

University of Montana
Department of Political Science

PSCI: 474
Civil Liberties & Rights Seminar
Spring 2016

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Office Hours: 11-12 pm M & W; by appointment

10:10 – 11 M, W, F
Classroom: LA 344

This seminar focuses on how the United States through the concept of civil liberties and rights has attempted to limit government and empower individuals. To that end, while surveying the historical and political development of rights and liberties within the context of American constitutionalism, we will pay particular attention to how the Supreme Court has and should interpret the Bill of Rights. To facilitate our inquiry, the course is arranged topically. Finally, in addition to normative questions, we will be concerned with the empirical question of whether litigation is, as is commonly assumed, an effective means of promoting social progress and constitutional change.

Readings

The books listed below are required reading and may be purchased at the University Bookstore.

Required Reading:

1. Akhil Reed Amar, *The Bill of Rights* (Yale: 1998)
2. Gillman, Graber, Whittington, *American Constitutionalism, Vol. II: Rights and Liberties* (Oxford: 2013)
3. Michael J. Klarman, *Brown v. Board of Education and the Civil Rights Movement* (Oxford: 2007)
4. Michael J. Klarman, *From the Closet to the Alter* (Oxford: 2012)
5. Bruce Ackerman, *We the People, Vol. 3: The Civil Rights Revolution* (Harvard: 2014)
(Selections will be up on Moodle)

Recommended Readings:

1. Gerald N. Rosenberg, *The Hollow Hope* (Chicago: 2008) (The most influential skeptical piece of social science research on the role of courts in protecting fundamental liberties and rights).

Procedures and Requirements

Grading and Assignments:

This course has 5 requirements, which include the following:

1. Faithful attendance to class and active participation during the discussions (50% of the final grade; see “Participation” below)
2. First Essay: 5-6 page paper (**Feb. 26:** 10%; see “Essay” below)

3. Second Essay: 5-6 page paper (**Mar. 18:** 10%; see “Essay” below)
4. Third Essay: 5-6 page paper (**Apr., 22:** 10%; see “Essay” below)
5. Final Essay: (**May 12:** 20%; see “Essay” below)

In order to pass the class, you must complete all of the assignments.

Participation:

This is a seminar. The excitement of seminars is that they are a chance for you to learn from each other, to try out your own analyses and comparisons, and to hear your own voice in intellectual conversation with each other. You are all bright and interesting people, and seminars are an opportunity for you all to be colleagues in an intellectual inquiry.

Our seminar will be organized around discussion. *Regular attendance and participation are thus required.* Given the nature of this course, the seminar’s participation grade is weighted accordingly at 50%.

The goal of our discussions is for participants to demonstrate informed, ongoing, responsive engagement with the material. By “informed,” I mean informed by a close reading of our texts and engaged with the other materials of the course. By “ongoing” I mean both sustained throughout each meeting and sustained throughout the semester. By “responsive,” I mean responsive to each other, taking each other seriously enough to respond to each other’s observations and analyses.

I know that for some of you talking in class is as easy as breathing, but that, for others, it is a hurdle to overcome. If talking in class is difficult for you, please come see me during an office hour early in the semester. There are tricks to making participation easier – and it’s well worth your time to practice sharing your ideas and thoughts with others in a constructive, yet critical, intellectual conversation. So, work on that skill here in this class!

Most classes, 4 or so members of the seminar will be required to start our discussion with a 3 to 4 minute responds to one or more of the prep questions for the day. *Given the size of our seminar, this means I expect that each participant will begin discussion at least once a week.* Some days, participants will respond to prep questions of their choice; other days, I will ask that people respond to specific questions and other days I will ask that people outline some aspect of a case we are reading. After the completion of these responses, then we will open the floor to the rest of the seminar so that we can hear people’s agreements and disagreements with the ideas and arguments advanced by the 4 members of the seminar. *Each person, during each class meeting of the seminar, will be expect to participate in this dialogue.*

Furthermore, during the term - when we read Michael Klarman’s *Brown v. Board of Education and the Civil Rights Movement*, his *From the Closet to the Alter*, and Bruce Ackerman’s *We the People, Vol. 3: The Civil Rights Revolution* – each participant will be asked to present on a chapter of these texts, along with putting together an outline of their proposed remarks, which will be handed out to the participants of the seminar. Given the amount of material we are attempting to get through, students should be prepared to present 3 times during the term. Each presentation should run approximately 5 to 6 minutes.

As I hope my remarks indicate, each participant in the seminar should come to class with that day's readings completed, and carefully thought about, with questions to ask and ideas and thoughts to share. That is to say, in class it is your job to put your ideas forward for your classmates to endorse, challenge, and transform. *As I indicate above, this is an obligation of every seminar participant, regardless of whether you have signed up to begin discussion or not.*

Your regular, thoughtful participation will be critical to determining the success of the seminar and the grade you receive in it. Put otherwise: **unless a student's participation is substantial, he or she will fail the seminar.**

Classroom Policy:

Because this is a seminar, electronic devices – cell phones and computers – are not permitted. The success of the seminar depends on the development of a constructive dialogue among its participants. There is simply no way that can happen if people are focused on their computer screens, rather than the human beings they are talking with.

Essays:

The course requires the successful completion of 3 short essays and one longer 10-12 page essay.

- Short Essays: Essays should be 5 to 6 pages long. Each essay should be “an argumentative essay.” That is your essay should be an explication of some feature of the material we have covered in class, along with an argument in favor or against some aspect of the reading. It is thus not to be a book report, but an opportunity for you to put forth some novel point of view about the material and your reasons for thinking you are right about the material. After all, everyone in the class has read the material, so just repeating back that material does not move the conversation forward much... Two books that are particularly helpful for learning how to write college level argumentative essays are: Anthony Weston, *A Rule Book for Arguments* and William Strunk Jr. and E.B. White, *The Elements of Style*. Consulting these books should give you a sense of what constitutes strong college level writing.
- Final Essay: The final essay should 10 to 12 pages. Like the shorter essays, it too should be an argumentative essay. Each participant in the seminar is required to clear the topic of his or her final paper with me. *It is your obligation to stop my by office hours, or schedule a time to discuss your paper with me.*

Late Paper Policy:

You will note from the syllabus that we do not have class scheduled on the week your essay is due. For this reason, late papers will be marked down a grade every day they are late.

Sources for Papers:

Generally speaking, essays should be written using the sources from the course – either texts from the class or books recommended via texts from the course or webpages used in the class. *That means the Internet, unless used to access databases of scholarly articles, or legitimate academic sources, is off-limits.*

Needless to say, there is a great deal of information and material on the Internet that touches on civil rights and liberties. Unfortunately, much of that information is of a poor quality. Furthermore, it is not always easy to distinguish high from low quality sources of information.

Writing Help:

The Writing Center is located in LA 144. To make an appointment with a writing advisor, call 243-2266, email growl@mso.umt.edu, or stop by LA 144.

Academic Dishonesty:

Students in this course are expected to follow the University's standards of academic integrity and honesty. If you are caught cheating or plagiarizing, you may receive a failing grade for the assignment and/or class and may be reported to the University. Students are responsible for understanding what constitutes plagiarism. The Code is available for review online at <http://www.umt.edu/SA/VPSA/index.cfm/page/1321>

Course Topics and Readings:

Week One: Constitutionalism, the Tradition of Liberty, and the Puzzle of Constitutional Change

1. Mon., Jan. 25: Constitutional Skepticism

*Video: Ronald Dworkin in Budapest on democracy and constitutionalism (and the role of judges and constitutional courts; Dworkin was the leading proponent of rights foundationalism and strong civil libertarianism in constitutional law) (start at 10:16-50 mins; see in particular his last remarks about the spirit of liberty) <https://vimeo.com/19803304>

* Dworkin, "The Moral Reading of the Constitution," *New York Review of Books* (1996) [M]

*Jeremy Waldron, "Constitutionalism – A Skeptical View" [M] (look specifically at sec 6, 11, 12, 14) (Waldron is a famous skeptic of judicial review – a position he most forcefully articulates in his influential piece, "The Core Case Against Judicial Review" listed below in the recommended readings; and thus disagrees with his famous old teacher, Dworkin)

*Video: Is Popular Right? A Debate on Popular Constitutionalism and Judicial Review (2012) The American Constitution Society (debate between Larry Kramer and Erwin Chemerinsky) https://www.youtube.com/watch?v=wOrTkKqKq_Y (Remarks start at 6:50 mins)

Prep: What is Dworkin's picture of democracy and the courts role in democracy? Why, though, is Waldron skeptical about constitutionalism? Further, what's the argument of Larry Kramer? What's the argument of Erwin Chemerinsky?

Recommended:

*Dworkin, "Liberalism" [M] (See in particular remarks at pp. 35-37)

*Dworkin, "Taking Rights Seriously" NYRB (1970) [M]

*Thomas Nagel, "Rawls and Liberalism," *Reading Rawls* [M] (The philosophical background of contemporary egalitarian liberalism, and of Dworkin's picture of the role of courts)

*Jeremy Waldron, "The Core Case Against Judicial Review," *The Yale Law Journal* (2006) [M] (Highly recommended for graduate students)

*Stephen Holmes, "Precommitment and the Paradox of Democracy" *Constitutionalism and Democracy*, eds. Jon Elster and Rune Slagstad (1988) [M]

*The Case Against the Supreme Court: Ewin Chemerinsky says justices side with powerful and privileged

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/the_case_against_the_supreme_court_erwin_chemerinsky_says_justices_side.html [M]

2. Wed., Jan. 27: Judicial Supremacy & the Puzzle of Constitutional Change

*Video: Does the Supreme Court Follow the People? Aspen Ideas Festival (2011) with Jeffrey Rosen, Larry, Kramer, Sandra Day O'Conner, and Stephen Breyer

<http://www.aspenideas.org/session/does-supreme-court-follow-people>

*Larry Kramer, "We the People," *Boston Review* (February/March 2004) [M]

* Continue reading material from Monday's class

Prep: Today we read the various protections of the Bill of Rights as legally enforceable commands that courts are obliged to recognize and execute (this is the picture Dworkin develops most forcefully). Kramer, Waldron, and many others are skeptical that this is the essential, core, way we should think about the issue of constitutional rights. How might Kramer think the framers, and Americans until quite recently, thought of the constitutional amendments we call the Bill of Rights? What, in broad outline, is Kramer's understanding of the development of judicial review in American constitutional development? Do you agree with the Kramer or Waldron position? With Dworkin's position? Why or why not?

3. Fri., Jan. 29: How Should We Think About *The Bill of Rights*?

*Gillman *et al.*, *American Constitutionalism*, pp. 3-10:

1. Introduction to Rights and Liberties
 - I. Constitutional Rights
 - II. Connections
 - III. Sources
 - IV. Constitutional Interpretation

*Amar, *The Bill of Rights*, pp. xi-19

Prep: What are the various types of constitutional rights, according to Gillman *et al*? Further, what are the several "connections" these rights may have to one another, and from whence might they originate? Does Amar interpret the Bill of Rights along the same lines as Gilman *et al*? Would Amar agree or disagree with the distinction between constitutional rights that Gilman *et al* explicate? If they - Amar and Gilman *et al* - do differ, then whose argument/interpretation of the Bill of Rights do you find more persuasive? Finally, do these views (those of Gilman *et al* and Amar) have similarities and differences with Waldron and Kramer?

Week Two: The First Amendment (Expression)

Amendment I: "Congress shall make no law...abridging the freedom of speech, or of the press, of the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances."

1. Mon., Feb. 1: Early Precedent and the Beginnings of the Modern Speech Doctrine

*Gillman *et al.*, *American Constitutionalism*, pp. 52-54, 173-74, 419-27, 539-47, 557-58

A. Free Speech

Schenck v. United States (1919)

Whitney v. California (1927)

West Virginia State Board of Education v. Barnette (1943)

Brandenburg v. Ohio (1969)

Prep: According to the early tradition of "seditious libel," truth was not considered a defense. Conversely, why might "truth" be an important free speech value in a democratic context? (See the recommended piece by J. S. Mill, which the justices themselves had read, and which influenced their thinking) What principle(s), that is, do you see at work in Schenck (pay attention to Holmes' test) and Whitney (pay attention to Brandeis's concurrence)? (Note the very early date of these cases relative to other civil liberties cases; does this tell us something about the free

speech value in the United States? Note in the early pages (52-54) the connection to religion) What principles do you see at work in Barnette and Brandenburg?

Recommended:

- *J.S. Mill, “On Liberty of Thought and Discussion,” *On Liberty* (1859) [M]
- *Andrew Cohen, “The Most Powerful Dissent in American History” *The Atlantic* (2013) [M]

2. Wed., Feb. 3: The Modern Doctrine & Contemporary Issues

- *Amar, *The Bill of Rights*, pp. 20-32
- *Gillman *et al.*, *American Constitutionalism*, pp. 795-796, 799-803, 810-812, 952-58:
 - A. Free Speech
 - Doe v. University of Michigan (Mich 1989)
 - Snyder v. Phelps (2011)
- *Eugene Volokh, “No, There’s No “Hate Speech” Exception to the First Amendment” *Washington Post* 2015 [M]
- *Jeremy Waldron, “Free Speech and the Menace of Hysteria” *NYRB* (2008) [M]
- *”What to Do About Hate Speech,” *NYRB* (2008) [M]
- *Cass Sunstein, “Islamic State’s Challenge to Free Speech” *Bloomberg* (2015) [M]

Prep: What is the core of first amendment speech rights today? Should the constitution protect libel, hate speech, “symbolic speech,” violent video games, cross-burning, picketing of military funerals, recruiting by terrorists? Or are there instances of speech that go too far? Should, in short, Americans be more European here? Finally, does Amar’s understanding of free speech differ from the core understanding of that right today? If so, in what way?

Recommended:

- *Emily Bazelon, “Do Online Threats Count as Free Speech” *NYT* (2014) [M]
- *Audio (Listen as you see fit): *Elonis v. United States* (2015) http://www.oyez.org/cases/2010-2019/2014/2014_13_983(In *Elonis* the court dodges the First Amendment issue, but the debate gives you a sense of how difficult the issue is)
- **Elonis v. United States*, Oral Argument Transcript [M]
- *”Hate Speech Prosecution in Montana,” *WP* (2015) [M]

3. Fri., Feb. 5: Our First Amendment?

- *Gillman *et al.*, *American Constitutionalism*, pp. 962-67:
 - Citizens United v. Federal Election Commission* (2010)
- *Ronald Dworkin, “The ‘Devastating’ Decision” & “The Decision that Threatens Democracy,” *New York Review of Books* (2010) [M]
- *Money Unlimited, *The New Yorker* (2012) [M]
- *Video: Big Sky, Big Money, *Frontline* (2012). <http://www.pbs.org/wgbh/pages/frontline/big-sky-big-money/>
- *Video: Richard Epstein, “*Citizens United v. Federal Election Commission*,” Inaugural Lecture of the Laurence A Tisch Professorship of Law, NYU (2010): <http://www.youtube.com/watch?v=Ip9qN7ePZmk>

Prep: Who do you agree with, Dworkin or Epstein? Why or why not? The history of the modern doctrine of free speech is strongly libertarian. Does this drive court decisions protecting the right of free speech to go too far? Is *Citizens United*, for instance, an example of this? How would you draw the line? Is campaign spending speech at all? Why or why not? Further, what understanding of constitutional interpretation –originalism, textualism, doctrinalism, prudentialism, or aspirationalism - is required by your position?

Week Three: First Amendment (Religion)

Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

1. Mon., Feb. 8: Foundations, Free Exercise, & Establishment

*Video: Watch Introduction, Moderator: Hon. William Francis Kuntz, II, U.S. District Court, Eastern District of New York at the Federalist Society, Lawyer's Conference, Religion Clauses (2012) (first 12 minutes) <http://www.youtube.com/watch?v=MPGdCy68dG0>

*Amar, *The Bill of Rights*, pp. 32-45

*Gilman *et al.*, *American Constitutionalism*, pp. 521-28:

B. Religion

Engel v. Vitale (1962)

Sherbert v. Verner (1963)

*Lemon v. Kurtzman (1971) [M]

*Marsh v. Chambers (1983) [M]

*Lynch v. Donnelly (1984) [M]

*Gilman *et al.*, *American Constitutionalism*, pp. 768-771:

Lee v. Weisman (1992)

Prep: What do you think the purpose of the religion clauses of the first amendment is? Is there a tension in the two clauses? What sorts of tests does the court articulate with regard to the establishment clause in *Lemon*, *Lynch*, and *Lee*? What do you notice about the shifts in the tests? Is the stringency of the tests changing? Further, how would you characterize the reasoning of *Marsh*?

2. Wed., Feb. 10: Contemporary Debate & Free Exercise

*Video: Watch Prof. William P. Marshall, University of North Carolina School of Law, Federalist Society, Lawyer's Conference, Religion Clauses (2012) (From 12 min to 25 min) <http://www.youtube.com/watch?v=MPGdCy68dG0>

*Gilman *et al.*, *American Constitutionalism*, pp. 647- 50, 760-62, 771-78, 907-10, 917-23

B. Religion

Ronald Regan, Speech to National Religious Broadcasters (1984)

Free Exercise

Employment Division v. Smith (1990)

House Committee on the Judiciary, Report on the Religious Freedom Restoration Act (1993)

City of Boerne v. Flores (1997)

Debate over Exemption from the Affordable Care Act (2012)

Burwell v. Hobby Lobby Stores, Inc. (2014) [M]

*Video: Hobby Lobby at SCOTUS: Behind the Decision:

https://www.youtube.com/watch?v=n_fkAKOpri4

*"Can't Have Your Cake, Gays Are Told, and A Rights Battle Rises," NYT (with video) (2014) [M]

*Emma Green, "How Will the U.S. Supreme Court's Same-Sex-Marriage Decision Affect Religious Liberty?" The Atlantic (2015) [M]

Prep: (1) Please explicate the opinion of *Smith* (1990); (2) please explicate the decision of *City of Boerne v. Flores* (1997); (3) please explicate the *Hobby Lobby* Case (2014). What principles do you see at work in these cases? Increasingly, cases regarding religious exemptions to state

anti-discrimination laws that protect LGBT rights in the case of public accommodations have come to the fore. Further, in the light of last year's constitutionalization of same sex marriage, issues regarding the implications of the decision for claims of religious liberty have surfaced. Based on your reading of these cases, do bakers and florists, for instance, have a constitutional right to deny services that support the marriage ceremonies LGBT people? (Question: Do you think the current presidential race has anything to do with these cases??)

3. Fri., Feb. 12: The Contemporary Debate Over Establishment

*Video: ISCOTUS: Historical Context of Town of Greece v. Galloway [M]

*Video: ISCOTUS: Town of Greece: Outcomes and Analysis [M]

*Video: ISCOTUS: Town of Greece: Facts and Legal Background [M]

* Audio: Oral Argument & Opinion Announcement by Justice Kennedy, Town of Greece v.

Galloway http://www.oyez.org/cases/2010-2019/2013/2013_12_696

*Town of Greece v. Galloway (2013) [M]

*Video: ISCOTUS: Behind the Decision of Town of Greece v. Galloway [M]

Prep: Given the evidence you have, how would you decide the case?

Recommended:

*Christian Legal Society (CLS) Chapter of the University of California, Hastings College of Law v. Martinez (2010) [M]

*Video: Watch Hon. Michael W. McConnell, Richard and Frances Mallery Professor of Law, Stanford Constitutional Law Center, and former Judge, United States Court of Appeals, Tenth Circuit & Prof. Corey L. Brettschneider, Brown University, Federalist Society, Lawyer's Conference, Religion Clauses (2012) (Start at 34 min to 108 min.)

<http://www.youtube.com/watch?v=MPGdCy68dG0>

Week Four: The Second Amendment (Guns)

Amendment II: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

1. Mon., Feb. 15: NO CLASSES: PRESIDENT'S DAY

2. Wed., Feb. 17: The Military Amendments and The "Embarrassing" Second Amendment

*Amar, *The Bill of Rights*, pp. 46-63

*Sanford Levinson, "The Embarrassing Second Amendment," *The Yale Law Journal*, 1989 [M]

Prep: Please explicate and interpret Amar's understanding of the "military amendments."

Further, why exactly is the second amendment "embarrassing" according to Levinson?

Remember this article was written before the current second amendment cases.

Recommended:

*Gilman *et al.*, *American Constitutionalism*, pp. 170-72, 234-37:

C. Guns

Bliss v. Commonwealth (KY 1822)

State v. Buzzard (1842)

* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origin of Gun Control in American* (2008)

3. Fri., Feb. 19: The Contemporary Debate and Public Meaning Originalism

*Gilman *et al.*, *American Constitutionalism*, pp. 778-81, 923-30:

C. Guns

Debate over the Federal Assault Weapons Ban (1994)

John Ashcroft, Letter to National Rifle Association (2001)

District of Columbia v. Heller (2008)

*Video: Watch Jack Rakove (History, Stanford) debate Eugene Volokh (UCLA Law School) about the meaning of the Second Amendment and Heller <http://bloggingheads.tv/videos/1673>

*Akhil Reed Amar, "Second Thoughts," *The New Republic* (1999) [M]

*Richard Posner, "The Incoherence of Antonin Scalia," *The New Republic* (2012) [M]

Prep: Based upon what you now know about the right to bear arms and the second amendment, do you think Heller was decided correctly? Put otherwise, who do you think has the better argument, Rakove or Volokh? And why do you come down on the issue as you do? What principle or evidence do you have for your position? The conflict over the second amendment is usually framed as a conflict over an individualist and statist reading. Is this though the only way to read the amendment? What other ways of reading the amendment does Amar see? (In the recommended readings, Konig and Cornell see a similar approach to the second amendment)

Recommended:

*David Thomas Konig, "Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America," *UCLA Law Review* (2009) [M]

* Saul Cornell, "A New Paradigm for the Second Amendment" (2004) [M]

*Gilman *et al.*, *American Constitutionalism*, pp. 891-896

McDonald v. City of Chicago (2010)

*Symposium: The New Originalism in Constitutional Law:

<http://fordhamlawreview.org/symposia/44>

Week Five: FIRST SHORT PAPER DUE (5-6 PAGES)

1. Fri., Feb. 26: Essay Due 5 pm in my Office

Week Six: Fourth (Search and Seizure), Fifth (Due Process & Habeas Corpus), Eighth Amendment (Cruel and Unusual Punishment) (I.E. Criminal Justice)

Amendment IV: "The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place or be searched, and the persons or things to be seized."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor be deprived of life liberty, or property, without due process of law..."

Amendment VIII: "Excessive bail shall not re required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

1. Mon., Feb. 29: Search and Seizure

*Amar, *The Bill of Rights*, pp. 64-77

*Gilman *et al.*, *American Constitutionalism*, pp. 69, 271-72, 462, 612-13, 719-20, 857, 1022-23:

B. Search and Seizure

Table 5-3: Some Landmark Cases in the Development of the Power of Search and Seizure

*Jeffrey Rosen, “Supreme Court Cellphone Case Went Further than Privacy Advocates Hoped” *The New Republic* (2014) [M]

*Video and Webpage: Shifting Scales: How the Robert’s Court is Interpreting the Fourth Amendment <http://projects.oyez.org/shifting-scales/>

Prep: Member of the course will be assigned different parts of the Shifting Scales page to work with.

Recommended:

*Amy Davison, “Four Ways the Riley Ruling Matters for the NSA” *The New Yorker* (2014). [M]

2. Wed., Mar. 2: Due Process and Habeas Corpus

*Habeas Corpus, *The Oxford Companion to the Supreme Court* [M]

*Video: An Evening with Anthony Lewis, New York Law School (2004) (28 mins.):

<http://www.youtube.com/watch?v=kq4gwtJgbq8>

*Video: In Depth with Eric Posner (2011) (First 17 mins): <http://www.c-spanvideo.org/program/299443-1>

*Gilman *et al.*, *American Constitutionalism*, pp. 265, 345-46, 350-52, 604-05, 610-12, 715, 1017-22, 1041-50:

A. Due Process and Habeas Corpus

The Civil War

Reconstruction

Wickersham Commission, Report on Lawlessness in Law Enforcement (1931)

Ex parte Quirin (1942)

The Antiterrorism and Effective Death Penalty Act (1996)

William Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996

Felker v. Turpin (1991)

F. Infamous Crimes and Criminals

The War on Terror

The USA Patriot Act

Hamdi v. Rumsfeld (2004)

Prep: “The Nazi Saboteur Case” [Ex parte Quirin] has become an influential case in the context of the War of Terror. Why might that be? What are the facts of the case, and what was the ruling of the Court? How does Stone distinguish Ex parte Milligan from Quirin? And do you find his argument convincing? What implications does the War on Terror have for due process and habeas corpus? How would Anthony Lewis see the matter do you think? How would Eric Posner see the matter? Who do you agree with? Further, what is the appropriate constitutional standard to use when thinking about these national security issues? A strong civil libertarian standard, such as heightened scrutiny? Or does war change everything, and should the court give deference to the executive branch? Or is there, perhaps, some other alternative?

Recommended:

Ronald Dworkin, “Terror & the Attack on Civil Liberties,” NYRB (2003) [M]

- *Eric Posner, “Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel,” *Harvard Journal of Law & Public Policy* (2012) [M]
- *Ibid., *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: 2007) [M]
- *Richard A. Posner, *The Constitution Not a Suicide Pact* (Oxford: 2006) [M]

3. Fri., Mar. 4: The Death Penalty

*Gilman *et al.*, *American Constitutionalism*, pp. 140-42, 728-34, 870-72, 876-78, 1035-

E. Punishments

- Benjamin Rush, On Punishing Murder by Death (1792)
- Gregg v. Georgia (1976)
- The First Presidential Debate (1988)
- Roper v. Simmons (2005)

*Supreme Court Allows Use of Execution Drug, NYT (2015) [M]

*Audio: Gossip v. Gross (2015): <https://www.oyez.org/cases/2014/14-7955>

*Supreme Court Strikes Down Part of Florida Death Penalty, NYT (2016) [M]

*Audio: Hurst v. Florida (2015): <https://www.oyez.org/cases/2015/14-7505>

*The Death Penalty Endgame, NYT (2016) [M]

*Death Penalty Foes Split Over Taking Issue to Supreme Court NYT (2015) [M]

*Could One of these Cases Spell the End of the Death Penalty? The Marshal Project (2016) [M]

*Video: Death Penalty Politics (NYT):

<http://www.nytimes.com/video/us/politics/100000004034416/death-and-politics.html>

Prep: On January 15th of this year, the Supreme Court met to hear a petition from a death row inmate in Pennsylvania. The petitioner – a 36 year old black woman named Shonda Walter – is asking the Supreme Court justices to rule that the death penalty in all cases violates the 8th amendment. What do you think the Supreme Court will do? What factors do you think matter? Is the death penalty indeed unconstitutional? Is this an example of the importance of party politics in the US constitutional scheme? (I.e. do you think party politics is helping drive the Court’s thinking on the death penalty?)

Week Seven: Article I, Sec. 10 (The Contract Clause), Fifth Amendment (Takings/Due Process) & 14th Amendment (Property/Due Process) (I.E. Economic Liberty)

Art. I, Sec. 10: “No State shall...[pass a law] impairing the Obligation of Contracts...”

Amendment V: “No person shall... be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

Amendment XIV: “...nor shall any State deprive any person of life, liberty, or property, without the due process of law...”

1. Mon., Mar. 7: Contract Clause (Property)

*Gilman *et al.*, *American Constitutionalism*, pp. 109-10, 157-63, 220-22, 512-16, 756:

A. Property

- Fletcher v. Peck (1810)
- Charles River Bridge Case (1837)
- Home Building & Loan Association v. Blaisdell (1934)
- Contracts

*Keith E Whittington, “The New Originalism,” *Georgetown Journal of Law & Public Policy* (2004) [M]

Prep: Does the constitution protect private property rights? Does it protect a conception of economic liberty? How does Marshall’s argument in *Fletcher v. Peck* impact on this question? What about the River Bridge Case and *Blaisdell*? Can you fit *Fletcher*, *Charles River*, and *Blaisdell* together? Or has something fundamentally changed here, and if so what? Finally, say the constitution does protect private property rights, what should be the judicial standard that is applied? How much scrutiny should the Court give in the protection of property? Is the right to private property the same as the protection of free speech and religion, for example? Or are there differences?

Recommended:

*David N. Mayer, *Liberty of Contract: Rediscovering a Lost Constitutional Right* (Cato: 2011)

*Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: 2004)

2. Wed., Mar. 9: Due Process Arguments (5th & 14th Amendment) for the Protection of Property (The New Conservative Judicial Activism)

*Video: Rand Paul, I disagree with Ted Cruz and Mike Lee on *Lochner v. New York*, Cato Institute (2013) (3 mins): <http://www.youtube.com/watch?v=udsUmfdfWF5Y>

*Gilman *et al.*, *American Constitutionalism*, pp. 226, 384-85, 390-91, 397-400, 516-20:

Due Process

Lochner v. New York (1905)

West Coast Hotel Co. v. Parrish (1937)

*Footnote Four, *Carolene Products* (1938) [M]

*David Bernstein, *Rehabilitating Lochner* (Chicago: 2011), *selections* [M]

*George Will, “Judicial Activism Isn’t a Bad Thing,” *The Washington Post*, Jan. 22, 2014 [M]

Prep: What do you make of the argument of *Lochner*? Is there, as the majority opinion in *Lochner* argues, a right to freedom of contract via the due process clause of the 14th Amendment? What is Bernstein’s argument in favor of *Lochner*? What is the position of Holmes in his dissenting opinion, and what is the argument of *West Coast Hotel*? In what ways is it a critique of *Lochner*? More specifically, what is the core constitutional value at stake in *West Coast Hotel*? (After *West Coast Hotel*, this constitutional value will become increasingly significant). Finally, what is the constitutional settlement marked out by Footnote 4?

Recommended:

*Video: David Bernstein, “Rehabilitating *Lochner*,” George Mason University (2011) (1 hour): <http://vimeo.com/19804729>

*Video: *The New Deal Constitution at 75: Many Happy Returns?* A conference at the American Enterprise Institute in 2013 with leading luminaries in constitutional law, include Jack Balkin (Yale), Richard Epstein (Chicago), Randy Barnett (Georgetown), and Barry Cushman (Notre Dame), among others – explore as you see fit: <http://www.aei.org/events/2013/04/25/the-new-deal-constitution-at-75-many-happy-returns/>

3. Fri., Mar. 11: Takings

*Amar, *The Bill of Rights*, pp. 77-80

*Gilman *et al.*, *American Constitutionalism*, pp. 110, 222-23, 642-44, 755-57, 901-07:

Takings and Due Process

Penn Central Transportation Co. v. City of New York (1978)

Kelo v. City of New London (2005)

*Video: *The Legacy of Kelo*, Duke Law School (2013) (first 27 minutes on the history of *Kelo* documentary): <http://www.youtube.com/watch?v=KwCdfd5g0C8>

Prep: After West Coast Hotel, the takings clause is the principle means for the protection of property in American constitutional law. What was the basis for the Kelo decision? Does it fit with the tradition of American constitutionalism as explicated in the other cases we have read? How does it, for instance, differ from Penn Central Transportation Co v. City of New York?

Recommended:

*Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard: 1985), selections [M]

*James W. Ely, "Impact of Richard A. Epstein," *William & Mary Bill of Rights Journal* (2006) [M]

Week Eight: SECOND SHORT PAPER DUE (5-6 PAGES)

1. Fri., Mar. 18: Essay Due 5 pm in my Office

Week Nine: 6th, 7th, 8th (Juries and Lawyers) & 9th and 10th Amendments (Popular Sovereignty)

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in an Court of the United States, than according to the rules of the common law."

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

Amendment IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

1. Mon., Mar. 21: We, The Jury?

*Gilman *et al.*, *American Constitutionalism*, pp. 74-78, 202-04, 275-78:

D. Juries and Lawyers

The Trial of William Penn and Bushell's Case (1670)

United States v. Callender (C.C.D. Va 1800)

Commonwealth v. Athens (MA 1855)

*Amar, *The Bill of Rights*, pp. 81-118

Prep: What distinguishes these early cases touching on the jury from later understandings of the role of the jury? How is the role of the judge understood, for instance, in Bushell's Case? Why might American's have thought serving on a jury was the second most important right they enjoyed after being able to elect representatives? How does Amar understand the role of the jury in the American constitutional order? What various functions does he think it serves?

2. Wed., Mar. 23: Juries/Lawyers,

*Gilman *et al.*, *American Constitutionalism*, pp. 470-73:

D. Juries and Lawyers

Powell v. Alabama (1932)

*Video: The 50th Anniversary of Gideon v. Wainwright, American Bar Association (2013)

<http://www.youtube.com/watch?v=Rnp7JzSfc7U>

*Gilman *et al.*, *American Constitutionalism*, pp. 624-26, 726-28, 865-70, 1032-35:

D. Juries and Lawyers

Gideon v. Wainwright (1963)

Peters v. Kiff (1972)

Batson v. Kentucky (1986)

Burdine v. Johnson (5th Cir. 2001)

Prep: Is the right to counsel a fundamental American constitutional right? What is Black's reasoning in Gideon? Is that a reasonable way to interpret a constitution and the Bill of Rights? After Gideon, how are we to interpret the right to an attorney? Further, what does the right to a jury trial include? What would a fair jury trial include?

Recommended:

*Anthony Lewis, *Gideon's Trumpet* (Vintage: 1989)

*<http://gideonat50.org/> (an interesting site to explore)

3. Fri., Mar. 25: The 9th and 10th Amendments (The Popular-Sovereignty Amendments)

*Amar, *The Bill of Rights*, pp. 119-33

*Video: Watch Ravoque on "18th century American rights." Fora TV

http://fora.tv/2007/03/05/18th_Century_American_Rights

* Jack N. Rakove, *Declaring Rights* (Bedford Books: 1998) pp. 1-31 [M]

Prep: How, according to Amar, ought we to interpret the "popular sovereignty amendments?" How that is, does Amar, interpret the Bill of Rights? As a compilation of counter-majoritarian personal rights, or something else? How does Rakove is the history of rights in the United States? What was the idea behind 18th Century rights?

Week Ten: Do Courts Cause Social Change? (The Case of Brown)

Amendment XIV: "Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. Mon., Mar. 28: Equality/Race

*Klarman, *Brown v Board of Education and the Civil Rights Movement*, pp. 3-53

*Gilman *et al.*, *American Constitutionalism*, pp. 334, 447-50, 452-53, 586-90:

Federal Courts

Plessy v. Ferguson (1896)

The Birth of the Civil Rights Movement

The Road to Brown

Prep: (1) Explicate *Plessy v. Ferguson*; (2) explicate pages 3-26 of Klarman on Jim Crow; (3) explicate pages 27-53 on World War II.

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Gilman *et al.*, *American Constitutionalism*, pp. 324-34:

B. Race

Implementing the Thirteenth Amendment

Congressional Debates over the Second Freedmen's Bureau Act (1866)

Congressional Debates over the Civil Rights Act of 1875

*Gerald N. Rosenberg, *The Hollow Hope*, pp. xi-71

2. Wed., Mar. 30: Equality/Race

*Gilman *et al.*, *American Constitutionalism*, pp. 590-98:

Brown v. Board of Education (Brown I) (1954)

Brown v. Board of Education (Brown II) (1955)

*Klarman, *Brown v. Board of Education and the Civil Rights Movement*, pp. 55-148

Prep: What is the reasoning of *Brown*? What is the core constitutional value? (We'll come back to this with Ackerman) (1) Explicate pages 55-78 (*Brown v. Board of Ed*) of Klarman; (2) explicate pages 79-104 (*Brown II* and Subsequent Developments); (3) explicate pages 125-48 (*Brown's Indirect Effects*).

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Rosenberg, *The Hollow Hope*, pp. 72-169

3. Fri., Apr. 1: Social Change and *Brown*?

*Klarman, *Brown v. Board of Education and the Civil Rights Movement*, pp. 149-231

*Kermit Hall, "The Warren Court: Today, Yesterday, and Tomorrow" [M]

*Video: Dennis J. Hutchinson, William Rainey Harper Professor of Law, University of Chicago, 9th Judicial Circuit Conference discussion on *Brown v. Board of Education* (Start at 10 min; end 34 min) <http://www.youtube.com/watch?v=pFHEZD7o7h8>

Prep: (1) Explicate pages 149-73 (*Brown's Backlash*); (2) explicate pages 175-211 (*Why Massive Resistance? & Brown, Violence, and Civil Rights Legislation*); (3) explicate pages 213-31 (*Conclusion*).

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Morton Horwitz, "The Warren Court and the Pursuit of Justice" (1993) [M]

Week Twelve: Do Courts Cause Social Change? (The Case of Same Sex Marriage)

1. Mon., Apr. 11: Gay Rights

*Gilman *et al.*, *American Constitutionalism*, pp. 792-94, 932-48:

Bowers v. Hardwick

Lawrence v. Texas

Goodridge v. Department of Public Health

Defense of Marriage Act

States Debate Same Sex Marriage

*Klarman, *From Closet to Alter*, pp. ix-47

Prep: What is the reasoning in Bowers and Lawrence? What is the reasoning of the Supreme Judicial Court of Massachusetts in the Goodridge case? What political consequences do you see with regard to Bowers, Lawrence and Goodridge? (1) Explicate pp. 3-15 (Klarman on WW II to Stonewall); (2) explicate pp. 16-47 (Klarman on Stonewall to Bowers).

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Rosenberg, *The Hollow Hope*, pp. 339-400

2. Wed., Apr. 13: Gay Rights

*The Same-Sex Marriage Cases: Hollingsworth v. Perry (California Prop. 8) & United States v. Windsor (The Defense of Marriage Act) <http://www.oyez.org/ssm/>

*Hollingsworth v. Perry (2013) [M]

*United States v. Windsor (2013) [M]

*Victory for Equal Rights (NYT 2013) [M]

*Klarman, *From Closet to Alter*, pp. 48-88

Prep: Seminar participants not explicating Klarman will be assigned a portion of the material from oyez to present to class. (1) Explicate Klarman pp. 48-74 (Hawaii and the “Defense of Marriage”); explicate Klarman pp. 75-88.

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Rosenberg, *The Hollow Hope*, pp. 400-31

3. Fri., Apr. 15: Gay Rights

*Klarman, *From Closet to Alter*, pp. 89-164

Prep: (1) Explicate pp. 89-118 (Goodridge and Its Backlash); (2) explicate pp. 119- 42 (The Gay Marriage Spring); (3) explicate pp. 143-55 (Backlash: Main and Iowa)

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Week Thirteen: THIRD SHORT PAPER (5-6 PAGES)

1. Fri., Apr. 22: Essay Due 5 pm in my Office

Week Fourteen: Contemporary Issues: Civil Rights

1. Mon., Apr. 25: Gay Rights

*Klarman, *From Closet to Alter*, pp. 165-219

*Thomas M. Keck, "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights," *Law & Society Review* (2009) [M]

* Audio (listen as you see fit): *Obergefell v. Hodges* (2015):

<https://www.oyez.org/cases/2014/14-556>

**Obergefell v. Hodges* [M]

Prep: Ask yourself, given *Perry*, *Windsor*, and *Obergefell* where do you come down on Klarman's thesis? In short, does the constitutionalization of same-sex marriage conflict with Klarman's thesis? How might Klarman's thesis accommodate these decisions? More generally, where do you come down on the question of whether litigation is an effective political strategy to promote one's interests understood in the context of civil right and liberties? Would Keck agree with Klarman? Why or why not? (1) Explicate pp. 165-82 (Why Backlash Part I); (2) explicate pp. 183-92 (Why Backlash Part II); (3) explicate pp. 193-207 (Looking to the Future)

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Michael McCann, "Law and Social Movements: Contemporary Perspectives" *Annual Review: Law and Social Science* [M]

*Jeffrey Rosen, "The Dangerous Doctrine of Dignity in *Obergefell v. Hidges*," *The Atlantic* (2015) [M]

2. Wed., Apr. 29: Dualist Democracy; Ackerman's Theory of Constitutional Change

*Bruce Ackerman, "Neo-Federalism," pp. 153-93 [M]

3. Fri. May 1: We the People, The Civil Rights Revolution

*Ackerman, *The Civil Rights Revolution*: Intro and Ch. 1 [M]

**Shelby County v Holder* (2013) [M]

*Adam Liptak, "Supreme Court Invalidates Key Part of the Voting Rights Act" *NYT* (2013) [M]

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Week Fifteen: Contemporary Issues: Civil Rights

1. Mon., May 4: We the People, The Civil Rights Revolution

*Ackerman, *The Civil Rights Revolution*: Ch. 2, Ch. 4, and Ch. 7

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

Charles Taylor, “The Politics of Recognition” [M]

2. Wed., May 6: We the People, The Civil Rights Revolution

*Ackerman, *The Civil Rights Revolution*: Ch. 7 [M]

*Adam Liptak, “Examining a Voting Rights Case” NYT (2015) [M]

*Garrett Epps, “Evenwel v. Abbott and the Future of One Person, One Vote” The Atlantic (2015) [M]

*Adam Liptak, “Potential Power Shift as Court Weights ‘One Person One Vote’” NYT (2015) [M]

*Audio: Oral Argument Evenwel v. Abbott (2015): <https://www.oyez.org/cases/2015/14-940>

*Briefs etc: SCOTUSblog: <http://www.scotusblog.com/case-files/cases/evenwel-v-abbott/>

Note: For those of you presenting today, please make sure to type up an outline of your notes to distribute to the class regarding the material you are explicating. Also, make sure to conclude your outline by raising some questions regarding the reading for the day.

Recommended:

*Symposium on We the People Volume 3: <http://balkin.blogspot.fr/2014/05/we-people-volume-3-symposium.html>

*Thomas B. Edsall, “The Republican Party’s 50 State Solution” NYT (2015) [M]

3. Fri., May 8: Constitutional Revolutions & the Future of American Rights

*Jack Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” *Virginia Law Review* (2001), pp. 1045-51 (skim), 1066-83, 1086-1101

*Bruce Ackerman, “Betrayal” *The Civil Rights Revolution* [M]

FINAL PAPER DUE: MAY 12