

**AMERICAN CONSTITUTIONAL****DEVELOPMENT II****CIVIL RIGHTS AND CIVIL LIBERTIES****DR. ALAN SAGER**

**HOME**   **COURSE INFO**   **ASSIGNMENTS**   **SYLLABUS**   **BRIEFING CASES**  
**VIDEO**   **RESOURCES**   **FROM THE MEDIA**

## Syllabus

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**Required Textbooks**

1. Lee Epstein and Thomas Walker. **Constitutional Law For A Changing America: Rights, Liberty and Justice** Sage Press **10th Edition** 2017 (There is also a supplement with recent cases that come with this edition. The supplement also contains some older cases we will read. *If you buy a used edition, make sure you purchase the supplement.* Otherwise you will have to read the full text on the web of the assigned cases in the supplement.) There may be a new edition of the textbook in late August 2019. The 2017 edition plus supplement will work.

**Required Supplementary Books**

1. Andrew Kull **The Colorblind Constitution**, Harvard University Press, 1998. Despite what we may think at first, the word colorblind is not generally associated with the 14th Amendment. From one point of view, Kull explains why not and also makes an argument as why it should be.

Pages: 1 [2](#)

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[SYLLABUS](#)

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[Back to top ↑](#)

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**HOME    COURSE INFO    ASSIGNMENTS    SYLLABUS    BRIEFING CASES**  
**VIDEO    RESOURCES    FROM THE MEDIA**

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2. Larry Arnn **The Founder's Key: The Divine and Natural Connection Between the Declaration and the Constitution and What We Risk by Losing It** Thomas Nelson, 2013 Paperback edition. The title tells you the argument by Larry Arnn, President of Hillsdale College and well known Winston Churchill scholar.

3. George Orwell **1984**. I expect everyone has read this in high school or before. Please refresh your memory or skim info about it on the web. The book itself is not assigned for this course. Some knowledge of it is required.

There are 6 feature films assigned for this class. Films 1, 4, 5 and 6 are available on Netflix, DVD, probably Amazon and other places as noted. 2 and 3 can be found on the PBS website and other places on the web. I have noted some of those place. I have had Lincoln, Expelled and Denial fact checked. Simple Justice and Freedom Riders do not need to be fact checked because of content, use of documentary footage and other attributed.

1. **Lincoln**, the recent Steven Spielberg film on the passage of the 13th Amendment. Though Lincoln was gone, what it took to pass the 14th Amendment, which is a cornerstone of this course, was likely not that different. Recently I saw list of the top 10 historically accurate movies. This movie was on it. I did not know most of the other ones on the list.

2. **Simple Justice**, a PBS film based on Richard Kluger's book of the same name, about the road from Plessy to Brown v. Board of Education. The story is told through the eyes of Justice Thurgood Marshall, from his entry into law school through the final decision in Brown. We will cover several of the cases mentioned in the movie. Production values could be improved. Still it is a wonderful engaging story.

3. **Freedom Riders**, a PBS documentary about the period from the decision in Brown through the 1964 Civil Rights Act. In particular it cover a Freedom Ride through the deep south from Tennessee to New Orleans. Some of the themes are similar to those in the recent film **Selma**. Best version for this

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<http://sites.la.utexas.edu/amcondev2/syllabus/2/> [Video/american-experience-freedom-riders/](#)

4. **Expelled**, a decade old Ben Stein documentary about political correctness in academia focusing on the biological sciences and academics who had the nerve to mention the term “Intelligent Design” in their work or bios.

5. **Denial** This is a film about a real libel trial in England, [Irving v. Penguin Books](#). While in colonial times and well into the 19th century we integrated much of the English legal system into our jurisprudence, we do not follow the English law of libel. In ours the burden of proof is on the person who claims to be injured by the words. The plaintiff must prove they are false and injurious. In the English system, the burden of proof is on the speaker, the defendant, to prove the veracity of their words. This difference in burden of proof is most interesting. We will be discussing burden of proof issues in general in relation to a number of Supreme Court doctrines. Both the acting and the “lawyering” in this case are wonderful. David Irving an English writer sues American historian, Deborah Lipstadt, for calling him a Holocaust denier in her books. Lipstadt’s lawyers must prove both he was a Holocaust denier and the Holocaust existed so they must prove is also a liar. While we may consider these claims to be quite factual to the point of being self evident, proof in a court room requires a much higher level of proof than we may use in our every day life. While this case is decided by a trial court, not an appellate court, it gives you a great sense of how everyday interactions among people might well end up in the Supreme Court. Also gives you a sense of what happens before a case even get to a Supreme Court. Lastly, it shows that many important civil liberties issues never get to a higher appellate court.

6. **Blazing Saddles**, a Mel Brooks film, also written by the late great comedian Richard Pryor. Despite its continuing popularity, is this a film that would not be made in today’s Hollywood culture and our culture of political correctness? If so why? In a recent Rolling Stone readers poll of best comedies, Blazing Saddles was rated the number 1. Mel Brooks has his own interpretation of what he was trying to do in this film. What is yours.

**The order for the films and supplementary books is as follows:**

Larry Arnn’s book is applicable to many of the ideas and themes that come up throughout the semester.

A. **Civil Rights** (major emphasis in first ½ of course)

**Books: Color Blind Constitution**

**Movies: Lincoln, Simple Justice, Freedom Riders,**

**B. Freedom Speech and Thought** (major emphasis in 2<sup>nd</sup> ½ of course)

**Movies: Expelled, Denial and Blazing Saddles**

The Arnn book applies to several parts of the course

We may show the movies outside of class for those who cannot view them at home or with friends. Movie nights will be on Sundays.

In the past, one or two of the movies are shown consecutively. A short discussion will follow for those interested in such a discussion. Guests are welcome at the Sunday showings.

Each of these films can be directly related to some of the cases we read. There are also many other good films that give some context to the cases we cover. I love a little known 2009 film entitled **Amazing Grace** which is about William Wilberforce, an upper class

English nobleman, who successfully campaigned to end Britain's participation in the slave trade in the early 1800's. It is also about the writing of the song which I know and will not publicly play on my fiddle.

The recent hit **Selma** is also very good about the 60's-70's civil rights era. I decided to keep **Freedom Riders** as the assigned film for this era after careful consideration of having **Selma** replace **Freedom Riders**. One of my high school friends walked across the bridge as part of the Dr. King entourage as shown in the film. I will touch on the events portrayed as we cover some cases from that era. I am sure most students have read or seen **To Kill A Mockingbird**. It relates to both issues of discrimination and criminal procedure. Some of the criminal procedure issues raised are taken up in my Judicial Process course next Spring. Lastly, **The Butler**, which is based on a real story, gives some glimpses of the the development of civil rights and presidential behavior from the perspective of a White House butler.

## **How to Brief a Case**

Description of how to brief a case [\(click here\)](#)

### **Sample Briefs**

Note: Some of these briefs may be more extensive than you will need for daily class preparation.

Click on the case for sample briefs of the following case which are assigned in the first few classes:

[Barron v. Baltimore](#), [The Slaughterhouse Cases](#), [Walker v. Sauvinet](#) and [Yick Wo v. Hopkins](#).

### **Daily Course Assignments**

**Note: Stay up with the assignments even if the class discussion falls behind. The exams will cover everything up to the date of the exam whether we have covered it in class or not.**

Pages: [1](#) [2](#)

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**HOME    COURSE INFO    ASSIGNMENTS    SYLLABUS    BRIEFING CASES  
VIDEO    RESOURCES    FROM THE MEDIA**

## Assignments

# American Constitutional Development: Rights and Liberties *Fall 2021*

## *List of Daily Assignments*

Read These Instructions Carefully First

Note: Cases for this class are assigned from 4 sources: the main textbook, the cases on the website, electronic supplement for the textbook, and a few cases that are not in the textbook or the supplement. **Cases that should be briefed before class are so noted** ([click here for instructions how to brief](#))

1. Each day there will be from 1-5 main cases to brief. There will be additional cases assigned which will be handled in one of two ways. Dr. Sager will discuss these cases in the context of the assigned cases or he will expect the class to discuss them as hypothetical fact situations in light of the theory, rules, doctrines etc. of the assigned cases. Those cases that Dr. Sager will discuss in detail are noted as “**Dr. Sager to discuss**” Cases listed with **no** notation to “**brief**” or **Dr. Sager**, will be covered as the hypotheticals and you will be told which ones you need to know something about them for the exams.
2. Cases listed by name with the word “**Brief**” after them, e.g. Hurtado v. California assigned in class 2, means to write a brief for that case and bring it class.
3. Cases listed by name with the word “**Supp**” after them, e.g. Bradwell v. Illinois assigned in Class 2, means they are in the online supplement to the casebook. You should have information in your book as to how to get on the book website. If you buy a used book, you can purchase the supplement separately. The cases in the textbook and on the supplement website are edited versions of cases, usually without

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Video Resources Assignments Course Info Home About The Media Briefing Cases

interest or you don't have access to that assigned case.

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4. Cases listed by name that are not in the textbook or supplement are denoted by [NIB](#)

I did link a short excerpt from the first NIB case, Calder v. Bull. Except for Calder, you do not need to brief or peruse them before class. However, the full opinion versions can be found on the Findlaw website which is linked on the Resource Page. Also you can just search the web by case name and find the full text or summaries on other websites.

5. If the case is noted to be discussed by Dr. Sager, you do not need to brief the case before class. Normally these are cases that have issues similar to those cases briefed for the day. Sometimes they are discussed for the historical significance. Other times they have a slightly different fact situation or a slightly different interpretation of the Constitution than the main cases assigned for that day. For Dr. Sager, a few of these cases are no longer in the canon of civil liberties cases for reasons that are hard to fathom.
6. Cases are assigned for various reasons. Most are assigned because they are considered part of the Civil Liberties canon, an agreed upon case list created by "experts" for civil liberties courses. Some are assigned mainly because there is just a memorable phrase or idea in them you should know. Others are assigned to illustrate different points of view among the justices. Still others are assigned because they form a foundation for future cases which may not show up for 40 years or more. Still others are assigned because they are eventually overruled or they overrule previous cases we have covered. Cases are covered almost exclusively in historical order so you can see the ebb and flow, the expansion and contraction, the creation and destruction of various constitutional doctrines and interpretations.
7. You will be provided a list of the cases for which you are responsible prior to each exam. For most of the exams, this list will mainly be the cases you were assigned to brief.
8. While it may seem like there are a lot of cases to know, you will see there are a small set of recurring issues with slightly different fact patterns. Since the Court is often split on most of these issues you should know which justices generally take which side.
9. Every case has the same basic form: the case starts in one of two ways. 1) An individual claims that some law or activity of federal, state or local government violates his or her civil rights or liberties or privilege and immunities under the Bill of Rights or the 13th, 14th or 15th amendments, 2) The government claims it can do something and the individual answers that it can't because what the government wants to do infringes on that individual's civil right or liberty under the Bill of Rights or the 13th, 14th or 15th amendments. Almost every case then involves an individual versus the federal government or state government or an entity created by the state or federal government. It is usually named, that way, e.g. Hurtado v. California or Barron v. Baltimore. There are a few cases where another entity of government is the surrogate for an individual., e.g. the very first case, Calder v. Bull seems to be two individuals suing each other. In fact, one side really represents the position of the state. For instance, Calder v. Bull really is Calder v. Connecticut. The Slaughterhouse

cases are really suits against the state of Louisiana. All of them will be pointed out as they occur.

10. Cases colored purple are assigned to the class for briefing. Those colored black Dr. Sager will discuss and present the brief. **For some cases Dr. Sager is covering there is a supplemental assignment such as reading a brief on the case or reading a part of the case and so on.**

10. On the assignment page there are links to materials prepared by Dr. Sager to help summarize some sets of cases, cases that have something similar about them and end up at the Supreme Court in a fairly compact time period. These will help you answer some of the questions below.

II When reading the cases, you should think about the cases in at least 6 different levels of analysis:

1. What are the facts and holding of the case. What are the various answers to fill in the brief.
2. How does this case relate to the other cases, issues, theories, constitutional doctrines we have covered so far
3. What are the views of the various justices on these issues.
4. What are the larger political issues, political theories, constitutional and democratic values, and interpretive issues raised and answered by this case.
5. Lastly, what generalizations can you make if any as to how an historical Court, say the Warren Court, decides cases in terms of some of the dimensions of analysis, e.g., liberal/conservative, activist/restraintist, originalist/nonoriginalist, expanding rights/limiting rights, pro-government/anti-government and so on.
6. What does this case or set of cases, tell us about how the Court or individual justices might resolve some of the larger civil rights and civil liberties issue we will be facing in the future. We know, among others, some of the privacy issues, due process and equal protection issues now and perhaps we can hypothesize about those that will be coming in the future. For instance, the courts are now beginning to have to deal with privacy issues with regard to others finding out what is on your mobile phone. Courts will soon be dealing with facial recognition issues and gene modification issue. European courts are beginning to deal with your right to remove your history, a history you may or may not have provided to places on the internet. How about an equal right to get on a shuttle to some distant planet to save your family DNA against some scourge on earth. As we go through the course, feel free to contribute the future issues you see.

**Check the website regularly for changes. Normally the changes will be a couple of weeks in advance.**

## **Class 1**

**Wednesday, August 25th**

**Course Overview**

If you have never studied much about the Court, read Epstein and Walker pp 1-40 to reacquaint yourself with the Supreme Court as an institution and with terms relevant to its operation. Read this over the next two weeks or so if you are not familiar with the Supreme Court and how it functions and fits into the large scheme of our governmental institutions.

**The Bill of Rights and the 14th Amendment In 18th and 19th Century America. Begin reading Arn book.**

## **Read or reread The Declaration of Independence and the Preamble to the Constitution**

The Pre Marshall Courts

**Calder v. Bull NIB** Dr. Sager to discuss. (In this case, Court was trying to decide if Connecticut legislature violated the Constitution. Court held for state of Connecticut) **For Class Read a couple of paragraphs from two of the opinions ;inked below.** What are they arguing about. Both agree that the Connecticut legislature acted constitutionally. ([click here](#))

**Some questions to consider.** (We will spend much of the semester answering some of these questions)

**What is a “right”? Who has “rights”? What are inalienable “rights”? What is the source of the “rights” of all Americans? What is the first line of protection for your rights?**

**What is “liberty”? What are “civil liberties”? What are the the rights to “life, liberty and happiness” as well as “life, liberty and property?”**

**Barron v. Baltimore Brief** **Facts are simple: Barron says city of Baltimore caused his wharf to become worthless because of various public works projects. He claims this is a taking of property without compensation contrary to 5th amendment** For the 3 page text of the case ([click here](#))\_ If you have a problem doing the brief from my facts and the **short opinion**, sample briefs for cases assigned today and next Wednesday appear at the bottom of the syllabus page. Try to do these without the samples first. These briefs can assist you if you have any questions about how to brief. Links appear on Syllabus page. Also there is a discussion of the briefing form for this course on the Syllabus page.

**Did The Bill of Rights Apply To the States?**

**Some other questions to consider in relation to this and perhaps several other cases.**

**Does Barron mean that citizen’s property as of 1833 do not have any protections against their state and local governments?**

**Can you think of a situation where Marshall might have said a citizen’s property is protected?**

**Can you think of an interpretation of the 5th amendment that would support Plaintiff’s claim?**

**Where did the state and local governments get the power to affect a**



citizen's property?

What does this case tell us about Marshall's view of federalism?

What are the rights which are the one such that "they are endowed by their creator with certain unalienable rights?"

No matter what these rights are, do they or should they affect the meaning of the later adopted Constitution?

Some advice for Students from some well known professors with diverse points of view from a variety of universities: ([click here](#))

George Orwell v. Robert Reich([click here](#))

## **Class 2**

### **Monday August 30th**

Orwell quotes not gotten to at first class. [\(Click here\)](#)

#### **The Bill of Rights and the 14th Amendment In 19th Century America**

**What Did the Post Civil War Amendments Do and what were they meant to do?**

[The Slaughterhouse Cases](#) -Brief ([Click here for sample brief](#))

[Bradwell v. Illinois](#) Dr. Sager to Discuss Supp For Bradley quote([click here](#))

**What is required to file a suit under the 14th or legislation enacted under it.**

[The Civil Rights Cases](#) Dr Sager to discuss([click here for quotes and framework](#))

**What was the meaning of "due process" and did 14th Amendment incorporate Bill of Rights**

[Hurtado v. California Brief](#)

[Walker v. Sauvinet](#) NIB study from brief ([click here](#))

**What is or was the meaning of "equal protection"?**

[Yick Wo v. Hopkins Brief](#) Supp ([Click here if you don't have supplement yet](#))  
([Read example brief click here](#))

[Plessy v. Ferguson Brief](#)

[Williams v. Miss\(1898\)](#) and [Strauder v. West Virginia\(1880\)](#)Dr. Sager to Discuss NIB

#### **Questions to consider:**

Did Yick Wo win because he was Chinese or because he was a businessman?

What standard did the Supreme Court apply in Plessy for judging whether an unconstitutional discrimination had taken place?

Was that the same or a different standard than in Yick Wo?

What was the social science argument used by the majority in Plessy?

Should social science or even physical science be a basis for a Supreme Court opinions?

Which of the cases assigned today for briefing are based on "originalist" arguments?

What does "due process" really mean? How do you know that? See Professor Graglia's short op. ed. from the Wall Street Journal in 2005 entitled "The Death of Due Process." This op. ed. could be found now in the

Congressional Record ([click here](#)) Also below Professor Graglia's pieces in the Congressional Record is a Charles Krauthammer column analyzing the medical marijuana case, Gonzales v. Reich. In this case Scalia and Thomas were on opposite sides. Krauthammer shows why they differed in terms of how they interpret the Constitution and also shows how inadequate and shallow press coverage is of Supreme Court cases using this case as the example.

Dr. Sager Daily Texan controversy in 2001 ([click here](#))

## **Class 3**

### **Wednesday September 1st**

#### **The Bill of Rights and the 14th Amendment In Late 19th Century America:**

##### **The Religion Clauses**

Reynolds v. U.S. Dr. Sager to Discuss Supp

Bradfield v. Roberts Dr. Sager to discuss Supp

**Questions to consider for class**

What is the purpose of the religion clauses in the 1st amendment?

What are the definitions of the terms in these clauses?

Have these clauses fulfilled whatever purpose they seem to have had?

#### **The Bill of Rights and the 14th Amendment In Early 20th Century America**

##### **Roots of "Substantive" Due Process**

Lochner v. New York Brief Supp. ([click here for copy if you don't yet have supplement](#))

Meyer v. Nebraska Dr. Sager to discuss Supp.

Pierce v. Society of Sisters Dr. Sager to discuss Supp For relevant quotes ([click here](#))

##### **Free Speech: The Search for Standards**

Schenck v. U.S. Brief

Abrams v. U.S. Brief

Gitlow v. New York Brief

Whitney v. California Dr. Sager to discuss Supp.

Stromberg v. California Dr. Sager to discuss Supp.

**Questions to consider for briefs**

Is there such a thing called "substantive due process" or is it the proverbial "oxymoron?"

What is the difference between laws about "freedom of speech" and laws about "speech"?

Is there a difference with regard the 1st Amendment?

Why protect either in the first place?

What is the difference between the tests used in Schenk, Abrams and Gitlow?

Study Basic Van Geel table ([click here](#))

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**Class 4****Wed September 8th**

Civil Rights and Civil Liberties in the early and mid 20th Century

**Free Press and Freedom of Association**

**Near v. Minnesota** Brief

**DeJonge v. Oregon** Brief Appears In Supp

**Rights of the Accused and Convicted** (Dr. Sager to discuss all of these except **Powell v. Ala.** which is in text and needs to be briefed)

([Click here for brief chart comparing these cases](#))

**Twining v. New Jersey** Supp

**Weeks v. U.S.** Supp

**Olmstead v. U.S.** Supp

**Powell v. Alabama** Brief

**Brown v. Mississippi** Supp

**Betts v. Brady** Supp

**Wolf v. Colorado** Supp (Van Geel analysis of Weeks as precedent for Wolf – [click here](#))

**The Incorporation Arguments Revisited**

**Palko v. Connecticut** Brief

**Adamson v. California** Read Dr. Sager's Brief([click here](#)) then outline the arguments between Frankfurter and Black in this case.

For their full opinions [click here](#))

**Rochin v. California** Supp

For various formulations of the meaning of due process, [click here](#).

**Some questions to consider for this class**

What is the meaning of the words in the various formulations of “due process?” What are the arguments for and against incorporation and how do they relate to Justice Miller’s interpretation of the 14th in Slaughterhouse? If you apply part of the Bill of Rights to the states through the due process clause, is the meaning of say the 5th amendment stricture against self-incrimination the same for both the federal and state governments? Does freedom of the press have different meanings at different times in our history? Alternately, how does technology affect the way freedom of the press is interpreted?

**Class 5****Monday September 13th**

Civil Rights and Civil Liberties in the early and mid 20th Century

**Fundamental Rights Analysis**

**Buck v. Bell** Dr. Sager to discuss NIB

**Skinner v. Oklahoma** Dr. Sager to discuss NIB

### The Second Amendment

**U.S. v. Miller** [Brief](#) Supp

### Preferred Freedoms and Carolene Products: Footnote 4 in Carolene

**U.S. v. Carolene Products** Dr. Sager to Discuss Supp For footnote 4([click here](#))

### Voting Discrimination and Voting Rights

**Smith v. Allwright** [Brief](#) Supp (and related cases)

([Click here for Dr. Sager's summary of White Primary Cases](#))

**Colegrove v. Green** [Brief](#) Supp

Some questions to consider for today's cases.

What is a fundamental right?

How does it differ from a right or a civil right?

Is there a hierarchy of rights protected in the Constitution and if so what is it?

While Buck v. Bell is not good law today, might it come back as good law when the government runs the health care system?

What questions about the 2nd Amendment are not answered in U.S. v. Miller? Can you think of at least 4.

What is the "political thicket" and why should or should not a court be involved in the "political thicket" according to Frankfurter. Are there any cases not in a "political thicket?"

Read Bartlette's 2007 piece from the Wall Street Journal entitled "Whitewash" What relevance, if any, does this article and these white primary cases have today? ([Click here](#))

**Paper #1 which will be a brief of a Supreme Court case on Civil Rights or Civil Liberties It will be due Monday September 30th**

## **Class 6**

**Wednesday, September 15th**

### **Civil Rights and Civil Liberties in the early and mid 20th Century**

Free Speech at Mid Century-Protected and Unprotected classes of speech

**Thornhill v. Alabama** Supp

**Cantwell v. Connecticut** [Brief](#)

**Chaplinsky v. New Hampshire** [Brief](#)

**West Virginia Board of Ed v. Barnette** [Brief](#)

**Dennis v. United States** [Brief](#)

What is "speech" for the purposes of these cases and what is the practice of "religion" for these cases?

What can we now say about the meaning of the 1st Amendment with some certainty.

### **Civil Rights and Civil Liberties in the early and mid 20th Century**

Civil Liberties in War Time and Equal Protection

**Korematsu v. U.S.** [Brief \(click here for court opinion\)](#) Read only Majority, Murphy and Jackson opinions, (skip Frankfurter concurrence and Roberts dissent)

## **Class 7**

**Monday September 20th**

**50 word or less summary of the facts of your assigned case due at beginning of class. 1 copy only.**

### **Civil Rights and Civil Liberties in the early and mid 20th Century**

The Development of Equal Protection: Attacking Equal In "Separate But Equal"

**McLaurin v. Oklahoma** Supp

**Sweatt v. Painter** [Brief](#)

### **Establishment of Religion**

**Everson v. Board of Education** [Brief](#)

Read and study Justice Douglas's statement in a related case([click here](#))

### **The Beginnings of the idea of Privacy**

**Poe v. Ullman** Supp [Brief](#)

Questions for today's cases

What is the rule and test for Justice Black as to whether an activity is an "establishment of religion."

What is "religion" for Black.

Can you explain the difference in approach to civil liberties Justice Jackson takes in Dennis vs. his approach in Korematsu and Barnette.

### **The Warren Court Legal Revolution 1954-1969**

#### **Equal Protection**

**Brown v. Board of Education I and II**([Brief](#))

**Finish viewing film "Simple Justice" before this class. We will discuss in class as we discuss Brown. This movie is on the first exam.**

## **Class 8**

**Wednesday September 22nd**

**The Warren Court Legal Revolution 1954-1969**

**Procedural Due Process: Rights of the Accused and Convicted**

**Mapp v. Ohio**

**Gideon v. Wainwright** [Brief](#)

**Escobedo v. Illinois**

**Miranda v. Arizona** [Brief](#)

**Katz v. U.S.**

**Terry v. Ohio** [Brief](#) Supp

**Religion**

**Sherbet v. Verner** [Brief](#)

**Schemp v. Abington Township** [Brief](#)

**Engel v. Vitale** Supp

**Will take questions and comments in class about the Spielberg film  
"Lincoln." This will be on Exam 1**

## Class 9

### Monday September 27th

**The Warren Court Legal Revolution 1954-1969**

**Speech, Association, Libel, Obscenity, Conduct**

**NAACP v. Alabama** Supp Dr. Sager to discuss

**Roth v. U.S.** Brief

**Jacobellis v. Ohio** Supp Dr. Sager to discuss 8 most famous words in the opinion

**NYT v. Sullivan** Brief

**U.S. v. O'Brien** Brief

**Brandenburg v. Ohio** Brief

**Tinker v. Des Moines** Brief

Madison Federalist 51 Angels quote in full ([click here](#))

**Where are we now with regard to the Declaration of Independence as it relates to the Constitution.**

**We will spend a few minutes discussing the Arnn book which will be Exam 1.**

## Class 10

### Wednesday Sept 29th

### The Warren Court Legal Revolution 1954-1969

#### Freedom of the Press

**Red Lion Broadcasting v. FCC** Supp Dr. Sager to discuss

Know facts

#### Fundamental Rights Analysis and Equal Protection

**Loving v. Virginia** Brief

**Griswold v. Connecticut** Brief

**Stanley v. Georgia** Supp Dr. Sager to discuss

#### Voting Rights

**Baker v. Carr** Brief

**Reynolds v. Simms** Brief

## Class 11

### Monday October 4th

**The Warren Court Legal Revolution 1954-1969**

#### Due Process and Incorporation

**Duncan v. Louisiana** Brief

Dr. Sager will discuss what are called The Sit-In cases arising from protests that began before the Freedom Riders and continued after them, Also look at the following article on Emmett Till's lynching which occurred when Dr. Sager was in high school in the Chicago area. ([click here](#))

( The film **Freedom Riders**, now available on Youtube, should be viewed by Class 12. There may be a short quiz on the movies during Class 14) which will count toward your participation grade or as points on the second exam.) Best version for this class

<https://www.pbs.org/video/american-experience-freedom-riders/>

**The Burger Court: Was There A Counter Revolution?**

Due Process Tests

Cleburne v. Cleburne Living [Brief](#)

**8th Amendment and Death Penalty**

Gregg v. Georgia [Brief](#)

**Establishment of Religion**

Lemon v Kurzman [Brief](#)

Wallace v. Jaffree Supp

**Free Exercise of Religion**

Wisconsin v. Yoder [Brief](#)

**What are the tests used in these cases to determine if there is a violation of the 8th Amendment([Gregg](#)), Establishment Clause([Lemon](#)), Free Exercise Clause([Yoder](#)) Also do [Yoder](#) and [Lemon](#) follow their historical precedents, [Everson](#), [Reynolds v. U.S.](#), and [Bradfield v. Roberts](#).**

## Class 12

**Wednesday, October 6th**

### Exam # 1

**Bring a pencil and a pen. Bubble sheets, questions and lined pages for answering the essay exam will be provided.**

A more specific list of cases and other materials covered will be provided about 10 days before exam. This exam will cover the Arnn book, and the first two movies, **Lincoln** and **Simple Justice**. In general all cases covered so far will be on the exam. You should know some very basic parts of the cases covered by Dr. Sager, such as facts and holding. There is likely to be a section of important quotes from cases covered so far as well. Check here for further information. Also you should understand in detail Professor Graglia's piece on due process and equal protection.

For a sample of previous objective questions ([click here](#)) Note: some cases covered on a first exam in some semesters may show cases not covered on this one because the exam may have come at a slightly different time in previous years or some of the assigned cases were different than the one covered this year. For an example of an essay exam([click here](#))

Specific cases to be covered: All cases assigned for briefing from **Baron to Tinker** plus the following supplement cases or cases covered by Dr. Sager. *Calder*, *Walker v. Sauvinet*, Civil Rights cases, *Reynold v. U.S.*, *Bradfield v. Roberts*, *Buck v. Bell*, *Skinner v.*

Oklahoma, Meyer v Nebraska and Pierce, White Primary cases, Wolf v. Colorado  
 Thornhill v. Alabama, DeJonge, Weeks, Olmstead, NAACP v Alabama, Betts v. Brady,  
 Rochin v. California, Mapp v. Ohio, Katz v. United States,

## **Class 13**

### **Monday October 11th**

#### **The Burger Court: Was There A Counter Revolution?**

##### **Freedom of Speech**

Cohen v. California [Brief](#)

Hustler Mag v Falwell [Brief](#)

Miller v. California [Brief](#)

Gertz v. Welch NIB Dr. Sager to discuss

Buckley v. Valeo Supp [Brief](#)

New York v. Ferber [Brief](#)

##### **Notes and Questions for Class**

What is the new distinction created in Buckley?

Cohen should take 10 minutes to brief. With Roth as the precedent, which Van geel  
 box does Miller fit into and what was narrowed or expanded?

What are the various tests used in each of the above cases if the Court approaches  
 the issue with a test.

What do these and other cases we have covered have to do with, if at all,  
 Bourgeoisie values?

## **Class 14**

### **Wednesday October 13th**

For the beginning of this class read the following article from a conservative blog called  
 The Federalist. Be prepared to argue both sides of the Mr. Davidson's premise. ([click here](#))  
 Where in his article does he discuss the Declaration of Independence and how does his  
 argument fit with Larry Arnn's.

#### **The Burger Court: Was There A Counter Revolutions?**

##### **Commercial Speech**

Va. Bd. of Pharmacy v. Va. Citizen's Council Supp

Bates v. Arizona Bar [Brief](#)

Central Hudson G and E v. PSC [Brief](#)

##### **Equal Protection**

Swann v. Charlotte Mecklenburg [Brief](#)

Milliken v. Bradley Supp

Bakke v. Board of Regents [Brief](#)

Here is the statute being interpreted in Swann:

##### **Civil Rights Act Statute in Swann**

Section 2000c(b) defines "desegregation" as it is used in Title IV:

"Desegregation" means the assignment of students to public schools and within  
 such schools without regard to their race, color, religion, or national origin, but



“desegregation” shall not mean the assignment of students to public schools in order to overcome racial imbalance. Section 2000c-6, authorizing the Attorney General to institute federal suits, contains the following proviso: nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standard.

Is the decision consistent or inconsistent with the statute?

What are the various positions in Bakke and what is the rule going forward in affirmative action cases.

### **Freedom of Association**

Roberts v. Jaycees Supp [Brief](#)

What is the statute being subjected to constitutional scrutiny. What test is Brennan using? What is O'Connor's disagreement with Brennan's test? Why isn't case in textbook any more? Why didn't Brennan who assigned

the opinion since **he** was senior Justice in the majority, assign it to a woman who agreed on the outcome?

(He was the senior Justice in the majority since Burger and Blackmun recused themselves, Why do you think they did this?)

## **Class 15**

**Monday October 18th**

**Finish Reading the last 2 Chapters in The Color Blind Constitution and we will discuss them at the beginning of class in light of Bakke**

**The Burger Court: Was There A Counter Revolution?**

### **Gender Discrimination**

Reed v. Reed [Brief](#)

Frontiero v. Richardson Supp

Craig v. Boren [Brief](#)

Rostker v. Goldberg Supp

Michael M. v. Superior Court Supp

Miss Univ for Women v. Hogan Supp

### **Other Equal Protections Issues**

San Antonio ISD v. Rodriguez Brief

Plyler v. Doe [Brief](#) ([Student Brief 1](#))([Student Brief 2](#))

Notes and questions for class:

What are the various tests used in there gender discrimination cases so far? What assumptions are being made about gender in these gender discrimination cases?

## Privacy and Fundamental Rights

**Roe v. Wade** [Brief](#)

**Bowers v. Hardwick** Supp Dr. Sager to discuss

Where do particular parts of the Roe opinion come from? e.g. trimester system, state interest, mother's interest, precedents, etc.

## Class 16

**Wednesday October 20th**

**The Rehnquist Court: How Conservative? 1986-200**

### Fundamental Rights

**Cruzan v. Mo. Dept of Health** Brief

**Planned Parenthood v. Casey** Brief

**Stenberg v. Carhart** Supp.

**Lawrence v. Texas** Brief

**Washington v. Glucksberg** Supp. Brief

### 8th Amendment and Death Penalty

**McCleskey v. Kemp** Dr. Sager to discuss Supp

**Atkins v. Virginia** [Brief \(student brief1\)](#)[\(student brief 2\)](#)

**Ewing v. California** Supp

**Roper v. Simmons** Supp Brief

### Equal Protection

Notes and questions: Based on the cases we have read in class, how does the Burger Court differ from the Warren Court? What is the equal protection test in San Antonio ISD and Plyler? What are the evolving 8th amendment standards used in the Rehnquist Court death penalty jurisprudence? What is their source? Do you agree or disagree? While I have given you some student briefs in Atkins for reference purpose it is important to understand the structure of the opinion and the arguments made in the majority and dissent to fully comprehend current 8th Amendment jurisprudence.

**It is always advisable when you brief a case to compare it to earlier cases in the area. Begin with a Van geel comparison. I will expect you did that when I call upon you in class.**

**At this point in the semester, we are looking at each case to see where it fits with previous cases and what potential issues it will give rise to in the future.**

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## Class 17

**Monday October 25th**

**The Rehnquist Court: How Conservative**

### Equal Protection

### Affirmative Action

**City of Richmond v. Croson** Supp Brief

**Adarand Contractors v. Peña** Supp Brief

**Grutter v. Bollinger** Supp. Brief

What is the relationship between a claim that the 14th Amendment now makes the Constitution color blind and affirmative action?

### Education/Race

**U.S. v. Fordice** Supp Dr. Sager to discuss

**Freeman v. Pitts** Supp Dr. Sager to discuss

**Missouri v. Jenkins** (Brief Thomas excerpts only) ([click here for excerpts](#))

**Holder v. Hall** (read only a paragraph of Thomas dissent [click here](#))

What is the criteria to determine if affirmative actions violated the 14th Amendment? Has that changed since Bakke? Should we treat the areas of education and commerce different? Does the Court? How does Thomas's concurrence in **Jenkins** fit with Burger's opinion in **Swann**? **Jenkins** is actually part of a long series

of cases involving many issues including de jure segregation in Kansas City school district. Here one issue is about federal judges ordering a state to tax its citizens for the building and financing of a magnet school to entice white students and family who do not live in the Kansas City school districts to attend or send their children to these schools

It starts out with one of the rules federal courts developed after **Brown** and we see in **Swann**, and later limited somewhat in **Milliken** and **Freeman**. It is the notion that scope of the violation determines the scope of the remedy.

Thomas's opinion is mainly about his view of how the Court should approach school desegregation issues. He is someone who grew up in the segregated South and holds a minority(not meant to be a pun) view on how the Court should approach this issue. What organized groups might oppose Thomas's view and why? Be on the watch for a case or two we will cover in the future which may surprise you about Thomas's view of an issue we have been discussing since early in the semester.

Should Justice Thomas be the most authoritative member of the Court on school segregation and desegregation since he is the only member of the Court who attended segregated schools?

How would argue for a against Thomas's views

## Class 18

### Wednesday October 27th

Voting behavior in Burger Court ([click here](#))

### The Rehnquist Court: How Conservative?

#### Rights of the Accused and Convicted

**National Treasury Union v. Von Raab** Supp

**Dickerson v. U.S. Supp****Establishment of Religion****County of Allegheny v. ACLU Supp. Dr. Sager to discuss****Edwards v. Aguilar Brief****Lee v. Weisman Dr. Sager to Discuss****Santa Fe Independent School district v. Doe Supp****Zelman v Simmons-Harris Brief([student brief1](#))([student brief2](#))****Van Orden v. Perry Brief****Board of Ed v. Village of Kiryas Joel Dr. Sager to discuss(also **Agostini v.******Felton Dr. Sager to discuss****Free Exercise of Religion****Employment Divison v. Smith Brief****Church of the Lukami Babalu v. City of Hialeah Supp****City of Boerne v. Flores Brief****Cutter v. Wilkinson Dr. Sager to Discuss Supp****Locke v. Davey Supp([Student brief](#))**

What if anything, do the following statements from the time of our founding have to do with the above cases:

**Jefferson to Danbury Baptist Association**

Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State. [*Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even those occasional performances of devotion, practiced indeed by the Executive of another nation as the legal head of its church, but subject here, as religious exercises only to the voluntary regulations and discipline of each respective sect.*] Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

I reciprocate your kind prayers for the protection & blessing of the common father and creator of man, and tender you for yourselves & your religious association assurances of my high respect & esteem.

**Washington Farewell Address**

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts

of justice ? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?

### **Northwest Ordinance Article III**

**Art. 3.** Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

## **Class 19**

### **Monday November 1st**

Read, digest and analyze the following article entitled:

Poll: 71% of Americans Say Political Correctness Has Silenced Discussions Society Needs to Have, 58% Have Political Views They're Afraid to Share [.click here](#)

Note: Cato Institute which did this survey is a very libertarian organization.

### **The Rehnquist Court: How Conservative?**

#### **Freedom of the Press**

**Hazelwood v. Kuhlmeier** Brief

#### **Gender**

**U.S. v. Virginia**(VMI case)Brief

**Romer v. Evans** Supp Brief

Freedom of Association

**Hurley v. Irish American Gay Lesbians** Supp Brief

**Boy Scouts of America v. Dale** Brief([student brief](#))

## **Class 20**

### **Wednesday, November 3rd**

## **Exam #2 In Class**

The Color Blind Constitution will be covered on the exam as will the movies

Freedom Riders and Denial. The following cases will covered on the exam.

Those listed in red are those you should know the main argument of each opinion with focus on majority. For dissents and concurrences you need to be able to identify the justices writing the dissents and concurrences. There will be quotes on the objective. They will either compare some justices across one case, e.g. all quotes will be from say Craig v. Boren or all quotes will be from a single justice

across several different cases. Also know which test the Court used if it spells out a test or the test is obvious. **For those noted as Supp cases, you will just need to know the basic facts in terms of government policy challenged in case and whether it was upheld or struck down.** These are cases that might be useful in an essay question to construct or buttress simple arguments. If any of the cases listed are going to be omitted from the exam, I will let you know this Monday. Cases are listed in order of days assigned. From past cases, you should know the tests, definitions or most important verbiage, e.g., separate but equal, colorblind from Plessy, libel/defamation test in Sullivan, obscenity tests and some others almost all of which have been referred to in class. Most have been supplanted by more modern cases. Loving v. Virginia, Griswold v. Connecticut, Stanley v. Georgia Supp, Duncan v. Louisiana, Gregg v. Georgia, Lemon v. Kurzman, Wallace v. Jaffree, Wisconsin v. Yode, Cohen v. California, Miller v. California, Gertz v. Welch Supp, Hustler Magazine v. Falwell supp, Buckley v. Valeo, main holdings, New York v. Ferber, Va. Bd. of Pharmacy v. Va. Citizens' Council supp, Bates v. Arizona Bar, Central Hudson G and E v. PSC, Swann v. Charlotte-Mecklenburg, Milliken v. Bradley supp, Bakke v. Board of Regents, Roberts v. Jaycees, Reed v. Reed, Frontiero v. Richardson supp, Craig v. Boren, Rostker v. Goldberg supp, Michael M. v. Superior Court supp, Miss Univ for Women v. Hogan Supp, San Antonio ISD v. Rodriguez, Plyler v. Doe, Roe v. Wade, Bowers v. Hardwick supp, Cruzan v. Mo. Dept of Health, Planned Parenthood v. Casey (overall holding not holding on specific parts like 24 hr rule or spousal notification), Stenberg v. Carhart, Lawrence v. Texas, Washington v. Glucksberg, McLeskey v. Kemp supp, Atkins v. Virginia, Ewing v. California supp, Roper v. Simmons, City of Richmond v. Croson, Adarand Contractors v. Pena, Grutter v. Bollinger, U.S. v. Fordice supp, Freeman v. Pitts supp, Missouri v. Jenkins (Thomas excerpts only), Holder v. Hall (read only a paragraphs of Thomas dissent), National Treasury Union v. Von Raab supp, Dickerson v. U.S. supp, Hazelwood v. Kuhlmeier, U.S. v. Virginia (VMI case), Romer v. Evans, Hurley v. Irish American Gay Lesbians, Boy Scouts of America v. Dale

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## Class 21

### **Monday November 8th**

#### **The Rehnquist Court: How Conservative**

##### **Freedom of Speech I**

Texas v. Johnson Brief

Hustler v. Falwell Brief

44 Liquormart v. Rhode Island Supp Brief

McConnell v. FEC Supp Dr. Sager to discuss

Regents v. Southworth Supp

McIntyre v. Ohio Dr Sager to discuss NIB

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## **Class 22**

**Wednesday November 10th**

**The Rehnquist Court: How Conservative**

**Freedom of Speech II**

**Brandzburg v. Hayes** [Brief](#)

**R.A. V. v. City of St. Paul** Dr. Sager to discuss NIB

**Wisconsin v. Mitchell** Supp [Brief](#)

**Virginia v. Black** Supp [Brief](#)

**Reno v. ACLU** Supp [Brief](#)

**Ashcroft v. Free Speech Coalition** Dr. Sager to discuss

**Hill v. Colorado** Dr. Sager to discuss

The statutes in R.A.V. and Black cases read as follows. What is the difference? Should the Constitution treat them differently?

City of St. Paul Ordinance\*

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

Virginia Law

"It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

"Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

\*Both are laws

**Finish viewing Ben Stein film "Expelled" for this class. It will be part of our discussion**

## **Class 23**

**Monday November 15th**

**The Roberts Court: Fidelity to Law?**

**Equal Protection Racial Discrimination**

**Parents Involved in Schools v. Seattle** ([Brief](#))

**Ricci v. De Stefano** Dr. Sager to discuss. View Amicus brief for Kedar Bhatia a former

student who is now in large N.Y. firm with Dr. Sager as counsel([click here](#))

**Fisher v U.T** Supp [Brief](#).

What is diversity in Fisher? How does it add to a college education. Compare with Yale Professor Kronman's view([click here](#))

### Other Equal Protection Issues

Gonzales v. Carhart (Planned Parenthood) [Brief Supp](#) ([student brief](#))

United States v. Windsor [\(student brief 1\)](#) ([student brief 2](#)) Dr. Sager to discuss

Hollingsworth v. Perry Supp Dr. Sager to discuss

Obergefel v. Hodges [Brief Supp](#)([Student Brief1](#)) ([Student Brief2](#))

The Roberts Court: Fidelity To Law?

2nd Amendment

District of Columbia v. Heller [Brief](#) (be able to discuss the various opinions)

McDonald v. City of Chicago [Brief](#) from Supp [\(Student brief\)](#)

**1 page outline of oral argument due. It is based on case you briefed earlier in semester. Oral argument mp3 and transcript can be found on the Oyez, Oyez website. Outline should contain at most a 2 sentence statement of the facts of your. Since you have already done a full brief, this should be quite easy to do.**

**Put your name at bottom and your row and seat number at top.**

**This is the only time we will be taking the outline and reviewing it. It will be returned with comments this Wednesday. If it is not returned, it means your are right on track.**

## Class 24

**Wednesday November 17th**

The Roberts Court: Fidelity To Law?

Free Speech I

Walker III v. Texas Division, Sons of Confederacy Supp [Brief](#)

Morse v. Frederick [Brief](#)

U.S. v. Alvarez [Brief](#)

**Dr. Sager will briefly discuss these 3 speech/election cases**

FEC v. Wisconsin Right To Life Supp [Dr. Sager to discuss](#)

Davenport v. Washington Ed. Association [Dr. Sager to discuss](#)

Citizens United v. FEC [Dr. Sager to discuss](#)

Janus v. AFSCME Supp. Dr. Sager to discuss

which finally overrules an older case entitled Abood v. Detroit Bd of Ed.(Supp)

United States v. Stevens Supp ([student brief](#))

Brown v. Entertainment Merchants Assoc [Brief](#)

United States v. Williams Dr. Sager to discuss



Finish viewing Blazing Saddles and we will briefly discuss in class. One obvious question is what is this movie really about? Another is could this movie be made today and should something like it be made?

## **Class 25**

**Monday November 22nd**

### **The Roberts Court: Fidelity To Law?**

#### **Free Speech II**

**McCullen v. Coakley** [Brief](#)

#### **Religion and Speech**

**Christian Legal Society v. Martinez** Supp ([student brief](#))

**Snyder v. Phelps** [Brief](#)

**Hosanna-Tabor Evangelical Lutheran Church** [Brief](#)

**Gonzales v. O Spirta** NIB Dr. Sager to discuss

**Reed v. Town of Gilbert** Supp [Brief](#)

**Town of Greece v. Galloway** [Brief](#)

**Trinity Lutheran Church v. Comer** [Brief](#)

**Paper #2 Due in class. Up to 3 pages or 900 words, comparing the issues and arguments in oral argument in your case with the issues and arguments in the final opinion.**

## **Class 26**

**Monday November 29th**

### **the Roberts Court: Fidelity to Law**

#### **Elections**

**Crawford v. Marion County**(Dr. Sager to discuss)

#### **Constitutional Criminal Procedure**

##### **8th Amendment**

**Kennedy v. Louisiana** Supp [Brief](#)

**Glossip v. Gross** Use this brief ([student brief](#))

**Miller v. Alabama** Use this Brief ([Student brief](#))

##### **4th Amendment**

**Maryland v. King** [Brief](#)(supp)

**Florida v. Jardines** [Brief](#)

Some recent Roberts Court case with Kavanaugh and Gorsuch on the bench.

**Iancu v. Brunetti** [Brief](#) ([student brief](#))

**Trump v. Hawaii** [Brief](#) (supplement)

#### **Elections**

Dr. Sager will briefly discuss this case:

**Crawford v. Marion County****Class 27****Wednesday 1st.****Exam #3 In Class**

List of cases covered since Exam 2 that could be on Exam 3. Starting with **County of Allegheny** and ending with **Crawford v. Marion County**. The following cases **will not** be expressly part of the exam: (1) Those that were on exam 2, Hurley, Dale, Hazelwood, VMI. (2) These which were in the assignments since Exam 2, Reno, Ashcroft, FEC v WRTL, Davenport, Citizens United.

The two assigned movies, Expelled and Blazing Saddles will be on the exam. There are no supplementary books on the exam.

You are also expected to be able to compare these to classic cases such as Brown, Tinker, Brandenburg, Bakke, Mapp, Roe, Ferber, Cantwell, Roper and so on.

Cases since the last exam with 2 or more opinions in casebook or supplement could be part of quotes sections.

**Class 28****Monday December 9th. 6:30 p.m.**

Special Event Dr. Sager's home. End of Year Awards Dinner 6:30-8:30 Special Guest Karen Lugo Esq.