

Political Science 321

Winter 2003

Mr. Pacelle

Office Hours: TuTh 12:30-1:30

and by appointment

email: pacelle@umsl.edu**Civil Liberties**

TuTh 11:00-12:15

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Plan and Purpose of the Course

The protection of the rights of individuals and minorities has always presented difficult questions for a democracy. How does a society founded on majoritarian, democratic principles balance the rights of individuals and minorities with the duty of the state to maintain order? What mechanisms are available to prevent what Alexis de Tocqueville called "the tyranny of the majority"? In the vernacular, that former noted civil libertarian, Ronald Reagan asks the rhetorical question: "Hasn't something gone haywire when this great Constitution of ours is invoked to allow Nazis and Ku Klux Klansmen to march, but it supposedly prevents our children from saying a simple prayer in school?" Studies show most Americans agree with Reagan and his successor, the first George Bush, who made political capital by bashing groups like the dreaded ACLU that seek to protect the liberties of individuals. Members of Congress lined up to support a Constitutional amendment to punish flag burning. Members of Congress (many of whom are lawyers) passed and then President Clinton (who taught Constitutional Law) signed an Internet decency act that was patently unconstitutional. Perhaps they should take this course. Governmental institutions have evolved to the point where we place the responsibility for the protection of individual rights in the hands of an unelected judiciary. This course is concerned with the issues of civil liberties and civil rights in the United States and how the United States Supreme Court decides which rights and liberties get which protections, at which times. These issues were largely ignored during the 1992 presidential campaign despite the controversial Clarence Thomas nomination, the "Year of the Woman" in American Politics, the age of the justices of the Supreme Court, and former Justice Blackmun's opinion in the *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision, which in essence, urged people to vote for pro-choice candidates in the 1992 election. Similarly, the issue was not raised in 1996. The composition of the Supreme Court was not explicitly considered a critical issue in the 2000 election (despite Al Gore's attempts to make it an issue) even though Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor approach retirement and the president who gets to replace them can reshape the Court and constitutional law for the next generation. We will investigate the work of the Supreme Court in light of its famous (or infamous) *Bush v. Gore* decision, which decided the 2000 election.

Civil liberties and civil rights issues are particularly important in the wake of September 11, 2001. Since that time, the U.S. government has attempted to crack down on terrorism. Through a variety of executive orders, acts of Congress, and Department of Justice policies, the government has initiated a number of policies that involve important restrictions on rights and liberties. Racial

profiling, more authority to conduct searches, denial of due process rights, limits on the right to a fair trial, limits on *habeas corpus*, limits on freedom of speech and association as well as right to counsel have all become important issues over the last year and a half. Only now are the nation's courts beginning to assess the constitutionality of these different policies. They raise the enduring question: how do we balance a person's right to basic liberties with the need of the government to preserve order? Those questions have confronted the nation since 1789 but they have assumed a particular significance in the light of the terrorist attacks and the response to the government.

Civil liberties refer to protections against governmental intrusion and normally require the Court to enjoin the government from committing some act. Civil rights, on the other hand, require the government to take positive steps to insure equal protection of the law. This course will look at the tests and doctrines the Court has used to decide questions involving civil liberties: freedom of speech, freedom of the press, freedom of religion, and the rights of the accused and how those tests have evolved over time. Civil rights issues are more recent additions to the Court's agenda and involve alleged discrimination against groups and individuals. This course will examine the standards used to determine whether discrimination does exist and whether remedies are available to correct it. The major concentration of this course will be on the Bill of Rights and the Fourteenth Amendment and the changes in the interpretations of these amendments. While 2003 is the 212th anniversary of the Bill of Rights, these provisions were given little credence until 1937. The method of studying these interpretations will focus on Supreme Court decisions and the development of law and doctrine through those decisions.

Particular attention will be directed to the political and legal determinants of the decisions and the revisions in doctrine. The course will combine doctrinal, behavioral, and policy concerns in assessing the past and current state of civil liberties and rights, and the future prospects for individual rights. We will pay particular attention to the changes in the composition of the current Supreme Court and the changes in the interpretation of the Constitution that they might wrought. Concern and interest for the Constitution and civil liberties and rights heightened in the wake of the resignations of William Brennan and Thurgood Marshall and the nominations of David Souter and Clarence Thomas. Opponents feared that Souter and Thomas are majoritarians who may help turn back the clock on civil liberties and civil rights issues. Yet, Souter and Anthony Kennedy's votes to uphold *Roe v. Wade* suggest that such simple generalizations can be misleading. The nominations of Robert Bork, Souter, and Thomas placed civil liberties and rights on the national agenda to a degree unprecedented in the past half-century. We will examine the background and growth of such issues, their current status, and attempt to assess the trends and the future of these rights and protections. The re-election of President Clinton and the advent of the Clinton Court altered the dynamics of this development. The election of George W. Bush has reinstated the pattern of limiting the expansion of civil liberties and civil rights. Bush has what no Republican has had for generations: control of the White House and both houses of Congress. With a number of potential retirements in the offing, Bush could shape the direction of the Court for the next generation. Some are arguing that the Supreme Court has changed its institutional role and no longer will be a protector of minority rights. We will consider this potential change in the policymaking

environment as well. We will also pay attention to the groups that litigate and file *amici* briefs and are the engines that keep the judicial process moving.

While Constitutional Law I (Political Science 320) is the logical prelude to this course, it is not a requirement. The two sections are fully separable and cover very different areas of law.

Student Responsibilities

The course will involve lectures and the discussion of cases. As a result, student participation is a very important component in the class. Students will be expected to come to class prepared to discuss the cases from the textbook for that session. In addition to class participation, there will be three essay examinations, two midterms and a final. The midterms will be worth approximately 20% of the ultimate grade and are tentatively scheduled for Thursday, February 20 and Thursday, April 10. The final exam will be worth approximately 25% and is scheduled for Tuesday, May 13 (10:00-12:00 AM). The use of the word "approximately" as regards the percentages will be explained in class. These examinations will involve essays and identifications, and the format will be discussed in class. The essays will require students to synthesize the readings, the cases, and class discussions. The final is ostensibly cumulative, but will rely most heavily on the material covered between the second midterm and the final. Makeup examinations will only be given in extraordinary circumstances and will be more difficult than the regular examination. There is also a paper assignment that will take the form of two hypothetical case analyses. Students will be asked to take the facts provided and apply appropriate precedents from the casebook, the supplementary book, and the class notes in fashioning a decision. Each of the hypothetical assignments should be approximately 8-15 typewritten pages in length. The first hypothetical will be due Thursday, March 20. The second hypothetical will be due Thursday, May 1, the last day of class. Each hypothetical will be worth approximately 15% of the final grade. Any late papers will carry a penalty, compounded daily (no excuses and no exceptions). The remainder of the grade will be derived from class participation.

Assigned Readings

Lee Epstein and Thomas Walker, *Constitutional Law for a Changing American: Rights, Liberties, and Justice*, fourth edition (casebook).

Lee Epstein and Thomas Walker, *Constitutional Law for a Changing American: Rights, Liberties, and Justice*, supplement.

John Domino, *Civil Rights and Liberties: Toward the 21st Century*.

Schedule of Events

January 14-21

I. The Judicial Process: Case screening, decision-making, and doctrinal construction

Reading: Epstein and Walker, pp. 3-9, chapters 1-2
Domino, chapter 1

January 23-28

II. The Constitutional Basis of Rights

Reading: Epstein and Walker, chapter 3, pp. 97-100

January 30

III. Freedom of Religion: The Two Clauses

Reading: Epstein and Walker, pp. 101-105

February 4-6

A. Free Exercise of Religion

Reading: Epstein and Walker, pp. 105-143
Domino, pp. 116-133

February 11-18

B. The Establishment of Religion

Reading: Epstein and Walker, pp. 143-207
Domino, pp. 133-160

FIRST MIDTERM EXAMINATION: Thursday February 20

February 25-27

IV. Freedom of Expression: What Type of Balance is Struck?

Reading: Epstein and Walker, pp. 208-240
Epstein and Walker (supplement), pp. 31-37
Domino, chapter 2

February 27-March 4

A. Freedom of Expression: Content, Context, and Forum

Reading: Epstein and Walker, pp. 241-309
Epstein and Walker (supplement), pp. 38-54

March 4-11

B. Freedom of the Press

Reading: Epstein and Walker, chapter 6, pp. 378-402

March 11-13

C. Obscenity

Reading: Epstein and Walker, pp. 348-370

Epstein and Walker (supplement), pp. 55-65

Domino, chapter 3

March 18

V. Due Process: Protecting the Rights of the Accused

Reading: Epstein and Walker, pp. 479-484

Domino, pp. 166-172

March 18-20

A. Search and Seizure and the Exclusionary Rule

Reading: Epstein and Walker, pp. 485-531

Epstein and Walker (supplement), pp. 66-74

Domino, pp. 172-199

FIRST HYPOTHETICAL DUE: Thursday, March 20

April 1

B. Self-Incrimination

Reading: Epstein and Walker, pp. 531-554

Domino, pp. 202-209

April 3

C. Right to Counsel and Trial

Reading: Epstein and Walker, pp. 556-588

Domino, pp. 199-202

April 3-8

D. Cruel and Unusual Punishment and the Death Penalty

Reading: Epstein and Walker, pp. 619-644

Epstein and Walker (supplement), pp. 75-84

Domino, pp. 209-223

SECOND MIDTERM EXAMINATION: Thursday, April 10

April 15

VI. Equality: Newer and Older Classifications of Discrimination:
Spreading the Net or Closing Access?

Reading: Epstein and Walker, pp. 619-627

April 20-22

A. Racial Discrimination and Suspect Classifications

Reading: Epstein and Walker, pp. 628-669

Domino, pp. 270-286

April 27

B. Gender Discrimination and Semi-Suspect Classifications

Reading: Epstein and Walker, pp. 669-695

Epstein and Walker (supplement), pp. 85-94

Domino, pp. 299-316

April 27-29

C. Other Forms of Classification

Reading: Epstein and Walker, pp. 696-718

Domino, pp. 316-323

April 29

D. Remedies: Affirmative Action

Reading: Epstein and Walker, pp. 718-748

Domino, pp. 286-299

SECOND HYPOTHETICAL DUE: Thursday, May 1

May 1

VII. Privacy and Abortion: The Creation of Judicial Rights

Reading: Epstein and Walker, chapter 9

Domino, chapter 6

FINAL EXAMINATION: Tuesday, May 13, 2003 10:00-12:00 AM