"When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged, and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has...is the power of judgment. This court neither approves nor condemns any legislative policy."


"Since the politicization of the law has, for half a century, moved results steadily to the left, a very large number of Americans do not like those outcomes. Increasingly, they are not deceived by the claim that those results are compelled by the actual Constitution....Americans increasingly view the courts, and particularly the Supreme Court, as political rather than legal institutions."

--Robert Bork in *The Tempting of America*

In an era of growing public disenchantment with government, the American judiciary remains strangely immune. Surveys consistently show that the American public places greater trust in the U.S. Supreme Court than in either Congress or the presidency. "Politics" has become a dirty word, and the judiciary is commonly thought to be the least "political" branch of government. However, a growing body of empirical research lends support to what casual observation suggests: that for all their distinctiveness, our nation's courts are affected by many of the same social, economic, and political considerations that affect the other two branches of government. The myth of the court as "nonpolitical" was, of course, shattered by its actions during the 2000 presidential election.

In this course, we will study the judiciary as an inherently political institution, raising both empirical and normative issues. Empirically, we will attempt to shed light on the extra-legal forces which condition the behavior of courts. These extra-legal forces include things such as the intergovernmental relations, federalism, method of judicial selection, public opinion, interest groups, the press, attorneys, personal ideology and attitudes, among others. We shall highlight areas in which the judiciary behaves like the other branches of government, as well as its distinctive features. Normatively, we will consider how the results of our empirical examination inform the on-going debate about the proper role of the judiciary in a democratic society. By the end of the semester, you will have the information base required to generate some ideas regarding this question: Given their political nature, to what extent should the courts be involved in the making of policy?
A warning to those who find constitutional law exciting: you won't find much of it here. In this course, we will not be overly concerned about what the courts have said -- that material is covered in PolS 121a, 121b, and 123. Rather, we will be more interested in why they have said what they have said. However, stripping the judiciary of its mystery is a rewarding task in its own right, and hopefully we will make it an exciting one as well.

A Note on the Use of the Internet – This course has a site on the Internet. The address is listed at the beginning of this syllabus. Students are encouraged to find this site and bookmark it on their web browsers. The Internet site contains everything in this syllabus and more. Through the Internet site, you will:

a) be able to access your course grade
b) receive class news
c) find interactive study guides for the exams
e) find pictures of members of the Supreme Court
f) participate in on-line discussions with your classmates
g) download and print course handouts and forms
h) find links to other Internet sites that will be useful or interesting

As a student, you are not required to use this site. It is designed to complement, rather than replace, the traditional elements of this course. For example, you will never be responsible on an exam for information on the site or any of its links. However, the Internet is a wonderful source of information about the law and courts, and you will find it an essential resource. I encourage all students to become comfortable with using the Internet.

Reading

Textbooks -- There are three required textbooks for this course. They can be purchased at the Spartan Bookstore and at Roberts Bookstore. They may also be purchased on-line at Amazon.com


You should be aware that it will be difficult to do well on the exams unless you can demonstrate to me that you have done the reading carefully and fully. If you have any questions about the reading, please do not hesitate to ask me questions in class or to see me in my office.
Grading

Your grade consists of 6 elements:

- Quizzes on the Reading (2 at 5% each) 10%
- Midterm (October 9) 15%
- Final Exam (Mon., December 16 at 9:45 a.m.) 25%
- Participation 10%
- Paper #1 (due October 23) 15%
- Paper #2 (due December 2) 25%

**Quizzes** – Twice in the semester, you will be given a short quiz. The first quiz will test your comprehension of *Supreme Injustice*, and the second quiz will test your comprehension of *The Rehnquist Choice*. The dates of these quizzes will be announced in advance. Makeup will not be permitted on these quizzes, and each quiz is worth 5% of your overall course grade.

**Tests** – The midterm and the final exam will be closed-book, closed-note exams. Students should bring a blank blue book to each exam. The exams will consist exclusively of essay and short-answer questions. There are no multiple choice questions. The final will stress material from the second half of the course, although it may ask you to refer to material from the first half of the course.

Students often ask if the tests emphasize lecture or reading material more. I refuse to give an answer to this question. Suffice it to say that both book and lecture will comprise a sufficiently large portion of the test that if you fail to attend to either aspect, you will not do well on the exam.

**Paper Assignments** – These are discussed in more detail at the end of this syllabus.

**Participation** – Participation comprises 10% of your course grade. All students are expected to participate orally in class. I encourage participation because I believe that it aids in the learning process and makes class more interesting.

I do not take attendance, but if you do not attend regularly, you will be unable to participate and will thus lower your grade. This ought not be taken lightly -- while participation constitutes "only" 10% of your grade, if you earn no participation points, this means your final mark will be one full letter grade lower than if you had participated regularly.

Participation is the one component of your grade that is based on quantity rather than quality. I don't care whether you are the most brilliant student in class or the most dim-witted -- if you participate regularly, you will receive a good grade on your participation.

I realize that many students are uncomfortable with participating in class. If you are one of those students, I have two suggestions:

1) Asking questions is just as legitimate as answering questions. I encourage you to ask any questions that you might have. Please do not be afraid of asking "dumb" questions -- I can assure you that there are other students in the class with the same question, and they're not smart enough to ask.

2) If you have nothing to say, come and visit me in my office. I can give you a "sneak preview" of the next class, so you can have some time to formulate your opinions. If you really need help, I will tell you something brilliant to say, and then you can raise it in class and seem brilliant to your classmates.
My Make-Up/Late Policy

**Exams** -- I will be the most willing to permit you to take a make-up exam when the following three conditions are met:

1) you notify me in advance
2) you have an acceptable excuse (usually something beyond your control)
3) you have written documentation

Naturally, sometimes it will not be possible to meet these three conditions. Situations which do not do so will be judged by me on a case-by-case basis. I reserve the right to refuse to allow you to make up an exam (although I will usually try to accommodate you). I also reserve the right to make the make-up exam more difficult than the in-class exam.

If you miss an exam, you should approach me the next time you are in class and request a makeup. If approved, I will drop off a test at the Testing Center. You should call the Testing Center (924-5980) to arrange to take the exam.

**Quizzes** – Makeups for the 2 quizzes will not be permitted.

**Papers** -- I am more strict in enforcing penalties against late papers than missed exams! The due date of the paper is not the only day that you may submit your paper. It is merely the last day that you may do so without incurring a penalty. Papers are due at the end of class period on the date due. All late papers, regardless of the excuse, will be penalized by ten percentage points. They will continue to be penalized by ten percentage points for each additional week that they are late.

Papers submitted late will be graded only after I finish grading all of those papers submitted on time. Therefore, you may wait longer for a late paper to be graded.

**Miscellaneous**

**Anonymity Policy** -- I like to grade all assignments anonymously. Therefore, you should omit your name on all assignments. Instead, you should only indicate your social security number. Any assignment that contains your name will not be graded. It will be returned to you so that you may cross out your name and fill in your social security number.

**Accommodations for Disabled Students:** I will happily accommodate the needs of disabled students, provided that such students submit proper documentation from the SJSU Disability Resource Center.

**Extra Credit:** You will have one (and only one) opportunity to receive extra credit in this course. On Wednesday, September 4, I will be taking a group of students to watch the California Supreme Court at oral argument in San Francisco. This trip will cost $12 and will last from 7:15 a.m. to 3:00 p.m. If you attend this trip and type a 3-page summary of your experiences, you will receive an additional 10 points on the first midterm. Because this trip will greatly enhance your understanding of the work of appellate courts, I highly encourage you to attend.
Course Topics and Readings

Note: All readings should be completed by the time we cover the corresponding topic in class.

I. Background: Constitutional and Historic – **Baum, Chapter 1**
   A. The Nature of Courts and the American Judicial System
   B. The Constitutional Context
   C. Separation of Powers and the Judiciary
     1. The Structure of the American Judiciary

II. **CASE STUDY:** The Supreme Court & the 2000 Presidential Election -- **read ALL of Supreme Injustice**

III. Politics and Policymaking in Appellate Courts
   A. Selection of Judges
      1. Selection of State Judges
      2. Selection of Federal Judges -- **read ALL of The Rehnquist Choice and Baum, Chap. 2**
   B. Judicial Agenda Setting -- **Baum, Chapter 3**
   C. Interest Groups and Litigation
   D. Appellate Procedure – **Baum, pp. 128-37**
   E. Political Influences on Judicial Behavior -- **Baum, pp. 137-179**
      1. Race, Gender, and other attributes
      2. Political Ideology
      3. Small Group Influences
      4. The Chief Justice's Role
      5. Public Opinion
   G. The Capacity of Courts to Make Social Policy

IV. The Impact of Judicial Decisions – **Baum, Chapter 6**
   A. Conditions for Compliance
   B. The Courts and the Media
More than 100 individuals have served as Supreme Court justices since the Court first began hearing cases in 1789. Contrary to the sentiment expressed in the Declaration of Independence, not all of these justices were created equal – some were better than others. Scholars have spent a fair amount of time debating which justices were “great”. Now is your opportunity to weigh in on this subject. For your first paper assignment, you will conduct research on and write a paper about the person you consider to be the “greatest” justice in the history of the Supreme Court.

To write your paper, you should first do a bit of reading about the history of the Court and its justices (recommended sources will be discussed in class). You should then pick a justice to write your paper about. After you have picked your justice, you may continue your research and begin writing your paper. Your paper should include two major elements:

- **Define “Greatness”** – First, you should indicate what criteria you believe make for a ‘great’ justice.
- **Explain Why Your Justice Was “Great”** – This portion of your paper should discuss why your justice was great, making explicit reference to the criteria you have formulated. You should present evidence of your justice’s greatness, making reference to specific opinions or decisions made by the justice, and/or any personal qualities s/he might have.

Your paper should be a minimum of 8, typed, double-spaced pages long. It should incorporate a minimum of eight sources, including a generous helping of “high quality” sources (e.g. books and journal articles, rather than merely web sites or newspaper or magazine articles). For a more complete description of the grading criteria, please see the end of this syllabus.
Paper Assignment #2

Steven Breyer joined the Supreme Court in 1994. Since then, there have not been any additional vacancies on the Supreme Court, making this the second-longest “natural court” in U.S. history. As a result, George W. Bush is likely to enjoy one or more openings on the Supreme Court during his first term in office.

For your second paper, you should pick one area of law that interests you (e.g. abortion, civil rights, free speech, federalism, etc.). You should then write a paper in which you first discuss how the Court’s decisions on this issue are likely to be affected by George W. Bush’s nominating one or more justices to the Court.

Specifically, your paper should include the following elements:

- First, you should describe the current “balance of power” on the Court regarding the issue you have chosen. For example, if you have chosen affirmative action, you should tell me whether the Supreme Court tends to be in general agreement over affirmative action, or whether the Court is divided regarding that issue. As a part of this section, you should also analyze the positions of each of the individual justices (e.g. how does Justice Thomas usually vote on affirmative action? How does Justice Ginsberg vote? And so on)
- Next, you should research President Bush’s views on both your issue specifically and on his appointments to the Court generally. In other words, this section should attempt to determine what kinds of justices the president would appoint regarding this issue. For example, would President Bush appoint a justice who supports or opposes affirmative action?
- Finally, you should show how the Court’s decisions regarding the issue you have selected would be altered under the following 3 scenarios: 1) Justice Rehnquist retires, 2) Justice Stevens dies, 3) Justices Rehnquist, O’Connor, Stevens, and Ginsburg all leave the court. In other words, using our earlier example, you would attempt to determine how the Court’s decisions on affirmative action would change under each of the 3 scenarios mentioned.

Your paper should be a minimum of 12, typed, double-spaced pages long. It should incorporate a minimum of 10 sources, including a generous helping of “high quality” sources (e.g. books and journal articles, rather than merely web sites or newspaper or magazine articles). For a more complete description of the grading criteria, please see the next page.
How Both Papers Will Be Graded

Both papers will be graded on the following criteria:

1) **The Amount of Effort Expended** – The first paper is required to be a minimum of 8 pages and must use a minimum of 8 sources. The second paper must be a minimum of 12 pages long and must use a minimum of 10 resources. Although the quality of a paper is not synonymous with the length of the paper or the number of sources used, the two are closely related. Longer papers, and papers with a greater number of sources, are likely to be more complex and better supported than shorter papers with fewer sources. Therefore, **if you only do the minimum that is required, your grade will probably reflect that fact.**

2) **The Quality of Your Sources** – Academic sources (e.g. law reviews, court cases, journal articles, and books) will lead to a more intellectual paper than non-academic sources (e.g. newspaper and magazine articles). Certainly, you are encouraged to use non-academic sources when appropriate. However, the best papers will also make extensive use of academic sources.

3) **Spelling and Grammar** – Papers with extensive spelling and grammatical errors are less credible and will receive a lower grade.

4) **Attribution** – In an academic paper, you must both provide a bibliography and cite your sources **within the text of the paper itself**. Papers lacking proper attribution will either receive a lower grade or will be returned to the student without grading for revisions. More information about attribution will be given in class.

5) **The Strength of the Argument (i.e. the ability to think critically)** – Both papers ask you to make an argument. This is a major dimension of your paper. It should not be relegated to one or two brief paragraphs at the end of your paper, but instead should be the main feature of your paper. In other words, you should be able to demonstrate that you can use empirical evidence (which will be gathered through your research) and logic to support your conclusion.

6) **Imagination, Insight, Originality, and Other “Intangibles”** – Finally, the best papers will display certain intangible qualities such as those listed here.

I will be happy to accept rough drafts of either paper for review, provided that you submit them to me at least 2 weeks before the paper is due.