Perhaps the central issue in academic constitutional theory in the twentieth century has concerned the proper scope and legitimacy of judicial review. Although the legitimacy of the basic practice of judicial review has been widely accepted by both political actors and commentators since the early nineteenth century, the scope of that practice has been intermittently politically controversial and regularly intellectually troubling. Although we have accepted judicial review as a matter of historical fact, there is substantial disagreement as to how the practice should or could be justified. Relatedly, there are substantial disagreements as to when and how the power of judicial review should be exercised, if it should be exercised at all. This normative debate, with particular applications to judicial cases and doctrine, largely defines contemporary constitutional theory.

This course will provide an introduction to that debate, while also situating those arguments within the context of empirical studies of judicial behavior and the Court’s relationship to American politics. The empirical literature can add depth to the normative argument over what the Court’s role in the political system can and should be. Perhaps more importantly, the empirical literature may also shed useful light on our understanding of what role the Court has played within the political system and the empirical assumptions that are embedded within the normative literature. Ultimately, the empirical and the normative should be linked.

The debate over judicial review is primarily an American debate, shaped by the particulars of American history and political ideology. Constitutional courts in other countries have also, intentionally, been designed differently than the American system, complicating comparisons. Thus, although placing the American debate in a comparative context (international and intranational) would be welcome, the readings are centrally concerned with debates over the U.S. Supreme Court. This is not a course in constitutional law, but some familiarity with constitutional law may be helpful. If you need more to refresh yourself on American constitutional history, I suggest Robert McCloskey’s *The American Supreme Court*, Lucas Powe’s *The Supreme Court and the American Elite*, and Alfred Kelly, Winfred Harbison and Herman Belz’s *The American Constitution*. There are a number of American constitutional law casebooks available, including Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism*. Laurence Tribe’s comprehensive treatise, *American Constitutional Law*, is also helpful. An overview of the law and politics field can be found in *The Oxford Handbook of Law and Politics*.

The topics under examination this semester are only a selection of the possible ones. Not only will our examination of each individual topic necessarily be limited, but there will also be other topics concerning theories of judicial review, constitutional and statutory interpretation, adjudication, and judicial behavior that will not be examined at all. These readings should relate not only to the other readings within a given week, but also to other readings in the semester and to other topics not discussed this semester. Class discussion in any given week should be permeable to those concerns. The syllabus provides a brief comment on each week’s readings. The questions asked in those comments are at best starting points for your thinking, and are merely intended to help orient you toward that week’s material in the context of the course. Those suggested questions are also framed in a rather general fashion, and do not explore the specifics raised by the assigned readings. You should certainly be thinking about those specifics, as well as how the readings relate to our general concerns.

Schedule:

The Normative and Legal Debate

1. February 2: Introduction: The Problem of Judicial Review
2. February 9: The “Activism” Debate
3. February 16: Democracy, Reason and Neutrality
4. February 23: Fundamental Values
5. March 2: Reinforcing Democracy
6. March 9: Originalism
7. March 23: Judicial Supremacy v. Popular Constitutionalism
8. March 30: The Countermajoritarian Court?
9. April 6: Constructing Judicial Review
10. April 13: Entrenchment and Judicialization
11. April 20: Dialogues and Constraints
12. April 27: Litigation and Impact

Materials:

The following books are available for purchase at the University Store:

Alexander Bickel *The Least Dangerous Branch*
John Hart Ely *Democracy and Distrust*
Keith Whittington *Political Foundations of Judicial Supremacy*
Tom Clark, *The Limits of Judicial Independence*

The remaining readings are on electronic reserve at the library or on Blackboard.

Requirements:

Seminar participants will prepare two short papers of 6-8 pages each and one substantial literature review or review essay of 6-8 pages during the course of the semester. Each short paper is to explore some problem arising from or addressed by the readings of a selected week. There is no reason why two or even three of your papers could not address different facets of a common problem. The papers may be guided by the suggested questions provided in the syllabus, but they are by no means constrained by those suggestions.

The literature review or review essay should be framed around a work or topic suggested by a given week of the syllabus. The essay should provide an original, synthetic, and analytical accounting of the subject at hand. It should integrate at least seven relevant sources into the discussion. This is not a short book review, of the type that can be found in Perspectives on Politics or the Law and Politics Book Review (http://www.bsos.umd.edu/gvpt/lpbr), which are generally limited to under 2000 words and focused on summary and quick evaluation of a single book. Some useful tips on writing a literature review can be found at http://www.writing.utoronto.ca/advice/specific-types-of-writing/literature-review. Literature reviews can be found as a section in most journal articles and as a chapter or portion of a chapter in most dissertations and some academic books. Good examples can be found in JOP 72 (2010): 767; JOP 72 (2010): 747; JOP 72 (2010): 672. Stand-alone review essays are related but take a somewhat different form. Examples can be found in journals like Reviews in American History, Law and Social Inquiry, Political Theory, as well as some law reviews, annuals and handbooks. For some models, consider LSI 24 (1999): 221; LSI 17 (1992): 715; LSI 34 (2009): 747. You have flexibility in choosing the thesis and central works for the review, so long as it connects to a specific week in the syllabus.

Each paper should include a brief abstract (150-500 words). Papers should not simply be read at the seminar, but you should be prepared to present an oral version of your argument. The oral presentation should develop the argument contained in your paper and initiate that day’s discussion. Papers will be scheduled at the beginning of the semester and are due the day before the relevant seminar. They should be emailed to me and the other seminar participants by 5:00 pm on the preceding Thursday, if not before.

The “required” readings are absolutely required. You are expected to have read thoroughly and thought about each of these readings before every class. The suggested readings are for your further consideration and reference. You are welcome to make use of the suggested readings in preparing your papers, and to incorporate them as appropriate for the benefit of the other participants. The suggested readings are sometimes directly related to the required readings. In other weeks, the suggested readings are a diverse collection of interesting works that raise related questions.
Each of the three papers will constitute a quarter of your final grade, with the remainder determined by participation.
Readings:

1. Introduction: The Problem of Judicial Review (February 2)

The practice of judicial review has become an important problem for democratic and liberal theory and for descriptive political science in the twentieth century. But of course it began as the assertion by a judicial body of a legal power under the written Constitution. The legality of that initial assertion has itself been controversial. Was the power of judicial review implicit in the Constitution, or was it the creation of the Marshall Court? Is Marbury v. Madison an instance of careful legal judgment or early judicial activism? Is judicial review a legal doctrine or a political power, or both?

Required:

Alexander Hamilton The Federalist Papers, No. 78
“Brutus” XI, XII, XV
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163-180 (1803)

Suggested:

Edward S. Corwin The Doctrine of Judicial Review
Edward S. Corwin, The “Higher Law” Background of American Constitutional Law
William Crosskey Politics and the Constitution
Charles Grove Haines The American Doctrine of Judicial Supremacy
Robert L. Clinton Marbury v. Madison and Judicial Review
Sylvia Snowiss Judicial Review and the Law of the Constitution
Coke Dr. Bonham's Case 8 Co. 114 (C.P. 1610)
Coke Calvin's Case 7 Co. 1, 12-14 (C.P. 1609)
Commonwealth v. Caton et al. 4 Call 5 (Va. 1782)
Kamper v. Hawkins 1 Va. Cases 20 (1793)
VanHorne's Lessee v. Dorrance 2 U.S. (2 Dall.) 304 (1795)
Calder v. Bull 3 U.S. (3 Dall.) 386 (1798)
Eakin v. Raub 12 Serg. & Rawle 330, 344 (Pa. 1825)
Raoul Berger Congress v. the Supreme Court
Philip Hamburger, Law and Judicial Duty
Richard Ellis The Jeffersonian Crisis
Robert K. Faulkner The Jurisprudence of John Marshall
David Currie The Constitution in the Court: The First Hundred Years
Brinton Coxe Judicial Power and Unconstitutional Legislation
Andrew C. McLaughlin The Courts, the Constitution, and Parties
James R. Stoner, Jr. Common Law and Liberal Theory
Christopher Wolfe The Rise of Modern Judicial Review
Wallace Mendelson, “Was Marshall an Activist?” in Supreme Court Activism and Restraint, eds. Halpern and Lamb
2. The “Activism” Debate (February 9)

The public debate over judicial review primarily revolves around denunciations of judicial “activism.” Unfortunately the term does not have any clear content, though it does have a fairly clear valence (nobody likes “activism,” whatever it might be). Nonetheless, some basic notion of activism underlies the normative scholarly debate over judicial review as well. Is there anything worth salvaging here? Is judicial activism a bad thing?

Required:


Suggested:

Christopher Wolfe, ed., Judicial Activism
Christopher Wolfe, ed., That Eminent Tribunal
Kenneth Holland, ed., Judicial Activism in Comparative Perspective
Stephen Halpern and Charles Lamb, eds., Supreme Court Activism and Restraint
David Forte, ed., The Supreme Court in American Politics
Paul Carrese, Cloaking of Power
Stephen Powers and Stanley Rothman, The Least Dangerous Branch?
Herman Schwartz, ed., The Rehnquist Court
Thomas Keck, The Most Activist Supreme Court in History
Frederick Lewis, The Context of Judicial Activism
Keith Schlesinger, The Power that Governs
Arthur Miller, Toward Judicial Activism
Mitchell Muncy, ed., The End of Democracy?
Mitchell Muncy, ed., The End of Democracy II?
Matthew Franck, Against the Imperial Judiciary
Robert Bork, Coercing Virtue
Robert Bork, The Tempting of America
Bradley Watson, ed., Courts and the Culture War
Gary McDowell, Curbing the Courts
Richard Neely, How Courts Govern America
John Daly, ed., An Imperial Judiciary: Fact or Myth?
Mark Kozlowski, The Myth of the Imperial Judiciary
Jamin Raskin, Overruling Democracy
Herman Schwartz, Packing the Courts
Robert McKeever, Raw Judicial Power?
Frances Rudko, Truman’s Court
Lane Sutherland, Popular Government and the Supreme Court
Stephen Macedo, The New Right v. the Constitution
Martin Garbus, Courting Disaster
Symposium: Judicial Activism in the States, Benchmark 4 (1988)
3. Democracy, Reason and Neutrality (February 16)

The *Lochner* era of the late nineteenth and early twentieth centuries provoked a crisis for the Court and the power of judicial review. By the time of the New Deal, a substantial body of Progressive-minded legal thought questioned the value and process of judicial review. The Court’s capitulation to the Roosevelt administration was seen by many to mark the beginning of a new era of judicial restraint. The Warren Court forced a rethinking of the value of judicial review in light of progressive judicial activism. The core concerns of modern constitutional theory were laid out in this era. How can democracy and judicial review be reconciled? How can judicial review be anything other than the exercise of raw political power? Can the courts be distinguished from legislatures in any meaningful way? In particular, are courts more principled and reasonable than legislatures, and is that sufficient to justify judicial review?

Required:

Learned Hand *The Bill of Rights* pp. 66-77
Alexander M. Bickel, *The Least Dangerous Branch* pp. 1-127

Suggested:

Alexander Bickel *The Supreme Court and the Idea of Progress*
Lon Fuller *The Morality of Law*
Robert H. Jackson *The Struggle for Judicial Supremacy*
Charles Grove Haines *The American Doctrine of Judicial Supremacy*
Charles Black *The People and the Court*
William Ross *A Muted Fury*
Jerome Frank *Law and the Modern Mind*
Jerome Frank *Courts on Trial*
Louis Boudin *Government by Judiciary*
Edward S. Corwin *The Twilight of the Supreme Court*
Edward S. Corwin *Constitutional Revolution, Ltd.*
Edward Leuchtenberg *The Supreme Court Reborn*
Charles Beard, *The Supreme Court and the Constitution*
Eugene Rostow *The Sovereign Prerogative*
G. Edward White, *Patterns of American Legal Thought*
Edward A. Purcell *The Crisis of Democratic Theory*
Neil Duxbury *Patterns of American Jurisprudence* ch. 4
Charles Warren *The Supreme Court in United States History*
4. Fundamental Values (February 23)

The “legal process” school of the 1950s and early 1960s emphasized principle, but their conception of principle was relatively thin and legalistic. As scholars became more comfortable with the Warren Court, a more explicitly and substantively rich values approach to constitutional jurisprudence was developed. Judicial review might be justified by the important values that it advanced. If the children of the New Deal were centrally concerned with establishing the primacy of democracy over controversial rights claims, the children of the Warren Court were centrally concerned with identifying rights as “trumps” over democratic outcomes. Can the enforcement of fundamental values provide an adequate justification for judicial review? Must the Court be limited to those values contained within the Constitution or traditionally recognized in the law? Can the fundamental values approach be rationalized with the Court as a judicial institution and with the inherited Constitution as written? What values should be enforced? How should they be generated? Can the Warren Court be justified without also justifying the *Lochner* Court?

Required:

Ronald Dworkin, *Taking Rights Seriously* ch. 5

Suggested:

Ronald Dworkin *Law’s Empire*
Ronald Dworkin *Taking Rights Seriously*
Michael Perry *Morbidity, Politics and Law*
Michael Perry *The Constitution, the Courts, and Human Rights*
Laurence Tribe and Michael Dorf *On Reading the Constitution*
Hadley Arkes *Beyond the Constitution*
Sotirios Barber *The Constitution of Judicial Power*
Sotirios Barber *On What the Constitution Means*
Graham Walker *The Moral Foundations of the Constitution*
Scott Gerber *To Secure These Rights*
David A.J. Richards *Toleration and the Constitution*
Rogers Smith *Liberalism and American Constitutional Law*
Richard Epstein *Takings*
Steven Smith *The Constitution and the Pride of Reason*
As we saw last week, one common response to Bickel’s “countermajoritarian difficulty” is to deny that countermajoritarianism raises any problems at all – to defend an activist Court and constitutional rights as trumps. Another option is to seek to avoid the difficulty by charging the Court with reinforcing and facilitating democracy rather than checking it. Limiting the Court to actions that can reinforce democracy has also been advocated as a way for the Court to avoid the *Lochner* problem of making controversial value judgments. What does democracy require and how might the Court reinforce it? Can the Court claim democratic credentials? Is reinforcing democracy an adequate role for the Court? Is it a possible role for the Court? Would this mission resolve the Court’s legitimacy problems?

Required:

United States v. Carolene Products, 304 U.S. 144 (1938)
John Hart Ely *Democracy and Distrust*
Christopher Eisgruber, *Constitutional Self-Government* ch. 2

Suggested:

Jesse Choper *Judicial Review and the National Political Process*
Daniel Farber and Phillip Frickey *Law and Public Choice: A Critical Introduction*
Jurgen Habermas *Between Facts and Norms* ch. 4, 5, 6
Mark Tushnet *Red, White and Blue: A Critical Analysis of Constitutional Law*
Robert Burt *The Constitution in Conflict*
Jeremy Waldron *Law and Disagreement* ch. 12, 13
Fundamental values and democratic justifications for judicial review offer substantive, functional defenses of the Court. A more traditional alternative that received renewed attention over the past two decades reemphasizes the legal role of the Court as an interpreter of the Constitution. Rather than going “beyond the Constitution” to enforce some particular value, the Court should instead focus on interpreting the Constitution as written and enforcing its various commitments. Constitutional theory joined the “interpretive turn” that was made by much of the humanities and social sciences, exploring the implications and possibilities of textual interpretation and the role that texts play within interpretive communities. A prominent – but not the only – interpretive theory is originalism, that the Court should enforce the Constitution as the Founders understood it. Why interpret? What is the authority of the text? What is “the Constitution”? What is required by constitutional interpretation? Is interpretation possible? Can interpretation be distinguished from originalism? What is the authority of the Founders? What does originalism require?

Required:
Keith Whittington, *Constitutional Interpretation* pp. 50-76, 195-212
Ronald Dworkin, *A Matter of Principle* ch. 2

Suggested:
Gregory Bassham, *Original Intent and the Constitution*
Ronald Dworkin *Taking Rights Seriously* ch. 4-5
Ronald Dworkin, *A Matter of Principle* ch. 5-7
Ronald Dworkin *Law’s Empire*
Ronald Dworkin *Freedom’s Law* ch. 12-17
Antonin Scalia, et al. *A Matter of Interpretation*
Michael Perry *The Constitution in the Courts*
Robert H. Bork *The Tempting of America*
Earl Maltz, *Rethinking Constitutional Law*
Raoul Berger, *Government by Judiciary*
Erwin Chemerinsky, *Interpreting the Constitution*
Stanley Fish *Doing What Comes Naturally*
Mark Tushnet Red, White and Blue
David Lyons Moral Aspects of Legal Theory
Robin West Progressive Constitutionalism
Robert Nagel Constitutional Cultures
Philip Bobbitt, Constitutional Fate
Charles Black, Structure and Relationship in Constitutional Law
Symposium, Constitutional Commentary 6 (1989): 19
Mitchell Berman, “Originalism is Bunk.”
Thomas Colby and Peter Smith, “Originalism’s Living Constitutionalism,”
Lawrence Solum, “Semantic Originalism,”
Two related debates have dominated constitutional theory over the past few decades, a debate over how “activist” or “restrained” the Court should be in exercising the power of judicial review and a debate over the proper foundations and purposes of the power of judicial review. In recent years, another strand of debate has emerged focusing on how “supreme” judicial interpretations of the Constitution should be and how authoritative other interpreters of the Constitution might be. The debate over judicial supremacy has both normative and empirical elements, introducing a more explicit institutional element to the debate over judicial review. Who should interpret the Constitution? Under what circumstances? Should the judiciary defer to other political actors? Does judicial review make sense in the absence of judicial supremacy? What is “popular constitutionalism,” and is it consistent with the modern constitutionalism of legally constrained government? Do nonjudicial actors take the Constitution seriously? How are constitutional values best defined and enforced?

Required:

Keith E. Whittington, Political Foundations of Judicial Supremacy, ch. 2, 4

Suggested:

Mark Graber and Michael Perhac, eds., Marbury v. Madison: Documents and Commentary
Keith Whittington Constitutional Construction
Sanford Levinson, ed. Responding to Imperfection
Paul W. Kahn, Legitimacy and History
Bruce Ackerman, We the People
Symposium: On Bruce Ackerman’s We the People, Ethics 104 (1994): 446
Symposium: On Bruce Ackerman’s We the People: Transformations, Constitutional Political Economy 10 (1999): 355
Mark Tushnet, *Taking the Constitution Away from the Courts*
Barry Cushman *Rethinking the New Deal Court*
G. Edward White, *The Constitution and the New Deal*
John Vile *Constitutional Change in the United States*
Neal Devins, *Shaping Constitutional Values*
Robert Spitzer, ed., *Politics and Constitutionalism*
Louis Fisher, *Constitutional Conflicts Between Congress and the President*
Louis Fisher, *Religious Liberty in America: Political Safeguards*
John Dinan, *Keeping the People’s Liberties*
Susan Burgess, *Contest for Constitutional Authority*
Jeremy Waldron, *Law and Disagreement*
Donald Morgan, *Congress and the Constitution*
David Currie, *The Constitution in Congress*
Sanford Levinson, *Constitutional Faith*
8. The Countermajoritarian Court? (March 30)

As we saw, the starting point for contemporary normative theorizing about judicial review is the assumption that the Court is a countermajoritarian institution. That countermajoritarianism created both possibilities and difficulties. It created the possibility that the Court could protect minorities and individuals from majority power. It created the difficulty that judicial review was in conflict with democracy. The dramatic conflict between the *Lochner* Court and the New Deal exposed the central feature of American judicial review. The normative debate essentially begins with from that core empirical assumption. But through most of the nineteenth century, no one would have given credence to that assumption, and James Madison himself doubted the value of constitutional rights because he thought the popular will was the only significant political force in a republic. Is the countermajoritarian Court a myth? Can the Court be countermajoritarian? Will it want to be countermajoritarian? What would it mean to be countermajoritarian? What is the relationship of the Court to other political actors? Are the assumptions of normative theory consistent with our understandings of how politics works and how political power is accumulated and exercised?

Required:


Suggested:

Lucas A. Powe, Jr. *The Warren Court and the American Elite*
Henry Abraham *Justices, Presidents, and Senators*
David Yalof *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*
William Mishler & Reginald Sheehan, “The Supreme Court as a Countermajoritarian Institution?,” *APSR* 87 (1993): 87
John Gates *The Supreme Court and Partisan Realignment*
Walter Murphy *Congress and the Court*
Thomas Marshall *Public Opinion and the Supreme Court*
Robert McCloskey *The American Supreme Court*
Louis Fisher *Constitutional Dialogues: Interpretation as Political Process*
Michael Klarman, *From Jim Crow to Civil Rights*
Girardeau Spann *Race Against the Court*
David Garrow *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*
Landes-Posner helped put the question of how independent judiciaries are created and sustained on the agenda for empirical social science. Placing the problem of judicial independence within a larger framework of interest group efforts to “buy” legislation, Landes-Posner suggested that private actors – and through them legislators – might value independent judges who could help provide some assurance of temporal stability for legislative bargains (which in turn made those bargains – legislation – more valuable). There are a number of puzzles about the Landes-Posner model (why, for example, would judges be interested in enforcing past legislative bargains, and why would current legislators want them to do so?), but it emphasized that a political explanation was needed for an independent judiciary and suggested that such an explanation might be found in the varying incentives and time horizons of courts, legislators and private actors. Subsequent models have tended to emphasize either internal or external factors supporting judicial independence. Internal models focus on the incentives of elite political actors that lead them to desire an independent judiciary (the Landes-Posner model is an example). External models focus on external constraints on political actors that prevent them from subverting an independent judiciary (e.g., mass public opinion that supports the judiciary). Do political models of judicial independence capture what we mean by “judicial independence”? What do we mean by “judicial independence”? How do we observe it? Are internal and external models incompatible? What do judges do these models?

Required:


Suggested:

Rafael Gely and Pablo Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court-Packing Plan*, 12 Internatl. Rev. of L. and Econ. 45 (1992)
Ran Hirschl, Toward Jurisprudence
Mondak & Smithey, “Dynamics of Public Support for the Court,” *JOP* 59 (1997)
Georg Vanberg, “Establishing and Maintaining Judicial Independence,” *The Oxford Handbook of Law and Politics*
Frank Cross, “Judicial Independence,” *The Oxford Handbook of Law and Politics*
10. Entrenchment and Judicialization (April 13)

Judicial review may be understood as a mechanism by which powerful political actors entrench their interests against future displacement. The Constitution itself may be understood as an entrenchment device, identifying certain commitments as particularly important and handicapping future political actors who may want to violate those commitments. The entrenchment logic may help explain both the political supports for judicial review and the substantive content of the constitutional decisions that courts render. How does Court fit within the political system? How does it advance, resist or complicate the goals of the dominant political coalition? What make a commitment stick? Under what conditions are efforts at entrenchment successful? Does this approach make judicial review more or less normatively attractive? We might distinguish between two somewhat separate dynamics – the entrenchment of currently preferred policy against easy displacement by future political actors, and the judicialization of political disputes by shifting issues from the legislative and electoral arena into the judicial arena for resolution.

Required:

Howard Gillman “How Political Parties Use the Courts to Advance their Agendas,” *APSR* 96 (2002): 511
Keith E. Whittington, *Political Foundations of Judicial Supremacy*, ch. 3

Suggested:

Jon Elster *Ulysses and the Sirens*
Jon Elster *Ulysses Unbound*
Stephen Holmes *Passions and Constraints*
Stefan Voigt *Explaining Constitutional Change*
Ronald Kahn and Ken Kersch, eds., *The Supreme Court and American Political Development*
Deborah Barrow, et al., *The Federal Judiciary and Institutional Change*
Mark Tushnet, *The New Constitutional Order*
Alex Cukeran, *Central Bank Strategy, Credibility and Independence*
Tom Ginsburg, *Judicial Review in New Democracies*
Kevin McMahon, *Reconsidering Roosevelt on Race*
Mark Shapiro and Alec Stone Sweet, eds., *On Law, Politics, and Judicialization*
Rather than a bolt from the blue, the exercise of judicial review and constitutional interpretation by the courts might be understood as part of a process that includes other actors and institutions. The Court has an ongoing relationship with the other branches of government, and it may be in dialogue with them in both a strategic sense and a deliberative sense. How does the Court and Congress relate to one another? The Court and the executive branch? What is the Court’s role in the constitutional dialogue? What are the limits of judicial action? What are the spurs to judicial action? What responses to judicial decisions are available to elected officials? Are judicial and non-judicial actors speaking the same language? What is the value of judicial review to political actors? How is constitutional law shaped by its historic and political context? Can a strategic Court be consistent with our normative theories of judicial review and constitutionalism? Can a strategic Court be justified? Should the Court take into account strategic considerations in deciding constitutional cases?

Required:

Barry Friedman and Anna Harvey, “Pulling Punches: Legislative Constraints on the Supreme Court” LSQ (2006)
Tom S. Clark, The Limits of Judicial Independence, ch. 2, 4-6

Suggested:

George Lovell, Legislative Deferrals
Robert McCloskey The American Supreme Court
William Lasser The Limits of Judicial Power
Jeffrey Segal “Sup. Ct Deference to Congress: An Examination of the Marksist Model,” in Supreme Court Decision-Making
Lee Epstein and Jack Knight The Choices Justices Make
Walter Murphy Elements of Judicial Strategy
Cornell Clayton and Howard Gillman, eds., Supreme Court Decision-Making
Howard Gillman and Cornell Clayton, eds., The Supreme Court in American Politics
Richard Bauman & Tsivi Kahana, The Least Examined Branch
James Rogers, Roy Flemming and Jon Bond, Institutional Games and the U.S. Supreme Court
Prior to the twentieth century, the Supreme Court’s appellate jurisdiction was mandatory. The Court had to hear any case meeting certain criteria. In the twentieth century, the Court has been given discretionary jurisdiction, leaving it up to the justices to decide which cases to accept for decision. In either case, the justices only have control over the case for a short time. The Court cannot determine what cases are brought to it, and they must ultimately rely on others to implement their decisions. Although normative theories of judicial review often portray the Court as a lone and omnipotent crusader, the justices actually operate within their own extended institutional environment. How does this context affect judicial power? How might it affect how the power of judicial review is exercised? Does the litigation environment affect our view of judicial independence? Does the litigation context matter to judicial decision-making? Does it affect outcomes? How should this context be integrated into theories of judicial policy-making, such as the attitudinal model? How powerful is the Court? What can it accomplish? How should this context be integrated into our normative theories of judicial review? Should the Court worry about the impact of its rulings? What might the regime development perspective say about Rosenberg’s analysis of desegregation?

Required:

Gerald Rosenberg *The Hollow Hope* ch. 1-2
Valerie Hoekstra, “Competing Constraints: State Court Responses to Supreme Court Decisions” *PRQ* (2005)

Suggested:

Charles Epp *The Rights Revolution*
Michael McCann *Rights at Work*
Michael McCann *Taking Reform Seriously*
David Schultz, ed. *Leveraging the Law*
Stuart Schingold *The Politics of Rights*
Donald Horowitz *The Courts and Social Policy*
Phillip Cooper *Hard Judicial Choices: Federal District Judges and State and Local Officials*
Jack Peltason *58 Lonely Men*
Theodore Becker and Malcolm Feeley, *The Impact of Supreme Court Decisions*
Bradley Canon and Charles Johnson, *Judicial Policies: Implementation and Impact*
Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State*
Lee Epstein and Joseph Kobylda, *The Supreme Court and Legal Change*
Kenneth Dolbeare and Phillip Hammond *The School Prayer Decisions: From Court Policy to Local Practice*
Kevin McGuire, “Explaining Executive Success in the Supreme Court,” *Political Research Quarterly* 51 (1998): 505
Kevin McGuire *The Supreme Court Bar: Legal Elites in the Washington Community*
Susan Gluck Mezey *Pitiful Plaintiffs: Child Welfare Litigation and the Federal Courts*
Jerold Auerbach *Unequal Justice: Lawyers and Social Change in Modern America*
Kristin Bumiller *The Civil Rights Society: The Social Construction of Victims*

H.W. Perry *Deciding to Decide: Agenda Setting in the United States Supreme Court*


William Lasser *The Limits of Judicial Power: The Supreme Court in American Politics*

Edward Purcell Jr. *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958*

David O’Brien *Storm Center: The Supreme Court in American Politics*


Susan Lawrence *The Poor in Court: The Legal Services Program and Supreme Court Decisions*


Clement Vose *Caucasions Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases*

Mark Tushnet *The NAACP’s Legal Strategy against Segregated Education, 1925-1950*

Susan Sterett *Creating Constitutionalism? The Politics of Legal Expertise and Administrative law in England and Wales*


Marc Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society,” *UCLA Law Review* 31 (1983): 4


Stephen Wasby *The Impact of the United States Supreme Court*


Gregg Ivers, *To Build a Wall*

Lee Epstein, *Conservatives in Court*

Frank Sorauf, *The Wall of Separation*

David Manwaring, *Render Unto Caesar*

Shawn Francis Peters, *Judging Jehovah’s Witnesses*


Helena Silverstein, *Girls on the Stand*