

POLITICAL SCIENCE 272
AMERICAN CONSTITUTIONAL LAW II:
RECONSTRUCTION TO THE MODERN ERA

Fall 2019

Prof. Kimberly Smith

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Class meets at 3a, in Willis 114

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This course covers the development of constitutional law from Reconstruction to the contemporary era. Constitutional Law I is not a prerequisite, but a good background in American history is strongly recommended. We will focus on the development of modern civil liberties doctrine and the emergence of the federal courts as the primary guarantor of civil rights, examining not only constitutional doctrine but also the broader intellectual and political context in which it evolved. Topics will include adoption of the Reconstruction amendments, the struggle over economic regulation and the doctrine of substantive due process, FDR's battle with the Supreme Court and the expansion of civil liberties under the Warren Court.

Texts: Finkelman & Urofsky, *A March of Liberty*, Vol. II, 3rd ed.

Additional readings in coursepack [CP] and posted on moodle

Course requirements: This course requires a great deal of participation. Each student should be prepared to answer searching questions about the assigned case every day. Students should be able to summarize the facts of the assigned case(s), explain the Court's reasoning and the holding, explain the reasoning of the dissenting opinions, if any, and critique the Court's decision.

Your participation grade will reflect the quality and quantity of your contribution to class discussion. Because this in-class discussion is a critical part of learning to read and analyze cases, attendance is mandatory. Absences will substantially lower your grade.

Your grade will be computed as follows:

| | |
|-------------------|-----|
| Moot Court: | 15% |
| Judicial opinion: | 5% |
| Midterm: | 20% |
| Final: | 25% |
| Case Note: | 25% |
| Participation | 10% |

Course Outline

Part I: The Second Founding

Class 1: Introduction

Class 2: Judicial Review

CP: *Marbury v. Madison*

CP: *Barron v Baltimore*

Class 3: The Thirteenth & Fourteenth Amendments
Urofsky & Finkelman Ch. 22 [posted on moodle]
CP: Black's Appendix to Adamson v. California
CP: Civil Rights Act of 1866
CP: Corfield v. Coryell

Fri. Sept. 20, 7:00-8:00 pm: Legal Research session (Location TBD)

Class 4: The State Action Doctrine
CP: Civil Rights Cases

***Topic of case note due in class (Mon. Sept. 23)**

Class 5: The Privileges and Immunities Clause
Urofsky & Finkelman Ch. 23 [posted on moodle]
CP: Slaughterhouse Cases

Class 6: The Equal Protection Clause
CP: Plessy v Ferguson
Epstein, "Standing Firm, on Forbidden Grounds," 31 San Diego Law Review 1, 1994 (part VI)

***Moot Court Research Plan due in class (Fri. Sept. 27)**

Class 7: The Due Process Clause
CP: Hurtado v. California
CP: Palko v. Connecticut
CP: Rochin v. California

***Peer Review Assignment #1: Submit self-assessment by Tues. Oct. 1, 9:00 am**

Part II: Building the Regulatory State

Class 8: Expansion of State Power: Regulating business
Urofsky & Finkelman, Ch. 24, 25
CP: Munn v. Illinois

Class 9: Cont.
CP: Lochner v. New York
CP: Muller v. Oregon

***Peer Review Assignment #1: Submit peer evaluation by Fri. Oct. 4 at noon**

Class 10: Expansion of Federal Power: Conservation
Urofsky & Finkelman, Ch. 26, 28
CP: Geer v. Connecticut
CP: Missouri v. Holland

Class 11: Managing Public lands
CP: Light v. U.S.
CP: U.S. v. Grimaud

Class 12: The Conservative Critique of the Administrative State
Lawson, The Rise and Rise of the Administrative State, 107 HLR 1231 (1994), pp. 1231-1249;
Vermeule, The Administrative State and the Optimal Abuse of Power, Regulatory Review (Jun. 2, 2014) [posted on moodle]

***Case Note: Background section due, *properly documented* and with preliminary bibliography, in class. (Fri. Oct. 11)**

Class 13: Urban reform
CP: Euclid v. Ambler Realty
CP: Pennsylvania Coal Co. v. Mahon

***Peer Review Assignment #2: Submit self-assessment by Tues. Oct. 15, 9:00 am**

Class 14: The New Deal
Urofsky & Finkelman, Ch. 30, 31
CP: Adkins v. Children's Hospital
CP: W. Coast Hotel v. Parrish

Class 15: MIDTERM

***Peer Review Assignment #2: Submit peer evaluations by Fri. Oct. 18 at noon**

Part III: The Rights Revolution

Class 16: Warren court jurisprudence
Urofsky & Finkelman, Ch. 32
CP: Carolene Products Footnote 4
CP: W. Virginia Bd. of Ed. v. Barnette

***Analysis and revised background sections of case note due in class, both sections properly documented (Wed. Oct. 23)**

Class 17: **Moot Court 1** (*if necessary*)
CP: Cantwell v. Connecticut

Class 18: Equal Protection
Urofsky & Finkelman, Ch. 35, 36
CP: Brown v. Bd. of Ed. I & II

***Judicial opinions for moot court 1 due in class**

Class 19: Equal Protection and State Action Doctrine
CP: Heart of Atlanta Motel v. U.S.
CP: Katzenbach v. McClung

Class 20: **Moot Court 2**
CP: Grutter v. Bollinger

Convo: Tim Duane, energy and environmental law

Class 21: **Moot Court 3**
Urofsky & Finkelman, Ch. 37, 40
CP: Griswold v. Connecticut
CP: Roe v. Wade
CP: Casey v. Planned Parenthood

***Judicial opinions for moot court 2 due in class**

Class 22: Courts and Social Reform [with guest speaker Jeff Justman (POSC '04)
Rosenberg, The Hollow Hope (selections)

***Judicial opinions for moot court 3 due in class**

Class 23: **Moot Court 4**
CP: Bowers v. Hardwick
CP: Lawrence v. Texas
CP: Obergefell v. Hodges

Class 24: Limiting national civil rights authority
Urofsky & Finkelman, Ch. 42, 43
CP: Oregon v Smith
CP: Boerne v Flores

***Judicial opinions for moot court 4 due in class**

Class 25: **Moot Court 5**
CP: U.S. v. Morrison

Class 26: The originalism debate
Scalia, A Matter of Interpretation, pp. 37-47 & Amar's Introduction to the New
Edition pp. xv-xxiv [posted on moodle]

***Judicial opinions for moot court 5 due in class**

Part IV: The Security State

Class 27: **Moot Court 6**
Urofsky & Finkelman, Ch. 44
CP: Katz v. United States
CP: Smith v. Maryland
CP: Carpenter v. U.S.

Class 28: Cont.

Balkin, The Constitution in the National Surveillance State, 93 Minn. Law Rev. 1-25 (2008)

***Judicial opinions for moot court 6 due in class**

***Final draft of case note due in class today**

***Final Peer Evaluations due Saturday Nov. 23 at noon**

FINAL EXAM: Mon Nov. 25 or Self-scheduled

Moot Court Assignment

The Basic Task:

Each group will be assigned one case to debate. The group's task is to research and develop two opposing arguments on how the current Supreme Court should decide the central constitutional issue in the case. The presentation will take the form of an oral argument: one student should serve as "lead counsel" for one side, a second student should serve as "lead counsel" for the other side. A third student should be prepared to offer a rebuttal for the first side and the fourth student should do the rebuttal for the other side. The rest of the class will listen attentively in preparation for writing an opinion deciding the question (see judicial opinion assignment).

You should assume the Supreme Court has elected to revisit the issue in the case and may be willing to overturn it, in light of contemporary conditions. You must argue for or against overruling the decision.

Cases:

Cantwell v. Connecticut
Grutter v. Bollinger
Roe v. Wade
Obergefell v. Hodges
U.S. v. Morrison
Carpenter v. U.S.

The Debates:

You will receive 10 minutes to present each side, and 5 minute for each rebuttal (30 minutes total). **Be prepared for the judge to interrupt your presentation with questions.** Your group will receive a collective grade. The rest of the class will be expected to write up opinions based on your oral argument, so it's useful to provide a handout with your main points.

In addition to your presentation, your group should turn in a **bibliography** of the sources it relied on. Please follow *The Chicago Manual of Style* in documenting your sources. (*The Chicago Manual of Style* is available in the reference section of the library).

The Process

I will put you into groups during the first week of classes. You should expect to be meeting regularly and working on your presentations throughout the term. You will also do a self & peer evaluation three times during the term.

Friday Sept. 27: Your group will submit in class a brief research plan that identifies (1) what questions will you research; (2) who will do which tasks, (3) your plan for meeting and sharing your work and (4) your interim deadlines.

The peer evaluation dates and moot court dates are indicated on the syllabus.

Peer Evaluation Process

Your grade for the group project will be based in part on peer evaluation. I'll calculate it thus: (Project grade * your peer evaluation score)/100.

Your peer evaluation score:

We will use the "peer review workshop" activity on moodle to do peer reviews. You will be asked to submit a self-assessment of your group participation (by the deadline). Then your other group members will look at your self-assessment and provide their own (anonymous!) feedback on your group participation (by the next deadline). In addition, everyone in the group has 100 points to distribute among the other group members (e.g. 33 for one, 35 for one, 32 for one). Please do not give everyone the same number of points!

Your peer evaluation score is the sum of these points. The first two evaluations have no impact on your grade; only the final peer evaluation score is used to calculate your grade.

Appeals: You may appeal your peer evaluation to me. I'll listen to your complaint and ask each group member to explain their reasoning. I'll affirm reasonable scores and modify scores that don't seem to be supported by good reasons.

Judicial Opinion Assignment

In addition to the debate, you will choose one of the other questions debated (you can decide which one) and write a short opinion explaining how you would rule on the question and why. The goal of this exercise is to help you master the art of legal writing and analysis. You should adopt the voice of a judge; your paper should be clear, concise, and polished.

A good judicial opinion states the question briefly, announces the ruling, and then explains the judge's reasoning. The aim is to make the reasoning supporting the conclusion crystal clear. The judge should also carefully and respectfully explain and respond to counterarguments. Legal writing always aims for concision, so your paper should be no longer than 1000 words (about two pages, single-spaced).

Case Note Assignment

Your assignment is to research a significant constitutional case decided after 1866 and explain why it's important to the development of constitutional law, to constitutional politics, and to the development of the Court as a political institution. Your paper may be **no more than 15 pages** (12-pt font, 1 inch margins). Case notes are designed to explain the facts, reasoning and holding in a case in a concise and simple fashion. They are usually read by legal professionals, but they should be easily understood by an intelligent layperson. They follow a standard format:

I. Introduction: This should be brief and to the point. It should state your thesis.

II. Background: This section will discuss the specific facts of the case as well as any political, social, legal, or cultural contextual factors that you think will help to illuminate the case. It should conclude by telling us how the case got to the Supreme Court and what the major legal issues were.

III. Analysis of the Decision: This section will take us carefully, in a step-by-step analysis, through the reasoning in the Court's opinion and the concurring and dissenting opinions. You may ignore or only touch on the minor or technical issues; focus on the important ones.

IV. Significance: This section should discuss the important impacts of the decision, which may be social, economic, political or legal. Your research should alert you to a range of important consequences; this section should demonstrate your deep engagement with the scholarly literature.

V. Conclusion: A separate conclusion is optional.

You will turn in sections of the case note for me to comment on as indicated on the syllabus. You will then revise these sections and turn in a complete, polished case note on November 15.

Documenting sources: I expect you to do a significant amount of research on your case, which means at least 15 scholarly sources. A thoroughly researched paper will rely on many sources, drawing on both books and periodicals. Your bibliography should demonstrate that you've explored the best scholarship on the subject (which will typically mean that you should not rely on Internet sources, unless you can make the case that they're reliable and respected.) You should cite your sources; the conventions of legal scholarship demand that you carefully document your factual assertions. *PLEASE NOTE:* You should carefully document your sources on all drafts that you turn in.

Suggested cases: (You may choose a case not on this list; just clear it with me first.)

The Slaughterhouse Cases, 83 US 36 (1873) [equal protection]

The Civil Rights Cases, 109 US 3 (1883) [equal protection]

Geer v Connecticut, 161 US 519 (1895) [wildlife protection]

Lochner v New York, 198 US 45 (1905) [econ regulation]

Muller v Oregon, 208 US 412 (1908) [labor]

Missouri v Holland, 251 US 416 (1920) [environmental protection]

Light v. U.S., 220 U.S. 523 (1911) [environmental protection]

Palko v Connecticut, 302 US 219 (1937) [due process]

West Virginia State Board of Education v Barnette, 319 US 624 (1943) [church & state]

Mapp v Ohio, 367 US 643 (1961) [rights of accused]

Griswold v Connecticut, 381 US 479 (1965) [privacy rights]

Brandenburg v Ohio, 395 US 444 (1969) [free speech]

US v O'Brien, 391 US 367 (1968) [free speech]

Miranda v Arizona, 384 US 436 (1966) [rights of accused]

Roe v Wade, 410 US 113 (1973) [abortion rights]

Regents of the Univ. of California v Bakke, 438 US 265 (1978) [aff. action]

Grutter v. Bollinger, 539 U.S. 306 (2003) [aff action]

Lawrence v Texas, 539 US 558 (2003) [gay rights]

Kelo v City of New London, 545 US 469 (2005) [takings; environmental regulation]

District of Columbia v. Heller, 554 US 570 (2008) [right to bear arms]

Obergefell v Hodges, 576 US ____ (2015) [gay rights]