

Government 67: Civil Liberties: Legal and Normative Approaches

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Winter 2014

218 Silsby Hall
Office Hours: Monday, 3-5pm

Overview:

This course examines the normative and constitutional bases for protecting certain civil liberties or rights. The objectives of the course are: (1) to learn the constitutional language of civil liberties (2) to understand the normative arguments underlying these issues and (3) to be able to critically evaluate (1) and (2). Much of what we discuss will raise questions but no definitive answers. This is the nature and appeal of political and legal theory. This course is not designed specifically for students contemplating law school. It is aimed at students who want a general introduction to civil liberties. Issues covered include: property, race, sex, abortion, sexual freedom and “alternative” marriages.

Texts:

Two course packets: Cases and Secondary Readings (both available at Wheelock Books) (All cases are also uploaded on Blackboard) (All secondary sources are on reserve at Baker Berry). As I do not permit computers in class, you should make sure all materials are printed out/copied if you elect not to purchase the course packets.

Selected readings and handouts are on Blackboard under the Course Materials link.

Requirements:

Take Home Midterm: 40%
Take Home Final: 60%
(See grading policy below)

February 17, 2003, 4:30 pm, Location TBA
Professor Robin West
Frederick J. Haas Professor of Law and Philosophy
Georgetown Law Center
Timbers Named Lectureship

Take Home Midterm and Final (PLEASE READ CAREFULLY):

The midterm will be available on February 12th on Blackboard. It will be due in class on February 19th. However, I will automatically grant everyone a week extension in order to accommodate unforeseen personal circumstances placing the extended date to February 26th. Please note that as a result I will not entertain any kind of extension beyond February 26th. The final will be available by the last day of class. It will be due on March 14th by 3pm. I will not accept a late final. Students with disabilities should self-identify at the Office of Student Accessibility Services to request support services. (<http://www.dartmouth.edu/~accessibility/>).

Attendance/Participation:

I expect everyone to come to class having done the reading. I intend to lecture on most Monday and Wednesday leaving seven or so discussion sections/reviews. These will generally but not always fall on Friday. I will assign a group of students to be “on call” ready to participate for the discussion sections. I’ve listed some questions to consider for those sections. While I will expect those students “on call” to participate more actively, I expect everyone to contribute to the discussion. Although participation is not a formal component of the grade, regular attendance/participate may positively impact your grade. I do not permit computers in class.

Reference Letters:

I aim to write reference letters that are thorough and meaningful. To do so, my general policy is that students complete at least two courses with me, if they seek such a letter.

Assignments

Note: each number on syllabus represents one day (note the X hours). Below each assignment are questions to consider in doing the readings.

Introduction 1/6

Natural Rights and Originalism

1. Constitution http://www.archives.gov/exhibits/charters/constitution_transcript.html. Declaration of Independence http://www.archives.gov/exhibits/charters/declaration_transcript.html. Himmelfarb (packet); *Bolling v. Sharpe* (1954) (packet); Frank and Munro (packet) (pp. 136-142; 147-162). 1/8

The Declaration of Independence famously states that there are certain unalienable God-given rights. Where does the Constitution contain or validate such rights? What about the Ninth Amendment? What is Himmelfarb's argument regarding the relationship between the Declaration and the Constitution? What has the Supreme Court said about such a relationship? Originalism is a theory of constitutional interpretation that demands judges look to the original meaning of a particular clause (I will define originalism in detail in class). Is there an originalist defense of *Bolling v. Sharpe* (1954)? What is odd about the text of the 5th Amendment? According to Frank and Munro, what is the original meaning of equal protection?

Incorporation and Theories of Judicial Review

2. *Duncan v. Louisiana* (1968); Sec. 1 of 14th Amendment Handout (on Blackboard). <http://teachingamericanhistory.org/library/document/constitutional-interpretation/> (Justice Brennan); http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm (Justice Scalia). 1/10

How did the Reconstruction Amendments (specifically the 14th Amendment) change or alter the character of the Bill of Rights? What do you make of the *Slaughter House Cases* and the privileges and immunities clause? What are the three theories of "incorporation" outlined in *Duncan* (pay attention to the majority opinion, Black's concurrence, and the dissent)? Brennan and Scalia articulate contrasting theories of constitutional interpretation. In what ways are they both similar? In what ways are they different?

Discussion Component: How do we square the notion of human rights with the Constitution? Is there a right against torture in the Constitution? Isn't it problematic to deploy originalism to understand constitutional phrases that concerns civil liberties? Why do politicians invariably invoke the rights to life, liberty, and the pursuit of happiness when they are nowhere in the Constitution? 1/13

Constitutional Doctrine: Fundamental (Unenumerated) Rights

Property/Contract

3. *Lochner v. New York* (1905) (packet); *Nebbia v. New York* (1934) (packet); *U.S. v. Carolene Products* (1938) (packet); *Kelo v. New London* (2005) (packet) 1/15

What is the Court's approach to economic legislation in *Lochner*? How does this approach change in *Nebbia* and *Carolene Products*? Hint: look at footnote 4 in *Carolene Products*. What does this footnote say about heightened scrutiny and the presence of a fundamental right? In what way does *Kelo* endorse this approach? How would the *Kelo* dissent evaluate a majority's decision that particular economic legislation is for the "public" good?

Privacy

4. *Griswold v. Connecticut* (1965); *Bowers v. Hardwick* (1986); *Lawrence v. Texas* (2003). 1/17.

Do you think there is a right to privacy in the Constitution? What does Douglas say? How does this differ from Goldberg's deeply rooted test? How does this differ from Harlan's implicit ordered conception of liberty test? (Revisit the debate between Scalia and Stevens). If there is no constitutional right to privacy must the anti-contraception ban stand? Does *Griswold* accurately reflect national consensus? How do you distinguish *Griswold* from *Lochner*? How, then, should we determine the scope of such rights? How does the majority frame the issue in *Bowers*—how does this relate deciding fundamental rights? The Court has accepted the deeply rooted test. Does *Bowers* consider the law under rational review? Why does *Lawrence* come out differently? Is the right to privacy doing the work? What is Scalia's characterization of the majority decision? If you believe *Lawrence* was rightly decided, does a right to privacy also protect adult incest or bestiality?

Body

4. *Washington v. Glucksberg* (1997); *Vacco v. Quill* (1997). Dworkin (packet). 1/20

If you think the Court erred in *Kelo*, do you agree with its decisions regarding suicide? Does the right to property cover bodily organs? Is there a limit to freedom of contract—is there a limit to the kind of contracts adults may enter into? Do these cases suggest that the deeply rooted test is flawed? Do they suggest that any test to determine fundamental, unenumerated rights is flawed?

Discussion Component: What is the difference between property and the body as far as the Constitution is concerned? If there is a right to property that invalidates laws and policies that seek to regulate it, what about a right to the body? Is the federal law prohibiting the sale of bodily organs unconstitutional? 1/22

Constitutional Doctrine: Suspect Classification

Overview

5. Geiger (packet) (only pp. 1206-1242); Ely (Ch. 6) (packet); *San Antonio v. Rodriguez* (1973) 1/24.

What are the four criteria to determine suspect status? What is the relationship between scrutiny and suspect class status (I will discuss this in more detail in class outlining the doctrine.) Currently, ex-offenders are not a suspect class. Should they count as one? Poverty is not a suspect classification. Should it be?

Race

5. *Plessy v. Ferguson* (1896), *Brown v. Board of Education* (1954); *Loving v. Virginia* (1967); Scrutiny Handout (on Blackboard). 1/27

Why does Justice Brown contend that the law in *Plessy* is not arbitrary or unjust? What standard does *Brown* use in evaluating the segregation law—is it the same standard employed in *Carolene Products*? What are the various kinds of equality Justice Harlan articulates in his dissent in *Plessy*? What kind of equality is at play in *Brown*? In reading *Loving*, pay attention to the Court’s reasoning. Which principle is doing the work: fundamental rights, formal equality, and/or anti-subordination

6. Bell (packet); Read the following excerpts from PBS documentary on race: (http://www.pbs.org/race/000_About/002_04-background-03-02.htm, http://www.pbs.org/race/000_About/002_04-background-03-03.htm) 1/29

What is Bell’s concern with *Brown*? (Why would he have dissented from the opinion?) Read his argument carefully. Where is the discussion of “white privilege” in *Brown*? Do you believe that Bell’s proposal would have more efficiently brought about social change? If the historical effects of racism are still present today (for instance, current disparities in wealth between blacks and whites are attributable to prior state policies), does it make sense to adopt a “color-blind” approach?

Discussion component: Do we miss something when we focus simply on racial discrimination rather than racial privilege? Is the “color-blind” approach problematic? If so, why does it have such appeal? What is so important about immutability in the suspect class framework? 1/31

8. *Washington v. Davis* (1976); *United States v. Clary* (8th Cir. 1994) (packet); Lawrence, only read pp. 317-328, 344-376 (packet) (disparate impact) 2/3

How do we determine the purpose or intent of a facially neutral statute that we believe discriminates on the basis of race? What is the meaning of racial discrimination?

9. Rappaport (uploaded on Blackboard, only pp. 1-22); *University of California v. Bakke* (1978) (affirmative action). 2/5

What should we make of originalism and affirmative action? How should this influence, if at all, current constitutional doctrine? How does Rappaport’s argument relate to *Bolling*? What is the racial quota system employed in *Bakke*? Why does the law get “strict scrutiny?” Focus on Powell’s concurrence. What kind of equality does Justice Powell endorse? What kind of equality does the dissent endorse? Why does Powell reject “remedying societal discrimination” as a compelling purpose?

10. *Korematsu v. United States* (1944); *Grutter v. Bollinger* (2003) (packet); Bedi (packet). (affirmative action) 2/7

According to *Grutter*, why is achieving diversity (a “critical mass”) a compelling purpose? Does the dissent accept this as a compelling purpose? Why does the dissent contend that the affirmative action system in *Grutter* is not narrowly tailored (pay careful attention to Thomas’ dissent)? What is the relationship between *Korematsu* and *Grutter*?

Discussion Component: What is the problem with racial preferences? Is there a similar problem with legacy preferences? Or geographical preferences? Aren’t these all alleged exceptions to merit? 2/10

Midterm Review. Midterm will be available on Blackboard. 2/12

Sex (Gender)

11. *Reed v. Reed* (1971); *Frontiero v. Richardson* (1973); *Craig v. Boren* (1976); *Rostker v. Goldberg* (1981) (packet). 2/14

Is sex like race? What theory (or standard) did *Reed* use to invalidate the law? What standard did *Frontiero* use to invalidate the fringe benefits law? Is it the same standard employed in Powell's concurrence? What role (if any) should the ERA have played in *Frontiero*? What standard did *Craig* deploy? (this is the current standard for sex discrimination). What does intermediate scrutiny prohibit? Does it only prohibit those laws that affirm/validate outdated and archaic stereotypes or models? The Department of Defense has now repealed the combat exclusion for women. Was such a policy unconstitutional? Why shouldn't women serve in exactly the same way as men in the armed forces including being drafted? What do you make of separate barracks for males and females?

Guest Class Lecture. Robin West 2/17. Reading TBA.

Public Lecture. 2/17

12. *Miss. Univ. v. Hogan* (1982), *United States v. Virginia* (1996); Crenshaw (packet: only pp. 139-152). 2/19

In reading these cases, keep in mind the following background question: Are separate all male and all female but "truly equal" educational institutions constitutional? What kind of equality—formal equality or anti-subordination—is at play in *VMI* and *Hogan*? According to Ginsburg, why does the all male status of *VMI* not further an important state policy? Why does Scalia disagree? (Pay attention to their historical accounts). Evaluate Scalia's dissent in *VMI* and Powell's dissent in *Hogan*? What kind of equality does each seem to endorse? Do you find it at odds with their stand on race-based affirmative action? What is Crenshaw's frustration with the Court's jurisprudence on equal protection? (Midterms Due in Class)

Discussion Component: What is the difference between race and sex? Is this difference constitutionally relevant? If separate race bathrooms are unconstitutional why not separate sex bathrooms? If there are separate showers for men and women, why not separate showers for gays and straights? 2/21

Abortion

13. *Roe v. Wade* (1973); (packet). Ginsburg (packet). 2/24

What principle does the work in *Roe*—equality or rights? How is *Roe* like *Lochner*? Why does Rehnquist believe that abortion does not implicate privacy? Do Rehnquist and White contend that the fetus is a person under the Fourteenth Amendment? What would be the implications of holding that the fetus is a person? What does Ginsburg make of *Roe*'s trimester framework?

14. *Planned Parenthood v. Casey* (1992); *Gonzales v. Carhart* (2007) (packet: pp. 1-9, 14-16, 20-24, 26-37 from Kennedy's majority opinion; p. 1-7, 13-25 from Ginsburg's dissent). 2/25 (X Hour).

What is the relationship between *Nebbia/Carolene Products* and *Brown* on one hand and *Casey* on the other? According to the Court, why is *Casey* unlike the other two cases? Does it matter? If *Roe* was wrongly decided do you think that this should be sufficient to overrule it? What is Scalia's view of the relationship between democracy and *Roe*? What is different between the reasoning in *Roe* and the reasoning in *Casey*? How is the undue burden standard in *Casey* an argument about equality? In

Stenberg (2000) the Court invalidated the Nebraska law on two grounds: one, the law is over-inclusive, prohibiting more than just “partial birth abortions” and two, it failed to provide an exception for the health of the pregnant woman. Keeping that in mind, why does the Court uphold the Congressional ban on partial birth abortions in *Gonzales* (2007)? According to Kennedy, why is a health exception not necessary to pass constitutional muster? What is the purpose behind the Congressional ban on partial birth abortions? What does Ginsburg think of that purpose? What does she think is really going on?

15. Thomson (packet); Koppelman (packet: only pp. 480-523). 2/26

If the fetus is a person, why does Thomson contend that the woman ought still to be able to abort? What is the relationship between Thomson’s argument and forced Good Samaritan laws? Is Thomson’s argument ultimately one grounded in rights or equality? How does Koppelman translate Thomson’s philosophical insight into a constitutional one? Why does he think that the Thirteenth Amendment is the best textual hook to prohibit abortion laws—as compared to a rights analysis or an equality analysis? For Koppelman, what is the difference between ownership of your body and ownership of your property? How does this fit with his interpretation of the Thirteenth Amendment? How does he respond to the objection that in most cases the pregnant woman has consented to bearing the child? Do you find his comparison between the laborer in *Bailey* and the pregnant woman seeking an abortion convincing? What is the difference between Koppelman’s argument and Thompson’s?

Discussion Component: Is it problematic that we do not have forced Good Samaritan Laws but abortion laws force women to sustain a fetus against their will for nine months? Do laws against abortion that contain exceptions for rape undermine the idea that such laws seek to protect fetal life? 2/28

Same Sex Marriage

18. *Romer v. Evans* (1996), *Windsor v. United States* (2013), Attorney General’s Memorandum to Congress regarding Defense of Marriage Act; (<http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>) . 3/3

What is the exact constitutional argument underlying the decision in *Romer*? Does Amendment 2 pass rational review? Is the concern equal protection? Is Florida’s ban on gay adoption unconstitutional? Can one distinguish *Lofton* from *Lawrence*? Does the adoption ban pass rational review? Should sexual orientation be a suspect classification? Why does Judge Norris think so? Is sexual orientation like race? like sex? Is sexual orientation discrimination sex discrimination? If there is an equality argument is it one of formal equality or anti-subordination or both? According to Sandel, what is the problem with tolerance? What is the problem with the way privacy protects? How does Stein’s argument affect the claim that sexual orientation is a suspect classification?

19. *Reynolds v. United States* (1878); ACLU statement (packet); George (packet); Metz (packet); X-Men: First Class (available on Blackboard). 3/5

If you think *Goodridge* was rightly decided, why does *Reynolds* come out differently? *Reynolds* also concerns religious liberty (“free exercise”). Does this make it an easier case than same-sex marriage? Consider plural marriage rather than the practice at issue in *Reynolds*. Why not permit three men from marrying? What view of marriage does George adopt? Can we both reject plural marriage but accept same sex marriage? In fact, why should the state even recognize marriage? Why should it deem certain relationship “superior” to others—is there an acceptable justification for this? Why not take the state out of the marriage business altogether? According to Metz, why does liberal theory suggest this?

Final Exam Review. The final will be available before class. I will answer any questions about it or about the readings in general. 3/7

Grading Policy

Your exams will be graded on three criteria. First, how well written, clear, and coherent is the response? Second, how well does the response answer the question? Third, how nuanced and sophisticated is the content of the response? Keep in mind that an exam is not like taking a driving test in which you start with 100 points and lose points for errors. Rather, you start with zero points. The burden, then, is on you to write an answer that will meet these three criteria.

Below is a general rubric for grading:

A: This is a superb answer that is extremely clear and well written. It not only answers the question in a creative and insightful way but also offers a new or fresh perspective that was not obvious from class materials. It represents a deep, thorough, and complete understanding of the material.

A-: This is an excellent answer that is extremely clear and well written. It not only answers the question by drawing on the relevant class materials but also offers a creative or insightful synthesis of them. It represents a very strong grasp of the material.

B+: This is a good answer that is relatively clear and well written. It answers the question by drawing on the relevant class materials. It represents a good grasp of the material.

B: This answer makes some good points but may be unclear or may not answer the question completely or may not draw on the relevant class materials. It represents a good but in certain respects deficient grasp of the material.

B- and below: These answers are weaker than a B answer with regards to one or more of the three outlined criteria.

Course Packet 1
Cases
Available at Wheelock Books and Blackboard

1. *Bolling v. Sharpe* (1954)
2. *Duncan v. LA* (1968)
3. *McDonald et al. v. City of Chicago* (2009)
4. *Lochner v. New York* (1905)
5. *Nebbia v. New York* (1934)
6. *U.S. v. Carolene Products* (1938)
7. *Kelo v. New London* (2005)
8. *Griswold v. Connecticut* (1965)
9. *Bowers v. Hardwick* (1986)
10. *Lawrence v. Texas* (2003).
11. *Washington v. Glucksberg* (1997)
12. *Vacco v. Quill* (1997).
13. *San Antonio v. Rodriguez* (1973)
14. *Plessy v. Ferguson* (1896)
15. *Brown v. Board of Education* (1954)
16. *Loving v. Virginia* (1967)
17. *Washington v. Davis* (1976)
18. *United States v. Clary* (8th Cir. 1994)
19. *University of California v. Bakke* (1978)
20. *Korematsu v. United States* (1944)
21. *Grutter v. Bollinger* (2003)
22. *Reed v. Reed* (1971)
23. *Frontiero v. Richardson* (1973)
24. *Craig v. Boren* (1976)
25. *Rostker v. Goldberg* (1981)
26. *Miss. Univ. v. Hogan* (1982)
27. *United States v. Virginia* (1996);
28. *Roe v. Wade* (1973)
29. *Planned Parenthood v. Casey* (1992)
30. *Gonzales v. Carhart* (2007)
31. *Romer v. Evans* (1996)
32. *Windsor v. United States* (2013),
33. *Reynolds v. United States* (1878)

Course Packet 2
Secondary Readings
Available at Wheelock Books and Baker-Berry Reserve

1. Himmelfarb, Dan. "The Constitutional Relevance of the Second Sentence of the Declaration of Independence." *Yale Law Journal* (1990): 169-187.
2. Frank, John P. and Robert F. Munro, "The Original Understanding of 'Equal Protection of the Laws,'" *Columbia Law Review* (1950): 131-169.
3. Dworkin, Gerald, Markets and Morals: The Case for Organ Sales, in *Morality, Harm, and the Law* (ed. Gerald Dworkin) (Westview: 1994) pp. 155-161
4. Geiger, Ben. "The Case for Treating Ex-Offenders as a Suspect Class," *California Law Review* (2006): 1191-1242.
5. Ely, John. *Democracy and Distrust: A Theory of Judicial Review* (1980). Chapter 6.
6. Bell, Derrick, (dissenting), *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision*. (ed. Jack M. Balkin) (NYU Press, 2001) pp. 185-200.
7. Lawrence, Charles R. III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review*, Vol. 39, No. 2 (1987) pp. 317-388.
8. Rappaport, Michael B. "Originalism and the Colorblind Constitution," SSRN working paper (uploaded on Blackboard).
9. Bedi, Sonu. "How Constitutional Law Rationalizes Racism," *Polity*, Vol. 42 (2010), pp. 542-567.
10. Crenshaw, Kimberle. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracists Politics," 1989 *University of Chicago Legal Forum*, pp. 139-167.
11. Thomson, Judith, "A Defense of Abortion," *Philosophy and Public Affairs*, Vol. 1, No. 1, 1971, pp. 47-66.
12. Koppelman, Andrew. "Forced Labor: A Thirteenth Amendment Defense of Abortion," 84 *Northwestern University Law Review*, 1990, pp. 480-535.
13. ACLU Statement on Plural Marriage (ACLU Website)
14. George, Robert P. "What's Sex Got to do with it? Marriage, Morality, and Rationality," *American Journal of Jurisprudence* (2004): 63-85.
15. Metz, Tamara. "The Liberal Case for Disestablishing Marriage," *Contemporary Political Theory* (2007): 196-217.