Course Goals and Objectives:

Americans settle an uncommon proportion of policy questions through a legal process rather than a political one. In effect, this means that courts play a substantial role in the making of public policy. This course will explore the complex and controversial relationship between public policy and courts of law in the United States. The course will approach this relationship from both a normative and an empirical perspective. That is to say, we will examine the role that courts should play as well as the role that they actually play in the making of public policy.

The principal objectives of the course are the following.
1. Familiarize students with the historical development of the courts’ involvement in several major areas of public policy
2. Familiarize students with the major alternative understandings of the constitutional role of courts in the making of public policy, especially as these understandings rely upon different theories of separation of powers, individual liberty, and constitutional democracy
3. Prepare students to evaluate intelligently the courts’ involvement in the making of public policy in light of these alternative understandings

Required Texts:


Online Resources:

The Founders’ Constitution (http://press-pubs.uchicago.edu/founders)
Justia.com: Supreme Court Center (supreme.justia.com)
Legal Information Institute at Cornell Law School (www.cornell.law.edu)
The Avalon Project at Yale Law School (avalon.law.yale.edu)
Teaching American History (www.teachingamericanhistory.org)

Readings:
The readings for the course will consist primarily of judicial opinions and secondary literature on the role of the Courts in the policy process. Opinions can be found online from a number of sources. Articles from scholarly journals and law reviews can be easily obtained online through the Baylor libraries website. All other readings will be posted on Blackboard as PDF files. Please bring all reading with you to class in printed or electronic form.

Graduate Course Requirements:

Participation (10%): Come to class prepared to discuss the assigned readings with your peers.

Review Essay (30%): Write a review essay not more than 15 pages in length on a policy area in which the courts have played a substantial role. The essay should address the relevant case law as well as the reactions of other policy makers (e.g., states, Congress, or the administration) and treatments of the court’s role in secondary literature (i.e., scholarly journals, books, and law reviews). Suggested topics include criminal procedure, the use of eminent domain, antitrust policy, Congress’ use of the spending power to regulate, regulation of internet content, zoning, education, child protective services, affirmative action, medical research (stem cells), independent regulatory commissions, federal economic regulation, etc. The more specific the issue, the easier it will be to deal with, so broad themes like zoning or criminal procedure should probably be narrowed. The purpose of this assignment is to develop a solid grasp of the courts’ role in a particular policy area. Topics must be approved by the third week of the semester.

Prescriptive Essay (30%): Building on the review essay, write an essay not more than 15 pages in length in which you evaluate the role the courts have played in your chosen policy area and, if you have developed a position on the matter, suggest the direction you think the courts should go in future.

Final Exam (30%): All students will take a final exam.

Undergraduate Course Requirements:

Participation (10%): Come to class prepared to discuss the assigned readings with your peers.

Essay 1 (25%): Select an author covered in the second or third week of the course. Write an essay not more than 8 pages in length evaluating his or her approach to determining the proper role of Courts in the making of public policy. The essay should contain the following elements: (1) a summary of the approach advocated; (2) a comparison of this approach with competing alternatives; (3) an incisive critique of the approach; (4) a competent defense of the approach against these criticisms. It will be necessary to look beyond the assigned readings to adequately address the topic.

Essay 2 (25%): Select one of the policy areas addressed in the course. Compose an essay not more than 8 pages in length evaluating the constitutional issues the policy raises and the manner in which the Court has settled these issues. You may, if you wish, conclude your essay by suggesting the direction the Court’s treatment of similar policies should take in future cases.
Final Exam (40%): All students will take a final exam.

Grading Scale:

A=100-90, B+=89-87, B=86-80, C+=79-77, C=76-70, D=69-60, F=59-0

Attendance Policy:

Students will be expected to attend every class meeting and to participate extensively in discussion. For every absence after the third, two points will be deducted from a student’s final grade for the course. Any student missing more than 25% of scheduled class meetings will fail.

Course Outline:

Week 1 - Law and Politics in the Making of Public Policy: An Introduction
Marbury v. Madison (1803)
Boerne v. Flores (1997)
Thomas Jefferson to James Madison, 6 September 1789 (FC 1.2.23)
Eakin v. Raub (1825)
Hamilton, Madison and Jay, Federalist, Nos. 49 & 78 (1788)

Week 2 - The Judicial Role in the Making of Public Policy I
William J. Brennan, Address to the Text and Teaching Symposium, Georgetown University, 12 October 1985 (BB)
Alexander Bickel, The Least Dangerous Branch (Yale University Press, 1986), ch. 5 (BB)

Weeks 3 - The Judicial Role in the Making of Public Policy II
Mark Tushnet, Taking the Constitution Away from the Courts (Princeton University Press, 1999) (excerpts BB)
Ronald Dworkin, Freedom’s Law, Introduction
Bruce Ackerman, We the People: Foundations (Harvard University Press, 1991), ch. 10 (BB)

Week 4 - The Institutional Integrity of Policy-Making: Taxation, Spending, and Commerce
Gibbons v. Ogden (1824)
U.S. v. E.C. Knight (1895)
NLRB v. Jones & Laughlin Steel (1937)
Wickard v. Filburn (1942)
South Dakota v. Dole (1987) w/ O’Connor’s dissent
U.S. v. Lopez (1995) w/ Kennedy’s and Thomas’ concurrences and Stevens’ dissent
U.S. v. Morrison (2000) w/ Breyer’s dissent
Barnett, Restoring the Lost Constitution, chs. 7 and 11

Week 5 - The Institutional Integrity of Policy-Making: Discretion and Judgment
Standard Oil Company v. United States (1911)
INS v. Chadha (1983) w/ Powell’s concurrence
Bowsher v. Synar (1986)
Clinton v. City of New York (1998) w/ Kennedy’s concurrence
Massachusetts v. EPA (2007) w/ Roberts’ dissent
John Rohr, To Run A Constitution: The Legitimacy of the Administrative State (The University Press of Kansas, 1986) chs. 9 & 10 (BB)

Week 6 - Property Rights and Economic Regulation: Contracts and Bankruptcy
Fletcher v. Peck (1810)
Sturges v. Crownenshield (1819)
Ogden v. Saunders (1827) w/ Marshall’s dissent
Providence Bank v. Billings (1830)
Charles River Bridge v. Warren Bridge (1837) w/ Story’s dissent
Home Building and Loan v. Blaisdell (1934)

Week 7 - Property Rights and Economic Regulation: The Privileges or Immunities Clause
Slaughterhouse Cases (1873)
Whittington, Constitutional Construction, ch. 1 (BB)
Michael Zuckert, “Fundamental Rights, the Supreme Court and American Constitutionalism: The Lessons of the Civil Rights Act of 1866,” in Wilson and Masugi
Dworkin, Freedom’s Law, ch. 3

Week 8 - Property Rights and Economic Regulation: Substantive Due Process
Munn v. Illinois (1877) w/ Field’s dissent
Lochner v. New York (1905)
West Coast Hotel v. Parrish (1937)
Barnett, Restoring the Lost Constitution, ch. 8

Week 9 - Property Rights and Economic Regulation: The Takings Clause
Berman v. Parker (1954)
Midkiff v. Hawaii Housing Authority (1984)
Nollan v. California Coastal Commission (1987)
Lucas v. South Carolina Coastal Council (1992)
Kelo v. City of New London (2005) w/ O’Connor’s dissent

Week 10 - Civil Rights and Public Policy: Segregation
United States v. Carolene Products (1938), especially footnote 4
Plessy v. Ferguson (1896) w/ Harlan’s dissent
Shelley v. Kramer (1948)
Brown v. Board of Education (1954)
Barnett, Restoring the Lost Constitution, chs. 9-10
Bruce Ackerman, We the People: Foundations, ch 5

Week 11 - Civil Rights and Public Policy: Judicial Remedies
Baker v. Carr (1962) w/ Frankfurter’s and Harlan’s dissents
Reynolds v. Sims (1964) w/ Harlan’s dissent
Swann v. Charlotte-Mecklenberg (1971)
Sotirios Barber, Welfare and the Constitution, chs. 1-2, 5-6
Rosenberg, The Hollow Hope, pt. 1
Barnett, Restoring the Lost Constitution, ch. 6

Week 12 - Civil Rights and Public Policy: Affirmative Action
Board of Regents v. Bakke (1978)
Ricci v. DeStefano (2009)

Week 13 - The Family, Privacy, and Social Policy: Child Rearing and Education
Meyer v. Nebraska (1922)
Pierce v. Society of Sisters (1925)
Moore v. City of East Cleveland (1977)
Wisconsin v. Yoder (1978) w/ Douglas’ dissent
Troxel v. Granville (2000) w/ Kennedy’s and Scalia’s dissents
Ashcroft v. ACLU (2004) w/ Breyer’s dissent
J. Gresham Machen, *Christianity and Liberalism* (Eerdmans, 1923, 1996), ch. 1 (BB)

**Week 14 - The Family, Privacy, and Social Policy: Sex and Procreation**
*Jacobson v. Massachusetts* (1905)
*Griswold v. Connecticut* (1963)
*Eisenstadt v. Baird* (1972)
*Roe v. Wade* (1973)
*Planned Parenthood v. Casey* (1992) w/ Scalia’s dissent
Dworkin, *Freedom’s Law*, chs. 3-5
Rosenberg, *The Hollow Hope*, part 2
*Lawrence v. Texas* (2003) w/ O’Connor’s concurrence

**Week 15 - Campaign Finance Reform and Free Speech**
*Buckley v. Valeo* (1976)
*Citizens United v. FEC* (2009)