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, Fri. Sept. 26, 2014. Sections 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, October 7, 2014.

The second assignment, an essay of 8-10 double-spaced typewritten pages, is on materials in Section IV of the syllabus, through Class 21, Monday, October 27, 2014; that is, it is on Equal Protection of the Law: The Social Construction of Race and Gender. The second essay will be due on Tuesday, November 11, at any time.

The third assignment, an essay of 8-10 pages, is on material in Section V, that is, on material through Class 30, Wednesday, Nov. 17, 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, Dec. 2, 2014.

The Final Examination is Wednesday, December 17, 2014, 9:00-11:00AM. 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 Friday, Dec. 5, 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 OTHER SOURCES) 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. 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](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.supremecourtus.gov](http://www.supremecourtus.gov), which is the official web site of the United States Supreme Court, and [www.findlaw.com/casecode/](http://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](http://www.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 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, 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 lxxvii-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)

File: 202sylfall2014.final
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. 3, 2014)

2. The Role of the Supreme Court in the Constitutional Scheme: Founding Principles and Marbury v. Madison (1803) as a Basic Framework. (Fri. Sept. 5, 2014)


      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 (Mon. Sept. 8, 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?


   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


a. 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 (Mon. Sept. 15, 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*


      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

   b. Gun Free School Zones in 1990s, 203-212.


   c. The Tenth Amendment, Federalism, 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 War making Authority


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

    Note: The “War on Terror” and the Second Gulf War
    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)


Note: The Legislative Veto

c. Pragmatic Formalism versus Functionalism in Interpreting What the Separation of Powers Means: Must It Be One or the Other?


Other Sources


First Assignment: Six-Eight Page Essay on Material Through Class 11, Due Tuesday, October 7, 2014
IV. What Constitutes a Denial of Equal Protection Before the Law Under the 14th Amendment?: Explaining Different Levels of Court Scrutiny of Laws Involving Invidious and Benign Race and Gender Classifications

12. Race, the Constitution, and Changing Conceptions of Equality. (Mon. Sept. 29, 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*, 463-472.

   Note: The Work of the Reconstruction Congress

   Note: The Judicial Reaction

   *Plessy v. Ferguson* (1896)
   Note: Separate but Equal


   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)


   Reread: *Plessy v. Ferguson* (1896)

   *Brown v Board of Education of Topeka* (1954) (Brown I)

   Note: Justifications and Explanations for *Brown*


   c. Compare the Social Construction of Race and Rights in *Plessy* and *Brown*


   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)


      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)

   c. Should the Court Allow Interest Group Politics In Legislatures or a Concern for the Public Interest Govern Its Review of Public Policy?, 509-520.

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

15. Equal Protection Methodology II: Heightened Supreme Court Scrutiny of Race Classifications (Mon. Oct. 6, 2014)


      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
      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?
      Palmore v. Sidoti (1984) (Granting child custody on the basis of race)
      Johnson v. California (2005) (Assignment of Prisoners to Cells Based on Race)
      Hunter v. Ericson (1969) (Constitutionality of referendum suspending fair housing


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 I (1973) (Segregation in the North: Denver)
Milliken v. Bradley I (1974) (No federal court power to impose inter-district remedies in Detroit)
Milliken v. Bradley II (1974) (Federal Courts have power to order remedial education to help victims of unconstitutional conduct by school officials)
Missouri v. Jenkins (1995) (Restriction on Milliken II remedies)


Or


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

Note: Distinctive Problems in the Administration of Justice
McCleskey v. Kemp (1987) (Race and capital punishment)
Note: Racial Disparities in Investigating, Charging, and Sentencing


   
   Note: The Imposition of Strict Scrutiny (Only 562-563)
   Regents of University of California v. Bakke (1978) (Entry to medical school)
   Note: The Constitutionality of “Benign” Racial Classifications

b. Entry to Law School and the Undergraduate College at University of Michigan, 580-598, 41-47 in 2014 Suppl. to Stone Text on Blackboard

   Note: The Contemporary Application of Strict Scrutiny
   Fisher v. University of Texas (2013) (Affirmative Action at the University of Texas)


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.


   Parents Involved in Community Schools v. Seattle School District No.1 (2007) (Public Schools)
   Note: Parents Involved and the Synthesis of Equal Protection Law

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

You may wish to reread or review:


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) (Required maternity leaves)
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?


Spring Recess: Saturday October 18-Sunday, October 26, 2014


Archaic and Overbroad Generalizations versus “Real” Differences


Second Essay On Equal Protection of the Law, Due on Tuesday, Nov. 11, 2014

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


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, 814-823.

   *Shapiro v. Thompson* (1969) (Right to travel and durational requirements for welfare)
   *Saenz v. Roe* (1999) (Shapiro affirmed on right to travel and welfare payments)
   
   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) (No fundamental right to welfare and equal welfare payments)
   
   Note: (The Reach of) *Dandridge* and the Judicial Role in the Welfare Context
   *U.S. Department of Agriculture v. Moreno* (1973)


a. A Fundamental Right to Education?, 828-841

   *San Antonio Ind. School District v. Rodriguez* (1973) (No right to equal funds for school districts)
   
   Note: The *Rodriguez* Formulation
   
   Note: *Plyler* and the Equal Protection Clause

b. Must Government Pay For a Poor Woman’s Medically and Non-Medically Necessary Abortion?, 866-869

   *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 or for medical procedures necessary for the victims of rape incest)

Other Sources


   Chapter 5, "Equal Protection on the Burger Court," 139-160
Modern Substantive Due Process: A Fundamental Right to Privacy and to an Abortion (Wed. Nov. 5, 2014)


*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 Any Problems in the Way the *Roe* Decision is Constructed?, Should the Court or State Legislatures Decide Abortion Rights?, 854-866.

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


The Right of Abortion Choice Today—The *Casey* Decision: Why Was *Roe* Not Overturned, But the *Lochner*, and *Plessy* Landmark Decisions Were Overturned?, 870-883. (Fri. Nov. 7, 2014)

a. The 1992 *Casey* Decision—The Right of Abortion Choice Today; What Changes from *Roe*?

Note: Abortion Regulation Between *Roe* and *Casey*
Note: Casey and the Role of the Court

b. Why Was *Roe* Not Overturned? What Does *Casey* Tell Us About Supreme Court Decision-making?


a. The Right to Family Choice and to Marry As Part of the Right of Privacy, 909-917.

*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 to 916)
*Califano v. Jobst* (1977) (Disability benefits after one marries)
*Turner v. Safely* (1987) (Right of inmates to marry)

Note: Intimate and Cultural Association

c. What Level of Court Scrutiny For Sexual Orientation Classifications Under Equal Protection Clause?:
Equal Protection Methodology and the Problem of Sexual Orientation, 673-685.

Note: The Nature of the Class at Issue
Romer v. Evans (1996) (Colorado’s anti-homosexual constitutional amendment is unconstitutional)
Note: The Meaning of Romer


a. The Right of Gay Men and Lesbians To Engage in Intimate Personal Relations: Court’s First Look; Can Romer and Bowers Stand Together? 921.

Bowers v. Hardwick (1986) (No right to sodomy for gay men and lesbians)

b. Why Was Bowers Eviscerated, Rather Than Simply Overturned?. 922-934.

Note: Homosexuality, Sexual Liberty, and Substantive Due Process


Other Sources


      Note: Same Sex Marriage (Before Windsor)
      United States v. Windsor (2013)


      Note: The Standard of Review

   Other Sources


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

Same Sex Marriage and LGBT Rights In the Year After United States v. Windsor (2013)

30. Why Does the Supreme Court Expand Implied Fundamental Rights (Such as the Right to Marry) in a Conservative Age?: A Critique of Sunstein’s Judicial Minimalism. (Mon. Nov. 17, 2014)


      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 Essay on Implied Fundamental Rights Due December 2, 2014
VI. The First Amendment

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

31. History and Philosophy of First Amendment Principles; Content-Based Restrictions: Dangerous Ideas and Information-Expression that Induces Unlawful Conduct. (Wed. Nov. 19, 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”)


*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

Other Sources


32. Speech That Provokes a Hostile Audience Reaction and Fighting Words. (Fri. Nov. 21, 2014)

a. Speech That Provokes a Hostile Audience Reaction, 1083-1091.

*Terminello v. Chicago* (1949) (Political speech before hostile audiences)
*Cantwell v. Connecticut* (1940) (What constitute fighting words?)
*Feiner v. New York* (1951) (Police remove speaker because of fear of violence)
Note: The Search for Mechanisms of Control
*Kunz v. New York* (1951) (No clear standards for licenses to protest unconstitutional)
(Why are these three cases a far cry from *Feiner*?)
*Edwards v. South Carolina* (1963) (Protest on South Carolina State House)
*Cox v. Louisiana* (1965) (Protest at Courthouse)
*Gregory v. City of Chicago* (1969) (Protest at Chicago Mayor House)

b. Fighting Words, 1091-1100.

*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)
33. The Modern Formulation of the “Clear and Present Danger”: The Brandenburg Standard. (Mon. Nov. 24, 2014)


   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: An Outlier Case)

b. The Speech-Action Dichotomy and “True Threats” Off and On the Internet: Has the Court Always Been Faithful to the Brandenburg Distinction Between Speech and Action?, 1163-1165, 1076-1078

   Bridges v. California (1941) (A union leader can call a strike after negative court decision)
   Watts v. United States (1969) (Threatening to kill the president)
   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)

c. The Speech-Action Dichotomy, Political Speech and Association, and the War on Terror

   Holder v. Humanitarian Law Project (2010) (Speech rights and the war on terror)

34. The Constitutionality of Lewd, Profane, Indecent Not Obscene Speech Off and On the Internet (Wed., Nov. 26, 2014)

a. In Public Forums (Public Buildings and Streets) and on the Radio, 1214-1225.

   Cohen v. California (1971) (Dirty words on jacket in public building)
   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

b. On the Internet, 1227-1229.

   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)

   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)


   *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

   Other Sources


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


Chapter 3, When the State Speaks, What Should It Say?: Democratic Persuasion And the Freedom of Expression, 71-108
(An argument for government speaking out and not supporting hateful groups and speech)

B. Freedom of Expression II—Content-Neutral Restrictions: Limitations on the Means of Communication and the Problem of Content Neutrality


   *Schneider v. State* (1939)
   *Martin c. City of Struthers* (1943)
   *Kovacs v. Cooper* (1949)
   Note: The Search for Principles
b. Speech on Public Property: Streets and Sidewalks, 1274-1281 (through Section 8 of note) and 96-100 in 2014 Suppl. to Stone Text on Blackboard.

*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)  
*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)  

*McCullen v. Coakley* (2014) (Required 35 foot buffers near abortion clinics) 96-100 in 2014 Suppl. to Stone Text on Blackboard

38. Publicly Owed Property Other Than Streets and Parks; Equal Access to Public Forum (Mon. Dec. 8, 2014)

a. Publicly-Owed Property Other than Streets and Parks: Jail Grounds, Military Bases, State Fairgrounds, And Mail Boxes, 1285-1291, 1293-1294.

*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)  
Note: Modern Public Forum Doctrine


*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 (Through section 5 of note)
   Stromberg v. California (No red flags as symbol of opposition to government
   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)

40. Review for Final (Fri. Dec. 12, 2014)

   FINAL EXAMINATION ON THE FIRST AMENDMENT
   Wednesday, December 17, 2014, 9:00-11:00AM.