

POLS 385: Comparative Law and Politics

Emory University

Fall 2014

Meeting room: Tarbutton 313
Meeting time: Tuesday/Thursday, 4:00pm–5:15pm

Instructor: Jeffrey K. Staton
Email: jeffrey.staton@emory.edu
Phone: 404-727-6559
Office: Tarbutton 111
Office hours: Tuesday, 10:00am–11:00am or by appointment

Course Description

The goal of this course is to expose students to the literature on comparative law and politics. The first third of the class focuses on the nature and ends of law, the world's legal traditions, and the judicialization of politics. The second third of the class considers the roles courts are believed to play in democracy and dictatorship. The last third considers the possibility for powerful courts and the conditions under which they are constructed and maintained. The course is not designed to be a comprehensive review of the literature. For example, key material in law and development, the globalization of law and law and psychology are regrettably missing.

The primary question around which the course revolves is this. Should political scientists care about the literature on law and courts? To provide context within which we can answer that question, the course begins by considering important lines of inquiry in political science. How is political order constructed and maintained? Under what conditions is limited governance possible? Under what conditions can elections produce democratic outcomes? By the end of the semester, our goal will be to identify the ways in which our answers to these questions ought to include a judicial component, if there are any. I mean this seriously. As much as the problems we will consider interest me personally, as much as they interest those who work on problems of law and politics, they need not warrant general interest in the discipline. Let's put it this way. Do courts affect political processes? Of course they do. But the answer is true and trivial. The key question is familiar if we consider our interest in gaining understanding of the political world through modeling politics. Will we come too badly unstuck if we pursue answers to general political questions assuming that courts are irrelevant? That is the question we need to answer.

Grading

Your final grade is a weighted average of the following components:

Weekly reactions (25%) Each week, you are responsible for writing a short (400 words or so) reaction to the readings we will cover. You should post your remarks to the reactions wiki, which is located on the Blackboard site for the class. You must post your remarks by 8:00 pm Tuesday night, so that we all have time to look over your reactions before class Wednesday morning.

Data report (25%) You will pick a concept (or concepts) that plays a critical role in models of law and politics. You will investigate the availability of data that purportedly measures that concept and provide a report summarizing your findings. The report should summarize the concept and provide a comprehensive review of existing data sources. You should identify questions that might be answered with the data you summarize and highlight opportunities for building new measures, if necessary.

Research paper and peer review (40%) **The Paper:** You will write a research paper that is (at least) suitable for presentation at a professional conference. The paper should address an important question in law and politics. Your research design can address theoretical or empirical issues in previous research or propose a novel contribution to a problem. There is no length requirement. Write a paper. We will discuss norms of paper writing. To help you, should you wish to write an empirical paper, I am making two new data sets in comparative politics available to you. One is associated with the Comparative Law Project and the other with the Varieties of Democracy Project (VDem). There are rules associated with using these data. For example, VDem data are not publicly available yet. Any use of those data will be understood as work related to a project on which I am the principal investigator. We will discuss both VDem and CompLaw in class.

Deadlines: In March, you will turn in a one page research proposal, which can be in outline form. You will turn in a first draft in early April and a final draft at the end of the semester.

Peer Review You will receive comments along the way from your peers and me. Our class is paired with a similar class at Washington University in St. Louis, taught by Professor Matthew Gabel. You will be part of a group of students comprised of Emory and Wash U students. Each member of the group will provide comments to every other member concerning a one page research proposal or outline. You will then be paired with a member of the group and asked to give careful comments on the first and final drafts of your colleague's paper.

Participation (10%) Active participation is essential to graduate seminars. I expect you to be present. I expect you to be prepared.

Readings

The readings for this class are either available on the web or from the course reserve. Check the books carefully. Our library has online access to many books. If you cannot find a reading, let me know. You will see that there are some weeks in which the reading is, let's say, excessive. In such cases, and when I want to cover a reading in great detail, I will let you know.

Incomplete Grades

No incomplete grades will be given unless there is an agreement between the instructor and the student **prior** to the end of the course. The instructor retains the right to determine legitimate reasons for an incomplete grade.

Integrity of Scholarship

I will follow the guidelines established by Emory College, which can be found at http://www.college.emory.edu/current/standards/honor_code.html. In short, don't cheat. The

benefits are small. Even if the probability of getting caught is tiny, the costs of getting caught are huge.

Students with Disabilities

Students requiring any type of academic accommodation should consult with the Office of Disability Services (<http://www.ods.emory.edu/> or 404-727-6016) and discuss the issue with the instructor within the first week of class.

Class schedule

January 15: Course Introduction

Douglass North, John Wallis, and Barry Weingast. *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*. Cambridge University Press, 2009.

G Bingham Powell. *Elections as instruments of democracy: Majoritarian and proportional visions*. Yale University Press, 2000.

Adam Przeworski and José María Maravall. *Democracy and the Rule of Law*, volume 5. Cambridge University Press, 2003.

Notes:

Przeworski and Maravall: Read introduction

North, Wallis and Weingast: Read introduction

Powell: Read pp. 1-32

January 22: Law and the Rule of Law

Roscoe Pound. *An introduction to the philosophy of law*. Yale University Press, 1954.

Joseph Raz. The rule of law and its virtue. *Law Quarterly Review*, 93:195–211, 1977.

Roberto Gargarella. The majoritarian reading of the rule of law. In Adam Przeworski and José María Maravall, editors, *Democracy and the Rule of Law*. Cambridge University Press, 2006.

Daniel B Rodriguez, Matthew D McCubbins, and Barry R Weingast. The rule of law unplugged. *Emory Law Journal*, 59:1455, 2009.

Stephan Haggard and Lydia Tiede. The rule of law and economic growth: where are we? *World Development*, 39(5):673–685, 2011.

Ryan E Carlin. Rule-of-law typologies in contemporary societies. *Justice System Journal*, 33(2):154–173, 2012.

Notes:

Pound: Read “The End of Law.”

January 29: Legal Traditions

Paul H Rubin. Why is the common law efficient? *The Journal of Legal Studies*, 6(1):51–63, 1977.

Todd J Zywicki. The rise and fall of efficiency in the common law: A supply-side analysis. *Nw. UL Rev.*, 97:1551–1891, 2003.

John Henry Merryman. *The civil law tradition: an introduction to the legal systems of Europe and Latin America*. Stanford University Press, 2007.

Peter G Stein. Roman law, common law, and civil law. *Tul. L. Rev.*, 66:1591, 1991.

Emilia J. Powell and Sara McLaughlin Mitchell. The international court of justice and the world's three legal systems. *The Journal of Politics*, 69(2):397–415, 2007.

Rafael La Porta, Florencio Lopez-de Silanes, Andrei Shleifer, and Robert Vishny. The quality of government. *Journal of Law, Economics, and organization*, 15(1):222–279, 1999.

Notes:

Merryman, selected passages TBA

February 5: Constitutions

Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer. *Comparative constitutionalism: cases and materials*. Thomson/West, 2003.

Frank I Michelman. What do constitutions do that statutes don't (legally speaking)? In Richard W. Bauman and Tsvi Kahana, editors, *The least examined branch: The role of legislatures in the constitutional state*. Cambridge University Press, 2006.

Russell Hardin. Why a constitution? In Denis J. Galligan and Ila Versteeg, editors, *Social and Political Foundations of Constitutions*. Cambridge University Press, 2013.

John M Carey. Parchment, equilibria, and institutions. *Comparative Political Studies*, 33(6-7):735–761, 2000.

Barry Weingast. The political foundations of democracy and the rule of law. *American Political Science Review*, 91(2):245–263, 1997.

Notes:

Dorsen, Read 16-47.

February 12: The Judicialization of Politics

- Bruce Ackerman. The rise of world constitutionalism. *Virginia Law Review*, pages 771–797, 1997.
- Kim Lane Scheppele and Adam Czarnota. Democracy by judiciary: Or, why courts can be more democratic than parliaments. *Rethinking the rule of law after communism*, 2005.
- Alec Stone Sweet. Judicialization and the construction of governance. *Comparative Political Studies*, 31:147–184, 1999.
- Pablo Rueda. Legal language and social change during colombia's economic crisis. In Javier Couso, Alexandra Huneeus, and Rachel Sieder, editors, *Cultures of Legality: Judicialization and Political Activism in Latin America*. Cambridge University Press, 2013.
- Karina Ansolabehere. More power, more rights? the supreme court and society in mexico. In Javier Couso, Alexandra Huneeus, and Rachel Sieder, editors, *Cultures of Legality: Judicialization and Political Activism in Latin America*. Cambridge University Press, 2013.
- Bruce M Wilson and Juan Carlos Rodríguez Cordero. Legal opportunity structures and social movements the effects of institutional change on costa rican politics. *Comparative Political Studies*, 39(3):325–351, 2006.
- Varun Gauri and Daniel M. Brinks. Introduction: The elements of legalization and the triangular shape of social and economic rights. In Varun Gauri and Daniel M. Brinks, editors, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World.*, pages 1–37. Cambridge University Press, 2008.
- César Rodríguez-Garavito. Beyond the courtroom: The impact of judicial activism on socioeconomic rights in latin america. *Tex. L. Rev.*, 89:1669, 2010.

February 19: Courts: What are they good for?

- Keith E. Whittington. Interpose your friendly hand: Political supports for the exercise of judicial review by the united states supreme court. *American Political Science Review*, 99(4):583–596, 2005.
- Ran Hirschl. The political origins of the new constitutionalism. *Indiana Journal of Global Legal Studies*, 11(1):71–108, 2004.
- William M. Landes and Richard A. Posner. The independent judiciary in an interest-group perspective. *Journal of Law and Economics*, 18(3):875–901, 1975.
- F. Andrew Hanssen. Is there a politically optimal level of judicial independence? *The American Economic Review*, 94(3):pp. 712–729, 2004.

February 26: Courts: Seriously, what are they good for?

Adam Przeworski. Democracy as an Equilibrium. *Public Choice*, 123(3):253–273, 2005.

Clifford J. Carrubba. Courts and compliance in international regulatory regimes. *Journal of Politics*, 67(3):669–689, 2005.

Christopher Reenock, Jeffrey K. Staton, and Marius Radean. Legal institutions and the democratic order. *Journal of Politics*, 75(2):491–505, 2013.

James R. Rogers. Information and judicial review: A signaling game of legislative-judicial interaction. *American Journal of Political Science*, 45(1):84–99, 2001.

Justin Fox and Matthew C Stephenson. Judicial review as a response to political posturing. *American Political Science Review*, 105(02):397–414, 2011.

March 5: Authoritarian Courts: What are THEY good for?

Tamir Moustafa and Tom Ginsburg. The functions of courts in authoritarian politics. In Tom Ginsburg and Tamir Moustafa, editors, *Rule by law: The politics of courts in authoritarian regimes*. Cambridge University Press, 2008.

José Juan Toharia. Judicial independence in an authoritarian regime: the case of contemporary Spain. *Law & Soc'y Rev.*, 9:475, 1974.

Beatriz Magaloni. Enforcing the autocratic political order and the role of courts: The case of Mexico. In Tom Ginsburg and Tamir Moustafa, editors, *Rule by law: The politics of courts in authoritarian regimes*. Cambridge University Press, 2008.

Tom Ginsburg. Administrative law and the judicial control of agents in authoritarian regimes. In Tom Ginsburg and Tamir Moustafa, editors, *Rule by law: The politics of courts in authoritarian regimes*. Cambridge University Press, 2008.

Lisa Hilbink. Agents of anti-politics: Courts in Pinochet's Chile. In Tom Ginsburg and Tamir Moustafa, editors, *Rule by law: The politics of courts in authoritarian regimes*. Cambridge University Press, 2008.

Alexei Trochev. Less democracy, more courts: A puzzle of judicial review in Russia. *Law & Society Review*, 38(3):513–548, 2004.

Notes:

Research proposal due

March 12: No class - Spring Break

March 19: Interpretative Challenges

- Alexander M Bickel. The supreme court, 1960 term. *Harvard Law Review*, 75(1):40–244, 1961.
- Gerald Gunther. The subtle vices of the “passive virtues”—a comment on principle and expediency in judicial review. *Columbia Law Review*, 64(1):1–25, 1964.
- Stephen Gardbaum. The new commonwealth model of constitutionalism. *The American Journal of Comparative Law*, 49(4):pp. 707–760, 2001.
- William N Eskridge Jr and Philip P Frickey. Quasi-constitutional law: Clear statement rules as constitutional lawmaking. *Vand. L. Rev.*, 45:593, 1992.
- Neal Kumar Katyal. Judges as advicegivers. *Stan. L. Rev.*, 50:1709, 1997.

March 26: Modeling Law

- Lewis A. Kornhauser. Modeling collegial courts: Legal doctrine. *Journal of Law Economics & Organization*, 8:441–70, 1992.
- Jeffrey R Lax. Constructing legal rules on appellate courts. *American Political Science Review*, 101(3):591, 2007.
- Jeffrey K Staton and Georg Vanberg. The value of vagueness: delegation, defiance, and judicial opinions. *American Journal of Political Science*, 52(3):504–519, 2008.
- Jeffrey R. Lax. Political constraints on legal doctrine: How hierarchy shapes the law. *Journal of Politics*, 74(3):765–781, 2012.
- Clifford J Carrubba and Tom S Clark. Rule creation in a political hierarchy. *American Political Science Review*, 1(1):1–22, 2012.

April 2: Judicial Independence and Judicial Power

- Charles M. Cameron. Judicial independence: How can you tell it when you see it? and, who cares? In Steven B. Burbank and Barry Friedman, editors, *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, pages 134–147. Sage Publications Inc., New York, 2002.
- Diana Kapiszewski and Matthew M Taylor. Doing courts justice? studying judicial politics in latin america. *Perspectives on Politics*, 6(4):741–767, 2008.
- Lewis A. Kornhauser. Is judicial independence a useful concept? In Steven B. Burbank and Barry Friedman, editors, *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, pages 45–55. Sage Publications Inc., New York, 2002.

Joseph L Staats, Shaun Bowler, and Jonathan T Hiskey. Measuring judicial performance in latin america. *Latin American Politics and Society*, 47(4):77–106, 2005.

Drew A. Linzer and Jeffrey K. Staton. A measurement model for synthesizing multiple comparative indicators: The case of judicial independence. presented at the annual meeting of the American Political Science Association, Seattle, Washington, September 1-4., 2011.

Daniel M Brinks and Abby Blass. The conceptualization and measurement of formal judicial independence. paper presented at the American Political Science Association Meetings, 2011., 2011.

Notes:

Data report due

April 9: The Context of Power

J. Ríos-Figueroa. Fragmentation of power and the emergence of an effective judiciary in mexico, 1994–2002. *Latin American Politics & Society*, 49:31–57, 2007.

Georg Vanberg. *The Politics of Constitutional Review in Germany*. Cambridge University Press, New York, 2005.

Lee Epstein, Jack Knight, and Olga Shvetsova. The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society review*, pages 117–164, 2001.

Tom Ginsburg. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge University Press, New York, 2003.

Diana Kapiszewski. Tactical balancing: High court decision making on politically crucial cases. *Law & Society Review*, 45(2):471–506, 2011.

Juan Carlos Rodríguez-Raga. Strategic deference in the colombian constitutional court. In Gretchen Helmke and Julio Ríos Figueroa, editors, *Courts in Latin America*. Cambridge University Press, 2011.

Tom S. Clark. *The Limits of Judicial Independence*. Cambridge University Press, 2010.

Gretchen Helmke. *Courts under Constraints*. Cambridge University Press, Cambridge, 2005.

Notes:

First draft of paper due

Ginsburg and Vanberg, Read the theory chapters

Clark and Helmke, read TBA

April 16: The Construction of Power

Karen J Alter. The european court's political power. *West European Politics*, 19(3):458–487, 1996.

Alexandra Huneeus. Courts resisting courts: Lessons from the inter-american court's struggle to enforce human rights. *Cornell Int'l LJ*, 44:493, 2011.

Clifford J. Carrubba. A model of the endogenous development of judicial institutions in federal and international systems. *Journal of Politics*, 71(1):1–15, 2009.

Lisa Hilbink. The origins of positive judicial independence. *World Politics*, 64(4):587–621, 2012.

Jeffrey K. Staton. *Judicial Power and Strategic Communication in Mexico*. Cambridge University Press, New York, 2010.

Karen J. Alter. Who are the “masters of the treaty”? european governments and the european court of justice. *International Organization*, 52(1):121–147, 1998.

Alec Stone Sweet. The european court of justice, state non-compliance, and the politics of override. *American Political Science Review*, 106(1):204–213, 2012.

Clifford J Carruba, Matthew Gabel, and Charles Hankla. Understanding the role of the european court of justice in european integration. *American Political Science Review*, 106(01):214–223, 2012.

Notes:

Staton, Read Chapters 2, 3 and 5

April 23: Wrap Up So, should political scientists pay much attention to law and politics? More practically, should core graduate syllabi in comparative politics include a law and politics component? If so, what should we be reading?

May 1: Final research paper due