

The Supreme Court & Public Policy

Spring 2019

Room: Keller 0021
Tuesday & Thursday
2:00 - 3:20 p.m.

Professor

Douglas Spencer
E-mail: dougspencer@uchicago.edu
Office: Keller 3103
Office Hours: Tuesdays 9-11am

TA

Kylin Fisher
E-mail: kylin@uchicago.edu
Office: The Forum
Office Hours: Wednesdays 2-4pm

“Scarcely any political question arises that is not, sooner or later, transformed into a legal question.”
– Alexis de Tocqueville, *Democracy in America* (1838)

Course Description

Courts play an important role in shaping dozens of national and local policy issues such as voting rights, redistricting, affirmative action, abortion, birth control, same sex marriage, transgender rights, gun rights, criminal law, economic justice, and more. Learning how courts interpret policy has become an important component of the policymaker’s toolkit. The course content is divided into four broad units, all of which are essential for understanding the courts’ role in the promotion and interpretation of national policy. These are (1) federal courts, their nature, and their limited powers, (2) the courts’ role in social movements and as “protectors” of individual rights and liberties, (3) political questions and immunity, and (4) the complicated relationship between courts and administrative agencies.

By the end of the course, you should be able to:

1. Understand when federal courts will and will not intervene in a policy dispute, particularly with regard to political issues.
2. Understand when a government actor can be sued in federal court (and by whom).
3. Think critically about, and assess the ability of courts as instruments of social change.
4. Understand the scope of federal courts jurisdiction over administrative agencies.

Readings will include cases decided by the Supreme Court (including cases from recent terms), and also contemporary scholarship on judicial politics and decisionmaking. Throughout, the emphasis will be on what policy makers can expect from the courts in terms of federal and state policy interpretation.

Prerequisites

There are no prerequisites for this course. Students who have taken at least one semester of constitutional law (or administrative law) at the law school level will find some overlapping coverage, though the focus of this course is different than a traditional law school course. Students who have taken both constitutional law and administrative law at the law school level may take this course only with the permission of the instructor.

Class Attendance

I expect that you will do your best to attend every class and show up on time. If you need to miss a class due to an emergency, it is your responsibility to obtain missed notes and course announcements from another student. Any lecture slides presented in class will be posted on the course Canvas site.

Laptop and Cell Phone Policy

Responsible use of laptops is permitted in class, so long as it is not distracting to other students. Please be considerate and silence and put away cell or mobile phones and smartphones during class.

Suggested Texts

All Supreme Court cases are publicly accessible online, but they are mostly in unedited formats. I will post edited versions of the cases to the course Canvas website, as available. I will post copies of articles to the Canvas site, but all students have access via the University's library subscriptions.

While there are no required texts, I do recommend one book for those unfamiliar with the basic contours of U.S. constitutional law.

- Fallon, Richard H. 2004. *The Dynamic Constitution: An Introduction to American Constitutional Law*. New York, NY: Cambridge University Press.

This text can easily be rented, bought used, or bought new, all online.

Academic Integrity

I encourage you to discuss the course readings and assignments with your fellow students. However, all written work, unless otherwise specified, must be done independently and not in collaboration with others. All class activities must be performed in accordance with the University's Academic Policies & Requirements (available at:

<https://studentmanual.uchicago.edu/Policies>). Your reputation is the most important thing you have, especially at this stage of your career; please do not tarnish it.

Grading

Your grade in this class will comprise class participation and three short (approx. 1,500 words) policy memos that will ask you to make a recommendation on an important issue:

- 20 pts - Assignment #1 (due April 18, by 2pm CDT)
- 35 pts - Assignment #2 (due May 16, by 2pm CDT)
- 35 pts - Assignment #3 (due June 6, by 2pm CDT)
- 10 pts - Class participation

The final grade for the course will be based on the following scale:

A: 95+	A-: 90-94	B+: 87-89
B: 83-86	B-: 80-82	C+: 77-79
C: 73-76	C-: 70-72	D+: 67-69
D: 63-66	D-: 60-62	F: < 60

Paper Extension Policy

Papers must be submitted online through the course website by the due date and time (before class begins on the Thursday due date). Attempting to turn a paper in late is extremely unfair to your colleagues. For all papers, extensions will be granted only in case of (1) a death in the family or (2) a unforeseen medical emergency. In case of such an emergency, please let me know as soon as possible; in most cases, I will require supporting documentation (e.g., a doctor's note) out of fairness to the other students. Also in the interest of fairness, (1) unsubstantiated requests for extensions will be denied summarily and (2) retroactive extensions (e.g., extensions requested after the paper is submitted) will never be granted.

If you do not have an extension, and you turn in a paper late, you will be docked one third of one letter grade for every 24 hours that the paper is late, with late penalties accruing from the time the paper is due. For example, if your paper earned a B+, but you turned it in a few hours past the time it was due, you will receive a B; if you turned it in 30 hours past the time it was due, you will receive a B-.

Date	Subject	Pages
I. Introduction to the American Legal System		
April 2	The Least Dangerous Branch	45
4	Justiciability	35
9	Theories of Judicial Decisionmaking, Part I	70
11	Theories of Judicial Decisionmaking, Part II	65
II. Courts and the Constitution		
16	Separation of Powers and Commerce Clause	50
18	Equal Protection Under the Laws	40
23	Affirmative Action	30
25	Gender Discrimination	50
30	Reproductive Rights	55
May 2	LGBT Right and Same-Sex Marriage	35
7	Voting Rights & Political Questions	48
9	Habeas Corpus and the Death Penalty	70
14	Sovereign Immunity and Qualified Immunity	50
16	Executive Immunity and Emoluments	45
III. Statutory Interpretation		
21	Statutory Interpretation: Introduction	40
23	Statutory Interpretation: Strategic Design	50
IV. The Administrative State		
28	Agency Delegation and Separation of Powers	50
30	Agency Rulemaking and Judicial Review	45
June 4	Judicial Review and Agency Compliance	30
6	Hollow Hope or Force for Democracy?	75

Schedule and Readings

Note: This schedule subject to change, depending on how far we get in each class meeting.

UNIT 1: INTRODUCTION TO THE LEGAL SYSTEM

April 2: The “Least Dangerous” Branch

- Case excerpts: *Hollingsworth v. Perry* (2013)
- RICHARD FALLON, *THE DYNAMIC CONSTITUTION* (2004) pp. 275-297
- Martin Shapiro. 1994. “Judges as Liars,” *Harvard Journal of Law & Public Policy* 17(1): 155-156.
- Text of John Roberts’ opening statement before the Senate Judiciary Committee (Aug. 12, 2005)
- Recommended: Robert A. Dahl. 1957. “Decision-Making in a Democracy: The Supreme Court as National Policy-Maker,” *Journal of Public Law* 6(1): 279-295.
- Recommended: Alexander Bickel. 1961. “Foreword: The Passive Virtues,” *Harvard Law Review* 75(1): 40-79.
- Recommended: Orin Kerr. 2007. “How to Read a Legal Opinion: A Guide for New Law Students,” *Green Bag Law Journal* 11(1): 51-63.

April 4: Doctrines of Justiciability

- Case excerpts: · *City of Los Angeles v. Lyons* (1983)
· *Gill v. Whitford* (2018)
- Epstein & Walker, “Justiciability,” in *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* (4th ed.), pp. 78-86
- ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (2016), ch. 1.
- Recommended: Antonin Scalia. 1983. “Standing as an Essential Element of the Separation of Powers,” *Suffolk Law Review* 17(3): 881-899.
- JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

April 9: Theories of Judicial Decisionmaking, part I

- Case excerpts: *Bush v. Gore* (2000)
- JEFFREY A. SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) ch. 2-3.
- Recommended: Ruger, Theodore W., Pauline T. Kim, Andrew D. Martin, Kevin M. Quinn. 2004. "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking," *Columbia Law Review* 104(4): 1150-1210.
- Recommended: Adam Glynn and Maya Sen. 2015. "Identifying Judicial Empathy," *American Journal of Political Science* 59(1): 37-54.

April 11: Theories of Judicial Decisionmaking, part II

- Case excerpts: · *Marbury v. Madison* (1803)
- LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1997), ch. 1-3
- Recommended: Barry Friedman. 2006. "Taking Law Seriously," *Perspectives on Politics* 4(2): 261-276.
- Richard L. Hasen. 2012. "Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law," *Emory Law Journal* 62(2): 779-800.

UNIT 2: COURTS AND THE CONSTITUTION

April 16: Separation of Powers and the Commerce Clause

- Case excerpts: · *United States v. Lopez* (1995)
 - *United States v. Morrison* (2000)
 - *National Federation of Independent Business v. Sebelius* (2012)
 - *South Dakota v. Dole* (1987)
- RICHARD FALLON, *THE DYNAMIC CONSTITUTION* (2004), pp. 227-251.
- Donald J. Trump, "Enhancing Public Safety in the Interior of the United States," *Executive Order No. 13768*, January 25, 2017.
- Darla Cameron, "How sanctuary cities work, and how Trump's blocked executive order could have affected them," *Washington Post*, November 21, 2017.
- Recommended: Thomas R. McCoy and Barry Friedman, "Conditional Spending: Federalism's Trojan Horse," *The Supreme Court Review* (1988): 85-127.
- Recommended: John Dinan. 2002. "Congressional Responses to the Rehnquist Court's Federalism Decisions," *Journal of Federalism* 32(1):1-24.

- Recommended: Phillip Frickey and Steven Smith. “Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique.” *Yale Law Journal* 111(4):1707.

April 18: Equal Protection Under the Laws

Assignment #1 due by 2:00 p.m.

- Case excerpts:
 - *City of Cleburne v. Cleburne Living Center* (1985)
 - *Korematsu v. U.S.* (1944)
 - *Washington v. Davis* (1976)
 - *Arlington Heights v. Metro. Housing Dev. Corp.* (1977)
- Recommended: William Eskridge. 1991. “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79(2): 613-684.
- Recommended: Kenji Yoshino, “The New Equal Protection,” *Harvard Law Review* 124(3): 747-803.

April 23: Affirmative Action: Law & Policy

- Case excerpts:
 - *Grutter v. Bollinger* (2003)
 - *Gratz v. Bollinger* (2003)
 - *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)
- Gelman, Andrew, Sharad Goel, and Daniel Ho. 2019. “What Statistics Can’t Tell Us in the Fight over Affirmative Action at Harvard,” *Boston Review*.
- Recommended: Goodwin Liu, “The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions,” *Michigan Law Review* 100(5): 1045-1107.
- Recommended: Daniel E. Ho, “Why Affirmative Action Does Not Cause Black Students To Fail the Bar. A Reply,” *Yale Law Journal* 114(6): 1997-2004.

April 25: Gender Discrimination

- Case excerpts:
 - *Craig v. Boren* (1976)
 - *U.S. v. Virginia* (1996)
 - *Alex Morgan et al. v. U.S. Soccer Federation, Inc.* (2019)
- Matt Stevens, “Transgender Student in Bathroom Dispute Wins Court Ruling,” *New York Times*, May 22, 2018.

April 30: Reproductive Rights

- Case excerpts: · *Roe v. Wade* (1973)
 - *Planned Parenthood v. Casey* (1992)
 - *Whole Woman's Health v. Hellerstedt* (2016)
- JEFFREY TOOBIN, *THE NINE* (2007), pp. 36-59.
- Sarah Mervosh, “Judge Blocks Kentucky Fetal Heartbeat Law That Bans Abortion After 6 Weeks,” *New York Times*, March 16, 2019.
- Overview of Abortion Laws, *Guttmacher Institute*, March 1, 2019.
- Recommended: Zakiya Luna and Kristin Luker. 2013. “Reproductive Justice,” *Annual Review of Law & Social Science* 9(2): 327-352.

May 2: LGBT Rights and Same-Sex Marriage

- Case excerpts: · *Lawrence v. Texas* (2003)
 - *Obergefell v. Hodges* (2016)
- Michael Dorf and Sidney Tarrow. 2014. “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” *Law & Social Inquiry* 39(2): 449-473.
- Scott Sommerdorf, “Polygamy remains a crime as U.S. Supreme Court won’t hear case from ‘Sister Wives’,” *Salt Lake Tribune*, Aug. 3, 2017.

May 7: Voting Rights & Political Questions

- Case excerpts: · *Shelby County v. Holder* (2013)
 - *Walter Nixon v. United States* (1993)
 - *U.S. Term Limits, Inc. v. Thornton* (1995)
 - *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n* (2015)
- New Jersey Senate Bill 119, “An Act Concerning the Disclosure of Federal Income Tax Returns by Candidates for President and Vice President of the United States” (2019).
- Recommended: *Vieth v. Jubelirer* (2004).
- Recommended: Christopher Elmendorf & Douglas Spencer, “Administering Section 2 of the VRA After Shelby County,” *Columbia Law Review* 115(8): 2143-2218.

May 9: Criminal Jurisdiction, Habeas Corpus, and the Death Penalty

- Case excerpts: · *Furman v. Georgia* (1972)
· *McCleskey v. Kemp* (1987)
· *Hamdi v. Rumsfeld* (2004)
- David Baldus, Charles Pulaski and George Woodworth. 1983. “Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience,” *Journal of Criminal Law and Criminology* 74(3): 661-753. (Read only pp. 663-673 and 728-733).
- STEIKER & STEIKER, *COURTING DEATH: THE SUPREME COURT & CAPITAL PUNISHMENT* (2016) ch. 3.
- Recommended: Richard Fallon. 2010. “The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science,” *Columbia Law Review* 110:352-398.

May 14: Sovereign Immunity and Qualified Immunity

- Case excerpts: · *Harlow v. Fitzgerald* (1982)
· *Alden v. Maine* (1999)
· *Bivens v. Six Unknown Named Agents* (1971)
· *Ashcroft v. Iqbal* (2009)
- Erwin Chemerinsky. 2001. “Against Sovereign Immunity,” *Stanford Law Review* 53(6): 1201-1224.
- Recommended: David Rudovsky. 1989. “The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights,” *University of Pennsylvania Law Review* 138(1): 23–81.

May 16: Executive Immunity and Emoluments

Assignment #2 due by 2:00 p.m.

- Case excerpts: · *Clinton v. Jones* (1997)
· *United States v. Richard Nixon* (1974)
- Norman L. Eisen, Richard W. Painter and Laurence Tribe, “The Emoluments Clause: Its text, meaning, and application to Donald J. Trump”
- Adam Liptak, “A Constitutional Puzzle: Can the President Be Indicted?” *NY Times* (May 29, 2017)
- Akil Reed Amar. 1999. “On Prosecuting Presidents,” *Hofstra Law Review* 27:671-676.

UNIT 3: STATUTORY INTERPRETATION

May 21: Statutory Interpretation: Introduction

- Case excerpts: · *Caminetti v. United States* (1917)
 - *Mortensen v. United States* (1944)
 - *Cleveland v. United States* (1946)
- Elizabeth Garrett, “Legislation and Statutory Interpretation,” in OXFORD HANDBOOK OF LAW & POLITICS (eds. Whittington et al. 2008), ch. 20.
- Recommended: Congressional Research Service. 2014. “Statutory Interpretation: General Principles and Recent Trends.”
- Recommended: William Eskridge and Philip Frickey, 1990. “Statutory Interpretation as Practical Reasoning,” *Stanford Law Review* 42(2): 321-384.
- Recommended: Lee Friedman, “The Structure of American Law: Statutes and Statute Makers.” *American Law: An Introduction*, 108-127.

May 23: Statutory Interpretation: Strategic Design

- Case excerpts: · *Griggs v. Duke Power Company* (1971)
 - *United Steelworkers of America v. Weber* (1979)
- Richard A. Posner. 1983. “Statutory Interpretation—In the Classroom and in the Courtroom,” *University of Chicago Law Review* 50(2): 800-822.
- Sean Farhang. 2008. “Public Regulation and Private Lawsuits in the American Separate of Powers System,” *American Journal of Political Science* 52(3): 821-839.

UNIT 4: THE ADMINISTRATIVE STATE

May 28: Agency Delegation and Separation of Powers

- Case excerpts: · *J.W. Hamptons & Co v. U.S.* (1928)
 - *Commodity Futures Trading Commission v. Schor* (1986)
 - *Whitman v. American Trucking Associations, Inc.* (2001)
 - *Clinton v. City of New York* (1998)
- Non-Delegation Doctrine (summarized)
- National Emergencies Act of 1976
- Brest et al., “Rise of the Modern Welfare State,” in PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (6th ed. 2015) pp. 1791-1795.
- DAVID EPSTEIN AND SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999) (ch. 2)

- McNollgast. 1987. “Administrative Procedures as Instruments of Control,” *Journal of Law, Economics, and Organization* 3(2): 243-77.
- Recommended: STEPHEN C. HALPERN. ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (ch. 3-4).

May 30: Agency Rulemaking and Judicial Review

- Case excerpts:
 - *Massachusetts v. EPA* (2007)
 - *Chevron, U.S.A., Inc. v. NRDC* (1984)
 - *Goldberg v. Kelly* (1970)
- Overview of Administrative Law
- Administrative Procedure Act
- Recommended: William Landes & Richard Posner. 1975. “The Independent Judiciary in an Interest-Group Perspective,” *Journal of Law and Economics* 18(4): 875-901..
- Recommended: Thomas J. Miles & Cass R. Sunstein. 2006. “Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron.” *University of Chicago Law Review* 73(3): 823-880 .
- Recommended: Charles Shipan. 2004. “Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence.” *American Political Science Review* 98(3): 467-480 (skim technical details).

June 4: Hollow Hope or Force for Democracy?

Assignment #3 due by 2:00 p.m.

- GERALD ROSENBERG, *THE HOLLOW HOPE* (1991) ch. 2.
- ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2018) ch. 1.
- TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990) ch. 1 and 4.
- Marc Galanter. 1974. “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9(1): 95-160.
- Recommended: Charles Epp, “Law as an Instrument of Social Reform,” in *OXFORD HANDBOOK OF LAW & POLITICS* (eds. Whittington, et al. 2008) ch. 34.
- Recommended: Robert Kagan, “American Courts and the Policy Dialogue,” in *MAKING POLICY, MAKING LAW* (eds. Miller & Barnes 2004) ch. 1.
- Richard H. Pildes, “Romanticizing Democracy, Political Fragmentation, and the Decline of American Government,” *Yale Law Journal* 124(4): 804-852.