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., affirmative action; faculty use of social media; federal regulations pertaining to sexual misconduct). 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; Constitutional provisions; federal statutes and regulations; scholarly treatises by legal and higher education experts; law review articles; reports prepared by legal counsel; a consent decree that settled litigation; 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, February 15, 2019. Factoring in time for me to make comments/suggestions and your subsequent research and revisions, Final Papers will be due by Friday, March 15, 2019.

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 Reading Assignments While this syllabus presents an estimated, session-by-session, schedule of where we should be, this may vary a bit, depending on how fast we’re moving. I shall try to ensure that we spend sufficient time on each part of the course so that you understand the concepts and we can explore the issues adequately before we move to the next unit. We may also spend extra time on a particular topic if it coincidentally receives national or local media attention during the course because of current events (e.g., a lawsuit or legal controversy unfolding at a college or university). If you miss class, please contact a fellow student or me to learn at what point on the syllabus we ended and the topics we will be covering in the next class. It is always a good idea to read ahead if you can, since the reading for some units will be more voluminous than for others.

A note about the selection of topics: The law applicable to higher education is vast, incorporating some subjects that are taught as entire courses in law school. We will touch upon, for example, Constitutional law (freedom of speech, due process, equal protection), non-discrimination law, contract law, tort law (liability for negligence), administrative law, and employment law, to name just a few. In five short weeks we cannot cover the entire field of higher education law, and therefore I have had to leave out some topics or touch upon them only briefly. If you have an interest in topics that are not covered (which can certainly be paper subjects), I am happy to provide suggestions for supplemental reading on your own.

January 8

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

**January 10 and January 15**

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

14th Amendment jurisprudence
Recent Supreme Court holdings
Harvard Affirmative Action dispute/litigation
Likely next wave(s) of dispute/litigation
   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 (2016 Supreme Court majority opinion)

On Harvard Affirmative Action dispute/litigation

“Affirmative Action Won, But Now It Faces a Far Bigger Threat,” Mother Jones 1/24/16

“Justice Dept. investigating Harvard over affirmative action policies,” CNN.com 11/21/17

“In Court Battle Over Harvard Admissions, Plaintiffs Allege University Ignored ‘Negative Effects’ on Asian-Americans,” Chronicle of Higher Education 6/15/18

“Harvard faces new scrutiny over how it evaluates Asian-American applicants,” Inside Higher Ed 6/18/18


“Asian-American groups take opposing sides in Harvard affirmative action case,” NBCNews.com 8/3/18

“Harvard’s Star Witness Testified All day. Here Are 4 Moments That Mattered,” Chronicle of Higher Education 10/31/18

“Harvard’s Admissions Process Was Just Dissected in Federal Court. How Did It Hold Up?,” Chronicle of Higher Education 11/2/18


Suggested Additional reading:

Alito dissent from Fisher v. University of Texas (2016 Supreme Court 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

**January 17, January 22, and January 24**

**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

On faculty scholarship (?) in various nontraditional media

“Professor’s Tweets Were ‘Insensitive’ and Embarrassed Fresno State, but She Won’t Be Punished,” *Chronicle of Higher Education* 4/25/18

“Georgetown Professor’s Profane Tweet Elicits Tepid Response From University,” *Chronicle of Higher Education* 10/2/18

“Professor Who Tweeted About ‘Castrating the Corpses’ of GOP Senators No Longer Teaching,” *Inside Higher Ed* 10/8/18

“Furor over Texas A&M philosopher’s comments on violence against white people,” *Inside Higher Ed* 5/11/17

Statements from Texas A&M President Michael Young dated 5/10/17 and 5/17/17, accessed from https://president/tamu/edu/messages

“Controversial Drexel professor resigns,” *Inside Higher Ed* 1/2/18

**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*

“Two professors on different campuses used the N-word last week. One was suspended and one was backed by his institution,” *Inside Higher Ed* 2/12/18
“Princeton professor who was criticized for using N-word in class on hate speech cancels course,” *Inside Higher Ed* 2/14/18

“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

“Penn Law professor who said black students are ‘rarely’ in top half of class loses teaching duties,” *Wahsington Post* 3/15/18

“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

“A Professor Called Out a Student by Name on His Blog. Should That Cost Him His Job?,” *Chronicle of Higher Education* 7/5/18

*McAdams v. Marquette*, including Bradley dissent

On Melissa Click controversy:

Report to the University of Missouri Board of Curators by Bryan Cave law firm

“U of Missouri board votes to fire Melissa Click as assistant professor,” *Inside Higher Ed* 2/26/16

“AAUP finds Mizzou compromised academic freedom in terminating Melissa Click,” *Inside Higher Ed* 5/19/16

“Melissa Click firing lands University of Missouri on association censure list for third time,” *Columbia Daily Tribune* 6/19/16

“U of Missouri Responds to AAUP on Click Case,” *Inside Higher Ed* 3/18/16

“My Fights Are With My Peers’: When a Professor Gets Banned for Bullying,” *Chronicle of Higher Education* 10/10/18

Suggested Additional reading:


January 29 and January 31

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

“How Should Colleges Respond to Politics in Letters of Recommendation,” *Chronicle of Higher Education* 10/10/18

*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


“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*

“Feeling Suicidal, Students Turned to Their College. They Were Told to Go Home,” *New York Times* 8/28/18


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

**Readings for Session 8**

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

Yoffe, “The College Rape Overcorrection,” *Slate* 12/7/14

“What You Need to Know About the Proposed Title IX Regulations,” *Chronicle of Higher Education* 11/16/18

Excerpts from Department of Education’s proposed regulations implementing Title IX, Federal Register Volume 83, p. 61,462 (proposed November 29, 2018)

“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

“Columbia Settles With Student Cast as a Rapist in Mattress Art Project,” *New York Times* 7/14/17

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


**February 5**

**Session 9: Beyond the Ivory Tower: College and University Relations with the Outside World**

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

**Readings for Session 9**

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

On new federal endowment tax:


   “Colleges reckon with new endowment tax and conservative antipathy,” *Washington Examiner* 2/6/18

   “Private colleges look for repeal if endowment tax,” *Inside Higher Ed* 4/23/18

On “free” college:


   “Growing number of Democrats run on free college, pushing issue into mainstream,” *Inside Higher Ed* 9/26/18


“Why Conservative Lawmakers Are Turning to Free-Speech Bills as a Fix for Higher Ed,”
_Chronicle of Higher Education_ 6/8/17

On taking positions on political and moral disputes

“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

On tax exemptions and town/gown relations:

“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

**February 7**

**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 25%
- Final Paper 50%
- Class Participation (including Moodle posts and especially in class-contributions) 25%

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 1-2:00 pm,  
and by appointment, as needed  
Phone: (507) 222-4305  
Fax: (507) 222-5400  
Email: sposkanzer@carleton.edu