

INTRODUCTION.

1/16. Introduction. Civil rights: the founders' view.

Locke, Second Treatise, sec. 123-6, in O'Brien 232-233.

Declaration of Independence, Kurland and Lerner, *Founders' Constitution*, vol. 5, pp. 4-5.

Jefferson, Bill for Crimes, 1778, *Founders' Const* 5:374 (read the first two paragraphs only).

Virginia Declaration of Rights, 1776, *Founders' Constitution* 5:3-4.

Mass. Constitution, Preamble and Decl of Rts, 1780. 7

Northwest Ordinance, 1787, bill of rights. 9

Brent Johnson, "'Knockout Game' Bill: N.J. Lawmakers Introduce Measure Mandating
Minimum Prison Term" 10

Locke, *Letter on Toleration*, excerpts on private associations. 11

Optional:

All OPTIONAL readings will be on Blackboard, under "Content."

West, "Universal Principles of the Founding," 2012. A quick overview of the political theory
of the founding.

West, "Economic Principles of America's Founders." The founders on what laws are needed
to secure the right to acquire and possess property.

1/21. Civil rights: the views of pre- and post-1970 Progressives.

Dewey and Tufts, *Ethics*, ch. 20, pp. 437-39, 442, 444-449. 14

Taussig, *Principles of Economics*, 1913, 2:290-91, 294, 300. 20

Buck v. Bell, 1927, O'Brien 1295-96.

Richard T. Ely, *Social Aspects of Christianity*, selection from chap. 4, "Ethics and
Economics," 123-132. 22

John Rawls, *A Theory of Justice*, 11-15, 60-63, 100-101, 178-79, 302-3. 28

Ronald Dworkin, *Taking Rights Seriously*, 272-78. 36

Franklin Roosevelt, "Second Bill of Rights," 1944. 40

Barack Obama, Second Inaugural Address, 2013. 40

Optional:

West, "The Progressive Movement and the Transformation of American Politics."

1/23. Civil rights in the U. S. Constitution. The use and disadvantage of "parchment barriers."

U. S. Constitution: Preamble; Article 1, sec. 8, 9, & 10; Article 3, sec. 2 & 3; Article 4, sec. 2
& 4; Amendments 1-10, 13-15. The Constitution is in O'Brien, starting on p. 1.

Discussion of Founders on Bill of Rights, O'Brien, 320-324.

Barron v. Baltimore, 1833, O'Brien 335-337.

Home Building & Loan v. Blaisdell, 1934, O'Brien 249 to middle of 250; bottom of 252 to
254.

D.C. v. Heller, 2008, on 2d amendment. 42

Optional:

Nelson Lund, "Federalism and Civil Liberties." Argues that the Bill of Rights is not very

important as a restraint on state governments.

Philip A. Hamburger, “Trivial Rights.” Argues that the main restraint on the federal government is not the Bill of Rights but the enumeration of limited federal powers.
Zuckert, “Completing the Constitution: 14th Amendment and Constitutional Rights.”

14TH AMENDMENT: EQUAL PROTECTION.

1/28. The 14th Amdt. Equal protection of the laws.

Civil Rights Act of 1866, O’Brien (quoted in the middle of 1394).

Green, “Original Sense of Equal Protection,” 1-3, 32-36, 39-44, 49-51, 61-63. 45

Flaherty, *White Girl Bleed a Lot*, i-vii, 12-17, 20-21, 28-29, 42-47, 276-81, 303-309. 56

Dahl, “Why wasn’t Aaron Alexis prosecuted for previous shooting incidents?” with

Addendum on the Seattle case. 75

Stefanie Thomas, “Family of Humble Murder Victim”. 76

Optional:

Hamburger, “Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights.” On “equal protection” in the founding.

1/30. “Equal protection” in public schools.

Brown v. Board I, 1954, and *Brown II*, 1955, O’Brien 1452-1454.

Bolling v. Sharpe, 1954, O’Brien, bottom of 1461 to 1462.

Swann v. Charlotte-Mecklenburg, 1971, O’Brien 1473-1476 (read only sec. 1 on “Racial Balances,” sec. 3 on “Remedial Altering,” and sec. 4 on “Transportation of Students”).

Milliken v. Bradley, 1974, O’Brien 1477 (first 2 paragraphs in Burger’s opinion); 1478 (second paragraph only).

Plyler v. Doe, 1982, O’Brien, read p. 1635 and ¶2 on 1637.

Missouri v. Jenkins, Thomas concurring opinion, 1995. 77

Parents v. Seattle School District, 2007. 79

Optional:

Michael W. McConnell, “The Originalist Case for *Brown v. Board*.”

Michael W. McConnell, “Originalism and the Desegregation Decisions.”

Earl M. Maltz, “Originalism and the desegregation decisions—a response to Professor McConnell.”

Optional:

Joshua M. Dunn, *Complex Justice: The Case of Missouri v. Jenkins*. In the library.

2/4. “Equal protection” in college admissions and government contracting.

Regents v. Bakke, 1978, O’Brien, bottom of 1514 to third paragraph on 1515; ¶2 on 1517; 1520 ¶3 to 1521 ¶2.

Gratz v. Bollinger, 2003, O’Brien, second-last paragraph on 1549 to 1550 ¶2; read the Ginsburg opinion, starting on 1551.

Grutter v. Bollinger, 2003, O’Brien; read the paragraph that starts on the bottom of 1553; 1554 ¶2; 1555 ¶2 and ¶3 (up to “patently unconstitutional”); ¶2 on 1557; opinions of Scalia and Thomas on 1560.

Richmond v. Croson, 1989, O'Brien. Read the last paragraph on 1526; 3rd and 4th paragraphs on 1529.	
Adarand v Pena, 1995, O'Brien. In O'Connor's opinion, read the first 3 paragraphs, starting on 1540; ¶1, ¶2, and ¶3 on 1544; Ginsburg's dissent on 1547.	
Adarand v. Pena, Thomas concurring opinion.	80
Steve Thompson, "Dallas City Hall . . . Minority Contracting".	81

2/6. "Equal protection" and employment; laws treating men and women differently; racially mixed marriage.

Sailer, "Professor Gates . . . and the New York Fire Department," 2009.	82
The EEOC's 4/5 rule.	85
Bradwell v. Illinois, 1872.	85
Quotation from Muller v. Oregon, 1908, O'Brien, middle of 1562.	
Craig v. Boren, 1976, O'Brien. Read the first 3 paragraphs of Brennan's opinion, starting on 1573; Also ¶5 on 1574, starting with "Even were this."	
U.S. v. Virginia, 1996, O'Brien 1581-1583 (intro + beginning of Ginsburg opinion), 1590-91 (first 3 paragraphs of Scalia dissent).	
Loving v. Virginia, 1967 (summary), O'Brien 1400.	

Optional:

Upham, "Interracial Marriage and . . . Privileges or Immunities."

14TH AMENDMENT. DUE PROCESS OF LAW.

2/11. Fourteenth Amendment, Due Process of Law.

Joseph Story, <i>Commentaries</i> , §1783 only (due process of law), <i>Founders' Constitution</i> , 5:296.	
Supreme Court, <i>Murray's Lessee</i> , 1856, summary.	86
Hurtado v. California, 1884, O'Brien 339, para 3, to 340.	
Sailer, "Minority Police Racial Profiling Immigrants".	87
<i>The Economist</i> , "The grabbing hand of the law," with Mark Steyn's comment.	88
Stephen Baskerville, <i>Taken Into Custody</i> , 165-67, 177-186.	

Optional:

Ryan Williams, "The One and Only Substantive Due Process Clause."

14TH AMENDMENT. PRIVILEGES OF CITIZENSHIP.

2/13. Fourteenth Amendment, Privileges or Immunities of Citizenship.

Review Locke, <i>Letter on Toleration</i> , on private associations.	11
Campbell v. Morris, 1797.	89
Corfield v. Coryell, 1823.	90
Dred Scott v. Sandford, 1857, on privileges and immunities of citizenship.	91
Slaughterhouse Cases, 1873.	91
McDonald v. Chicago, 2010.	94

Optional:

- John Harrison, "Reconstructing the Privileges or Immunities Clause." "The actual content of the p. and i. . . . is given by positive law, state and national." This is disputed by Upham. However, later in the piece Harrison agrees with Upham about many of the actual privileges of citizenship. Harrison also has a competent discussion of equal protection and due process.
- David R. Upham, "Corfield v. Coryell and the Privileges and Immunities of American Citizenship."
- David R. Upham, "Protecting the Privileges of Citizenship: Founding, Civil War, and Reconstruction."

2/16, Sun. 5:00 pm. First civil rights paper due.

2/18. Fourteenth Amendment: Privileges of citizenship cases perhaps wrongly decided as due process cases.

- Munn v. Illinois, 1877, O'Brien 280, ¶2-5, plus Field's dissent.
 Summary of Allgeyer v. Louisiana, 1897, O'Brien 265, para 2; summaries of Meyer v. Nebraska, 1923, and Pierce v. Society of Sisters, 1925, O'Brien 1284.
 Holden v. Hardy, 1898. 97
 Lochner v. New York, 1905, O'Brien 281-287.
 Summary of, and quotation from, Adair v. U.S., 1908, O'Brien 269.
 Bernstein, "Oyez" (on Barbier and Lochner). 100

2/20. Due Process of Law (or Privileges of Citizenship?) and race.

- Civil Rights Cases, 1883, O'Brien 1420-1426.
 Plessy v. Ferguson, 1896, O'Brien 1427-1431.
 Buchanan v. Warley, 1917. 103
 Shelley v. Kraemer, 1948: O'Brien 1431-1433.

RELIGION: FREE EXERCISE AND ESTABLISHMENT.

2/25. Religion and politics: The Founders.

- Review Locke, *Letter on Toleration*, on private associations. 11
 Boston, Rights of the Colonists, on religion, 1772, *Founders' Constitution* 5:60
 Congress to Quebec, 1774, *Founders' Constitution* 5:61-64
 State Constitutions: VA (*Founders' Constitution* 5:70), NC (71), PA (71), NY (75), MA (77-78)
 Washington, Thanksgiving Proclamation, *Founders' Const.* 5:94
 Washington, Farewell Address, 1796, excerpt on religion and education. 104
 review Northwest Ordinance, 1787, provisions on religion and education. 9
 Madison, Memorial and Remonstrance, 1785, *Founders' Constitution* 5:82-84
 Jefferson, Va. Act for Establishing Relig Freedom, 1785, *Founders' Constitution* 5:84-85
 Jefferson, Letter to Danbury Baptists, 1802, *Founders' Constitution* 5:96
 Barnes v. First Parish, 1810 (on Mass. estab. of relig.). 105

Optional:

Jefferson, Autobiography (on Va. Act for Relig. Freedom), 1821, *Founders' Const.* 5:85
West, "The Great Separation: Church and State," 2010.

2/27. Free exercise of religion: exemptions from general laws.

Washington, letter to Hebrew Congregation, 1790. 106
Washington, letter to Quakers, 1789. 107
Noonan, The Mormon Question, *Believer*, 194-207. 107
Sherbert v. Verner, 1963, O'Brien, read the first 4 paragraphs of Brennan's opinion (starts on 848), and the first paragraph of Harlan's dissent (850).
Wisconsin v. Yoder, 1972, O'Brien, read the paragraph on the middle of 855 (starts with "[A]") and Douglas's dissent on 857.
Oregon v. Smith, 1990, O'Brien, paragraphs on the bottom of 860 and top of 861.
Church of Lukumi Babalu Aye v. City of Hialeah, 1993, O'Brien, starting at ¶5 on 868 to ¶2 on 869.
Hosanna-Tabor School v. EEOC, 2012. 109

Optional:

Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion." This article, and Hamburger's response, were the basis of the Scalia and O'Connor opinions in the *Boerne* case.
Philip A. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective." Response to McConnell.

3/4. Establishment of religion: government aid to religion.

Everson v. Board, 1947, O'Brien. Read the editor's intro on 758; last 2 paragraphs on 759; last para on 760 to bottom of 761.
Abington v. Schempp, 1963, O'Brien 772-773 (Brennan concurring).
Lemon v. Kurtzman, 1971, O'Brien 776, ¶2 only (the three-part Lemon test).
Zelman v. Simmons-Harris, 2002, O'Brien, first two paragraphs of Rehnquist's opinion on 815; also Stevens's dissent on 817-18.
Elk Grove v. Newdow, 2004, O'Brien. Final two paragraphs of Rehnquist's opinion on 168. Look at O'Connor's 4 factors defining "ceremonial deism," starting on 169. Thomas's dissent, 171-72.
Van Orden V. Perry, 2005, O'Brien. Read Thomas's concurring opinion, 828-29; and Stevens's dissent, 829-30.
McCreary County V. ACLU of Kentucky, 2005, O'Brien. Read the editor's intro to the case on 830-31; the last para on 831 in Souter's opinion. In Scalia's dissent, read the first 2 paragraphs on 836, the first full para on 837, and the last para on 837.

3/6. Midterm examination**FREEDOM OF SPEECH AND PRESS.**

3/18. Freedom of speech and press: original understanding. The problem of injurious speech.

West, "Free Speech in the Founding and in Modern Liberalism," 310-339. Blackboard
 James Wilson, Pennsylvania Ratif. Convention, 1787, *Founders' Constitution* 5:122-3.
 Respublica v. Oswald, 1788, *Founders' Constitution* 5:126-7 (read the right column on 126
 to the top para on 127).

People v. Crosswell, 1804, *Founders' Const.* 5:160 (this page only).

James Madison, Report on Va. Resolutions, 1800, *Founders' Const* 5:145 (read p. 145 only).

U.S. v. Cooper, 1800, *Founders' Const* 5:149-150 (para on bottom rt of 149 to top rt. of 150).

People v. Ruggles, 1811, *Founders' Constitution* 5:101 only, + last para of Ruggles on 102.

Updegraph v. Commonwealth, 1824, *Founders' Constitution* 5:173 only (just this page).

Optional:

Commonwealth v. Blanding, 1825, *Founders' Constitution* 5:176-79 (focus on 176-77)

Joseph Story, *Commentaries on the Constitution*, 1833, *Founders' Constitution* 5:182-85.

3/20. Government limits on injurious speech: criminal conspiracy, obscenity.

West, "Free Speech in the Founding and in Modern Liberalism," 339-359. Blackboard
 N.Y. Times v. Sullivan, 1964, O'Brien 579, ¶3-4 on 582, ¶3 on 583.

Schenck v. U.S., 1919, O'Brien 449-450.

Gitlow v. New York, 1925, O'Brien, 452 to the top para on 454; also Holmes's dissent, 455.

Brandenburg v. Ohio, 1969, O'Brien 467-468 (skip the intro; read the Per Curiam opinion).

Memoirs v. Massachusetts, 1966, Clark and Douglas. 112

Roth v. U.S., 1957, O'Brien, ¶2 on 484 only.

Miller v. California, 1973, O'Brien, read only the para starting on 491, line 3.

Optional:

David Lowenthal, *No Liberty for License*, 1997, 99-107.

3/25. Government limits on speech injurious to the disadvantaged: broadcasting, employer speech, campaign finance regulation. Speech in places owned by, or under jurisdiction of, government.

West, "Free Speech in the Founding and in Modern Liberalism," 359-384. Blackboard
 Red Lion v. Federal Communications Commission, 1969, O'Brien 656-658.

National Labor Relations Board v. Gissel, 1969. 110

Morse v. Frederick, 2007 ("bong hits for Jesus"). 111

Summaries of Lamb's Chapel, Rosenberger, and Good News v. Milford, O'Brien 753-754.

West Virginia v. Barnette, 1943, O'Brien 676-680 (read only Jackson's opinion of the Court).

Tinker v. DesMoines, 1969, O'Brien 684-686.

Optional:

Bradley Smith, "Campaign Finance Reform's War on Political Freedom."

Ronald Dworkin, "The Curse of American Politics."

Jonathan Rauch, "Offices and Gentlemen." How laws against sexual harassment deny free speech.

3/27, Thurs. Free speech concluded. No new assignment.

4TH, 5TH, 6TH, AND 8TH AMENDMENTS (AND 14TH AMDT DUE PROCESS CLAUSE).

- 4/1. Searches and seizures. Right to counsel (Miranda).
 Provisions of Va., Md., and Mass. constitutions on searches, *Founders' Constitution* 5:237
 Original meaning: O'Brien 890-892.
 Summary of Carroll v. U.S., 1925, O'Brien 936.
 Summary of U.S. v. Chadwick and Ark. v. Sanders, O'Brien 940 (last para) to middle of 941.
 Mapp v. Ohio, 1961, O'Brien 1027-28, ¶2 on 1032; ¶2 of Harlan's dissent on 1034.
 Miranda v. Arizona, 1966, O'Brien, 1076 (explanatory paragraph only at top of page), 1077
 ¶4 to 1079 ¶5, 1080 ¶4 to 1081, last para on 1085 to ¶3 on 1086.
 Admin. searches: O'Brien middle of 960-961; other warrantless searches on 963-965.

Optional:

Randy Barnett, "Knowledge is Power: How the NSA Bulk Data Seizure Program Is Like Gun Registration."

- 4/3. Takings; right to be informed of charges and confront accusers; right to counsel. 8th Amdt.
 Vanhorne's Lessee, Federal District Court of PA, 1795, *Founders' Constitution*, read the 2d
 and 3rd paragraphs only of the first column on 5:319.
 Tahoe-Sierra, 2002... 114
 Kelo v. New London, 2005. 115
 Right to be informed of charges and to confront accusers: O'Brien 1187-1190.
 Gideon v. Wainwright, 1963, O'Brien. Read the paragraph on the bottom of 1145; top
 paragraph on 1149.
 Alabama v. Shelton, 2002. 117
 Furman v. Georgia, 1972, O'Brien. Read the opinion of Douglas, starting on 1225, and
 Rehnquist's dissent on 1234. Also look at the graph on 1215 (executions, 1930-2010).
[TGW: in future, maybe add Brennan's and Burger's dissent.]
 McKlesky v. Kemp, 1987, O'Brien, read the first paragraph of Brennan's dissent on 1247.

FAMILY LAW AND CIVIL RIGHTS.

- 4/8. Divorce and custody law in earlier America
 Tom James, "History of Custody Law" 118-128
 Stephen Baskerville, *Taken Into Custody*, 11-35.

4/6, Sun. 5:00 pm. Second civil rights paper due.

- 4/10. Divorce, custody, and child support law today
 Stephen Baskerville, *Taken Into Custody*, 35-79.
- 4/15. Divorce, custody, and child support law today
 Stephen Baskerville, *Taken Into Custody*, 79-109.
 Billingsley, "PC Kidnappers," *Heterodoxy*, January 1993. 129

Lawrence Friedman, *Crime and Punishment in American History*, 125-32, 134-39. 136

CIVIL RIGHTS AND SEXUAL EXPRESSION.

4/17. Illegitimacy, birth control, right to nonmarital sex, abortion.

Summary of Gomez v. Perez and Trimble v. Gordon, O'Brien 1626-1627.

Griswold v. Connecticut, 1965, O'Brien 355-358, 362-363 (read Douglas and Black only).

Summary of Eisenstadt v. Baird, 1972, O'Brien 1285-1286.

Roe v. Wade, 1973, O'Brien, 1305, starting at ¶3, to 1308. Also White's dissent on 1310.

Planned Parenthood v. Casey, 1992, O'Brien, read the indented paragraphs on 1326-27 summarizing the "undue burden" test. Also read the last 4 paragraphs of Scalia's dissent on 1332.

Stenberg v. Carhart, 2000, O'Brien, read only the final paragraph of Breyer's opinion on 1293.

Guttmacher Institute, Facts on Induced Abortion in the U.S.. 144

Optional:

Thomas West, "Founding-Era Laws Promoting Marriage."

4/22. Right to private associations versus "civil rights." Right to homosexual sex.

Review Locke, *Letter on Toleration*. 11

Roberts v. U.S. Jaycees, 1984, O'Brien 718-720.

Boy Scouts v. Dale, 2000, O'Brien 721 to middle of 722; ¶3 on 723 to end of ¶2 on 724; in Stevens's dissent, second-last para on 727 to 728.

Lawrence v. Texas, 2003. 146

Goodridge v. Massachusetts, Mass. Supr. Court, 2003. 149

Optional:

Clayes, "The Private Society and the Liberal Public Good in John Locke's Thought."
Freedom of association in Locke.

4/24. The future of civil rights? Same-sex marriage, transgender rights, polygamy.

U.S. v. Windsor. 152

Hillary Clinton, LGBT rights speech, 2011. 155

Tarringo Vaughan, "Joe Biden: Transgender . . . is 'civil rights issue of our time'". 155

Banda, "Coy Mathis . . . Transgender . . . School Bathroom". 156

John Schwartz, "Utah Law Prohibiting Polygamy Is Weakened". 157

Optional:

Brown v. Buhman, 2013 (this is the Utah polygamy case discussed in Schwartz's article).

CONCLUSION.

4/29. Conclusion.

COURSE REQUIREMENTS for undergraduates:

A midterm and final examination. Each counts about 25% of the final grade.

Two papers. Each counts about 25%.

Paper topics to be announced. Both papers: 1,700 - 2,000 words in length (about 5 to 6 pages, double-spaced). Please hand in a *printed* copy and a copy *emailed to me*. Send me the email copy on the Sunday due date by 5:00 pm. On Monday by 5:00 pm, put the printed copy in the mail slot outside my office in Kendall 313.

Preparation, participation, memory of assigned readings, and attendance will affect the final grade if unusually good or bad. Students who rarely volunteer to answer questions about the readings will be graded down.

For any given day, students are responsible not only for the readings assigned for that day but also for the previous class day. Each class period will be devoted to the assignments for that day and the previous day.

Students will be asked to submit brief questions or comments on that day's assigned readings at the beginning of class, once a week. About 100-150 words. Details will be announced.

Late work will be accepted, but the grade will typically be lowered. The amount is at the discretion of the instructor. The later the work is completed, the more the grade will suffer.

COURSE REQUIREMENTS for graduate students:

A midterm and a final examination. Each counts about 15% of the final grade.

Two papers. Each counts about 35%.

Preparation, participation, memory of assigned readings, and attendance will affect the final grade if unusually good or bad. Students who rarely volunteer to answer questions about the readings will be graded down.

For any given day, students are responsible not only for the readings assigned for that day but also for the previous day. Each class period will be devoted to the assignments for that day and the previous day.

Students will be asked to submit brief questions or comments on that day's assigned readings at the beginning of class, once a week. Details will be announced.

Two papers, about 3,000 to 3,400 words each (about 8 to 10 pages) for grad students. Prompts will be provided. In their papers, graduate students must briefly discuss the views of at least three important or thoughtful scholars, with two of whom they disagree at least in part. Send me the email copy by 5:00 pm on Sunday. On Monday by 5:00 pm, put the printed copy in the mail slot outside my office in Kendall 313.

Late work will be accepted, but the grade will typically be lowered. The amount is at the discretion of the instructor. The later the work is completed, the more the grade will suffer.

During the course, and especially in preparation for their papers, grad students are expected to read some of the scholarly literature. The optional readings listed in the course plan indicate some of the things that I have found useful. You are expected to find others.

DR. WEST:

Email twest@hillsdale.edu. Cell phone 972-849-8515, 8:00am to 10:00pm. Leave a message. Office hours (Kendall 313): TuTh 11:00-11:15, 1:00-2:15, 3:45-4:00. I am often in the office at other times. For an appointment, email or phone.

OTHER MATTERS

Students are bound by all relevant College rules and regulations, including the Policy on Academic Honor.

Computers and other electronic devices must be silenced and put away.

Food and drinks are permitted if consumed silently and cleaned up afterward.

BOOKS REQUIRED:

Baskerville, Stephen. *Taken into Custody: The War against Fathers, Marriage, and the Family*. Nashville: Cumberland House, 2007.

Kurland, Philip B. and Ralph Lerner, ed. *The Founders' Constitution: Volume 5: Amendments I Through XII*. Indianapolis: Liberty Fund, 2000.

O'Brien, David M. *Constitutional Law and Politics*, vol. 2: *Civil Rights and Civil Liberties*. 8th ed. New York: Norton, 2011. ISBN 978-0-393-93550-9. (If you use a different edition, some of the cases will be missing and the pagination will be incorrect for all cases.)

West, Thomas G., ed. *Course Packet for Civil Rights, Politics 305 and 509*.