

## LAW 667, SUPREME COURT PRACTICE (WINTER 2018)

Mon.-Fri, 9:00 a.m. to Noon, Rm. 215; [Prof. Anthony Johnstone](#), Rm. 312 (x6711)

This course offers an opportunity to understand the function of the United States Supreme Court and other appellate courts by simulating a case currently pending before the Court. Each student will play counsel or a justice in: the selection of a case through the certiorari process; presentation of briefs and arguments by petitioners, respondents, and amici; and conference followed by an announcement of opinions. Throughout, students will reflect upon litigation strategy, judicial philosophy, and the interaction among various participants in the Supreme Court's process, and by extension other appellate judicial processes. In addition to seminar discussion, students will participate in oral argument from both sides of the bench, and produce a short brief or opinion.

**Outcomes:** *Knowledge emphasized:* a practical understanding of the distinctive processes of petitions for a writ of *certiorari*, briefs of *amici curiae*, and argument before a multi-member court; the basic jurisprudences of the justices and dynamics of their application in particular cases; and the strategy of litigating with these distinctive processes and dynamics. *Skills emphasized:* problem solving, legal analysis, legal research, communication, counseling, and dispute resolution. *Values emphasized:* self-reflection.

**Readings.** The course book is Seamon, Siegel, Thai, & Watts, *The Supreme Court Sourcebook* (Wolters Kluwer 2013), available new, used, and electronically online. The readings include commentary from *The Supreme Court Sourcebook*, legal research about the case at issue, and colleagues' briefs and opinions. (Approximate page count is denoted in parentheses for each day of class.) We will select from the following petitions (summarized below and available on Moodle and at [scotusblog.com](http://scotusblog.com)):

***Minnesota Voters Alliance v. Mansky*, No. 16-1435**

***Stone v. Montana*, No. 17-670**

***U.S. v. Microsoft Corp.*, No. 17-2**

**Questions.** I am in my office all week but you can confirm my availability by e-mail. Please do not pose questions by e-mail; instead, post the question on the Moodle discussion forum where your colleagues can benefit from your questions.

**Assessment.** Your grade has three components: *discussion* (40%), *argument* (10%), and *brief/opinion* (50%). *Discussion* assesses daily constructive engagement in class discussion, including presentation of assigned readings. *Argument* assesses playing the role of a Supreme Court advocate or justice in the oral presentation of a selected case. *Brief/opinion* measures the legal research, analysis, and writing of a 1500-word summary of your role's position in the case, framed as either a brief (counsel) or an opinion (court); briefs are due Thursday, January 11 at 5pm, opinions are due Friday, January 12 at 5pm (post as attachments on Moodle). Be prepared to participate fully in each day's agenda.

**Academic Honesty.** All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the [Student Conduct Code of the University of Montana](#). Law students should also be familiar with the Law School Honor Code in the Law Student Handbook.

**Disabilities.** Students with disabilities may request reasonable modifications by contacting me. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. "Reasonable" means the University permits no fundamental alterations of academic standards or retroactive modifications.

***DRAMATIS PERSONAE***

Counsel for Petitioner  
Counsel for Respondent  
Solicitor General  
Amicus Curiae in Support of Petitioner  
Amicus Curiae in Support of Respondent  
Amicus Curiae in Support of Neither Party

Chief Justice John Roberts  
Justice Anthony Kennedy  
Justice Clarence Thomas  
Justice Ruth Bader Ginsburg  
Justice Stephen Breyer  
Justice Samuel Alito  
Justice Sonia Sotomayor  
Justice Elena Kagan  
Justice Neil Gorsuch

Rank your preferred roles at this link *by Monday at 9:00 a.m.*:  
[https://umt.co1.qualtrics.com/jfe/form/SV\\_cC7Lb85nuB4r3bD](https://umt.co1.qualtrics.com/jfe/form/SV_cC7Lb85nuB4r3bD)

**PETITIONS FOR CERTIORARI*****Minnesota Voters Alliance v. Mansky, No. 16-1435***

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

***Stone v. Montana, No. 17-670***

Whether the Fifth Amendment's protection from double jeopardy attaches when the court accepts a defendant's guilty plea.

***U.S. v. Microsoft Corp., No. 17-2***

Whether a United States provider of email services must comply with a probable-cause-based warrant issued under 18 U.S.C. § 2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad.

**Course Rubric**

| <i>Discussion (4 days x 10 pts.)</i>   |   |   |     |   |   |
|--|---|---|-----|---|---|
| 0-3<br><i>Physically or mentally disengaged; counter-productive.</i>   | 4-7<br><i>Minimal engagement; leaves the discussion where it stood.</i> | 8-10<br><i>Significant engagement; advances discussion.</i> | Day |   |   |
|  |   |   | M   | T | W |
| <b>Argument (10 pts)</b>   |   |   |     |   |   |
| <b>Organization</b> (structures argument effectively) (2 pts.)   |   |   |     |   |   |
| <b>Format</b> (professional in presentation) (2 pts.)  |   |   |     |   |   |
| <b>Clarity</b> (speaks and answers questions clearly) (2 pts.)   |   |   |     |   |   |
| <b>Style</b> (conveys content with rhetorical effect) (2 pts.)   |   |   |     |   |   |
| <b>Role-playing</b> (acts according to assigned persona) (2 pts.)  |   |   |     |   |   |
| <b>Brief / Opinion (1500 words, 50 pts.)</b>   |   |   |     |   |   |
| <b>Research (20 pts.)</b><br>Originality (adds perspective to course material)<br>Background (develops relevant factual and procedural background)<br>Coverage (covers relevant legal authorities)<br>Depth (explores focused topic deeply relative to paper length)   |   |   |     |   |   |
| <b>Analysis (20 pts.)</b><br>Balance (addresses arguments on both sides)<br>Accuracy (correctly relies on relevant authority)<br>Synthesis (synthesizes legal principles in application)<br>Conclusion (supports brief conclusion with arguments)  |   |   |     |   |   |
| <b>Writing (10 pts.)</b><br>Organization (structures content effectively at all levels)<br>Format (professional in type, grammar, punctuation, and spelling)<br>Clarity (reads well as legal prose)<br>Style (conveys content with rhetorical effect)  |   |   |     |   |   |
| <b>TOTAL (100 pts.)</b>  |   |   |     |   |   |
| <b>Self-Assessment (100 words):</b> At the end of the course, email me a short reflection on your performance and I will provide your assessment. Consider <i>whether</i> your performance met expectations, <i>what</i> choices you could have made differently, <i>why</i> you made the choices you did (for yourself, for others involved, and for social/institutional reasons), and <i>how</i> your thinking process changed as a result of the performance. Include <u>SCT18</u> in the subject. |   |   |     |   |   |

**1. GETTING TO THE COURT: *CERTIORARI***Mon. **A. Introduction**

1/8 1. Course and Court overview (1:00)

(34+) **B. The Court and *certiorari***1. Discussion of the Court's docket and *certiorari* (0:30)

2. Conference (0:05 each on which case to grant, which not, &amp; why)

3. Announce counsel and court roles (0:15)

***ALL READ:*****Petitions in *Mansky, Stone, & Microsoft*** (on scotusblog.com & Moodle)**I.D. The Supreme Court of the United States** (17-19)**4.B. What Makes a Case "Certworthy"? Rule 10** (173-74)

1. Rule-Based Considerations (184-91)

2. Other-Considerations (191-204)

**4.C. The Process of Deciding to Decide: Rules 13-14** (204)

2. Review of Cert Papers (and the Cert Pool) (226-28)

3. The Discuss List (252-54)

4. Voting at Conference (and the Rule of Four) (254-60)

**2. THE CASE AND YOUR ROLE**Tue. **A. The Case**

1/9 1. Introduction to the issue (0:30)

(+) 2. Discussion of the case and questions (0:45)

**B. Your Role**

1. Counsel on approaches to case (0:05 each on best case &amp; why)

2. Justices on approaches to case (0:05 each on best opinion &amp; why)

3. Discussion of approaches to case (0:30)

***READ:***

1. Lower court opinion(s) in the case

***PETITIONER & RESPONDENT:*** Pick and read your *best case****AMICI & S.G.:*** Pick your client and position; pick and read your *best case****JUSTICES:*** Pick and read your own *best opinion* (maj/con/dis) for the case

**3. BRIEFING & DECIDING CASES****Wed. A. Briefing & Deciding**

- 1/10  
(36+)
1. **Background for briefing** (0:30 total)
  2. **Petitioner and Respondent on merits brief strategy** (0:20 total)
  3. ***Amici Curiae* on *amicus* brief strategy** (0:20 total)
  4. **Justices on decision strategy** (0:30 total)
- B. Discussion of Strategy** (0:20 total)  
**[End early for work session]**

***ALL READ:*****5.A. The Briefing Schedule: Rule 25** (287-90)**5.B. Merits Briefs: Rule 24**

1. Elements of the Brief (290-95)

**5.C. *Amicus* Briefs: Rule 37** (356-57)**7.A Deciding Cases: Process**

6. Separate Opinions: Scalia, *The Dissenting Opinion* (519-26)

***MERITS COUNSEL READ: 5.B. Merits Briefs***

2. Preparing an Effective Merits Brief (295-305)
3. Advice from the Justices: (305-10)  
C.J. Roberts, J. Scalia, J. Thomas, J. Ginsburg, J. Breyer, J. Alito

***AMICUS COUNSEL (& S.G.) READ: 5.C. Amicus Briefs***

1. The Role of the *Amicus* (357-68)
2. Effective *Amicus* Briefing (368-80)

***JUSTICES READ: 7.A Deciding Cases: Process***

1. The Conference (453-62)
3. The Assignment (467-70)
4. Opinion Writing and Negotiation (470)

**4. PREPARING FOR ORAL ARGUMENT**

- Thur. **A. What happens at oral argument**  
1/11 **1. Hear Supreme Court argument example (1:00)**  
(19+) **B. Discuss argument strategies**  
**1. How the Court uses oral argument (0:30)**  
**2. How Counsel can be useful at oral argument (0:30)**  
**[End early for work session]**

**ALL READ:**

- 6.A. Setting the Stage (397-400)**  
**1. The Supreme Court Building**  
**2. The Supreme Court Courtroom**  
**6.B. Court Rules: Rule 28 (401-402)**  
**6.C. What Should Happen at Oral Argument (402-424)**  
**1. The Court's Guide for Counsel**  
**2. Advice from Experts**  
**6.E.2. The Importance of Oral Argument: Impact (447-52)**

**COUNSEL:** Briefs due at 5pm Thursday (posted on Moodle)

**5. ARGUMENT AND DECISION**

- Fri. **A. Oral argument (including questions from the bench)**  
1/12 **1. Petitioner (0:10, less time reserved for rebuttal)**  
(+) **2. Amicus in Support of Petitioner (0:10)**  
**3. Amicus in Support of Neither Party (0:10)**  
**4. Respondent (0:10)**  
**5. Amicus in Support of Respondent (0:10)**  
**6. Solicitor General (0:10)**  
**7. Review of argument (0:15)**  
**B. Conference**  
**1. Discussion and vote of justices (0:03 each)**  
**2. Assignment of opinions (0:15)**  
**3. Hear opinion announcement example (0:15)**

**ALL READ:**

All briefs (posted on Moodle at 5pm Thursday)

**JUSTICES:** Opinions due at 5pm Friday (posted on Moodle)