

**Department of Political Science
Spring 2022**

Courts and Social Policy

Ed Rubin
Kaleigh Ruiz

American courts resolve disputes between private parties and determine guilt or innocence in criminal trials. But they also do a great deal more. Using their authority under the Constitution, the Supreme Court has played a decisive role in social policy areas such as minority rights, intimate family and sexual relations, voting rights, police practices, punishment of criminals, environmental protection, and many other areas. In addition, lower federal courts have managed reform programs for prisons, mental hospitals, schools, and other public institutions.

This course will consider the role of courts in our governmental system. Are they overstepping their boundaries when they take an active role in public policy formation and institutional management? Are they interfering with the proper functioning of other government institutions, such as Congress, the Presidency or state governments? Are they acting on the basis of law or merely expressing the political preferences of the judges? Are they upholding or violating the rule of law? Are they supporting or undermining democratic government? With the nation waiting in anticipation to see what the current Supreme Court will do, this is a crucial time for us, as a nation, to address these questions.

Written assignments: Each student will be responsible for preparing questions for one of the “Zoom” visitors, two short papers during the semester describing a case and one 15-20 paper at the end

Readings: The one book we want you to buy, as we will be using a large proportion of it, is

Geoffrey R. Stone and David A. Strauss, *Democracy and Equality*.

All other readings will be available online via Brightspace. Cases are publicly available and easily searchable, but you will want to use the Brightspace page as many of our cases will be edited down for you.

Zoom Visitors: The following authors will join our class via Zoom on the day their work is assigned:

Gerald Rosenberg, Univ. of Chicago Pol. Sci.

Erwin Chemerinsky, Univ. of California, Berkeley L.S. (for the Lockyer case)

David Strauss, Univ. of Chicago L. S. (to be determined)

William Fletcher, U.S. Court of Appeals, Ninth Circuit

Susan Sturm, Columbia University L.S.

Malcolm Feeley, University of California, Berkeley L.S.

Charles Epp, University of Toledo Pol. Sci.

Owen Fiss, Yale University L.S.

Brian Tamanaha, Washington University L.S.

Schedule of Readings (subject to change)

A: Introduction to Judicial Decision Making

Week 1: Decisions

Tuesday (Jan. 18)

Introduction (No Reading)

Thursday (Jan. 20)

Nix v. Hedden, 149 U.S. 304 (1893)

Karl Llewellyn, *The Bramble Bush*, pages 60-71

Orin Kerr, "How to Read a Judicial Opinion," pp. 1-8

B: Managing the Legal System

Week 2: Juries and Attorneys

Tuesday (Jan. 25)

Batson v. Kentucky, 476 U.S. 79 (1986)

Julia C. Maddera, "*Batson* in Transition: pp. 195-212

Thursday (Jan. 27)

Gideon v. Wainwright, 372 U.S. 335 (1964)

Geoffrey Stone & David Strauss, *Democracy and Equality*, pages 52-62

Anthony Lewis, *Gideon's Trumpet*, pp. ____

Week 4: Police Practices and Sentencing

Tuesday (Feb. 1)

Geoffrey Stone & David Strauss, *Democracy and Equality*, pp. 27-39, 101-113

Thursday (Feb. 3)

Lockyer v. Andrade, 538 U.S. 63 (2003)

McCleskey v. Kemp, 481 U.S. 279 (1987)

Evan Tsen Lee & Ashutosh Bhagwat, "The McCleskey Puzzle," pp. 145-161

C: Confronting Public Controversies

Week 5: American Apartheid

Tuesday (Feb. 8)

Plessy v. Ferguson, 153 U.S. 537 (1896)

Brown v. Board of Education, 347 U.S. 483 (1954)

Geoffrey Stone and David Strauss, *Democracy and Equality*, pp. 13-26

Thursday (Feb. 10)

Kevin D. Brown, "Review: Robert L. Carter, *A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights*," pp. 931-943

Erwin Chemerinsky, *The Case Against the Supreme Court*, 21-53

Gerald Rosenberg, *The Hollow Hope*, pp. 42-71

Week 6: Voting

Tuesday, Feb. 15

Smith v. Allwright, 321 U.S. 649 (1944)

Baker v. Carr, 369 U.S. 186 (1962)

Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484 (2019)

Geoffrey Stone and David Strauss, *Democracy and Equality*, pp. 76-88

Thursday, Feb. 17

Shelby County v. Holder, 570 U.S. 529 (2013)

Brnovich v. Democratic National Comm., 594 U.S. ___, 141 S. Ct. 1263 (2021)

Zachary Roth, *The Great Suppression*, pp. 17-42

Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, "Voter Identification Law and the Suppression of Minority Votes" [79 *Journal of Politics*]

Week 7: Sex and Reproduction

Tuesday (Feb. 22)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Roe v. Wade, 410 U.S. 113 (1973)

Gerald Rosenberg, *The Hollow Hope*, pp. 173-201

Thursday (Feb 24)

J.B. v. M.B. 783 A.2d 707 (2001)

Johnson v. Calvert, 851 P.2d 776 (1993)

Anita Allen, "The Black Surrogate Mother," 8 Harv. Blackletter J. 17 (1991)

Week 8: Intimate Relations

Tuesday (Mar. 1)

Loving v. Virginia, 388 U.S. 1 (1967)

Geoffrey R. Stone and David A. Strauss, *Democracy and Equality*, pages 114-123

Dorothy Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 N.Y. L. Sch. L. Rev. 175 (2014)

Thursday (Mar. 3)

Obergefell v. Hodges, 576 U.S. 644 (2015)

Jack M. Balkin, *What Obergefell v. Hodges Should Have Said*, pp. 71-88

SPRING BREAK - NO CLASSES

D. Courts as Parens Patriae

Week 9:

Tuesday (Mar. 15)

Prince v. Massachusetts

Parham v. J.R.

Maria N. Greenstein, *The Role of the Judge in Children's Matters*

Thursday (Mar. 17)

Stanley v. Illinois

In re J.N.S.

Week 10:

Tuesday (Mar. 22)

Ginsburg v. New York

Tinker v. Des Moines

Thursday (Mar. 24)

In re Gault

Roper v. Simmons

E. Courts as Institutional Reformers

Week 11: Institutional Reform: Prisons

Tuesday (Mar. 29)

Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State*, pp. 27-79

Thursday (Mar. 31)

William Fletcher, *The Discretionary Constitution*, pp. 635-57

Susan Sturm, *A Normative Theory of Public Law Remedies*, pp. 1378-1412

Week 12: Police Departments

Tuesday (Apr. 5)

Monroe v. Pape, 365 U.S. 167 (1961)

Kisela v. Hughes, 584 U.S. ___, 138 S. Ct. 1138 (2019)

David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, pages 23-35; 72-81

Thursday (Apr. 7)

City of Los Angeles v. Lyons, 461 U.S. 95 (1983)

Rizzo v. Goode, 423 U.S. 362 (1976)

Charles Epp, *Making Rights Real*, pp. 93-138

F. Policy and Law

Week 14: The Role of the Judge

Tuesday (Apr. 12)

Jerome Frank, *Courts on Trial*, pp. 146-64

Jeffrey Segal & Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, pp. 1-26, 86-114

Thursday (Apr. 14)

Owen Fiss, *Objectivity and Interpretation*

Ronald Dworkin, *Law's Empire*, pp.

Week 16: The Role of Law

Tuesday (Apr. 19)

Robert A. Dahl, "Decision-Making in a Democracy"

Erwin Chemerinsky, *The Case Against the Supreme Court*, pp. 229-65

Thursday (Apr. 21)

Brian Tamanaha, *Beyond the Formalist-Realist Divide*, pp. 111-31, 181-99