

# JUDICIAL STUDIES

## Fall 2020

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## **Course Description**

The traditional view of courts and administrative tribunals has been that of disinterested neutral arbiters in the policy-making process, whose role was restricted to being called upon to resolve disputes between private citizens and between private citizens and the state. However, these bodies have increasingly been considered and have increasingly considered themselves as more active participants in the policy-making process and that politics in most Western democracies has become more legalized or judicialized. Through a series of seminars, this course will examine the potential causes of this increased legalization or judicialization and consider the impact that this development has had on the policy-making process and politics more generally.

The course will be comparative in nature, with the seminar material focusing mostly on policy-making and the judicial and administrative tribunal institutions in Canada, the United States and the United Kingdom. Students are encouraged to pursue other comparative jurisdictions in relation to their own interests and research for course requirements.

## **Course Objectives**

By the end of the course students should:

- Have a deeper understanding of and engage with on a critical level the various theoretical approaches to understanding the impact of judicial institutions on politics and public policy as set out in the judicial studies literature;
- Have enhanced written and oral communication skills.

## **Required Materials and Texts**

- Various journal articles and other assigned readings available through McMaster University libraries.

## **Class Format**

The class is scheduled for one three-hour on-line or virtual session every week.

To assist with ease of communication and discussion through online sessions, the class will be divided in half and is expected to virtually attend their assigned session of one and a half hours every week.

As a fourth year seminar, students are expected to play an active role in their own learning and learning processes. The challenges presented by the shift to an on-line or virtual learning format means that the course will function, in part, as a group based independent study course. In this regard, the purpose of the weekly online sessions will be to help clarify and answer questions about the weekly readings.

In support of this approach, the instructor will provide relatively brief, lecture based approach to assist in the understanding of the course content on a weekly basis. This content is intended to help provide a broader context for the material being reviewed and to help clarify or provide questions about the theoretical, methodological and empirical content where need be.

These sessions, however, are not a substitute for conducting the readings on a weekly basis and thinking critically about the theoretical, methodological and empirical content of each article. At the very least, students are expected to have completed the readings and watched the instructor posted content **PRIOR TO** the weekly seminar sessions.

As the normal group dynamic associated with seminars has been disrupted by the shift to online learning, the course will also attempt to replicate the benefits of group discussions through the course assignments. While the use of the Avenue to Learn discussion forum is strongly encouraged, it cannot replace the stronger learning associated with discussion and interaction with others. As such, the course will require significant group work as part of the learning and assessing processes.

As indicated above, the class will be divided into four different groups for the online sessions and students will be assigned by the instructor to specific groups. The course is also broken down into three distinct sections and each group will meet with each of the other groups for one of those sections. This is being done to provide the ability for everyone in the course to interact with all of the other students in the course.

### **Course Evaluation – Overview**

1. Group Discussion Papers	20% each	October 26, 2020 November 16, 2020 December 07, 2020
2. Literature Review Paper	30%	November 23, 2020
3. Take Home Exam	10%	December Exam Period

### **Course Evaluation – Details**

#### **Group Discussion Papers (20% each), due October 26, 2020, November 16, 2020 and December 07, 2020.**

Students will work with up to three other students and submit three ten to twelve page papers for each section of the course.

The papers should be based solely on the assigned readings for the section and attempt to synthesize the various readings and provide an opinion on which of the competing explanations the group finds most compelling as an explanation as to the causes of judicialization or the impacts of it.

Unless agreed to in advance by all students in the group and the instructor, students will both receive the same grade for the assignment and both are responsible for ensuring that the assignment conforms to the Academic Integrity Policy.

**Literature Review Paper (30%), due November 23, 2019.**

Students will submit a literature review based on the relevant literature(s) associated with a judicial studies topic of their choosing.

The purpose of this specific literature review is to provide a theoretical foundation and background for a research paper to be written in POL SCI 4LC3 in the Winter 2021 term. As such, students may want to consult with the instructor about their topic before embarking too far into obtaining literature for the literature review assignment.

The purpose of a literature review is to demonstrate that there is a continuing need to explore the chosen topic in question from a theoretical, methodological and/or empirical perspective. As such, it is anticipated that the paper will only briefly summarize much of the existing literature on the subject, and then focus more clearly on its strengths and weaknesses and identify shortcomings in the completed work to date. It should be analytical in nature and attempt to synthesize (not describe) the existing literature on the topic.

Further instructions concerning the completion of a literature review paper will be provided to students early in the semester.

**Take Home Exam (10%), due December exam period.**

Students will submit a six to eight page paper based on a question posed by the instructor that will link both the various conceptual and theoretical issues raised throughout the semester.

The take home exam will be based on all materials covered in the course. The exam will provide an overall summary of the course for students and an opportunity to apply the material they have learned over the course of the term.

The take home will be released in accordance with the date scheduled by the registrar for the final exam and will provide students with a minimum of seven days to complete the exam.

**Weekly Course Schedule and Required Readings**

**Week 1 – September 14, 2020**

**Introduction and Course Organization**

No Readings

## **Week 2 – September 21, 2020**

### **Judicialization**

Readings:

Vallinder, Torbjan (1994) 'The Judicialization of Politics. A World Wide Phenomenon: Introduction' *International Political Science Review* vol. 15(2), 91-99.

Hirschl, Ran (2006) 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' in *Fordham Law Review* vol. 75, 721.

## **CAUSES OF JUDICIALIZATION**

### **Week 3 – September 28, 2020**

#### **Culture**

Readings:

Glendon, Mary Ann (1991) Rights Talk: The Impoverishment of Political Discourse. Toronto: Maxwell Macmillan Canada, chapters 1, 2, 3 and 7.

Simpson, Jeffrey (1994) 'Rights Talk: The Effect of the Charter on Canadian Political Discourse' in Bryden, Philip, Steven Davis and John Russell, eds. Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal and Intellectual Life. Toronto: University of Toronto Press.

Hoover, Dennis R. and Kevin R. den Dulk (2004) 'Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada' in *International Political Science Review* vol. 25(1), 9-34

### **Week 4 – October 05, 2020**

#### **The Judiciary and Judicial Activism**

Readings:

Powers, Stephen P. and Stanley Rothman (2002) The Least Dangerous Branch? Consequences of Judicial Activism. London: Praeger Publishers, chapter 1, 2 and conclusion.

Manfredi, Christopher P. (2002) 'Strategic Behaviour and the Canadian Charter of Rights and Freedoms' in James, Patrick, Donald E. Abelson and Michael Lusztig, eds. The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada. Montreal & Kingston: McGill-Queen's University Press.

Songer, D.R. and Siripurapu, J., 2009. "The unanimous decisions of the supreme court of Canada as a test of the attitudinal model" *Canadian Journal of Political Science* vol. 42(1), 65-92.

### **Week 5 – October 12, 2020**

#### **Reading Week**

Readings:

None

### **Week 6 – October 19, 2020**

#### **Institutions**

Readings:

Clayton, Cornell W. (2002) 'The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be so Positive about the Judicialization of Politics?)' in *Law and Contemporary Problems* vol. 65(3), 69-85.

Malleson, Kate (1999) 'A British Bill of Rights: Incorporating the European Convention on Human Rights' in *Choices* vol. 5(1), 21-39.

Howlett, Michael (1994) 'The Judicialization of Canadian Environmental Policy, 1980-1990: A Test of the Canada-United States Convergence Thesis' in *Canadian Journal of Political Science* vol. 27(1), 99-127

### **Week 7 – October 26, 2020**

#### **Interest Groups**

Readings:

Hein, Gregory (2000) 'Interest Group Litigation and Canadian Democracy' in *Choices* vol. 6(2), 3-30.

Brodie, Ian. 2001. "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program" *Canadian Journal of Political Science* vol. 34(2), 357-76.

Smith, Miriam. (1998) 'Social Movements and Equality Seeking: The Case of Gay Liberation in Canada' in *Canadian Journal of Political Science* vol. 31(2), 285-309.

Morton, F.L. and Avril Allen (2001) 'Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada' in *Canadian Journal of Political Science* vol. 34(1), 55-84.

**Note: First Group Discussion Paper due.**

## **Week 8 – November 02, 2020**

### **Resource Mobilization and Legal Effects**

Readings:

Epp, Charles R. (1996) 'Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms' in *American Political Science Review* vol. 90(4), 765-779.

Songer, Donald R. and Reginald S. Sheehan (1992) 'Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals' in *American Journal of Political Science* vol. 36(1), 235-258.

McCormick, Peter (1993) 'Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992' in *Canadian Journal of Political Science* vol. 26(3), 523-540.

## **Week 9 – November 09, 2020**

### **Globalization**

Readings:

Badenbacher, Carl (2003) 'Judicial Globalization: New Development or Old Wine in New Bottles?' in *Texas International Law Journal* vol. 38, 505.

Slaughter, Anne-Marie (2000) 'Judicial Globalization' in *Virginia Journal of International Law* vol. 40, 1103.

Hansen, Patricia Isela (2003) 'Judicialization and Globalization in the North American Free Trade Agreement' in *Texas International Law Journal* vol. 38, 489.

## **EFFECTS AND OUTCOMES OF JUDICIALIZATION**

## **Week 10 – November 16, 2020**

### **Democratic Governance**

Readings:



Allan, James (1996) 'Bills of Rights and Judicial Power – A Liberal's Quandary' in *Oxford Journal of Legal Studies* vol. 16(2), 337-352.

Morton, F.L. and Leslie A. Pal (1985) 'The Impact of the Charter of Rights and Freedoms on Public Administration: A Case Study of Sex Discrimination in the Unemployment Insurance Act' in *Canadian Public Administration* (vol. 28(2), 221-44.

Hiebert, Janet L. (1999) 'Wrestling with Rights: Judges, Parliament and the Making of Social Policy' in *Choices* vol. 5(3), 3-32.

Banfield, Andrew C. and Rainer Knopff (2009) 'Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes' in *Australian Journal of Political Science* vol. 44(1), 13-27.

**Note: Second Group Discussion Paper due.**

## **Week 11 – November 23, 2020**

### **Winners and Losers**

Readings:

Galanter, Marc (1975) 'Explaining Litigation' in *Law & Society Review* vol. 9(2), 347-368.

Brodie Haire, Susan, Stefanie Lindquist, and Roger Hartley (1999) 'Attorney Expertise, Litigant Success, and Judicial Decision-making in the U.S. Courts of Appeals' in *Law & Society Review* vol. 33(3), 667-685.

Flemming, Roy B. and Glen S. Krutz (2002) 'Repeat Litigators and Agenda Setting on the Supreme Court of Canada' in *Canadian Journal of Political Science* vol. 35(4), 811-833.

Szmer, John, Susan Johnson and Tammy A. Sarver (2007) 'Does the Lawyer Matter? Influencing Outcomes on the Supreme court of Canada' in *Law & Society Review* vol. 41(2), 279-304.

**Note: Literature Review Assignment due.**

## **Week 12 – November 30, 2020**

### **Judicial and Judicialization Limitations**

Readings:

Ratner, Steven R. (2003) 'The International Criminal Court and the Limits of Global Judicialization' in *Texas International Law Journal* vol. 38, 445.

Russell, Peter H. (1994) 'Canadian Constraints on Judicialization from without' in *International Political Science Review* vol. 15(2), 165-175.

Scholtz, Christa (2009) 'The Influence of Judicial Uncertainty on Executive Support for Negotiation in Canadian Land Claims Policy' in *Canadian Journal of Political Science* vol. 42(2), 417-442.

## **Week 13 – December 07, 2020**

### **Conclusion and Exam Preparation**

No Readings

**Note: Third Group Discussion Paper due.**

## **Course Policies**

### **Submission of Assignments**

Assignments should be submitted to the drop box on Avenue to Learn by the beginning of class on the respective due date.

Papers received by e-mail or any other means other than through submission on Avenue to Learn not be accepted without the prior express permission of the instructor on each specific assignment.

### **Grades**

Grades will be based on the McMaster University grading scale:

<b>MARK</b>	<b>GRADE</b>
90-100	A+
85-90	A
80-84	A-
77-79	B+
73-76	B
70-72	B-
67-69	C+
63-66	C
60-62	C-
57-59	D+
53-56	D
50-52	D-
0-49	F

## **Late Assignments**

Students should make all reasonable attempts to submit papers on the due date. In the event that a legitimate extension is required, students should contact the instructor ***in advance*** of the due date to make the appropriate arrangements for such an extension.

Examinations and/or assignments related to this and other courses do not constitute or qualify as exceptional circumstances or legitimate excuses.

Late papers may be penalized at the rate of five percentage points per working day for each day of delay, up to a maximum of one week. After one week, the instructor may refuse to accept any late assignments in the absence of proper medical certification justifying an inability to fulfill academic requirements on a prolonged basis. Papers accepted after one week of lateness, in addition to the daily deduction, will be subject to a further deduction of one full letter grade (ie. A to B, B to C) per each week of lateness.

The instructor reserves the right to not provide any comments or feedback on papers submitted after the original deadline, whether an extension is granted or not and whether any other late penalties are applied.

## **Absences, Missed Work, Illness**

McMaster Student Absence Form (MSAF): In the event of an absence for medical or other reasons, students should review and follow the Academic Regulation in the Undergraduate Calendar “Requests for Relief for Missed Academic Term Work”. Under no circumstances does an MSAF relieve a student of the requirement to complete the assigned work.

## **Courses with an On-Line Element**

Some courses may use on-line elements (e.g. e-mail, Avenue to Learn (A2L), LearnLink, web pages, capa, Moodle, ThinkingCap, etc.). Students should be aware that, when they access the electronic components of a course using these elements, private information such as first and last names, user names for the McMaster e-mail accounts, and program affiliation may become apparent to all other students in the same course. The available information is dependent on the technology used. Continuation in a course that uses on-line elements will be deemed consent to this disclosure. If you have any questions or concerns about such disclosure please discuss this with the course instructor.

## **Online Proctoring**

Some courses may use online proctoring software for tests and exams. This software may require students to turn on their video camera, present identification, monitor and record their computer activities, and/or lock/restrict their browser or other applications/software during tests or exams. This software may be required to be installed before the test/exam begins.

## **Authenticity / Plagiarism Detection**

Some courses may use a web-based service (Turnitin.com) to reveal authenticity and ownership of student submitted work. For courses using such software, students will be expected to submit their work electronically either directly to Turnitin.com or via an online learning platform (e.g. A2L, etc.) using plagiarism detection (a service supported by Turnitin.com) so it can be checked for academic dishonesty.

Students who do not wish their work to be submitted through the plagiarism detection software must inform the Instructor before the assignment is due. No penalty will be assigned to a student who does not submit work to the plagiarism detection software. **All submitted work is subject to normal verification that standards of academic integrity have been upheld** (e.g., on-line search, other software, etc.). For more details about McMaster's use of Turnitin.com please go to [www.mcmaster.ca/academicintegrity](http://www.mcmaster.ca/academicintegrity).

## **Copyright and Recording**

Students are advised that lectures, demonstrations, performances, and any other course material provided by an instructor include copyright protected works. The Copyright Act and copyright law protect every original literary, dramatic, musical and artistic work, **including lectures** by University instructors

The recording of lectures, tutorials, or other methods of instruction may occur during a course. Recording may be done by either the instructor for the purpose of authorized distribution, or by a student for the purpose of personal study. Students should be aware that their voice and/or image may be recorded by others during the class. Please speak with the instructor if this is a concern for you.

## **Academic Accommodation for Religious, Indigenous or Spiritual Observances (RISO)**

Students requiring academic accommodation based on religious, indigenous or spiritual observances should follow the procedures set out in the [RISO](#) policy. Students should submit their request to their Faculty Office **normally within 10 working days** of the beginning of term in which they anticipate a need for accommodation or to the Registrar's Office prior to their examinations. Students should also contact their instructors as soon as possible to make alternative arrangements for classes, assignments, and tests.

## **Academic Integrity Statement**

You are expected to exhibit honesty and use ethical behaviour in all aspects of the learning process. Academic credentials you earn are rooted in principles of honesty and academic integrity. **It is your responsibility to understand what constitutes academic dishonesty.**

Academic dishonesty is to knowingly act or fail to act in a way that results or could result in unearned academic credit or advantage. This behaviour can result in serious consequences, e.g. the grade of zero on an assignment, loss of credit with a notation on

the transcript (notation reads: “Grade of F assigned for academic dishonesty”), and/or suspension or expulsion from the university. For information on the various types of academic dishonesty please refer to the [Academic Integrity Policy](#), located at <https://secretariat.mcmaster.ca/university-policies-procedures-guidelines/>

The following illustrates only three forms of academic dishonesty:

- plagiarism, e.g. the submission of work that is not one’s own or for which other credit has been obtained.
- improper collaboration in group work.
- copying or using unauthorized aids in tests and examinations.

### **Conduct Expectations**

As a McMaster student, you have the right to experience, and the responsibility to demonstrate, respectful and dignified interactions within all of our living, learning and working communities. These expectations are described in the [Code of Student Rights & Responsibilities](#) (the “Code”). All students share the responsibility of maintaining a positive environment for the academic and personal growth of all McMaster community members, **whether in person or online**.

It is essential that students be mindful of their interactions online, as the Code remains in effect in virtual learning environments. The Code applies to any interactions that adversely affect, disrupt, or interfere with reasonable participation in University activities. Student disruptions or behaviours that interfere with university functions on online platforms (e.g. use of Avenue 2 Learn, WebEx or Zoom for delivery), will be taken very seriously and will be investigated. Outcomes may include restriction or removal of the involved students’ access to these platforms.

### **Academic Accommodation of Students with Disabilities**

Students with disabilities who require academic accommodation must contact [Student Accessibility Services](#) (SAS) at 905-525-9140 ext. 28652 or [sas@mcmaster.ca](mailto:sas@mcmaster.ca) to make arrangements with a Program Coordinator. For further information, consult McMaster University’s [Academic Accommodation of Students with Disabilities](#) policy.

### **Faculty of Social Sciences E-mail Communication Policy**

Effective September 1, 2010, it is the policy of the Faculty of Social Sciences that all e-mail communication sent from students to instructors (including TAs), and from students to staff, must originate from the student’s own McMaster University e-mail account. This policy protects confidentiality and confirms the identity of the student. It is the student’s responsibility to ensure that communication is sent to the university from a McMaster account. If an instructor becomes aware that a communication has come from an alternate address, the instructor may not reply at his or her discretion.

### **Course Modification**

The instructor and university reserve the right to modify elements of the course during the term. The university may change the dates and deadlines for any or all courses in extreme circumstances. If either type of modification becomes necessary, reasonable notice and communication with the students will be given with explanation and the opportunity to comment on changes. It is the responsibility of the student to check his/her McMaster email and course websites weekly during the term and to note any changes.

### **Extreme Circumstances**

The University reserves the right to change the dates and deadlines for any or all courses in extreme circumstances (e.g., severe weather, labour disruptions, etc.). Changes will be communicated through regular McMaster communication channels, such as McMaster Daily News, A2L and/or McMaster email.