The Struggle for Power: the Court, the Legislature and the Executive

Prof. Jeff Metzler
Spring 2014
Tue / Thurs. 6:45pm – 8pm
Silver Center, Rm 507
Office Hours: Thursday, 5:30-6:30, Puck Building (295 Lafayette), Rm 3045
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The best way to contact me outside of class with questions, comments, or other issues is by e-mail or by scheduling time during office hours. I will typically respond to e-mails on the same day and almost always within 48 hours, barring extenuating circumstances.

Synopsis

This course introduces students to the manner in which the judiciary, the legislature, and the executive shape public policy in the United States at the federal, state, and local level. Since the adoption of the Constitution, the powers and limitations of each branch of government to shape policy has evolved as new challenges arise and each branch seeks to assert its influence on how the nation responds. The course uses current public policy debates – such as legal challenges to the Affordable Care Act and aspects of the War on Terror – as well as historical examples to explore the evolution of power for the three branches of government and the manner in which legal issues shape policy development and implementation. Readings will consist of primarily excerpts from court cases, supplemented by articles and books.

Learning Objectives

By the end of the course, students should be able to:

- Read and summarize judicial opinions;
- Identify the holdings of landmark cases dealing with separation of powers;
- Recognize recurrent themes and identify trends in the struggle for power between the three branches of government;
- Evaluate the strength of different legal arguments;
- Construct their own arguments using appropriate support;
- Apply their understanding of separation of powers to current policy debates.

In addition, the most successful students will begin to reflect on their own biases and develop their own views on the appropriate balance of power between the three branches.

1 Please let me know at least several hours before office hours if you would like to schedule time to meet so that I can be sure to be in the office when you arrive.
Course requirements

Students are not expected to have any particular background knowledge in the law. However, it is assumed that students have general familiarity with the process by which statutes are passed and the basic American legal system.

Students will be expected to complete all assigned readings and participate in spirited class discussions. Readings will draw primarily from the textbook by Stone et al., CONSTITUTIONAL LAW (7th ed. 2013), which will be available at the NYU bookstore. Supplemental readings from books, articles, and cases not included in the textbook will be available either online or through NYU Classes. Class participation includes answering directed questions about the readings, volunteering insights and observations and responding to classmates.

Students will also be required to write 2 short papers (5-7 pages each) that expand on issues discussed in class. Students can choose to write on any topic that interests them with prior approval, but each topic should be related to a different unit of the course. Papers related to each unit are due the week after class discussion of that unit is complete. Late papers will lose a letter grade for each day after the deadline they are submitted. Papers will not be accepted more than two days late without prior permission from the instructor. While students can choose which of the units to write their papers on, at least one paper must be based on either the first or second unit. In other words, student cannot wait until the third unit to hand in their first paper. Each paper will be worth 15% of the grade.

There will also be two moot court arguments for which student will need to prepare outside of class. These arguments together will count for another 15% of the grade. There will also be a final exam (worth 30%). The remaining 25% of the grade will be based on class participation. Students with disabilities that seek accommodations should speak with the professor at the beginning of the semester.

Grading

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<tr>
<th>Component</th>
<th>Percentage</th>
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<tr>
<td>Class participation</td>
<td>25%</td>
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<tr>
<td>Paper 1</td>
<td>15%</td>
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<tr>
<td>Paper 2</td>
<td>15%</td>
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<td>Debates</td>
<td>15%</td>
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<tr>
<td>Final exam</td>
<td>30%</td>
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All students must comply with the NYU Academic Code.
Unit I - The Judicial Branch

The first unit examines who decides what the law is and how it gets interpreted. In this unit, we will discuss the basic framework of judicial review, its legitimacy, and methods of constitutional interpretation. This unit will also explore the practical limits on judicial authority as illustrated by institutional reform cases such as Brown v. Board of Education and The Campaign for Fiscal Equity v. New York.

Readings

1) Basic Framework
   a) United States Constitution – Stone pp. xli-lvi
   b) The Federalist Papers, No. 78 - The Judiciary (available online)
   c) Marbury v. Madison – Stone, 25-32
   d) Cooper v. Aaron – Stone, 44-48

2) Methods of Constitutional Interpretation
   i) District of Columbia v. Heller, Stone 48-52
   ii) McCulloch v. Maryland – Stone, 52-62
   iv) Stephen Breyer, ACTIVE LIBERTY, excerpts

3) Limits on judicial authority
   a) “Case or Controversy” Requirements & the Passive virtues
      i) Standing
         (1) Stone, 82-83, 85-106
         (4) Silver v. Pataki
      ii) Political Questions – Stone, 121-153
   b) Practical Limits
      i) School Funding
         (1) Education Law Center, “A History of Abbott v. Burke”
         (2) National Education Access Network, School Funding Cases in New York
Unit II - The Legislative Branch

Unit II will explore the powers and limits of Congress under the U.S. Constitution. This unit will explore issues relating to Federalism, the commerce clause, and the spending power. We will explore these issues using both historical examples such as the New Deal crisis and contemporary debates such as the constitutionality of the Affordable Care Act. This unit will also explore the differences between Congressional authority and the authority of state and local legislatures over their respective jurisdictions.

Readings

1) The Scope of Congress’s Powers
   a) Federalism, Stone 159-179
   b) Commerce Clause
      i) Stone, 179-198
      ii) Bruce Ackerman, *We the People* (excerpt)
      iii) Stone, 198-239
   c) Taxing and Spending -- Stone 293-320
   d) War Powers – Stone 322-325
   e) Reconstruction Amendments – Stone 325-336
   f) Federalism – Stone 346-358
2) The Legislative Process
   a) Eskridge & Frickey, *Legislation: Statutes and the Creation of Public Policy* (excerpts)

Unit III - The Executive Branch

The third unit will look at the powers of the Executive through issues such as President Truman’s seizure of the nation’s steel mills in 1952, assertions of executive authority in the War on Terror, and Nixon’s claims of executive privilege.

Readings

1) Introduction - Stone 367-382
2) NYC
   a) *NY Statewide Coalition of Hispanic Chambers of Commerce v. NYC Dep’t of Health and Mental Hygiene* (1st Dep’t 2013) (“Soda Ban Case”).
3) National Government
   a) Foreign Affairs – Stone 382-411
   b) Domestic Affairs – Stone 411-451
4) The NSA Surveillance Program
   a) Readings TBD
Unit IV - Tension between the branches

While each of the first three units include examples of tensions between the different branches, the final unit will explore these tensions in greater depth through the lens of a specific issue or issues to be selected by the students. Possible topics include the right to privacy, civil rights, or campaign finance.

Readings (tentative)

1) Substantive Due Process
   a) The Protection of Economic Interests – Stone 750-776
   b) Right to Privacy – Stone 841-909
   d) J. Harvie Wilkinson III, Cry, the Beloved Constitution, NYTimes (March 12, 2012).

2) Campaign Finance
   a) Jeff Clement, CORPORATIONS ARE NOT PEOPLE (2012)
   b) Citizens United (2010)

3) Civil Rights
   b) Shelby County v. Holder (2012)
   c) Affirmative Action
      i) Stone – 562-624

4) DOMA
   b) US v. Winsor (oral argument transcript at 1-55)
   c) Mayor v. Council (“Equal Benefits”) (available on NYU classes)