

POLS 122 – Judicial Politics  
Section 01, Fall 2018 – Dr. James Brent

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a.m.

Office Hours:  
Mondays & Weds. 8:00 to 9:00 a.m.  
Mondays & Weds. 10:30 a.m. to 11:30  
a.m.

**Course Description**

"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged, and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has...is the power of judgment. This court neither approves nor condemns any legislative policy."

Justice Owen Roberts in *U.S. v. Butler* (1936)

"Since the politicization of the law has, for half a century, moved results steadily to the left, a very large number of Americans do not like those outcomes. Increasingly, they are not deceived by the claim that those results are compelled by the actual Constitution....Americans increasingly view the courts, and particularly the Supreme Court, as political rather than legal institutions."

Robert Bork in *The Tempting of America*

"It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

--Justice John Paul Stevens, dissenting, in *Bush v. Gore* (2000)

In an era of growing public disenchantment with government, the American judiciary remains strangely immune. Surveys consistently show that the American public places greater trust in the U.S. Supreme Court than in either Congress or the presidency – although that trust, too, has been eroding.. "Politics" has become a dirty word, and the judiciary is commonly thought to be the least "political" branch of government. However, a growing body of empirical research lends support to what casual observation suggests: that for all their distinctiveness, our nation's courts are affected by many of the same social, economic, and political considerations that affect the

other two branches of government. The myth of the court as “nonpolitical” was, of course, shattered by its actions during the 2000 presidential election.

In this course, we will study the judiciary as an inherently political institution, raising both empirical and normative issues. Empirically, we will attempt to shed light on the extralegal forces which condition the behavior of courts. These extralegal forces include things such as the intergovernmental relations, federalism, method of judicial selection, public opinion, interest groups, the press, attorneys, personal ideology and attitudes, among others. We shall highlight areas in which the judiciary behaves like the other branches of government, as well as its distinctive features. Normatively, we will consider how the results of our empirical examination inform the ongoing debate about the proper role of the judiciary in a democratic society. By the end of the semester, you will have the information base required to generate some ideas regarding this question: Given their political nature, to what extent should the courts be involved in the making of policy?

A warning to those who find constitutional law exciting: you won't find much of it here. In this course, we will not be overly concerned about what the courts have said that material is covered in PolS 121a, 121b, and 123. Rather, we will be more interested in why they have said what they have said. However, stripping the judiciary of its mystery is a rewarding task in its own right, and hopefully we will make it an exciting one as well.

### **Course Learning Objectives**

By the end of this course, you should be able to:

- Understand the nature of courts and the role of the judiciary in the American system of separation of powers, and how that role has evolved over time.
- Discuss the structure of the American judiciary, including judicial federalism and the different roles played by courts of original and appellate jurisdiction.
- Discuss the different methods for selecting judges and their consequences.
- Explain how the U.S. Supreme Court sets its agenda.
- Explain the procedure used by the Supreme Court for deciding cases on the merits, from oral argument to the announcement of a decision.
- Identify the legal and extra-legal influences on judicial voting behavior, including the influence of interest groups, small group dynamics, public opinion, personal biases, and structural rules on judicial decisions
- Discuss how judicial decisions are implemented or evaded and identify factors that enhance compliance.
- Understand the debate regarding the Supreme Court's capacity to make social policy.
- Identify leading historical and current Supreme Court justices

The exams will assess all of these learning objectives. The research paper will assess learning objectives 3, 6 and 9, while the e-portfolio will assess learning objectives 6 and 9

## CANVAS Course Web Page

Course materials such as syllabus, handouts, notes, assignment instructions, etc. can be found on the Canvas learning management system course website. You are responsible for regularly checking with the messaging system through CANVAS to learn of any updates.

### Succeeding in a Four-Unit Course

At SJSU, students are expected to spend two hours outside of class for every one hour of class time. Because this is a **four-unit class**, you can expect to spend a minimum of eight hours per week in addition to time spent in class and on scheduled tutorials or activities. Careful time management will help you keep up with readings and assignments and enable you to be successful in all of your courses. In this class, one of the four units is an engagement unit, which consists of online quizzes, and data exercises. You are expected to spend 45 hours this semester (both to prepare for and to complete the work) to successfully complete this unit.

### Required Texts/Readings

Carp, Robert A., Ronald Stidham and Kenneth L. Manning. (2013). *Judicial Process in America* (9<sup>th</sup> edition). CQ Press: Washington DC. ISBN 978-1452226323

Dean, John W. (2002). *The Rehnquist Choice: The Untold Story of the Nixon Appointment that Redefined the Supreme Court*. New York: The Free Press. ISBN 978-0743233200

Toobin, Jeffrey. (2012). *The Oath: The Obama White House & the Supreme Court*. New York: Doubleday. ISBN 978-0307390714

### Course Requirements and Assignments

**Tests** – The midterm and the final exam will be closed-book, closed-note exams. Students should bring a blank blue book to each exam. The exams will consist exclusively of essay and short-answer questions. There are no multiple choice questions. The final will stress material from the second half of the course, although it may ask you to refer to material from the first half of the course.

**Paper Assignment** – This discussed in more detail at the end of this syllabus.

**Participation** – Participation comprises 10% of your course grade. All students are expected to participate orally in class. I encourage participation because I believe that it aids in the learning process and makes class more interesting.

I do not take attendance, but if you do not attend regularly, you will be unable to participate and will thus lower your grade. This ought not be taken lightly -- while participation constitutes "only" 10% of your grade, if you earn no participation points, this means your final mark will be one full letter grade lower than if you had participated regularly.

Participation is the one component of your grade that is based on quantity rather than quality. I don't care whether you are the most brilliant student in class or the most dim-witted -- if you participate regularly, you will receive a good grade on your participation. Asking questions is just as legitimate as answering questions.

**Book Outlines** – We will be discussing *The Rehnquist Choice* and *The Oath* extensively in class. Prior to participation in these discussions, students will be required to write brief outlines of each chapter in each of the two books. Students who do not submit a paper cannot participate in the in-class discussion. Each outline is worth 5% of your grade.

NOTE that [University policy F69-24](#) states that “Students should attend all meetings of their classes, not only because they are responsible for material discussed therein, but because active participation is frequently essential to insure maximum benefit for all members of the class. Attendance per se shall not be used as a criterion for grading.”

### Grading Policy

Midterm (Wednesday, October 10)	15%	
Final Exam (Wed., December 12, 7:15 a.m.)		20%
Participation	10%	
Book Outlines (due dates TBA)	10%	
Paper Outline (due October 31)	10%	
Final Draft of Paper (due December 12)	20%	
Eportfolio	15%	

Final letter grades for the course will be assigned based on the following scale:

A = 93-100%	A- = 90-92%	B+ = 88-89%	B = 83-87%
B- = 80-82%	C+ = 78-79%	C = 73-77%	C- = 70-72%
D+ = 68-69%	D = 63-67%	D- = 60-62%	F = 59% or less

### Miscellaneous Policies

**Makeup Exams** -- I will be the most willing to permit you to take a make-up exam when the following three conditions are met:

- 1) you notify me in advance
- 2) you have an acceptable excuse (usually something beyond your control)
- 3) you have written documentation

Naturally, sometimes it will not be possible to meet these three conditions. Situations which do not do so will be judged by me on a case -by-case basis. I reserve the right to refuse to allow you to make up an exam (although I will usually try to accommodate you). I also reserve the right to make the make-up exam more difficult than the in-class exam.

If you miss an exam, you should approach me the next time you are in class and request a makeup. If approved, I will drop off a test at the Testing Center. You should call the Testing Center (924-5980) to arrange to take the exam.

**Late Papers -- I am more strict in enforcing penalties against late papers than missed exams!**

The due date of the paper is not the *only* day that you may submit your paper. It is merely the *last* day that you may do so without incurring a penalty. Papers are due at the end of class period on the date due. All late papers, regardless of the excuse, will be penalized by one letter grade.

**Anonymity Policy** -- I like to grade all assignments anonymously. Therefore, you should omit your name on all assignments. Instead, you should only indicate the last four digits of your student ID number. Any assignment that contains your name will not be graded. It will be returned to you so that you may cross out your name and fill in the last four digits of your student ID number.

Note that “All students have the right, within a reasonable time, to know their academic scores, to review their grade-dependent work, and to be provided with explanations for the determination of their course grades.” See [University Policy F13-1](http://www.sjsu.edu/senate/docs/F13-1.pdf) at <http://www.sjsu.edu/senate/docs/F13-1.pdf> for more details.

## University Policies

### Workload and Credit Hour Requirements

Success in this course is based on the expectation that students will spend, for each unit of credit, a minimum of 45 hours over the length of the course (normally 3 hours per unit per week with 1 of the hours used for lecture) for instruction or preparation/studying or course related activities including but not limited to internships, labs, clinical practica. Other course structures will have equivalent workload expectations as described in the syllabus.

### Other University Policies

Other important university policies can be found [by clicking here](#).

## Course Topics and Readings

Note: All readings should be completed by the time we cover the corresponding topic in class.

- I. Weeks 1 through 4 -- Background: Constitutional and Historic – **Carp, et al, Chapters 1, 2 and 4**
  - A. The Nature of Courts and the American Judicial System
  - B. The Constitutional Context
  - C. Separation of Powers and the Judiciary
  - D. The Structure of the American Judiciary
  
- II. Politics and Policymaking in Appellate Courts
  - A. Selection of Judges (Weeks 5 through 7)
    - 1. Selection of State Judges – **Carp et al, Chapter 5**
    - 2. Selection of Federal Judges -- **Read all of Dean ; Carp, et al, Chapter 6 and 7**
  - B. Judicial Agenda Setting (Weeks 8 and 9)
  - C. Appellate Procedure – **Carp et la, Chapter 13** (Weeks 10 through 12)
    - 1. CASE STUDY: *Patterson v. McLean Credit Union* (1989)
  - D. Political Influences on Judicial Behavior – **read all of Toobin;** (Week 13)
    - Race, Gender, and other attributes
    - Political Ideology
    - Small Group Influences
    - The Chief Justice's Role
    - Public Opinion
    - Interest Groups – **Carp et al, Chapter 8**
  
- IV. Week 14 -- The Impact of Judicial Decisions – **Carp et al, Chapter 14**
  - A. Conditions for Compliance
  - B. The Courts and the Media
  - C. The Capacity of Courts to Make Social Policy – **Carp et al, Chapter 15**
  
- V. Week 15 -- The Proper Role of the Judiciary Revisited: Activism vs. Restraint

## Paper Assignment

This semester will see the nomination of a new Supreme Court justice and the associated Senate hearings. Your paper assignment asks you to look back on the confirmation of a past justice and to discuss whether such hearings are useful.

For this paper, you should select any justice confirmed since 1987 (starting with Anthony Kennedy). For that justice, you should read the transcripts of their confirmation hearings and select two (2) issues that were discussed at some length. You should summarize what your justice had to say about both of those issues. You should then research your justice's voting record on the two issues that you've selected. The purpose is to discover whether the justice's actual voting behavior on the Court was consistent with what they said during their confirmation hearings. Then, based on that analysis, you should discuss whether confirmation hearings are useful or not.

### Stage 1: The Outline & Bibliography (due October 31)

You should provide me with a one-page outline (in outline format) detailing as specifically as possible what your final draft will contain. The more specific it is (in terms of actual cases you might reference, etc.), the better feedback I will be able to offer you, and the higher your grade will be. In addition, you should include a bibliography of at least 15 sources that would be appropriate to use in constructing your paper, at least 5 of which should be law review articles. [Please note that you do not have to actually use all or any of these sources in your final draft.]

### Stage 2: Final Draft (due December 12)

The first draft should be complete -- it should contain the full text of your paper, with proper attribution, grammar, and spelling. You should pretend as though this were the final draft of your paper. This paper should be a minimum of 10 typed, double-spaced pages long, not including the works cited and title pages. This draft should incorporate, to the extent you deem appropriate, the comments made on your outline and bibliography.

### How Both Drafts Will Be Graded

Both drafts will be graded on the following criteria, in decreasing order of importance:

1. The Depth and Completeness of Your Analysis – This is an analytical paper. Therefore, it should be more than a mere recounting of facts (although it will certainly contain facts, as well). You should make an effort to make comparisons, draw contrasts, spot trends, or otherwise interpret the information that you find.
2. Spelling and Grammar – Papers with extensive spelling and grammatical errors are less credible and will receive a lower grade.

3. Attribution – In an academic paper, you must both provide a bibliography and cite your sources *within the text of the paper itself*. Papers lacking proper attribution will either receive a lower grade or will be returned to the student without grading for revisions.
4. Amount of Effort Expended – Although the quality of a paper is not synonymous with the length of the paper or the number of sources used, the two are closely related. Longer papers, and papers with a greater number of sources, are likely to be more complex and better supported than shorter papers with fewer sources. Therefore, if you only do the minimum that is required, your grade will probably reflect that fact.
5. The Use of High-Quality Sources— some academic sources should be used in a substantial way to support your paper
6. Imagination, Insight, Originality, and Other “Intangibles” – Finally, the best papers will display certain intangible qualities such as those listed here.
7. Avoidance of Plagiarism— All papers will be submitted to turnitin.com and should therefore avoid plagiarism at all costs.

## E-portfolio of a Recent Justice

Over the course of the semester, you will compile an e-portfolio on any Supreme Court justice of your choosing, using the “Portfolium” app that will be accessible through the course’s Canvas site.. You will scour the web – including the university’s academic databases – for articles, videos, blog posts – and compile an electronic dossier on your chosen justice. The goal is to create a multifaceted, multimedia portrait of your justice’s politics and jurisprudence. Hopefully, you’ll get to know your justice a lot better, and you’ll have some fun doing it. Be creative! Among the things that you might want to include are:

- Videos of your justices’ confirmation hearing
- Videos of speeches or interviews given by your justice
- Videos of news reports about the justice
- Editorials for or against your justices confirmation
- Stories about your justice’s personal life
- Any law review or other articles written by your justice
- Lower court opinions written by your justice
- Any law review or academic journal article, newspaper report, or blog post written about your justice
- Links to opinions for which your justice is well known
- Editorial cartoons about your justice

Please note that every item contained in the portfolio must be accompanied by a 4-5 sentence description of the item written by you. Your portfolio should contain at least 75 items, with at 15 links to legal opinions, political science journals, law review articles, or other academic sources. You will be graded on how many items and adequate descriptions you provide.

- A = 75 items
- B = 60 items
- C = 50 items
- D = 30 items
- F = 29 items or fewer