

U.S. Supreme Court Decision-Making
GVPT 418A Fall 2009
University of Maryland

Prof. Dennis J. Coyle
Tydings 3114H 5-4132
dcoyle@gvpt.umd.edu

"The judiciary ... will always be the least dangerous [branch] to the political rights of the Constitution."

-- Alexander Hamilton, Federalist #78

Welcome! In this course we will consider whether the Supreme Court, as the pinnacle of the judiciary, is indeed the "least dangerous" branch.

The Supreme Court is an institution of contradictions. It serves the traditional judicial function of settling particular individual disputes, yet its rulings can have sweeping political and policy consequences. It has taken on the authority to strike down the actions of the president, the Congress, and the state governments, yet is utterly dependent on the cooperation of those institutions to give effect to its rulings. It is an unelected body in a democratic republic. It is at once removed from yet embedded in politics. We will seek to understand these contradictions, and the significant role of the Court in American politics, by examining its structure and practices.

There will a midterm exam, a final exam, and a term paper. Class participation is also an important part of your grade. Students will present their papers in class, and also prepare notes on assigned readings. You will be divided into groups and alternate preparation of brief outlines on the readings to distribute among the group. Everyone is expected to do the readings for class and be ready to discuss them.

By October 5 you should submit a brief, one-page statement of the topic you would like to research. You should state a *question* you would like to investigate, and explain why it is significant or interesting, how you will investigate it, and what you expect to find. By October 26, you will submit an expanded and revised research proposal that will include a brief review of at least five scholarly sources, summarizing their findings and describing how they modify your question and expectations. Your research topic should be empirical, and may be qualitative or quantitative, involving original research or a secondary evaluation of existing data and literature. You will briefly present your findings to the class at the conclusion of the course. Your presentation and final draft should be structured as an argument, in the scientific, not rhetorical, sense. That is, you should have a clearly stated conclusion, or answer to your question, which you will support by a careful evaluation of the evidence and scholarly literature. Your argument should be nuanced and qualified, taking into account uncertainties and inconsistencies. It is OK to point out weaknesses and ambiguities; it is not OK to make strong assertions without adequate support. Research sources will vary depending on your topic, but I will generally expect you to utilize about a dozen sources beyond class material, including both articles and books. You should also cite and incorporate relevant class materials.

Grading:

Midterm:	15 percent
Final Exam:	35 percent
Paper and Presentation:	35 percent
Class Participation:	15 percent

Books:

Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton University Press, 2009) ISBN: 978-1-4008-2782-4

Mark C. Miller and Jeb Barnes, eds. *Making Policy, Making Law: An Interbranch Perspective* (Georgetown University Press, 2004) ISBN: 9781589010253 (1589010256)

David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 8th ed. (Norton, 2008) ISBN 978-0-393-93218-8

William D. Pederson and Norman W. Provizer, eds., *Leaders of the Pack: Polls and Case Studies of Great Supreme Court Justices* (Peter Lang, 2003), ISBN 978-0-8204-6306-3

David M. O'Brien, ed., *Judges on Judging: Views From the Bench*, 3rd ed. (CQ Press, 2008) ISBN 978-0-87289-951-3

Readings:**Introduction**

O'Brien, "Preface"	O xiii-xvi
O'Brien, <i>Judges</i> , "Preface"	J viii-xvii
Katzmann, "Foreward"	MB ix
Eisgruber, preface	

The Context: The Court in American Politics

O'Brien ch. 1, "A Struggle for Power"	OB 1-32
Jackson, <i>Judges</i> ch. 2, "The Supreme Court in the American System of Government"	J 32-40
Eisgruber ch. 1, "A Broken Promise in Partisan Times"	E 1-16

The Context: State, Federal and Foreign Courts

Frank, <i>Judges</i> ch. 4, "The 'Fight' Theory versus the 'Truth' Theory"	J 75-78
Frankel, <i>Judges</i> ch. 5, "The Adversary Judge: The Experience of the Trial Judge"	J 79-87
Hornby, <i>Judges</i> ch. 6, "The Business of the U.S. District Courts"	J 88-96
Roberts, <i>Judges</i> ch.13, "Year-End Report on the Federal Judiciary"	J 130-132
Reinhardt, <i>Judges</i> ch. 8, "Whose Federal Judiciary Is It Anyway?"	J 103-108
Kaye, <i>Judges</i> ch. 34, "State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions"	J 329-338
Barak, <i>Judges</i> ch. 27, "The Importance of Comparative Law"	J 255-258

Life on the Court

O'Brien ch. 2, "The Cult of the Robe"	OB 33-106
O'Brien ch. 3, "Life in the Marble Temple"	OB 107-132, 132-163
O'Brien, <i>Judges</i> , "The Dynamics of the Judicial Process"	J 41-64

O'Brien ch. 4, "Deciding What to Decide" OB 164-170, 187-211, 211-236
Stevens, *Judges* ch. 11, "Deciding What to Decide: The Docket and the Rule of Four" J 117-125
Powell, *Judges* ch. 9, "What Really Goes On at the Supreme Court" J 109-112

Decision-Making on the Court

O'Brien ch. 5, "Deciding Cases and Writing Opinions" OB 237-265, 265-307
Rehnquist, *Judges* ch. 10, "The Supreme Court's Conference" J 113-116
O'Brien ch. 4, "Deciding What to Decide" OB 171-187
Kozinski, *Judges* ch. 7, "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making" J 97-102
Harlan, *Judges* ch. 12, "The Role of Oral Argument" J 126-129

The Early Court

Burger, *Judges* ch. 1, "The Doctrine of Judicial Review" J 19-31
Proviser, *Leaders* ch. 2, "John Marshall" PP 23-34
Adkinson, *Leaders* ch. 3, "Joseph Story" PP 35-50
Pederson and Williams, *Leaders* ch. 4, "Roger B. Taney" PP 51-60

Progressivism Comes to the Court

Pryzbyszewski, *Leaders* ch. 5, "John Marshall Harlan the Elder" PP 61-73
Davies, *Leaders* ch. 6, "Oliver Wendell Holmes" PP 74-89
Shaw, *Leaders* ch. 7, "Louis D. Brandeis" PP 90-98
Staab, *Leaders* ch. 8, "Benjamin Nathan Cardozo" PP 99-131
Cardozo, *Judges* ch. 15, "The Judge as a Legislator" J 148-151

The New Deal Court

Abraham, *Leaders* ch. 9, "Hugo L. Black" PP 132-141
Coyle, *Leaders* ch. 10, "Felix Frankfurter" PP 142-157
Frankfurter, *Judges* ch. 29, "Some Reflections on the Reading of Statutes" J 281-290
Davies, *Leaders* ch. 11, "William O. Douglas" PP 158-176
Vile, *Leaders* ch. 12, "Charles Evans Hughes" PP 177-189
Vestal, *Leaders* ch. 13, "Harlan Fiske Stone" PP 190-199

The Warren Court and Its Shadow

Proviser and Vigil, *Leaders* ch. 14, "Earl Warren: Justice as Fairness" PP 200-214
Grunes, *Leaders* ch. 15, "William J. Brennan, Jr. and Human Dignity" PP 215-231
Perry, *Leaders* ch. 16, "William H. Rehnquist and the Conservative Counterrevolution" PP 232-245
Erwin, *Leaders* ch. 17, "Sandra Day : Tall in the Saddle" PP 246-261

Justices in Politics

Eisgruber ch. 1, "A Broken Promise in Partisan Times" E 1-16
Eisgruber ch. 2, "Why Judges Cannot Avoid Political Controversy" E 17-30
Eisgruber ch. 3, "The Incoherence of Judicial Restraint" E 31-50
Eisgruber ch. 4, "Politics at the Court" E 51-72
Eisgruber ch. 5, "Why Judges Sometimes Agree When Politicians Cannot" E 73-97
Eisgruber ch. 6, "Judicial Philosophies and Why They Matter" E 98-123

Appointment Criteria and Process

Miner, *Judges* ch. 3, "Advice and Consent in Theory and Practice" J 65-74
Eisgruber ch. 7, "How Presidents Have Raised the Stakes" E 124-143

Eisgruber ch. 8, "Should the Senate Defer to the President?"	E 144-163
Eisgruber ch. 9, "How to Change the Hearings"	E 164-177
Eisgruber ch. 10, "What Kind of Justices Should We Want?"	E 178-185

Interbranch Perspective -- Setting the Stage: Themes and Concepts

Barnes and Miller, <i>Policy</i> , "Putting the Pieces Together"	MB 3-12
Kagan, <i>Policy</i> ch. 1, "American Courts and the Policy Dialogue"	MB 13-34
Barnes, <i>Policy</i> ch. 2, Adversarial Legalism, Judicial Policymaking, Separation of Powers"	MB 35-52

A Closer Look at Interbranch Perspectives

Miller, <i>Policy</i> ch. 3, "The View of the Courts from the Hill"	MB 53-71
Kassop, <i>Policy</i> ch. 4, "The View from the President"	MB 72-88
Melnick, <i>Policy</i> ch. 5, "Courts and Agencies"	MB 89-106

Statutory Construction: The Interbranch Perspective Applied

Baum and Hausegger, <i>Policy</i> ch. 6, "The Supreme Court and Congress"	MB 107-122
Easterbrook, <i>Judges</i> ch. 30, "What Does Legislative History Tell Us?"	J 291-298
Burke, <i>Policy</i> ch. 7, "The Judicial Implementation of Statutes"	MB 123-139
Bragraw and Miller, <i>Policy</i> ch. 8, "The City of Boerne: Two Tales of One City"	MB 140-152

Constitutional Interpretation: The Interbranch Perspective Applied:

Fisher, <i>Policy</i> ch. 9, "Judicial Finality or an Ongoing Colloquy"	MB 153-169
Epstein, Knight and Martin, <i>Policy</i> ch. 10, "Constitutional Interpretation from a Strategic Perspective"	MB 170-188
Devins, <i>Policy</i> ch. 11, "Is Judicial Policymaking Countermajoritarian?"	MB 189-201
Barnes and Miller, <i>Policy</i> ch. 12, "Governance as Dialogue"	MB 202-207

Conclusion: The Present and Future Court

Bradley, <i>Leaders</i> ch. 1, "Selecting and Ranking Great Justices"	PP 1-22
O'Brien ch. 6, "The Court and American Life"	OB 308-334, 334-368
Eisgruber ch. 11, "The Path Forward"	E 186-191
Schultz, <i>Leaders</i> ch. 18, "Why No More Giants on the Supreme Court"	PP 262-274