Politics, Constitutional Policy, and the Institution of the U.S. Supreme Court

GVPT XXX — Spring 2017
Lecture: Monday & Wednesday TBD TIME, TBD Hall
Discussion Section: Friday (time & room location vary by section)

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Office Hours: TBD, and by appointment

“*The Executive not only dispenses honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacy of its judgment.”* — Alexander Hamilton, Federalist No. 78

The modern U.S. Supreme Court regularly issues decisions that have a significant impact on the most divisive public policy issues in contemporary politics. In recent years, the Court has published opinions to adjudicate disputes over the right to private ownership of firearms, the constitutionality of corporate- and union-funded campaign contributions, the extent of presidential power to detain suspects of terrorism at Guantanamo Bay, the death penalty as a criminal sentence for child rape, affirmative action policy in American higher education, the constitutionality of President Obama’s Affordable Care Act, and constitutional protection of same-sex marriage. Yet, behind each landmark ruling is an institutional framework that is far removed from the public eye. The justices seldom appear in public and their decision-making processes are largely insulated from direct public scrutiny. Although the Court’s final decisions attract the most widespread attention from the media and mass public, it is the institutional processes preceding those judgments that critically determine the substance of judicial policy in American politics and the meaning of the U.S. Constitution.

The Supreme Court is primarily a legal institution that clarifies both constitutional and statutory interpretation while establishing precedents intended to direct the decisions of
all lower federal courts. Yet, the Court is also a political institution that is situated in a complex separation of powers with justices that hold their own political values. As Alexander Hamilton notes in *Federalist No. 78*, the Supreme Court cannot, by itself, implement its decisions, as the justices merely have judgment and must rely on the support of the elected branches. The justices’ decisions, as a result, often reflect multiple considerations related to the law, politics, and the Court’s position in the larger separation of powers.

What are the primary factors that contribute to presidential appointments to the Court and successful confirmation before the U.S. Senate? How do Supreme Court justices manage the Court’s caseload and what leads them to choose some cases while rejecting most others? What potential considerations might shape the justices’ votes, such as legal precedent, political preferences, and public opinion? How do the justices manage their internal decision making during conference discussion? What are the interactions that regularly occur between the justices during the opinion-writing process? This course will consider these questions (among others) to better understand the Supreme Court as an institution and the implications of its decisions for contemporary public policy. In doing so, it will draw on interdisciplinary approaches from political science, law, economics, psychology, and linguistics to convey a systematic approach to studying the Supreme Court and its decisions.

**Course Description & Learning Objectives**

This course offers a thorough examination of the U.S. Supreme Court in the American political system, including recent issues the Court has decided and current pending cases. We will focus primarily on the Court as an institution—the set of norms, rules, and policymaking processes that lead to the Supreme Court’s decisions—and how justices’ decision-making processes critically determine substantive legal policy and the meaning of the U.S. Constitution. In doing so, we will investigate how the Court operates as both a legal and political institution, as well as its place in the larger political system. This course will also emphasize the social scientific study of the Supreme Court, involving topics such as judicial selection, the Court’s agenda-setting and control of its docket, and decision making on the merits.

This is a 3-credit undergraduate I-series course designed to facilitate learning by students from any substantive discipline. Students must complete all assigned readings, come to class prepared and on time, and actively participate in classroom discussions. The primary aim is to familiarize students with: the institutionalization of the Supreme Court over time, the manner in which justices receive their seats on the bench, and the step-by-step process involved in the Court’s consideration of an individual case and decision in each formal dispute. Following this course, students should be able to:

- Assess the numerous factors that affect the judicial selection process, including the president’s primary considerations when making an appointment to the Supreme Court and the major factors influencing Senate confirmation.

- Identify and explain the Court’s institutional policymaking process while emphasizing
the important factors that influence the justices’ decision making at each stage.

• Describe the Supreme Court’s role in the larger American political system, its place in the separation of powers, and how the political environment shapes judicial policy.

• Identify different systematic methodological tools and analytical approaches that social scientists use to study the Supreme Court’s decision making and the importance of those decisions to public policy in the United States.

• Improve writing skills and the ability to articulate analytical writing in a clear and cohesive manner.

Course Reading

There are three required books for this course:


I encourage all students to regularly follow the ongoing activities of the Court during the 2015 term—oral arguments, certiorari petitions, and published opinions—prior to class each day, as I will regularly integrate them into classroom discussions. In addition to coverage in major newspapers (e.g., New York Times), the SCOTUSblog is a superb resource to stay informed about all the action happening on the Court (available at: http://www.scotusblog.com/).

Please Note: I may announce additional (required) readings during the semester and post them on the Elms course website (https://Elms.umd.edu).

Course Requirements & Evaluation

Your final grade will reflect the sum of points earned from each of the following assignments:

<table>
<thead>
<tr>
<th>Assignment</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Pop Quizzes (administered in section)</td>
<td>10%</td>
</tr>
<tr>
<td>Midterm Exam #1</td>
<td>20%</td>
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<tr>
<td>Midterm Exam #2</td>
<td>20%</td>
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<tr>
<td>Final Exam (non-cumulative)</td>
<td>20%</td>
</tr>
<tr>
<td>Term Paper</td>
<td>20%</td>
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<tr>
<td>Group Assignment</td>
<td>10%</td>
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Grades are defined below and are based upon how many points you earn according to the following distribution:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Description</th>
<th>Points</th>
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<tbody>
<tr>
<td>A+</td>
<td>“Excellent mastery of the subject”</td>
<td>97-100 pts.</td>
</tr>
<tr>
<td>A</td>
<td></td>
<td>93-96 pts.</td>
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<tr>
<td>A-</td>
<td>“Good mastery of the subject”</td>
<td>90-92 pts.</td>
</tr>
<tr>
<td>B+</td>
<td>“Acceptable mastery of the subject”</td>
<td>87-89 pts.</td>
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<tr>
<td>B</td>
<td></td>
<td>83-86 pts.</td>
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<tr>
<td>B-</td>
<td></td>
<td>80-82 pts.</td>
</tr>
<tr>
<td>C+</td>
<td>“Borderline understanding of the subject”</td>
<td>77-79 pts.</td>
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<td>C</td>
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<td>73-76 pts.</td>
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<tr>
<td>C-</td>
<td></td>
<td>70-72 pts.</td>
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<tr>
<td>D+</td>
<td>“Failure to understand the subject”</td>
<td>67-69 pts.</td>
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<tr>
<td>D</td>
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<td>63-66 pts.</td>
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<td>D-</td>
<td></td>
<td>60-62 pts.</td>
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<td>F</td>
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<td>fewer than 60 pts.</td>
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Attendance, Participation & Pop Quizzes

I expect you to come to class prepared, participate in classroom discussions, and demonstrate comprehension of the assigned reading. Your teaching assistant will administer at least four pop quizzes over the course of the semester. Quizzes will feature two short open-ended questions based on the current week’s course material and the reading assigned for that day. The objective of this policy is to improve the substantive quality of in-class discussions and to incentivize the regular reading and attendance necessary to maximize your learning potential in this course.

IMPORTANT: Your teaching assistant will administer a quiz only at the beginning of class. If you are late, he or she will still collect all quizzes 15 minutes after the start of class, regardless of successful completion. Any quiz missed due to an unexcused absence will result in a zero grade (with no exceptions). An absence will only be excused if you present the appropriate documentation. If you miss a quiz due to an excused absence, you must contact your teaching assistant within one week following your return to class in order to arrange a makeup. Failure to arrange a makeup date within this one-week period will result in a zero grade for the missed quiz.

Exams

There will be three examinations in this course—two in-class midterms and a non-cumulative final examination. The format of each exam will consist primarily of short-answer and essay questions. I will notify you of the precise format at least one week in advance of each exam. You can expect the exams to test your knowledge of the lectures, in-class discussions, and required readings. Regular attendance, reading, and attentiveness will be critical to achieve success on each exam.
Term Paper & Group Presentation

You will complete a written term paper in this course. The term paper will require analytical, critical thinking where you must apply concepts learned during the course to analyze a case on the Supreme Court’s 2016 term docket. The goal is to help you improve your critical thinking skills while making reasoned arguments. The term paper assignment, including a specific description of its details and scope, is appended to the syllabus. Late papers will be accepted, but will be subject to a 10% penalty (10 points) per day beyond the due date.

In addition to submitting an individual written paper, you will participate in a group presentation about the Supreme Court case featured in your paper. I will randomly assign all students to a group of five and assign a different case to each group (which will also serve as the case you must analyze in your written paper). At the end of semester, each group will deliver a 20-minute powerpoint presentation during a discussion section. The presentation must summarize the case’s background, the legal question(s), the parties to the case, and a summary analysis of how you expect the Court to rule. The group is responsible for using the course concepts to justify the analysis of the Court’s (predicted) decision. Before presenting to the class, the whole group should meet at least twice with the teaching assistant to seek feedback and guidance.

Academic Integrity

Academic integrity is a core value of institutions of higher learning. It is your responsibility to refrain from engaging in plagiarism, cheating, and dishonest behavior. The official university honor code policy is located at: [http://www.president.umd.edu/policies/iii100a.html](http://www.president.umd.edu/policies/iii100a.html). Needless to say, exams, quizzes, and the assigned term paper should reflect only your own work. But, studying and class preparation can (and should) be done with others.

Students with Disabilities

I will make every effort to accommodate those who register with the Disability Support Service (DSS) office and provide a University of Maryland DSS Accommodation form. I can only accommodate those who present the required written DSS documentation.

Excused Absence Policy

If at all possible, you should give advance notice if you must miss class (and have an accepted, verifiable excuse). When advance notice is not feasible, you must present the appropriate documentation on the very next class that you are in attendance in order to verify that your absence should be excused. Consistent with university guidelines, excused absences only occur “due to illness, religious observance, participation in University activities at the request of University authorities, or compelling circumstances beyond the student’s control.” No student will be allowed to make up a quiz, exam, or request an extension on the term paper deadline without a verifiable excused absence.
You may submit a self-signed note in order to be excused for missing one class. This note must include the date of illness, a statement that the information you have provided is true, and must be signed by you. You must also state that if your absence is found to be false, you understand that you will be referred to the Office of Student Conduct. Please note that official university policy states only one self-signed note for a single absence will be allowed. For all other non-consecutive absences, I will require written documentation from the Health Center or a medical doctor. Please also note that scheduled exam dates and the term paper due date are considered major grading events, and thus a self-signed note will not be sufficient to verify an excused absence on these three class days. Lastly, please be aware that university policy requires a written request (within the first two weeks of the semester) from any student who must miss a scheduled class due to a specific religious observance.

**COURSE SCHEDULE**

The following is a (tentative) class and reading schedule, which is subject to change (with advance notice). It is essential that you do not fall behind in the reading, as it will be difficult to catch up. **Note:** Required readings listed each day should be completed PRIOR to the start of class.

January 25: Course Introduction
January 27 (section): Tribe & Matz, Prologue (pp. 1-14)

**The Social Scientific Study of the Supreme Court**
- Provide an overview of the social scientific research process.
- Introduce core concepts that are part of a systematic approach to studying the U.S. Supreme Court and its decisions.

January 30: Baum Ch. 1 (pp. 1-27)
February 1: Perry Ch. 1 (pp. 1-20)
February 3 (section): Tribe & Matz, Ch. 1 (pp. 15-51)

**Supreme Court History & Institutionalization**
- Discuss the constitutional (and institutional) foundations of the U.S. Supreme Court.
- Consider the U.S. Supreme Court in an historical context, including its institutional capacity and the growth of its decision-making authority in the American political system.

February 6: Perry Ch. 2 (pp. 21-42)
Theories of Judicial Decision Making

• Provide an overview of the central theoretical perspectives of Supreme Court decision making and discuss their respective strengths and weaknesses.

• Discuss observable (empirical) implications of different theoretical perspectives and begin to consider systematic analytical approaches to distinguish between them.

Retirement & Selection of the Justices

• Discuss each stage of the judicial selection process, including the principal actors and decision-making motivations behind the departure, appointment, and confirmation of Supreme Court justices.

• Consider systematic evidence to better understand political behavior each stage of the judicial selection process.

March 1: Midterm Exam #1

Attorneys & Interest Groups

• Consider the role of experienced attorneys and interest groups in shaping the content of Supreme Court decisions.

• Discuss the special impact of the Office of Solicitor General on justices’ consideration (and resolution) of judicial disputes.

March 6: Baum Ch. 3, part 1 (pp. 67-83)

March 8: Tribe & Matz, Ch. 5 (pp. 154-184)

March 10 (section): Pacelle (2003): *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation*, Ch. 2 (elms)

The Supreme Court’s Agenda

- Discuss how the Supreme Court’s agenda-setting process operates, including how that process has evolved over time.
- Consider analytical approaches to systematically examine why justices decide to review certain cases (and not others) and how the agenda-setting process critically shapes judicial policy.

March 13: Baum Ch. 3, part 2 (pp. 83-103)

March 15: Perry Ch. 4 (pp. 63-86)

March 17 (section): Perry Ch. 4 (pp. 63-86)

March 20: Spring Break (no class)

March 22: Spring Break (no class)

March 24: Spring Break (no class)

Briefs & Oral Argument

- Discuss the purpose of litigant briefs and oral argument in the Supreme Court’s decision-making process.
- Consider systematic evidence to examine if litigant briefs and oral argument are merely perfunctory stages of the Court’s decision-making process, or if they can independently shape the content of judicial policy.

March 27: Perry Ch. 5 (pp. 87-108)

March 29: Perry Ch. 6 (pp. 109-134)

March 31 (section): Black, Treul, Johnson, & Goldman: “Emotions, Oral Arguments, and Supreme Court Decision Making” (elms)

Opinion Writing & The Collegial Court

- Discuss the process of opinion writing on the Supreme Court and the different types, and principal components, of judicial opinions.
• Examine the potential role of strategic decision making in crafting the language of opinions (and thus the meaning of constitutional and statutory interpretation) on the Supreme Court.

April 3: Baum Ch. 4, part 1 (pp. 104-113)
April 5: Tribe & Matz, Ch. 6 (pp. 185-218)
April 7 (section): Tribe & Matz, Ch. 6 (pp. 185-218)

**April 10: Midterm Exam #2**

**Decision Making on the Merits**

• Consider systematic approaches to studying the impact of law and politics on the Supreme Court’s merits decisions.

April 12: Baum Ch. 4, part 2 (pp. 113-136)
April 14 (section): Tribe & Matz, Ch. 7 (pp. 219-252)
April 17: Tribe & Matz, Ch. 7 (pp. 219-252)

**The Separation of Powers & Public Opinion**

• Consider the potential impact of external factors on Supreme Court decision making.

• Discuss theoretical arguments and systematic analytical approaches when studying the potential influence of the U.S. Congress and public opinion on judicial policy.

April 19: Baum Ch. 4, part 3 (pp. 136-151)
April 21 (section): Perry Ch. 7 (pp. 135-156)
April 24: Perry Ch. 7 (pp. 135-156)
April 26: Tribe & Matz, Ch. 8 (pp. 253-281)
April 28 (section): Tribe & Matz, Ch. 8 (pp. 253-281)

**The Role of Law Clerks**

• Discuss the demographic characteristics (and representation) among law clerks and their duties as the legal assistants to Supreme Court justices.

• Consider how justices’ use of clerks has changed over time as well as evidence to suggest clerks can exert a meaningful impact on judicial decisions.
May 1: Term Paper Due

Policy Outputs & The Judicial Hierarchy

- Discuss the content of Supreme Court policymaking and its impact on lower federal (and state) courts in the judicial hierarchy (e.g., federal district courts and the U.S. Courts of Appeals).

May 3: Baum Ch. 5 (pp. 152-182)
May 5 (section): Tribe & Matz, Ch. 9 (pp. 282-314)

Consequences and Impact of Judicial Policymaking

- Consider the degree to which Supreme Court decisions can generate, or at least catalyze, broad social change in American politics.

- Reflect on readings from the semester about the Supreme Court’s role in shaping the meaning of the Constitution and divisive governmental policy issues (e.g., affirmative action and government-sponsored health care).

May 8: Baum Ch. 6 (pp. 183-223); Tribe & Matz, Epilogue (pp. 315-320)
May 10: Perry Ch. 8 (pp. 157-178)

Final Exam (non-cumulative): TBD

One Final Note:

All grade appeals will only be considered in writing. Should you believe that you deserve a higher grade on an exam, quiz, or the term paper, you must write a paragraph or so outlining your case and why the grade should be changed. After you submit this written appeal, I will then be happy to read your explanation and re-grade your exam, quiz, or paper. The deadline for consideration of any appeal will be one week following receipt of a particular grade. Of course, you may always ask questions for clarification, but no grade changes will be considered that you have not conducted in writing (or that you fail to submit before the one-week deadline).

Please note that all course materials are copyright protected. You must receive written consent prior to any reproduction and distribution of lectures or any other course materials.
This course focuses extensively on the institutional processes that the Supreme Court uses to consider, and ultimately decide, cases. By the end of the semester, we will have discussed various factors at each step of the judicial process that can have a meaningful impact on the justices’ final decisions – e.g., oral argument, amicus curiae briefs, experienced lawyers, the solicitor general, the political balance on the Court, etc. Your task in this paper is to utilize this knowledge and examine a case that is on the Court’s docket for the current 2016 term. Specifically, I would like you to analyze a pending case and predict the likely outcome based on the concepts that we have discussed (or, will discuss) in class. I will randomly split each discussion section into groups of five and assign each group a Supreme Court case to examine and analyze. Each student must complete an individual written term paper and participate in a group powerpoint presentation using the assigned case.

With your assigned case, your individual term paper should have two main components:

1) Provide an overview of the background of the case (2-3 pages) – that is, the facts of the dispute, the history in the lower courts (e.g., which courts previously made decisions and what was the reasoning or legal justification for their decisions), and the general arguments that both litigants have presented to the Supreme Court.

2) Make an argument about how you expect the Supreme Court to decide the case (6-7 pages). In particular, I expect you to apply the concepts that we have discussed in class to justify this argument. It will be critical that you provide as much breadth in your argument as possible. In other words, I want you to show that you can apply numerous concepts (that are relevant to your chosen case) to justify your argument. Thus, do not simply say that you expect the Court to make a particular decision because the majority of the justices seem to be conservative (i.e., that might be one part of your paper, but it should not be the only thing used to justify the argument). This is the most important section of your paper (especially as it relates to my grading), and you should utilize your space, within the page limit constraint, accordingly.

It will be important, as in any writing assignment involving critical thinking and reasoned argument, that you adequately support and defend your argument in your chosen case. In order to do this, I expect you to cite any relevant concepts that we have covered in the course. While this paper should not require much research beyond the original materials relevant to each case (that are available on the Court’s website and through the links below), you may find that a little extra research related to the case participants will help you to make the most convincing argument.

I will evaluate your term paper on both the logic of your argument (including breadth and whether you have sufficiently explained and supported that argument) and the overall quality of your writing. Below are some general guidelines for writing a successful essay that will guide my grading.

**Criteria for a Successful Essay:**
1) **Quality of information presented** (i.e., does the writing provide useful information related to the concepts involving the Supreme Court’s institutional process and how the justices make decisions?)
2) **Explanation of how the information presented actually illustrates the general argument** (i.e., is the writing clear by expressing a justification for the argument of how the Court is likely to decide the chosen case and how the class concepts help to support or illustrate that argument?)

3) **Overall quality of the argument** (i.e., does the writing make a clear, logical argument about the predicted outcome in the chosen case?)

4) **Presentation** (i.e., does the writing correctly use grammar and punctuation?)

5) **Organization** (i.e., does the writing provide a clear thesis, a cohesive argument, and cover both principal components outlined in the paper assignment?)

A = excellent performance on all criteria  
B = above average on four or excellent on some, but flawed in others  
C = average across the board or above average in part with significant flaws (such as deficient grammar and/or lack of a clear argument)  
D = below average across the board

**Some Helpful Sources of Information:**

To locate the cases on the Court’s docket, briefs that have been filed, etc., you should consult the following websites:

- [http://www.oyez.org/](http://www.oyez.org/)

**Please Note:** Papers are due at the beginning of class. Any paper not submitted when I collect them in class will be penalized 10 points for each day that it is late – no exceptions (short of a serious, unavoidable issue that can be verified in some manner). There will be no extensions on the paper due date. And, everyone must deliver a hard copy – no exceptions without my consent.

**Some General Writing Instruction and Tips:**

- Font: 12-point, Times New Roman, Double-Spaced
- Binding: Staple the paper, do not use a binder
- Citations: You should include citations and footnotes or endnotes as appropriate. While I do not require a particular style of documentation, you must use a style that is commonly accepted. Bibliography: Use a commonly accepted bibliography style to list the cases or other references cited in the paper. **A bibliography is not a substitute for references within the text of your paper.**
- Length: 8-10 pages (please do not exceed 10 pages).
- Please, no name on your papers, only your student ID number.
Style

• Please do not use bulleted for lists of ideas.
• Be brief and eliminate extra words. Once you have finished a first draft, go back to the document and ask yourself – where are the extra words and how can I write this more succinctly? A simple, terse writing style is always the best writing.
• Re-write, re-write, and re-write (good advice for any paper).
• Resist the urge to use quotations excessively. It is often best to paraphrase something in your own words and then cite the source, as opposed to writing half a paper with someone else’s language. As a general rule, quotations are best used when a passage is said in such a compelling way that it is most effective to use the author’s exact wording.
• Remove the use of passive voice/phrasing from your writing. Avoid the use of contractions.
• Try reading your paper out loud to help isolate awkward phrasing and incorrect grammar.