

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

Dr. Anthony Grasso  
401 Cooper Street, Office 104  
agrasso@camden.rutgers.edu  
Synchronous Online Course  
Class Time: T/TH, 11:10-12:30

### 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 an insight to critically and intelligently question the proper role courts and judges should play in shaping law and policy in 21<sup>st</sup> 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.

## Some Notes About Online Learning

What follows are a few notes about how this course will be conducted online:

- The course will consist of a combination of asynchronous lessons and live synchronous meetings. Pay attention to the Lesson Schedule in this syllabus, as the live sessions are spread throughout the semester without a fixed pattern. Since our schedule does not cleanly alternate between asynchronous and live sessions, make sure to follow the schedule closely.
- When we do have live sessions, please come prepared to speak about the material. We will not only be speaking about the material assigned for that day, but for all of the asynchronous lessons since our last live meeting. If you cannot make a live discussion you must give me a reason to excuse the absence, in which case you can make up the missed class through a makeup assignment (see below).
- During class keep your microphone off and only turn it on if you are called on to speak. Use the raise your hand function on Zoom if you would like to speak.
- The chat function should only be used to ask clarification questions about the material. If you have a more complex question – especially one that may provoke discussion or be met with competing responses and opinions – use the hand raise function so I can call on you to speak.
- Be flexible. I am ready to adapt our lessons dependent on how things go.

## 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
Participation	5%
Asynchronous Assignments	10%
Oral Argument Paper	10%
Case Paper	20%
Midterm	25%
Final Exam	30%

**Participation (5%):** This course will occasionally meet synchronously as a discussion-driven seminar. On such days, participation is key to success and I expect all students to contribute in ways that reflect a strong understanding of the course material. Understand 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% participation score).

Live sessions will be recorded. For those who miss our live sessions, you must provide me a reason for your absence to get it excused. Adjusting to online learning is difficult and I understand that everyone is dealing with obstacles in their schedule. If your absence is excused, you will then have the opportunity to make up participation with alternative assignments that will require you to watch the recorded lesson and write an accompanying reaction paper. If your absence is unexcused you won't be eligible for the makeup assignment, so if you have an unexcused absence and do not complete a makeup assignment you will get a 0/10 for the day for participation.

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.

**Asynchronous Assignments (10%):** For recorded lessons, you will have accompanying assignments. These will be a combination of written assignments responding to specific questions, discussion board posts, and/or reading quizzes taken through Canvas.

**Oral Argument Reaction Paper (10%):** For class on Thursday, Feb-11 you are required to listen to one oral argument made before the Supreme Court (oral arguments for a given case last approximately an hour). 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](https://www.supremecourt.gov/oral_arguments/argument_audio/2020)>. You are required to submit a reaction paper by Thursday, Feb-11 at 11:59PM, outlining your reaction to the arguments. What did you think of the way the Justices acted and asked questions? Did you notice any strategies in how the Justice 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 800-1,200 words.

**Case Paper (20%):** Early in the semester, students will select either a pending case in the federal circuit courts or one that is on the Supreme Court's docket for the fall term. I will provide options early in the semester, although you are welcome to choose other cases if you receive approval from me. You will study the case, how it has processed through the court system, and discuss how you think the Supreme Court might rule on it using frameworks and theories we study. How might the Court might rule on it? What decision-making models might help explain the potential outcomes? How would different forms of constitutional interpretation lead to different decisions? What do the potential outcomes say about the nature of judicial power? What do you think the outcome will ultimately be and why? They are due uploaded to Canvas by 11:59PM. Papers must be 1,500-2,000 words.

**Midterm (25%):** There will be a single midterm exam, the structure of which is TBD.

**Final (30%):** The final exam will be comprehensive, and its structure is also TBD.

### **Administrative Standards**

**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:** There is a zero-tolerance policy for plagiarism in this class. Academic dishonesty is a severe offense, and plagiarism will not be tolerated. All source material MUST be cited when

presenting someone else's words or ideas. If you have any questions about citing source material, please speak to me. I would much rather correct any accidental errors in citation and attribution ahead of time rather than address them after turning in an assignment.

**Readings and Class Prep:** Students should attend class prepared to thoroughly discuss the lesson's readings and must have access to the assigned readings with them during class. As noted, if in-class discussion falters, I will create in-class quizzes to count towards participation.

**Absences:** Students who miss class should make a reasonable effort to contact me before synchronous sessions. Without appropriate documentation your absence will count as unexcused and you receive a 0 for your daily participation score and be ineligible to makeup the lesson by watching the recorded session and completing the assignment. Any absence that prevents you from completing a graded requirement such as an exam cannot be counted as your automatic excused absence and requires documentation ahead of a makeup, otherwise your grade will be penalized.

**Late Submissions:** If you anticipate turning in an assignment late, email me immediately and inform me when you anticipate turning it in. In the absence of extenuating circumstances or documentation to excuse it, you will be deducted ten percent for every 24 hours the assignment is late.

**Writing Standards:** The ability to write clearly and articulately is an important skill. As such, your writing in this course will be evaluated against several dimensions of good writing. This means I will not only evaluate the substance of your paper – meaning persuasiveness, factual accuracy, strong use of evidence, and critical and intelligent thought – but I will also give you feedback on your writing style. In your written work, you should pay attention to organization and presentation, writing tone, sentence structure, grammar, spelling, punctuation, and proper citations and documentation. All writing should conform to a standardized citation format (MLA, APA, Chicago, etc.). Whichever is fine, but please remain consistent in your writing. All papers should be typed in 11- or 12-point of a standard font (Times New Roman, Arial, Cambria, etc.) with standard 1-inch margins.

**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.**

### **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	19-Jan	Course Introduction	Asynchronous
Lesson 2	21-Jan	The Politics of Judicial Power	<b>LIVE (Zoom)</b>
Lesson 3	26-Jan	Judicial Process and Structure	Asynchronous
Lesson 4	28-Jan	The Court as Policymaker	<b>LIVE (Zoom)</b>
Lesson 5	2-Feb	Judicial Appointment I: Overview	Asynchronous
Lesson 6	4-Feb	Judicial Appointment II: The Rise of Partisan Warfare	Asynchronous
Lesson 7	9-Feb	Judicial Appointment III: Party Politics & Modern Court	<b>LIVE (Zoom)</b>
Lesson 8	11-Feb	<b>Oral Argument Reaction Paper</b>	<b>NO CLASS</b>

### Block 2 – Judicial Decision-Making and Policymaking

Lesson 9	16-Feb	Constitutional Interpretation	Asynchronous
Lesson 10	18-Feb	Policy-Oriented Decision-Making	<b>LIVE (Zoom)</b>
Lesson 11	23-Feb	Intra-Branch Strategy	Asynchronous
Lesson 12	25-Feb	Political Context	<b>LIVE (Zoom)</b>
Lesson 13	2-Mar	Legislative Deference Theory	Asynchronous
Lesson 14	4-Mar	Rights-Based Constitutionalism	Asynchronous
Lesson 15	9-Mar	The Hollow Hope	<b>LIVE (Zoom)</b>
Lesson 16	11-Mar	<b>Midterm Exam</b>	<b>NO CLASS</b>

### Block 3 – Normative Perspectives on Judicial Power

Lesson 17	23-Mar	Popular Constitutionalism and Judicial Supremacy	Asynchronous
Lesson 18	25-Mar	The Counter-Majoritarian Difficulty	<b>LIVE (Zoom)</b>
Lesson 19	30-Mar	Judicial Power as Democratic	Asynchronous
Lesson 20	1-Apr	Judicial Power as Elitist	<b>LIVE (Zoom)</b>
Lesson 21	6-Apr	A Normative Critique of Judicial Power	Asynchronous
Lesson 22	8-Apr	A Normative Defense of Judicial Power	<b>LIVE (Zoom)</b>
Lesson 23	13-Apr	<b>Case Papers</b>	<b>NO CLASS</b>

### Block 4 – The Rise of Modern Judicial Power

Lesson 24	15-Apr	The Rise of Modern Judicial Power	Asynchronous
Lesson 25	20-Apr	The Beneficiaries of a Conservative Court	<b>LIVE (Zoom)</b>
Lesson 26	22-Apr	Elections and Voting	Asynchronous
Lesson 27	27-Apr	The Supreme Court and the 2020 Election	<b>LIVE (Zoom)</b>
Lesson 28	29-Apr	Course Conclusion: Whither the Court?	<b>LIVE (Zoom)</b>

## Course Schedule

### BLOCK 1: The Structure and State of the Supreme Court Today

*“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

1. Course Introduction
  - Syllabus
2. The Politics of Judicial Power (**Synchronous**)
  - **Kaplan**, prologue and chapter 1
  - Editorial Board, “The Republican Party’s Supreme Court,” *New York Times*, Oct. 26, 2020, <<https://www.nytimes.com/2020/10/26/opinion/amy-coney-barrett-supreme-court.html>>
3. Judicial Process and Structure
  - Baum, Lawrence. *The Supreme Court* (Thousand Oaks: SAGE, 2019), 13<sup>th</sup> ed., pp. 1-26
  - U.S. Constitution
  - Alexander Hamilton, “Federalist No. 78,” <[https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp)>
4. The Court as Policymaker (**Synchronous**)
  - Dahl, Robert, “Decision-Making in a Democracy: The Supreme Court as a National Policymaker,” *Journal of Public Law* 6 (1957): 279-295
  - Casper, Jonathan, “The Supreme Court and National Policy Making,” *The American Political Science Review*, 70.1 (1976): 50-63.
5. Judicial Appointment I: Overview
  - Baum, Lawrence. *The Supreme Court* (Thousand Oaks: SAGE, 2019), 13<sup>th</sup> ed., pp. 31-69
  - **Video Clips TBD**
6. Judicial Appointment II: The Rise of Partisan Warfare
  - **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>>
7. Judicial Appointment III: Party Politics and the Modern Court (**Synchronous**)
  - **Kaplan**, chapters 5-8
  - Fawwaz Shoukfeh, “Democrats Should Pack the Court – Republicans Did It First,” *Harvard Political Review*, Nov. 17, 2020, <<https://harvardpolitics.com/pack-the-court/>>

8. **ORAL ARGUMENT REACTION PAPER DUE. No class.**

- Listen to an Oral Argument of your choice and write a response paper.

**BLOCK 2: Judicial Decision-Making and Policymaking**

*“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

9. 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
- Video File: The National Press Club. “The Kalb Report: Ruth Bader Ginsburg & Antonin Scalia,” *YouTube*, <[https://www.youtube.com/watch?v=z0utJAu\\_iG4](https://www.youtube.com/watch?v=z0utJAu_iG4)> (April 17, 2014). (selections will be specified on Canvas)

10. Policy-Oriented Decision-Making (**Synchronous**)

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

11. Intra-Branch Strategy

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

12. Political Context (**Synchronous**)

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

13. Legislative Deference Theory

- Graber, Mark, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993): 35-73
- 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-n124206>>

14. Rights-Based Constitutionalism

- Keck, Thomas, “Activism and Restraint on the Rehnquist Court,” *Polity* 35 (2002): pp. 121-152
- Editorial Board, “The Activist Roberts Court, 10 Years In,” *New York Times*, July 4, 2015, <<https://www.nytimes.com/2015/07/05/opinion/sunday/the-activist-roberts-court-10-years-in.html>>

15. The Court as Hollow Hope (**Synchronous**)

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

16. **MIDTERM DUE. No class.**

**BLOCK 3: Normative Perspectives on Judicial Power**

***“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

17. Popular Constitutionalism and Judicial Supremacy

- Goldstein, Leslie Friedman, “Constitutionalism as Judicial Review: Historical Lessons from the U.S. Case,” 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. 78-94
- 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

18. The Counter-Majoritarian Difficulty **(Synchronous)**

- 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

19. 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

20. Judicial Power as Elitist **(Synchronous)**

- 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

21. 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

22. A Normative Defense of Judicial Power **(Synchronous)**

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

23. **CASE PAPERS DUE. No class.**



## BLOCK 4: The Rise of Modern Judicial Power

*“Of the three separated powers mentioned above, the judiciary is next to nothing.”*

- Baron de Montesquieu, *The Spirit of the Laws*, vol. 1, 1748

*“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)

### 24. The Rise of Modern Judicial Power

- **Kaplan**, chapters 9-10

### 25. The Beneficiaries of a Conservative Court (**Synchronous**)

- **Kaplan**, chapters 12-13, 15

### 26. Elections and Voting

- **Kaplan**, chapter 11, 14

### 27. The Supreme Court and the 2020 Election (**Synchronous**)

- *NOTE: Please pay attention the dates each piece was published in relation to the following timeline:*
  - *Nov. 3, 2020: Election Day*
  - *Nov. 9, 2020: Networks call the presidential election for Joe Biden*
  - *Dec. 8, 2020: “Safe Harbor Day,” when all state-level election challenges must be completed*
  - *Dec. 14, 2020: The Electoral College Vote*
  - *Jan. 6, 2021: Congressional session to count the electoral votes*
  - *Jan. 20, 2021: Inauguration*
- Hasen, Richard. “In a 4-4 Split, the Supreme Court Lets Pennsylvania Make Voting Easier— for Now,” *Slate*, Oct. 19, 2020, <<https://slate.com/news-and-politics/2020/10/supreme-court-pennsylvania-election-law-order.html>>
- Liptak, Adam. “Missing From Supreme Court’s Election Cases: Reasons for Its Rulings,” *New York Times*, Oct. 26, 2020, <<https://www.nytimes.com/2020/10/26/us/supreme-court-election-cases.html>>
- Hasen, Richard. “Trump’s Legal Farce is Having Tragic Results,” *New York Times*, Nov. 23, 2020, <<https://www.nytimes.com/2020/11/23/opinion/trump-election-courts.html>>
- Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of U.S. Representative Mike Johnson and 125 Other Members of the U.S. House of Representatives, *Texas v. Pennsylvania*, No. 155, U.S. Supreme Court, Dec. 10, 2020, <<https://www.supremecourt.gov/DocketPDF/22/22O155/163550/20201211132250339-Texas%20v.%20Pennsylvania%20Amicus%20Brief%20of%20126%20Representatives%20--%20corrected.pdf>> (focus on pp. 27-44, skim rest)
- 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](https://www.supremecourt.gov/DocketPDF/22/22O155/163506/20201211114620451_Amicus%202020-12-11.pdf)>

- Barnes, Robert. “Supreme Court dismisses bid led by Texas attorney general to overturn the presidential election results, blocking Trump’s legal path to a reversal of his loss,” *Washington Post*, Dec. 11, 2020, <[https://www.washingtonpost.com/politics/courts\\_law/supreme-court-texas-election-trump/2020/12/11/bf462f22-3bc6-11eb-bc68-96af0daae728\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-texas-election-trump/2020/12/11/bf462f22-3bc6-11eb-bc68-96af0daae728_story.html)>

28. Course Conclusion: Whither the Court? **(Synchronous)**

- **Kaplan**, Epilogue