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Political Science (POLS) 411
Constitutional Law II
DU 246 MW 3:30-4:45
NIU Fall 2009

Liberty, Privacy, and Equality in Constitutional Law

Course Description

The 14th Amendment to the U.S. Constitution guarantees that we cannot be deprived of “life, liberty, or property without due process of law” and mandates “equal protection of the laws.” In this course, we will learn how the U.S. Supreme Court has defined the liberty and equality referenced in these constitutional clauses.

In the first part of the course, we will read major U.S. Supreme Court cases that give substantive meaning to the term “liberty” and to an implied fundamental right of privacy. These cases read a “liberty to contract” into and then out of the 14th Amendment’s due process clause and expand, retract, and redirect a “right to privacy” the Court discovers in this clause and other Bill of Rights amendments. Among other things, these latter cases limit government regulation of contraception, abortion, suicide, and sodomy.

In the second part of the course, we will focus on major U.S. Supreme Court cases defining what “equal protection of the laws” means with respect to laws that treat races and men and women differently. The racial cases decide the constitutionality of segregated public schools; of affirmative action in public schools and contracting; of racial disparities in public hiring and administration of the death penalty; of race-based internments during wartime; and of prohibitions on whites marrying or selling their homes to non-whites.

The gender cases determine the constitutionality of laws that make male survivors the administrators of estates; set different beer-buying ages for men and women; prohibit males from having sex with girls outside of marriage; require men to prove financial dependence on their wives to receive governmental benefits; and exclude women from military academies.

Course Requirements

Your grade in this course will be based on class participation, two take-home midterms, and an in-class final. *Class participation will determine a substantial portion of your grade (40%) and is further described on the next page.* The midterms and final will consist of hypothetical fact-patterns that I will ask you to analyze using the cases we are reading. Take-home midterm answers should be six pages in length, double-spaced, with

12 point type. If you want, the first midterm answer can be jointly authored with one other person from this class. The final is open-book, open-note.

All readings are on e-reserves accessed through a link on blackboard. If you want, you can purchase a casebook online that covers most of the readings: Geoffrey R. Stone, et al., *Constitutional Law* (5th edition) (New York: Aspen Publishing, 2005). No outside reading or research is required.

Exam Schedule

September 14	Midterm #1 (15%)	Take-home, can be jointly authored; six pages; <i>due following Mon., Sept. 21st</i> , at beginning of class
October 19	Midterm #2 (20%)	Take-home; must be your own work; six pages; <i>due following Mon., Oct. 26th</i> , at beginning of class
December 7	Final	(25%) In-class; open book, open note; but no sharing of materials or discussion during exam; <i>Monday, 4-5:50 p.m. Please bring your own blue books.</i>
Participation	(40%)	See next two sections for further explanation

Briefing Cases, the Socratic Method, and Class Participation

We will read and discuss many judicial opinions in this course. I will teach you how to read these cases so that you can extract their constitutionally relevant aspects. This specialized form of note-taking is called “briefing cases.”

In class, I will ask you questions about your readings, including the cases you have read. Your case briefs will be essential to answering these questions. This questioning approach to teaching is called the Socratic Method, the teaching style most commonly used in law schools.

Every day that we meet I will select several of you from the course enrollment roster to answer questions about the readings. If you are here and prepared to answer those questions, you will receive credit for participating in class discussion that day. If you are absent or unprepared, you will receive no credit that day.

Oral Argument and Class Participation

Periodically, I will ask you to act as lawyers, arguing constitutional cases before a judicial appellate panel composed of your fellow students. Lawyers will consist of teams of two to three students each. Judges will have the opportunity to question counsel before voting on the case. Lawyers will receive extra credit for participating in oral arguments; judicial questioning will contribute significantly to your participation grade.

Oral argument will consist of opening statements by lawyers for both sides, followed by closing arguments/rebuttals by co-counsel. Argument will focus on constitutional not factual or other legal issues in the cases.

You will be given advance notice of which cases we will be arguing in class, and who will be acting as lawyers and judges. This will allow counsel to prepare their arguments and judges to prepare their questions.

Counsel and judges will use majority, concurring, and dissenting opinions in our cases to re-create the arguments and questions that occurred during oral argument before the U.S. Supreme Court. Each attorney will have 3-5 minutes to make his or her argument.

Serving as a Witness or Juror in NIU Law School Mock Trials

There may be an opportunity for you to serve as a witness or juror in mock trials that function as final exams for students of NIU law school's courses in trial advocacy. The availability of this opportunity will depend on the needs of the law school faculty who teach these courses and on how many public law students wish to serve as witnesses or jurors.

I encourage all of you to serve as a witness or juror and will give you extra credit for serving and even for observing these mock trials – an opportunity that should be available to everyone.

Other Opportunities to Participate and/or to Receive Extra Credit

At various points during the semester, I may announce other opportunities to improve your class participation grade and/or to receive extra credit. These opportunities may include analyzing law related events on campus, in the community, country, or world.

I am open to your suggestions for additional opportunities to participate and/or to receive extra credit in the course.

Other Course Requirements

Please do not...

- ask for extensions on turning in your midterms. Midterms will be graded down one third of a grade per day that they are late.
- ask to take make-up exams or an incomplete in the course unless you have a very, very compelling reason to do so.

Definitely do not...

- engage in “academic misconduct,” defined by the NIU *Student Judicial Code* as the “receipt or transmission of unauthorized aid on assignments or examinations, plagiarism, unauthorized use of examination materials, or other forms of dishonesty in academic matters.”

Department of Political Science Announcements

Undergraduate Writing Awards

The Department of Political Science will recognize, on an annual basis, outstanding undergraduate papers written in conjunction with 300-400 level political science courses or directed studies. Authors do not have to be political science majors or have a particular class standing. Winners are expected to attend the Department's spring graduation ceremony where they will receive a certificate and \$50.00. Papers, which can be submitted by students or faculty, must be supplied in triplicate to a department secretary by February 28. All copies should have two cover pages – one with the student's name and one without the student's name. Only papers written in the previous *calendar* year can be considered for the award. However, papers completed in the current spring semester are eligible for the following year's competition even if the student has graduated.

Statement Concerning Students with Disabilities

Under Section 504 of the Rehabilitation Act of 1973, NIU is committed to making reasonable accommodations for persons with documented disabilities. Those students with disabilities that may have some impact on their coursework and for which they may require accommodations should notify the Center for Access-Ability Resources (CAAR) on the fourth floor of the Health Services Building. CAAR will assist students in making appropriate accommodations with course instructors. It is important that CAAR and instructors be informed of any disability-related needs during the first two weeks of the semester.

Department of Political Science Web Site

Undergraduates are strongly encouraged to consult the Department of Political Science web site on a regular basis. This up-to-date, central source of information will assist students in contacting faculty and staff, reviewing course requirements and syllabi, exploring graduate study, researching career options, tracking department events, and accessing important details related to undergraduate programs and activities. To reach the site, go to <http://polisci.niu.edu>.

Reading Assignments and Lecture and Discussion Topics

WEEK 1 INTRODUCTION AND COURSE OVERVIEW

HISTORICAL BACKGROUND AND BRIEFING CASES

Liberty, Privacy, and “Substantive” Due Process

The Slaughterhouse Cases (1873) (725-733)
(privileges and immunities – butchers).

WEEK 2 LIBERTY TO CONTRACT

Introduction to Substantive Due Process (741-745).

Lochner v. New York (1905) (745-755) (liberty of contract – bakers).

The *Lochner*-era cases (755-761).

Demise of the *Lochner*-era cases (761-768).

WEEK 3 PRIVACY TO CONTRACEPT

NOTE: NO CLASS MONDAY, SEPTEMBER 7th, LABOR DAY

Griswold v. Connecticut (1965) (845-853)
(right of privacy – married use of contraceptives).

Griswold and the Right to Privacy
[particularly *Eisenstadt v. Baird*, et al (1972)] (853-857)
(right of privacy – distribution of contraceptives to unmarried people).

WEEK 4 PRIVACY AND LIBERTY TO ABORT

**NOTE: MIDTERM #1 HANDED OUT AT END OF CLASS ON
MONDAY, SEPTEMBER 14TH**

Roe v. Wade (1973) (857-863) (right of privacy – abortion).

The Abortion Regulation Cases (877-880).

The Abortion Funding Cases (869-877), including:
Maier v. Roe (1977) (869-872);
Harris v. McRae (1980) (872-873).

Planned Parenthood v. Casey (1992) (884-903)
(liberty right – abortion).

Gonzales v. Carhart (2007) (extra credit opportunity)
(liberty right – abortion).

WEEK 5 PRIVACY AND LIBERTY TO SODOMIZE

**NOTE: MIDTERM #1 DUE AT BEGINNING OF CLASS ON
MONDAY, SEPTEMBER 21st**

Bowers v. Hardwick (1986) (930-935)
(right of privacy – sodomy).

Lawrence v. Texas (2003) (935-948).
(right of liberty and privacy – sodomy).

Homosexuality, Sexual Liberty, and Substantive Due Process (948-949).

WEEK 6 LIBERTY TO COMMIT SUICIDE

Cruzan v. Missouri Department of Public Health (1990) (950-957)
(liberty interest – refusing life support).

Washington v. Glucksberg (1997) (957-965)
(liberty interest – assisted suicide).

WEEK 7 LIBERTY IN STATE HOSPITALS AND PRISONS

Youngberg v. Romeo (1982) (**only on e-reserves**) (liberty interest – rights to care, safety, and training of institutionalized mentally retarded).

Washington v. Harper (1990) (**only on e-reserves**) (liberty interest – prisoner’s right to refuse anti-psychotic medication).

“Equal Protection of the Laws”

WEEK 8 RACIAL DESEGREGATION OF PUBLIC SCHOOLS

Plessy v. Ferguson (1896) (464-467)
(racially separate but equal train compartments).

The Road to Brown (471-473).

Brown I and *Brown II* (1954 and 1956) (473-483)
(racially separate schools not equal).

WEEK 9

**NOTE: MIDTERM #2 HANDED OUT AT END OF CLASS ON
MON., OCTOBER 19TH**

Southern Desegregation Cases (483-488).

Northern Desegregation Cases (488-500).

Parents v. Seattle (2007) (extra credit opportunity)

RATIONAL BASIS REVIEW V. STRICT SCRUTINY

NYCTA v. Beazer (1979) (502-504)
(subway refuses to employ methadone users).

WEEK 10 RACE-SPECIFIC CLASSIFICATIONS THAT DISADVANTAGE MINORITIES IN WARTIME AND HOUSING

**NOTE: MIDTERM #2 DUE AT BEGINNING OF CLASS ON
MON., OCTOBER 26TH**

Korematsu v. United States (1944) (525-529)
(military orders internment of Japanese on West Coast during WWII).

Shelley v. Kraemer (1948) (**only on e-reserves**) (judicial enforcement of
contracts prohibiting re-sale of homes to non-whites).

NON-RACE-SPECIFIC CLASSIFICATIONS THAT DISADVANTAGE MINORITIES IN HIRING, HOUSING, AND ADMINISTRATION OF JUSTICE

Washington v. Davis (1976) (546-549) (Black applicants to D.C. police department fail qualifying test at higher rate than whites).

Village of Arlington Heights (1977) (550-553) (Chicago suburb refuses to rezone land to build low income housing, disproportionately affecting racial minorities).

What Constitutes a Racially Motivated Classification? (558-566), including:

Yick Wo v. Hopkins (1886) (559).

WEEK 11 Problems in Administration of Criminal Justice (567-569).

McCleskey v. Kemp (1987) (569-573) (Georgia blacks murdering whites sentenced to death more often than white murderers).

Racial Disparities in Investigating, Charging, and Sentencing (573-576).

RACE-SPECIFIC CLASSIFICATIONS THAT ARE FACIALLY NEUTRAL IN MARRIAGE AND PRISON

Loving v. Virginia (1967) (529-531) (Virginia prohibits marriage of whites with non-whites).

Johnson v. California (2005) (**only on e-reserves**) (California racially segregates prisoners).

WEEK 12 **RACE-SPECIFIC CLASSIFICATIONS THAT BENEFIT MINORITIES IN ADMISSION TO UNIVERSITIES AND PROFESSIONAL SCHOOLS**

Bakke v. Regents of the University of California (1978) (**only on e-reserves**) (U.C. Davis medical school sets aside 16 seats for minority applicants).

Grutter v. Bollinger (2003) (594-606) (U. of Michigan law school uses race “as a factor” in admissions).

Application of Strict Scrutiny (606-608).

Gratz v. Bollinger (2003) (608-611) (U. of Michigan undergrad college of liberal arts gives automatic “bonus points” to minorities in admissions).

WEEK 13 RACE-SPECIFIC CLASSIFICATIONS THAT BENEFIT MINORITIES IN PUBLIC CONTRACTING

Fullilove v. Klutznick (1980) (577-578)
(Congress requires 10 percent of federal funds spent on local public works to go to minority contractors).

City of Richmond v. Croson (1989) (578-581) (Virginia city requires prime contractors to subcontract 30 percent of their city business to minority businesses).

Adarand v. Peña (1995) (581-589) (Federal highway construction programs provide additional funds to contractors who hire subcontractors controlled by “socially and economically disadvantaged individuals”).

Constitutionality of “Benign” Racial Classifications (589-594).

WEEK 14 GENDER DISCRIMINATION IN ADMINISTRATION OF ESTATES, GOVERNMENT BENEFITS, AND BEER SALES

NOTE: NO CLASS WEDS., NOVEMBER 25TH; THANKSGIVING BREAK

Early Cases (622-623), including:
Bradwell v. Illinois (1873) (622);
Muller v. Oregon (1908) (623).

Reed v. Reed (1971) (624) (Idaho gives male survivors the right to administer estates).

Frontiero v. Richardson (1973) (624-626) (Federal law permits male members of armed services to claim wives as dependents without proving dependency).

From *Reed* to *Craig v. Boren* (626-629).

Craig v. Boren (1976) (629-634) (Oklahoma prohibits 3.2% beer sales to men under 21 and women under 18).

Heightened Scrutiny for Gender Classifications? (634-639).

**WEEK 15 GENDER DISCRIMINATION IN STATUTORY RAPE LAWS,
GOVERNMENT BENEFITS AND ADMISSION TO MILITARY
ACADEMIES**

Michael M. v. Sonoma (1981) (**only on e-reserves**) (California prohibits males from having sex with girls outside of marriage).

Archaic and Overbroad Generalizations v. “Real” Differences (639-640).

The Relevance of “Real Differences” (654-658).

Califano v. Goldfarb (1977) (658-661) (Social Security benefits are automatically payable to widows of beneficiary while widowers have to prove dependency).

Califano v. Webster (1977) (661-662) (Social Security Act allows women to exclude more of their lower wage earning years than men in calculating retirement benefits).

The Problem of “Benign” Gender Classifications (662-665).

U.S. v. Virginia (1996) (640-647).

(All male military school – VMI -- wants to stay that way).

“Real Differences” and Formal Equality (647-650).

WEEK 16 FINALS

**NOTE: FINAL EXAM, MON., DECEMBER 7TH, 4-5:50 P.M.
GOOD LUCK!**