

Constitutional Law III: Civil Rights  
PSCI 364 – Winter 2022  
Monday/Wednesday 12PM – 1:50PM  
Prof. Sally Lawton  
OH: Wednesdays 10-12  
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## Overview

**Please note: This syllabus was developed with Drexel's 10-week term in mind. I would love to adapt this to a longer, full semester.**

The United States Constitution is designed to both facilitate — and frustrate — the will of the majority in a variety of ways. This course, Constitutional Law III: Civil Rights, examines major decisions of the U.S. Supreme Court in the area of civil rights, particularly those arising under the Fourteenth Amendment guarantees of due process and equal protection. Rather than taking on the impossible task of dealing with all of the cases and principles the Fourteenth Amendment has spawned, this course is organized with several persistent and important questions in mind: How do we reconcile our commitment to equality with recognition of difference? When does difference lead to discrimination, and when does discrimination warrant government intervention? What groups are eligible for enhanced protection from discrimination and why? What answers have judges and legislators proposed to these questions, and how are those approaches influenced by legal, political, and cultural changes?

Through exposure to both legal doctrine and scholarly commentary on Supreme Court decisions, students will develop an understanding of the constitutional and political conflicts and dilemmas related to civil rights issues, and to develop and defend their own views about what principles and practices should guide American politics. Students will also refine the critical reading, writing, and analytic skills to tackle complex, multi-dimensional legal and political problems.

### *A note about materials used in this class:*

The United States has a long and troubling history of discrimination against individuals based on characteristics such as race, ethnicity, sex, gender, sexual orientation, dis/ability, and income. The materials used in this class, which include judicial opinions, scholarly materials, and audio-visual resources, will include language, images, and statements that many of us today might find anachronistic, stigmatizing, and even profoundly offensive. My general approach is that such original texts, terms, and images are critical to understanding the conditions people have lived under in the US over the last 200 years, and illustrate how law, policy, and culture have (and sometimes have not) changed over time. The use of such language in original sources, however, does not mean it is appropriate for class discussion. ***I expect us all to be thoughtful and respectful in how we approach the questions, language, and issues raised in the course.*** Any student who is uncomfortable with the course content, a particular case, or the conduct of class discussions is welcome to speak with me privately at any time.

### Texts

David M. O'Brien and Gordon Silverstein. *Constitutional Law and Politics Volume 2: Civil Rights and Civil Liberties (11<sup>th</sup> Edition)*

The casebook contains most of the court cases, but there will be a few that you will need to locate using Oyez or the Library of Congress.

I also assign select journal articles and book chapters, which I will post to the class Blackboard page.

### Class Rules

1. Do the work
2. Be kind
3. READ THE SYLLABUS

## Assessment and Assignments

Assessment for this class uses “The Learning Record.” A full guide is on the course Blackboard site and we will go over the process in detail during the first week of class. Simply, the Learning Record (LR) is a portfolio-style assessment system. It helps you to gather, organize, analyze, evaluate, and report on your individual progress and achievement throughout the term. The LR enables you to show what you have learned individually as well as demonstrate how you contributed to the collective learning effort. Balancing individual learning with collaborative effort is difficult to do using traditional grading schemes, which is why this assessment system is particularly useful for courses that utilize a lot of group activities. Also, it is often difficult to reward experimental and creative learning through traditional grading techniques, because traditional grading focuses on deliverables such as tests or papers. Experimental learning, on the other hand, does not always result in high-quality deliverables, because it involves building something new that may or may not be successful. The LR focuses on your learning process rather than the outcomes, which gives your instructor a detailed sense of what you have learned. Hopefully, it gives you the confidence to think big and take risks in your research, problem-solving, and design work.

### Ongoing assignments

Two observations per week posted to your individual Microsoft Teams channel. These are part of the data that will go into your midterm portfolio. You may also post your observations to the shared class channel for the week.

Format and example:

**Date:** 6/30/2022

**Context:** Reading “America Wasn’t a Democracy”

**Observation:** The founding of the United States is not so clear

**Significance of the observation:** In high school, I learned that the United States was founded in 1776 with the Declaration of Independence. In this article, the author claims that the real date is 1619 because it was the first time that people purchased African slaves in the colonies. The author argues that this is the true founding because the United States is not founded in equality, like I was taught in High School, but with inequality. It also made me think about how the founding looks different to different people. Maybe it is 1776 if you are a member of the Daughters of the American Revolution, but maybe 1619 if you trace your family’s history back to slavery.

### Individual Assignments

In the first 5 weeks of the term, you will choose and follow a civil right or liberty, including its evolution through case law and American political development. We will set aside time during class and you will also

devote time outside of class to completing these tasks. Your midterm portfolio is a collection of these assignments.

In the second 5 weeks of the term, you will work on writing a 10-12 page paper based on the evidence you gathered during the first 5 weeks of the class. You are required to write a draft of your paper, which will then be peer reviewed and which you will edit for your final portfolio. In most classes, students do not get to experience editing assignments. As many of you intend to attend law school, writing is an essential skill. In order to write well, you must learn to edit well.

## Schedule of Work

**All reading assignments are subject to revision. Pay attention to the “Announcements” widget on BB. You will always have a week’s notice of changes to the readings. BB stands for Blackboard and is where to find PDFs and links to supplementary readings. Unless otherwise indicated, readings come from the O’Brien & Silverstein text.**

### WEEK 1: Problems of slavery and the origins of civil rights law

January 3	Douglass, “What to the Slave is the Fourth of July?” <b>BB</b> <i>Dredd Scott v. Sandford</i> [pg. 1346-1357] The Learning Record <b>BB</b>
January 5	The Reconstruction Amendments (13 <sup>th</sup> , 14 <sup>th</sup> , and 15 <sup>th</sup> ) (easily available anywhere on the Internet) Foner, Eric. “Justice & Jurisprudence.” <i>The Second Founding</i> , W.W. Norton & Company, New York, 2019 <b>BB</b>

What democratic promise does Douglass find in the constitution? What constitutional provisions justify the *Dredd Scott* decision? What are the characteristics of freedom and liberty outlined in today’s readings? How can beliefs about liberty both promote and frustrate attempts to achieve equality? How was the institution of slavery intrinsic to American conceptions of liberty and equality? We will also review the concept of judicial review.

**Class Activity (both classes): Write an observation and learn how to post it to MSTeams.**

### WEEK 2: Rights in a post-Reconstruction world

January 10	Valelly, Richard M. “The Limits of Jurisprudence Building.” <i>The Two Reconstructions</i> , The University of Chicago Press, Chicago, 2004, pp. 99-120 <b>BB</b> <i>United States v. Carolene Products</i> [1321-1325] O’Brien & Silverstein [1326-1329] <i>The Slaughterhouse Cases</i> [pg. 332-333]
January 12	<i>The Civil Rights Cases</i> [pg. 1359-1366] O’Brien & Silverstein [pg. 1326-1337] Smith, Rogers. “The Gilded Age of Ascriptive Americanism, 1876-1898.” <i>Civic Ideals</i> . Yale University Press, 1997, pp. 375-77, 383-85, 390-396 <b>BB</b>

What is the jurisprudence built in the *Slaughterhouse Cases*? How can sanitary conditions in a slaughterhouse relate to voting rights? Describe Justice Miller’s reflections on citizenship, as written in his majority opinion. Do dissenting opinions play an important role in court decisions? What role did the *Civil Rights Cases* play in the rise of legal segregation? What role does federalism play in the decisions?

**Class Activity 1: Choose your Civil Right. Write a 250-word reflection on why you chose this right. Post your reflection to MSTeams.**

**Class Activity 2: Write what you know. Make a list of 10 things you know about your chosen civil right. Make a list of 5 things you want to know about this civil right. Write a 250-word reflection on your personal knowledge and post it to MSTeams.**

### WEEK 3: Separate but equal

January 17	No Class in observance of Martin Luther King, Jr. Day
January 19	<p><i>Plessy v. Ferguson</i> [pg. 1366-1370]  O’Brien &amp; Silverstein [pg. 1358]  Gotanda, Neil. "A Critique of "Our Constitution is Colorblind""(1991)." <i>Stanford Law Review</i> 44: 1.</p> <p>READ the following sections from "A Critique of Our Constitution is Colorblind"</p> <p>I: Introduction [pg. 2-7]  II A: The Private Right to Discriminate [pg. 7 -12]  III A: Nonrecognition as Technique [pg. 16-17]  III B1: The impossibility of private sphere nonrecognition [pg. 17-21]  IV: READ ALL OF THIS SECTION [pg. 23-36]  V A: Status-race, Formal race, and Historical Race [pg. 36-40]  V C: Support for Racial Subordination [pg. 43-52]  VII: READ ALL OF THIS SECTION [pg. 62-69]  VIII: Conclusion [pg. 69]</p>

Should governments (state or federal) have the power to ban discrimination in public accommodations? What about private expressions of discrimination? Be prepared to offer arguments for and against such propositions. In *Plessy*, Justice Harlan famously argues that the Constitution is “colorblind.” What are the benefits of a “colorblind” constitution in achieving equality? What is Gotanda’s critique of a colorblind constitution?

**Class Activities: In class, we will spend some time researching which cases support your chosen civil right. Put together a timeline of cases and post it to MSTeams.**

### WEEK 4: Legal segregation? The importance of policy and the limits of law

January 24	<p><i>Buchanan v. Warley</i> [find on Oyez or the LoC]  <i>Shelley v. Kraemer</i> [pg. 1370-1372]  Revell, Keith D. "The road to Euclid v. Ambler: city planning, state-building, and the changing scope of the police power." <i>Studies in American Political Development</i> 13,</p>
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	no. 1 (1999): 50-145. Blumgart: How Redlining Segregated Philadelphia: <a href="https://nextcity.org/features/redlining-race-philadelphia-segregation">https://nextcity.org/features/redlining-race-philadelphia-segregation</a>
January 26	<i>McLaurin v. Oklahoma</i> [find on Oyez or LoC] <i>Sweatt v. Painter</i> [find on Oyez or LoC] Klarman, Michael J. "Chapter 5." in <i>From Jim Crow to civil rights: The Supreme Court and the struggle for racial equality</i> . Oxford University Press, 2006. <b>BB</b>

Up until now, the reconstruction amendments have not yielded much promise for civil rights. However, this begins to change beginning with these cases. Think about what equal protection really means. What are the limits to equal protection? Can you identify contemporary mechanisms of segregation?

**Class Activity 1:** Monday we will outline which constitutional provisions support your civil right. You will do this by looking through the cases you found. Write a 250-word reflection on what you found.

**Class Activity 2:** On Wednesday, we'll get started building a literature review. I'll show you how to find law review articles, introduce you to the major databases dealing with law, and you'll find 5 articles that you will review for your annotated bibliography (due next week). Post your list of articles to MStams.

#### WEEK 5: *Brown* and the Warren Court's 'Second Reconstruction'

January 31	<i>Brown v. Board of Education (I)</i> [pg. 1389-1394] O'Brien & Silverstein [pg. 1376-1388; 1394-1395] Bell Jr, Derrick A. "Brown v. Board of Education and the interest-convergence dilemma." <i>Harvard law review</i> (1980): 518-533.
February 2	<i>Heart of Atlanta Motel v. U.S.</i> [find on Oyez or LoC] <i>Katzbach v. Morgan</i> [find on Oyez or LoC] O'Brien & Silverstein [pg. 315-330] JFK Speech on the Civil Rights Bill <b>BB</b>

What vision of racial justice does *Brown* express? Why, according to the court, is racial segregation unconstitutional and unjust? What are the costs of segregation and to what individuals/groups? What remedies does the Court lay out for segregation? What problems might you foresee with the Court's approach to ending segregation? How does the Court see its role in *Brown* as compared with the vision it articulated in *The Civil Rights Cases* and *Plessy*?

**Class Activities:** We'll set aside time in class to begin work on your annotated bibliography and developing a checklist for your midterm portfolio, which will be due this coming Sunday at midnight.

**WEEK 6: Remedying past discrimination or engendering new harms?**

February 7	<i>Regents of the University of California vs. Bakke</i> [pg. 1441-1449] <i>Gratz v. Bollinger</i> [pg. 1462-1466] <i>Grutter v. Bollinger</i> [pg. 1466-1474] O'Brien & Silverstein [pg. 1432-1434; 1449-1454]
February 9	<i>United Steelworkers v. Weber</i> [Oyez or LoC] Anthony Chen. "I Have a Dream Deferred," <i>The Fifth Freedom</i> . Princeton, Princeton University Press, 2009: pp. 170-229 <b>BB</b>

These cases illustrate the tensions between past discrimination and contemporary problems. What sorts of remedies, if any, are permissible to address historic discrimination? What interests and rights are the Justices balancing in these cases? How and why do these cases pose a dilemma for how we think about equality? Is it possible to redress racial injustices without creating new racial harms? How did the United States end up with Affirmative Action rather than Fair Employment practices?

**Class Activities:** We'll take some time this week to formulate your thesis statement. We'll work individually and workshop your idea with the class. Post your thesis statement to MTeams and write a 250 word reflection on the process of collaboration and development.

**WEEK 7: A right to vote? A right to representation?**

February 14	<i>Baker v. Carr</i> [pg. 166-177] <i>Smith v. Allwright</i> [abridged version posted on BB] <i>Gomillion v. Lightfoot</i> [abridged version posted on BB] <i>Shelby County v. Holder</i> [Read Roberts' majority opinion & Ginsburg's dissent] Watch: Frontline, "Whose Vote Counts" <a href="https://www.youtube.com/watch?v=XmC98pc9xzg">https://www.youtube.com/watch?v=XmC98pc9xzg</a>
February 16	"Shaw v. Reno and the future of voting rights." <i>PS: Political Science &amp; Politics</i> 28, no. 1 (1995): 27-36. Ackerman, Bruce. "Spheres of Calculation," in <i>We the People, Volume 3: The Civil Rights Revolution</i> . Harvard University Press, 2014. <b>BB</b>

Was the Court correct to intervene in redistricting cases, or was this an illegitimate usurpation of state and local power? What historical background led to the adoption of the Voting Rights Act of 1965? Is the Voting Rights Act still needed at a time when the US has twice elected a black President? Are districts a valid basis for gerrymandering? What are legitimate factors and concerns legislatures use in drawing voting districts, and what considerations should be impermissible? When (if at all) should federal courts get involved with these matters, and why?

**Class Activities:** This week, we'll set aside some time to write and collaborate on your paper outlines. When you have your outline complete, post it to your MTeams channel.

### WEEK 8: *Property Rights and Economic Freedom*

February 21	Review <i>The Slaughterhouse Cases</i> <i>Lochner v. New York</i> [pg. 277-283] <i>Muller v. Oregon</i> [pg. 283-286] <i>West Coast Hotel v. Parrish</i> [pg. 286-288] O'Brien & Silverstein [pg. 232-237; 256-260]
February 23	<i>Hawaii Housing Authority v. Midkiff</i> [pg. 297-300] <i>Berman v. Parker</i> [find on Oyez or LoC] <i>Kelo v. City of New London</i> [pg. 305-314] O'Brien & Silverstein [pg. 289-293] Blackstone, Bethany. "An analysis of policy-based congressional responses to the US Supreme Court's constitutional decisions." <i>Law &amp; Society Review</i> 47, no. 1 (2013): 199-228.

*Lochner*, *Muller*, and *West Coast Hotel* offer very different theories of how law should treat economic freedom and how the government should manage pay discrimination and working conditions. Should laws and policies take into account private discriminatory and safety practices? How might assertions of formal equality ignore real forms of difference and discrimination? Is there a difference between legal protection and paternalism? How did the rise of legal protection for women play out against the larger political changes going on during the Progressive & New Deal Eras? Our second class day focuses on the takings clause and eminent domain. How does what happens in these cases relate to cases about wage discrimination? Or racial discrimination?

**Class Activities:** None this week because your first draft of your paper is due on Sunday at midnight.

### Week 9: *The Rights of the Accused*

February 28	<i>Olmstead v. United States</i> [pg 951-955] <i>Katz v. United States</i> [pg. 956-960] <i>Mapp v. Ohio</i> [pg. 1000-1007 – Including the “Inside the Court” page] O'Brien & Silverstein [pg. 838-841; 943; 950]
March 2	<i>Miranda v. Arizona</i> [pg. 1054-1063] <i>Powell v. Alabama</i> [pg. 1103-1106] <i>Gideon v. Wainright</i> [pg. 1106-1109] <i>Batson v. Kentucky</i> [pg. 1136-1138] O'Brien & Silverstein [pg. 1035-1054; 1096-1102; 1128-1136] Listen to: S2, E7 of <i>In the Dark</i> “The Trials of Curtis Flowers” <a href="https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7">https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7</a>

The Bill of Rights devotes five amendments to the rights of the accused (4, 5, 6, 7, and 8). It is clear that the founders found this important. While reading these chapters and cases, consider the role of technology in court decisions. How does class and race play into these decisions? How do these rights have implications for a right to privacy?

***In class activities:*** We'll talk about how to edit a paper and how to do your peer review. We'll also set aside time for you to meet with your reviewer to talk about what you want feedback on.

Week 10: A right to privacy

March 7	<i>Griswold v. Connecticut</i> [pg. 1247] <i>Roe v. Wade</i> [pg. 1247] <i>Planned Parenthood v. Casey</i> [pg. 1267-1280] O'Brien & Silverstein [pg. 1228-1236; 1260-1266] Greene, Jamal. "The meming of substantive due process." <i>Const. Comment.</i> 31 (2016): 253.
March 9	<i>Frontiero v. Richardson</i> [pg. 1497-1500] <i>Lawrence v. Texas</i> [1534] <i>Obergefell v. Hodges</i> [1534-1558] <i>Loving v. Virginia</i> [Oyez or LoC] O'Brien & Silverstein [pg. 1338-1342; 1490-1491; 1520-1523; 1286-1287]

Where does the Court "find" the right to privacy in *Griswold*? How does the Court balance the interests of the pregnant woman and the state in *Roe*? How does that balance change in *Casey*?

Why has the Court used both equal protection and privacy to protect the interests of LGBTQ people? What, if any, are the limits of personal autonomy under the right to privacy? Which, if any, state interests might legitimately trump individual rights to sexual freedom and/or marriage?

What is substantive due process and how does it differ from equal protection?

***In class activities:*** This week will work on peer review. On Wednesday, you'll formally present your comments to your reviewer and ask questions. You will use these comments to revise your paper.

***Final papers and final portfolios due Wednesday of next week!***