CONSTITUTIONAL LAW III: Civil Liberties

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

-Thomas Jefferson, Declaration of Independence

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant....

-John Stuart Mill, On Liberty

This is a course on civil liberties. An important dilemma for liberal and democratic theory is how to protect individual rights and liberties from government intrusion while at the same time empowering government to be able to provide security and other essential or desirable services. America's history is wrought with struggles over how to use the tools of government to defend its people and encourage prosperity and equality while respecting individual freedom and individual autonomy. This dilemma is as significant for contemporary law, politics and society as it is for abstract political and legal theory, as evidenced by modern debates over the war on terrorism, privacy, same-sex marriage and gay rights, prayer in school and the relationship between church and state, hate speech, affirmative action, abortion, and pornography among many others.

Today, we typically think of civil liberties as legal issues that are most properly addressed by courts of law. While courts play an important role in protecting individual liberties and rights today, they do not have a monopoly on these issues, and historically, it can be argued that civil rights and liberties have been better protected by other institutions, actors and mechanisms. Moreover, the moral and philosophical arguments over what rights and liberties we ought to have are not legal arguments, and the question of what institutions are best situated to protect our rights and liberties is more of a political question than a legal one.

Undoubtedly, we associate civil liberties with the U.S. Constitution, and more specifically the Bill of Rights, or the first ten amendments and the Fourteenth Amendment to the Constitution, as well as the Supreme Court’s interpretation of relevant constitutional provisions. This does not mean that the Court should be the only voice in national debates on these issues, but the Court does often serve as the focal point for debates over many of the controversies that arise in the U.S. over the relationship between government power and individual liberty. In this class, you will also be exposed to a broad range of philosophical, ethical, historical, social and political theories and arguments. An important goal of this class is to motivate you to make your own judgments about the issues we cover, and to be able to support your views with more sophisticated and persuasive arguments than you would have been able to before taking this class.
Course Requirements: Readings, Assignments and Examinations

Readings. We will focus on Supreme Court cases in the casebook, American Constitutionalism: Volume II: Rights and Liberties, by Howard Gillman, Mark Graber and Keith Whittington (2013), designated by “GGW” on the syllabus. We will follow the outline below; at the end of each class you will be told which cases or portions of the assigned readings to focus on for the next class. You should take note at the outset of this class that the cases themselves are only partially the subject of our study. Rather, the cases are examples of problems (legal and political in nature) that arise in the context of constitutional interpretation, and they are examples of how to analyze those problems. Simply memorizing the outcome in the cases is merely one of many objectives in this course; rather you should use the opinions in the Supreme Court cases as examples of reasoning, analysis and argumentation, and learn to apply those methods of reasoning, analysis and argumentation to new and hypothetical scenarios. Additionally, other supplemental readings will be made available to you on Blackboard throughout the semester (“BB” on the syllabus). You are responsible for any materials assigned in class. The supplemental readings will allow us to go beyond the caselaw of the Supreme Court and address important issues involving the role of the Court and other institutions in constitutional construction, the meaning of the Constitution in a historical context and debates over interpretive theories. You are also expected to read a reputable national news source (such as New York Times, Washington Post, Wall Street Journal etc.) and stay informed of any current developments relevant to the course material.

Assignments and Exams. It is very difficult to learn the material in this course and to develop your own positions on the legal, political and theoretical issues raised throughout the course, without being actively engaged in discussion and debate. Class is an open forum for discussion. You are encouraged to go out on the proverbial limb and take intellectual risks as you wrestle with the material in this course. Regular attendance, preparation and participation are required. You will be expected to answer questions in class about the readings for each class. Regular class absences or lack of preparedness will adversely affect your grade. In addition, there will be a midterm examination and a final examination. You will also be required to do a case brief which will be assigned during the first two weeks of the semester and will not require any outside research.

No late assignments will be accepted. Academic misconduct of any type on an assignment or exam will result in a grade of “F” for the course, non-negotiable.

Grades will be based on attendance and participation, a case brief (assignment will be made available on Blackboard) and two exams. Final course grades will be calculated as follows:

- Attendance and participation (15%)
- Case brief, due Thursday, January 22, Safe Assign AND hard copy in class (15%)
- Midterm Exam, Thursday, February 26, in class (30%)
- Final Exam, Thurs., May 10, Noon-1:50 PM (40%)

* Note that exceptional in-class participation can be weighed more heavily. “Exceptional” means quality - not quantity – of participation. Additionally, the Final Exam may be weighted more heavily for those who show substantial improvement over their midterm exam.
Course Outline

I. Introduction: Overview of the Constitution, the Supreme Court and Methods of Interpretation

A. Constitutional Structure and Interpretation
   Reading: The Constitution, GGW pp. 1055-1067
            GGW, Chapter 1

B. Applying the Bill of Rights to States: The Incorporation Issue
   Reading: Barron v. Baltimore, GGW p. 218
            Duncan, GGW p. 496
            McDonald, GGW p. 891

C. Liberty, Democracy and Government?
   Reading: Rauch excerpts (BB)

II. Freedom of Expression

A. Freedom of Speech – General Issues
   Reading: The Sedition Act, GGW, pp. 173-178
            Schenck, p. 422
            Whitney, p. 423
            Near, p. 427
            Barnett, p. 544
            Dennis, p. 549
            O’Brien, p. 555
            Brandenburg p. 557
            Texas v. Johnson, p. 796

B. Obscenity and Pornography
   Reading: Roth (BB)
            Jacobelis (BB)
            Miller (BB)
            Ferber (BB)
            Ashcroft v. FSC (BB)

C. Hate Speech
   Reading: GGW, pp. 799-801
            R.A.V. (BB)
            Virginia v. Black (BB)
            Doe v. Univ. of Mich., p. 801
            Snyder v. Phelps, p. 955

D. Freedom of the Press and Regulation of the Media
   Reading: GGW pp. 807-810
            New York Times v. Sullivan, 553
            Red Lion Broadcasting, p. 558
E. Campaign Finance
   Reading:  
   * Buckley v. Valeo, p. 670  
   * Citizen's United, p. 963  
   * McCutcheon, (BB)  

E. Right of Association
   Reading:  
   * Boy Scouts v. Dale, p. 969  

III. Freedom of Religion

A. Overview of the So-Called “Religion Clauses”
   Reading:  
   * GGW, pp. 37-49, 111-118  

B. The Establishment Clause
   Reading:  
   * Engel, p. 523  
   * Mueller, p. 763  
   * Edwards, p. 765  
   * Weisman, p. 768  
   * Zelman, p. 910  
   * Kitzmiller, p. 915  

C. The Free Exercise Clause
   Reading:  
   * Reynolds, p. 410  
   * Sherbert, p. 526  
   * Yoder, p. 650  
   * Smith, p. 773  
   * Boerne, p. 919  

III. The Right to Bear Arms
   Reading:  
   * Bliss, p. 171  
   * Buzzard, p. 234  
   * Assault Weapons Ban debate, p. 799  
   * Ashcroft latter to NRA, p. 924  
   * Heller, p. 925
Other Items and Policies:

Undergraduate Writing Awards
The Department of Political Science recognizes, on an annual basis, outstanding undergraduate papers written in conjunction with 300-400 level political science courses or directed studies, such as independent studies or honors theses. Winners are expected to attend the Department’s spring graduation ceremony where they will receive a certificate and a check for $100.00. No more than two papers may be submitted by a student. There is no requirement as to the length of papers submitted for the award. Often the Department awards prizes for both an outstanding short paper and an outstanding long paper. The number and types of award is dependent upon the papers submitted for consideration in any given year. Authors do not have to be political science majors or have a particular class standing. Only papers written in the previous calendar year are considered for the award. However, papers completed in the current spring semester are eligible for the following year’s competition even if the student has graduated. Papers can be submitted by students or faculty and must be supplied in triplicate to the undergraduate secretary. All copies must have two cover pages – one with the student’s name and one without the student’s name. Papers are not to be stapled or bound. Instead, please use paper clips. Papers are generally due in March and notice of call for papers and submission deadlines will be published in the department e-announcements. You may also contact the department for information at 753-1015.

Department of Political Science Web Site
Undergraduates are strongly encouraged to consult the Department of Political Science website on a regular basis. This up-to-date, central source of information will assist students in contacting faculty and staff, reviewing course requirements and syllabi, exploring graduate study, researching career options, tracking department events, and accessing important details related to undergraduate programs and activities. To reach the site, go to http://polisci.niu.edu.

Accommodations for Students with Disabilities
A student who believes that reasonable accommodations with respect to course work or other academic requirements may be appropriate in consideration of a disability must (1) provide the required verification of the disability to the Center for Access-Ability Resources, (2) meet with the Center for Access-Ability Resources to determine appropriate accommodations, and (3) inform the faculty in charge of the academic activity of the need for accommodation. Students are encouraged to inform the faculty of their requests for accommodations as early as possible in the semester, but must make the requests in a timely enough manner for accommodations to be appropriately considered and reviewed by the university. If contacted by the faculty member, the staff of the Center for Access-Ability Resources will provide advice about accommodations that may be indicated in the particular case. Students who make requests for reasonable accommodations are expected to follow the policies and procedures of the Center for Access-Ability Resources in this process, including but not limited to the Student Handbook. A wide range of services can be obtained by students with disabilities, including housing, transportation, adaptation of printed materials, and advocacy with faculty and staff. Students with disabilities who need such services or want more information should contact the Center for Access-Ability Resources at 815-753-1303.