U.S. SUPREME COURT WATCH
Prof. Gottlieb, Fall 2009

SYLLABUS, INSTRUCTIONS AND MATERIALS

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OVERVIEW OF THE COURSE

After a week of readings designed to orient you to the workings of the Court, we will explore the justices’ positions on several cases to be argued during the current Term. We will do that by role playing post-argument conferences as those conferences might take place in the Court. We will then focus separately on each of the individual justices. Finally the work you do exploring the approach of a member of the Court will culminate in a paper. Each portion of the course builds on the last, making the job more manageable and at the same time making it possible to take you much deeper into the working of the Court than would otherwise be possible.

Note that each portion of the course builds on the last, making the job more manageable and at the same time making it possible to take you much deeper into the working of the Court than would otherwise be possible. We start with some background, then look at individual cases, and then put them together to get a better understanding of each of the justices.

CLASSES AND ASSIGNMENTS

● ORIENTATION TO THE COURT

Sample among the following readings for classes 2-4:

● Class 2: THE JUSTICES' VIEWS ABOUT INTERPRETATION

William H. Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693


**Recommended reading on Interpretation**

Philip Bobbitt, Constitutional Fate, 58 Texas L. Rev. 695 (1980)


- **Class 3: THE REALIST RESPONSE**


- **Class 4: UNDERLYING PHILOSOPHY**

  Both liberal and conservative philosophy are quite varied. On the conservative side, it is important to grapple with Richard Epstein and Leo Strauss. I would suggest:


Liberal utilitarianism is out of fashion among philosophers but still powerful in its appeal to judges. One of the more famous modern critiques is:


Other philosophical approaches with a strong hold among liberals are by Ronald Dworkin and the late John Rawls. Among their most famous and relevant works are:


Dworkin, Ronald M., TAKING RIGHTS SERIOUSLY (Cambridge, MA: Harvard University Press 1977)


SUPREME COURT PRACTICE


• ASSIGNMENTS FOR MOCK U.S. SUPREME COURT CONFERENCES

Each week, the nine justices hold a conference to discuss and vote on the cases argued during that week. You will each play the role of one of the justices at such a conference leading to a preliminary vote on one of the cases we will take up. We will use those conferences to begin to understand each of the justices.

Discussion at the conferences: In class we will combine the post-argument conference among the justices with discussion about what the justices would have wanted to elicit during argument. Thus at the conference on each case, students assigned to a justice will:
• present the position of that justice as the justice might do in conference; and
• explain what might concern that justice that the justice would want to explore during argument;
• back up your conclusions with a description of the research you have done into the relevant positions of your justice.

Our discussion will explore which justices are essential to the majority, who the swing justices might be, how the argument can be directed toward those justices, and possible responses to questions each justice might ask.

The cases for the conferences. The course will begin by exploring cases granted review either via appeal or certeriorari but not yet argued or decided by the US Supreme Court at its coming term. They will be assigned separately.

Materials to assist your preparation for the conferences:

• Recent decisions by your justice: In addition to the opinion below and the briefs, you will also need to look at recent decisions by the justice you will be role-playing to get a grounding in that justice's approach.

• Briefs as they become available can be found through:
  LEXIS in the “US Supreme Court Briefs” directory [listed under Cases - U.S.]
  WESTLAW in the “US Sup. Ct. Briefs” directory [abbreviated SCT-BRIEF-ALL];
  The U.S. Supreme Court website, http://www.supremecourtus.gov/ under “Dockets” where there is a tab for “online MERITS BRIEFS”;

• Issues granted review and lower court decisions: I will provide you with citations to the decision below and to the U.S. Law Week summary of the issues on which the U.S. Supreme Court granted review. In general, a summary of the issues on which the Supreme Court granted review for each case can be found in the Proceedings Section of the U.S. Supreme Court Section of U.S. Law Week. In addition, citations to the opinions of the lower courts are listed in most of the U.S.L.W. squibs about the cases.

Why the justices matter: This has become a "conservative" Court but there are very important differences among the Justices which have a dramatic impact on how cases must be argued and how the Court will shape law in the foreseeable future. The course is designed to explore argument before a multi-judge court and the effects of the different judicial personalities.

Which justice to pick: Each student will select one justice to explore for the term. I recommend picking a judge with whom you are in fundamental disagreement. That way the justices’ views do not appear "natural" and you are likely to look deeper and learn more. I will have to ask the class to distribute their choices of justices to play so that every justice has more or less even coverage.
ASSIGNMENT FOR REPORTS ON THE JUSTICES

The second part of the course will be devoted to an individual examination of each justice. At a class prior to the first class on the justice, those reporting should suggest readings on the justice. The class should read the readings suggested by those responsible for the justice as well as the section on that justice in my MORALITY IMPOSED: THE REHNQUIST COURT AND CIVIL LIBERTIES IN AMERICA. The class discussion will center around the report on that justice by the appropriate member or members of the class. Feel free at a prior class to suggest other material for background reading by the rest of the class. Good materials on the justices are surprisingly rare. There tends to be a spate of articles when they are appointed and occasional articles when they do something interesting thereafter.

For class presentations, if possible, try out on the class whatever claims you expect to make in your papers. That will give you a chance to react to criticism and improve your papers.

For your presentations, let me suggest that among the best ways of examining your justice, would be to focus on opinions in which your justice takes a position which is not typical for that justice, or in which that justice disagrees with members of the Court with whom your justice is generally in agreement. By doing that you identify the limits of the justice's position and can uncover more than bringing in more routine samples.

For the second class about each individual justice, you will all have available both the relevant work in the field, included with these materials, and a copy of my own study of the individual members of the Court. We will discuss which portrayal[s] seem more or less faithful to the justice and why. Incidentally, I would appreciate critical comments about my own work as I try to ready the material for publication.

Note that we will do the Justices in order of seniority.

See the Bibliography on the Justices, below, for preparatory readings for each of these classes. All students, not only those reporting, should read the relevant chapter of my book and some of the other works on the justices under discussion both to give you a firmer basis of comparison and for class discussion.

PAPERS AND GRADES

During the first part of the course you will be working on a justice for the purpose of presenting the justice's views in conference. In the second part of the course you will report on the justice's approach in a class set aside to discuss the views of that justice. Your work on each justice will culminate in a paper developing the position of that justice and trying to explain the justice's approach. In addition the paper should differentiate the justice's position from that of the other members of the Court.

Requirements and grading standards: In the paper you are expected to discuss:
[a] the position of the justice;
   [I] evidenced in the cases which you studied in order to prepare for
the case conferences – i.e., use the research you have already done and
add to it for the paper;
   [ii] evidenced in other helpful cases;
   [iii] evidenced in any other helpful material.
[b] the position of commentators about the justice;
[c] conflicting views and evidence on those questions; and
[d] analyze the competing positions and reach a conclusion based on the available
evidence.
[e] SKIP THE BIO – I will not count pages taken up with telling me where the
justice came from, went to school and grew up, etc. Analyze the justice, not his or
her upbringing. Biographical material can be helpful to readers who are not
familiar with the Court, which, of course, does not include any of us! So skip it.

In other words, merely describing what the justice says or what someone else says about the
justice without considering evidence that conflicts with that position is not analysis and is not
adequate.

This bears emphasis:
[1] Your grade depends on analysis.
[2] I expect more than merely telling me what someone else said – whether it is the
justice or a commentator. I expect you to look at the evidence and see if it is so –
analysis counts, not regurgitation.
[3] And it is not enough just to say what you believe without defending your claims –
analysis counts, not a confessional.

You definitely do not have to agree with my position – in fact I find critiques much more
interesting and useful.

Types of analysis. There are of course many ways of thinking about what the Court is
doing. Each method has characteristic benefits and difficulties. There is no one right way – it
depends on what materials are available and what you are trying to accomplish.

I described my own methodology in the preface to my book, pages xii-xiv and exemplify
it most clear in Chapter 2 of my book, the chapter titled The Gulf. I actually used a combination
of the approaches described below. Another writer who used a methodology similar to one of
the major methods I used in my book is Jed Rubenfeld, “The Anti-Antidiscrimination Agenda,”
111 Yale L J 1141 (2002). He called it “juxtaposition across doctrines”, that is looking for
inconsistencies in the ways that the Court handles different doctrinal areas.

There are several approaches which are somewhat more familiar and easier than what Jed
and I have done. The most familiar is to focus on the work of the court in a single doctrinal area
and examine it for consistency.
Another is to focus on the pattern of results affecting a given real world problem or class of litigants, like workers or minorities, which is an approach espoused by the “legal realists” and used along with other techniques in my book.

Or one can probe by looking at a case in which the justices’ positions surprise you and try to figure out why they seemed to reverse course.

A fifth is to explore a comparison with another justice. Doing that helps to identify the limits of the justice's position and uncover perspectives about your justice that are not obvious from their own opinions. Comparisons with justices on the opposite end of the Court can be use in bringing out larger philosophical differences though this approach can easily lead to somewhat crude distinctions. Comparisons with justices closer in views to your justice, particularly exploring when and why your justice disagrees with members of the Court with whom your justice is generally in agreement, tend to be more precise but can miss the big picture.

Pick an approach that seems congenial and enjoy getting dissecting a justice!

**Due date:** By the end of the semester – we can discuss the precise dates later.

**Drafts:** You can submit a draft for my comments to help avoid problems. If you want me to read and comment on a draft of your paper, however, it must be submitted no later than the last day of class.

**Form of papers:**
- [a] Papers must be TYPED OR COMPUTER PRINTED.
- [b] PROOFREAD your papers – sloppy papers will be treated the way they deserve.
- [c] Turn ON PAGE NUMBERING OR NUMBER THE PAGES – it makes it easier for me to work with your paper, to find things in the paper, make comments, cross reference, etc.
- [d] There is no way to do justice to these justices in less than 20 PAGES. If you have less than 20 pages, keep working.

**For writing credit:**
- [a] A paper designed for writing credit should be at least 30 pages. Please discuss you plans with me in advance.
- [b] Give the Registrar one copy;
- [c] Give me another copy;
- [d] Indicate on both copies that the paper is submitted for writing credit.

**ATTENDANCE**

Because of the format of the class, your presence in class is important for everyone's benefit. Unavoidable absences must be discussed with me before the previous class so that we can try to work around them by, for example, scheduling other justices’ positions for discussion.
Except in emergencies, absences without advance warning will be counted against you.

**BIBLIOGRAPHY ON THE JUSTICES**

Bibliographies are always out of date and I have not been systematic in updating this one. So use it to find helpful materials and sample the books and articles listed, but don’t stop with what is included below.

What follows are pieces that are interesting, challenging and/or informative with respect to the Rehnquist and Roberts Court and each of the justices on the Court. Please note that I have included pieces which disagree with each other and with my own views about the justices. The relevant chapters in my book are listed last under the justices discussed. Regardless of which justice you choose, for each session focused on a particular justice, read the relevant chapter of my book and some of the other work about each of the justice both to give you a firmer basis of comparison and as a basis for class discussion.

1. CHIEF JUSTICE JOHN G. ROBERTS JR.

   See the material on the Roberts Court, below, and see:

   Online available at: http://purl.access.gpo.gov/GPO/LPS65331


2. JUSTICE SCALIA
There is a Symposium on Justice Scalia at 12 CARDOZO LAW REVIEW 1583-1867 (1991). There are several pieces in that symposium that I found very perceptive. My views are in GOTTLIEB, MORALITY IMPOSED, esp. Chapters 2 and 4. [Chapter 2 considers Scalia’s fundamental commitments along with the rest of the conservative majority. Chapter 4 compares Justice Scalia with Justices O’Connor and Kennedy.]

In addition I have found the following very interesting and/or helpful:

RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL (Baltimore, MD: Johns Hopkins Univ. Press, 1997)


Antonin Scalia, The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race, 47 WASH. U. L. Q. 147 (1979)

Sean Wilentz, A Chilling Vision of Religion’s Authority in America, NY Times, July 8, 2002, A19

3. JUSTICE STEVENS

My views are in Gottlieb, Morality Imposed, esp. Chapters 6-8, which compare Stevens to the rest of the relatively liberal minority on the Court.

In addition the following are helpful. Of the scholarly literature, I was particularly impressed by the Popkin article:


John Paul Stevens, Judicial Restraint, 22 San Diego L. Rev. 437 (1985)


Robert Judd Sickels, John Paul Stevens and the Constitution (University Park, Pa.: Pennsylvania State University Press, 1988)

Leonard Orland, John Paul Stevens, in 5 The Justices of the United States Supreme Court, 1789-1978, 149 (Leon Friedman and Fred L. Israel, eds., 1980)


4. Justice Kennedy

My views are in Gottlieb, Morality Imposed, esp. Chapters 2 and 4. [Chapter 2 compares the conservative majority, Kennedy included, to the relatively liberal minority. Chapter 4 compares O’Connor, Scalia and Kennedy.].

In addition the following are interesting and/or helpful:

Anthony M. Kennedy, Law and Belief, 34 Trial 23 (July 1998)


Christopher Schroeder, *Kennedy, On the High Road*, Legal Times, August 7, 1989, S10

Hearings before the Committee on the Judiciary, United States Senate, on the Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States, December 14-16, 1987 (100th Cong., 1st Sess., Ser. J-100-67, 1989)

5. JUSTICE THOMAS

My views are in GOTTLIEB, MORALITY IMPOSED, esp. Chapters 2 and 5. [Chapter 2 compares the conservative majority, Thomas included, to the relatively liberal minority. Chapter 5 focuses on Thomas specifically.]

In addition you may find the following helpful:


------, The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, 12 HARVARD J. OF L. & PUBLIC POLICY 63 (1989)

------, Toward a 'Plain Reading' of the Constitution -- the Declaration of Independence in Constitutional Interpretation, 30 HOWARD L. J. 983 (1987)


Christopher E. Smith and Scott Patrick Johnson, The first-term performance of Justice Clarence Thomas, 76 JUDICATURE 172 (1993)

6. JUSTICE GINSBURG

My views are in GOTTLIEB, MORALITY IMPOSED, esp. Chapters 6-8, which compare Ginsburg to the rest of the relatively liberal minority on the Court.

There is a Symposium on Justice Ginsburg at 20 U. HAWAII L. REV. 581-894 (1998)

In addition you may find the following helpful:


http://www.lexis.com/research/retrieve?_m=0997a57ec4cfb3f75a3c479a1e0ec8c6&docnum=27&_fmtstr=FULL&_startdoc=1&_startchk=1&wchp=dGLStkJSl1b&md5=576596c3e6ec406bcc2042c3bf56d114


7. JUSTICE BREYER

My views are in GOTTLIEB, MORALITY IMPOSED, esp. Chapters 6-8, which compare Breyer to the rest of the relatively liberal minority on the Court.

In addition you may find the following helpful:


**STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION**

*New York: Knopf, 2005*

**STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION**

*Cambridge, Mass.: Harvard University Press, 1993*


8. JUSTICE SAMUEL A. ALITO JR


Online available at: http://purl.access.gpo.gov/GPO/LPS68348

There is a great deal of pre-appointment material, consisting of reports by various organizations and I can share some of that with whomever studies Alito. Law reviews run a couple of years behind and some interesting material about Justice Alito since his appointment is beginning to emerge. See below on the Roberts Court and the handout chart of Roberts Court decisions broken down by justice.

9. JUSTICE SONIA SOTOMAYOR

Her pre-confirmation record has been canvassed at length in the confirmation hearings and by organizations like the ACLU, Alliance for Justice, etc. The Library of Congress has put together a website with a great deal of information on the Justice: <http://www.loc.gov/law/find/sotomayor.php>

10. THE ROBERTS COURT

See handout on Roberts Court decisions broken down by justice.

There is a symposium on PRECEDENT & THE ROBERTS COURT in 86 N.C.L. Rev. 1251 et seq (2008) with articles by Frank B. Cross, Lee Epstein, Barry Friedman & Nancy Staudt, Michael J. Gerhardt and Tracey E. George.

There are symposia on the Court in the 2007 and 2008 issues of the Tulsa L.

There is a SYMPOSIUM on THE ROBERTS COURT AND EQUAL PROTECTION: GENDER, RACE, AND CLASS: CLASS in the South Carolina Law Rev. See Andrew M. Siegel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851 (2008).


11. THE REHNQUIST COURT


Sherry, Suzanna, “All the Supreme Court Really Needs to Know It Learned from the Warren Court,” 50 Vanderbilt L. Rev. 459 (1997)


12. ON THE DIFFICULTIES OF ANALYZING THE COURT


13. SUPREME COURT DELIBERATION


Bob Woodward and Scott Armstrong, *The Brethren* (1979)

14. JUDICIAL POWER


15. PREDICTION

Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin, & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Colum. L. Rev. 1150 (2004)

16. HISTORY AND DATA ABOUT THE COURT


OTHER RESOURCES ON THE COURT


The official cite of the U.S. Supreme Court <http://www.supremecourtus.gov/ >

A particularly well-organized site with excellent links < www.supremecourt.org >

Federal Judicial Center includes the History of the Federal Judiciary site < www.fjc.gov >

A searchable Constitution, including amendments never ratified < http://www.law.emory.edu/FEDERAL/usconst.html >

The Supreme Court Assistance Project of the Public Citizen Litigation Group < http://www.citizen.org/litigation/court_assist/ > for assistance to public interest lawyers and < http://www.citizen.org/litigation/court_assist/index.cfm > and press < Table of Supreme Court Cases and Petitions Being Monitored by SCAP > for issues presented in current term

The Georgetown Supreme Court Institute has a similar mission, see < http://www.law.georgetown.edu/sci/ >

Cornell Supreme Court Collection - http://supct.law.cornell.edu/supct/ includes the Supreme Court calendar, argument schedule, cases and decisions since 1990, and information about each of the justices

The Oyez Project at Northwestern University includes United States Supreme Court oral arguments, summaries of cases and other materials < http://www.oyez.org/oyez/frontpage >

Current legal news can be found at:
Findlaw at Cornell <http://legalnews.findlaw.com/legalnews/us/sc/>
Cornell Legal Information Institute Supreme Court materials are at http://www.law.cornell.edu/supct/

The Supreme Court Forecasting Project: <http://wusct.wustl.edu/> has become inactive.

A well organized site with many links is http://www.chesslaw.com/supremecourt.htm


Tom Goldstein, an attorney with an active Supreme Court practice, and partner at Akin, Gump, Strauss, Hauer and Feld, puts out a widely read and quoted blog, www.scotusblog.com