

DPI 505: The Supreme Court, Law, and Public Policy

HKS 2024

Tues/Thurs 10:30-11:45am
Location: Littauer Building, L230, HKS

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Overview of DPI-505

Learning how courts interpret policy has become an important component of the policymaker's toolkit. This course aims to introduce policy-oriented students to how Constitutional interpretation touches upon pressing policy questions. Students will engage with what courts expect to see from policymakers, while also learning how to read cases from a lawyer's perspective. Topics covered include federalism, LGBT rights, race and ethnicity, criminal justice issues, voting rights, and political questions and official immunity. Texts will include cases decided by the Supreme Court (including cases from recent terms), and also contemporary scholarship on judicial politics and decision making. Although our focus will be on the Supreme Court, the pedagogical emphasis will be on what policy makers can expect from the courts in terms of federal and state policy implementation.

Our goal is that by the end of this course you will be able to:

1. Understand when federal courts will and will not intervene, particularly with regard to key policy and political issues
2. Think critically and assess the ability of courts to be used as instruments of social change
3. Understand what oversight, if any, the courts exercise over federal policy making, including by administrative agencies

The course content is divided into four units, all of which are essential for understanding the courts' role in the promotion and interpretation of national policy. These are (1) federal courts, their nature, and their limited powers, (2) the courts' role in social movements and as "protectors" of individual rights and liberties, (3) political questions and immunity, and (4) the complicated relationship between courts and administrative agencies.

Logistics

Who May Enroll. DPI-505 is open to all Harvard Kennedy School and undergraduate students on a space-available basis. Students in other programs at Harvard and visitors may enroll with the permission of the instructor only on a space-available basis. This year, the maximum number of students will be set by the classroom size.

Prerequisites. There are no prerequisites for this course. However, note that this course is designed as an applied introduction to the legal system, from the perspective of policymakers. Students who have taken at least one semester of constitutional law (or administrative law) will find that some components of the course overlap, although the focus of this course is different than that of a traditional law school course. Students who have taken *both* constitutional law and administrative law may take this course only with the permission of the instructor.

Class Attendance. Most class meetings will be a mix of substantive lecture with discussion throughout. Although class attendance is not required, we expect that you will do your best to attend every class and show up on time. If you need to miss a class due to an emergency, it is your responsibility to obtain missed notes and course announcements from another student. There is no need to email the course head. All class/lecture notes will be posted on the course website.

Laptop and Cell Phone Policy. Responsible use of laptops is permitted in class, so long as it is not distracting to other students. Please be considerate and silence and put away cell or mobile phones and smartphones during class.

Suggested Texts. The syllabus links to all required readings that are on the Internet; the rest will be posted on Canvas. You may need to use your HUID login to access articles requiring a university subscription.

We will read several U.S. Supreme Court cases. These are free and publicly accessible online, but they are mostly in unedited formats. When possible, we will post edited versions of the cases to the course via the [H20 open platform](#) hosted by Harvard Law School. (Brand new cases are not yet available for inclusion, so we will include a link to the unedited published opinion, which you should skim with the purpose of understanding the ruling.) Additional edited versions of the cases can be found on Canvas (for some, not all the cases).

The H20 open source casebook can be found at: <https://opencasebook.org/casebooks/9384-the-supreme-court-and-public-policy/> (will be updated as we go along)

You will need to make an account using your Harvard “.edu” email address.

We recommend a few resources for those unfamiliar with the basic contours of U.S. constitutional law.

- United States Department of State, Bureau of International Information Programs, [Outline of the U.S. Legal System](#). Available online. A great easy-to-read introduction to U.S. legal institutions.
- Fallon, Richard H. 2004. *The Dynamic Constitution: An Introduction to American Constitutional Law*. A nice introduction to constitutional structure and law.

Office Hours. My office hours during this semester will be Thursdays 2:30-4:30pm (Taubman-466). Office hours are open; there is no need to email to schedule a time to meet during office hours.

Academic Integrity. We encourage you to discuss the course readings and assignments with your fellow students. However, all written work, unless otherwise specified, must be done independently and not in collaboration with one another. All class activities must be performed in accordance with the HKS Academic Code (<https://www.hks.harvard.edu/educational-programs/academic-calendars-policies/student-handbook>). Your reputation is the most important thing you have, especially at this stage of your career; please do not tarnish it.

Use of ChatGTP/AI. We will follow HKS Guidelines on AI in this class. Specifically, “it is generally acceptable to use generative AI for finding information and for solidifying your knowledge of the course content. For instance, it is fine to use AI-powered web search and to have ‘conversations’ with tools like ChatGPT to help you explore ideas, refine your thinking, identify examples, and better understand the course material. However, unless otherwise specified, it is a violation of the HKS Academic Code to incorporate into your coursework text produced predominantly by generative AI – similar to copying from a book or article. For example, it would be inappropriate to simply rewrite a draft generated by AI.”

In addition, “Generative AI can produce false or misleading information. You are ultimately responsible for the accuracy of any work you submit.”

If you have any doubt about whether a specific use of generative AI is permitted for an assignment or course, please discuss it with the course head prior to using it.

Policy Brief Assignments. Policy Briefs will be short (5–7 pages) memos that will ask you to make a detailed strategic recommendation to an organization or individual regarding an important policy issue, using the knowledge and skills from class (no outside research). Policy brief assignments will be posted about two weeks before they are due.

Policy briefs must be submitted *online through the course website by the due date and time.*

Grading

Your grade in this class will be composed of:

- 20% - Policy Brief #1 (due Oct 4 at 5pm)
- 20% - Policy Brief #2 (due Oct 25 at 5pm)
- 20% - Policy Brief #3 (due Nov 27 at 5pm)
- 20% - Policy Brief #4 (due Dec 13 at 5pm)
- 20% - General class participation and engagement

Final letter grades will be determined on a curve using the most generous version of the HKS Dean’s Recommended Grade Distribution.

Paper Extension Policy. Attempting to turn a paper in late is unfair to everyone else in the class. For all papers, extensions will be granted only in case of (1) a death in the family or (2) an unforeseen medical emergency. In case of such an emergency, please let me know as soon as possible. Documentation may be required. Also in the interest of fairness, (1) other requests for extensions will be denied and (2) retroactive extensions (e.g., extensions requested after the paper is submitted) will never be granted.

If you do not have an extension, and you turn in a paper late, *the paper will be docked one third of one letter grade for every 24 hours that the paper is late, with late penalties accruing from the time the paper is due.* For example, if your paper earned a B+, but it was turned in a few hours past the time it was due, it will receive a B; it was turned in 30 hours past the time it was due, it will receive a B-.

Schedule and Readings

We will use the 2024-2025 HKS Academic Calendar (not FAS). This schedule subject to change, depending on how far we get in each class meeting.

UNIT 1: INTRODUCTION TO THE LEGAL SYSTEM & ENUMERATED POWERS

Thursday, September 5 (Class Meeting 1) Course Introduction and Overview of U.S. Legal System

- Case excerpts: *Marbury v. Madison*
- Recommended:
 - Constitution of the United States, [Article III](#)
 - United States Department of State, Bureau of International Information Programs, [Outline of the U.S. Legal System](#), Chapters 1-2

Tuesday, September 10 and Thursday, September 12 (Class Meetings 2 & 3) The Power of Courts, Separation of Powers & “Cases and Controversies”

- Case excerpts: *City of Los Angeles v. Lyons*, *Cooper v. Aaron*
- Orin Kerr, “[How to Read a Legal Opinion: A Guide for New Law Students](#),” *Green Bag Law Journal* (2007).
- Recommended:
 - Constitution of the United States, [Article III](#)
 - United States Department of State, Bureau of International Information Programs, [Outline of the U.S. Legal System](#), Chapters 1-2
 - Richard Fallon, *The Dynamic Constitution* (2004), pp. 1-25 (overview of the American constitutional system); pp. 189-204 (overview of the role of courts in the system)

Tuesday, September 17 (Class Meeting 4) Enumerated Powers and the Commerce Clause

- Case excerpts: *United States v. Lopez*, *United States v. Morrison*, *Gonzales v. Raich*, *National Federation of Independent Business v. Sebelius*
- United States Department of State, Bureau of International Information Programs, [Outline of the U.S. Legal System](#), Chapter 3
- Recommended:
 - *South Dakota v. Dole*
 - Richard Fallon, *The Dynamic Constitution*, pages 157-72, 225-36 (overview of legislative authority, focusing on commerce power)
 - Thomas R. McCoy and Barry Friedman, [Conditional Spending: Federalism's Trojan Horse](#), *The Supreme Court Review* (1988)

Thursday, September 19 (Class Meeting 5) Theories of Judicial Politics

- Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Chapters 1–3 (skim)
- Lee Epstein and Jack Knight, *The Choices Justices Make*, Chapter 1
- Recommended:
 - Barry Friedman, [Taking Law Seriously](#), *Perspectives on Politics* (2006)
 - Theodore Ruger et al, [The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking](#) *Columbia Law Review* (2004)
 - Harris, Allison P., and Maya Sen, [Bias and Judging](#), *Annual Review of Political Science* (2019)

Tuesday, September 24 (Class Meeting 6) Public Opinion and the Courts

- Dahl, Ronald (1957). *Decision-Making in Democracy: The Supreme Court as National Policy-Maker*
- Stephen Jessee et al, [A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public](#), *Proceedings of the National Academy of Sciences* (2022)
- Recommended:
 - Alexander Bickel, *The Least Dangerous Branch*, Ch 1
 - Logan Strother and Shana Gadarian, [The Supreme Court in a Polarized Era: Is Legitimacy at Risk?](#) (Working Paper)

UNIT 2: INDIVIDUAL RIGHTS AND LIBERTIES

Thursday, September 26 & Tuesday, October 1 (Class Meeting 7 and 8) Individual Rights and Equal Protection

- Case excerpts: *Carolene Products* Footnote 4, *Craig v. Boren*, *City of Cleburne v. Cleburne Living Center*, *Korematsu v. United States*

Thursday, October 3 (Class Meeting 9) Race and Civil Rights

- Case excerpts: *Plessy v. Ferguson*, *Brown v. Board of Education*
- Gerald N. Rosenberg, *The Hollow Hope*, Chapters 2-3
- Recommended:
 - *Yick Wo v. Hopkins*
 - *Village of Arlington Heights v. Metropolitan Housing Development*

Tuesday, October 8 (Class Meeting 10) Affirmative Action - What Happened?

- Case excerpts: *Grutter v. Bollinger*, *Students for Fair Admissions v. Harvard*
- Douglas Belkin, *Wall St Journal*, [The Man Behind the Push to End Affirmative Action](#)

Thursday, October 10 (Class Meeting 11) Criminal Law Jurisdiction & the Death Penalty

- Case excerpts: *Furman v. Georgia*, *McCleskey v. Kemp*
- Recommended:
 - United States Department of State, Bureau of International Information Programs, Outline of the U.S. Legal System Ch 5
 - Congressional Research Service R43023, [Congressional Authority to Enact Criminal Law: An Examination of Selected Recent Cases](#)
 - David Baldus, Charles Pulaski and George Woodworth, [Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience](#), *Journal of Criminal Law and Criminology* (1983) (skim)

Tuesday, October 15 & Thursday, October 17 (Class Meeting 12 & 13) Abortion and Due Process Rights

- Case excerpts: *Griswold v. CT*, *Roe v. Wade*, *Dobbs v. Jackson Women's Health Organization*
- Amelia Thomson-DeVeaux, 538.com, [Dobbs Turned Abortion Into A Huge Liability For Republicans](#)
- Recommended:
 - Levendusky, Matthew, et al. [“Has the Supreme Court become just another political branch? Public perceptions of court approval and legitimacy in a post-Dobbs world.”](#) *Science Advances* (2024).

Tuesday, October 22 (Class Meeting 14) LGBTQ+ Rights

- Case excerpts: *Lawrence v. Texas*, *Obergefell v Hodges*
- Recommended:
 - *Masterpiece Cakeshop v. Colorado Civil Rights Commission*

UNIT 3: POLITICAL QUESTIONS AND IMMUNITIES

Thursday, October 24 and Tuesday, October 29 (Class Meetings 15 and 16) Voting Rights and Political Questions

- Case excerpts: *Baker v. Carr*, *Rucho v. Common Cause*
- Recommended:
 - *Walter Nixon v. United States*

Thursday, October 31 (Class Meeting 17) Voting Rights Continued and the Voting Rights Act of 1965

- Case excerpts: *Shelby County v. Holder*
- Recommended:
 - *Merrill v. Milligan*
 - Mayya Komisarchik and Ariel White, [Throwing Away the Umbrella: Minority Voting after the Supreme Court’s Shelby Decision](#) (Working Paper)
 - Alex Keyssar, *The Right to Vote*, Ch 8
 - Christopher Elmendorf and Douglas M. Spencer, “[Administering Section 2 of the Voting Rights Act After Shelby County](#),” *Columbia Law Review* (2015)

Tuesday, November 5 (Class Meeting 18) Sovereign Immunity and Qualified Immunity

- Case excerpts: *Harlow v. Fitzgerald*, *Alden v. Maine*, *Bivens v. Six Unknown Named Agents*
- Recommended:
 - Erwin Chemerinsky, [Against Sovereign Immunity](#), *Stanford Law Review* 53:1201 (2001).
 - David Rudovsky, [The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights](#), *University of Pennsylvania Law Review* 138:23–81 (1989).

Thursday, November 7 (Class Meeting 19) Executive Immunity and Presidential Powers

- Case excerpts: *Clinton v. Jones*, *United States v. Richard Nixon*, *Trump v. U.S.*
- Recommended:
 - Department of Justice, Office of Legal Counsel, “[A Sitting President’s Amenable to Indictment and Criminal Prosecution](#)”
 - Kimberly L. Wehle, [Law and the OLC’s Article II Immunity Memos](#) Stanford Law and Policy Review (2020).
 - Saikrishna Bangalore Prakash, [Prosecuting and Punishing Our Presidents](#), Texas Law Review (2021)
 - [Interview with Saikrishna Bangalore Prakash](#), UVA Law School

UNIT 4: STATUTES, REGULATIONS, AND ADMINISTRATIVE AGENCIES

Tuesday, November 12 & Thursday, November 14 (Class Meetings 20 and 21) Statutes and Delegation of Congressional Power to Administrative Agencies

- Case excerpts: *Caminetti v. United States*, *Whitman v. American Trucking Associations*
- [Administrative Procedure Act](#) (skim through)
- Recommended:
 - Joseph Mead, Overview: Legislative Delegations of Authority (all posted on H20)
 - *Gundy v. U.S.*
 - Congressional Research Service, [Statutory Interpretation: General Principles and Recent Trends](#)

Tuesday, November 19 (Class Meeting 22) Agency Rulemaking

- [Administrative Procedure Act](#)
- Congressional Research Service, [A Brief Overview of Rulemaking and Judicial Review](#)
- Video: The Rulemaking Process (<https://www.youtube.com/watch?v=NGc1SUedEr0>)
- Recommended:
 - Case excerpts: *Chevron v. Natural Resources Defense Counsel*
 - Joseph Mead, Overviews of Rulemaking, Initiating Rulemaking, Notice of Rulemaking, and Participating in Rulemaking (posted on H20)
 - Office of the Federal Register, [A Guide to the Rulemaking Process](#)

Thursday, November 21 (Class Meeting 23) Judicial Review of Agency Decisions

- Case excerpts: *Chevron v. Natural Resources Defense Counsel*, *Motor Vehicle Manufacturers Association v. State Farm*, *Loper Bright Enterprises*
- Recommended:
 - Joseph Mead, *Judicial Review of Agency Actions: An Overview* (posted on H20)
 - Congressional Research Service Report R44699, [An Introduction to Judicial Review of Federal Agency Action](#)

Tuesday, November 26 (Class Meeting 24) Environmental Regulation and Climate Implications

- Case excerpts: *Lujan v. Defenders of Wildlife*, *West Virginia v. EPA*, *Massachusetts v. EPA*
- Recommended:
 - Ann Carlson, Amelia Keyes, Ben Harris and Dallas Burtraw, [Climate Policymaking in the Shadow of the Supreme Court](#), Legal Planet

Thursday, November 28 NO CLASS - THANKSGIVING

UNIT 5: CONCLUSION

Tuesday, December 3 (Class Meeting 25) Big-Picture Policy Implications

- Nikolas Bowie, [The Contemporary Debate over Supreme Court Reform: Origins and Perspectives](#), Testimony to the Presidential Commission on SCOTUS Reform
- Mark A. Lemley, [The Imperial Supreme Court](#), Harvard Law Review (2022)
- Recommended:
 - Brian Highsmith et al, *The Structurally Conservative Nature of American Courts* (Working Paper)

Thursday, December 5 (Class Meeting 26) Court Reform and Looking Forward

- Presidential Commission on U.S. Supreme Court Reform, [Final Report](#), pp. 12-28, pgs 74-84 (expansion), pp 112-121 (term limits)
- Recommended:
 - Adam Chilton et al, [Designing Supreme Court Term Limits](#), Southern California Law Review (2021)
 - Adam Chilton et al, [The Endgame of Court-packing](#) (Working Paper)
 - Sam Moyn and Ryan Doerfler, [Reform the Court, but Don't Pack It](#), The Atlantic

Friday, December 13 Policy brief due by 5pm