

**Baylor University**  
**Political Science 4342**  
**Public Policy and the Courts**  
**Professor David Nichols**

**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:**

Sotirios Barber, *Welfare and the Constitution* (Princeton University Press, 2003)  
Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, 2004)  
Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996)  
Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago University Press, 1991)  
Bradford Wilson and Ken Masugi, eds., *The Supreme Court and American Constitutionalism*, (New York: Rowman and Littlefield, 1997)

**Online Resources:**

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

Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker," *Journal of Public Law* 6 (1957): 279-95

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)

Robert Bork, "The Constitution, Original Intent, and Economic Rights," *San Diego Law Review* 23, no. 4 (1986): 823-32

David Strauss, "Common Law Constitutional Interpretation," *University of Chicago Law Review* 63, no. 3 (1996): 877-935

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

Randy Barnett, "Necessary and Proper," in Wilson and Masugi, 157-94

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  
Robert George and Gerard Bradley, "Outer Limits: The Commerce Clause and Judicial Review,"  
in Wilson and Masugi, 195-210

Week 5 - The Institutional Integrity of Policy-Making: Discretion and Judgment

*Standard Oil Company v. United States* (1911)  
*Schechter Poultry v. U.S.* (1935)  
*Humphrey's Executor v. U.S.* (1935)  
*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. Crownshield* (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)  
Douglas Kmiec and John McGinnis, "The Contract Clause: A Return to the Original  
Understanding," *Hastings Constitutional Law Quarterly* 14 (1986-87): 525

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  
Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," *Harvard Law Review* 23  
(1916): 353  
Cass Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (1987): 873

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  
Richard Epstein, "Takings: Descent and Resurrection," *Supreme Court Review* (1987): 1  
Mark Tunick, "Constitutional Protections of Private Property," *University of Pennsylvania Journal of Constitutional Law* 3 (2001): 885

#### 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  
Scalia, "Economic Affairs as Human Affairs," *Cato Journal* 4 (1984)  
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)  
*San Antonio Independent School District v. Rodriguez* (1973)  
*Milliken v. Bradley* (1974)  
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)  
*Adarand Constructors v. Peña* (1995)  
*Grutter v. Bollinger* (2003)  
*Ricci v. DeStefano* (2009)  
L. Peter Schultz, "The Supreme Court, Affirmative Action, and the Judicial Function" (1990) (BB)  
Kenneth L. Karst, "The Revival of Forward-Looking Affirmative Action," *Columbia Law Review* 104, no. 1 (2004): 60-74  
Richard Epstein, "A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense," *Michigan Law Review* 100, no. 8 (2002): 2036-61  
David Strauss, "The Myth of Colorblindness," *Supreme Court Review* (1986): 99  
David Strauss, "Affirmative Action and the Public Interest," *Supreme Court Review* (1995)

#### 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)  
Emily Buss, "Adrift in the Middle: Parental Rights after *Troxel*," *Supreme Court Review* (2000)

Week 14 - The Family, Privacy, and Social Policy: Sex and Procreation

Samuel Warren and Louis Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890)

*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

William Mohengarten, "Same-Sex Marriage and the Right of Privacy," *Yale Law Journal* 103,  
no. 6 (1994): 1495-1531

Week 15 - Campaign Finance Reform and Free Speech

*Buckley v. Valeo* (1976)

*McConnell v. FEC* (2003)

*Wisconsin Right to Life v. FEC* (2006)

*Randall v. Sorrell* (2006)

*Citizens United v. FEC* (2009)

Robert Bauer, "When 'The Pols Make the Calls': McConnell's Theory of Judicial Deference in the Twilight of Buckley," *University of Pennsylvania Law Review* 153, no. 1 (2004)

Richard L. Hasen, "Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of *McConnell v. FEC*," *University of Pennsylvania Law Review* 153, no. 1 (2004)

Persily and Lammie, "Perception of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law," *University of Pennsylvania Law Review* 153, no. 1 (2004)