Oberlin College
Department of Politics

Politics 202
American Constitutional Law
Office: Rice Hall, 232
Office Hours: Tuesday, 3:00-4:00
Friday, 2:30-4:00

Spring Semester, 2012
Mr. Kahn
Phone: (0) 775-8495
(H) 774-1670
(Dept.) 775-8487
ronald.kahn@oberlin.edu

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 Major.

My office hours will be in Rice Hall, Room 232, Tuesday 3:00-4:00 PM and Friday from 2:30 to 4:00 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 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 and state and national power over economic and social policy. (On material through Section III of syllabus, that is, through class 11). The four-page memo is due at my office any time on Monday March 12, 2012. The second assignment, an essay of 8-10 double-spaced typewritten pages, will be due on Monday, April 16, 2012, 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 7, 2012 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 and time of the final examination, which will center on the First Amendment, for Section I is Wednesday May 16, at 9-11 AM. For Section 2 the date and time of the final examination is Thursday, May 17, 7-9 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 4, 2012.

The first assignment, the four page short essay, will count for 15% of your grade. The second assignment, an essay of 8-10 typed double-spaced pages, will count for 25% of your grade. The third essay will count for 25% of your grade. The final examination on the First Amendment will count for 20%, and the level and quality of your class participation will count for 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 Oberlin Bookstore has ordered for your purchase the following required readings:


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 POLT 202. However, several readings may be listed under POLT 308: 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” that 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 Gerard Michael D’Emilio can be reached at gerard.demilio@gmail.com and at 412-818-2938.

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.

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-lviii, and Biographical Notes on Selected U.S. Supreme Court Justices, at lxix-lxxvii. 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 POLT 202, 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.

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)
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. For excellent background reading on the Supreme Court decision-making process, see David O'Brien, Storm Center: The Supreme Court in American Politics.

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). (Mon. Feb. 6, 2012)


      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

   b. The Basic Framework in Marbury v. Madison (1803); Text or Outside Political Forces as Explaining Marbury, 29-43.

      Marbury v. Madison (1803)
      Note: Marbury v. Madison
      Note: Constitutions, Democracy, and Judicial Review

   c. Justifying Judicial Review: Originalism and the “Counter-Majoritarian Difficulty for the Supreme Court

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

3. An Alternative Explanation for Marbury v. Madison (1803)
   Interpretive Methods in Supreme Court Decision-making I: Social Constructions and Common Law Constitutional Interpretation (Fri., Feb. 10, 2012)

   Review Marbury, 29-36.


4. Interpretive Methods in Supreme Court Decision-making II: 
   Representation-Reinforcement and Natural Law (Mon. Feb. 13, 2012)
   

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

b. Natural Law Bases to Constitutional Interpretation and the Definition of Individual Rights, 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)

c. The Founders’ View of Original Intent

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

5. Interpretive Methods in Supreme Court Decision-making III: 

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


II. The Changing Shape of Federal and State Power over Economic and Social Regulations

6. State and National Control of Economic and Social Regulation: 


   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
b. The “Lochner Era” (1905-1937): Views of National and State Government Power over Commerce and Manufacturing When the Lochner Era Court Declared There Was an Individual Right or Liberty to Engage In Economic Activities under the Due Process Clauses of the 5th and 14th Amendments (a.k.a. Economic Substantive Due Process), 177-178; 195-203


Note: The New Deal Crisis

*Carter v. Carter Coal Co.* (1936)
New Deal Legislation and Commerce Clause Tests in the 1930’s

c. The End of the “Lochner Era,” 179-180

*Wichard v. Filburn* (1942) (Supreme Court finally rejects right to “Economic Substantive Due Process”—Can Government limit the amount of wheat grown and consumed on a farm?)

d. The Commerce Clause and Race Discrimination in the 1960s, 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


Note: Federalism after the New Deal


8. The Tenth Amendment as a Federalism-Based Limitation on National Government: Environmental Regulations, National Background Check to Purchase Guns; Health Care Reform (Wed. Feb. 22, 2012)

a. 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
Note: Concluding Observations on Congress’s Power

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


      *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

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. 27, 2012)

   a. 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”
      Note: Some Unanswered Questions

   b. Is the President above the Law?: Executive Authority, Policy-making, and Personal Conduct, 400-412.

      Note: Executive Privilege and Presidential Immunity
      *Mississippi v. Johnson* (1867) (Presidential enforcement of Reconstruction Laws)
      *Nixon v. Fitzgerald* (1982) (Damages for misconduct in office)
      *Cheney v. United States District Court* (2004)
      Note: The Politics of Impeachment
      Note: The “Law” of Impeachment

a. The Non-Delegation Doctrine-Past (Lochner Era and Present (Presidential Line Item Veto and Legislative Veto), 412-424.

Note: The Nondelegation Doctrine and “Quasi-Constitutional” Statutes
NIRA Panama Refining Co. v. Ryan (1935)
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

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

Read the three following short articles or the Haltom article:


Or

Assignment I: Five-Page Short Essay (Due Monday March 12, 2012)

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

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) (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)


*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: Compare the Social Construction of Race in *Plessy* and *Brown*


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 I* (1973) (Segregation in the North: Denver)
*Freeman v. Pitts* (1992) (Incremental court withdrawal from remediation efforts)
(We will take up *Community Schools v. Seattle School District* (2007) below)


15. Equal Protection Methodology I: Minimal Court Scrutiny or “Rational Basis” Supreme Court Review of Non-constitutionally Suspect Classifications in the Law (Fri. March 9, 2012)

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


*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-End Nexus (Over- and Under-inclusion)
*Williamson v. Lee Optical* (1955) (Ophthalmologist and optometrists prescriptions needed for an optician to replace lens or frames)
16. Equal Protection Methodology II: Heightened Supreme Court Scrutiny of Race Specific Classifications (Mon., March 12, 2012)


- *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 Strict Scrutiny of Racial Classifications
(Including the first discussion of famous “footnote 4” of *United States v. Caroline Product* (1938)
on political system defects and discrimination against minorities)

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


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


Note: Racial Disparities in Investigating, Charging, and Sentencing

b. Discriminatory Intent As a Standard After Brown:


PLUS


OR


The Early Cases: Affirmative Action in Access to Medical Schools and 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


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

   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?


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


   You May Wish to Read:

   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.(ERes)
20. Equal Protection Methodology IV: Intermediate Court Scrutiny and Gender Discrimination
(Wed. March 21, 2012)


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


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 (Fri. March 23, 2012)

a. Admitting Women into the Virginia Military Academy: Has the Level of Court Scrutiny

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”


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 21 is Due by Monday, April 16, 2012

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


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)


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 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)

c. 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)

d. 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.


*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—Whether or Not You Support 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

c. Public Funding of Abortions and Abortion Regulation between *Roe* and *Casey*
Do These Cases Make Sense in Light of the Fundamental Right to Choose?, 855-860.

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

Please read the Ely critique of *Roe v. Wade* (1973) and the Lynch response:


You may wish to read the following:


OR


**25.** The Right of Abortion Choice Today—The *Casey* Decision; Why Are Landmark Decisions Overturned?, 860-883. *(Mon. April 9, 2012)*

a. Note: Abortion Regulation between *Roe* and *Casey*, 860-864.


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?


a. Family and Other “Privacy” Interests, 899-906, 910-911.

   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 5 only)
   Califano v. Jobst (1977) (Disability benefits after one marries)
   Turner v. Safety (1987) (Right of inmates to marry)
   Note: Intimate and Cultural Association

b. The Right to Sexual Intimacy for Gay Men and Lesbians—The Court’s “First Stab,” 911.

   Bowers v. Hardwick (1986) (Right to sexual intimacy)


   Note: The Nature of the Class at Issue
   Note: The Meaning of Romer

(No Class, Fri. April 13)


   Note: Homosexuality, Sexual Liberty, and Substantive Due Process


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

Don’t Ask Don’t Tell in 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?


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)

2008 California Same-Sex Marriage Case—Edited Version on ERes

29. Should there be a Right to Same-Sex Marriage? Should Such a Right be Based on Equal Protection or Due Process Privacy Principles?: Gerstmann’s Arguments in Light of the Cases (Fri. April 20, 2012)


Chapter 5, Same-Sex Marriage and the Fundamental Right to Marry, 91-118.
Chapter 6, Should Courts Create New Rights? 119-137.
Chapter 9, Principles and Practicalities, 196-214.

30. 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 (Mon. April 23, 2012)

a. Sunstein’s Judicial Minimalism


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

You may wish to read:


Third Graded Essay on Implied Fundamental Rights, Due Monday, May 7, 2012

VI. The First Amendment

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

31. Introduction; Content-Based Restrictions: Dangerous Ideas and Information-Expression that Induces Unlawful Conduct; Expressions That Provoke Hostile Audiences (*Wed April 25, 2012*)


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: 1028-1036, 1038-1043. (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


a. The KKK, and the *Brandenburg* Standard, 1059-1066.

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)


OR


33. Fighting Words (Speech That Provokes a Hostile Audience Reaction);
Lewd, Indecent, Not-Obscene Speech on Public Streets, Radios, and the Internet (*Mon. April 30, 2012*)


*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.?

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. Jacksonville* (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)

c. Child Porn on the Internet, 1192-1198.

*New York v. Ferber* (1962) (Child porn on film)
Note: Child Pornography

34. Hateful Speech: Can Groups Be Defamed? Should Hate Speech Be Regulated?;
Anti-Bias Ordinances and Cross-Burnings, 1223-1249. (*Wed. May 2, 2012*)

*Beauharnais v. Illinois* (1952) (Group defamation in the 1950’s)
Note: Group Defamation and "Hate 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?

35. Speech in Public Forums

a. The Traditional Public Forum: Streets and Parks, 1266-1274. (Fri. May 4, 2012)

   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)

   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)
   Hill v. Colorado (2000) (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)

36. “Symbolic Conduct” as Protected Expression: Burning Draft Cards and Flags (Mon. May 7, 2012)


       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?)

38. Review for Final and Course Evaluations (Fri. May 11, 2012)

       FINAL EXAMINATION
       The First Amendment
       Section 1: Wednesday May 16, 9-11AM.
       Section 2: Thursday May 17, 7-9PM.

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