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 1:00 to 2:30 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 5-6 double-spaced typewritten pages on questions in which you compare cases in light of questions on material through Section III of the syllabus (Class 11 on October 3, 2012) (Judicial Authority and Interpretation in a System of Checks and Balances, Changing Shape of Federal and State Power Over Economic and Social Legislation; and the Distribution of National Powers. That paper is due in my office at any time on Tuesday, October 16, 2012.

The second assignment, an essay of 8-10 double-spaced typewritten pages, will be due on Thursday, November 15, 2012 at any time. It is on Equal Protection of the Law, that is, on material in Section IV of the syllabus (Class 21 on Friday, November 2, 2012).

The third assignment, an essay of 8-10 pages, is on material in Section V (through Class 29 on November 16, 2012) of the syllabus on implied fundamental rights, such as the right of privacy, abortion choice, and sexual intimacy/marriage for gay men and lesbians. That paper is due in my office by Tuesday, December 4, 2012.

The date and time of the final examination, which will center on the First Amendment is Tuesday, December 18, 9-11AM. 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 Wednesday, December 5, 2012.

The first assignment of 5-6 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 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 text:


(New Copies of the Sixth Edition come with on-line version in addition to the printed version)

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 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 Willow Thompson, who can be reached at her cellphone, 610-316-1460, or by email at Willow.Thompson@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](http://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.supremecourts.gov](http://www.supremecourts.gov), which is the official web site of the United States Supreme Court, and [www.findlaw.com/cascode/](http://www.findlaw.com/cascode/) 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](http://Oyez.nwu.edu) is a site at which you can hear oral arguments on major Supreme Court cases. [Http://www.scotusblog.com/](http://www.scotusblog.com/) provides commentary on current cases. For a new and comprehensive listing of links from the Clough Center at Boston College to document collections, research and instructional centers, news sites, and blogs see [http://www.bc.edu/centers/cloughcenter/links.html](http://www.bc.edu/centers/cloughcenter/links.html).
Important reference information may be found in the following sections of the course text, Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, and Pamela S. Karlen, Constitutional Law, Sixth Edition (New York: Aspen Publishers, 2009): The Constitution of the United States, at xliii-lviii, and Biographical Notes on Selected U.S. Supreme Court Justices, at lix-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. 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 ERes 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). (Wed. Sept. 5, 2012)

2. The Role of the Supreme Court in the Constitutional Scheme: Founding Principles and Marbury v. Madison (1803) as a Basic Framework (Fri. Sept. 7, 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 and Contemporary Constitutionalism

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

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


   a. An Introduction To Constitutional Interpretation and Judicial Review: Is there a “Counter-Majoritarian Difficulty” for the Supreme Court?; “Originalism and Its Critics”

      Note: Constitutions, Democracy, and Judicial Review, 43-51
      Note: Theories of Constitutional Interpretation and Bases of Individual Rights— "Originalism” And Its Critics, 711-720.

   b. Does the Supreme Court in Marbury v. Madison (1803) Simply Apply an Originalist Interpretation of the Constitution or Simply Give Into Politics Outside the Court?

      Reread Marbury v. Madison (1803), 29-36.

4. Interpretive Methods in Supreme Court Decision-making II: Representation-Reinforcement, Natural Law, and Common Law Sources of Constitutional Interpretation (Wed. Sept. 12, 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. Common Law Bases of Constitutional Interpretation


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


   No Class Monday, September 17, 2012.

II. The Changing Shape of Supreme Court, National, and State Power over Economic and Social Policy


      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, 177-178; 195-203.


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 a farm?)

Note: Political Constraints versus Judicial Enforcement


*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

b. Gun Free School Zones, the Violence Against Women Act, and Health Care Reform 214-231.


Note: Federalism after the New Deal


a. Environmental Regulations and 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. Oct. 1, 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”
      Hamdan v. Rumsfeld (2006) (Military commissions violate the Constitution)
      Detainee Treatment Act and Commission Act
      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)
      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.LA 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

First Assignment: 5-6 Page Essay on Material Through Class 11 (Due Tuesday, October 16, 2012)

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


   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 1* (1973) (Segregation in the North: Denver)
*Freeman v. Pitts* (1992) (Incremental court withdrawal from remediation efforts)


15. Equal Protection Methodology I: Minimal Court Scrutiny or “Rational Basis” Supreme Court Review of Non-Constitutionally Suspect Classifications in the Law *(Fri., Oct. 12, 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) (Doctor 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


Note: Justifications for Strict Scrutiny of Racial Classifications  
(Including the first discussion of famous “footnote 4” of *United States v. Caroleen Products* (1938) on political system defects and 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 law)  

17. Non-Race Specific Classifications that Disadvantage Racial Minorities:  


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

18. Equal Protection Methodology III: Affirmative Action—Race-Specific Classifications that Benefit Racial Minorities—What Factors Are Important to the Court in These Early Cases?  
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)
*Adarand Constructors, Inc. v. Pena* (1995) (Federal contracts)

Note: The Constitutionality of “Benign” Racial Classifications

**Fall Recess: Saturday October 20-Sunday, October 28, 2012**


   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)


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. Nov. 2, 2012)

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

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
Ronald Kahn “New Historical Institutionalism, Precedential Social Constructs, Political Culture, and
Doctrinal Change: Gender Discrimination in the Twentieth Century,” (with Susan Dennehy), (Paper presented

**Second Essay On Equal Protection of the Law is Due Thursday, November 15, 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. Carolene 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)

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)

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.


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

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

b. The Right To Abortion Choice—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

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


You may wish to read the following:


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


Planned Parenthood of Southeastern Pennsylvania v. Casey (1992) (Roe reaffirmed)
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. Safely (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*


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](http://www.danpinello.com))

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

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. Nov. 21, 2012)*
a. Sunstein’s Judicial Minimalism


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


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


You may wish to read:


Thanksgiving Break Thursday November 22-Sunday November 25, 2012

Third Graded Essay on Implied Fundamental Rights is Due Tuesday, December 4, 2012

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 (Mon. Nov. 26, 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


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)
(aka ACLA Case) (Listing abortion doctors—dead, wounded, and alive on the Internet)

David A. Strauss, Freedom of Speech and the Common Law Constitution, in Lee C. Bollinger &
Geoffrey Stone, Eternally Vigilant: Free Speech in the Modern Era (Chicago: University of Chicago
Press, 2002) 33-59.(ERes)

OR
Kent Greenawalt, “Clear and Present Danger” and Criminal Speech, in Lee C. Bollinger & Geoffrey
97-119. (ERes)

32. Fighting Words (Speech That Provokes a Hostile Audience Reaction);
Lewd, Indecent, Not-Obscene Speech on Public Streets and Radios, and the Internet (Fri. Nov. 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, 1201-1210.

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)


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


    Note: Child Pornography

    *United States v. Williams* (2008) (Ban on advertising and solicitation of actual minor engaging in sexually explicit conduct)

    *United States v. Stevens* (2010) (Ban on creating or possessing depiction of animal cruelty)

    *Brown v. Entertainment Merchants Association* (2010) (Ban on sale and rental of violent video games to minors)

b. Lewd, Indecent, Not-Obscene Speech on the Internet, 1211-1218.

    *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)

    Note: “Indecent Expression”

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

    Anti-Bias Ordinances and Cross-Burnings, 1223-1249. (*Wed. Dec 5, 2012*)

    *Beauharnais v. Illinois* (1952) (Group defamation in the 1950’s)

    Note: Group Defamation and "Hate Speech"


    Note: *R.A.V.* and *Mitchell*


    Note: *R.A.V.* and *Black*


Chapter 5, Protecting Dignity or Protection from Offense?, 105-143.

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


   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 Funeral (in note)


   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) (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


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


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


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


  FINAL EXAMINATION
  The First Amendment
  Tuesday, December 18, 2012
  9:00-11:00AM

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