

Contemporary Supreme Court Cases Syllabus Spring 2018

Professor details

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Office Hours: Tonja: Monday, 2 PM — 4 PM, LM207, or by appointment;
Abby: office hours by appointment
Class: MC381, Tuesday 4 PM – 5:50 PM — with a 10 min. break

Course description & learning outcomes

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. By the end of this course, students will have learned about the Supreme Court's agenda setting process, Supreme Court advocacy, the justices' decision-making processes, as well as specifics about contemporary legal issues.

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

- a. class organization and presentation (30%);
 - b. general class participation (20%); and
 - c. a final short paper (50%).
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- a. Each student will be responsible for introducing the discussion of one case in a 10 minute PowerPoint (or equivalent) presentation. This should NOT be a summary of the case, but rather a thematic analysis of its significance, *providing your analysis and insights*. Basic background should instead be provided in a one-page handout for the class, including e.g. statutory language, procedural posture, and/or other relevant background. We will provide feedback to each student individually about the presentation. Each student will also be responsible for choosing and distributing the readings for the class on which they present – these will consist of three short blog posts/news articles/podcasts etc. analyzing the case (once again, not summarizing oral argument). One good option is the summary of argument parts of the briefs. 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. 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 or statutory 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 – for instance whether judicial ideology explains the cases, 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 qualitatively assessing advocate technique or 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. Past successful topics have included: use of hypotheticals, incidence of laughter, politics vs methodology in explaining decisions, minimalism as an avoidance technique, interruptions, use of analogy, types of questions, new questions during replies, statutory interpretation vs other cases. Examples of previous excellent papers are on the website.

The paper should be 10-15 pages double spaced in any 12 point font other than courier, with page numbers. You can refer to any oral argument in this form: (*Heffernan*, Oral Arg. T. at 49.). Please send your paper to each of us and to Maryanne Martinez, m-martinez@law.northwestern.edu, by the end of exam period.

Materials: After the first week's class, materials for class will consist of:

- (i) oral arguments, available at <https://www.oyez.org/cases/2017>
- (ii) articles chosen by the student presenting, which must be publicly available and *emailed to the rest of the class on the Tuesday one week prior*.

All other materials are available on Tonja's website (details above).

Proposed schedule

Class 1: January 9 — 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 us 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 for including a case not on the default list, but you have to convince us 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 we have selected have a public law bias—we are 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*: We will then briefly introduce you to the literature on judicial decision-making and available tools of Supreme Court analysis, as well as the process by which the Supreme Court Justices engage in decision-making. 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/ot2017/>

- ii. Listen to the More Perfect podcast on a paper developed in this class:

<https://www.wnyc.org/story/justice-interrupted/>

- iii. 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>

Class 2 — January 16:

[Gill v. Whitford](#) — *argued Oct 3, 2017*

A case in which the Court will decide whether partisan gerrymandering claims are justiciable, and whether the district court erred in striking down Wisconsin's redistricting plan as an unconstitutional partisan gerrymander.

[District of Columbia v. Wesby](#) — *argued Oct. 4, 2017*

A case in which the Court will decide whether officers have probable cause to arrest for unlawful entry under D.C. law despite a claim of good-faith entry and whether the relevant law was sufficiently clearly established to justify the denial of immunity to the officers.

Class 3 — January 23:

[Class v. United States](#) — *argued Oct 4, 2017*

A case in which the Court will decide whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his conviction.

[Ernst & Young LLP v. Morris](#) — *argued Oct 2, 2017*

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Class 4 — January 30:

[Patchak v. Zinke](#) — *argued Nov. 7, 2017*

A case in which the Court will decide whether a statute that directs the federal courts to "promptly dismiss" certain lawsuits without affecting any underlying laws violates the Constitution's separation of powers principles, and whether that statute violates the due process rights of a plaintiff with a pending lawsuit affected by the statute.

[Carpenter v. United States](#) — *argued Nov. 29, 2017*

A case in which the Court will determine whether the warrantless seizure and search of cell phone records revealing the location and movements of a cell phone user over the course of 127 days violates the Fourth Amendment.

Class 5 — February 6:

[Jennings v. Rodriguez](#) — *argued Nov. 30, 2017*

A case in which the Court will determine whether noncitizens who are subject to mandatory detention under the Immigration and Nationality Act are entitled to bond hearings with the possibility of release if they are detained for longer than six months. The Court will also determine whether the government's burden is to prove by clear and

convincing evidence that they are dangerous to their communities and represent flight risks.

[Christie v. National Collegiate Athletic Association](#) — *argued Dec. 4, 2017*

A case in which the Court will decide whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States*.

Class 6 — February 13:

[Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission](#) — *argued Dec. 5, 2017*

A case in which the Court will determine whether the application of Colorado's public accommodations law to compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

[Florida v. Georgia](#) — *argued Jan. 8, 2018*

A case in which the Court will decide whether Florida is entitled to equitable apportionment of the waters of the Apalachicola-Chattahoochee-Flint River Basin (ACF Basin) and appropriate injunctive relief against Georgia to sustain an adequate flow of fresh water into the Apalachicola Region.

Alternatively: [Texas v. New Mexico and Colorado](#) — *argued Jan. 8, 2018*

A case in which the Court will decide whether New Mexico's pumping of groundwater that is hydrologically connected to the Rio Grande violates the Rio Grande Compact and the Rio Grande Project Act, which apportion water to Rio Grande Project beneficiaries, including Texas.

These 2 cases may sound dry, but every year the Supreme Court hears a couple of them, as states fight over diminishing water supplies — something we can expect to only gain in importance.

Class 7: February 20:

[Husted v. A. Philip Randolph Institute](#) — *argued Jan. 8, 2018*

A case in which the court will consider whether Ohio's list-maintenance process is permitted under 52 U.S.C. § 20507 when such process relies on the inactivity of a registered voter as an impetus to send a confirmation notice to that voter under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA).

[Collins v. Virginia](#) — *argued Jan. 9, 2018*

A case in which the Court will decide whether the Fourth Amendment's automobile exception permit a police officer without a warrant to enter private property in order to search a vehicle parked a few feet from the house.

Class 8: February 27:

[Byrd v. United States](#) — *argued Jan. 9, 2018*

A case in which the Court will resolve a circuit split as to whether a driver of a rental car who has permission to drive the car but is not listed as an authorized driver on the rental agreement has a reasonable expectation of privacy in the rental car.

[Oil States Energy Services v. Greene’s Energy Group](#) — *argued Nov. 27, 2017*

Whether inter partes review, an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.

Class 9: March 6:

[City of Hays, Kansas v. Vogt](#) — *argued Feb. 20, 2018*

A case in which the Court will clarify the scope of the Fifth Amendment right against self-incrimination in a “criminal case”—specifically whether the Fifth Amendment is violated when a criminal defendant is compelled to incriminate himself and the incriminating statement is used in a probable cause hearing.

[Currier v. Virginia](#) — *argued Feb. 20, 2018*

A case in which the Court will decide whether a defendant who consents to the severance of multiple charges into sequential trials loses his right under the Double Jeopardy Clause to the issue-preclusive effect of an acquittal.

Class 10: March 13:

[Rosales-Mireles v. United States](#) — *argued Feb. 21, 2018*

A case in which the Court will decide whether the Fifth Circuit applied the appropriate standard for plain error review when it required that the error be one that “would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.”

[Janus v. Am. Fed’n of State, County & Municipal Employees, Council 31](#)

— *argued Feb. 26, 2018*

A case in which the Court will decide whether to overturn its prior decision in *Abood v. Detroit Board of Education*, where it held that public employees who do not belong to a union can be required to pay a fee to cover the union’s costs to negotiate a contract that applies to all public employees, including those who are not union members.

Class 11: March 20:

[Ohio v. American Express Co.](#) — *argued Feb. 26, 2018*

A case in which the Court will decide whether, under the “rule of reason,” the government’s showing that American Express’s anti-steering provisions stifled price

competition on the merchant side of the credit-card platform was sufficient to prove anti-competitive effects, thereby shifting to American Express the burden of establishing pro-competitive benefits from the provisions.

[United States v. Microsoft Corporation](#) — argued Feb. 27, 2018

A case in which the Court will decide whether a provision of the Stored Communications Act, 18 U.S.C. § 2703, requires that an email provider who has been served with a warrant provide the federal government with emails, even when the email records are stored exclusively outside the United States.

Spring break: March 27

Class 12: April 3 —

[Lozman v. City of Riviera Beach, Florida](#) – argued Feb. 27, 2018

Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law.

[Minnesota Voters Alliance v. Mansky](#) – argued Feb. 28, 2018

Whether Minnesota statute Section 211B.11, which broadly bans all political apparel at the polling place, is facially overbroad under the First Amendment.

Class 13 — April 10:

If we have 22 students or fewer, we will use the final class to talk about your papers, and I will present my most recent research on oral arguments before the Supreme Court. If we have more than 22 students, this week will be like previous weeks, with two cases and student presentations from the list below, *or any others that you advocate for in class.*

Additional interesting and/or potentially important cases we can consider adding and substituting:

[Dahda v. U.S.](#), No. [17-43](#) [Arg: 2.21.2018]

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520, requires suppression of evidence obtained pursuant to a wiretap order that is facially insufficient because the order exceeds the judge's territorial jurisdiction.

Cases Not (Yet) Set for Argument

[National Institute of Family and Life Advocates v. Becerra](#), No. [16-1140](#)

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the free speech clause of the First Amendment, applicable to the states through the 14th Amendment.

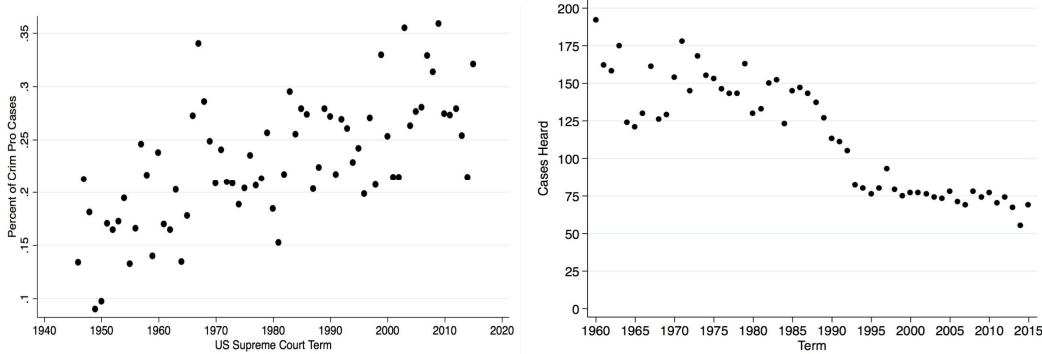
[Benisek v. Lamone](#), No. [17-333](#)

(1) Whether the majority of the three-judge district court erred in holding that, to establish an actual, concrete injury in a First Amendment retaliation challenge to a

partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map; (2) whether the majority erred in holding that the *Mt. Healthy City Board of Education v. Doyle* burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders; and (3) whether, regardless of the applicable legal standards, the majority erred in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016.

Jacobi's note on why we have so many Criminal procedure cases — in recent years, the Supreme Court has taken a significantly increasing number of criminal procedure cases, even as its overall docket has shrunk, as I showed in a forthcoming article, written with a graduating student:

Percentage of Supreme Court Criminal Procedure Cases, and general cases, by Term



This is docket is no exception, with an enormous number of criminal procedure cases. I believe that to truly understand Supreme Court's docket you need to have a good understanding of the Court's approach to criminal procedure, but I may be biased.