

## The Role of Courts in a Democratic Society

Political Science 01:790:411:H1

Advanced Studies in Law II

Thursday 2:50-5:50pm (Fall semester – 2018)

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“In a democracy, the power to make law rests with those chosen by the people. [The Supreme Court’s] role is more confined – ‘to say what the law is.’”

Chief Justice John Robert in King v. Burwell

### Introduction

Democracy has been described as governance by the majority, subject to the rule of law. What do we mean by the “rule of law,” and, to the extent we accept the proposition that courts make law, how does this fit within the idea of democracy? What is the nature of a democratic society? Since WW II there has been a significant increase in judicial involvement in the making not only of law itself, but, as well, in determining public policy. This raises the question as to the legitimacy of their actions. We may ask three questions: first, whether the role of a court as described is democratic; second, whether, if it is not democratic, is it nonetheless justifiable; and third, whether it is indeed a necessary element of a democracy.

This seminar is intended to examine not so much the correctness of judicial decisions, but the role courts should properly play in the democratic process. We will review the nature and sources of law, including the purpose of constitutions, and what we mean by the “rule of law;” the social functions of law and courts; the concepts of judicial reasoning and review; and the court’s function in the constitutional separation powers and checks and balances. While the discussion will focus principally on courts in the United States, we will also look at courts in other developed and developing countries.

We will examine not only the normative role of law and courts, but also how law is applied and how courts work in practice, and the implication of courts making social policy. The discussions will include an analysis of contemporary opinion of judicial decisions in landmark US

Supreme Court cases such as *Lockner v New York*, *Brown v Board of Education*, and *Roe v Wade*, and more recent cases of *Hamdi v Rumsfeld*, *Citizens United*, *Obergefell v Hodges*, and the *Masterpiece Cakeshop* decision. We will ask, for instance, whether morality is a necessary element of judicial decisions, whether court should act where the legislature fails, and how we might hold judges accountable.

This course is scheduled to meet 14 times, once a week for three hours. It will consist principally of class discussion, student oral and written presentations, and a final paper of no more than ten pages. Grade distribution will be based one-half on seminar participation, and the other half, more or less, between presentations and the final paper. I will meet students, upon request, prior to class in the class room assigned for the seminar.

### Reading Materials

1. Required books:
  - a. Laurence Tribe and Joshua Matz, *Uncertain Justice*, (Henry Holt and Company, 2014).
  - b. Antonin Scalia, *A Interpretation*, (Princeton University Press, 1997).
  - c. Cass R. Sunstein, *Constitutional Personae*, (Oxford University Press, 2015).
  - d. Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, (Twelve-Hachette Book Group, 2010).
  - e. A.C. Grayling, *Democracy and Its Crisis*, (One World Publications, 2017).
2. Other materials will be handed out during the course of the seminar.

### Course Outline

1. September 6: Course Introduction
  - Setting the Stage – What should we expect of courts in a democracy?
2. September 13: The Nature of Law
  - \*What is “law” and what do we mean by “rule of law?”
  - \*Law as distinguished from custom and other social rules.

\*Sources and types of law.

Readings:

a) D.J. Galligan, *Law in Modern Society*, (Oxford, 2007) Ch. 1, 3, and 12 (copy provided)

b) J. Raz, *The Authority of Law*, (Clarendon Oxford, 1979), Ch. 11 (copy provided)

3. September 20: The Nature of “Democracy” and the nature of Constitutions.

After reading assigned pages of the Grayling book, be prepared to discuss what our form of government is -where do we get the sense of it being a “democracy?” In that context consider the following questions:

\* What are constitutions for?

\* What should constitutions contain?

\_ \* What functions do constitutions serve?

Readings: A.C. Grayling, “Democracy and Its Crisis,” pages 1-93.

4) September 27: The Functions of Courts: The Normative Case.

\* The nature of the common law and dispute resolution

\* Statutory interpretation

\* Modes of legal reasoning

\*Courts and social change

Readings:

Melvin Aron Eisenberg, *The Nature of the Common Law*, (Harvard, 1988).

Chapters 1, 2, 3, and 8 (copy provided).

5) October 4: Judicial Review

- \* Origin and nature of judicial review.
- \* Limitations on review: constitutional, political, and practical

Readings:

- a) The Federalist Paper No. 78
- b) Antonin Scalia, Preface and Scalia: “Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws.” (pages 3-47).
- c) Scalia’s book, Comment by Gordon Wood, pages 49-63.
- d) G. Edward White, *The American Judicial Tradition* (Oxford, 1976).  
Ch. 1: “John Marshall and the genesis of the Tradition.” (Copy provided).
- e) Jeffrey Rosen, *The Most Democratic Branch*, (Oxford University Press, 2006)  
Introduction (Copy provided).
- f) King v. Burwell, 576 U.S. \_\_\_\_ (2015).

6) October 11: Separation of Powers and Checks and Balances – Watergate Revisited

- \*Judicial review of the actions of legislative and executive branches
- \*Executive discretion in times of war and terror
- \*Courts and administrative agencies: due process standards and review of discretion

Readings:

- a) Archibald Cox, *The Role of the Supreme Court in American Government*, (Oxford, 1976), Introduction and Ch. 1, “The Supreme Court and the System of Government,” pages 1-30 (Copy provided).
- b) Tribe and Matz, *Uncertain Justice*, Prologue: “Uncertain Justice,” and Ch. 6, “Presidential Power: Hail to the Chief.”
- c) Fionnuala Ni Aolain, “Trusting the Courts in Times of Internal Strife,” (Presented at a seminar on Courts and the Making of Public Policy, given by the Foundation for Law, Justice, and Society, 2009). (Copy provided).
- d) *Hamdi v. Rumsfeld*, 542 U.S. (2004).
- e) Stephen Breyer: *Active Liberty*, (Knoph, 2005), pages 102-108. (copy provided).

7) October 18: Deciding Hard Cases: Theories of Judicial Reasoning.

Readings:

- a) Cass R. Sunstein, *Constitutional Personae*.
- b) Barak Obama's senate floor statement explaining why he would vote against confirming Supreme Court nomination of John Roberts (September, 2005) (Copy provided).

8) October 25: Deciding Hard Cases II.

Readings:

- a) Scalia book: comment by Ronald Dworkin (pages 115-127).
- b) A.G. Guest, "Logic in the Law." Oxford Essays in Jurisprudence (Oxford University Press, 1961). (Copy Provided).

9) November 1: Deciding Hard Cases III.

Readings:

- a) Scalia book: Response by Scalia to Wood and Dworkin (pages 129-144 and 144-149).
- b) Tribe and Matz book: Chapter 3: "Campaign Finance: Follow the Money." (pages 88-120) and Chapter 4: "Freedom of Speech: Sex, Lies, and Video Games" (pages 121-153).

10) November 8: Should Judges be Concerned if the Public is Outraged at Their Opinions.

\* Is the majority view necessarily good for the common welfare in a democratic society?

Readings:

Sunstein: "Public Opinion and Social Consequences," Annual lecture of the Foundation for Law, Justice, and Society. (Copy provided).

11) November 15: The Role of Courts in Determining Social Policy: Personalities, Philosophy, and Politics.

Readings:

Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*.

12) November 29: Courts and Public Policy: Establishing the Bounds of Privacy.

Readings:

- a) Tribe and Matz: Chapter 7, "Privacy: What Have You Got to Hide?" (pages 219- 252).
- b) Jack M. Balkin, "The Constitution in the National Surveillance State," pages 197-208. (Copy Provided).

13) December 6: Summing Up: Assessing the Court's Role.

\* What is the court's proper role in a democratic society? Is judicial law making and involvement in determining social policy unavoidable but undemocratic, or a necessary element of our democracy? Has our Supreme Court assumed its proper role, or is it just another political institution? Let's think again about "Democracy is governance by the majority, subject to the rule of law."

14) December 13: Final Paper Due.

