Instructor: Scott Barclay  
Tuesday and Thursday 8:45am -10:05am in Social Science 116

Course Description:  
The course is designed to familiarize students with the courts as policymakers and the law as policy. The first half of the course will examine the courts as policymakers; who creates and controls policy; the impact of court decisions; influencing policy through and within the courts; and, the relationship of social movements. The second half will reintroduce formal law into the discussion and consider recent examples of judicial involvement in state and national policymaking. In addition, we will apply our understanding of the nature of policymaking to consider a likely future Supreme Court case.

Contacting Me:  
The only way to contact me (except office hours) is by e-mail: s.barclay@albany.edu

Office Hours:  
Tuesday and Thursday 11.45am -1.00pm in the Political Science Office (Humanities 016)

Requirements:  

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<th>Requirement</th>
<th>Percentage</th>
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<tr>
<td>15 page Final Paper</td>
<td>40%</td>
<td>Wednesday, May 13 at 3.30pm</td>
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<tr>
<td>6 one page Article Reviews</td>
<td>60%</td>
<td>Throughout the semester: based on your selection</td>
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6 Article Reviews: (60%) Due throughout the semester: based on your selection  
On six separate occasions, each student must submit via email a one-page review of a class reading to be handed in the day we first discuss that reading -- it must be emailed by the start of class on that day. The review is to be attached (as a Word, Wordperfect, RTF, or PDF document) to an email to s.barclay@albany.edu.  

Please label your attached file AND your subject line in this format: your last name pos328 assignment number  
For example: obama pos328 assign1.doc or biden pub328 assign3.pdf or mccain pos328 assign5.rtf

Each review must have a complete citation to the reading at the top; a short paragraph of two to three sentences outlining the author’s thesis; a description of the arguments they use to develop their thesis; a paragraph on the evidence they use; and, a discussion of how the article advances or alters the ideas advocated in related articles that we have read in the class.

Students can select any six articles or books to review. Reviews will only be accepted on the first day we discuss an article or book, if we discuss it over more than one class session. I will know that you chose to review a reading when you send a review on that day by the start of class. You may submit more than six article reviews and your grade will be calculated based on your best six grades from all of your submitted article reviews. Each review is worth 10 points. You will receive zero points if you do not submit all six reviews.

Final Paper: (40%) Due Wednesday, May 13 at 3.30pm  
Each student must complete a 10-15 page paper as outlined at the end of this syllabus. The completed paper must be submitted via email to s.barclay@albany.edu as an attached file (as a Word, Wordperfect, RTF, or PDF document). Please label your attached file AND your subject line in this format: your last name pos328 final

ATTENDANCE IS NOT REQUIRED. You are free to miss as many classes as you like for any reason. If you miss class, you do not need to provide a note to me unless it actually hinders your ability to effectively complete a requirement. However, if you choose to attend class, I will take your presence in class as evidence that you completed the assigned readings and that you are prepared to discuss them. Class will be very interactive and you can expect to be called upon to actively engage the assigned readings and the ideas in that material. You may be called to the front of the class to help present the ideas in the class. Based on prior experience from teaching this class, I warn you that it is extremely difficult to complete the final paper successfully without active and consistent engagement with the readings and the resultant class discussion.
Required Books


Required Readings:
Required readings will be posted on Blackboard. You can also access almost all of the articles via Lexis, Westlaw, JSTOR or directly from the original source by using the University Library.

Accessing cases and laws:
You can easily access all court cases and state and federal laws discussed in class and in the final assignment. These are available in their full format from Lexis-Nexis. Go to University Library, then to Database Finder, then the letter “L”, then choose Lexis-Nexis academic universe. In Lexis-Nexis, select Law. In Law, you will find the necessary links. To find a case, simply type the name or citation into the appropriate dialog box. All articles and cases have their full citation listed in this syllabus. Recent law review articles can also be accessed with Lexis or Westlaw.

Accessing some articles:
In addition to the version on Blackboard, you can easily access many of the articles discussed in class. These are available in their full format from JSTOR. Go to University Library, then to Database Finder, then the letter “J”, then choose JSTOR. In JSTOR, it is best to select journals from the fields of Political Science and Sociology. Recent law review articles can also be accessed with Lexis or Westlaw.

Examples of Correct In-Text Citations:
Legal Citations:
On May 20, 1974, the Court of Appeals of Washington (Division One) in *Singer v Hara* (11 Wn. App. 247 at 264) “concluded that the state's denial of a marriage license to [same sex] appellants is required by our state statutes and permitted by both the state and federal constitutions.” While state courts in Minnesota (in *Baker v. Nelson* 191 N.W.2d 185), New York (in *Anonymous v. Anonymous* 67 Misc. 2d 982, and later in *Kenney v Kenney* 76 Misc 2d 927), and Kentucky (in *Jones v. Hallahan* 501 S.W.2d 588) had previously issued opinions that denied marriage to lesbian and gay couples, the legal claim in *Singer v Hara* was the first of the challenges to state policies that prohibited same sex marriage to rely primarily on state constitutional provisions rather than rights associated with the US Constitution.

Academic Citations: (To be accompanied by a reference section at the end of the paper with full references)
As Scheingold (1998, 124) notes “according to some critics of left-activist cause lawyering, legal challenges to the foundations of established authority are counter-productive as well as ineffectual.” ……. Through the use of law, the state protects certain social, political, and economic configurations (Abel 1998) or, in this case, a certain sexual configuration.
**Eight Important Warnings about Your Submitted Work:**

**Proper citations:**
In the final paper and each of the submitted reviews, you are required to use correct citations to the referenced articles or book, including the book or article being reviewed. The failure to use citations or correctly reference quotes will count heavily against your grade. (Also, see below the warning on plagiarized material).

**The Quality of Submitted Work and the Possibility of Public Shaming:**
Based on an assessment of work submitted in prior years, it is clear that some individuals spend very little time and/or effort on their submitted reviews. Consequently, the submitted work includes absurd statements, inaccurate citations and very poor sentence structure. To encourage students to pay more attention to their submitted work (beyond the grade I issue to these submissions), I will post the WORST examples of sentences and absurd statements on Blackboard as well as highlight them in class.

**The Number of Submitted Reviews.**
You will receive zero points if you do not submit all six reviews. There are no exceptions – you cannot submit a review after the reading occurs in class. The last opportunity to submit an article or book review is Class 28.

**Use of Class Readings in the Final Paper:**
In your final paper, if you fail to address AT LEAST EIGHTEEN OF THE CLASS READINGS, you will automatically lose 20 of the 40 points. Obviously, addressing many or all of these class readings incorrectly will also not aid in your final score.

**Use of Material beyond that provided in Class in the Final Paper:**
In order to complete the final paper effectively, you may need to access additional material that allows you to apply the class readings to the case scenario. For example, the class readings suggest public opinion and the background of justices each play a role in shaping the timing and direction of judicial decisions. Accordingly, in writing your final paper, you may need to look up recent public opinion polls related to the issue in the case scenario or the judicial background of the current justices of the United States Supreme Court. However, the paper is designed to test your knowledge and understanding of the readings assigned in class. Consequently, you should have no need in the final paper to reference academic articles or books beyond those assigned in class. If you find yourself using academic articles or books beyond those assigned in class, you are on the wrong path with the paper. If you find yourself regularly citing *Wikipedia* rather than the assigned class material, you should surrender all hope of passing the class.

**A Legal Response as the Primary or Only Answer in the Final Paper:**
The final paper question specifically asks you to use the class readings and apply them to the scenario in a manner that explains the role of social and political forces in shaping the timing and nature of US Supreme Court decision making. It does NOT ask for a legal brief or an analysis of the law. The use of a legal or doctrinal argument as either the primary or the major basis of the final paper will be treated as an incorrect response that does not appropriately address the final paper question. Your grade will suffer accordingly from failing to answer the question.

**Cheating and Plagiarism:**
I encourage students to work together in reading and understanding the material. I even encourage study groups. However, another student cannot write or copy all or part of your paper unless so acknowledged (and there are no group work assignments in the class). Such incidents will be defined as cheating. Similarly, any example of copying of material or ideas belonging to another person without correct reference to the original author by citation (and quotation marks, if directly quoting) will be treated as plagiarism. In any case of cheating or plagiarism, you will be failed for the entire course and your case will be forwarded to Judicial Affairs with a request for additional sanction as allowed by the rules of the University.

**Personal Opinion:**
The submitted reviews and the final paper require academic responses. They are not asking whether you like or dislike the relevant reading, same sex marriage, marriage in general, the State of New York or the legal system.
The Course:
(A) Introduction

Class 1: General Discussion of Syllabus and Course

(B) Constraints upon Courts as Policymakers: Rules of the Game

Class 2: Neither Sword nor Purse

Federalist Papers 78

Class 3: Legitimating the Dominant National Alliance


Class 4: Policymaking around the Dahlian Constraint


Class 5: Policymaking around the Dahlian Constraint


Class 6: Structural Constraints inherent in Legal Institutions


Class 7: Policymaking by Implicit Permission


(C) Who Influences the Final Policy

Class 8: Policymaking and the Changing Case Pool


Class 9: Those Who Appoint: Ideology of Appointer

Class 10: Public Opinion:


Class 11: Election Results


Class 12: Interest Groups I


Class 13: Interest Groups II – Amicus Curiae


Class 14: Media


Class 15: Cause Lawyers


(D) **Deciding Policy**

Class 16: [Judges as Strategic Actors I](#)


Class 17: [Strategic Actors II](#)

Discussion only (based on Murphy, Walter F. *Elements of Judicial Strategy*. Chicago: University of Chicago Press 1964)

Class 18: [Strategic Actors III](#)


Class 19: [Issue Fluidity](#)


(E) **Policy Impact and Compliance**

Class 20: [Impact and Compliance](#)


Class 21: [Legitimacy](#)


Class 22: [Intervening Agencies and the Distant Scapegoat](#)

(F) **Bringing Law Back into the Picture**

Class 23: The Myth of Rights / The Politics of Rights I


Class 24: The twin edges of the Social Meaning of Law


Class 25: Legal Mobilization in Action I


Class 26: Law Constructing Identity


(F) **The Unequal Playing Field**

Class 27: Structural Problems in terms of Legal Change


******Last opportunity to submit an article or book review is Class 28 ******

Class 28: Redefining Popular Usage of the Law

(G) **Putting the Pieces Together**

Class 29: **The Myth of Activist Judges**


Class 30: **The Dynamic Nature of Law**

Discussion Only and last opportunity for questions about the final paper
Final Paper: (50%) -- Due Wednesday, May 13 at 3.30pm

Each student must complete a 15 page paper discussing how they think the United States Supreme Court would decide the following case. Please state what is the relevant claim and whether the US Supreme Court would support the State of New York in this claim. With direct reference to AT LEAST EIGHTEEN OF THE READINGS discussed in class and with only very limited use of related material from outside sources (such as public opinion, judicial backgrounds, etc.) consistent with the class readings, please also outline ALL of the political, and social factors that might influence the US Supreme Court in determining its decision on this issue and explicitly explain how they might apply in the current context. Using this material, explain how you reached your assessment of the how the US Supreme Court would decide this case.

You can work as a group to discuss possible answers, but each student must submit a unique and individual answer using their own written material.

All cases MUST have a full case citation and all articles and books mentioned in your answer must have a full citation. Feel free to use quotation marks from the cases as referenced in Lexis-Nexis or Westlaw, but any quotes from a case must be identified by quotation marks and must give the correct legal citation. Similarly, quotes and material from articles or books (including those we covered in class) must be properly identified with quotation marks and correct citations.

Use of material from the Web, another student, or another source without proper attribution (such as a citation to identify it as work written by another person or an idea belonging to a source other than you) will be treated as plagiarism. In any case of cheating or plagiarism, you should be aware that you will be failed for the course and your case will be forwarded to Judicial Affairs with a request for additional sanction as allowed by the University rules.

Submitted answers that fail to address AT LEAST EIGHTEEN OF THE CLASS READINGS will automatically lose 20 of the 40 points in this assignment.

CASE FACTS:
Joan Ng and Katie Cat are residents of Albany, New York. They have been involved in a long-term relationship as romantic partners since 1998. On May 29, 2006, they are legally married in a large ceremony at their parent’s holiday house on Cape Cod in Massachusetts – this marriage is permitted by the change in Massachusetts’ law pursuant to the judicial order in Massachusetts Supreme Judicial Court in November 2003 in Goodridge v. Dept. of Public Health (440 Mass. 309). Their ability to marry as non-residents at that time is confirmed by the amended order in Cote-Whitacre v Public Health (446 Mass. 350). After a short honeymoon of 2 weeks sailing in the Canadian Gulf Islands, Ng and Cat return to their respective jobs in Albany, New York.

Upon their return, Ng presents her marriage documents to the human resources section of her employer, the Department of Taxation and Finance of New York State. Although only 36, Ng is a senior member of the Department and he reports directly to the Commissioner. Within the Department of Taxation and Finance of New York State, Ng earns a substantial pay as one of the New York’s top corporate tax lawyers associated with ensuring state tax compliance by all registered members of the New York Stock Exchange. Her partner, Cat, is the Evan Wolfson Chair of Civil Rights at New York University (NYU) Law School.

Pursuant to the May 2008 directive of the New York State Governor that New York recognizes same sex marriages celebrated in other (non-New York) legal jurisdictions, the Commissioner directs that the Department of Revenue of New York State change Ng’s status to married in her employment record for purposes of her state tax withholding. Other legal and financial issues related to Ng’s new marital status are similarly changed, but only for those legal and financial issues directly accorded or controlled by the State of New York. This change in legal status offers significant financial benefits to Ng and Cat. For the first time for tax purposes they are treated as a married couple by New York State when calculating the taxes owed on their substantial income and assets.
However, based on the 1996 Federal Defense of Marriage Act (104 P.L. 199; 110 Stat. 2419), the change in Ng’s marital status in 2008, including its full and complete recognition by the State of New York, is NOT reflected in relation to any federal taxes or other benefits allocated by the federal government.

Section 3 of the 1996 Federal Defense of Marriage Act (104 P.L. 199; 110 Stat. 2419) changes the definition of marriage for all laws promulgated by the United States government. This section (1 USCS § 7) states:


Second 3 follows the more famous second section of the 1996 Federal Defense of Marriage Act which relates to the recognition of same sex marriages celebrated by another state or jurisdiction. This section (28 USCS § 1738C) states:

NO STATE, TERRITORY, OR POSSESSION OF THE UNITED STATES, OR INDIAN TRIBE, SHALL BE REQUIRED TO GIVE EFFECT TO ANY PUBLIC ACT, RECORD, OR JUDICIAL PROCEEDING OF ANY OTHER STATE, TERRITORY, POSSESSION, OR TRIBE RESPECTING A RELATIONSHIP BETWEEN PERSONS OF THE SAME SEX THAT IS TREATED AS A MARRIAGE UNDER THE LAWS OF SUCH OTHER STATE, TERRITORY, POSSESSION, OR TRIBE, OR A RIGHT OR CLAIM ARISING FROM SUCH RELATIONSHIP.

Based on this existing definition of marriage in the federal law, Cat is unable to be recognized by the federal government as married to Ng for tax purposes. This tax determination incurs substantial financial costs for the married couple since each is required to file as though they were single for the purposes of federal tax returns. This occurs despite the fact that a federal district court judge ruled in 2004, in addressing the application and constitutionality of 1996 Federal Defense of Marriage Act, that “the determination of who may marry, however, continues to be exclusively a function of state law.” (Snyder J. in In re Kandu 315 B.R. 123 at 132).

Ng and Cat decide to challenge this determination in the federal courts. They argue that state designations of marital status should have effect for the purposes of taxation since the determination of marital status is exclusively a state function.

In her legal challenge, Ng and Cat are provided legal counsel by lawyers from Gay and Lesbian Advocates & Defenders (GLAD). After discussions with New York’s Governor and Attorney General, New York joins the case on Ng and Cat’s side. The New York Attorney General represents the State of New York in challenging the United States in terms of which government entity – the state or federal government – has control over the designation of marriage.

Ng and Cat’s legal team argue that the Federal Government is violating New York’s sovereignty by exercising control over whom the state may designate as married. They argue that states have traditionally maintained control over the parameters of marriage since its inception as a civil contract recognized by states. They argue that this principle was re-affirmed as recently as 1996 by the US Congress and President in the second section of Federal Defense of Marriage Act. Finally, they note that this legal principle was de facto acknowledged in the dispersal of federal funds when the United States permitted New York State to recognize the lesbian and gay partners of victims of the attacks on the World Trade Center on September 11, 2001. And, that it applied when the Federal Government had historically recognized marital designations offered by Pennsylvania that, until recently, accepted a common law definition of marriage in that state.
The US Government, represented by counsel from the office of the US Solicitor General as well as lawyers from the Internal Revenue Service, rejects this proposition. They argue that the US Congress can set and has historically set, through federal statutes, the rules for executive agencies administering federal programs, including the parameters of marriage in the case of federal taxation. And that the 1996 Defense of Marriage Act validly enacts this idea.

The case is designated as:
*The State of New York v United States*

In their opinion in this case, the US District Court in New York holds that the current 1 USCS § 7 is so vague as to violate a state’s exclusive control over the designation of marital status – a traditional state function. On appeal by the United States, the Court of Appeals (Second Circuit) decides that states exercise primary and near exclusive control over marriage and that the constitution reserves that power to them. Consequently, it is entirely within state powers to recognize or not recognize same sex marriages as a state may see fit, consistent with its own state constitutional requirements. However, consistent with this holding and the 1995 decision in *Dean v. District of Columbia* (653 A.2d 307), it rules that the US government may set the criteria for marriages performed in the District of Columbia.

The US Government appeals it to the U.S. Supreme Court.

American Express, Microsoft, Apple, Google, Marriage Equality, Lambda Legal, HRC, Boston University, Harvard Law School, ACLU, Verizon, Fleet Bank, GLAAD, the Gay and Lesbian Medical Association, the Commonwealth of Massachusetts, the State of California, the State of Vermont, the State of New Hampshire, the State of Rhode Island, the State of Connecticut, the State of New Jersey, the National Tax Lawyers’ Association, New York Stock Exchange, the Cities of New York, Albany, and Rochester, Cornell University, and the Uniting Church of New England are all allowed to file *amicus curiae* briefs supporting the State of New York.

The State of Nebraska, the State of Florida, the State of Virginia, Log Cabin Republicans of South Carolina, the American Family Association, the Family Research Council, the Center for Law and Policy, and the Conference of Southern Baptist Churches, and National Conference of Catholic Bishops are allowed to file *amicus curiae* briefs supporting the US Government.

The Supreme Court has all of the same justices as of May 1, 2009.

In a 15 page paper, you must discuss how you think the United States Supreme Court would decide this case. Please state what is the relevant claim and whether the US Supreme Court would support the State of New York in this claim. With direct reference to AT LEAST EIGHTEEN OF THE READINGS discussed in this class and with only very limited use of related material from outside sources that are consistent with the class readings (such as recent public opinion, judicial backgrounds, etc.), please also outline ALL of the political and social factors that might influence the US Supreme Court in determining its decision on this issue and explicitly explain how they might apply in the current context. Using this material, explain how you reached your assessment of the how the US Supreme Court would likely decide this case.