

Legal Studies 138: The Supreme Court and Public Policy

Professor Brittany Arsiniega
GSI: Jorge Cortes-Monroy

Summer Session A, 2020
Mondays, Tuesdays, Wednesdays, and Thursdays from 2PM-4PM

Instructors

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Course Overview:

This course examines the nature and scope of the U.S. Supreme Court in making public policy. We will explore the Court's role in public-policy-making from both a *normative* perspective and an *empirical* perspective. The *normative* perspective asks: how desirable is judicial activism and intervention into American policymaking? The *empirical* perspective takes the form of research that attempts to measure the extent to which the Court has actually been able to effect social change through its rulings. We will also examine the institutional capacity of the Supreme Court and inferior federal courts: do courts actually have the institutional capacity to effectively serve as policymaking institutions?

The course begins with an introduction to the U.S. legal and constitutional system. We will then study theories of judicial review, decision-making, and power and capacity. We will evaluate how these theories have been used to explain judicial decision-making and impact.

Substantively, the course explores and traces, through in-depth study of particular cases, the U.S. Supreme Court's interventions in the following key areas: civil rights and desegregation, abortion, criminal justice reform and the rights of defendants, affirmative action, gay rights and the same-sex marriage movement, prison reform, and environmental policy.

Office Hours and Availability

Brittany Arsiniega Office Hours: Tuesdays 9AM-11AM (Zoom ID 594-832-8146) and by appointment: <https://calendly.com/arsiniega>.

Jorge Cortes-Monroy Office Hours:

I check emails once a day and will do my best to respond within 24 hours. Please put the course number (LS 138) in the subject line of all emails.

Assignments & Grading

- **Weekly journals (15%):** Knowledge plans are due on Wednesday, May 27 by 10 PM. Thereafter, weekly reflections are due each Sunday by 10PM (May 31; June 7, 14, 21, 28)
- **Quiz on the Supreme Court (5%):** Administered via bCourses. Due Friday, May 29 by 10PM.
- **Participation and collaboration (15%):** This includes participation in both asynchronous and synchronous class activities and discussion sections.
- **Midterm Writing Assignment (30%):** Due Friday, June 12 at 10 PM.
- **Final Writing Assignment (35%):** You will choose from a list of three possible final exam topics. Your final writing assignment is due Friday, July 2 at 10PM.

Attendance

I will take attendance during the first week of lectures and discussion sections. I will verify through Zoom who has joined the Zoom meeting and who has not. Students who do not attend lecture and/or section in the first week may be dropped from the class roster to make room for students on the waitlist who have been attending.

If you have extenuating circumstances (including but not limited to caretaking responsibilities, limited access to internet, or participating from a different time zone) that will prevent you from attending class live, please email me as soon as possible.

Readings

There are three required texts for the course:

1. Linda Greenhouse's *The U.S. Supreme Court: A Very Short Introduction*
2. Gerald Rosenberg's *The Hollow Hope* (2nd Edition)
3. Michael Klarman's *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*

All other readings, including judicial decisions, will be available as links or .pdfs from the course bCourses site. Many of these articles and cases require in-depth reading, and you should allocate your time accordingly.

Policies

Late work. Written assignments must be turned in electronically to the bCourses site. It is 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). I will provide exceptions only for documented, late-occurring emergencies or maladies. Please talk to your GSIs regarding his policies on extensions.

Academic integrity. You are a member of an academic community at one of the world's leading research universities. Universities like Berkeley create knowledge that has a lasting impact in the world of ideas and on the lives of others; such knowledge can come from an undergraduate paper as well as the lab of an internationally known professor. One of the most important values of an academic community is the balance between the free flow of ideas and the respect for the intellectual property of others. Researchers don't use one another's research without permission; scholars and students always use proper citations in papers; professors may not circulate or publish student papers without the writer's permission; and students may not circulate or post materials (handouts, exams, syllabi--any class materials) from their classes without the written permission of the instructor. Any test, paper or report submitted by you and that bears your name is presumed to be your own original work that has not previously been submitted for credit in another course unless you obtain prior written approval to do so from your instructor. In all of your assignments, you may use words or ideas written by other individuals in publications, web sites, or other sources, but only with proper attribution. If you are not clear about the expectations for completing an assignment or taking a test or examination, be sure to seek clarification from your instructor or GSI beforehand. Finally, you should keep in mind that as a member of the campus community, you are expected to demonstrate integrity in all of your academic endeavors and will be evaluated on your own merits. The consequences of cheating and academic dishonesty—including a formal discipline file, possible loss of future internship, scholarship, or employment opportunities, and denial of admission to graduate school—are simply not worth it.

Accommodations. [Disability Student Resources \(DSP\)](#) is committed to helping qualified students with disabilities achieve their academic goals by providing reasonable academic accommodations under appropriate circumstances. If you have a disability and anticipate the need for an accommodation in order to participate in this class, please apply for services with DSP. They will assist you in getting the resources you may need to participate fully in this class.

Course Schedule

Week 1 (May 26-28)

Introduction to the course

The U.S. Constitution and the Supreme Court

The Constitution of the United States

Gideon v. Wainwright (1963) (skim)

How the Supreme Court Operates: Methods of Interpretation

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

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

How the Supreme Court Operates: What is Judicial Policymaking?

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

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"

Judicial Review, Judicial Reasoning, and How to Read a Legal Opinion

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

Orin Kerr, How to Read a Judicial Decision

Marbury v. Madison (1803)

Philip Bobbitt, *The Modalities of Constitutional Argument*

The Least Dangerous Branch: The Counter-Majoritarian Difficulty; Representation Reinforcement Theory

Anti-Federalist Papers #11

Federalist Papers #78

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

Alexander Bickel, "The Countermajoritarian Difficulty" in *The Least Dangerous Branch*, (excerpt)

Lawrence Solum, "The Countermajoritarian Difficulty"

Ely, *Democracy and Distrust* (excerpt)

Week 2 (June 1-4)

Race and the Constitution I: Slavery and the Post-Civil War Amendments

Dred Scott v. Sandford (1857)

Slaughterhouse Cases (1876)

Civil Rights Cases (1883)

The Constrained Court? Rosenberg's Hollow Hope

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

Case Study #1: Brown v. Board and Public Law Litigation

Plessy v. Ferguson (1893)

Brown v. Board of Education (1954); *Brown II* (1955)

Mark Tushnet, *Public Law Litigation*

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

Majoritarian Theories of Judicial Decision-Making

Robert Dahl, "Decision Making in a Democracy", *Journal of Public Law* 6:279-95 (1957)

Mark Graber, "Constructing Judicial Review"

Mark Graber (1993). "The Nonmajoritarian Difficulty: Legislative Deference To The Judiciary." *Studies in American Political Development* 7: 35-73.

Week 3 (June 8-11)

Rosenberg: Constrained versus Dynamic Court

Gerald Rosenberg, *The Hollow Hope*, 107-169; 420-429

Critical Perspectives on Rosenberg

Kevin McMahon, “Did the Federal Judiciary Help Spark the Civil Rights Movement?”
Malcolm Feeley, “Hollow Hopes, Flypaper, and Metaphors”
Michael McCann, Reform Litigation on Trial: A Review of the Hollow Hope

Case Study #2: Roe v. Wade 410 U.S. 113 (1973)

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

Roe v. Wade

Planned Parenthood v. Casey

Is Rosenberg Right about Roe?

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

“The Contemporary Politics of Abortion”

Week 4 (June 15-18)

Case Study #3: Civil Rights Movement

Klarman, From Jim Crow to Civil Rights, Chapters 1-7 & Conclusion

Week 5 (June 22-25)

Case Study #4: Same-Sex Marriage (Rosenberg v. Keck & Cole)

Obergefell v. Hodges

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

Michael Klarman, The Supreme Court is Most Powerful When it Follows Public Opinion, The New York Times, July 6, 2015

Tom Keck, “Beyond Backlash”

David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law, p. 17-93

Case Study #5: Affirmative Action in Higher Education

Bakke; Grutter and Gratz

Fisher v. U.T.

Yuvraj Joshi, *Bakke* to the Future: Affirmative Action After *Fisher*

Week 6 (June 29-July 2)

Rosenberg and Hall: *Miranda* and Criminal Justice

Rosenberg, *The Hollow Hope*, 304-335

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”

Legal Mobilization and Social Change

Robert Kagan, Adversarial Legalism (excerpt on bCourses)

Charles Epp, The Rights Revolution (excerpt on bCourses)

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

Final Paper Options:

Choose one of the following three topics to explore in your final paper. Suggested readings for each topic are below; you are free to conduct additional research. Final papers are due Friday, July 2 by 10PM.

1. California prison reform
2. Affirmative action in public schools
3. Climate Change

California Prison Reform: *Brown v. Plata*

Brown v. Plata (2011) (majority opinion, J. Kennedy)

Brown v. Plata (2011) (dissenting, J. Scalia)

Jonathan Simon, *Mass Incarceration on Trial*, Chapters 5, 6, 7

Affirmative Action in Public Schools

Parents Involved

San Antonio v. Rodriguez

Robinson, *The High Cost of the Nation's Current Framework of Education Federalism*

Massachusetts v. EPA and Climate Change

Massachusetts v. EPA, 549 U.S. 497 (2007)

Jonathan Cannon, *Environment in the Balance*, Chapters 2, 3, and 6