

**The Politics of Rights  
(Or how do rights matter?)**

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**Overview**

Some scholars argue that the “judicialization” of politics and public policy is one of the most important developments in the post-World War II era in industrialized democracies. While there is a growing consensus about the growth of our reliance on rights, courts and litigation, there is much less agreement about the consequences of this phenomenon. In this course, we’ll ask: what are the political consequences of our reliance on rights to make policy? Do rights advance the quest for institutional change and social justice? Or undermine it? How do we know?

**Course Format and Instructional Methods**

The class will be both didactic and interactive, combining traditional lectures and class discussions with hands-on exercises. The exercises and assignments are intended to highlight diverse student skills as well as provide a range of opportunities for assessment.

**Readings**

Weekly readings will be posted on blackboard and/or available online through the library databases

**Assignments**

- Analytical paper (10%).
- Midterm examination (25%).
- Senate Hearing Project (65%), consisting on the following:
  - Short briefing memo (group) (15%)
  - Hearing presentation (including power point slides) (group) (20%)
  - Committee Report (individual) (30%)
- *Plagiarism or any other POSSIBLE violation of the student code will be referred automatically to the proper University authorities. There will be no exceptions.*

**FAILURE TO COMPLETE ANY WRITTEN ASSIGNMENT (I.E., EXAMS OR PAPERS) WILL RESULT IN AN AUTOMATIC “F” FOR THE COURSE, REGARDLESS OF PERFORMANCE ON OTHER ASSIGNMENTS AND WHETHER THE STUDENT IS TAKING THE CLASS ON A PASS/FAIL BASIS.**

### Learning Objectives and Assessments

Learning Objective	Description	Assessment
Content Mastery	Articulate competing definitions of law, the political appeal of rights as a mode of policymaking and critiques of rights-based policy-making	First paper, Midterm exam
Hypothesis testing	Set forth competing hypotheses about how law constrains judicial decision-making, identify observable implications of the hypotheses and apply them to a case	First paper
Policy analysis	Weigh costs and benefits of relying on rights as a mode of implementing policy	Senate hearing project

The following grading rubric sets forth the basic expectations for different letter grades:

Grade	General Expectations
A	In addressing the assignment, the student (1) demonstrates mastery of the material and ability to apply concepts accurately and with sophistication, (2) provides compelling examples in support of arguments, (3) articulates the best counter-arguments and persuasive reasons why these arguments are not compelling, and (4) recognizes the theoretical and data limitations of the underlying arguments and (where appropriate) how these limitations could be addressed in future work
B	In addressing the assignment, the student (1) demonstrates a thorough understanding of the material and ability to apply concepts accurately, (2) provides concrete examples in support of arguments, (3) articulates plausible counter-arguments, and (4) recognizes the theoretical and data limitations of the underlying arguments
C	In addressing the assignment, the student (1) demonstrates a basic understanding of the material, (2) offers examples in support of arguments, (3) considers relevant counter-arguments, and (4) avoids making unsupported claims or inaccurate statements
D or below	The student fails to (1) demonstrate a basic understanding of the materials, (2) makes unsupported claims, (3) ignores relevant counter-arguments, and/or (4) <i>fails to address the assignment.</i>

**General Expectations for Class Meetings:** Throughout the semester, I expect you to be *prompt, prepared*, and, most importantly, *respectful of one another*. In short, take this class as seriously as I do and actively participate in building a productive and supportive learning environment. If you rather read the paper, check your e-mail, surf on the net, listen to music, talk or text to your friends, or sleep, please do so outside the classroom.

**Deadlines:** All deadlines are firm. Late papers will be marked down by one-third of a grade. For each additional day a paper is late, the final grade will be lowered an additional one-third. So, the final grade of a paper due on Wednesday, but handed in on Thursday, would be reduced two-thirds of a grade: one-third for being late on Wednesday and one-third for being handed in a day late. (So, for example, a “B” paper would receive a “C+”.) Weekends will count as one day. Extensions will be granted only for good cause – such as a documented medical problem – and, whenever possible, must be arranged with your section leaders *prior* to the due date. **HAVING AN AIRPLANE RESERVATION ON AN EXAM DATE OR A PAPER DUE IN ANOTHER CLASS DOES NOT CONSTITUTE A VALID EXCUSE FOR AN EXTENSION OR ACCOMODATION.**

**Office Hours:** Office hours offer a chance to raise any questions or concerns you may have about the course or your research project. Believe me, there is no such thing as a “dumb” question, so feel free to ask.

**Academic Accommodations:** Any student requesting academic accommodation based on a disability is required to register with Disability Services and Programs (DSP). A letter of verification for approval of accommodations can be obtained from DSP. Please be sure the letter is delivered to me (or your teaching assistant) as early in the semester as possible. DSP is located in STU 301 and is open 8:30 a.m. to 5:00 p.m., Monday through Friday. The phone number for DSP is (213) 740-0776.

## **Course Outline**

### **I. Introduction and Background**

**January 13. Course overview.**

**January 15. Introducing the Politics of Rights (and How We Study Them)**

We’ll begin with an open discussion of what is the politics of rights, how it comes about, and what we need to do to study this topic systematically.

Thomas Edsall, “When the Rights Revolution Runs into Political Trouble,” *New York Times* December 18, 2019

-----, “Trump Wants Law and Order Front and Center,” *New York Times* January 8, 2020

Thomas F. Burke and Jeb Barnes, “Is There an Empirical Literature on Rights?,” *Studies in Law, Politics and Society* (2009)

**January 20. MLK Day.**

## **January 22, 27 and 29. What is law?**

In a course about “rights,” we must define “law.” As we’ll see, defining law is difficult. Nevertheless, we must dig into this contested area because how we conceptualize law has a profound implications for how we evaluate the impact of rights. This material is very challenging—perhaps the most challenging of the semester—but is crucial to the rest of the course (and the first paper).

H. L. A. Hart, “A New Conception of Law,” from Feinberg & Gross, eds., *Philosophy of Law*, (Wadsworth 1975) 54-68

Ronald Dworkin, “The Model of Rules,” from Feinberg & Gross, eds., *supra*, 75-92

E. P. Thompson. “The Rule of Law,” from Beirne & Quinney, eds., *Marxism and Law* (Wiley & Sons 1982), 258-269.

Stuart Scheingold, *The Politics of Rights* (University of Michigan Second Edition), 3-10

Lief Carter and Thomas F. Burke, *Reason in Law* (Pearson 7<sup>th</sup> Edition), Chapters 1 and 6

Gordon Silverstein, *Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge 2009), 63-75

## **II. Law and Judicial Decision-Making**

### **February 3 and 5. Rights, Rules and the Courts**

Perhaps the most obvious way that rights can matter is the shaping of judicial decisions, which, in turn, can have significant policy consequences. Does law, in fact, shape judicial decision-making? The answer to this seemingly straightforward question is deeply contested, raising questions about how we think about law and judicial discretion as well as how we interpret judicial behavior.

Jeffrey Segal and Harold Spaeth, “The Influence of *Stare Decisis* on the Votes of the Supreme Court,” 40 *American Journal of Political Science* 971 (1996) (JSTOR)

Howard Gillman, “What’s Law Got to Do With It? Judicial Behavioralists Test the ‘Legal Model’ of Judicial Decision Making,” 26(2) *Law & Social Inquiry* 465 (Spring 2001) (JSTOR)

Herbert Kritzer and Mark Richards, “Jurisprudential Regimes and Supreme Court Decision Making: The Lemon Regime and Establishment Clause Cases,” 37 *Law & Society Review* 827 (2003) (JSTOR)

*Masterpiece Bakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018) (Oyez)

### **III. The “judicialization” of politics**

#### **February 10 and 12. The Creation of Rights-Based Policy-making.**

Rights are more than rules; they are also a mode of policy-making. What is the appeal of rights-based policy-making? Why not make policy through the legislature? Does the rights-based policy making template still work?

Robert Kagan, “The Political Construction of Adversarial Legalism,” in Austin Ranney, ed., *Courts and the Political Process: Jack W. Peltason’s Contributions to Political Science* (1996), 19-39.

Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (Berkeley 2001), 1-21.

Sean Farhang, “Public Regulations and Private Lawsuits in the American Separation of Powers System,” *52 American Journal of Political Science* 821 (2008) (JSTOR)

#### **Part IV. The Political Critiques of Rights**

In the aftermath of the civil rights movement, scholars began to question rights as a means of social change. This period of questioning gave rise to a series of powerful political critiques of rights.

#### **February 17. Presidents’ Day.**

#### **February 19. “Flypaper courts” and the legitimacy of rights-based claiming**

Litigation is costly and circumvents the elected branches of government. One concern is that the high cost of litigation “crowds out” the pursuit of allegedly more effective and legitimate strategies for change.

Gerald Rosenberg, *The Hollow Hope* (University of Chicago Press 1991), 9-27, 336-343

*US v. Windsor*, 570 US \_\_\_\_ (2013) (Oyez)

#### **February 24 and 26. Path Dependence and rights-based advocacy**

A different concern is that litigation is “path dependent,” meaning it is subject to increasing returns, so that the more we litigate, the more we want to litigate. The point is not that the cost of litigation displaces (or crowds out) other forms of advocacy, but internal dynamics of the litigation process causes groups to prefer litigation to other modes of advocacy (even if they can afford to fight in multiple forums).

Paul Pierson, “Increasing Returns, Path Dependence and the Study of Politics,” *American Political Science Review* 94(2) (2000): 251-267 (JSTOR)

Re-read Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge 2009), 63-75

Charles R. Epp, "Law's Allure and the Power of Path-Dependent Legal Ideas," 35(4) *Law & Social Inquiry* 1041 (2010) (JSTOR)

### **March 2 and 4. Backlash**

A third critique of rights is that it engenders a polarizing backlash, effectively eliminating the moderate middle and mobilizing opposition.

Rosenberg, *The Hollow Hope* 175-201

Michal Klarman, *From Closet to the Altar: Courts, Backlash and the Struggle for Same-Sex Marriage* (Oxford 2013) 48-70

Jeffrey Dudas, "In the Name of Rights: 'Special Rights' and the Politics of Resentment in Post-Civil Rights America," 39 *Law & Society Review* 723 (2005) (JSTOR)

Alison Gash, "Under the Gaydar," *Washington Monthly*, May/June 2013

*Burwell v. Hobby Lobby Stores*, 573 U.S. \_\_\_\_ (2014) (Oyez)

We'll take stock of what we've learned so far and apply the lesson of the course thus far to material from at least one documentary about the political construction of rights.

### **March 9. Review Lecture.**

### **March 11. Midterm.**

### **March 16 and 18. Spring Break**

### **Part V. A rights revival?**

While some have criticized rights, others—relying mainly on a "law and society" understanding of rights—have pointed to the promise of rights as a (contingent) resource that can be used instrumentally in the struggle for social justice.

### **March 23 and 25. The "destabilizing power" of rights.**

The status quo is a powerful force in politics, especially in a country like the United States in an era of divided government. One potential use of rights is to break apart the status quo and thereby open opportunities for change.

Charles Sabel and William Simon, “Destabilization Rights: How Public Law Succeeds,” 117(4) *Harvard Law Review* 1016 (2004) (JSTOR)

### **March 30 and April 1. Rights, legal discourse and political mobilization**

Another use of rights is to change how people see the world and, in the process, create possibilities for meaningful action down the road, including mobilizing groups for change.

Michael McCann, *Rights at Work* (University of Chicago Press 1997), selections

### **April 6 and 8. The “fertile fear of liability”**

In part because rights destabilize the status quo, raise consciousness and fragment interests, it gives rise to the possibility of building broad coalitions for change. In this view, the “fertile fear of liability” is cause for celebration.

Charles Epp, *Making Rights Real* (University of Chicago Press 2009), selections

### **April 13 and 15. Wrapping up: Do rights matter? How? What questions remain?**

This week, we’ll wrap up the traditional part of the course and make the transition to the project-based part of the class.

Gerald Rosenberg, “Much Ado About Nothing? The Emptiness of Rights’ Claims in the Twenty First Century United States,” *Studies in Law, Politics and Society* (2009) (posted on Blackboard)

Jeb Barnes, “Courts and Social Policy,” *Oxford Research Encyclopedia of Politics* (2018) Courts and Social Policy

## **Part VI. Senate Hearing Project**

**April 20, 22 and 27.** Team meetings

**April 29.** Committee hearing and vote

**May 8.** Committee Report due.

Of course, this outline is not written in stone. I reserve the right to modify the readings and schedule as we go along.

## STATEMENT ON ACADEMIC CONDUCT AND SUPPORT SYSTEMS

### Academic Conduct:

Plagiarism—presenting someone else’s ideas as your own, either verbatim or recast in your own words—is a serious academic offense with serious consequences. Please familiarize yourself with the discussion of plagiarism in SCampus in Part B, Section 11, “Behavior Violating University Standards” (<https://policy.usc.edu/scampus-part-b/>).

Other forms of academic dishonesty are equally unacceptable. See additional information in SCampus and university policies on scientific misconduct, <http://policy.usc.edu/scientific-misconduct>.

### Support Systems:

Student Counseling Services (SCS)-(213) 740-7711 – 24/7 on call.

Free and confidential mental health treatment for students, including short-term psychotherapy, group counseling, stress fitness workshops, and crisis intervention. <https://engemannshc.usc.edu/counseling/6>

National Suicide Prevention Lifeline -1-800-273-8255. Provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week. <http://www.suicidepreventionlifeline.org>

Relationship and Sexual Violence Prevention Services (RSVP) -(213) 740-4900 -24/7 on call

Free and confidential therapy services, workshops, and training for situations related to gender-based harm. <https://engemannshc.usc.edu/rsvp/>

Sexual Assault Resource Center. For more information about how to get help or help a survivor, rights, reporting options, and additional resources, visit the website: <http://sarc.usc.edu/>

Office of Equity and Diversity (OED)/Title IX compliance –(213) 740-5086 Works with faculty, staff, visitors, applicants, and students around issues of protected class. <https://equity.usc.edu/>

Bias Assessment Response and Support Incidents of bias, hate crimes and micro aggressions need to be reported allowing for appropriate investigation and response <https://studentaffairs.usc.edu/bias-assessment-response-support/>

The Office of Disability Services and Programs Provides certification for students with disabilities and helps arrange relevant accommodations. <http://dsp.usc.edu>

Student Support and Advocacy –(213) 821-4710 Assists students and families in resolving complex issues adversely affecting their success as a student EX: personal, financial, and academic. <https://studentaffairs.usc.edu/ssa/>

Diversity at USC Information on events, programs and training, the Diversity Task Force (including representatives for each school), chronology, participation, and various resources for students. <https://diversity.usc.edu/>

USC Emergency Information Provides safety and other updates, including ways in which instruction will be continued if an officially declared emergency makes travel to campus infeasible, <http://emergency.usc.edu>

USC Department of Public Safety –213-740-4321 (UPC) and 323-442-1000 (HSC) for 24-hour emergency assistance or to report a crime

Provides overall safety to USC community. <http://dps.usc.edu>

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