

## HERTOG 2019 SUMMER COURSES THE CONSTITUTION, THE COURTS, AND CONSERVATISM

Adam J. White, fellow, Hoover Institution

In *Federalist 78*, Alexander Hamilton famously wrote that the federal courts “may truly be said to have neither force nor will, but merely judgment,” and thus would be, relative to Congress and the President, the part of government “least dangerous to the political rights of the Constitution.”

At first glance, these seem rather straightforward and perhaps even self-evident statements. But for generations, they have spurred significant disagreement—not just between rival ideological groups, but even within what we now consider modern conservatism.

In this course, students will explore debates and disagreements among conservatives and libertarians over how to best understand the Constitution generally and the judicial power specifically. We will consider debates over originalism, natural law, traditionalism, and the burgeoning debate between advocates of “judicial restraint” and advocates of “judicial engagement.” To that end, we will read not just modern authors but also their historical antecedents.

This course will consist of two sessions per day over a one-week period. Each morning, students will participate in seminar discussion led by legal expert Adam White. Each afternoon, they will hear from a leading scholar or practitioner on that individual’s area of expertise.

### Books:

- U.S. Constitution
- Course Reader

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### Monday, July 22, 2019

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9:00 a.m. to Noon

Constitutional Courts: Foundational Debates

### Readings:

- *Brutus* No. 15
- *Federalist 78* (Hamilton)
- *Federalist 37* (Madison)
- *Federalist 51* (Madison)
- Tocqueville, *Democracy in America* (excerpts)
- *Gibbons v. Ogden* (1824)

### Discussion Questions:

1. What is the nature and character of judicial power, according to Publius? To Tocqueville?
2. Why does Publius believe that the judiciary is the “least dangerous branch?” What assumptions (e.g., about the branches of government, law as a profession, human nature, etc.) are reflected in this argument?

3. Is judicial independence a constitutional virtue or a constitutional vice?
4. In a constitutional government based on popular sovereignty, how much power should we commit to the countermajoritarian body of judges and lawyers?

**Noon to 1:30 p.m.                      Opening Group Lunch**

**1:30 p.m. to 3:00 p.m.              Guest Speaker: Randy Barnett, professor, Georgetown University Law Center**

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## **Tuesday, July 23, 2019**

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**9:00 a.m. to Noon                      Liberty and “Judicial Restraint”**

### **Readings:**

- *Pierce v. Society of Sisters* (1925)
- *Lochner v. New York* (1905)
- *Buck v. Bell* (1927)
- *Griswold v. Connecticut* (1965)
- *Eisenstadt v. Baird* (1972)
- Alexander Bickel, “Notes on the Constitution” (1975)
- William Rehnquist, “The Notion of a Living Constitution” (1976)

### **Discussion Questions:**

1. What is judicial restraint? How is it opposed to judicial activism?
2. In deciding cases and controversies, how should judges go about exercising “merely judgment?” Is judicial restraint an answer to this problem?
3. What is the “counter-majoritarian difficulty” facing judges? Why might judicial review have a tendency to “weaken the democratic process” over time?
4. How much deference should judges give to Congress? To the will of the majority?

**Noon to 1:30 p.m.                      Group Lunch & Guest Speaker: Hon. Neomi Rao, U.S. Circuit Judge of the U.S. Court of Appeals for the District of Columbia Circuit**

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## **Wednesday, July 24, 2019**

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**9:00 a.m. to Noon                      Conservative “Originalism”**

### **Readings:**

- Edwin Meese, “Speech Before the ABA” (1985)
- Antonin Scalia, “Originalism: The Lesser Evil” (1989)
- Antonin Scalia dissenting, *Planned Parenthood v. Casey* (1992)
- Harvey Wilkinson, “Originalism: Activism Masquerading as Restraint,” *Cosmic Constitutional Theory*

## Discussion Questions:

1. What is originalism, according to Meese and Scalia? How is original *intent* different from original *meaning*?
2. Can the Constitution's "objective" meaning be ascertained and applied by impartial judges? What should judges do when that meaning is not readily apparent—and, more important, how can they know when they've arrived upon such an ambiguous case?
3. Why does Scalia call originalism "the lesser evil"?
4. Is Wilkinson correct in arguing that originalism lacks judicial restraint?

**Noon to 1:30 p.m.**

**Lunch Break**

**1:30 p.m. to 3:00 p.m.**

**Guest Speaker: Matthew Spalding, Associate Vice President and Dean of Educational Programs, Kirby Center, Hillsdale College**

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**Thursday, July 25, 2019**

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**9:00 a.m. to Noon**

**Libertarian "Judicial Engagement"**

## Readings:

- Randy Barnett, "Scalia's Infidelity" (2006)
- Debate: "Scalia v. Epstein" (1985)
- Clarence Thomas, "Toward a 'Plain Reading' of the Constitution: The Declaration of Independence in Constitutional Interpretation" (1987)
- Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment" (1989)
- Hadley Arkes, "A Natural Law Manifesto" (2011)

## Discussion Questions:

1. What is judicial engagement? How is it different from judicial restraint or judicial activism?
2. How strongly bound should judges be to the doctrine of *stare decisis*?
3. Should judges read the Constitution in light of natural rights theory or the natural law principles of the Declaration of Independence? Does such an approach constrain or empower judges?
4. How should conservative jurists balance their devotion to a law's original public meaning with other conservative principles in judicial decision-making (e.g., precedent, federalism, popular rule, etc.)?

**Noon to 1:30 p.m.**

**Lunch Break**

**1:30 to 3:00 p.m.**

**Guest Speaker: Ilya Shapiro, Director of the Robert A. Levy Center for Constitutional Studies, Cato Institute**

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**Friday, July 26, 2019**

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**9:00 a.m. to Noon**

**“Republican Remedies”**

**Readings:**

- Abraham Lincoln, First Inaugural Address (1861)
- Thomas W. Merrill, “Bork v. Burke” (1995)
- *Employment Division v. Smith* (1990)
- Yuval Levin, “Taking the Long Way” (2014)
- Mary Ann Glendon, “The Land of Rights” (1991)
- Alexander Bickel, “Watergate and the Legal Order” (1974)

**Discussion Questions:**

1. What is conventionalism? Why should conservatives prefer conventionalism, according to Merrill?
2. What is the “conservative idea of liberty,” according to Levin?
3. How much deference should judges give to states and local communities? To practical experience and tradition?
4. To what extent does the legitimacy of a democratic government rest on the consent of the people, and to what extent does it rest on the correctness of its principles?

**12:00 p.m. to 1:15 p.m.**

**Lunch on Careers in Law – Adam White**

**1:30 to 3:00 p.m.**

**Guest Speaker: Marc DeGirolami, professor, St. John’s University**

## Instructor and Speaker Bios

### *Instructor*

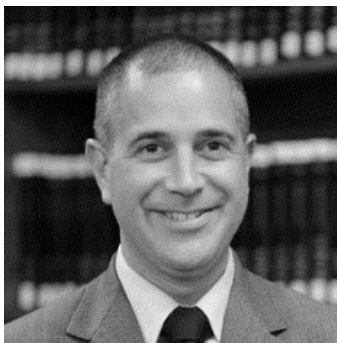


**Adam J. White** is a research fellow at the Hoover Institution, and an assistant professor at George Mason University's Antonin Scalia Law School, where he also directs the Gray Center for the Study of the Administrative State. He writes widely on the administrative state, the Supreme Court, the Constitution, and regulatory policy, with special focus on energy policy and financial regulation. Prior to joining Hoover, he was an adjunct fellow at the Manhattan Institute and practiced law with Boyden Gray & Associates. He clerked for Judge David Sentelle of the U.S. Court of Appeals for the DC Circuit, after graduating from Harvard Law School and the University of Iowa's College of Business. He is a contributing editor with *National Affairs*, *The New Atlantis*, and *City Journal*, and a contributor to the *Yale Journal on Regulation's* blog.

### *Speakers*



**Randy Barnett** is the Carmack Waterhouse Professor of Legal Theory at the Georgetown University Law Center and Director of the Georgetown Center for the Constitution. After graduating from Harvard Law School, he tried many felony cases as a prosecutor in the Cook County States' Attorney's Office in Chicago. In 2004, he argued the medical marijuana case of *Gonzalez v. Raich* before the U.S. Supreme Court. In 2012, he was one of the lawyers representing the National Federation of Independent Business in its challenge to the Affordable Care Act. His latest book is *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People* (2016).



**Marc DeGirolami** is Professor of Law at St. John's University and the Associate Director of the Center for Law and Religion. His book, *The Tragedy of Religious Freedom*, was published by Harvard University Press in 2013. At St. John's, he teaches or has taught Constitutional Law, Constitutional Theory, Criminal Law, courses in Law and Religion, Professional Responsibility, and Torts. Prior to joining the St. John's faculty, he was an Associate-in-Law at Columbia Law School, and Visiting Assistant Professor and Scholar in Residence at Catholic University's Columbus School of Law. He will be a Visiting Fellow at Princeton University in 2019, in the James Madison Program in American Ideals and Institutions.



**Neomi Rao** serves as a United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, appointed by President Donald Trump. She is a former administrator of the Office of Information and Regulatory Affairs. Judge Rao is also a former professor of structural constitutional law, administrative law, and legislation and statutory interpretation at the Antonin Scalia Law School at George Mason University. Judge Rao founded the Law School's Center for the Study of the Administrative State and focused her scholarship on the political and constitutional accountability of administrative agencies and the role of Congress. Prior to joining the Law School, Judge Rao served in all three branches of government.



**Ilya Shapiro** is the director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute. Before joining Cato, he was a special assistant/adviser to the Multi-National Force in Iraq on rule-of-law issues and practiced at Patton Boggs and Cleary Gottlieb. Shapiro is the co-author of *Religious Liberties for Corporations? Hobby Lobby, the Affordable Care Act, and the Constitution* (2014), and editor of 11 volumes of the *Cato Supreme Court Review* (2008–18). He holds an A.B. from Princeton University, an M.Sc. from the London School of Economics, and a J.D. from the University of Chicago Law School.



**Matthew Spalding** is Associate Vice President and Dean of Educational Programs for Hillsdale College in Washington, DC, where he oversees the operations of the Kirby Center and Hillsdale's various academic programs. Dr. Spalding serves as the Henry Salvatori Visiting Fellow at Heritage and as a senior fellow at the Claremont Institute. He is the author of *We Still Hold These Truths: Rediscovering Our Principles, Reclaiming Our Future*, and the executive editor of *The Heritage Guide to the Constitution*. He received his B.A. from Claremont McKenna College, and his M.A. and Ph.D. in government from the Claremont Graduate School.