

POLITICAL SCIENCE 206
THE AMERICAN COURTS
Winter 2013
Professor Kimberly Smith
Wilis 203
MWF 3a

Office Hours: MW 9-11, Fri 1-2
Office: Goodsell 106a
Phone: 4123
e-mail: ksmith@carleton.edu

In this course, we consider courts as political institutions, comparable to but also different from Congress and the Presidency. We will examine the institutional features of the courts, how judges makes decisions and at the logical, social and institutional factors that constrain their discretion, the relationship between the courts and the other branches of government, and whether or how courts can be used to effect significant political change.

Course requirements: There will be no exams. Your grade will be computed as follows:

Paper #1: 25%

Paper #2: 30%

Paper #3: 30%

Participation: 15% (Assignments #1 & #2 are ungraded but contribute to your participation score.)

Rewrite policy: The first and second papers may be revised for a new grade, until the deadline for final revisions indicated on the syllabus. There's no time to revise the third paper, but I will be happy to review drafts before you turn it in.

*****All assignments must be turned in on the day they are due. No late papers, please!**

*****Readings should be completed prior to class**

Texts: Frank Murphy, Courts, Judges and Politics, 6th ed.
Rosenberg, The Hollow Hope, 2nd ed
Feeley & Rubin, Judicial Policy Making and the Modern State
Epstein & Knight, The Choices Justices Make
Additional readings on electronic reserve [R]

Course Outline

Institutional Features of American Courts

Class 1: Introduction

Class 2: Structure of the Judicial System and the Role of Courts

Murphy, Ch. 3, pp. 77-91

Murphy, Ch. 2, intro

Glaberson, In Tiny Courts of NY, Abuses of Law and Power [R]

Class 3: Courts in a Constitutional System

Murphy, Ch. 2: 2.2, 2.3

Class 4: Judicial independence

Widner, "Building Judicial Independence in Common Law Africa,"
in Schedler et al, The Self-Restraining State [R]

- Assignment #1 due in class: Judicial independence exercise

Class 5: Judicial independence: How independent is the Supreme Court?

Murphy 2.4, 2.5

- Revised Assignment #1 due in class

Class 6: Selection of judges: Appointment vs Elections

Murphy, Ch. 4: intro, 4.8

Class 7: Selection of judges: Appointment vs Elections

Murphy, 4.1-4.6

Class 8: Selection cont,

Case study: Should Minnesota elect judges? [R]

***Paper 1 due in class**

Legal Reasoning and Judicial Behavior

Class 9: Reasoning from Cases: Reasoning by Analogy

Murphy, Ch. 10: intro, 10.2

*Please be prepared to discuss the common law exercise

Class 10: cont.

Murphy, Ch. 10: 10.1, 10.3

*Please be prepared to discuss the discussion questions

Class 11: Reasoning from Cases: Stare Decisis?

Murphy, Ch. 10: 10.5, 10.6, 10.7

Class 12: Reasoning from Statutes

Murphy, Ch. 11: intro, 11.1, 11.2

Class 13: cont.

Murphy, Ch. 11: 11.4, 11.5, 11.7, 11.8

TVA v Hill, 437 US 153 (1978) [locate on Lexis]

- Assignment #2 due in class: TVA v Hill exercise

Class 14: Constitutional Interpretation
Murphy, Ch. 12: intro, 12.2, 12.4, 12.8, 12.9

- Revised Assignment #2 due in class

Class 15: No class!

Class 16: Legal Reasoning and the Legal Community: Interpretation as a Chain Enterprise
Dworkin, Law as Interpretation [R]
Fish, Working on the Chain Gang, 60 Tex. L. Rev 527 (1982) [R]

***Final revision of Paper #1 due in class**

Class 17: The Strategic Interaction Model of Judicial Behavior
Epstein & Knight, Ch 1 & 2

Class 18: Cont
Epstein & Knight, Ch. 3& 4

Class 19: Cont.
Epstein & Knight, Ch. 5&6

***Paper #2 due in class**

Courts as Policy Makers

Class 20: Powers of the Court (and Their Limits)
Murphy, Ch. 7: intro; Ch. 8: intro
Sentencing Guidelines packet [R]

Class 21: The Traditional View: Constraints on Courts as Policy Makers
Fuller, Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) [R]
Galanter, Why the Haves Come Out Ahead, Law & Soc. (Fall 1974), pp. 95-125 [R]

Class 22: cont.
Rosenberg, The Hollow Hope, pp. 1-36

Class 23: cont.
Rosenberg, pp. 39-106

Class 24: cont
Rosenberg, pp. 339-429

Class 25: Challenging the Traditional View: Courts and Prison Reform
Feeley & Rubin, Judicial Policy Making and the Modern State, ch. 1, 2

Class 26: cont.
Feeley & Rubin, ch. 3

***Final revision of Paper #2 due in class**

Class 27: cont.
Feeley & Rubin, pp. 145-177, ch. 7

Class 28: Feeley& Rubin, Conclusion & Coda

***Paper #3 due Saturday, March 16 at noon in my office (or by e-mail)**

PAPERS

These papers are designed to give you the opportunity to reflect on the material covered in class and draw conclusions about where you stand on the major theoretical issues we've discussed. I will be evaluating your ability to synthesize the materials we've covered, make well-reasoned and creative arguments, and communicate your ideas effectively.

A note on citing sources: Whenever you quote from a text, paraphrase someone else's argument, or rely on an idea developed in depth by someone else, you must tell the reader precisely where the quote, argument or idea came from. In other words, you must cite your sources. There are two standard citation systems: the documentary-note system and the author-date system (also sometimes called MLA, parenthetical or in-text citation).

- The documentary-note system requires that you put your sources in a footnote, with all the required bibliographic information.¹
- The author-date system requires that you put the author (or, if there is no author, the title), date of the work, and the page of the text, in a parenthetical at the end of the sentence (Chicago Manual of Style 1993, 493). The MLA version of this system leaves out the date: just cite the author and page. Then you include a list of references at the end of the paper with a complete bibliographic entry for each source you cite.

Social scientists use both of these systems, depending on what kind of paper they are writing. It is best to use the documentary-note system when you are citing lots of different sources or lots of weird sources (like government reports, interviews, etc.) It's best to use the parenthetical system when you're citing a small number of sources, and when you're going to make lots of references to the same source. You may use either system in this class.

Paper Topics

Paper #1: You are a legislative aide for a US Senator. The Senator is considering a constitutional amendment to allow for the election of federal judges. You have been asked to brief the Senator on this subject. Please make a case for or against election of federal judges, drawing on the readings and class discussions. In making your case, you should consider and respond to counterarguments. I am looking for a careful, thoughtful analysis, in clear, concise, readable prose.

The paper should be no more than 5 pages (double-spaced, 1-inch margins). You do not have to include a bibliography, but you must include a full citation when you cite an author.

DUE: Monday, Jan. 21, in class. Final revision due Monday, Feb. 11, in class.

¹ *Chicago Manual of Style*, 14th ed. (Chicago: University of Chicago Press, 1993), p. 493.

Paper #2:

Judicial power, as contradistinguished from the power of the law, has no existence. Courts are mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

– Chief Justice John Marshall

The choices that are made by judges . . . always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives, if given empirical reference.

– Arthur S. Miller & Ronald F. Howell

You are still a legislative aide for a US Senator. Your boss has been appointed to the Senate Committee on the Judiciary. She wants to understand a judge's job better, so she has asked you to brief her on the following question: Which of the above views of the judge's role is more persuasive? Are judges constrained by the law, or do they always have the freedom to rule based on his/her subjective preferences? Explore this debate. Do not present only one side of the argument; consider and respond to counterarguments. I am looking for a careful, thoughtful analysis, in clear, concise, readable prose.

The paper should be no more than 8 pages (double-spaced, normal 1-inch margins). You do not have to include a bibliography, but you must include a full citation when you cite an author.

DUE: Wednesday, Feb. 6, in class. Final revision due Wednesday, March 6, in class.

Paper #3:

Read the article by George Will on e-reserve (“Judges and ‘Soft Rights’”). Write a response, drawing on the materials we’ve discussed in class. I do not expect you to do any outside research. You may want to consider the formal powers of court, the institutional constraints on its power (including the powers given to the other branches to check the courts), the political calculations and dynamics that influence judicial decision making, and the relative success of the court in ensuring compliance with its decisions. You may agree or disagree with Will, but your answer should demonstrate that you have carefully considered all sides of the issues involved. I am looking for a careful, thoughtful analysis, in clear, concise, readable prose.

The paper should be no more than 6 pages (double-spaced, normal 1-inch margins). You do not have to include a bibliography, but you must include a full citation when you cite an author.

DUE: Saturday, March 16, at noon in my office (or by e-mail)

OTHER ASSIGNMENTS AND EXERCISES

Assignment #1: Judicial Independence

You have just been appointed to the Supreme Court of an African common law country by the newly-elected President. You have received the following memo from one of the other members of the Court. Please draft a 3-4 page (double-spaced) reply, drawing on the readings and class discussion. I am looking for evidence that you understand the readings and issues discussed in class, and can respond to the question thoughtfully, in clear, concise and readable prose.

Dear Justice,

Congratulations on your appointment. Your tenure promises to mark a new era for our legal system. With the recent establishment of multiparty democracy, we can expect at last to reap the benefits of constitutionalism and the separation of powers.

Toward that end, I respectfully suggest that the first priority of the Court should be the protection and promotion of judicial independence. As you are aware, the need to establish the rule of law is urgent. The country remains troubled by tribal conflict, and our struggling business community is in desperate need of impartial forums for the adjudication of contract disputes. I am aware of your familiarity with the experience of our neighboring countries in building judicial independence. What can we learn from their experiences, and from the considered judgment of legal scholars, that would enhance our efforts to ensure judicial independence? What strategies would you advise this Court to follow in achieving this end?

Common law exercise [class 9]:

You're a judge asked to decide the following case:

Plaintiff Mary lived with Defendant Mark for 6 years. When Mary told Mark she intended to leave him, he threw their television out the window, destroying it. Mary is suing Mark for the cost of the television. Mary has produced evidence – a cancelled check drawn on her account – that she purchased the television while they were living together. She also contends that the television was kept in her home office and she used it much more frequently than Mark did. “It was understood that the television was mine,” she said in her testimony.

Mark claims that television was jointly owned and he should be liable for only half the cost. He argues that although they held separate checking accounts, they considered all the income of the household to be jointly owned. Mary agreed during cross-examination that they regularly consulted on the purchase of “big-ticket” items, and had agreed together that they could afford to purchase the television.

There are no statutes relevant to this issue. But lawyers for Mary and Mark have brought up two previous decisions from this jurisdiction that might be relevant:

In *James v. James*, a couple that had been married for 5 years got divorced. The divorce decree awarded their Mercedes to Ben. However, Wanda continued to drive the car, apparently with Ben's permission. Eight months after the divorce was finalized, after a particularly bitter exchange between Wanda and Ben, Wanda deliberately drove the car into a tree, causing substantial damage. Ben sued for the full cost of repairing the damage. Wanda claimed that she should be liable for at most only half the damage, because in fact Ben had given her the car. She produced evidence at trial that, although Ben had always held the title to the car (even before the divorce), she started paying the insurance on the car after the divorce. The court held that Wanda was liable to Ben for the full cost of the damage.

In *Lee v. Cohen*, a couple had lived together for 10 years but never married. When they separated, Jennie Lee sued for half the value of a television and VCR that Tim Cohen had taken. She argued that the equipment was jointly owned because Tim had purchased it with a credit card, and they had paid the credit card bill from a joint checking account. Tim, a college professor, argued that he owned the equipment because he had put funds from his professional development account into the joint checking account to pay for it, it was kept in his office and used solely in his classes. The couple had another television that they used at home.

The court held in favor of Tim and denied Jennie's claim.

Consider the following questions. As always, I encourage you to discuss this question with other students before coming to class. **You do not need to turn in a written response:**

1. What is the legal issue in *Mary v. Mark*?
2. How does Carter (the reading in *Murphy*) tell us to proceed?
3. Is this common law method a good way to make law?

Discussion Questions on *Levi, MacPherson v Buick, Dworkin* [class 10]:

As you do the reading for this class, consider and discuss the following questions. **You do not need to turn in a written response:**

1. Levi describes the process by which a legal concept is created, becomes fixed and easy to apply, then gradually breaks down as it is applied to an increasing variety of new cases. Levi goes on later in his book to use *MacPherson v Buick* to illustrate this process.
 - What is the legal rule announced in *Thomas v Winchester*?
 - What was the legal rule announced in *MacPherson v Buick*?
 - How did the *Thomas* rule become the *MacPherson* rule? Did Levi accurately describe the process?
 - Is the *MacPherson* decision best viewed as an objective decision resulting from a process of legal reasoning, a subjective (or "political") decision based on the judge's biases or interests, or something else? What else might we want to know to answer this question?
2. Levi asserts that common law decision making (judges reasoning from cases) is a good way to make law because it "accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity by providing a forum for the discussion of policy in the gap of ambiguity." (p. 432) He makes it sound very democratic. How does this process compare with law-making by legislatures? Is it a rational and democratic way to make laws? What about Dworkin's justification for common law decision making? Is it persuasive?

Assignment #2: TVA v Hill [class 13 & 14]:

In 1967, Congress authorized the TVA to build a dam on the Little Tennessee River. In 1973, Congress passed the Endangered Species Act, which ordered federal agencies “to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence” of an endangered species. When it was discovered that the dam would threaten the snail darter, an endangered variety of perch, the Supreme Court stopped the project.

Your task is to:

- 1) locate *TVA v. Hill* on Lexis/Nexis Academic or Findlaw and read it;
- 2) Take the position of the US government, and explain how you would have defended the TVA (argue that the Act shouldn’t stop the dam.) You *must* draw on the principles of statutory interpretation discussed in the readings and in class to make your case. If you want to argue that the decision is just good policy, you must explain why, under the rules of statutory interpretation, the Court should be allowed to weigh policy reasons.

The following guidelines will help you make an effective legal argument:

1. Your introduction should be brief and clearly state your position
2. In making your argument, you should state the legal rule or principle first, then explain how it applies to this case.

Example:

Rule → The statute prohibiting flag-burning should be struck down. The First Amendment bars states from restricting freedom of speech.

application → Burning a flag as part of a demonstration is a form of speech. The statute prohibits this sort of demonstration. Therefore, it violates the First Amendment.

Follow this rule/application formula for each point. If you want to argue that a rule *should not* apply, state the rule and then explain why it doesn’t apply here. I will be looking for evidence that you understand the various principles and theories of statutory interpretation that we have discussed, that you can apply them to a case, and that you can make your reasoning clear.

I expect this paper to be 2-3 pp., double-spaced, and written in clear, concise, readable prose.