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PSCI 461.01: United States Administrative Law in Historical, Comparative and Global Context

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University of Montana
Department of Political Science

PSCI 461
United States Administrative Law in Historical, Comparative
and Global Context
Autumn 2015

Patrick Peel
Office: LA 414
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Office Hours: 1-2 pm M, W; by appointment

M, W, F 10:10-11 pm
Classroom: LA 344

This is a seminar on the administrative law of the United States in historical, comparative, and global context. Rather than being a single integrated course, it is, as such, three mini-courses, each of which builds upon on the other. Our goal as students of politics is to understand more fully than a typical law school class the nature, problems and potentialities of administrative law in the United States. This seminar, set against the backdrop of what Micklethwait and Wooldridge call “The Fourth Revolution: The Global Race to Reinvent the State,” will allow us – by varying our perspective – to be in a position to better understand the American administrative state, the law that governs it, and the range of possibilities the future presents.

The course is also designed to help you develop the following skills:

- Learn to read primary and secondary sources for content and argument
- Learn to think holistically – i.e. strengthen the capacity to synthesize and interpret large amounts of information, so as to “see” various connections and thus implications of the material under consideration
- Develop the capacity to write effective “argumentative essays” through in class and out of class writing assignments – i.e. strengthen your capacity to put forth reasons for your claims, and through the process of “giving good reasons” figure out what you believe and think
- Strengthen the ability to engage in constructive critical public argument through class participation and discussion

Readings

Required Reading:

1. Jerry L. Mashaw, Richard A. Merrill, and Peter M. Shane, *Administrative Law: The American Public Law System Cases and Materials*, 6th Edition (West: 2009). **[Note there is a newer edition of this book, a 7th edition. However, it is considerable more money, and thus we are using the 6th edition]**

Recommended Texts:

Anthony Weston’s *A Rulebook for Arguments*, while not required, is highly recommended as a reference for how to write college level argumentative essays. In addition, other books you may also wish to purchase are listed below.

1. Anthony Weston, *A Rule Book for Arguments* (Hackett: 2008).

2. John Micklethwait and Adrian Wooldridge, *The Fourth Revolution: The Global Race to Reinvent the State* (Penguin Press: 2014).
3. Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred years of American Administrative Law* (Yale: 2012).

Procedures and Requirements

Grading and Assignments:

This course has five requirements, which include the following:

1. Faithful attendance to class and active participation during the discussions (50% of the final grade; see “Participation” below)
2. First Essay: 5-6 page paper (**Oct. 1:** 10%; see “Essay” below)
3. Midterm: 50 minute in class examination (**October 23:** 10%; see “In Class Writing Assignment” below)
4. Second Essay: 5-6 page paper (**Nov. 6:** 10%; see “Essay” below)
5. Final Paper: (**December 16:** 20%; see “Essay” below)

In order to pass the class, you must complete all of the assignments.

Participation:

This is a seminar. The excitement of seminars is that they are a chance for you to learn from each other, to try out your own analyses and comparisons, and to hear your own voice in intellectual conversation with each other. You are all bright and interesting people, and seminars are an opportunity for you all to be colleagues in an intellectual inquiry.

Our seminar will be organized around discussion. *Regular attendance and participation are thus required.* Given the nature of this course, the seminar’s participation grade is weighted accordingly at 50%.

The goal of our discussions is for participants to demonstrate informed, ongoing, responsive engagement with the material. By “informed,” I mean informed by a close reading of our texts and engaged with the other materials of the course. By “ongoing” I mean both sustained throughout each meeting and sustained throughout the semester. By “responsive,” I mean responsive to each other, taking each other seriously enough to respond to each other’s observations and analyses.

I know that for some of you talking in class is as easy as breathing, but that, for others, it is a hurdle to overcome. If talking in class is difficult for you, please come see me during an office hour early in the semester. There are tricks to making participation easier – and it’s well worth your time to practice sharing your ideas and thoughts with others in a constructive, yet critical, intellectual conversation. So, work on that skill here in this class!

Most classes, 4 or so members of the seminar will be required to start our discussion with a 3 to 4 minute respond to the reading. *Given the size of our seminar, this means I expect that each participant will begin discussion at least once a week.* Some days, participants will be free to

choose what issue they wish to bring to the class's attention; other days, I will ask that people respond to specific issues or questions and other days I will ask that people outline some aspect of a case we are reading. After the completion of these responses, then we will open the floor to the rest of the seminar so that we can hear people's agreements and disagreements with the ideas and arguments advanced by the 4 members of the seminar. *Each person, during each class meeting of the seminar, will be expected to participate in this dialogue.*

Furthermore, during the term each participant will be asked to give a more formal presentation on the texts from the course. This will entail putting together an outline of one's proposed remarks, which will be handed out to the participants of the seminar. Students should be prepared to present 3 times during the term. Each presentation should run approximately 5 to 6 minutes.

As I hope my remarks indicate, each participant in the seminar should come to class with that day's readings completed, and carefully thought about, with questions to ask and ideas and thoughts to share. That is to say, in class it is your job to put your ideas forward for your classmates to endorse, challenge, and transform. *As I indicate above, this is an obligation of every seminar participant, regardless of whether you have signed up to begin discussion or not.*

Your regular, thoughtful participation will be critical to determining the success of the seminar and the grade you receive in it. **Unless a student's participation in the course is significant, a student will fail the seminar.**

In Class Writing Assignment:

The course requires one in class written examination.

- The midterm will take place on Oct. 23. It will last 50 minutes and cover the material from the course thus far. The test will be a bluebook exam, which requires you to write an essay on some given topic or theme from the course. The test will be open-book; the test is worth 10% of your grade.

Essays:

The course requires the successful completion of 2 short essays and one longer 10-12 page essay.

- Short Essays: Essays should be 5 to 6 pages long. Each essay should be "an argumentative essay." That is your essay should be an explication of some feature of the material we have covered in class, along with an argument in favor or against some aspect of the reading. It is thus not to be a book report, but an opportunity for you to put forth some novel point of view about the material and your reasons for thinking you are right about the material. After all, everyone in the class has read the material, so just repeating back that material does not move the conversation forward much... Two books that are particularly helpful for learning how to write college level argumentative essays are: Anthony Weston, *A Rule Book for Arguments* and William Strunk Jr. and E.B. White, *The Elements of Style*. Consulting these books should give you a sense of what constitutes strong college level writing.
- Final Essay: The final essay should 10 to 12 pages. Like the shorter essays, it too should be an argumentative essay. Each participant in the seminar is required to clear the topic of his or her final paper with me. *It is your obligation to stop by my office hours, or schedule a time to discuss your paper with me.*

Late Paper Policy:

You will note from the syllabus that we do not have class scheduled on the week your essay is due. For this reason, late papers will be marked down a grade every day they are late.

Sources for Papers:

Generally speaking, essays should be written using the sources from the course – either texts from the class or books recommended via texts from the course or webpages used in the class. *That means the Internet, unless used to access databases of scholarly articles, or legitimate academic sources, is off-limits.*

Writing Help:

The Writing Center is located in LA 144. To make an appointment with a writing advisor, call 243-2266, email growl@mso.umt.edu, or stop by LA 144.

Class Drop Policy:

The University allows students to drop courses until September 21 (i.e. the 15th instructional day). After that, students are required to obtain the signature of the faculty member teaching the course. ***It is my policy to not sign students out of classes.*** That is, you have three weeks (until Sept. 21) to decide if you wish to take this course. If you do not drop the course by Sept. 21, I will assign students the grade they have received in the class. (Side note: It is not good for you or for the class to have students not committed to taking a course, and hence the policy...)

Fulfilling the Writing 400 Requirements:

Students taking this course to fulfill writing the 400 requirements will be required to revise and expand in consultation with the instructor one of their essays into 10-12 pages. Substantive and grammatical revisions will be expected. Students wishing to complete this requirement must include their original essay with the revised essay.

Academic Dishonesty:

Students in this course are expected to follow the University's standards of academic integrity and honesty. If you are caught cheating or plagiarizing, you may receive a failing grade for the assignment and/or class and may be reported to the University. Students are responsible for understanding what constitutes plagiarism. The Code is available for review online at <http://www.umt.edu/SA/VPSA/index.cfm/page/1321>

Accessibility:

The University of Montana assures equal access to instruction by supporting collaboration between students with disabilities, instructors, and Disability Services for Students. If you have a disability that requires an accommodation, contact me at the beginning of the semester so that proper accommodations can be provided. Please contact Disability Services for Students if you have questions, or call Disability Services for Students (DSS) for voice/text at 406-243-2243. You may also fax the Lommasson Center 154 for more information at 406-243-5330.

Course Topics and Readings:

Reading assignments are to be completed before the class meeting for which they are listed. Bring to class the assigned books, online assignments, your reading notes, and this syllabus.

Part I: Administrative Law: Historical Context

Week One: Introduction

1. Mon., Aug. 31: Introduction

Recommended:

*Tom Ginsburg, "Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law," in Susan Rose-Ackerman and Peter Lindseth, eds., *Comparative Administrative Law* (Edward Elgar: 2010), pp. 117-33. [M]

2. Wed., Sept. 2: No Class (American Political Science Association)

*Fareed Zakaria, *In Defense of a Liberal Education* (Norton: 2015), chap. 1, pp. 16-39. [M]

Assignment: Write paragraph on ch. 1.

3. Fri., Sept. 4: No Class (American Political Science Association)

*Fareed Zakaria, *In Defense of a Liberal Education* (Norton: 2015), chap. 3, pp. 72-105. [M]

Assignment: Write paragraph on ch. 3.

Week Two: The BIG puzzle

1. Mon., Sept. 7: No Class Labor Day

2. Wed., Sept. 9: Reinventing the State

*John Micklethwait and Adrian Wooldridge, *The Fourth Revolution*, pp. 1-46 [M]

Due: Paragraphs on ch. 1 and 3 of *In Defense of a Liberal Education*.

3. Fri., Sept. 11: Reinventing the State

* John Micklethwait and Adrian Wooldridge, *The Fourth Revolution*, pp. 47-101. [M]

*G. John Ikenberry, "Leviathan 2.0; The Fourth Revolution," *Foreign Affairs*, Sept./Oct. 2014 [M]

Week Three: The American Administrative State I

1. Mon., Sept. 14: Bringing the State Back In; The State Building Problem in America

*Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, *Bringing the State Back In*, pp. 3-37. [M]

*Stephen Skowronek, *Building a New American State* (Cambridge: 1982), preface, chaps. 1-2, pp. vii-35. [M]

2. Wed., Sept. 16: Building A New American State: Patching Business Regulation

*Stephen Skowronek, *Building a New American State* (Cambridge: 1982), part II intro, chap. 3, pp. 37-162. [M]

THURS., SEPT. 17 EXTRA-CREDIT:

Mark Tushnet (William Nelson Cromwell Professor of Law, Harvard University):
12 pm University of Montana Law School

3. Fri., Sept. 18: Building A New American State: Reconstituting Business Regulation

*Stephen Skowronek, *Building a New American State* (Cambridge: 1982), part III intro, chap. 8, epilogue, pp. 163-293. [M]

Recommended:

*"Social Science History Roundtable: Twenty Years After Building a New American State," *Social Science History* 27 (3), pp. 425-80. (Includes contributions by Julian E. Zelizer, Elisabeth S. Clemens, Brian Balogh, and Daniel P. Carpenter, and a response by Stephen Skowronek). [M]

Week Four: The American Administrative State II

1. Mon., Sept. 21: The Myth of the Weak State?

*William J. Novak, "The Myth of the "Weak" American State," *American Historical Review*, June 2008, pp. 752-771. [M]

*Nicholas Parrillo, "Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States," in Susan Rose-Ackerman and Peter Lindseth, eds., *Comparative Administrative Law* (Edward Elgar: 2010), pp. 47-62. [M]

Recommended:

*The American State: Power Obscured, An Interview with William Novak & James Sparrow [M]

2. Wed., Sept 23: A Government Out of Sight

*Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: 2009), intro, chap. 1, conclusion, pp. 1-52, 379-399. [M]

3. Fri., Sept. 25: Post-War Era

*Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Strategy* (Princeton: 2000), chaps. 1-2, pp. 9-61. [M]

Week Five: FIRST SHORT PAPER DUE (5-6 PAGES)

1. Mon., Sept. 28: Work on paper

2. Wed., Sept. 30: Work on paper

3. Fri., Oct 1: Paper Due

Week Six: Creating the Administrative Constitution

1. Mon., Oct 5: The Traditional Story

*Lawrence Friedman, "Administrative Law and Regulation of Business," *A History of American Law* (Touchstone: 2001), pp. 329-349. [M]

2. Wed., Oct. 7: Recovering American Administrative Law; Federalist Foundations

*Jerry L. Mashaw, *Creating the Administrative Constitution* (Yale: 2012), pp. 3-25; 29-52 [M]

3. Fri., Oct 9: Federalist Foundations

*Jerry L. Mashaw, *Creating the Administrative Constitution* (Yale: 2012), pp 53-78 [M]

Week Seven: Creating the Administrative Constitution

1. Mon., Oct. 12: Reluctant Nationalists

*Jerry L. Mashaw, *Creating the Administrative Constitution* (Yale: 2012), pp. 81-90, 119-143 [M]

2. Wed., Oct. 14: Democracy, the Gilded Age and Administration

*Jerry L. Mashaw, *Creating the Administrative Constitution* (Yale: 2012), pp. 147-223, 227-250 [M]

3. Fri., Oct. 16: No Class (Pacific Northwest Political Science Association)

Week Eight: MIDTERM OR PAPER

1. Mon., Oct. 19: Optional Review

2. Wed., Oct. 21: No Class

3. Fri., Oct. 23: 50 Minute In Class Midterm or Paper (Association for Political Theory)

Part II: Administrative Law: Contemporary Contexts

Week Nine: Congress and the President

1. Mon., Oct. 26: The "Nondelegation Doctrine"

*Mashaw et al., *Administrative Law*, pp. 72-90.

2. Wed., Oct. 28: The "Legislative Veto"

*Mashaw et al., *Administrative Law*, pp. 101-27

3. Fri., Oct. 30: The President's Power to Appoint and Remove Administrators

* Mashaw et al., *Administrative Law*, pp. 177-84, 228-53

Week Ten: SECOND SHORT PAPER DUE (5-6 PAGES)

1. Mon., Nov. 2: Workshop

2. Wed., Nov. 4: Workshop

3. Fri., Nov. 6: Paper Due

Week Eleven: Executive Supervision of the Administrative State

1. Mon., Nov. 9: Executive Authority to Direct Agency Policy

*Mashaw et al., *Administrative Law*, pp. 253-266.

2. Wed., Nov. 11: No Class: Veterans Day

3. Fri., Nov. 12: No Class (Northeast Political Science Association)

Week Twelve: Presidential Administration

1. Mon., Nov. 16: Presidential Oversight of Regulatory Policy

*Mashaw et al., *Administrative Law*, pp. 266-87

2. Wed., Nov. 18: Presidential Oversight of Regulatory Policy

*Mashaw et al., *Administrative Law*, pp. 287-307

3. Fri., Nov. 20: Ossification?

*Thomas McGarity, "Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age", 61 *Duke Law Journal* 1671 (2012) [M]

*Cass Sunstein, "The Office of Information and Regulatory Affairs: Myths and Realities," 126 *Harvard Law Review* 1838 (2013) [M]

*Lisa Heinzerling, Inside the EPA: A Former Insiders Reflections on the Relationship Between the Obama EPA and the Obama White House, 31, *Pace Environmental Law Review* 325-369 (2014) [M]

Week Thirteen:

1. Mon., Nov. 23: No Class

THANKSGIVING BREAK: 25TH THROUGH 27TH

Week Fourteen: Administrative Adjudication & Suits to Review Administrative Action

1. Mon., Nov. 30: Administrative Adjudication

*Mashaw et al., *Administrative Law*, pp. 308-313, 438-448

2. Wed., Dec., 2: The Chevron Doctrine

*Mashaw et al., *Administrative Law*, pp. 793-798, 812-846

3. Fri., Dec. 4: The Administrative Constitution: Then and Now

*Jerry L. Mashaw, *Creating the Administrative Constitution* (Yale: 2012), pp. 285-316 [M]

Part III: Administrative Law: Comparative and Global Contexts

Week Fifteen: Comparative and Global Administrative Law

1. Mon., Dec. 7: Comparative Administrative Law

*Bruce Ackerman, "Good-bye, Montesquieu," in Susan Rose-Ackerman and Peter Lindseth, eds., *Comparative Administrative Law* (Edward Elgar: 2010), pp. 128-133. [M]

*Robert Kagan, "American and European Ways of Law: Six Entrenched Differences" [M]

2. Wed., Dec. 9: Comparative Administrative Law

*Martin Shapiro, "A Comparison of US and European Independent Agencies," in Susan Rose-Ackerman and Peter Lindseth, eds., *Comparative Administrative Law* (Edward Elgar: 2010), pp. 293-306. [M]

*R. Daniel Kelemen, "Adversarial Legalism and Administrative Law in the European Union," in Susan Rose-Ackerman and Peter Lindseth, eds., *Comparative Administrative Law* (Edward Elgar, 2010) [M]

3. Fri., Dec. 11: Global Administrative Law

*Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68: 15-61 (2005). [M]

*Carol Harlow, "Global Administrative Law: The Quest for Principles and Values." *European Journal of International Law* 17(1): 187-214 (2006). [M]

FINAL: PAPER DUE DECEMBER 16