The first Monday in October, when the United States Supreme Court begins its yearly term, is a day of consequence. The scope of the issues, the gravity of the proceedings, and the stories behind the cases make the Supreme Court potentially enthralling theater. Hollywood has tried its hand at capturing all that drama, most recently in the feature film First Monday in October and the television series First Monday. Both of those productions flopped, but the Law School's own First Monday lecture series for alumni has become a long-running hit, featuring a star-studded cast, compelling storylines, and even a few cliffhangers.

First Mondays
Annual Law School lecture series marks the beginning of each Supreme Court term

Now in its fifth year, the First Monday luncheon continues to draw large and enthusiastic audiences. “These lunches are a unique addition to intellectual life at the Law School,” says Dean Saul Levmore. “They have given me a new appreciation of the strength and range of our constitutional law faculty.”

Hundreds of alumni have already attended this year's production featuring Professor David Strauss. Strauss, the Harry N. Wyatt Professor of Law, is highly qualified for his role, having argued eighteen cases before the Supreme Court and served as assistant to the solicitor general for four years. He's currently an editor of the Supreme Court Review.

Strauss’s topic is “The Virtues and Vices of Judicial Imperialism.” (So as not to spoil the experience for those planning to attend in Los Angeles or San Francisco in November, we'll simply give you a preview.)

Strauss says that although this Supreme Court has rendered some highly controversial decisions, its authority is still intact, and it demonstrates a remarkable self-confidence in exercising power over Congress and state legislatures. It applies that power with great regularity, having already invalidated an unprecedented number of federal statutes.

Strauss says that last term's Blakely decision, which he described as “arguably reckless” in apparently (but not clearly) holding that federal sentencing guidelines are unconstitutional, demonstrates the sweep of the Court's power and illustrates how it can create turmoil throughout governments, national and local.

The virtues and vices of such a self-confident Court, says Strauss, are in the eyes of the beholder, but in understanding the continuum of cases from Bush v. Gore, in which the Court was at its most “imperial,” to the decisions about enemy-combatant detainees in Rasul v. Bush, in which the Court rejected the administration's claims of unfettered jurisdiction, the aforementioned cannot go unnoticed.

The four faculty members who preceded Strauss all provided provocative perspectives guaranteed to enliven anyone’s Court-watching. Following a tradition begun in 2000 by the inaugural presenter, Dennis Hutchinson, Senior Lecturer in Law and William Rainey Harper Professor in the College, they also offered predictions about the outcomes of specific cases.

Mary Anne Case, Arnold I. Shure Professor of Law, called her 2001 presentation “Looking at the Supreme Court Term Through Bush v. Gore Tinted Lenses.” She discussed how the opinion in Bush v. Gore could be viewed as consistent with this Court's “commitments to rules over standards, theoretical abstractions over messy realities, surface appearance over what lies beneath, and uniformity over diversity.”

Case enumerated some dangers that might arise from a Court that favors “the superficial appearance of precision” and that views reality from inside what New York Times reporter Linda Greenhouse dubbed a “marble cocoon.”

Among those dangers, Case said, is “the Court's susceptibility
to the illusion that by intervening it can achieve greater perfection."

Because she was speaking a few weeks after the 9/11 terrorist attacks, Case also reviewed some then-recent decisions that might bear on the Court's future deliberations in an altered national-security context. She said that *Atwater v. Lago Vista*, in which the Court upheld the jailing of a "soccer mom" for violating a seat-belt regulation, would give the Court plenty of leeway in dealing with detentions of others who are perceived less sympathetically. She noted that the Court's decisions in several recent immigration cases could provide "ample wiggle room" to permit stronger exercise of state power in immigration matters.

In 2002, Geoffrey Stone, '71, the Harry Kalven, Jr. Distinguished Service Professor of Law, employed what he called "an entirely speculative counter-factual thought experiment" to imagine how constitutional law might be different if Democratic presidents had made more Supreme Court appointments than the two of twelve they have made since 1968. Within a list of ten such differences, Stone suggested that "The Court might have struck down, rather than upheld, many applications of the death penalty"; "The Court might have upheld, rather than struck down, a broad range of campaign finance regulations"; and "The Court might have upheld, rather than struck down, federal laws governing such issues as the environment, workplace safety, and violence against women, all of which it has recently invalidated on the plea of states' rights."

Stone said his list, "gives a sense of the highly contingent nature of law, perhaps especially of constitutional law," and shows "how easy it is to imagine alternative constitutional universes." He added that the creation of such lists of potential differences would be "a great party game for lawyers, if only lawyers had parties."

In his 2003 talk, Professor Adrian Vermeule discussed judicial activism, which he defined as "the invalidation of statutes by courts exercising the power of judicial review."

By that standard, Vermeule said, "the Rehnquist Court has wrested from the Warren Court the mantle of the most activist court in American history, which must also mean in the history of constitutional democracy."

Describing himself as an "equal opportunity offender," Vermeule critiqued all the Justices for their readiness to override legislative decisions. "Left and right," he said, "each camp eagerly substitutes its judgment for that of the political branches; they differ only on what the substitute should be."

After considering how minimal review may allow statutes to exist in violation of the Constitution (what he called "false negatives"), and how aggressive review can erroneously invalidate the judgments of other institutions ("false positives"), Vermeule said, "Learned Hand argued for minimal judicial review because he thought that the false positives were more likely, and more costly, than the false negatives: I agree."

The First Monday presenters have reinforced the acuity of their observations regarding past decisions by predicting the outcomes of future cases. In this year's term, Strauss expects the Court to uphold a Ninth Circuit ruling that prevents the federal government from prosecuting noncommercial medical use of marijuana in California.

Will Strauss's success as a prognosticator match that of his predecessors? In 2001, Mary Anne Case told her listeners that the Court would dismiss the much anticipated affirmative-action suit, *Adarand Constructors v. Mineta*, without deciding it. When the Court heard oral arguments for that case in late October, it appeared that her prediction might be in jeopardy—but then the Court dismissed the case in November.

The next year, Geoffrey Stone was correct in anticipating that the Court would hold, in relation to California's so-called three strikes law, that "a life sentence is not 'grossly excessive' for a three-time loser, even though he has never committed a serious crime."

Adrian Vermeule accurately forecast the Court's ruling in *United States v. Tucker* that the exclusionary rule does not apply to evidence discovered through voluntary statements elicited in violation of *Miranda v. Arizona*.

Will the series feature a new cast next year? Yes and maybe. Certainly another faculty member will offer new insight into the Court. And maybe there will also be a new Justice or two to dissect.—David Strauss and Dennis Hutchinson are both predicting that the next President will fill at least two vacancies sometime during his term.

Stay tuned.—G deJ.