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 also counts toward the Law and Society Major.

My office hours will be in Rice Hall, Room 232, Tuesday 3:00-4:00 PM and Friday from 2:30-3:30 PM, 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 written assignment will be an essay of 6-8 double-spaced typewritten pages on questions in which you compare cases in light of questions I will hand out on materials through Section III of the syllabus, that is, through Class 11, Wed. Feb. 26, 2014. Section I-III cover material on Judicial Authority and Interpretation in a System of Checks and Balances, Changing Shape of Federalism—National, State, and Court Power Over Economic and Social Policy; and Distribution of National Powers. That paper is due in my office at any time on Tuesday, March 11, 2014.

The second assignment, an essay of 8-10 double-spaced typewritten pages, will be due on Thursday, April 3, 2014 at any time. It is on Equal Protection of the Law: The Social Construction of Race and Gender in Section IV of the syllabus, that is, through Class 21, Friday, March 21, 2014.

The third assignment, an essay of 8-10 pages, is on material in Section V. that is, through Class 29, Wednesday, April 16, 2014. The essay is on implied fundamental rights, such as the right of privacy, abortion choice, sexual intimacy and marriage for gay men and lesbians. That paper is due in my office by Tuesday, April 29, 2014).

The Final Examination is Thursday, May 15, 2014, 7:00-9:00PM. The final examination will be on Section V. of the syllabus on The First Amendment. It will be a closed book and closed note final, at which you will answer several questions that you select from a list of review questions that I will hand out on Wednesday, April 30, 2014.
The first assignment of 6-8 pages will count for 15% of your grade. The second assignment, an essay of 8-10 typed double-spaced pages, will count 25% of your grade. The third essay also will count for 25% of your grade. The final examination on the First Amendment will count for 20%. The amount and quality of your class participation will count for 15% of your grade. 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 Oberlin Bookstore has ordered the following required text for your purchase:


ALL OTHER REQUIRED (AND RECOMMENDED) READINGS ARE ON BLACKBOARD

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, Seventh Edition* (New York: Aspen Law & Business Publishers, 2013). The major cases and the NOTES in the text that we will discuss are listed in order in the syllabus. You must read cases, notes, and cases in notes. Consider how the cases inform the concept or argument in note. 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 in the text. The readings are listed by class period. 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 Kalind Parish can be reached by phone at 858-401-9182 and by email at Kalind.Parish@Oberlin.edu.

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.supremecourtus.gov, which is the official web site 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 comprehensive listing of links from the Clough Center at Boston College to document collections, research and instructional centers, news sites, and blogs 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, Seventh Edition (New York: Aspen Publishers, 2013): The Constitution of the United States, at xli-lvi, and Biographical Notes on Selected U.S. Supreme Court Justices, at lvii-lxxv. 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 lxxvi-lxxxviii. If you want to find where a case is referenced in the book, look at Table of Cases, at 1621-1640, where they are listed in alphabetical order. The Table of Authorities provides full citations of works that are cited in the text, at 1641-1664. The Index to the book is at 1665-1684. For excellent background reading on the Supreme Court decision-making process, see David O’Brien, Storm Center: The Supreme Court in American Politics. I have placed on Blackboard under “102 Briefs,” the following entries in Encyclopedia of the U.S. Supreme Court. These are terms and words that students tend to ask about in class (The three volumes of the Encyclopedia of the U.S. Supreme Court (2001) are available at the Main Reference in Mudd at KF8742.A35 E53 2001):

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)
R.A.V. v. City of St. Paul (765-766)
Reporters, Supreme Court (790-791)
Reporting of Opinions (791-792)
San Antonio Independent School Dist. v. Rodriguez (828-829)
Seniority within the Court (853-855)
Workload (1037-1040)
Schedule of Classes and Required Reading

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

Class
1. Organizational Meeting (Discussion of course and first readings). (Mon. Feb. 3, 2014)

2. The Role of the Supreme Court in the Constitutional Scheme:
      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

      What issues and questions does Chief Justice Marshall consider in deciding this case?
      Why did William Marbury receive his appointment as justice of the peace?
      What justifications for the power of judicial review?

3. Marbury v. Madison (1803) As An Introduction to Understanding Court Decision-making:
   The Supreme Court in Marbury Does Not Simply Apply an Originalist/Textual Interpretation of the Constitution or Simply Respond to Politics Outside the Court (Fri., Feb. 7, 2014)


   What is the difference between an empirical interpretive as compared to an empirical behavioral approach to the analysis of Court decision-making?

   In what way is Marbury a Model for Understanding Contemporary Supreme Court Decision-making and Judicial Review?

   What role do polity and rights principles and the construction of the world outside the Court play in Supreme Court decision-making?
4. Interpretive Methods in Supreme Court Decision-making: Representation-Reinforcement, Natural Law, And Common Law Sources of Constitutional Interpretation
(Mon. Feb. 10, 2014)


   Note: Text and “Original Public Meaning”


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


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

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


a. A Closer Look at the Heller Case


b. The Problem with Textualism and Originalism, 722-729

   Note: Theories of Constitutional Interpretation- “Originalism and Its Critics


   Other Sources

   David A. Strauss, Common Law Constitutional Interpretation, 64 University of Chicago Law Review (Summer, 1996): 1-21. (How is common law constitutional interpretation different from textualism and originalism?)
II. The Changing Shape of Federalism: National, State, and Supreme Court Power over Economic and Social Policy

6. Historical Roots of State and National Control of Economic and Social Regulation:
The Marshall and “Lochner” Court Eras (Fri, Feb. 14, 2014)

   
   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*

   Rigid Lines of National and State Power and a Newly Minted Individual Right under *Lochner* to Engage in Economic Activities under the Due Process Clauses of the 5th and 14th Amendments, 169-170, 185-191.

   Note: The New Deal Crisis
   *A. L.A. Schechter Poultry v. United States* (1935) (Chickens in transit and at rest)
   *Carter v. Carter Coal Co.* (1936) (National power over coal industry)


   *Wickard v. Filburn* (1942) (Supreme Court finally rejects right to “Economic Substantive Due Process”—Can Government limit the amount of wheat grown and consumed on farm?)
   Note: Political Constraints versus Judicial Enforcement


a. The Commerce Clause and Race Discrimination in 1960s, 199-203.

   *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


   Note: Federalism after the New Deal
   *Gonzales v. Raich* (2005) (Federal ban on cultivation and use of marijuana upheld)
c. The Tenth Amendment and the Anti-Commandeering Principle: Environmental Regulation and National Background Checks to Purchase Guns, 354-360

*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 (Only to 360)


a. The Constitutionality of Obama Care and the Individual Mandate, 218-239.

Note: Activity and Inactivity

b. Are There Nascent Individual Liberty Interests Under the Commerce Clause?


III. Distribution of National Powers: What Do Separation of Powers and Checks and Balances Mean?


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


*United States v. Curtiss-Wright Corp.* (1936)

Note: The President and Foreign Affairs
Note: The Allocation of Warming Authority
10. Presidential and Supreme Court Authority/Power under Separation of Powers: The Right of Habeas Corpus and the Prisoners at Guantanamo Bay; The President, Personal Conduct, and the Rule of Law and Politics (Mon. Feb. 24, 2014)

a. The Right of Habeas Corpus and the Prisoners at Guantanamo Bay, 390-406

Note: The “War on Terror” and the Second Gulf War
Hamdi v. Rumsfeld (2004) (Government detention of U.S. citizen as “enemy combatant”) 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)
Detainee Treatment Act and Commission Act
Note: Some Unanswered Questions (Torture, Wiretaps, Relevance of Constitutional Law)

b. Is the President above the Law?: Executive Authority, Policy-making, and Personal Conduct, 411-424.

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


a. Is the Non-Delegation Doctrine (Constitutional Limitation on Congress’ Power to Delegate Authority to the Executive) Still Alive—No Line-Item Veto Power for President?, 424-429.

Note: The Nondelegation Doctrine and “Quasi-Constitutional” Statutes
Panama Refining Co. v. Ryan (1935)
A.L.A Schechter Poultry Corp. V. United States (1935) (Sick Chickens Again!)
Clinton v. City of New York (1998) (Limit on Presidential line-item veto)

b. Separation of Powers and the Protection of Individual Rights, 429-435

Note: The Legislative Veto

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


Other Sources

First Assignment: Six-Eight Page Essay on Material Through Class 11 Due Tuesday, March 11, 2014

IV. What Constitutes a Denial of Equal Protection Before the Law Under the 14th Amendment?:
Explaining Different Levels of Court Scrutiny for Laws Involving Invidious and Benign Race and Gender Classifications?

12. Race, the Constitution, and Changing Conceptions of Equality I:
Slavery and Reconstruction, through Plessy v. Ferguson (1896) (Fri. Feb. 28, 2014)


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), 463-472.

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


a. The Attack on Jim Crow, 472-476

Note: The Road to Brown (Supreme Court cases prior to Brown)
Missouri Ex. Rel. Gaines v. Canada (1938) (Cannot send blacks to neighboring colleges)
Sipuel v. Board of Regents (1948) (States must provide an equal legal education)
Sweatt v. Painter (1950) (Segregated legal education cannot be equal)
McLaurin v. Oklahoma (1950) (Cannot segregate within a graduate school)

Equal Protection Principles and the Social Construction of Law, 476-482.

Brown v Board of Education of Topeka (1954) (Brown I)
Note: Justifications and Explanations for Brown
c. Comparison of the Social Construction of Race and Rights in *Plessy* and *Brown*


*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)
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)


15. Equal Protection Methodology I: Minimal Court Scrutiny or “Rational Basis” Supreme Court Review of Non-Constitutionally Suspect Classifications in the Law *(Fri., Mar. 7, 2014)*

a. The Rationality Requirement: When are Classifications In Laws Excessively “UNDER-INCLUSIVE” or “OVER-INCLUSIVE”? [Or How Equal Protection Analysis Roots Out Illegal Discrimination] (Handout)

b. Rational Basis Review (Minimal Court Scrutiny) of Formally “Non-Suspect” Classifications in Laws, 497-520.

*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
Note: The Means-Ends Nexus (Over- and Under-inclusion)
*Williamson v. Lee Optical* (1955) (Is prescription needed for optician to replace lens/frames)


* 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

b. Why “Strict Scrutiny” for Racial Classifications?; What Counts As “Facial” Race Classifications?, 530-540

Note: Justifications for Strict Scrutiny of Racial Classifications

The famous “footnote 4” of *United States v. Carolene Products* (1938)
(Court should act when the political system is defective, as with discrimination against minorities)

Note: The Structure of Strict Scrutiny—What Counts as “Facial” Race Classifications?

* Johnson v. California* (2005) (Assignment of Prisoners to Cells Based on Race)
* Hunter v. Ericson* (1969) (Constitutionality of referendum suspending fair housing


* Washington v. Davis* (1976) (Police tests)

Note: Rational Basis Review of Non-Race-Specific Classifications

Note: Distinctive Problems in the Administration of Justice


Note: Racial Disparities in Investigating, Charging, and Sentencing

b. Discriminatory Intent As a Standard After *Brown*: What Did *Brown* Outlaw:

Lack of impartiality, Subordination, Stigma, Second Class Citizenship, Encouragement of Prejudice


PLUS


OR


Affirmative Action in Access to Medical Schools; Government Contracts, 562-580.

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


a. Entry to Law School and Undergraduate College at University of Michigan, 580-598.

Note: The Contemporary Application of Strict Scrutiny

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


Other Sources

Ronald Kahn and Ken I. Kersch, in 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.
20. Equal Protection Methodology IV: Intermediate Court Scrutiny and Gender Discrimination
(Wed. Mar. 19, 2014)

a. Early Cases and the Road to Intermediate Scrutiny, 629-637

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)

Allowing Gender Classifications
Kahn v. Shevin (1974) (Property tax exemptions)
Schlesinger v. Ballard (1975) (Promotion in navy)

b. Intermediate Scrutiny of Gender Classifications, 637-646

Craig v. Boren (1976)(Men and women and 3.2 beer!)
Note: Heightened Scrutiny for Gender Classifications?


21. What Constitute Archaic and Overbroad Generalizations (about Gender) versus “Real” Differences—
The Social Construction of Gender Today—A Higher Level of Scrutiny (Fri. Mar. 21, 2014)


Archaic and Overbroad Generalizations versus “Real” Differences
Note: “Real Differences” and Formal Equality
Rostker v. Goldberg (1981) (Men-only military registration)
Note: The Relevance of “Real Differences”

b. "Benign" Gender Classifications As a Two-Edged Sword: Have Men Benefitted Under Principles Against Gender Discrimination, 666-671

   Note: Gender Discrimination as a Two-Edged Sword  
   *Califano v. Goldfarb* (1977) (Social Security benefits and gender-based proof of need)  
   *Califano v. Webster* (1977) (Social Security benefits and gender-based proof of need)  
   Note: The Problem of "Benign" Gender Classifications

Second Essay On Equal Protection of the Law is Due on Thursday, April 3, 2014

Spring Recess: Saturday March 21-Sunday, March 30, 2014

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


   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. Carolene Products Co.* (1938) (Footnote 4, when are courts to create rights)  
   *Williamson v. Lee Optical of Oklahoma* (1955) (Economic regulation off limits to courts)  
   Note: Pluralism, Naked Wealth Transfers, and the Courts

Other Sources

23. The Rebirth of **Implied Fundamental Rights** Under the Equal Protection Clause - The Right to Procreation, Welfare, and Education (**Wed. April 2, 2014**)

a. The Fundamental Right to Procreate, 776-780.

   *Skinner v. Oklahoma* (1942) (Sterilizing chicken stealers, but not “white collar” crime)
   Note: The Fundamental "Right to Have Offspring"

b. The Right to Travel, State Benefits, and Equal State Citizenship, 814-824

   *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 Interests"
   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)


   *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)

d. Is There A Fundamental Right to Education?, 828-841

   *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

   **Other Sources**


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


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

b. Right To Abortion Choice—Do You Find Problems With the Way the *Roe* Decision is Constructed?, 854-866.

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


25. The Right of Abortion Choice Today—The *Casey* Decision; Why Was *Roe* Not Overturned, But the *Lochner, Plessy*, and *Bowers* Landmark Decisions Were Overturned?, 860-883. (Mon. April 7, 2014)

a. Abortion Regulation between *Roe* and *Casey*, 866-869; 870-873.

   *Maher v. Roe* (1977) (No Medicaid benefits for non-medically necessary abortions)
   *Harris v. McRae* (1980) (No Medicaid benefits for medically necessary abortions, except where life of mother is endangered to do term or for medical procedures necessary for the victims of rape and incest)
   Note: Abortion Regulation Between *Roe* and *Casey*


   Note: Casey and the Role of the Court

c. Unlike *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905), Why Was *Roe* Not Overturned?


d. Partial Birth Abortions, 893-909.

   *Gonzales v. Carhart* (2007) (Limited law banning partial birth abortions in constitutional)
   Note: The Future of Abortion Rights

16


   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 6 only on 917)  
   Califano v. Jobst (1977) (Disability benefits after one marries)  
   Turner v. Safely (1987) (Right of inmates to marry)

   Michael H. v. Gerald D. (1989) (Child born to married woman with her husband is presumed to be the child of the marriage.)

b. The Right to Sexual Intimacy for Gay Men and Lesbians—  

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

c. Heightened Scrutiny for Sexual Orientation Classifications Under Equal Protection Clause-  
The Supreme Court Invalidates Colorado’s Anti-Homosexual Constitutional Amendment:  
Can Romer and Bowers Stand Together?, 673-685

   Note; The Nature of the Class at Issue  
   Romer v. Evans (1996)  
   Note: The Meaning of Romer

Is Lawrence Based on Due Process Privacy Rights or Equal Protection Principles? 922- 934.  
(Fri. April 11, 2014)

Note: Homosexuality, Sexual Liberty, and Substantive Due Process

Ronald Kahn, “Social Constructions, Supreme Court Reversals, and American Political Development:  


Other Sources  


Note: The Standard of Review (Arguments in Marriage cases before United States v. Windsor, 685-696. Note: Same Sex Marriage, 934-937.

Other Sources


Massachusetts Supreme Judicial Court Advisory 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

Hollingsworth v. Perry 570 U.S. ____ (2013) (Proponents of Proposition 8, banning gay marriage in California do not have standing to overturn federal court decision finding Proposition 8 unconstitutional)

In Re Marriage Cases, 43 Cal. 4th 757, 183 P. 3d 384. (California) at http://www.danpinello.com

29. Should Courts Define Implied Fundamental Rights Such as the Right to Marry in a Conservative Age?; Why do They Continue to Do So?: A Critique of Sunstein’s Call for Judicial Minimalism (Wed. April 16, 2014)

a. Cass Sunstein’s Judicial Minimalism


Chapter 1, Leaving Things Undecided, 3-23.
Chapter 2, Democracy-Promoting Minimalism, only 25-32.

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


Third Graded Essay on Implied Fundamental Rights is Due Tuesday, April 29, 2014
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 (Fri. April 18, 2014)

a. History and Philosophy of the First Amendment, 1027-1038.

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

b. Content-Based Restrictions—Dangerous Ideas and Information: Expression That Induces Unlawful Conduct. 1038-1047, 1048-1053. (Seeking How to protect the nation and political speech?)

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


31. Modern Formulations of “Clear and Present Danger” (Mon. April 21, 2014)

a. The KKK and the Brandenburg Standard, 1070-1076,

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)

b. “True Threats” on the Internet, 1163-1165

Planned Parenthood v. American Coalition of Life Activists (9th Circuit Ct., 2002)
(aka ACLA Case) (Listing abortion doctors—dead, wounded, and alive on the Internet)
32. Fighting Words (Speech That Provokes a Hostile Audience Reaction); Lewd, Indecent, Not-Obscene Speech on Public Streets and Radios, and the Internet (Wed. April 23, 2014)

a. Speech That Provokes a Hostile Audience Reaction; Fighting Words, Ill. 1083-1085; 1091-1100.

Terminello v. Chicago (1949) (Political speech before hostile audiences)
Cantwell v. Connecticut (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.?
Snyder v. Phelps (2011) (Picketing at a military funeral)

b. Lewd, Indecent, Profane, But Not-Obscene Speech on Streets and Radio 1214-1225;

Cohen v. California (1971) (Dirty words on jacket)
Note: Profanity, Cohen, and the Captive Audience
Erznoznik v. Jacksonville (1975) (Nudity at drive in movie)
FCC v. Pacifica Foundation (1978) (Dirty words on radio)
Note: Fleeting Expletives

c. Lewd, Indecent, Profane, But Not-Obscene Speech on the Internet, 1226-1229.

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)

33. Use of Children in Sexually Explicit Media Off and On the Internet; Ban on Depictions of Animal Cruelty; Ban on Sale of Violent Video Games to Children, 1201-1214 (Fri. April 25, 2014)

New York v. Ferber (1962) (Use of children in sexually explicit media)
Note: Child Pornography
United States v. Stevens (2010) (Ban on creating or possessing depiction of animal cruelty)
Brown v. Entertainment Merchants Association (2011) (Ban on sale and rental of violent video games to minors)

34. Hateful Speech: Can Groups Be Defamed? Should Hate Speech Be Regulated?: Anti-Bias Ordinances and Cross-Burnings, 1236-1262 (Mon. April 28, 2014)

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
Other Sources


Chapter 5, Protecting Dignity or Protection from Offense?, 105-143.
(An argument for limiting hateful speech)

B. Freedom of Expression II—"Content-Neutral" Restrictions: Limitations on the Means of Communication without Regard to Its Content: How is Neutrality Being Defined?


   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. Schultz (1988) (Picketing near a home)
   Clark v. Community for Creative Non-Violence (1983) (Sleeping in a park)
   The Abortion Clinic Cases:
   Madsen v. Women's Health Center, Inc. (1994) (Thirty-six foot buffer)
   Schenck v. Pro-Choice Network of Western New York (1997) (Floating buffers)
   Hill v. Colorado (2000) (Floating buffers)

36. Publicly Owed Property Other than Streets and Parks; Equal Access to Public Forum (Fri. May 2, 2014)

   a. Publicly-Owned Property Other than Streets and Parks: Jail Grounds, Military Bases, State Fairgrounds, And Mail Boxes, 1285-1296

   Adderly v. Florida (1966) (Jail grounds)
   Note: "No Less Than a Private Owner of Property"?
   Grayned v. Rockford (1972) (Demonstration permitted 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) (Dist. of literature 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
_Carey v. Brown_ (1980) (Demonstration at mayor’s home)
_Lehman v. City of Shaker Heights_ (1974) (Bus advertising)
Note: _Lehman_ and the Limits of _Mosley_

37. “Symbolic Conduct” as Protected Expression: Burning Draft Cards and Flags (Mon. May 5, 2014)


_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
_National Endowment for the Arts v. Finley_ (1998) (Is the NEA allowed to consider “standards of decency” when awarding grants?)
_Legal Services Corporation v. Velazquez_ (2001) (Can government paid lawyers be banned from testing the constitutionality of welfare laws?)
Note: The Reach of Government Speech
_Pleasant Grove City Utah v. Summum_ (2009) (Private funded monuments in parks)
_United States v. American Library Association_ (2003) (Can government require libraries to have filters on computers to protect children in order to receive grants?)

39. Review for Final (Fri. May 9, 2014)

FINAL EXAMINATION ON THE FIRST AMENDMENT
Thursday, May 15, 2014 -- 7:00-9:00PM

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