Contemporary Supreme Court Cases
Syllabus Spring 2019

Professor details

Professor: Tonja Jacobi
e-mail: drtonja@gmail.com

Website: tonjajacobi.com/student-resources/contemporary-supreme-court-cases/
Password: Dele#20
Office Hours: Wednesday, 2:30 PM – 3:45 PM, LM207, or by appointment
Class: MC175, Wednesday 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%).

a. Each student will be responsible for introducing the discussion of one case in a 10 minute (Supreme Court rules – i.e. strictly enforced) 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, including e.g. statutory language, procedural posture, and/or other relevant background, can instead be provided in a one-page cover page for the materials you select. Each student will be responsible for choosing and distributing a PDF of the readings for the class on which they present – these will consist of: the summary of the briefs of respondent and petitioner, ScotusOA.com analysis or forecast if available, and 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. I will provide feedback to each student individually about the presentation and organization.

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 selection criteria, such as: cases already decided during the Term, the constitutional cases, or the 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 (or not);

    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, e.g. assessing advocate technique, or quantitatively, e.g. 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 (A+) 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 me and to my assistant, Francesca Bullerman: Francesca.Bullerman@law.northwestern.edu, by the end of exam period.

Materials:

(i) The first week's class materials are available at the website: tonjajacobi.com/student-resources/contemporary-supreme-court-cases/

(ii) Oral arguments are available at https://www.oyez.org/cases/2018

(iii) All materials for subsequent classes will be PDFs emailed by the student presenting by the *Wednesday one week prior*

(iv) All other information, including examples of slides of A+ presentations, A+ papers, etc. are available on the website.

Proposed schedule

Class 1: January 16 — 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 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, 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/ot2018/

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 23:

Gundy v. U.S., No. 17-6086 [Arg: 10.2.2018 Trans./Aud.]
Issue(s): Whether the federal Sex Offender Registration and Notification Act's delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.

Madison v. Alabama, No. 17-7505 [Arg: 10.2.2018 Trans./Aud.]
Issue(s): (1) Whether, consistent with the Eighth Amendment, and the Supreme Court's decisions in Ford v. Wainwright and Panetti v. Quarterman, a state may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense; and (2) whether evolving standards of decency and the Eighth Amendment's prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition that prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution.

Class 3 — January 30:

Knick v. Township of Scott, Pennsylvania, No. 17-647 [Arg: 10.3.2018 Trans./Aud.]
Issue(s): (1) Whether the Supreme Court should reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank* that requires property owners to exhaust state court remedies to ripen federal takings claims; and (2) whether *Williamson County*'s ripeness doctrine bars review of takings claims that assert that a law causes an unconstitutional taking on its face, as the U.S. Courts of Appeals for the 3rd, 6th, 9th and 10th Circuits hold, or whether facial claims are exempt from *Williamson County*, as the U.S. Courts of Appeals for the 1st, 4th and 7th Circuits hold.

Nielsen v. Preap, No. 16-1363 [Arg: 10.10.2018 Trans./Aud.]
Issue(s): Whether a criminal alien becomes exempt from mandatory detention under 8 U.S.C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

Class 4 — February 6:

Stokeling v. U.S., No. 17-5554 [Arg: 10.9.2018 Trans./Aud.]
Issue(s): Whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.
Note: the companion cases to this one, **U.S. v. Stitt**, & **U.S. v. Sims**, addressing whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act we decided unanimously to include the vehicle or structure within burglary. It is considered that Stokeling is the more difficult case and also may be more complicated outcome.

Garza v. Idaho, No. 17-1026 [Arg: 10.30.2018 Trans./Aud.]
Issue(s): Whether the "presumption of prejudice" recognized in *Roe v. Flores-Ortega* applies when a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver.

Class 5: February 13:

Frank v. Gaos, No. 17-961 [Arg: 10.31.2018 Trans./Aud.]
Issue(s): Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."

Bucklew v. Precythe, No. 17-8151 [Arg: 11.6.2018 Trans./Aud.]
Issue(s): (1) Whether a court evaluating an as-applied challenge to a state's method of execution based on an inmate's rare and severe medical condition should assume that medical personnel are competent to manage his condition and that procedure will go as intended; (2) whether evidence comparing a state's method of execution with an alternative proposed by an inmate must be offered via a single witness, or whether a court at summary judgment must look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate; (3) whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition; and (4) whether petitioner Russell Bucklew met his burden under *Glossip v. Gross* to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the state's method of execution.

Class 6: February 20:

Apple Inc. v. Pepper, No. 17-204 [Arg: 11.26.2018 Trans.]
Issue(s): Whether consumers may sue anyone who delivers goods to them for antitrust damages, even when they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense. **CVSG: 05/08/2018.**

Nieves v. Bartlett, No. 17-1174 [Arg: 11.26.2018 Trans.]
Issue(s): Whether probable cause defeats a First Amendment retaliatory-arrest claim under 42 U.S.C. § 1983.

Class 7: February 27:

Carpenter v. Murphy, No. 17-1107 [Arg: 11.27.2018]
Issue(s): Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

Timbs v. Indiana, No. 17-1091 [Arg: 11.28.2018]
Issue(s): Whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment.
Note: petitioner's advocate in this case was mooted hear at Northwestern and this case may well see the Court defining a new constitutional right as applied to the states.

Class 8: March 6:

Gamble v. U.S., No. 17-646 [Arg: 12.5.2018]
Issue(s): Whether the Supreme Court should overrule the "separate sovereigns" exception to the double jeopardy clause

Franchise Tax Board of California v. Hyatt, No. 17-1299 [Arg: 1.9.2019]
Issue(s): Whether Nevada v. Hall, which permits a sovereign state to be haled into another state's courts without its consent, should be overruled.
Note: This sounds boring, but it is enormously consequential as indicated by an amicus brief by 45 states urging the Court to overrule Nevada v. Hall. The court granted review on Hyatt a few terms back, but couldn't resolve the issue because the court was equally divided. Since that time, a new and potentially tie-breaking vote has joined the court.

Class 9: March 13:

In re Department of Commerce, No. 18-557 [Arg: 2.19.2019]
Issue(s): Whether, in an action seeking to set aside agency action under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—when there is no evidence that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

Tennessee Wine & Spirits Retailers Association v. Byrd, No. 18-96 [Arg: 1.16.2019]
Issue(s): Whether the 21st Amendment empowers states, consistent with the dormant commerce clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.

Class 10: March 20:

U.S. v. Haymond, No. 17-1672 [Arg: 2.26.2019]
Issue(s): Whether the U.S. Court of Appeals for the 10th Circuit erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. § 3583(k) that required the district court to revoke the respondent's 10-year term of supervised release, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that the respondent violated the conditions of his release by knowingly possessing child pornography.

The American Legion v. American Humanist Assoc'n, No. 17-1717 [Arg: 2.27.2019]
Issue(s): (1) Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross; (2) whether the constitutionality of a passive display incorporating religious symbolism should be assessed under the tests articulated in *Lemon v. Kurtzman*, *Van Orden v. Perry*, *Town of Greece v. Galloway* or some other test; and (3) whether, if the test from *Lemon v. Kurtzman* applies, the expenditure of funds for the routine upkeep and maintenance of a cross-shaped war memorial, without more, amounts to an excessive entanglement with religion in violation of the First Amendment.

Spring break: March 27

Class 11: April 3:

Obduskey v. McCarthy & Holthus LLP, No. 17-1307 [Arg: 1.7.2019]
Issue(s): Whether the Fair Debt Collection Practices Act applies to non-judicial foreclosure proceedings.
Note: This case is significant because the fate of potentially thousands of lawsuits challenging non-judicial foreclosures is up for grabs. According to Obduskey's petition, there were nearly 400,000 foreclosures in the U.S. in 2016, with about 200,000 of those being done outside of the court system. The technical issue presented is whether the FDCPA applies to nonjudicial foreclosures.

Mont v. U.S., No. 17-8995 [Arg: 2.26.2019]
Issue(s): Whether a period of supervised release for one offense is tolled under 18 U.S.C. § 3624(e) during a period of pretrial confinement that upon conviction is credited toward a defendant's term of imprisonment for another offense.

Class 12: April 10:

Lamone v. Benisek, No. 18-726 — March sitting, exact date TBD
Issue(s): In case in which the plaintiffs allege that a Maryland congressional district was gerrymandered to retaliate against them for their political views: (1) whether the various legal claims articulated by the three-judge district court are unmanageable; (2) whether the three-judge district court erred when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections; and (3) whether the three-judge district court abused its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting.
Note: this may be the most important case of the decade

Iancu v. Brunetti, No. 18-302
Issue(s): Whether Section 2(a) of the Lanham Act's prohibition on the federal registration of "immoral" or "scandalous" marks is facially invalid under the free speech clause of the First Amendment
Note: this case has not been yet set for argument so we would be taking a small risk to set this one, but it will no doubt be entertaining as it will involve the justices having to try to avoid saying the word "FUCT"
Background: Erik Brunetti tried to register the trademark "FUCT" in connection with his clothing line; after the U.S.P.T.O. rejected the application, the U.S. Court of Appeals for the Federal Circuit agreed with him that the ban violates the Constitution. The federal government went to the Supreme Court, which today agreed to weigh in. This follows on

last year's decision that the PTO could not prevent an Asian group from registering its trademark as "the slants," which was originally refused as a derogatory term.

Class 13: April 17:

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.*

Other potentially interesting cases to consider that are not yet set for argument

PDR Network, LLC v. Carlton & Harris Chiropractic Inc., No. 17-1705
Issue(s): Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.

Flowers v. Mississippi, No. 17-9572
Issue(s): Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky* in this case.
Background: Curtis Flowers was sentenced to death for an infamous quadruple murder at a furniture store in Winona, Mississippi. Flowers was tried six times. During the first four trials, prosecutor Doug Evans was twice found to have violated the constitutional ban on racial discrimination in selecting jurors: He had struck all 10 of the potential African-American jurors, while he used all of his strikes to remove African Americans from the jury pool in the third and fourth trials. Flowers' fifth trial deadlocked, but at his sixth trial, Evans allowed the first African-American juror to be seated but then struck the remaining five African-American jurors.

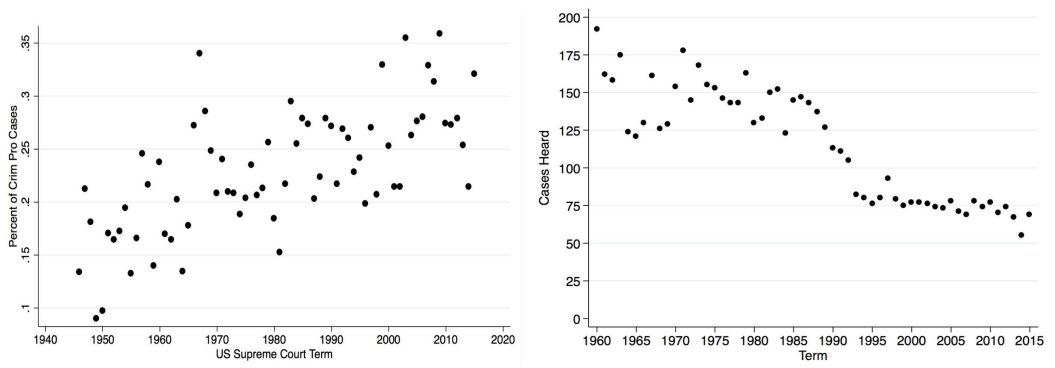
Virginia House of Delegates v. Bethune-Hill, No. 18-281
Issue(s): (1) Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case, Bethune-Hill v. Virginia State Board of Elections, even though it ignored a host of evidence, including the overwhelming majority of district lines, which were carried over unchanged from the prior map; the geographic location of population disparities, which imposed severe redistricting constraints and directly impacted which voters were moved into and out of the majority-minority districts; and the degree of constraint the House's Voting Rights Act compliance goals imposed in implementation, which was minimal; (2) whether the Bethune-Hill "predominance" test is satisfied merely by a lengthy description of ordinary Voting Rights Act compliance measures; (3) whether the district court erred in relying on expert analysis it previously rejected as unreliable and irrelevant and expert analysis that lacked any objective or coherent methodology; (4) whether the district court committed clear error in ignoring the entirety of the house's evidentiary presentation under the guise of credibility determinations unsupported by the record and predicated on expert testimony that should not have been credited or even admitted; (5) whether Virginia's choice to draw 11 "safe" majority-minority districts of around or above 55 percent black voting-age population ("BVAP") was narrowly tailored in light of the discretion the Voting Rights Act afforded

covered jurisdictions to "choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," under Georgia v. Ashcroft, or the requirement the Voting Rights Act, as amended, imposed on covered jurisdictions "to prove the absence of racially polarized voting" to justify BVAP reductions towards or below 50 percent BVAP; (6) whether the district court erred in ignoring the district-specific evidence before the house in 2011 justifying safe districts at or above 55 percent BVAP; and (7) whether appellants have standing to bring this appeal.

U.S. v. Davis, No. 18-431
Issue(s): Whether the subsection-specific definition of "crime of violence" in 18 U.S.C. § 924(c)(3)(B), which applies only in the limited context of a federal criminal prosecution for possessing, using or carrying a firearm in connection with acts comprising such a crime, is unconstitutionally.

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.