

CIVIL LIBERTIES

Spring 2022

Political Science 2386-01

Professor Ken I. Kersch

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Civil Liberties

In this class, we will study the nature and scope of the protection afforded by American constitution(s) to individual rights and liberties in the United States. In its fundamentals, the topic is rather simple, and even repetitive. The United States is a democracy. This means that America's democratically-elected governments -- state and national -- are responsible for passing and enforcing laws aimed at advancing the common good. But, at the same time, as a *constitutional* democracy, American government officials are also prohibited from passing (or enforcing) laws that either exceed the powers granted (or reserved) to them under the relevant constitutions, or infringe upon constitutionally protected rights. Questions concerning civil liberties repeatedly pit the claim of the people's elected representatives (and other government officials) to legislate in the public interest against the claims of individuals that, in doing so in a particular instance, they are exceeding their constitutional powers, or violating constitutionally protected individual rights. These dual -- and perhaps even opposed -- commitments are often in tension.

Clashes over the limits on government(s) in the name of individual rights have characterized the U.S.'s political culture from its inception, and often been implicated in the some of the most politically-salient issues of their times. The nature, scope, and institutional protections afforded to civil liberties have been fought-over, debated, settled, and unsettled over the course of American political history and development. In this class, we will explore the principles, problems, history, and future of individual rights protection in the United States, with a selective emphasis on a few key substantive rights. While we will at times touch upon issues of equality -- civil rights, as opposed to civil liberties -- given time constraints, those must be left to another course. We will take a broad view of the subject, emphasizing not only legal, but also cultural and political contestation over rights. As such, while we will read many Supreme Court cases, unlike a traditional (doctrinal) law school course, we will also study a wide variety of other relevant events, struggles, arguments, and texts.

Although we will follow it in order, the syllabus does not list weekly assignments: I will tell you how far to read each week in class.

Office Hours: Office hours -- both in person, in my office in McGuinn 515, and via Zoom -- will be by appointment. You should email me -- best -- or otherwise speak to me to set up a time to talk.

Class Meetings/Attendance: This class will meet Tuesdays and Thursdays, 3- 4:15 PM. Except in cases of illness or other important life issue, students are expected to attend all

classes (for Covid or disability issues affecting attendance, please make arrangements through the disability office (information below) or the Dean's office). The class will be part lecture and part discussion. Students are expected to attend all classes, to do all assigned readings prior to class, and to be ready to discuss the readings and the questions they raise during our class meetings. I reserve the right to call on any student in class at any time.

Restrictions on Computers in Class: To minimize distractions, students are prohibited from using any type of computer or phone into class that is active/turned on (this means laptops, notebooks, smartphones, etc.) *for any purpose other than bringing up assigned readings on the screen.* Student may not browse the internet, engage in social media, chat, or use their computer for any other purpose than accessing course texts. These restrictions, and this rule, are mandatory. Exceptions will be made in individual cases for legitimate, dean-approved reasons, including disability (information below) and covid-related issues cleared through the Dean's or the disability office.

Canvas: We will make use of the course Canvas page. Most significantly, most of the readings in this class are posted on the course Canvas page: you will find any reading in the class listed that is not in a required-for-purchase book posted in the Modules section of the course Canvas page.

While we will use Canvas for various exercises and for the submission of papers, you should disregard any number grades that Canvas assigns to the letter grades I give in this class. Grades are given, and kept separately, off Canvas on a private Excel sheet.

Teaching Assistant: X will be the Teaching Assistant for the course.

Academic Integrity: Academic integrity is violated by any dishonest act committed in an academic context, including but not limited to cheating, plagiarism (attempting to pass the work of others off as your own, in any way in any part of an assignment), and submitting for credit in this class work done for another class.

The University's policy on Academic Integrity may be found at www.bc.edu/integrity. Ask me if you have any questions about academic integrity; the Political Science Department also offers a quiz and discussion at <http://www.bc.edu/content/bc/schools/cas/polisci/integrity/quiz.html>.

All suspected violations will be reported to the Dean in accordance with University policy. A final grade of "F" for the course will be given in the event of a violation of academic integrity."

Disability Accommodations: If you are a student with a documented disability seeking reasonable accommodations in this course, please contact Kathy Duggan, [\(617\) 552-8093](tel:6175528093), dugganka@bc.edu, at the Connors Family Learning Center regarding learning disabilities and ADHD. For other students with medical, physical, psychological, and temporary disabilities should register with the Disability Services Office. Go to the

following link for more details to register: <https://www.bc.edu/content/bc-web/offices/student-affairs/sites/student-outreach-and-support-services/disability-services.html>

ESL Assistance: Boston College welcomes students from around the world and recognizes the unique perspectives international students bring enrich the campus community. To empower students whose first language is not English, Boston Colleges makes ESL specific resources available on campus, including ESL writing support and conversation appointments through the [Connors Family Learning Center](#). To schedule an appointment call 617-552-0611. A [curated list of web resources](#) is also available through the CFLC website.

Course Requirements: Two Quizzes (30%); Two (2) Papers (50%); Class Attendance/Participation/Ungraded Exercises (20%).

All grades will be calculated by me, on a private Excel sheet -- and not using (idiosyncratic) numbers auto-generated by Canvas, or any other calculating system.

Texts:

Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism, Volume II: Rights and Liberties* (Oxford, 2021)(Third edition)[You are **required** to purchase/borrow, read, and bring this text to each class meeting].

Additional Materials posted on the course Canvas Site [CV].

Readings:

The assignment of weeks to the readings is approximate. Please keep up with where we are in reality in the actual class.

Students are required to do the readings ***from the assigned text*** -- NOT from what you think are the same thing from Wikipedia and other web sources. While many of those web sources are accurate on the basic (case) facts, and useful for many purposes, they will not place that information in the proper context (both of the course, and historically and politically) in a way that is reliable for this class. The assigned texts are recent work by top scholars reflecting the best, current scholarly understandings of U.S. constitutional development. My purpose in teaching ***this course, with these texts*** – as opposed of giving you a list of cases, terms, and events to Google – is to initiate you into these more sophisticated understandings of the subject as taught by the assigned texts.

BASIC CONCEPTS

WEEK ONE:

What are Civil Liberties? Why do they Matter? How are they Protected?

Contemporary Focus:

Policing Extremism in the U.S. Military:

Lolita Baldor, “Pentagon Issues New Rules,” *Associated Press* (December 20, 2021)[CV]

DOD Instruction Number 1325.06 (“Handling Protest, Extremist, and Criminal Gang Activities Among Members of the Armed Forces” December 20, 2021)) [CV].

WEEKS TWO/THREE:

HOW HAVE INDIVIDUAL RIGHTS BEEN PROTECTED IN THE UNITED STATES? POLITICAL AND CONSTITUTIONAL DEVELOPMENT

Beginnings:

**The English Inheritance, and the Colonial Experience:
Political Clashes and Settlements; Liberal and Republican Political
Thought Rights Enumerations/Constitutional Entrenchment;
Common Law; Natural Law/Rights**

GGW 29-38, 61-69

English Bill of Rights (1689); Massachusetts Body of Liberties (1641)

Entick v. Carrington (1765); *Wilkes v. Wood* [CV]; Otis, Argument in Writs of Assistance Case [CV]; *The Trial of William Penn and Bushell’s Case* (1670)

**Constitutional Structures: Americans Design a System of Rights
Protection**

GGW 71-79, 93-94

Declaration of Independence (1776); Federalist # 1 [Hamilton]; Federalist # 10 [Madison]; Federalist #51 [Madison][CV]

Rights Enumerations

GGW 79-93

Virginia Declaration of Rights (1776); A Declaration of the Rights of the Inhabitants of Pennsylvania (1776); Drafting Debate Over the National Bill of Rights (1787); Ratification Debates Over the National Bill of Rights (1787); Congressional Debates over the Bill of Rights (1789); Americans React to the Bill of Rights [CV]

Federalist #84 [Hamilton]

Correspondence Between Thomas Jefferson and James Madison on a Bill of Rights.

Judicial Review as a Method of Rights Protection: Natural Law/Rights; Structural Design; Constitutional Text

GGW 123-125; 128-131

Colonial Era Discussions of Judicial Review [CV]

Calder v. Bull (1798); *Marbury v. Madison* (1803)

Federalist #78 [Hamilton][CV]

WEEK FOUR:

Constitutional Development Involving Individual Liberty: The Modern Era and Before – Constitutional Rights Protection Regimes?

The Rights Protections Before the Civil War (1789-1860)

GGW 119-124, 169-176

Barron v. Baltimore (1833)

[Substance – mostly under state constitutions and state constitutional law, and national (unadjudicated) politics -- covered in substantive sections of the syllabus below on Property, Contract, Speech, Religion, etc.]

The Civil War and the Civil War/Reconstruction Amendments (13th/14th/15th)(1865-1870): A New Regime of Powerful Courts (and others) Protecting Rights?

GGW 223-241

Thirteenth/Fourteenth/Fifteenth Amendments; Debates Over the Thirteenth Amendment (1864-1865); Debates Over the Fourteenth Amendment (1866); *Slaughterhouse Cases* (1873)

Twentieth Century Progressivism and Liberalism: The Living Constitution and Civil Libertarianism

Woodrow Wilson, “What is Progress?” [CV]; Woodrow Wilson, “The Meaning of Democracy” [CV]

Justice David Brewer, “Judicial Power: The Nation’s Safeguard” [CV]; Justice Stephen Field, “The Centenary of the Supreme Court of the United States” [CV]

Samuel Walker, *In Defense of American Liberties: A History of the ACLU* [CV]

The Liberal New Deal/Civil Libertarian Order: Nationalizing Constitutional Rights – Incorporation of the Bill of Rights, Bifurcated Review/Tiers of Scrutiny/Preferred Freedoms

GGW 279-285, 371-386, 309-315, 382-386, 489-494, 773-777

Amendments 1-10, U.S. Constitution; *Barron v. Baltimore* (1833); Fourteenth Amendment (1868)

[*Slaughterhouse Cases* (1873)]; *Lochner v. New York* (1905)

Franklin Delano Roosevelt, Four Freedoms Speech [CV]
U.S. v. Carolene Products (1938)

Hurtado v. California (1884)[CV]; *Powell v. Alabama* (1932)[“The Scottsboro Case”]; *Palko v. Connecticut* (1937)[CV]; *Adamson v. California* (1947)[CV]; *Rochin v. California* (1952) [CV]; *McDonald v. City of Chicago* (2010).

SPECIFIC INDIVIDUAL LIBERTIES

WEEKS FIVE/SIX:

PROPERTY RIGHTS AND CONTRACT RIGHTS

Contemporary Controversy:

GGW 801-805

Masterpiece Cake Shop v. Colorado Civil Rights Commission (2017)

Are economic liberties “civil liberties”?

John Locke, *Second Treatise of Civil Government* (Property)[CV]

Christopher Tiedemann and Benjamin Cardozo on Property Rights and the Public Good [CV]

State Impairment of the Obligation of Contract (Article I, Section 10)

Contemporary Controversies:

CDC Eviction Moratorium (August 3, 2021)[CV]
 Nova, “Renters are Still Protected from Eviction in These States and Cities,” CNBC (November 12, 2021)[CV]

GGW 132-136, 176-178, 242, 394-398, 501, 587, 702

Dartmouth College v. Woodward (1819) [CV]; *Charles River Bridge v. Warren Bridge* (1837); *Home Building and Loan Association v. Blaisdell* (1934)

Liberty of Contract (Substantive Due Process Liberty) and Government Regulation (5th/14th Amendment Due Process Clauses and State Constitutions)

GGW 180-184, 252-255, 307-318

Wynehamer v. People (1856); Thomas Cooley, *A Treatise of the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868); *Lochner v. New York* (1905); *Muller v. Oregon* (1908)

GGW 396-400

West Coast Hotel v. Parrish (1937); *Williamson v. Lee Optical* (1955)

“Takings” of Private Property (Fifth Amendment and State Constitutions)

GGW 178-184, 242-246, 302-307

Beekman v. Saratoga and Schenectady Railroad Co (1831); *Taylor v. Porter & Ford* (1843); Debate Over the Second Confiscation Act (1861-1862); Abraham Lincoln, To the Senate and House of Representatives; *Mugler v. Kansas* (1887); *Pennsylvania Coal v. Mahon* (1927)

GGW 579-583, 680-685, 782-788

Lucas v. South Carolina Coastal Council (1992); *Kelo v. New London* (2005); *Horne v. Department of Agriculture* (2015)

WEEK SEVEN:

ARMS (SECOND AMENDMENT AND STATE CONSTITUTIONS)

<https://constitutioncenter.org/interactive-constitution/podcast/armed-in-america>

<https://constitutioncenter.org/interactive-constitution/podcast/is-the-second-amendment-a-second-class-right>

<https://constitutioncenter.org/interactive-constitution/podcast/a-reasoned-debate-about-the-second-amendment>

GGW 49, 103, 140-141, 184-188, 321, 505-506, 596-598, 773-777, 805-806

Bliss v. Commonwealth (Ky. 1822); *State v. Buzzard* (Ark. 1842)

National Party Platforms on Gun Rights and Gun Control [CV]

Debate Over the Federal Assault Weapons Ban (1994); John Ashcroft, Letter to the NRA (2001); *District of Columbia v. Heller* (2008); *McDonald v. City of Chicago* (2010)

David Cole, “What Liberals Can Learn from the N.R.A.” [CV]

WEEKS EIGHT/NINE:

SPEECH (FIRST AMENDMENT AND STATE CONSTITUTIONS)

Current Controversies:

(1) Free Speech on Campus

<https://constitutioncenter.org/interactive-constitution/podcast/campus-free-speech-and-academic-freedom>

<https://constitutioncenter.org/interactive-constitution/podcast/should-the-government-regulate-speech-on-campus>

(2) Should Government Regulate Social Media?

Emily Bazelon, “The First Amendment in the Age of Disinformation” [CV]

Jameel Jaffer and Scott Wilkens, “Social Media Companies Want to Co-Opt the First Amendment. The Courts Shouldn’t Let Them,” *New York Times* (December 9, 2021)[CV]

Anya Shiffrin, “European Regulation of Online Disinformation May Be A Game Changer in 2022,” *Columbia Journalism Review* (December 8, 2021)[CV]

Jack Balkin, “How Should the Law Approach Social Media Abuses?” University of Virginia Law School (January 2019):

<https://www.youtube.com/watch?v=PdX816XNP0c>

History:**Radical/De-Stabilizing Political Speech****Contemporary Controversy:**

Austin Ramzy and Tiffany May, “14 Cuts in 25 Minutes: How Hong Kong Censors Movies,” *New York Times* (October 6, 2021)[CV]

Austin Ramzy, “Student Sentenced As Hong Kong Uses Security Law to Clamp Down on Speech,” *New York Times* (November 23, 2021)[CV]

Ivan Nechepurenko and Andrew Kramer, “Russian Court Orders Prominent Human Rights Group to Shut,” *New York Times* (December 28, 2021)[CV]

Hartosh Singh Bal, “Modi’s Campaign of Fear and Prejudice,” *New York Times* (April 17, 2019)[CV]

Pre-Civil War

GGW 50-55, 104-105, 142-146

The Zenger Trial (1733-34).

The Sedition Act (1798) -- An Act for the Punishment of Certain Crimes Against the United States; The Sedition Act Debate in Congress; The Report of a Select Committee on the Petitions Praying for a Repeal of the Alien and Sedition Laws; Resolutions of Virginia of December 21, 1798; Resolutions of the Kentucky Legislature [CV].

People v. Ruggles (NY 1811)[CV]

GGW 190-194

States Debate Prohibiting Abolitionist Speech; Resolutions of South Carolina; New York in Reply to the South; Wolf, Annual Message to the Assembly (1835)[CV]; Congress Debates Incendiary Publications in the Mail (1836); Report on Post Offices and Post Roads

GGW 247-251

The Trial of Clement Vallandigham (1863)

Modern (World War I – Present)

Theodore Schroeder, “The Meaning of Unabridged Freedom of Speech” [CV]
 Zechariah Chafee, Jr., “The Freedom of Speech” [CV]

GGW 326-336

Schenck v. U.S. (1919); *Abrams v. U.S.* (1919) [CV]; *Gitlow v. New York* [CV];
Whitney v. California (1927)

GGW 417-425, 428-430,

Minorsville v. Gobitis (1940)[CV]; *West Virginia Board of Education v. Barnette*
 (1943); *Dennis v. United States* (1951); *United States v. O’Brien* (1967);
Brandenburg v. Ohio (1969)

Modern Free Press (First Amendment)

Contemporary Controversies:

Oscar Schwartz, “That Comment Someone Left on Facebook? It Can Get You Sued,” *New York Times* (September 24, 2021)

GGW 425-428

New York Times v. Sullivan (1964)

<https://constitutioncenter.org/interactive-constitution/podcast/should-the-supreme-court-reconsider-nyt-v-sullivan>

WEEK TEN

Regulation of “Hate Speech”: The Relationship Between Freedom and Equality

GGW 613-617

Chaplinsky v. New Hampshire (1942)[CV]
Beauharnais v. Illinois (1952) [CV]

Texas v. Johnson (1989)
R.A.V. v. St. Paul (1992) [CV]; *Virginia v. Black* (2003)[CV]; *Snyder v. Phelps*
 (2011)[CV]

Money as Speech and the Future of Democracy

GGW 820-833

Citizens United v. FEC (2010)[equality of voice v. political speech?]

Janus v. AFSCME (2018)

Internet and Social Media -- The New Speech Context

<https://www.youtube.com/watch?v=PdX816XNP0c>

WEEK ELEVEN:

RELIGION (FIRST AMENDMENT AND STATE CONSTITUTIONS)

The Non-Establishment of Religion (“Establishment Clause”)

Contemporary Controversies:

<https://constitutioncenter.org/interactive-constitution/podcast/church-state-separation-and-the-constitution>

<https://constitutioncenter.org/interactive-constitution/podcast/the-future-of-church-and-state-at-scotus>

<https://constitutioncenter.org/interactive-constitution/podcast/the-bladensburg-peace-cross-case>

Origins

GGW 39-46

William Blackstone, “Of Offenses Against God and Religion” (1773); John Locke, *A Letter Concerning Toleration* (1689); Roger Williams, *The Bloody Tenent* (1644).

GGW 97-103, 136-139

South Carolina Constitution of 1778; Virginia Debates Over Religious Assessments, including James Madison’s “Memorial and Remonstrance on Religious Assessments”; The First American Presidents on Thanksgiving Proclamations [CV]; Thomas Jefferson, Letter to the Danbury Baptists (1802); Massachusetts Debates Test Oaths (1820-1821)

Debate Over Congressional Chaplains [CV]; Debate Over Sunday Mails [CV]

GGW 246

Proposed Constitutional Amendments on Religious Establishment (Blaine Amendments)[CV]

Modern Church-State Separation

John F. Kennedy, Speech to the Greater Houston Ministerial Association [CV]

GGW 400-404, 583-589, 685-692, 796-801

Everson v. Ewing (1947) [CV]; *Engel v. Vitale* (1962); *Lemon v. Kurtzman* (1971)[CV]; Ronald Reagan, Speech to National Religious Broadcasters (1984); *Lee v. Weisman* (1992); *Zelman v. Simmons-Harris* (2002)

Trinity Lutheran Church v. Comer (2017)

American Legion v. American Humanist Association (2019)[CV]

WEEK TWELVE:

Free Exercise of Religion (“Free Exercise Clause”)

<https://constitutioncenter.org/interactive-constitution/podcast/religious-exemptions-from-the-founding-to-today>

<https://constitutioncenter.org/interactive-constitution/podcast/religious-liberty-in-france-and-america-a-constitutional-dialogue>

GGW 46-49, 318-321

Maryland Toleration Act; Debates over religious exemptions (1789)

Reynolds v. U.S. (1878)

GGW 502-505, 589-594

Cantwell v. Connecticut (1940) [CV]; *Wisconsin v. Yoder* (1972); *Sherbert v. Verner* (1963)

Employment Division v. Smith (1990)

Church of the Lukumi Babalu Aye v. Hialeah (1993)[CV]

GGW 717-720, 801-805

Christian Legal Society v. Martinez (2010)[CV]

Burwell v. Hobby Lobby Stores (2014)[CV]

Masterpiece Cake Shop v. Colorado Civil Rights Commission (2018)

WEEK THIRTEEN:

BODILY AUTONOMY

Contemporary Controversy:

- (1) Covid -- Vaccine and Mask Mandates

Mark Landler, “Vaccine Mandates Rekindle Fierce Debate Over Civil Liberties” *New York Times* (December 10, 2021)[CV]

<https://constitutioncenter.org/interactive-constitution/podcast/civil-liberties-and-covid-19>

<https://constitutioncenter.org/interactive-constitution/podcast/are-vaccine-mandates-constitutional>

(2) The End of The Right to Abortion?

<https://constitutioncenter.org/interactive-constitution/podcast/will-roe-v-wade-be-overturned>

<https://constitutioncenter.org/interactive-constitution/podcast/should-roe-v-wade-be-overturned>

Early:

GGW 49, 103, 268-271, 321-325, 327-328

Jacobson v. Massachusetts (1905); *Buck v. Bell* (1927).

Bradwell v. Illinois (1873)

Modern:

Sexual and Reproductive Autonomy; Gender Non-Conformity:

GGW 412-416, 598-609, 806-812

“My Abortion” *New York Magazine* [CV]

Griswold v. Connecticut (1965); *Roe v. Wade* (1973)[CV]; Reagan Administration on *Roe v. Wade* (1986); *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

Whole Woman’s Health v. Hellerstedt (2016)

GGW 609-612, 698-703, 813-820

Bowers v. Hardwick (1986); *Lawrence v. Texas* (2003); *Obergefell v. Hodges* (2015).

Bostock v. Clayton County (2020)[CV](read Justice Gorsuch’s opinion for the Court only).

WEEK FOURTEEN

PRIVACY (FOURTH/FIFTH/14TH AMENDMENTS)

Contemporary Controversy:

Digital Privacy:

<https://constitutioncenter.org/interactive-constitution/podcast/the-future-of-digital-privacy>

Digital Surveillance in China:

Muyi Xiao and Paul Mozur, “A Digital Manhunt: How Chinese Police Track Critics on Twitter and Facebook,” *New York Times* (December 31, 2021)[CV]

Child Online Privacy and Protection Rule (COPPA)[Federal Trade Commission Regulation]

<https://www.npr.org/podcasts/510053/on-point> [December 20, 2021 show with Marc Gorman]

GGW 358-359 364-367, 473-480, 853-860

Olmstead v. U.S. (1928)

<https://constitutioncenter.org/interactive-constitution/podcast/the-fourth-amendment-past-and-present>

<https://constitutioncenter.org/interactive-constitution/podcast/when-can-police-enter-suspects-homes>

Mapp v. Ohio; *Katz v. U.S.* (1967); *Skinner v. Railway Labor Assn*; *Pottawatomie v. Earls* (2002)[CV]; *U.S. v. Jones* [CV]

Crime Control -- Police Surveillance

Terry v. Ohio (1968) [CV]

Omnibus Crime and Safe Streets Act of 1968 [CV]

Baltimore City Police Department Investigation and Consent Decree (2016-2017)

WEEK FIFTEEN

FREEDOM OF ASSOCIATION

Contemporary Controversy:

White Supremacist Rallies: The Case of Charlottesville

<https://constitutioncenter.org/interactive-constitution/podcast/charlottesville-and-free-assembly>

GGW 296-300, 344-349, 351-353, 386-391

Thirteenth, Fourteenth Amendment, and Fifteenth (“Civil War”) Amendments; *Civil Rights Cases* (1883); *Plessy v. Ferguson* (1896); *Buchanan v. Warley*

(1917); *Smith v. Allwright* (1944) [CV]; *Shelley v. Kraemer* (1948); *Jones v. Alfred Mayer* (1968); *Roberts v. Jaycees* (1984)[CV]; *Boy Scouts of America v. Dale* (2000)[CV].

CODA: WHERE ARE CIVIL LIBERTIES GOING FUTURE?
The Confusing Conjunction of Hyper-Liberalism and Illiberalism: Whose Rights?
Whose Freedom? Where is the Trump Supreme Court?

GGW 763-772

Emily Bazelon, “How Will Trump’s Supreme Court Remake America” (*New York Times*, February 27, 2020)[CV]