

CIVIL LIBERTIES AND CIVIL RIGHTS

POSC 4251—Spring 2010
Mondays, Wednesdays, and Fridays: Noon—12:50 PM
William Wehr Room 122

Professor Stephen Engel
stephen.engel@marquette.edu
William Wehr Room 415

Office Hours: Mondays and Wednesday from 4 PM until 5:30 PM, Tuesdays from 10:30 AM until 12:30 PM, and by appointment

Course Description

This course examines the development of civil rights and civil liberties over the course of American political history. What counts as a right and liberty is contested terrain. Expanding, contracting, or otherwise altering the meaning of a right or a liberty involves a range of actors in a variety of venues, not only the courts. Therefore, we will examine the traditional list of civil liberties and civil rights that define American politics from a “law and society” perspective, which focuses on the content of judicial rulings as well as on the political processes involved in drafting legislation and in grassroots mobilization around these rights and liberties.

You will have the opportunity to examine how the law has structured the relationship between the citizen and the state as well as among citizens. We will assess how these relationships have changed over time (or not changed) and examine the role of courts and other actors in producing this change (or failing to do so). We will examine case law, processes of social mobilization, the role of entrepreneurial action, and the importance of opportunity windows. Our class is interdisciplinary in nature, linking questions from law, political science, history, and sociology.

The course is divided into three parts. Part One introduces the concept of rights and liberties and offers an introduction on how to read a case. Part Two examines the role of judicial review in democracy and the role of the judiciary in the larger context of federal inter-branch relations. Part Three examines 6 areas of rights and liberties development: (1) freedom of speech (2) freedom of religious exercise and freedom from religious establishment, (3) criminal procedure and punishment, (4) racial equality, (5) privacy and autonomy, (6) sex equality and sexual orientation equality. We will be using insights gained in Parts One and Two to evaluate the cases and other readings presented in Part Three. Our examination of each unit is motivated by a similar set of questions:

1. What right or liberty is stake?
2. What actors mobilized around the case or controversy and how have they framed issue at stake?
3. What venues are utilized to achieve social change? Why?
4. What kinds of social change were produced? Can this reform be connected to court rulings? Did the court ruling have direct or indirect effects? How can these effects be measured?

Course Structure and Requirements

This is a reading and writing intensive course, and it is designed and designated to fulfill the Marquette University requirement in writing. Students are responsible for drafting 1 short paper (5-6 pages,

double-spaced), 1 critical response memo (2 pages, single-spaced), which will be used to as a springboard for class discussion, and 1 final research paper (10-12 pages, double-spaced). There will be “reading quizzes” to ensure retention and understanding of key concepts and cases, but there will be no midterm or final exam.

Short Paper:

This paper will be due at class on **Wednesday, February 10, 2010**. It should answer one of these questions:

1. Make the best case you can for or against an independent judiciary. To what extent is an independent judiciary necessary to protect individual and/or minority rights?
2. Should the judiciary seek to protect procedural or substantive rights? How do you distinguish between those rights?

Response Memos/Briefs:

Each student is responsible for writing **ONE 2-page response memo** of no more than two pages, single-spaced, no less than 11-point font. These memos should critically assess the various readings on a given day, and they will be used as a springboard for class discussion. They should not simply summarize the readings, but offer your thoughts on the themes, how those themes relate to previous readings, and ask a set of questions triggered by your interpretation.

Research Paper:

This paper replaces the traditional final exam. A hard copy should be dropped of to my office no later than **10 AM on Monday, May 10, 2010**. **Students must clear the topic and research question with Professor Engel no later than Monday, February 15, 2010.** There is a set schedule for the component parts of the research paper (research question, outline & bibliography, first draft, and final draft). The grade on the first draft and the final draft will be a weighted average that will make up the final research paper grade. The research paper should address some question in an area of your interest within one of the six substantive rights and liberties units covered in the class.

Research Question	Meet with Professor Engel by February 15, 2010
Outline and Bibliography	Due on Monday, March 1 (Returned by Monday March 8)
First Draft	Due on Monday, April 12 (Returned by Monday, April 26)
Final Paper	Due on Monday, May 10

Reading Quizzes:

These are short (no more than 15 or so minutes) in-class closed-book quizzes to ensure that you are retaining key concepts presented in the reading. There will be five, and I will drop the lowest scoring quiz. The average of the remaining four will constitute 15 percent of your final grade.

Grading

Short paper:	25%
Response Paper/Class Leadership:	15%
Reading Quizzes:	15%
Participation:	10%
Final Research Paper:	35%

Academic Honesty

Academic honesty is expected. Plagiarism of any kind will not be tolerated. If you plagiarize once on any assignment, you will receive an F for the assignment and documentation of the offence will be sent to the Dean of your respective school per university requirements. If you plagiarize more than once, documentation of the

repeat offense will be sent to the Dean of your respective school per university requirements, and you are liable to fail the course. If you have questions, please see Professor Engel or refer to (<http://www.marquette.edu/wac/plagiarism/AvoidingPlagiarism2.shtml>).

Late Policy

Each day an assignment is turned in late, it will be marked down 5 points if permission of instructor for an extension has not been attained before the due date. For example, if an assignment is due at Noon on Wednesday, and it is turned in at 4 PM on Thursday, it will be considered 2 days late and receive a 10-point deduction.

Attendance Policy

Students are allowed no more than 4 **unexcused** absences (an excused absence is one that has received prior approval from the professor). If you have over 4 **unexcused** absences, you will fail this course.

Course Texts

- Stephen M. Engel, *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movement* (New York: Cambridge University Press, 2001)
- Richard H. Fallon, Jr. *The Dynamic Constitution* (New York: Cambridge University Press, 2004)
- M. Ethan Katsh, *Taking Sides: Clashing Views on Legal Issues*, 13th Ed. (New York: McGraw-Hill, 2008)
- Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984)
- John D. Skrentny, *The Minority Rights Revolution* (Cambridge: Belknap Press of Harvard University, 2002) (*Recommended, not Required*)

Wednesday, January 20

Welcome and Course Overview

Part One: Rights and Liberties—Understanding the Concept

Friday, January 22

Liberties and Rights: A General Introduction

- Samuel Kernell, Gary C. Jacobson, and Thad Kousser, “Civil Liberties” in *The Logic of American Politics* **(D2L)**
- Samuel Kernell, Gary C. Jacobson, and Thad Kousser, “Civil Rights” in *The Logic of American Politics* **(D2L)** (*Recommended*)
- The Constitution of the United States of America **(D2L)**

Monday, January 25

Civil Liberties and Civil Rights in Conflict: An Introductory Case Study

- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) **(D2L)**

Part Two: Judicial Review

Wednesday, January 27

The Judicial Role in American Democracy: Presumption of a Countermajoritarian Difficulty

- Federalist 78 (D2L)
- Alexander Bickel, *The Least Dangerous Branch* (Chapter 1) (D2L)
- Robert Dahl. 1957. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6. (D2L)

Friday, January 29

The Judiciary in American Democracy: The Procedural versus Substantive Rights Debate (I)

- Jeremy Waldron, "The Core Case against Judicial Review," *Yale Law Journal* 115 (2006) (D2L)

Monday, February 1

The Judiciary in American Democracy: The Procedural versus Substantive Rights Debate (II)

- John Hart Ely, "Policing the Process of Representation: The Court as Referee," *Democracy and Distrust* (Cambridge: Harvard University Press, 1980) (D2L)
- Cass Sunstein, "Social and Economic Rights? Lessons from South Africa," in *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001) (D2L)

Wednesday, February 3

Judicial Politics: Strategies of Appointment

- Lee Epstein and Jeffrey Segal, "Politics, Presidents, and Judging," in *Advice and Consent: The Politics of Judicial Appointments* (2005) (D2L)
- Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution", 87 *Virginia Law Review* 1045 (2001). (D2L) (*Highly Recommended*)

Friday, February 5

Judicial Politics: Politically Strategic Use of Courts and Judges

- Mark Graber. 1993. "The Nonmajoritarian Difficulty" in *Studies in American Political Development*, 35-73. (D2L)

Monday, February 8

No Class

- Extended office hours to discuss questions regarding short papers (11 AM to 1 PM and 4-5:30 PM)

SPECIAL EVENT: Tuesday, February 9

The Little Rock Nine will receive the Pere Marquette Discovery Award (4 PM, Varsity Theater)

Wednesday, February 10 (Short Paper Due)

Discussion of Short Papers and Catch up

Part Three: Examining Rights and Liberties as Social Change

Unit 1—Free Press and Free Speech

Friday, February 12

The Legal Overview

- Fallon, Introduction and Chapter 1

Monday, February 15

Freedom of the Press

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 291-317 **(D2L)**

Wednesday, February 17

Symbolic Speech and Hate Speech

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 226-34 and 248-257 **(D2L)**

Friday, February 19

Obscenity and the Limits of Expression

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 319-27 **(D2L)**
- William N. Eskridge and Nan D. Hunter, *Sexuality, Gender, and the Law*, 2nd ed. (New York: Foundation Press, 2004), pp. 321-328, 352-358, 419-421, 430-436, 445-462. **(D2L)**

Monday, February 22 (15 Minute Reading Quiz)

The Money-Speech Matrix: Power and Democratic Competition

- Kathleen Sullivan, "Political Money and Freedom of Speech," *UC Davis Law Review* (1996) **(D2L)**
- Various short readings on *Citizens United v. Federal Elections Commission* (2009) **(D2L)**

Unit 2—Freedom from and Freedom to Religious Exercise

Wednesday, February 24

Church and State—Exercise

- Fallon, Chapter 2, pp. 57-9, 67-72
- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 95-129 **(D2L)**

Friday, February 26

Church and State—Establishment

- Fallon, Chapter 2, 59-67, 72-4
- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 129-147, 163-70 **(D2L)**

Monday, March 1 (Final Paper Outlines Due)

Church and State—Prayer in School and Religious Displays

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 170-192 **(D2L)**

Unit 3—Crime, Punishment, and Search & Seizure

Wednesday, March 3

Fair Procedures (I)—Search and Seizure

- Fallon, Chapter 4
- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 449-68 **(D2L)**

Friday, March 5

Fair Procedures (II)—Self-Incrimination

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 497-99, 502-13 (D2L)

Monday, March 8

Fair Procedures (III)—Evidence and Its Potential Exclusion

- Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, pp. 477-85 (D2L)
- Katsh, Issue 10, “Does the Use of High-Technology Thermal Imaging Devices Violate the Fourth Amendment Search and Seizure Guarantee?”
- Katsh, Issue 14, “Is Drug Use Testing of Students Who Participate in Extracurricular Activities Permitted Under the Fourth Amendment.”

Wednesday, March 10

The War on Terror and the Legality of “Enhanced Interrogation”

- Fallon, Chapter 12
- Stephen Gillers, “The Torture Memo,” *The Nation*, 9 April 2009
<http://www.thenation.com/doc/20080428/gillers> (D2L)
- Rich Lowry, “The Case for the ‘Torture Memos’”, *National Review*, 21 April 2009.
<http://article.nationalreview.com/?q=YTRhM2E2MTE0NjQ3MzYwNWM2ODJjMTgwNWQwMmVkYzc> (D2L)

Friday, March 12 (15 Minute Reading Quiz)

The Death Penalty

- *Kennedy v. Louisiana*, 554 U.S. ____ (2008) (D2L)
- Katsh, Issue 12, “Does the ‘Cruel and Unusual Punishment’ Clause of the Eighth Amendment Bar the Imposition of the Death Penalty on Juveniles”

Unit 4—Racial Equality

Monday, March 22

Racial Segregation After the Civil War

- *1883 Civil Rights Cases* (D2L)
- *Plessy v. Ferguson* (1896) (D2L)
- Rogers Smith, “Beyond Toqueville, Myrdal, and Hartz: The Multiple Traditions in America,” *American Political Science Review* 87 (September 1993)

Wednesday, March 24

The Demise of Separate But Equal

- *Brown v. Board of Education* (1954) (D2L)
- Jack Balkin, ed. *What Brown v. Board of Education Should Have Said*. New York: New York University Press, 2001 (Chapters 1 and 2) (D2L)
- *Heart of Atlanta Motel v. United States (Recommended)* (D2L)

Friday, March 26

Desegregation and the Court’s Effect (II)

- Gerald Rosenberg, *The Hollow Hope*, 2nd ed. (Chicago: University of Chicago Press, 2002), Chapters 1 and 2 (D2L)

Monday, March 29

Civil Rights—The Movement as Grassroots

- Aldon Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: The Free Press, 1984) (Chapters 1 and 4) (D2L)

Wednesday, March 31

Civil Rights—Opportunity and Governance, or the Movement at the Top

- Mary Dudziak, “Desegregation as a Cold War Imperative,” *Stanford Law Review* 41 (November 1998) (D2L)

Wednesday, April 7 (15 Minute Reading Quiz)

Affirmative Action and the Levels of Scrutiny

- Fallon, Chapter 5
- Katsh, Issue 19, “Do Race-Conscious Programs in Public University Admissions Policies Violate the Fourteenth Amendment’s Guarantee of Equal Protection Under the Law”

Unit 5—Privacy and Autonomy

Friday, April 9

Sex and Privacy, or is Government at the Bedroom Door (I)?

- Fallon, Chapter 6
- *Griswold v. Connecticut* (1965) (D2L)
- *Eisenstadt v. Baird* (1971) (D2L)

Monday, April 12 (First Draft of Final Paper Due)

Abortion as Law and Politics (I)

- *Roe v. Wade* (D2L)
- Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984), Chapters 5, 6, 7, and 8

Wednesday, April 14

Abortion as Law and Politics (II)

- *Planned Parenthood v. Casey* (1992) (D2L)
- Katsh, Issue 5, “Is it Constitutional to Ban Partial-Birth Abortion Without Providing for an Exception to Protect the Health of the Mother?”

Friday, April 16 (15 Minute Reading Quiz)

Sex and Privacy, or is Government at the Bedroom Door (II)?

- *Bowers v. Hardwick*, 478 U.S. 186 (1986) (D2L)
- *Lawrence v. Texas* (2003) (D2L)

Unit 6—Sex Equality and Sexual Orientation Equality

Monday, April 19

Sex Equality (I)—The Fight for Difference

- *Muller v. Oregon* (1908) (D2L)
- *Adkins v. Children’s Hospital* (1923) (D2L)
- William E. Leuchtenberg, *The Supreme Court Reborn* (New York: Oxford University Press, 1996), Chapter 6 (D2L)

Wednesday, April 21

Sex Equality (II)—The Fight for Equality

- Jane Mansbridge, “Why We Lost the ERA,” *American Society and Politics*, Theda Skocpol and John Campbell (New York: McGraw-Hill, 1995), 446-467. **(D2L)**
- *Frontiero v. Richardson* (1973) and context readings **(D2L)**

Friday, April 23

Sex Equality (III)

- *United States v. Virginia* (1996) **(D2L)**
- Reva Siegal, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA,” 2005-Brennan Center Symposium Lecture
http://www.law.yale.edu/documents/pdf/Faculty/Brennan_Center_Symposium_Lecture1.pdf **(D2L)**

Monday, April 26

One-on-one meetings with Professor Engel to discuss revisions to first-draft

Wednesday, April 28

One-on-one meetings with Professor Engel to discuss revisions to first-draft

Friday, April 30

One-on-one meetings with Professor Engel to discuss revisions to first-draft

Monday, May 3

LGBTQ Rights—Mobilization since the Mid-20th Century

- Stephen M. Engel, *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movements* (New York: Cambridge University Press, 2001), Chapters 1, 2, and 4

Wednesday, May 5

LGBTQ Rights—Litigating for Social Change

- *Romer v. Evans* (1996) **(D2L)**
- Rebecca Mae Salokar, 2001. “Beyond Gay Rights Litigation: Using a Systemic Strategy to Effect Political Change in the United States.” *Sexual Identities, Queer Politics*. Mark Blasius, ed. Princeton: Princeton University Press. **(D2L)**

Friday, May 7 (15 Minute Reading Quiz)

Same Sex Marriage

- William N. Eskridge and Nan D. Hunter, *Sexuality, Gender, and the Law*, 2nd ed. (New York: Foundation Press, 2004), pp. 1063-93, 1553-63. **(D2L)**
- Margaret Talbot, “A Risky Proposal: Is it too soon to petition the Supreme Court on gay marriage?” *The New Yorker*, 18 January 2010. **(D2L)**

Monday, May 10

Final Papers due to Professor Engel’s office no later than 10 AM.