

PSC 4342
Public Policy and the Courts
Spring 2017

Instructor: Steve Block

Office: Draper 350

Office Hours: Tuesdays and Thursday, 10am-12pm, and by appointment

Email: steve_block@baylor.edu

Class Time: MWF, 1:25-2:15pm

Room: Draper 353

Course Goals and Objectives:

In what is the most famous of all defenses of the authority and power accorded by the Constitution to the federal courts, *Federalist 78*, Alexander Hamilton asserted that “the judiciary, due to the nature of its functions, will be least dangerous to the political rights of the Constitution.” Hamilton qualified this assessment, however, by making clear that this judgment held true only so long as the courts did not usurp the powers vested in the other branches. Given that Americans settle an uncommon proportion of policy questions through a legal process rather than a political one, which effectively means that courts play a substantial role in the making of public policy, is the judiciary really “the least dangerous branch” as Hamilton claimed? This course will explore the complex and controversial relationship between public policy and courts of law in the United States with this question in mind. We will examine the role that courts *should* play as well as the role that they *actually* play in the making of public policy.

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 of primary documents (judicial opinions, political speeches, writings of the Founders, etc.) and secondary literature on the role of the Courts in the policy process. Primary documents can be found online from a number of sources listed above, but I will supply abridged opinions/readings when necessary to make reading manageable. All other readings will be posted on Canvas. You should bring all the readings to be discussed with you to class.

Undergraduate Course Requirements:

Participation (10%): There will be two elements of the participation grade. First, come to each class prepared to discuss the assigned readings with your peers, and you will be evaluated on both the quantity and quality of your contributions. Second, each student will be assigned one Supreme Court case covered during the course and will be required to provide a 5-10 minute presentation on the case and to generate at least one relevant question about the case for class discussion.

Quiz Average (15%): A series of quizzes will be administered on the readings for the course. Some will be announced, some will not, so you should come prepared each class for a quiz on the reading assignment.

Midterm Exam (25%): All undergraduate students will take a midterm exam.

Essay (25%): Details TBA.

Final Exam (25%): All students will take a final exam.

Graduate Course Requirements:

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

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, 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, campaign finance 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 20 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.

Grading Scale:

>93%= A >90-93%=A- >87-90%=B+ >83-87%=B >80-83%=B- >77-80%=C+
>73-77%=C >70-73%=C- >67-70%=D+ >63-67%=D >60-63%=D- 0-60%=F

Attendance Policy: Students will be expected to attend every class meeting and to participate extensively in class discussion. For every recorded absence after the third, two points will be deducted from a student's final grade for the course. In accordance with University policy, any student missing more than 25% of scheduled class meetings will fail.

Note on Technology: The use of cell phones during class is absolutely prohibited. Each violation of this rule will result in a deduction of *five points* from the student's final grade. Laptop computers/tablets may only be used in class with the consent of the instructor, and consent will usually only be given for a documented learning disability. If the instructor discovers improper use of a computer in class (i.e. anything but taking notes/looking up information at the request of instructor) *five points* will be deducted from the student's final grade.

TITLE IX OFFICE: If you or someone you know would like help related to an experience of sexual violence including sexual assault, harassment, domestic violence, dating violence, stalking or other type of non-consensual sexual conduct, please contact Kristan Tucker, the Title IX Coordinator at Baylor University, by email (Kristan_Tucker@baylor.edu) or phone (254-710-8454). Anonymous reporting for students or third parties is also available on the Title IX website, www.Baylor.edu/TitleIX.

Turnitin.com: Students agree that by taking this course, all required papers, exams, class projects or other assignments submitted for credit may be submitted to turnitin.com or similar third parties to review and evaluate for originality and intellectual integrity. A description of the services, terms and conditions of use, and privacy policy of turnitin.com is available on its website: <http://www.turnitin.com/>. Students understand all work submitted to turnitin.com will be added to its database of papers. Students further understand that if the results of such a review support an allegation of academic dishonesty, the course work in question as well as any supporting materials may be submitted to the Honor Council for investigation and further action.

Tentative Course Reading Schedule:

American Constitutionalism and the Courts

Mon 1/9: Course Introduction

1/11-1/16: No Class

Wed 1/18: Popular Sovereignty and Written Constitutionalism:

US Constitution, Preamble and Articles I-III

Brutus, *Letter 1* (1787)

Madison, *Federalist 10* (1787)

Fri 1/20: Popular Sovereignty and Written Constitutionalism:

Madison, *Federalist 49* (1788)

Thomas Jefferson to James Madison, 6 September 1789

Mon 1/23: The Constitutional Role of the Judiciary:

Brutus, *Letter 15* (1788)

Alexander Hamilton, *Federalist 78* (1788)

Wed 1/25: Judicial Review and Its Critics:

Marbury v. Madison (1803)

Thomas Jefferson to W.H. Torrance, 11 June 1815

Fri 1/27: Judicial Review and Its Critics:

Eakin v. Raub (1825, Gibson Dissenting)

Stanley Brubaker, "The Supreme Court as Astigmatic Schoolmarm"

Mon 1/30: Judicial Interpretation of the Constitution, Part I:

William J. Brennan, "Constitutional Interpretation"

David A. Strauss, "Common Law Constitutional Interpretation"

Wed 2/1: Judicial Interpretation of the Constitution, Part II:

Robert Bork, "The Constitution, Original Intent, and Economic Rights"

Antonin Scalia, "Common-Law Courts in a Civil Law System"

The Construction of Congress' Economic Powers

Fri 2/3: Constitutional Structure and Congressional Commercial Regulation:

US Constitution, Article I

US v. EC Knight (1895)

NLRB v. Jones & Laughlin Steel (1937)

Wickard v. Filburn (1942)

Mon 2/6: Constitutional Structure and Congressional Commercial Regulation:

US v. Lopez (1995) w/ Thomas concurrence and Breyer dissent

Gonzalez v. Raich (2005) w/ O'Connor dissent

Wed 2/8: Constitutional Structure and Congress' Taxing and Spending Powers:
Bailey v. Drexel Furniture (1922)
Steward Machine v. Davis (1937)

Fri 2/10: Constitutional Structure and Congress' Taxing and Spending Powers:
South Dakota v. Dole (1987) w/ O'Connor dissent
NFIB v. Sebelius (2012) w/ Scalia dissent

Judicial Protection of Constitutional Rights

Mon 2/13: Reconstruction and its End:
US Constitution, Amendments 1-10, 13-15
The Civil Rights Acts of 1866 and 1875 (selections)
The Slaughterhouse Cases (1873) w/ Field dissent
The Civil Rights Cases (1883) w/ Harlan dissent

Economic and Property Rights

Wed 2/15: The Rise of Economic Due Process
Munn v. Illinois (1877) w/ Field dissent
Lochner v. New York (1905) w/ Holmes and Harlan dissents

Fri 2/17: The Decline of Economic Due Process
West Coast Hotel v. Parrish (1937)
US v. Carolene Products (1938) (Footnote Four)
Williamson v. Lee Optical Co. (1955)
Cass Sunstein, "Lochner's Legacy"

Mon 2/20: Governmental Takings: What is a "Taking?"
Lucas v. South Carolina Coastal Commission (1992)
Dolan v. City of Tigard (1994)
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002)

Wed 2/22: Governmental Takings: What is a "Public Use?"
Hawaii Housing Authority v. Midkiff (1984)
Kelo v. New London (2005) w/ O'Connor and Thomas dissents

Legal Equality

Fri 2/24: Segregation and Legal Equality
Plessy v. Ferguson (1896) w/ Harlan dissent
Cumming v. Board of Education (1899)

Mon 2/27: Desegregation

Sweatt v. Painter (1950)
Brown v. Board of Education I (1954)
Bolling v. Sharpe (1955)
Brown v. Board of Education II (1955)

Wed 3/1: Legal Equality Beyond Race:

San Antonio v. Rodriguez (1973) w/ Marshall Dissent
Michael M. v. Superior Court (1981)
United States v. Virginia (1996)

Fri 3/3: **Midterm Exam**

3/6-3/10: **Spring Break**

Privacy and Social Regulation

Mon 3/13: Parental Rights:

Meyer v. Nebraska (1922)
Pierce v. Society of Sisters (1925)
Troxel v. Granville (2000) w/ Kennedy and Scalia dissents

Wed 3/15: Marriage and the Family:

Griswold v. Connecticut (1965) w/ Black dissent
Loving v. Virginia (1967)

Fri 3/17: Marriage and the Family:

Eisenstadt v. Baird (1972)
Moore v. City of East Cleveland (1977)

Mon 3/20: Regulation of Abortion I:

Roe v. Wade (1973) w/ Rehnquist and White dissents
Akron v. Akron Center for Reproductive Health (1983)
John Hart Ely, "The Wages of Crying 'Wolf': A Comment on *Roe v. Wade*"

Wed 3/22: Regulation of Abortion II:

Webster v. Reproductive Health Services (1989)
Planned Parenthood v. Casey (1992) w/ Scalia dissent

Fri 3/24: Regulation of Abortion III:

Gonzales v. Carhart (2007) w/ Ginsberg dissent
Whole Women's Health v. Hellerstedt (2016)

Mon 3/27: "Autonomy" – Sexual and Otherwise

Bowers v. Hardwick (1986) w/ Stevens dissent
Washington v. Glucksberg (1997)

Wed 3/29: Autonomy and Gay Rights:

Lawrence v. Texas (2003) w/ O'Connor concurrence and Scalia dissent
Obergefell v. Hodges (2015) w/ Roberts and Scalia dissents

Religion in Public Life

Fri 3/31: Establishment of Religion: Governmental Aid to Religion:

Everson v. Board of Education (1947) w/ Jackson dissent
Board of Education v. Allen (1968)
Lemon v. Kurtzman (1971) w/ White dissent
Zelman v. Simmons-Harris (2002) w/ Thomas concurrence and Souter dissent

Mon 4/3: Establishment of Religion: Religious Coercion and Public Endorsement of Religion I:

Wallace v. Jaffree (1983) w/ Rehnquist dissent
Lee v. Weisman (1992) w/ Scalia dissent

Wed 4/5: Establishment of Religion: Religious Coercion and Public Endorsement of Religion II:

Van Orden v. Perry (2005) w/ Breyer concurrence
Greece v. Galloway (2014)

Fri 4/7: Free Exercise of Religion: Religious Exemptions, Part I:

Sherbert v. Verner (1963) w/ Harlan dissent
Wisconsin v. Yoder (1972)

Mon 4/10: Free Exercise of Religion: Religious Exemptions, Part II:

Lyng v. Northwest Indian CPA (1988)
Employment Division v. Smith (1990) w/ O'Connor concurrence

Wed 4/12: Free Exercise of Religion: The Religious Freedom Restoration Act

Religious Freedom Restoration Act (1993)
Boerne v. Flores (1997) w/ O'Connor dissent
Burwell v. Hobby Lobby Stores (2014) w/ Ginsburg dissent

Wed 4/19: Free Exercise of Religion: Religious Discrimination and Anti-Establishment Interests

Church of the Lukumi Babalu Aye v. Hialeah (1993)
Locke v. Davey (2004) w/ Scalia dissent
Trinity Lutheran Church v. Pauley (8th Cir. 2015)

Criminal Policing and Punishment

Fri 4/21: Criminal Procedure: The Exclusionary Rule and Coerced Confessions:

Akhil Reed Amar, "The Future of Criminal Constitutional Procedure"
Mapp v. Ohio (1961)
Miranda v. Arizona (1966) w/ Harlan dissent
Dickerson v. US (2000) w/ Scalia dissent

Mon 4/24: Criminal Procedure: Privacy, Technological Development, and Police Surveillance I:

Olmstead v. US (1928) w/ Brandeis dissent

Katz v. US (1967)

Maryland v. Smith (1973)

Wed 4/26: Criminal Procedure: Privacy, Technological Change, and Police Surveillance II:

Kyllo v. US (2001)

US v. Jones (2012) w/ Sotomayor concurrence

Riley v. California (2014)

Fri 4/28: Punishment: Capital Punishment:

Gregg v. Georgia (1976) w/ Brennan and Marshall dissents

Roper v. Simmons (2005) w/ Scalia dissent

Kennedy v. Louisiana (2008)

Mon 5/1: Punishment: Proportionality:

Harmelin v. Michigan (1991) w/ Scalia dissent

Ewing v. California (2003)

Miller v. Alabama (2012) w/ Roberts dissent