

THE ORIGIN AND EVOLUTION OF AMERICAN CIVIL RIGHTS LAW
Spring 2022

Professor Stephen M. Rich

Office Hours: By appointment via Zoom

Office: Room 474

Assistant: Maria Chan

Email: srich@law.usc.edu

Email: mchan@law.usc.edu

Course description. American civil rights law represents one of our nation's most celebrated moral achievements. For this reason, it may be tempting to think of civil rights laws as pure expressions of our moral aspirations; doing so, however, obscures the realities of their complex constitution and continuing public controversy. Our nation's civil rights laws emerged as hard-fought political responses to urgent social problems. For example, how would the United States ensure the physical protection and promote the social and economic inclusion of newly freed slaves following the Civil War? Would civil rights laws end the social and economic domination of women and provide them with the same civil and political rights afforded to their husbands, brothers, and sons? Must states' restrictions on interracial and same-sex marriage be upheld as valid expressions of public morality or did the constitutional value of equality trump such mores?

When we examine the history of American civil rights laws today, we must acknowledge that our civil rights laws were enacted, generally speaking, in response to the problems of their day and that this fact has affected their effectiveness when applied to problems faced by later generations. There is a deep tension between the practical origins of civil rights laws and the forward-looking application of the moral principles that they express. This course will examine that tension across time, and it will culminate by posing to students the questions of what are the most urgent inequalities facing our nation today and how should the law be adapted to meet the challenges that they pose.

The course will adopt a genealogical rather than a merely chronological approach to civil rights history. That is, it will concern itself primarily with the development of certain relationships (e.g., between historical problems and legal principles) over time. In other words, the course will take civil rights history as its foundation, and thus it will seek to provide students with a basic understanding of that history; but the course will be more concerned with the ways in which legal concepts and principles have been shaped over time to meet social and political needs rather than with narrating the deeds of particular historical actors. The course will offer a deep examination of the substance of American civil rights laws, including constitutional and statutory legal bodies of law, with special attention to the manner in which these laws have 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 legal frameworks in several key civil rights areas (including education, employment, voting, 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, voter identification laws, affirmative action in university admissions, and racially discriminatory policing practices.

Learning objectives. The course is structured to 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. This course will depart from the tradition grading structure based on a midterm and final. The distance learning experience increases the need for continuing conversation and student output throughout the semester. Quarantine also places tremendous strain on students' abilities to conduct research, making research papers a far less attractive grading option than in prior years. This year, therefore, the grading structure for the course will be as follows:

- 70% Response papers
- 20% Discussion questions
- 10% Class participation

By "response papers," I mean four short (5-7 page) papers that you will write over the course of the semester responding to readings that we have done in the course. These

response papers differ from what are sometimes called “reaction papers” in that they call for a critical response that engages with the substance of the material, not for your personal reactions to or reflections upon the material. They are meant to be, in other words, analytical papers. When writing them, please identify a passage, statement, or concept from one of the readings and analyze that passage, statement, or concept, for example, by considering the sufficiency or desirability of its assumptions or implications. Regardless whether you agree or disagree with the substance of the passage, statement, or concept that you analyze, you should consider counterarguments to your position and defend your position against those arguments. **Response papers are due by 9 a.m. on the day before the reading that you analyze will be discussed in class.** (For example, if we are scheduled to discuss a case or other written material on Tuesday, your response papers will be due by 10 a.m. on Monday.) **You must submit your first response paper by February 7.**

By “discussion questions,” I mean that you will be responsible for submitting questions that you have about the readings prior to class. You must do this for at least 5 class sessions. The questions must be uploaded to the “Discussion” tab on Blackboard by 10 a.m. the day before class. They will be viewable by the entire class. Questions need not be lengthy, but they should be thoughtful and based on a careful reading of the materials. I will shape my lectures and classroom discussion points in response to your posted questions. On Blackboard, you may respond or refer to each other’s questions, either as the basis for your own question or because you would like to offer a substantive response. If you choose to do this, I ask that, as in classroom discussion, you do so with respect for one another and for the work that your classmates has put into crafting their own questions. You may post comments instead of questions; all the same rules as for questions apply.

By “class participation,” I mean in-class discussion. I expect you to come to class having read the material to the best of your ability and ready to discuss its substance. Because there is no midterm or final, you are permitted (and in some sense encouraged) to come to class “with more questions than answers.” I am not asking for perfect comprehension of the materials prior to class. I understand that you may not be able to read all of the materials before class. However, I do ask that you make a good faith effort to read and to think about the assigned materials before class and that you come to class ready to offer your perspective on those materials.

In the past, I have offered a research paper option. Students who wish to write a research paper should meet with me (virtually, of course) to discuss their topic within the first two weeks of the course. **No one will be given permission to write research paper who cannot produce a prospectus and bibliography by February 7.** I know that this date is soon on the course calendar; this is by design. Research papers should be written only by those students who have some familiarity with and have carefully considered their topic prior to the beginning of the course. As a general rule, however, this course presupposes no greater prior knowledge of its material than what one would expect to find in a high school social studies course; it is designed for persons otherwise unfamiliar with American civil rights law, provided that they have a serious motivation to learn about the topic and are willing to put in the work. Were a student granted permission to

write a research paper in this course, the prospectus and paper would replace the response papers in the above grading rubric, thereby counting for 70% of the student's grade. For students exercising the research paper option, **the final paper will be due by May 10.**

Course materials and assignments. Four books are available at the campus bookstore:

Bruce Ackerman, *The Civil Rights Revolution*
Eric Foner, *The Second Founding*
Michael Klarman, *From Jim Crow to Civil Rights*
Rogers Smith, *Civic Ideals*

Each of these books offers important historical information and analysis related to three distinct historical periods where much of our work will focus: the Reconstruction Era, the Progressive Era, and the Civil Rights Era. I recognize, however, that it may be difficult for you to purchase all four books. I also recognize that one of these books, *Civic Ideals*, is a much more demanding read than the others, although the effort and attention that it demands of the reader are richly rewarded. I consider *Civic Ideals* to be optional rather than required reading. I will refer to it in class discussion. But for those who want the full benefit of its intellectual analysis and historical insight, I recommend few books as highly as I do this one. The campus bookstore will have used copies, and I have seen that used copies are available at very reasonable prices from Amazon.com.

In addition, I will post selected readings to Blackboard. As detailed below, these readings will be a combination of legal opinions, statutes, and commentary by other scholars. At various points, I have also included speeches and other writings from public intellectuals who lived during the period that we will be studying in that class. Law students typically read cases from casebooks that heavily redact judicial opinions to economize on space and time. I sometimes follow that convention; I sometimes do not. Outside of a law school context, where the student's primary task is to learn doctrine assembled from a diversity of case materials, I find that redacted cases quickly become a liability. We are in this class looking for a historical orientation to the material that is often obscured by such redactions. Treating the law in such a way often obscures the realities that the law unfolds over time and reflects the problems and preoccupations of the eras in which it is made. For this reason, where possible, I will ask you to read full judicial opinions. I will also offer you my counsel regarding how to read those opinions efficiently and effectively.

I. Introduction: Problems of Slavery and Citizenship on the Eve of Civil War

Jan. 11 The 1850s Emerson, "Address to the Citizens of Concord"
Douglass, "What to the Slave Is the Fourth of July?"
Stanton, 1854 Address to the New York Legislature
Excerpts from Tocqueville, *Democracy in America*
Dred Scott v. Sandford

Optional: Smith, *Civic Ideals* (ch. 9)

II. The Origins of Civil Rights Law

A. The Reconstruction Amendments and Early Civil Rights Legislation

Jan. 13 1865-1870 The Reconstruction Amendments
The Civil Rights Act of 1866
The Civil Rights Act of 1870
The Civil Rights Act of 1871
The Civil Rights Act of 1875
Douglass, “We Are Not Yet Quite Free”
Foner, *The Second Founding* (intro.)

Optional: Smith, *Civic Ideals* (ch. 10)

Jan. 18 1873-1874 *The Slaughterhouse Cases*
Bradwell v. Illinois
Minor v. Happersett
Foner, *The Second Founding* (chs. 1 & 2)

Optional: Smith, *Civic Ideals* (ch. 11 pp. 347-75, 385-90,
408-09)

Jan. 20 1883-1886 *The Civil Rights Cases*
Pace v. Alabama
Yick Wo v. Hopkins
Foner, *The Second Founding* (ch. 4)

Optional: Smith, *Civic Ideals* (ch. 11 pp. 375-77, 383-85,
390-96)

B. The Progressive Era

Jan. 25 1896 *Plessy v. Ferguson*
Excerpts from DuBois, *The Souls of Black Folk* (ch. 1)
Klarman, *From Jim Crow to Civil Rights* (ch. 1)

Optional: Smith, *Civic Ideals* (ch. 11 pp. 377-83)

Jan. 27 1901-05 *Giles v. Harris*
Hodges v. U.S.
Excerpts from DuBois, *The Souls of Black Folk* (ch. 2)
Foner, *The Second Founding* (ch. 3)
Klarman, *From Jim Crow to Civil Rights* (ch. 2)

Optional: Smith, *Civic Ideals* (ch. 12 pp. 412-29, 439-53)
DuBois, *The Souls of Black Folk* (ch. 9)

C. World War II and Its Aftermath

Feb. 1 1944-49 *Korematsu v. United States*
Shelley v. Kraemer
Excerpts from Baldwin, *Notes of a Native Son*
Excerpts from Myrdal, *An American Dilemma*
Klarman, *From Jim Crow to Civil Rights* (ch. 4)

Feb. 3 1950 *McLaurin v. Oklahoma*
Sweatt v. Painter
Klarman, *From Jim Crow to Civil Rights* (ch. 5)

D. *Brown* and the Warren Court's "Second Reconstruction"

Feb. 8 1954-55 *Brown v. Bd. of Educ. (I)*
Brown v. Bd. of Educ. (II)
"The Southern Manifesto"
Ackerman, *The Civil Rights Revolution* (ch. 7)
Bell, "Brown v. Board of Education and the Interest
Convergence Dilemma"
Klarman, *From Jim Crow to Civil Rights* (ch. 6 pp. 292-
320)

Feb. 10 1958-62 *Cooper v. Aaron*
Gomillion v. Lightfoot
Monroe v. Pape
Klarman, *From Jim Crow to Civil Rights* (ch. 6 pp. 321-43)

Feb. 15 1963-66 JFK Speech on Civil Rights Bill
MLK Jr. Letter from a Birmingham Jail
Heart of Atlanta Motel v. U.S.
Katzenbach v. Morgan
Ackerman, *The Civil Rights Revolution* (ch. 8)

Feb. 17 1963-68 *Miranda v. Arizona*
Terry v. Ohio

Midterms held between week of February 21 to March 14

Feb. 22 1967-68 *Loving v. Virginia*
Green v. County Sch. Bd.
Jones v. Alfred H. Mayer Co.
Ackerman, *The Civil Rights Revolution* (chs. 11 & 13)

III. The 1970s: Consolidating the Civil Rights Revolution and Setting a Course for the Post-Civil Rights Era

A. Defining a Right to Sex Equality

Feb. 24 1970-73 *Roe v. Wade*
 Reed v. Reed
 Frontiero v. Richardson

Mar. 1 1976-78 *Craig v. Boren*
 City of Los Angeles Dep't of Water & Power v. Manhart
 Excerpts from Ely, *Democracy and Distrust*

B. Redefining a Right to Race Equality

Mar. 3 1971 *Griggs v. Duke Power Co.*
 Swann v. Charlotte-Mecklenburg Bd. of Educ.
 Ackerman, *The Civil Rights Revolution* (ch. 9)

C. What a Difference a Statute Makes: Title VII of the 1964 Civil Rights Act as Blank Canvas

Mar. 8 1971-77 *Griggs v. Duke Power Co.*
 McDonnell Douglas Corp. v. Green
 Int'l Brotherhood of Teamsters. v. U.S.

D. Resistance to Rights Expansion: The Court's Growing Discomfort with Disparate Impact and *Brown*

Mar. 10 1976-80 *Washington v. Davis*
 Milliken v. Bradley (Milliken II)
 City of Mobile v. Bolden

Optional: *Milliken v. Bradley (Milliken I)*

Mar. 13-20 (Spring Recess – no classes)

E. Affirmative Action

Mar. 22 1978-79 *Bakke v. Regents of the University of California*
 United Steelworkers v. Weber

IV. Reconceptualizing Civil Rights to Answer the Challenges of Sex Discrimination

A. Title VII of the 1964 Civil Rights Act

Mar. 24

Meritor Savings Bank, FSB v. Vinson
Price Waterhouse v. Hopkins
Oncale v. Sundowner Offshore Servs.
Excerpts from Linda Hamilton Krieger, *The Content of Our Categories*
Excerpts from Vicki Schultz, *Reconceptualizing Sexual Harassment Law*

Optional: *Robinson v. Jacksonville Shipyards*

B. Equal Protection

Mar. 29

United States v. Virginia
United States v. Morrison
Dep't of Education OCR letter to VMI re: sexual misconduct

V. Race Discrimination in the Post-Civil Rights Era

A. Colorblind Constitutionalism

1. Affirmative Action

Mar. 31

City of Richmond v. J.A. Croson
Excerpts from Carter, *Reflections of an Affirmative Action Baby*

2. Voting Rights

Apr. 5

Shaw v. Reno
Miller v. Johnson

B. The Transformation of *Brown*

Apr. 7

Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1
Reva Siegel, *Equality Talk*

Optional: Rich, *Inferred Classifications*

C. The Retreat from *Griggs*

Apr. 12

Wards Cove Packing Co. v. Atonio
Ricci v. DeStefano

VI. Contemporary Cases and Problems

A. Sexual Orientation Discrimination

Apr. 14 *Lawrence v. Texas*
Obergefell v. Hodges

B. Voting Rights, Again

Apr. 19 *Rice v. Cayetano*
Shelby County v. Holder

C. Affirmative Action, Again

Apr. 21 *Grutter v. Bollinger*
Harvard College v. Students For Fair Admissions (SFFA)

Optional: *Rich, What Diversity Contributes to Equal Opportunity*

D. Profiling, Excessive Force, and Qualified Immunity

Apr. 26 *Floyd v. New York*
Estate of Jones v. City of Martinsburg
Banks, The Story of Brown v. Oneonta

Optional: *Obasogie, Blame the Supreme Court for Police Violence*
Serwer, There Will Be More Derek Chauvins

Apr. 28 *U.S. v. Clary* (E.D. Mo.)
U.S. v. Clary (8th Cir.)
Brown v. Oneonta (panel)
Brown v. Oneonta (en banc)
Siegel, Why Equal Protection No Longer Protects

Optional: *Banks, The Story of Brown v. Oneonta*

May 10 **Final Exam—No final in this class. Final papers 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

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