Professor Mark S. Hurwitz
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Office Hours: Tuesday, 8:00-9:30a.m.; Thursday, 2:00-4:30p.m.

Course Overview and Objectives:
This course focuses on the development of constitutional interpretation of certain types of civil liberties
by the U.S. Supreme Court from both a legal and nonlegal perspective. We will utilize a case book
approach commonly used in a constitutional law/civil liberties class in law school, although we will make
use of additional readings as well. In addition to learning about civil liberties in general and whether or
not the judiciary protects them, this approach is designed to expose students to judicial cases so they can
understand the legal analyses employed within particular contexts by the Supreme Court.

Course Web Site:
The course web site, which includes course information and links to various sources, including this
Syllabus, can be found at: http://homepages.wmich.edu/~mhurwitz/psci4220_civlib_sp08

Communicating Information:
Information will be communicated from the professor to students in three ways: 1) in class; 2) the course
web page; 3) email. You must activate and check your ‘wmich.edu’ email account to receive messages.
Consequently, “I did not receive notice” is not a sufficient excuse.

Required Books: available at the WMU Bookstore, http://www.wmubookstore.com/, the University
Bookstore, http://www.wmubooks.com/, and other sources:
1) Louis Fisher and David Gray Adler, American Constitutional Law, Seventh Edition (Carolina
Academic Press 2007)
2) Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (University of
Chicago Press 1991)
3) David M. O’Brien, editor, The Lanahan Readings in Civil Rights and Civil Liberties, Second

Recommended Books:
1) Richard L. Pacelle, Jr., The Role of the Supreme Court in American Politics: The Least
2) Lawrence Baum, The Supreme Court, Ninth Edition (CQ Press 2007)
3) Kevin T. McGuire, Understanding the U.S. Supreme Court: Cases and Controversies (McGraw
Hill 2002)
NOTE: Chapter 7 of the Pacelle book is an Assigned Reading that is available on-line through the course
reserve section of the WMU Library system.
**Assigned Readings:**
Readings on course reserve are available on-line through the WMU Libraries system, [http://www.wmich.edu/library/reserves/](http://www.wmich.edu/library/reserves/)

**Assigned Cases:**
There are a number of required cases not provided in the Fisher “casebook.” The citation for each such case is provided in the Schedule of Assignments, if the student wants to find them in the library. As well, a URL is provided for each, if the student wants to find them on the internet. Either is acceptable, so long as the student understands that these Assigned Cases are required reading. When reading an Assigned Case, the student must read the majority opinion and all concurring and dissenting opinions.

The following web sites house nearly all of the Supreme Court’s cases:

- [http://supct.law.cornell.edu/supct/](http://supct.law.cornell.edu/supct/)

The source of these cases is irrelevant. Nevertheless, cases from these internet sites are not edited, which means that they are much longer than those in the casebook; indeed, many unedited Supreme Court cases are well over 100 pages in length. Thus, it is strongly advised that students purchase the Fisher casebook, as opposed to obtaining all of the cases from the internet, not only because the cases are edited in the casebook, but also because there are readings in the casebook that are unavailable elsewhere.

**Class Schedule:**
We meet every Tuesday and Thursday from 11:00am - 12:15pm during the semester, with the exception of the following dates during which class is cancelled:

- March 3-7 – Spring Break
- April 3 – Professor attending Midwest Political Science Association Conference

**Exams:**
There are three (3) exams in this class. All of the exams consist of a variety of question types (e.g., multiple choice, short answer, essay). While the exams are not cumulative, concepts in the latter part of the semester build upon that previously presented. The exams are based on the entire body of material presented in class and in the assigned readings. Much of the material on these exams is delivered in class and not necessarily in the readings; however, some material from the readings that is not covered in class is tested on the exams as well. The exam schedule follows:

- Exam #1: Tuesday, February 5 (during class)
- Exam #2: Thursday, February 28 (during class)
- Exam #3: Wednesday, April 23, 10:15am - 12:15pm (during final exam period)

**Case Briefs:**
Each student is responsible for one (1) case brief. When your case is discussed in class, you must answer questions about the case you have briefed. A list of cases available for briefing, instructions and requirements for the briefs, due dates, and a sample case brief, follow this Syllabus
Grading:
The final course grade is based entirely upon performance on the exams and case briefs as stated below, as there is no extra credit in this class:

- Student’s highest exam grade: 35%
- Student’s next-highest exam grade: 35%
- Student’s lowest exam grade: 15%
- Case Brief/Discussion: 15%

Grading Scale:
The following numerical averages translate into final course grades:

- 90+: A (4.0)
- 85-89: BA (3.5)
- 80-84: B (3.0)
- 75-79: CB (2.5)
- 70-74: C (2.0)
- 65-69: DC (1.5)
- 60-64: D (1.0)
- <60: E (0.0)

Make-up Exams:
It is completely the student’s responsibility to take the exams when they are scheduled. As a general rule, make-up exams will not be allowed; thus, a missed exam counts as a zero (0) toward the final course grade. Notwithstanding, at the professor’s sole discretion make-ups will be permitted, but only the gravest of reasons will be accepted, if documented in writing by the proper authority. Even if there is an acceptable reason for missing the regularly scheduled exam, permission to take a make-up will be granted only if the student provides the professor with prompt and proper notification; that is, the student must inform the professor of the reason for missing the exam with proper documentation before the exam takes place, and the reason must be acceptable to the professor. If a make-up is permitted, both the format and questions can, and likely will, be different from the regularly scheduled exam.

Incomplete Grades:
Note that the professor does not give grades of Incomplete in this class under any circumstance, as a missed exam counts as a zero (0) toward the final course grade.

Academic Honesty and Integrity:
Per WMU policy: You are responsible for making yourself aware of and understanding the policies and procedures in the Undergraduate and Graduate Catalogs that pertain to Academic Honesty. These policies include cheating, fabrication, falsification and forgery, multiple submission, plagiarism, complicity and computer misuse. [The policies can be found at http://catalog.wmich.edu/, follow links to Academic Policies, Student Rights and Responsibilities.] If there is reason to believe you have been involved in academic dishonesty, you will be referred to the Office of Student Conduct. You will be given the opportunity to review the charge(s). If you believe you are not responsible, you will have the opportunity for a hearing. You should consult with the professor if you are uncertain about an issue of academic honesty prior to the submission of an assignment or test. [The Code of Honor passed by the Faculty Senate in November 2004 and administration in December 2004, can also be found at http://catalog.wmich.edu/.]
Special Needs:
Any student with special needs should inform the professor as soon as possible, so that appropriate accommodations can reasonably be made.

Class Procedure:
Class will be conducted in a combination of lecture/discussion and socratic method format. Classes will complement but not regurgitate material from the readings. Students are encouraged to ask questions or raise issues at any time on the readings, the class discussion, or a contemporary issue concerning constitutional law or civil liberties.

Assignments:
The Schedule of Assignments notes the topics to be covered and the dates for lectures and exams. This schedule will be followed as closely as possible; however, the professor reserves the right to change if necessary, and students will be notified appropriately (in class, email, and/or the web page) of any changes. Additionally, there may be material handed out in class or posted on the class web page (such as current news issues on civil liberties) for which students additionally are responsible. Since this schedule is comprehensive, it is imperative that the students keep up with the material.

Schedule of Assignments:
Note: All references in the Schedule of Assignments are to the Fisher casebook, unless provided otherwise. A case or reading denoted by * signifies that it is not found in any of the assigned books, and alternate references are supplied; a reading denoted by ** signifies that it is in the Assigned Readings on Course Reserve.

I. The Supreme Court, Judicial Power, and the Role of the Supreme Court in Social Policy
(January 8 - 17)
The Constitution of the United States of America, Appendix 1
Rosenberg: Preface, p. xi; Introduction (pp. 1-8), Chapter 1 (p. 9-36)
Constitutional Politics, p. 3
Mechanical Jurisprudence, pp. 3-4
Litigation as a Political Process, pp. 4-7
Judge as Lawmaker, pp. 17-19
School Desegregation, p. 20
Independent State Action, pp. 20-22
Who Has the Last Word?, pp. 22-24
Walter F. Murphy, Who Shall Interpret?, pp. 30-32
The Doctrine of Judicial Review, p. 35
Sources of Judicial Review Authority, pp. 35-38
Federalist No. 78, pp. 40-41
The Road to Marbury, pp. 41-45
Marbury v. Madison (1803) pp. 46
Jurisdiction: Original and Appellate, p. 148-149
Constraints on Judicial Review, pp. 57-60
The Carolene Footnote, p. 776 (box)
Note: The following [bracketed] readings are not required for this course; however, it is expected that the student understand the content therein which stems from other courses, such as PSCI 3200 and 4200.

[Framers’ Intent, p. 38]
[Threshold Requirements, p. 79]
[Cases and Controversies, pp. 79-83]
[Standing to Sue, pp. 84-86]
[Mootness, pp. 100-101]
[Ripeness, pp. 103-105]
[Political Questions, pp. 107-110]
[The Writ of Certiorari, pp. 149-151]
[From Oral Argument to Decision, pp. 152-158]
[Unanimity and Dissent, pp. 160-164]

II. Incorporation of the Bill of Rights (January 17 - 22)
Nationalization of the Bill of Rights, p. 389
The Incorporation Doctrine, pp. 389-392
*Barron v. Baltimore, 32 U.S. 242 (1833)
Slaughter-House Cases (1873), pp. 428
Adamson v. California (1947), pp. 392
Duncan v. Louisiana (1968), pp. 654
Table 8.3: Incorporation of Bill of Rights, pp. 390-391
The Incorporation Doctrine: Testimony by Justice Rehnquist, pp. 394-396
O’Brien (Lanahan) Readings: No. 3, Cortner

III. Freedom of Speech (January 22 - 31)
Free Speech in a Democratic Society, p. 451
Free Speech and National Security, pp. 451-455
Schenck v. United States (1919), pp. 455
Abrams v. United States (1919), pp. 456
Gitlow v. New York (1925), pp. 458
Dennis v. United States (1951), pp. 463
Yates v. United States (1957), pp. 465
Associational Rights, pp. 467-471
Regulation of Speech, pp. 471-78
Edwards v. South Carolina (1963), pp. 478
Adderley v. Florida (1966), pp. 480
Brandenburg v. Ohio (1969), pp. 482
Cohen v. California (1971), pp. 484
Forms of Speech, pp. 489-492
*United States v. O’Brien (1968)
Texas v. Johnson (1989), pp. 492
Conclusions, pp. 505-506
O’Brien (Lanahan) Readings: No. 10, (Greenawalt)
IV. Racial Discrimination (February 7 - 26)

Rosenberg: Civil Rights, Introduction, Chapters 2-4 (pp. 39-156)
Racial Discrimination; Slavery, pp. 759-762
_Dred Scott v. Sandford_ (1857), pp. 763
Lincoln’s Critique of _Dred Scott_, pp. 28-29

**Mississippi Historical Society**: “A Declaration Of The Immediate Causes Which Induce And Justify The Secession Of The State Of Mississippi From The Federal Union.” January 1861

Civil War Amendments, pp. 766-770
_Slaughter-House Cases_ (1873), pp. 424-427
_Civil Rights Cases_ (1883), pp. 428
_Plessy v. Ferguson_ (1896), pp. 772

*Strader v. West Virginia*, 100 U.S. 303 (1880)

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

School Desegregation, pp. 775-783

Review: _The Carolene Footnote_, p. 776 (box)

*Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)


Government’s Brief in _Brown_, 783-784

_Brown v. Board of Education I_ (1954), pp. 784

_Bolling v. Sharpe_ (1954), pp. 787

O’Brien (Lanahan) Readings: No. 28, Kluger

_Brown v. Board of Education II_ (1955), pp. 787

_Cooper v. Aaron_ (1958), pp. 789

*Griffin v. School Board of Prince Edward Co.*, 377 U.S. 218 (1964)

*Green v. County School Board of New Kent County*, 391 U.S. 430 (1968)


*Freeman v. Pitts*, 503 U.S. 467 (1992)

O’Brien (Lanahan) Readings: No. 29, Orfield
Desegregating Other Activities, pp. 794-797
Congress Interprets the Commerce Clause, pp. 801-802
Employment Discrimination and Affirmative Action, pp. 804-813
Regents of the University of California v. Bakke (1978), pp. 813
  http://supct.law.cornell.edu/supct/html/02-241.ZO.html
  http://supct.law.cornell.edu/supct/html/02-516.ZO.html
**The Chronicle of Higher Education: “Bar Association Moves to Strengthen Diversity
  Requirements for Accreditation of Law Schools.” February 14, 2006
**The Chronicle of Higher Education: “Opponents of Affirmative Action Seek Revocation of
  ABA’s Accrediting Power.” March 9, 2006
O’Brien (Lanahan) Readings: No. 30, Shaw
O’Brien (Lanahan) Readings: No. 31, Jones
Conclusions, pp. 823-824

Exam #2: Thursday, February 28 (during class)

V. Rights of Privacy (March 11 - 25)
  Rosenberg: Chapter 6, pp. 175-201
  O’Brien (Lanahan) Readings: No. 1, Hamilton
  O’Brien (Lanahan) Readings: No. 2, McCloskey
Dimensions of Privacy, pp. 891-895
  Buck v. Bell (1927), pp. 895
  *Skinner v. Oklahoma, 316 U.S. 535 (1942)
  *Loving v. Virginia, 388 U.S. 1 (1967)
  Stanley v. Georgia (1969), pp. 896
Substantive Due Process, pp. 434-437
  Lobern v. New York (1905), pp. 437
  West Coast Hotel Co. v. Parrish (1937), pp. 443
Review: The Carolene Footnote, p. 776 (box)
Use of Contraceptives, pp. 898-900
  Griswold v. Connecticut (1965), pp. 900
Reproductive Freedom, pp. 902-911
  Roe v. Wade (1973), pp. 912
  Planned Parenthood v. Casey (1992), pp. 922
  Stenberg v. Carhart (2000), pp. 925
    http://www.law.cornell.edu/supct/html/05-380.ZO.html
O’Brien (Lanahan) Readings: No. 33, Ginsburg
Ruth Bader Ginsburg on Abortion, p. 131 (box)
Gay Rights, pp. 935-939
Lawrence v. Texas (2003), pp. 942
Defining the Limits of Privacy, pp. 946-948
Financial Privacy Act of 1978: Congressional Debate, pp. 948-950
The Right to Privacy: The Bork Hearings, pp. 950-952
The Right to Die, pp. 928-930
Cruzan v. Director, Missouri Dept of Health (1990), pp. 930
Vacco v. Quill (1997), pp. 933
Conclusions, pp. 953

VI. **Gender Issues** (March 27 - April 10)
Rosenberg: Abortion and Women’s Rights, Introduction, pp. 173-174; Chapters 7-8, pp. 202-246
The Struggle for Women’s Rights, pp. 827-832
Bradwell v. State (1873), pp. 832
Congress Responds to Bradwell; Equal Pay Act of 1963; Civil Rights Act of 1964, pp. 834-838
Review: The Carolene Footnote, p. 776 (box)
Contemporary Gender Issues, pp. 838-843
*Goeseart v. Cleary, 335 U.S. 464 (1948)*
http://caselaw.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=335&invol=464
Debate on Equal Rights Amendment, p. 1031 (box)
*Reed v. Reed, 404 U.S. 71 (1971)*
Frontiero v. Richardson (1973), pp. 846
Craig v. Boren (1976), pp. 8448
Personnel Administrator of Massachusetts v. Feeney (1979), pp. 852
Michael M. v. Sonoma County Superior Court (1981), pp. 850
Pregnancy, pp. 843-844
*Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)*
*General Electric Co. v. Gilbert, 429 U.S. 125 (1976)*
Automobile Workers v. Johnson Controls (1991), pp. 855
Women in the Military, Combat Roles for Women, Women at Military Academies, pp. 845-846
Senate Debates Women in Combat, pp. 859-860
O’Brien (Lanahan) Readings: No. 32, Williams
O’Brien (Lanahan) Readings: No. 35, O’Brien
Conclusions, p. 888
VII. **Concluding Thoughts: Can, or Should, the Supreme Court Affect Social Change? If so, What Can, or Should, We Do About It?** (April 15 - 17)

Rosenberg: Chapter 5 (pp. 157-169); Chapter 9 (pp. 247-265); Chapter 12 (pp. 336-343)

O’Brien (Lanahan) Readings: No. 5, Brennan
O’Brien (Lanahan) Readings: No. 36, Klarman
O’Brien (Lanahan) Readings: No. 16, Posner


Efforts to Curb the Court, p. 1029
Constitutional Amendments, pp. 1030-1032
Statutory Reversals, pp. 1032-1036
Court Packing, pp. 1036-1040
Withdrawing Jurisdiction, pp. 1042-1050
Noncompliance, pp. 1052-1056
Constitutional Dialogues, pp. 1056-1064
Conclusions, p. 1064-1064

**EXAM #3: Wednesday, April 23, 10:15am - 12:15pm (during final exam period)**

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**Case Brief Information and Schedule**

As the Syllabus provides, each student is required to brief one (1) case during the semester. This entails writing a case brief, then discussing the case in class as well as answering questions about the case based upon your case brief. At the end of the class in which the case you have briefed is discussed, you must hand in a hard copy of the brief. Both the written case brief and your discussion of the case in class count toward your final course grade in accordance with the Syllabus.

The following list contains the cases for briefing (which includes only those assigned cases in the Fisher casebook), as well as dates on which the case briefs must be completed. To sign up for a case brief, you must email my teaching assistant at todd.a.curry@wmich.edu by Wednesday, January 16, 5pm, with a list of three (3) cases you are interested in briefing, in rank order. Make sure you choose no more than one case per section – this is necessary to ensure that each assigned case has a student assigned to it, and that only one student, or perhaps two if necessary, is responsible for any single case brief. I then will assign students (on a first come, first served basis) the cases for which each is responsible to brief.

<table>
<thead>
<tr>
<th>Cases: Freedom of Speech</th>
<th>Due Date:</th>
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<tr>
<td><em>Schenck v. United States</em> (1919)</td>
<td>Jan. 22</td>
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<td><em>Abrams v. United States</em> (1919)</td>
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<tr>
<td><em>Dennis v. United States</em> (1951)</td>
<td>Jan. 22</td>
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**Exam #1: February 5**
**Race**

_Dred Scott v. Sandford_ (1857)  
Feb. 7  
_Slaughter-House Cases_ (1873)  
Feb. 7  
_Civil Rights Cases_ (1883)  
Feb. 12  
_Plessy v. Ferguson_ (1896)  
Feb. 12  
_Brown v. Board of Education I_ (1954)  
Feb. 14  
_Bolling v. Sharpe_ (1954)  
Feb. 14  
_Brown v. Board of Education II_ (1955)  
Feb. 14  
_Cooper v. Aaron_ (1958)  
Feb. 14  
_Stanley v. Georgia_ (1969)  
March 11  
_Boyd v. Georgia_ (1969)  
March 11  
_Lochner v. New York_ (1905)  
March 13  
_West Coast Hotel Co. v. Parrish_ (1937)  
March 13  
_Griswold v. Connecticut_ (1965)  
March 13  
_Roe v. Wade_ (1973)  
March 18  
_Planned Parenthood v. Casey_ (1992)  
March 18  
_Stenberg v. Carhart_ (2000)  
March 20  
March 20  
March 25  
_Cruzan v. Director, Missouri Dept. of Health_ (1990)  
March 25  
_Vacco v. Quill_ (1997)  
March 25

**Exam #2: February 28**

**Privacy**

_Buck v. Bell_ (1927)  
March 11  
_Stanley v. Georgia_ (1969)  
March 11  
_Lochner v. New York_ (1905)  
March 13  
_West Coast Hotel Co. v. Parrish_ (1937)  
March 13  
_Griswold v. Connecticut_ (1965)  
March 13  
_Roe v. Wade_ (1973)  
March 18  
_Planned Parenthood v. Casey_ (1992)  
March 18  
_Stenberg v. Carhart_ (2000)  
March 20  
March 20  
March 25  
_Cruzan v. Director, Missouri Dept. of Health_ (1990)  
March 25  
_Vacco v. Quill_ (1997)  
March 25

**Gender**

_Bradwell v. State_ (1873)  
March 27  
_Frontiero v. Richardson_ (1973)  
April 1  
_Craig v. Boren_ (1976)  
April 1  
_Personnel Administrator of Mass. v. Feeney_ (1979)  
April 1  
_Michael M. v. Sonoma County Superior Court_ (1981)  
April 1  
_Automobile Workers v. Johnson Controls_ (1991)  
April 8  
April 8  
April 8  
April 10

**Exam #3: April 23**
**Marbury v. Madison**  
U.S. Sup.Ct. (1803)  
CJ Marshall

**Facts:** President Adams, as a lame duck, appointed Marbury and others to a federal judicial post (DC Justice of the Peace). The appointments were approved by the Senate, sealed, but failed to be delivered by the Sec of State, John Marshall (the CJ who decided this case). After being sworn in, Pres Jefferson refused to acknowledge the appointments. Marbury, based on an act of Congress, went directly to the US SupCt to have a writ of mandamus issued, so he could secure his position.

**Issue:** Is Marbury entitled to his post? If has a right to that post, do the laws afford a remedy? If yes, is a mandamus from the SupCt the proper remedy?

**Holding:** YES. YES. YES, but...

**Rationale:** Judicial commission was appointed, approved, signed, and sealed (all discretionary acts were carried out). Failure of delivery (a ministerial act) does not preclude Marbury from his post. Marbury also has a legal right to his post via a remedy. A mandamus **IS** the proper remedy; **BUT**, the SupCt does **NOT** have the power to issue such a writ. §13 of the Jud. Act of 1789 gave the SupCt the power to issue writs of mandamus. But, the Const limits the cases where the SupCt has original jurisdiction, and Congress cannot change the SupCt’s original jurisdiction; but, Congress did that by passing §13. Syllogism: 1) the Const is the supreme law of the land; 2) §13 is contrary to the Const; 3) therefore, §13 is unconst’al. Since §13 is repugnant to the Const, it is ruled to be invalid. The key to this case is not that Marbury gets his post, although not by the SupCt issuing a writ of mandamus. Instead, the key to this decision is that the SupCt affirmatively asserts its power of judicial review over a co-equal branch of the federal govt: “It is emphatically the province and duty of the judicial dept to say what the law is.”

**Other opinions:** None

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