

Tuesday and Thursday 8.45am – 10.05am – Humanities 24

Course Description:

The course will examine the nature of civil liberties and civil rights as proclaimed by the US Supreme Court.

Class Responsibilities:

Each student is expected to know the assigned cases prior to class because you will be called upon in class to comment on the cases and relate them to the ideas espoused in earlier cases. If you have not read the cases, you should not bother attending class.

Contacting Me:

Feel free to e-mail me at [s.barclay@albany.edu](mailto:s.barclay@albany.edu) for the fastest response  
Office Hours: Tuesday and Thursday 12.30pm – 1.15pm in Humanities 016

Required Material for Class:

There is **no** course packet or textbook. Each student is expected to read all of cases from Lexis-Nexis or Westlaw (or any other internet source that delivers accurately the case reports in full, such as Findlaw). If you prefer not to print out the cases, you should feel free to bring your laptops to class.

If you wish additional reference material, you may consult a constitutional law casebook -- good versions of such casebooks are: Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice* OR Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* (University Casebook Series). However, each student will be expected to know the case in full (not just excerpts) and with reference to the statements of all of the justices, unless otherwise directed in class.

Allocation of Grades:

*Assignments: (100%) -- Due as announced in class throughout semester*  
Each student must complete each of the four assignments at the end of syllabus

**ATTENDANCE AT CLASS IS NOT REQUIRED (but very strongly suggested):** You are free to miss as many classes as you like for any reason (on the clear presumption that you understand the consequences of such action). If you miss class, you are *not* required to provide a note or excuse to me. But, it is your responsibility to stay up to date with the material covered in class. Based on prior experience, I warn you that it is virtually impossible to successfully complete all of the assignments without consistent engagement with the class discussion. Missing even one class can cause major problems in gaining an understanding as the material is cumulative and complex. The due date of each assignment will only be announced in class. If you choose to attend class, you can expect to be called upon to discuss the current case as well as place it in the context of prior cases covered in class.

Cheating and Plagiarism:

I encourage students to work together in reading and understanding the material. I even encourage study groups to think about the assignments. However, another student cannot write or copy all or part of your paper unless so acknowledged. Such incidents will be defined as cheating. Similarly, **any** example of copying of material or ideas belonging to another person without correct reference to the original author by citation (and quotation marks, if directly quoting) will be treated as plagiarism. In any case of cheating or plagiarism, you will be failed for the entire course and your case will be forwarded to Judicial Affairs with a request for additional sanction as allowed by the rules of the University (which currently is an automatic one year suspension and a note on your academic transcript). Under the new University rules, any incident of plagiarism **MUST** be reported to the Dean and the respective faculty member is required to render a punishment. In the past, I have reported up to four separate students for plagiarism in the same semester in this class and all of these students were subsequently dismissed from the University with notations placed on their permanent academic transcripts.

**The Course:**

We will consider to 1 to 2 cases each class in the order listed below.

You can easily access all court cases and state and federal laws discussed in class and in the assignments. These are available in their full format from Lexis-Nexis or Westlaw.

LEXIS: Go to *University Library* (<http://library.albany.edu/>), then to *Database Finder*, then the letter “L”, then choose *Lexis-Nexis academic universe*. In *Lexis-Nexis*, select *Legal Research*. In *Legal Research*, you will find the link to *Get a Case* to click on. To find a case, simply type the name or citation into the *Get a case* dialog box. All cases have their full citation listed in this syllabus.

WESTLAW: Go to *University Library* (<http://library.albany.edu/>), then to *Database Finder*, then the letter “W”, then choose *Westlaw Campus*. In *Westlaw Campus*, you will note on the left hand side of the screen that there is a section called *Find*. To find a case, simply type the name or citation into the appropriate spaces in *Find*. All cases have their full citation listed in this syllabus.

**(A) Introduction:**

- 1) General Discussion of Syllabus and Course

**(B) Free Speech:**

- 1) *Schenk v. United States* 249 U.S. 47 (1919)
- 2) *Gitlow v. New York* 268 U.S. 652 (1925)
- 3) *Chaplinsky v. New Hampshire* 315 U.S. 568 (1942)
- 4) *Dennis v. United States* 341 U.S. 494 (1951)
- 5) *Beauharnis v. Illinois* 343 U.S. 250 (1952)
- 6) *Tinker v Des Moines* 393 U.S. 503 (1969)
- 7) *Cohen v. California* 403 U.S. 15 (1971)
- 8) *Buckley v. Valeo* 424 U.S. 1 (1976)
- 9) *R.A.V. v. St. Paul, Minnesota* 505 U.S. 377 (1992)
- 10) *Boy Scouts of America v. Dale* 530 U.S. 640 (2000)

**(C) Free Press:**

- 11) *Near v. Minnesota* 283 U.S. 697 (1931)
- 12) *New York Times v. Sullivan* 376 U.S. 254 (1964)
- 13) *New York Times v. U.S.* 403 U.S. 713 (1971)

**(D) Obscenity / Pornography:**

- 14) *Roth v. United States* 354 U.S. 476 (1957)
- 15) *Jacobellis v. Ohio* 378 U.S. 184 (1964)
- 16) *Memoirs v. Massachusetts*, 383 U.S. 413 (1967)
- 17) *Miller v. California* 413 U.S. 15 (1973)
- 18) *Paris Adult Theatre v. Slaton* 413 U.S. 49 (1973)
- 19) *FCC v. Pacifica Foundation* 438 U.S. 726 (1978)
- 20) *New York v. Ferber* 458 U.S. 747 (1982)
- 21) *Reno v. ACLU* 521 U.S. 844 (1997)

**(E) Civil Rights: Race**

- 22) *The Civil Rights Cases* 109 U.S. 3 (1883)
- 23) *Plessy v. Ferguson* 163 U.S. 537 (1896)

**As Applied to Education:**

- 24) *Sweatt v. Painter* 339 U.S. 629 (1950)
- 25) *Brown v. Board of Education, Topeka, Kansas* 347 U.S. 483 (1954)
- 26) *Swann v. Charlotte-Mecklenburg Board of Education* 401 U.S. 1 (1971)
- 27) *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973)
- 28) *Keyes v. School District No. 1, Denver, CO.* 413 U.S. 189 (1973)
- 29) *University of California v. Bakke* 438 U.S. 265 (1978)
- 30) *Grutter v Bollinger* 123 S. Ct. 2325 (2003) OR *Gratz v Bollinger* 123 S. Ct. 2411 (2003)

**(F) Civil Rights: Gender**

- 31) *Reed v. Reed* 404 U.S. 71 (1971)
- 32) *Frontiero v. Richardson* 411 U.S. 677 (1973)
- 33) *Michael M. v. Superior Court of Sonoma County* 450 U.S. 464 (1981)
- 34) *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982)
- 35) *United States v. Virginia* 518 U.S. 515 (1996)

**(G) Civil Rights: Sexual Orientation**

- 36) *Rowland v. Mad River Local School Dist* 470 U.S. 1009 (1985)
- 37) *Bowers v. Hardwick* 478 U.S. 186 (1986)
- 38) *Romers v. Evans* 517 U.S. 620 (1996)
- 39) *Lawrence v Texas* 123 S. Ct. 2472 (2003)

**(H) Privacy:**

- 40) *Griswold v. Connecticut* 381 U.S. 479 (1965)
- 41) *Eisenstadt v. Baird* 405 U.S. 438 (1972)
- 42) *Roe v. Wade, District Atty. of Dallas County* 410 U.S. 113 (1973)
- 43) *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992)
- 44) *Schenck v. Pro-Choice Network of Western New York* 117 S. Ct. 855 (1997)
- 45) *Lawrence v. Texas* 123 S. Ct. 2472 (2003)
- 46) *Planned Parenthood v. Gonzales* 2006 U.S. App. LEXIS 2315 (2006)

**Assignments:**

You can work as a group to discuss possible answers, but each student must submit a unique and individual answer using their own written material. All cases must have a full case citation. Feel free to use quotes from the cases as referenced in Lexis-Nexis, but any quotes from a case **must** be identified by quotation marks and **must** give the name of the justice being quoted and the case citation and page number.

Use of material from the Web, a book, a law review article, another student or any other source without proper attribution (such as a citation to identify it as work written by another person or an idea belonging to a source other than yourself) will be treated as plagiarism with commensurate University punishment.

All papers must be emailed to Professor Barclay (at s.barclay@albany.edu) by date designated in class. Late papers will be not accepted.

**Assignment One -- FREE SPEECH SECTION: (20%)**

**(Answer only ONE of these two questions for this section)** Please do **not** write more than five (5) pages (typed, double spaced, 1" margins, 12pt font) on this question. Please do **not** overly highlight constitutional or legal questions **unrelated** to the issues associated with the 1<sup>st</sup> Amendment's free speech protections.

- a) Over the last seventy years, the Supreme Court has created (and subsequently abandoned or altered) a variety of doctrines in order to establish framework from which to consider the issue of free speech. What are some of those doctrines? In addition, comment upon why it has been so difficult to create a standardized doctrine for free speech and what are the elements that you believe would be essential to creating a more effective, more lasting standard.

**OR**

- b) Using Justice Scalia's logic in *R.A.V. vs. St. Paul*, comment upon how we would decide *Tinker*, *Cohen*, and *Dennis* if those cases were only to be heard now. Further, given the logic in *RAV*, comment upon the degree to which Scalia's logic is consistent with the famous Holmes dissent in *Gitlow*.

**Assignment Two – FREE PRESS SECTION: (20%)**

Please do **not** write more than five (5) pages (typed, double spaced, 1" margins, 12pt font) on this question. Please do **not** overly highlight constitutional or legal questions **unrelated** to the issues associated with the 1<sup>st</sup> Amendment's free speech protections.

Recently, the *New York Times* and the *Wall Street Journal* separately published material demonstrating that agencies of the Executive Branch were tracking the financial data of millions of individuals. The President was not happy with the release of this information which he proposed jeopardized national security. He contemplated prosecuting these newspapers. With reference to the cases covered in class and the 1st Amendment, discuss whether the President could have forbidden the publication of this material if he had been aware of the impending story and whether the President has the power to prosecute newspapers (after the fact) for publication of material related to national security.

**Assignment Three -- OBSCENITY AND PORNOGRAPHY SECTION: (20%)**

**(Answer only ONE of these two questions for this section)** Please do **not** write more than five (5) pages (typed, double spaced, 1" margins, 12pt font) on this question. Please do **not** overly highlight constitutional or legal questions **unrelated** to the issues associated with the 1<sup>st</sup> Amendment's free speech protections.

- a) With reference to the cases covered in class, explain why material which is defined as either obscene and/or pornographic is not covered by the first amendment's protections of free speech.
  
- b) In *Paris Adult Theatre v. Slaton* (413 U.S. 49 at 83-84), Justice Brennan notes: "Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis v. Ohio, supra*, at 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech." With reference to the cases covered in class, explain the various approaches of the court to this issue and the reason for their subsequent failure.

**Assignment Four – EQUAL PROTECTION SECTION (40%)**

Please do **not** write more than ten (10) pages (typed, double spaced, 1" margins, 12pt font) on this question. Please do **not** overly highlight constitutional or legal questions **unrelated** to the issues associated with the 14<sup>th</sup> Amendment's equal protection clause.

Acting as though you were a lawyer for either the State of Mississippi **or** Lenore Jones, write a legal argument that argues your case to the U.S. Supreme Court. In your argument, please address 1) what level of judicial scrutiny should the U.S. Supreme Court use in deciding this case, 2) why this case and its particular facts would fit into that level of scrutiny rather than any other level of judicial scrutiny, and 3) whether the Mississippi statute passes that level of scrutiny as well as whether it would pass other levels of scrutiny. In crafting your legal argument, please reference prior Supreme Court cases (and using full case citations when you reference the cases) that we covered in class. We suggest that you use this precedent to offer insights into how the Supreme Court has decided analogous legal situations and therefore such prior cases should assist you in arguing how it would decide the present case. In addition, please demonstrate in your answer that you understand the role of different standards of judicial scrutiny associated with the 14<sup>th</sup> Amendment as well as the criteria established by the Supreme Court for determining whether a newly defined or redefined class fits within a pre-defined level of judicial scrutiny.

**CASE FACTS:**

After the results of the Human Genome project are released, scientists discover a series of genes that are highly correlated with later sexual development. These genes appear related to a variety of factors, including the date of onset of puberty and the development of ovaries in women and testicles in men. One pair of genes also appear to have a strong correlation to the eventual sexual orientation of the individual. While these genes are not specific enough to determine sexual orientation on all occasions, they do reflect a high likelihood of later sexual preferences in combination with a number of other social factors, including social norms of sexuality, social construction of gender, and the political level of tolerance for gay, lesbian, bisexual and trans-gendered persons during their teenage years.

Bayer and Roche, the large bio-chemical corporations, both develop tests for these genes. The tests are

originally designed to discover the likelihood of rare abnormal medical diseases associated with childhood sexual development, including detecting potentially dangerous cancerous developments in pre-pubescent children. However, these tests can be cheaply and easily modified to test for future (or current) sexual orientation. Based on self-reporting of test subjects, the tests are only 78% accurate in women and 81% accurate in men. Moreover, they only report sexual orientation in two categories -- heterosexual and homosexual. 11% percent of all people who take the test are not classified because of testing problems in reading the genetic sequence and they are classified as *unable to be determined by test*. The test is popularly called the Sexuality Test and they are widely available at a cost of about \$2400 for the test and interpretation of the results by a medical lab. They are used only infrequently to test for sexual orientation because of very high resistance by the medical community and complaints from lesbian, gay, bi-sexual and trans-gendered groups.

After much debate, the Mississippi legislature in January 2004 passes a bill that requires all kindergarten grade school, and middle school teachers, as well as registered child care workers, to be tested using the Sexuality Test. The legislative debate focuses on two issues. First, they discuss the supposed physical danger which gay and lesbian teachers represent to young children in terms of the possibility of molestation. Second, they discuss the supposed ideological danger which gay and lesbian teachers represent to young children in terms of promoting an "immoral lifestyle." Several prominent members of the state legislature note in the record of debates on the bill that the test removes the ability of gay and lesbian teachers from "hiding in the closet while doing irreparable harm to the minds and bodies of our sons and daughters."

The bill is passed over the veto of the state governor and with the threat of economic boycotts from many organizations outside of the state. The subsequent law is titled the *Save Our Wonderful Children Act*. It requires all Kindergarten teachers, Grade School teachers and child care workers to be tested at their own expense within one year of the promulgation of the law in order to be certified to teach in a school in Mississippi. Without certification, the state will not permit payment of state or local funds to such individuals if they are hired by any school district. The state also specifies that uncertified teachers cannot be hired by private schools, including those that receive no funding from any state sources.

The *Save Our Wonderful Children Act* requires:

- a) Kindergarten and Grade School teachers who are identified by the test as lesbian, gay, or bi-sexual are given a period of three years in which to obtain re-certification in order to teach students in high school. After three years, they are de-certified from teaching in the state of Mississippi in grade school or middle school, but may teach in a high school in the state.
- b) Child care workers who are identified by the test as lesbian, gay, or bi-sexual are immediately de-certified by the state.
- c) Teachers whose sexual orientation are *unable to be determined by test* remain in their positions and are placed on a special program, which includes increased questioning about their sexuality, increased weight given to complaints from the students or their parents, and increased supervision by the school district. The school board is legally able to take note of individuals associated with the teacher on off-duty hours as well as locations that the teacher is seen to visit in determining whether to certify the teacher.
- d) Heterosexual teachers are not subject to any change in their position or other action.
- e) Failure to take the test after one year results in removal from your current position.

Lenore Jones, a grade school teacher who openly identifies herself as a lesbian and is a , refuses to take the test within one year and she is fired. She sues the State of Mississippi in the Federal District Court and she is legally and financially supported in her case by Lambda Legal, National Organization of Women, and Gay & Lesbian Advocates & Defenders (GLAD). Jones argues that the *Save Our Wonderful Children Act* violates the 14<sup>th</sup> Amendment's equal protection clause by creating a state law that uses the characteristic of her sexual orientation (heterosexual, homosexual or otherwise) in a manner that is unrelated in any proven way to her ability to continue to meet the requirements of her job.

In its defense, the state of Mississippi argues that homosexuality is a physical characteristic and that it

precludes the ability of homosexuals to engage effectively in teaching young children because it requires, as part of their nature, that lesbian, gay, and bisexual individuals “sexualize” physically and mentally the children in their care. In such a case, lesbian, gay, and bisexual individuals cannot help themselves and the state is simply protecting them from their own nature (so that they do not commit crimes) as well as protecting children in their care. Mississippi compares such actions with the right of a state to determine the best interests of a minor or those whom are mentally retarded.

Jones, and her team of lawyers from Lambda Legal, argues that this law violates the 14<sup>th</sup> amendment. She appeals to the U.S. Supreme Court who agrees to hear her case and they schedule arguments for April 2008.

The Supreme Court asks for short legal arguments from the lawyers for Jones and the state of Mississippi.