Constitutional Law

Sections 4 & 5

Professor Fleming

Spring 2003

Syllabus

Materials for Course

Walter F. Murphy, James E. Fleming & Sotirios A. Barber, *American Constitutional Interpretation* (2d ed. 1995) ("ACI")

Supplemental Readings ("SR")

ACI and SR are available in the Bookstore. Both will be on reserve in the Library.

Administrative Details

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Office Hours: 2:00-3:00 Wednesday or by appointment
Final Examination: Thursday, May 14, 2003, 10:00-1:00 (limited open book exam)

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 a package of Supplemental Readings, 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 may 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
Specific Assignments

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

Background Reading

A. Introduction: What, Who, and How
ACI, 1-19, 41-67

January 6

B. Competing Conceptions of What, Who, and How

1. Case

Planned Parenthood v. Casey, 1281-1314

2. Articles

Bork, Again, a Struggle for the Soul of the Court, SR 1
Dworkin, The Center Holds!, SR 2
Neuhaus, The Dred Scott of Our Time, SR 3
Sullivan, A Victory for Roe, SR 4
Holmes, Right to Abortion Quietly Advances in State Courts, SR 5

II. WHO MAY AUTHORITATIVELY INTERPRET THE CONSTITUTION?

January 8

A. For the National Government?

1. Introduction

ACI, 260-74

2. Competing Conceptions of Who

Hamilton, Federalist No. 78, 286-89
Marbury v. Madison, 289-90, 298-306
Jefferson Instructs a Federal Prosecutor, 306-08
Jackson's Veto of the Bank Bill, 313-14
January 13

B. For the Federal System?

1. Introduction

   ACI, 345-51

2. Competing Conceptions of Who

   Nullifying and Reaffirming Brown v. Board of Education, 371-75
   Cooper v. Aaron, 375-78
   Remarks of Attorney General Meese on Cooper v. Aaron, SR 6

3. The Presidential Election Controversy

   Bush v. Gore, SR 7
   Selected articles on the Presidential Election Controversy, SR 8

III. HOW IS THE CONSTITUTION TO BE INTERPRETED?
     KEEPING POLITICAL PROCESSES OPEN

   A. Freedom of Political Communication

January 15

1. Introduction

   ACI, 622-31

2. The Structural Role of the First Amendment


3. Advocacy or Incitement of Unlawful Action

   Whitney v. California, 651-57
   Dennis v. United States, 658-66
   Brandenburg v. Ohio, 672-77
January 20: No class (Martin Luther King Day)

January 22

4. Fighting Words and Offensive Expression

   Chaplinsky v. New Hampshire, 677-80
   Cohen v. California, 705-09

5. Defamation of Groups

   Beauharnais v. Illinois, 680-85

January 27

6. Harmful Expression

   American Booksellers Association, Inc. v. Hudnut, 710-16

7. The Right Not to Speak

   Minersville School District v. Gobitis, 1165-74
   West Virginia v. Barnette, 1174-80

8. Symbolic Expression

   United States v. O'Brien, 721-26
   United States v. Eichman, 727-33

B. Political Participation

January 29

1. Introduction

   ACI, 758-67

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

   Reynolds v. Sims, 777-87
   Harper v. Virginia State Board of Elections, 225-30, 787
   Bush v. Gore, SR 7 (again)
February 3

3. The Right to Associate

NAACP v. Alabama, 797-803
Roberts v. United States Jaycees, 818-27
Boy Scouts of America v. Dale, SR 9

4. Money and Politics

Buckley v. Valeo, 828-33

IV. HOW? TREATING EQUALS EQUALLY

A. The Problems of Equal Protection I

February 5

1. Introduction

ACI, 872-82, 884-95

2. Historical Background

Dred Scott v. Sandford, 195-206
Strauder v. West Virginia, 896-900
Yick Wo v. Hopkins, 900-02
Plessy v. Ferguson, 902-08

3. Deferential Scrutiny

Williamson v. Lee Optical Co., 908-12

February 10

4. Suspect Classifications: Race and Ethnicity

Korematsu v. United States, 1383-91
Brown v. Board of Education I, 912-17
Bolling v. Sharpe, 917-19
Brown v. Board of Education II, 919-23
Loving v. Virginia, 926-31
February 12

5. Affirmative Action

Regents of the University of California v. Bakke, 942-54
City of Richmond v. J.A. Croson Co., 954-70
Adarand Constructors, Inc. v. Pena, SR 10

B. The Problems of Equal Protection II

February 17: No class (Presidents’ Day)

February 18: Monday schedule of classes

1. Introduction

ACI, 971-85

2. Somewhat Suspicious Classifications: Gender

Frontiero v. Richardson, 986-91
Craig v. Boren, 992-97
United States v. Virginia, SR 11

February 19

3. Other Suspect or Somewhat Suspicious Classifications?

Cleburne v. Cleburne Living Center, 1048-58
Romer v. Evans, SR 12

February 24

4. Fundamental Rights and Interests

Skinner v. Oklahoma, 1014-18
Reynolds v. Sims, 777-87 (again)
Harper v. Virginia State Board of Elections, 225-30, 787 (again)
Shapiro v. Thompson, 1019-27
Dandridge v. Williams, 1027-32
Plyler v. Doe, 1040-47
5. The Privileges or Immunities Clause

   Saenz v. Roe, SR 13

V. HOW IS THE CONSTITUTION TO BE INTERPRETED? GENERAL THEORIES

February 26

1. Interpretivism/Originalism

   Scalia, *Originalism: The Lesser Evil*, 231-36

2. Protecting Fundamental Rights


3. Deferring to the Representative Process

   Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 602-09

4. Reinforcing the Representative Process

   United States v. Carolene Products Co., 609-21

VI. HOW? PROTECTING FUNDAMENTAL RIGHTS

A. Economic Liberties

March 3

1. Introduction

   ACI, 1060-67, 1070-81
   Locke, *Property and the Ends of Political Society*, 1083-87
   Madison, *Federalist No. 10*, 1087-91

2. Economic Substantive Due Process

   Calder v. Bull, 121-25
   Lochner v. New York, 1110-15
   West Coast Hotel v. Parrish, 1123-29
   Ferguson v. Skrupa, 1129-31
3. The Takings Clause

4. The Contracts Clause

B. Personal Liberties

March 5

1. Introduction

ACI, 1236-45


Meyer v. Nebraska, 1247-51
Pierce v. Society of Sisters, 1251-53

3. Privacy

Poe v. Ullman, 141-46
Griswold v. Connecticut, 147-58

March 10

4. Abortion

Roe v. Wade, 1258-71
Harris v. McRae, 1271-80
Planned Parenthood v. Casey, 1281-1314 (again)

March 12

5. Family

Moore v. East Cleveland, 1314-21
Zablocki v. Redhail, 1034-39
Michael H. v. Gerald D., 158-67

March 17 & 19: No class (Spring Break)

March 24
6. Homosexuality

   Bowers v. Hardwick, 1322-37
   Romer v. Evans, SR 12 (again)
   Baker v. State, SR 14

March 26

7. Euthanasia

   Cruzan v. Director, Missouri Dept. of Health, 1338-49
   Washington v. Glucksberg & Vacco v. Quill, SR 15

8. The Constitution as a Charter of Negative Liberties?

   DeShaney v. Winnebago County Dept. of Social Services, 1350-56

VII. HOW? INFERENCES FROM STRUCTURES AND RELATIONSHIPS

A. Separation and Sharing of Powers within the National Government

March 31

1. Introduction

   ACI, 424-30
   Madison, Federalist No. 51, 432-35

2. Presidential Power

   United States v. Curtiss-Wright Export Corp., 441-43
   Youngstown Sheet & Tube Co. v. Sawyer, 443-55
   United States v. Nixon, 323-27 (again)
   The War Powers Resolution, 455-61

April 2

3. Congressional Power I

   Immigration and Naturalization Service v. Chadha, 485-98
   Clinton v. New York, SR 16
   Bowsher v. Synar, 499-513
April 7

4. Congressional Power II

Morrison v. Olson, SR 17
Mistretta v. United States, SR 18

B. Sharing of Powers within the Federal System

April 9

1. Introduction

ACI, 514-25
Madison, Federalist No. 39, 526-30

2. The Basic Structure of Federalism

McCulloch v. Maryland, 530-43
Slaughter-House Cases, 550-64 & 133-35

April 14

3. The Commerce Power I

Gibbons v. Ogden, SR 19
United States v. Darby, SR 20
United States v. Lopez, SR 21
United States v. Morrison, SR 22

April 21

4. The Commerce Power II

National League of Cities v. Usery, 565-76
Garcia v. San Antonio Metropolitan Transit Authority, 576-84
New York v. United States, 585-96
Printz v. United States, SR 23

VIII. CONCLUSION: COURTS, LEGISLATURES, AND THE VINDICATION OF CONSTITUTIONAL RIGHTS
April 23

Overview of the Course
Constitutional Law

Sections 4 & 5

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Assignment for First Class

The casebook for the course is Walter F. Murphy, James E. Fleming & Sotirios A. Barber, American Constitutional Interpretation (2d ed. 1995) ("ACI"). There is also a packet of Supplemental Readings ("SR"). Both will be available in the Bookstore.

The readings for the first class are as follows.

January 8

1. Case

   Planned Parenthood v. Casey, in ACI, 1281-1314

2. Articles

   Bork, Again, a Struggle for the Soul of the Court, SR 1
   Dworkin, The Center Holds!, SR 2
   Neuhaus, The Dred Scott of Our Time, SR 3
   Sullivan, A Victory for Roe, SR 4
   Holmes, Right to Abortion Quietly Advances in State Courts, SR 5

In the event that the packet of Supplemental Readings is not available in the Bookstore in time to prepare for the first class, I have made copies of the Supplemental Readings for the first class available outside Room 405.