Civil Liberties and Individual Rights
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Syllabus
• Updated syllabus online is SUBJECT TO CHANGE!
• Class 1-2 slides now posted (titles are hyperlinked)
• Public Comment and Final Paper details now posted
• Additional readings for next few weeks to be posted shortly


Final Paper
• 16-18 pages in length, BlueBook footnotes. [50% of grade]
• Topic approval deadline is TODAY
• A proposal outlining the topic significance, key questions, expected outcomes and preliminary sources will be due before class on Wednesday, June 9, 2021
• Instructions and sample proposal now posted to the syllabus page
  • Model your proposal on the SAMPLE!
  • The final paper will be due by 3pm on Tuesday, August 24, 2021

Public Comment Brief
• Topic: “Phased Approach to the Resumption of Cruise Ship Passenger Operations 2021-09094” (Centers for Disease Control and Prevention)
• Review the docket announcement and related materials for a Proposed Rule. Consult relevant legal, regulatory, and public health material to educate yourself about the context and implications for the proposed action.
• A structured “public comment” brief (6-8 pages) will be submitted to the agency by midnight on Wednesday, June 30, 2021 (25% of grade)
• A draft is due to me in Word format by June 16th so I can provide feedback before submission!
• Instructions are now posted on the syllabus page

Public Comment Brief
• Framework for public comment:
  • Executive Summary (250 words max, not counted toward page max): stating your position on the issues presented in the docket notice, major supporting arguments and evidence, and recommendations.
  • Background: (1-2 pages) Brief overview of the evolution and current state.
  • Analysis: (1-2 pages) Your position and its rationale, including which stakeholders’ interests you are seeking to protect and how.
  • Actions Recommended: (1-2 pages) state the recommended course of action and what action steps would be needed to accomplish it.
  • Tables and Figures (optional, with attribution)
  • Footnotes (no formatting required)

Public Comment Brief
• Phased Approach to the Resumption of Cruise Ship Passenger Operations 2021-09094
  • Docket: https://www.regulations.gov/document/CDC-2021-0011-0001
  • Posted: April 30, 2021
  • Due: June 30, 2021
• The OMB is particularly interested in comments that will help:
  • Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
  • Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
  • Enhance the quality, utility, and clarity of the information to be collected;
  • Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses; and
  • Assess information collection costs.
Syllabus Page

**Intermediate Assignment**: A structured “public comment” brief (6-8 pages), written instructions [HERE](#), (25% of grade)

- The CDC Docket is [HERE](#) and Federal Register notice in [HERE](#).
- The brief draft will be submitted for my feedback by Wednesday, June 16, 2021.
- The Public Comment will be submitted to the Docket (with email confirmation sent to me) by midnight on Wednesday, June 30, 2021.

**Final Paper**: The final paper on a pre-approved topic should be 15-18 pages in length and contain appropriately formatted Bluebook references, written instructions [HERE]. (30% of grade)

- Your topic should be cleared by Dr. Sinha no later than May 20, 2021.
- A proposal outlining the topic significance, key questions, expected outcomes and preliminary sources will be due before classes on Wednesday, June 9, 2021. A sample proposal is [HERE](#).
- The final paper will be due on Tuesday, August 24, 2021.

Review: Interstate Commerce

- Use of the channels of interstate commerce
  - e.g., highways, hotels
- Instrumentalities of or persons or things in interstate commerce
  - e.g., railroads, airlines, household goods
- Intrastate activities with a substantial effect on interstate commerce
  - e.g., illicit drugs, goods or items moving in commerce that need to be regulated in the aggregate

Review: Tax & Spend Power

- Congress can *indirectly* regulate (and/or influence policy) through taxing and spending powers
- Congress can also spend federal money *directly*
- But Congress cannot *force* states to act (federalism principles; *NFIB v. Sebelius*)

Civil Liberties, Equality, and Individual Rights

**Civil Liberties, Equality, and Individual Rights**

- Strong evidence for a tie between public health and civil rights
- Attention to social determinants of health and social justice fortifies that connection

Individual Rights Analysis

(1) Is it a FUNDAMENTAL RIGHT?

- **Yes**: strict scrutiny
- **No**: rational basis review
Individual Rights Analysis

(1) Is it a FUNDAMENTAL RIGHT?
(2) Is the right INFRINGED?
  • Sometimes clear: prohibition on exercising the right (e.g., prohibiting speech in a public forum)
  • Sometimes difficult: burdening the exercise of a right (e.g., does marriage penalty in tax law infringe the right to marry?)

(3) Is there a SUFFICIENT JUSTIFICATION for the law?
  • If strict scrutiny, then the governmental justification must be compelling
  • If rational basis review, then the justification need be legitimate

Equal Protection Analysis

(1) What is the CLASSIFICATION?
  • Does classification affect immutable characteristics or implicate historic discrimination?
  • Sometimes clear on face of law
    • e.g., no women can be doctors
  • Sometimes law is “facially neutral,” but purpose or effect is discriminatory
    • e.g., requirement that police officers must be 5’10” and 150 pounds (40% of men, 2% of women meet this requirement)

(2) What STANDARD OF REVIEW do courts apply?
  • rational basis review: law must be rationally related to achieving a legitimate government purpose
  • intermediate scrutiny: law must be substantially related to achieving an important government purpose.
  • strict scrutiny: law must be necessary to achieve a compelling government purpose

(3) Does government action satisfy THE APPLICABLE standard of review?
  • Is the justification matched to the means chosen for the particular law?
## Equal Protection Review

<table>
<thead>
<tr>
<th>Standard of Review</th>
<th>Description</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rational Basis</td>
<td>law must be rationally related to a legitimate governmental purpose (most deferential, law usually constitutional)</td>
<td>mental or physical disability, age, wealth/class, sexual orientation</td>
</tr>
<tr>
<td>Intermediate Scrutiny</td>
<td>law must bear substantial relationship to important governmental purpose (law has about equal chance of being struck down or deemed constitutional)</td>
<td>gender/sex, non-marital children</td>
</tr>
<tr>
<td>Strict Scrutiny</td>
<td>law must be narrowly tailored to meet a compelling governmental purpose (usually fatal for law challenged)</td>
<td>fundamental rights; race, national origin, alienage (Equal Protection Clause)</td>
</tr>
</tbody>
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### #PHLaw

**Smith v. Aroostook County** *(1st Cir 2019)*
- District Court issued a preliminary injunction ordering the jail to provide Smith with twice-daily buprenorphine while she is incarcerated.
- Circuit Court affirmed

### Meyer v. Nebraska *(1923)*

**Pierce v. Society of Sisters** *(1923)*

### Estelle v. Gamble *(1976)*

**Background and Holding**

8th Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

How does this apply to medication for opioid use disorder while incarcerated?

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*Justice Marshall says the state is obligated to provide healthcare to those who are incarcerated... but why stop there? #EstellevGamble #PHlaw*
**Meyer and Pierce**

- Some of the earliest Supreme Court cases finding fundamental rights protected by Due Process Clause of the 14th Amendment
- Parents have a fundamental right to make decisions as to how their children will be raised without governmental interference
  - Governmental interference requires a compelling interest in interfering with parental choice
- The parental right to make childrearing decisions is not absolute

**Parental vs. State Interests**

Can parents:
- Demand that schools abandon educational standards that teach that the Earth is round? Erase Black History Month from its curriculum?
- Decline childhood vaccinations?
- Prevent adolescent children from obtaining a vaccine they want?
- Prevent adolescent children from seeking reproductive care (contraceptives, abortion or pregnancy care)?
- Refuse emergent blood transfusions for children?
- Refuse other urgent/emergent medical care for children (e.g., spiral fractures or subdural hematomas that strongly suggest abuse)?
- Decline to follow car seat/seatbelt laws for children?

**Loving v. Virginia (1967)**

**Background and Holding**
- What is the Due Process argument and outcome?
  - A fundamental right to marry
- What is the Equal Protection argument and outcome?
  - An impermissible classification based on race

These two are often co-litigated, and a court may rely on both to declare state action unconstitutional (we’ll revisit this in Lawrence v. Texas)

**Constitutional Rights**

- 14th Amendment:
  - “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

**City of Cleburne v. Cleburne Living Center (1985)**

**Background and Holding**
- The Supreme Court under Chief Justice Earl Warren:
  - Involved in several civil rights decisions
  - Strong language objecting to Jim Crow laws’ inherent racism
  - Fundamental right to marry under the Due Process Clause
  - Impermissible classification based on race under the Equal Protection clause
- Classes of people (e.g., persons with disabilities) may not get special protections, but laws may still be irrational (rational basis “with teeth”)
  - We’ll revisit this in Obergefell v. Hodges

**Other fundamental rights**
- The Supreme Court under Chief Justice Earl Warren:
Other fundamental rights

- Can you think of any laws that rationally treat people with disabilities differently?
- What state interest justifies differential treatment of people with disabilities in these settings?

#PHLaw on Twitter

- Engage with course materials and current topics in patent law and policy by joining the conversation on Twitter!
- Counts toward participation!
- Be sure to tag the following in your tweets:
  • @DrSinhaEsq
  • #PHLaw
- Optional additional tags: @PHLawWatch, @PHLRTemple, @NetworkforPHL,
  • #PublicHealthLaw, #LawTwitter
- Student tweets will be highlighted at the beginning of each class
- If you want help getting started on Twitter, schedule time during office hours
Right to Refuse Treatment

In re Quinlan (N.J. 1976): 22-year-old suffered anoxic brain injury, was in vegetative state. Father asks to discontinue treatment, state intervenes. Court grants discontinuation of life support.


Cruzan v Director, Missouri Department of Health (1990)

Background and Holding

On February 25, 1990, Terri Schiavo (age 26) went into cardiac arrest at home and was resuscitated but left in a persistent vegetative state.

In 1998, Terri’s husband petitioned the court to remove her feeding tube, opposed by Terri’s parents.

The court determined that Terri would not have wished to be resuscitated and removed the tube for the first time in 2001. The tube was replaced a few days later.

After a series of appeals (and federal government intervention), the feeding tube order was upheld, and the tube was disconnected in 2005. Terri died 2 weeks later.
15 Minute Breakout Discussion:

In the aftermath of the Schiavo case, the state of Florida has consulted you to advise them on developing a policy for addressing future situations.

In your small group, please devise a policy that identifies and appropriately weights the interests of:
- Patients
- Family/Friends
- State Government
- Federal Government
- Other interested parties

Should the state intervene when a similar case occurs? If so, how?

Physician Aid-in-Dying


Background and Holding

Vacco v. Quill (1997)

Background and Holding


Background and Holding

What is the appropriate balance between civil rights and acknowledged state interests?

The State and Medical Decisions

- How does the state interest in these cases evolve over time?
- Where do you see these cases going in the future?