

POLITICS OF CONSTITUTIONAL MEANING

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Gov 312P *Honors* ▪ Unique 38820
Meets M/W 5:00PM- 6:30 pm ▪ Parlin 1

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We examine constitutional law, American political culture, and the sociology of rules by focusing on a problem central to our legal regime: the indeterminacy of some legal rules. Legal indeterminacy refers to the lack of determinate knowledge: knowledge of what a legal rule means and of how judges and others should apply it. Where law is indeterminate, no theory, rule, or principle constrains a judge to interpret or apply a law in a particular way. Consequently a case could have several different answers, yet all of them equally valid. While few scholars or judges today view law itself as something static, the notion that judges make rather than find law implies, to many observers, consequences such as unequal or arbitrary treatment of individuals. Where law is determinate, however, it may have an exclusively “correct” meaning and “proper” application, in short, one “right” answer. If justice through law is predicated on such qualities as consistency and even objectivity, then determinacy, in one form or another, might seem to be a prerequisite for justice. And yet, as this course will demonstrate, much law at the constitutional level is indeterminate. This course explores how the Supreme Court and other branches of the American government have coped with this phenomenon -- presenting both problems and opportunities -- over two centuries in five major areas: property, privacy, equal protection, expression, and religion. Some discussions will draw on Tocqueville’s *Democracy in America*.

EVALUATION: The final grade has two components: each student writes three in-class essays; and each student briefs in-class multiple times. Each essay counts for one third of the final grade, adjusted (potentially significantly) for the quality of the student’s briefs and class-participation.¹

BRIEFS: A student who fails to brief a case to which he or she has been assigned fails the course, unless that failure is due to a health condition or other serious matter documented within 48 hours of the missed brief by a *written* explanation from a physician or other relevant person.

ATTENDANCE: Attendance at *all* sessions except review sessions is mandatory. Each failure to attend will lower the student’s final grade by one letter. Exceptions only in cases of illness or other significant circumstances to be documented in writing within 48 hours.

GRADING: A = 4.00, A- = 3.67, B+ = 3.33, B = 3.00, B- = 2.67, C+ = 2.33, C = 2.00, C- = 1.67, D+ = 1.33, D = 1.00, D- = 0.67, F = 0.00

TEXT: Kathleen Sullivan & Gerald Gunther, eds.: *Constitutional Law*, 17th edition (2010)

¹ Students with disabilities may request appropriate accommodations from Division of Diversity and Community Engagement, Services for Students with Disabilities, 471-6259, <http://www.utexas.edu/diversity/ddce/ssd/>

SCHEDULE OF TOPICS AND ASSIGNED READINGS

January 19 • *Constitution of the United States of America*, in Appendix A:1-14

1. PROPERTY

January 24 • 379-387 (Economic Liberties and Regulation)

- *Lochner v. New York (1905)*

January 26 • 388-397 (Economic Liberties and Regulation, cont.)

- *Nebbia v. New York (1934)*, *West Coast Hotel Co. v. Parrish (1937)*, *United States v. Carolene Products Co. (1938)*, *Williamson v. Lee Optical Co. (1955)*

January 31 • 107-113 (Commerce Power)

- *United States v. Lopez (1995)*

February 2 • 119-143 (Commerce Power, cont.)

- *United States v. Raich (2005)*

2. PRIVACY

February 7 • 427-428; 429-434 (Antecedents; Contraception)

- *Meyer v. Nebraska (1923)*, *Pierce v. Society of Sisters (1925)*, *Skinner v. Oklahoma (1942)*; *Griswold v. Connecticut (1965)* [begin]

February 9 • 429-434 and 438-441 (Contraception; Abortion)

- *Griswold v. Connecticut (1965)* [finish]; *Roe v. Wade (1973)*

February 14 • 464-470 (Family Relations)

- *Loving v. Virginia (1967)*, *Zablocki v. Redhail (1978)*, *Turner v. Safley (1987)*, *Moore v. East Cleveland (1977)*, *Troxel v. Granville (2000)*, *Michael H. v. Gerald D. (1989)*

February 16 • 472-479 (Consensual Sex)

- *Lawrence v. Texas (2003)*

February 21 • 484-494 (Right to Die; Right to Physician-Assisted Suicide)

- *Cruzan v. Director, Missouri Dept. of Health* (1990); *Washington v. Glucksberg* (1997), *Vacco v. Quill* (1997)

February 23 • Review session; attendance optional

February 28 • **First in-class essay: remember your bluebook**

3. EQUAL PROTECTION

March 2 • 501-507 (Suspect Classifications: Race)

- *Strauder v. West Virginia* (1880), *Plessy v. Ferguson* (1896), *Brown v. Board of Education* (1954)

March 7 • 515-521 (Suspect Classifications: Race, cont.)

- *Loving v. Virginia* (1967), *Palmore v. Sidoti* (1984), *Johnson v. California* (2005), *Korematsu v. United States* (1944)

March 9 • 589-595 and 606-610 (Suspect Classifications: Sex)

- *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), *Craig v. Boren* (1976); *Geduldig v. Aiello* (1974), *Michael M. v. Superior Court* (1981), *Rostker v. Goldberg* (1981)

SPRING BREAK • March 14-18

March 21 • 595-605 (Suspect Classifications: Sex, cont.)

- *Mississippi University for Women v. Hogan* (1982), *J.E.B. v. Alabama* (1994), *United States v. Virginia* (1996)

March 23 • 532-538 and 549-560 (Affirmative Action in Higher Education)

- *Regents of University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), *Gratz v. Bollinger* (2003)

4. EXPRESSION

March 28 • 783-785 and 787-795 (Incitement)

- *Masses Publishing Co. v. Patten* (1917), *Gitlow v. New York* (1925), *Whitney v. California* (1927)

March 30 • 797-802 and 804-806 (Incitement, cont.)

- *Dennis v. United States* (1951), *Brandenburg v. Ohio* (1969)

April 4 • 846-853 and 855-861; and 862-870 (Hate Speech; Sexually Explicit Expression)

- ***R.A.V. v. City of St. Paul* (1992)**, *Wisconsin v. Mitchell* (1993), ***Virginia v. Black* (2003)**
- ***Roth v. U.S.* (1957)**, *Kingsly International Pictures Corp. v. Regents* (1959), *Stanley v. Georgia* (1969), ***Miller v. California* (1973)**

April 6 • 967-970 and 972-973 and 976-989 (Content-Based and Content-Neutral)

- ***U.S. v. O'Brian* (1968)**, *Arcara v. Cloud Books* (1986), ***Texas v. Johnson* (1989)**, *U.S. v. Eichman* (1990), *Barnes v. Glen Theatre* (1991)

April 11 • Review session; attendance optional

April 13 • **Second in-class essay: remember your bluebook**

5. RELIGION

April 18 • 1286-1294 and 1298-1300 (Free Exercise)

- ***Church of the Lukumi Babalu Aye v. City of Hialeah* (1993)**, ***Locke v. Davey* (2004)**, *Reynolds v. United States* (1878), ***Sherbert v. Verner* (1963)**, *Wisconsin v. Yoder* (1972)

April 20 • 1300-1314 (Free Exercise, cont.)

- *United States v. Lee* (1982), *Bob Jones University v. United States* (1983), *Goldman v. Weinberger* (1986), *O'Lone v. Estate of Shabazz* (1987), *Bowen v. Roy* (1986), *Lyng v. NW Indian Cemetery Protective Ass'n* (1988), ***Employment Division v. Smith* (1990)**, *City of Boerne v. Flores* (1997)

April 25 • 1319-1331 (Establishment)

- *Lemon v. Kurtzman* (1971), *McCollum v. Board of Education* (1948), ***Zorach v. Clauson* (1952)**, *Engel v. Vitale* (1962), *Abington School District v. Schempp* (1963), *Wallace v. Jaffree* (1985), ***Lee v. Weisman* (1992)**

April 27 • 1342-1352 (Establishment, cont.)

- ***Lynch v. Donnelly* (1984)**, *Allegheny County v. American Civil Liberties Union* (1989), *Capitol Square Review Board v. Pinette* (1995)

May 2 • Review session; attendance optional

May 4 • **Third in-class essay: remember your bluebook**

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HOW TO BRIEF A CASE FOR THIS COURSE

First of all, be brief – write notes, not an essay! Second, include these five points:

1. Factual background
2. “Constitutional question”: formulate in terms of a specific provision of the Constitution
3. The holding (a) of the majority and (b) of dissenters
4. The reasoning in 3 (a) and 3 (b)
5. “Constitutional upshot”: the significance of this case for understanding and applying the Constitution in future cases

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HOW TO WRITE AN IN-CLASS ESSAY FOR THIS COURSE

To improve your essay writing, first consider the organization and coherence of your essay as a whole. By providing an introductory thesis that clearly presents your overall argument and directly addresses each aspect of the topic, you establish a framework for the remainder of your essay. This thesis need not be one sentence but can be a few interrelated sentences that **(a)** make sense of the topic as a whole and **(b)** explicitly declare your overall argument, responding to each part of the topic while treating them as parts of a larger whole.

Always address every part of the topic. Think of your introductory thesis as a skeleton of sorts, which you then systematically flesh out in the body of your essay. By reading the introductory thesis (which is like a preview), the reader should know the defining features of the essay that will follow -- specifically, how you will respond to each part of the topic and how your argument will attempt to fit these parts together. Toward that goal, construct a brief outline of your main ideas before you begin writing.

In writing the rest of your essay, do three things.

First, make an argument that analyzes a limited amount of important material in depth. Engage these ideas and wrestle with them. This shows that you recognize key issues and are thinking critically about them.

Second, utilize the opinions and reasoning from the cases as evidence to support your claims. This is what separates an essay that makes clear, strong, and convincing points in defense of a main argument, from an essay that offers only speculation and personal commentary. But remember to use the court cases as evidence; don't rely on them to make your points for you.

Third, explain the significance of the examples that you cite and make especially clear how they help promote or defend your main thesis. This illustrates that you have a good grasp of course materials and that you can make sense of cases in relation to other cases or in terms of a larger context or issue that encompasses a number of cases.