Constitutional Law

Sections 1 & 2

Professor Fleming

Spring 2007

Syllabus

Materials for Course

Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, American Constitutional Interpretation (3d ed. 2003) (“ACI”)

Supplemental Readings (“SR”)

ACI is available in the Bookstore. SR will be available on Blackboard. The Student User Guide to Fordham Blackboard Courses is appended on pages 13-14 of this Syllabus. Both ACI and SR will be on reserve in the Library.

Administrative Details

Office: Room 229
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Email: jfleming@law.fordham.edu
Office Hours: 1:00-2:00 Monday (before class) or by appointment
Final Examination: Wednesday, May 9, 9:30-12:30 (limited open book exam: no copies of answers to previous exams that were on reserve in the Library are permitted in the exam room)

Assignments

There will be 28 class meetings during the semester, and there are 28 assignments formulated below. Some assignments will take more, and others less, than a full class session, but this syllabus should serve to indicate the overall pace and emphases of the course.

Most of the assigned cases and materials are in ACI, and are noted in the syllabus with page numbers. The remaining assigned cases and materials are in the Supplemental Readings available on Blackboard, and are noted with “SR.” The assigned introductory chapters in ACI are noted with page numbers preceded by “ACI.” Entries on the syllabus with no assigned pages indicate topics on which I shall lecture briefly.
General Outline

I. The Problems of Constitutional Interpretation: What is the Constitution? Who May Authoritatively Interpret It? and How is It to be Interpreted?

II. Who May Authoritatively Interpret the Constitution?
   
   A. For the National Government?
   B. For the Federal System?

III. How is the Constitution to be Interpreted? Keeping Political Processes Open

   A. Freedom of Political Communication
   B. Political Participation

IV. How? Treating Equals Equally

   1. Historical Background and Deferential Scrutiny
   2. Suspect Classifications: Race and Ethnicity
   3. Affirmative Action
   4. Somewhat Suspicious Classifications: Gender
   5. Other Suspect or Somewhat Suspicious Classifications?
   6. Fundamental Rights and Interests

V. How? General Theories

   A. Interpretivism/Originalism
   B. Protecting Fundamental Rights
   C. Deferring to the Representative Process
   D. Reinforcing the Representative Process

VI. How? Protecting Fundamental Rights

   A. Economic Liberties
   B. Personal Liberties
      1. Privacy
      2. Abortion
      3. Family
      4. Homosexuality
      5. Euthanasia

VII. How? Inferences from Structures and Relationships

   A. Separation and Sharing of Powers within the National Government
   B. Sharing of Powers within the Federal System

VIII. Conclusion: Courts, Legislatures, and the Vindication of Constitutional Rights and Powers
Specific Assignments

I. THE PROBLEMS OF CONSTITUTIONAL INTERPRETATION:
  WHAT IS THE CONSTITUTION?
  WHO MAY AUTHORTITATIVELY INTERPRET IT?
  AND HOW IS IT TO BE INTERPRETED?

Background Reading

A. Introduction: What, Who, and How

ACI, 1-21, 43-74

January 8

B. Competing Conceptions of What, Who, and How

Planned Parenthood v. Casey, 1404-37

II. WHO MAY AUTHORTITATIVELY INTERPRET THE CONSTITUTION?

January 10

A. For the National Government?

1. Introduction

ACI, 274-89

2. Competing Conceptions of Who

Hamilton, Federalist No. 78, 299-303
Marbury v. Madison, 303-04, 312-20
Jefferson Instructs a Federal Prosecutor, 320-22
Jackson’s Veto of the Bank Bill, 326-27
Lincoln’s First Inaugural Address, 328-32
Roosevelt’s Speech on Reorganizing the Federal Judiciary, 332-37
United States v. Nixon, 337-41
Selected materials on Presidential Signing Statements, SR 1

January 15: No class (Martin Luther King Day)
January 17

B. For the Federal System?

1. Introduction

ACI, 359-64

2. Competing Conceptions of Who

Nullifying and Reaffirming Brown v. Board of Education, 377-80
Cooper v. Aaron, 380-84
Remarks of Attorney General Meese on Cooper v. Aaron, SR 2

3. The Presidential Election Controversy

Bush v. Gore, 1558-77
Selected materials on the Presidential Election Controversy, SR 3

III. How is the Constitution to be Interpreted?
Keeping Political Processes Open

A. Freedom of Political Communication

January 22

1. Introduction

ACI, 692-701

2. The Structural Role of the First Amendment


3. Advocacy or Incitement of Unlawful Action

Whitney v. California, 713-19
Dennis v. United States, 719-28
Brandenburg v. Ohio, 728-33

January 24

4. Fighting Words and Offensive Expression
5. Defamation of Groups

Beauharnais v. Illinois, 736-42

January 29

6. Harmful Expression

American Booksellers Association, Inc. v. Hudnut, 767-74

7. The Right Not to Speak

Minersville School District v. Gobitis, 1266-75
West Virginia v. Barnette, 1275-82

8. Symbolic Expression

United States v. O’Brien, 775-80
United States v. Eichman, 780-86

B. Political Participation

January 31

1. Introduction

ACI, 796-805

2. The Right to Vote and Have One’s Vote Counted Equally

Reynolds v. Sims, 814-24
Harper v. Virginia State Board of Elections, 238-43, 824
Bush v. Gore, 1558-77 (again)

February 5

3. The Right to Associate
IV. **HOW? TREATING EQUALLY EQUALLY**

**A. The Problems of Equal Protection: Suspect Classifications**

**February 7**

1. Introduction

ACI, 895-904, 906-17

2. Historical Background

Dred Scott v. Sandford, 207-18
Strauder v. West Virginia, 919-23
Yick Wo v. Hopkins, 923-25
Plessy v. Ferguson, 926-31

3. Deferential Scrutiny

Williamson v. Lee Optical Co., 932-35

**February 12**

4. Suspect Classifications: Race and Ethnicity

Korematsu v. United States, 1548-56, 112-13
Brown v. Board of Education I, 936-41
Bolling v. Sharpe, 941-43
Brown v. Board of Education II, 943-47
Loving v. Virginia, 948-52
February 14

5. Affirmative Action

Regents of the University of California v. Bakke, 955-69
Adarand Constructors, Inc. v. Pena, 970-83
Grutter v. Bollinger, 984-1004

B. The Problems of Equal Protection: Somewhat Suspicious Classifications and Fundamental Rights

February 19 No class (Presidents Day)

February 20 (Monday schedule of classes)

1. Introduction

ACI, 1005-19

2. Somewhat Suspicious Classifications: Gender

Frontiero v. Richardson, 1022-27
Craig v. Boren, 1027-32
United States v. Virginia, 1033-49

February 21

3. Other Suspect or Somewhat Suspicious Classifications?

San Antonio School District v. Rodriguez, 1050-61
Cleburne v. Cleburne Living Center, 1135-45
Romer v. Evans, 1062-76

February 26

4. Fundamental Rights and Interests

Skinner v. Oklahoma, 1093-97
Reynolds v. Sims, 814-24 (again)
Harper v. Virginia State Board of Elections, 238-43, 824 (again)
Shapiro v. Thompson, 1098-1106
Dandridge v. Williams, 1115-20
V. **How is the Constitution to be Interpreted? General Theories**

**February 28**

1. Interpretivism/Originalism

   Scalia, *Originalism: The Lesser Evil*, 243-48

2. Protecting Fundamental Rights


3. Deferring to the Representative Process

   Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 672-79

4. Reinforcing the Representative Process

   United States v. Carolene Products Co., 679-91

**VI. How? Protecting Fundamental Rights**

A. Economic Liberties

**March 5**

1. Introduction

   AC1, 1147-54, 1158-71
   Locke, *Property and the Ends of Political Society*, 1174-77
   Madison, *Federalist No. 10*, 1178-82

2. Economic Substantive Due Process

   Calder v. Bull, 134-38
   Lochner v. New York, 1199-1205
West Coast Hotel v. Parrish, 1213-20
Ferguson v. Skrupa, 1221-23

3. The Takings Clause
4. The Contracts Clause

B. Personal Liberties

March 7

1. Introduction

ACI, 1356-66


Meyer v. Nebraska, 1369-73
Pierce v. Society of Sisters, 1374-75

3. Privacy

Poe v. Ullman, 149-57
Griswold v. Connecticut, 158-69

March 12 & 14: No class (Spring Break)

March 19

4. Abortion

Roe v. Wade, 1381-94
Harris v. McRae, 1394-1403
Planned Parenthood v. Casey, 1404-37 (again)

March 21

5. Family

Moore v. East Cleveland, 1437-44
Zablocki v. Redhail, 1122-27
Michael H. v. Gerald D., 169-78
March 26

6. Homosexuality I

Bowers v. Hardwick, 1445-61
Romer v. Evans, 1062-76 (again)
Lawrence v. Texas, 1461-81

March 28

7. Homosexuality II

Baker v. State of Vermont, 1076-92
Goodridge v. Department of Public Health, SR 5

April 2

8. Euthanasia

Cruzan v. Director, Missouri Dept. of Health, 1482-93
Washington v. Glucksberg, 1494-1512

9. Is the Constitution a Charter of Negative Liberties?

DeShaney v. Winnebago County Dept. of Social Services, 1513-20

April 4: No class (make-up class on Thursday, April 12, 12:30-2:00)

VII. HOW? INFERENCES FROM STRUCTURES AND RELATIONSHIPS

A. Separation and Sharing of Powers within the National Government

April 11

1. Introduction

ACI, 448-54
Madison, Federalist No. 51, 455-58

2. Presidential Power
United States v. Curtiss-Wright Export Corp., 464-66
Youngstown Sheet & Tube Co. v. Sawyer, 466-77
United States v. Nixon, 337-41 (again)
The War Powers Resolution, 478-86
Hamdan v. Rumsfeld, SR 6

April 12: Make-up class (for April 4), 12:30-2:00

3. Congressional Power I

Immigration and Naturalization Service v. Chadha, 518-31
Clinton v. New York, SR 7
Bowsher v. Synar, 531-45

April 16

4. Congressional Power II

Morrison v. Olson, SR 8
Mistretta v. United States, SR 9

B. Sharing of Powers within the Federal System

April 18

1. Introduction

AC1, 547-57
Madison, Federalist No. 39, 559-62

2. The Basic Structure of Federalism

McCulloch v. Maryland, 563-75
Slaughter-House Cases, 577-91 & 146-49

April 23

3. The Commerce Power I

Gibbons v. Ogden, 591-97
United States v. Darby, 597-602
April 25

4. The Commerce Power II

National League of Cities v. Usery, 602
Garcia v. San Antonio Metropolitan Transit Authority, 603-10
New York v. United States, 613-24
Printz v. United States, 625-39

VIII. CONCLUSION: COURTS, LEGISLATURES, AND VINDICATION OF CONSTITUTIONAL RIGHTS AND POWERS
In order to access Fordham's Blackboard site, you must direct your web browser to the following address:

http://fordham.blackboard.com/

*Note: There is no “www” in this address.*

Then:

1. Click on the Login button located at the left of the screen.
2. After you press the Login button, the Welcome Screen will appear requesting your Username and Password.
3. **Your username is your Lotus Notes Email username**, or everything before the @ sign. For example, if your email address is jsmith@fordham.edu, your username is jsmith.
4. **Your password is your four digit Oasis pin number.** If you have forgotten your password click on the “Forgotten Password” link and follow the instructions.
5. After you have filled in the correct username and password click Login.

Your Lotus Notes Email and Your Oasis Pin Number have already been established. If you have any questions, please contact the CIMS Help Desk at 718-817-3999 (or 1-3999 from any Lincoln Center Campus phone).

**Welcome Page**

Once you have logged into Fordham University’s Blackboard site, you will be greeted with a Welcome Page. It will identify you by your first name and the Course(s) in which you are participating. Choose from one of the courses listed on the right of the screen so that you can begin participating in that course.

**Enrollment**

Because the inputting of class rosters is done before the add/drop period is over, you may not see a course for which you have registered through the Registrar’s Office or Oasis. You can browse the Law School section of the Course Catalog to find the course you need. Follow the prompts to enroll yourself in the Blackboard Course. **NOTE:** Remember that if you enroll in a Blackboard course, you must also be officially registered in that course to receive course credit. If you are not sure if you are officially registered please go to our online registration system (http://oasis.fordham.edu) or contact the Registrar’s Office.
Editing Personal Information

The Edit Personal Information option allows you to control the information that appears in your account's profile. You can change the values in fields, populate empty fields, or remove information from fields. The fields with a red asterisk must be included. **Note: Please change your e-mail address to the one you use most regularly.** This will ensure timely communication.

Changing your Email address

If you would like to change your default email address, which is your Fordham email address, to one you check more frequently, please do the following:

1) Log on to Blackboard;
2) Go to the "TOOLS" area of your Welcome Page;
3) Go to "PERSONAL INFORMATION;"
4) Click "EDIT PERSONAL INFORMATION;"
5) Your Fordham email address will be there already. Replace it with the one you use regularly.

The Change Password option manages your account password in Blackboard ONLY and not in Lotus Email, etc.

The Set Privacy Options option manages your profile in the User Directory. Individuals may choose to make information available through the User Directory/Class roster, and controls what information will be displayed.

If you have any other questions, please contact the Law School’s Instructional Technologist, Daniel Auld at 212-636-6895 or by email: dau@law.fordham.edu You may also call the University’s Faculty Resource Center at 718-817-4706 or (1) 4706 if dialing from campus.