**You and the Court:**

Re-deciding the history of the Supreme Court

**Instructor**

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Gibson 163

**Course Description**

***“It is emphatically the province and duty of the judicial department to say what the law is.”***

— John Marshall

If you thought the Supreme Court couldn’t be fun, think again. This course is designed for students who want to learn about the Supreme Court but are not politics majors, do not have the time to devote to a 3-credit graded course on constitutional law and interpretation, and/or do not want to bury themselves in a textbook in order to learn about our nation’s highest court. The purpose of the course is to give students a greater understanding of and appreciation for the Supreme Court by allowing them to engage with actual cases that have come before the Court. The first few weeks of the course will consist of readings from *A History of the Supreme Court* (1993), which will give valuable background to the constitutional, historical, and judicial issues at play in the casework.

However, the core of the course is a mock court scenario, in which students argue out seminal cases from Supreme Court history. Everyone in the class will have the opportunity to act as petitioner or respondent on two different cases, which means by the end of the semester we will go through forty important Supreme Court cases. The rest of the class will act as the sitting justices and will evaluate the oral arguments made by their peers, eventually voting on the case, much as the justices themselves would. Students will use independent reasoning—informed by the Constitution and judicial precedent—to vote on the merits of the case, rather than impersonating past or current justices. In some instances, we will mirror the actual decisions of the historical Supreme Court; in others, we will make radical departures. Either way, you will learn more than you ever thought you would about the Supreme Court and the many ways it has shaped the development of the United States. Through the highly interactive mock court scenario, you will gain intimate knowledge of the most important cases to come before the Supreme Court—and occasionally rewrite history.

The course will involve a fair amount of reading in the first five weeks. For the rest of the semester, during the mock court scenario, the workload will vary significantly per student. Researching and preparing for oral arguments on a case will be a significant time expense; however, each student will only do this twice in ten weeks, so the overall workload will not be heavy. For the mock court, a willingness to do independent research and speak publically before one’s peers will be essential. Above all, this course will involve argumentation, debate, and discussion. Be critical, but respectful!

**Course Goals**

*1. Foundational knowledge*: By the end of this course, you will have a solid understanding of the history of the Supreme Court. You will be able to speak about its major eras of jurisprudence as delineated by its Chief Justices, from Marshall to Burger, and you will understand the arguments made in the most famous cases over the past two centuries. You will also gain a greater understanding of the Constitution of the United States and how it has been interpreted over the course of U.S. history.

*2. Application of knowledge*: Knowledge should not operate in a vacuum. In this course, you will learn to apply the constitutional concepts that you study to actual, historical Supreme Court cases during the mock court scenario. You will understand the challenges of interpreting the constitution in a constantly evolving society as well as the difficulty of weighing different constitutional rights against each other. You will see how the Bill of Rights and concepts like substantive due process play out in the legal sphere.

*3. Integration with other skills*: A vital component of the mock court scenario is the ability to speak persuasively in front of your peers. To this end, you will learn to become more comfortable with public speaking and to implement valuable rhetorical skills in your oral arguments. You will also learn how to reason analytically in the context of constitutional law.

*4. Interpersonal interaction*: The cornerstone of this course is debate over constitutional issues. Because of this, it is important to be able to criticize or contend with another’s point of view without demeaning or attacking the individual. It is a goal of this course that students will learn how to engage in lively and productive debate without generating an atmosphere of hostility or *ad hominem* attacks.

**Expectations**

For the first five weeks of class, students will be expected to complete all of the assigned readings and come to class ready to contribute, discuss, and take notes. After this period, we will focus on the mock court proceedings. During this time, each student will have to **prepare two (2) mock court cases, one (1) per curiam opinion, and one (1) dissenting opinion**. The guidelines for all of these will be explained below. I also expect all students to treat each other with respect. We will get involved in heated debates, especially during the mock court segment. This is good! These are controversial issues, and there is often no right answer. What is important, above all, is that you can learn to respectfully disagree with each other and refrain from personal attacks. If we can manage this, we will have a fruitful semester.

**Required Texts**

1. Bernard Schwartz, *A History of the Supreme Court*. Oxford University Press, 1993. ISBN 0195093879.
2. Constitution of the United States, available [here](http://www.archives.gov/exhibits/charters/constitution_transcript.html).

**Grade Breakdown**

* **Attendance (15%)**: Showing up to class on time will be a major part of your grade in this course. In order to have good discussions, we need people there to discuss! We only meet once a week, so please do your best to come every week. Speak to me well beforehand (if possible) about possible absences. You will only be able to miss two (2) classes during the semester and still pass. Exceptions can be made on a rare and individual basis.
* **Participation (20%)**: Being an active member of discussions, asking questions, and being an involved “justice” during the Mock Court scenarios will account for a fifth of your grade. The quality of this class will depend on the quality of your contributions—so speak your mind and engage with the material!
* **Reading quizzes (15%)**: We will have three unannounced reading quizzes during the five weeks we read from the Schwartz book. The quizzes will focus on the key cases and concepts covered in the reading. If you pay attention to the reading notes under each assignment, you will do well on the quizzes.
* **Mock Court cases (40%)**: Almost half of your grade will be based on the two (2) Mock Court cases you will do. The grade on these assignments will be based on your brief, your argumentation, the presentation of your argument in class, and your response to cross examination.
* **Per curiam and dissenting opinions (10%):** The guidelines for these can be found below. I will grade these mainly for completion and evidence of a good-faith effort.

**WEEKS 1-5: INTRODUCTION TO COURSE AND READINGS**

**Week 1. The Founding of the United States and the Formation of a Legal Tradition**

Read: Schwartz, pp. 11–14, 20–31 and Articles I-III the Constitution of the United States. Read also on the [pros and cons of lifetime appointment](http://www.cnn.com/2004/LAW/12/10/lazarus.federal.judges/). Finally, read about [the jurisdiction of federal courts](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction.aspx) and [the difference between state and federal courts](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/Jurisdiction/DifferencebetweenFederalAndStateCourts.aspx).

Article III of the Constitution (which establishes the judicial branch and the Supreme Court) is the shortest of the three articles laying out the architecture for our government. What does this tell you about the Framers’ views of the judiciary? Did it really carry equal importance at its inception? How about now? Since Supreme Court justices are appointed for life and serve “for Good behavior,” how can we prevent abuses of power? Make sure you understand the concept of ***judicial review***. This is developed next week with Chief Justice Marshall. Does it make the Supreme Court undemocratic? Does the current Supreme Court make policy for the United States? Be prepared to defend your stance.

**Week 2. The Marshall and Taney Courts.**

Read: Schwartz, pp. 32–53, 66–68; 69–88, 93–96 and 105–125.

You can skim pp. 32-38 to get an idea of who Marshall was and how he came to be Chief Justice. Pay attention to “Judicial Review,” and learn the facts of *Marbury vs. Madison*. What was Marshall trying to accomplish in *Marbury*? How did his landmark decision reflect good politics? What was the case's greater legacy? Learn the facts of the following cases: *Fletcher, Martin, Cohens, McCulloch, Gibbons,* and *Dartmouth.* We will discuss these cases in class.

Taney’s name is pronounced TAW-ney. To what extent did the Taney Court continue Marshall's legacy? How was it different? Pay special attention to the influence of Jacksonian democracy on Taney’s jurisprudence. Learn the facts of the following cases: *Charles River Bridge, Briscoe, New York,* and *Cooley.* The Cherokee case was decided on Marshall's watch, but how did it affect the Taney Court? What is ***judicial restraint***? Know the details of *Dred Scott*—we will discuss it in class.

**Week 3. Reconstruction and the Regulation of Business**

Read: Schwartz, pp. 126–146; 158–173 and the 14th Amendment to the Constitution

Look for three important clauses in section 1 of the 14th Amendment: ***incorporation***, ***due* *process***, and ***equal* *protection***. Know the details and decisions regarding four major cases relating to civil rights during and after the Civil War: *Merryman,* *Vallandigham, McCardle,* and *Milligan*. Define ***substantive due process*** in a way that you can understand. Pay particular attention to the evolution of how corporations were defined and protected during this period. Why was this important to the Court?

**Week 4. Welfare State and Progressivism.**

Read: Schwartz, pp. 174–202; 221–224

Keep substantive due process in mind. Why did the Court shift on the question of the income tax? How did Congress respond to the shift? To what do you attribute the apparent lack of consistency by the Court regarding governmental regulation of business affairs?

We will spend time discussing *Lochner v. New York*, so pay attention to that section of the reading.

We will also spend time discussing *Abrams* and what we think are legitimate restrictions on free speech. Is a “clear and present danger” too strict, or too lax, a Litmus test?

**Week 5. Judicial Activism.**

Read: Schwartz, pp. 263-285

The Warren Court is one of the most famous periods under a Chief Justice. Be able to define ***judicial activism*** and ***judicial restraint***, as well as note the different between ***civil rights*** and ***civil liberties***. Pay particular attention to the cases you read about in this section, as many of our Mock Court cases are drawn from this era: *Brown, Baker, Griffin, Gideon, Miranda, Mapp, Griswold.* You will not read the lengthy section on *Brown*, but we will discuss the decision in class.

**WEEKS 6-15: MOCK COURT**

**Mock Court Procedure**

* We will do four cases a week, which means we need to complete two cases per hour. This is very doable. Come energized and ready to debate!
* Briefs: Those assigned to argue the cases must submit legal briefs *24 hours before the start of class* so that the rest of the class can read the briefs the night before. The entire brief must fit on a single page, and lawyers are responsible for bringing copies to class for students to have in front of them. An example brief will be provided on Collab.
* Oral arguments (5 min. each.): Both lawyers must argue orally for 5 minutes, with a thirty-second grace period allowed. The oral argument should not merely repeat the brief. Rather, it should explain, augment, and/or elucidate the points that will convince the Court to decide for your side. The petitioner may reserve up to 90 seconds to use as rebuttal, in which he may only review his own and his opponent’s arguments.
* Cross-examination (3 min.): Immediately following the oral arguments, the Court will have 3 minutes to question the lawyers. Justices should not argue with the lawyers, but should ask questions to clarify their argument. Clever Justices can use this time to ask pointed questions that may trap lawyers or reveal flaws in their logic.
* Deliberation and voting (10 min.): Following cross-examination, the Justices will deliberate for no more than 10 minutes on the merits of the case. Lawyers will remain to hear the deliberations, but are not allowed to speak or react in any way; they must be dispassionate observers—“flies on the wall.” At the end of the deliberation period, the Justices will vote on the case.

**Per Curiam and Dissenting Opinions**

All students are required to write two (2) *per curiam* opinions and one (1) dissenting opinion. These are both simple exercises. The *per curiam* is a summary of the Court’s (the class’s) findings on a particular case. It consists of stating the basic facts of the case, summarizing the petitioner’s arguments, and summarizing the Court’s evaluation of these arguments. How did the Court rule? What factors did it consider? The dissenting opinion should be written on a case in which you disagreed with the ruling of the Court. Summarize the case and the finding of the Court (essentially a briefer *per curiam*) and then discuss where and why you disagree with the other Justices. Both opinions should be no longer than one page, single-spaced.

**Guidelines for Preparation and the Honor Code**

When preparing to argue before the Court, seek wherever possible to emulate the conditions of the day. Do not include information that the Justices of the day would not have had. For example, we will be hearing many cases related to segregation and civil rights. The amount of information available in 1954 differs from what was available in 1896. Remember this when making your arguments. There are several resources you can use in your research on Supreme Court cases. FindLaw.com has a database on every Supreme Court decision since 1893, which can be found [here](http://www.findlaw.com/casecode/supreme.html). Another good resource is Oyez.org, which has another database that goes further back, and can be found [here](http://www.oyez.org/cases/2013). Use these databases to read the actual Supreme Court opinions; it will inform how you structure your own argument. You may use Wikipedia to write the general background portion of your brief; this section also does not require citations, since it will be considered common factual knowledge.

When reading the Supreme Court briefs, choose wisely which arguments you will repeat, and which you will avoid; keep in mind the eventual success of the petitioner when doing so. You cannot use information or legal reasoning that was not available at the time, but that does not mean you are constrained to the logic of the Court. Be creative if you have to be. You do not need to cite the briefs when using them as a resource, unless you plan on quoting directly from the brief (which I discourage, since you should be making these arguments in your own words). You may consult with any other student in the class when making your argument, but all written work should be your own. Use each other to formulate ideas and rehearse oral arguments, but do not collaborate on any of the cases. Submitting work that is not entirely your own will be considered an Honor offense. If you are in doubt, ask.

**Schedule of Mock Court**

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| **#** | **Due Date** | **Case** | **Lawyer** |
| 1 |  | Dred Scott v. Sandford  60 U.S. 393 (1857) |  |
| Plessy v. Ferguson  163 U.S. 537 (1896) |  |
| Munn v. Illinois  94 U.S. 113 (1877) |  |
| Reynolds v. U.S.  98 U.S. (8 Otto.) 145 (1878) |  |
| 2 |  | Schenck v. U.S.  249 U.S. 47 (1919) |  |
| Near v. Minnesota  283 U.S. 697 (1931) |  |
| Missouri v. Canada  305 U.S. 337 (1938) |  |
| Smith v. Allwright  321 U.S. 649 (1944) |  |
| 3 |  | Morgan v. Virginia  328 U.S. 373 (1946) |  |
| Brown v. Board  347 U.S. 483 (1954) |  |
| Roth v. U.S.  354 U.S. 476 (1957) |  |
| Gomillion v. Lightfoot  364 U.S. 339 (1960) |  |
| 4 |  | Mapp v. Ohio  367 U.S. 643 (1961) |  |
| Baker v. Carr  369 U.S. 186 (1962) |  |
| Engel v. Vitale  370 U.S. 421 (1962) |  |
| Gideon v. Wainwright  372 U.S. 335(1963) |  |
| 5 |  | NY Times v. Sullivan  376 U.S. 254 (1964) |  |
| Griffin v. Board of Education  377 U.S. 218 (1964) |  |
| Escobedo v. Illinois  378 U.S. 478 (1964) |  |
| Griswold v. Connecticut  381 U.S. 479 (1965) |  |
| 6 |  | Memoirs v. Massachusetts  383 U.S. 413 (1966) |  |
| Cohen v. California  403 U.S. 15 (1971) |  |
| Lemon v. Kurtzman  403 U.S. 602 (1971) |  |
| New York Timesv.U.S.  403 U.S. 713 (1971) |  |
| 7 |  | U.S. v. Caldwell  408 U.S. 665 (1972) |  |
| Roe v. Wade  410 U.S. 113 (1973) |  |
| Milliken v. Bradley  418 U.S. 717 (1974) |  |
| Gregg v. Georgia  428 U.S. 153 (1977) |  |
| 8 |  | Regents v. Bakke  438 U.S. 265 (1978) |  |
| Board of Education v. Pico  457 U.S. 853 (1982) |  |
| Lynch v. Donnelly  465 U.S. 668 (1984) |  |
| Texas v. Johnson  491 U.S. 397 (1989) |  |
| 9 |  | Lee v. Weisman  505 U.S. 577 (1992) |  |
| Church of Lukumi Babalu Aye v. Hialeah  508 U.S. 520 (1993) |  |
| Reno v. ACLU 521 U.S. 844 (1997) |  |
| National Endowment for the Arts v. Finley 524 U.S. 569 (1998) |  |
| 10 |  | Lawrence v. Texas  539 U.S. 558 (2003) |  |
| Citizens United v. Federal Election Commission  558 U.S. 310 (2010) |  |
| U.S. v. Alvarez 576 U.S. \_\_\_\_ (2012) |  |
| Schuette v. Coalition to Defend Affirmative Action (2014) |  |