

GOV 357G, Unique 38315  
The Structure of Individual Liberties  
Tom Samuels  
Fall 2023

**Class:** Tuesdays and Thursdays, 9:30-11:00, RLP 1.106

**Office hours:** Monday and Wednesday, 3:00-4:30 in MEZ 3.216. Also available by appointment.

**Email:** [TomSamuels@utexas.edu](mailto:TomSamuels@utexas.edu)

**Course Description:**

In this class we will focus on the development of individual rights in 20<sup>th</sup> and 21<sup>st</sup> century American jurisprudence. We will explore questions such as: how can unelected judges legitimately strike down laws enacted by elected officials? Is there a principled way to distinguish rights, such as the right to privacy and the right to bear arms, so that one may be protected more than another? What role, if any, should changing social norms, or a judge's personal policy preferences, play in judicial decisions? And are there only enumerated rights in the constitution, or does the constitution imply rights that are not spelled out?

I understand that some students who take this class are interested in attending law school. While we will learn the grammar of constitutional arguments, the basics of how to read a case, and many important constitutional doctrines, this is not a pre-law class. Instead, we will concentrate on the conflicting social, political, and philosophical theories that underlie Supreme Court jurisprudence on individual rights. We will investigate the role that the Court plays, and should play, in politics, and the role that politics plays, and should play, in the Court's decisions. Insofar as each theory relates to an understanding of the meaning of America, I hope that this class can be an extended discussion of the different ways to understand what America is.

**Prerequisite:**

Six semester hours of lower-division coursework in Government

**Texts:**

Donald P. Kommers, et al, *American Constitutional Law: Essays, Cases, and Comparative Notes, Vol. II: Liberty, Community, and the Bill of Rights*, 4<sup>th</sup> ed. (West Academic, 2019)

\*Since computers will not be allowed in class, you should obtain a physical copy of the book.\*

Supplementary documents and cases as noted in the course outline.

## **Classroom Computer Policy:**

To encourage participation and discourage distraction, you may not use computers during class. Devices that do not have internet browsers and email (such as Remarkable) may be used.

## **Requirements:**

Grading policy:

- Grades will be calculated in the following manner:
  - 20% two short essays (no more than 2 double-spaced pages) responding to what we discussed in class and emailed to me. Responses to a Tuesday class will be due by noon Friday, and responses to a Thursday class will be due by noon Sunday. If you need an extension, let me know as soon as possible via email. If no extension is granted, you will lose one grade level for every day it is late (so an A would be an A-). You may choose which classes you write the essays for. These essays should be about what you find interesting or puzzling, or what you agree or disagree with, and why. Do not simply regurgitate what occurred during class but instead show how you are engaging with the material. \*In the subject line of your email put your last name followed by either “Essay 1” or “Essay 2”.\*
  - 30% midterm exam. The exam will be in-class on October 5<sup>th</sup>.
  - 50% final exam.
- Exams will be a mix of multiple choice, short answer, and short essay questions. You will be tested more on concepts than on the particular facts of legal cases.
- Plus and minus grades will be used. If you are within .5 points of a higher grade, I will round up.
- Exceptional in-class participation may bump a grade. So, for example, a B+ would become an A-. Students are encouraged to ask questions and make comments, directed at either myself or other students. I may also call on students.
- Exam questions will largely be based on what we discuss in class, so attendance and active participation will be important for your success. Classes will not be recorded, nor may any student make a recording.
- Grade appeals must be made to me via email within ten days of you receiving a grade.

The university is committed to creating an accessible and inclusive learning environment consistent with university policy and federal and state law. Please let me know if you experience any barriers to learning so I can work with you to ensure you have equal opportunity to participate fully in this course. If you are a student with a disability, or think you may have a disability, and need accommodations please contact Disability and Access (D&A). Please refer to D&A’s website for contact and more information: <http://diversity.utexas.edu/disability/>. If you are already registered with D&A, please deliver your Accommodation Letter to me as early as

possible in the semester so we can discuss your approved accommodations and needs in this course.

Absences for observance of a religious holy day are excused and accommodations will be made if notice is given in advance.

Students who violate University rules on academic misconduct are subject to the student conduct process. A student found responsible for academic misconduct may be assigned both a status sanction and a grade impact for the course. The grade impact could range from a zero on the assignment in question up to a failing grade in the course. A status sanction can range from a written warning, probation, deferred suspension and/or dismissal from the University. To learn more about academic integrity standards, tips for avoiding a potential academic misconduct violation, and the overall conduct process, please visit the Student Conduct and Academic Integrity website at: <http://deanofstudents.utexas.edu/conduct>.

This course is designed specifically with the assumption that the work you submit is generated by you yourself working individually. Thus, the use of generative large language artificial intelligence tools, e.g., ChatGPT, constitutes academic dishonesty.

Under state law, the instructor for this course is required to report for further investigation any information concerning incidents of sexual harassment, sexual assault, dating violence, and stalking committed by or against a UT student or employee. Federal law and university policy also requires reporting incidents of sex- and gender-based discrimination and sexual misconduct (collectively known as Title IX incidents). This means we cannot keep confidential information about any such incidents that you share with us. If you need to talk with someone who can maintain confidentiality, please contact University Health Services (512-471-4955 or 512-475-6877) or the UT Counseling and Mental Health Center (512-471-3515 or 512-471-2255). We strongly urge you make use of these services for any needed support and that you report any Title IX incidents to <https://titleix.utexas.edu>.

### **Readings:**

This reading schedule is subject to change based on what we as a class find interesting and how fast we get through the material. I have added non-textbook, non-case readings for the first four weeks of class, and I plan to add at least one such reading for each of the remaining weeks. These readings are designed to offer you various perspectives across the political spectrum.

Unless otherwise specified, all readings are in *American Constitutional Law* by Kommers, et al. Other readings will be posted under the files tab in Canvas.

### **Week 1: August 22 & 24**

#### **Course Introduction**

- Ruth Bader Ginsburg, Speaking in a Judicial Voice (1992) (Canvas)

- Antonin Scalia, Common-Law Courts in a Civil-Law System (1995) (Canvas)
- “The Constitution and Its Interpretation” (pp. 33-60)
- Griswold v. Connecticut (1965) (Canvas. Read the uploaded document, not the edited case in your textbook.)

### **Week 2: August 29 & 31**

The Fourteenth Amendment & the Bill of Rights

- Declaration of Independence & U.S. Constitution (pp. 1361-1385)
  - Pay particular attention to the second paragraph of the Declaration (pp. 1361-1362); the Preamble of the Constitution (p. 1365); Article III (pp. 1373-1374); and Amendments I-XV & XIX (pp. 1377-1382)
- “The Bill of Rights, Incorporation, and Capital Punishment” (pp. 167-184)
- Barron v. Baltimore (1833) (pp. 199-202)
- The Slaughter-House Cases (1873) (pp. 202-217)
- Bobbitt, Constitutional Fate excerpt (Canvas)
- Bickel, The Least Dangerous Branch excerpt (Canvas)

### **Week 3: September 5 & 7**

The Doctrine of Incorporation and the Rise and Fall of “Lochnerism”

- Palko v. Connecticut (1937) (pp. 218-221)
- Adamson v. California (1947) (pp. 223-231)
- Rochin v. California (1952) (pp. 231-237)
- Duncan v. Louisiana (1968) (pp. 237-244)
- McDonald v. City of Chicago (2010) (pp. 246-266)
- Levinson, The Embarrassing Second Amendment (1989) (Canvas)
- “Liberty and Property” (pp. 329-349)
- Lochner v. New York (1905) (pp. 394-403)
- West Coast Hotel v. Parrish (1937) (pp. 403-411)

### **Week 4: September 12 & 14**

Fundamental Rights after 1937

- “Fundamental Rights: Privacy and Personhood” (pp. 451-494)
- United States v. Carolene Products (1938) (pp. 498-499)
- Ely, Democracy and Distrust excerpt (1980) (Canvas)
- Meyer v. Nebraska (1923) (pp. 499-503)
- Skinner v. Oklahoma (1942) (pp. 503-509)

- Griswold v. Connecticut (1965) (pp. 509-523) (skim since read in Week 1)
- Roe v. Wade (1973) (pp. 523-539)
- Planned Parenthood v. Casey (1992) (pp. 539-565)
- Dobbs v. Jackson (2022) (Canvas)

### **Week 5: September 19 & 21**

Sexuality, Marriage, and the Reach of Fourteenth Amendment Liberty

- Bowers v. Hardwick (1986) (pp. 611-625)
- Lawrence v. Texas (2003) (pp. 625-645)
- U.S. v. Windsor (2013) (pp. 645-654)
- Obergefell v. Hodges (2015) (pp. 654-672)
- DeShaney v. Winnebago County Department of Social Services (1989) (pp. 591-600)
- Michael H. v. Gerald D. (1989) (pp. 672-686)
- Washington v. Glucksberg (1997) (pp. 686-702)

### **Week 6: September 26 & 28**

Speech in Times of Crisis

- “The First Amendment: An Interpretive Problem” (pp. 703-734)
- Schenck v. United States (1919) (pp. 746-751)
- Dennis v. United States (1951) (pp. 751-764)
- Brandenburg v. Ohio (1969) (pp. 762-768)
- New York Times Co. v. United States (1971) (pp. 768-779)

### **Week 7: October 3 & 5 – Midterm on Oct. 5**

Protected and Unprotected Speech

- Chaplinsky v. New Hampshire (1942) (pp. 779-783)
- United States v. O’Brien (1968) (pp. 783-788)
- Cohen v. California (1971) (pp. 788-795)
- New York Times Co. v. Sullivan (1964) (pp. 795-802)
- The Sedition Act of 1798 (pp. 802-803)

\*\*\*Midterm in-class on October 5\*\*\*

### **Week 8: October 10 & 12**

## Content-Based Speech Restrictions

- Texas v. Johnson (1989) (pp. 803-822)
- R.A.V. v. City of St. Paul (1992) (pp. 822-832)
- Morse v. Frederick (2007) (pp. 832-846)
- Miller v. California (1973) (pp. 846-857)
- Brown v. EMA (2011) (pp. 857-864)
- U.S. v. Alvarez (2012) (pp. 872-878)
- McCullen v. Coakley (2014) (pp. 879-890)

## Week 9: October 17 & 19

### The Establishment Clause

- “The Freedom of Religion in Public and Private Life” (pp. 891-930)
- Everson v. Board of Education (1947) (pp. 934-942)
- Engel v. Vitale (1962) (pp. 942-948)
- Lemon v. Kurtzman (1971) (pp. 948-956)
- Zelman v. Simmons-Harris (2002) (pp. 989-1008)
- McCreary County v. ACLU, Kentucky (2005) (pp. 1008-1023)
- Town of Greece v. Galloway (2014) (pp. 1023-1039)

## Week 10: October 24 & 26

### Free Exercise and the Rule of Law

- Davis v. Beason (1890) (pp. 1039-1045)
- West Virginia v. Barnette (1943) (pp. 1045-1053)
- Sherbert v. Verner (1963) (pp. 1053-1059)
- Wisconsin v. Yoder (1972) (pp. 1059-1067)
- Employment Division v. Smith (1990) (pp. 1067-1078)

## Week 11: October 31 & November 2

### Free Exercise and the Rule of Law Continued

- Religious Freedom Restoration Act (1993) (Canvas)
- Boerne v. Flores (1997) (pp. 1078-1091)
- Christian Legal Society v. Martinez (2010) (pp. 1091-1100)
- Burwell v. Hobby Lobby (2014) (pp. 1100-1110)
- Zubik v. Burwell (2016) (pp. 1110-1114)
- Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012) (Canvas)

- Our Lady of Guadalupe School v. Morrissey-Berru (2020) (Canvas)

### **Week 12: November 7 & 9**

Race and Equal Protection

- “The Equal Protection Clause and Racial Discrimination,” (pp. 1115-1143)
- Plessy v. Ferguson (1896) (pp. 1158-1166)
- Brown v. Board of Education (1954) (pp. 1166-1173)
- The Civil Rights Cases (1883) (pp. 1173-1184)
- Shelley v. Kraemer (1948) (pp. 1184-1188)

### **Week 13: November 14 & 16**

Race and Equal Protection Continued

- Regents of the University of California v. Bakke (1978) (pp. 1190-1204)
- Grutter v. Bollinger (2003) (pp. 1216-1226)
- Parents Involved in Community Schools v. Seattle School District No. 1 (2007) (pp. 1226-1239)
- Schuette v. Coalition to Defend Affirmative Action (2014) (pp. 1239-1248)
- Fisher v. University of Texas II (2016) (pp. 1248-1254)
- Students for Fair Admissions v. Harvard (2023) (Canvas)

### **Week 14: Thanksgiving, No Class**

### **Week 15: November 28 & 30**

Sex, Gender, Sexuality, and Equal Protection

- “Gender Discrimination and Other Claims to Equality” (pp. 1255-1277)
- Frontiero v. Richardson (1973) (pp. 1306-1312)
- Craig v. Boren (1976) (pp. 1312-1319)
- United States v. Virginia (1996) (pp. 1319-1329)
- Romer v. Evans (1996) (pp. 1350-1360)
- Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018) (Canvas)
- Bostock v. Clayton County, GA (2020) (Canvas)
- 303 Creative LLC v. Elenis (2023) (Canvas)

### **Week 16: December 2**

Nothing scheduled yet to leave room for flexibility later.