

PSCI 790:414: The Supreme Court as a Political Institution

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Fine Arts 227
Class Time: M/W 9:35-10:55

Course Overview

This course will survey the development of the federal judiciary, and particularly the Supreme Court, from the Constitutional Convention to today. It will address questions including: How was judicial power constitutionally designed? What is the proper role of courts in the American political system? How do judges influence policy? What factors shape judicial decision-making and interpretation? How has the judicial branch developed, accrued power, and changed in relation to other institutions of governance? Should the judiciary have this kind of power? Under what conditions do courts have power to compel social change? What will—or should—be the place of the judiciary in American politics moving forward?

There are four central objectives in this course. First, students will develop a deeper understanding of the constitutional and institutional design of the Supreme Court and its development since the Founding. Second, you will leave the course with knowledge of the political and institutional constraints, responsibilities, and decision-making frameworks that factor into judicial processes and decisions. Third, students will become familiarized with normative and empirical perspectives on judicial power in American politics as well as the conditions under which courts do and do not have the power to enact social change. Lastly, students will leave the course with a deeper appreciation for the nature of judicial power in the American political system and insight that helps them critically and intelligently evaluate the proper role courts and judges should play in shaping law and policy in 21st century America.

Course Grading Scale

	Letter Grade	Percentage	Interpretation
Excellent	A	89.5-100	Mastery of concepts. Can clearly apply concepts to new situations.
Above Average	B+ B	84.5 – 89.49 79.5 – 84.49	Strong understanding of concepts. Acceptable foundation for future work.
Proficient	C+ C	74.5 – 79.49 69.5 – 74.49	Basic understanding. Questionable foundation for future work.
Marginal	D	59.5-69.49	Weak understanding and foundation for future work.
Failure	F	<59.5	Clearly failed to demonstrate understanding.

Course Objectives

1. Learn about the structure and state of the Court, including how Justices get appointed and the Court's basic powers.
2. Understand major theories that explain how judges interpret the Constitution, make their decisions, and secure and exert power in the American political system.
3. Think through intellectual frameworks that adopt different positions on the normative role courts should play in American legal and political life.
4. Examine the modern court's role in American political life by studying recent developments in judicial ethics, power, and the Court's recent and upcoming rulings.

Course Assignments and Graded Events

There will be several graded events throughout the course which will assess your knowledge of the material and ability to critically analyze and apply concepts presented throughout the course.

ASSIGNMENT	POINTS
Attendance/Participation	10%
Paper 1	15%
Paper 2	20%
Midterm	25%
Final Exam	30%

Participation/Attendance (10%): The course will be a discussion-driven seminar, so all students are expected to participate in our discussions in ways that reflect a strong understanding of the course material. Come to class ready to provide a summary of the cases and express your opinions and thoughts on them. Know that I grade your participation from 0-10 each day. At the end of the semester I average your daily scores to determine your overall participation score (e.g. an average of 9.4/10 receives a 94%). Each student gets up to 2 unexcused absences free of penalty; all others must be excused. If the quality of our discussion falters, I will resort to alternative mechanisms for testing your comprehension, including more involved writing assignments or reading quizzes to gauge your understanding of the material.

Paper 1 (15%): For class on Wednesday, February 8, you are required to listen to one oral argument made before the Supreme Court (oral arguments for most cases last approximately an hour, with some variation). The oral argument can be for a case of your choice. Cameras are not permitted in the Supreme Court, but the audio for oral arguments in every case is recorded. Argument audio going for most oral arguments going back to 2010 are available here: <https://www.supremecourt.gov/oral_arguments/argument_audio/2020>. You are required to submit a reaction paper by February 8 at the start of class outlining your reaction to the arguments. (Note that this is the only time I expect a paper submitted at the start of class). You will be expected to present for approximately 3 minutes on what you heard. What did you think of the way the Justices acted and asked questions? Did you notice any strategies in how the Justices behaved during oral argument? Did anything surprise you? How would you have approached arguing before the Justices,

or alternatively, how would you have approached questioning the lawyers if you were on the Court? Papers should be 1,000-1,500 words.

Paper 2 (20%): For class on Wednesday, April 12, you will write a paper responding to our readings by addressing the critiques and defenses of judicial power we have read. Specifics will be sent out closer to the due date, but the topics will ask you to take a position on the appropriate role of judicial review and judicial power in American democracy. You will be expected to engage with readings from throughout the semester in your paper, but you will specifically be expected to engage with the readings following the midterm. Papers are due uploaded to Canvas by 11:59PM on April 12. Papers must be 1,400-1,800 words.

Midterm (25%): There will be a single midterm exam on March 8.

Final (35%): The final exam will be comprehensive and will take place during the scheduled final exam period.

Administrative Policies

Mask Mandate: To protect the health and well-being of all members of the University community, we will abide by any institutionally determined masking policies that may change throughout the semester.

Absences: If you are ill or experiencing symptoms of transmittable disease, please remain home and do not attend in-person class meetings. I just ask that you make a reasonable effort to contact me via email (agrasso@camden.rutgers.edu) if you anticipate missing class or were absent and that you make socially responsible choices if you are feeling ill. Students who are absent will have the opportunity to watch lecture recordings and makeup their quizzes. However, attendance does factor into your grade and is expected if you are healthy. If you miss class, email me and I will send you the recording of class, but this does not mean you can simply take the course online by choice. While I forgive up to 2 unexcused absences, if you are repeatedly absent and make no attempt to contact me or do not provide valid explanation upon request, I will penalize your grade and cease sending you lecture recordings.

Lateness: If you anticipate turning in an assignment late, email me and inform me when you anticipate turning it in. In the absence of extenuating circumstances, you will be deducted ten percent for every 24 hours the assignment is late. However, I am aware that unanticipated events can sometimes slow down progress and I am willing to show flexibility and understanding when it is warranted. I encourage you to speak with me if you need extra time on an assignment, and I will work to accommodate students when it is appropriate and needed.

Lecture Recordings: Lectures will be recorded and available for those who need to miss class. Again, please do not attend in-person classes if you are feeling ill.

Office Hours: Please email me to schedule an office hours visit. My regular office hours are by appointment. Email me ahead of time to schedule a time.

Makeup Exams: Make-up exams will only be offered at the discretion of the instructor and only in the event of illness or emergency. It is the responsibility of the student to email the instructor well in advance of the exams to inform the instructor of any problems in taking the exam. While I will be

understanding and flexible in understanding general absences, I will require formal proof to schedule a make-up exam without penalty. If you cannot validate your reason, your make-up exam will be graded with a deduction.

Academic Integrity: All Rutgers students are expected to abide by the University's academic integrity standards. Each student should review the academic integrity standards, available on the Rutgers Academic Integrity website. For this class you may use any generally recognized style manual to format your citations (Chicago Manual of Style, MLA Style Guide, APA Style Guide). It is strongly suggested that you use Rutgers Library's RefWorks platform for citation. See the current Academic Integrity Policy here: <https://policies.rutgers.edu/10213-currentpdf>

Plagiarism: Academic dishonesty will not be tolerated. All source material MUST be cited when presenting someone's words or ideas. If you are ever unsure about citations, please speak to me. I would much rather answer your questions ahead of time rather than handle a plagiarism case.

Disabilities: Any student in need of classroom accommodations due to disabilities should contact the Coordinator of Disability Services as soon as possible: (856) 225-6442, Fax: (856) 225-6443 or at the Rutgers-Camden Learning Center, Armitage Hall, Room 231. **No accommodations can be made without the explicit approval of the Office of Disability Service.**

Learning Support: If you are having trouble with this course, I encourage you to reach out to me and to take advantage of the full range of programs and services available at Rutgers Camden to support your learning. Details may be found on the website of the Rutgers Camden Learning Center (<https://learn.camden.rutgers.edu/>).

Readings and Class Prep: Please have all readings available to you during class meetings.

Writing and Formatting: Format your writing assignments in typed in 12-point sized appropriate fonts. Papers should be double-spaced with standard margins. Citation format is your choice, as long as you remain consistent.

Respect: The foundation of learning is respect for diverse opinions. We may discuss some controversial issues and people throughout the course, and students are welcome to express their views and opinions in the discussion. To foster good discussions, it is essential that we respect each other's opinions and political views. The expectation is that you will listen and learn from each other and treat each other with the respect that you would expect yourself.

Course Readings and Required Texts:

Two books are required for the course. Hard copies will be available through the bookstore.

- Epstein, Lee, and Jack Knight. *The Choices Justices Make* (Washington: CQ Press, 1998). ISBN: 978-1568022260
- Kaplan, David. (2019). *The Most Dangerous Branch: Inside the Supreme Court in the Age of Trump* (New York: Broadway Books). ISBN: 9781524759919

All remaining course readings are available either online or will be posted to Blackboard.

Lesson Schedule

Block 1: The Structure and State of the Modern Court

Lesson 1	Jan. 18	Course Introduction
Lesson 2	Jan. 23	Contemporary Judicial Politics
Lesson 3	Jan. 25	Judicial Process and Structure
Lesson 4	Jan. 30	Judicial Appointment I: Overview
Lesson 5	Feb. 1	Judicial Appointment II: Polarization
Lesson 6	Feb. 6	The Justices of the Modern Court
Lesson 7	Feb. 8	Paper 1 (with short presentations)

Block 2: Judicial Decision-Making and Power

Lesson 8	Feb. 13	Constitutional Interpretation
Lesson 9	Feb. 15	Policy-Oriented Decision-Making
Lesson 10	Feb. 20	Intra-Branch Strategy
Lesson 11	Feb. 22	Political Context
Lesson 12	Feb. 27	Challenges to Judicial Supremacy
Lesson 13	Mar. 1	Congressional Deference to Judicial Power
Lesson 14	Mar. 6	The Hollow Hope
Lesson 15	Mar. 8	Midterm

Block 3: Normative Perspectives on the Court

Lesson 16	Mar. 20	The Counter-Majoritarian Difficulty
Lesson 17	Mar. 22	Judicial Power as Democratic
Lesson 18	Mar. 27	Judicial Power as Elitist
Lesson 19	Mar. 29	A Normative Critique of Judicial Power
Lesson 20	Apr. 3	A Normative Defense of Judicial Power
Lesson 21	Apr. 5	The Development of Modern Judicial Power
Lesson 22	Apr. 10	The Court's Role in American Democracy
Lesson 23	Apr. 12	Paper 2

Block 4 – The Supreme Court and the Future of the Constitution

Lesson 24	Apr. 17	Judicial Ethics on the Modern Court
Lesson 25	Apr. 19	The Past Term
Lesson 26	Apr. 24	The Current Term
Lesson 27	Apr. 26	Proposals for Court Reform
Lesson 28	May 1	The Future of the Court and Constitution

Course Schedule

BLOCK 1: The Structure and State of the Modern Court

“The general liberty of the people can never be endangered...so long as the judiciary remains truly distinct from both the legislative and the executive.”

- Alexander Hamilton, Federalist No. 78

Wed., Jan.-18: Course Introduction

- Syllabus

Mon., Jan. 23: Contemporary Judicial Politics

- **Kaplan**, prologue and chapter 1
- Adam Liptak, “An ‘Imperial Supreme Court’ Asserts Its Power, Alarming Scholars,” *New York Times*, December 19, 2022
<<https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html>>

Wed., Jan. 25: Judicial Process and Structure

- Baum, Lawrence. *The Supreme Court* (Thousand Oaks: SAGE, 2019), 13th ed., pp. 1-26
- Alexander Hamilton, “Federalist No. 78,” <https://avalon.law.yale.edu/18th_century/fed78.asp>
- U.S. Constitution, Article III
- Optional:
 - Interpretations of Article III, Section One:
<https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/clauses/45>
 - Interpretations of Article III, Section Two:
<https://constitutioncenter.org/interactive-constitution/interpretation/article-iii/section/203>

Mon., Jan. 30: Judicial Appointment I: Overview

- Baum, Lawrence. *The Supreme Court* (Thousand Oaks: SAGE, 2019), 13th ed., pp. 31-69
- **Video Clips TBD**

Wed., Feb. 1: Judicial Appointment II: Polarization

- **Kaplan**, pp. chapters 2-4
- Audio File: NPR News, “What Is The Federalist Society And How Does It Affect Supreme Court Picks,” on *All Things Considered*, June 28, 2018 interview with Amanda Hollis-Brusky and Mary Louise Kelly, <<https://www.npr.org/2018/06/28/624416666/what-is-the-federalist-society-and-how-does-it-affect-supreme-court-picks>>

Mon., Feb. 6: The Justices of the Modern Court

- **Kaplan**, pp. 99-107, 119-133, chapter 7

- Ezra Klein, “The Ford-Kavanaugh sexual assault hearings, explained,” *Vox*, September 28, 2018 <<https://www.vox.com/explainers/2018/9/27/17909782/brett-kavanaugh-christine-ford-supreme-court-senate-sexual-assault-testimony>>
- Fandos, Nicholas, “Senate Confirms Barrett, Delivering for Trump and Reshaping the Court,” *New York Times*, October 26, 2020, <<https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>>
- Quinn, Melissa, “Ketanji Brown Jackson confirmed to Supreme Court, making history as the first Black female justice,” *CBS News*, April 7, 2022, <<https://www.cbsnews.com/news/ketanji-brown-jackson-supreme-court-senate-confirmation-first-black-woman/>>

Wed., Feb. 8: **PAPER 1 DUE.**

- Listen to an Oral Argument of your choice and write a response paper.
- PAPER DUE AT START OF CLASS. Come to class ready to discuss.

BLOCK 2: Judicial Decision-Making and Power

“The Constitution does not say, ‘Read me broadly,’ or ‘Read me narrowly.’ That decision must be made as a matter of political theory.”

- Judge Richard A. Posner, Seventh Circuit Court of Appeals, 1987

Mon. Feb. 13: Constitutional Interpretation

- Greene, Jamal, “Interpretation,” in *The Oxford Handbook of the U.S. Constitution*, eds. Mark Tushnet, Mark Graber, and Sanford Levinson (New York: Oxford University Press, 2015), pp. 887-908
- Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism Volume II: Rights and Liberties*, 3rd edition (New York: Oxford University Press, 2021), pp. 9-11
- **Video:** “Justice Scalia Writes Guide for Interpreting the Law,” interview with Justice Scalia, PBS Newshour, 9 August 2012, <<https://www.pbs.org/video/pbs-newshour-justice-scalia-writes-guide-for-interpreting-the-law/>>

Wed., Feb. 15: Policy-Oriented Decision-Making

- **Epstein and Knight**, chapters 1-2

Mon., Feb. 20: Intra-Branch Strategy

- **Epstein and Knight**, pp. 56-79, chapter 4

Wed., Feb. 22: Political Context

- **Epstein and Knight**, chapters 5-6

Mon. Feb. 27: Challenges to Judicial Supremacy

- Stoner, James, “Who Has Authority over the Constitution of the United States?” in *The Supreme Court and the Idea of Constitutionalism*, eds. Steven Kautz, Arthur Melzer, Jerry Weinberger, and M. Richard Zinman (Philadelphia: University of Pennsylvania Press, 2009), pp. 95-111
- Ryan Cooper, “The Case Against Judicial Review,” *The American Prospect*, July 11, 2022 <<https://prospect.org/justice/the-case-against-judicial-review/>>
- Erwin Chemerinsky, “In Defense of Judicial Review,” *The American Prospect*, July 18, 2022, <<https://prospect.org/justice/in-defense-of-judicial-review/>>

Wed., Mar. 1: Congressional Deference to Judicial Power

- Graber, Mark, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993): 35-73
- (SKIM) Kapur, Sahil, “Republicans may have a real shot at overturning Roe v. Wade. But political danger lurks,” *NBC News*, Oct. 5, 2020 <<https://www.nbcnews.com/politics/2020-election/republicans-may-have-real-shot-overturning-roe-v-wade-political-n1242068>>
- Matt Ford, “Voters Decided Who Won the Midterms. So Did the Supreme Court.” *The New Republic*, Nov. 10, 2022, <<https://newrepublic.com/article/168713/voters-decided-won-midterms-supreme-court>>

Mon., Mar. 6: The Court as Hollow Hope

- Rosenberg, Gerald, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd edition (Chicago: University of Chicago Press, 2008), pp. 1-36, 420-429

Wed., Mar. 8: **MIDTERM DUE. No class.**

Mar. 13 and Mar. 15: No Class, Spring Break.

BLOCK 3: Normative Perspectives on the Court

“It is emphatically the province and duty of the judicial department to say what the law is.”
Chief Justice John Marshall in *Marbury v. Madison* (1803)

Mon., Mar. 20: The Counter-Majoritarian Difficulty

- Bickel, Alexander, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962), p. 1-33, 111-133

Wed., Mar 22: Judicial Power as Democratic

- Epp, Charles, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago, 1998), pp. 26-70

Mon., Mar. 27: Judicial Power as Elitist

- Smith, Rogers, “Judicial Power and Democracy: A Machiavellian View,” pp. 199-217.
- Devins, Neal and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (New York: Oxford University Press, 2019), pp. 39-58

Wed., Mar. 29: A Normative Critique of Judicial Power

- Kramer, Larry. *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University press, 2004), pp. 3-8, 207-226, 249-254

Mon., Apr. 3: A Normative Defense of Judicial Power

- Peretti, Terri Jennings, *In Defense of a Political Court* (Princeton: Princeton University Press, 1999), pp. 77-80, 226-254

Wed., Apr. 5: The Development of Modern Judicial Power

- **Kaplan**, chapters 9-10

Mon., Apr. 10: The Court's Role in American Democracy

- **Kaplan**, chapters 11 and 15
- Kimberly Wehle, "Trump's Election Litigation Will Have Lasting Effects," *The Atlantic*, December 3, 2020 <<https://www.theatlantic.com/ideas/archive/2020/12/trumps-election-litigation-will-have-lasting-effects/617282/>>
- (SKIM): Brief of State of New California and New Nevada State as *Amici Curiae* in Support of Plaintiff's Motion for Leave to File Bill of Complaint, *Texas v. Pennsylvania*, No. 22O155, U.S. Supreme Court, Dec. 11, 2020, <https://www.supremecourt.gov/DocketPDF/22/22O155/163506/20201211114620451_Amicus%202020-12-11.pdf>

Wed., Apr. 12: **PAPER 2 DUE. No class.**

BLOCK 4: The Future of the Court and Constitution

"The President and the Congress are all very well in their way. They can say what they think they think, but it rests with the Supreme Court to decide what they thought."

- President Theodore Roosevelt, 1906

NOTE: Given that the Court could issue rulings during the term or that there could be developments related to what is covered in this section, these readings are particularly subject to change.

Mon., Apr. 17: Judicial Ethics on the Modern Court

- "Statement of Recusal Policy," Supreme Court of the United States, 1 November 1993, <<https://www.politico.com/f/?id=00000183-8648-d513-a19b-9fdc5acd0000>>
- Hailey Fuchs, Josh Gerstein, and Peter S. Canellos, "Justices shield spouses' work from potential conflict of interest disclosures," Politico, 29 September 2022 <<https://www.politico.com/news/2022/09/29/justices-spouses-conflict-of-interest-disclosures-00059549>>

- Harry Isaiah Black and Alicia Banon, “The Supreme Court ‘Shadow Docket,’” *The Brennan Center*, July 19, 2022, <<https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket>>
- Alicia Bannon, “The Real Supreme Court News Isn’t the Alleged Alito Leak,” *The Brennan Center*, November 22, 2022, <<https://www.brennancenter.org/our-work/analysis-opinion/real-supreme-court-news-isnt-alleged-alito-leak>>
- Glenn Fine, “The Supreme Court Needs Real Oversight,” *The Atlantic*, December 5, 2022, <<https://www.theatlantic.com/ideas/archive/2022/12/supreme-court-ginni-thomas-january-6-ethics-oversight/672357/>>

Wed., Apr. 19: The Past Term

- Tom Nichols, “Roe Was Flawed. Dobbs Is Worse.” *The Atlantic*, June 27, 2022, <<https://www.theatlantic.com/newsletters/archive/2022/06/dobbs-conservative-justices-activist-court-roe-overturned/661410/>>
- Ian Millhiser, “The end of Roe v. Wade, explained,” *Vox*, June 24, 2022, <<https://www.vox.com/2022/6/24/23181720/supreme-court-dobbs-jackson-womens-health-samuel-alito-roe-wade-abortion-marriage-contraception>>
- Amy Howe, “In 6-3 ruling, court strikes down New York’s concealed-carry law,” *SCOTUSblog*, June 23, 2022, <<https://www.scotusblog.com/2022/06/in-6-3-ruling-court-strikes-down-new-yorks-concealed-carry-law/>>
- Jenny Breen, “Right-Wing Supreme Court Imperils Democratic Self-Governance,” *Common Dreams*, July 1, 2022, <<https://www.commondreams.org/views/2022/07/01/right-wing-supreme-court-imperils-democratic-self-governance>>

Mon., Apr. 24: The Current Term

- Elie Mystal, “The Supreme Court Has Officially Launched Its War on LGBTQ Rights,” *The Nation*, December 6, 2022 <<https://www.thenation.com/article/society/supreme-court-attack-lgbtq-rights-303-creative/>>
- Drew Gilpin Faust, “The Blindness of ‘Color-Blindness,’” *The Atlantic*, December 2, 2022 <<https://www.theatlantic.com/ideas/archive/2022/12/sffa-v-harvard-supreme-court-affirmative-action/672312/>>
- Noah Feldman, “Midterms Highlight Supreme Court’s Threat to Black Votes,” *The Washington Post*, November 15, 2022 <https://www.washingtonpost.com/business/midterms-highlight-supreme-courts-threat-to-black-votes/2022/11/15/ca82b808-6507-11ed-b08c-3ce222607059_story.html>
- Melisa Quinn, “What to know about Moore v. Harper, the high-stakes elections case before the Supreme Court,” *CBS News*, December 7, 2022 <<https://www.cbsnews.com/news/supreme-court-independent-state-legislature-theory-moore-v-harper-elections/>>
- Tierney Sneed and Ariane de Vogue, “Takeaways from Moore v. Harper, the historic Supreme Court arguments on elections rules,” *CNN*, December 7, 2022

<https://www.cnn.com/2022/12/07/politics/takeaways-moore-harper-supreme-court/index.html>>

Wed., Apr. 26: Proposals for Court Reform

- Gabe Roth, “The Shadow Docket: Problems and Solutions,” *Fix the Court*, February 18, 2021, <<https://fixthecourt.com/2021/02/shadow-docket-problems-solutions/>>
- “The effort to implement a Supreme Court code of ethics,” *NPR*, April 17, 2022, <<https://www.npr.org/2022/04/17/1093265007/the-effort-to-implement-a-supreme-court-code-of-ethics>>
- Ryan Doerfler and Elie Mystal, “The Supreme Court is Broken. How Do We Fix It?” *The Nation*, June 6, 2022, <<https://www.thenation.com/article/society/how-to-fix-supreme-court/>>
- Ellena Erskine, “Term limits for justices gain new attention, but prospects for passage remain dim,” *SCOTUSblog*, Aug. 16, 2022, <<https://www.scotusblog.com/2022/08/term-limits-for-justices-gain-new-attention-but-prospects-for-passage-remain-dim/>>
- Ian Millhiser, “10 ways to fix a broken Supreme Court,” *Vox*, July 2, 2022 <<https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping>>
- Lederman, Josh, “Inside Pete Buttigieg’s plan to overhaul the Supreme Court,” *NBC News*, Jun 3, 2019 <<https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491>>

Mon., May 1: The Future of the Court and Constitution

- **Kaplan**, Epilogue