THE U.S. SUPREME COURT
POLITICAL SCIENCE 202

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Because the U.S. Supreme Court resolves pressing issues of public policy, Americans often take a considerable interest in the justices and how they make their decisions. In only the last few months, the justices have issued important rulings governing the right to the private ownership of firearms, the president's war power over detainees in Guantanamo Bay, Cuba, and the death penalty for the rape of a child. Indeed, at least since the 1950s, Americans have perceived the Supreme Court as a governmental institution with significant influence over the political, social, and economic issues that affect their lives.

This has not always been the case. The Founding Fathers contemplated a relatively limited role for the federal judiciary, devoting only minimal constitutional language to the judicial article: A Supreme Court and such other courts as Congress deemed prudent to provide, with the power to hear disputes arising under federal law. With no requirements regarding its size or qualifications for membership, the Court got off to a slow start. During its early years, for example, the Court was relegated to, among other places, the basement of the Capitol building, a room "little better than a dunjeon," according to one observer. It was a modest player in Washington's power game. Consequently, potential justices were, quite unlike today, reluctant to serve on the Court, opting instead for more prestigious political posts. Those who did accept faced literally life-threatening responsibilities, as they crisscrossed the countryside each year to help staff lower federal courts. At the Court itself, the cases were often trivial, decisionmaking was informal, and the policies the justices produced commanded little attention. Clearly, the members of the Court were not originally envisioned as occupying a central position in American political life, and yet today they do --- and in significant degrees.

The modern Court has become transformed in a number of important respects. The justices now hear and decide cases in their own magnificent structure, the "Marble Palace," adjacent to the Capitol. Service on the bench is highly coveted, and there is certainly no shortage of qualified individuals who are keen to fill vacancies when they occur. Similarly, the scope of its authority is quite extensive, selecting only a small number of cases from an annual docket of roughly 5,000 petitions. Not surprisingly, its rulings often spark intensive and divisive national debates. For their part, popular decisionmakers are close students of the Court; Congress, for example, frequently reverses the Court's interpretation of its statutes, while state legislatures strive to craft legislation that they believe will survive potential scrutiny from the justices. Lower courts generally make good faith efforts to conform to Supreme Court doctrine when resolving their own cases. Those charged with implementing both public and private policies must consider whether a wide range of actions are consistent with the Court's interpretation of the law. Quite obviously, the business of the Supreme Court matters a great deal to a whole host of actors.

In light of the Supreme Court's importance in American politics, a number of fairly intriguing questions are worth examining more closely: Who are the individuals who are selected to serve as justices? What factors affect their nomination and confirmation? What kinds of disputes come to the Court, and how do the justices select cases from among them? Once the Court accepts cases, how does it resolve them? What impact do legal considerations have on the justices? Do lawyers and interest groups shape case outcomes? What role does the leadership of the chief justice play? How important are the interactions of the justices in their voting and opinion writing? What kind of relationship does the Supreme Court have with the media, the public, and its coordinate branches of the federal government? How well are the Court's policies implemented? And does it matter if they are? These and other questions will be the focus of this course.

This course is an introduction the politics of the U.S. Supreme Court. As such, it focuses on the actors, processes, and consequences of the Court. It is not so much concerned with the substance of the Court's policies as it is with the factors that generate those policies. You will gain an understanding of the Supreme Court as a legal institution --- a court charged with clarifying the meaning of federal law --- but you will also develop a substantial appreciation of the extent to which the Court is intertwined with the political process. Being cognizant of this fact better enables one to come to grips with, among other things, the process of judicial selection, the Court's decisionmaking, and the impact of the Court on different segments of society. So, as you examine the topics that emanate from the general theme of the Supreme Court's role in the American governmental system, you will see, over and over again, that politics --- not merely the law --- is perhaps the key variable to understanding the Court.

Course requirements:

Books. There are two required texts for this course, Lawrence Baum's *The Supreme Court, 9*th ed. (Washington: CQ Press, 2007) and Jeffrey Toobin's *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007). Although I will not discuss these books in class, you will find that the reading will often complement much of the lecture material. It will be helpful, therefore, to consult the relevant readings --- especially the Baum textbook --- at a time close to our class meetings. For each topic that we cover, you will also find a number of suggested readings. These readings are not required, but they will be useful, should you be overcome by an urge to consider a particular subject in greater depth.

Grades. Your grade will be a function of your performance on three multiple choice examinations and three short papers of roughly four pages each. The materials that we cover in class will serve as the principal basis for the three examinations, but each exam will also contain some questions from the readings, as well. The first two will take place, in class, on **September 23** and **October 30**. The third, which is non-comprehensive, will be held on Thursday, **December 11**, at 8:00am. Each of these exams will constitute 22% of your grade. Your short-paper assignments will be due by 5:00pm on **September 11**, **October 14**, and **November 20**. Each paper is worth 11% of your grade and will require you to analyze a small amount of data and determine how well those data reflect the information and conclusions presented in class.

Overview of the Course

1. ***Who Serves on the Supreme Court?***
(August 19)

The demographics of the Court are worth considering for a number of reasons. Among other things, knowing something of the backgrounds of the justices is one way to gauge the kinds of factors that are taken into consideration in the process of selection. In addition, these background factors aid in evaluating whether the appropriate types of persons are selected to serve on the Court. The characteristics of the justices also provide some important clues as to their likely behavior on the bench.

Required reading:
Baum, pp. 1-26
Toobin, Chapters 1-2

Suggested reading:
Henry J. Abraham. 1999. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton.* Lanham, MD: Rowman & Littlefield.
Barbara A. Perry. 1991. *A Representative Supreme Court?: The Impact of Race, Religion, and Gender on Appointments*. New York: Greenwood Press.

"Impressed with a conviction that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system. Hence the selection of the fittest characters to expound the laws and dispense the justice has been an invariable subject of my anxious concern."

--- President George Washington

"The peace, prosperity, and very existence of the Union rest continually in the hands of these...federal judges. Without them the Constitution would be a dead letter....The federal judges therefore must not only be good citizens and men of education and integrity...but they must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws. The President may slip without the state suffering, for his duties are limited. Congress may slip without the Union perishing, for above Congress is the electoral body which can change its spirit by changing its members. But if ever the Supreme Court came to be composed of rash or corrupt men, the confederation would be threatened by anarchy or civil war."

--- Alexis de Tocqueville, in *Democracy in America*

"It would require discernment more than daring, it would demand complete indifference to the elusive and intractable factors in tracking down causes, in short, it would be capricious, to attribute acknowledged greatness in the Court's history either to the fact that a Justice

had had judicial experience or that he had been without it....Greatness in the law is not a standardized quality, nor are the elements that combine to attain it."

--- Justice Felix Frankfurter

American Political Science Association Meeting
NO CLASS, August 28

2. ***Selecting the justices***
(August 21 – September 2)

Formally, the process of selecting justices lies in the hand of the other two branches. The President nominates individuals to serve on the Court, and the Senate confirms or rejects them. To what extent are these two branches interested in getting the best people to sit on the Court? What kinds of factors affect the choices of these decisionmakers? How do presidents decide whom to nominate, and what determines whether a nominee successfully navigates the confirmation process?

Required reading:
Baum, pp. 27-68
Toobin, Chapters 3-5

Suggested reading:
John Anthony Maltese. 1995. *The Selling of Supreme Court Nominees*. Baltimore: Johns Hopkins University Press.
Mark Silverstein. 1994. *Judicious Choices: The New Politics of the Supreme Court Confirmations*. New York: W.W. Norton & Co.
David Yalof. 1999. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. Chicago: University of Chicago Press.

"Doctor Franklin observed that two modes of choosing the judges had been mentioned, to wit, by the legislature and by the executive. He wished such other modes be suggested as might occur to other gentlemen; it being a point of great moment. He would mention (one which) he had understood was practiced in Scotland. He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice (among themselves)."

--- *The Records of the Federal Convention of 1787*

"On July 1, 1987, I stood beside President Ronald Reagan in the press room at the White House while he announced to the nation that he would place my name in nomination for the position of Associate Justice of the Supreme Court of the United States....what I did not know on July 1 was that activist groups of the left had begun preparing an all-out campaign against my confirmation well before President Reagan announced his nomination."

--- Judge Robert Bork, in *The Tempting of America*

3. ***Stepping Down: When and Why Do Justices Leave the Bench?***
(September 4)

Unlike virtually every other public official in the United States, the members of the Supreme Court serve during "good behavior," which effectively means that the justices have lifetime tenure. In other contexts, elections regularly intervene to determine whether one is elevated to office and whether those already in office continue to serve. Not so for the Supreme Court. Practically speaking, the decision to leave the Court is entirely in the hands of its members. Do they leave the Court for personal reasons, or do political considerations enter into the calculus?

Required reading:
Toobin, Chapters 6-7

Suggested reading:
David N. Atkinson. 1999. *Leaving the Bench: Supreme Court Justices at the End.* Lawrence, KS: University Press of Kansas.
Artemus Ward. 2003. *Deciding to Leave: The Politics of Retirement from the United States Supreme Court.* Albany, NY: State University of New York Press.

"I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to it affording due support to the national government; nor acquire the public confidence and respect which, as he last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system."
--- Chief Justice John Jay

"[Justice] Douglas' mental condition deteriorated. He repeatedly addressed people at the Court by their wrong names, often uttered non sequiturs in conversation or simply stopped speaking altogether, retreating into glassy-eyed silence. On one occasion, Douglas adamantly refused to be wheeled into his own office, claiming it was the chambers of the Chief Justice."
--- James F. Simon
in *Independent Journey: The Life of William O. Douglas*

"If I had ever known what was going to happen to this country and this Court, I never would have resigned. They would have had to carry me out of here on a plank!"
--- Chief Justice Earl Warren

First Paper Assignment Due
September 11

4. *The Process and Politics of Agenda Setting*
(September 9-18)

The Supreme Court has an almost completely discretionary agenda. That is, in virtually every case that is brought to the Court, it is up to the justices to decide whether to consider it. Thus, one of the most critical functions of the Court is deciding which cases it will hear. With thousands of potential cases ever year, the justices select only a very small number for formal decision. How does this process work? What determines which cases make it onto the Court's agenda? Are the justices predominantly concerned with legal considerations or do political factors govern this important process?

Required reading:
Baum, pp. 69-105
Toobin, Chapters 8-10

Suggested reading:
H.W. Perry, Jr. 1991. *Deciding to Decide: Agenda Setting on the United States Supreme Court.* Cambridge, MA: Harvard University Press.
Richard L. Pacelle. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration.* Boulder, CO: Westview Press.
D. Marie Provine. 1980. *Case Selection in the United States Supreme Court.* Chicago: University of Chicago Press.

"To be sure, there are some 'great issues' which are probably not meet for judicial treatment....But within the limits of what it regards as its capacities, the Court can be expected to preoccupy itself with the issues that most preoccupy America."
--- Robert G. McCloskey, in *The American Supreme Court*

"No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit."
--- Chief Justice William Howard Taft

"Unless some relief is given, it is not unreasonable to think that there may be some judges in some courts who will exploit the reality that, since the chance of being reviewed by the Supreme Court is swiftly diminishing, they need not pay very much attention to what the Supreme Court decides."
--- Chief Justice Warren E. Burger

First Examination
September 23

5. ***Decision Making on the Merits***
(September 25)

The Supreme Court has an established set of procedures for making decisions on the merits. From the filing of written briefs to oral argument, from conference deliberations and voting to opinion writing, the justices adhere to a regularized decision making process in which the justices consider arguments and information, reach a judgment, and then issue their rulings. What are the stages in that process?

Required reading:
Baum, pp. 106-114
Toobin, Chapters 11-13

Suggested reading:
Edward Lazarus. 1998. *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court.* New York: Penguin Books.
William H. Rehnquist. 2001. *The Supreme Court.* New York: Alfred A. Knopf.
Bernard Schwartz. 1997. *Decision: How the Supreme Court Decides Cases.* New York: Oxford University Press.

"When I first went to the Court, I was both surprised and disappointed at how little interplay there was between the various justices during the process of conferring on a case....Like most junior justices before me must have felt, I thought I had some very significant contributions to make, and was disappointed that they hardly ever seemed to influence anyone because people did not change their votes in response to my contrary views. I thought it would be desirable to have a more round-table discussion of the matter after each of us had expressed our views. Having now sat in conferences for fifteen years, and risen from ninth to seventh to first in seniority, I now realize --- with newfound clarity --- that while my idea is fine in the abstract it probably would not contribute much in practice, and at any rate is doomed by the seniority system to which the senior justices naturally adhere."

--- Chief Justice William H. Rehnquist

"I recall an article in the *New York Times Magazine*...that described the Supreme Court as probably the most 'secret society in America.' The fact is that the extent of our secrecy is greatly exaggerated. The doors of the Court are open to the public. Both the press and the public are welcome at all of our oral argument sessions. Our decisions in the argued cases are printed and widely disseminated. The charge of secrecy relates to the discussions, exchanges of views by memoranda, and the drafting that precede our judgments and published opinions. As lawyers know, we get together almost every Friday to discuss petitions by litigants who wish us to hear their cases, and to debate and vote tentatively on the argued cases. Only justices attend these conferences. There are no law clerks, no secretaries, and no tape recorders --- at least none of which we have knowledge."

--- Justice Lewis F. Powell, Jr.

6. ***Models of Decision Making: Law v. Preferences***
(September 30 – October 7)

For political scientists who study the Supreme Court, probably the central question of interest is, "What explains the decisions of the justices?" Scholars have offered a variety of explanations for the voting behavior on the Court. Which is the most compelling? Do the justices make decisions based largely upon the law, as some would argue? Or is the law, as other have concluded, largely irrelevant in determining case outcomes? What kinds of goals do the justices have, and to what extent do those goals account for their decisions?

Required reading:
Baum, pp. 114-132
Toobin, Chapters 14-16

Suggested reading:
Cornell Clayton and Howard Gillman. 1998. *Supreme Court Decision Making: New Institutionalist Approaches*. Chicago: University of Chicago Press.
Jeffrey A. Segal and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited.* New York : Cambridge University Press.
Walter F. Murphy. 1964. *Element of Judicial Strategy*. Chicago: University of Chicago Press.
Keith E. Whittington. 1999. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence: University Press of Kansas.

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

--- Chief Justice John Marshall, in *Osborn v. Bank of the United States* (1824)

"Five votes. Five votes can do anything around here."

--- Justice William Brennan

"Sometimes an opinion author will find a colleague's suggestion meritorious. But often whether the author adopts the proposed change depends mainly on how close a case it is, in other words, how badly the author needs the other justice to join in order to obtain or preserve a majority."

--- Edward Lazarus, in *Closed Chambers*

Second Paper Assignment Due
October 14

7. *Collegiality on the Bench*
(October 9-21)

The chambers of the justices on the Supreme Court are sometimes referred to as "nine little law firms." This embodies the notion that the members of the Court operated fairly independently of one another, with relatively little interaction. It is true that the justices do not spend a great deal of time engaged in active discussion and collaboration; most of what the justices do does indeed take place within the confines of their individual offices. That there are relatively modest levels of collegiality does not mean, though, that the interactions between the justices are unimportant. There is, in fact, a good degree of collective activity on the Court, and it often has considerable consequences for votes of the justices and their policies.

Required reading:
Baum, pp. 132-142
Toobin, Chapters 17-18

Suggested reading:
Phillip J. Cooper. 1995. *Battles on the Bench: Conflict inside the Supreme Court*. Lawrence, KS: University Press of Kansas.
Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. New York: Cambridge University Press.
James F. Simon. 1995. *The Center Holds: The Power Struggle inside the Rehnquist Court*. New York : Simon & Schuster.
Bob Woodward and Scott Armstrong. 1979. *The Brethren: Inside the Supreme Court*. New York: Simon & Schuster.

"For justices, bargaining is a simple fact of life. Despite conflicting views on literary style, relevant precedents, procedural rules, and substantive policy, cases have to be settled and opinions written; and no opinion may carry the institutional label of the Court unless five Justices agree to sign it. In the process of judicial decision-making, much bargaining may be tacit, but the pattern is still one of negotiation and accommodation to secure consensus. Thus how to bargain wisely --- not necessarily sharply --- is a prime consideration for a Justice who is anxious to see his policy adopted by the Court."

--- Walter F. Murphy, in *Elements of Judicial Strategy*

"It is 'not good for public respect for courts and law and the administration of justice,' Roscoe Pound decades ago observed, for an appellate judge to burden an opinion with 'intemperate denunciation of the writer's colleagues, violent invective, attributions of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of other judges.' Yet one has only to thumb through the pages of current volumes of United States Reports...to come upon condemnations by the score of a court or colleague's opinion or assertion....The most effective dissent, I am convinced, 'stands on its own legal footing'; it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary. I try to write my few separate opinions each year as I once did briefs for appellees --- as affirmative statements of my reasons,

drafted before receiving the court's opinion, and later adjusted, as needed, to meet the majority's presentation."

--- Justice Ruth Bader Ginsburg

"The Court's thrashing about for evidence of 'consensus' includes reliance upon the margins by which state legislatures have enacted bans on execution of the retarded. Presumably, in applying our Eighth Amendment 'evolving-standards-of-decency' jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed by how much....Even less compelling (if possible) is the Court's argument that evidence of 'national consensus' is to be found in the infrequency with which retarded persons are executed in States that do not bar their execution....But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls. I agree with the Chief Justice that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people. 'We must never forget that it is a Constitution for the United States of America that we are expounding....[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.'"

--- Justice Antonin Scalia, in *Atkins v. Virginia* (2002)

"Well, I like to get away. As a matter of fact, I think I have to get away from Washington and this building, once in a while, just to maintain my sanity. This is a very close intimate association that the nine of us have. We're working constantly with each other under conditions of a certain amount of agreement, and a very definite amount of disagreement."

--- Justice Harry Blackmun

8. ***Organized Interests***

(October 23-28)

Many explanations for judicial behavior focus on factors internal to the Court, but what about the outside forces that attempt to shape the policies of the bench? Organized interests, in one form or another, have long lobbied the Supreme Court in efforts to achieve outcomes favorable to different and competing segments of society. How do groups lobby the Court? Does their participation make any difference? Do the justices actually respond to the arguments offered by the legal community?

Required reading:
Baum, pp. 145-146
Toobin, Chapter 19

Suggested reading:
Lee Epstein and Joseph F. Kobylka. 1992. *The Supreme Court and Legal Change: Abortion and the Death Penalty*. Chapel Hill: University of North Carolina Press.
Gregg Ivers. 1995. *To Build a Wall: American Jews and the Separation of Church and State*. Charlottesville: University of Virginia Press.

Suzanne U. Samuels. 2004. *First among Friends : Interest Groups, the U.S. Supreme Court, and the Right to Privacy*. Westport, CT: Praeger.

"The activities of the judicial officers of the United States are not exempt from the processes of group politics. Relations between interest groups and judges are not identical with those between groups and legislators or executive officials, but the difference is rather one of degree than of kind....Though myth and legend may argue to the contrary, especially concerning our highest courts, the judiciary reflects the play of interests, and few organized groups can afford to be indifferent to its activities."

--- David B. Truman, in *The Governmental Process*

"Further indicators of contemporary standards of decency that should inform our consideration of the Eighth Amendment question are the opinions of respected organizations. Where organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards. There is no dearth of opinion from such groups that the state-sanctioned killing of minors is unjustified. A number, indeed, have filed briefs amicus curiae in these cases, in support of petitioners. The American Bar Association has adopted a resolution opposing the imposition of capital punishment upon any person for an offense committed while under age 18, as has the National Council of Juvenile and Family Court Judges. The American Law Institute's Model Penal Code similarly includes a lower age limit of 18 for the death sentence. And the National Commission on Reform of the Federal Criminal Laws also recommended that 18 be the minimum age."

--- Justice William Brennan, in *Stanford v. Kentucky* (1989)

"In November, in an interview with *The Philadelphia Inquirer*, [Senator Joseph Biden] responded to a hypothetical question with the comment: 'Say the administration sends up Bork. I'd have to vote for him, and if the groups tear me apart, that's the medicine that I'll have to take.' On July 1, when Judge Bork was nominated to replace Justice Lewis F. Powell Jr., Mr. Biden said, 'I will not now take a formal position.' A week later, after meeting with civil rights groups, the Delaware lawmaker shifted ground again, declaring, 'Most certainly, I'm going to be against him."

--- R.W. Apple, Jr., *The New York Times*

"The many Franciscan Sisters of Newton, Massachusetts, were happy that he was faithful as an altar boy in serving mass, he was faithful in his homework, and he was faithful as a patrol boy, and he was faithful as a model student."... "Judge Thomas has rejected much of the decisional framework on which our Nation's protection of civil rights is based." ... "I can tell you that Clarence Thomas is a man of good moral character. He is disciplined. He has a very keen mind. He is, contrary to what I have been hearing today, in my judgment a scholar. And I think he will be a scholar on this Court." ... "What I tried to do was place Clarence Thomas in that context, as a guardian of individual rights, as a member of a people's court. And the more I did that, the more difficult I found it to envision Clarence Thomas as the next Associate Justice of the Supreme Court." ... "I taught Clarence Thomas

in the 8th grade. He was a regular fun-loving boy. He was cooperative and studious, willing to give a helping hand to those less able than himself. He was always grateful to those who provided a home for him and to the sisters who taught him. He seemed to recognize and appreciate the sacrifices others made for his betterment." ... "One cannot help but wonder what this history of accommodation has done to Clarence Thomas' character. In always striving to please those who have been his benefactors, has he lost himself? It is somehow not surprising in the course of these hearings that we have heard him disavow so much of what he has said before." ... "Mr. Chairman and other members, his character, his integrity and his honesty, his intellectual ability and sense of purpose are unquestioned." ... "Translating [his speech] into constitutional doctrine means something more radical than any nominee for the Supreme Court has heretofore proposed, something more radical than Judge Bork proposed, and he was rejected by the Senate." ... "I have heard no reason not to vote to confirm President Bush's choice of Judge Thomas as his nominee to the Supreme Court. He appears to be a man of balance, unquestioned integrity and independence, and generally good character, intelligence, compassion, and patriotism."

--- Selected testimony from organized interests
at the confirmation hearings of Justice Clarence Thomas

Second Examination
October 30

9. *Institutional Conflict: Congress, the President, and the Court*
(November 4-11)

The Supreme Court cannot afford to ignore its coordinate branches within the federal government. After all, the Court often must rely upon executive officials to put their policies into effect. Similarly, the justices have to consider whether their decisions will be accepted by members of Congress, who have the potential to overturn their interpretation of federal law. What kinds of factors govern the relationship between the Court and the legislative and executive branches?

Required reading:
Baum, pp. 146-149
Toobin, Chapters 20-21

Suggested reading:
Robert Lowry Clinton. 1991. *Marbury v. Madison and Judicial Review*. Lawrence, KS: University Press of Kansas.
Howard Gillman. 2003. *The Votes That Counted: How the Court Decided the 2000 Presidential Election*. Chicago: University of Chicago Press.
Jessica Korn. 1996. *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*. Princeton: Princeton University Press.
Edward Keynes and Randall K. Miller. 1989. *The Court vs. Congress: Prayer, Busing, and Abortion*. Durham: Duke University Press.

"The Executive not only dispenses honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgment."

--- Alexander Hamilton, in *Federalist No. 78*

"We recognize that the plight of an ex-spouse of a retired service member is often a serious one. That plight may be mitigated to some extent by the ex-spouse's right to claim Social Security benefits and to garnish military retired pay for the purposes of support. Nonetheless, Congress may well decide...that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have re-emphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs....Congress has weighed the matter, and '[i]t is not the province of...courts to strike a balance different from the one Congress has struck.'"

--- Justice Harry Blackmun, in *McCarty v. McCarty* (1981)

"The separation of powers doctrine does not require federal courts to stay all private actions against the President until he leaves office. Even accepting the unique importance of the Presidency in the constitutional scheme, it does not follow that that doctrine would be violated by allowing this action to proceed....Respondent is merely asking the courts to exercise their core Article III jurisdiction to decide cases and controversies, and, whatever the outcome, there is no possibility that the decision here will curtail the scope of the Executive Branch's official powers. The Court rejects petitioner's contention that this case...may place unacceptable burdens on the President that will hamper the performance of his official duties. That assertion finds little support either in history, as evidenced by the paucity of suits against sitting Presidents for their private actions, or in the relatively narrow compass of the issues raised in this particular case."

--- Justice John Paul Stevens, in *Clinton v. Jones* (1997)

10. ***Public Opinion as a Constituency of the Court***

(November 13-18)

In the abstract, public opinion should play no role in Supreme Court policymaking. The justices, who are unelected and have lifetime tenure, have little reason to come to terms with popular preferences. In light of those facts, there is little reason to suspect the members of the Court would consult public opinion in making its decisions. But do they? Are there reasons for the Court to think about mass opinion when formulating policy, and what evidence — if any — is there that it really does? To some extent, the relevance of public opinion presumes that the public has some working knowledge of the Court and its decisions. For most American, that knowledge comes

from exposure to the media. It is important to ask, therefore, how well the media cover the business of the Court.

Required reading:
Baum, pp. 142-145
Toobin, Chapters 22-23

Suggested reading:
Valerie J. Hoekstra. 2003. *Public Reaction to Supreme Court Decisions*. New York: Cambridge University Press.
Thomas R. Marshall. 1989. *Public Opinion and the Supreme Court*. Boston : Unwin Hyman.
Barbara A. Perry. 1999. *The Priestly Tribe: The Supreme Court's Image in the American Mind.* Westport, CT: Praeger.
Elliot E. Slotnick and Jennifer A. Segal. 1998. *Television News and the Supreme Court: All the News That's Fit to Air?* New York: Cambridge University Press.

"One would not expect the public to be interested in the Court. Indeed, one would fear for the republic if the public was interested in it. And since the public is not interested in it, one would hardly expect the press to report it. That is why the University of Chicago Law Review is not sold at 7-Eleven."

--- Justice Antonin Scalia

"After the abortion decision was announced, thousands of letters poured in the Court. The guards had to set up a special sorting area in the basement with a huge box for each justice. The most mail came to Blackmun, the decision's author, and to Brennan, the Court's only Catholic. Some letters compared the Justices to the Butchers of Dachau, child killers, immortal beasts, and Communists. A special ring of hell would be reserved for the Justices. Whole classes from Catholic schools wrote to denounce the Justices as murderers. 'I really don't want to write this letter but my teacher made me,' one child said."

--- Bob Woodward and Scott Armstrong, in *The Brethren: Inside the Supreme Court*

"The Government's interest cannot justify its infringement on First Amendment rights. We decline the Government's invitation to reassess this conclusion in light of Congress' recent recognition of a purported 'national consensus' favoring a prohibition on flag burning. Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment."

--- Justice William J. Brennan, in *U.S. v. Eichman* (1990)

"The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."

--- Justice Sandra Day O'Connor, in *Penry v. Lynaugh* (1989)

Third Paper Assignment Due
November 20

11. ***Judicial Policymaking and Its Consequences***
(November 20 - December 2)

It is tempting to think that the Supreme Court is an important force in American national policymaking, but such thinking presumes that, when the justices speak, those who are affected listen to the Court's rulings and accept them as authoritative. To be sure, the justices make policies an critical issues of the day, but it is not at all clear that their policies are followed ─ or even known ─ by relevant publics. Are the justices well-equipped to make national policy? What difference do their policies actually make? Do its policies have a major impact on the social, political, and economic life in the United States? Supporters of the Court have heralded its rulings as indispensable to the advancement of various causes, while opponents have denounced the Court for impeding the discretion of popular decision makers. But has judicial policy really had such effects?

Required reading
Baum, pp. 156-170, 187-226
Toobin, Chapters 24-25

Suggested reading:
Robert Justin Goldstein. 2000. *Flag Burning and Free Speech: The Case of Texas v. Johnson.* Lawrence, KS: University Press of Kansas.
Karen O'Connor. 1996. *No Neutral Ground?: Abortion Politics in an Age of Absolutes*. Boulder, CO: Westview Press.
Gary Orfield and Susan E. Eaton. 1997. *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education.* New York: New Press.
Gerald N. Rosenberg. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

"John Marshall has made his decision, now let him enforce it."
--- President Andrew Jackson

"By itself, the Court is almost powerless to affect the course of national policy."
--- Robert A. Dahl, in *Decision Making in a Democracy*

"The mass movement sparked by *Brown [v. Board of Education]* was unmistakably thriving as soon as six months after the Court handed down its implementation decree. It began in the Deep South, in Montgomery, Alabama, when a forty-three-year-old seamstress and active NAACP member named Rosa Parks refused to move to the back of a city bus to make room for a white passenger. Within days, and thanks to the leadership of Mrs. Parks's pastor, the Reverend Martin Luther King, Jr., all blacks were staying off the buses of

Montgomery in a massive show of resentment over the continuing humiliation of Jim Crow."

--- Richard Kluger, in *Simple Justice*

"Abortion is a medical procedure and safe abortion requires trained personnel. But when done properly, first-term and most second-term abortions can be performed on an out-patient basis with less risk of death than with childbirth or with such a routine procedure as tonsillectomy. Following Supreme Court action, however, the medical profession moved with 'extreme caution' in making abortion available. In addition to the hostility of some state legislatures, barriers to legal abortion remained....The bottom line is that hospital administrators, both public and private, refused to change their abortion policies in reaction to the Court decisions."

--- Gerald N. Rosenberg, in *The Hollow Hope*

Third Examination
Thursday, December 11, 8:00am