

The Supreme Court and Public Policy

LS 138

Summer 2021

4 credits

Course Description

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.

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, gay rights and the same-sex marriage movement, affirmative action in higher education, and criminal justice reform and the rights of defendants. You will also have the opportunity to pick between three additional topics to learn more about for your final writing assignment: prison reform, affirmative action in public schools, and climate change.

Course Outcomes

After successfully completing this course, you will be able to...

- Summarize how the United States Supreme Court operates
- Describe what judicial policymaking is and restate arguments for and against the Supreme Court acting as a policymaker
- Explain what the concepts legal pluralism and the countermajoritarian difficulty mean
- Identify the most important policymaking elements of Supreme Court opinions
- Articulate and differentiate between theories of judicial power and policymaking
- Evaluate competing theories of judicial power and policymaking using specific case studies
- Apply competing theories of Supreme Court power and policymaking to a new scenario
- Reflect on your performance in the course and develop an action plan for continued growth and development

Instructor Information, Contact, Office Hours, & Communication

Course Professor

Brittany Bilderback Arsiniega

Email: arsiniega@berkeley.edu

Graduate Student Instructor (GSI)

While the instructor will interact with the whole class and will oversee all activities and grading, as well as being available to resolve any issues that may arise, the GSI will be your main point of contact. Your GSI is responsible for assisting you directly with your questions about assignments and course requirements, as outlined in the Assignments and Calendar. The GSI will also facilitate ongoing discussion and interaction with you on major topics in each module.

- Laura Ramirez: lauraram@berkeley.edu

Office Hours

The course instructor and GSIs will offer virtual office hours via Zoom, a video conferencing program. These office hours allow for synchronous interaction with the instructor and GSIs and are a good opportunity to discuss your questions relevant to the course.

Brittany Arsiniega Office Hours: One-on-one meetings by appointment (<https://calendly.com/arsiniega/officehours>); drop-in Q&A sessions every Thursday from 12:30PM-2PM (Pacific Time) via Zoom (<https://furman.zoom.us/j/94522574237>).

Laura Ramirez Office Hours:

Links to the appropriate Zoom room will be available in bCourses.

Course Mail

You can also contact your GSI and instructor using bCourses emailing system, accessed via your Inbox. Make sure to check the Inbox for messages from the instructor and GSI. You can also choose to have your bCourses mail forwarded to your personal email account or your cell phone.

Question & Answer Discussion

Please use this discussion to post questions relevant to the entire class. This can include questions about the course materials and topics or mechanics around assignments. The instructor and GSIs will monitor this discussion, but you should also feel free to answer questions posted by other students. This helps to create a general FAQ so that all students in the course may benefit from the exchange.

Course Materials and Technical Requirements

Required Materials

There are four 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*
4. Matthew E. K. Hall's *The Nature of Supreme Court Power*

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

Each week you will find the assigned reading materials posted in bCourses.

Technical Requirements

This course is built on a Learning Management System (LMS) called Canvas and UC Berkeley's version is called bCourses. You will need to meet these [computer specifications to participate within this online platform](#).

Optional

bCourses allows you to record audio or video files of yourself and upload them in the course. Although doing so is not required for any of the activities, using these features will enhance your engagement in the course. If you would like to use these features, you will need to have a webcam and a microphone installed on your computer.

Technical Support

If you are having technical difficulties please alert one of the GSIs immediately. However, understand that neither the GSIs, nor the instructor can assist you with technical problems. You must call or email tech support and make sure you resolve any issues immediately.

In your course, click on the "Help" button on the bottom left of the global navigation menu. Be sure to document (save emails and transaction numbers) for all interactions with tech support.

Extensions and late submissions will not be accepted due to "technical difficulties."

Learning Activities

You are expected to fully participate in all the course activities described here.

1. Read the daily reading assignments
2. Watch, listen to, and read the weekly instructor lectures
3. Watch and listen to any additional media (e.g. podcasts or videos) provided for the week
4. Fully participate in asynchronous discussions by responding to the provided prompts and engaging with other students' posts
5. Complete knowledge plan, Supreme Court quiz, and weekly reflection journals
6. Complete midterm writing assignment and final writing assignment

Sections

Your GSI will grade all of your work, as well as that of your section-mates, and engage with you in the course discussions. You can see whose section you've been placed in by exploring the "Section" column within the "People" page or by examining your discussion group's title.

Reading Assignments

Each week includes assigned readings relevant to the topics covered. You can access all of the assigned readings via bCourses.

Lectures

Each week you'll find lectures that provide important information and insights on the week's topics. You are required to watch all lectures and will be responsible for addressing the concepts they contain in your course assignments.

Discussion forum on bCourses

Each week contains a discussion assignment, with the exception of the final week of class.

While the discussion assignments are asynchronous, each week's posting is due by **10 PM (PT) on Friday** (May 28, June 4, June 11, June 18, and June 25). You must respond to at least two other students' postings by **10 PM (PT) each Sunday** (May 30, June 6, June 13, June 20, & June 27). Continued participation throughout the week is highly encouraged. See the instructions within each discussion for specific guidelines.

Assignments

All assignments are due at **10PM (PT)** on the indicated due date.

Knowledge Plan: You will write a plan to help ensure optimal learning in this course by writing a short essay to a list of questions available on bCourses. Your responses should be 2-3 pages long, single-spaced. Your knowledge plan is due **Wednesday, May 26**.

Supreme Court quiz: This quiz will be administered on bCourses. It will be available between Friday, May 28 and Monday, May 31. This quiz will contain multiple-choice and true/false questions to demonstrate you've learned the basics about the Supreme Court, how it operates, and the legal system of which it is a part.

Participation in discussion section: Discussion sections will be held live via Zoom. Section 101 meets on Mondays from 12:10PM-2PM (PT); Section 102 meets on Tuesdays from 12:10PM-2PM (PT). Your GSI will share the Zoom link for these meetings. **There will be section starting the first week of class.**

Discussion prompts: You will demonstrate participation in the form of discussion prompts. You are expected to contribute weekly. Your posting is due by 10 PM (PT) each Friday (May 28, June 4, June 11, June 18, & June 25). You must respond to at least two other students' postings by 10 PM (PT) each Sunday (May 30, June 6, June 13, June 20, & June 27). Continued participation throughout the week is highly encouraged. See the instructions within each discussion for specific guidelines.

Midterm writing assignment: This will be a short (600-800 word) paper in which I will select one of the case studies we have covered, and must evaluate the extent to which the Court's ruling in the case study was implemented, and whether the case supports or undermines theories about Supreme Court power. This assignment will be released at 8AM (PT) on **Tuesday, June 15**, and must be submitted by **10PM** that evening.

Final Writing Assignment: The final will ask you to reflect on what you've learned from the final case study (for which you have three choices), and will also require you to generalize beyond your case to other cases examined in the course. The final will ask you to:

- 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; and
- c) evaluate whether your case undermines or supports claims about the weaknesses of the Court as a policymaking institution.

The final writing assignment will be released at 8AM (PT) on June 31 and will be due by **10PM (PT) on Thursday, July 1**.

Final Reflection: This will be a short (500 word) paper in which I will ask you to re-read your knowledge plan, think about your growth over the course, and plan for how you will apply the knowledge from this course in the future. This end-of-semester reflection is due by **July 1 at 10PM (PT)**.

Grading and Course Policies

Your final course grade will be calculated as follows:

Table 1: Final Grade Percentages

Category	Percentage of Grade
Knowledge Plan	2%
Participation in discussions and responding to classmates' posts (5)	25%
Supreme Court Quiz	5%
Midterm Writing Assignment	30%

Category	Percentage of Grade
Final Writing Assignment	35%
Final Reflection	3%

Late Work Policy

Written assignments must be turned in electronically to the bCourses site. Assignments are due at precisely the time specified in this syllabus. Assignments submitted 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. If you would like to request an extension on an assignment, you must email the professor (not your GSI).

Course Policies

Promptness

All assignments have specific due dates and times listed in the course site and the Calendar on bCourses. You are expected to meet those listed due dates. All assignments will be submitted via bCourses.

Honor Code

The student community at UC Berkeley has adopted the following Honor Code: "As a member of the UC Berkeley community, I act with honesty, integrity, and respect for others." The expectation is that you will adhere to this code. Read the entire [Berkeley Honor Code](#) for more information.

Collaboration and Independence

Reviewing lecture and reading materials and studying for exams can be enjoyable and enriching things to do with fellow students. This is recommended. However, all assignments are to be completed independently and should be the result of one's own independent work.

Cheating

A good lifetime strategy is always to act in such a way that no one would ever imagine that you would even consider cheating. Anyone caught cheating or engaging in another type of academic dishonesty (e.g., plagiarism) on any assignment, including the midterm and final writing assignments, will receive a failing grade in the course and will also be reported to the University Center for Student Conduct. The expectation is that you will be honest in the completion of all work in this course.

Plagiarism

To copy text or ideas from another source without appropriate reference is plagiarism and will result in a failing grade for your assignment and usually further disciplinary action. For

additional information on plagiarism and how to avoid it, read the [UC Berkeley Library Citation Page, Plagiarism Section](#).

Academic Integrity and Ethics

Cheating on exams and plagiarism are two common examples of dishonest, unethical behavior. Honesty and integrity are of great importance in all facets of life. They help to build a sense of self-confidence, and are key to building trust within relationships, whether personal or professional. There is no tolerance for dishonesty in the academic world, for it undermines what we are dedicated to doing - furthering knowledge for the benefit of humanity.

Incomplete Course Grade

Students who have substantially completed the course but for serious extenuating circumstances, are unable to complete the final writing assignment, may request an Incomplete grade. This request must be submitted in writing to the GSI and instructor. You must provide verifiable documentation for the seriousness of the extenuating circumstances. According to the policy of the university, Incomplete grades must be made up within the first three weeks of the next semester.

Students with Disabilities

If you require course accommodations due to a physical, emotional, or learning disability, contact [UC Berkeley's Disabled Students' Program \(DSP\)](#). Notify the instructor and GSI through course email of the accommodations you would like to use. You must have a Letter of Accommodation on file with UC Berkeley to have accommodations made in the course.

UC Berkeley is committed to providing robust educational experiences for all learners. With this goal in mind, we have activated the ALLY tool for this course. You will now be able to download content in a format that best fits your learning preference. PDF, HTML, EPUB, and MP3 are now available for most content items. For more information visit the alternative formats link or watch the video entitled, "[Ally First Steps Guide](#)."

End of Course Evaluation

Before your course ends, please take a few minutes to participate in the course evaluation to share your opinions about the course. Information about the course evaluation will be made available in bCourses.

Reading and topic schedule

Our course schedule is as follows. Note: this chart only contains topics and readings. It does *not* contain other materials including lectures, podcasts, and other media. You should use bCourses for the most comprehensive schedule.

Date	Topic(s)	Assigned reading
May 24	● Introduction to the course	● Syllabus

	<ul style="list-style-type: none"> ● Introduction to key terminology 	
May 25	The Supreme Court's place in the U.S. legal system	<ul style="list-style-type: none"> ● Linda Greenhouse, <i>The U.S. Supreme Court</i>, pp. 1-41 (Chs. 1-3) ● G. Alan Tarr, "The Federal and State Court Systems," <i>Judicial Process and Judicial Policymaking</i>, pp. 249-243 ● The Constitution of the United States
May 26	<ul style="list-style-type: none"> ● How the Supreme Court operates ● What is judicial policymaking? ● Is Supreme Court policymaking bad? ● Can the Supreme Court avoid making policy? 	<ul style="list-style-type: none"> ● Linda Greenhouse, <i>The U.S. Supreme Court</i>, pp. 42-92 ● Jeb Barnes, "Martin Shapiro and the Logic of the Triad" ● Robert Bork, <i>The Tempting of America</i> pp. 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"
May 27	<ul style="list-style-type: none"> ● Judicial review ● Judicial reasoning ● How to read a legal opinion ● Modes of constitutional decisionmaking 	<ul style="list-style-type: none"> ● Lief Carter and Thomas Burke, <i>Reason in Law</i>, pp. 6-17 ● Orin Kerr, "How to Read a Judicial Decision" ● <i>Marbury v. Madison</i>, 5 U.S. 137 (1803) ● Brandon J. Murrill, "Modes of Constitutional Interpretation"
May 31	NO CLASS	NO CLASS
June 1	<ul style="list-style-type: none"> ● Is the Supreme Court the 'least dangerous branch'? ● Rosenberg's 'constrained court' view 	<ul style="list-style-type: none"> ● Anti-Federalist Paper #11 ● Federalist Papers #78 ● Gerald Rosenberg, <i>The Hollow Hope</i>, 1-36
June 2	Case study #1: Race and the constitution: slavery and the post-Civil War Amendments	<ul style="list-style-type: none"> ● <i>Dred Scott v. Sandford</i>, 60 U.S. 393 (1857) ● <i>Slaughter-House Cases</i>, 83 U.S. 36 (1876) ● <i>Civil Rights Cases</i>, 109 U.S. 3 (1883)
June 3	Case study #2: Brown v. Board of Education	<ul style="list-style-type: none"> ● <i>Plessy v. Ferguson</i>, 163 U.S. 537 (1893) ● <i>Brown v. Board of Education</i>, 347 U.S. 483 (1954)

		<ul style="list-style-type: none"> ● <i>Brown II</i>, 349 U.S. 294 (1955) ● Gerald Rosenberg, <i>The Hollow Hope</i>, 37-106
June 7	Case study #2: Brown v. Board of Education	<ul style="list-style-type: none"> ● Gerald Rosenberg, <i>The Hollow Hope</i>, 107-169
June 8	Critical perspectives on Rosenberg	<ul style="list-style-type: none"> ● Kevin J. 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
June 9	Case Study #3: Civil rights movement I	<ul style="list-style-type: none"> ● Klarman, <i>From Jim Crow to Civil Rights</i>, Chapters 1-3
June 10	Case study #3: Civil rights movement II	<ul style="list-style-type: none"> ● Klarman, <i>From Jim Crow to Civil Rights</i>, Chapters 4-7 & Conclusion
June 14	Case study #4: Roe v. Wade Is Rosenberg right about Roe?	<ul style="list-style-type: none"> ● Gerald Rosenberg, <i>The Hollow Hope</i>, 173-201 ● <i>Roe v. Wade</i>, 410 U.S. 113 (1973) ● <i>Planned Parenthood v. Casey</i>, 505 U.S. 833 (1992) ● Linda Greenhouse and Reva B. Siegel, “Before (And After) Roe v. Wade: New Questions about Backlash”
June 15	<i>Work day – midterm writing assignment due at 10PM</i>	No new reading
June 16	Case study #5: Same-sex marriage Rosenberg v. Keck & Cole	<ul style="list-style-type: none"> ● <i>Obergefell v. Hodges</i>, 576 U.S. 644 (2015) ● Gerald Rosenberg, <i>The Hollow Hope</i>, 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”
June 17	Case study #6: Affirmative action in higher education	<ul style="list-style-type: none"> ● <i>Regents of the Univ. of Cal. v. Bakke</i> 438 U.S. 265 (1978) ● <i>Grutter v. Bollinger</i>, 539 U.S. 306 (2003)

		<ul style="list-style-type: none"> ● <i>Gratz v. Bollinger</i>, 539 U.S. 244 (2003) ● <i>Fisher v. U.T.</i>, 579 U.S. ___ (2016) ● Yuvraj Joshi, <i>Bakke</i> to the Future: Affirmative Action After <i>Fisher</i>
June 21	Alternative view of Supreme Court power: Matthew E. K. Hall	<ul style="list-style-type: none"> ● Matthew E.K. Hall, <i>The Nature of Supreme Court Power</i>, 1-27 and pp. 127-130
June 22	The counter-majoritarian difficulty	<ul style="list-style-type: none"> ● Justice Antonin Scalia, dissenting, <i>Obergefell v. Hodges</i>, 576 U.S. ___ (2015) ● Alexander Bickel, “The Counter-majoritarian Difficulty” in <i>The Least Dangerous Branch</i>, 16-20 ● Lawrence Solum, “The Counter-majoritarian Difficulty”
June 23	<ul style="list-style-type: none"> ● Pluralism and the Supreme Court ● Pluralism & democratic theory 	<ul style="list-style-type: none"> ● Terri Jennings Peretti, In Defense of a Political Court, 189-198, 209-225 ● Jonathan M. Ladd, “Don’t Worry about Special Interests” ● James Q. Wilson and John Dilulio, <i>The Civil Rights Movement</i>, 201-207
June 24	Legal mobilization and social change	<ul style="list-style-type: none"> ● Robert Kagan, <i>Adversarial Legalism</i>, Chs. 1-3 ● Charles Epp, The Rights Revolution, Chs. 1-2
June 28	Is the Supreme Court well-designed for making policy?	<ul style="list-style-type: none"> ● Donald Horowitz, <i>The Courts and Social Policy</i>, pp. 22-56 ● Lon Fuller, “The Forms and Limits of Adjudication,” pp. 394-5 ● Jeb Barnes, “In Defense of Asbestos Tort Litigation”
June 29	Final case study; choice of 1) California prison reform; 2) Affirmative action in public schools; or 3) climate change	<p>California Prison Reform</p> <ul style="list-style-type: none"> ● <i>Brown v. Plata</i>, 563 U.S. 493 (2011) (majority opinion by J. Kennedy & dissenting opinion by J. Scalia) ● Jonathan Simon, <i>Mass Incarceration on Trial</i>, Chs. 5, 6, 7 <p>Affirmative Action in Public Schools</p>

		<ul style="list-style-type: none"> ● <i>Parents Involved v. Seattle</i>, 501 U.S. 701 (2007) ● <i>San Antonio v. Rodriguez</i>, 411 U.S. 1 (1973) ● Robinson, “The High Cost of the Nation’s Current Framework of Education Federalism” <p>Climate Change</p> <ul style="list-style-type: none"> ● <i>Massachusetts v. EPA</i>, 549 U.S. 497 (2007) ● Jonathan Cannon, <i>Environment in the Balance</i>, Chs. 2, 3, & 6
June 30	Review of course	No new reading
July 1	Final writing assignment due at 10PM Final reflection due at 10PM	No new reading