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POLI/LGST 111A
Engineer 2 192

U.S. Constitutional Law: Civil Liberties and Civil Rights Summer Session I 2015

It is emphatically the province and duty of the judicial department to say what the law is. With these words, the U.S. Supreme Court began its journey into constitutional law. The Court consistently reiterates its role as “ultimate interpreter of the Constitution” every time it denies attempts by other branches of government to increase their own executive and legislative powers. But the Court’s early 19th century proclamation of its power of judicial review was anything but a simple matter of constitutional interpretation; it was mired in the partisan politics of the age. Constitutional doctrine can rarely, if ever, be read outside of the political context of the time. The U.S. Supreme Court is, and always has been, a *political* Court.

This course provides an upper division introduction to Constitutional Law, emphasizing foundations, religion, expression, discrimination, and election law. Although we will consider history and context, this class ultimately focuses on constitutional *doctrine*, i.e., the rules and debates generated by the members of the U.S. Supreme Court. As such, course readings focus almost exclusively on U.S. Supreme Court opinions. Careful reading and scrutiny of Supreme Court opinions is necessary for successful completion of this course.

Requirements

Students are required to attend all classes, read all assigned material before class meetings, prepare for and participate in discussions and exercises (10%), as well as complete three in-class examinations: a quiz (20%), midterm (30%), and final examination (40%).

The quiz and the midterm will take place at the beginning of the class meetings designated, and lecture will commence after a short break. The first exam will take roughly one hour to complete, and the second will take roughly one-and-a-half hours. The final examination will be comprehensive and will take place during the last day of class; it is designed to take one hour and 45 minutes.

I will take attendance at the beginning of every class. If, for some reason, you must miss class, you must notify me via e-mail. Insufficient attendance will result in course failure. If there are ongoing issues that prevent you from normally attending class, please take another class, because you will not pass this one.

I will deduct points from your final grade for the following infractions: (1) missing class; (2) arriving to class late; (3) talking while someone else is talking; (4) using your phone at *any* time during class for any reason; (5) being unprepared for class, e.g., not having done the assigned readings; (6) not fully participating in class exercises, e.g., being "finished" long before others because you've only performed a cursory analysis and/or used the time to socialize.

Goals

As this course progresses, the successful student will attain: (1) a substantive command of major debates and rules from assigned Supreme Court decisions; (2) increased skills reading and understanding Supreme Court cases; (3) a command of basic legal analysis.

Understanding U.S. Constitutional Law is not a self-evident endeavor. It requires the development of reading skills relatively exclusive to lawyers, judges, and other participants in the legal process. If this is your first time reading cases and/or case excerpts, the process of developing reading skills will likely be very difficult at first, especially given the rapidity of summer coursework. However, if you fully and faithfully prepare for class and attend my lectures, you'll find yourselves becoming socialized by the language little by little.

Class Participation

Your participation is necessary for your own successful understanding of course material. You must be *fully present* – providing your full attention to lectures as well as to our corresponding discussions – to be successful in this course.

My debates and class exercises are designed to maximize your understanding of course concepts. My hypotheticals are almost always based on real-life cases and scenarios, allowing students to both extend and apply knowledge garnered from cases and lectures. The better prepared you are for class – and the more enthusiastic you are to participate – the better the exercises will go.

Regarding student questions during lecture, I prefer that you write down your question and wait for me to invite questions; I will do so often enough. While I invite and encourage questions, we have quite a bit of material to cover in a relatively small amount of time, so I try to precisely manage class times to balance the assigned materials with student curiosity.

Your participation grade will be based on your preparation for – and performances during – small group exercises. Your TA and I will monitor these activities. Your small groups will be assigned during the third class, and your first group activity will be during the fourth class.

Bring your textbook to class every day, as you will use it to complete classroom assignments.

Classroom Policies

Please arrive to class on time, as your lateness disrupts the *entire* class. I will deduct points for each instance.

Whether during lecture or discussions, raise your hand and wait for me to call on you before you speak. When I don't enforce this rule, discussions devolve into chaos.

Turn off all cell phones and electronic devices before class begins. Laptop/notebook computers are acceptable, but please don't let me catch you doing anything other than taking notes. Surfing the Internet during class for *any* reason is not permitted. I may not say anything, but I will deduct points if I see such behavior.

Assignments

All readings appear in the latest edition of *Constitutional Law for a Changing America: Rights, Liberties, and Justice* (8th edition, 2013) by Lee Epstein and Thomas G. Walker, available at the university's Bay Tree Bookstore. Assignments are listed on the day they are discussed or due.

Day One (6/23)

Constitutional Foundations

What is the purpose of creating a Founding document? Is a constitution necessary to create a nation? Might it be necessary to create a certain *kind* of nation? What sorts of powers should constitutions grant, and what rights should they protect?

How did the Founders reconcile their stark disagreements, and what concessions were made in the name of creating a new nation? To what extent do we see the legacy of these original compromises today?

How do we explain the relationship between U.S. democracy and the Supreme Court? What is the Court's role in U.S. democracy? Do we betray a major democratic element of our republic when we allow nine unelected judges to overturn the will of our directly elected leaders, or does the Court's electoral insulation offer citizens more protection than our elected leaders are able to provide? To what extent should Court action vis-à-vis other branches be seen as simply another means of balancing interests as well as the powers of government?

Day Two (6/25)

Be sure to have read the syllabus before this meeting. If you have questions, better to ask them sooner rather than later.

The Text and Judicial Review

The original Constitution enumerates the powers and constraints of each formal branch of government. From this big picture standpoint, what does the Bill of Rights add to the Constitution that wasn't there before?

The "holding" of *Marbury v. Madison* is repeatedly cited by the Court as precedential authority for its power of judicial review. What did the Court decide in *Marbury v. Madison*? What was the reasoning behind Justice Marshall's decision? What does this decision demonstrate to you about the nature of Constitutional Law?

Required for Today: U.S. Constitution (773-784); Judicial Review (45-56)

Incorporation of the Bill of Rights

How did the Court go about "nationalizing" the Bill of Rights? To what extent does this

“incorporation” against the states comport with the intent of the Founders? What might be some consequences of incorporation?

Required for Today: Incorporation (66-86)

Day Three (6/30)

Quiz (20%) promptly at 1:00 PM. Bring ONE BLUE BOOK. Lecture commences at 2:15 PM.

The First Amendment: Free Exercise of Religion

The two religion clauses are often described as being in tension with each other. Some will even go so far as to argue that one cannot legitimately consider one clause without considering the impact on the other. To what extent do you agree or disagree with this claim?

How does the Court define “religion” in these cases? To what extent will the Court allow the government to define religion? To what extent *should* the government and/or the Court define religion? If we *don't* define religion, to what extent can we enforce the Free Exercise clause? Must the Court define religion in order to protect it?

To what extent do the three tests the Court ultimately articulates “protect” religion? Are all religions protected with the same vigor? For which test, if any, do you advocate and why?

To what extent is the Court "protecting" religion, as opposed to balancing interests?

If you were an attorney challenging government action under the Free Exercise Clause, which test(s) would you use to argue in your brief today?

As you read, note in particular how the free exercise test develops over time, and the conditions that arguably allow the test to change and develop.

Required for Today: Approaching Civil Liberties (89-92); Three Tests to Determine Free Exercise (99-100; 104-112; 114-120; 122-127)

Day Four (7/2)

The First Amendment: The Establishment Clause

What is a *Wall of Separation*? To what extent can this philosophy be realistically applied? What would be the consequences of enforcing a strict wall of separation?

How do we determine whether the Establishment Clause has been violated? What test(s) would you argue before the Court? If you were an attorney before the Court, for which test(s) would you argue and why?

Should private schools receive public funds? Are there circumstances where you might be willing to allow public funds, and others where you would oppose their use? To what extent, if at all, does *pragmatism* influence your position?

Required for Today: Government Aid to Religious Institutions (128-134; 138-142; 146-158); Teaching Religious Principles in Public Schools (164-168); Prayer in School (170-175; 177-182) or Religious Displays (186-190); Government Involvement in Affairs of Religious Organizations (191-196)

Day Five (7/7)

The First Amendment: Freedom of Expression I

How does the context of expression change how it is handled under the First Amendment? Do you agree with the Court's reasoning that there is a clear line between "speech" and "conduct"? To what extent is there such a thing as "pure" speech?

Should the government be able to prohibit "offensive" words on public streets? In public courtrooms? To what extent should the government be able to prohibit threatening, hurtful, and intimidating speech?

To what extent is "hate speech" protected or unprotected, according to the Court? Should hate speech be protected? What reasoning exists for protecting speech that has no use whatsoever in public discourse?

What level of First Amendment rights should be accorded to minor students? How could the Court consistently reason that armbands in an elementary school were protected, but a banner message from a high school student on a public street was not?

Required: Government Interests and Restraints on Governmental Power (225-230); Symbolic Speech (230-238); Public Forums and Order (238-253); "Hate" Speech (253-263); Student Speech (264-272)

Day Six (7/9)

MIDTERM EXAMINATION (30%) – Bring BLUE BOOKS

Class recommences promptly at 3:00 PM. Reading is optional for today, but you're responsible for the lecture material.

"Privacy" and Reproductive Rights

Where does "privacy" come from? Was it in the Founders' Constitution? If you can find it, where is it?

Which, if any, of the Court member's justifications for "privacy" do you find most compelling? Can you find a constitutional basis for protecting reproductive rights outside of privacy and/or Due Process?

What, if any, acceptable reasons exist for protecting rights that are clearly not specifically in the

Constitution? Are there certain conditions whereby the Court should step in and essentially legislate, or must the Court draw a line and refuse to maximize its judicial role? What theory (or theories) might justify the Court in either maximizing or minimizing its "activism"?

How should the new slate of state-based anti-abortion laws be viewed via the current status of the "right to abortion"? What are the arguments for and against the constitutionality of these new rules? Considering *politics*, i.e., the membership of the Court and their own reasons for making decisions, how do you think these new rules might fare if the current Court were to decide their constitutionality?

Optional for Today: Contraception (400-407); Abortion (407-418; 422-431); Sodomy (435-44); Right to Die (445-450)

Day Seven (7/14)

The First Amendment: Freedom of Expression II

Should the liberty to speak include the liberty *not* to speak? Why or why not? According to the Court, to what extent does the First Amendment protect the right not to speak? What is the Court's reasoning for the rule?

According to the Court, does the First Amendment protect the right of private groups to discriminate? In other words, should private groups be allowed to associate with whomever they choose, or should the government be able to prevent associational discrimination? Why or why not?

How should a balance between a free press and the fear of defamation be achieved? Do you agree with the Court's solution? Why or why not?

How do you define "obscenity"? To what extent should it be given First Amendment protection? Via the five ways of constitutional interpretation introduced earlier in the course, how would you argue for or against First Amendment protection of pornography? Does the context of child pornography impact your constitutionalism?

Required: Right Not to Speak (272-281); Association (293-297); Prior Restraint (300-316); Reporters' Privilege (321-325); Libel (328-334; 338-341); Obscenity (345-347; 350-353)

Day Eight (7/16)

Discrimination and Constitutional Equality

As you read these materials, consider the extent to which the Court honored the constitutional intent(s) of the Civil War Amendments. More specifically, to what extent has *Equal Protection* been honored? How should the Equal Protection and Due Process Clauses be deployed?

To what extent does the notion of three tiers of scrutiny – determined on the basis of race and gender – contrast with the notion of *equal* protection?

What are the limits of “state action” with regard to the scope of the Fourteenth Amendment? Do you agree or disagree with the line the Court has drawn?

When reading *Craig v. Boren* (pg. 657), consider the level of scrutiny used to strike the Oklahoma law. The Court majority claimed it was using the same test used in *Reed v. Reed* (pg. 654). If you read the cases precisely enough, you should have a strong response to this claim.

To what level of scrutiny should rules targeting sexual orientation be held? How "bad" is such discrimination as compared to that on the basis of sex and race?

Does affirmative action advance or hinder the goals of the Fourteenth Amendment? Outside of potential constitutional barriers, is affirmative action a positive or desirable policy? To what extent should the Constitution be deployed as a barrier, if at all?

Required: Racial Discrimination (627-631; 632-638; 639-642; 644-652); Sex Discrimination (654-661; 663-669); Sex Orientation (671-676); Affirmative Action in Education (691-99; 707-716)

Day Nine (7/21)

Elections and the Constitution

Does the Constitution guarantee the right to vote? If so, where is this guarantee located? How have voting rights been enforced, and which legal provisions have been used to guarantee voting rights? When have such provisions been effective, and when have they not?

Even if you agreed that the Florida Supreme Court violated the Equal Protection Clause by not determining a uniform standard for determining voter intent (*Bush v. Gore*, pg. 722), what *remedy* would you have applied? As the Court was acting *in equity*, it had virtually unlimited options. What would *you* have opted to do?

What, if any, level of identification should be required to vote at the polls on Election Day? What factual information helps you to arrive at your position, or is your position entirely theoretical?

Should the spending of money be equated with political speech? If so, to what extent should such speech be protected under the First Amendment? Does the government have an interest in guaranteeing political equality? In preventing corruption? In preventing the appearance of corruption?

Is “One Person One Vote” a desirable policy to apply to all levels of government? Should it have been applied to state legislatures as well as to the federal government? Why can the Court accept a malapportioned U.S. Senate, but not a malapportioned state senate in a bicameral state legislature?

Required: 721-768

Day Ten (7/23)

FINAL EXAMINATION (40%) – Bring BLUE BOOKS.

Enjoy the rest of your summer!

Academic Integrity¹

"Academic integrity is the cornerstone of a university education. Academic dishonesty diminishes the University as an institution and all members of the University community. It tarnishes the value of a UCSC degree.

"All members of the UCSC community have an explicit responsibility to foster an environment of trust, honesty, fairness, respect, and responsibility. All members of the university community are expected to present as their original work only that which is truly their own. All members of the community are expected to report observed instances of cheating, plagiarism, and other forms of academic dishonesty in order to ensure that the integrity of scholarship is valued and preserved at UCSC.

"In the event a student is found in violation of the UCSC Academic Integrity policy, he or she may face both academic sanctions imposed by the instructor of record and disciplinary sanctions imposed either by the provost of his or her college or the Academic Tribunal convened to hear the case. Violations of the Academic Integrity policy can result in dismissal from the university and a permanent notation on a student's transcript."

If you have any questions regarding what constitutes plagiarism, please see me immediately.

UCSC, your T.A., and I all vigorously enforce these policies.

Disability Accommodations

If you require a DRC accommodation, please notify me and bring me the required paperwork as soon as possible, preferably by the second class period. Resources are tight during the summer, and I'll need to make test arrangements for the second week of class.

Syllabus Changes

Although unlikely, this syllabus is subject to change at any time. I will note any changes during class.

Useful Resources

The Supreme Court Collection, Cornell University Law School: <http://www.law.cornell.edu/supct>

Findlaw: www.findlaw.com

Black's Law Dictionary:² Enter through Westlaw, and click on "Black's Law Dictionary" in upper left-hand corner: <http://library.ucsc.edu.oca.ucsc.edu/find/databases/a-z?search=westlaw>

¹ From the UCSC Division of Undergraduate Education website:

² If off campus, enter the University portal before clicking on the link in the same browser window:
<http://oca.ucsc.edu/login>

Oyez: <http://www.oyez.org/>

SCOTUSblog: <http://www.scotusblog.com/>

For full texts of Supreme Court decisions, use the Legal Information Institute sponsored by Cornell University Law School. For those interested in federal law, this is an invaluable resource:

<http://www.law.cornell.edu/>

IF YOU HAVE ANY QUESTIONS OR CONCERNS ABOUT ANYTHING ON THIS SYLLABUS, PLEASE CONTACT ME.