Oberlin College  
Department of Politics  
King 306  
Spring Semester, 2010  
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The Syllabus

Politics 202 is a course about the Constitution, the historical development of its major principles, efforts by the Supreme Court to redefine these principles, and differing approaches by justices and scholars about how the Constitution should be interpreted. We also explore how internal Court reasoning is related to the social, economic, political, and institutional structures outside the Court. Through such analyses, we study the Supreme Court as a forum of social and political change. This course counts toward the Law and Society and GSEF majors.

In addition to lecture-discussions on Monday and Wednesday, which will meet in King 306, from 11:00-12:00 on Monday and 11:00-12:00 on Wednesday, each student will participate in one of three discussion sections that will meet on most Fridays. The discussion sections have been scheduled in Wilder 211 (Section 1 at 10:00-10:50 AM, Section 2 at 11:00-11:50 AM, and Section 3 at 1:30-2:20 PM.) These discussion classes are regular classes in which new material will be discussed. Class attendance and participation is central to success in this course. Students are urged to participate actively in discussions both in the lecture-discussions on Monday and Wednesday and in Friday discussion sections. Being prepared for class by reading the assigned required material prior to class is required for success in this class. Please leave the Friday 11:00AM - 12:00 time period open, even if you are a member of the discussion section that meets at 10:00AM or 1:30PM. On several Fridays the entire class will meet in King 306 at 11:00 rather than in separate discussion sections.

My office hours will be in Rice Hall, Room 232, on Wednesdays from 1:00 to 2:00, and on Fridays from 2:30 to 4:00, or by appointment. I can be reached at my office number, 775-8495, where you can leave a message. I also can be reached at home, 774-1670, or by e-mail (Ronald.Kahn@oberlin.edu). I will have a sign-up sheet on my office door for office hours. Please sign up as early in the office hours as possible.

Course Assignments and Grading

The first piece of written work required in the course will be a typed four-page memo in which you criticize and compare two cases from a list I will give you, in light of questions on presidential and congressional power under separation of powers or state and national power over economic and social policy. (on material through Section III of syllabus, that is, through class 10). The four page memo is due at my office any time on Wednesday, March 10, 2010. The second assignment, an essay of 8-10 double-spaced typewritten pages, will be due on Wednesday, April 14, at any time. It is on material through Section IV of the syllabus (equal protection of the law). The third essay, 8-10 pages, on rights of privacy, abortion choice, and gay rights, is due on Monday, May 10, 2010 any time. Place the essays under my office door in Rice 232. I do not accept essays by e-mail. It is simply not possible to do so in a class of this size.

The date of the final examination, which will center on the First Amendment, is Thursday May 20, 2010 at 7:00-9:00 PM. It will be a closed book and closed note final which will ask you to answer a question from a list of review questions, which will be handed out by Friday, May 7, 2010.
The first assignment, the four page short essay, will count 10% of your grade. The second assignment, an essay of 8-10 typed double-spaced pages, will count 25% of your grade. The third essay, which can be up to 12 pages in length, will count 30% of your grade. The final examination on the First Amendment will count 20%, and the level and quality of your class participation will count 15%. Again, participation is crucial in this course because it is taught by the Socratic or case method. Many times the difference in one’s grade depends on class participation.

The following required readings have been ordered by the Oberlin Bookstore for your purchase:


ALL OTHER REQUIRED (AND RECOMMENDED) READINGS ARE ON ERes

The password to access ERes readings for this course is POLT202. Most of the readings in this course are listed under POLT202. However, several readings may be listed under POLT308: Seminar on Constitutional Interpretation and Individual Rights. Page numbers for articles do not include endnotes.

Reading the Syllabus

WHEN PAGE NUMBERS ARE LISTED WITHOUT A FULL CITATION they refer to pages in the casebook: Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlen, Constitutional Law, Sixth Edition (New York: Aspen Law & Business Publishers, 2009). The major cases which will be discussed in class along with the “notes” are listed in order on the syllabus. When cases are indented under a note, consider how they inform the concept or argument in the note. When a case is in a Supplement to the casebook, it will be so listed.

It will help your learning to read the readings in the order that I have listed them, which, at times, may be in a different order than they come in the text. The readings are listed by class period. Several topics will be covered in two classes; these are listed under two class numbers. For these topics, I will tell you which specific readings must be read for upcoming classes.

Let me reiterate, class attendance and participation are mandatory for success in this course. This is not a course that one can take successfully as a correspondence course.

Class Writing Tutors

We are fortunate to have class tutors for this course. All tutors have taken this course. Please visit with them when you are writing your papers, or at any time. They will hold group sessions during the two weeks prior to when essays are due. Tutors also will meet with students individually. I urge you to show drafts of your essays to a class tutor prior to your writing final drafts. Some students may wish to visit a writing tutor when completing the ungraded memo. The Head Tutor is Allison Handler, who can be reached at 440-525-3975.

Other Sources of Information and Full Text of Cases

The essays and the final will be based on the required reading material. However, you may wish to read the full text of a Supreme Court case, such as when you are writing your essays. These cases are available on the
LexisNexis Academic Universe Computer based Legal Data Service, which is on the web and thus available in your dorm rooms. LexisNexis can be accessed on the web by going to www.oberlin.edu. Click on Libraries, then find articles, then database by name, then L-M. After selecting “LexisNexis Academic,” click on “Legal Research” and then “Get a Case.”

Other websites on the Internet at which you can read the full Supreme Court cases and view other materials on the Supreme Court and constitutional law include the following: www.supremecourto.us, which is the official website of the United States Supreme Court, and www.findlaw.com/casecode/ which is a particularly useful venue at which you can find all Supreme Court decisions, state and lower federal court opinions, as well as news about the Supreme Court and law. Oyez.nwu.edu is a site at which you can hear oral arguments on major Supreme Court cases. http://www.scotusblog.com/ provides commentary on current cases. For a new and comprehensive listing of links from the Clough Center at Boston College to document collections, research and instructional centers, news sites and blogs whose primary focus is constitutional democracy or constitutionalism more generally see http://www.bc.edu/centers/cloughcenter/links.html.

Important reference information may be found in the following sections of the course text, Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlen, Constitutional Law, Sixth Edition (New York: Aspen Publishers, 2009): The Constitution of the United States, at xliii-lvii, and Biographical Notes on Selected U.S. Supreme Court Justices, at lxix-lxvii. Of particular usefulness is the chart “The Supreme Court Since 1789,” which is a chronological listing of justices and chief justices, along with dates of major cases, at lxxx-xc. If you want to find where a case is referenced in the book, look at Table of Cases, at 1611-1629, where they are listed in alphabetical order. The Table of Authorities provides full citations of works that are cited in the text, at 1631-1654. The Index to the book is at 1655-1671.

I have placed on ERs for POLT202, under “102 Briefs,” the following entries in Encyclopedia of the U.S. Supreme Court. These are terms and words which students tend to ask about in class.

Briefs (pp. 102-103)
Brown v. Board of Education 1954 (110-112)
Cert pool (145)
Certiorari, writ of (145-148)
Chief Justice (156-158)
Clerks of the justices (186-187)
Collegiality (197-198)
Concurring opinions (207-208)
Conference of the justices (208-209)
Constitution, U.S. (217-221)
Constitutional interpretation (227-231)
Constitutional law (231-233)
Court-packing Plan (248-250)
Court of Appeals (250-251)
Decision-making (270-271)
Disability of justices (280-281)
Dissents (281-284)
Lee v. Weisman 1992 (555)
Opinions, Writing of (687-688)
Oral Argument (688-689)
Race and Discrimination (762-765)
Schedule of Required Reading

I. Judicial Authority in a System of Checks and Balances; Theories of Constitutional Interpretation.

Class
1. Organizational Meeting (Discussion of course and first readings).

2. The Role of the Supreme Court in the Constitutional Scheme:
   Founding Principles and Marbury v. Madison (1803) as a Basic Framework

      Introduction: Creating a Constitution That Binds the Future
      Note: The Textual Constitution’s Role in Binding the Future
      The Origins of the U.S. Constitution
      The Arguments over the New Constitution
      Federalist No. 10 (Madison)
      Note: Madisonian Republicanism
      Federalist No. 51 (Madison)
      Note: Madisonian Republicanism, Checks and Balances
      Note: Madisonian Republicanism and Contemporary Constitutionalism

      Marbury v. Madison (1803)
      Note: Marbury v. Madison

3. An Alternative View of Marbury v. Madison (1803): Supreme Court Decision-making as Bi-Directional or Constructing The World Outside; Justifying Judicial Review: Is there a “Counter-Majoritarian Difficulty” for the Supreme Court?

   a. An Alternative View of Marbury v. Madison (1803)
      Reread Marbury, 29-36.
b. Justifying Judicial Review: Is there a “Counter-Majoritarian Difficulty for the Supreme Court?

Note: Constitutions, Democracy, and Judicial Review, 43-51.

4. Interpretive Methods in Supreme Court Decision-making I: Representation-Reinforcement and Natural Law


McCulloch v. Maryland (1819) (Is the National Bank constitutional?)
Note: Constitutional Methodology and Constitutional Interpretation in McCulloch

b. Natural Law Constitutional Interpretation, 75-78.

Calder v. Bull (1798)
Note: Natural Law, Moral Argument, and the Supreme Court

Thomas C. Grey, Do We Have an Unwritten Constitution, 27 Stan. L. Rev. 703 (1975): 78-81(ERes)

5. Interpretive Methods in Supreme Court Decision-making II: Originalism

Note: Theories of Constitutional Interpretation--"Originalism" And Its Critics, 711-720.


J. Jefferson Powell, The Original Understanding of Original Intent, 51-56. (ERes)


Note: A Government of Enumerated Powers
Note: The Values of Federalism
Gibbons v. Ogden (1824) (What constitutes commerce among and within the states)
Note: Gibbons v. Ogden

Hammer v. Dagenhart (1918) (The Child Labor Case)
Wichard v. Filburn (1942) (Supreme Court finally rejects right to “Economic Substantive Due Process-Government control of wheat consumed on a farmer’s farm)

Note: The New Deal Crisis
A. L.A. Schechter Poultry v. United States (1935)
Carter v. Carter Coal Co (1936)
New Deal Legislation and Commerce Clause Tests in the 1930’s

c. The Commerce Clause and Race Discrimination in the 1960’s, 210-214.

Heart of Atlanta Motel v. United States (1964) (Race discrimination in public accommodations)
Katzenbach v. McClung (1964) (Race discrimination in restaurants)
Note: Federalism and Congressional Motivation

7. National and State Government Power over Economic and Social Legislation in the 1990’s and 21st Century: Guns in School Zones and Violence against Women; The Tenth Amendment as a Federalism-Based Limitation on National Government Authority to Mandate States to Regulate Radioactive Waste and Hand-gun Registration


Note: Federalism after the New Deal


b. The Tenth Amendment as a Federalism-Based Limitation on National Government: Environmental Regulations, National Background Check to Purchase Guns, 336-354.

New York v. United States (1992) (Regulation of radioactive waste disposal)
Prinz, V. United States (1997) (National instant background check to purchase guns)
Note: The “Anticommandeering” Principle
III. Distribution of National Powers: What do Separation of Powers and Checks and Balances Mean?

8. Presidential and Congressional Power over Domestic and Foreign Affairs.


   The Federalist No. 47 and 48 (Madison) (1787)
   Note: The Theory of Separation and Checks and Balances
   Youngstown Sheet & Tube Co. v. Sawyer (1952) (The Steel seizure case)
   Note: Youngstown and the Power of the President
   Note: The Relevance of Foreign Law

b. Foreign Affairs and War-Making Authority, 371-381.

   United States v. Curtiss-Wright Corp.(1936)
   Note: The President and Foreign Affairs
   Note: The Allocation of Warmaking Authority
   Note: The “War on Terror” and the Second Gulf War

9. The President and Supreme Court under Separation of Powers: The Right of Habeas Corpus and the Prisoners at Guantanamo Bay, 381-395,

   Note: The Interplay between the President, Congress, and the Court with Regard to the “War on Terror”
       Hamdan v. Rumsfeld (2006) (Military commissions violate the Constitution)
   Note: Some Unanswered Questions

10. Is the President above the Law In Domestic Matters?; “Formal” versus “Functional” Bases for Deciding Presidential and Congressional Power: The Legislative Veto, the Line-Item Veto; What Role Should the Supreme Court Play in Determining the Power of Congress and the Presidency to Restructure Government?

a. Is the President above the Law In Domestic Affairs?: Executive Authority, Policy-making, and Personal Conduct, 400-412.

   Note: Executive Privilege and Presidential Immunity
       Mississippi v. Johnson (1867) (Presidential enforcement of Reconstruction Laws)
       Cheney v. United States District Court (2004)
   Note: The Politics of Impeachment
   Note: The “Law” of Impeachment
b. Congressional Control of Deportation Decisions and the Presidential Power to Make Line-Item Vetoes, 412-424

Note: The Nondelegation Doctrine and "Quasi-Constitutional" Statutes
   A.L.A Schechter Poultry Corp. V. United States (1935) (Sick Chickens Again!)
   INS v. Chadha (1983) (Legislative veto and the deportation of non-citizens)
   Note: The Legislative Veto

c. Pragmatic Formalism versus Functionalism in Interpreting What the Separation of Powers Means

   Read two of the three following short articles or the Haltom article


   Or

IV. **Rights Principles, Equality, and Racial Segregation: What Constitutes a Denial of Equal Protection Before the Law Under the 14th Amendment?**


   State v. Post (Supreme Court of New Jersey) (1845)
   Note: The Constitutionality of Slavery
   Dred Scott v. Sandford (1857)
   Note: Dred Scott and the Power of Judicial Review

   b. Reconstruction and Retreat: The Interpretation of the 14th Amendment in Plessy v. Ferguson (1896), 451-461.

   Note: The Work of the Reconstruction Congress
   Note: The Judicial Reaction
   Plessy v. Ferguson (1896)
   Note: Separate but Equal


   Note: The NAACP’s Legal Strategy
   Note: The Road to Brown (Supreme Court cases prior to Brown)
   Missouri Ex. Rel. Gaines v. Canada (1938) (Sending blacks to neighboring colleges)
   Sipuel v. Board of Regents (1948) (States must provide an equal legal education)
   Sweatt v. Painter (1950) (Segregated legal education can’t be equal)
   McLaurin v. Oklahoma (1950) (Can’t segregate within a graduate school)


   Brown v Board of Education of Topeka (1954) (Brown I)
   Note: Justifications and Explanations for Brown

c. Constitutive Supreme Court Decisionmaking and the Social Construction Process -- A First Look:
   The Social Construction of Race in Plessy and Brown


13. The Implementation of Brown v. Board of Education: 1955 to the Present; Brown as a Rule of Law and as Part of a Political Movement— The Relationship of Law and Politics, 472-

a. Fulfilling Brown’s Promise, 472-479.

   Brown v. Board of Education of Topeka (1955) (Brown II- The Implementation Decision)
   Note: "All Deliberate Speed"
   Note: The Initial Response to Brown
   Cooper v. Aaron (1958) (Federal troops in Little Rock-end of all deliberate speed)
   1964 Civil Rights Act
   Green v. County School Board (1968) (Freedom of choice plans)
   Swann v. Charlotte Mecklenburg Board of Education (1971)
b. The End of an Era?, 479-488.

Note: The Dejure/Defacto Distinction and the Limits of the Courts’ Remedial Powers
Keys v. School District Number 1 (1973) (Segregation in the North: Denver)
tower to impose inter-district remedies in Detroit)
Freeman v.Pitts (1992) (Incremental court withdrawal from remediation efforts)
(We will take up Community Schools v. Seattle School District (2007 below)

Donald E. Lively, Desegregation and the Supreme Court: The Fatal Attractions of Brown, 20 Hastings

Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in

14. Equal Protection Methodology I: Minimal Court Scrutiny or “Rational Basis” Supreme Court Review of Non-
Constitutionally Suspect Classifications in the Law

a. “UNDER-INCLUSIVE” and “OVER-INCLUSIVE” CLASSIFICATIONS [Or How Equal Protection
Analysis Roots out Illegal Discrimination] (Handout and on ER es)

b. Rational Basis Review (or Minimal Court Scrutiny) of Formally “Non-Suspect” Classifications in
Laws, 589-512.

New York City Transit Authority v. Beazer (1979) (Former drug addicts as transit workers)
Note: Equal Treatment and Relevant Differences
Note: Limitations on Permissible Government Purposes
U.S. Department of Agriculture v. Moreno (1973) (Food stamps)
City of Cleburne v. Cleburne Living Center (1985) (Group home for mentally challenged)
Romer v. Evans (1996) (Different political process for legislation favoring gay men and lesbians)
Note: “Actual Purpose” Review
Minnesota c. Clover Leaf Creamery Co. (1981) (Paper versus plastic milk containers)
Note: The Means-End Nexus (Over- and Under-inclusion)
and taxis)
Williamson v. Lee Optical (1955) (Ophthalmologist and optometrists prescriptions needed for an
optician to replace lens or frames)

15. Equal Protection Methodology II: Heightened Supreme Court Scrutiny of Race Specific Classifications

a. Origin and Rationale for Heightened Scrutiny of Race-Specific Classifications That Disadvantage Racial
Minorities  (Invidious Race Classifications): 512-521

Strauder v. West Virginia (1879) (Denial of blacks on juries)
Korematsu v. United States (1944) (Japanese-American removal to camps in WWII)
Loving v. Virginia (1967) (Laws against inter-racial marriage)
Note: Doctrinal Evolution in the Scrutiny Applied to Racial Classifications

Note: Justifications for Special Scrutiny of Racial Classifications (Including the first discussion of famous “footnote 4 of United States v. Caroline Products (1938)” on political system defects and discrimination against minorities)

Note: The Structure of Strict Scrutiny—What Counts as “Facial” Race Classifications?
Palmore v. Sidoti (1984) (Granting child custody on the basis of race)
Johnson v. California (2005) (Assignment of Prisoners to Cells Based on Race)
Hunter v. Ericson (1969) (Constitutionality of referendum suspending fair housing law)


Washington v. Davis (1976) (Police tests)
Note: Rational Basis Review of Non-Race-Specific Classifications

McCleskey v. Kemp (1987) (Race and capital punishment)
Note: Racial Disparities in Investigating, Charging and Sentencing

b. Defining Discriminatory Intent After Brown


You may wish to read:


The Early Cases: Access to Medical Schools and Affirmative Action in Government Contracts, 553-571.

Note: The Imposition of Strict Scrutiny
Regents of University of California v. Bakke (1978) (Entry to medical school)
Fullilove v. Klutznick (1980) (Federal contracts)
City of Richmond v. J. A. Croson Co. (1989) (City contracts)
Note: The Constitutionality of "Benign" Racial Classifications

18. Affirmative Action Today; Entry to College/Law School; Assigning Students Based on Race in Contemporary Urban Schools: What Did Brown Mean in Light of Affirmative Action Today

a. Entry to College and Law School, 571-590.

Note: The Contemporary Application of Strict Scrutiny

Ronald Kahn and Ken I. Kersch, The Supreme Court and American Political Development (Lawrence: University Press of Kansas, 2006)

Tom Keck, Chapter 10, From Bakke to Grutter: The Rise of Rights-Based Conservatism, 414-436. (ERes)


Parents in Community Schools v. Seattle School District No. 1
Note: Parents Involved and the Synthesis of Equal Protection Law

c. What Did Brown Mean in Light of Affirmative Action and Invidious Race Discrimination Cases? What Could It Have Meant?


Plus, please read at least one of the two articles listed below:


19. Equal Protection Methodology IV: Intermediate Court Scrutiny and Gender Discrimination


- Bradwell v. Illinois (1873) (Women Lawyers)
- Minor v. Happersett (1875) (Right to vote not a privilege of US Citizenship)
- Muller v. Oregon (1908) (Hour limitation law for women)
- Goesaert v. Cleary (1948) (Women bartenders)

- Reed v. Reed (1971) (Gender and administration of wills)
- Frontiero v. Richardson (1973) (Spousal military benefits)

Note: From Reed to Craig v. Boren—Evolution and Doctrinal Confusion

- Invalidating Gender Classifications
  - Stanley v. Illinois (1972) (Treating unwed mothers and fathers differently)
  - Cleveland Board of Education v. LaFleur (1974)
  - Taylor v. Louisiana (1975) (Women on juries)
  - Weinberger v. Wiesenfeld (1975) (Treating widows and widowers differently)
  - Stanton v. Stanton (1975) (Different parental support of children based on gender)

- Unsuccessful Challenges to Gender Classifications
  - Schlesinger v. Ballard (1975) (Promotion in navy)


- Craig v. Boren (1976)(Men and women and 3.2 beer!)

Note: Heightened Scrutiny for Gender Classifications?

20. What Constitute Archaic and Overbroad Generalizations (about Gender) versus “Real” Differences—The Social Construction of Gender Today:

a. Admitting Women into the Virginia Military Academy:

- Has the Level of Court Scrutiny Increased Since Craig v. Boren (1976), 636-648, 652-656.

  - Note: “Real Differences” and Formal Equality
  - Rostker v. Goldberg (1981) (Men-only military registration)

Note: The Relevance of “Real Differences”


- Califano v. Goldfarb (1977) (Gender-based proof of need)
- Califano v. Webster (1977) (Gender-based benefits)

Note: The Problem of "Benign" Gender Classifications

**Second Essay (on material through Class 20) is Due by Wednesday, April 14, 2010**

V. Should the Supreme Court Define Implied Fundamental Rights Under the Due Process Clauses and the 14th Amendment Equal Protection Clause? On What Bases?

   Substantive Due Process -- The Protection of Economic Interests and the Questions of Redistribution

   a. The Rise and Decline of the “Lochner Era’s” Substantive Liberty or Right To Engage In Economic Activities (a.k.a. Economic Substantive Due Process) 735-754.

      Note: The Road to Lochner
      Lochner v. New York (1905) (State maximum hour law)
      Note: The (Alleged?) Vices of Lochner
      Note: The Lochner Era—1905-1934
      Nebbia v. New York (1934) (State pricing of milk)
      West Coast Hotel Co. v. Parrish (1937) (State min. wage law)
      Note: The Context of West Coast Hotel and the 1930s Political and Economic Climate


      Note: The End of an Era
      United States v. Caroline Products Co. (1938) (Footnote 4, when should courts define rights)
      Williamson v. Lee Optical of Oklahoma (1955) (Economic regulation off limits to courts)
      Ferguson v. Skrupa (1963) (Economic regulation off limits to courts)
      Note: Pluralism, Naked Wealth Transfers, and the Courts

22. The Rebirth of Implied Fundamental Rights: **Fundamental Interests under the Equal Protection Clause**
   -- The Right to Procreate, Travel, and Education.

   a. The Fundamental Right to Procreate 762-766.

      Skinner v. Oklahoma (1942) (Sterilizing chicken stealers, but not “white collar” crime)
      Note: The Fundamental "Right to Have Offspring"
b. The Fundamental Right to Vote, Gain Access to Judicial Process

The Fundamental Right to Vote, 766-770

Note: Is the Right to Vote "Fundamental"?

Right to Meaningful Access to Court, 794-796, 799-800

Griffin v. Illinois (1956) (Right to free trial manuscript for poor)
Douglas v. California (1963) (Right to legal counsel for poor)
Boddie v. Connecticut (1971) (Right to waiver from court costs to divorce)

c. The Right to Travel and Equal State Citizenship, 803-813.

Shapiro v. Thompson (1969) (Right to travel and durational requirements for welfare)
Saenz v. Roe (1999) (Travel and welfare rights under 14th Amendment “Privileges and Immunities Clause.”)
Note: The Right to Travel as a "Fundamental Interest"
Note: "Penalizing" the Right to Travel
   Zobel v. Williams (1982) (State benefits based on years as resident)
   Dunn v. Blumstein (1972) (One year residency before voting)
   Memorial Hospital v. Maricopa County (1974) (Non-emergency medical care)
   Sosna v. Iowa (1975) (One year residency requirement to secure a divorce)

d. Is There a Right to Welfare?, 813-817.

Dandridge v. Williams (1970) (Is there a right to equal welfare?)
Note: Dandridge and the Judicial Role in the Welfare Context
   Lindsey v. Normet (1972) (No right to decent housing)
   Collins v. Texas (1992) (No right to be free of indifference to employee safety)
   U.S. Department of Agriculture v. Moreno (1973) (No arbitrary denial of food stamps)

e. Is There A Fundamental Right to Education?, 818-830

San Antonio Ind. School District v. Rodriguez (1973) (Equal state funding of school districts)
Note: The Rodriguez Formulation
   Note: Plyler and the Equal Protection Clause

You may also wish to read:

Chapter 5, "Equal Protection on the Burger Court," 139-160.

15

a. The Right of Privacy: Griswold to Roe, 831-843.

   Griswold v. Connecticut (1965) (Right to Privacy)
   Note: Griswold and the Right of Privacy
   Eisenstadt v. Baird (1972) (Privacy rights of unmarried)

b. The Right To Abortion Choice—Both Irrespective and Respective of Your Views of the Right to Abortion Choice, Do You Find Problems With the Roe Decision?, 843-855.

   Roe v. Wade (1973) (Right to abortion choice)
   Note: The Abortion Decision


   Chapter 6, Should Courts Create New Rights?

   Also read One of the following critiques of Roe v. Wade (1973) for class discussion:


   OR


   OR


c. Public Funding of Abortions and Abortion Regulation between Roe and Casey, 855-864.

   Maher v. Roe (1977) (Federal funding (Medicaid) for an indigent’s abortion)
   Harris v. McRae (1980)
   Note: The Abortion-Funding Cases
   Note: Abortion Regulation between Roe and Casey


      Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) (Roe reaffirmed)
      Note: Casey and the Role of the Court

   b. Why Was Roe Not Overturned? (Unlike Plessy and Lochner)


      Note: The Future of Abortion Rights

25. The Right of Privacy, Family Choice, and Sexual Intimacy for Gay Men and Lesbians,

   a. Family and Other “Privacy” Interests, 899-908.

      Moore v. East Cleveland (1977) (Zoning and family make-up)
      Note: Family and Association
      Zablocki v. Redhail (1973) (Fundamental right to marry)
      Note: Families, Marriage, and Tradition (sections 1 through 7 only)
          Califano v. Jobst (1977) (Disability benefits after one marries)
          Turner v. Safely (1987) (Right of inmates to marry)
          Michael H. V. Gerald D. (1989) (Tradition and what is a child living with wife & husband)


      Note: Intimate and Cultural Association
      Bowers v. Hardwick (1986) (Right to sexual intimacy)


      Note: The Nature of the Class at Issue
      Note: The Meaning of Romer
      Note: More Targeted Laws Discriminating on the Basis of Sexual Orientation
          Don’t Ask Don’t Tell on the Military
          Same Sex Marriage
          Goodridge v. Department of Public Health (2003) (Right to marry in Massachusetts)
      Note: Strict Scrutiny for Discrimination Based on Sexual Orientation?

Note: Homosexuality, Sexual Liberty, and Substantive Due Process


OR


27. Should there be a Right to Same-Sex Marriage? Should Such a Right be Based on Equal Protection, Due Process Privacy Principles?


Chapter 1, Introduction, 3-14.
Chapter 5, Same-Sex Marriage and the Fundamental Right to Marry, 91-118.
Chapter 7, Identifying Fundamental Rights, 138-162.


Note, More Targeted Laws Discriminating on the Basis of Sexual Orientation


Massachusetts Supreme Judicial Court Advisor Opinion on the Constitutionality of Massachusetts Civil Union Law Passed by Senate in Response to the Goodrich Case (Edited text at http://www.danpinello.com)

2008 California Same-Sex Marriage Case –Edited Version on ERes
29. Should Courts or Political Institutions Define Implied Fundamental Rights? Should the Supreme Court Decide Whether the Right to Marry Should Exist Under the U.S. Constitution?, and Why Do Courts Continue To Define New Fundamental Rights in a Conservative Age?: The Limitations of Sunstein’s Call for Judicial Minimalism

a. Sunstein’s Judicial Minimalism

Cass Sunstein, “What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage.” The Supreme Court Review (2003), 27-74. [This is lots of footnotes so it’s not as long as it looks]

   Chapter 1, Leaving Things Undecided, 3-23. (ERes)
   Chapter 2, Democracy-Promoting Minimalism, 25-45. (ERes)

b. The Problem with Viewing Court Decision-making in Pragmatic/Judicial Minimalism Terms


   Chapter 9, Principles and Practicalities, 196-214.


You may wish to read:


Third Graded Essay on Implied Fundamental Rights, Due Monday, May 10, 2010
VI. The First Amendment

A. Freedom of Expression I--Content-Based Restrictions on "Low Value" Speech

30. Introduction; Content-Based Restrictions: Dangerous Ideas and Information-Expression that Induces Unlawful Conduct; Expressions That Provoke Hostile Audiences


   Note: The History of Free Expression
   Note: The Philosophy of Free Expression
   Note: Organization ("Content-Based" and "Content-Neutral")


   Shaffer v. United States (9th Circuit) (1919)
   Masses Publishing v. Patten (1917)
   Schenck v. United States (1919) (Falsely yelling fire in theatre as a clear and present danger)
   Note: Shaffer, Masses, and Schenck
   Abrams v. United States (1919) (Holmes Dissent)
   Note: Abrams and the Emergence of the Holmes-Brandeis Tradition


   Note: The Road to Brandenburg
   Brandenburg v. Ohio (1969) (KKK Speech and imminence)
   Note: The Brandenburg Formulation
   Hess v. Indiana (1973)) (We’re Taking the F... Street!)
   NAACP v. Claiborne Hardware Co (1982) (Inducing unlawful conduct and “true threats” economic boycott)
   Rice v. The Paladin Enterprises (1997) (How to be a Hitman)


   Planned Parenthood v. American Coalition of Life Activists (9th Circuit Ct., 2002) (Listing abortion doctors -dead, wounded, and alive on the Internet)


32. Fighting Words; Lewd, Indecent, Non-Obscene Speech on Public Streets, Radios, and the Internet


Terminello v. Chicago (1949) (Political speech before hostile audiences)
Cantwell v. Connecticutt (1940) (What constitute fighting words?)

Chaplinsky v. New Hampshire (1942) (Calling a police officer a fascist)
Note: Fighting Words
Note: The Skokie Controversy: Should The Nazis Be Able to March in Skokie, Ill.?

b. The Lewd, Profane, Indecent (Not Obscene) on Public Streets, Radios and the Internet, 1201 -1214.

Cohen v. California (1971) (Dirty words on jacket)
Note: Profanity, Cohen, and the Captive Audience
Erznoznik v. Jacksonvile (1975) (Nudity at drive in movie)
Sable Communications Inc. v. FCC (1989) (Dial-a-Porn)
FCC v. Pacifica Foundation (1978) (Dirty words on radio)
Reno v. American Civil Liberties Union (1997) (The Indecent on the Internet)
Ashcroft v. American Civil Liberties Union (2004) (Indecent content as harmful to children)


New York v. Ferber (1962) (Child porn on film)
Note: Child Pornography
United States v. Williams (2008) (Can an offer to provide child porn be prosecuted? YES)

33. Hateful Speech: Can Groups Be Defamed? Should Hate Speech Be Regulated?


Beauharnais v. Illinois (1952) (Group defamation in the 1950's)
Note: Group Defamation and "Hate Speech"
Wisconsin v. Mitchell (1993) (Bias-motivated assaults)
Note: R.A.V. and Mitchell
Note: R.A.V. and Black
B. Freedom of Expression II—"Content-Neutral" Restrictions: Limitations on the Means of Communication without Regard to Its Content: How is Neutrality Being Defined?

34. Speech in Public Forums


- Commonwealth v. Davis (1895) and Davis v. Massachusetts (1897) (Speech in parks and streets)
- Hague v. CIO (1939) (Speech on parks and streets forty-two years later)
- Schneider v. State (1939) (Leafleting on Streets)

Note: Regulating the Public Forum

- United States v. Grace (1983) (Demonstrations at Supreme Court)
- Grayned v. Rockford (1972) (Demonstration noise near a high school)
- Frisby v. Shultz (1988) (Picketing near a home)
- Clark v. Community for Creative Non-Violence (1983) (Sleeping in a park)

Demonstrating near abortion clinics:

- Madsen v. Women's Health Center, Inc. (1994) (Thirty-six foot buffer zone)
- Schenck v. Pro-Choice Network of Western New York (1997) (Floating buffers)

Picketing Near Military Funerals


- Adderly v. Florida (1966) (Jail grounds)

Note: "No Less Than a Private Owner of Property"?

- Grayned v. Rockford (1972) (Demonstration if no noise near school)
- Greer v. Spock (1976) (Military base)


- City Council of Los Angeles v. Taxpayers for Vincent (1984) (Signs on public property)
- United States v. Kokinda (1990) (Table on postal property)

International Society for Krishna Consciousness v. Lee (1992) (Distribution of literature-yes; solicitation-no at Airports)

Note: Modern Public Forum Doctrine

Note: The Right to a "Private" Forum (Speech in shopping centers)


- Police Department of Chicago v. Mosley (1972) (Picketing at schools)

Note: Mosley and the "Equality" of Ideas


Lehman v. City of Shaker Heights (1974) (Bus advertising)

Note: Lehman and the Limits of Mosley
35. “Symbolic Conduct” as Protected Expression: Burning Draft Cards and Flags


United States v. O’Brien (1968) (Draft card burning)
Note: Draft Card Burning and First Amendment
Schacht v. United States (1970) (A military uniform in anti-war skit)
Wisconsin v. Mitchell (1993) (Hate-caused assault)


Note: Flag Desecration and Misuse
Street v. New York (1969) (Contempt of flag/flag burning when law is unclear)
Smith v. Goguen (1974) (Contemptuous treat of a flag--on seat of pants)
Spence v. Washington (1974) (Flag misuse, peace symbol on flag)
Texas v. Johnson (1989) (Flag desecration, Is there a right to burn a flag?)
United States v. Eichman (1990) (Congress tries again)


Rust v. Sullivan (1991) (Government doctors not allowed to counsel (or refer) patients about abortions)
Note: The Implications of Rust
Legal Services Corporation v. Velazquez (2001) (Can government paid lawyers be banned from testing the constitutionality of welfare laws?)
National Endowment for the Arts v. Finley (1998) (Is the NEA allowed to consider “standards of decency” when awarding grants?)
United States v. American Library Association (2003) (Can government grants to libraries for computers require blocking software to limit access to materials that are “harmful to children?”

FINAL EXAMINATION
The First Amendment
Thursday, May 20, 2010 at 7:00-9:00PM.

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