Contemporary Supreme Court Cases
Syllabus Spring 2017

Professor details

Professor: Tonja Jacobi
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Office Hours: Thursday & Friday, 3 PM — 4 PM, LM207
Class: Wednesday 4 PM – 5:50 PM, MC 375 — with a 10 min. break

Course description

This course examines Supreme Court cases as they are pending before the Court, as well as new cases that come down during the Term. The aim of the course is to provide an insight into the range of issues that the Supreme Court faces in any given year, and an opportunity to study in depth topics that we may be unfamiliar with. It will also allow us to examine the process by which Supreme Court cases take form, the political-legal context of cases, and the impact of litigator advocacy before the Court.

Classes

Each week, we will examine in detail two cases that the Court is considering in the current Term. Rather than extensive reading, we will listen to oral arguments and read some relevant contemporary commentary. Students will have input into which cases we examine – we will decide on a list of cases in the first meeting (see below). We will attempt to choose cases of interest and/or importance that represent the breadth of the Supreme Court's docket. Students will also have input into the content of our readings.

Assessment

Assessment will consist of:

a. class organization and presentation (30%);
b. general class participation (20%); and
c. a final short paper (50%).

a. Each student will be responsible for introducing the discussion of one case in a 10 minute PowerPoint (or equivalent) presentation (or joint 20 minutes when two students are introducing). This should NOT be a summary of the case, but rather a thematic analysis of its significance, *providing your analysis and insights*. Each student will also be responsible for choosing and distributing the readings for the class on which they present – these should consist of three short blog posts/news articles/podcasts etc. analyzing the case (once again, not summarizing oral argument). If you choose an advocacy piece, please also be sure to have an advocacy piece representing the opposing position. If the case is decided during our semester, you should come to the next class prepared with a brief summary of what the Court held, who made up the majority coalition, and if there has been any significant reaction to the case.

b. This is a seminar and is made meaningful and enjoyable by your participation. You will not be able to skip any week's preparation. In the past, participation has always been excellent, as this is an interesting and fun topic. To encourage participation, laptops will not be used in class, except by the presenter.

c. Whereas the presentation allows students to provide an in-depth analysis of one case, the paper is a vehicle for showing your breadth of knowledge of the cases discussed during the semester. You do not need to discuss every case, but you do need to discuss a significant proportion of them and have a selection criteria, such as those cases already decided during the Term, or the constitutional and criminal cases, etc. The paper can involve minimal research. Students can choose between:

    1. Writing a discussion of the overall direction of the Supreme Court's agenda that emerges from the various topics we examine, developing an argument of whether there is a coherent logic to the Court's approach this Term;

    2. Analyzing the overall direction of the Supreme Court's mode of decision-making, and whether judicial ideology can fully explain the various topics we examine, or whether legal methodology or some other factor drives SCOTUS opinions;

    3. Assessing the impact of Supreme Court oral arguments on judicial decision-making this Term; this can be done utilizing question and time data on oyez.org.

You cannot write a paper that centers on cases other than those discussed in class. It is, of course, fine to discuss other cases as context to your analysis, but not as your primary focus. Examples of previous excellent papers will be posted on the website.

Layout: The paper should be approximately 10 pages double spaced – however after using this as a guide, please put your papers in single space with paragraph spaces (as this syllabus is laid out), in any 12 point font other than courier. Use bluebook footnoting for any research, and refer to any oral argument in this form: (*Heffernan*, Oral Arg. T. at 49.). Please send your paper to me and to my assistant, Maryanne Martinez, m-martinez@law.northwestern.edu, by the end of exam period.

Longer papers: This seminar is not appropriate for multi-draft papers, however I am happy to oversee students who want to write a longer paper for supervised credit in this or subsequent semesters.

Materials: After the first week's class, materials for class will consist of:
(i) oral arguments, available at https://www.oyez.org/cases/2016
(ii) articles chosen by the student presenting, which must be publicly available and *emailed to the rest of the class one week prior*.

All other materials are available on my website (details above).

Proposed schedule

January 11 — Administration and Introduction

Our first class will be a mixture of administration and introduction.

- *Administration*: The rest of the syllabus constitutes the default list of proposed cases. In the first class, you will have an opportunity to modify this list—if you can convince me and your fellow students. Students should come prepared in the first class to discuss cases of interest that are pending in the Supreme Court's current Term. You can advocate including a case not on the default list, and argue which case it should be substituted for—but be sure to choose one that is after the date of the oral argument of your preferred case. You will see that the cases I have selected have a public law bias—I am open to different topics, but you will need to advocate for them. Once we have finalized our list, students will select which case they will lead for discussion. This will be done on a first come basis, so be prepared to put your hand up for the case that you want, but also have a backup plan.
- *Introductory analysis:* I will then briefly introduce you to the literature on judicial decision-making and available tools of Supreme Court analysis. We will then have a short discussion of this week's reading on the impact of oral argument.

Reading:

i. Read the brief descriptions below and the rest of this Term's cases and be prepared to discuss them. Also think about which classes you want to volunteer to lead. They are available here:

http://www.scotusblog.com/case-files/terms/ot2016/

ii. Tim Johnson, Paul Wahlbeck & Jim Spriggs*: The Influence of Oral Arguments on the U.S. Supreme Court*. Available here:

http://home.gwu.edu/~wahlbeck/articles/Johnson-Wahlbeck-Spriggs%202006%20APSR.pdf

January 18 — Fourth Amendment & Fifth Amendment

Fourth Amendment: Manuel v. City of Joliet, No. 14-9496 [Arg: 10.5.2016]
Issue(s): Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.

Fifth Amendment: Buck v. Davis, No. 15-8049 [Arg: 10.5.2016]
Issue(s): Whether the Fifth Circuit imposed an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and

deepens two circuit splits when it denied petitioner a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that petitioner was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing.

January 25 — Copyright & Civil procedure and the ADA

Copyright: Pena-Rodriguez v. Colorado, No. 15-606 [Arg: 10.11.2016]
Issue(s): Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

Civil procedure: Fry v. Napoleon Community Schools, No. 15-497 [Arg: 10.31.2016]
Issue(s): Whether the Handicapped Children's Protection Act of 1986 commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages – a remedy that is not available under the Individuals with Disabilities Education Act. CVSG: 05/20/2016.

February 1 — Presidential power & Federal jurisdiction

Presidential power: NLRB v. SW General, No. 15-1251 [Arg: 11.7.2016]
Issue(s): Whether the precondition in 5 U.S.C. 3345(b)(1) on service in an acting capacity by a person nominated by the President to fill the office on a permanent basis, requiring that a person who is nominated to fill a vacant office that is subject to the Federal Vacancies Reform Act may not perform the office's functions and duties in an acting capacity unless the person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy, applies only to first assistants who take office under subsection (a)(1) of 5 U.S.C. 3345, or whether it also limits acting service by officials who assume acting responsibilities under subsections (a)(2) and (a)(3).

Federal Jurisdiction: Lightfoot v. Cendant Mortgage Co., No. 14-1055 [Arg: 11.8.2016]
Issue(s): (1) Whether the phrase "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal" in the charter of the Federal National Mortgage Association ("Fannie Mae") confers original jurisdiction over every case brought by or against Fannie Mae to the federal courts; and (2) whether the Court's decision in *American National Red Cross v. S.G.* should be reversed. CVSG: 05/23/2016.

February 8 — Equal Protection and immigration & Death penalty

Equal protection: Lynch v. Morales-Santana, No. 15-1191 [Arg: 11.9.2016]
Issue(s): (1) Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection; and (2) whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

Death penalty: Moore v. Texas, No. 15-797 [Arg: 11.29.2016]
Issue(s): Whether it violates the Eighth Amendment and this Court's decisions in *Hall v. Florida* and *Atkins v. Virginia* to prohibit the use of current medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

February 15 — Racial gerrymandering x2

McCrory v. Harris, No. 15-1262 [Arg: 12.5.2016]
Issue(s): (1) Whether the court below erred in presuming racial predominance from North Carolina's reasonable reliance on this Court's holding in *Bartlett v. Strickland* that a district created to ensure that African Americans have an equal opportunity to elect their preferred candidate of choice complies with the Voting Rights Act (VRA) if it contains a numerical majority of African Americans; (2) whether the court below erred in applying a standard of review that required the State to demonstrate its construction of North Carolina Congressional District 1 was "actually necessary" under the VRA instead of simply showing it had "good reasons" to believe the district, as created, was needed to foreclose future vote dilution claims; (3) whether the court below erred in relieving plaintiffs of their burden to prove "race rather than politics" predominated with proof of an alternative plan that achieves the legislature's political goals, is comparably consistent with traditional redistricting principles, and brings about greater racial balance than the challenged districts; (4) whether, regardless of any other error, the three-judge court's finding of racial gerrymandering violations was based on clearly erroneous fact-finding; (5) whether the court below erred in failing to dismiss plaintiffs' claims as being barred by claim preclusion or issue preclusion; and (6) whether, in the interests of judicial comity and federalism, the Court should order full briefing and oral argument to resolve the split between the court below and the North Carolina Supreme Court which reached the opposite result in a case raising identical claims.

Bethune-Hill v. Virginia State Board of Elections, No. 15-680 [Arg: 12.5.2016]

Issue(s): (1) Whether the court below erred in holding that race cannot predominate even where it is the most important consideration in drawing a given district unless the use of race results in "actual conflict" with traditional districting criteria; (2) whether the court below erred by concluding that the admitted use of a one-size-fits-all 55% black voting age population floor to draw twelve separate House of Delegates districts did not amount to racial predominance and trigger strict scrutiny; (3) whether the court below erred in disregarding the admitted use of race in drawing district lines in favor of examining circumstantial evidence regarding the contours of the districts; (4) whether the court below erred in holding that racial goals must negate all other districting criteria in order for race to predominate; and (5) whether the court below erred in concluding that the General Assembly's predominant use of race in drawing House District 75 was narrowly tailored to serve a compelling government interest.

February 22 — Immigration and detention & Tribal sovereignty

Immigration & detention: Jennings v. Rodriguez, No. 15-1204 [Arg: 11.30.2016]
Issue(s): (1) Whether aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months; (2) whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months; and (3) whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

Tribal sovereignty: Lewis v. Clarke, No. 15-1500 [Arg: 1.9.2017]
Issue(s): Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

March 1 — Due Process & Commercial free speech

Due process: Nelson v. Colorado, No. 15-1256 [Arg: 1.9.2017]
Issue(s): Whether Colorado's requirement that defendants must prove their innocence by clear and convincing evidence to get their money back, after reversal of conviction of a crime entailing various monetary penalties, is consistent with due process.

Free speech: Expressions Hair Design v. Schneiderman, No. 15-1391 [Arg: 1.10.2017]
Issue(s): Whether state no-surcharge laws unconstitutionally restrict speech conveying price information (as the Eleventh Circuit has held), or regulate economic conduct (as the Second and Fifth Circuits have held).

March 8 — Immunity from suit & Trademark

Immunity from suit: Ziglar v. Abbasi, No. 15-1358 [Arg: 1.18.2017]
Issue(s): (1) Whether the Court of Appeals, in finding that Respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, erred by defining "context" at too high a level of generality where Respondents challenge the actions taken in the immediate aftermath of the attacks of September 11, 2001 regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of the September 11 attacks, thereby implicating concerns regarding national security, immigration, and the separation of powers; (2) whether the Court of Appeals, in denying qualified immunity to Petitioner Ziglar erred: (A) by failing to focus on the specific context of the case to determine whether the violative nature of Mr. Ziglar's specific conduct was at the time clearly established,

instead defining the "established law" at the high level of generality that this Court has warned against; and (B) by finding that even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like Petitioner Ziglar was not clearly established at the time in question, Respondents nevertheless could maintain a § 1985(3) claim against him so long as his conduct violated some other clearly established law; and (3) whether the Court of Appeals erred in finding that Respondents' Fourth Amended Complaint met the pleading requirements of *Ashcroft v. Iqbal* , and related cases, because that complaint relied on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with Petitioner Ziglar's liability, but fall short of stating plausible claims.

Trademark: Lee v. Tam, No. 15-1293 [Arg: 1.18.2017]
Issue(s): Whether the disparagement provision of the Lanham Act, 15 U.S.C. 1052(a), which provides that no trademark shall be refused registration on account of its nature unless, *inter alia*, it "[c]onsists of . . . matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute" is facially invalid under the Free Speech Clause of the First Amendment.

Cases Not Yet Set for Argument — the remaining cases have not been set for argument yet and so the dates may change to maximize our chances of having oral arguments available to listen to

March 15 — Use of deadly force and qualified immunity & Establishment clause

Use of deadly force & Qualified immunity: Hernández v. Mesa, No. 15-118
Issue(s): (1) Whether a formalist or functionalist analysis governs the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States; (2) whether qualified immunity may be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident; and (3) whether the claim in this case may be asserted under *Bivens v. Six Unknown Federal Narcotics Agents*. CVSG: 03/01/2016.

Establishment clause: Trinity Lutheran Church of Columbia v. Pauley, No. 15-577
Issue(s): Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

March 22 — no class, spring break

March 29 — Free speech & Brady violations

Free speech & sex offenders: Packingham v. North Carolina, No. 15-1194
Issue(s): Whether, under the court's First Amendment precedents, a law that makes it a

felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and nytimes.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"

Brady violations: Turner v. U.S., No. 15-1503 & Overton v. U.S., No. 15-1504
Issue(s): Whether the petitioners' convictions must be set aside under *Brady v. Maryland*.
Scotusblog Description: the cases arise out of the brutal 1984 murder of Catherine Fuller, a District of Columbia mother. The petitioners in the case are a group of D.C. men who were convicted of the crime, based in large part on testimony from alleged eyewitnesses. Decades later, a reporter learned that defense attorneys had not received a statement suggesting that someone else had committed the crime; additional discovery then revealed that prosecutors had failed to turn over other evidence that could have aided the defendants. The men sought to vacate their convictions, but were unsuccessful in the lower courts… Overton had asked the court to weigh in on the standard that the lower court used to evaluate his claim that prosecutors had not complied with their obligations under *Brady v. Maryland*, which requires the government to turn over information that could exonerate the defendant. Turner and his co-defendants had asked the court to consider whether, when determining the significance of suppressed evidence, courts can consider information that comes to light after trial. But the court today announced that it would review a more straightforward question in both cases: whether the men's convictions must be set aside under *Brady*.

April 5 — Transgender rights & Plea bargaining and immigration

Transgender rights: Gloucester County School Board v. G.G., No. 16-273
Issue(s): (1) Whether courts should extend deference to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought; and (2) whether, with or without deference to the agency, the Department of Education's specific interpretation of Title IX and 34 C.F.R. § 106.33, which provides that a funding recipient providing sex-separated facilities must "generally treat gender students consistent with their gender identity," should be given effect.

Plea-bargaining & immigration: Lee v. U.S., No. 16-327
Issue(s): Whether it is always irrational for a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

April 12 — Patents and Civil procedure & Police use of force

Patents & civil procedure: TC Heartland v. Kraft Foods Group Brands, No. 16-341
Issue(s): Whether the patent venue statute, 28 U.S.C. § 1400(b), which provides that

patent infringement actions "may be brought in the judicial district where the defendant resides[,]" is the sole and exclusive provision governing venue in patent infringement actions and is not to be supplemented by the statute governing "[v]enue generally," 28 U.S.C. § 1391, which has long contained a subsection (c) that, where applicable, deems a corporate entity to reside in multiple judicial districts.

Police use of force: County of Los Angeles v. Mendez, No. 16-369
Issue(s): (1) Whether the U.S. Court of Appeals for the 9th Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other courts of appeals; and (2) whether, in an action brought under Section 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the Fourth Amendment.