

Current Issues in the Supreme Court: The Roberts Court

GVPT 439C

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Course Content

In this course, we will examine (selectively) the jurisprudence of the Roberts Court. To do so, we will analyze nine significant Roberts Court decisions, attempting to understand how the Roberts Court approaches the task of constitutional interpretation. We will begin with an exploration of theories of constitutional interpretation and the role of a “supreme” court in the American constitutional republic. How does a “supreme” court go about its work? How should it? Is there an “objective” way to understand the Constitution? When should it overrule decisions of the democratic majority? How does it decide when to do so? Is there a dominant constitutional approach by the Roberts Court?

In analyzing the selected cases from the Roberts’ Court, we will attempt to answer the question--Is there a “method” to the Roberts Court’ approach to constitutional interpretation or is it just “*ad hocism*?”

Course Requirements

1. **Class Participation: VERY IMPORTANT.** You should come prepared to discuss the readings each and every class. Anyone can be called upon at any time. This is not a lecture course. Learning depends upon the active engagement of everyone.
2. **Exams:** There will be a short “mid”-term exam, following the conclusion of the theory section of the course. There will be a comprehensive final exam.
3. **Case Opinion:** Everyone will write a Supreme Court opinion in one of the two 2017 term cases.
4. **Short Papers:** Everyone will prepare short 1-2 page reaction papers for 4 of the 8 Roberts Court decisions we discuss in depth. (I will discuss these more in class.)

Grading Criteria

Grades will be computed as follows:

Short Papers	12%
Mid-Term	20%
Group Project	12%
Case Opinion	20%
Final Exam	36%

Participation will be evaluated upon a purely subjective basis taking into consideration the quality and quantity of your comments in class. I reserve the right to adjust your final grade up or down based upon your class participation.

Required

The Constitution of the United States

Recommended

Coyle, *The Roberts Court*

Barber and Fleming, *Constitutional Interpretation: The Basic Questions*

Garvey, Aleinikoff and Farber, *Modern Constitutional Theory: A Reader*

Great Web Sites

For current information about the Supreme Court: www.scotusblog.com

For transcripts of Supreme Court Cases and audio recordings: www.oyez.org

General Policies

1. **Late Assignments.** Short Papers are due at the **beginning** of the appropriate class. No short papers will be accepted by email.
2. **Make up Exams.** Exams including the Final Exam will be re-administered for those with excused absences only. An absence can only be excused in advance.
3. **Cell phones and computers.** ALL cellphones and computers must be turned off during class. This is a discussion class so your active participation is required. Studies have shown that multi-tasking is not productive or efficient. Moreover, it is disrespectful and harmful to classmates.

4. **Attendance.** While I do not take attendance, I do make a mental note of those who are absent. 100% attendance is expected. You cannot do well in this class if you are not in class to listen to and participate in the discussion.

A complete discussion of all UMD undergraduate course policies can be found at: <http://www.ugst.umd.edu/courserelatedpolicies.html>.

Students with Disabilities

Students with disabilities who are registered with Disability Support Services (301-314-7682) are encouraged to meet with the instructor early in the semester to arrange appropriate academic accommodations.

Inclement Weather

Exams will be rescheduled for the next class meeting if the university is officially closed because of inclement weather. Similarly, any assignments due should be turned in at the next class meeting. Official closures and delays are announced on the campus website and snow phone line (301-405-SNOW) as well as local radio and TV stations.

Religious Holidays

For any assignment due on a religious holiday, you must make arrangements to submit the assignment **before** your absence.

Academic Honesty and Honor Code Pledge

The University of Maryland, College Park has a nationally recognized Code of Academic Integrity, administered by the Student Honor Council. This Code sets standards for academic integrity at Maryland for all undergraduate and graduate students. As a student you are responsible for upholding these standards for the course. It is very important for you to be aware of the consequences of cheating, fabrication, facilitation and plagiarism. For more information on the Code of Academic Integrity or the Student Honor Council, see <http://www.studenthonorcouncil.umd.edu/whatis.html>.

Academic honesty is taken very seriously in this course. Plagiarism and any other infractions will be taken up with the appropriate university judicial proceedings.

Students should write and sign the following statement on the cover page of each paper they submit in this course, “I pledge on my honor that I have not given or received any unauthorized assistance on this assignment.”

OFFICE HOURS

Finally, I strongly encourage everyone to visit me during office hours—even if you do not have questions to discuss. It is a great way for me to get to know you and help you to be successful in this course.

Course Schedule

August 28: Introduction

August 30: Interpreting Law and Constitutions

Reading:

Fuller, Lon. 1999. "The Case of the Speluncean Explorers." *Harv. L. Rev.* 112(8): 1851.

September 4: NO CLASS—Labor Day

PART 1: THEORIES OF JUDICIAL REVIEW

September 6: The Warren Court, the Countermajoritarian "Difficulty" and the Rise of Originalism (OR was *Brown v. Board of Education* rightly decided?)

Readings:

Brown v. Board of Education

The Decision of the Supreme Court in the School Cases, Declaration of Constitutional Principles (i.e. The Southern Manifesto) (on ELMS)

Brennan, William J. 1985. "The Constitution of the United States: Contemporary Ratification." *S. Tex. L. J.* 27: 433.

Rehnquist, William H. 1976. "The Notion of a Living Constitution." *Tex. L. Rev.* 54: 693.

Wills, Garry. "Child of the Enlightenment." [On ELMS]

For Additional Consideration:

Meese III. 1988. "Toward a Jurisprudence of Original Intent." *Harv. J. L. & Pub. Pol'y* 11: 5.

Scalia, Antonin. 1988. "Originalism: The Lesser Evil." *U. Cinn. L. Rev.* 57: 849.

September 11: Originalism 2.0 and Liberal Originalism (or is Justice Thomas an Aspirationalist?)

Readings:

District of Columbia v. Heller. (Skim)

Colby, Tomas B. 2011. "The Sacrifice of the New Originalism." *Geo. L. J.* 99: 713. (Read pages 713-744)

Gerber, Scott D. 2014. "Liberal Originalism: The Declaration of Independence and Constitutional Interpretation." *Cleveland St. L. Rev.* 63(1): 1.

For Additional Consideration:

Toler, Lorianne Updike; J. Carl Cecere with the assistance of Justice Don Willett. 2013. "Pre-Originalism." *Harv. J. L. & Pub. Pol.* 36: 277. (An excellent use of quantitative methods to investigate when and how the Court actually uses originalist methods.)

September 13: New Textualism and Intratextualism: Is there an Answer in the Text?

Readings:

Roe v. Wade

Ryan, James E. 2011. "Laying Claim to the Constitution: The Promise of New Textualism." *Va. L. Rev.* 97(7): 1523. (Read pages 1538 - 1571).

Amar, Akhil Reed. 1999 "Intratextualism." *Harv. L. Rev.* 112(4): 747. (Read pages 747-778; 795-802)

September 18: Process Theory

Readings:

Baker v. Carr

Ely, John Hart. 1980. *Democracy and Distrust*. (selections on ELMS).

For additional reading:

Schachter, Jane S. 2011. "Ely at the Alter: Political Process Theory Through the Lens of the Marriage Debate." *Mich. L. Rev.* 109: 1363.

Smith, Evan Barret. 2013. "Representation Reinforcement Revisited: *Citizens United* and Political Process Theory." *Vt. L. Rev.* 38:445.

Tribe, Laurence H. 1980. "The Puzzling Persistence of Process-Based Constitutional Theories." *Yale L. Rev.* 59:1063.

September 20: Judicial Minimalism OR do we need a Theory?

Readings:

Posner, Richard A. 1998. "Against Constitutional Theory." *N. Y. U. Law Rev.* 73(1):1.

Sunnstein, Cass R. 2005. "Testing Minimalism: A Reply." *Mich. L. Rev.* 104(1): 123.

PART 2: THE ROBERTS COURT

September 25: The Court Picks a President

Readings:

Bush v. Gore

For Additional Consideration:

Lund, Nelson. 2001. "Equal Protection, My Ass!?" *Bush v. Gore* and Laurence Tribe's Hall of Mirrors." (On ELMS)

Tribe, Laurence. 2002. "The Unbearable Wrongness of *Bush v. Gore*." (On ELMS)

September 27: "Mid"-term Short Exam

CASES:

***Gonzalez v. Carhardt* (2006)**

October 2

October 4

Reading:

Calhoun, Samuel W. 2010. "Partial-Birth Abortion' in Not Abortion: *Carhart* II's Fundamental Misapplication of *Roe*." *Miss. L. J.* 79(4): 775.

***Citizen's United* (2008)**

October 9

October 11

For Additional Consideration: Mayer, *Dark Money*

NFIB v. Sebelius (2011)

October 16

October 18

Shelby County v. Holder (2013)

October 23

October 25

Town of Greece (2013)

October 30

November 1

Hobby Lobby (2014)

November 6

November 8

Obergefell (2015)

November 13

November 15

Reading:

Girgis, George and Anderson, "What is Marriage?"

November 20: Catch Up Day

November 22: NO CLASS: HAPPY THANKSGIVING

Fisher v. University of Texas at Austin (2016)

November 27

November 29

Readings:

"Affirmative Action" in *Modern Constitutional Theory: A Reader*
Complaint in *Students for Fair Admissions v. Harvard* (Skim)

For Additional Consideration:

Sander, Richard H. and Stuart Taylor, Jr. *Mismatch*

THE 2017 TERM:

Gill v. Whitford

December 4

**For Additional Consideration:
X, Ratf****d**

***Masterpiece Cakeshop v. Colorado Civil Rights Commission*
December 6**

**December 11: Closing Thoughts on Constitutional Interpretation and the Roberts
Court**