

# Current Issues in the Supreme Court

GVPT 439C  
Fall 2023

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## Course Content

This course will focus on the role of the Supreme Court in interpreting and applying the Constitution. We will examine the role of the Supreme Court in the American constitutional republic including the concept of judicial review. We will explore various theories of constitutional interpretation including: originalism, living constitutionalism, textualism, pragmatism and process theory. We will then attempt to analyze how (or if) the Court uses these theories in addressing contemporary issues such as abortion and reproductive rights, marriage equality, religion and the state. To do this, we will examine (very selectively) significant cases from the Roberts Court. Among the questions we will address are: 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?

## Learning Outcomes

At the conclusion of this course, you should be able to:

1. Explain the role of the Supreme Court in the American political system and the concept of judicial review and its implications.
2. Understand and critiques various theories of constitutional interpretation and demonstrate an ability to apply those theories to current constitutional issues and controversies.
3. Demonstrate an ability to conduct legal research and collaborate with other students to present the results of that research.
4. Demonstrate a deep understanding of current constitutional issues.

## 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. **Class Presentation:** You (and members of your “law firm”) will lead a class discussion of one of the constitutional theories we discuss and one of the cases we discuss.
4. **Short Papers:** Everyone will prepare short 1-2 page reaction papers for the classes in which you are assigned as a respondent. (I will discuss these more in class.)

## Grading Criteria

Grades will be computed as follows:

|                     |     |
|---------------------|-----|
| Mid-Term            | 20% |
| Theory Presentation | 25% |
| Case Presentation   | 25% |
| Final Exam          | 30% |

Grades will be computed as follows:

|             |             |
|-------------|-------------|
| A+          | 97-100      |
| A           | 93-96       |
| A-          | 90-92       |
| B+          | 87-89       |
| B           | 83-86       |
| B-          | 80-82       |
| (and so on) |             |
| F           | 59 or lower |

I expect everyone to do at a minimum B work in this course so I will not have to give any other grades.

Participation is a very important part of this course and 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.

I will ask you to evaluate your performance in the class as part of an “ungrading” process. I will discuss this more in class.

## Required

Barber and Fleming, *Constitutional Interpretation: The Basic Questions*  
*The Constitution of the United States*

## Recommended

Coyle, *The Roberts Court*

Greenhouse, *The U.S. Supreme Court: A Very Short Introduction* (Oxford 2012)

## For More Theory

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

O'Brien, *Judges on Judging: Views from the Bench*, 5<sup>th</sup> ed. (CQ Press, 2016)

## Great Web Sites

**For current information about the Supreme Court:** [www.scotusblog.com](http://www.scotusblog.com)

**For transcripts of Supreme Court Cases and audio recordings:** [www.oyez.org](http://www.oyez.org)

## General Policies

1. **Late Assignments.** Short Papers are due no later than 10 pm the day before the appropriate class. You should post your paper on ELMS and bring a hard copy to me in class.
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 specific 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

(I reserve the right to modify the syllabus at any time. It is your responsibility to always be aware of changes.)

### PART 1: A “SUPREME” COURT? (And Other Issues)

**August 28: Introduction**

**August 30: Constitutional Gestalts, Constitutional Regimes and Constitutional Time**

**Readings:**

Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*

Solum, *How NFIB Affects Constitutional Gestalts* (pp. 41-57)

Wikipedia, *Cyclical Theory*

**September 6: Why a “Supreme” Court?: The Countermajoritarian Difficulty**

**Readings:**

*Marbury v. Madison*

Bickel, *The Least Dangerous Branch*, pp. 16-26 (on ELMS)

Graber, *The Countermajoritarian Difficulty* (on ELMS)

Dorf, “Majoritarian Difficulty and Theories of Constitutional Decision Making” (on ELMS)

**September 4: NO CLASS. HAPPY LABOR DAY.**

**September 11: Neutrality: Can the Court be “Neutral”?**

**Readings:**

Wechsler, *Neutral Principles*

Sunstein, *Neutrality in Constitutional Law*

**September 13: A Brief Detour: Substantive Due Process**

**Reading:**

Sandefur, *In Defense of Substantive Due Process*

Green, *Twelve Problems with Substantive Due Process*

**September 18: Another Brief Detour: The Ninth Amendment**

**Readings:**

Abrams, *Rights of Ninth Amendment*

Berger, *Ninth Amendment*

Williams, *Ninth Amendment as Rule of Construction*

Seidman, *Ninth Amendment*

## **PART 2: THEORIES OF CONSTITUTIONAL INTERPRETATION**

### **September 20: The Warren Court and “Living Constitutionalism”**

#### **Readings:**

CI, pp. 16-25

Marshall, “The Constitution: A Living Document.” (on ELMS)

Brennan, Jr., “The Constitution of the United States: Contemporary Ratification.” (on ELMS)

Rehnquist, “The Notion of a Living Constitution.” (on ELMS)

### **September 25: Originalism 1.0/2.0**

#### **Readings:**

CI, Chapter 6

Scalia, “Originalism: The Lesser Evil.” Chapter 21 in *Judging*

Meese III. 1988. “Toward a Jurisprudence of Original Intent.”

*District of Columbia v. Heller*. (Selections on ELMS)

Stevens, Originalism and History.” (on ELMS)

### **September 27: Moral Originalism?**

#### **Readings:**

CI, pp. 26-33

Dworkin, Freedom’s Law (excerpts)

### **October 2: Originalism 3.0: Common Good Originalism OR Beyond Originalism: Common Good Constitutionalism**

#### **Readings:**

Ward, Critics Call it Theocratic and Authoritarian

Vermeule, Beyond Originalism

Vermeule, Introduction-Common Good Constitutionalism

Hammer, *Manly Originalism*

### **October 4: Textualism, New Textualism and Intra-textualism: Is there an Answer in the Text?**

#### **Readings:**

CI, Chapter 5

Amar, Akhil Reed. 1999 “Intratextualism.” *Harv. L. Rev.* 112(4): 747.

(Read pages 747-778; 795-802)

*Bostock v. Clayton County*

Spivey, Torturing Textualism

**October 9: 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*.

Smith, Evan Barret. 2013. *Representation Reinforcement Revisited: Citizens United and Political Process Theory*.

Tribe, Laurence H. 1980. "The Puzzling Persistence of Process-Based Constitutional Theories."

**October 11: Pragmatism/Consequentialism**

**Readings:**

CI, Chapter 11

Breyer, *Our Democratic Constitution*.

Posner, *Against Constitutional Theory*.

**October 16: Judicial Minimalism OR do we need a Theory?**

**Readings:**

CI, Chapter 9

Sunnstein, Cass R. 2005. *Testing Minimalism: A Reply*.

**October 18: Judicial Review or Judicial Supremacy**

**Readings:**

*Bush v. Gore* (Selections on ELMS)

Sager, "Fair Measure: The Legal Status of Unenforced Constitutional Norms." (On ELMS)

Alexander and Schauer, "Defending Judicial Supremacy." (On ELMS)

**For Additional Consideration:**

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

Tribe, Laurence. 2002. "The Unbearable Wrongness of *Bush v. Gore*."

**October 23: Take Home **Mid-term Exam** Due**

### **PART 3: THE ROBERTS COURT (or is it the Alito Court?)**

**October 23 and October 25:** *West Virginia v. EPA* (2022)

**October 30 and November 1:** *Bruen v. NY Gun and Pistol*

**November 6 and November 8:** *Kennedy v. Bremerton* (2022)

**November 13 and November 15:** *Dobbs v. Jackson Women's Health Organization*  
(2022)

**November 20:** Catch up Day

**November 27 and November 30:** *303 Creative v. Elenis* (2023)

**December 4 and December 6:** *SFFA v. Harvard* (2023)

### **CONCLUSION**

**December 11: Final Thoughts About the Supreme Court and the Constitution: The Most Dangerous Branch?**