This course provides a historical and philosophical framework within which to consider the place of such an institution as judicial review in the context of a democratic political system. The arguments considered range from the abstract to the highly specific, but share a common concern with balancing minority and individual interests with majoritarian politics. Considerations of this problem not only call into question whether judicial review as we know it should exist, but also shed light on what kind of judicial review should exist, what function the Court should serve and what interpretative approaches are appropriate to it.

The course pursues these issues through a historical examination of the theoretical and political arguments that inform the modern practice of judicial review. The goal of these readings is not merely to demonstrate a historical trajectory which culminates in the current Court, but to open the now entrenched practice of judicial review to serious consideration.

In addition to attending seminar, completing the readings and engaging in discussions, the course requirements include completion of four one-page "briefs," at least two of which will be presented orally at the beginning of a class, to highlight critical issues in the reading and frame the class discussion. In addition, there will be two 8-10 page papers on topics of your choice. The first is due in class on Thursday, February 17; the second is due on Thursday, April 28. A 20-25 page research paper may be substituted for the two shorter papers, and would be due on April 28. Papers will be penalized five points for every day late. Class participation, including presentations, are worth 25%; first paper 35%; second paper 40%.

The following books are available for purchase at Book Haven:
   Niccolo Machiavelli  Discourses
   John Locke Two Treatises of Government
   Jean-Jacques Rousseau On the Social Contract
   Alexander Hamilton, et al. The Federalist Papers
   John Dewey The Public and Its Problems
   Alexander Bickel The Least Dangerous Branch
   John Ely Democracy and Distrust

The remaining readings are contained in two packets available at Minitprint. Books and packet are on reserve at Cross Campus Library.

Week 1, Jan. 13:  Introduction
   no readings

Week 2, Jan. 20:  Republican Balance of Powers
   Machiavelli Discourses Bk. 1; Bk. 3 Ch. 1
Week 3, Jan. 27: British Constitutionalism
   Locke Second Treatise ch. 1-14, 18-19
   Coke Dr. Bonham's Case 8 Co. 114 (C.P. 1610)
   Coke selection from Calvin's Case 7 Co. 1, 12-14 (C.P. 1609)
   Blackstone selections from Commentaries on the Laws of England

Week 4, Feb. 3: Strong Democracy
   Rousseau On the Social Contract

Week 5, Feb. 10: Separation-of-Powers
   Montesquieu Spirit of the Laws Bk. 11
   "Centinel" I
   Federalist Papers #10, 39, 47-51, 63, 68, 70, 73

Week 6, Feb. 17: Judicial Review
   Federalist Papers #78-84
   "Brutus" XI, XII, XV
   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)
   Marshall's opinion in Marbury v. Madison 5 U.S. (1 Cranch) 137, 154 (1803)
   Gibson's opinion in Eakin v. Raub 12 Serg. & Rawle 330, 344 (Pa. 1825)

Week 7, Feb. 24: Ante-Bellum Democracy
   Tocqueville Democracy in America Pt. I.4, 6; II.7-8
   John Marshall Letter to Samuel Chase, January 23, 1805
   Thomas Jefferson various letters
   Andrew Jackson Bank veto message; Letter to Robert Hayne, February 8, 1831
   James Buchanan Inaugural address
   Abraham Lincoln Inaugural address; Speeches of July 10 and 17, 1858
   Frederick Douglass "The Dred Scott Decision" speech of May 11, 1857

Week 8, March 3: Property, Representation, and Mobocracy
   J.S. Mill Considerations on Representative Government ch. 6-8
   Herbert Spencer "Representative Government"
   Stephen Field Address on the centenary of the Supreme Court (1892); concurrence in Butchers' Union v. Crescent City 111 U.S. 746, 754 (1883)
   John Dillon Presidential address to the ABA (1892)
   Oliver Wendell Holmes "The Path of Law"; dissent in Lochner v. New York 198 U.S. 45, 74 (1904)

Week 9, March 24: Anti-Formalism, Sociology and Realism
   Friedrich Nietzsche selections from Beyond Good and Evil (§1-10, 16, 21, 32, 43); Genealogy of Morals (1:2, 2:12, 3:24); Will to Power (515-7, 590-2, 604-6)
   John Dewey The Public and Its Problems ch. 4-6
   Roscoe Pound "Liberty of Contract" 18 Yale Law Journal 464 (1909)
   Karl Llewellyn "The Constitution as an Institution" 34 Columbia Law Review 7 (1934)
Week 10, March 31: Procedural Democracy
   Robert Dahl A Preface to Democratic Theory ch. 5
   Alexander Bickel The Least Dangerous Branch ch. 1-4

Week 11, April 7: Procedural Democracy (Part II)
   John Ely Democracy and Distrust ch. 4-6

Week 12, April 14: Taking Rights Seriously
   John Rawls A Theory of Justice § 11, 23, 29, 32, 39-40, 54
   Ronald Dworkin Taking Rights Seriously ch. 5, 7
   Richard Epstein Takings ch. 1-3, conclusion

Week 13, April 21: Back to the Future
   Robert Bork The Tempting of America ch. 6-8