Oberlin College  
Department of Politics  
Politics 303  
Seminar on Equal Protection and Implied Fundamental Rights:  
The Constitutional Rights of Gays  
King 335  
Spring Semester, 2012  
Tuesday: 1:00-2:50

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Office Hours: Tu: 3:00-4:00  
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F: 2:30-4:00

This seminar explores various topics on Equal Protection of the Law and Implied Fundamental Rights. This year the seminar focuses on the rights of Gay Americans. Some spillover effects of these gay rights questions on the First Amendment rights of speech and privacy will also be considered. Seminar topics include: conceptualizing sexuality, sexual orientation and the law; rights of privacy and sexual intimacy; the right to same-sex marriage; due process privacy compared to equal protection as a basis for gay rights under the Constitution; homosexual rights in the military: Don’t Ask, Don’t Tell; sexuality and workplace rights; sexuality and First Amendment freedoms of speech and association; judicial minimalism and gay rights; courts compared to legislatures and definers of gay rights.

The Seminar Paper

The second half of the semester will be devoted to each student conceptualizing researching, and writing a 20-30 page seminar paper and making a 25 minute oral presentation to the class. As part of this process the student will write 5-7 page paper prospectus. It is important that students explore and identify the subject of inquiry for the seminar paper in the first half of the seminar. I urge each seminar participant to peruse Eskridge and Hunter’s *Sexuality, Gender, and the Law, Third Edition* and both required and non-required readings for ideas about a possible paper topic. In class meetings from time to time I will ask you about your progress in identifying a paper topic. For your papers, you may choose to consider how a specific scholar approaches issues and cases involving gay constitutional rights-- such as Cass Sunstein, Catherine MacKinnon, or even William Eskridge, for that matter. You may wish to write a paper on the implications of using equal protection versus due process privacy and personhood as a basis for gay rights. You may wish to compare a judicial minimalist versus maximalist approach to Court action on gay rights. One could compare the approach to same sex marriage in different states, nations, or perhaps the constitutionality and/or policy implications of the Defense of Marriage Act (DOMA). One could write a paper on the relationship of Court action to political and social institutions in the wider society. Finally, these paper topics are offered as examples; in no way am I providing a full range of possible paper topics. While many students in the seminar write a paper on some aspect of gay constitutional rights, your paper may center on any issue or doctrine in constitutional law and theory-- because this is the only constitutional law seminar that is offered at Oberlin College.
On Tuesday, April 3, the first Tuesday after Spring Recess I will meet with you individually to discuss your seminar paper topic. These meetings will be held in my office, Rice 232. You should have chosen your paper topic before you meet with me, so you can discuss your approach to the topic and bibliographic sources that you will use in your research. I will review a draft of your paper prospectus if you have a draft ready for that meeting. The prospectus describes the topic of your paper, the primary questions that you seek to research, expected findings, and a full bibliography of sources you will use in the paper.

By Friday, April 13, at 5:00 PM, e-mail to me and to each of the students in the seminar a copy of your prospectus. Each student will read all the prospectuses, and write comments on the prospectuses of the three or four other students who I have assigned to you based on paper content. Please send your comments to all members of the seminar and me to by Sunday, April 15, 2012 by 5:00 PM. On Tuesday, April 17, we will meet during regular class time to discuss each prospectus. Students should be prepared to respond to questions and comments by fellow class members and the teacher.

By Tuesday, April 24, students are to provide to me a final copy of your prospectus. The grade on the prospectus will be based on the quality of the prospectus, your comments on other prospectuses in writing and class, your responses to comments by fellow students and me, and your ability to respond to those comments in the final version of the prospectus. At class meetings on April 24, May 1, and May 8, 2012 students will make a twenty-five minute oral presentation, before which they will hand out a detailed outline of their talk. We may need to add a fourth class meeting for presentations.

The following required readings have been ordered by the Oberlin bookstore for your purchase.


On ERes For Printing

It will help your learning to read the required readings in the order that I have listed them. All required readings, except those in the textbook and Gerstmann book have been placed on ERes.

Full Texts of Supreme Court and Lower Court Cases and Other Sources

The cases are available on the Lexis-Nexus Academic Universe computer-based Legal Data Service, which can be accessed on the web by going to www.Oberlin.edu, click on Libraries, under find articles click on database cited by name, L-M. Click on Lexis-Nexus Academic, then the following: Legal Research, and “get a case.” Place the citation for the case as listed on the syllabus in the citation box. For example, place 5 U.S. 137 for Marbury v. Madison (1803). Other web-sites 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, 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. Not all web sites have 19th century cases. http://oyez.nwu.edu is a site in which you can hear oral arguments on major Supreme Court cases.
The Appendixes in the back of Daniel R. Pinello, *Gay Rights and American Law* (New York: Cambridge University Press, 2003) provide a terrific source of information on gay rights. For example, Appendix 1.2 lists all Federal and State Appellate Cases Adjudicating Lesbian and Gay Rights Claims, 1981-2000; Appendix 2.1 lists Cases Adjudicating Lesbian and Gay Family Issues, 1981-200. There is a terrific list of references at 315-331. Finally, at www.dan.pinello.com these lists are brought up to date; also other information on gay rights is provided, along with links to key gay rights cases.


Schedule of Classes

I. Organization Meeting (February 7, 2012)

II. Conceptualizing Sexuality and Sexual Orientation (February 14, 2012)

A. Natural Law


Chapter 4, Theories of Sexuality Gender and the Law

Section 1 Natural Law Theories of Sexuality Gender, and the Law, 411-425

Natural Law Theories of Sexuality, Gender, and the Law
John Finnis, “Law, Morality, and ‘Sexual Orientation’”
Notes on the New Natural Law’s Theory of Sexuality and Gender Role.
Notes on a Newer Natural Law Open to Sexual Minorities

Non-Required Readings


B. Modern or Liberal Theories of Sexuality, Gender, and the Law
1. Feminist Theories—MacKinnon versus Rubin


Section 2 Liberal Theories of Sexuality, Gender, and the Law, 431-435; 445-463; 467-476

Introduction to Section 2

Catherine A. MacKinnon, “Feminism, Marxism, Method, and the State: An Agenda for Theory”

Notes on Radical Feminism and the Relationship Between Compulsory Heterosexuality and Patriarchy

Gayle Rubin, “Thinking Sex: Note for a Radical Theory of the Politics of Sexuality”

Note on the Clash Between Mackinnon’s and Rubin’s Theories of Sexuality, Gender, and the Law

Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*

Mary Dunlap, “The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy”

Note on Critical Race Theory and Feminism

Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color”

Notes on Intersectionality and Its Implications for the Constitutional Politics of Sexuality and Gender

Elizabeth Young-Bruehl, *The Anatomy of Prejudice*

Notes on Young-Bruehl’s Theory of Prejudice and Implications for Constitutional Rights

2. Historical (Social Movement) Theories of Sexuality, Gender, and the Law


Chapter 4, Theories of Sexuality Gender and the Law

Section 2 Liberal Theories of Sexuality, Gender, and the Law, 445-463, 467-471

John D’Emilio, “Capitalism and Gay Identity”

Notes on Capitalism and Medicalization (Transgender and Intersex Persons)

Caroll Smith-Rosenberg, *Disorderly Conduct, Visions of Gender in Victorian America*
Note on the Survival of Natural Law Tropes Through a Modernization of Justification
Notes on Identity-Based Social Movements and Constitutional Rights

C. Post-Liberal Theories of Sexuality, Gender, and the Law


Chapter 4, Theories of Sexuality Gender and the Law
Section 3 Post-Liberal Theories of Sexuality, Gender, and the Law

1. Social Constructionist Theories, **489-499**

   **Introduction to Section 3**
   Sexuality as a Social Construction (Michel Foucault)
   Foucauldian Strategies for Understanding Laws Relating to Sex Gender, and Sexuality
   Note on Feminism and Foucault

2. Gender and Sex as Social Constructions, **504-515**

   Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity*
   Notes on Hopkins and Law’s Invocation of Gender
   Note on Social Constructionist Theories and Identity Politics

3. Post-Liberal Theories of Identity and Strategies of Empowerment, **521-538**
   (Deconstructive Theory, Binarism and the Double Bind)

   Note on Goffmanian Strategies for Dealing with Stigma: Passing, Covering, etc.
   Eve Kosofsky Sedgwick, *The Epistemology of the Closet*
   Note on “Double Binds” and the Law
   *Marjorie Rowland v. Mad River Local School District* (USCA, Sixth Circuit, 1984)
   Note on the Mad River Case, the Construction of Heterosexuality, and the Erasure of Bisexuality
   Note on Minoritizing Versus Universalizing Strategies for Sex, Gender, and Sexual Minorities

III. Rights of Privacy, Sexual Intimacy, and Marriage for Gay Men and Lesbians:
Supreme Court and Major State Cases (February 21, 2012)
(For Students Who Have Not Studies Right of Privacy and Abortion Choice, also read Chapter 1, Regulation of Sexuality and Gender Before Casey and Lawrence, Section I, Contraception, Abortion, and the Privacy Right 3-29.)


   Chapter 1 Section 2, Part A, The Era of Sodomy Law, **30-53**

   Sodomy: “The Ultimately Confused Category”
   Morality and Constitutional Privacy
   Note on Medicalization and Morality
   Clive Michael Boutilier v. Immigration and Naturalization Service (USSC, 1967)
   Notes on *Bowers v. Hardwick*
   *Commonwealth of Kentucky v. Wasson* (KY Supreme Court, 1992)
   Note on the Kentucky Sodomy Case
   Note on the Rubenfeld Critique: What Is the Proper Basis of a Constitutional Privacy Right?


(For Students Who Have Not Studies Right of Privacy and Abortion Choice, also read Chapter 2, Part A. The Center Holds (on the *Casey* decision 177-189)


   Chapter 2 Watershed: *Casey* and *Lawrence*
   Section 2 Part A The Repudiation of *Bowers v. Hardwick*, **197-221**

   On the Eve of *Lawrence*
   Notes on the Status of Consensual Sodomy Laws, June 2003
   Notes on *Lawrence*


4. The Reach of *Lawrence*

Chapter 2 Watershed: *Casey* and *Lawrence*

Section 2 Part B The Reach of *Lawrence*, 221-238.

Steven Lofton et al. v. Secretary of the Department of Children and Social Services et.al. (USCA, Eleventh Circuit, 2004)
Note on *Lofton* and the Eleventh Circuit’s Battles over *Lawrence*

Reliable Consultants, Inc. v. Earle (USCA, Fifth Circuit, 2008)
Margaret Witt v. Department of the Air Force (USCA, Ninth Circuit, 2008)

Notes on the Progeny of *Lawrence* 237-238.

Non-Required Readings


Chapter 8, Andrew Koppelman, *The Rule of Lawrence*: 151-168.


Chapter 4, Hardwick and Historiography, 149-173.

IV. The Right to Same-Sex Marriage? On What Basis?; What Institutions Should Decide the Question?; State and Federal Recognition of Same-Sex Marriages (February 28, 2012)
A. Liberty Equality and the Right to Marriage

1. The Same Sex Marriage Movement Before *Lawrence*: Gay Couples as Threats to Marriage

   Chapter 3 The Twenty-First Century’s Liberty-Equality Debates
   Section 2 Part A The Same-Sex Marriage Movement Before *Lawrence*: Gay Couples as Threats to Marriage, 311-318

   Richard and Mildred Loving v. Virginia (USSC, 1967)
   Notes on *Loving*, The Case for Same-Sex Marriage, and Justifications for Same-Sex Bars

2. The Post *Lawrence* Gay Marriage Breakthrough in New England & DOMA ISSUES


   Chapter 3 The Twenty-First Century’s Liberty-Equality Debates

   Hillary Goodridge et al. v. Department of Public Health (MA Supreme Court, 2003)
   Notes on the Massachusetts Same-Sex Marriage Case and Its Aftermath

   Nancy Gill and Marcelle LeTourneau et al. v. Office of Personnel Management et al. (Federal District Court MA. July 8, 2010) (Goodridge and DOMA, the federal Defense of Marriage Act Companion Case
   Note on the Massachusetts DOMA Cases

3. The California Marriage Equality Cases


   Chapter 3 The Twenty-First Century’s Liberty-Equality Debates

   In re Marriage Cases (CA Supreme Court, 2008)
   Notes on the California Same-Sex Marriage Cases
   Note on Proposition 8 and Liberty-Protecting Arguments Against Marriage Equality
   Karen L. Strauss et al., v. Mark B. Horton et al. (CA Supreme Court, 2009)
   Notes on the State Court Challenge to Proposition 8: What is a Constitution For?
   Note on the District Court Opinion in *Perry*
Note on Whether the Marriage Equality Movement was a Queer Error
Paula Ettelbrick, “Since When is Marriage a Path to Liberation?”
Thomas Stoddard, “Why Gay People Should Seek the Right to Marry”
Notes on the Ettelbrick-Stoddard Debate

B. The Emerging Regime: A Menu of State Recognized Family Forms


Chapter 6 Families We Choose
Section 2 Part C The Emerging Regime: A Menu of State Recognized Family Forms, 727-733.

Notes on the Expanding Menu of State-Recognized Family Forms

C. Interstate Recognition of Civil Unions or Domestic Partnerships


Chapter 6 Families We Choose
Section 3 Part A, Interstate and Federal Recognition of Same Sex Marriages, 734-743.

Notes on Interstate Recognition of Same-Sex Unions or Marriages
*Margaret R. Chambers v. Cassandra B. Ormiston* (RI Supreme Court, 2007)
Whether Out of State Same-Sex Marriage That Is Valid in the State of Celebration May be Recognized in Maryland (Opinion of Attorney General, Maryland)
Notes on Interstate Marriage Recognition Law

Non-Required Readings


Chapter 5, Choice of Law and Public Policy, 94-129.
Chapter 6, Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional, 127-140.


Chapter 3, The Fundamental Interest in Marriage, 49-74.
Chapter 5, Full Faith and Credit, 101-126.
Chapter 6, The Defense of Marriage Act, 127-158

V. Equal Protection Should Sexual Orientation Classifications in Law Be Subject to Strict Court Scrutiny?; The Military and “Don’t Ask, Don’t Tell.” (March 6, 2012)

A. Should Sexual Orientation Be A Suspect Classification? Watkins, Romer, and Lawrence


Chapter 1 Regulation of Sexuality and Gender
Section 4 Part B Equal Protection and Discrimination Based on Sexual Orientation, 90-114

Clifford Norton v. John Macy et. Al. (USCA, D.C. Circuit)
Note on the Development of Equal Protection Claims for Gay Persons
Note on the Immutability “Requirement” for Suspect Classifications and It’s Relevance to Sexual Orientation
Notes on Romer v. Evans.

B. The Sex and Sexual Orientation Relationship in Constitutional Law


Chapter 1 Regulation of Sexuality and Gender
Section 4, Part C The Sex and Sexual Orientation Relationship in Constitutional Law, 114-121.
John Singer and Paul Barwick v. Lloyd Hara (Washington State Court, 1974)
Note on the Subsequent History of the Sex Discrimination Argument for Gay Marriage
Andrew Koppelman, “Why Discrimination Against Lesbians and Gay Men is Sex Discrimination” (1994)
Notes on the Sex Discrimination Argument for Same-Sex Marriage
Concluding Note on Levels of Equal Protection Scrutiny

Non-Required Readings:


Chapter 1, Equal Protection and Invidious Intent, 6-34.
Chapter 2, The Right to Privacy, 35-52.
Chapter 4, Why Discriminate, 72-93.

C. The Military’s Exclusion of Sexual and Gender Minorities

1. The Armed Forces’ Exclusion of “Sodomites” and Sexual “Deviates,” 1022-1038


Chapter 9 U.S. Military Exclusions and the Construction of Manhood
Section 3 Part A The Armed Forces’ Exclusion of “Sodomites” and Sexual “Deviates,” 1022-1038.

Notes on Steffan and the “Old” Exclusion of Gays from the Armed Forces.
Michelle Benecke and Kristin Dodge, “Military Women in Nontraditional Fields: Casualties of the Armed Forces’ War on Homosexuals” (1990)
Note on Anti-Gay Military Policy as Sex Discrimination

2. Don’t Ask, Don’t Tell, 1993-2011


Chapter 9 U.S. Military Exclusions and the Construction of Manhood
Section 3 Part B Don’t Ask, Don’t Tell, 1993-2011, 1038-1057
3. The Demise of Don’t Ask, Don’t Tell and Its Aftermath

Chapter 9 U.S. Military Exclusions and the Construction of Manhood
Section 3 Part C The Demise of Don’t Ask, Don’t Tell and Its Aftermath, 1057-1063; 1068-1075

Notes on Marcum and Sex Crimes by Military Personnel
Margaret Witt v. Department of the Air Force (USCA, Ninth Circuit, 2008)
The Conditional Repeal of Don’t Ask, Don’t Tell

Non-Required Readings


Francine D’Amico, Sexuality and Military Service, 249-265. (Sarah E. Brewer, David Kaib, and Karen O’Connor)

VI. Equal Protection: Sexuality at Work (March 13, 2012)
Discussion of Paper Topics at Beginning of Class

A. The Office Closet

Chapter 5 Sexuality, Gender and the Law in the Workplace
Section 1 Part A Sexuality at Work, The Office Closet, 557-585

Overview: Fragmented Legal Regimes
Notes on Singer and the Fall of the Civil Service Exclusion.
Notes on Shahar. (The Double Bind)
Notes on Constitutional Claims for Workplace Equality
Workplace Equality in the Post-Lawrence World

B. Partner Benefits


Chapter 5 Sexuality, Gender and the Law in the Workplace
Section 1 Part B Sexuality at Work, Partner Benefits, 585-595.

Christian Tanner v. Oregon Health Sciences University et al. (Oregon Ct. of Appeals, 1998).
National Pride at Work v. Governor of Michigan (Michigan Supreme Court, 2008)
Notes on Employment Benefits as a Political Football

C. Sexual Harassment

Chapter 5 Sexuality, Gender and the Law in the Workplace
Section 3, 645-661.

Part A, The Meaning of “Sexual Harassment”


Part B, Competing Paradigms

Part C, The Sex-Sexual Orientation Convergence in Harassment Cases

Medina Rene v. MGM Grand Hotel, Inc. (USCA, 9th Circuit, 2002-3)
VII. Speech and Expressive Association Rights for Gay Persons (March 20, 2012)

A. Penalizing Coming-Out Speech at Universities


Chapter 1 Regulation of Sexuality & Gender
   Section 5 Speech and Expressive Association
   Part A. From Obscenity to Political Speech, 122-132

   Gay Students Organization of the University of New Hampshire v. Thomas Bonner (USCA 1st Circuit, 1974)
   Notes on Student Organization Cases
   Gay Law Students Assn. et al. v. Pacific Telephone and Telegraph Co. (Cal. Supreme Court, 1979)
   Notes on “Coming Out” as Political Activity.

B. Identity, Viewpoint and Expressive Association:
   The Boston Irish Parade and New Jersey Boy Scouts Cases


Chapter 1 Regulation of Sexuality & Gender
   Section 5 Part C, Identity, Viewpoint and Expressive Association, 151-173

   Note on the Right of (Expressive) Association
   Kathryn Roberts and the United States Jaycees (USSC, 1984)
   Notes on the *Boy Scouts* Case and Expressive Identity Law
   Challenges to the Scouts’ Employment Policy

C. First Amendment Attacks on Don’t Ask, Don’t Tell
   Chapter 9 U.S. Military Exclusions and the Construction of Manhood
   Section 3 Part C The Demise of Don’t Ask, Don’t Tell and Its Aftermath, 1063-1067

   Log Cabin Republicans v. United States of America (USCC, District of Columbia, 2010)
   Note on First Amendment Attacks on “Don’t Ask, Don’t Tell”
VIII. Fall Recess (March 27, 2012) (No Class)

IX. **Tuesday April 3, 2012** Meet individually with Prof. Kahn to discuss paper topics.

X. No class meeting on Tuesday April 10, 2012. Work on your prospectuses and research for the seminar paper and email a draft of your prospectus to the teacher and all class members by **Friday April 13, 2012**

XI. By **Sunday April 15, 2012**, by 5:00PM, send comments/critiques of draft student prospectuses to the teacher and all students.

   We shall meet **Tuesday, April 17, 2012** at regular class time to discuss each prospectus. Students should be prepared to answer questions expected based on the comment/critiques they have received.

   By **Monday, April 23, 2012** each student will hand in to the teacher the final version of their prospectus.

XII. **Tuesday Evening, April 24, 2012** Presentations and Pizza Dinner at Ron Kahn’s Home, 45 King Street

XIII. **Tuesday, May 1, 2012** Class Presentations

XIV. **Tuesday, May 8, 2012** Class Presentations

(We may need to set a time for a fourth class for oral presentation)
Other Topics and Readings

Judicial Minimalism as an Interpretive Strategy in Gay Rights Cases


Chapter 12, Ronald Kahn, Why Lawrence v. Texas (2003) was Not Expected: A Critique of Pragmatic Legalist and Behavioral Explanations of Supreme Court Decision making, 229-264.


Non-Required Readings


The Impact of Lawrence v. Texas (2003), the Supreme Court, and Other Gay Rights Cases on Homosexual Rights in the Future


Chapter 1, John D’Emilio, Some Lessons from Lawrence: 3-14.


Chapter 5, A Test of Stare Decisis, 118-143.
Chapter 6, Conclusion, 145-162.

Additional Articles of Interest on Lawrence v. Texas (2003)


Goldberg, Suzanne B. Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas. Minnesota


Tollison, Jeanne L. Explain This to Me Again; If We Protect the Right to Intimate Sexual Relations, We Can't Protect the Right to Abortion? Justice Scalia’s Implausible Dissent in Lawrence v. Texas. Western State University Law Review 31 (Fall 2003):P1163-183.