

CON LAW OLLI FALL 2020: SYLLABUS

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Welcome to one and all: This is a class in constitutional law and thus, inescapably, a class in how the Supreme Court surfs with and against the waves of our politics. And of course nothing looms larger in our recent politics than the election of Trump.

I hope to engage you in a good deal of discussion and usually will take questions as we move along. This is not a survey course, as you know, but something more akin to a sampling--of six issues of grave concern to us all this fall. For us, as for undergrads, a close reading of the texts, particularly of the assigned Supreme Court opinions, will make for the best discussions. But I recognize that your time for reading may be limited. **Make a special effort to read the Supreme Court opinions that I feature each week.**

Please feel free to text or email me with ideas, questions and reactions, especially a day or so in advance of the class: I will try to incorporate your commentary in what I say in the Zoom classes.

CLASS I:

CONSTITUTIONAL INTERPRETATION AND THE ASTOUNDING LGBTQ+
DECISION

1. The Bostock case and the Gorsuch opinion:

Bostock v. Clayton County (2020):

[BOSTOCK v. CLAYTON COUNTY | Supreme Court | US Law | LII](#)

Read all of Justice Gorsuch's opinion (with the concurrence of Chief Justice Roberts and the liberals).

Read the first four of five pages of Justice Alito's dissent (with Justice Thomas)--and the very last page.

Read all of Justice Kavanaugh dissent--and do not miss his line, "Seneca Falls was not Stonewall."

2. Here is the NYT report on case:

[Gorsuch Leads Way on Landmark LGBT Rights Decision](#)

CLASS II:

THE POLICE POWER AND COMPULSORY MEASURES, INCLUDING VACCINATIONS

1. Jacobson v. Commonwealth of Massachusetts(1905):

<https://www.law.cornell.edu/supremecourt/text/197/11>

2. Biskupic on the Jacobson precedent:

<https://www.cnn.com/2020/04/10/politics/pandemic-coronavirus-jacobson-supreme-court-abortion-rights/index.html>

3. Jacobson and Public Health Writ Large,

American Journal of Public Health:

<https://ajph.aphapublications.org/doi/10.2105/AJPH.2004.055152>

Chemerinsky and Goodwin, pre-Covid essay, on the constitutionality of compulsory vaccines generally:

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1237&context=nulr>

And the question of a mandatory vaccination against the virus:

<https://medicalxpress.com/news/2020-07-mandatory-covid-vaccinations-states-employers.html>

Social Distancing and ‘Stay in Place’ orders:

a. Kaiser Family Foundation round up of disputes:

[Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures - Table](#)

b. DOJ and AG Barr:

https://www.youtube.com/watch?v=_plz9ZRATSG

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, April 14, 2020

Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case

Attorney General William P. Barr issued the following statement:

"In light of the COVID-19 pandemic, the President has issued guidelines calling on all Americans to do their part to slow the spread of a dangerous and highly contagious virus. Those measures are important because the virus is transmitted so easily from person to person, and because it all

too often has life-threatening consequences for its victims, it has the potential to overwhelm health care systems when it surges.

To contain the virus and protect the most vulnerable among us, Americans have been asked, for a limited period of time, to practice rigorous social distancing. The President has also asked Americans to listen to and follow directions issued by state and local authorities regarding social distancing. Social distancing, while difficult and unfamiliar for a nation that has long prided itself on the strength of its voluntary associations, has the potential to save hundreds of thousands of American lives from an imminent threat. Scrupulously observing these guidelines is the best path to swiftly ending COVID-19's profound disruptions to our national life and resuming the normal economic life of our country. Citizens who seek to do otherwise are not merely assuming risk with respect to themselves, but are exposing others to danger. In exigent circumstances, when the community as a whole faces an impending harm of this magnitude, and where the measures are tailored to meeting the imminent danger, the constitution does allow some temporary restriction on our liberties that would not be tolerated in normal circumstances.

But even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. Thus, government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity. For example, if a government allows movie theaters, restaurants, concert halls, and other comparable places of assembly to remain open and unrestricted, it may not order houses of worship to close, limit their congregation size, or otherwise impede religious gatherings. Religious institutions must not be singled out for special burdens.

Today, the Department filed a [Statement of Interest](#) in support of a church in Mississippi that allegedly sought to hold parking lot worship services, in which congregants listened to their pastor preach over their car radios, while sitting in their cars in the church parking lot with their windows rolled up. The City of Greenville fined congregants \$500 per person for attending these parking lot services – while permitting citizens to attend nearby drive-in restaurants, even with their windows open.^[1] The City appears to have thereby singled churches out as the only essential service (as designated by the state of Mississippi) that may not operate despite following all CDC and state recommendations regarding social distancing.

As we explain in the Statement of Interest, where a state has not acted evenhandedly, it must have a compelling reason to impose restrictions on places of worship and must ensure that those restrictions are narrowly tailored to advance its compelling interest. While we believe that during this period there is a sufficient basis for the social distancing rules that have been put in

place, the scope and justification of restrictions beyond that will have to be assessed based on the circumstances as they evolve.

Religion and religious worship continue to be central to the lives of millions of Americans. This is true more so than ever during this difficult time. The pandemic has changed the ways Americans live their lives. Religious communities have rallied to the critical need to protect the community from the spread of this disease by making services available online and in ways that otherwise comply with social distancing guidelines.

The United States Department of Justice will continue to ensure that religious freedom remains protected if any state or local government, in their response to COVID-19, singles out, targets, or discriminates against any house of worship for special restrictions."

[1] The City has since stated it will drop the fines, but will continue to enforce the order.

CLASS III

ELECTIONS AND VOTING RIGHTS AT RISK

1. An excellent pictorial mini-history of voting rights in the US:
https://www.sos.wa.gov/_assets/elections/history-of-voting-in-america-timeline.pdf

2. Liptak, SCOTUS not more liberal on the right to vote:

<https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html>

3. Shelby and its Aftermath:

a. The case=33 pages, including dissent=

https://scholar.google.com/scholar_case?case=4053797526279899410&hl=en&as_sdt=6&as_vis=1&oi=scholar

b. At Midterm and Since:

<https://www.propublica.org/article/voting-rights-by-state-map>

<https://www.splcenter.org/news/2020/06/25/seven-years-after-shelby-county-vs-holder-voter-suppression-permeates-south>

<https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress>

CLASS IV

POLICE BRUTALITY AND IMMUNITY

History of immunity and protection from prosecution, started in MD:

[Police Bill of Rights: Officers protected from discipline by 1973 Maryland law](#)

Reuters shows vivid photo and video with terrific statistical and doctrinal explanation of a police killing of a hospitalized man:

[For cops who kill, special Supreme Court protection](#)

Vox further explains the qualified immunity doctrine in the courts:

[Qualified immunity, explained: The rule that shields police who defy the Constitution](#)

Congressional Research Service on qualified immunity:

<https://crsreports.congress.gov/product/pdf/LSB/LSB10492#:~:text=The%20Supreme%20Court%20developed%20qualified,of%20action%20at%20Section%201983.&text=The%20Court%20first%20extended%20a,its%201967%20decision%20Pierson%20v.>

Kisela v. Hughes, Opinion and Sotomayor Dissent:

[17-467 Kisela v. Hughes \(04/02/2018\)](#)

[Qualified Immunity Ruling for Police Officer Causes a Stir](#)

Thomas's concern: [18-1287 Baxter v. Bracey \(06/15/2020\)](#)

A leftward critique of condemnation of looting:

[Kenosha's looting is a symptom of a decrepit democracy](#)

CLASS V

EMERGENCY AND EVEN SECRET POWERS OF THE PRESIDENT

1. Wikipedia Survey of Presidential Powers: In and Out of the Constitution and Article II.

https://en.wikipedia.org/wiki/Powers_of_the_president_of_the_United_States#:~:text=The%20Constitution%20explicitly%20assigns%20the,and%20pardons%2C%20and%20receive%20ambassadors.

2. Presidential Emergency Action Documents (or PEADS):

NYT Op Ed by Elizabeth Goitein:

<https://www.nytimes.com/2020/04/10/opinion/trump-coronavirus-emergency-powers.html>

The Atlantic, "The Alarming Scope..." by E. Goitein:

<https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>

[Optional additional materials at: The Brennan Center:

[Presidential Emergency Action Documents](#)]

3. Emergency Powers at the Supreme Court:

Toysaburo Korematsu v. United States (1944)

<https://www.law.cornell.edu/supremecourt/text/323/214>

Youngstown Sheet and Tube v. Sawyer (1952)

<https://www.law.cornell.edu/supremecourt/text/343/579>

CLASS VI

CAN TRUMP REALLY STAY NO MATTER WHAT?

Lawrence Douglas's take in *Will He Go*:

[The Lawfare Podcast: Lawrence Douglas on Presidential Election Concessions](#)

2. Bush v. Gore, Oral Argument (90 minutes):

[\[Bush v. Gore\] Oral Arguments | C-SPAN.org](#)

“Look it over some time. 'T is fine spoort if ye don't care f r checkers. Some say it laves th' flag up in th' air an' some say that's where it laves th' constitution. Annyhow, something'» in th' air. But there's wan thing I 'm sure about.”

" What's that ?" asked Mr. Hennessy.

" That is," said Mr. Dooley, " no matther whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns.”

– **Finley Peter Dunne, Mr. Dooley's Opinions**

Bush v. Gore=60 pages= [Stevens dissent](#), a classic.

Richard Posner's *Prolegomenon*: [Bush v. Gore: Prolegomenon to an Assessment](#)

The Count Act and its confusions:

a. the text [3 US Code § 15 - Counting electoral votes in Congress | US Code](#)

b. WaPo, "The Worst..."

[Trump could refuse to concede - The Washington Post](#)

c. NYT's bad scenarios (with fixes):

[Seven Election Day Nightmares](#)

d. Fried, Steele, et al. = moderates outline steps to prevent coup and disorder in transition: [Preventing a Disrupted Presidential Election and Transition 8-3-20](#)

