

Politics 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*. (Rowman, 2004)

Rossiter, ed., *The Federalist Papers*.

Recommended:

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

IV Schedule of Papers.

a) On Thursday, Feb. 3, I will describe in class how to brief a case. Every student must submit a case brief on Tuesday, Feb. 15.

b) On Tuesday, Feb. 15, 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, March 1.

c) On Tuesday, March 1, 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 31.

d) The moot courts will meet during the week of April 5-7. Attendance at one of the moot courts is mandatory. Opinions of the Court are due on Thursday, April 21.

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 20: Introduction & Administravia

Assigned: The Constitution of the United States of America

Jan 27-Feb 2: No Class.

Assigned: KFJ, chapters 1 & 2

Feb 3: The Rise of Judicial Power

Assigned: KFJ, chapter 3

Recommended:

Arkes, Beyond the Constitution

Burgess, The Contest for Authority

Snowiss, Judicial review and the Law of the Constitution

Fisher, Constitutional Dialogues

Feb 8-10: 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 15-17: 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 22-24: The Right to Privacy

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

Garrow, Liberty & Sexuality

Mar 1-3: 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 4-21: Spring Break. No Class

Mar 22-24: Freedom of Speech, II

Assigned: KFJ, chapter 12 (continued)

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

Mar 29-31: 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 5-7: Moot Courts

Apr 12-14: The Religion Clauses, II

Assigned: KFJ, chapter 13 (continued)

Apr 19-21: 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"

Apr 26-28: The Equal Protection Clause—Gender

Assigned: KFJ, chapter 15

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

May 3: 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