

SEMINAR ON THE SUPREME COURT AND CONSTITUTIONAL LAW
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
LAW 2278 (3 units), FALL 2018
TENTATIVE COURSE OUTLINE & SYLLABUS

Professor Tyler
Simon 794
atyler@law.berkeley.edu

This seminar examines the Supreme Court as an institution with emphasis on the ways in which the institutional forms and structures of the Court influence the decisions that the Court hands down. Topics studied include: the Court's jurisdiction and procedures for determining those cases that it will adjudicate; appointments to the Court; the internal deliberative process employed by the Justices; the role of the advocates before the Court, and proposals for increasing public access to the Court. Cases currently pending in the Supreme Court will be studied and debated for illustrative purposes.

Class Schedule:

This class will meet every Wednesday* from 10:00 a.m. to 12:40 p.m. in Room 115. We will take a break in the middle of the class session.

*Rescheduled Classes:

Due to longstanding speaking commitments, I unfortunately have to reschedule two of our class meetings, those slated for August 29 and November 28. In lieu of meeting on those days, we will have rescheduled sessions on:

Friday, September 7, from 1:00-3:40 p.m. in Room 111

Friday, November 16, from 1:00-3:40 p.m. in Room 115 (our final class meeting)

Class Attendance:

Attendance at the first class is mandatory for all enrolled students. Failure of enrolled student to attend the first class without prior email notice to me explaining the absence will result in the student being dropped from the course after the first class. Waitlisted students are encouraged to attend the first class.

Office Hours:

Tuesdays, 1:30 p.m.-3:00 p.m. I can meet otherwise by appointment; just email me.

Course Requirements:

Course grades will be based on 1/3 classroom participation and 2/3 on the quality of

written assignments. The participation component will take into account your attendance, preparation, and engagement with the class discussions. The participation component is not intended to reward participation alone, but instead to weigh significantly the quality of a student's contributions to class discussions.

Participation: Class attendance is mandatory and every student is expected to come prepared to participate extensively in the class discussion of the assigned reading.

Written Assignments: During the semester, students are to complete three written assignments, which will vary in required length. These assignments will include: drafting a very short cert pool memo to the Justices on a real pending cert petition; drafting a 7-page double-spaced bench memo to a Justice in a real pending merits case; and drafting 20 double-spaced pages comprising of majority and dissenting opinions in a different pending merits case. Because I will give feedback on the first draft of the opinion assignment, the paper will satisfy the new Writing Requirement's "Option 1." (Note that to satisfy the new Writing Requirement along these lines, a student must complete two "Option 1" courses.) Note that the first two of the writing assignments will be posted on bcourses to aid class discussion. Additional details about each assignment are posted on the class bcourse page.

Classes may not be recorded in any manner without my permission.

Assignments and Class Meetings:

Typically, we will cover one assignment per class meeting. Bear in mind, however, that I am highly likely to adjust our syllabus and assignments so as to accommodate guest speakers and/or developments with respect to the pending nomination of Judge Kavanaugh. I will make regular use of the class bcourses page to post course announcements, so check it regularly.

For our first class, I expect every student to have prepared Assignment 1.

Course Materials:

This year I am trying something new. Because the casebook that I previously used is now quite outdated and very costly, I have decided to compile my own course materials to go along with the materials that I will post from actual pending cases before the Court. I will be eager to receive your feedback on the materials that I assemble as the semester unfolds. In the weeks that we will be reading pending merits cases, the reading packets will be minimal.

Students Information Sheet:

Please complete the student information sheet from the class bcourse page and email it to me before the first class so that I can get to know a little bit about you.

COURSE OUTLINE AND TENTATIVE ASSIGNMENTS

1. INTRODUCTION

1. Introduction to the Court's work and the Role of Stare Decisis (8/22)
U.S. Const. Art. III
Biographies of the Justices
The Court and its Traditions
The Court at Work
Week 1 Reading Pack (Article III, *Casey*, *Lawrence*, and discussion questions)

2-3. SETTING THE COURT'S AGENDA

2. The Jurisdiction of the Court; The Rule of Four; The Role of the Law Clerks; The Ever-Shrinking Docket; Strategy in Case Selection; The Relevance of Denials of Certiorari (9/5)
The Court and its Procedures
Week 2 Reading Pack
Casey, *Waters* Pool Memos (for skimming)
3. Illustrative Cases: Petitions Currently Pending Before the Court (9/7)*
 - 1) ***McKee v. Cosby***, No. 17-1542
Question Presented: Whether a victim of sexual misconduct who merely publicly states that she was victimized (i.e., #metoo) has thrust herself to the forefront of a public debate in an attempt to influence the outcome, thereby becoming a limited-purpose public figure who loses her right to recover for defamation absent a showing of actual malice by clear and convincing evidence.
 - 2) ***Hernández v. Mesa***, No. 17-1678
Questions Presented: (1) Whether, when the plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*; and (2) whether, if the federal courts do not recognize such a claim, the Westfall Act violates the due process clause of the Fifth Amendment insofar as it pre-empts state-law torts suits for damages against rogue federal law enforcement officers acting within the scope of their employment for which there is no alternative legal remedy.
 - 3) ***Altitude Express Inc. v. Zarda***, No. 17-1623
Question Presented: Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation.
 - 4) ***Jones v. Oklahoma***, No. 17-6943
Questions Presented: (1) Whether a complex statistical study that indicates a risk that racial considerations enter into Oklahoma’s capital-sentencing determinations proves that the petitioner’s death sentence is unconstitutional under the Sixth,

Eighth and 14th Amendments to the U.S. Constitution; and (2) whether Oklahoma's capital post-conviction statute, Okla. Stat. Ann. tit. 22 § 1089(D)(8)(b), and the Oklahoma Court of Criminal Appeals' application of the statute in this case, denies the petitioner an adequate corrective process for the hearing and determination of his newly available federal constitutional claim in violation of his rights under the 14th Amendment's due process and equal protection clauses.

(petition materials posted in petitions folder along with a sample student pool memo and a document with the sample format for a pool memo)

* This is a lot of reading. You are only responsible for reading the petition and brief in opposition in each case. I have also uploaded some amicus briefs and reply briefs, which you should consider reading only if you are writing a pool memo in the particular case.

4-5. NOMINATIONS AND APPOINTMENTS

4. Introduction to the Nomination and Confirmation Process & Case Study on Judge Bork's Nomination (9/12)
Week 4 Reading Pack
5. Managing Nominations in the Post-Bork Era; Debating Changes to the Nomination and Confirmation Process (9/19)*
Week 5 Reading Pack
Committee Votes on Recent Nominations (visit:
<https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes>)
Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond* (Introduction, Parts I & II only)
* Be sure to check bcourses for additional materials posted relating to the pending nomination of Judge Kavanaugh

6-13. DECIDING CASES

6. Introduction: The Court's Work; The Role of Dissents; The Role of Swing Justices; The Role of the Chief Justice & Opinion Assignments (9/26)
Week 6 Reading Pack
Casey Bench Memo sample
7. The Role of Oral Argument & Illustrative Merits Case Currently Pending Before the Court: (10/3)
Week 7 Reading Pack

Gundy v. United States, No. 17-6086
Question Presented: Does the Sex Offender Notification and Registration Act's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. §16913(d) violate the nondelegation doctrine?

(briefs and lower court opinion posted in merits cases folder)

8. How to Write a Good Brief & Illustrative Merits Case Currently Pending Before the Court: (10/10)
Week 8 Reading Pack

Madison v. Alabama, No. 17-7505

Questions Presented: (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.

(briefs and lower court opinion posted in merits cases folder)

9. The Role of the Advocates & Illustrative Merits Case Currently Pending Before the Court: (10/17)
Week 9 Reading Pack

Timbs v. Indiana, No. 17-1091

Question Presented: Is the Eighth Amendment's excessive fines clause incorporated against the states under the 14th Amendment?

(briefs and lower court opinion posted in merits cases folder)

10. The Role of the Solicitor General & Illustrative Merits Case Currently Pending Before the Court: (10/24)
Week 10 Reading Pack

Herrera v. Wyoming, No. 17-532

Question Presented: Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

(briefs and lower court opinion posted in merits cases folder)

11. The Role of the Law Clerks (more) & Illustrative Merits Case Currently Pending Before the Court: (10/31)
Week 11 Reading Pack
Scotus Clerks – The Law School Pipeline
Supreme Court Feeder Judges – Men and Few Women Send Clerks to SCOTUS

Gamble v. United States, No. 17–646

Question Presented: Should the Court overrule the “separate sovereigns” exception to the Double Jeopardy Clause?

(briefs and lower court opinion posted in merits cases folder)

12. The Role of Amici & Illustrative Merits Case Currently Pending Before the Court (11/7):
Week 12 Reading Pack

To be announced.

(briefs and lower court opinion posted in merits cases folder)

13. Illustrative Merits Case Currently Pending Before the Court (11/14):
To be announced.
(briefs and lower court opinion posted in merits cases folder)

14. LINGERING QUESTIONS FOR THE COURT’S FUTURE (11/16)

14. Enhancing Public Access to the Court: Televising Arguments and Revisiting Life Tenure
Week 14 Reading Pack