

### Study Questions for the Final Exam

#### Tom Keck, “Party, Policy, or Duty”

1. What important factor, besides partisanship and ideology, does Keck identify as something that explains the Court’s decisions to strike down laws? How does Keck go about showing that the factor is important?

#### Keith Bybee, “Legal Realism, Common Courtesy, and Hypocrisy”

2. What puzzle regarding public attitudes toward judging and politics does Bybee attempt to explain through his analogy to courtesy? Briefly explain how the analogy helps to explain why law might remain a stable and powerful force even if people see law’s official claims of neutrality as hypocritical.

3. Bybee concludes by noting that the analogy to courtesy works well descriptively to explain expressed public attitudes about law. However, he also suggests that the analogy points to a normative problem. In particular, Bybee suggests that legal courtesy is not neutral but is “organized around a specific order and dedicated to keeping people in their proper place.” Explain what Bybee means with this claim, and what kind of scholarship Bybee uses to support it.

#### Epstein and Knight vs. Graber on the Establishment of Judicial Review

4. What important insight regarding Jefferson’s motivations and preferences do Epstein and Knight say emerges from their model of the decision-making process? Explain how their insight emerges from the game that they use in their article. Epstein and Knight identify several equilibrium paths that solve the game. Explain why they focus on the one solution that they associate with their key insight.

5. In what way does Graber undermine Epstein and Knight’s key conclusion in his article, “The Problematic Establishment of Judicial Review”? Explain precisely the underlying premise of Epstein and Knight’s article that Graber calls into question.

6. Does Graber argue that *Marbury v Madison* established the power of judicial review? Explain his position on this question.

#### Brandwein on the State Action Doctrine

7. What is the *state action doctrine*? What clause of the constitution does the doctrine apply to? What Supreme Court case is usually identified as the source of the doctrine?

8. Explain Brandwein’s interpretation of the Supreme Court’s claims about the link between “state action” and federal power in the *Civil Rights Cases*? How is Brandwein’s reading different from the way judges today interpret that case and apply its holding as the *state action doctrine*? What misunderstanding regarding the Court’s language in the *Civil Rights Cases* does Brandwein uncover and explain? How does her reading support her doctrine of state neglect? What are the implications of Brandwein’s findings for Constitutional law on civil rights?

### **Robert Dahl on the Role of the Supreme Court.**

9. Briefly explain Robert Dahl's account of the role of the Supreme Court in the American political system. Include a brief description of the evidence Dahl uses to support his account.

10. Dahl's argument is based in part on his effort to identify and count cases where the Supreme Court has thwarted national majorities. What kinds of cases does Dahl count, and what kinds of cases does he not count? What kinds of cases where the Court strikes down laws does Dahl *not* count? Is that omission important?

11. Dahl's article was written just as the Warren Court was beginning to make a series of very controversial rulings that were broadly perceived as activist and undemocratic. More recently, the Rehnquist Court compiled a record of striking down congressional statutes that have made it the most activist Court in history. Do such developments mean that Dahl was wrong about the power and role of the Court? Or, can the apparently anomalous behavior of the Warren and Rehnquist Courts be explained within Dahl's framework?

### **Spann: *Race Against the Court***

12. *Brown v Board of Education* is usually thought of as a case that advanced the interests of African Americans, and also as a case that shows the power of the Supreme Court to protect minority rights. Does Spann agree with these views? Explain Spann's stance on *Brown*.

13. What, according to Spann, is "legitimation"? Is it a good thing that the Supreme Court can legitimate things, according to Spann? Explain. How does Spann's account of "legitimation" differ from what Dahl had in mind when he said that the role of the Supreme Court is to "legitimate" the policies of a new governing coalition? Do Dahl and Spann agree about whether it is a good thing for the Court to help to legitimate certain outcomes? Explain their views. When might legitimating be a good thing? Under what kinds of conditions is legitimation a bad or harmful thing?

### **Hetherington and Smith: Evaluations of the Supreme Court.**

14. What important puzzle regarding the relationship between political ideology (liberal or conservative) and support for the Supreme Court does this article try to explain? Explain the evidence that Hetherington and Smith use to explain the puzzle and show that it exists.

15. What feature of media coverage of the Supreme Court do Hetherington and Smith draw attention to in their effort to explain the puzzle? What kind of evidence do they use to demonstrate the relevant feature of media coverage.

16. In order for their argument to work, Hetherington and Smith have to claim that media coverage of the Court has some effect on public views of the Court. What evidence do Hetherington and Smith offer to support their view that media coverage has such effects? Are all citizens equally susceptible to the effects of distorted media coverage? Explain.

### **Graber on the Non-Majoritarian Difficulty**

17. What is a crosscutting issue? Give three examples of crosscutting issues in American politics.
18. Why do party leaders want to keep crosscutting issues off of the policy-making agenda and avoid taking responsibility for resolving those issues? What other actors have incentives for putting such issues on the active political agenda?
19. *Dred Scott* is usually thought of as a case where the Supreme Court contributed to the start of the Civil War by making an unwelcome intrusion and imposing a solution to questions that would otherwise have been resolved by elected officials. How does Graber's account differ from this standard account?
20. What evidence does Graber offer to show that Congress wanted the Courts to resolve the meaning of the key provisions in the Sherman Act?

### ***Duplex Printing v Deering***

21. What is a secondary boycott? Why is there confusion about what exactly counts as a secondary boycott? Explain by first giving an example of a boycott that would clearly be a regular or primary boycott, and then an example of a boycott that would clearly be a secondary boycott. Then explain why the boycott at issue in the *Duplex Printing* case falls somewhere in between, with elements of a primary boycott and elements of a secondary boycott.
22. The Supreme Court allowed an injunction against a boycott even though language in Section 20 seemed to state that courts could not issue injunctions for "ceasing to patronize". Why did the Court conclude that the statutory language did not apply to the actions of the machinists in this case? What evidence from the text and/or congressional record did the Court use to support its claim?
23. The Supreme Court concluded that the long list of immunities in Section 20 did not apply in this case because the boycotting machinists were not "employees" of the Duplex Company and were not involved in a dispute concerning the "terms and conditions of employment". What elements of the text of section 20 support the Court's reading? What alternative reading of the same text suggests that the Court was wrong on this point?
24. Explain the issue of the missing "or" in Section 20. Where was the "or" located in earlier proposals? If the "or" had stayed in the statute, would the Court's reading of the statute in *Duplex* be less plausible?
25. Why, according to Lovell's chapter, did the AFL agree to legislative compromises in 1914 that the same organization had repeatedly rejected during earlier congressional sessions?

### **Rosenberg on *The Hollow Hope***

26. What is a natural experiment? In what way did court and congressional actions on segregation create a natural experiment that allows Rosenberg to test the power of the Supreme Court to produce significant social change? What are some limitations of the experiment that make it dif-

difficult to conclude, on that basis alone, that interest group should not devote resources to litigation?

27. Rosenberg claims that desegregation did not really start happening until 10 years after *Brown* was decided. What finally happened that finally led to desegregation in the South? Which branch acted, and what actions did that branch take?

### **Baum on The Court's Impact**

28. What concrete "sanctions for disobedience" does the Court possess, according to Baum? Do those sanctions mean that the Court can always prevail? Are the effects of the sanctions limited in some types of cases? Explain.

29. Explain Baum's point about the connection between the impact of Supreme Court rulings and the way the Court communicates its rulings. Does the Court always at least try to communicate its rulings in a way that maximizes the Court's impact? Explain, using examples.

30. What is the difference between a statutory case and a constitutional case? Give an example of each. What does Congress need to do to overturn a Supreme Court ruling in a statutory case?

31. Explain how Congress can sometimes reverse or limit the impact of the Supreme Court's constitutional rulings by passing ordinary legislation. In some cases Congress can do this by passing laws that directly limit the ability of judges to continue to make rulings that Congress does not like. List the specific powers that Congress has to limit judicial power in this way. In other cases, Congress limits the impact of a Court ruling not by limiting judicial power directly, but by coming up with an alternative law that achieves similar results while avoiding constitutional problems. Give some examples where Congress has pursued this strategy.

### **Gillman on Using Courts to Advance Agendas**

32. What is entrenchment? Explain two examples of efforts by political parties to use the courts to entrench their power. Pick one example from before the Civil War and one example for after the Civil War.

### **Lovell and Lemieux on Ideological Shifts**

33. In *Planned Parenthood v Casey*, the Supreme Court surprised many observers by saying that it was not overruling *Roe v Wade*. Many observers have used *Casey* as an example to claim that the Republican efforts to transform the Court and make it more conservative have failed. How does Lovell and Lemieux's account differ from this standard interpretation? More generally, what do they say is wrong with measuring ideological shifts on the Court by counting the number of times that the Court has overturned precedents?

34. Dahl argues that regular vacancies on the Court, along with the President's appointment power, usually ensure that the ideology of the Court is close to the ideology of the ruling coalition in the elected branches. Has the pattern that Dahl observed continued in the period since Dahl wrote his article in 1957? Is the current dominance of conservatives on the Supreme Court the result of sustained Republican success in winning elections?

## Susan Burgess on *Bush v Gore*

35. Burgess claims:

I would argue, the Court (as well as mainstream and critical constitutional theorists) sets up legal identity as true and natural and political identity as an inauthentic imitation in U.S. Constitutional theory. Following Butler, the Court's legal façade is a fiction or performance that the Court (and mainstream constitutional theorists) feels compelled to repeat regularly in order to further naturalize legal identity, despite all evidence to the contrary. Hence the need for mimicry and parody of the straight reasoning of both the Court and the academics who study it. (p. 142)

Explain what Burgess means by this in your own words. Then evaluate her claim that there is a "need" for mimicry and parody of the reasoning used by the Supreme Court. What often hidden aspects of the Court might be revealed through the use of parody? Does Burgess's own parody of *Bush v Gore* produce any insights that support her claim that parody is a useful way to learn about the Court? Are there any examples of scholarship read in this class that might deserve to be parodied in the way Burgess suggests?