United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 19

Judge Amy Coney Barrett
Nominee to be Associate Justice
of the Supreme Court of the United States

CIVIL PROCEDURE

Fall 2016

Professor Amy Barrett

Office: Room 3165
Phone: [redacted]
Email: [redacted]

Class Location: Room 1315
Class Times: MWF 11:05-12:20

Course Materials

FREER & PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (7TH ED.)

Supplement: FEDERAL RULES OF CIVIL PROCEDURE (2016-17 ED.)

On Reserve:

JOSEPH W. GLANNON, EXAMPLES AND EXPLANATIONS: CIVIL PROCEDURE (7TH ED.).

RICHARD D. FREER, CIVIL PROCEDURE (3RD ED.).

WILLIAM V. DORSANEO, III & ELIZABETH G. THORNBURG, QUESTIONS & ANSWERS: CIVIL PROCEDURE (3RD ED.)

Course Description and Goals

This course deals with the mechanics of litigating in federal court. We will begin by studying the concept of jurisdiction, which is a court's power to hear a lawsuit. We will then learn how to take a case from filing to final judgment. Along the way, we will grapple with policy questions presented by any judicial system, including its justice and efficiency.

Civil Procedure, like your other first-year courses, will give you the opportunity to learn to read cases. It will also, however, expose you to constitutional provisions, statutes, and court rules. Interpreting these texts requires a skill different from that learned through the case method. Because lawyers spend a large portion of their time dealing with statutes and regulations, it is critical that you become comfortable reading them too.

Course Policies

You may not use notes, outlines, or other study materials prepared by another student who has taken or is currently taking this course at Notre Dame or any other law school. You may, however, use outlines to which you have proportionally contributed as part of a study group, and you may use notes from a classmate when absence from class has prevented you from taking them yourself. Violation of this policy may result

in a lowered grade and/or honor code proceedings. There is no restriction on the use of commercial outlines or books.

Grade

Your grade will be based upon an examination at the end of the semester. You will be allowed to use your Federal Rules supplement during the exam. Apart from your access to the supplement, the exam will be "closed book."

I may bump your grade up for extraordinary participation or reduce it for excessive tardiness, absence, unpreparedness, or the misuse of electronic devices during class time.

My Availability

Please feel free to seek my help outside of class. You may stop by my office anytime, either unannounced or by appointment.

PERSONAL JURISDICTION AND NOTICE

III. Notice and an Opportunity to be Heard

The Constitutional Requirement
147-57

The Statutory Requirement
157-66

SUBJECT MATTER JURISDICTION AND JURISDICTIONAL CHALLENGES

I. Introductory Material

181-86

II. Diversity Jurisdiction

Diversity of Citizenship

Individuals: 186-195

Entities: 195-208; *Americold Realty Trust v. Conagra Foods, Inc.*, No. 14-1382 (U.S. Mar. 7, 2016); 214-15

Amount in Controversy
215-18

III. Federal Question Jurisdiction

Introductory Note
219-20

The Well-Pleaded Complaint Rule
220-24; 226-38

Supplemental Jurisdiction: Preview
238-39

Removal Jurisdiction
239-46

IV. RAISING JURISDICTIONAL CHALLENGES

THE ERIE DOCTRINE

PLEADINGS AND JUDGMENTS BASED ON PLEADINGS

DISCOVERY

411

VII. Discovery in the International Context

420-22

VIII. Review Problem

422-23

IX. Timing

423-28

X. Discovery Sanctions

428-44

ADJUDICATION WITH AND WITHOUT A TRIAL OR JURY

I. Summary Judgment

490-514

II. Judgment as a Matter of Law

514-23

III. New Trials

523-32 (omit note 5 on page 531)

THE PRECLUSION DOCTRINES

I. Introduction

621-23

II. Claim Preclusion

JOINDER AND SUPPLEMENTAL JURISDICTION

APPELLATE REVIEW

Constitutional Law

Spring 2016

Professor Amy Barrett

Office: Room 3165
Phone: [redacted]
Email: [redacted]

Class Location: Room 3140
Class Times: M/W/F
11:05-12:20

Casebook

GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW (3d ed. West 2015) and Supplement (2015) (available online).

Course Description and Goals

This course addresses the structure of the government established by the United States Constitution. It considers the allocation of power across the three branches of the federal government (the separation of powers) and the distribution of power between the federal and state governments (federalism). The overarching goal of the course is to help you master the constitutional provisions and doctrines that govern these structural relationships.

Any course in constitutional law, however, raises questions that transcend particular doctrines. We will use our study of the separation of powers and federalism to explore the central question of constitutional law: How should we interpret the Constitution? Should the historical meaning of its provisions control, or should we treat the Constitution as a living document whose meaning evolves over time? Both of these approaches can be challenged on grounds of democratic legitimacy. Which is more vulnerable to the objection?

Our study of constitutional law will also continue the development of the skills you acquired last semester. We will work on your ability to read cases, distill their holdings, and critique their reasoning. Our class discussions will give you the opportunity to practice the skill of articulating legal arguments in a public setting.

Course Policies

You may not use notes, outlines, or other study materials prepared by another student who has taken or is currently taking this course at Notre Dame or any other law school. You may, however, use outlines to which you have proportionally contributed as part of a study group, and you may use notes from a classmate when an absence from class has prevented you from taking them yourself. Violation of this policy may result in a lowered grade and/or honor code proceedings. There is no restriction on the use of commercial outlines or books.

I expect you to be present and prepared. Internet usage during class time is prohibited, and your cell phone must be turned off during class. You may not audio or video record any class session without my permission.

Grade

Your grade will be based upon an exam administered at the end of the semester. The exam will be limited open-book: you may consult your casebook, your notes, an outline that you prepared or to which you proportionately contributed, a pocket copy of the Constitution, and any materials that I distribute. The use of any other sources during the examination—including but not limited to treatises and commercial outlines—is strictly prohibited.

I may bump your grade up for extraordinary participation or reduce it for excessive tardiness, absence, unpreparedness, or the misuse of electronic devices during class time.

My Availability

Please feel free to seek my help outside of class. I do not have restricted office hours. You may come to my office anytime, either unannounced or by appointment.

On Reserve

I have placed the following materials on reserve, some of which you may find of interest.

General Background:

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (4th ed. 2011)

Historical Background:

THE FEDERALIST PAPERS

HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981)

GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1998)

Interpretation and Theory

STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006)

MICHAEL GERHARDT ET AL, CONSTITUTIONAL THEORY: ARGUMENTS AND

PERSPECTIVES (4TH ED. 2013)

ANTONIN SCALIA, A MATTER OF INTERPRETATION (1998)

KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (2001)

READING ASSIGNMENTS

The Constitution:	1307-23
History and Overview:	1-22
Illustrative Case:	23-38

I. Federal Judicial Power

A. Introduction

43-44

B. The Power of Judicial Review

45-55

C. Judicial Review of State Court Judgments

55-60

D. Judicial Supremacy

61-67

E. Political Question Doctrine

67; 72-78

F. The Prohibition on Advisory Opinions

78-82

G. Standing to Sue

82-97

II. Federal Legislative Power

A. Introduction

107-08

B. The Necessary and Proper Clause

109-28

C. The Commerce Power

1. Introduction

128-29

2. Early Cases

129-41

3. The New Deal Court

142-54

4. The "Effects" Test and the Civil Rights Era

155-63

5. The Rehnquist Court

163-86

6. The Roberts Court

187-99

D. The Taxing Power

199-214

E. The Spending Power

215-32

III. Federal Limitations on State Power

IV. Separation of Powers: Federal Executive Power

A. Introduction

361-63

B. Domestic Affairs

363-75

C. Foreign Affairs

375-90; Supp. 1-12

D. The President's Power in Times of War

391-407

E. Executive Privilege and Immunity

407-26

V. Separation of Powers: The Legislative Process

A. Delegation of Legislative Power

431-39

B. Bicameralism and Presentment

439-57

C. Congressional Control over Executive Officials

457-94

D. Recess Appointments

494-98

VI. The Fourteenth Amendment

A. Introduction

507-15

B. The Privileges or Immunities Clause

515-25

C. Incorporation

525-45

D. Substantive Due Process and Economic Liberty

553-69

V. Congress's Enforcement Power

A. The Thirteenth Amendment

881-85

B. The Fourteenth and Fifteenth Amendments

885-919

EVIDENCE
FALL 2015
PROFESSOR AMY BARRETT
T/TH 11:05-12:20
ROOM 1130

Course Materials

GEORGE FISHER, EVIDENCE (3RD ED. 2013) with 2015-16 STATUTORY AND CASE SUPPLEMENT

On Reserve

CLIFFORD FISHMAN, A STUDENT'S GUIDE TO HEARSAY (4TH ED. 2012).

CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE (5TH ED. 2012).

GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY (7TH ED. 2011).

Course Goals

My overarching goal for this course is to help you master and think critically about the body of law that determines the admissibility of evidence. We will accomplish this not only by reading cases but also by arguing mock evidentiary motions based on problems in the book. These problems, which typically require the assignment of advocates on either side, serve my subsidiary goal of enhancing your ability to make legal arguments in a public setting. Some evidentiary objections are raised in pretrial motions, but most are asserted during a deposition or trial. It is important, then, that you gain the skill of making evidentiary arguments orally as well as in writing. It is also important that you know the rules well enough to think on your feet: in practice, you will have a split-second to decide whether to object and another split-second to articulate your objection. Doing this well requires complete command of the evidentiary rules. To encourage you to achieve this level of mastery, which necessarily requires some memorization, you will have access to only your Statutory and Case Supplement during the exam.

Classroom Policies

I discourage, but do not forbid, your use of a tablet or laptop computer during class to take notes. If you choose to use a tablet or laptop, you may not use it for any purpose unrelated to class, including but not limited to checking email, instant messaging, and surfing the internet. Audio or voice recording of class is prohibited unless you receive my permission. Those who violate the policy regarding electronic devices risk both a lowered grade and loss of the privilege of using electronic devices in class. Please turn your cell phones off before class begins.

You are not permitted to possess or use in any way notes or other materials (*e.g.*, outlines) prepared by students at the Notre Dame Law School in a prior rendition of this course. Violation of this rule may result in a lowered grade in addition to honor code proceedings.

Late arrivals disrupt instruction. Timeliness, moreover, is important to your formation as professionals. If you cannot be in your seat by the time class begins and you do not have advance permission from me to be late, you should skip class and get the notes from a friend. If you are detained by an unanticipated circumstance and choose to attend class anyway, please see me after class to explain. Otherwise, I will attribute your tardiness to poor time management. I reserve the right to lower your grade without notice for any unexcused tardiness.

Grade

Your grade will be based upon a three-hour examination administered at the conclusion of the semester. The Statutory and Case Supplement is the only source that you may consult during the exam.

I may bump your grade a step up or down (*e.g.*, from a B+ to an A- or from a B+ to a B) based on your class participation. Thoughtful and regular contributions to class discussion may raise your grade; tardiness, absence, lack of preparedness, misuse of electronic devices, or disrupting class may lower it.

My Availability

Please feel free to seek my help outside of class. You may stop by my office unannounced, or you may schedule an appointment.

RELEVANCE AND PREJUDICE

I. Introduction

Fisher 1-8

II. Relevance

Fisher 22-34

III. Conditional Relevance

Fisher 35-42

IV. Unfair Prejudice

Fisher 42-56; 82-94

V. Categorical Rules of Exclusion

A. Introduction

Fisher 95-99

B. Subsequent Remedial Measures

Fisher 99-100; 110-13

C. Compromise Offers and Payment of Medical Expenses

Fisher 113-26

D. Pleas in Criminal Cases

Fisher 137-38

VI. Character Evidence

A. The Propensity Ban

Fisher 145-61

B. Non-Propensity Uses

Fisher 165-71; 189-95

C. The Huddleston Standard

Fisher 201-07

D. Proof of the Defendant's and Victim's Character

Fisher 234-52 [Omit Problem 3.15]

E. Habit

Fisher 252-56

VII. Character for Truthfulness

A. Introduction

Fisher 257-61

B. Impeachment by Opinion, Reputation, and Cross-Examination about Past Lies

Fisher 269-76

C. Impeachment With Past Convictions

Fisher 278-81; 284-303

D. Rehabilitation

Fisher 307-11

E. Extrinsic Evidence

Fisher 311-17

HEARSAY

I. Defining Hearsay

A. The Basic Rule

Fisher 376-86

B. Assertions

Fisher 388-406

II. Hearsay Exceptions

A. Introduction

Fisher 406-08

B. Statements of Party Opponents

Fisher 408-30

C. Past Statements of Witnesses and Past Testimony

(1) Introduction

Fisher 430-32

(2) Inconsistent Statements Offered to Impeach

Fisher 435-39

(3) Inconsistent Statements Offered Substantively

Fisher 452-54

(4) Past Consistent Statements

Fisher 454-63

(5) Statements of Identification

Fisher 469-74

D. Hearsay Exceptions under Rule 804: "Declarant Unavailable"

(1) Past Testimony

Fisher 474-88

(2) Statements Against Interest

Fisher 488-97

(3) Dying Declarations

Fisher 497-503

(4) Forfeiture by Wrongdoing

Fisher 505-09

E. Hearsay Exceptions Under Rule 803: "Availability Immaterial"

(1) Introduction

Fisher 510-11

(2) Present Sense Impressions and Excited Utterances

Fisher 512-15

(3) Statements of Then-Existing Condition

Fisher 515-22

(4) Statements for Medical Diagnosis

Fisher 531-32; 541-42

(5) Refreshing Memory and Recorded Recollections

Fisher 542-48

(6) Business Records

Fisher 548-62

(7) Public Records and Reports

Fisher 569-74

III. The Confrontation Clause

Fisher 594-608; 617-18; 627-46

LAY OPINIONS AND EXPERT TESTIMONY

I. Lay Opinions

Fisher 735-39; 747-48

II. Expert Opinions

A. Who is an Expert?

Fisher 748-52; 756

B. Topics of Expert Testimony

Fisher 757-66

C. Bases of Expert Testimony

Fisher 783-86; 791-92 [Omit Problem 9.14]

D. Assessing the Reliability of Scientific Testimony

Fisher 793-805

AUTHENTICATION AND "BEST EVIDENCE"

I. Authentication and Identification

A. Introduction

Fisher 894-97

B. Documents

Fisher 897-902

C. Phone Calls

Fisher 904-07

D. Photographs

Fisher 908-13

II. The "Best Evidence" Rule

Fisher 913-18; 925-28

PRIVILEGE

I. General Principles

A. Rule 501's Origins and Applications

Fisher 930-42

B. Witness's Privileges vs. Defendant's Need for Evidence

Fisher 959-73

II. Attorney-Client Privilege

A. Introduction

Fisher 974-75

B. Scope of the Privilege

Fisher 975-77

(1) The Nature of Legal Services

Fisher 977-83

(2) Maintaining Confidentiality

Fisher 983-85; 992-97

(3) Defining Communications: Source of Fees and Client Identity

Fisher 997-1002

C. The Crime-Fraud Exception

Fisher 1010-17

III. Familial Privileges

A. The Spousal Testimonial Privilege

Fisher 1043-58

B. The Marital Confidences Privilege

Fisher 1059-66

CONCLUSION

Fisher 1077-80

FEDERAL COURTS
SPRING 2017
PROFESSOR AMY BARRETT

TU/TH 9:40-10:55
ROOM 3140

Course Materials

FALLON, MANNING, MELTZER & SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7th ed. 2015) and the 2016 Supplement.

Course Description and Goals

This course studies the role of federal courts in the constitutional system of the United States. It considers federal-court power in relation to the power of Congress and the President, as well as in relation to the States. We will focus primarily on constitutional law, but we will also analyze many of the federal statutes that define federal jurisdiction.

The main goals of this course are to help you (1) gain a sophisticated understanding of the law governing the federal courts and (2) equip you to analyze issues related to this body of law. Along the way, we will also work to develop your ability to reason from cases, to interpret statutory and constitutional text, and to formulate legal arguments. By semester's end, you should have both mastered the substantive law and improved your analytical skills.

Classroom Policies

I discourage, but do not forbid, your use of a computer during class to take notes. If you do choose to use a computer, you may not use it (or any other electronic device) for any purpose unrelated to class, including but not limited to checking email, instant messaging, and surfing the internet. Audio or voice recording of class is prohibited unless you receive my permission.

You are not permitted to possess or use in any way notes or other materials (*e.g.*, outlines) prepared by students at the Notre Dame Law School in a prior rendition of this course. Violation of this rule may result in a lowered grade (up to an including failure of the course) in addition to honor code proceedings.

Late arrivals disrupt instruction. Timeliness, moreover, is important to your formation as professionals. If you cannot be in your seat by the time class begins and you do not have advance permission from me to be late, you should skip class and get the notes from a friend. If you are detained by an unanticipated circumstance and choose to attend class

anyway, please see me after class to explain. Unexcused tardiness is grounds for lowering your grade.

Grade

Your grade will be based upon a three-hour, limited open-book examination administered at the conclusion of the semester. During the exam, you may consult your casebook, class handouts, your class notes, and an outline that you prepared or to which you substantially contributed. You may not consult any other materials during the exam. Violation of this rule may result in a lowered grade (up to an including failure of the course) in addition to honor code proceedings.

We will use a panel system in this class. Each time we meet, a designated group of students will be "on call" for our class discussion. I will circulate the schedule a week or two into the semester. If you cannot be present on a day that you are on call, switch days with a classmate and inform me in advance of class about the schedule change. Of course, you should be prepared and willing to participate voluntarily in class discussions even if you are not on call. Class is always livelier and more interesting when many students participate.

I may bump your grade a step up or down (*e.g.*, from a B+ to an A- or from a B+ to a B) based on your class participation. Thoughtful and regular contributions to class discussion may raise your grade. Tardiness, lack of preparedness, repeated absence, or misuse of electronic devices may lower it.

My Availability

Please feel free to seek my help outside of class. You may stop by my office unannounced, or you may schedule an appointment.

Federal Courts
Professor Amy Barrett
Reading Assignments

You will find that pages 1-48 offer helpful background on the federal judicial system, but we will not cover this material in class.

Note that you need not consult the Supplement unless the syllabus expressly assigns it.

Class 1: Judicial Review

59-67; 70-81

Class 2: Standing

103-15; 119-20 (introductory note only); 121-25

Class 3: Taxpayer and Third-Party Standing

127-30; 161-66 (eliminate note 4)

Class 4: Mootness and Ripeness

195-208; 212-21; 226-27 (eliminate note (e))

Class 5: Congressional Regulation of Federal Jurisdiction

295-312 (eliminate note 5); 314-22 (eliminate note 3); 323-25 (see also Supp. 16-17 for update)

Class 6: Legislative Courts & Magistrate Judges

361-81 (through note 2); 390-94

Class 7: Precluding the Jurisdiction of State Courts

412-20; 427-35 (through note 4).

Class 8: The Obligation of State Courts to Enforce Federal Law

437-59 (through note 7)

Class 9: The Jurisdiction of the Supreme Court

461-64; 477-88

Class 10: The Relationship between State and Federal Law: Substance

488-513 (see also Supp. 21-23 for update)

Class 11: The Relationship between State and Federal Law: Procedure

524-39 (through note 5)

Class 12: The *Erie* Doctrine

575-78; 580-80 (read only note 2); 584 (start with *Erie*)-92; 610-16

Class 13: Federal Common Law

635-36 (Introduction); 643-56; 666-77

Class 14: Federal Common Law, Cont.

686-712

Class 15: Enforcing Primary Obligations: Statutes

723-44

Class 16: Remedies for Constitutional Violations

762-77

Class 17: Federal Question Jurisdiction: The Constitutional Grant

779-94

Class 18: Federal Question Jurisdiction: The Statutory Grant

806-15 (eliminate note 5); 837-43

Class 19: Challenging Federal Official Action

877-904

Class 20: Challenging State Official Action: The Eleventh Amendment

905-22

Class 21: Challenging State Official Action: Officer Suits

922-32

Class 22: Abrogating State Sovereign Immunity

939-63 (through note 5)

Class 23: 42 U.S.C. § 1983

986-1003; 1009-11

Class 24: Official Immunity

1030-55

Class 25: Federal Habeas Corpus

1193-98 (through note 6); 1265-1284

Class 26: Retroactivity in Habeas Corpus

1292-93; 1295-1315 (see also Supp. 48-49 for update); 1317-19

Class 27: Procedural Default

1326-44 (through Section B)

Collateral Attack on Federal Convictions

1356-63 (see also Supp. 66-68 for update)

Class 28: Exam Review

MODERN CONSTITUTIONAL THEORY

Amy Coney Barrett
Spring 2020
Monday 3:30-5:10
Room 2172

Course Description and Goals

This seminar is a scholarly exploration of the modern constitutional theory. The course is not designed to be a comprehensive survey of the vast literature regarding our Constitution and how it should be interpreted. Rather, the course is designed to introduce you to, and encourage you to think critically about, several of the major theories and themes that inform the modern debate.

The course has two goals that transcend its subject matter. Because the class is run as a weekly conversation about the assigned reading, the course is an opportunity for you to refine your ability to speak articulately about legal topics. Because you will produce a substantial research paper by the semester's end, the course is also an opportunity for you to develop as a writer. Both speaking and writing are critical to the practice of law. The small size of the seminar makes it possible for me to work closely with each of you as you strive to master these skills.

Course Materials

There is no casebook for this class; you may retrieve all the assigned material from HeinOnline, Westlaw, and Sakai. You might find it useful to have a pocket Constitution to consult during class discussions.

I strongly recommend that you purchase a grammar reference book if you do not already own one. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE (available at the library's reserve desk) is the most comprehensive, and it would be a good reference for you to have on your office shelf when you begin practice. Even a shorter guide, however, like WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE or MIGNON FOGARTY, GRAMMAR GIRL'S QUICK AND DIRTY TIPS FOR BETTER WRITING would be useful to you. Grammatical guides are not only for those who struggle—the best and most experienced writers routinely consult them.

Paper

You have the option of taking this course for either 2 or 3 credits. Those who take the course for 2 credits must produce a 6500-word paper; those who take the course for 3 credits must produce a 10,000-word paper. The paper can address any topic in the field of constitutional theory (and that includes theories of constitutional interpretation). The crucial thing is that the paper must do more than summarize what courts and/or commentators think about an issue; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the writing process so that I can assist you to that end. You will also have an opportunity to solicit feedback from your classmates about your paper topic. By 11:59 p.m. on February 18th, you must upload a one-paragraph description of your tentative paper topic in pdf format to the

course website on Sakai. You will read one another's proposals, and we will devote the two classes before Spring Break to exchanging ideas about them.

You must submit the final paper to me via email in pdf format by 5 p.m. on April 27th, which is the last day of class. You must also deliver a hard copy of the paper to my assistant, Kirsten Niederer, by noon the next day. Citations in the paper should conform to THE BLUEBOOK, and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you express them. Spelling and grammar count.

Participation

Participation is the other component of your grade. The class is structured as a discussion of the assigned reading for the week. I will lead our discussion of the first six topics. Discussion of the remaining topics will be led by teams of three students. Your task in leading class discussion is simply starting and sustaining a thoughtful conversation about the assigned reading; there is no presentation required. I will invite you to sign up for the student-led classes in a few weeks.

The success of the seminar is dependent on your willingness to immerse yourself in the material and engage your classmates in thoughtful discussions about it. Because of that, I will take the quality of your participation into account when determining your final grade. I expect each of you to come to class with at least one question or thought to share about the reading for the day; your reactions to the material will fuel our conversation. Unexcused absences, lack of preparedness, and tardiness are grounds for lowering your grade.

Using an iPad or another e-reader is fine if you prefer to read the weekly assignments in electronic format rather than hard copy. But because this class is run as a conversation rather than a lecture, I prefer that you not use laptops. There is no need to take extensive notes, and the screen stands as a barrier between you and your classmates. In addition, constant typing during a conversation is discourteous—because there is no need to take extensive notes, continual typing suggests that you are doing something other than listening to what others are saying.

Audio or video recording of class is not permitted.

Contact Information

[Redacted] I look forward to getting to know each of you over the course of the semester.

I. The United States Constitution (ACB)

We have all read the Constitution before, but we typically focus on specific provisions of it. For this class, read it from beginning to end. Think about the choices the Framers made (with respect to both the original Constitution and its Amendments) and how they could have done things differently. To help you think about the latter point, compare our Constitution with two others.

U.S. CONSTITUTION

BRITISH CONSTITUTION
https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution

CONSTITUTION OF ECUADOR (Skimming is fine—this one is long.)
http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html

II. Judicial Review (ACB)

No one seriously argues that *Marbury v. Madison* should be overruled. Nonetheless, scholars continue to debate the justification for judicial review in a democratic society. Should we be uncomfortable with its exercise?

Marbury v. Madison, 5 U.S. 137, 176-80 (1803).

Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals*, 52 ARK. L. REV. 533-549, 556, 561 (1999).

III. Judicial Supremacy (ACB)

In *Cooper v. Aaron*, the Supreme Court asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution." Is that assertion correct? Must state governments and other branches of the federal government acquiesce in the Supreme Court's interpretations of the Constitution? Or may they exercise independent judgment about what the Constitution means?

Cooper v. Aaron, 358 U.S. 1 (1958).

Larry Alexander & Frederick Schauer *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV.1359 (1997).

IV. Is the Founders' Law our Law? (ACB)

Studying the Constitution requires us to say what we mean when we refer to "the Constitution." So, what constitutes "the Constitution?" Is it only the document itself? Or does "the Constitution" also encompass judicial interpretations of it? Interpretations by the

political branches? Consider how the content of "the Constitution" has changed since the original document was ratified in 1788. The article below advances a theory of constitutional change—do you buy it?

Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. PUB. POL. 817, 844 (start at Part B)-874 (2015).

V. Amending the Constitution (ACB)

Article V of the Constitution is the formal mechanism for constitutional change. But the Constitution is notoriously difficult to amend. Consider the 27 amendments that succeeded, as well as some of the proposed amendments that have failed. Is the difficulty of the amendment process a good or bad thing? Does Article V even matter?

U.S. CONST. ART. V.

U.S. CONST. AM. 1-27
https://www.senate.gov/reference/measures_proposed_to_amend_constitution.htm

https://theweek.com/articles/446233/6-constitutional-amendments-that-just-missed-cut

David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

VI. Originalist Theories (ACB)

Originalism is an old theory, but new iterations of it emerged toward the start of the twenty-first century. You may be surprised to learn that originalism has become a big tent: originalists agree on some basic principles, but they disagree on many others, including the justification for originalism itself. The below article is an excellent summary of the state of the debate.

As you read the article, consider the following questions. Some originalists maintain that originalism is the only interpretive method consistent with democratic government—is that right? Is originalism too inflexible? Is it possible to honestly identify the original meaning of the Constitution's provisions? Is originalism consistent with the way courts actually approach constitutional interpretation? Which version of originalism—if any—do you find most persuasive?

Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

VII. Discussion of Paper Topics

VIII. Discussion of Paper Topics

IX. **The Living Constitution** (Student Team)

Evolutionary theories reject the notion that the original intent or meaning is controlling; they also treat the semantic meaning of constitutional text as an interpretive starting point rather than the last word. Do evolutionary theories better advance the Constitution's purpose? Are they consistent with our constitutional structure? Do they reflect our actual constitutional practice over time?

Justice William J. Brennan, Jr., Speech at Georgetown University (Oct. 12, 1985)
https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html

GOODWIN LIU, PAMELA S. KARLAN, CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 97-107 (2009) (on Sakai).

X. **Popular Constitutionalism** (Student Team)

Is constitutional law responsive to public opinion? Should it be?

BARRY FRIEDMAN	THE WILL OF THE PEOPLE, 369-85 (2009) (On Sakai).
LARRY KRAMER	THE PEOPLE THEMSELVES 7-8, 105-14, 227-47 (2004) (On Sakai).
Robert Post & Reva Siegel	Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 382-91 (2007).

XI. **Does Originalism Constrain Judges?** (Student Team)

In the 1980s, originalist scholars emphasized originalism's ability to constrain judges. It was sold, at least in part, as a theory of judicial restraint. Yet contemporary originalists are more ambivalent about the role of constraint in originalist theory. Should constraint be an important feature of originalism—or, for that matter, any other theory? Is originalism better than other theories at constraining judges?

William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017).

XII. **Precedent in Constitutional Adjudication** (Student Team)

The question of when the Supreme Court should overrule its precedent is a controversial one, as evidenced by the fact that it routinely arises in the confirmation hearings of nominees to the Supreme Court. When should the Supreme Court overrule precedent it believes erroneous?

Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994).

Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PENN. J.

CON. L. 1, 13-42 (2016).

Caleb Nelson *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1-8, 52-73, 78-84 (2001).

XIII. Judicial Independence (Student Team)

Article III's promise of life tenure strives to safeguard judicial independence. Can it deliver, or is more required? What is the value of judicial independence? Can federal judges ever truly be independent?

Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV 465 (2018).

XIV. Conclusion (ACB)

In today's class, we will reflect on the themes we have discussed over the course of the semester. Many of these themes run through the below case, which you should read for today.

NLRB v. Noel Canning, 573 U.S. 513 (2014).

How would you have resolved *Noel Canning*? How, if at all, have your views about constitutional interpretation changed since the first day of class?

MODERN CONSTITUTIONAL THEORY

Amy Coney Barrett
Spring 2019
Monday 3:30-5:10
Room 2172

Course Description and Goals

This seminar is a scholarly exploration of the modern constitutional theory. The course is not designed to be a comprehensive survey of the vast literature regarding our Constitution and how it should be interpreted. Rather, the course is designed to introduce you to, and encourage you to think critically about, several of the major theories and themes that inform the modern debate.

The course has two goals that transcend its subject matter. Because the class is run as a weekly conversation about the assigned reading, the course is an opportunity for you to refine your ability to speak articulately about legal topics. Because you will produce a substantial research paper by the semester's end, the course is also an opportunity for you to develop as a writer. Both speaking and writing are critical to the practice of law. The small size of the seminar makes it possible for me to work closely with each of you as you strive to master these skills.

Course Materials

There is no casebook for this class; you may retrieve all the assigned material from HeinOnline, Westlaw, and Sakai. You might find it useful to have a pocket Constitution to consult during class discussions.

I strongly recommend that you purchase a grammar reference book if you do not already own one. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE (available at the library's reserve desk) is the most comprehensive, and it would be a good reference for you to have on your office shelf when you begin practice. Even a shorter guide, however, like WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE or MIGNON FOGARTY, GRAMMAR GIRL'S QUICK AND DIRTY TIPS FOR BETTER WRITING would be useful to you. Grammatical guides are not only for those who struggle—the best and most experienced writers routinely consult them.

Paper

You have the option of taking this course for either 2 or 3 credits. Those who take the course for 2 credits must produce a 6500-word paper; those who take the course for 3 credits must produce a 10,000-word paper. The paper can address any topic in the field of constitutional theory (and that includes theories of constitutional interpretation). The crucial thing is that the paper must do more than summarize what courts and/or commentators think about an issue; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the writing process so that I can assist you to that end. You will also have an opportunity to solicit feedback from your classmates about your paper topic. By 11:59 p.m. on February 18th, you must upload a one-paragraph description of your tentative paper topic in pdf format to the

course website on Sakai. You will read one another's proposals, and we will devote the two classes before Spring Break to exchanging ideas about them. *(Note: I will need to reschedule the class scheduled on February 25th; we will talk about what times work well for you to do a makeup.)*

You must submit the final paper to me via email in pdf format by 5 p.m. on April 29th, which is the last day of class. You must also deliver a hard copy of the paper to my assistant, Leslie Berg, by noon the next day. Citations in the paper should conform to THE BLUEBOOK, and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you express them. Spelling and grammar count.

Participation

Participation is the other component of your grade. The class is structured as a discussion of the assigned reading for the week. I will lead our discussion of the first six topics. Discussion of the remaining topics will be led by teams of two or three students. Your task in leading class discussion is simply starting and sustaining a thoughtful conversation about the assigned reading; there is no presentation required. I will invite you to sign up for the student-led classes in a few weeks.

The success of the seminar is dependent on your willingness to immerse yourself in the material and engage your classmates in thoughtful discussions about it. Because of that, I will take the quality of your participation into account when determining your final grade. Unexcused absences, lack of preparedness, and tardiness are grounds for lowering your grade.

Because this class is run as a conversation rather than a lecture, I prefer that you not use laptops. There is no need to take extensive notes, and the screen stands as a barrier between you and your classmates. Using an iPad or another e-reader is fine, however, if you prefer to read the weekly assignments in electronic format rather than hard copy. Audio or video recording of class is not permitted.

Contact Information

[redacted]

I look forward to getting to know each of you over the course of the semester.

I. The United States Constitution

We have all read the Constitution before, but we typically focus on specific provisions of it. For this class, read it from beginning to end. Think about the choices the Framers made (with respect to both the original Constitution and its Amendments) and how they could have done things differently. To help you think about the latter point, compare our Constitution with two others.

U.S. CONSTITUTION

BRITISH CONSTITUTION
https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution

CONSTITUTION OF ECUADOR (Skimming is fine—this one is long.)
http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html

II. Judicial Review

No one seriously argues that *Marbury v. Madison* should be overruled. Nonetheless, scholars continue to debate the justification for judicial review in a democratic society. Should we be uncomfortable with its exercise?

Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals*, 52 ARK. L. REV. 533-549, 556, 561 (1999).

Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813-15, 820-35, 837-38 (2003).

III. Judicial Supremacy

In *Cooper v. Aaron*, 138 U.S. 1 (1958), the Supreme Court asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution." Is that assertion correct? Must state governments and other branches of the federal government acquiesce in the Supreme Court's interpretations of the Constitution? Or may they exercise independent judgment about what the Constitution means?

Larry Alexander & Frederick Schauer *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV.1359 (1997).

Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 85-98 (1998).

Keith Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 786-808 (2002).

IV. Originalism

Originalism is an old theory, but new iterations of it emerged toward the start of the twenty-first century. Are some originalist theories right to suggest that originalism is the only interpretive method consistent with democratic government? Is it too inflexible? Is it possible to honestly identify the original meaning of the Constitution's provisions? Is originalism consistent with the way courts actually approach constitutional interpretation?

Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

Stephen Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. PUB. POL. 817, 844 (start at Part B)-874 (2015)

William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2017)

William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2349 (2015).

V. Living Constitutionalism

Evolutionary theories reject the notion that the original intent or meaning is controlling; they also treat the semantic meaning of constitutional text as an interpretive starting point rather than the last word. Do evolutionary theories better advance the Constitution's purpose? Are they consistent with our constitutional structure? Do they reflect our actual constitutional practice over time?

Justice William J. Brennan, Jr., Speech at Georgetown University (Oct. 12, 1985)
https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html

David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-906, 925-34 (1996).

GOODWIN LIU, PAMELA S. KARLAN, CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 97-107 (2009) (on Sakai).

Ernest A. Young, *Dying Constitutionalism and the Fourteenth Amendment*, MARQUETTE L. REV. (forthcoming) (available on Sakai).

VI. Amending the Constitution

The United States Constitution is notoriously difficult to amend. After refreshing your memory on the amendment process and the 27 amendments that succeeded, consider some of the proposed amendments that have failed. Is the difficulty of the amendment process a good or bad thing? Does Article V even matter?

U.S. CONST. ART. V.

U.S. CONST. AM. 1-27
https://www.senate.gov/reference/measures_proposed_to_amend_constitution.htm

https://theweek.com/articles/446233/6-constitutional-amendments-that-just-missed-cut

David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

VII. Discussion of Paper Topics

VIII. Discussion of Paper Topics

IX. Precedent in Constitutional Adjudication

The question of when the Supreme Court should overrule its precedent is a controversial one, as evidenced by the fact that it routinely arises in the confirmation hearings of nominees to the Supreme Court. When should the Supreme Court overrule precedent it believes erroneous?

Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739-55 (1988).

Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994).

Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PENN. J. CON. L. 1, 13-42 (2016).

Caleb Nelson *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1-8, 52-73, 78-84 (2001).

X. Constitutional Gloss

Curtis Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017).

Noel Canning v. NLRB, 134 S. Ct. 2550 (2014).

XI. Popular Constitutionalism

Is constitutional law responsive to public opinion? Should it be?

BARRY FRIEDMAN THE WILL OF THE PEOPLE, 369-85 (2009) (On Sakai).

LARRY KRAMER THE PEOPLE THEMSELVES 7-8, 105-14, 227-47 (2004) (On Sakai).

Robert Post & Reva Siegel — Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 382-91 (2007).

MARK V. TUSHNET — TAKING THE CONSTITUTION AWAY FROM THE COURTS 134-35, 143-52 (1999) (On Sakai).

XII. Judicial Minimalism

The argument that the Supreme Court should be minimalist in its decision-making has gained traction in commentary about the Court. Is judicial minimalism a desirable goal?

Cass Sunstein *Burkean Minimalism*, 105 MICH. L. REV. 355, 356-66, 388-94 (2006).

Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash* 42 HARV. C.R.-C.L. L. REV. 373 (2007).

XIII. Judicial Independence

Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV 465 (2018).

XIV. Conclusion

In today's class, we will reflect on the themes we have discussed over the course of the semester.

Modern Constitutional Theory
Professor Amy Barrett
Spring 2013

This seminar is a scholarly exploration of the modern constitutional theory. The course is not designed to be a comprehensive survey of the vast literature regarding our Constitution and how it should be interpreted. Rather, the course is designed to introduce you to, and encourage you to think critically about, several of the major theories and themes that inform the modern debate.

The primary text for the course is JOHN H. GARVEY, T. ALEXANDER ALEINIKOFF, AND DANIEL FARBER, MODERN CONSTITUTIONAL THEORY: A READER (FIFTH ED.). In addition to this text, we will read law review articles that you may retrieve from Hein Online and cases that you may retrieve from Westlaw or Lexis. Each class will consist of a discussion of the assigned reading for the week. I will lead our discussion for the first six classes. For the next seven classes, our discussion will be student led. (I will lead the last class.) You will divide into teams, and each team will select a class to lead. Your primary job in leading class discussion is starting and sustaining a thoughtful conversation about the assigned reading. I will pass around a sign-up sheet for the student-led classes in a few weeks.

Your grade will be based on class participation (50%) and a paper (50%). First, class participation: Your performance during the class that your team leads is an important part of your participation grade. But I am also looking for frequent, thoughtful contributions to the conversation throughout the semester. The success of the seminar is dependent on your willingness to immerse yourself in the material and engage your colleagues in thoughtful discussions about it. Unexcused absences or excessive tardiness will have a negative effect on this portion of your grade. Because the class is run as a conversation, the use of laptops (or other electronic devices) is not permitted.

Now, the paper: By our last class (April 24th), you must turn in a research paper that is between 20 and 25 pages long. Citations in the paper should be according to THE BLUEBOOK, and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you communicate them. You may write about any topic that interests you in the field of constitutional theory. The crucial thing is that the paper must do more than summarize what courts and/or commentators think about a particular topic; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the drafting process so that I can assist you to that end.

I don't have restricted office hours; you may come to my office anytime. I am in Room 3165. You can also reach me by email [redacted] or phone [redacted]. I encourage you to seek me out. One advantage of a seminar is the opportunity to get to know students well, and I look forward to getting to know each of you over the course of the semester.

I. Theories of the Constitution

As you read the material for this class, consider the following questions: Should the Constitution be understood primarily as a compromise among competing regional and economic interests of the founding generation? Or does the Constitution have an overarching purpose? If it has an overarching purpose, what is it?

Introductory Reflection

Reader 1-4

Process Theory

Reader 18-33 John Hart Ely, *Policing the Process of Representation: The Court as Referee*

Reader 33-37 Laurence H. Tribe, *The Puzzling Persistence of Process-Based Theories*

Morality-Based Approaches

Reader 37-43 Ronald H. Dworkin, *Introduction: The Moral Reading and the Majoritarian Premise*

Reader 43-51 Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*

Reconceptualizing Democracy

Reader 51-62 BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS

Reader 72-75 Jed Rubenfeld, *Of Constitutional Self-Government*

II. Textualism

All theories of constitutional interpretation agree that interpretation should begin with the Constitution's words. But to what degree can words constrain constitutional interpretations?

Reader 125-32 Frederick Schauer, *Easy Cases*

Reader 142-49 Sanford Levinson, *Law as Literature*

Reader 149-57 Lawrence Lessig, *Fidelity and Constraint*

III. Originalism

Below are classic defenses and critiques of originalism. Is originalism a coherent or desirable theory? Is it the interpretive approach most consistent with our constitutional structure, as its adherents claim? Is it supported by our actual practice over time?

Antonin Scalia	*Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-65 (1989).
Reader 100-13	Paul Brest, *The Misconceived Quest for the Original Understanding*
Reader 113-25	Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*

IV. Evolutionary Theories

Evolutionary theories reject the notion that the original intent or meaning is controlling; they also treat the semantic meaning of constitutional text as an interpretive starting point rather than the last word. Do evolutionary theories better advance the Constitution's purpose? Are they consistent with our constitutional structure? Do they reflect our actual constitutional practice over time?

Reader 157-70	Thomas Grey, *Do We Have an Unwritten Constitution?*
Reader 170-81	David Strauss, *Common Law, Common Ground, and Jefferson's Principle*

V. The New Originalism and Constitutional Construction

"New originalism" emerged toward the start of the twenty-first century. In contrast to their predecessors, new originalists treat the Constitution's original public meaning rather than the intent of its framers and ratifiers as controlling. Perhaps the greatest difference between old and new originalists, however, is the latter's focus on the way that the Constitution's open-ended provisions invite the construction of constitutional meaning, as opposed to interpretation of it. As you read these materials, consider whether the process of construction renders the new originalism functionally indistinguishable from evolutionary theories. In addition, taking the new originalist argument for construction on its own terms, which branch(es) should engage in construction and what principles should guide it?

Keith Whittington	*The New Originalism*, 2 Geo. J. L. & Pub. Pol'y 599, 599-613 (2004).

Lawrence B. Solum	*The Interpretation-Construction Distinction*, 27 CON. COMM. 95, 100-08 (2010).
Keith Whittington	*Constructing a New American Constitution*, 27 CON. COMM. 119, 120-29 (2010).
Jack Balkin	*Framework Originalism and the Living Constitution*, 103 Northwestern L. Rev. 549, 566-92 (2009).
John O. McGinnis & Michael Rappaport	*Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 10 NORTHWESTERN L. REV. 751, 772-80 (2009).
John O. McGinnis & Michael Rappaport	*Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378-81 (2007).

VI. Judicial Review

No one seriously argues that *Marbury v. Madison* should be overruled. Nonetheless, scholars continue to debate the justification for judicial review in a democratic society. Should we be uncomfortable with its exercise?

Reader 197-205	Jeremy Waldron, *Banking Constitutional Rights: Who Controls Withdrawals*
Reader 209-14	Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries*
Reader 214-19	Charles Black, Jr., *The Building Work of Judicial Review*
Reader 219-25	Alexander Bickel, *Establishment and General Justification of Judicial Review*

VII. Judicial Supremacy

In *Cooper v. Aaron*, 138 U.S. 1 (1958), the Supreme Court asserted that "the federal judiciary is supreme in the exposition of the law of the Constitution." Is that assertion correct? Must state governments and other branches of the federal government acquiesce in the Supreme Court's interpretations of the Constitution? Or may they exercise independent judgment about what the Constitution means?

Larry Alexander & Frederick Schauer	*On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

Neal Devins & Louis Fisher — *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 85-98 (1998).

Keith Whittington — *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 786-808 (2002).

VIII. Judicial Minimalism

The argument that the Supreme Court should be minimalist in its decision-making has gained traction in commentary about the Court. Is judicial minimalism a desirable goal?

Cass Sunstein — *Burkean Minimalism*, 105 MICH. L. REV. 355, 356-66, 388-94 (2006).

Neil Siegel — *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2003-17 (2005).

Robert Post & Reva Siegel — Roe *Rage: Democratic Constitutionalism and Backlash* 42 HARV. C.R.-C.L. L. REV. 373, 401-06, 425-27 (2007).

IX. Precedent in Constitutional Adjudication

The question of when the Supreme Court should overrule its precedent is a controversial one, as evidenced by the fact that it routinely arises in the confirmation hearings of nominees to the Supreme Court. When should the Supreme Court overrule precedent it believes erroneous?

Gary Lawson — *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23 (1994).

Henry Monaghan — *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739-55 (1988).

Caleb Nelson — *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1-8, 52-73, 78-84 (2001).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854-69 (1992) (plurality opinion); *id.* at 953-66 (Rehnquist, C.J., dissenting).

X. Popular Constitutionalism

Is constitutional law responsive to public opinion? Should it be?

Amy Coney Barrett	*Introduction: Stare Decisis and Nonjudicial Actors*, 83 NOTRE DAME L. REV. 1147, 1169-72 (2008).
BARRY FRIEDMAN	THE WILL OF THE PEOPLE, 369-85 (2009).
LARRY KRAMER	THE PEOPLE THEMSELVES 7-8, 105-14, 227-47 (2004).
Robert Post & Reva Siegel	Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 382-91 (2007).
MARK V. TUSHNET	TAKING THE CONSTITUTION AWAY FROM THE COURTS 134-35, 143-52 (1999).

XI. Separation of Powers

In the next three classes, we will bring the broader principles we have discussed to bear on specific topics of constitutional law. The first is separation of powers: Does a formalist or functionalist approach yield better answers to conflicts about separation of powers? How would these approaches resolve the questions surrounding, for example, executive privileges and immunities?

Reader 356-64	Gary Lawson, *The Rise and Rise of the Administrative State*
Reader 364-78	Martin Flaherty, *The Most Dangerous Branch*
Reader 407-14	Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*
Reader 414-19	Akhil Reed Amar & Neil Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*
Clinton v. Jones	520 U.S. 681 (1997).

XII. Affirmative Action

The Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Is affirmative action consistent with the Equal Protection Clause?

Reader 608-17	Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*
Reader 617-22	Akhil Reed Amar & Neil Kumar Katyal, *Bakke's* Fate

Reader 622-32	Girardeau Spann, *The Dark Side of* Grutter
STEPHEN BREYER	ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3-16, 75-84 (2005).
Grutter v. Bollinger	539 U.S. 306 (2003).

XIII. Abortion

One of the most controversial issues in modern constitutional law is the question whether the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee women the freedom to terminate a pregnancy. Has the Court correctly concluded that this freedom is one protected by the Constitution's guarantee of due process?

Reader 649-50, 683-85	Introduction
Reader 702-11	John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*
Reader 690-97	Judith Jarvis Thompson, *A Defense of Abortion*
Jack M. Balkin	*Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 311-40 (2007).

XIV. Conclusion

In today's class, we will reflect on the themes we have discussed over the course of the semester. Be prepared to share your paper topics with one another.

STATUTORY INTERPRETATION

Amy Coney Barrett
Fall 2020
Monday 3:30-5:10
Biolchini 1310

Course Description and Goals

This seminar is a scholarly exploration of the modern debate about how federal courts should interpret statutes. The course is not designed to be a comprehensive survey of thinking about statutory interpretation. Rather, the course is designed to introduce you to and encourage you to think critically about several of the major theories and themes that inform the modern debate. For example, must a court apply the statutory text as enacted? Or does it have the freedom to adjust or depart from statutory text based on prudential considerations? In addition to helping you grapple with questions like these, the course will arm you with skills that you can use in practice. Lawyers deal with statutes as much as they deal with cases. Throughout the semester, you will learn the tools and arguments that lawyers bring to bear on the interpretation of statutes.

The course has two goals that transcend its subject matter. Because the class is run as a weekly conversation about the assigned reading, the course is an opportunity for you to refine your ability to speak articulately about legal topics. Because you will produce a substantial research paper by the semester's end, the course is also an opportunity for you to develop as a writer. Both speaking and writing are critical to the practice of law. The small size of the seminar makes it possible for me to work closely with each of you as you strive to master these skills.

Course Materials

There is no casebook for this class; you may retrieve all the assigned material from HeinOnline, Westlaw, and Sakai. Please note that I have posted a course bibliography on Sakai. In addition to providing you with citations to additional reading that might interest you, the bibliography is a good place to start the research for your paper.

I strongly recommend that you purchase a grammar reference book if you do not already own one. BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE (available at the library's reserve desk) is the most comprehensive, and it would be a good reference for you to have on your office shelf when you begin practice. Even a shorter guide, however, like WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE or MIGNON FOGARTY, GRAMMAR GIRL'S QUICK AND DIRTY TIPS FOR BETTER WRITING would be useful to you. Grammatical guides are not only for those who struggle—the best and most experienced writers routinely consult them.

Paper

You have the option of taking this course for either 2 or 3 credits. Those who take the course for 2 credits must produce a 6500-word paper, and those who take the course for 3 credits must produce a 10,000-word paper. The paper can address any topic in the field of statutory interpretation. The crucial thing is that the paper must do more than summarize what courts and/or commentators think about an issue; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the writing process so that I can assist you to that end. You will also have an opportunity to solicit feedback from your classmates about your paper topic. By

September 15th, you must upload a one-paragraph description of your tentative paper topic in pdf format to the course website on Sakai. You will read one another's proposals, and we will devote the next two classes (September 21st and 28th) to exchanging ideas about them.

You must submit the final paper to me via email in pdf format by 11:59 p.m. on November 9th, the last day of class. You must also put a hard copy in my faculty mailbox by noon the next day. Citations in the paper should conform to THE BLUEBOOK, and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you express them. Spelling and grammar count.

Participation

Participation is the other component of your grade. The class is structured as a discussion of the assigned reading for the week. I will lead our discussion of the first six topics. Discussion of the remaining six topics will be led by teams of two or three students. Your task in leading class discussion is to start and sustain a thoughtful conversation about the assigned reading; there is no presentation required. I will invite you to sign up for the student-led classes in a few weeks.

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Covid-19

Covid-19 has created instructional challenges. None of us may come to class without the campus pass generated by the daily health check, we must all wear masks throughout the class period, and we must remain socially distanced in the classroom. A mandatory seating chart will assist with both social distancing and contact tracing. On the first day of class, please record your seat number on the seating chart, which can be found in a Google Sheet on Sakai. At the end of each class period, you should exit the classroom one row at a time, maintaining appropriate distance from the student in front of you. Because we cannot cluster in groups at the conclusion of the class period, I too will leave the classroom immediately.

The pandemic may require any one of us—or all of us—to stay home. If the Law School resorts to remote instruction, our classes will continue via Zoom in their regular time slot. If I become unable to teach in person, I will either conduct class via Zoom, schedule a makeup, or recruit a substitute to facilitate class discussion in my (hopefully brief) absence. If any of you is unable to attend class for a Covid-related reason—for example, because you are feeling unwell or have recently been exposed to someone who is positive—let me know in advance of class by email, and I will arrange for

you either to participate remotely or to submit a reflection paper as a substitute for your missed participation. It goes without saying that any such absence is excused.

Contact Information

[Redacted]

I. Introduction (ACB)

This class will situate the modern debate within its historical context, as well as introduce and preliminarily consider issues that we will study over the course of the semester. We will use *Bostock v. Clayton County* to identify recurrent themes in statutory interpretation.

Bostock v. Clayton County, 140 S.Ct. 1731 (2020). Read all three opinions, but you need not read the Appendix to Justice Alito's opinion.

II. Purposivism (ACB)

Traditionally, courts have asserted that the intent or purpose of the enacting Congress should guide statutory interpretation. *Holy Trinity* is the case most emblematic of this approach. The book and article excerpts illustrate how purposivism functions in its modern form.

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On the other hand, consider the following critique of the search for congressional intent or purpose:

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After studying these defenses and critiques of purposivism, come to class prepared to discuss the following question: What role, if any, should congressional intent or purpose play in statutory interpretation?

III. Textualism (ACB)

Textualism arose in the 1980's, initially fueled by what some judges and academics perceived as excessive judicial reliance on legislative history. Modern arguments for textualism emphasize its fit within the constitutional structure, particularly Article I, § 7's requirement of bicameralism and presentment. Read the following descriptions of textualist theory:

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Be prepared to discuss the following questions:

(1) What is textualism? How, if at all, does it differ from purposivism? How, if at all, does it differ from "strict constructionism"?

(2) Do you agree or disagree with textualism's claims?

IV. The Search for Ordinary Meaning (ACB)

It is a foundational principle of statutory interpretation that a statute's "ordinary" or "plain" meaning controls. But what is the ordinary or plain meaning, and how does one find it? In this class, we will discuss the problems posed by language's indeterminacy and consider tools that court sometimes use to pin it down.

Consider what role, if any, that dictionaries should play in the interpretation of statutes.

Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

Recently, some judges and scholars have embraced tools used in the field of corpus linguistics. Is this a desirable approach?

Thomas R. Lee, Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828-78 (2018).

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The conventional view is that judges should conduct themselves as the faithful agents of the legislature. According to this view, it is the job of the democratically elected legislature to enact the laws, and it is the job of the judges to apply them. Some, however, maintain that judges should be the partners rather than simply the faithful agents of Congress. They contend that allowing judges more freedom in statutory interpretation is consistent with both democracy and the Constitution's separation of powers. Do you agree?

William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319-30 (1987).

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VI. Legislative History (ACB)

Related to (although, importantly, also distinct from) the debate about the role of congressional intent or purpose in interpreting statutes is the debate about the role of legislative history in interpreting statutes.

Consider the following defense of the use of legislative history as an interpretive tool:

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

Finally, what about presidential signing statements? If legislative history is fair game, should the president's views count too?

Christopher S. Yoo, *Presidential Signing Statements: A New Perspective*, 164 PENN. L. REV. 1801 (2016).

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Are canons of construction useful to the enterprise of interpreting statutes? Where do judges get the authority to create and apply canons that push statutory language beyond its most natural interpretation?

Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

Anita S. Krishnakumar & Victoria Nourse, *The Canon Wars*, 97 TEX. L. REV. 163 (2018).

Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 949-64 (2013).

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For years, federal judges—including some professed textualists—have relied on the "absurdity doctrine" as an escape hatch from statutory text when application of the text would lead to ostensibly absurd results. The following case illustrates the difficulty:

United States v. Kirby, 74 U.S. 482 (1868).

As you read *Kirby*, think about the tension between the absurdity doctrine and textualism. Does textualist adherence to the absurdity doctrine mean that in hard cases, textualists resort to purposivism? Must a faithful textualist choose between textualism and the absurdity doctrine? If so, does this mean that textualism is ultimately unsustainable? The following article addresses these questions.

John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2388-93, 2431-86 (2003).

XI. Drafting Statutes: The Insider's View (Student Team)

Consider how statutory drafting actually happens in the modern Congress. Should this information influence the approach that a court takes to statutory interpretation?

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Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017).

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Philip Hamburger, *Chevron Bias* 84 GEO. WASH. L. REV. 1187, 1187-97, 1205-37 (2016) 1-6, 11-26.

Kisor v. Wilkie, 139 S.Ct. 2400, 2410-22 (2019).

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In the class, we will discuss two different topics.

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Should state courts interpret state statutes differently than federal courts interpret federal statutes?

Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 494-513, 522-32 (2013).

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Are uniform rules of statutory interpretation desirable? If so, which branch of government—legislative or judicial—is best suited to impose them?

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Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1822-29 (2010).

In this class, we will also return to the themes that we discussed on the first day, and consider how, if at all, our answers have changed as a result of our work this semester.

STATUTORY INTERPRETATION

Amy Coney Barrett
Fall 2019
Monday 3:45-5:25
Room 2171

Course Description and Goals

This seminar is a scholarly exploration of the modern debate about how federal courts should interpret statutes. The course is not designed to be a comprehensive survey of thinking about statutory interpretation. Rather, the course is designed to introduce you to and encourage you to think critically about several of the major theories and themes that inform the modern debate. For example, must a court apply the statutory text as enacted? Or does it have the freedom to adjust or depart from statutory text based on prudential considerations? In addition to helping you grapple with questions like these, the course will arm you with skills that you can use in practice. Lawyers deal with statutes as much or more than they deal with cases. Throughout the semester, you will learn the tools and arguments that lawyers bring to bear on the interpretation of statutes.

The course has two goals that transcend its subject matter. Because the class is run as a weekly conversation about the assigned reading, the course is an opportunity for you to refine your ability to speak articulately about legal topics. Because you will produce a substantial research paper by the semester's end, the course is also an opportunity for you to develop as a writer. Both speaking and writing are critical to the practice of law. The small size of the seminar makes it possible for me to work closely with each of you as you strive to master these skills.

Course Materials

There is no casebook for this class; you may retrieve all the assigned material from HeinOnline, Westlaw, and Sakai. Please note that I have posted a course bibliography on Sakai. In addition to providing you with citations to additional reading that might interest you, the bibliography is a good place to start the research for your paper. I have placed some of the most frequently used books on reserve in the library so that you can all have access to them.

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You have the option of taking this course for either 2 or 3 credits. Those who take the course for 2 credits must produce a 6500-word paper, and those who take the course for 3 credits must produce a 10,000-word paper. The paper can address any topic in the field of statutory interpretation. The crucial thing is that the paper must do more than summarize what courts and/or commentators think about an issue; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the writing process so that I can assist you to that end. You

will also have an opportunity to solicit feedback from your classmates about your paper topic. By October 2nd, you must upload a one-paragraph description of your tentative paper topic in pdf format to the course website on Sakai. You will read one another's proposals, and we will devote the two classes before Fall Break to exchanging ideas about them.

You must submit the final paper to me via email in pdf format by 11:59 p.m. on December 2nd, the last day of class. You must also deliver a hard copy of the paper to my assistant by noon the next day. Citations in the paper should conform to THE BLUEBOOK, and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you express them. Spelling and grammar count.

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Muscarello v. United States, 524 U.S. 125 (1998).

Ash Sheep Co. v. United States, 252 U.S. 159, 166-70 (1920).

Nix v. Hedden, 149 U.S. 304 (1893).

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Samantar v. Yousuf, 130 S.Ct. 2278, 2287 n. 9 (2010); *id.* at 2293-94 (opinions of Alito, J., Thomas, J., and Scalia, J.).

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Aaron Saiger, *Agencies' Obligation to Interpret the Statute*, 69 VAND. L. REV. 1231 (2016).

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In this class, we will discuss the problems posed by language's indeterminacy and consider whether dictionaries are an effective tool for clarifying the meaning of statutory terms.

Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI-KENT L. REV. 859, 859-66, 880-88 (2004).

As you read the following cases, consider the role dictionaries should play in the interpretation of statutes.

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Recently, some judges have rejected dictionaries in favor of a tool called "corpus linguistics." As you read the following case, consider whether corpus linguistics is a legitimate tool for judges to employ in statutory interpretation.

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III. Purposivism (ACB)

Traditionally, courts have asserted that the intent or purpose of the enacting Congress should guide statutory interpretation. *Holy Trinity* is the case most emblematic of this approach. The book and article excerpts illustrate how purposivism functions in its modern form.

Holy Trinity Church v. United States, 143 U.S. 457 (1892).

STEPHEN BREYER, MAKING OUR DEMOCRACY WORK, 92-102 (2010) [available on Sakai]

ROBERT A. KATZMANN, JUDGING STATUTES 31-35 (2014) [available on Sakai].

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After studying these defenses and critiques of purposivism, come to class prepared to discuss the following question: What role, if any, should congressional intent or purpose play in statutory interpretation?

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Textualism arose in the 1980's, initially fueled by what some judges and academics perceived as excessive judicial reliance on legislative history. Modern arguments for textualism emphasize its fit within the constitutional structure, particularly Article I, § 7's requirement of bicameralism and presentment. Read the following descriptions of textualist theory:

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Be prepared to discuss the following questions:

(1) What is textualism? How, if at all, does it differ from purposivism? How, if at all, does it differ from "strict constructionism"?

(2) Do you agree or disagree with textualism's claims?

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The conventional view is that judges should conduct themselves as the faithful agents of the legislature. According to this view, it is the job of the democratically elected legislature to enact the laws, and it is the job of the judges to apply them. Some, however, maintain that judges should be the partners rather than simply the faithful agents of Congress. They contend that allowing judges more freedom in statutory interpretation is consistent with both democracy and the Constitution's separation of powers. Do you agree?

William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319-30 (1987).

Hively v. Ivy Tech, 853 F.3d 339 (7th Cir. 2017) (en banc)

VI. Legislative History (ACB)

Related to (although, importantly, also distinct from) the debate about the role of congressional intent or purpose in interpreting statutes is the debate about the role of legislative history in interpreting statutes. Consider the disputes between the justices over the use of legislative history in these cases:

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Samantar v. Yousuf, 130 S.Ct. 2278, 2287 n. 9 (2010); *id.* at 2293-94 (opinions of Alito, J., Thomas, J., and Scalia, J.).

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Should courts rely on legislative history in interpreting statutes?

VII. Discussion of Paper Topics

Please read the abstracts circulated by those classmates who will solicit your feedback about their paper topics today.

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Are canons of construction useful to the enterprise of interpreting statutes? Where do judges get the authority to create and apply canons that push statutory language beyond its most natural interpretation?

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Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 949-64 (2013).

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For years, federal judges—including some professed textualists—have relied on the "absurdity doctrine" as an escape hatch from statutory text when application of the text would lead to ostensibly absurd results. The following cases illustrate the difficulty:

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As you read these cases, think about the tension between the absurdity doctrine and textualism. Does textualist adherence to the absurdity doctrine mean that in hard cases, textualists resort to purposivism? Must a faithful textualist choose between textualism and the absurdity doctrine? If so, does this mean that textualism is ultimately unsustainable?

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Recent scholarship has looked closely at how statutory drafting actually occurs in the modern Congress. Should this information influence the approach that a court takes to statutory interpretation?

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Much statutory interpretation is done by administrative agencies rather than federal courts. *Chevron* instructs courts to defer to reasonable administrative interpretations of federal statutes. Is this deference warranted? If a court thinks that one interpretation of a statute is better than another, why should it set that interpretation aside in favor of an interpretation that it believes inferior (though still reasonable)?

Chevron U.S.A. v. *NRDC*, 467 U.S. 837, 843-45, 859-66 (1984).

Philip Hamburger, *Chevron Bias* 84 GEO. WASH. L. REV. 1187, 1187-97, 1205-37 (2016) 1-6, 11-26.

Lawrence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822-28 (1990).

XIII. Statutory Interpretation in Federal and State Courts (Student Team)

In the class, we will discuss two different topics.

A. Statutory Interpretation Inside the Federal Courts

Abbe Gluck & Richard Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018).

B. Statutory Interpretation by State Courts

Should state courts interpret state statutes differently than federal courts interpret federal statutes?

Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 494-513, 522-32 (2013).

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Are uniform rules of statutory interpretation desirable? If so, which branch of government—legislative or judicial—is best suited to impose them?

Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086-90, 2140-56 (2002).

Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1822-29 (2010).

In this class, we will also revisit the problems we discussed on the first day, and consider how, if at all, our answers have changed as a result of our work this semester.

STATUTORY INTERPRETATION

Professor Amy Barrett
Spring 2016
Tuesday 2-3:40
Room 3108

Course Description and Goals

This seminar is a scholarly exploration of the modern debate about how federal courts should interpret statutes. The course is not designed to be a comprehensive survey of thinking about statutory interpretation. Rather, the course is designed to introduce you to and encourage you to think critically about several of the major theories and themes that inform the modern debate. An overarching theme is the role of a court vis-à-vis the legislature in statutory interpretation. Should a court aim to be the legislature's faithful agent, implementing the statutory text as enacted? Or does a court have the freedom to adjust or depart from statutory text based on prudential considerations? In addition to helping you grapple with questions like these, the course will arm you with skills that you can employ in practice. Lawyers deal with statutes as much or more than they deal with cases. Throughout the semester, you will learn the tools and arguments that lawyers bring to bear on the interpretation of statutes.

The course has two goals that transcend its subject matter. Because the class is run as a weekly conversation about the assigned reading, the course is an opportunity for you to refine your ability to speak articulately about legal topics. Because you will produce a substantial research paper by the semester's end, the course is also an opportunity for you to develop as a writer. Both speaking and writing are critical to the practice of law. The small size of the seminar makes it possible for me to work closely with each of you as you strive to master these skills.

Course Materials

There is no casebook for this class; you may retrieve all of the assigned material from HeinOnline, Westlaw, and Sakai. Please note that I have posted a course bibliography on Sakai. In addition to providing you with citations to additional reading that might interest you, the bibliography is a good place to start the research for your paper. I have placed some of the most frequently used books on reserve in the library so that you can all have access to them. With the permission of their authors, I have uploaded to Sakai some "A" papers from past iterations of the course. Those of you who have not written a research paper before may find these models instructive.

I strongly recommend that you purchase a grammar reference book if you do not already own one. BRYAN A. GARNER, GARNER'S MODERN AMERICAN USAGE (available at the library's reserve desk) is the most comprehensive, and it would be a good reference for you to have on your office shelf when you begin practice. Even a shorter guide, however, like WILLIAM STRUNK, JR. AND E.B. WHITE, THE ELEMENTS OF STYLE or MIGNON FOGARTY, GRAMMAR GIRL'S QUICK AND DIRTY TIPS FOR BETTER WRITING would be useful to you. Grammatical guides are not only for those who struggle—the best and most experienced writers routinely consult them.

Paper

You have the option of taking this course for either 2 or 3 credits. Those who take the course for 2 credits must produce a 6500 word paper, and those who take the course for 3 credits must produce a 10,000 word paper. The paper can address any topic in the field of statutory interpretation. The crucial thing is that the paper must do more than summarize what courts and/or commentators think about a particular issue; it must critique existing work or develop a new idea. You should consult me both when you choose a topic and during the writing process so that I can assist you to that end. You will also have an opportunity to solicit feedback from your classmates about your paper topic. By Friday, February 24th, you must upload a one-paragraph description of your tentative paper topic in pdf format to the course website on Sakai. You will read one another's proposals, and we will devote the two classes before Spring Break to exchanging ideas about them. If you would like me to read a rough draft, please get it to me by March 21st.

You must submit the final paper to me via email in pdf format by 5 p.m. on April 25th, the last day of class. You must also deliver a hard copy of the paper either to me or to my assistant, Sharon Loftus, by noon the next day. Citations in the paper should conform to THE BLUEBOOK and page numbers should appear at the bottom center of each page. Your grade will be determined by both the substance of your ideas and the clarity with which you express them. Spelling and grammar count.

Participation

Participation is the other component of your grade. The class is structured as a discussion of the assigned reading for the week. I will lead our discussion of the first six topics. The discussion of the remaining six topics will be led by teams of two or three students. Your task in leading class discussion is simply starting and sustaining a thoughtful conversation about the assigned reading; there is no presentation required. I will invite you to sign up for the student-led classes in a few weeks.

The success of the seminar is dependent on your willingness to immerse yourself in the material and engage your classmates in thoughtful discussions about it. In light of that, your participation grade will be determined by the frequency and thoughtfulness of your in-class contributions as well as by your preparedness when you lead our conversation on your assigned day. The grades of those students whose participation is above average will be bumped a half-step up (e.g., from a B+ to an A-); the grades of those whose participation is average will remain flat; the grades of those whose participation is below average will be bumped a half-step down (e.g., from a B+ to a B). Unexcused absences, lack of preparedness, and tardiness are grounds for lowering your grade.

Because this class is run as a conversation rather than a lecture, the use of laptops is not permitted. I will, however, permit you to use an iPad or e-reader if you prefer to read the weekly assignments in electronic format rather than hard copy. Audio or video recording of class is not permitted.

Office Hours

I don't have restricted office hours; you may come to my office anytime. I am in Room 3165. You can also reach me by email [redacted] or phone [redacted]. I encourage you to seek me out. One advantage of a seminar is the opportunity to get to know students well, and I look forward to getting to know each of you over the course of the semester.

I. Introduction (Professor Barrett)

Hillel Y. Levin, *The Food Stays in the Kitchen*, 12 GREEN BAG 2D 337 (2009).

Introduction to Problems in Interpretation [available on Sakai]

This class will situate the modern debate within its historical context, as well as introduce and preliminarily consider themes that we will study over the course of the semester.

II. The Search for Plain Meaning (Professor Barrett)

In this class, we will discuss the problems posed by language's indeterminacy and consider whether dictionaries are an effective tool for clarifying the meaning of statutory terms.

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As you read the following cases, consider the role dictionaries should play in the interpretation of statutes.

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As you read these cases, think about the tension between the absurdity doctrine and textualism. Does textualist adherence to the absurdity doctrine mean that in hard cases, textualists resort to purposivism? Must a faithful textualist choose between textualism and the absurdity doctrine? If so, does this mean that textualism is ultimately unsustainable?

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Lawrence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 822-28 (1990).

XIII. Statutory Stare Decisis *and* Statutory Interpretation by State Courts (Student Team)

In the class, we will discuss two different topics.

A. Statutory Stare Decisis

Federal courts give statutory interpretations stronger precedential force than common law or constitutional decisions. Should they?

Lawrence Marshall, *"Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis,"* 88 MICH. L. REV. 177, 177-219 (1989).

B. Statutory Interpretation by State Courts

Should state courts interpret state statutes differently than federal courts interpret federal statutes?

Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 494-513, 522-32 (2013).

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In this class, we will also revisit the problems we discussed on the first day, and consider how, if at all, our answers have changed as a result of our work this semester.

Statutory Interpretation

Professor Amy Barrett
Fall 2007
(Short Course)

Syllabus

I. Introduction

Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 242-56 (1992).

Introduction to Problems in Interpretation [Handout]

This class will situate the modern debate within its historical context, as well as introduce and preliminarily consider themes that we will study during the course.

II. Purposivism

Traditionally, courts have asserted that the intent or purpose of the enacting Congress should guide statutory interpretation. Consider the following examples of this approach, one taken from the case law and the other from the academic literature.

United States v. American Trucking Assoc., 310 U.S. 534 (1940).

Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-22 (1983).

On the other hand, consider the following critique of the search for congressional intent or purpose:

Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988).

Come to class prepared to discuss the following questions: Is there any difference between the concept of "congressional intent" and the concept of "congressional purpose"? What role, if any, should congressional intent or purpose play in statutory interpretation?

III. Legislative History

Related to (although, importantly, also distinct from) the debate about the role of congressional intent or purpose in interpreting statutes is the debate about the role of legislative history in interpreting statutes.

The following articles will acquaint you with some of the strongest arguments for and against the use of legislative history as an interpretive tool.

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706-38 (1997).

Should courts rely on legislative history in interpreting statutes?

IV. Textualism

Textualism arose in the 1980's, fueled largely by what some judges and academics perceived as excessive judicial reliance on legislative history. Read the following descriptions of textualist theory:

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John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 427-50 (2005).

Be prepared to discuss the following questions:

(1) What is textualism? How, if at all, does it differ from purposivism? How, if at all, does it differ from "strict constructionism" or a search for a statute's "plain meaning?"

(2) Do you agree or disagree with textualism's claims?

V. Dynamic Statutory Interpretation

Whatever their differences, textualism and purposivism share two important beliefs: A belief in legislative supremacy and a belief that a statute should be interpreted with reference to the time of its enactment. A third approach to statutory interpretation challenges both of these premises:

William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 319-30 (1987).

William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-1497 (1987).

What are the pros and cons of Professor Eskridge's approach? Give particular consideration to the objection that dynamic statutory interpretation is inconsistent with our constitutional structure.

VI. The Absurdity Doctrine

For years, federal judges—including some professed textualists—have relied on the "absurdity doctrine" as an escape hatch from statutory text when application of the text would lead to absurd results. The following cases, which you should read for class, illustrate the difficulty:

United States v. Kirby, 74 U.S. 482 (1868).

United States v. Locke, 471 U.S. 84 (1985).
Green v. Bock Laundry, 490 U.S. 504 (1989).
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002).

After reading these cases, you should think about the tension between the absurdity doctrine and textualism. Does textualist adherence to the absurdity doctrine mean that in hard cases, textualists resort to purposivism? Must a faithful textualist choose between textualism and the absurdity doctrine? If so, does this mean that textualism is ultimately unsustainable?