Constitutional Theory

Professor Fleming

Spring 2003

Syllabus

Materials for Course

I. Required

Walter F. Murphy, James E. Fleming & Sotirios A. Barber, American Constitutional Interpretation (2d ed. 1995) ("ACI")
Robert H. Bork, The Tempting of America (1990)
Ronald Dworkin, Life's Dominion (1993)

Supplemental Readings ("SR")

All of the required materials will be available in the Bookstore. They also will be on reserve in the Library.

II. Recommended

Bruce Ackerman, We the People: Foundations (1991) & Transformations (1998)
Sotirios A. Barber, On What the Constitution Means (1984)
Sanford Levinson, Constitutional Faith (1988)
Antonin Scalia, A Matter of Interpretation (1997)
Laurence H. Tribe, American Constitutional Law (2d ed. 1988)
Mark Tushnet, Taking the Constitution Away from the Courts (1999)
Robin West, Progressive Constitutionalism (1994)

All of the recommended books will be on reserve in the Library.

Administrative Details

Office: Room 229 Fax: 636-6899
Phone: 636-6839 Email: jfleming@law.fordham.edu
Office Hours: 4:00-5:00 Thursday or by appointment
Paper: you may write a paper, which may be used to satisfy the School's writing requirement
Final Examination: or you may write a take-home final examination
Reaction Papers: you are required to write three short papers reacting to the readings; the first is due by February 6, the second by March 13, and the third by April 24
General Outline

I. The Problems of Constitutional Interpretation: What is the Constitution? Who May Authoritatively Interpret It? How is It to be Interpreted? (Assignment 1)

II. General Theories of Constitutional Interpretation (Assignments 2-3)
   A. Interpretivism/Originalism (Assignment 2)
   B. Protecting Fundamental Rights: Personal Liberties (Assignment 2)
   C. Reinforcing Representative Democracy (Assignment 3)
   D. Reinforcing Deliberative Democracy (or Liberal Republicanism) (Assignment 3)
   E. A Call for a Progressive Constitutionalism (Assignment 3)

III. Arguments For and Against Protecting Certain "Unenumerated" Fundamental Rights (Assignments 4-14)
   A. Economic Liberties (Assignment 4)
   B. Fundamental Rights Equal Protection (Assignment 5)
   C. Personal Liberties: Privacy, Personhood, and Equal Citizenship (Assignments 6-14)
      1. General Liberty and Privacy (Assignment 6)
      2. Family (Assignment 7)
      3. Abortion (Assignments 8, 9 & 10)
      4. Homosexuality (Assignments 11, 12 & 13)
      5. Euthanasia (Assignment 14)

IV. Reprise on Reinforcing Democracy and Protecting Fundamental Rights: A Call for Perfecting Constitutional Democracy (Assignment 14)
Specific Assignments

Assignment 1: January 9

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

A. Introduction: What, Who, and How

Interpreting a Constitution, 1-19
The Theoretical Context of Constitutional Interpretation, 41-67

B. Competing Conceptions of What, Who, and How

1. Case

Planned Parenthood v. Casey, 1281-1314

2. Defenses and Critiques

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, The Right to Abortion Advances Quietly in State Courts, SR 5

II. GENERAL THEORIES OF CONSTITUTIONAL INTERPRETATION

Assignment 2: January 16

A. Interpretivism/Originalism

1. Arguments for Interpretivism/Originalism

Bork, The Tempting of America, 133-60, 81-84
Scalia, Originalism: The Lesser Evil, 231-36

2. Case

Brown v. Board of Education, 912-17
B. Protecting Fundamental Rights: Personal Liberties

1. Arguments for Judicial Vindication of Fundamental Rights

   Dworkin, Life's Dominion, 118-47

2. Case

   Planned Parenthood v. Casey, 1281-1314 (again)

Assignment 3: January 23

C. Reinforcing Representative Democracy

1. Arguments for Judicial Deference to the Representative Process

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

2. Arguments for Judicial Reinforcement of Representative Democracy

   Ely, Democracy and Distrust, 73-104

3. Case

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

D. Reinforcing Deliberative Democracy (or Liberal Republicanism)

1. Arguments for Judicial Reinforcement of Deliberative Democracy (or Liberal Republicanism)

   Sunstein, The Partial Constitution, (1-39 recommended), 123-61, 347-54

2. A Critique of Process-Perfecting Constitutional Theories

   Fleming, *Constructing the Substantive Constitution*, SR 6, 211-20, 249-60 (recommended)

E. A Call for a Progressive Constitutionalism
West, *Progressive and Conservative Constitutionalism*, SR 7 (recommended)

**III. ARGUMENTS FOR AND AGAINST PROTECTING CERTAIN "UNENUMERATED" FUNDAMENTAL RIGHTS**

Assignment 4: January 30

**A. Economic Liberties**

1. Cases

   Dred Scott v. Sandford, 195-206  
   Lochner v. New York, 1110-15  
   West Coast Hotel v. Parrish, 1123-29

2. Critiques of "Lochnering"

   Bork, *The Tempting of America*, 36-49  
   Ely, *Democracy and Distrust*, 14-21 (again)  

3. The New Right v. the Libertarian Right on Economic Liberties

   Bork, *The Tempting of America*, 223-30

Assignment 5: February 6

**B. Fundamental Rights Equal Protection**

1. Cases

   Skinner v. Oklahoma, 1014-18  
   Shapiro v. Thompson, 1019-27  

2. Arguments for Welfare Rights

   Amar, *Forty Acres and a Mule*, SR 10  
3. Critiques of Welfare Rights

Ely, *Democracy and Distrust*, 148-49, 162, 172-79

4. Is the Constitution a Charter of Negative Liberties?

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

C. Personal Liberties: Privacy, Personhood, and Equal Citizenship

**Assignment 6: February 13**

1. General Liberty and Privacy

   a. Cases

      Meyer v. Nebraska, 1247-51
      Pierce v. Society of Sisters, 1251-53
      Poe v. Ullman, 141-46
      Griswold v. Connecticut, 147-58

   b. Arguments for Deriving Unenumerated Rights Through the Ninth Amendment

      Ely, *Democracy and Distrust*, 34-41
      Black, *On Reading and Using the Ninth Amendment*, SR 12
      Fleming, *Constructing the Substantive Constitution*, SR 6, 235-38

   c. Critiques of Doing So

      Bork, *The Tempting of America*, 95-100, 166-67, 178-85

**Assignment 7: February 20**

2. Family

   a. Cases

      Loving v. Virginia, 926-31
      Moore v. East Cleveland, 1314-21
      Michael H. v. Gerald D., 158-67
7

b. Critiques of Justice Scalia's *Michael H. Jurisprudence*

Bork, The Tempting of America, 235-40
Tribe & Dorf, *Levels of Generality in the Definition of Rights*, SR 13
(recommended)

Assignment 8: February 27

3. Abortion I

a. Case

Roe v. Wade, 1258-71

b. Arguments for the Right to Abortion

Dworkin, *Life's Dominion*, 3-35 (recommended), 81-117

c. Critiques of the Right to Abortion

Bork, The Tempting of America, 110-16
Noonan, *The Root and Branch of Roe v. Wade*, SR 16

Assignment 9: March 6

4. Abortion II

a. Cases

Roe v. Wade, 1258-71 (again)
Harris v. McRae, 1272-80
Planned Parenthood v. Casey, 1281-1314 (again)

b. Arguments for the Right to Abortion: Privacy versus Equality

Dworkin, *Life's Dominion*, 148-78, 50-57
Sunstein, *The Partial Constitution*, 257-61, 270-85
Assignment 10: March 13

5. Abortion III

a. Cases

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

b. Calls for Taking Responsibilities as well as Rights Seriously

West, Foreword: Taking Freedom Seriously, SR 18
Glendon, Rights Talk, SR 19
Dworkin, Life's Dominion, 57-67, 150-59 (again)
McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence, SR 20

Assignment 11: March 27

6. Homosexuality I

a. Case

Bowers v. Hardwick, 1322-37

b. Defenses of Bowers

Bork, The Tempting of America, 116-26

c. Critiques of Bowers

Ely, Democracy and Distrust, 162-64
Sandel, Moral Argument and Liberal Toleration: Abortion and Homosexuality, SR 21
Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, SR 22
Fleming, Constructing the Substantive Constitution, SR 12, 260-75

Assignment 12: April 3

7. Homosexuality II

a. Cases
Bowers v. Hardwick, 1322-37 (again)
Romer v. Evans, SR 23

b. Further Critiques of Bowers

Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, SR 24
Thomas, Beyond the Privacy Principle, SR 25

c. Critiques of Romer

Dworkin, Sex, Death, and the Courts, SR 26, 44-45, 47-50
Halley, Romer v. Hardwick, SR 27 (recommended)
Sunstein, Foreword: Leaving Things Undecided, SR 28, 6-10, 53-71

Assignment 13: April 10

8. Homosexuality III

a. Case

Baker v. State of Vermont, SR 29

b. Assessments of Baker

9. A Critique of the Calls for a Substantive and a Minimalist Republicanism

Fleming and McClain, In Search of a Substantive Republic, SR 30

Assignment 14: April 24

10. Euthanasia

a. Cases

Cruzan v. Director, Missouri Dept. of Health, 1338-49
Washington v. Glucksberg and Vacco v. Quill, SR 31

b. Critiques

Dworkin, Life's Dominion, 179-217, 237-41 (218-37 recommended)
Dworkin, Assisted Suicide: What the Court Really Said, SR 32
Carter, *Rush to a Lethal Judgment*, SR 33
Fleming, *Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?*, SR 34
Sandel, *Last Rights*, SR 35
Sunstein, *Foreword: Leaving Things Undecided*, SR 28, 93-96

IV. REPRISE ON REINFORCING DEMOCRACY AND PROTECTING FUNDAMENTAL RIGHTS: A CALL FOR PERFECTING CONSTITUTIONAL DEMOCRACY

Fleming, *Securing Deliberative Autonomy*, SR 36
Constitutional Theory

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Spring 2003

Assignment for First Week

Materials for Course

The casebook for the course is the second edition of Walter F. Murphy, James E. Fleming & Sotirios A. Barber, American Constitutional Interpretation (Foundation Press, 1995) ("ACI"). The casebook is available in the Bookstore.

There are four additional books that will be available in the Bookstore.

There will also be a packet of Supplemental Readings ("SR"). The first installment of it is available outside Room 405.

Primary Reading for January 9

1. Case

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

2. Defenses and Critiques

   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, The Right to Abortion Advances Quietly in State Courts, SR 5

Background Reading

   ACI, Ch. 1, pp. 1-19, & Ch. 3, pp. 41-67
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Professor Fleming

Spring 2003

Reading for Second Week

The readings for the second week include pp. 118-47 of Ronald Dworkin, Life’s Dominion. Unfortunately, this book is not yet available in the Bookstore. They told me that it will be available by Thursday. But in the event that it is not, I have made pp. 118-47 available outside Room 405.