

University of California  
Berkeley  
Liberty, Equality, Privilege and the U.S. Constitution

Legal Studies 190  
Syllabus

Alan J. Pomerantz, Esq.  
[alanpomerantz@berkeley.edu](mailto:alanpomerantz@berkeley.edu)  
Office hours by appointment

The Constitution was written by men of privilege who formed a government designed, in part, to preserve and protect their advantages. History has eroded certain concepts of privilege which have influenced American morality, culture and politics. Martin Luther King, Jr. said: "The arch of moral history is long but it bends towards justice." But he did not indicate who gets to decide what is justice. Since *Marbury v Madison*, when the Supreme Court determined that it would be the final adjudicator of the meaning of the Constitution, the Court has been a significant arbiter of "justice" and has affected the power of privilege in American society. As the population of the country and the composition of the Court have changed, historically accepted constitutional principles of equality, privilege, personal liberty and freedom have been re-examined and modified—maybe for the better and maybe not. As a necessary result, the relationship between individual liberty and governmental mandated equality has been significantly re-balanced.

This course will examine the evolution of the Supreme Court's treatment of the conflicts between individual liberty and governmental mandates of equal treatment. We will begin by examining the historical legal, social and cultural support and acceptance of unequal treatment of people based on certain inherent characteristics including race, gender, gender identity, and sexual orientation, towards the Court's support of governmental mandates of equal treatment at the expense of individual liberty and freedom of choice, to the current trend permitting individuals and governmental institutions to "opt out" of non-discrimination laws based on newly developed and reinterpreted constitutional theories.

The constitutional development will trace the evolution of the explicitly stated First Amendment protection from the government abridging speech, the Court's interpretation that certain conduct, such as cross burning, flag burning, paying dues to a union, parading, carrying or posting a sign, and wearing protest arm bands, are "expressive" and accordingly entitled to First Amendment protection; the expanded notion that since the government cannot "abridge" speech (and accordingly certain expressive acts), neither can the government "compel speech" or compliance with certain governmental mandates. And expansion of the explicit First Amendment protected right to the free exercise of religion, from just protecting beliefs to also protecting acts; and accordingly limiting governmental enforcement of non-discrimination laws that infringe on religious beliefs. We will also examine the constitutionality of governmental mandates requiring the equal treatment of others that violate such person's "sincerely held religious beliefs or moral convictions." These constitutional arguments have recently been made to support a baker's refusal to bake a cake for a same sex marriage, an employer's refusal to buy certain health insurance for its women employees, allowing government employees to refuse to issue a marriage license to a same sex couple, allowing a pharmacist to refuse to sell prescription medication to a customer, permitting a medical professional to refuse to perform a "legal"

abortion, allowing "opt-outs" from health-care mandates established to fight a pandemic (Covid-19), refusing to place a child in a foster-care home of a same-sex couple in direct violation of a government funded program, and protecting a person's or organization's refusal to fulfill virtually any governmental mandate if doing so requires an action by the person or organization that the person or organization deems "compels" speech or actions that the person or organization does not wish to express, or policies the person or organization does not wish to support.

In addition, the course will examine the evolution of the constitutional mandate of "equal protection" (and the denial of equal protection) based on race, gender, gender identity, sex and sexual orientation.

The materials for the course required to be read and understood will include the Constitution of the United States, Supreme Court decisions, political, social and moral commentary, and news reports. The materials for the course are posted on bCourse. The seminar will be conducted mostly using the Socratic Method; there will be very little lecturing. In addition to "learning" the materials, the course will emphasize critical thinking: *how* to think, not *what* to think.