

Legal Studies 138

The Supreme Court and Public Policy

Spring Semester 2016

Professor Tom Burke

This course examines the U.S. Supreme Court as a maker of public policy. In particular, we will ask three questions about the Supreme Court:

- Is it powerful? Can the Court get people and institutions to change their behaviors in line with its rulings?
- Is it democratic? Can the policymaking activities of the Court, an unelected body, be squared with some convincing version of democratic theory?
- Is it wise? Does the Court have the “institutional capacity” to make good public policy?

As in many courses, we will examine these questions in part by reading what experts in this field—judges, lawyers, law professors and social scientists—have said about them. But for the most part, you will be answering the questions yourself, through your own research. At the beginning of the semester you will pick a case in which the Court made public policy, and throughout the semester you will conduct research on your case, so by the end of the semester you will be an expert on it. You will do this using UC-Berkeley’s incredibly powerful library resources; to guide you in these resources we will be assisted by the Berkeley library’s subject expert on law, government, and public policy, Jesse Silva. You will write short but well-researched papers in which you determine whether, in the case you’ve studied, the Court acted powerfully, democratically, and with wisdom.

The rest of the course is designed to support the research you do on your case. To provide the proper context for studying your case, you will first learn about how the Court operates and about the larger legal system of which it is a part. You will learn the basics of reading legal opinions, enough so that you can figure out the public policy the Court is making in your case—not an easy task! We will then study theories about the power, democratic accountability and wisdom of the Court, and see how they have been applied to some famous Court cases. Outside class, meanwhile, you will be conducting research on how these theories apply to your case.

At the end of the semester we will review what we have learned both from your research and from the rest of the class about the Court’s role as policymaker.

The Cases

[Massachusetts v. EPA](#), 549 U.S. 497 (2007)—climate change; air pollution regulation

[Faragher v. City of Boca Raton](#), 524 U.S. 775 (1998)—workplace sexual harassment

[Batson v. Kentucky](#), 476 U.S. 79 (1986)—racially discriminatory jury selection

[Davis v. Monroe County](#), 525 U.S. 629 (1999)—sexual harassment in schools

[Boumediene v. Bush](#), 553 U.S. 723 (2008)—rights of Guantanamo detainees

[Tennessee v. Garner](#), 471 U.S. 1 (1985)—rules governing police shootings

[UC Regents v. Bakke](#), 438 U.S. 265 (1978)—affirmative action in college admissions

[Engel v. Vitale](#), 370 U.S. 421 (1962)—school prayer

I have selected the eight Supreme Court cases above because I believe they are fascinating and will work nicely with the assigned paper topics. Of course, we don't want every student in the course to pick the same case, so early in the semester we will ask you to list your top choices; we will assign one to you accordingly. I can't guarantee that you will get your first choice, but we will try hard to give you one of your top choices.

If there is a Supreme Court case you find fascinating that is not among these eight, you may apply to go "off the board" and write papers on your favorite case instead. To do so you must write a one-page memo to me outlining why you find the case so fascinating and how you would go about answering for your case the questions posed in the paper assignments. You will then meet with me to discuss whether in fact your chosen case will work well with the assignments—some cases are likely to be impossible to research or simply inappropriate for the assigned paper topics. You may only go "off the board" with my approval—and if you do so, I will be grading your paper rather than the GSI's, so keep this in mind!

Assignments & Grading

Participation (15%) The participation grade will be based on your participation in the weekly discussion sections, but if you are a helpful contributor to the conversations in our regular class meetings you will get credit for this as well.

Quiz on the Supreme Court (5%) An in-class multiple-choice, true/false quiz to demonstrate you've learned the basics about the Supreme Court, how it operates, and the legal system of which it is a part.

Quiz on Your Case (10%) An in-class short-answer exam in which you demonstrate your understanding the basic legal concepts and policy outcomes in your case

Two Concise Research Papers (25% each) You will write **two** of the following three short (750-word) papers in which you:

- (a) evaluate the extent to which the Court's ruling in your case was implemented, and whether your case supports or undermines theories about Supreme Court power;
- (b) evaluate the extent to which Court's behavior in your case can be squared with democratic theory; or
- (c) evaluate whether your case undermines or supports claims about the weaknesses of the Court as a policymaking institution.

Final Exam (20%) The final will ask you to reflect on what you've learned from studying your case, but also requires you to generalize beyond your case to other cases examined in the course.

Readings

There are only two required texts, Linda Greenhouse's [The U.S. Supreme Court: A Very Short Introduction](#), and Gerald Rosenberg's [The Hollow Hope](#). All other readings will be available as links or .pdfs from the course bCourses site.

I've tried to keep the readings fairly light in terms of page numbers, especially toward the end of the course. But don't let the page count mislead you: Some of the key readings are dense and tricky, and so you will have to spend considerable time on them. This is crucial to your performance in the course. You can't write a good paper #1, for example, if you don't fully understand Rosenberg's "Constrained Court hypothesis," you can't write a good paper #2 if you don't understand pluralist theory as described by Terri Jennings Peretti, and paper #3 will be impossible if you don't follow what Donald Horowitz is claiming in his critique of the judicial policymaking. So be ready to focus careful attention on the readings, and please come to class having gone through them at least once—it will make the class meetings much more valuable for you. I will provide in advance of our class meetings study guides for many of the readings to help you focus on the most important aspects.

Drop-in Hours and Electronic Communication

I will be holding drop-in hours after class on **Wednesdays 12:15-2.15** and by appointment. Because it's so close to where our class meets, I'll normally hold drop-in hours at "Brewed Awakenings," a coffee shop at 1807 Euclid Avenue, just on the other side of the block from our classroom. Drop-in hours are your chance to discuss anything you wish with me, from coursework to topics you find interesting to career plans. If when you arrive I am speaking to another student, please interrupt and announce your presence. It's not rude, it's necessary! Otherwise I may end up blabbing with the other student for the whole time.

I can also answer questions via email: tburke@wellesley.edu. I try to be reasonably quick to respond. Keep in mind, though, that I occasionally sever the electronic umbilical cord--over weekends and holidays I'm often out of email range. (Not a bad strategy, by the way, if you want to retain your sanity.)

Policies

No laptops or other electronic devices. Research consistently shows that when students use laptops or smartphones in classes they learn less. Perhaps even worse, they enjoy the class less. Thus I have decided to ban all electronic devices from the classroom. Please keep all such devices in your bag or pocket. Exceptions will, of course, be made for students who have a documented disability and for whom use of an electronic device is a suggested adaptation, so please don't look askance at any student who uses such devices in the class. Also, I have great sympathy for students who struggle to take notes quickly by hand; I have the same problem! For that reason, after each class I will post my Powerpoint or other class notes to bCourses.

Late work. The papers will all be turned in electronically to the bCourses site. They are due at precisely the time specified in this syllabus. Papers turned in late will be penalized one-third grade per day (from an A- to B+ for example), exceptions only for documented, late-occurring emergencies or maladies. Please talk to your GSI's regarding their policies on extensions.

Working Together. The research paper topics are quite challenging, and so I encourage you to work with other students in the class who have chosen the same case. To facilitate this, I have created wiki pages for each of the cases. Please add to your case wiki page citations and links of particularly helpful sources you have found. I will track your contributions to the wiki page, and will be rewarding the roughly 10% of students in the class who I believe have contributed the most useful sources and links to the pages—if you are in this group, you will receive a boost of one-third of a grade (from B+ to A- for example) on one of your research papers. In addition if

I see a wiki page that is truly outstanding and that many students contributed to, I will consider an additional reward for that group. Beyond the wiki page, you are free to meet with and work with others in the class on the research component of the paper. You cannot, however, coordinate on writing the paper; that work must be your own.

Plagiarism. I take a very hard line on plagiarism. We will review in class the proper ways in which to cite information you have gathered. If you copy from sources without attribution, or in any other way present as your own writing you have in fact taken from others, be aware that when I find misconduct like this, I have no reluctance at all to bring charges. If you are struggling with an assignment in the course, please meet with me or your GSI to discuss it, don't resort to cheating.

Schedule

January 20 Introduction to the Course

January 22 The Supreme Court's Place in the U.S. Legal System

Linda Greenhouse, *The U.S. Supreme Court*, 1-37

G. Allan Tarr, "The Federal and State Court Systems," 249-255

January 25 The Basics: How the Supreme Court Operates

Linda Greenhouse, *The U.S. Supreme Court*, 38-87

Case preferences submitted by January 25

January 27 What is Judicial Policymaking? Is it Bad? And Can the Supreme Court Stop Doing It?

Jeb Barnes, "Martin Shapiro and the Logic of the Triad"

Robert Bork, *The Tempting of America*, 1-6

Richard Posner, "What Am I, a Potted Plant?"

Martin Shapiro, "How the Justices Decide"

Malcolm Feeley and Edward Rubin, "The Nature of Judicial Policymaking"

Cases assigned by January 29

January 29 [UC Librarian Jesse Silva](#) Introduces the Research Resources You Will Need For This Course

February 1 How to Read and Understand a Legal Opinion: Legal Reasoning

In-Class Quiz on Basic Facts about the Supreme Court

Lief Carter and Thomas Burke, *Reason in Law*, 6-17

February 3, 5 How to Read and Understand a Legal Opinion II

[Orin Kerr, "How to Read a Legal Opinion" \(Links to an external site.\)](#)

McBoyle v. United States, 283 U.S. 25 (1931)

United States v. Windsor, 570 U.S. ____ (2013)--skim!

February 8 The Least Dangerous Branch?

In-Class Quiz on Your Case

[Anti-Federalist Papers #11 \(Links to an external site.\)](#)

[Federalist Papers #78 \(Links to an external site.\)](#)

February 10,12 The Least Dangerous (Most Constrained) Branch?

Gerald Rosenberg, *The Hollow Hope*, 1-36

February 15 Case Study: *Brown v. Board of Education* 347 U.S. 483 (1954)

Gerald Rosenberg, *The Hollow Hope*, 37-106

February 17 Case Study: *Brown v. Board of Education* 347 U.S. 483 (1954)

Gerald Rosenberg, *The Hollow Hope*, 107-169

February 19 Critical Perspectives on Rosenberg

Kevin McMahon, “Did the Federal Judiciary Help Spark the Civil Rights Movement?”

Malcolm Feeley, “Hollow Hopes, Flypaper, and Metaphors”

February 22 Case Study: *Roe v. Wade* 410 U.S. 113 (1973)

Gerald Rosenberg, *The Hollow Hope*, 173-201

February 24 Is Rosenberg Right about *Roe*?

& 26

Linda Greenhouse and Reva B. Siegel, “Before (And After) *Roe v. Wade*: New Questions about Backlash”

“The Contemporary Politics of Abortion”

February 29 Library Study Day—No Class!

March 2 Rosenberg vs. Keck on Same-Sex Marriage

This assignment requires skimming! Skimming is an important skill in academic research and in law. Use the study guide I provide to focus on the key points.

Gerald Rosenberg, *The Hollow Hope*, 339-419

Tom Keck, “Beyond Backlash”

March 4 Summing up Rosenberg: Constrained versus Dynamic Court

Gerald Rosenberg, *The Hollow Hope*, 420-429

March 7-11 Matthew Hall’s Theory of Supreme Court Power

Matthew E.K. Hall, *The Nature of Supreme Court Power*, 1-27.

Matthew Hall, “The Miranda Warnings,” in *The Nature of Supreme Court Power*, 61-71

“Examples of defiance of and compliance with Supreme Court rulings”

March 14 The Countermajoritarian Difficulty

Justice Antonin Scalia, dissenting, *Obergefell v. Hodges*, 576 U.S. __ (2015)

Alexander Bickel, “The Countermajoritarian Difficulty” in *The Least Dangerous Branch*, 16-20

Lawrence Solum, “The Countermajoritarian Difficulty”

[\(Links to an external site.\)](#)

March 16 Paper #1 Due 10pm

March 16, 18 How to Assess the Countermajoritarian Difficulty in Your Case

Kevin Hechtkopf, [Support for Gays in the Military Depends on the Question \(Links to an external](#)

[site.\)](#)

“A Polling Puzzle”

Allan Rivlin, “Do You Trust Polls or Not?”

John Hanley, “The Death Penalty,” in *Public Opinion and Constitutional Controversy*, 109-113

March 21-25 Spring Break!

March 28 Pluralism & the Supreme Court

Terri Jennings Peretti, *In Defense of a Political Court*, 189-198, 209-225

**March 30 Pluralism & Democratic Theory: How to Study it in Your Case
& April 2**

[Jonathan M. Ladd, “Don’t Worry about Special Interests” \(Links to an external site.\)](#)

James Q. Wilson and John Dilulio, *The Civil Rights Movement*, 201-207

April 4, 6 Is The Court Really Countermajoritarian?

Mark Graber, “Constructing Judicial Review”

April 8 Library Study Day—No Class!

April 13 Paper #2 Due at 10 pm

April 11-15 Is the Supreme Court Well-Designed for Making Policy?

Donald Horowitz, *The Courts and Social Policy*, 22-56

Lon Fuller, “The Forms and Limits of Adjudication,” 394-5

Jeb Barnes, “In Defense of Asbestos Tort Litigation,” 7-12

April 18-22 Judicial Incapacity? Judicial Folly? Some Case Studies

Garrett Epps, “The Story of Al Smith: The First Amendment Meets Grandfather Peyote”

McClesky v. Kemp, 481 U.S. 279 (1987)

Gordon Silverstein, *Law’s Allure*, 152-174

April 28 Paper #3 Due at 10pm

April 25-29 Review of The Course

During the final week of the class as preparation for the final we will review the major questions we posed during the semester and discuss what you have learned from your cases. I will likely ask you to read some of the outstanding papers your fellow students have written and consider them both for our discussion and for the final exam.