

PubPol 750: Courts as Policy-Makers
Case Studies in Education Reform and Marriage Equality
Winter 2015

Visiting Lecturer, Kary L. Moss, J.D.

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Office Hours: Wednesday, 5:30-7pm, 3236 Weill and by appointment

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Location: Classroom 1230

Introduction

This course focuses, broadly, on the role of the courts in making and influencing public policy. It does not require a background in the law.

It was not until early in this century that legal advocates began to use litigation to enforce the Bill of Rights. Once those efforts began, interest groups who had operated outside of formal power structures found a new arena in which to speak. Advocates had a new arena in which to advance important policy issues and leverage social change. And the rights guaranteed to us by the Constitution as individuals living in a democratic society began to finally breathe.

We will examine the role of the courts in the context of two case studies, each of which encompass multiple and interrelated policy questions -- "equal" education opportunities and marriage equality -- and that play out amidst ever-changing dynamics between the courts, legislatures, and evolving public opinion.

The course is organized, generally, around the theme of equality. "A nation, conceived in liberty, and dedicated to the proposition that all men are created equal," is a precept that is, for many Americans, central to their core values relating to concepts of fairness, justice, human dignity, privacy, and autonomy. "Equality" or "equal protection of the law" is an abstract principle and aspiration whose meaning and effect varies widely across the political spectrum and is both driven and informed by how the courts give it expression over time.

Learning Objectives:

1. Learn to read legal decisions and understand the rulings and reasoning of decisions.
2. Obtain a basic understanding of the courts, the state and federal systems, and different theories of judicial review.
3. Observe and consider the role non-lawyers play in legal advocacy.
4. Think critically about how the legal arena shapes policy issues and how legal decisions can expand or constrain policy options.
5. Think critically about the intersection of the legal system with the legislative branch of government, community-driven advocacy, and public opinion.
6. Understand several of the most seminal Supreme Court decisions and become acquainted with equal protection theory.

To help me gear class discussions as effectively as possible, it would help me to know a little about you and your background. I therefore ask that you complete a short survey and turn it into me before the first day of class.

Required Books: There are no required books. Articles will be available on C Tools.

Grading

We will not have any exams. Instead, your grade will be a composite of the instructor's assessment based on the following:

Activities	Percentages
1 Reaction Paper	25%
Final Paper	50%
Class Participation	25%

Strong writing and analytical skills are a key objective and hence you will write several papers. I am happy to review drafts and provide feedback before you turn in a final product.

Classroom policy

I expect you will complete the assigned reading before each class and actively participate in our discussions. No cell phones or internet activity during class. I will have office hours immediately following our class each week. I am also available via email at kmoss@aclumich.org.

It is also important to me that our class is one of mutual respect and civility. Insularity can be the death of creative thinking; strong leaders are capable of managing disagreement. The issues we will discuss may have deep personal meaning to many and generate strong opinions. I expect and hope that our discussions will be lively and engage everyone and for that we need to create a trustful environment.

Addendum

On two class days – **January 14** and **February 25** -- I will be returning from New York on an early flight. Should there be a delay because of weather, I would hope that we could start class later. We can discuss options should this turn out to be a problem.

January 7, 2015: Class 1, Introduction to the Course and to the Courts

We will review the course syllabus, learning objectives, and course requirements. We will talk broadly about the themes and kinds of questions you should be thinking about as we work through the materials.

Required Reading:

State Courts v. Federal Courts, *Judicial Learning Center*. <http://judiciallearningcenter.org/state-courts-vs-federal-courts/>

The Court and Constitutional Interpretation, United States Supreme Court, <http://www.supremecourt.gov/about/constitutional.aspx>

Irons, Peter, Emotions Bubble and Temples Flare, *The Courage of their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*, Penguin Books (1988) (Prologue)

MacGregor Burns, James and Burns, Stewart, The Birth of Rights in *The Pursuit of Rights in America* (Vintage Books 1993) pp. 11-14

January 14, 2015: Class 2, Public Education

In *Brown v. Board of Education* the United States Supreme Court unleashed reform to end desegregation on a massive scale. As you read this material, what policy arguments do both sides make? How are they different than the arguments made by the lawyers? What role do experts play and how do they influence the Court's opinion? Why did the lawyers use experts? Whose voices were heard in the Supreme Court and what was the impact?

Required Reading:

How to Read a Legal Opinion: A Guide for New Law Students, by Orin Kerr, *The Green Bag: An Entertaining Journal of Law*, Vol 11, No.1 (Autumn 2007) George Washington University, <http://poseidon01.ssrn.com/delivery.php?ID=952112098007005067101068016019096024031086037020053013069082092065096024112124102087055031099031027019034094120094116080004004033047002081054087083107115121105029039076022117005088126086109003008087095&EXT=pdf>

MacGregor Burns, James and Burns, Stewart, "Education, A Birthright?" in *The Pursuit of Rights in America* (Vintage Books 1993) pp 213-223.

Brown v. Board of Education, 347 US 483 (1954)

January 21, 2015: Class 3, Public Education, cont.

In *Brown*, the Supreme Court strikes down explicit discriminatory laws. By 1973, education reform advocates are arguing that a "right to an education" exists in the federal Constitution, in *San Antonio v. Rodriguez*, but they are not successful. Why do you think they lost? Do you agree with the Court's

rationale? Do you think the outcome would have been any different if the case had not sought financing of equal education?

Required Reading:

San Antonio v. Rodriguez, 411 US 1 (1973)

Heise, Michael, **The Story of *San Antonio Indep. School Dist. v. Rodriguez*: School Finance, Local Control and Constitutional Limits**, *Cornell Law Faculty Publications*, Paper 76

Irons, Peter, *Demetrio Rodriguez v. San Antonio*, **The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court** (Penguin: 1988) (Chapter 12)

January 28, 2015: Class 4, Public Education, cont.

After *Rodriguez*, education reform advocates moved to the state courts and began litigating under state Constitutions. The *Abbott* case is one example among many across the country in which state constitutions are used successfully to leverage resources and greater equity across school districts.

What laws does the judge in *Abbott* rely upon? What facts does the court think are important? What policy objectives is the court interested and not interested in achieving?

Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) ("Abbott I")

Megerian, Chris. Christie says he won't fight N.J. Supreme Court order to add \$500M in funding for poor school districts, *NJ.Com*, May 24, 2011, http://www.nj.com/news/index.ssf/2011/05/christie_says_he_will_comply_w.html

February 4, 2015: Class 5, Public Education, cont.

As the struggle for educational equity shifted from dismantling Jim Crow to achieving some level of "equality" between school districts and an adequate education, problems persist. The story of the system in Highland Park describes abysmal learning conditions. What has changed since *Brown* was decided? What policy options are available when federal and state court legal action is limited? While we do not have time to explore the advantages and disadvantages of the non-profit and for-profit charter school movements or market-based theories for public education, give some thought to whether 'school choice' is helping or hurting conditions in these schools. What is 'school choice' and who decides?

Required Reading:

Moss, Kary, **The Right to Read**, *Wayne State University School of Law Journal of Law and Policy* (forthcoming).

Bollinger, Lee, **Sixty Years Later, We Need a New Brown**, *The New Yorker*, 5/16/14

February 11, 2015: Class 6: Reflection, Reaction Papers Assignment #1 Due.

Guest Speaker: John Austin, President, Michigan State School Board. Our guest speaker will talk about the limits and power of state and local school boards and the role he sees courts play as an instrument of policy reform.

February 18, 2015: Class 7, Courts as Policy Makers: Judicial Review

Professor Norman Dorsen lays out five theories of judicial review recognizing that “American courts have considerable power to invalidate, and thus render inoperative, federal and state statutes or the executive acts of federal and state officials.” What powers do the courts have to expand our interpretation of our rights? **John A. Powell** talks about the role of the courts in both breaking down de jure segregation while re-inscribing racial segregation in jurisdictional boundaries. What powers do the courts have to influence where the ‘fights’ take place?

Dorsen, Norman. How American Judges Interpret The Bill of Rights, *11 Constitutional Commentary* 379 (1994) (pp 379-393)

powell, john, Race and Space in *Challenges to Equality: Poverty and Race in America*, ed. Hartman, Chester (M.E. Sharpe 2001) (p. 21-27)

February 25, 2015: Class 8, Marriage Equality

In this second case study there has been a great transformation in the judiciary’s willingness to accord protection and rights to same-sex couples. We begin with *Bowers v. Hardwick*, a case upholding a Georgia sodomy law that criminalized sex in private between consenting adults of the same gender.

Required Reading:

Bowers v. Hardwick, 478 US 186 (1986)

Irons, Peter, "I Saw a Bedroom Door Partially Open," *The Courage of Their Convictions* (Chapter 16)

March 4, 2015: Spring Break

March 11, 2015: Class 9, Marriage Equality, cont.

Less than twenty years after *Bowers*, the Supreme Courts reverses itself in *Lawrence v. Texas*. Who were the amici and do you think they had any influence on the Supreme Court? Who is speaking for the affected community? Could the loss in *Bowers* help to create or strengthen the community?

Required Reading:

Lawrence v. Texas, 539 US 558 (2003)

NeJaime, Douglas, The Legal Mobilization Dilemma, *61 Emory Law Journal* 663 (2012) (pp.

March 18, 2015: Class 10, Marriage Equality, cont.

In *Windsor*, the Supreme Court struck down Section 3 of the Defense of Marriage Act, which forbade federal recognition of same-sex marriages that were legal under state law. Justice Anthony Kennedy's majority opinion concludes that its "purpose and effect" was "to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." Justice Scalia, in his minority opinion, denounces the opinion as the triumph of the "homosexual agenda" and end of state laws restricting marriage to opposite-sex couples. He accuses the majority of using "legalistic argle-bargle." What does he mean?

Since this decision, federal district judges have struck down over a dozen bans – in Utah then Ohio, Illinois, Virginia, Kentucky, Michigan, and even Texas. Are courts influenced by public opinion or do courts influence public opinion? Do you think that *U.S. v. Windsor* affected the pace and/or intensity of the movement for marriage equality? How does the Supreme Court's discussion of "state sovereignty" affect the role that public opinion can play on this issue?

Required Reading:

U.S. v. Windsor, 570 US 12 (2013)

Rosenberg, Gerald, You've Got that Loving Feeling? The Litigation Campaign for Same Sex Marriage in *The Hollow Hope: Can Courts Bring About Social Change* (Chapter 12, pp 342-354)

Sicaridis, Richard, **The Growing Impact of the Supreme Court's Gay-Marriage Ruling**, *The New Yorker*, Jan. 27, 2014, <http://www.newyorker.com/news/news-desk/the-growing-impact-of-the-supreme-courts-gay-marriage-ruling?mobify=0>

Silver, Nate, How Opinion on Same Sex Marriage is Changing and What it Means, *The New York Times*, March 26, 2013
http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0

Recommended: *Edie and Thea: A very long engagement* (2009) <http://www.imdb.com/title/tt1512779/> (60 minutes)

March 25, 2015, Class 11, Marriage Equality, cont.

The United States Court of Appeals for the Sixth Circuit's decision in *DeBoer v. Snyder* is the first federal appellate court to uphold a voter-initiative banning same sex marriage. Should voters have the final

say? Professor Hammer asserts that “trust in federalism’s ‘laboratories of experimentation’ may be wise in revealing new strategies for utility regulation, but such trust is misplaced in regards to the protection of civil rights.” Do you agree? Should courts defer entirely to voter initiatives?

DeBoer v. Snyder: decision by Judge Friedman, <https://www.equalitymi.org/files/March2014-DeBoer-ruling.pdf>

DeBoer v. Snyder: decision by U.S. Court of Appeals for the Sixth Circuit
<http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf>

Hammer, Peter. *Mississippi Burning: Marriage Equally, Anti-Gay Animus and Majoritarian Politics* (forthcoming)

April 1, 2015: Class 12, Courts as Policy-Makers

Guest Speaker: Justice Bridget McCormack, Michigan Supreme Court

April 8, 2015: Class 13, Courts as Policy-Makers: The Dynamic and Constrained Court

As you reflect on the reading materials for this course, would you agree with Rosenberg’s characterization of the different roles of the courts?

Rosenberg, Gerald. “The Dynamic and the Constrained Court” in *The Hollow Hope: can Courts Bring About Social Change* (The University of Chicago Press, 2d Edition, 2008) (Chapter 1, pp 9-36)

April 15, 2015: Class 14, Final Papers Due.

We will use this class for a reflective discussion about the class, what you have learned, and how it might affect your professional choices.

Assignments:

Reaction/Reflection Paper: Due February 11.

The purpose of this assignment is to provide you with an opportunity to describe the key features of this important case and ensure that you are learning to parse a legal opinion. The paper should be between 3-5 pages. You may choose one of the following options:

1. Was *Brown* consistent with what the Constitution required or did the Supreme Court forge new ground in rendering its decision?
 - a. Describe the Court’s holding

- b. Describe the procedural history of the case
 - c. Describe the Court's legal rationale for its holding
 - d. Describe the public policies relied upon by the Court in making its decision.
 - e. Identify the social science data discussed by the court
 - f. How was the decision transformative?
2. **What public policies were identified by Supreme Court as important to its reasoning in *Brown* and do you think they are equally relevant today? Please be sure to cover #1 (a-e) in your answer.**

Final Paper: Due April 15.

Write a ten page paper, selecting one of the two topics below. I am happy to look at a thesis statement and provide feedback before you begin your work. You are encouraged to develop an argument that draws upon literature from more than one academic discipline (eg law, political science, public policy) as well as from serious and trustworthy non-academic sources (eg media, advocacy group publications.) Your argument should be well supported by the materials and not simply an opinion piece.

If you choose a topic that is outside the scope of the issues we have covered, please submit a paragraph describing your topic for approval by April 1.

- 1) **What role can the courts play in the effort to improve public education for children attending schools in low-performing/high poverty districts?**
- 2) **What role have the courts played in the effort to secure marriage equality?**

If it would be helpful, here are some propositions that you can address in your paper:

- 1) Strategic litigation can give communities a voice with which to address inequities;
- 2) Strategic litigation can marginalize communities and diminish their ability to affect public policy;
- 3) The legal arena provides a dynamically interrelated venue that drives impact;
- 4) The level of community engagement in litigation is a significant variable in assessing the viability of any effort at social change;
- 5) The courts cannot solve complex social problems;
- 6) The courts are the primary vehicle for dismantling laws that deny rights or mitigating the effects of social prejudice.

Student Survey

Name:

Degrees/Institutions:

Place of Origin:

Describe any college level coursework or professional activity that is relevant to the topics covered in this class:

Professional Aspirations:

Your goals for this course:

Non-Profit Advocacy and Public Interest Lawyering: Equality and Justice Bibliography (Winter 2015)

Books/Book Chapters

Boutcher, Steven, **Mobilizing in the Shadow of the Law**, in *Research into Social Movements, Conflict and Change*, (Emerald Group: 2011) pp. 178-208

Irons, Peter, **The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court** (Penguin: 1988)

Rosenberg, Gerald, **The Hollow Hope: Can Courts Bring About Social Change** (University of Chicago Press, 2008)

MacGregor Burns, James and Burns, Stewart, *The Pursuit of Rights in America* (Vintage Books: 1993)

powell, john, Race and Space in *Challenges to Equality: Poverty and Race in America*, ed. Hartman, Chester (M.E. Sharpe 2001) (p. 21-27)

Court Opinions, transcripts, and complaints

Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) ("Abbott I")

Bowers v. Hardwick, 478 US 186 (1986)

Brown v. Board of Education, 347 US 483 (1954)

San Antonio v. Rodriguez, 411 US 1 (1973)

DeBoer v. Snyder: decision by Judge Friedman, <https://www.equalitymi.org/files/March2014-DeBoer-ruling.pdf>

DeBoer v. Snyder: decision by U.S. Court of Appeals for the Sixth Circuit, <http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf>

Lawrence v. Texas, 539 US 558 (2003)

U.S. v. Windsor, 570 US 12 (2013)

News Articles

Berry, Dan, **The Legacy of School Segregation Endures, Separate but Legal**, *The New York Times*, Sept. 30, 2007

Bollinger, Lee, **Sixty Years Later, We Need a New Brown**, *The New Yorker*, May 16, 2014

Sicaridis, Richard, **The Growing Impact of the Supreme Court's Gay-Marriage Ruling**, *The New Yorker*, Jan. 27, 2014

Megerian, Chris, Christie says he won't fight N.J. Supreme Court order to add \$500M in funding for poor school districts, *NJ.Com*, May 24, 2011,
http://www.nj.com/news/index.ssf/2011/05/christie_says_he_will_comply_w.html

Silver, Nate, How Opinion on Same Sex Marriage is Changing and What it Means, FiveThirtyEight , *The New York Times*, March 26, 2013
http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0

Law Review and Legal Articles

Dorsen, Norman. How American Judges Interpret The Bill of Rights, *11 Constitutional Commentary* 379 (1994) (pp 379-393)

Hammer, Peter, Mich-issippi Burning: Marriage Equally, Anti-Gay Animus and Majoritarian Politics, Wayne State University School of Law (forthcoming)

Heise, Michael, **The Story of *San Antonio Indep. School Dist. v. Rodriguez: School Finance, Local Control and Constitutional Limits***, *Cornell Law Faculty Publications*, Paper 76

Kerr, Orin. **How to Read a Legal Opinion: A Guide for New Law Students**, *The Green Bag: An Entertaining Journal of Law*, Vol. 11, No. 1 (Autumn 2007) George Washington University

Moss, Kary, **The Right to Read**, *Wayne State University School of Law Journal of Law and Policy* (forthcoming).

State Courts v. Federal Courts, *Judicial Learning Center*. <http://judiciallearningcenter.org/state-courts-vs-federal-courts/>

The Court and Constitutional Interpretation, United States Supreme Court,
<http://www.supremecourt.gov/about/constitutional.aspx>