

LAW AND CONTEMPORARY PROBLEMS 940:002 F2018

PUBLIC LAW AND PRIVATE POWER

M 1:10 PM-3:10 PM, 3247 LAW

PROFESSOR JOEL ROGERS

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COURSE DESCRIPTION

This course is about problems in the design and maintenance of a democratic “affirmative” (*aka* “welfare” or “opportunity”) state that satisfies popular interest in both efficacy and democratic legitimacy, particularly in the latter’s requirement of demonstrated fidelity to the rule of law. We take the activities of this kind of state, which is characteristic of all modern capitalist democracies, to include not only income maintenance and social insurance programs but any public policies or programs that, in alleged pursuit of improved living standards and egalitarian ends, supplement or replace unregulated markets, procedural rights, and representative democracy — for example, in environmental protection, industrial policy, and the provision of basic public goods in education, security, energy, transportation, and communication. We will examine the modern affirmative state’s origin, evolution, current problems in satisfying expectations of it, and a variety of strategies to address those problems.

STUDENT LEARNING OUTCOMES

By the end of this course, students should be able to articulate and defend a view, informed by comparative experience, of the democratic affirmative state’s: (1) origins and politics, (2) challenge to legal order, (3) crisis of operation and legitimacy, and (4) most promising strategies of renewal.

COURSE REQUIREMENTS & GRADING

Students are expected to attend all class sessions and to complete all assigned readings for each class in advance of its attendance. They are also required to provide in advance of class, and emailed to Michelle Bright (above) no later than 7 AM the day of the class, a single-spaced page or two of questions or comments about anything in those readings they don’t understand, object to, or otherwise would like see more discussion of. I’ll use these short writings to shape my comments in our class discussion, in assigning the class participation part of your grade, and as part of the “formative assessment” of student work now required ABA.

Readings are up at Learn@UW (Canvas). Depending on class discussion, we may reduce or add to readings. Grades will be based on pre- and in-person contribution to class (30 percent) and

performance on a 24-hour, open-book, take-home exam (70 percent). The last will be available for pickup during the Law School Final Exam period, which this year runs December 8-21, 2018. A pass/fail option is also available for this course; the deadline for declaring interest in taking it is December 6.

SCHEDULE OF CLASS SESSION TOPICS AND READINGS

1. INTRODUCTION TO CLASS & THE CURRENT MOMENT (SEPTEMBER 10)

1. THEODORE LOWI (1966). Distribution, Regulation, Redistribution: The Functions of Government. In R.B. Ripley (editor), *Public policies and their politics; an introduction to the techniques of Government control* (pp. 27-40). New York: W. W. Norton.
2. IRA KATZNELSON, "Anxieties of Democracy," *Boston Review*, September 8, 2015.
3. ADAM PRZEWORSKI (1996). A Better Democracy, A Better Economy. *Boston Review*, 21(2), 9.
4. GEORGE PACKER (2018). All That's Left Is The Vote. *The New Yorker*, August 6 & 13, 2018.
5. DAVID KORTEN, "A Living Earth Economy for an Ecological Civilization," 2017 Academy of Management Annual Conference Beyond Markets Series session on *Progressive Localism as an Alternative Future: A Dialogue with David Korten and Joel Rogers*. 1-9.
6. WOLFGANG STREECK, "How Will Capitalism End?," *New Left Review* 87 (May-June 2014): 35-64.
7. BILL MCKIBBEN, "Global Warming's Terrifying New Math," *Rolling Stone* 1162 (August 2, 2012): 52-60 & "A World at War," *New Republic* Vol. 247 Issue 9 (2016): 22-31.
8. DANIEL HO, "Does Peer Review Work? An Experiment in Experimentalism," *Stanford Law Review* 69: 1-80 — **NB: Reading assignment only pp. 1-7, ending in footnote 70.**
9. ERIC SANDERSON, JOSEPH WALSTON, JOSEPH, & JOHN ROBINSON (2018). From Bottleneck to Breakthrough: URBANIZATION and the Future of Biodiversity Conservation. *BioScience*, 68(6), 412-426.
10. JOEL ROGERS, "Tikkun," *Public Law & Private Power* (Fall 2016); "What Does "High Road" Mean?" (1990); "Productive Democracy," *The Nation (150th Anniversary Issue)* 300 (April 6, 2015): 206-210.

2. CAPITAL, LABOR, AND INSTITUTIONALIZED ACCORDS: 1 (SEPTEMBER 17)

11. MANCUR OLSON, "The Rise and Decline of Nations" (New Haven: CT: Yale University, 1982) 17-74.
12. JOEL ROGERS, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws'," *University of Wisconsin Law Review* (1990): 1-147.

3. CAPITAL, LABOR, AND INSTITUTIONALIZED ACCORDS: 2 (SEPTEMBER 24)

13. FRANK LEVY & PETER TEMIN, "Inequality and Institutions in 20th Century America" (Cambridge: MA: MIT Industrial Performance Center, May 2007).
14. ADAM PRZEWORSKI & MICHAEL WALLERSTEIN, "Democratic Capitalism at the

Crossroads,” in A. Przeworski, *Capitalism and Social Democracy* (Cambridge: Cambridge University Press, 1985): 205-21.

15. JESSICA BULMAN-POZEN, “Executive Federalism Comes to America,” *Virginia Law Review* (Vol. 102, 2016): 953-1030.

4. WELFARE STATE ORIGINS & EVOLUTION IN THE U.S. (OCTOBER 1)

16. WALTER DEAN BURNHAM, “The Appearance and Disappearance of the American Electorate,” in idem, *The Current Crisis in American Politics* (New York: Oxford University Press, 1982): 121-65.
17. ROBERT KUDRLE & THEODORE MARMOR, “The Development of Welfare States in North America,” in P. Flora and A. J. Heidenheimer (eds.), *The Development of Welfare States in Europe and America* (New Brunswick: Transaction Books, 1981): 81-121.
18. MONICA PRASAD, *The Land of Too Much: American Abundance and the Paradox of Poverty* (Cambridge: Harvard University Press, 2012): 3-95, 267-268.

5. HOW THE WELFARE STATE UPSET THE “RULE OF LAW” (OCTOBER 8)

19. GRANT GILMORE, *The Death of Contract* (Columbus: Ohio State University Press, 1974): 35-85.
20. MORTON HORWITZ, “The Crisis of Legal Theory in the Regulatory State” (MSS, 1983). 1-58.
21. THEODORE LOWI, “The Welfare State: Ethical Foundations and Constitutional Remedies,” *Political Science Quarterly*, Vol 101 No. 2 (1986): 197-220.
22. ROBERT SCOTT, “*The Death of Contract Law*,” *The University of Toronto Law Journal*, Vol. 54, No. 4, (2004) 369–390.
23. CHARLES REICH, “The New Property,” *The Yale Law Journal* 73(1964): 733-787.
24. ABRAM CHAYES, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89 (1976): 1281-1316.
25. RONALD GILSON, CHARLES SABEL & ROBERT SCOTT, “Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms,” *New York University Law Review*, Vol 88 (2013). 170-215.
26. RICHARD POSNER, “Theories of Economic Regulation,” *The Bell Journal of Economics and Management Science* 5 (1974): 335-358.
27. JAMES FREEDMAN, “Crisis and Legitimacy in the Administrative Process,” *Stanford Law Review* 27 (1975):1041-1076.

6. HOW CHANGES IN POLITICAL ECONOMY UPSET THE WELFARE STATE ... (OCTOBER 15)

28. JOSHUA COHEN & JOEL ROGERS, “Solidarity, Democracy, Association,” in J. Cohen and J. Rogers (eds.), *Associations and Democracy* (New York: Verso, 1995): 236-267.
29. MICHAEL STEWART, *The Age of Interdependence* (Cambridge: MIT Press, 1984): 47-81.
30. ANAT ADMATI, “It Takes a Village to Maintain a Dangerous Financial System,” in *Just Financial Market: Finance in a Just Society*, Lisa Herzog, Ed., Oxford University Press, 2017.
31. PAUL KRUGMAN, “The Eternal Triangle: Understanding International Financial Complexity,” (October 13, 1998).
32. DANI RODRIK, “The Inescapable Trilemma of the World Economy” (June 22, 2007) & “More on the Political Trilemma of the Global Economy” (March 11, 2016)
33. CHARLES SABEL, “A Real-Time Revolution in Routines,” in C. Heckscher and P. Adler (eds.), *The Corporation As a Collaborative Community Organization in the Knowledge-Based Economy*

(Oxford: Oxford University Press, 2005): 106-156.

7. ... AND GENERATED NEW POSSIBILITIES (OCTOBER 22)

34. YOCHAI BENKLER, "Coase's Penguin, or, Linux and The Nature of the Firm," *Yale Law Journal* 112 (2002): 369-446.
35. STEVEN JOHNSON, *Future Perfect: The Case for Progress in a Networked Age* (New York, NY: Riverhead Books, 2012): 3-50.
36. CHARLES SABEL, "Learning by Monitoring: The Institutions of Economic Development," in N. Smelser and R. Swedberg (eds.), *Handbook of Economic Sociology* (Princeton: Russell Sage and Princeton University Press, 1994): 137-165.

8. ... ALONG WITH LOST ILLUSIONS (OCTOBER 29)

37. SUE HALPERN, "How He Used Facebook to Win," *The New York Review of Books*, June 8, 2017. <http://www.nybooks.com/articles/2017/06/08/how-trump-used-facebook-to-win/> Retrieved August 29, 2017.
38. CHRISTIAN KRELL, "World Wide Web of Equal Freedom?", Friedrich Ebert Stiftung Connect. June 19, 2017. <http://www.fes-connect.org/reading-picks/world-wide-web-of-equal-freedom/> Retrieved August 29, 2017
39. MICAH SIFRY, *The Big Disconnect: Why the Internet Hasn't Transformed Politics (Yet)* (New York, NY: OR Books, 2014): 7-50.
40. EVA VIVALD, "How Much Can We Generalize from Impact Evaluations?" MSS (May 2016).

9. NEW DEALS 1: EXPANDED RIGHTS & PROGRESSIVE FEDERALISM (NOVEMBER 5)

41. GOODWIN LIU, "Education, Equality, and National Citizenship," *Yale Law Journal* 116 (2006): 330-411.
42. NATHAN NEWMAN & J.J. GASS, *A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendments* (New York: Brennan Center, 2004).
43. RICHARD FREEMAN & JOEL ROGERS, "The Promise of Progressive Federalism," in J. Soss, J.S. Hacker, and S. Mettler, eds., *Remaking America: Democracy and Public Policy in an Age of Inequality* (New York: Russell Sage Foundation, 2007): 205-227.
44. JOEL ROGERS, "Foreword: Federalism Bound," *Harvard Law and Policy Review* 10 (2016): 281-297.

10. NEW DEALS 2: PUBLIC-INTEREST MARKETS, IMPROVED MANAGEMENT, GUIDED DISCRETION, ASSOCIATIVE DEMOCRACY (NOVEMBER 12)

45. RICHARD SANDOR, ERIC BETTELHEIM & IAN SWINGLAND, "An overview of a free-market approach to climate change and conservation," *Phil. Tran. R. Soc. Lond. A.* 360 (2002): 1607-1620.
46. PETER BARNES & MARC BRESLOW, "The Sky Trust: The Trust for Atmospheric Scarcity Rent," in J. Boyce and B. Shelley (eds.), *Natural Assets: Democratizing Environmental Ownership* (Washington, DC: Island Press, 2003): 135-149.
47. CARY COGLIANESE & DAVID LAZER, "Management Based Regulation," *Law and Society Review* 37 (2003): 691-730.
48. JOHN BRAITHWAITE & VALERIE BRAITHWAITE, "The Politics of Legalism: Rules versus

Standards in Nursing-Home Regulation,” *Social and Legal Studies* 4 (1995): 307-341.

49. JOSH COHEN & JOEL ROGERS, “Secondary Associations and Democratic Governance,” *Politics & Society* 20 (1992): 393-472.
50. JANICE FINE, “Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?” *Politics & Society*, 2017. Vol. 45(3) 359-388.

11. NEW DEALS 3: TRANSPARENCY, NUDGES (NOVEMBER 19)

51. DAVID WEIL ET AL, “The Effectiveness of Regulatory Disclosure Policies,” *Journal of Policy Analysis and Management* 155 (2006): 155-81.
52. MARY GRAHAM, “An Epidemic of Medical Errors,” *Democracy by Disclosure: The Rise of Technopopulism* (Washington, DC: Brooking Institution Press, 2002): 104-36.
53. CASS SUNSTEIN & RICHARD THALER, “Libertarian Paternalism Is Not an Oxymoron,” *University of Chicago Law Review* 70 (2003):1159-1202.
54. DANIEL HO, “Fudging the Nudge,” *Yale Review Journal* 122 (2012): 574-588.

12. NEW DEALS 4: DEMOCRATIC EXPERIMENTALISM, NEW CONTRACTING (NOVEMBER 26)

55. CHARLES SABEL & WILLIAM SIMON, “Minimalism and Experimentalism in the Administrative State.” *The Georgetown Law Journal* 100 (2011): 53-93.
56. **SEE [8]** DANIEL HO, “Does Peer Review Work? An Experiment in Experimentalism,” *Stanford Law Review* 69 (2017): 1-80
57. RONALD GILSON, CHARLES SABEL & ROBERT SCOTT, “Text and Context: Contract Interpretation as Contract Design,” *Cornell Law Review* 100 (2012): 23-97.
58. JOEL ROGERS & JOSHUA COHEN, “Democracy,” *On Democracy: Toward a Transformation of American Society* (New York, NY: Penguin, 1983): 146-183, 214-233.

13. REVIEW: ALL QUESTIONS, NO WORRIES! (DECEMBER 3)