

Political Science 242  
The American Constitution II  
Federalism, Privacy, and the Equal Protection of the Laws  
Fall 2011  
Professor Arkes

## I. The Foundation of Law and Polity

- Aristotle, *The Politics*, Bk. I, A (1252a-1253a); Bk. III, C, ch. 9 (ca. 1280a-1281a)  
[Principles of Oligarchy and Democracy, and the Nature of Distributive Justice]  
Hadley Arkes, *The Philosopher in the City*, pp. 3-20  
Harry Jaffa, *Crisis of the House Divided*, pp. 302-62  
-Excerpts from Douglas at Jonesboro (September 15, 1858), Lincoln at Quincy  
(October 13, 1858) [in packet]  
Hadley Arkes, *Beyond the Constitution*, chs. 1-3, pp. 3-57  
-Exchange on the Constitution and moral principles antecedent to the Constitution:  
With Robert Bork: Bork, "Natural Law and the Constitution," *First Things* (March  
1992), pp. 16-20; Arkes, reply, *First Things* (May 1992), pp. 45-48  
-Harry Jaffa, "Original Intent and Justice Rehnquist," *Original Intent and the  
Framers of the Constitution*, pp. 83 ff.
- Alexander Hamilton, *The Federalist*, #32, 33, 81  
From Debates at the Constitutional Convention: Madison, Sherman, and others  
(June 6, 21, 28, 1787)  
Alexander Hamilton, Memorandum for Washington on the constitutionality of a national  
bank (1791)  
[Recommended: Martin Diamond, "The Federalists' View of Federalism," in Goldwin  
(ed.), *A Nation of States* [Electronic Reserve]

## II. On the Question of Citizenship and "Rights" in a Republic

- Jaffa, *Crisis of the House Divided*, pp. 363-86  
Horace White, *Lyman Trumbull*, pp. 257-80  
[Recommended: Eric Foner, *Reconstruction*, pp. 251-80 (on the Fourteenth Amendment;  
the hesitation, even among the Republicans, on black voting; and finally the  
coming of black suffrage) Electronic Reserve]  
Allan Bloom, "On Christian and Jew: The Merchant of Venice," in Bloom and Jaffa,  
*Shakespeare's Politics*, pp. 13-31 (Recommended: Jacob Katz, *Out of the Ghetto*, chs. 2  
and 10, pp. 9-27, 161-75)  
*Afroyim v. Rusk*, 387 U.S. 253 (1967)  
*Nyquist v. Mauclet*, 53 L Ed 2d 63 (1977) [higher education]

Plyer v. Doe, 72 L Ed 2d 786 (1982), 791-812, 815-23 [children of illegal aliens in public schools]

Hamdi v. Rumsfeld (June 2004)

[Recommended:

-Edward Bates, "Citizenship," Opinions of the Attorney General (November 1862), pp. 382-413

-Foley v. Connelie, 55 L Ed 2d (1978) (police)]

-Ambach v. Norwich, 60 L Ed 2d 49 (1979) (high school teachers) ]

Edwards v. California, 314 U.S. 160 (1941)

-Arkes, "Life Among the Clauses," Beyond the Constitution, Ch. 5, pp. 80-111

Shapiro v. Thompson, 394 U.S. 618 (1969)

Katzenbach v. McClung, 379 U.S. 294 (1964)

-Lawrence Tribe, Testimony on the Freedom of Choice Act, Hearings of the Senate Committee on Labor and Human Resources (May 1992), pp. 31-35

(Recommended: Daniel v. Paul, 395 U.S. 298 [1969])

Arkes, "The Puzzle of Commerce," in *The Return of George Sutherland*, pp. 119-58

[Recommended, Richard Epstein, *How the Progressives Rewrote the Constitution*, esp. pp. 1-13, 19-100, 117-37]

U.S. v. Lopez, 131 L Ed 2d 626 (1995), 623-43, 653-65, 673-84

[Recommended: -Brzonkala v. Morrison [US. v. Morrison] 529 U.S. 598, 601-645, 655-666 (Breyer's dissent) [2000] –Striking down the attempt to reach a case of rape with a federal prosecution –Electronic Reserve]

Gonzales v. Raich, 545 U.S. 1 (2005) [marijuana for medical purposes in California]

Gonzales v. Oregon, 126 S. Ct. 904 (2006) [permitting drugs to be used in assisted suicide; dissents from Scalia, Roberts, Thomas]

Partial-Birth Abortion Act of 2003, Text and findings (as introduced into the House, with its ground in the Commerce Clause)—cf. then to Thomas's opinions in Lopez, Raich, Gonzales v. Oregon, above)

Gonzales v. Planned Parenthood (2007), esp. the opinion for the majority by

Justice Kennedy, pp., 10-36, and cf. Justice Thomas concurring, 36-27 [Elec. Reserve]

[Recommended: Arkes and Eastman, Amicus Curiae Brief for *Gonzales v.*

*Planned Parenthood Federation* (August 2006), for the case to be argued in the term upcoming (Electronic Reserve)]

[Query: In the light of Clarence Thomas's concurring opinion in Gonzales v. Oregon, what would you have expected him to do when Congress invoked the Commerce Clause as the ground for the Partial-Birth Abortion Act of 2003. That problem came before the Court in Gonzales v Planned Parenthood Federation?]

Thomas More Center v. Obama [sustaining Obamacare –6<sup>th</sup> Circuit, June 29, 2011]

Jeffrey Sutton's opinion [Electronic Reserve]

Gregory Katsas, Brief on Obamacare, 11<sup>th</sup> Federal Circuit, Northern District of Florida (May 2011) [Electronic Reserve]

William Crosskey, "The True Meaning of the Fourteenth Amendment," in *Politics and the Constitution*, pp. 1083-1118

Plessy v. Ferguson, 163 U.S. 537 (1897)

Sweatt v. Painter, 339 U.S. 629 (1950)

Brown v. Board of Education, 347 U.S. 483 (1954)

Arkes, "Segregation, Busing and the Idea of Law," Ch. IX of *The Philosopher in the City*, pp. 223-55

Richard Morgan, "Coming Clean About Brown," *City Journal* (Fall 1996)

Washington v. Davis, 48 L Ed 2d (1976)

Wards Cove Packing Co. v. Atonio, 104 L Ed 2d 733 (1990)

[Recommended:

-Arlington Heights v. Metro Housing Corp., 50 LEd 2d 450 (1977) [zoning]

-Massachusetts v. Feeney, 60 LEd 2d 870 (1979) [preference for veterans]

-Walter Berns, "Voting Rights and Wrongs," Commentary (March 1982), pp. 31-36  
[Electronic Reserve]

-Recommended: Shaw v. Reno, 509 U.S. 630 (1993)]

University of California v. Bakke, 57 LEd 2d 750 (1978)

United Steelworkers v. Weber, 61 L Ed 2d 480 (1979)

Metro Broadcasting v. FCC, 111 L Ed 2d 445 (1990), 455-510

Adarand Construction, Inc. V. Pena, 132 L Ed 2d 158 (1995), Opinions by O'Connor, Scalia,

Thomas, Souter, Ginsburg, 167-91, 205-13

Richmond v. Croson Co., 102 L Ed 2d 854 (1989), 871-904 [Electronic Reserve]

[Recommended: Marshall's opinion, 904-926]

Civil Rights Act of 1991

[Recommended: George Bush, Message on the veto of the Kennedy-Hawkins Bill of 1990]

Grutter v. Bollinger (2003) [the same Justice O'Connor?]

[Recommended: Gratz v. Bollinger (2003); companion case] [Electronic Reserve]

[Note: In 2007 the people of Michigan amended their Constitution to forbid public colleges and universities from giving "preferential treatment" based on "race, sex, color, ethnicity or national origin." That amendment was just struck down by a federal court in July 2011. But on appeal, the case will go to a Court in which Justice Alito has replaced Justice O'Connor. See *Coalition to Defend Affirmative Action v. Regents and Trustees of Universities in Michigan* –July 2011 (Electronic Reserve)]

Parents Involved in Community Schools v. Seattle School District (2007), especially the main opinion by Chief Justice Roberts [Electronic Reserve]

Richard Epstein, *Forbidden Grounds*, pp. xi-xv, 59-78 ("Rational Discrimination"), 367-91

[Recommended:

-Arkes, "The Structure of Privacy: Adair and Coppage Revisited, in Eastland (ed.) *Benchmarks*, pp. 45-70]

-Terry Eastland, *Ending Affirmative Action*, chs. 5 and 8, pp. 92-116, 159-94]

[Electronic Reserve]

Reed v. Reed, 404 U.S. 71 (1971)

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

[Recommended: Arkes, The Return of George Sutherland, pp. 12-14, 20-22 71-81]  
Electronic Reserve?

Kahn v. Shevin, 416 U.S. 351 (1974)

Frontiero v. Richardson, 411 U.S. 677, 678-91 (1973)

[Recommended: Arkes, Beyond the Constitution, pp. 99-111]

Craig v. Boren, 429 U.S. 190 (1976) [Electronic Reserve]

Johnson v. Transportation Agency, 480 U.S. 616, 619-42, 657-77 (1987)

[Recommended: Martin v. Wilks, 104 L Ed 2d 835 (1990)]

Mississippi University for Women v. Hogan, 73 L Ed 2d 1090 (1982)

U.S. v. Virginia [Military Institute], 518 U.S. 515 (1996)

[Recommended:

- "Declaration on the Admission of Women to the Ministerial Priesthood," Sacred  
Congregation for the Doctrine of the Faith (1976), Vatican II documents, pp.

331-

45 Electronic Reserve]

-Emerson, Freedman, Brown, and Falk, "The Equal Rights Amendment: A  
Constitutional Basis for Equal Rights for Women," *Yale Law Journal* (1971),  
pp. 872-980)

-Arkes, "Playing Jackie Robinson" [On Jackie Robinson and the Ordination of  
Women] *Crisis* (October 1995), pp. 20-24 ]

"The Legality of Homosexual Marriage," 82 Yale Law Journal 573 (1973)]

[Recommended:

-Baehr v. Lewin, 852 P. 2d 44 (Hawaii 1993)

-Arkes, "Aloha," [Hawaii and the Laws of Marriage] The American Enterprise  
(Spring 1995)]

Arkes, "Gay Marriage and the Courts: Roe v. Wade II," *The Weekly Standard*  
(November 1995), pp. 37-39

Romer v. Evans, 134 L Ed 2d 855 (1996), 860-79

Arkes, Testimony before the House Judiciary Committee on The Defense of Marriage Act,  
May 15, 1996

Arkes, "A Culture Corrupted," in the Symposium on "The Judicial Usurpation of Politics,"  
*First Things* (November 1996), pp. 30-33

[Recommended:

-City of Boerne v. Flores, 134 L Ed 624 (1997) [The power of Congress in guiding the  
courts, here on the Religious Freedom Restoration Act] Electronic Reserve

Lawrence v. Texas (2003)

[Recommended: The overruled case, *Bowers v. Hardwick*, 478 U.S. 186, 187-214 (1986)]  
*Goodridge v. Dept of Public Health* (Mass, November 2003) [the critical case on  
“same-sex” marriage]

Arkes, *Some Thoughts on Marriage and Its Discontents in Massachusetts*

(Remarks at the Harvard Law School, February 9, 2004) [Electronic Reserve]

Robert Bork, “The Necessary Amendment,” *First Things* (Aug./Sept. 2004), 17-21

Marriage Protection Act of 2003 [removing from the federal courts the  
Jurisdiction to hear challenges to the Defense of Marriage Act—passed the  
House, July 22, 2004] --Text of bill, and remarks by Sensenbrenner, DeLay, and  
Nadler

[Recommended:

--“Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex  
Marriage,” *Harvard Law Review* (June 2004)—117 *Harv. L. Rev* 2684]

### III. The "Equal Protection of the Laws" and the Re-founding of the Constitution: The Reach of the National Government, against the Claims of Federalism and Privacy

*The Slaughter House Cases*, 16 Wall. 36 (1873)

*Railway Express v. New York*, 336 U.S. 106 (1949)

*Goesaert v. Cleary*, 335 U.S. 464 (1948)

[Recommended: *The Civil Rights Cases*, 109 U.S. 3 (1883)]

*U.S. v. Williams*, 341 U.S. 70 (1951) [Frankfurter's opinion]

[Recommended:

-*Screws v. United States*, 325 U.S. 91 (1945), opinions of Douglas, Rutledge, and  
Roberts-Frankfurter-Jackson

-*U.S. v. Price*, 383 U.S. 787 [the killing of the three Civil Rights workers] (1966)

-Foner, *Reconstruction*, pp., 425-44 (on the Ku Klux Klan)

Arkes, "The Sweep of Civil Rights and the Maze of Federalism" *Beyond the Constitution*  
Ch. 6, pp. 112-49

Arkes, “The Mirage of Enumerated Powers,” *Claremont Review of Books* (Winter 2010/  
Spring 2011), pp. 33-37 [Electronic Reserve]

The Unborn Victims of Violence Act 2001 –text, and Arkes testimony (from 1999)

From the *Washington Post*: “Justices to Decide if Curbs on Officials’ Abuse Apply to  
Sexual Assaults,” (January 3, 1997)

[Recommended:

--*Monroe v. Pape*, 365 U.S. 176 (1961), pp. 168-87, 202-46

-*Goss v. Lopez*, 42 L Ed 2d 725 (1975)

- Rutledge v. Arizona Bd. of Regents, 660 F 2d 640 (1981) [the tragedy of the missed punt]
- Owens v. Brierley, 452 F 2d 640 (1971)
- Carey v. Phipus, 55 L Ed 2d 252 (1978)
- U. of Missouri v. Horowitz, 55 L Ed 2d 124 (1978)]

Rankin v. McPherson, 97 L Ed 2d 315 (1987)

Scalia's concurring opinion in Cruzan v. Director, Mo. Health Dept., pp. 251-56 [See below, in packet]

Grove City College v. Bell, 79 L Ed 2d 516, 522-35 (1984)  
 [Recommended: dissenting opinion by Brennan, 537-51]

Arkes, on the Civil Rights Restoration Act [the response to the Grove City case] and the oral argument in the Baby Doe case [Bowen v. American Hospital Association], in Beyond the Constitution, Ch. 9, pp. 206-48

Roth v. United States, 354 U.S. 476 (1954)[Harlan's dissent]

Palko v. Connecticut, 302 U.S. 319 (1937)  
 [Recommended: California v. Byers, 402 U.S. 424 (1971) (Self-incrimination on the highways), Harlan's opinion]

Arkes, "On the Art of 'Incorporating' Rights," Beyond the Constitution, Ch. 7, pp. 150-72

#### Incorporation and the Second Amendment:

McDonald v. Chicago (2010) , Justice Alito's opinion for the Court [recommended  
 Dissenting opinions] (Electronic Reserve)

[Recommended:

- District of Columbia v. Heller (2008), especially Scalia's opinion for the majority, 51 pp. --The breakthrough opinion, holding that the Second Amendment did indeed apply to persons, not only militias (Electronic Reserve)]
- Brown v. Plata (2011) [on releasing prisoners on the grounds of "overcrowded" conditions, Kennedy v. Alito] (Electronic Reserve)]

[Recommended:

- Ullmann v. United States, 350 U.S. 422 (1956)
- John Langbein, "Torture and Plea Bargaining," The Public Interest (Winter 1980), pp. 43-61
- U.S. v. Nixon, 41 L Ed 2d 1039 (1974)
- U.S. v. Ward, 448 U.S. 242 (1980) [On the Water Pollution Control Act]
- Zurcher v. Stanford Daily, 56 L Ed 2d 525 (1978) ]

Wolf v. Colorado, 338 U.S. 25 (1949)

Rochin v. California, 342 U.S. 165 (1952)

Schmerber v. California, 384 U.S. 757 (1966)

[Recommended:

- Winston v. Lee, 84 L Ed 2d 662 (1985) (removing bullet from the shoulder of a

defendant)  
-South Dakota v. Neville, 74 L Ed 2d 748 (1983)]

Irvine v. California, 347 U.S. 436 (1954), 129-38, 142-49  
[Recommended: Miranda v. Arizona, 384 U.S. 436 (1966) Electronic Reserve]  
Rhode Island v. Innis, 64 L Ed 2d 297 (1981)  
Arkes, *Beyond the Constitution*, Ch. 8 ("Incriminations: Self, and Others"), pp. 173-205  
[Recommended: New York v. Quarles, 81 L Ed 2d (1984)]  
Stone v. Powell, 49 L Ed 2d 1067 (1976)

Ciucci v. Illinois, 356 U.S. 571 (1958)  
H.L Mencken, "Mr. Justice Holmes," in *The Vintage Mencken*, pp. 189-97)  
[Recommended:  
-U.S. v. DiFrancesco, 66 L Ed 2d 328 (1980)  
-Ashe v. Swenson, 397 U.S. 436 (1970), 437-447, 460-69  
-Pointer v. Texas, 380 U.S. 400 (1965)]  
Maryland v. Craig, 111 L Ed 2d 666 (1990) (Children giving evidence through closed-circuit television)  
[Recommended: Davis v. Washington [Hammon v. Indiana] (June 2006, on the question of whether information relayed in calls to the police become "testimony") (Electronic Reserve)  
"Legal Beginnings of Boston Housing Suit," Boston Globe (September 10, 1978), A2  
[Recommended: Walter Berns, *The First Amendment and the Future of American Democracy*, pp. 86-146]

Charles Black, *Structure and Relationship in Constitutional Law*, pp. 33-66  
Garcia v. San Antonio Metro, 83 L Ed 2d 1020-38, 1052-58 (1985) (Electronic Reserve)  
Printz v. United States [the Brady bill], 138 L Ed 3d 914, 923-70 (1997)  
[opinion by Scalia, dissents by Stevens and Souter] (Electronic Reserve)

#### The Enigma of the Eleventh Amendment

-Chisholm v. Georgia , 2 Dallas 493 (1793), opinions of James Wilson and John Jay  
-Arkes, "The 'Laws of Reason' and the Surprise of the Natural Law," in Paul, Miller, and Paul (eds.) Natural Law and Modern Moral Philosophy (Cambridge, 2001), pp. 146-175  
[Recommended:  
-Alden et al. v. Maine, 527 U.S. 706, 711-740, 748-804, 808-814 [Elec. Reserve]  
-College Savings Bank v. Florida Prepaid Postsecondary Expense Bd., 527 U.S. 666, at 668-91, 694-705 (Scalia and Breyer) [1999] [Elec. Reserve]  
-Arkes, "More Supreme Than Ever," *National Review* (July 26, 1999), pp. 38-39]  
  
-Michael Greve, "Federalism, Yes. Activism, No." American Enterprise Institute (July 2001)

- The End of the New Eleventh Amendment Jurisprudence?:  
Nevada Dept of Human Resources v. Hibbs, 538 U.S. 721 (2003)  
[Recommended:  
--Tennessee v. Lane (2004)  
--John Noonan, *Narrowing the National Power*  
-- Seminole Tribe v Florida 517 US 44 (1996)]

Shelley v. Kraemer, 334 U.S. 1 (1948)  
Arkes, *The Philosopher in the City*, pp. 339-45  
Rice v. Sioux City Cemetary, 60 N.W. 2d 110 (1953)  
Gordon v. Gordon, 24 N.E. 2d 228 (1955)  
Daniel N. Robinson, "Testamentary Capacity," in Psychology and Law, pp. 84-109

Moose Lodge v. Irvis, 407 U.S. 163 (1972)  
[Recommended: New York State Club Assn. v. NYC, 101 L Ed 2d 1, 10-21 (1988)]  
Runyon v. McCrary, 49 L Ed 2d 415 (1976)  
[Recommended: Patterson v. McLean Credit Union, 105 L Ed 2d 132 (1989)]

Kober v. Kober, 211 N.E. 2d 817 (1965)  
Hill v. State, 480 S.W. 2d 670 (1972)  
"Rape and Battery Between Husband and Wife," 6 Stanford Law Review, 719-28  
Clippings on "the reach of the law" [multilith]  
Arkes, *The Philosopher in the City*, pp. 346-60  
Hadley Arkes, "Privacy and the Reach of the Law," Chap XV of *First Things* [Electronic Reserve]  
John Noonan, *A Private Choice*, pp. 10-12, 90-95, 137-45  
[Recommended:  
-Roe v. Wade, 410 U.S. 113 (1973)  
-Arkes, *First Things*, Chs. XVI-XVII  
-Arkes, *The Return of George Sutherland*, pp. 282-85  
-John Hart Ely, "The Wages of Crying Wolf," *Yale Law Journal* (April 1973)]  
-Connecticut v. Menillo, 46 L Ed 2d 152 (1975)  
-Harris v. McRae, 65 L Ed 2d 784 (1980)]  
-Hadley Arkes, "On the Public Funding of Abortions," in Burtchaell (ed.), *Abortion Parley* (1980), pp. 237-64]

Webster v. Reproductive Health Serv., L Ed 2d 410 (1989)  
Planned Parenthood v. Casey, 120 L. Ed 2d 674 (1992), Sections II-III of the plurality opinion, pp. 695-709, and the dissenting opinion by Scalia, 781-97  
Arkes, "Slouching Towards Infanticide," *Weekly Standard* (May 25, 1998), pp. 26-29  
Stenberg v. Carhart, 530 U.S. 914 (2000) [Electronic Reserve] [Breyer's opinion for the Court; dissents by Kennedy, Scalia, and Thomas --This decision seems to have been overruled or displaced by Gonzales v. Planned Parenthood--See above, p. 2]



[Recommended:

- On the train of cases on partial-birth abortion, see the fuller account in Arkes, "Antijural Jurisprudence," *Natural Rights & the Right to Choose*, pp. 112-46 Electronic Reserve
- On "assisted suicide": *Washington v. Glucksberg*, 138 L Ed 2d 772, 779-833 (1997)
- Arkes, Commentary on *Glucksberg* in First Things [the journal] (October 1997), pp. 22-23
- Cruzan v. Director, Mo. Health Dept.*, 111 LEd 2d 224 (1990) ]

*Stanley v. Georgia*, 394 U.S. 557 (1969)

Walter Berns, "Obscenity and Public Morality," in The First Amendment and the Future of American Democracy, pp. 205-28

*Miller v. California*, 413 U.S. 15 (1973) and *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973)  
[Recommended: *New York v. Ferber*, 458 U.S. 747, 749-77 (child pornography case)]

Arkes, The Philosopher in the City, Chs. XIV-XV ("Law, Morals, and the Regulation of Vice"; "On Principles and Experience: Republican Virtue and the Enforcement of Morality"), pp. 385-455

*Brown v. Entertainment Merchants Association* (2011), especially the opinions by Justices Scalia, Alito, and Thomas (in dissent) [Electronic Reserve]

Arkes, "That's Entertainment: Free Speech and the Moral Regulation of the Arts," *Public Discourse*, July 6, 2011