

# Course # | The Supreme Court

## Description

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If the U.S. Constitution is the holy text of the American civic religion, then the justices of the Supreme Court are its high priests. Of late, however, the faith of the laity has been challenged by three interconnected crises of legitimacy. First, there has been an awakening to the role played by the Constitution (and American law more generally) in perpetuating grave social injustices in the past and the present. This has reignited questions about whether the Constitution is morally worthy of its exalted place in American life. Second, the basic functioning of many American political institutions appears to be flagging, raising concerns that the “world’s longest surviving written charter of government” is not up to the challenges of the twenty-first century. What is worse, the Constitution’s inflexible amendment process makes revolution look more pragmatic than reform. Third, even those who retain faith in the justice and efficacy of the American constitutional order have reasons to doubt the legitimacy of *this* Supreme Court to act as its interpreters. The Court is increasingly accused of nakedly partisan decisionmaking, its membership is unrepresentative of modern America, and three of its members entered office under unusually contentious circumstances. Are the Court and the Constitution deserving of the respected position they have traditionally occupied in American public life? Can a liberal democracy flourish without also being a constitutional democracy? Can a constitutional democracy flourish without a high court with powers of strong judicial review?

This course is designed to introduce students to the theory and practice of American constitutional law since 1787, as told through the decisions of the U.S. Supreme Court. Readings consist of original court cases, primary and secondary sources from American history, and normative and empirical work from contemporary scholars in public law. Students will leave the course with a richer perspective on the Court’s role in helping or hindering social change, as well as a deep grounding in the theory of *constitutional* democracy.

## Assignments

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- (1) *Case Briefs* (x3): You will be required to submit three case briefs over the course of the semester. Briefs must follow a prescribed format which will be provided on the first day of class. Briefs are due by the start of the class for which they were prepared.
- (2) *Position Papers* (x2): The readings for each class are accompanied by two or three reflection questions. Sign up for two classes for which you will compose a 1000-word position paper on one question for that date. Papers are due by 11:59 PM one week after the class to which you are responding.
- (3) *Moot Court*: Each student will be required to participate in one moot court presentation. You will either take on the role of a lawyer or a Supreme Court Justice. During a typical “Moot Court” session, 4-6 students (2-3 per side) will play the role of lawyers representing particular sides of the issue assigned, and they will present their arguments to the judges, played by 3+ students. The moot court presentation is meant to replicate the process of presenting an oral argument before the Supreme Court of the United States. The process is almost like a “high-powered conversation” between the justices and the lawyers. Lawyers will be evaluated on knowledge of the case and its relevant precedents, the ability to respond effectively to questioning, and the use of sound logic and reasoning in their arguments. Justices will be evaluated on their knowledge of the case and its relevant precedents, the ability to pose focused, thoughtful, and effective questions, and the use of sound logic and reasoning in rendering an opinion.
- (4) *28<sup>th</sup> Amendment Project*: In the final part of the course, you will be asked to use the comparative constitutions database at [Constitute](#) to search out a promising constitutional amendment idea for the U.S. Defend the amendment idea you have chosen in a paper (1,500 words) due [date]. The top five proposals, as judged by me, will be asked to participate in a “Shark Tank”-style pitch competition on the final day of class, with your classmates as the judges.
- (5) *Final Exam*: A closed-book, open-note final exam will be held during the university’s exam period. It will consist of short essay questions covering the material of the course as a whole.

**1. The Court & The Constitution**

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**A Crisis of Faith?**

01.       ▪ Thurgood Marshall. 1987. “Reflections on the Bicentennial of the United States Constitution.” *Harvard Law Review* 101(1): 1–5.
- Jeffery Toobin. 2013. “Our Broken Constitution.” *The New Yorker*.
- Ruth Marcus. 2021. “Opinion: The Supreme Court’s Crisis of Legitimacy.” *The Washington Post*.
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**American Constitutionalism**

02.       ▪ Alexis de Tocqueville. 2002. “On the Federal Courts...” and “On the Spirit of the Lawyer in the United States...,” in *Democracy in America*. eds. Harvey C. Mansfield and Delba Winthrop. Chicago: University of Chicago Press: 130–149 and 250–258.
- Edward S. Corwin. 1928. “The Higher Law Background of American Constitutional Law.” *Harvard Law Review* 42(2): 149–85.
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**The Constitution as Social Contract?**

03.       ▪ Thomas Jefferson to James Madison, 6 September 1789; James Madison to Thomas Jefferson, 4 February 1790. (“The question Whether one generation of men has a right to bind another...”)
- Jack Rakove,. 1997. “The Concept of Ratification.” In *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Vintage Books, 94–130.
- John Arthur. 1995. “Enforcing the Social Contract: Original Intent,” in *Words That Bind: Judicial Review and the Grounds of Modern Constitutional Theory*, 7–43.
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**Reading the Constitution**

04.       ▪ Laurence H. Tribe and Michael C. Dorf. 1992. *On Reading the Constitution*, Intro, Chapters 1 & 2.
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**Reading the Constitution (cont’d)**

05.       ▪ Laurence H. Tribe and Michael C. Dorf. 1992. *On Reading the Constitution*, Chapters 3–5.
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**2. American Constitutional History & Development**

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**The Constitution of 1787**

06.       ▪ U.S. Constitution (1787) [esp. Article III]
- Publius, *The Federalist*, No. 78 – 82.
- Brutus, *Anti-Federalist*, No. XI, XII, XV
- Jack Rakove. 1997. “Debating the Constitution.” In *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Vintage Books, 131–160.
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**The Bill of Rights**

07.       ▪ The English Bill of Rights of 1689
- Richard Henry Lee. “Letter to Edmund Randolph with Objections to the Constitution.” October 16, 1787.
- Brutus, *Anti-Federalist*, No. II.
- Publius, *Federalist*, No. 84
- The Bill of Rights (1791)
- *Baron v. Baltimore* (1833) in Ducat, 471–473.
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- Jeremy Waldron. 1999. “Between Rights and the Bill of Rights.” In *Law and Disagreement*. Oxford, UK: Oxford University Press: 211–231.
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### The Origins of Judicial Review

- 08. ▪ Publius, *The Federalist*, No. 78 (review), 49.
  - *Marbury v. Madison* (1803), in Nichols and Nichols, 2004, *Readings in American Government*: 348-356.
  - Thomas Jefferson, “Against Judicial Review (1815),” in Nichols and Nichols, 2004, *Readings in American Government*: 345-346.
  - Jack Rakove. 1997. “Madison and the Origins of Originalism.” In *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Vintage Books, 339–370.
- 

### The Early Republic

- 09. ▪ 11<sup>th</sup> (1795) and 12<sup>th</sup> (1804) amendments to the U.S. Constitution.
  - Publius, *The Federalist*, No. 33, 44.
  - Brutus, *Anti-Federalist*, No. XVII.
  - Jefferson’s Opinion on the Constitutionality of a National Bank (1791).
  - Alexander Hamilton, Opinion on the Constitutionality of the Bank (1791).
  - *McCulloch v. Maryland* (1819), in Nichols and Nichols, 2004, *Readings in American Government*: 70–78.
  - *Gibbons v. Ogden*, 22 U.S. 1 (1824) [syllabus].
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### Jacksonian Democracy & Native Americans

- 10. ▪ *Johnson & Graham’s Lessee v. McIntosh*, 21 U.S. 543 (1823).
  - *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831).
  - President Jackson’s Proclamation Regarding Nullification (Abridged), December 10, 1832.
  - *Worcester v. Georgia*, 31 U.S. 515 (1832).
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### Slavery & The Constitution

- 11. ▪ Publius, *The Federalist*, No. 38, 54.
  - Eugene D Genovese. 1976. “The Hegemonic Function of Law,” in *Roll, Jordan, Roll: The World the Slaves Made*: 25-48.
  - William Lloyd Garrison, “The Great Crisis,” *The Liberator*, 52, 2 (December 29, 1832), 206–207.
  - *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). (On The Fugitive Slave Act)
  - *Dred Scott v. Sanford*, 60 U.S. 393 (1857). (On Black citizenship)
  - Abraham Lincoln, “The Authority of the Supreme Court (1857),” in Nichols and Nichols, 2004, *Readings in American Government*: 346–348.
  - Frederick Douglass, “The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?” (1860)
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### Nullification, Secession, and The Civil War

- 12. ▪ John C. Calhoun, “South Carolina ‘Exposition’” (1828)
  - Stephen A. Douglas and Abraham Lincoln, “Exchange on State Sovereignty and the Problem of Majority Rule (1858),” in Nichols and Nichols, 2004, *Readings in American Government*: 11–19.
  - Abraham Lincoln, *First Inaugural Address* (1861).
  - Abraham Lincoln, “On the Suspension of the Writ of Habeas Corpus (1863),” in Nichols and Nichols, 2004, *Readings in American Government*: 314–320.
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### Reconstruction and (Un)Equal Protection

- 13. ▪ 13<sup>th</sup> (1865), 14<sup>th</sup> (1866) and 15<sup>th</sup> (1869) amendments to the U.S. Constitution.
  - *The Slaughterhouse Cases*, 83 U.S. 36 (1873)
  - *United States v. Cruikshank*, 92 U.S. 542 (1876).
  - *The Civil Rights Cases*, 109 U.S. 3 (1883).
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- *Plessy v. Ferguson*, 163 U.S. 537 (1896).
  - *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
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#### **The Lochner Era and the Revolution of 1937**

- 16<sup>th</sup> (1913) – 21<sup>st</sup> (1933) amendments to the U.S. Constitution.
  - *Lochner v. New York*, 198 U.S. 45 (1905).
  - 14. ▪ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
  - *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).
  - *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1 (1937).
  - *Gitlow v. People of New York*, 268 U.S. 652 (1925).
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#### **WWII & The Cold War**

- 22<sup>nd</sup> amendment to the U.S. Constitution (1951).
  - 15. ▪ *Korematsu v. United States*, 323 U.S. 214 (1944).
  - *Dennis v. United States*, 341 U.S. 494 (1951).
  - *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
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#### **The Civil Rights Era**

- 16. ▪ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
  - *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
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### **3. Modern Civil Rights and Liberties Jurisprudence**

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#### **Equal Protection of the Laws**

- 17. ▪ Richard H. Fallon. 2013. *The Dynamic Constitution*. Second edition. New York: Cambridge University Press, 149–190.
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#### **Voting Rights**

- 23<sup>rd</sup> (1961) – 26<sup>th</sup> (1971) amendments to the U.S. Constitution.
- *Shelby County v. Holder*, 570 U.S. 529 (2013).
- 18. ▪ McGann, Anthony J., Charles Anthony Smith, Michael Latner, and Alex Keena. 2016. “The Jurisprudence of Districting,” in *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty*. Cambridge University Press, 22–55.

[MOOT COURT 1]

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#### **Freedoms of Speech & Religion**

- 19. ▪ Richard H. Fallon. 2013. *The Dynamic Constitution*. Second edition. New York: Cambridge University Press, 41–98.
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#### **Fundamental Rights**

- 20. ▪ Richard H. Fallon. 2013. *The Dynamic Constitution*. Second edition. New York: Cambridge University Press, 125–148 and 191–226.

[MOOT COURT 2]

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**Retrospection: The Court, The Constitution, and Social Change**

- 21.
  - Gerald N. Rosenberg. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* 1 – 36.
  - Tomiko Brown-Nagin. 2017. “The Constitution, The Courts, and Social Change,” in *Cambridge Companion to the United States Constitution*, 441-470.
  - David A. Shultz. 1998. “Introduction,” in *Leveraging the Law: Using the Courts to Achieve Social Change*, 1-10.

[MOOT COURT 3]

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**4. The Constrained Court**

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**Legal Value Constraints**

- 22.
  - Michael A. Bailey and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press, Intro & Chapters 3–5.

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**Political Constraints**

- 23.
  - Michael A. Bailey and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press, Chapters 6–8.

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**Politics or Principle?**

- 24.
  - *Bush v. Gore*, 531 U.S. 98 (2000).
  - *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).
  - *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020).

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**Is Judicial Review Justifiable?**

- 25.
  - Jeremy Waldron. 1998. “Judicial Review and the Conditions of Democracy.” *Journal of Political Philosophy* 6(4): 335–55.

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**5. Constitutional Change**

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**Amending the Constitution: Article V vs. Constituent Power**

- 26.
  - U.S. Constitution, Article V.
  - 27<sup>th</sup> amendment to the U.S. Constitution (1992\*).
  - Bruce A. Ackerman. 1998. *Transformations*. Cambridge, MA: The Belknap Press of Harvard University Press, Chapters 1 – 3.

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**Reconstruction & Modernity**

- 27.
  - Bruce A. Ackerman. 1998. *Transformations*. Cambridge, MA: The Belknap Press of Harvard University Press, Chapters 4, 10, and 13.

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**The 28<sup>th</sup> Amendment Project**

- 28.
    - In-class pitch competition
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