

Judicial Politics

LGAF 6218

Spring 2012

Instructor: Brendan Dunn

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I will respond to emails within 48 hours. For questions about assignments due for Tuesday's class, please send me an email before 1 p.m. on Sunday.

Office hours: By appointment

Welcome to Judicial Politics.

This course will evaluate the role of the federal judiciary in our constitutional system. Both here and abroad, America's independent judiciary is understood as one of the bulwarks of a government of limited powers and civil liberties. Over the course of this semester, we will evaluate the formal and informal legal authority, and limits, of this critical institution. As we examine the judiciary, we will consider foundational legal texts, the nomination and confirmation process, institutional structure, the development of interest groups that attempt to influence the decision making of judges and policymakers, the judiciary's interaction with more explicitly political institutions, and constitutional law. As we consider the development of this unique institution, we will pay particular attention to political and legal history. We will also devote considerable time to a number of politically relevant case studies on race, sexual orientation, reproductive rights, economic rights, and national security.

This is not a lecture course. Meaningful student participation is expected, and your performance in class will comprise a significant percentage of your final grade. To assist with your class preparation, you will have short weekly written assignments that must be submitted prior to each class.

Course Goals

By the end of this course, students will:

- Understand the primary legal and political sources of judicial power and the structure of the federal judiciary;
- Acquire historical knowledge of the modern judicial nomination and confirmation process, including institutional actors in the executive and legislative branches;
- Review the role of interest groups in confirmation and litigation strategy;

- Participate in legal case studies that involve reading of select case law;
- Analyze competing claims regarding the appropriate use of judicial power in a democracy;
- Develop critical reading and analytical skills through weekly writing assignments; and
- Complete a significant research assignment on a topic of the student's choosing, related to the exercise of judicial power (or non-exercise) in a case with significant political implications. Required Texts

Required Texts

Fisher, Louis. *Defending Congress and the Constitution*. University of Kansas Press (2011).

Greenberg, Jan Crawford. *Supreme Conflict*. Penguin (2008).

Rosenberg, Gerald. *The Hollow Hope*, 2nd ed. University of Chicago Press (2008).

Teles, Steven. *The Rise of the Conservative Legal Movement*. Princeton University Press (2010).

Whittington, Keith. *The Constitution of Judicial Supremacy*. Princeton University Press (2009).

Yoo, John. *Powers of War and Peace*. University of Chicago Press (2006).

Course Readings on Blackboard

Requirements and Grading

Seminar Participation (25% of final grade)

Again, this is not a lecture course. You are expected to come to class having read the course materials and prepared to discuss and debate issues raised by them. I reserve the right to call on students even when they do not volunteer. Students who do not attend class regularly will see their participation grade significantly reduced. Consider each class session to be a business meeting. You are expected to come to class on time and prepared. Due to the participatory nature of this class, and the limited amount of class time to demonstrate understanding of the course texts, I will take attendance at every class. Those students who have more than two unexcused absence will have their class participation grade reduced by 5 points per additional unexcused absence. For example, a student with 4 unexcused absences will receive a maximum of 15 points (out of 25 possible points) for their class participation grade.

Reaction Papers (25% of final grade)

To assist in your preparation for class, you will be required to submit short papers that react to the week's reading assignments. **Reaction papers are due to me via email by 1:00 pm of the day of class. No reaction paper is expected for the first day of class (January 17).**

Following the first week of class, there are eleven (11) class meetings for which readings are assigned. You are required to submit reaction papers for eight (8) of those classes.

These reaction papers should be between two and three pages in length. My expectation is not that you provide a comprehensive summary of the week's assignments. Rather, you will be

graded on the thoughtfulness of your analysis of the readings, and the manner in which you identify key questions / issues raised by the assignments. Though these are short papers, you will be graded on your writing. Failure to write in complete sentences, with structured paragraphs, and using appropriate grammar will result in reductions to your grade on these papers.

Final Paper: (25% of final grade)

There are three components to your final paper, all of which will have separate deadlines and will receive a separate grade. If you need assistance in choosing a topic or finding adequate research materials, contact me early, rather than later, in this process. **In the final paper, references to internet resources are not sufficient. You are expected to reference published academic work beyond what was covered in class.**

- **February 14 (5:00 pm) -- Topic/Thesis Statement Due.** This should be no longer than 1 page and should include several sources that you will use in preparing your final paper. (3 points)
- **March 20 (5:00 pm) -- Rough Draft Due.** The rough draft should be a thoroughly researched and polished draft. This is not a simple outline of a final paper. The expectation is that you will have completed much of your research and writing when you submit this draft. (7 points)
- **April 24 (5:00 pm) -- Final Papers Due.** The final paper will be a fully cited (see “Policies and Procedures” regarding plagiarism) research paper between 15 and 20 pages in length. (15 points)

Final Exam: (25% of final grade)

The all essay final examination will be held at the time scheduled by the university. Please see “Policies and Procedures” for discussion about late exams and alternative dates.

Policies and Procedures

Assignments

Assignments turned in after their deadlines (Reaction Papers, and the three assignments associated with the Final Paper) will NOT be accepted and the student will receive a grade of zero for the assignment.

Examinations

Make-up exams will NOT be given without express written permission from the university produced. Alternate exams will NOT be given without express written permission from the university in advance of the examination date assigned by the university. In compliance with the Americans with Disabilities Act, all qualified students enrolled in this course are entitled to “reasonable accommodations.” See below for a discussion of eligibility and coordination of reasonable accommodations.

ADA

In compliance with the Americans with Disabilities Act, all qualified students enrolled in this course are entitled to reasonable accommodations. Any student who may need an accommodation based on the potential impact of a disability should contact the Disability Support Services office at 202-994-8250 in the Marvin Center, Suite 242, to establish eligibility and to coordinate reasonable accommodations. For additional information please refer to: <http://gwired.gwu.edu/dss/>

Ethics/Academic Integrity

Ethical behavior is an integral component of your academic and professional careers. Academic integrity is the hallmark of this university, and the George Washington University does not tolerate academic dishonesty in any form. A student who acts dishonestly risks sanctions in both the academic and conduct arenas. Academic dishonesty includes, but is not limited to, cheating, fabrication, plagiarism, and facilitating academic dishonesty. unauthorized use of another's intellectual property (plagiarism) and lying to an instructor or other university employee. Such actions will result in a failing grade on the assignment at issue, with the strong possibility of course failure and referral to the Academic Integrity Council for a conduct sanction. See the George Washington University "Code of Academic Integrity." Available at <http://www.gwu.edu/~ntegrity/code.html>

Emergency Preparedness

To report an emergency or suspicious activity, call the GW Police Department at **202-994-6111 (Foggy Bottom)** or **202-242-6111 (Mount Vernon)**. If the line is unavailable or you are calling from another University location or off campus, dial 911. Your first reaction in an emergency should be to stay where you are. Evacuate only if you hear the fire alarm or someone instructs you to evacuate. We will ALWAYS evacuate if the fire alarm sounds or if the building we are in becomes unsafe. In the event of an evacuation, please quickly gather your personal belongings (purse, keys, cell phone, GWorld card, etc.) and proceed to the nearest exit. Do not use the elevator.

Schedule

The course meets every Tuesday from 6-8 p.m. at the Hall of States on Capitol Hill

January 17 -- Contemporary Confirmation Conflict (I)

Kennedy, “Robert Bork’s America”
Greenberg, Chapter 2
Kagan, “Confirmation Messes”
Posner, “Why Originalism Is So Popular”
Casey v. Planned Parenthood, 505 U.S. 833 (1992)
REVIEW: Documents from Federal Judicial Center

January 24 -- Contemporary Confirmation Conflict (II)

Greenberg, Chapters 1; 3-6
Declaration of Independence
Lincoln, “Gettysburg Address”
Roosevelt, “Commonwealth Club Address”
Port Huron Statement
Reagan, “First Inaugural Address”

January 31 -- Sources of Judicial Power (I)

Articles of Confederation
Madison, “Deficiencies of the Confederation”
U.S. Constitution, Art. II, Sec. 2; Art. III; Art. V; Amendments 1-10; Amendments 13-15
Marbury v. Madison, 5 U.S. 137 (1803)
Eakin v. Raub
Cooper v. Aaron, 358 U.S. 1 (1958)
City of Boerne v. Flores, 521 U.S. 507

February 7 -- Sources of Judicial Power (II)

Federalist #78 and #79
Federalist #10 and #51
Federalist #84
Fisher, *Defending Congress and the Constitution*

February 14 -- Limits on Judicial Power (I)

Greenberg, Chs. 7-8
Lincoln, “Speech on the Dred Scott Decision”
Brennan, “Georgetown University Speech,” October 12, 1985

Meese, "Speech Before the American Bar Association," July 9, 1985.

February 21 -- Limits on Judicial Power (II)

Rosenberg, *Hollow Hope* (Selected chapters)

Southern Manifesto

Whelan on Gingrich (Parts 1-6)

Brown v. Board of Education,

February 28 -- Theories of Judicial Behavior

Greenberg, Chs. 9-10

Graber, "Non-Majoritarian Problem"

Whittington, *Political Foundations of Judicial Supremacy*

March 6 -- Interest Groups and the Conservative Judicial Revolution

Greenberg, Chs. 11-12

Teles, *Rise of the Conservative Legal Movement*

Liu, Karlan, Schroeder, "Keeping Faith With the Constitution"

S.Hrg 107-463, "Should Ideology Matter?"

March 12-17 – SPRING BREAK (No Class)

March 20 -- Race

Rosenberg, *Hollow Hope* (Selected chapters)

"Grutter Amicus Avalanche"

"Bush's First Justice"

Grutter v. Bollinger, 539 U.S. 306 (2003)

March 27 -- Gender and Sexual Orientation

Rosenberg, *Hollow Hope* (Selected chapters)

"California Votes for Prop 8"

"Iowa Judges Defeated After Ruling on Same-Sex Marriage"

"A Risky Proposal"

Romer v. Evans, 517 U.S. 620 (1996)

Lawrence v. Texas, 539 U.S. 558 (2003)

U.S. v. Virginia, 518 U.S. 515 (1996)

April 3 -- Economic Rights

Edelman, "Worst Thing Bill Clinton Has Done"

Obama, Barack, "Redistributive Change"

Florida v. HHS, 648 F.3d 1235 (2011)

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

April 10 -- National Security

Yoo, *Powers of War and Peace*

Cohen, "Keystone Commandos"

"Bush Lets U.S. Spy on Callers Without Courts"

"Legal Authorities Supporting the Activities of the NSA Described by the President"

"Secret U.S. Memo Made Legal Case to Kill a U.S. Citizen"

April 17 -- Flex Class

April 24 -- Final Paper Presentations

FINAL EXAM