

govPolitics of Civil Liberties
Government 250
Wesleyan University
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SYLLABUS

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I Introduction.

Civil Liberties is designed to introduce students to a uniquely American, and to some ways of thinking, a wonderfully naive contribution to politics: The written specification of individual liberties and rights that citizens possess and can juridically enforce against the state. Civil Liberties is not, however, a course on law. It is instead a course in political science about law, or a course that has as its subject the relationship of law to the most fundamental sorts of questions about politics.

During the semester, we shall see that most of the serious difficulties (and there are many) in the politics of civil liberties arise from conflicts between our commitments to two or more positive values. There are, for example, inevitable and recurrent conflicts (despite our attempts to ignore them) between the values of liberty and equality. As Felix Frankfurter once wrote, these and other such conflicts are "what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs." In this course, we examine these clashes in light of the broader philosophical and institutional problems of the constitutional order. I hope to show that constitutional "answers" to problems like those of abortion, freedom of speech, and affirmative action require a coherent understanding of the Constitution, and of the assumptions it makes about human nature and the proper ends of government and civil society.

We will, therefore, examine the doctrinal development of specific liberties and rights, such as due process and privacy, but we shall consider them in a broader theoretical context. We shall want to know what overall conception of liberties, rights, and governmental powers most nearly reflects and promotes our best understanding of the Constitution and the polity it both constitutes and envisions. In addressing these issues we will confront a welter of difficult and controversial questions. It is unlikely that we will succeed in our attempts to answer them fully or finally.

What we can hope to achieve, however, is an improved and more sophisticated appreciation of the importance (or not) of our commitment to civil liberties, and of the sacrifices we must make if we choose to honor that commitment.

II Reading Cases in Civil Liberties.

Reading court cases is, for most of you, a new experience. Unfortunately, it is not often (at least initially) a very pleasant experience. You may find the reading a bit easier if you bear in mind the following inquiries:

a. **SUBSTANCE.** What is the "law" after the case was decided? What is the holding of the judges in the case? Is it consistent with prior cases? How does the case fit into the "doctrine" on this subject matter?

b. **ASSUMPTIONS.** What assumptions does the opinion make to support its argument? What does it assume, for example, about the Constitution? About human nature? About the framers? Are these assumptions consistent with the rest of the argument? Where is the reasoning deficient, unsupported, or implausible?

c. **HISTORY.** It is quite possible to see judicial opinions as political artifacts, as "period pieces" that value ideas quaintly idealistic or long since tarnished. Is history a relevant source of constitutional meaning?

d. **JUDICIAL ROLES.** Almost every significant case in civil liberties must come to terms with questions about the proper role of the judiciary in a constitutional democracy. As we shall see throughout the course, questions about relative institutional competencies are central to a complete understanding of the constitutional order.

e. **POLITICAL THEORY.** Serious controversies in civil liberties require of judges that they possess a conception of the nature of the American political system and the importance of civil liberties to that system. Is that conception--whether explicit or implicit--consistent with the result in the case? Is it coherent? Is it desirable?

III Books to Purchase.

Required:

Kommers, Finn, & Jacobsohn, *American Constitutional Law: Essays, Cases, & Comparative Notes*. 2d edition. (Rowman, 2004)

Rossiter, ed., *The Federalist Papers*.

Recommended:

van Geel, *Understanding Supreme Court Opinions*. (2d ed.)

IV Schedule of Papers.

- a) On Thursday, Feb. 2, I will describe in class how to brief a case. Every student must submit a case brief on Tuesday, Feb. 14.
- b) On Tuesday, Feb. 14, I will hand out a short (4-6) page mini-moot court exercise that I will describe more fully in lecture. In brief, the problem will require that you prepare a bench memorandum for a judge that analyzes a legal problem and offers a resolution of the problem in light of the considerations described in the course readings and the Introduction to this syllabus. This assignment is due on Tuesday, Feb. 28.
- c) On Thursday, March 2, I will hand out a moot court problem, assign students to courts, and, if there are no volunteers, appoint counsel. Briefs of counsel must be completed and duplicated for all members of the court by Thursday, March 30.
- d) The moot courts will meet during the week of April 4-6. Attendance at one of the moot courts is mandatory. Opinions of the Court are due on Thursday, April 27.

V Exams & Grading.

In addition to the bench memorandum and the moot court exercise, there will be a final examination.

The bench memorandum is worth 10% of the course grade;

The moot court is worth 40% of the course grade; and

The final exam is worth 40% of the course grade.

Class participation is worth 10% of the course grade.

To avoid the inevitable problems engendered by late papers, I will strictly enforce the following regulations:

- a) Students have three "days of grace" that they may use to shift submission deadlines for the case briefs, bench memoranda, and moot court opinions. Days of grace may not be used for Briefs of Counsel or the final examination.
- b) Papers turned in after the "days of grace" have run out will be penalized one full grade per day. There are no exceptions.
- c) Students must take and pass the final examination, at the time and place determined by the Registrar's Office, to pass the course.

VI Lecture Topics & Assignments.

January 26: Introduction & Administration

Assigned: The Constitution of the United States of America

Jan 31-Feb 2: Judicial Power and Constitutional Interpretation

Assigned: KFJ, chapters 1-3

Recommended:

Arkes, Beyond the Constitution

Burgess, The Contest for Authority

Snowiss, Judicial review and the Law of the Constitution

Fisher, Constitutional Dialogues

Feb 7-9: The Bill of Rights & Incorporation

Assigned: KFJ, chapter 9

Recommended: Richard Cortner, The Supreme Court and the Bill of Rights.

Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights"?

Michael Curtis, No State Shall Abridge.

Feb 14-16: Liberty and the Once (And Future?) Right to Property

Assigned: KFJ, chapter 10

Recommended: Epstein, Takings

Horwitz, The Transformation of American Law

Ackerman, Property & the Constitution

MacPherson, "Human Rights as Property Rights"

Radin, "Property & personhood"

Siegen, Economic Liberties & the Constitution

Feb 21-23: The Right to Privacy I

Assigned: KFJ, chapter 11

Recommended: Dworkin, Taking Rights Seriously

Grey, "Eros, Civilization, and the Burger Court"

Ely, "The Wages of Crying Wolf: Roe v. Wade"

Glendon, Abortion & Divorce in Western Law

Allen, Uneasy Access: Privacy for Women

Brill, Nobody's Business

Dworkin, Life's Dominion

Garro, Liberty & Sexuality

Feb 28-Mar 2: The Right to Privacy II

Assigned: KFJ, chapter 11 (continued)

Mar 7-9: Freedom of Speech I

Assigned: KFJ, chapter 12

Recommended: Recommended: Fish, There's No such Thing as Free Speech
Schauer, Free Speech
Bollinger, The Tolerant Society
Levy, Emergence of a Free Press
Shiffrin, The First Amendment, Democracy, and Romance
Greenawalt, Fighting Words

Mar 14-23: Spring Break. No Class

Mar 28-30: Freedom of Speech II

Assigned: KFJ, chapter 12 (continued)

Recommended: Meiklejohn, Free Speech & its Relation to Self-Government
Davis, Decisions & Images

Apr 4-6: Moot Courts

Apr 11-13: The Religion Clauses, I

Assigned: KFJ, chapter 13

Recommended: Locke, Letter on Toleration
Choper, Securing Religious Liberty
Howe, The Garden & the Wilderness
Carter, The Culture of Disbelief
Levy, The Religion Clauses
Richards, Toleration & The Constitution
Smith, Foreordained Failure

Apr 18-20: The Religion Clauses, II

Assigned: KFJ, chapter 13 (continued)

Apr 25-27: The Equal Protection Clause—Race

Assigned: KFJ, chapter 14

Recommended: Dworkin, Taking Rights Seriously

Fiss, "Groups & the Equal Protection Clause"
Kluger, Simple Justice
Gunther, "In Search of an Evolving Doctrine"
Ely, "The Constitutionality of Reverse Discrimination"

May 2-4: The Equal Protection Clause—Gender

Assigned: KFJ, chapter 15

Recommended: Baer, The Fourteenth Amendment
VanBurkleo, "Belonging to the World"

May 9: The Constitution in Crisis

Assigned: KFJ, chapter 5
Federalist Papers, #1

Recommended: Finn, Constitutions in Crisis
Rossiter, Constitutional Dictatorship
Becker, The Declaration of Independence
Irons, Justice at War
Smith, Democracy on Trial

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NOTES ON PAPERS

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I. GENERAL

A. Purpose

The primary purpose of the moot court paper is, within the context of the central questions in this course—the What, Who, How, and When—to provide training in close, careful analysis and lucid expositions. The description of the problem for the moot court includes a list of references. Please do not use any references other than those provided or read in the weekly assignments. I also advise you not to raise issues on which the references and other materials for the course offer no guidance. Concentrate on the problem's relation to the central questions of the course.

B. Timing

I suggest students wait until several weeks into the course before beginning the moot court. I counsel students, however, not to postpone work until the last minute. Experience has taught me that the papers in this course invariably require more work than students initially expect.

II. REASONING & ANALYSIS

A. Persuasion

The persuasiveness of any argument depends heavily not only on the massing of evidence but also on logical organization, clear wording, and proper grammar and syntax. Clear thinking and clear writing go together.

B. Models

For models of what a moot court opinion should resemble, please consult opinions of the Supreme Court. (Please note, however, the differences in format and footnoting style explained below.) Students should bolster their arguments by citing and, where appropriate, quoting from previous opinions. Justices and counsel must show in their papers that they have read and understood and can effectively use relevant material. The papers do not ask for top-of-the-head reactions, but considered judgments based on close analysis. To be truly valuable, fresh insights must be the product of disciplined thought.

C. Use of Precedents

In "real" life, judges do not decide cases merely by reading previous opinions, nor should judges do so in our moot court. At the same time, students must demonstrate an understanding of the cases that support their reasoning and those that go against it. Judges must use the former to buttress their reasoning and explain why they deviate

form the latter. Neither judges nor counsel in this course may ignore cases listed in the references or relevant rulings previously assigned for weekly readings. One cannot convince intelligent, informed people--though on occasion a Supreme Court justice will try--by pretending there is nothing to be said for the other side. (Counsel may prefer, however, to let opposing counsel fully develop the argument.) Easy cases rarely reach the Supreme Court; they never get to a moot court.

An opinion *must* contain a coherent and persuasive line of reasoning; it should not be merely a compilation of summaries of earlier decisions. The facts present a problem. Previous decisions offer guides--sometimes conflicting guides--to a solution. The opinion explains and justifies a particular solution to the problem, using previous decisions as one of its principal instruments. The opinion chooses among the cases--explaining some, distinguishing some, relying on some, and perhaps extending the logic of some. The process is not a mechanical one of choosing a previous decision that seems closest to the problem at hand. And, the central questions of What, Who, How, and When do not become less central in the moot court.

Earlier I counseled against treating issues on which the references offer little or no guidance. The necessity of going beyond the cases is compatible with this advice. I mean simply that the assigned readings do not solve the problem. In that sense, it is necessary to go beyond them, or to use rather than regurgitate them. But it is very dangerous to bring in legal(?) doctrines that one has only vaguely heard about. Constitutional interpretation is a complex field, and invocation of a doctrine that one has not thoroughly researched and understood may be hazardous to one's intellectual health.

D. Use of Separate Opinions

As in real life, judges in the moot court may distinguish and overrule previous decisions and counsel may ask judges to do so. The burden, however, will fall heavily on the writer who asks for an overruling or who chooses to overrule. Judges and counsel may also cite concurring or dissenting opinions. If one does so, however, he or she should remember that separate opinions do not carry the same authority as opinions or the Court. The writer must convincingly explain--"I think the Court was wrong and the dissenters correct" is insufficient--why he or she adopts the minority's views instead of those of the majority.

Whenever citing or quoting from an opinion other than that of the Court, the writer must make it clear that he or she understands that the material in question is not authoritative and thus is shouldering the burden of proof. For example, "As Justice Harlan said in dissent..." not merely "As Justice Harlan said" Similarly, one should

show when a justice is speaking for the Court and not merely for him or herself "As Justice Holmes held for the Court...."

E. Facts

Neither judges nor counsel may add to the facts. This limitation is important and realistic. Among the many intractable problems that appellate judges face is that the record before them is often fuzzy or incomplete. If your record is incomplete or fuzzy, simply acknowledge the problem and try to overcome it. Do not make up or assume facts.

III. FORMAT OF BENCH MEMORANDA

A. Abstract

The bench memorandum must begin with an abstract that should not exceed one page (The abstract should not be counted as a page for purposes of length.) Your abstract should begin with a concise statement of the facts and a precise formulation of the legal issue the case raises. Then briefly describe your answer to the problem and the reasoning you used to arrive at it.

B. Text

A bench memorandum is an outline of a case that a law clerk prepares for a judge. The memorandum condenses the facts, posits the issues in the case, and outlines alternative solutions to the problem. The bench memo advises a judge-it *does not* decide the case. Consequently, a bench memorandum is not a brief by counsel or a judicial opinion. It canvasses the various arguments, discusses their merits and demerits, and offers a recommendation.

Your bench memorandum should be approximately six to ten pages in length. If you need more pages to fully develop your argument, then by all means use them—I am not especially concerned about the length of these papers. Case and secondary source citations should follow the format you will use for the moot courts. All of the other stylistic conventions that apply to the moot court also apply to the bench memorandum. You need not, however, prepare a table of cases.

C. Summary

At the close of the memorandum, you should have a separate section succinctly summarizing his or her reasoning and recommendation. The summary should not exceed one-half page in length.

IV. FORMAT OF OPINIONS

A. Syllabus

Each opinion of the Court must begin with a section entitled: Syllabus by the Court. Essentially, this section will be similar to a brief of that opinion, in the sense that 'brief' refers to the summaries of cases that students prepare for the weekly assignments. Such a summary may reveal much about the strengths and weaknesses of your reasoning and so indicate where to allocate that scarcest of all resources, time. The Syllabus should: (1) Very tersely--no more than three or four sentences at most--summarize the facts of the case; (2) List the principal questions that the opinion will address; (3) Provide the answers to those questions; (4) Summarize the reasoning the opinion will employ; and (5) State the approaches to constitutional interpretation the opinion will follow. You may choose to reverse the order of (4) and (5). Requirement (5) will make more sense after a few weeks in the course.

The syllabus should also contain references to the pages in the opinion at which the various steps in reasoning appear and the approaches to constitutional interpretation unfold. These references will probably have to be put in by hand after the opinion is typed. The entire Syllabus should not exceed one page in length.

I urge students to compose a rough draft of the Syllabus before beginning the opinion, and to reread the opinion several times before drafting a final version of the Syllabus.

The Core of the Opinion

Here the writer will develop his or her argument. Length is not an issue—oftentimes, opinions run about fifteen to twenty-five pages—so please don't worry if your opinion is longer. You may include a somewhat more elaborate statement of the facts than appears in the Syllabus; but as already noted, it is not necessary to repeat them in any detail unless one or two particular factual aspects are crucial to the reasoning. Dividing an opinion into several subsections often increases clarity.

C. Summary

At the close of the opinion, you should have a separate section succinctly summarizing his or her reasoning and approach(es) to constitutional interpretation. This section should be no more than one-half page in length.

D. Table of Cases

At the end of the opinion, you should append an Annotated Table of Cases and a Table of Other References. The Table of Annotated Cases should consist of (1) an alphabetical listing of all cases cited in the opinion (with full citation to the U.S. Reporter); (2) pages at which each case is cited in the opinion (probably inserted by hand); and (3) one of the following letters after each reference to a page:

- c: where a case is merely cited as an authority;
- d: where case is distinguished as inapplicable or at least as not

controlling,
e: where case is explained;
f where case is followed;
o: where case is overruled;
s: where opinion other than that of the Court is cited.

Example: Roe v. Wade, 410 U.S. 113 (1973): 3,f; 5,3; 8,c.

E. Table of Other References

This Table will consist of an alphabetical listing of all other materials cited in the body of the opinion.

V. FORMAT OF BRIEFS OF COUNSEL

Briefs of Counsel will follow the same format as opinions except that there will be no Syllabus. Instead, the Brief will begin with: (1) a statement of the question(s) presented by the case; (2) suggested answer(s) to that (those) question(s); and (3) a concise presentation of the argument of the Brief. Briefs of Counsel will conclude with a summary as well as the tables described above in Part III.

VI. FORMAT: MISCELLANEOUS

A Typing

Papers must be typed, double spaced, with standard margins, and pages consecutively numbered. References to pages in the Syllabus and in the two tables at the end, as well as the letters of annotation, may be put in by hand.

B. Cover Sheets of the Briefs

Counsel should put their names and the side they represent on the cover sheet.

VII. DOCUMENTATION

Constitutional creativity will not evaporate if judges and counsel quote accurately, cite adequately, spell correctly, and write grammatically. Care is the hallmark of good students of all disciplines. PLEASE CAREFULLY PROOFREAD PAPERS. All of us understand what a painful experience proofreading is; it can also be an educational experience. Some errors are inevitable, as anyone who has read the various items distributed in this course knows. Still, I ask you to keep errors to a minimum. I shall return unread those papers that are sloppily composed; and the clock on the period of grace will begin to run.

A Citations

I prescribe a time-tested method of citation that is unorthodox in legal writing but is very simple. Use of a Table of Cases and Table of Other References makes such a system clear, because all materials cited in the opinion will be listed in those tables along with full information about publication.

(1) Citations can be run in the body of the opinion or brief. There is no need to use footnotes, though you may do so if you like.

(2) The first time you cite a case, you should use the full title and date. E.g.: *Roe v. Wade* (1973). Thereafter you may use a short title, usually the name of the first party. E.g.: *Roe*. If the first party is the United States or a state, use the name of the second party.

(3) If you wish to refer to a specific page in an opinion--and, of course, one must if quoting or utilizing a particular point in an opinion—simply give the page after the name of the case. E.g.: *Roe v. Wade* (1973), 118; or *Roe*, 118.

(4) For cases read in the casebook, simply cite the page in that collection.

(5) For other materials, follow the same general procedures as for cases, except that one need never give more than the last name of the author, the date of publication, and the specific page. E.g.: *Downs* (1957), 188.

B. Table of Cases

(1) Please list alphabetically all cases cited in the opinion or brief, together with the pages at which cited and the letter code listed above under III. D. E.g.:

Roe v. Wade, 410 U.S. 113 (1973): 3,f; 5,e; 8,c.

(2) Please use this official form of citation in the Table of Cases even if the moot court allows use of the case as edited in the casebook.

C. Table of Other References

(1) Please list alphabetically all other materials cited in the opinion or brief.

(2) For periodical literature, you may use any of the common modes of citation as long as you have the full name of the author, the title of the article, the name of the journal, and the volume and date of the journal, as well as the number of the page on which the article begins.

(3) You may encounter articles in law reviews whose authors are not listed or are listed at the conclusion of the article. These are note or comments done by students at the law school. One cites them as Note or Comment where one usually puts the author.

