today, Friday, January 20th.

Constitutional Arrangements of Power: What is the role of the Court? Week 2

Read: Review of Robert Dahl's *How Democratic is the American Constitution?* Available on Blackboard (Tues).

The following readings are available in "Constitutional Arrangements of Power" on Blackboard. They can also be individually accessed through Kurland and Lerner, *The Founders' Constitution*:

Locke, *Second Treatise*, §143, 144, 150, 159;
Montesquieu, *Spirit of the Laws*, Book 11, ch 6 "Of the Constitution of England;"
Jefferson, *Notes on the State of Virginia*, Query 13;
Madison, Federalist 10; Federalist 51;
Hamilton, Federalist 71 (Weds)

Madison, Federalist 37 (excerpt); Federalist 47;
Brutus 1;
Patrick Henry, VA Ratifying Convention:
Jefferson, Resolutions Relative to the Alien and Sedition Acts;
Hamilton, Federalist 78;
Federal Farmer 15;
Brutus 15;
Wilson, PA Ratifying Convention;
Federal Farmer 15 (2nd excerpt of 15);
Brutus 11;12 (Fri).

The NAACP, Brown v. Board of Education, & the Fight for Civil Rights Weeks 3-4

Read: *Plessy v. Ferguson* 163 US 537 (1896) on Blackboard (Tues); NPR radio documentary on *Brown* available as an external link on Blackboard (Weds); *Brown v. Board of Education* 347 US 483 (1954) (on Findlaw.com) (Fri); Cass Sunstein review article of scholarly work on *Brown* (Blackboard) (Tues). **Brief of Brown v. Board of Education due today** (Wednesday, February 8th); Concluding discussion of *Brown* (Friday).

Suggested Reading: Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, (Introduction, pp. vii-xlii, Conclusion, "Political Process and Black Insurgency," pp. 230-234. Available on reserve.

The Fight for Pay Equity for Women Weeks 5-6

Read: McCann, *Rights at Work* chapters 1,2 (Tues); chapters 3 (Wed); **Exam, Friday February 17th**. Covers all reading including McCann 1,2.

McCann, chapters 4-5 (Tues); Reread Constitution and finish book (Weds); Discussion and assessment (Fri).

The Challenge to the Court as Reformer: Rosenberg's "Hollow Hope" Weeks 7-9

Read: Rosenberg, *The Hollow Hope*, chapters 1-2 (Tues), chapter 3 (Wednesday), chapter 4 (Friday).

*****SPRING BREAK, NO CLASS 3/7-3/10*****

Conclusion pp. 336-344 (Tues); McCann, "Reform Litigation on Trial: Review of the Hollow Hope," *Law and Social Inquiry* 17 (1992) (Wed) and Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann" *Law & Social Inquiry*, Vol. 17 (1992) on Blackboard (Fri).

Recommended Reading: John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (First paragraph of the preface (vii), Chapter 1, "The Allure of Interpretivism" (pp. 1-9); Chapter 2, "The Impossibility of a Clause-Bound Interpretivism" (pp. 11-41)(this chapter gives an overview of theoretical approaches to interpretation, particularly the due process clause of the 5th and 14th amendments essential to *Brown* and other civil rights cases). This is highly recommended reading. On reserve.

Book Review due on Monday, March 20th in B/L 105 before 4:00 p.m. See notes above for book review requirements.

Death Penalty Moot Court Exercises

Weeks 10-11

Read: Lee Epstein and Joseph Kobylka (E/K), *The Supreme Court and Legal Change: Abortion and the Death Penalty*, Introduction and Furman chapter (Tues) **Sign up for moot court exercise today. If you are absent, please contact me.;** *Furman v. Georgia* (shortened version on Blackboard AND full version of YOUR JUSTICE(S) (presentations) (Wed); E/K, Gregg chapter and *Gregg v. Georgia* (shortened version on Blackboard AND full version of YOUR JUSTICE(S) (presentations); Case presentations con't (Fri); *McCleskey v. Kemp* (shortened version on Blackboard AND full version of YOUR JUSTICE(S) (presentations) (Tues); *Atkins v. Virginia* (shortened version on Blackboard AND full version of YOUR JUSTICE(S) Please note: Chief Justice Rehnquist's polling data is up as a separate file on Blackboard. (presentations) (Wed); *Roper v. Simmons* on Blackboard. (Presentations) (Fri).

Abortion

Weeks 12-13

Read: Lee Epstein and Joseph Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty*, chapter 5 "Abortion I: The Road to Roe;" Reread Constitution (Tues); *Griswold v. Connecticut*. **Brief of Griswold due Wednesday, April 5th** (Wed); *Roe v. Wade* (Fri); E/K, chapter 6, "Abortion II; From *Roe to Webster*" (Tues); Read E/K, Chapter 6, "The Life of the Law" (Wed); *Casey* (Fri).

Recommended Reading: Short excerpts from *Akron* and *Webster* on Blackboard; Rosenberg chapters on abortion cases; Ruth Bader Ginsberg, "Speaking in a Judicial Voice" on Blackboard.

FRIDAY, APRIL 14TH, NO CLASS, EASTER BREAK.

Same-Sex Unions and Gay Marriage

Weeks 14-15

Read: Eskridge, *Equality Practice: Civil Unions and the Future of Gay Rights*, prologue, chapters 1-2 (Tues); chapters 3-4 (Wed); Robert Sokolowski, "The Threat of Same-Sex Marriage" and Eskridge, chapter 5 (Fri); Eskridge, chapters 6-7 (Tues).

Conclusions and Reflections

Week 15

Concluding thoughts on civil unions and gay marriage (Weds); Final thoughts (Fri).