

**JUDICIAL POWER & RESTRAINT SEMINAR**  
**Fall 2018**  
**M 1:00–2:40 p.m. | Room 285A**

**PROFESSOR ROBERTS**

office:  
office hours:

classroom:  
email:

**UNIVERSITY OF FLORIDA**  
**LEVIN COLLEGE OF LAW**  
370B & the UF Law Courtyard  
M 3:00 to 4:00 p.m.  
T 8:30 to 10:00 a.m.  
+ by appointment  
285A  
caprice.roberts@law.ufl.edu

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This course will critically explore the court’s role in our constitutional democracy. Issues will touch upon federalism, separation of powers, recusal, interpretation, judicial philosophies, authority, judicial selection, abstention, remedial power, and judicial ethics. This advanced writing course is a two-credit seminar.

**Course Materials:** Readings will be excerpts from *FEDERAL COURTS—CONTEXT, CASES, AND PROBLEMS* by ALLEN, FINCH & ROBERTS and complimentary electronic supplements on TWEN. Readings will include chapters, law review articles, cases, statutes, blogs, and news articles. All of the reading is intended to stimulate discussion and interest, so you will read at a level to be conversant rather than to be tested on details. If the syllabus indicates “optional,” reading the additional material is truly at your discretion. Readings may change, with notice, if class interest and current events alter our path.

**Course Overview:** Seminars are small to facilitate fuller discussions, depth of analysis, and substantive feedback on oral and written product. This course strives to stimulate meaningful student discussion of a range of topics connected to the judicial branch and provides a meaningful opportunity for the student to become an expert in an area of the student’s choosing. I will help all students in developing paper ideas. All students will submit a final research paper analyzing a relevant topic of the student’s interest.<sup>1</sup>

The Judicial Power & Restraint course explores the judiciary’s sources of power, the separation-of-powers tension between the federal judiciary and the other branches (Congress/Executive), federalism (federal/state), areas where the court restrains its power, judicial philosophies (such as strict constructionism), judicial ethics, judicial independence, judicial defiance, judicial selection controversies (such as partisan election of state judges vs. federal appointment system), judicial clerk role, and judicial recusal. These are sample areas, and current events may alter our path.

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<sup>1</sup> The course paper should be approximately 25 double-spaced pages in length and written *for* this course. It should model law review format with respect to general structure and footnoting proper sources. Further written and oral guidance will follow. For immediate guidance, consult Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL ED. 247 (June 1998).

## Student Learning Objectives

- Question and critique proper judicial role, philosophy, and selection methods
- Identify constitutional versus prudential sources and limits of federal court power
- Articulate and distinguish separation of powers, federalism, and parity
- Appreciate the import of the power and myths of judicial review
- Reconcile and prioritize complex bodies of federal court doctrines
- Sharpen the ability to analogize, distinguish, and synthesize cases
- Examine and apply doctrines of restraint such as abstention
- Explicate the meaning and implications of constitutional and statutory law
- Interpret quintessential, complex precedent to resolve modern hypotheticals
- Navigate conflicting precedent and propose normative paths
- Distinguish competing jurisprudential schools as represented by famous jurists
- Compare and contrast competing scholarly voices
- Demonstrate more nuanced oral communication and advocacy skills
- Deepen critical thinking and bolster unique legal voice on controversial topics
- Develop working thesis, conduct thorough research, and craft thoughtful drafts
- Engage in dialogue to improve your draft and incorporate constructive feedback
- Complete a major, written, finished product evidencing original systematic scholarship based on your individual research

## The Fine Print

**Grading:** The course will include a thoughtful, reflective paper on a student-created topic related to the judiciary. The paper should rely on course materials and outside research as needed to analyze your topic. Meaningful class participation constitutes 30% of your course grade,<sup>2</sup> and the paper comprises the remaining 70% of your grade.

**Grading Scale:** This course will conform to the Levin College of Law mean and mandatory distributions, <https://www.law.ufl.edu/life-at-uf-law/office-of-student-affairs/current-students/academic-policies#9>.

**Attendance:** Attendance—on time and complete—at every class is expected. It's your responsibility to sign the roster at the start of class. Excessive absence (>2 absences, including lack of punctuality, preparation, or respect for others) will result in withdrawal from the course and a grade of withdrawn failing.

**Academic Honesty:** The UF Honor Code, <http://www.dso.ufl.edu/students.php>, governs our class activities & embodies the foundational community values of honesty and integrity.

LETTER GRADE	POINT EQUIVALENT
A (EXCELLENT)	4.0
A-	3.67
B+	3.33
B	3.0
B-	2.67
C+	2.33
C (SATISFACTORY)	2.0
C-	1.67
D+	1.33
D (POOR)	1.0
D-	0.67
E (FAILURE)	0.0

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<sup>2</sup> Because this course meets a limited number of times and relies on discussion, absences and lack of preparation will detrimentally affect your participation grade. If you have mandatory conflicts with certain days or with the final paper deadline, please speak with me in advance to make appropriate arrangements.

**Workload:** Expect to spend approximately 2 hours preparing for every hour of class.

**Technology:** Use it well: any educational purpose directly related to the course. Please be attentive and refrain from texting, emailing, surfing, gaming, and other nongermane uses of technology. Please silence cell phones. Disruptive use will forfeit technology privileges.

**Notes in Class:** Laptops instill an automatic inclination to transcribe every word the professor utters. My advice is to spend more time listening, thinking, and taking fewer in-class notes. Draft your impressions of articles before class and reconcile new insights from our in-class discussion immediately after class.

**Readings:** Some readings are deep and heavily footnoted. Remember you are not reading for a final exam, but instead reading to gain a broad overview to see if a particular topic interests you. If it does, then you would use the footnotes to aid your research.

**Recording:** Recording a class requires advanced permission and, if granted, will be conditioned upon educational use and shared access with the class.

**Accommodations:** If you seek accommodation, first register with the Disability Resource Center, <https://drc.dso.ufl.edu/>, which will issue an Accommodation Letter to qualifying applicants for presentation to the Associate Dean for Student Affairs.

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## ***Reading Roadmap ...***

### **Class One: August 13 SEPARATION OF POWERS, FEDERALISM & PARITY**

FEDERAL COURTS—CONTEXT, CASES, AND PROBLEMS by ALLEN, FINCH & ROBERTS pages 1–18; TWEN: “An Institutional Overview,” from SEPARATION OF POWERS LAW CASES & MATERIALS by SHANE & BRUFF; U.S. CONSTITUTION art. I, II, III; The Articles of Confederation.

### **Class Two: August 20 PROPER JUDICIAL ROLE & JUDICIAL SELECTION METHODS**

*Jurisprudence on Proper Judicial Role:* William J. Brennan, Jr., *Reason, Passion & “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1989); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe & Nerve,* 65 FORDHAM L. REV. 1249 (1997); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis,* 40 CASE W. RES. L. REV. 581 (1990); Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails),* N.Y. TIMES (Aug. 25, 2005).

### **JUDICIAL SELECTION METHODS**

*Federal Appointment and Confirmation Overview:* Elena Kagan, *Confirmation Messes, Old and New,* 62 U. CHIC. L. REV. 919 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS*). Ironically, Justice Kagan criticized the confirmation process, which she later had to defend in her confirmation hearing: <http://www.washingtonpost.com/wp->

[dyn/content/video/2010/06/29/VI2010062904683.html](http://dyn/content/video/2010/06/29/VI2010062904683.html). My contribution is *Discretion and Deference in Senate Consideration of Judicial Nominations*, <http://ssrn.com/author=355762>.

*State Selection Methods*: Overview – Read Executive Summary of ABA Report: *Justice in Jeopardy* (ABA Commission on 21st Century Judiciary) (July 2003), at: <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>;

Read the following if any interest in state reform: Difficulty of reform – John D. Feerick, *Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 3 (2007); Pro-reform – Norman L. Greene, *Perspectives on Judicial Section Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597 (2005); Anti-reform and Pro-Judicial Elections – Justice Larry V. Starcher, *Choosing West Virginia’s Judges*, 20 QLR 767 (Spring 2001).

### **Class Three: August 27 JUDICIAL REVIEW**

Review Article III. FEDERAL COURTS text, Chapter 1, pages 18–28 (*Marbury v. Madison*). William Michael Treanor, *The Story of Marbury v. Madison: Judicial Authority and Political Struggle*, in FEDERAL COURT STORIES; William W. Van Alstyne, *A Critical Guide to Marbury*, 1969 DUKE L. REV. 1 (1969), [http://eprints.law.duke.edu/archive/00000544/01/18\\_Duke\\_L.\\_R.\\_1\\_\(1969\).pdf](http://eprints.law.duke.edu/archive/00000544/01/18_Duke_L._R._1_(1969).pdf) Debate excerpts re: *Why We Have Judicial Review*, 116 YALE L.J. POCKET PART 215 (2007): Mary Sarah Bilder, *Why We Have Judicial Review*, <http://thepocketpart.org/ylj-online/constitutional-law/93-why-we-have-judicial-review>; Treanor, *Original Understanding & WWH of Judicial Review*, <http://thepocketpart.org/ylj-online/constitutional-law/94-original-understanding-and-the-whether-why-and-how-of-judicial-review>; Scott Gerber, *The Political Theory of an Independent Judiciary*, <http://thepocketpart.org/ylj-online/constitutional-law/95-the-political-theory-of-an-independent-judiciary>. Also: Lawrence Solum Lexicon Entries on the Counter-majoritarian Difficulty: [http://lsolum.typepad.com/legaltheory/2006/07/legal\\_theory\\_le.html](http://lsolum.typepad.com/legaltheory/2006/07/legal_theory_le.html).

Optional Supplement: Michael McConnell, “The Story of *Marbury v. Madison*: Making Defeat Look Like Victory,” in CONSTITUTIONAL LAW STORIES (Michael C. Dorf, ed.).

### **SEPTEMBER 3 LABOR DAY**

**Class Four: September 10 JUSTICIABILITY – ADVISORY OPS, STANDING, RIPENESS, MOOTNESS & POLITICAL QUESTIONS**

FEDERAL COURTS, Chapter Two, Justiciability and the Judicial Function, pages 29–125.

**Class Five: September 17 CONGRESSIONAL CONTROL OVER THE JUDICIARY**

FEDERAL COURTS, Chapter Three, Congressional Control of Federal Jurisdiction and Decisionmaking, pages 127–197. For my contribution on the topic of jurisdiction-stripping maneuvers, see Caprice L. Roberts, *Jurisdiction-Stripping in Three Acts—A Three-String Serenade*, 51 VILLANOVA L. REV. 593 (2006): <http://ssrn.com/abstract=870868>.

Optional Supplements: Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

**Class Six: September 24**      **FEDERALISM: SUPREME COURT REVIEW OF STATE COURTS**

FEDERAL COURTS, Chapter Twelve, The Original Jurisdiction of the Supreme Court and Appellate Jurisdiction in the Federal Courts, pages 851–912.

❖ Also read: Eugene Volokh, *Writing a Student Article*, 48 J. Legal Ed. 247 (June 1998)

**Class Seven: October 1**      **ROLE OF PRECEDENT, STATUTORY INTERPRETATION & JUDICIAL PHILOSOPHY—MAKING POLICY?**

Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Mei-Fei Kuo & Kai Wang, *When is an Innovation in Order?: Justice Ruth Bader Ginsburg & Stare Decisis*, 20 U. HAW. L. REV. 835 (1998); William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) [Focus: Intro, Part VI, & Conclusion]; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Robert H. Bork, *The Judge’s Role in Law & Culture*, 1 AVE MARIA L. REV. 19 (2003); Ronald Dworkin, *Bork’s Jurisprudence*, 57 CHI. L. REV. 657 (1990).

Optional Supplements & Resources: Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEXAS L. REV. 959 (2008); Michael Gerhardt, *Book Review—The Confirmation Mystery*, 83 GEO. L.J. 395 (1994); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988); Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

**Class Eight: October 8**      **JUDICIAL ACTIVISM & JUDICIAL RESTRAINT**

Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43 (2007); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567 (2007); Judge Richard A. Posner, *Enlightened Despot* (reviewing Aharon Barak, *THE JUDGE IN A DEMOCRACY*), THE NEW REPUBLIC, Apr. 23, 2007, at 53, <http://www.tnr.com/article/enlightened-despot>; Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner’s Critique of Aharon Barak’s Judicial Activism*, 49 HARV. INT’L L.J. 1 (2007).

Optional Supplement: Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010); Lori A. Ringhand, *The Rehnquist Court: A By The Numbers Retrospective*, 9 U. PA. J. CONST. L. 1033 (2007).

**Class Nine: October 15**      **NATIONAL SECURITY, DOMESTIC POLICY, AND THE COURTS**  
\*\*PROPOSED TOPIC & OUTLINE DUE\*\*

Sample Hot Topic Materials: National Security, Private Contracts, and State Secrets.



*General Dynamics v. United States* and *Boeing v. United States* (Nos. 09-1298 & 09-1302). General resource: <http://www.scotusblog.com/case-files/cases/general-dynamics-corp-v-united-states/> – from link: 9-0 opinion by Justice Scalia, Argument Recap (or full transcript or audio of Oral Argument), Merits Briefs, and a Review of State Secrets. For background on the state’s secrets doctrine, see Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931 (2007) and *United States v. Reynolds*, 345 U.S. 1 (1953) (landmark case). For news articles, see Dahlia Lithwick, “Go, Leave, Get Outta Here” – *The Supreme Court wants nothing to do with the state secrets privilege, or the litigants or squabble about them*, *SLATE*, Jan. 18, 2011; Adam Liptak, *In Knotty State Secrets Case, Justices Ponder Telling Litigants to ‘Go Away,’* *N.Y. TIMES* (Jan. 18, 2011).

**Class Ten: October 22 JUDICIAL, CHAMBER & LAWYER ETHICS RE: FIRST AMENDMENT  
\*\*THESIS & BIBLIOGRAPHY DUE\*\***

Judges—*Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); Lawyers—*Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995); *In re Sawyer*, 360 U.S. 622 (1959); Law Clerks—David Margolick *et al.*, *The Path to Florida*, *VANITY FAIR* (Oct. 2004) [TWEN; Focus: Intro & Part II—Think about the ethical duties of judicial law clerks]. Corporations: *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010); David W. Wright, *In re Holtzman: Free Speech or Professional Misconduct*, 9 *TOURO L. REV.* 587 (1993).

**Class Eleven: October 29 RECUSAL, CONTEMPT & REMOVAL  
\*\*BEST EFFORTS DRAFT DUE\*\***

Dennis Hutchinson, *The Black-Jackson Feud*, 1988 *S. CT. REV.* 203; *Caperton v. AT Massey Coal Co.*, 129 S. Ct. 2252 (2009); 28 U.S.C. § 144 (“Bias of Prejudice of a Judge”); 28 U.S.C. § 455 (“Disqualification of Justice, Judge, or Magistrate”); ABA Model Code of Judicial Conduct Canon 3E, *Laird v. Tatum*, 409 U.S. 824 (1972); *Cheney v. United States Dist. Court*, 124 S. Ct. 1391 (2004); News Articles re: Judge Jon P. McCalla’s Removal [TWEN]; Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 *RUTGERS L. REV.* 107 (2004).

**Class Twelve: November 5 INFORMAL PAPER WORKSHOP  
PRESENTING WORK-IN-PROGRESS & BRAINSTORMING**

**Class Thirteen & Fourteen: November 12 & 19 \*\*EDITING DRAFTS\*\*  
[Individual Draft Meetings as Necessary to Finalize Papers]**

**\*\*FINAL PAPER DUE November 26 (Monday) by 4:30 p.m. via email\*\***

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