
OUR CONSTITUTION

GENERAL COMMENTS

This chapter introduces the student to the fundamentals of constitutional law. Already we have reminded students of the dramatic societal changes that occurred over the last century and of the challenging events unfolding this century. Younger students will often lack personal perspective on the durability of the constitution. As current events unfold, the United States' role in worldwide events is raising questions on the meaning, application and efficacy of the Constitution. We hope to demonstrate how our Constitution survived the changes in the last century by leading with principles that are immutable. The students' lives, however, will be focused on the future and the viability of the constitution will continue to be tested with the challenges of contemporary society.

We continue our investigation of legal issues with a focus on the contemporary situations with which our students may be familiar. For example, the distinction between natural law and our constitutional positive law is made by making reference to the interesting case of David Thomas Cash, Jr., who at the time of the questioned events was a UC Berkeley student. It is unlikely that any of your students will forget the natural/positive law distinction after studying Cash's behavior.

At this editions' writing, international issues that involve the question of how the United States should apply the Constitution overseas continue to capture attention. The "war on terror" is entering its second decade and issues stemming from it are driving many of these topics including racial preferences and the question of what rights a non-citizen prisoner or enemy combatant has. Issues such as abortion and immigration continue as hotly debated topics with a constitutional law connection. The rights of homosexuals to enjoy the same rights and privileges as heterosexuals is a growing constitutional topic of debate. With these issues, the text may be out of date a day after publication on these topics and others. You will need to do current topical research. However, we do believe we have provided the coverage of fundamental constitutional concepts needed to create a useful conversation about the difficult issues facing a free society.

We have arbitrarily selected and emphasized those constitutional principles that we believe are most interesting and useful to our students. Undoubtedly we have missed some that you may find most suitable for your classes — we leave those to your own devices.

With their new mastery of constitutional law — albeit limited — students will better understand media reports of legislative, executive, and judicial skirmishes and battles over civil rights (e.g., affirmative action; immigration), the separation of powers (e.g., the executive line-item veto; suspension of initiatives), proposed constitutional amendments (e.g., balanced budget; school prayer), and a variety of other important issues (e.g., campaign financing; war powers) confronting society. We are confident

our students will be served by this presentation of constitutional law; we sincerely hope they draw the same conclusion.

CHAPTER SUGGESTIONS

1. The chapter's organization generally follows the pattern used in most "con law" textbooks. We recommend the use of any such text as a valuable supplemental reference for you in case we have over-simplified or narrowed a topic more than you desire.
2. Constitutional law can be very difficult, even a "turn off" for students, particularly when it is squeezed into a single chapter. We have attempted to provide stimulating examples to show how constitutional law applies to people's lives. We have found that classroom discussions of examples are the most effective way to enliven our students' involvement with, and appreciation of, constitutional principles. Many obvious questions for student discussion deserve preparation time. Consider this question, for example: "Should state courts be able to suspend a new law (or constitutional provision) immediately following its adoption by the people through the initiative process?" The question could include a specific topic, such as restricting the expenditure of public funds for services to illegal immigrants. Discussion might include the requirement of a case or controversy, the role of the people in governing, the time and effort in passing an initiative, the role of corporate money in the process, alternative safeguards against improper initiatives, etc. Because of the wide scope of many questions or topics involving constitutional law, we have found it especially helpful to e-mail proposed questions to a selection of our students for their consideration over the weekend preceding the next class meeting. Other students in the class weren't aware of who received the questions and who did not, leading to participation by all (or, at least most) students. Sooner or later every student receives questions or topics in advance.

FOR CRITICAL ANALYSIS

Thomas et al. v. Chicago Park District

1. It was important. Content neutral means the license was granted or not granted without reference to what speech was planned for the event. The park districts ordinance does not authorize a licensor to pass judgment on the content of speech: The grounds for denying a permit has nothing to do with what a speaker might say. The same procedural safeguards which are necessary when censorship is involved are necessarily required when licenses are granted without regard to content.
2. The Fourteenth Amendment due process clause has been interpreted to incorporate the free speech clause and provide federal constitutional protection from state government action. (A municipality is considered a state government.)
3. A prior restraint is constraint on speech before it happens. The notion is that it is odious to conclude behavior will be wrongful before one knows exactly what the behavior will be. The constitutional concern is free speech protects unpopular views that the majority would often times be inclined to prohibit. Any licensing of speech before it occurs is a prior restraint. The question is whether it is an unconstitutional prior restraint. The petitioner wished the court to apply its test from *Freedman*: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must

bear the burden of proof once in court. The court did not do so, because the licensing ordinance was content neutral with reasonable specific grounds for rejection of a license.

McDonald v. Chicago

1. Justice Alioto's plurality opinion relies upon the due process of clause of the 14th Amendment to apply the 2nd Amendment to states. Thus it depends on both. This case is a good opportunity to highlight how the 14th Amendment works as much as it is also an opportunity to explore the 2nd Amendment.
2. Justice Stevens' dissent provides a tight description of substantive due process compared to procedural due process. He finds that the Supreme Court's case history has established that the 14th Amendment, when it comes to the question of incorporation of the Bill of Rights, is a substantive due process issue, meaning it must be asked whether the proposed law directly violates a liberty right. Justice Alioto disagrees with Justice Steven's characterization of the case law. You can determine that simply by Stevens' framework. He approaches the case as a question of whether or not the 2nd Amendment is applied to states via the 14th Amendment. In any case, the question of whether or not Chicago could ban firearms as the city did could be answered yes or no under either approach. But Justice Alioto shows that it is probably easier to reach his outcome if you take the 2nd Amendment approach than if you approach the topic from the fundamental liberty perspective.
3. Justice Alioto believes that the incorporation doctrine must consider whether the right in question was one guaranteed to citizens in the bill of rights. If it was, then it should be part of the Bill of Rights that is incorporated in the 14th Amendment's due process clause. Justice Stevens believes that you must find the right in question to be one of fundamental liberty and disagrees with the incorporation doctrine in its entirety. Their disagreement ultimately drives their different outcomes.

ANSWERS TO QUESTIONS AND PROBLEMS

1. The question is answered by the case of *Gerber v. Hickman* 291 F.3d 617 (9th Cir. Cal., 2002) cert. denied 123 S.Ct. 558, (2002)
 - a. A prisoner does not lose all constitutional rights, but certain rights are curtailed. "[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." For example, a prisoner has a right to send and receive mail, to marry, and to access the courts.
 - b. The court held that a prisoner had no federal constitutional right to require the prison warden to accommodate his request that he be allowed to provide his wife with a sperm specimen with which she could be artificially inseminated. "We hold that the right to procreate while in prison is fundamentally inconsistent with incarceration." The inmate argued a fundamental right to procreate, violation of equal protection, and a violation of the Eighth Amendment's provision on cruel and unusual punishment.
 - c. The court held that the fact that "California prison officials may choose to permit some inmates the privilege of conjugal visits is simply irrelevant to whether there is a constitutional right to conjugal visits or a right to procreate while in prison." The California rule did not allow such visits for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date established by the Board of Prison Terms." No parole date has been set for plaintiff, and according to plaintiff, due to the length of his sentence, no parole date seems likely.

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2. The plurality *Bakke* case found a hard quota to be unconstitutional. In 2003, the Supreme Court decided a college admissions affirmative action case, *Grutter v. Bollinger* (539 U.S. 306, 123 S.Ct. 2325 (2003)) and allowed a college admissions program that focused on diversity with race and ethnic background being only one of many factors considered. A race specific scholarship program, however, is more akin to a hard quota such as in *Bakke* and is thus probably unconstitutional. One has to use the word probably since *Bakke* was a plurality and the *Grutter* case did not provide any clear renunciation or endorsement of the *Bakke* prohibition of a hard quota.
3. E-mail is a “push” phenomenon in which consumers do not ask for the “spam” they receive. Thus, government regulation can be characterized as consumer protection. Web sex, however, is a “pull” phenomenon in which customers seek out, and often pay for, the information they obtain. Thus, consumers appear to need less regulation of web sex than of unwanted e-mail. For example, the “First Amendment gives anyone the right to say whatever they want, but it does not give them the right to stand at my doorway and shout it through my mail slot.” Web sex was popularized by a couple who announced they would show a live video feed of themselves, both virgins, having sex on the Internet. Some newspapers reported that the event would be “broadcast” on the Internet. In reality, before it was withdrawn, the plan was to present it on a website available only to paying customers.

Although the courts have not resolved the questions asked, the answer would appear to be related to the distinction noted above. Although sexually explicit spam has grown the distinction may be more difficult to make. The case for regulation of unwanted e-mail appears to be much stronger than the argument for regulation of websites.

4. In 2003, in *Lawrence v. Texas*, discussed on pages 87-88, the Supreme Court held in a divided opinion that private homosexual sexual relations are protected as a liberty right. Thus a law prohibiting sodomy is considered unconstitutional. The *Lawrence* decision reflected a major change in the interpretation of whether banning sodomy was constitutional. Previously the court had held that a liberty right did not extend to sexual acts. The court by accepting the perspective that banning sodomy restricted the rights of homosexual individuals to fully enjoy their freedoms in their relationships, made a significant change in law. Consider how the same court might evaluate the question of gay marriage under this paradigm. Consider also how a later Supreme Court with a different composition of justices could reverse the *Lawrence* decision or restrict the holding.
5. The court initially avoided the issue by stating that the School District’s use of the racial tiebreaker violated Washington state law. Because “we look first to state law to resolve this issue, in accordance with our longstanding principle that courts should avoid making federal constitutional decisions unless and until necessary.” On rehearing en banc, the Court of Appeals, Fisher, Circuit Judge, held that:
 - (1) school district had compelling interest in securing educational and social benefits of racial and ethnic diversity and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments did not simply replicate Seattle's segregated housing patterns,
 - (2) for purposes of determining whether district's plan was narrowly tailored to meet its compelling interests, district's fifteen percent plus or minus variance was not “quota”;
 - (3) district made good-faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of system involving sibling preference, race-based tiebreaker and proximity preference;
 - (4) tiebreaker imposed minimal burden shared equally by all district's students and did not unduly harm members of any racial group; and
 - (5) plan included periodic reviews to determine whether racial preferences were still necessary to

achieve student body diversity.

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 426 F.3d 1162, C.A.9 (Wash.), 2005.

6. Discussion questions as issues are raised in the courts: a) equal protection and due process, b) due process and all criminal law protections, c) search and seizure.
7. Yes. The city was exercising its police power to protect its residents from the threat of fire, and the restriction on flag burning was necessary to achieve that legitimate governmental objective. The ordinance made no attempt to squelch flag burning as a political statement, and it could take place on days when fire hazards were moderate to low.
8. Many would agree with *The Economist*, because the philosophical balance of the court, for many years in the future could be affected by the vote of one new justice. Not only is the appointment for life “during good behavior,” but the impact on our culture is pervasive and powerful. This is manifest in the numerous rules and regulations that govern and shape our social, political, and economic affairs. The Supreme Court is the final arbiter, short of amendment of the Constitution, in resolving conflicts over solutions to questions of law with a constitutional dimension. Life in civilized society requires predictable certainty with “equal justice under law.” The U.S. Supreme Court is responsible to fulfill these requisites.

On the other hand, a single judicial appointment is only one person on a panel of nine. The appointment of a bureaucratic-type individual, who is the product of political pressures from special interest groups, could create a court capable of little more than gridlock (with reference to 5-4 decisions, so that every time a justice is replaced, the law of the land may be significantly changed).

However, justices may agree on a decision, but for different reasons, as is occasionally reflected in voluminous concurring opinions. These opinions tend to breed uncertainty as to the foundation of justice. In effect, this gives “something to everyone” and avoids the harsh impact of decisiveness.

For better or worse, the appointment process itself has become politicized. Women demand a woman, various ethnic groups demand specific representation, and the president is increasingly under pressure to make recommendations to appease special interest groups in Congress. Furthermore, because many decisions are 5-4, it can be argued that a single person in the ultimate showdown makes fundamental changes to society.

9. The U.S. Supreme Court said yes by a 5-4 margin. The court held that prayer, even if nonsectarian, violates the Constitution when it is part of a public high school or public elementary school graduation ceremony. Justice Kennedy, in the majority opinion, acknowledged the difficulty of deciding cases that involve religious activities in public settings and made several observations about this public ceremony and its participants. First, high school graduations are important public ceremonies. Second, even if attendance is voluntary, as it was for the Providence school’s graduation ceremony, most students and their families wished to attend. Thus, if prayers are offered, students are expected to observe the prayers in some respectful way. Any student who does not wish to participate in the prayer lacks a reasonable alternative. The student can either participate, perhaps against conscience, or risk disapproval from her or his classmates. Because school officials direct the activity, and even control the content of the prayer, they create a dilemma for the student.

“One timeless lesson [of the First Amendment] is that if citizens are subject to state-sponsored religious exercises, the state [denies] its own duty to guard and respect [the]... conscience and belief which is the mark of free people.”

10. Whether it is fair to force someone to “break the law” in order to “change the law” is a question of ethics. In discussing this question consider both duty-based and utilitarian methods of ethical

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analysis. Under a duty-based view, the question is one of whether there is a duty to follow a law that you consider illegal or immoral. From a utilitarian perspective, one could balance the costs and benefits of access to the courts to those seeking advisory opinions and those with true legal conflicts.