

Professors David Glick and Serena Laws
Spring 2011
PBPL 28 / GOVT 30.03
2A (T/Th 2-3:50)

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*Law, Courts and Public Policy:
The Role of Courts in American Public Policymaking*

Many critics see judges as “policy makers in robes” while others, perhaps naively, would never think of judges as “policy makers.” In this course we will investigate the role that legal institutions, particularly courts, play in public policy making. We will think about the similarities and differences between courts and other political institutions in the policy making process. The course considers questions such as: What role do practical policy considerations play in judicial decision making? How can groups use courts to pursue public policy change? How much impact do courts and judges have on policy outcomes on the ground? Do courts have the capacity to make good public policy, and is judicial policy making desirable? We will address these questions by looking at the U.S. Supreme Court as well as lower courts, and will examine a variety of substantive applications including educational funding, tobacco regulation, abortion, and campaign finance. The class is open to students who have taken PBPL 5, and counts toward the Law and Public Policy track of the Public Policy Minor.

Course Objectives:

- Understanding of the importance of law in public policy in the American context
- Assessing the strengths and weaknesses of legal versus other strategies for social change
- Developing an understanding of the courts as political actors

Readings and Discussion: On most days, you will read a couple of pieces related to the same topic. These pieces will often disagree with each other, or otherwise leave us all with room to interpret, synthesize, and analyze. This is not a course where there are a lot of basics or facts to learn. There is no textbook. Nearly everything we read will be sophisticated academic analysis primarily directed at other academics. Our job will be to take it all apart and put it all together in interesting ways and to apply the ideas we encounter to a variety of interesting public policy areas.

We expect you to come to class prepared to answer questions, evince understanding, and speak intelligently about the day's materials. Rather than use short reading quizzes, we will freely call on people and expect you to have something to contribute. Frequently, we will split the class in half to have more manageable sized discussion groups. To help, we may send out a few questions the night before class to guide your thinking. On those days, we will expect you to be able to offer answers to these questions if called upon.

Books for Purchase:

Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*
available at Wheelock Books

Assignments and Grade Components: The final grade for the course will be based on your participation in class and your performance on assignments and exams. Instead of more standard papers, in this course students will complete a number of varied assignments.

For the **case brief** assignment, students will be asked to "brief" a current or recent court case related to a public policy issue, then answer several questions about the case and its relationship to readings we have done in class. The purpose of this assignment is to learn to distill complicated legal materials into a concise summary of the important questions, decisions, and implications.

For the **strategy brief** assignment, each student will write a policy memo from the perspective of a "consultant" to an interest group or social movement of your choice. In this memo you will help your "client" assess their options for pursuing their policy agenda via legal strategies and assess their prospects for success based on your understanding of the academic literature.

For the **op-ed** paper, you will write a 750 (and no more) word op-ed piece just like those found in newspapers.¹ You can write it about any issue related to the class. The goal is to apply course materials to a contemporary issue or question. You will want to be precise and concise and tell the reader why the issue is important and briefly advance a clear thesis based in course materials which would also be interesting to the newspaper reading public. You will find examples on the editorial pages of the New York Times, Wall Street Journal and Washington Post among others and should pay particular attention to writers such as Paul Krugman and David Brooks who often ground their op-eds in social scientific thinking, findings, and methods. (There are also frequently op-eds tied to recent court cases in major newspapers).

¹ Professor John Carey deserves full credit for this idea

There will be one standard **exam** which will fall about three quarters of the way through the term. It will assess your understanding of the core themes and debates of the course, and offer and analysis.

The final project will be a **policy memo**, 12-15 pages in length, in which you will apply legal and policy analysis to a topic of your choice using many of the central themes of the course. For this final policy memo, you will identify a policy that is under consideration in your area of interest, and that has legal dimensions and connotations. You will recommend what should be done, including the arguments against. Successful policy memos will explain how the legal environment (precedent, composition of the judiciary, interbranch relations, etc.) shapes the options available and the framing of the issue. We expect you to be thinking about this project throughout the term, and will set benchmark deadlines (for selecting a topic, preliminary bibliography, and rough draft) to keep you on track. The memo will be graded based on how clearly and persuasively you explain the law and tie into class ideas, how persuasively and comprehensively you argue for the policy, and the level of research evident in the memo.

Your grade for the course will be based on your performance on the above assignments, as well as your preparedness for and participation in class.

- Case Brief 10%
- Strategy Brief 10%
- Op-Ed 15%
- Exam 20%
- Final Policy Memo 30%
- Participation 15%

Grades for Written Work and Exams: For written work, the A range will comprise only work which features strikingly original thinking and/or argumentation, expressed in clear, cogent, error-free writing. Only students that go well beyond class materials and discussions (in thought, not extra research) will be considered for an A grade. Papers and examinations in the B range exhibit mastery of the course materials and discussions, expressed in clear, cogent, error-free writing. Papers and examinations in the C range exhibit inadequate understanding of the course materials and discussions and/or deficient, error-plagued writing. Papers and examinations in the D range exhibit wholly inadequate understanding of the course materials combined with deficient, error-plagued writing. Hopefully the D range and worse will not be an issue. Pluses, minuses, or flat grades within any of these ranges reflect the instructors' judgment of the merits of the paper or examination relative to other papers in the same range. All late assignments will be reduced 1/3 of a grade for every day they are late. Students may appeal grades they feel they received in error but we reserve the right to increase or decrease their grade upon reconsideration.

Other Practical Matters:

Email: The most efficient way to reach us via email. Please include both Professors on emails. No promises, but we'll try to respond quickly. If you write and don't hear back in 24 hours, please write again.

Office Hours: Our official office hours are listed at the top of the syllabus, but we aim to be around and as accessible as possible. If you cannot make it to either of our scheduled office hours, email us some times that work for you and at least one of us will find a good time to meet with you.

Laptops: While understanding that there are benefits to having laptops in class, at this point, our experience suggests that the negatives outweigh the positives. Thus, we will prohibit their use. If you are taking enough notes to need a laptop, you're spending too much time taking notes and not enough engaging with the materials, the instructors, and your classmates.

Course Schedule:

1. Tue. 3/29 - *The Importance of Law; Courts as Political Actors*

- David B. Rivkin and Lee A. Casey, "Mandatory Insurance Is Unconstitutional," *The Wall Street Journal*, 9/18/09
- Akil Reed Amar, "Constitutional Showdown," *The Los Angeles Times*, 2/6/11
- Laurence Tribe, "On Health Care, Justice Will Prevail," *The New York Times*, 2/7/11
- Peter Brown, "Health Care and the Supreme Court: It's All in the Timing," *WSJ.com*, 2/9/11
- Adam Liptak, "The President's Courthouse" *The New York Times* 2/26/2011.

2. Thu. 3/31 - *The "Juridification" of American Politics and Policy*

- Gordon Silverstein *Law's Allure*, Introduction, Chapters 1-2
- Margaret Talbot. "A Risky Proposal: Is it Too Soon to Petition the Court on Gay Marriage?" *New Yorker*. January 18, 2010.

3. Tue. 4/5 - *Is Judicial Review Undemocratic?*

- Alexander Bickel (1962), *The Least Dangerous Branch*. Bobbs-Merrill Chapter 1
- *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)
- Julie Novkov. Intro to Briefing a Case:
<http://www.albany.edu/~jn293713/profession/caseguid.htm>
- Mark Graber (1993). "The Nonmajoritarian Difficulty: Legislative Deference To The Judiciary." *Studies in American Political Development* 7: 35-73.

4. Thu. 4/7 - *Courts as Political Actors*

- Neal Devins (2004). "Is Judicial Policymaking Countermajoritarian?" in Mark C. Miller and Jeb Barnes, eds. *Making Policy, Making Law: An Interbranch Perspective*.
- Howard Gillman (2001). "What's Law Got to Do with It? Judicial Behavioralists Test the 'Legal Model' of Judicial Decision Making." *Law and Social Inquiry* 26(2): 465-504.
- Harold J. Spaeth (2005). "Chief Justice Rehnquist: 'Poster Child' for the Attitudinal Model." *Judicature*. 89(3): 108-115

5. Tue. 4/12 - *Courts and the Other Branches*

- David Glick. (2009) "Conditional Strategic Retreat: The Court's Concession in the 1935 Gold Clause Cases." *The Journal of Politics* 71(3): 800-816.
- Silverstein, Ch. 8
- Jonathan Cohn "The Worst Case." *New Republic*. January 19, 2010.
- *Hamdan v. Rumsfeld* (2006) – case summary
- Seymour M. Hersch "Torture at Abu Ghraib." *The New Yorker* pp. 42-47, 5/10/2004.
- Nicole Moen (2009). "Habeas Revisited: An Associates View of Guantanamo Bay" *Northeastern University Law Journal* 1(1): 131-138.

6. Thu. 4/14 - **Case Brief Due**

- Case Brief Discussion

7. Tue. 4/19 - *Indirect Effects on Policy: Courts and Elections*

- Ansolabehere, Stephen and Samuel Issacharoff. 2004. "The Story of *Baker v. Carr*." In Dorf, Michael C. Ed., *Constitutional Law Stories*. New York: Foundation Press, 297-323.
- Silverstein Ch. 6
- Howard Schweber. "Citizens United: Less Important, More Important, and (Even) Weirder Than You Think" http://www.huffingtonpost.com/howard-schweber/emcitizens-unitedem-less_b_437528.html 1/26/2010.
- *Buckley v. Valeo* (1976)
- *Baker v. Carr* (1962)
- Michael Miller. "Clean Elections vs. Political Speech, the Monkey Cage" (blog), 3/23/11 <http://www.themonkeycage.org/Miller%2520Monkey%2520Cage%25203-22-11%5B1%5D.pdf>

8. Thu. 4/21 - *Policy Considerations in Court?*

- Richard Posner. 1996. "Pragmatic Adjudication," *Cardozo Law Review* 18(1): 1-20
- Jeffrey Rosen. 1995. "Overcoming Posner." *Yale Law Journal* 105(2): 584-596 (*Sections I & II*).
- Herbert Garfinkel. 1959. "Social Science Evidence and the School Segregation Cases," *The Journal of Politics* 21(1): 37-59.
- *Brown v. Board of Education* (1954)

9. Tue 4/26 - *Policy Considerations in Court? A Debate*

- *Buck v. Bell* (1927)
- John Conley, "The First Principle of Real Reform: The Role of Science in Constitutional Jurisprudence," *North Carolina Law Review*, Vol 65, 1986
- *McCleskey v. Kemp* (1987)
- Article on *Matrixx Initiatives, Inc. v. Siracusano* (2011)
- **In Class Debate**

10. Thu. 4/28 - *Does Law Really Matter?*

- Robert Ellickson, *Order Without Law* (excerpts)
- Lynn Mather. 1995. "The Fired Football Coach (Or, How Trial Courts Make Policy)" in *Contemplating Courts*, ed. Lee Epstein. Washington, D.C.: CQ Press.

11. Tue. 5/3 - *Legal Movements - Interests use courts as policy venues. Who goes to court/who goes to the legislature*

- Michael McCann "How Does Law Matter for Social Movements?" in *How Does Law Matter*, ed. Bryant G. Garth and Austin Sarat. Evanston, IL: Northwestern University Press.
- Michael Paris (2010). *Framing Equal Opportunity Law and the Politics of School Finance Reform*. Chapter 4

- Steven Teles (2007). “Conservative Mobilization Against Entrenched Liberalism,” in *The Transformation of American Politics: Activist Government and the Rise of Conservatism* (Paul Pierson and Theda Skocpol editors).

12. Thu. 5/5

- **Amicus Brief Due; Activity**

13. Tue. 5/10 – *Impact of Policymaking through Courts*

- Rosenberg (1991). *The Hollow Hope*, Introduction and Part I (excerpts)

14. Thu. 5/12

- Helena Silverstein. “‘Honey, I Have No Idea’: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion,” with Leanne Speitel. *Iowa Law Review* (Volume 88, Number 1, October 2002), pp. 75-120.
- Goetz, Edward G. 2003. “*Hollman v. Cisneros*” In *Clearing the Way: Deconcentrating the Poor in Urban America*. Washington D.C.: The Urban Institute Press, 137-175.
- Paul Frymer. “Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in US Labor Unions, 1935-85,” *American Political Science Review* 97: 483-99 (August 2003)

15. Tue. 5/17 - *Legal Mobilization - Rebuttal to Rosenberg*

- R. Shep Melnick, Separation of Powers and the Strategy of Rights: the Expansion of Special Education, in *The New Politics of Public Policy* (Mark L. Landy and Martin A. Levin editors) (1995)
- Charles Epp *The Rights Revolution*, 1-25.

16. Thu. 5/19 - **Exam Day**

17. Tue. 5/24 - *Welfare and Poverty Rights*

- Elizabeth Bussiere, *(Dis)entitling the Poor*, excerpts
- Silverstein, Ch. 4

18. Thu. 5/26 - *Tobacco Settlements*

- Silverstein, Ch. 9
- Mather, Lynn. 1998. “Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation.” *Law and Social Inquiry* 23(4): 897-940.

19. Tue. 5/31 - TBA

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