

Course Proposal for Richard B. Rosenthal, Esq.
Osher Lifelong Learning Institute – Dominican University of California
Spring Session 2024

Course Title:

Inside the U.S. Supreme Court: The Last Bastion of Democracy . . . or a Failed Institution?

Short Course Description:

The centrality of the U.S. Supreme Court in modern American life can hardly be overstated. Nearly every aspect of modern political, social, and personal life—from free speech, religious liberty, marriage rights, reproductive rights, voting rights, gun ownership, immigration rights, the death penalty, even the structure and maintenance of America’s democracy itself—ultimately winds up at the Supreme Court’s marble steps. We will examine how this came to be, and discuss whether it is how things should be. Should Americans’ most cherished rights be decided by 9 unelected judges? Is this consistent with our basic notions of representative democracy? Is the Supreme Court an essential element of American democracy that should be protected and cherished—or is it something to be feared? Get ready for lively, informative, interactive discussions, filled with historical background, juicy insider tidbits, and present-day controversies!

Proposed Course Schedule:

- 8 Classes
- Either Tuesday or Wednesday or Thursday (day to be determined)
- Time Slot to be determined

Class #1: Week of March 25

Class #2: Week of April 1

Class #3: Week of April 8

Class #4: Week of April 15

Class #5: Week of April 22

Class #6: Week of April 29

Class #7: Week of May 6

Class #8: Week of May 13

Anticipated Week-By-Week Course Syllabus:

Class #1: Overview and The Basics of Judicial Review (*Marbury v. Madison*)

Today the Supreme Court decides cases affecting nearly every aspect of American life. But at the close of the American Revolution, the Supreme Court was literally housed *inside* the halls of Congress and never once passed judgment on the constitutionality of Congress's acts. All of that changed with Chief Justice John Marshall's brilliant (but sneaky and clever) 1803 opinion for the Court in *Marbury v. Madison*. The concept of "Judicial Review" was born, and from then on, the Supreme Court—and America—would never be the same. In tonight's class, we will explore the Court's humble origins and begin our examination of whether such humility is a virtue or a vice.

Class #2: The Court in the 20th Century (*Lochner* & The New Deal)

It is sometimes said that the Supreme Court follows popular public opinion, rather than shaping it. We explore that question through the lens of the Court's decisions in early part of the 20th Century, with a particular focus on the Court's *Lochner* era of hostility to FDR's New Deal social programs, based on so-called "economic rights." This will highlight the tension between the Court's role as a political actor, when 9 unelected judges decide important policy questions for the entire Nation. We also discuss the famous "Switch-in-time that saved Nine," a precursor to modern day Court-packing proposals.

Class #3: The "Rights Revolution" of the Warren Court

In the middle part of the 20th Century, the Supreme Court gradually assumed the central role in American life that it has today. Under the leadership of Chief Justice Earl Warren—the former Governor of California and an unabashed legal progressive—the Court undertook what has come to become known as the "Rights Revolution," a sweeping series of decisions on the rights of criminal defendants (e.g., *Miranda* warnings, Fourth Amendment privacy protections for *Terry* stops, wiretaps, and searches-and-seizures); free speech (e.g., students' rights to protest/dissent, rights regarding prayer in public schools); and rights of personal autonomy and privacy (e.g., the right of married couples to use contraception, a woman's right to choose to abort a pregnancy). We discuss many of these landmark cases, and their far-reaching implications for the Court's role in today's debates over hot-button social issues.

Class #4: Dark, Shameful Chapters: When the Supreme Court Gets it Terribly Wrong

We tend to think the Supreme Court gets things right—or at least tries to. But what about when the Court gets things obviously, terribly wrong? In its history the Court has held the following: that African-American former slaves are mere property, rather than human beings entitled to basic rights (*Dred Scott*); that Americans of Japanese descent can be held by the government in internment camps throughout and beyond World War II (*Korematsu*); that an ongoing recount of a razor-thin U.S. Presidential election can be halted midstream and the winner of the Presidency can be decided by the Court itself (*Bush v. Gore*); that money is "speech" and thus Congress' attempts to reign in the influence of big-money in politics are unconstitutional restrictions on donors' freedom

of expression (*McConnell v. FEC*); and that a President can ban certain immigrants to the United States based upon their religion (Trump's travel ban case). What do these tragic mistakes say about the Supreme Court itself? What harm do they bring to the Supreme Court as an institution? Are there any possible solutions? What about when one segment of American society thinks that a particular judicial decision is terribly wrong, but another segment of American society believes that same decision is absolutely correct (e.g., the abortion rulings of *Roe & Dobbs*)? We will discuss issues of democratic accountability, the role of the Court's public credibility, and the long arc of history.

Class #5: The Empire Strikes Back: The Counter-Revolution of the Rehnquist and Roberts Courts
The Warren Court's "Rights Revolution" during the middle part of the 20th Century wasn't the end of the story—far from it. Instead, it set off a 50-year struggle—reaching from the end of the 1970's all the way to the present day—by Republican politicians and judicial "Conservatives" to reign in and dial back the perceived excesses of the "Rights Revolution." Some of these efforts came in the cloak of judicial formalisms such as Federalism, severe limits on "legal standing" and justiciability, and most recently, efforts by some Justices to impose "judicial modesty" in decisionmaking. Are these doctrines legitimate, or are they just ruses, resulting in more naked—sometimes even brazen—attempts by various political actors (and their funders) to shape the Court?

Class #6: The Modern-Day Judicial Confirmation Wars
Undoubtedly, the result of the Warren Court's "Rights Revolution" and the "Counter-Revolutions" of the Rehnquist and Roberts Courts has been major political dramas virtually every time one of the 9 seats on the Supreme Court becomes open. We will discuss some of these unsavory chapters, including the "Borking" of Robert Bork, the Clarence Thomas/Anita Hill drama, its redux in the Brett Kavanaugh/Christine Blasey Ford matter, the apparent double standard used regarding Merrick Garland and Amy Coney Barrett, and the confirmation hearings of Ketanji Brown Jackson.

Class #7: The Court Examined from Theoretical and Global Perspectives
The Supreme Court has its origins in Article III of the Constitution, but America existed for more than a decade before the Supreme Court. Could America exist without the Supreme Court at all, or even with a Court's whose powers and authorities are significantly scaled-back? Or would such a country cease to be America at all? Can the Court be viewed as if were a human entity, possessing human qualities like forgetfulness, growth, regret, and evolution—or can it and should it always remain purely "neutral" and static? We consider these questions with reference to the experiences of other world democracies (and some decidedly un-democratic nations) – places such as the United Kingdom, Canada, Israel, Russia, etc.

Class #8: A Glimpse into the Court's Future: What Lies Ahead?
As we begin the second decade of the 21st Century—a time of remarkable upheaval and uncertainty in America—we will discuss the major issues and the major players that will shape the Court moving forward. Is the Court equipped to handle these tumultuous

times? We will also discuss the role of rapid technology at the Court itself; the strategic use of free speech and religious liberty doctrines as legal weapons; the increasingly fragile role of personal and informational privacy in the Internet Age; the possible path that the new 6-3 Conservative-dominated Court may cut in the law; various court-packing and tenure-limiting proposals designed to blunt the impact of this newly-ascendant Conservative bloc; and recent ethical scandals and missteps that may have further tarnished the Court's reputation. Is there any way back from the abyss?

About the Instructor:

Richard B. Rosenthal is an appellate lawyer who over the past quarter-century has been involved in high stakes, high-profile legal disputes across the nation. He has participated in numerous U.S. Supreme Court proceedings at both the certiorari stage and merits stage, filings petitions for certiorari, briefs in opposition to certiorari, and amicus briefs. Among his various legal representations, he has served as a personal attorney to then-President Barack Obama. In 2008, he represented the Obama for America campaign, where he eventually served as the campaign's Statewide Lead Counsel for Florida. His clients have also included two U.S. Senators (one Republican, one Democrat); an active Chief Judge of a U.S. District Court; a retired California Appellate Justice; the largest U.S. independent record label; the then-largest class of data breach victims in U.S. history; victims of narcoterrorism in Colombia; a class of combat-support pilots in Iraq and Afghanistan missions; a Canvassing Board in Florida during the 2000 Presidential election recount, from Election Day through its conclusion in *Bush v. Gore*. He is a former law clerk two federal judges, and has repeatedly achieved the rare distinction of having been named simultaneously to "Super Lawyer" and "Best Lawyer" lists in two states: California and Florida. In 2019, he was one of only 25 lawyers honored by The National Law Journal as a "Top U.S. Trailblazer for Plaintiffs." He frequently lectures to lawyers, judges, and students on issues of appellate law, election law, and Constitutional law. In 2008, he addressed the Florida delegation at the Democratic National Convention regarding voting rights. A former adjunct law professor, he has delivered guest lectures at prestigious law schools including Yale, Stanford, Columbia, and Michigan, as well as international lectures at law schools in Siberia, Kyrgyzstan, and Ukraine. Mr. Rosenthal is a former President of a local chapter of the American Constitution Society and a former member of the Board of the American Bar Association's Rule of Law Initiative. In 2022, at the invitation of the Chairman of the Senate Judiciary Committee, Mr. Rosenthal testified to the Senate Judiciary Committee in support of the successful nomination of his lifelong friend, Judge Ketanji Brown Jackson, to serve as an Associate Justice of the Supreme Court.