Legal Issues in Higher Education  
Political Science 313

Fall 2015  
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 and financial aid; 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 as the Supreme Court prepares to rehear the case of Fisher v. University of Texas; recent federal and state 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.

3 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 universities 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 provisions; federal statutes and regulations; 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 paper, on a higher education law topic of your choosing. This could be a deeper exploration of a topic explored in class or you can 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 Friday, October 23, 2015. Factoring in time for me to make comments/suggestions and your subsequent research and revisions, Final Papers will be due by Friday, November 20, 2015.

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)

**September 15**

**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

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


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

**September 17 and September 22**

**Sessions 2 and 3: Admissions and Affirmative Action**

14th Amendment jurisprudence
Recent Supreme Court holdings
   *Fisher* case
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)


*Grutter v. Bollinger*

*Gratz v. Bollinger*

*Fisher v. University of Texas* (2013 Supreme court opinion, including Thomas concurrence and Ginsberg dissent)

“U. of Texas Flagship’s Use of Race in Admissions Can Stand, Court Rules,” *Chronicle of Higher Education* 7/15/14

“What to Expect as the Supreme Court Revisits Race in Admissions,” *Chronicle of Higher Education* 6/30/15

**Suggested Additional reading:**

*Fisher v. University of Texas* (2014 5th Circuit opinion)

**Readings for Session 3**

*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


**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

**September 24, September 29 and October 1**

**Sessions 4, 5 and 6: Academic Freedom: Why it Matters and What are its Limits**

**Session 4: Academic Freedom and Faculty Scholarship**

**Readings for Session 4**

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

Finkin and Post, *For the Common Good*, pp. 11-27; 53-77


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

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


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


“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

On Steven Salaita controversy:


*Salaita v. Kennedy*

“Nearly a Year Later, Fallout From Salaita Case Lingers on Campuses,” *Chronicle of Higher Education* 7/6/15

**Session 5: Academic Freedom in the Classroom**

**Readings for Session 5**


Finkin and Post, *For the Common Good*, pp. 79-111

*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

“Students’ Requests for Trigger Warnings Grow More Varied,” *Chronicle of Higher Education* 9/14/15


“American U.’s Faculty Senate Takes Stand Against Trigger Warnings,” *Chronicle of Higher Education* 9/23/15

Session 6: Academic Freedom and Institutional Speech; Tenure Systems

Intra-Institutional speech
Does Academic Freedom extend to students and administrators?
Tenure as a distinctive employment construct

**Readings for Session 6**

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 6 and October 8**

**Sessions 7 and 8: Student Rights, Responsibilities and Changing Expectations**

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

Readings for Session 7

*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

“Oklahoma President’s Swift Action on Racist Video Carries Risks,” *Chronicle of Higher Education* 3/11/15

“Why expelled Oklahoma frat boys would have an ‘excellent chance’ in court,” *Washington Post* 3/11/15

*Bradshaw v. Rawlings*

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


“25 Years Later, Has Clery Made Campuses Safer?,” *Chronicle of Higher Education* 3/9/15

Readings for Session 8

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


“Reporting Rape, and Wishing She Hadn’t,” *New York Times* 7/12/14

Yoffe, “The College Rape Overcorrection,” *Slate* 12/7/14
“It’s hard to ignore a woman toting a mattress everywhere she goes, which is why Emma Sulkowicz is still doing it,” *Washington Post* 10/29/14

“In Columbia University rape case, accuser and accused are now fighting it out in public,” *Washington Post* 2/4/15

“Columbia University sued by male student in ‘Carry that Weight’ rape case,” *Washington Post* 4/24/15

“Should Colleges Be Judging Rape?,” *Chronicle of Higher Education* 4/12/15


“UC San Diego didn’t give male student fair trial in sex case, judge rules,” *Los Angeles Times* 7/14/15


“How a Michigan college student beat a sexual assault allegation,” *Washington Post* 9/16/15

October 13

**Session 9: 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

**Readings for Session 9**

“Education Department Now Plans a College-Rating System Minus the Ratings,” *Chronicle of Higher Education* 6/25/15

“White House pivots to accountability and outcomes, and away from debt-free, in major Duncan speech,” *Inside Higher Ed* 7/27/15

“In 3 Reports, Senate Republicans Hint at Higher-Ed Agenda,” *Chronicle of Higher Education* 3/24/15

Task Force on Federal Regulation of Higher Education (2105), “Recalibrating Regulation of Colleges and Universities,” pp. 1-2, 10-17

Grassley, “Wealthy Colleges Must Make Themselves More Affordable,” *Chronicle of Higher Education* 5/30/08
“Universities Worldwide Face Increasing Pressure to Drop Fossil-Fuel Investments,” *Chronicle of Higher Education* 4/1/15


350.org, “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

**October 15**

**Session 10: Review and Conclusion**

**Preparation for Class, Attendance, and Class Participation**

The readings for the course average about 100 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 two occasions:

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: Tuesdays, September 22, 29; October 6, and 13, 1-2:00 pm,
and by appointment, as needed
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