The quadrennial exercise of participatory democracy otherwise known as the election of the American president is once again upon us. We the people, or rather the Electoral College, will determine who will advance to the Oval Office after the departure of Barack Obama. Yes, the election of our chief executive as the most important single leader of the nation and beyond is undeniably our major political event. There is no doubting that assertion, but that statement does not end the story. In our time together in this judicial process class, we will see clearly that a significant part of that executive power is the president’s power to shape the makeup of the United States Supreme Court. Arguably, that power and the results of the use of that power have more impact upon our nation than any other power exercised by the president or other government actors.

The concept of a national government divided into three separate but connected branches is most often attributed to the French philosopher, Montesquieu. To most of the early founders of the republic, application of that concept appeared to be the best way to avoid a concentration of power in the hands of any one branch of government and would thus further the goal of creating a government characterized by checks and balances. As history has shown us, some of the most noble of theoretical ideals are often accompanied by a down side or at least carry unintended consequences that are able to frustrate the goals of those attempting to apply the theories to the actual practice of government.

The legislative, executive, and judicial branches make up our national government structure but debate is ongoing as to the boundaries and responsibilities of each branch. Disputes are never ending as to whether or not one or another branch has overstepped its assigned authority. Our purpose in this course is to focus on the United States Supreme Court as the branch of government that is often singled out as the “chief offender” in overstepping its legitimate sphere of authority. The primary reason for the designation of the Court as the chief offender is that the Court has the last word on the power boundaries for all the other players in the drama. The Court is subject to increasing criticism as it exercises its power of judicial review and is frequently caught up in the political rhetoric of the day, particularly in an election year when candidates discuss “activist” judges. Critics allege that the high court makes law and thereby usurps the powers appropriately assigned to the United States Congress and other sources of government. That “last word” is also spoken by the Court when the Court defines state power boundaries in relationship to national government powers. Is it then surprising that the United States Supreme Court has been described as “the storm center”? I think not. Even the American chief executive’s decisions are subject to the Court’s “last word”. Should the actions of the President of the United States be subject to review by the Court, particularly as the chief executive confronts our enemies in an era dominated by fears of terrorism? These are among the questions that are foremost in
the concerns of critics examining the work of the Supreme Court as that tribunal hears and decides cases. Those cases are inevitably controversial and create highly emotional and sharply divided public responses. The cases we study illustrate the Court’s powers and the conflicts that are generated when the Court acts.

There is a lot to sort out and the scholars in this class have the unenviable task of making sense of how the system works, how it should work, and what reforms, if any, may be proposed. The cases heard by the Court are our laboratory and through reading those cases and briefing them we will be equipped to make important contributions to the ongoing discussion. Many politicians or would be politicians decry “activist” justices and promise to appoint or support justices who don’t “make law” and who will practice judicial restraint. Those comments are utter nonsense, emotional, hypocritical and totally wrong. Anyone of sound mind should be alerted that anyone one who thinks and expresses the views that courts are not and should not be activist is either not serious or is deliberately intending to mislead others usually doing so in elections years in order to pander for votes.

United States Supreme Court justices serve for life unless removed for improper behavior and that happens infrequently. It has even been suggested facetiously that appointment to the United States Supreme Court is almost a guarantee for immortality or at least longevity! The emotional and contentious issues of today will find their way to the docket of our highest tribunal. Those issues will be resolved by the nine robed judicial giants, serving for life, accountable to no voters who rule from their exalted edifice looming over the back of Capitol Hill. That reality further fuels the criticism of our federal judiciary. And so it goes.

There was a time when the public assumed that the wearing of priestly robes provided judges with a direct line to ultimate truth in the Platonic sense of meaning assigned to words and ideas existing somewhere in an ethereal world of absolutes. Judges, dispassionate and wise, were thought to have transcended their personal experiences and biases and were able to pluck truth from the heavens as they rendered their decisions in constitutional cases. Politics and partisan ideologies were not part of the process. Wisdom and objectivity were the hallmarks of judging. We know better. We are well aware that judges at all levels are human beings. We have suffered a loss of innocence concerning the perfect beings who are the judiciary. A loss of innocence, yes, and there is a wistful regret that all is not as it had seemed. Reality is, after all, a little scary.

Judges in any court are mortal beings who carry the heritage (baggage) of who they are and what they have believed and experienced. Simply put, politics is now recognized as an integral part of the judicial process. Confirmation hearings and the battles taking place in those confirmation proceedings have underscored the central role politics play in the judicial system. One needs only to be familiar with the political debate (and grandstanding) throughout the hearings and eventual confirmation of Justices Sotomayor and Kagan that demonstrated clearly the presence of raw ideological partisan politics making mischief on the American political scene. Similarly, no one would doubt that it was no mere coincidence that five Republican Supreme Court justices chose George W. Bush to be the president in the contested 2000 national election and four Democratic justices formed the minority in opposition to that decision.
Our loss of naïveté is sad but understanding and accepting reality are marks of maturity. We are well aware that presidents nominate justices whose views of the Constitution mirror their own political views. The presidential intent is obviously to create judicial benches whose decisions legitimize the policy preferences of the appointing presidents. So much for “finding” the law rather than “making” the law.

With the accession to the bench of Chief Justice Roberts and the addition of Justice Alito to the Court a new judicial era began. The Court already had moved in a more conservative policy direction under Chief Justice Rehnquist and the Roberts Court has continued that movement. President Obama’s two appointments added two less conservative members to the Court but those appointments replaced two retiring justices whose views were similar to the Obama appointees. As a result the makeup of the Court has not changed since the Obama administration began its tenure.

In this semester we will not only study issues and cases that have been decided by the Supreme Court but we will also follow closely cases that were brought to the Court during the 2014-2015 term and are before the Court during the present 2015-2016 term. Decisions will be heard and handed down while we are on our academic journey this term. Careful reading of The New York Times and information from other reliable sources will enable you to be current on any topics related to the Supreme Court. You will also be intelligently informed as to any other judicial topics relevant to our study of the judicial process. The recent challenges to health care reform legislation and gun control have, of course, presented significant questions about the role of Court as it interprets not only its own powers of judicial review but also the powers of the United States Congress. These issues and others illustrate how difficult it is to maintain a functional and effective system of separation of powers and checks and balances in a divided and polarized society where policy consensus is increasingly difficult to achieve. Constitutional interpretation is no easy task. It is no small wonder that the place of the United States Supreme Court in the American political system engenders constant debate not only about the legitimacy of its role but the manner in which that role is played out in actual controversial decisions. We are ready for the challenge of sorting it all out!

**Cases to be submitted as briefs:** Additional cases will be added as needed.

**Marbury v. Madison**

**Baker v. Carr**

**Flast v. Cohen**

**Powell v. McCormack**
Mc Culloch v. Maryland
United States v. Curtiss-Wright Export Corp.
South Carolina v. Katzenbach
Bush v. Gore
United States v. Nixon
Korematsu v. United States
Youngstown Sheet and Tube Co. v. Sawyer
Hamdan v. Rumsfeld
Hammer v. Dagenhart
Gibbons v. Ogden
United States v. E.C. Knight Co.
A. L. A. Schechter Poultry Corp. v. United States
Wickard v. Filburn
National Labor Relations Board v. Jones and Laughlin Steel Corporation
United States v. Darby
United States v. Morrison
Heart of Atlanta Motel, Inc. v. United States
Cooley v. board of Wardens
McCray v. United States
Bailey v. Drexel Furniture Co.
United States v. Butler
Steward Machine Co. v. Davis
The Slaughterhouse Cases
Munn v. Illinois
Lochner vs. New York
Muller v. Oregon

West Coast Hotel v. Parrish

Course Requirements

United States Supreme Court cases are our working tools and we will focus on those cases for much of our class discussion. Students will become masters of the art of briefing. Prepared case briefs will be submitted and discussed in class to that end stale briefs will not be accepted. Failure to submit a timely brief will result in a grade of zero for the delinquent brief. Careful reading of The New York Times or some equivalent source is essential in order to keep up with judicial events.

All tests are to be written in “bluebooks” (often green) and no makeup tests are given. Attendance rules follow the university policy. This attendance requirement must be rigorously followed. More importantly, attendance is vital to success in the course. Active and articulate discussion will be enhanced by your participation. The nature of the course and the necessity of student-professor-student interaction precludes the use of laptops in class as they create an unwelcome intrusion into the interactive relationship. Please respect this policy.

During the term students will attend two local trials in any court of your choosing. The trials may be civil or criminal and may take place in a state or federal court and at any level, trial or appellate. The student must select cases that have instructive merit allowing the student to gain understanding of the judicial process. Waiting until the end of the semester creates a risk that the available trials will offer little opportunity to enhance the student’s knowledge. Written reports of the court visits will be submitted to the course instructor on or before April 15th and will not be accepted after that date.

Course Reading


Lee Epstein and Thomas Walker

The New York Times

Additional cases assigned by course instructor
**Course Testing and Grading**

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