Princeton University
Department of Politics

POL 565 – Theories of Judicial Review
Spring 2017

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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:

1. Feb 6: Introduction: The Problem of Judicial Review
2. Feb 13: The "Activism" Debate
3. Feb 20: Democracy, Reason and Neutrality

4. Feb 27: Fundamental Values
5. March 6: Reinforcing Democracy
6. March 13: Originalism
7. March 27: Judicial Supremacy v. Popular Constitutionalism
8. April 3: Constitutional Declension or Rehabilitation?
9. April 10: The Countermajoritarian Court?
10. April 17: Constructing Judicial Review
11. April 24: Entrenchment and Judicialization
12. May 1: 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*
Randy Barnett, *Our Republican Constitution*
David Strauss, *The Living Constitution*

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 day preceding the seminar, if not before. Students may choose to complete a single research paper instead of the short papers. A research paper would replace the short papers, but oral presentations would still be required. If you intend to pursue this option, please speak to me immediately.

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 6)

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)
Mary Sarah Bilder, "Idea or Practice: A Brief Historiography of Judicial Review," *Journal of Policy History* (2008)
Keith E. Whittington, *Repugnant Laws*, ch. 2

Suggested:

Edward S. Corwin *The Doctrine of Judicial Review*
Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*
William Van Alstyne "A Critical Guide to *Marbury v. Madison*," *Duke Law Journal* 1969 (1969): 1
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)
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*
David E. Engdahl, "John Marshall's 'Jeffersonian' Concept of Judicial Review," *Duke Law Journal* 42 (1992): 279
John Harrison, "The Constitutional Origins and Implications of Judicial Review," *Virginia Law Review* 84 (1998): 333
Dean Alfange, Jr., "Marbury v. Madison & Original Understandings of Judicial Review," *The Supreme Court Review, 1993*
Philip Hamburger, *Law and Judicial Duty*
James A. O'Fallon, "Marbury," *Stanford Law Review* 44 (1992): 219
Richard Ellis *The Jeffersonian Crisis*
Robert K. Faulkner *The Jurisprudence of John Marshall*
S. Bloch & M. Marcus, "John Marshall's Selective Use of History in *Marbury*," *Wisconsin Law Review* 1986 (1986): 301
David Currie *The Constitution in the Court: The First Hundred Years*
Andrew C. McLaughlin, "Marbury v. Madison Again," *ABA Journal* 14 (1928): 155
George L. Haskins and Herbert A. Johnson, *The History of the Supreme Court*: Vol. 2, *Foundations of Power*
Brinton Coxe *Judicial Power and Unconstitutional Legislation*
Andrew C. McLaughlin *The Courts, the Constitution, and Parties*
Keith E. Whittington & Amanda Rinderle, "Making a Mountain Out of a Molehill?" *Hastings Con L Q* (2012)
Christopher Wolfe *The Rise of Modern Judicial Review*
Wallace Mendelson, "Was Marshall an Activist?" in *Supreme Court Activism and Restraint*, eds. Halpern and Lamb
J.A.C. Grant, "*Marbury v. Madison* Today," *American Political Science Review* 23 (1929): 673
George L. Haskins, "Law versus Politics in the Early Years of the Marshall Court," *U. of Penn. Law Review* 130 (1981): 1
William E. Nelson, "The 18th Century Background of Marshall's Constitutional Jurisprudence," *Mich. L. Rev.* 76 (1978): 893
William E. Nelson, "Changing Conceptions of Judicial Review," *U. of Penn. L. Rev*. 120 (1972): 1166
Robert L. Fowler, "The Origins of the Supreme Judicial Power in the Federal Constitution," *American Law Rev* 29 (1895): 711
William M. Meigs, "The Relation of the Judiciary to the Constitution," *American Law Review* 19 (1885): 175

2. The "Activism" Debate (February 13)

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:

James Bradley Thayer "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 129
Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* 66 (1983): 237.
Gregory A. Caldeira and Donald J. McCrone, "Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973," in *Supreme Court Activism and Restraint*, eds. Halpern and Lamb
Philip Hamburger, "A Tale of Two Paradigms: Judicial Review & Judicial Duty," *George Washington L. Rev.* 78 (2010): 1162
Keith E. Whittington, "The Least Activist Court in History?" *Notre Dame Law Review* (2014)

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*
Keenan Kmiec, "The Origins and Current Meaning of Judicial Activism," *California Law Review* (2004)
Sujit Choudhry & Claire Hunter, "Measuring Judicial Activism on the Supreme Court of Canada," *McGill Law Journal* 48 (2003): 525
Lino Graglia, "The Myth of the Conservative Supreme Court," *Harvard J. of Law and Public Policy* 26 (2003): 281
Symposium: Conservative Judicial Activism, *University of Colorado Law Review* 73 (2002)
Symposium: Judicial Activism in the States, *Benchmark* 4 (1988)
J. Skelly Wright, "The Judicial Right and the Rhetoric of Restraint," *Hastings Con Law Quarterly* 14 (1987): 487

3. Democracy, Reason and Neutrality (February 20)

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:

Karl Llewellyn, "A Realistic Jurisprudence – The Next Step," *Columbia Law Review* 30 (1930): 431
Learned Hand *The Bill of Rights* pp. 66-77
Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 1
Alexander M. Bickel, *The Least Dangerous Branch* pp. 1-127
J. Skelly Wright, "The Role of the Sup Ct in a Democratic Society – Judicial Activism or Restraint?" *Cornell L. Rev*. (1968)

Suggested:

Arthur Miller & Ronald Howell "The Myth of Neutrality in Constitutional Adjudication," *U. of Chicago L. Rev*. 27 (1960): 661
Henry M. Hart, Jr. "A Time Chart of the Justices," *Harvard Law Review* 73 (1959): 84
Erwin Griswold, "Of Time and Attitudes – Professor Hart and Judge Arnold," *Harvard Law Review* 74 (1960): 81
Thurman Arnold, "Professor Hart's Theology," *Harvard Law Review* 73 (1960): 1298
Alexander Bickel and Harry Wellington, "Legislative Purpose and the Judicial Process: The *Lincoln Mills* Case," *Harvard Law Review* 71 (1957): 1
Gerald Gunther, "The Subtle Vices of the 'Passive Virtues' – A Comment on Principle and Expediency in Judicial Review," *Columbia Law Review* 64 (1964): 1
Skelly Wright, "Professor Bickel, The Scholarly Tradition, and the Supreme Court," *Harvard Law Review* 84 (1971): 769
Charles Clark, "A Plea for the Unprincipled Decision," *Virginia Law Review* 49 (1963): 660
Charles Clark and David Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition," *Yale Law Journal* 71 (1961): 255
Benjamin F. Wright, "The Supreme Court Cannot be Neutral," *Texas Law Review* 40 (1962): 599
Martin Shapiro "The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles," *George Washington Law Review* 31 (1963): 587
Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96 (1983): 781
Hans Linde, "Judges, Critics, and the Realist Tradition," *Yale Law Journal* 82 (1972): 255
Robert K. Faulkner, "Bickel's Constitution: The Problem of Moderate Liberalism," *APSR* 72 (1978): 925
Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *NYU Law Review* 73 (1998): 333
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*
Eugene Rostow "The Democratic Character of Judicial Review," *Harvard Law Review* 66 (1952): 193
Thomas Reed Powell "The Logic and Rhetoric of Constitutional Law," *J. of Phil., Psych. & Scientific Method* 15 (1918): 645
Joseph Hutcheson, "The Judicial Intuitive: The Function of the 'Hunch' in Judicial Decision," *Cornell Law Q.* 14 (1929): 274
Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 605
Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909): 454
Roscoe Pound, "The Theory of Judicial Decision," *Harvard Law Review* 36 (1923): 641
Karl Llewellyn, "Some Realism about Realism – Responding to Dean Pound," *Harvard Law Review* 44 (1931): 1222
Jerome Frank *Law and the Modern Mind*

Jerome Frank *Courts on Trial*
Jan G. Deutsch, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science," *Stanford Law Review* 20 (1968): 169
Alpheus Thomas Mason "Judicial Activism: Old and New," *Virginia Law Review* 55 (1969): 385
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*
Henry Steele Commager "Judicial Review and Democracy," *Virginia Quarterly Review* (1943): 417
Eugene Rostow *The Sovereign Prerogative*
Barry Friedman, "Neutral Principles: A Retrospective," *Vanderbilt Law Review* 50 (1997): 503
Kent Greenawalt, "The Enduring Significance of Neutral Principles," *Columbia Law Review* 78 (1978): 982
Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1
Gary Peller, "Neutral Principles in the 1950s," *Journal of Law Reform* 21 (1988): 561
G. Edward White, *Patterns of American Legal Thought*
Edward A. Purcell *The Crisis of Democratic Theory*
Neil Duxbury *Patterns of American Jurisprudence* ch. 4
Stephen M. Griffin, "What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition," *Southern California Law Review* 62 (1989): 493
"One Hundred Years of Judicial Review: The Thayer Centennial Symposium," *Northwestern University Law Review* 88 (1993): 1
John Dewey, "Logical Method and Law," *Cornell Law Quarterly* 10 (1924): 17
Charles Warren *The Supreme Court in United States History*

4. Fundamental Values (February 27)

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:

Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 703
Ronald Dworkin, *Taking Rights Seriously* ch. 5
Larry Alexander, "The Constitution as Law," *Constitutional Commentary* 6 (1989): 103
Jeremy Waldron, "The Core of the Case against Judicial Review," *Yale Law Journal* 115 (2006): 1346
James Fleming, *Securing Constitutional Democracy*, ch. 5-6

Suggested:

Lawrence G. Sager, "The Incorrigible Constitution," *NYU Law Review* 65 (1990): 893
Thomas C. Grey, "Origins of the Unwritten Constitution: Fundamental Law and American Revolutionary Thought," *Stanford Law Review* 30 (1978): 843
Thomas C. Grey, "The Constitution as Scripture," *Stanford Law Review* 37 (1984): 1
Thomas C. Grey, "The Uses of an Unwritten Constitution," *Chicago-Kent Law Review* 64 (1988): 211
Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," *Yale Law Journal* 90 (1981): 1063
Ronald Dworkin *Law's Empire*
Ronald Dworkin *Taking Rights Seriously*
Michael Perry *Morality, 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*
David A.J. Richards, "Moral Philosophy & the Search for Fundamental Values in Con. Law," *Ohio St. L. J.* 42 (1981): 319
Rogers Smith *Liberalism and American Constitutional Law*
Richard Epstein *Takings*
Steven Smith *The Constitution and the Pride of Reason*
Daniel O. Conkle, "Nonoriginalist Constitutional Rights and the Problem of Judicial Finality," *Hastings Con L. Q*. 13 (1985): 9
Randy Barnett, "Getting Normative: The Role of Natural Rights in Constitutional Adjudication," *Const. Comm*. 12 (1995): 93
Owen Fiss "The Supreme Court, 1978 Term – Forward: The Forms of Justice," *Harvard Law Review* 93 (1979): 1
Jeremy Waldron "Moral Truth and Judicial Review," *American Journal of Jurisprudence* 43 (1998): 75
Symposium: Constitutional Adjudication and Democratic Theory, *NYU Law Review* 56 (1981): 259
Chris Eisgruber, "*Dred Again*: Originalism's Forgotten Past," *Constitutional Commentary* 10 (1993): 37
Chris Eisgruger, "Justice and the Text: Rethinking the Constitutional Relationship between Principle and Prudence," *Duke Law Journal* 43 (1993): 1
Chris Eisgruber, "Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism," *University of Chicago Law Review* 55 (1988): 273
James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90 (1992): 761

5. Reinforcing Democracy (March 6)

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*
Mark Tushnet, "Darkness on the Edge of Town: Contributions of John Hart Ely to Constitutional Theory," *Yale L. J.* (1980)
Christopher Eisgruber, *Constitutional Self-Government* ch. 2
Corey Brettschneider, "Balancing Procedures and Outcomes within Democratic Theory," *Political Studies* (2005)

Suggested:

Jesse Choper *Judicial Review and the National Political Process*
Symposium: Judicial Review and Democracy, *Ohio State Law Journal* 42 (1981): 1
Symposium: Constitutional Adjudication and Democratic Theory, *NYU Law Review* 56 (1981): 259
Symposium: *Democracy and Distrust*: Ten Years Later, *Virginia Law Review* 77 (1991): 631
Symposium: The Republican Civic Tradition, *Yale Law Journal* 97 (1998): 1493
Lawrence Sager "Rights Skepticism and Process-Based Responses" *New York University Law Review* 56 (1981): 417
Laurence Tribe "The Puzzling Persistence of Process-Based Constitutional Theories," *Yale Law Journal* 89 (1980): 1065
David Lyons "Substance, Process, and Outcome in Constitutional Theory," *Cornell Law Review* 72 (1987): 745
Daniel Ortiz "Pursuing a Perfect Politics: The Allure and Failure of Process Theory," *Virginia Law Review* 77 (1991): 721
Michael J. Klarman "The Puzzling Resistance to Political Process Theory" *Virginia Law Review* 77 (1991): 747
Michael J. Klarman "Majoritarian Judicial Review: The Entrenchment Problem," *Georgetown Law Journal* 85 (1997): 491
Samuel Issacharoff "Judging Politics: The Elusive Quest for Judicial Review," *Texas Law Review* 71 (1993): 1643
Frederick Schauer "Judicial Review of the Devices of Democracy," *Columbia Law Review* 94 (1994): 1326
Einer R. Elhauge "Does Interest Group Theory Justify More Intrusive Judicial Review?" *Yale Law Journal* 101 (1991): 31
Daniel Farber and Phillip Frickey *Law and Public Choice: A Critical Introduction*
Robert Cover "The Origins of Judicial Activism in the Protection of Minorities," *Yale Law Journal* 91 (1982): 1287
Bruce Ackerman "Beyond Carolene Products," *Harvard Law Review* 98 (1985): 713
Frank Michelman "Law's Republic" *Yale Law Journal* 97 (1988): 1493
Frank Michelman, "Traces of Self-Government," *Harvard Law Review* 100 (1986): 4
Frank Michelman, "Human Rights and the Limits of Constitutional Theory," *Ratio Juris* 13 (2000): 63
Jurgen Habermas *Between Facts and Norms* ch. 4, 5, 6
Mark Tushnet *Red, White and Blue: A Critical Analysis of Constitutional Law*
Daniel Farber and Phillip Frickey "Is Carolene Products Dead?" 79 *California Law Review* 79 (1991): 685
Gregory Basham "Freedom's Politics," *Notre Dame Law Review* 72 (1997): 1235
Michael McConnell "The Importance of Humility in Judicial Review: A Comment on Dworkin's 'Moral Reading of the Constitution'" *Fordham Law Review* 65 (1997): 1269
Brennan Center Symposium on Constitutional Law *California Law Review* 86 (1997): 399
Robert Burt *The Constitution in Conflict*
Jeremy Waldron *Law and Disagreement* ch. 12, 13
James Fleming, "Constructing the Substantive Constitution," *Texas Law Review* 72 (1993): 211
Lane Sunderland, "Constitutional Theory and the Role of the Court: An Analysis of Contemporary Constitutional Commentators," *Wake Forest Law Review* 21 (1986): 855
Steven Gey, "The Unfortunate Revival of Civic Republicanism," *University of Pennsylvania Law Review* 141 (1993): 801
Stephen Feldman, "The Persistence of Power and Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism," *Georgetown Law Journal* 81 (1993): 2243
Michael Klarman, "Majoritarian Judicial Review: The Entrenchment Problem," *Georgetown Law Journal* 85 (1997): 491

6. Originalism and Interpretation (March 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
Stephen Griffin, "Rebooting Originalism," *University of Illinois Law Review* (2008)
Jack Balkin, "Framework Originalism and the Living Constitution" *Northwestern University Law Review* (2009)
Lawrence Solum, "The Interpretation-Construction Distinction" *Constitutional Commentary* (2010)

Suggested:

Gregory Bassham, *Original Intent and the Constitution*
Daniel Farber, "The Originalism Debate: A Guide for the Perplexed," *Ohio State Law Journal* 49 (1989): 1085
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
Jeffrey Goldsworthy, "Dworkin as an Originalist," *Constitutional Commentary* 17 (2000): 49
Keith Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation," *Review of Politics* 62 (2000): 5
Keith Whittington, "Originalism: A Critical Introduction," Fordham Law Review (2013)
Randy E. Barnett, "An Originalism for Nonoriginalists," *Loyola Law Review* 45 (1999): 611
Stephen Munzer and James Nickel, "Does the Constitution Mean What It Always Meant?" *Columbia L. Rev.* 77 (1977): 1029
Antonin Scalia, et al. *A Matter of Interpretation*
Michael Perry *The Constitution in the Courts*
Robert H. Bork *The Tempting of America*
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Henry Monaghan, "Our Perfect Constitution," *NYU Law Review* 56 (1981): 353
William Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693
Earl Maltz, *Rethinking Constitutional Law*
Raoul Berger, *Government by Judiciary*
Raoul Berger, "New Theories of 'Interpretation': The Activist Flight from the Constitution," *Ohio St. Law J.* 47 (1986): 1
Raoul Berger, "The Founders' Views – According to Jefferson Powell," *Texas Law Review* 67 (1989): 1033
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Robert N. Clinton, "Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'" *Iowa Law Review* 72 (1987): 1193
James A. Gardner, "The Positivist Foundations of Originalism: An Account and Critique," *Boston U. Law Review* 71 (1991): 5
Bret Boyce, "Originalism and the Fourteenth Amendment," *Wake Forest Law Review* 33 (1998): 909
Erwin Chemerinsky, *Interpreting the Constitution*
Richard Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation," *Harvard L. Rev*. 100 (1987): 1189
Robert Bennett, "Objectivity in Constitutional Law," *University of Pennsylvania Law Review* 132 (1984): 445
Larry Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?" *California Law Review* 73 (1985): 1482
Paul Brest, "The Misconceived Quest for Original Understanding," *Boston University Law Review* 60 (1980): 204

Stanley Fish *Doing What Comes Naturally*
Richard Posner, "Bork and Beethoven," *Stanford Law Review* 42 (1990): 1380
Mark Tushnet *Red, White and Blue*
David Lyons *Moral Aspects of Legal Theory*
David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy and Public Affairs* 17 (1988): 105
Joseph Raz, "Intention in Interpretation," in *The Autonomy of Law*, ed. Robert George
Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," *Phil. & Public Affairs* 21 (1992): 1
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Anthony Segall, "A Century Lost: The End of the Originalism Debate," *Constitutional Commentary* 15 (1998): 411
Terrence Sandalow, "Constitutional Interpretation," *Michigan Law Review* 79 (1981): 1087
Frederick Schauer, "An Essay on Constitutional Language," *UCLA Law Review* 29 (1982): 797
Martin Flaherty, "History 'Lite' in Modern American Constitutionalism," *Columbia Law Review* 95 (1995): 523
Robin West *Progressive Constitutionalism*
Robert Nagel *Constitutional Cultures*
Jed Rubenfeld, "Reading the Constitution as Spoken," *Yale Law Journal* 104 (1995): 1119
Akhil Amar, "Intratextualism," *Harvard Law Review* 112 (1999): 747
Howard Gillman "The Collapse of Constitutional Originalism and the Rise of the Notion of the 'Living Constitution' in the Course of American State-Building," *Studies in American Political Development* (1997)
Philip Bobbitt, *Constitutional Fate*
Charles Black, *Structure and Relationship in Constitutional Law*
Symposium: Interpretation, *Southern California Law Review* 58 (1985)
Symposium: Textualism and the Constitution, *George Washington Law Review* 66 (1998): 1085
Symposium: Critical Legal Studies, *Stanford Law Review* 36 (1984): 1
Symposium: Law and Literature, *Texas Law Review* 60 (1982): 373
Symposium: Originalism, Democracy, and the Constitution, *Harvard Journal of Law and Public Policy* 19 (1996)
Symposium, *Constitutional Commentary* 6 (1989): 19
Symposium: Philip Bobbitt's *Constitutional Interpretation*, *Texas Law Review* 72 (1994): 1703
Symposium: Judicial Review and the Constitution – The Text and Beyond, *University of Dayton Law Review* 8 (1983): 447
Symposium: Constitutional Law and the Experience of Judging, *University of Colorado Law Review* 61 (1990): 783
Symposium: Jack Balkin's Originalism, *Illinois Law Review* (2012)
Symposium: The New Originalism in Constitutional Law, *Fordham Law Review* (2013)
Stephen Griffin, "Rebooting Originalism," University of Illinois Law Review (2008): 1185
Richard Primus, "When Should Originalism Matter?," *University of Michigan Law Review* (2008)
Mitchell Berman, "Originalism is Bunk,"
Thomas Colby and Peter Smith, "Originalism's Living Constitutionalism,"
John O. McGinnis and Michael Rappaport, *Originalism and the Good Constitution*
Lawrence Solum, "Semantic Originalism,"
Lawrence Solum and Robert Bennett, *Constitutional Originalism: A Debate*
Adam Samaha, "Dead Hand Arguments and Constitutional Interpretation," *Columbia Law Review* (2008)
Jack Balkin, *Living Originalism*
Adam Coan, "The Irrelevance of Writtenness in Constitutional Interpretation," *U. of Penn Law Review* (2010)
Frank Cross, *The Failed Promise of Originalism*

7. Judicial Supremacy v. Popular Constitutionalism (March 27)

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:

Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Rev*. 110 (1997): 1359
Keith E. Whittington, *Political Foundations of Judicial Supremacy*, ch. 2, 4
Larry Kramer, "Popular Constitutionalism, Circa 2004," *California Law Review* (2004)
Robert Post and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *Calf. L. Rev*. (2004)

Suggested:

Symposium on *Marbury v. Madison*, *Constitutional Commentary* 20 (2003): 205
Symposium: *Marbury* and Its Legacy, *George Washington Law Review* 72 (2003): 1
Symposium: *Marbury v. Madison*, *Virginia Law Review* 89 (2003): 1105
Symposium: Judicial Review, Blessing or Curse?, *Wake Forest Law Review* 38 (2003): 313
Symposium: Evaluation of *Marbury v. Madison*, *Michigan Law Review* 101 (2003): 2557
Mark Graber and Michael Perhac, eds., *Marbury v. Madison: Documents and Commentary*
Larry Alexander & Frederick Schauer, "Defending Judicial Supremacy: A Reply," *Constitutional Commentary* 17 (2000): 455
Barry Friedman and Steven Smith, "The Sedimentary Constitution," *U. of Penn Law Review* 147 (1988): 1
B. Friedman, "History of the Countermajoritarian Difficulty, Pt One: The Road to Jud. Sup.," *NYU Law Review* 73 (1998): 333
B. Friedman, "History of the Countermajoritarian Difficulty, Pt 2: Reconstruction's Political Court," *G'town L.J.* 91 (2002): 1
Barry Friedman, "History of the Countermajoritarian Difficulty, Pt Three: Lesson of *Lochner*," *NYU L Rev* 76 (2001): 1383
B. Friedman "The History of the Countermajoritarian Difficulty, Part Four: Law's Politics," *U. of Penn. L Rev* 148 (2000): 971
Barry Friedman, "History of the Countermajoritarian Difficulty, Pt 5: Birth of Academic Obsession," *Yale L.J*. 112 (2002): 153
Barry Friedman, "Dialogue and Judicial Review," *Michigan Law Review* 91 (1993): 577
Symposium: Congressional Power in the Shadow of the Rehnquist Court, *Indiana Law Journal* 78 (2003)
Keith Whittington *Constitutional Construction*
Keith Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," *NC L. Rev*. 80 (2002): 773
Keith Whittington, "The Road Not Taken: *Dred Scott*, Constitutional Law, and Political Questions, *JOP* 63 (2001): 365
Sanford Levinson, ed. *Responding to Imperfection*
Paul W. Kahn, *Legitimacy and History*
Bruce Ackerman, *We the People*
Symposium: Moments of Change: Transformations in American Constitutionalism, *Yale Law Journal* 108 (1999): 1917
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
Michael Klarman "Constitutional Fact/ Constitutional Fiction," *Stanford L Rev* 44 (1992): 759
James Fleming, "We the Unconventional People," *University of Chicago Law Review* 65 (1998): 1513
James Fleming, "We the Exceptional American People," *Constitutional Commentary* 11 (1994): 355
Michael McConnell, "The Forgotten Constitutional Moment," *Constitutional Commentary* 11 (1994): 115
Larry Kramer "What's a Constitution for Anyway? Of History and Theory, Bruce Ackerman and the New Deal," *Case Western Reserve Law Review* 46 (1996): 885
Larry Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," *Columbia Law Review* 100 (2000): 215
Saikrishna Prakash & John Yoo, "Puzzling Persistance of Process-Based Theories of Federalism," *Tex L. Rev*. 79 (2001): 1459
Saikrishna Prakash & John Yoo, "The Origins of Judicial Review," *University of Chicago Law Review* 70 (2003): 887
Mark Tushnet "Living in a Constitutional Moment?: *Lopez* and Constitutional Theory," *Case Western Reserve Law Review* 46 (1996): 845

Mark Tushnet, *Taking the Constitution Away from the Courts*
Symposium: Mark Tushnet's *Taking the Constitution Away from the Courts*, *Richmond Law Review* 34 (2000): 359
Reva Siegel, "Text in Contest: Gender & the Constitution from a Social Movement Persp.," *U. of Penn L Rev* 150 (2001): 297
Reva Siegel, "She the People: The 19th Amendment, Sex Equality, Federalism, and the Family," *Harv. L Rev* 115 (2002): 947
Symposium: Fidelity in Constitutional Theory, *Fordham Law Review* 65 (1997): 1247
Lawrence Lessig "Fidelity in Translation," *Texas Law Review* 71 (1993): 1165
Lawrence Lessig, "Translating Federalism: United States v. Lopez," *Supreme Court Review 1995*
Lawrence Lessig "What Drives Derivability: Reponses to Responding to Imperfection," *Texas Law Review 71* (1993): 839
Lawrence Lessig, "Plastics: Unger and Ackerman on Transformation," *Yale Law Journal* 98 (1989): 1173
Michael Klarman "Antifidelity," *Southern California Law Review* 70 (1997): 381
Lawrence Sager "The Incorrigible Constitution," *New York University Law Review* 65 (1990): 894
Symposium: Fidelity, Economic Liberty, and 1937, *William and Mary Law Review* 41 (1999): 1
Barry Cushman *Rethinking the New Deal Court*
G. Edward White, *The Constitution and the New Deal*
Laurence Tribe "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108 (1995): 1292
William Brennan "The Constitution of the United States: Contemporary Ratification," *Texas Law Review* 27 (1986): 433
William Rehnquist "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693
John Vile *Constitutional Change in the United States*
Morton Horowitz "The Constitution of Change: Legal Fundamentality Without Fundamentalism," *Harv.L Rev* 107 (1993): 32
Richard H. Fallon Jr. "Implementing the Constitution," *Harvard Law Review* 111 (1997): 540
Neal Devins, *Shaping Constitutional Values*
Neal Devins and Louis Fisher, "Judicial Exclusivity and Political Instability," *Virginia Law Review* 94 (1998): 83
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*
Christian Fritz, "Alternative Visions of American Constitutionalism," *Hastings Con Law Q*. 24 (1997): 287
Scott Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution," *Hastings Con Law Q* 24 (1997): 359
Bruce Peabody, "Nonjudicial Const Interp. Authoritative Settlement, & New Agenda for Research," *Const Comm* 6 (1999): 63
Bruce Peabody, "Congressional Constitutional Interpretation and the Courts," *Law and Social Inquiry* 29 (2004): 127
Donald Morgan, *Congress and the Constitution*
David Currie, *The Constitution in Congress*
Sanford Levinson, *Constitutional Faith*
Daniel Farber, "The Supreme Court and the Rule of Law: *Cooper v. Aaron* Revisited," *U. of Illinois L Rev* 1982 (1982): 387
Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," *Georgetown L. J*. (1994)
Walter Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter" *Review of Politics* (1986)
Dawn Johnsen, "Functional Departmentalism & Nonjudicial Interp," *Law & Cont. Prob*. (2004)
Dawn Johnsen, "Presidential Non-Enforcement of Constitutionally Objectionable Statutes," *Law & Cont. Problems* (2000)
David Barron, "Constitutionalism in the Shadow of Doctrine," *Law & Contemporary Problems* (2000)

8. Constitutional Declension or Rehabilitation? (April 3)

Required:

Randy Barnett, *Our Republican Constitution*, pp. 1-166
David Strauss, *The Living Constitution*, pp. 1-50, 77-114

9. The Countermajoritarian Court? (April 10)

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:

Robert Dahl "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," *Journal of Public Law* 6 (1957): 279
Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *SAPD* (1993)
Michael Klarman "Rethinking the Civil Rights and Civil Liberties Revolutions," *Virginia Law Review* 82 (1996): 1
Keith Whittington, "'Interpose Your Friendly Hand': Political Supports for the Exercise of Judicial Review by the United States Supreme Court," *APSR* 99 (2005): 583
Tom Keck, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?" *APSR* 101 (2007): 321
Christopher J. Casillas, Peter K. Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the U.S. Supreme Court," *AJPS* (2011)

Suggested:

Lucas A. Powe, Jr. *The Warren Court and the American Elite*
K. Whittington, "To Support This Constitution: Jud. Supremacy in the 20th Century," in *Marbury v. Madison*, ed. M. Graber
Symposium: Judicial Independence and Accountability, *Southern California Law Review* 72 (1999): 315
Symposium: Judicial Independence and Accountability, *Law and Contemporary Problems* 61 (1998): 3
Henry Abraham *Justices, Presidents, and Senators*
David Yalof *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*
Gerald Rosenberg "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 369
William Mishler & Reginald Sheehan "Public Opinion, Attitudinal Model, & Sup. Ct Decision-Making," *JOP*58 (1996): 169
William Mishler & Reginald Sheehan, "The Supreme Court as a Countermajoritarian Institution?," *APSR* 87 (1993): 87
"Controversy: Popular Influence on Supreme Court Decisions," *American Political Science Review* 88 (1994): 711
James Stimson, et al, "Dynamic Representation," *APSR* 89 (1995): 543
D. Barnum, "The S. C. & Public Opinion: Judicial Decision Making in the Post-New Deal Period," *JOP* 47 (1985): 652
Jonathan Casper "The Supreme Court and National Policy Making," *American Political Science Review* 70 (1976): 50
David Adamany, "Legitimacy, Realigning Elections, and the Supreme Court," *Wisconsin L. Rev*. (1973) 790
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*
Barry Friedman "Dialogue and Judicial Review," *Michigan Law Review* 577 (1993): 91
Barry Friedman "The History of the Countermajoritarian Difficulty, Part One," *NYU Law Review* 73 (1998): 333
Michael Klarman, *From Jim Crow to Civil Rights*
Steven Winter "An Upside/Down View of the Countermajoritarian Difficulty," *Texas Law Review* 69 (1991): 1881
Girardeau Spann *Race Against the Court*
L. Michael Siedman "Ambivalence and Accountability," *Southern California Law Review* 61 (1988) 1571
David Garrow *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*
Mark Ramseyer, "The Puzzling Independence of Courts: A Comparative Approach," *Journal of Legal Studies* 23 (1994): 721
William Landes & Richard Posner, "The Independent Judiciary in an Interest-Group Persp.," *J. of Law & Econ*. 18 (1975): 875

10. Constructing Judicial Review (April 17)

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:

Mark Ramseyer, "The Puzzling Independence of Courts: A Comparative Approach," *Journal of Legal Studies* 23 (1994): 721
Matthew Stephenson, "When the Devil Turns . . . : Political Foundations of Independent Judicial Review," *J. of Legal Studies* 32 (2003): 59
Thomas Ginsburg, *Judicial Review in New Democracies*, ch. 1-2
Keith Whittington, *Political Foundations of Judicial Supremacy*, ch. 5

Suggested:

William Landes & Richard Posner, "The Independent Judiciary in an Interest-Group Persp.," *J. of Law & Econ*. 18 (1975): 875
John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 *S. Calf. L. Rev.* 353 (1999).
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)
Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of* Marbury v. Madison, 38 Am. J. of Pol. Sci. 285 (1994)
LEE EPSTEIN AND JACK KNIGHT, THE CHOICES JUSTICES MAKE 139-145 (CQ Press 1998)
James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 *AJPS* 84 (2001)
Georg Vanberg, *Legislative-Judicial Relations: A Game Theoretic Approach to Constitutional Review*, 45 *AJPS* 346 (2001)
Georg Vanberg, *Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers*, 32 Comp. Pol. 333 (2000)
Donald J. Bourdreaux and A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 Const. Pol. Econ. 1 (1994)
Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary*, 13 Internatl. Rev. of L. and Econ. 349 (1993)
Robert D. Cooter and Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 Internatl. Rev. of L. and Econ. 295 (1996)
Ran Hirschl, *Toward Juristocracy*
Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-1994)*, 11 St. in Am. Pol. Dev. 149 (1997)
James L. Gibson, Gregory A. Caldeira, and Vanessa Baird, *On the Legitimacy of National High Courts*, 92 *APSR* 343 (1998)
Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 *APSR* 1139 (1987)
Mondak & Smithey, "Dynamics of Public Support for the Court," *JOP* 59 (1997)
Keith Whittington, "Legislative Sanctions & the Strategic Environment of Judicial Review," *International J. of Con. L*. (2003)
Clifford Carruba, "Courts and Compliance in International Regulatory Regimes," *Journal of Politics* (2005)
Jeffrey Staton, "Constitutional Review and Selective Promotion of Case Results," *AJPS* (2006)
Mark Graber, "Constructing Judicial Review," *Annual Review of Political Science* (2005)
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*

11. Entrenchment and Judicialization (April 24)

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:

Ran Hirschl, "Political Origins of Judicial Empowerment through Constitutionalization," *Law & Social Inquiry* 25 (2000): 91
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
Mila Versteeg and Emily Zackin, "Constitutions Un-Entrenched: Toward an Alternative Theory of Constitutional Design," *APSR* (2017).

Suggested:

Jon Elster *Ulysses and the Sirens*
Thomas Schelling "Enforcing Rules on Oneself" *Journal of Law, Economics, and Organization* (1985)
Michael Seidman "Ambivalence and Accountability" *Southern California Law Review* (1988)
Samuel Freeman "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy* 9 (1990)
Stephen Holmes *Passions and Constraints*
Douglass North "Institutions and Credible Commitment," *Journal of Institutional and Theoretical Economics* (1993)
D. North & B. Weingast "Constitutions & Commitment," *Journal of Economic History* (1989)
Stefan Voigt *Explaining Constitutional Change*
Peter C. Ordeshook, "Constitutional Stability," *Constitutional Political Economy* (1992)
Cornell Clayton and David May, "The New Institutionalism and Supreme Court Decision-making," *Polity* 32 (2000): 233
Cornell Clayton and Mitchell Pickerill, "The Rehnquist Court and the Political Dynamics of Federalism," *POP* 2 (2004): 233
Ronald Kahn and Ken Kersch, eds., *The Supreme Court and American Political Development*
Keith Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive," *Duke L. J.* 51 (2001): 477
Keith Whittington, "Legislative Sanctions and the Strategic Environment of Judicial Review," *Inter. J. of Con. L.* 1 (2003): 446
K. Whittington, "To Support This Constitution: Jud. Supremacy in the 20th Century," in *Marbury v. Madison*, ed. M. Graber
Deborah Barrow, et al., *The Federal Judiciary and Institutional Change*
Mark Tushnet, *The New Constitutional Order*
John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *S. Calf. L. Rev*. 72 (1999): 353
Alex Cuikerman, *Central Bank Strategy, Credibility and Independence*
Mark Crain & Robert Tollison, "The Exec. Branch in the Interest-Group Theory of Government," *J. of Legal St*. 8 (1979): 555
Eli Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers," *Inter. Rev. of Law & Econ*. 13 (1993): 349
Matthew Stephenson, "When the Devil Turns . . ." *J. of Legal St*. 32 (2003): 59
Mark Ramseyer, "The Puzzling Independence of Courts: A Comparative Approach," *J. of Legal St*. 23 (1994): 721
Tom Ginsburg, *Judicial Review in New Democracies*
Tamir Moustafa, "The Judicialization of Politics in Egypt," *Law and Social Inquiry* 28 (2003): 883
Eli Salzberger and Stefan Voigt, "On the Delegation of Powers," *Constitutional Political Economy* 13 (2002): 25
Kevin McMahon, *Reconsidering Roosevelt on Race*
Martin Shapiro and Alec Stone Sweet, eds., *On Law, Politics, and Judicialization*
Dawn Johnsen, "Ronald Reagan and the Rehnquist Court on Congressional Power," *Indiana Law Journal* 78 (2003): 363
Mark Graber, "Naked Land Transfers and American Constitutional Development," *Vanderbilt Law Review* 53 (2000): 73
Mark Graber, "The Jacksonian Origins of Chase Court Activism," *Journal of Supreme Court History* (2000)
Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *IO* 54 (2000): 217

12. Litigation and Impact (May 1)

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 it 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
Paul Frymer "Acting when Elected Officials Won't," *APSR* (2003)
Matthew E.K. Hall, *The Nature of Supreme Court Power*, ch. 3, 5, 7
Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *L&SR* (2009)
Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review," *AJPS* 45 (2001): 346

Suggested:

Charles Epp *The Rights Revolution*
Michael McCann *Rights at Work*
Michael McCann *Taking Reform Seriously*
David Schultz, ed. *Leveraging the Law*
Stuart Scheingold *The Politics of Rights*
Valerie Hoekstra and Jeffrey Segal, "The Shepherding of Local Public Opinion: The Supreme Court and 'Lamb's Chapel,'" *Journal of Politics* 58 (1996): 1079
Erskine and Siegel, "Civil Liberties and the American Public," *J. of Social Issues* 31 (1975): 13
Michael Combs, "The Supreme Court as a National Policy-Maker: A Historical and Legal Analysis of School Desegregation," *Southern U. Law Review* 8 (1982): 197
Robert Glennon, "The Role of Law in the Civil Rights Movement," *Law and History Review* 9 (1991): 59
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*
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