

The Role of Courts in Policymaking

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Study Group Outline

This Study Group will meet six times, on the following dates: 9/24, 10/8, 10/22, 11/5, 11/19 and 12/3. We will meet from 11:00am-12:30pm.

Study Group Leader: Senior Judge William E. Smith is a federal district court judge in the District of Rhode Island, where he has served for the past 23 years. 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 prominent academics, judges, and lawyers.

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. To that end, we will reserve time for discussion of these issues.

Structure of the Study Group: In advance of each meeting, students will be given a selection of short readings or other materials to review, such as podcasts or websites. (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 the first meeting, students will sign up to prepare discussion questions for the group, developed from the materials, for each of the five subsequent sessions. The designated students for each class will help lead the discussion along with Judge Smith.

Questions will be circulated to the full group several days before the group meets. (Of course, every student is encouraged to think of their own questions and comments as well.) For several meetings we will have guest speakers. For these, 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. Several of these cases are being litigated in Rhode Island federal court, and several are pending before Judge Smith. 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. But students must be aware that ethical limitations apply to Judge Smith and other 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 half 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:

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>

Session 2: “Adversarial Legalism” as a structural framework for understanding judicial policymaking

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. We are very fortunate that Professor Kagan will be joining us as a guest to discuss his work and his book.

Reading:

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.

Session 3: Brown v. Board of Education and the social policy litigation revolution of the 1970s

Any discussion of judicial policymaking in the modern era usually begins with Brown. It is truly one of the most important cases in U.S. history, and it set in motion a movement centered on achieving significant social policy change through the courts. In the wake of Brown, and especially through the 1970s, litigation was a primary tool used to correct perceived social ills, and reform government institutions (particularly on the state and local level). The success of these efforts was the result of creative litigation strategies devised by lawyers; judges who were receptive to these cases; and the resulting interplay with other players in the system. In this session, we will consider Brown’s controversial legacy, and look at the rise of public interest litigation, class actions, and consent decrees from the 1970s to 2000s.

Reading:

Linda Greenhouse, “How Brown Came North and Failed,” New York Review of Books (2025) (PDF File)

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

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

Ross Sandler and David Schoenbrod, “Democracy by Decree: What Happens When Courts Run Government” (2004), Excerpt (PDF File)

Suggested Podcast:

Revisionist History, “Miss Buchanan’s Period of Adjustment,”
<https://www.pushkin.fm/podcasts/revisionist-history/miss-buchanans-period-of-adjustment/>

Session 4: Judicial policy-making in the modern era

For decades after Brown, judicial policy-making was considered a tool of the liberal interests and causes. But times have changed. In this session we will look at how the landscape has changed in response to the progressive rulings of the 70s, 80s, and 90s, including legislative changes, Supreme Court rulings, and the Trump Administration’s assertion of executive authority.

Reading:

Thomas F. Burke and Jeb Barnes, “The Post-Brown Era in Judicial Policymaking,” The Forum (2024) (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/>

Suggested Reading:

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

Session 5: So, you want to be a Supreme Court litigator?

For this class, we will be joined by two special guests: Judge Julie Rikelman of the First Circuit Court of Appeals, and Matthew Wessler, founding partner of Gupta Wessler LLP, a boutique public interest appellate litigation firm based in Washington, D.C., San Francisco, CA, and Cambridge, MA. Before joining the First Circuit in 2023, Judge Rikelman was the national litigation director of the Center for Reproductive Rights and argued the Dobbs case in the U.S. Supreme Court. Matt Wessler has argued numerous cases in the Supreme Court, and most recently has been representing Gwynne Wilcox, the NLRB member fired by the

Trump Administration. Her case presents the issue of whether the Supreme Court's 70-year-old precedent Humphrey's Executor will remain good law.

Reading:

Judge Julie Rikelman, Wikipedia, https://en.wikipedia.org/wiki/Julie_Rikelman

Gupta Wessler website, <https://www.guptawessler.com/>

Listen to some of the oral arguments in Dobbs: <https://www.oyez.org/cases/2021/19-1392>
(Judge Rikelman's argument is from 00:44:30-01:23:40).

Suggested Reading:

Wilcox v. Trump, U.S. Supreme Court Order Granting Stay,
https://www.supremecourt.gov/opinions/24pdf/24a966_1b8e.pdf

Session 6: But what about the state courts?

This will be our final class, and once again we will be joined by two terrific guests: Chief Judge Jeffrey Sutton of the Sixth Circuit Court of Appeals, and Justice Melissa Long of the Rhode Island Supreme Court. Chief Judge Sutton is author of two highly regarded books on the role of state courts, 51 Imperfect Solutions: States and the Making of American Constitutional Law, and Who Decides: States as Laboratories of Constitutional Experimentation. We will discuss the role of the often forgotten or underutilized state courts in our federal system: How do they fit into the policymaking work of the courts? Should they be used more than they are? And how do all the different methods of judicial selection impact the role of state courts?

Reading:

Chief Judge Jeffrey Sutton, Wikipedia, https://en.wikipedia.org/wiki/Jeffrey_Sutton

Justice Melissa Long, Wikipedia, https://en.wikipedia.org/wiki/Melissa_A._Long

Chief Judge Jeffery S. Sutton, Browning Symposium Opening Comments, 84 Mont. L. Rev. 9 (2023) <http://scholarworks.umt.edu/mlr/vol84/iss1/2>

Other Readings TBA