

Legal Issues in Higher Education

Political Science 313

Fall 2013

Instructor: Steven Poskanzer

Course Hours: Tuesday and Thursday 3:10-4:55

Location: Library 344

Course Description

This seminar will explore a series of defining legal and public policy issues facing American colleges and universities. The overarching theme will be an examination of how core academic values (e.g., robust intellectual exchanges; the creation and maintenance of a community of learners with shared values) mesh and/or conflict with statutory, regulatory and judicially-created law. We will see how legal rules and principles that arise from outside the academy play out in this distinctive context. We will also explore the nature of intra-academy rules, practices, and cultural expectations that can both advance and impede the creation and transmission of knowledge and student learning/growth. Specific topics to be addressed include: college admissions; the purpose, value and scope of academic freedom in faculty scholarship, teaching and intra-institutional speech; the nature of tenure; student rights and responsibilities; and universities as institutional actors in a broader world. Special emphasis will be placed on “emerging” higher education law issues likely to draw the attention of courts and policymakers (e.g., debates over affirmative action following the Supreme Court’s June 2013 opinion in *Fisher v. University of Texas*; recent federal initiatives on campus safety and college access and effectiveness). Most broadly, we will examine the role of law as a stabilizing force, a catalyst for, and a reflector of societal change.

2 credits

This course can be applied to satisfy the Social Inquiry graduation requirement

Course Materials

We will read an intentionally wide-ranging set of materials about the legal impact of actions by colleges and university and their faculty, staff and students, including: key judicial opinions; scholarly treatises by legal and higher education experts; law review articles; consent decrees that settle litigation; Constitutional and statutory rules; formal policy statements/guidance from the federal government; media accounts of legal controversies; and opinion pieces and advocacy statements from groups or individuals concerned with higher education topics. I have posted all of these readings (with the one following exception) on the Moodle site for this course.

Because we will be reading large portions of Matthew Finkin’s and Robert Post’s book *For the Common Good* (New Haven: Yale University Press, 2009), you should purchase this volume at the College bookstore or online.

Depending on legal developments, supplemental readings may also be assigned and posted on the course’s Moodle site.

Course Requirements

All students will be expected to write a 12-15 page, original research seminar paper, on a higher education law topic of your choosing. This could be a deeper exploration of a topic explored in class or address a completely new subject. The course instructor will be glad to offer guidance on topic selection.

To provide feedback and help ensure that your research proceeds on a good track—and also to break up this writing assignment into less daunting chunks—I ask that you submit an abstract or outline of your proposed paper, together with a preliminary annotated research bibliography, by November 4, 2013. Factoring in time for me to make comments/suggestions and your subsequent research and revisions, Final Papers will be due by Friday, November 22, 2013.

You are also expected to participate in class discussions and, on occasion, to post discussion prompts and post-class reflections on the course's Moodle site. (See the discussion on Preparation for Class, Attendance and Class Participation below). You will receive a grade for class participation that will figure into your final grade.

Course Outline and Assignments (this may vary a bit, depending on how fast we're moving)

October 1

Session 1: Overview—How Legal Rules Shape, Promote and Impede the Work of Colleges and Universities

Goals of course

Introductions/Housekeeping matters

Relevant sources of law affecting higher education

Boards of Trustees and faculty governance

A preview topic: Antitrust law and Financial Aid

Readings for Session 1

U.S. Constitution excerpts

Poskanzer, *Higher Education Law: The Faculty*, pp. 5-16; 19-22

American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, in *Policy Documents and Reports*

On Antitrust/Financial Aid:

Excerpt from Sherman Antitrust Act

Overlap Group Consent decree

“Upping the Ante for Student Aid,” *Chronicle of Higher Education* 2/16/01

“Yale U. Joins Its Ivy Peers in Increasing Aid to Students,” *Chronicle of Higher Education* 9/6/01

Sullivan, “Merit and Access,” *Inside Higher Ed* 4/19/07

Maguire and Butler, “‘Have Not’ Colleges Need New Ways to Compete With Rich Ones,” *Chronicle of Higher Education* 1/18/08

“Private-College Presidents Urge a Commitment to Need-Based Financial Aid,” *Chronicle of Higher Education* 1/6/13

“U.S. Opens Antitrust Investigation Into Colleges’ Talk of Student-Aid Reform,” *Chronicle of Higher Education* 6/17/13

“Inquiry Into Aid Talks Ends,” *Inside Higher Ed* 8/8/13

“Merit Aid Madness,” *Washington Monthly* September/October 2103

October 3

Session 2: Admissions and Affirmative Action

14th Amendment jurisprudence
 Recent Supreme Court holdings
 Likely next wave(s) of dispute/litigation
 Race-specific scholarships
 Socioeconomic preferences
 Legacy admissions

Readings for Session 2

Fetter, *Questions and Admissions*, pp. 16-40 (description of Stanford admission process)

Starkman, “Confessions of an Application Reader,” *New York Times* 8/1/13

Grutter v. Bollinger

Gratz v. Bollinger

Fisher v. University of Texas (including Thomas dissent)

“‘Fisher’ Ruling May Open a ‘Wave of Litigation Against Colleges,’” *Chronicle of Higher Education* 6/26/13

Podberesky v. Kirwan

“As Colleges Open Race-Exclusive Programs to All, Some Minority Students May Be Left Out in the Cold,” *Chronicle of Higher Education* 1/26/06

Bowen, Kurzweil, and Tobin, *Equity and Excellence in American Higher Education*, pp. 175-186; 167-171

Golden, "An Analytic Survey of Legacy Preference," in *Affirmative Action for the Rich*, Richard Kahlenberg, ed.

Suggested Additional reading:

Alger, "From Desegregation to Diversity and Beyond: Our Evolving Legal Conversation on Race and Higher Education," 36 *Journal of College and University Law* 983

October 8

Session 3: Academic Freedom: Scholarship and Teaching

The nature of Academic Freedom...and why it matters

Faculty scholarship

Academic Freedom in the classroom

Readings for Session 3

Poskanzer, *Higher Education Law: The Faculty*, pp. 25-34; 63-92

Finkin and Post, *For the Common Good*, pp. 11-27; 53-111

"Believing Scripture but Playing by Science's Rules," *New York Times* 2/12/07

Cooper v. Ross

Bishop v. Aronov

Axson-Flynn v. Johnson

"U. of Montana Will Let Conservative Professor Teach Constitutional Law," *Chronicle of Higher Education* 9/10/04

"U. of Montana Law Faculty Denies Emeritus Status to Controversial Professor," *Chronicle of Higher Education* 6/16/11

"Appalachian State Chancellor Defends Discipline of Professor Who Showed Film About Porn," *Chronicle of Higher Education* 1/26/12

On Ward Churchill controversy:

"Inside a Free-Speech Firestorm," *Chronicle of Higher Education* 2/18/05

"U. of Colorado Will Investigate Allegations of Misconduct Against Controversial Professor," *Chronicle of Higher Education* 3/25/05

"Ward Churchill Committed Research Misconduct, U. of Colorado Panel Finds," *Chronicle of Higher Education* 5/17/06

"U. of Colorado President Recommends Dismissal of Ward Churchill," *Chronicle of Higher Education* 6/8/07

“Colo. Regents Vote to Fire Ward Churchill,” *Chronicle of Higher Education* 8/3/07

“Churchill Wins Lawsuit, but Only \$1 in Damages,” *Chronicle of Higher Education* 4/3/09

Stanley Fish, “Ward Churchill Redux,” *New York Times* 4/5/09

“Judge Rejects Ward Churchill’s Plea for Reinstatement, Vacates Verdict in His Favor,” *Chronicle of Higher Education* 7/8/09

“AAUP Unit Slams U. of Colorado Over Firings of 2 Controversial Faculty Members,” *Chronicle of Higher Education* 11/8/11

“Ward Churchill loses appeal to win back CU job,” *Denver Post* 9/10/12

October 10

Session 4: Academic Freedom: Institutional Speech; Tenure Systems

Intra-Institutional speech

Does Academic Freedom extend to students, administrators?

Tenure as a distinctive employment construct

Readings for Session 4

Finkin and Post, *For the Common Good*, pp. 113-126

Hong v. Grant

Demers v. Austin

DelFattore, “To Protect Academic Freedom, Look Beyond the First Amendment,” *Chronicle of Higher Education* 10/31/10

Board of Regents v. Roth

Perry v. Sindermann

Brown v. Trustees of Boston University

“Dismissals ‘for Cause,’” *Chronicle of Higher Education* 12/7/94

“U. of Saskatchewan Fires Tenured Professor Accused of Maligning Colleagues on RateMyProfessors.com,” *Chronicle of Higher Education* 2/24/06

October 15

Session 5: Student Academic and Behavioral “Discipline”; Student Rights, Responsibilities and Changing Expectations

“Academic” Discipline
 Consequences of Poor Academic Performance
 Grading disputes involving faculty
 Grading disputes involving Students
 “Behavioral” Discipline
 Sexual violence on campuses
 Expectations about Safety and Student well-being

Readings for Session 5

Regents of the University of Michigan v. Ewing

Board of Curators of the University of Missouri v. Horowitz

“A Professor at Louisiana State Is Flunked Because of Her Grades,” *Chronicle of Higher Education* 5/16/10

“Grad loses in C+ lawsuit against Lehigh University,” *Morning Call* 2/14/13

Schaer v. Brandeis University

Kors and Silverglate, *The Shadow University*, pp. 270-288

“Discipline Goes on Trial at Colleges,” *Chronicle of Higher Education* 3/27/09

“With ‘Restorative Justice,’ Colleges Strive to Educate Student Offenders,” *Chronicle of Higher Education* 4/17/09

“Campuses Strive for Compliance and Fairness in Policies on Sexual Assault,” *Chronicle of Higher Education* 6/6/11

U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts” 4/4/11

Bradshaw v. Rawlings

“In a Surprise Move, MIT Settles Closely Watched Student-Suicide Case,” *Chronicle of Higher Education* 4/14/06

Lake, “Higher Education Called to Account,” *Chronicle of Higher Education* 6/29/07

October 17

Session 6: Beyond the Ivory Tower: College and University Relations with the Outside World

Federal intrusions
 Should Colleges and Universities take positions on moral and political disputes?
 Divestment of stocks
 Tax exemptions and neighborhood relations
 Concluding Thoughts

Readings for Session 6

“Obama Plan to Tie Student Aid to College Ratings Draws Mixed Reviews,” *Chronicle of Higher Education* 8/22/13

American Council on Education, “Special Edition: A Closer Read of Obama’s College Affordability Plans,” *President to President* 9/6/13

Grassley, “Wealthy Colleges Must Make Themselves More Affordable,” *Chronicle of Higher Education* 5/30/08

“Fewer Colleges Let Moral Concerns Govern How They Invest Funds,” *Chronicle of Higher Education* 3/29/96

“It’s Only Getting Hotter,” *Inside Higher Ed* 4/18/13

“Frequently Asked Questions” about fossil fuel company divestment from 350.org website

“Middlebury College officials opt not to divest from fossil fuels,” *Addison County Independent* 9/2/13

“President Bowen discusses institution’s role on external issues,” *Princeton Alumni Weekly* 2/13/78

“Colleges and Cities Square Off Over Tax Demands,” *Chronicle of Higher Education* 1/31/10

Brody, “Payments in Lieu of Taxes: ‘Contributions,’ Say the Towns; ‘Extortion,’ Say the Colleges,” *Chronicle of Higher Education* 1/31/10

“Towns, Gowns, and Taxes,” *Chronicle of Higher Education* 2/1/10

Preparation for Class, Attendance, and Class Participation

The readings for the course average about 150 pages per class, and of course I expect you to have done the reading before each session. However, as you will quickly discover, some of the selections (e.g., the news accounts of various controversies) are meant to draw out issues and provoke debate, and thus are not overly dense. Conversely, another set of readings is comprised of judicial opinions that illustrate how judges apply the law to specific disputes—and sometimes create new law. Reading such opinions is something of an acquired skill, because of the formal language and structure used by judges and the reliance upon precedent in crafting a decision, but you will get the hang of it quickly (really!) To that end, I will introduce you to (1) basic legal terminology and concepts; (2) the mechanics and impact of legal reasoning; and (3) the case method approach to studying law and divining legal principles.

This is a seminar class that depends in no small measure upon robust participation by all participants. Our class sessions are designed to help build upon and confirm your understanding not just of the assigned material but of the underlying issues and themes. Therefore, your attendance and participation are important. I will assume from your presence that you are benefiting and learning from the course. Conversely, I will infer from your

absence that you are not. If you accumulate more than one unexcused absences, I will deduct from your course average.

While I will occasionally offer a brief mini-lecture to explicate a particularly complicated or unfamiliar topic, for the most part our class will be a free-wheeling Socratic debate and discussion, led and facilitated by me. While I will expect people to participate voluntarily, I will also call upon students by name. Be ready to participate. Your comments, questions, observations and critique of the readings (and of my and others' arguments) will be central to the seminar and will make this a richer learning experience for us all.

To that end, during the first session of the class I will break us into five sub-groups, each of which will be charged with helping us prepare for—and then reflect upon—the discussions during subsequent sessions. Starting with Session 2, each of the members of a designated sub-group will be asked, on one occasion:

To post on the course's Moodle site, at least 24 hours before the next session, two specific questions that, based on the readings and your own knowledge or viewpoints, you feel are central to the subject(s) at hand and which you would urge the full class to take up for consideration. (N.B., I recognize that, given the tight timeframe between Sessions 1 and 2, some adjustment may need to be made here); and

To post on the course's Moodle site, within 48 hours after the preceding session, a short reflection/analysis piece (300-500 words) of the idea(s) discussed in that session that you find most compelling, provocative, or worthy of further examination—and why you feel that way.

Because these discussion prompts and post-class reflections will be of value to all seminar participants, everyone should read them.

Grading

I will compute your grade from a course average with the following weights:

- Paper abstract/outline and preliminary bibliography 30%
- Final Paper 50%
- Class Participation (including Moodle posts and especially in class-contributions) 20%

Written assignments are due on due date, as confirmed in class by instructor.

- Late assignments will be penalized.
- Missed assignments will receive a grade of zero (0).

Academic Integrity

In an academic community, cheating and plagiarism are “capital offenses” that are the most serious violations of our shared standards and expectations. Given the fact that academe relies upon the ethical conduct of scholars, students are held to the same standards in their own work. Any act of academic dishonesty or misconduct will be referred to the Office of the Dean. For further information, see the "Complete Academic Integrity Handbook"

<<http://apps.carleton.edu/campus/doc/integrity/complete/>>

Special Needs

Carleton College is committed to providing reasonable accommodations to students with disabilities. Students seeking accommodations should contact the Coordinator of Disability Services at 222-4464 to begin the process. Carleton faculty are strongly encouraged to wait for official notification of accommodations before modifying course requirements for students.

Contacting the Instructor:

I can be reached at:

Office: 100 Laird Hall

Office hours: Thursdays, October 3rd, 10th, 17th, and 31st, 10-11:00 am,
and by appointment, as needed

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