I. Required Texts

Kathleen Sullivan and Gerald Gunther, *Constitutional Law* 15th Ed. Foundation Press (Text)


Photocopied Materials Distributed in Class

II. General Course Requirements

a. Quiz on *Understanding Supreme Court Opinions* (10% of final grade.)
b. Midterm examination (30% of final grade).
c. Final examination (60% of final grade).
d. Class Attendance – Failure to Attend Regularly Will Result in a Grade Reduction
e. Regular and valuable contributions to class discussions can lead to an up-ward adjustment of the final grade when the final grade, based on the quiz and exam, is close to the next grade on the grade scale.

III. Instructions; Tips

a. Seek to formulate the *ratio decidendi* of the decisions as if you were:
   i. Defending the government in a suit
   ii. Bringing the suit
b. Ask yourself how you would rule on the decisions if you were a Justice on the Court? Why would you rule that way?

PART ONE

January

Wed. 12 INTRODUCTION TO COURSE and TO LAW
Fri. 14  READING SUPREME COURT OPINIONS and THE REACH OF THE CONSTITUTION (the State Action Doctrine)

T. R. van Geel, Understanding Supreme Court Opinions – Note
There Will Be a Quiz on This Book on Feb. 4th

The Constitution was drafted to establish government; define its purposes and its powers. It also establishes certain rights which limit the methods government may use in achieving its legitimate purposes. In short, it is a document directed to and controlling only by governmental action. The Constitution does not speak to, address or control the actions of “private” actors.

Text: 924 (DeShaney)-925

Sometimes, however, “private” actors are engaged in governmental action. The next cases help us discover when a private actor is engaged in governmental (state) action, and, hence, is subject to the limitations of the Constitution. What is the test which emerges from the cases? Why is “state action” found to be present Burton but not in the Jackson,Blum, and Rendell-Baker cases?

Text: 907-910; 916-924

Mon. 17  No Class – Martin Luther King Day

Wed. 19  THE POWER OF JUDICIAL REVIEW

Introduction: In Marbury v. Madison the Supreme Court takes to itself the power of “judicial review.” The Court uses this power to strike down - declare unconstitutional the Judiciary Act of 1789. Because the Court struck down this law the Court said it could not take the case brought by Marbury. Marbury relied on the Judiciary Act to bring his suit, but, if the act was not constitutional, his suit had to be dismissed. Why was the Judiciary Act not constitutional?

The answer to that question is not the most interesting part of the Marbury decision. The most interesting part is the claim by the Court that it had the authority to declare a statute passed by Congress to be unconstitutional. It was this taking of the power of judicial review that was the important part of the case. What reasons did the Supreme Court offer that it had this power? Were those reasons convincing?

What is the ratio decidendi of this case? What is the strategy of justification? What is the scope of the judicial power taken by the Court?

Text: 2-31; 68-73
PART TWO: CIVIL LIBERTIES

Section One: Economic, Property and Privacy Rights

Fri. 21

SUBSTANTIVE DUE PROCESS: THE REGULATION OF BUSINESS

To what extent does the Constitution protect property rights and the free market? Should property rights and freedom of contract receive the same degree of protection as the right to freedom of speech?

Read the 14th amendment and find the due process clause. How are the cases we read for this assignment related to this clause? What does the phrase “substantive due process” mean?

As you read the cases you should think about the kinds of questions raised in van Geel, pp. 129-136. What is the ratio decidendi of these cases? What strategy of justification do they adopt? Are these originalist or nonoriginalist decisions?

The assigned cases trace the change in approach and doctrine of the Supreme Court regarding the regulation of business. The Lochner case represents one extreme position and the Lee Optical the other. Why is Lochner viewed today as a mistake? How might Lee Optical be criticized?

What is the underlying ideological change that has occurred when we move from Lochner to Lee Optical? How would you state the ratio decidendi of Lochner and Lee Optical?

Text: 485-506

The Supreme Court’s attitude regarding its role in reviewing the constitutionality of legislation other than legislation regulating business is today very different. The Court is more willing to “closely scrutinize” other forms of legislation. The starting point for understanding the theory behind the Court’s willingness to engage in more vigorous review in these other cases is taken up in the next part of the assignment. Is there an ideological change involved in this new approach?

Text: 506-513

Mon. 24 continued
Wed. 26 TAKING AND REGULATING PROPERTY

Property rights are specifically and expressly protected in the Constitution. Look at the fifth amendment. How should the term “taking” be defined? Should it cover only the physical appropriation of property? Should the term be expanded to cover limitations on the use of property? Expanded to include some loss of the value of the property due to a regulation? Is there a taking if all economic value is lost because of the regulation? Is there a taking if the reason the government acted was not very important but there is no taking if the government acted for important reasons?

Text: 514-534

Fri. 28 SUBSTANTIVE DUE PROCESS: PRIVACY

We turn now to a series of cases in which the Court considers how far government may go in regulating matters of personal life style. If government is not to be severely limited in its efforts to regulate business and property, why should it be limited in its efforts to regulate personal life style? Look at Understanding Supreme Court Opinions.

Very important here are the techniques the Court uses to interpret the Constitution. How does the Court go about finding these rights in the Constitution? Look at Understanding Supreme Court Opinions.

Contraception

What is the standard of review used in Griswold?
What is the ratio decidendi of Griswold?

Text: 544-557

Abortion May Not Be Banned:

Is Griswold a solid precedent for the Roe decision?
Setting aside the issue of precedent, is Roe well reasoned?

Text: 558-569

The Roe Decision is Revised

Text: 574-to top of 577; 578 (Starting with
Section IV) – 582; 587-591.

Abortion Funding:

Banning abortions and refusing to fund abortions are different things. Why is government forbidden by the Constitution from banning abortions, yet it is not required to fund abortions? If these abortion funding cases had been decided the way the dissent wanted them decided, what would the implications have been for other constitutional rights?

Text: 569 (Maher) - 572

Other Privacy Issues:

Should the Supreme Court recognize a right to marry (Zablocki) or to live with one’s grandchildren, (Moore) or visit one’s children (Michael H.)? Did Griswold protect a right of sexual intimacy as such? (See Lawrence.) Should the Constitution protect one’s right to self-grooming? (Kelley) What are the “sources” of these rights?

Text: 591-614

Death

What are the state interests in not allowing someone to accelerate the moment of one’s death? How strong are those interests? Should there be a recognized right of liberty to: (a) commit suicide when not terminally ill; (b) withdraw lifesupport when terminally ill; (c) have the assistance of a physician in dying when terminally ill; (d) be subject to active euthanasia by a physician when one is terminally ill? If the state regulates in these areas, what standard of review should be used? What approach to constitutional interpretation be used?

Text: 614-629

Mon. 31 continued

February

Wed. 2 continued

Fri. 4 continued; Quiz on Understanding Supreme Court Opinions
Section Two: Religious Liberty

The origin of democratic liberalism can be found in the Reformation when religious toleration became a central concern. Religious liberty is to a significant extent the headwaters of the other liberties we hold to be central to the notion of our system of government.

Mon. 7 GOVERNMENTAL ECONOMIC ASSISTANCE TO RELIGION

Read the first amendment. Also revisit Understanding Supreme Court Opinions. What is a “strong” establishment clause and a “weak” establishment clause? Also consider if there are circumstances when government has a duty to aid religion? How can a duty to aid religion be squared with the duty not to create an “established church”?

Text: 1434-1444; 1507-1532 1503-1513; 1580-1606.

Wed. 9 continued

Fri. 11 GOVERNMENT AND RELIGIOUS PRACTICES AND SYMBOLS

What is it that leads in these cases to a ruling that the governmental policy is unconstitutional? For example, how can you distinguish Weisman from Lynch?

Text: 1546-1580

Mon. 14 continued

Wed. 16 RELIGIOUS LIBERTY
How can one know whether a law is intentionally discriminatory against religion? (Babalu Aye.) In dealing with the question of whether the free exercise clause requires an exemption from a law which not passed in order to discriminate against religion the court’s rulings have taken an almost circular path. Are we back where we started with the first rulings? What is the ratio decidendi of Yoder? Of Smith? How do the tests used by the Court differ in these two cases? Would exemptions really flirt with chaos? What is a “weak” versus a “strong” version of the free exercise clause?

Text: 1513-1531; 1533-1546

Fri. 18 continued

**Section Three: Political Liberties**

The Court protects free speech more strongly than political liberties. Why? What is “speech” anyway? Why do we care about defining this term?

Mon. 21 POLITICAL SPEECH: THE DEVELOPMENT OF THE CLEAR AND PRESENT DANGER TEST

We begin by drawing a distinction between content-based restrictions and content-neutral restrictions. Thus, cases can go down either of “two tracks” with different tests applying if the restriction is content-based as opposed to being content-neutral.

Text: 984-996; 1192-1206; 1038-1043; 1248-1253

A central purpose of the government is to maintain public peace and to maintain itself. “The constitution is not a suicide pact.” Yet what may government do to deal with speech which is not politically orthodox, which in fact advocates resistance and rebellion. The cases which follow outline the history of the Court’s effort to deal with radical political speech. Must government tolerate the speech of those who would abolish free speech? The test to be used in this area has changed over the years? Which test do you think should be used?

The Origins of the Clear and Present Danger

Text: 996-1008

Judge Hand's Suggested Alternative

Text: 1008-1012

Holmes and Brandies Revise the Clear and Present Danger Test
The Dennis Test and the Red Scare

The Modern Clear and Present Danger Test

Heckler’s Veto

Speech In Governmental Educational Institutions

Wed. 23 continued

Fri. 25 continued

Mon. 28 SHOULD CERTAIN CATEGORIES OF SPEECH GET A LOWER DEGREE OF PROTECTION?

Why should commercial speech be protected by the first amendment? Is protecting commercial speech an originalist or nonoriginalist position? How has the doctrine regarding commercial speech evolved over the years? What are the tests used in this area?

Commercial Speech

What is the prevailing test? And is that test applied with vigor or does it operate as a rather lenient test?

Text: 1158-1179; 1182-1191

Indecent/Vulgar Speech
Is vulgar speech still protected? How would you describe the current doctrines regarding protection of vulgar speech? Why does this speech get less protection? Is it today not possible to protect children without violating the rights of adults? Does a professor have a constitutional right to use vulgar language in the classroom?

Text: 1043-1048; 1126-1158; 1221-1226

March
Wed. 2 MIDTERM
Fri. 4 continued

Spring Break
Mon. 14 SHOULD CERTAIN CATEGORIES OF SPEECH BE EXCLUDED FROM FIRST AMENDMENT PROTECTION?

Some kinds of speech activities have never been considered to be covered by the first amendment. For example, no one has seriously argued that offering a bribe to a public official is protected speech. Nor has it been entertained that solicitation a crime, providing information which helps a prisoner escape, or providing an accomplice with the combination number to a safe, or perjuring oneself in court, or lying in order to defraud a person are speech activities which are covered by the first amendment. But the Court and scholars have debated whether other kinds of speech activities are or should be excluded from the protection of the first amendment.

Fighting Words and Racist Speech

The fighting words doctrine is a narrow doctrine. Is it too narrow? Ought other speech which wounds the psyche but is not likely to cause a fight to prohibitable by government? What exactly is government permitted and not permitted to do regarding the regulation of deeply offensive speech? What are the implications of these decisions for such issues are racial and sexual harassment on the job? May government control racist and sexist speech on college campuses? How? to what extent?

Has the Supreme Court been consistent in its rulings?

Text: 1038-1043; 1054-1056; 1333-1350; 1074-94

Obscenity
Why should sexually explicit “speech” not be protected by the first amendment? Or should it be protected? Should some sexually explicit speech fall within the first amendment and some not? How should the line be drawn?

Text: 1094-1095; 1102-1120

Subordination of Women

The ordinance struck-down in American Booksellers does or does not define “obscenity?” Is the theory behind this ordinance consistent with first amendment theory as found in cases such as Brandenburg?

Text: 1120-1126

Wed. 16 continued

Fri. 18 CONTENT NEUTRAL REGULATIONS AND PUBLIC FORUMS

Damaging Content Neutral Regulations

Text: 1209 (Arcara)- 1210; 1376-1378

Content Neutral Regulations in Public Spaces

How should one determine if a regulation is truly content neutral? Should it make a difference if the ban is a total medium ban? What kinds of reasons are good enough reasons to support content neutral regulations? Are the cases consistent?

Text: 1226-1248; 1254-1262; 1280-1292

Mon. 21 RIGHT NOT TO ASSOCIATE (and compelled speech)

The Supreme Court has recognized and protected in various ways a first amendment right to associate. This protection has included a right of public employees to be members of subversive organizations; the right of associations to keep their membership lists private; and the right of associations to engage in such concerted activities to engage in nonviolent
economic boycotts. The materials assigned here focus on a related right – a right not to associate.

Text: 1409-1419; 1383-1386; 1373-1378

Wed. 23  MONEY AND POLITICAL CAMPAIGNS

Does a ruling which allows the regulations of contributions but not the regulation of expenditures, make sense? What is “soft money”? Has the Court gone too far in permitting the regulation of soft money?

Text: 1424-1461.

Fri. 25  RESTRANITS ON THE PRESS; ACCESS TO PRIVATE PROPERTY

Prior Restraints and Gag Orders

Text: 1350-1372

Libel

Text: 1054-1069

Right of Reply

Text: 1378

Access to Private Property

Text: 1378-1383

Broadcast Media- OPTIONAL

Are there good reasons for the Court to treat the broadcast media differently from the print media?

Text: 1421-1433

Mon. 28  continued

Wed. 30  continued
PART THREE: CIVIL RIGHTS

April

Fri. 1 EQUAL PROTECTION: GENERAL PERSPECTIVE

Look at the equal protection clause of the fourteenth amendment. This clause does not require that all people be treated identically. Government may treat people differently if there is adequate justification for the difference in treatment.

The next cases are Group III cases. How does the rational basis test operate in these cases? What is the ratio decidendi of the Railway Express case? What is the ratio decidendi of Massachusetts Board of Retirement?

Text: 640-655; 825-837

Mon. 4 EQUAL PROTECTION: OVERT RACE-DEPENDENT DISCRIMINATION

Banning De Jure Segregation and Discrimination

The next cases are Group I cases. All these cases deal with de jure racial discrimination being openly carried out by government. We will review the cases in chronological order, not the order printed in the book. Begin by comparing Strauder and Plessy. Are these cases inconsistent or can they be distinguished? What is the ratio decidendi of the Brown I decision? The Brown decision does not make specific reference to the strict scrutiny test. How might you re-write the opinion using this test? Is this a nonoriginalist or nonoriginalist opinion? Notice that the Brown decision has wide implications, e.g., consider the problem of race and jury selection.

What is the reason the Court uses a strict scrutiny test in racial discrimination cases?

Text: 837-838; 667-685.

Wed. 6 continued

Fri. 8 EQUAL PROTECTION: COVERT RACIAL DISCRIMINATION and the DE JURE/DE FACTO DISTINCTION

In the previous cases the government did not hide the fact it was relying on a racial criterion. We now turn to cases in which government denies that it was relying on racial considerations in carrying out its policies.
The Need to Prove Intent: Why?

But before we get to that question, we need to ask whether it is important that the plaintiff prove an intentional use of a racial criteria, or should it be sufficient that the plaintiff prove that the policy has a racially discriminatory impact (de facto discrimination) and the intention to cause this discrimination is irrelevant.

What is the ratio decidendi of the Davis opinion? Is it a sound decision?

Text: 688-697; 803 (Feeney) - 806

How to Prove Intent

Assuming that the plaintiff must prove an intent to discriminate, the next question is what must the plaintiff prove to establish that the government acted with the "intent" to discriminate on the basis of race? How must the plaintiff go about proving this intent? Pay close attention to the "foreseeability test."

Text: Re-read Washington v. Davis. 704-705; 699-700; 704-707

Remedying School Segregation

Text: 698-704

Mon. 11 continued

Wed. 13 EQUAL PROTECTION: DISCRIMINATION BASED ON GENDER

These are Group II cases. The Court’s handling of gender discrimination has gone through several phases and is still not fully stabilized today. You should trace the development of the law in this area from Goeaert to the present. Also, ask yourself whether it is justifiable that the Court addresses gender discrimination in a way that is very different from racial discrimination.

Overt: How is gender like and unlike race?

Text: 769-803

Covert

Text: 803-806
Fri. 15 continued

Mon. 18 EQUAL PROTECTION: AFFIRMATIVE ACTION

Gender and Affirmative Action

In the cases that follow a social welfare type benefit is provided to one group of people, but not to another.

Text: 806-810

Race and Affirmative Action

Affirmative action based on race is supported for a variety of reasons. One reason is the current racism of white society. Another argument is that, while whites today may not be racist today, there was clear wrong-doing in the past. Thus, the argument continues, we need to correct past wrongs. Another aims is to bring about equality in the future, even if today’s inequality was not caused by past wrong-doing (forward looking reform). Some speak in terms of the need to overcome “institutional racism,” meaning that the past wrongs have been institutionalized and is perpetuated by indifference, inertia and lack of courage. In a number of the cases which follow, these are the central reasons for the program. There is an implication here that without affirmative action “people of color cannot at present compete on the same playing field with people who are white.”

In other cases, these concerns play a role as well as additional consideration -- the desire to assure the presence of a “minority viewpoint,” in order to assure a diversity of perspectives. This may assume there is a special minority perspective and that there is a dominant white-male perspective that needs to be counter-balanced. Thus what is needed is promotion of people of color because they have a distinct and valuable perspective on the problems generated by racism.

Affirmative action, thus, often rests on an assumption that minorities, especially African-Americans, have suffered in ways that are unique. This special history makes them a special group deserving of special treatment.

All these assumptions have been challenged as well as the claims that affirmative action helps the minority community, that injured members of the majority community deserve to be injured, and that there are no other solutions.

What is current doctrine regarding the permissibility of affirmative action? How would you describe the difference between the liberals and conservatives on the Court regarding affirmative action?
Fri. 22 FUNDAMENTAL RIGHTS AND DISCRIMINATION ON THE BASIS OF WEALTH

The period of the “Warren Court” (1953-1969) was marked by many liberal rulings, but among the most distinctive of these was the effort to seek to extend special protections to the poor. The kind of discrimination addressed was de facto wealth discrimination in a context in which a “fundamental right” was also affected.

What is the ratio decidendi of the cases in the text? Note how these case may be moving toward establishing a right to governmental subsistence. They also seem to point to a right to a minimally adequate level of governmental services. Do the cases today recognize a right to minimally adequate services of all kinds?

The Right to Vote

Text: 839-841

Reapportionment

Baker v. Carr deals with the doctrine of justiciability and concludes that this doctrine is no barrier to suits charging malapportionment. The next cases announce the Court’s doctrines for dealing with malapportionment. What is the ratio decidendi? Compare closely the majority and dissenting opinions.

Text: 33-39; 846-860

Transcripts, Attorneys, and Fees

Text: 860-863; 866-870

Welfare I

Text: 460 (Shapiro)-467

Commentary

Text: 870- 873

Education
Text: 873-884

Mon. 25  continued

Wed. 27  continued