

# Law & Politics

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## Information

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Office Hours: MW 11:30–12:30

## Course Description

This course provides an introduction to the political analysis of law and courts with an emphasis on the United States Supreme Court. We will focus on understanding how institutional rules mediate the relationship between law and politics. Along the way we will begin to develop answers to some of the core questions underlying the study of law and politics. These questions include: What qualities do we want judges to have and how do we design institutional rules to promote the selection and retention of judges with these qualities? To what extent are federal judges independent? How do we justify the exercise of judicial review by unelected judges in a republican system of government? How do institutional rules and preferences shape the development of law? How do internal and external institutional constraints influence judicial behavior? In addition to focusing our attention on these and other foundational issues underlying the study of law and politics, we will develop our understanding of how the American legal system operates and use important historical events to detail the influence of law and legal institutions on American political development.

## Reading

There are no required texts to purchase. The assigned readings are posted on Canvas. Note that the date ranges provided below are recommendations for completing each block of assigned readings. Depending on course progress we may be behind or slightly ahead of the assigned readings on any given day; regardless, you should keep up with the recommended completion dates as things will tend to even out over time. Lectures and class discussion supplement rather than duplicate material from the assigned readings. We may not discuss particular readings at all during class, but the material provides important background information and is fair game on the exams.

## Grading

Grades will be comprised of the following components:

- First Exam (35%) [October 4]
- Second Exam (35%) [November 15]
- Research Paper (20%) [December 4]
- Presentation (10%) [November 20–December 8]

Final grades will be distributed according to the following scale:

A	93-100	C	73-76
A-	90-92	C-	70-72
B+	87-89	D+	67-69
B	83-86	D	63-66
B-	80-82	D-	60-62
C+	77-79	F	59 and below

## Course Topics

### 1. Introduction [August 28–September 1]

- David Margolick, *The Path to Florida*, VANITY FAIR (2004)
- Clarence Thomas, *Judging*, 45 UNIVERSITY OF KANSAS LAW REVIEW 1 (1996)

### 2. Independence [September 4–8]

- William Rehnquist, *Judicial Independence*, 38 UNIVERSITY OF RICHMOND LAW REVIEW 579 (2004)
- Barry Cushman, *Court-Packing and Compromise*, 29 CONSTITUTIONAL COMMENTARY 1 (2013)
- Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINNESOTA LAW REVIEW 1337 (2006)

### 3. Selection [September 11–15]

- Victor Kramer, *The Case of Justice Stevens: How to Select, Nominate and Confirm a Justice of the United States Supreme Court*, 7 CONSTITUTIONAL COMMENTARY 325 (1990)
- Stephen Choi and Mitu Gulati, *A Tournament of Judges?*, 92 CALIFORNIA LAW REVIEW 299 (2004)
- Lawrence Solum, *A Tournament of Virtue*, 32 FLORIDA STATE UNIVERSITY LAW REVIEW 1365 (2005)

### 4. Agenda Setting [September 18–22]

- Cert Pool Memo, *Texas v. Johnson* (1989)
- David Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONSTITUTIONAL COMMENTARY 151 (2010)
- John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 NEW YORK UNIVERSITY LAW REVIEW 1 (1983)

### 5. Oral Argument [September 25–29]

- John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 JOURNAL OF SUPREME COURT HISTORY 68 (2005)

- Timothy Johnson, Ryan C. Black, Jerry Goldman and Sarah A. Treul, *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 241 (2009)
  - Timothy Johnson, Ryan Black and Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOYOLA LAW REVIEW 331 (2009)
6. Bargaining [October 2–6]
- Memos Exchanged Between Justices, *Roe v. Wade* (1973)
  - Greg Goelzhauser, *Silent Concurrences*, 31 CONSTITUTIONAL COMMENTARY 351 (2016)
  - Pamela Corley, Amy Steigerwalt and Artemus Ward, *Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus*, 38 JOURNAL OF SUPREME COURT HISTORY 20 (2013)
7. The Merits I [October 9–13]
- Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOYOLA LOS ANGELES LAW REVIEW 993 (1992)
  - Richard Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUPREME COURT ECONOMIC REVIEW 1 (1993) [read pp. 1–30]
  - Patricia Wald, *Some Real-Life Observations About Judging*, 26 INDIANA LAW REVIEW 173 (1992)
8. The Merits II [October 16–20]
- Andrew Martin, Kevin Quinn, Theodore Ruger and Pauline Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSPECTIVES ON POLITICS 761 (2004)
  - Lee Epstein and Jack Knight, *Reconsidering Judicial Preferences*, 16 ANNUAL REVIEW OF POLITICAL SCIENCE 11 (2013)
  - William Baude, *The Supreme Court's Shadow Docket*, 9 NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 1 (2015)
9. Constitutional Decisionmaking I [October 23–27]
- Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIVERSITY OF CINCINNATI LAW REVIEW 849 (1989)
  - Stephen Breyer, *Our Democratic Constitution*, 77 NEW YORK UNIVERSITY LAW REVIEW 245 (2002)
  - Richard Posner, *Against Constitutional Theory*, 73 NEW YORK UNIVERSITY LAW REVIEW 1 (1998)
10. Constitutional Decisionmaking II [October 30–November 3]

- Alexander Bickel, *The Passive Virtues*, 75 HARVARD LAW REVIEW 40 (1961)
- Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 35 (1993)
- Daniel Farber, *The Importance of Being Final*, 20 CONSTITUTIONAL COMMENTARY 369 (2003)

#### 11. Institutional Alternatives [November 6–10]

- Mariah Zeisberg, *Should We Elect the U.S. Supreme Court?*, 7 PERSPECTIVES ON POLITICS 785 (2009)
- Stephen Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARVARD JOURNAL OF LAW & PUBLIC POLICY 769 (2006) [read pp. 809–854]
- David Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINNESOTA LAW REVIEW 1710 (2007)

### Research Paper

The research paper will propose a reform concerning the federal courts. The proposed reform can be in the form of a constitutional amendment (e.g., electing federal judges), statute (e.g., creating a new court of appeals), or norm (e.g., changing the rule of four) depending on source of the status quo policy. The paper will be graded on the basis of the quality of your argument (including support provided), accuracy, thoroughness, editing, and compliance with the following requirements: 5–7 pages of text (N.B. satisfying the page-length requirement is not intrinsically relevant to the more important evaluative factors of analytical quality, accuracy, and thoroughness), separate title page with author information, paginated (with the title page unnumbered), 12-point font, 1-inch margins, double spaced with no extra space between paragraphs, section headings, and citations where appropriate inserted as footnotes (any citation system is fine as long as the relevant information for finding the references is included). At a minimum, the paper should include three sections: an introduction describing the status quo policy and your proposed reform (not to exceed one page) including relevant text (e.g., the specific language of a constitutional amendment), an argument section detailing at least two arguments in support of and two arguments in opposition to your proposed reform, and a conclusion summarizing your most important points (not to exceed one page).

### Presentation

You will present the results from your research in an oral presentation. The presentation should be 3–5 minutes followed by audience questions. Use of slides is optional. The presentation will be graded on the basis of how well the arguments are presented, clarity, staying within the allotted time, and ability to respond to basic questions about your proposed reform

### Course Policies

Applicable [university policies](#) will be followed. These include, but are not limited to, policies on matters such as [excused absences](#), [classroom conduct](#), [academic integrity](#), and [disability-related](#)

**accommodation.** Students are bound by university policies regardless of prior knowledge or understanding. As a result, it is good practice to periodically review these policies.

Although the university's policy on **excused absences** addresses numerous contingencies, it delegates discretion to faculty with respect to several matters. As a result, the following policies are adopted pursuant to university's regulations. First, excused absences will generally be limited to the mandatory and "other allowable" reasons delineated by university policy. There is a strong presumption against the grant of excused absences for any other reason, though exceptions may be considered on a case by case basis. Second, appropriate independent documentation must generally be provided for any excused absence. If documentation cannot be provided for good reason, other verification may be required. I reserve the right to determine what constitutes acceptable documentation or verification for purposes of classifying an absence as excused subject to applicable university policy. Third, without an excused absence, make-up exams can be taken and late papers submitted within 24 hours of the original deadline with a 20% reduction in grade for that course component. Time will be tolled on non-business days, including weekends and university holidays.

The syllabus is subject to change.