



The Role of Courts in Policymaking

Judge William E. Smith (Ret.)

United States District Court, District of Rhode Island

Study Group Outline

This Study Group will meet six times, on the following dates: 2/4, 2/18/, 3/4, 3/18, 4/1 and 4/15. We will meet from 11:00am-12:30pm.

Study Group Leader: Judge William E. Smith (Ret.) was a federal district court judge in the District of Rhode Island, where he served for the past 23 years. He retired in January, 2026. Prior to joining the court, he practiced law at a major law firm in Providence and briefly ran the Rhode Island Office of a United States Senator. He served as Chief Judge of the federal court from 2013-2019. He has been very active in training and mentoring new judges and in judicial administration of the federal courts nationally. For many years, he has taught on the faculty of Roger Williams University School of Law and served as the Chair of its Board of Directors.

Overview and Objectives: The study of public policymaking in the United States typically focuses on the roles of the Executive and Legislative branches of government. Yet, the Judicial branch plays a major, but often less well understood, role in policymaking. The process of how litigation and the courts shape public policy is the topic of this study group. The goal is to give students an appreciation for how the American legal system is structurally designed to utilize litigation to make law and policy; how policymakers in the Legislative and Executive branches interact with the courts in an iterative process that has evolved dramatically over the last 70 years; the roles of lawyers and judges in the litigation and policymaking process; and the benefits and limitations of public interest and class action litigation. We will explore this topic through readings and by meeting with interesting guests.

Because many students of public policy are considering law as a career, or law school as their next educational step, another objective of this study group is to give students an opportunity to discuss law school and career paths in the law. We will reserve time both in class with our guests and in office hours for these discussions.

Structure of the Study Group: In advance of each meeting, students will be given a selection of short readings or other materials (such as podcasts or websites) to review. (Readings will be kept to a minimum; optional or suggested readings may be listed in case you want to dig deeper on a topic.) In our first meeting, students will be asked to sign up to prepare discussion questions for the group, developed from the materials, for each of the four subsequent sessions. (Our 6th

session will be reserved for a wrap-up and will probably not include a guest.) The designated students for each class will help lead the discussion along with Judge Smith. Questions will be circulated to all students before the study group meets. (Of course, every student is encouraged to think of their own questions and comments as well.) Questions should be designed to engage the speakers in a guided discussion of their particular topic areas and explore their own career journeys.

In many ways, this study group could not be more timely. We are living through the most extraordinary period of inter-branch conflict and policy-based litigation in American history. In federal courts around the country, Presidential Executive Orders are being challenged by state Attorneys General, nonprofit groups, unions, businesses, or other institutions. Many of these cases are being litigated in Rhode Island federal court, and several were decided by Judge Smith prior to his retirement. Many others are in federal courts in Massachusetts and other New England states in the First Circuit. These cases are good fodder for our discussion group, and we will talk about them. And indeed, the major shift in the legal landscape we are witnessing in real time will be a primary focus of our discussion group with several guests. (Students should be aware that ethical limitations apply to active judges who will be guests: Generally speaking, judges are prohibited from discussing the merits of cases pending before them or in other courts. Judges are able, however, to discuss matters unrelated to the merits of specific cases.)

Class Sessions:

Session 1: Overview: The role of courts in policymaking

Popular discussion of judicial policymaking most often focuses on the Supreme Court. That is for good reason, because so much of what the Court does is so critical. But much happens before cases come before the Supreme Court. And in fact, very few cases actually end up in the Court. Much judicial policymaking is conducted in the lower courts; and those that make it to the Supreme Court typically “percolate” through the lower courts before reaching the Supreme Court. So, to understand the larger role of the courts in policymaking, one has to first understand the structure of the lower federal courts, as well as the state courts. We will spend the first part of the class on an overview of the courts. After this overview, we will begin to consider a framework for thinking about judicial policy-making in the modern era.

Reading (first half):

Browse the website of the Administrative Office of the U.S. Courts: Court Role and Structure – <https://www.uscourts.gov/about-federal-courts/court-role-and-structure>

Michael Boudin, “The Real Roles of Judges,” Boston University Law Review (2006),
<https://www.bu.edu/law/journals-archive/bulr/volume86n5/documents/BOUDINV.2.pdf>

The role of litigation and courts in policymaking in the United States is a feature, not a bug, of the American legal system. It is a function of both constitutional design and legislative choice.

But while the structure is arguably intentional, it is not static. The role of litigation, lawyers, and judges in the policy dialogue has ebbed and flowed over generations. Many books and articles have been written by political scientists and legal scholars about this topic; probably the most significant work in the field is by Professor Robert Kagan, Professor Emeritus at University of California Berkeley. His book, first published in 2001 and updated in 2019, coined the term “adversarial legalism” that most scholars now use as a framework for understanding judicial policymaking in the American system. In the second half of the class, we will discuss the framework of Adversarial Legalism.

Reading (second half):

Robert A. Kagan, “Adversarial Legalism: The American Way of Law” (2019), Chapter 1 and Afterword (PDF File)

Suggested Reading:

The 2001 edition of Professor Kagan’s book is available on BruKnow and is well worth reading if you are interested:

https://bruknow.library.brown.edu/discovery/fulldisplay?docid=alma991043258530406966&context=L&vid=01BU_INST:BROWN&lang=en&search_scope=MyInst_and_CI&adaptor=Local%20Search%20Engine&tab=Everything&query=any,contains,Adversarial%20Legalism:%20The%20American%20Way%20of%20Law&offset=0

The 2019 edition is available as an ebook for a reasonable price from Amazon.

Donald L. Horowitz, “The Courts and Social Policy” (1977), Excerpt (PDF File)

Session 2: The Supreme Court as Supreme Policy Maker

The intention of this study group is to broaden students’ understanding of the role of the courts and litigation in making public policy in the United States. Most of that work is done in the lower federal courts and the state courts, but the U.S. Supreme Court looms large over the policy making process always. And particularly in these times, all eyes seem to be on the Court. In this session, we will dive into the workings of the Supreme Court and some of the present cases and controversies involving it with one of its most prolific and helpful observers, Prof. Steven Vladeck of Georgetown University Law Center.

Readings: Peruse Prof. Vladeck’s blog on Substack, One First:

<https://www.stevevladeck.com/>

(The substack is partially free; to get more in-depth material, you will need to subscribe. The cost is nominal, and a great value.)

further readings TBD

Suggested Reading:

William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015).

<https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket>

Vladeck, S. I. (2023). *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. Basic Books.

Vladeck, Stephen I. "The Solicitor General and the Shadow Docket." *Harvard Law Review* 133 (2019): 123-163.

Vladeck, Steve. "Symposium: The solicitor general, the shadow docket and the Kennedy effect." *SCOTUSblog* (Oct. 22, 2020).

Session 3: Environmental law—Legislation, Litigation and Regulation

Probably no area of law and regulation better exemplifies the relationship between the legislative process, the regulatory process, and litigation than environmental law. For this session, we will be joined by Janet Coit, an environmental lawyer and advocate who has worked at the top levels of both state and federal government, as well as in the non-profit advocacy space. Janet will discuss her own journey, the changes she has witnessed over the years, and the current state of environmental law and regulation, with a particular focus on fisheries.

Readings: Peruse the following websites and read/listen to links as you like.

<https://www.fisheries.noaa.gov/gallery/photos-janet-coit-former-administrator-noaa-fisheries-out-and-about>

Rea, Christopher What We Learned From 25,775 Environmental Lawsuits"

<https://issues.org/environmental-lawsuits-real-numbers-rea/>

Suggested Reading:

"The Consequences of Loper Bright," Harvard Public Law Working Paper (2024),
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4881501

https://nclalegal.org/wp-content/uploads/2025/07/FILING_Relentless-v.-Department-of-Commerce_Opinion-and-Order-of-the-U.S.-District-Court-for-the-District-of-Rhode-Island_07152025.pdf#:~:text=%20The%20Court%20agrees%20with,11%20of%2014%20Page1D%20%23%3A

Session 4: Litigating against the Trump Administration

As of the beginning of January, there are over 250 cases that have been filed against the Trump administration aimed at stopping a wide variety of policy initiatives and actions. Many of those cases have been brought by a coalition of states. (Others have been brought by non-profits and interest groups.). Our guest this week will be R.I. Attorney General Peter N erhona, who has been a leader in the states' coalition. We will discuss both the substance of some of the challenges, but also the broader implications of the litigation and the tactical considerations that go into this massive litigation effort.

Readings: There are several excellent tools for tracking the litigation against the Trump administration. Here are several links. Peruse the lists and summaries, and focus on those brought by states.

<https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/>

<https://www.lawfaremedia.org/projects-series/trials-of-the-trump-administration/tracking-trump-administration-litigation>

Session 5: Public interest litigation/Class Actions (and more!)

The role of the lawyer and litigation in driving policy change is the primary focus for this session. Litigation drives change in various ways. And it doesn't just happen. It takes creative and entrepreneurial lawyers bringing cases with new theories and smart tactics. For this session we will be joined by Chief Judge John McConnell of the federal district court of Rhode Island. Judge McConnell will speak about his time as a prominent trial lawyer litigating high profile cases involving so-called public nuisances. The most prominent of these cases was the litigation brought by numerous states against the tobacco industry, which resulted in a historic settlement in 1998 of \$206 billion. He will also discuss his role in the so-called lead paint litigation here in Rhode Island. (And, time allowing, he will discuss some of the litigation he has handled involving the present administration.)

Readings: John C. Coffee, Jr., "Entrepreneurial Litigation: Its Rise, Fall, and Future" (2015), Excerpt (PDF File)

Brian Fitzpatrick and John H. Beisner, "The Conservative Case for Class Actions," *Judicature* (2020), <https://judicature.duke.edu/articles/the-conservative-case-for-class-actions/>

Session 6: This will be our final session. It will be reserved for discussion of topics we may not have sufficiently covered in the other sessions, or topics that arise during the course of the semester, and any other topics students would like to discuss.

Suggested Reading: Thomas F. Burke and Jeb Barnes, “The Post-Brown Era in Judicial Policymaking,” The Forum (2024) (PDF File)