

THE ORIGIN AND EVOLUTION OF AMERICAN CIVIL RIGHTS LAW

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Course description. This course traces the development of U.S. constitutional and statutory mechanisms designed to fulfill the promise of equality under the law. American civil rights law represents one of our nation's most celebrated traditions. The course will examine the substance of federal civil rights laws, with special attention to the manner in which this body of law has evolved over time and to the equality values that have competed for dominance across this history. The course will provide students with an introduction to doctrinal frameworks in several key civil rights areas (including education, employment, housing, voting, policing, and marriage), and it will discuss how these frameworks have applied to different types of discrimination (including discrimination based on race, sex, religion, disability, and sexual orientation).

Students will be asked to consider how, over time, civil rights laws' inclusion of new protected statuses and prohibition against new forms of discrimination may have exposed unforeseen problems with the project of providing equality under the law. For example, are legal mechanisms constructed to address problems of civil and political inequality faced by former slaves after the Civil War adequate to address issues of social inequality faced by their descendants in the present day? Are laws passed during Reconstruction and the civil rights era merely anachronistic political artifacts in today's "post-racial" America, or are they more relevant than ever given the contentious policing and immigration issues of our time? Are existing civil rights laws adequate to address claims of discrimination based on non-racial statuses, such as gender, sexual orientation, and class? Or have the racial origins of American equality discourse obscured the uniqueness of those claims? Building upon its historical foundation, the course will conclude by giving close consideration to contemporary issues such as marriage equality, racially discriminatory policing practices, campus sexual harassment policies, voter identification laws, and the Trump administration's controversial travel ban.

Student performance will be evaluated on the basis of a short mid-term paper written in response to questions posed by the instructor (30% of final grade) and a longer final essay which may be written in response to questions posed by the instructor or it may be written on a topic approved by the instructor (60% of final grade). In addition, class attendance and participation will account for 10% of the final grade. Course readings will consist of selections from primary and secondary materials. Those readings are designed to average approximately 100 pages per week.

Learning objectives. The course is structured help students to fulfill the following learning objectives.

1. For students to obtain an understanding of the origins of American civil rights law and the particular objectives and assumptions that shaped the law at its origins.

2. For students to develop proficiency in the application of current civil rights law doctrine across a range of social circumstances.

3. For students to understand the set of normative commitments and assumptions that continue to guide the development and enforcement of American civil rights law.

4. For students to develop the ability to use their understandings of legal assumptions and normative commitments in order to apply those understandings to contemporary cases.

Grading. Grades will be determined on the basis of a midterm paper (30%), a final paper (60%), and class attendance and participation (10%). The midterm paper should be 5-7 pages in length, double-spaced, and it should answer a question posed by the instructor, present a clear thesis, and give due consideration to arguments against the student's thesis. The final paper should be 20-25 pages in length. Regardless whether they are written in response to questions posed by the instructor (option 1) or on topic approved by the instructor (option 2), all final papers should present a clear and original thesis, include (where necessary) supporting research outside the course materials, and give due consideration to arguments against the student's thesis.

Course materials and assignments. Our casebook for the majority of our constitutional case materials is BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (7th ed.). All other course materials shall be provided in the form of a workbook of readings selected by the instructor.

Week 1

I. Introduction: Theories of Equality and Four Questions about the Law

- ❖ Assignment 1: *Brown v. Board of Education*
Griggs v. Duke Power Co.

II. The Origins of Civil Rights Law

A. Problems of Slavery and Citizenship

- ❖ Assignment 2: *Dred Scott v. Sandford*
Douglass, "What to the Slave Is the Fourth of July?" (1852)
SMITH, CIVIC IDEALS (pp. 212-17, 230-35)

B. The Reconstruction Amendments and Early Civil Rights Legislation

- ❖ Assignment 3: SMITH, CIVIC IDEALS (pp. 286-317, 325-42)
BICKEL, THE MORALITY OF CONSENT (ch. 2)

Week 2

- ❖ Assignment 4: *The Slaughterhouse Cases*
Strauder v. West Virginia
The Civil Rights Cases
Bradwell v. Illinois
Pace v. Alabama
Minor v. Happersett
- ❖ Assignment 5: *Pace v. Alabama*
Plessy v. Ferguson
Douglass, "The Race Problem" (1890)
- ❖ The Fourteenth Amendment and the "Second Reconstruction"
 - i. *Brown* Reconceptualizes Equal Protection and Judicial Review
- ❖ Assignment 6: *Brown v. Board of Education*
Bickel, "The Original Understanding and the Segregation Decision"
Black, "The Lawfulness of the Segregation Decisions"
Wechsler, "Toward Neutral Principles of Constitutional Law"

Week 3

(Labor MLK Day, January 21)

- ii. School Desegregation as Model for Judicial Review and Judicial Restraint
- ❖ Assignment 7: *Loving v. Virginia*
MLK, "Letter from a Birmingham Jail" (1963)
Notes on the school desegregation cases
San Antonio Independent Sch. Dist. v. Rodriguez
Missouri v. Jenkins
BICKEL, THE LEAST DANGEROUS BRANCH
ACKERMAN, THE CIVIL RIGHTS REVOLUTION
Siegel, "Equality Talk"

C. Modern Equal Protection Doctrine

- iii. Suspect Classification Doctrine

1. Strict Scrutiny

- ❖ Assignment 8: *Korematsu v. United States*
Graham v. Richardson
Theories of suspect classification
Palmore v. Sidoti

Week 4

- ❖ Assignment 9: *Rice v. Cayetano*
City of Richmond v. J.A. Croson Co.
Adarand Constructors, Inc. v. Peña

2. Intermediate Scrutiny

- ❖ Assignment 10: *Frontiero v. Richardson*
Craig v. Boren
Michael M. v. Superior Court
United States v. Virginia
Nguyen v. INS
MacKinnon, "Difference and Dominance"

3. Rational Basis Review

- ❖ Assignment 11: *Plyler v. Doe*
Cleburne v. Cleburne Living Ctr.
Romer v. Evans

ii. Discriminatory Purpose Doctrine

Week 5

- ❖ Assignment 12: *Yick Wo v. Hopkins*
Palmer v. Thompson
Washington v. Davis
Arlington Heights v. Metropolitan Housing Corp.
- ❖ Assignment 13: Ackerman, "Beyond *Carolene Products*"
Siegel, "Why Equal Protection No Longer Protects"
YOSHINO, COVERING

iii. The Post-Racial Politics of Racial Egalitarianism

1. Affirmative Action in Education

- ❖ Assignment 14: *Regents of the University of California v. Bakke*
Grutter v. Bollinger
Fisher v. University of Texas at Austin (Fisher I)
Fisher v. University of Texas at Austin (Fisher II)

Week 6

- ❖ Assignment 15: CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY
Guinier, "Admissions Rituals as Political Acts"
Rich, "What Diversity Contributes to Equal Opportunity"
Rubinfeld, "Affirmative Action"
Siegel, "Equality Talk"

2. Racial Remedies in the Political Process

- ❖ Assignment 16: *Washington v. Seattle Sch. Dist. No. 1*
Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1
Coalition for Econ. Equity v. Wilson
Coalition to Defend Affirmative Action v. Brown
Schuetz v. BAMN
Siegel, "From Colorblindness to Antibalkanization"
Rich, "Inferred Classifications"

IV. Congressional Authority to Enact Antidiscrimination Law

- ❖ Assignment 17: *Jones v. Alfred H. Mayer Co.*
Katzenbach v. Morgan
City of Boerne v. Flores
United States v. Morrison

Week 7

(President's Day—February 18)

February 19—Monday Classes meet

V. Equal Employment Opportunity

A. Race Discrimination as the Paradigm

1. Individual Disparate Treatment

- ❖ Assignment 18: *McDonnell Douglas v. Green*
Furnco Construction Co. v. Waters
St. Francis College v. Al-Khazraji

General Building Contractors Ass'n v. Pennsylvania
St. Mary's Honor Ctr. v. Hicks

- ❖ Assignment 19: Bertrand & Mullainathan, “Are Emily and Greg More Employable than Lakisha and Jamal?”
Krieger, "The Content of Our Categories"
Rich, “Against Prejudice”
Sturm, “Second Generation Employment Discrimination”
Bagenstos, “The Structural Turn in Antidiscrimination Law”

2. Systemic Discrimination

- ❖ Assignment 20: *Teamsters v. United States*
United States v. Hazelwood Sch. Dist.

Week 8 – Midterm papers due

- ❖ Assignment 21: *Griggs v. Duke Power Co.*
Connecticut v. Teal
Wards Cove Packing v. Atonio
Ricci v. DeStefano
EEOC v. Freeman
Reyes v. Pharma Chemie, Inc.
FISHKIN, BOTTLENECKS

B. Special Problems in Sex Discrimination

1. Rational Discrimination

- ❖ Assignment 22: *City of Los Angeles Dep't of Water & Power v. Manhart*
Dothard v. Rawlinson
International Union, UAW v. Johnson Controls, Inc.
AFSCME v. State of Washington
Young v. UPS
Schultz, “Telling Stories about Women and Work”

2. Harassment

- ❖ Assignment 23: *Meritor Savings Bank FSB v. Vinson*
Harris v. Forklift Sys.
Burlington Indus. v. Ellerth
Faragher v. City of Boca Raton
ESTRICH, SEX AT WORK

MACKINNON, THE SEXUAL HARASSMENT OF WORKING
WOMEN

Week 9

- ❖ Assignment 24: *Oncale v. Sundowner Offshore Servs., Inc.*
Robinson v. Jacksonville Shipyards, Inc.
Jenson v. Eveleth Mines (D. Minn.)
Jenson v. Eveleth Mines (8th Cir.)
Velez v. Novartis (news reports)
Franke, “What’s Wrong with Sexual Harassment?”
Schultz, “Reconceptualizing Sexual Harassment”

3. Sex Stereotyping: Grooming Codes, "Lady Partners," and
Customer Preferences

- ❖ Assignment 25: *Price Waterhouse v. Hopkins*
Wilson v. Southwest Airlines
Craft v. Metromedia, Inc.
Jespersen v. Harrah’s Operating Co.
Dwoskin, “Is This Woman Too Hot to Be a Banker?”
Burgess & Borgida, “Who Women Are, Who Women
Should Be”
Bartlett, “Only Girls Wear Barrettes”

C. Sexual Orientation

- ❖ Assignment 26: *Rene v. MGM Grand Hotel*
Smith v. City of Salem
Hively v. Community Tech. Community College
Case, “Disaggregating Gender from Sex and Sexual
Orientation”

Week 10 – Spring Break

Week 11

D. Reasonable Accommodation of Religious Observance

- ❖ Assignment 27: *Trans World Airlines, Inc. v. Hardison*
Ansonia Board of Education v. Philbrook
EEOC v. Abercrombie & Fitch Stores, Inc.
Hosanna Tabor Evangelical Lutheran Church and School
v. EEOC

E. Reasonable Accommodation of Disability

- ❖ Assignment 28: *Raytheon v. Hernandez*
U.S. Airways, Inc. v. Barnett
EEOC v. United Airlines, Inc.
 Bagenstos, “Rational Discrimination, Accommodation, and the Politics of (Disability) Civil Rights”
 Jolls, “Antidiscrimination v. Accommodation”

F. Workplace Affirmative Action and Diversity

- ❖ Assignment 29: *Steelworkers v. Weber*
Firefighters Local Union NO. 1784 v. Stotts
Johnson v. Transportation Agency of Santa Clara, County
Patrolmen’s Benevolent Ass’n v. New York
Ricci v. DeStefano
 Rich, “Whose Diversity?”

Week 12

VI. Fair Housing

- ❖ Assignment 30: *City of Memphis v. Greene*
Town of Huntington v. NAACP
Bank of America v. Miami
Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project, Inc.

VII. Sex Discrimination in Education: Equal Protection and Title IX of the Education Amendments of 1972

- ❖ Assignment 31: *Mississippi Univ. for Women v. Hogan*
United States v. Virginia
Garrett v. Board of Education
- ❖ Assignment 32: *Gebser v. Lago Vista Independent School Dist.*
Davis v. Monroe County Board of Education
 Documents regarding Dep't of Justice investigations into sexual harassment on university campuses (2014-2016)
 Dep't of Education press release regarding resolution of sexual harassment complaints against VMI (May 9, 2014)

Week 13

VII. Speech as Discrimination: Hate Speech, Hate Crimes, and Antidiscrimination Law

- ❖ Assignment 33: *R.A.V. v. City of St. Paul*
Wisconsin v. Mitchell
Aguilar v. Avis Rent-A-Car
Schultz, "The Sanitized Workplace"
Volokh, "Freedom of Speech and Workplace Harassment"

VIII. Voting Rights

A. Vote Dilution and Ballot Access

- ❖ Assignment 34: *The White Primary Cases*
Whitcomb v. Chavis
White v. Regester
City of Mobile v. Bolden
- ❖ Assignment 35: *Thornburg v. Gingles*
Johnson v. De Grandy
Holder v. Hall
Bartlett v. Strickland
Issacharoff, "Groups and the Right to Vote"

Week 14

B. Racial redistricting

- ❖ Assignment 36: *United Jewish Org. of Williamsburg v. Carey*
Shaw v. Reno
Miller v. Johnson
Bush v. Vera
Pildes & Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights"
- ❖ Assignment 37: *LULAC v. Perry*
Georgia v. Ashcroft
NAMUDNO v. Holder
Shelby County v. Holder
Charles, "Racial Identity, Electoral Structures, and the First Amendment Right of Association"

VIII. Special Topics in 21st Century Antidiscrimination Law

a. Sexual Orientation and Same-Sex Marriage under the Constitution

- ❖ Assignment 38: *Lawrence v. Texas*
United States v. Windsor

Obergefell v. Hodges
YOSHINO, SPEAK NOW

Week 15

b. Criminal Law and Policing

- ❖ Assignment 39: *McClesky v. Kemp*
United States v. Clary
Chavez v. Illinois State Police
Floyd v. City of New York
United States v. Johnson

c. Voter ID Laws

- ❖ Assignment 40: *Veasey v. Abbott* (5th Cir. en banc)
Veasey v. Abbott (S.D. Tex. 4/11/2017)
NAACP v. McCrory
Ansolabehere & Persily, "Vote Fraud in the Eye of the Beholder"

d. Alienage and Immigration

- ❖ Assignment 41: *Sessions v. Morales-Santana*
Hawaii v. Trump
Int'l Refugee Assistance Project v. Trump
TBD

May 9 – Final Paper due

Statement on Academic Conduct and Support Systems

Academic Conduct:

Plagiarism – presenting someone else’s ideas as your own, either verbatim or recast in your own words – is a serious academic offense with serious consequences. Please familiarize yourself with the discussion of plagiarism in *SCampus* in Part B, Section 11, “Behavior Violating University Standards” <https://policy.usc.edu/scampus-part-b/>. Other forms of academic dishonesty are equally unacceptable. See additional information in *SCampus* and university policies on scientific misconduct, <http://policy.usc.edu/scientific-misconduct>.

Support Systems:

Student Counseling Services (SCS) - (213) 740-7711 – 24/7 on call

Free and confidential mental health treatment for students, including short-term psychotherapy, group counseling, stress fitness workshops, and crisis intervention. <https://engemannshc.usc.edu/counseling/>

National Suicide Prevention Lifeline - 1-800-273-8255

Provides free and confidential emotional support to people in suicidal crisis or emotional distress 24 hours a day, 7 days a week. <http://www.suicidepreventionlifeline.org>

Relationship & Sexual Violence Prevention Services (RSVP) - (213) 740-4900 - 24/7 on call

Free and confidential therapy services, workshops, and training for situations related to gender-based harm. <https://engemannshc.usc.edu/rsvp/>

Sexual Assault Resource Center

For more information about how to get help or help a survivor, rights, reporting options, and additional resources, visit the website: <http://sarc.usc.edu/>

Office of Equity and Diversity (OED)/Title IX compliance – (213) 740-5086

Works with faculty, staff, visitors, applicants, and students around issues of protected class. <https://equity.usc.edu/>

Bias Assessment Response and Support

Incidents of bias, hate crimes and microaggressions need to be reported allowing for appropriate investigation and response. <https://studentaffairs.usc.edu/bias-assessment-response-support/>

Student Support & Advocacy – (213) 821-4710

Assists students and families in resolving complex issues adversely affecting their success as a student EX: personal, financial, and academic. <https://studentaffairs.usc.edu/ssa/>

Diversity at USC

Tab for Events, Programs and Training, Task Force (including representatives for each school), Chronology, Participate, Resources for Students. <https://diversity.usc.edu/>