

SYLLABUS

THE ROBERTS COURT – FROM BAD TO WORSE

1. INTRODUCTION

I went to law school when the decisions of the “liberal” Supreme Court presided over by Chief Justice Earl Warren defined what our Constitution meant – an end to “separate but equal”, limits on police power, the right to a lawyer even if you couldn’t afford one, separation of Church and State, ‘one man, one vote’ – the list goes on and on. These decisions are in fact why I went to law school, with the fantasy of fighting for justice, truth, and the American Way....as the Warren Court had defined it.

But I instead have lived a professional lifetime under the Burger Court, the Rehnquist Court, and most awful of all, the Roberts Court of the last 15 years – a Court that seems determined to turn our Constitutional clock back to pre-New Deal, if not further.

From 2011, when Republicans gained control of the House of Representatives, until the present, Congress has enacted hardly any major legislation outside of the tax law President Trump signed in 2017. In the same period, the Supreme Court dismantled much of America's campaign finance law, severely weakened the Voting Rights Act, permitted states to opt-out of the Affordable Care Act's Medicaid expansion, weakened laws protecting against age discrimination and sexual and racial harassment, gave corporations control over much of our economy, but held that every state must permit same-sex couples to marry. This powerful unelected body, now controlled by six very conservative Republicans, has become and will continue to be the locus of policymaking in the United States.

So I have spent some time lately trying to get beneath the headlines, reading decisions of the Roberts Court, listening to oral arguments before them, and reading the rapidly mounting critical literature about where this Court has been and is now going. *I want to share with you the thinking of people far more expert than I. I am an amateur, a lawyer who has a passing knowledge of this Court, so I have gone to deeper thinkers who are studying what this Court has done and is doing now –*

Week One (March 29): **ADAM COHEN**, an attorney who worked with the ACLU, the Southern Law and Poverty Center, and now is a policy advisor to New York Mayor Bill DeBlasio, and author of Supreme Inequality: The Supreme Court’s Fifty Year Battle for a More Unjust America, which I believe is the best single introduction to the current Court I have read. He will talk about his book’s basic thesis, as expressed in its title.

Suggested Reading: Adam Cohen, *Supreme Inequality: The Supreme Court’s Fifty Year Battle for a More Unjust America*.

Week Two (April 6): **ERWIN CHEMERINSKY**, Dean of the Berkeley School of Law, a prolific author and speaker and op ed writer, whose most recent book, with Howard Gillman, is *The Religious Clauses*. He will talk about the First Amendment’s religious clauses. The Court is moving very rapidly on this front, and as always, Dean Chemerinsky is thinking, speaking and

writing about the latest developments at the Court. My favorite of his many books is The Case Against the Supreme Court.

Suggested Reading: Gillman & Chemerinsky, The Religious Clauses

Week Three(April 12): **BERTRALL ROSS**, Chancellor's Professor of Law at Berkeley School of Law, teaches Constitutional Law, has written extensively, most recently on issues of election law – voter suppression, gerrymandering, lack of representation of the poor, etc. He will speak about this Court's record on racial justice (and injustice). He has a book coming out this year, with Douglas Spencer, titled Voter Data and Democratic Inequality.

Week Four(April 19): **CYNTHIA GORNEY**, a journalist with National Geographic, who wrote Articles of Faith: A Frontline History of the Abortion Wars, in conversation with **EMILY BAZELON**, a journalist with the New York Times Sunday Magazine, whose most recent book is Charged: The New Movement to Transform American Prosecution and End Mass Incarceration. They will be talking about this Court's record and likely future concerning womens' reproductive rights.

Week Five(April 26): **CATHERINE FISK**, Barbara Nachtrieb Armstrong Professor of Law at Berkeley School of Law, an expert and prolific author on employment and labor law. Her most recent book is Writing for Hire: Unions, Hollywood, and Madison Avenue. She will speak on this Court's record with respect to workers' rights and workplace law – where it's been and where it may well be going.

Week Six (May 3): **BILL SOKOL**. I'm your basic labor lawyer; I have represented working people and their Unions and benefit plans (retirement/healthcare/apprenticeship) for more than forty years. As legal counsel to many Union/Employer Health Plans, I have become somewhat knowledgeable about the Affordable Care Act (Obamacare) and this Court's record in addressing it. I write a lot about it and speak a lot about it. I expect we will listen to the oral arguments in this year's ACA case, California v Texas, and discuss the future of the ACA and healthcare in this Court's ongoing adventures with it.

Week Seven (May 10): **IRA KURZBAN**. A graduate of Berkeley School of Law ('76), Kurzban is the dean of the immigration law bar. He is the author of the definitive text on immigration law, found on the desk of every immigration administrative law judge and every immigration law practitioner, Kurzban's Immigration Law Sourcebook. He has argued before the U.S. Supreme Court and litigated over 50 federal cases regarding immigrants' rights. He has also taught both here and abroad, was the Past President of the American Immigration Lawyers Association, and the founder of Immigrants List, a PAC supporting progressive immigration policies.

Week Eight (May17): **JAMES WHEATON**, Lecturer at UC Berkeley Graduate School of Journalism, founder and senior counsel at The First Amendment Project and president of the Environmental Law Foundation. Wheaton teaches journalists about the First Amendment and

defends free speech rights in cases all over the country. He will speak about the way in this Court is transforming the First Amendment from a shield to protect free speech into a weapon to restrain speech.

Suggested Reading: Mary Anne Franks, *The Cult of the Constitution: Our Deadly Devotion to Guns and the First Amendment*

SUGGESTED ONLINE RESOURCES TO REFER TO THROUGHOUT THE COURSE:

You can have a wonderful time getting lost in all the excellent online sources covering the Supremes – I have listed a few that are “neutral”, where you can find both sides of any dispute, and two leading partisan sites where you can find viewpoints on the law from the Right and from the Left.

1. Supremecourt.gov: The official site of the Court, where it posts its Opinions and much else – ‘the facts, m’am, nothing but the facts’ – the place to go to get the basics on any case, but devoid of any analysis or commentary.
2. Scotusblog.com: The best single source to begin with for everything going on at the Supreme Court. You can find all the briefs and decisions filed for any case on its docket now and for the past several years, as well as “balanced” articles by journalists, lawyers, and scholars, on both sides of any case currently on the Court’s docket.
3. Oyez.org: A good site to go for commentary on Court’s actions and decisions. It has an impressive list of academic experts, all gathered in one place, to comment on what the Court is doing.
4. SubscriptLaw.com: A good site for easing into any SCOTUS case because it tries to do graphics to show what each case is about.
5. C-SPAN.org: Online site of C-SPAN offers live streaming of oral arguments before the Court. During the Covid-19 Crisis, all arguments are by telephone, with careful time limits imposed on lawyers and on Justices when they ask questions. A great adventure to try to make sense of what the Justices are thinking about any given case by listening to the comments and questions asked during oral argument. C-SPAN and Scotusblog.com provide calendar of when live arguments will be aired.

Partisan points of view:

1. From the Right: fedsoc.org is the site of the Federalist Society, an association of lawyers and students who call themselves “conservatives”.

2. From the Left: acslaw.org is the site of the American Constitution Society, an association of lawyers and students who call themselves “progressives.”

Additional Reading: Here are a few books that I have found useful, interesting, and “good reads”:

1. David Kaplan, *The Most Dangerous Branch: Inside the Supreme Court in the Age of Trump*
2. Joan Biskupic, *The Chief, The Life and Tumultuous Times of Chief Justice John Roberts*
3. Sonia Sotomayor, *The True American Dream*
4. Linda Hirshman, *Sisters in Law, How Sandra Day O'Connor & Ruth Bader Ginsburg Went to the Supreme Court and Changed the World*
5. Corey Robin, *The Enigma of Clarence Thomas*
6. Levinson & Levinson, *Fault Lines in the Constitution*
7. Mary Anne Franks, *The Cult of the Constitution: Our Deadly Devotion to Guns and Free Speech*
8. Jeffrey Toobin, *The Oath: The Obama White House & The Supreme Court*
9. Erwin Chemerinsky: *The Case Against the Supreme Court*