

SEEKING JUSTICE IN THE CONSTITUTION

UGS 303

Meets Tu/Th 5-6:30 ▪ CLA 0.128

Flag ▪ Ethics & Leadership

Flag ▪ Writing

Professor Benjamin Gregg

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Office ▪ Mezes Hall 3.138

Office Hours ▪ Tu/Th 6:30-8

Discussion sections led by teaching assistants ▪ Fridays ▪ attendance mandatory

Thomas Rives Bell ▪ thomas.bell@utexas.edu ▪ *office hours* Tu/Th 3:30-5 in Batts 1.118

12-1 pm (unique 63610) ▪ Parlin 214 ▪ ▪ 1-2 pm (unique 63615) ▪ Mezes 1.202

Robert B. Shaffer ▪ rbshaffer@utexas.edu ▪ *office hours* Th 12:30-3:30 in Batts 1.118

2-3 pm (unique 63620) ▪ Mezes 1.204 ▪ ▪ 3-4 pm (unique 63625) ▪ Mezes 1.204

We examine constitutional law, American political culture, and the sociology of rules by focusing on a problem central to our legal regime: the “indeterminacy” of some legal rules, constitutional rules in particular. The term *legal indeterminacy* refers to the lack of determinate knowledge: knowledge of what a legal rule means and of how judges and others should apply it. Where law is indeterminate, no theory, rule, or principle constrains a judge to interpret or apply a law in a particular way. Consequently a case could have several different answers, yet all of them equally valid. While few scholars or judges today view law itself as something static, the notion that judges make rather than find law implies, to many observers, consequences such as unequal or arbitrary treatment of individuals. Where law is determinate, however, it may have an exclusively “correct” meaning and “proper” application, in short, one “right” answer. If justice through law is predicated on such qualities as consistency and even objectivity, then determinacy, in one form or another, might seem to be a prerequisite for justice. And yet, as this course will demonstrate, much law at the constitutional level is indeterminate. This course explores how the Supreme Court has coped with this phenomenon — presenting both problems for justice and opportunities for justice — over two centuries in five major areas: property, privacy, equal protection, expression, and religion.

Interdisciplinary Content: Our course draws on political science, sociology, philosophy, history, jurisprudence, and on the history of Supreme Court decisions.

Contemporary Content: This course examines the development of contemporary legal regulation of property, privacy, equal protection, expression, and religion in the United States by analysis of decisions across the twentieth century and into the early twenty-first. This analysis will enable students to make thoughtful, informed opinions about the possible future course of constitutional interpretation at least in the near term.

Evaluation: The final grade has two components: each student writes five in-class essays; and each student briefs in-class multiple times. Each essay counts for 20% of the final grade, adjusted (potentially significantly) for the quality of the student's briefs and participation in both lecture and in discussion section.

In-Class Briefs: **The course grade of a student who fails to brief a case to which he or she has been assigned will be reduced by one full letter grade for each such failure**, unless that failure is due to a health condition or other serious matter documented within 48 hours of the missed brief by a *written* explanation from a physician or other relevant person.

Writing and Information Literacy: Toward helping students improve writing and information literacy in the context of in-class essays, teaching assistants will discuss before and after each assignment aspects of careful, critical, thoughtful analysis of written sources (in our casebook) that take competing positions on core issues of the seminar. Students will learn how to defend a clear thesis with good arguments via discursive reasoning and by drawing on written sources. Further, consultants at the **University Writing Center**, located in the PCL Learning Commons, offer free, individualized, consultation and additional feedback on graded in-class essays. Consultants available by appointment (UWC Front Desk: 512-471-6222) and on a walk-in basis.

Attendance: Students may be absent from discussion section without excuse no more than three times. Attendance is required on all other days. At the TA's discretion, an excuse for an absence will be honored solely if warranted, and if documented by a written petition, accompanied by a letter from a physician or other appropriate person.

Take Notes by Hand; No Computer Use in Classroom: Brief each case for yourself before class; each session, always take notes on the in-class briefings; and bring your notebook and the textbook to consult while writing each of the in-class essays.

Mandatory Events Beyond the Classroom: (1) visits to gems of the university and (2) university lecture series (see below for information)

Evaluation: A = 4.00, A- = 3.67, B+ = 3.33, B = 3.00, B- = 2.67, C+ = 2.33, C = 2.00, C- = 1.67, D+ = 1.33, D = 1.00, D- = 0.67, F = 0.00

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SCHEDULE OF TOPICS AND ASSIGNED READINGS

Thursday, August 25 • Introduction by Teaching Assistants; assignment of students to brief *Lochner* for next Tuesday; in Appendix A read *Constitution of the United States of America*

1. PROPERTY

Tuesday, August 30 • pages 487-493 (Economic Liberties and Regulation)

- *Lochner v. New York (1905)*, pp. 487-498

Thursday, September 1 • pages 498-504 (Economic Liberties and Regulation, cont.)

- *Nebbia v. New York (1934)*, *West Coast Hotel Co. v. Parrish (1937)*, *United States v. Carolene Products Co. (1938)*, *Williamson v. Lee Optical Co. (1955)*

Tuesday, September 6 • pages 142-149 (Commerce Power)

- *United States v. Lopez (1995)*

Thursday, September 8 • pages 155-160 (Commerce Power, cont.)

- *Gonzales v. Raich (2005)*

Tuesday, September 13 • **First in-class essay: remember your bluebook**

2. PRIVACY

Thursday, September 15 • pages 598-516 (Antecedents; Contraception)

- *Meyer v. Nebraska* (1923), *Pierce v. Society of Sisters* (1925), *Skinner v. Oklahoma* (1942); ***Griswold v. Connecticut* (1965)** [begin]

Friday, September 16 • Bell's sections meet together from 1-2, and Shaffer's sections meet together from 2-3, in PCL, *Learning Lab 4*, for presentation on how to use UT libraries to access scholarly sources (e.g., choosing a database); bring laptop or receive computer access in library

Tuesday, September 20 • pages 510-524 (Contraception; Abortion)

- ***Griswold v. Connecticut* (1965)** [finish]; ***Roe v. Wade* (1973)**

Thursday, September 22 • pages 544-551 (Family Relations)

- *Loving v. Virginia* (1967), *Zablocki v. Redhail* (1978), *Turner v. Safley* (1987), *Moore v. East Cleveland* (1977), *Troxel v. Granville* (2000), *Michael H. v. Gerald D.* (1989)

Tuesday, September 27 • pages 561-568 (Consensual Sex)

- ***Lawrence v. Texas* (2003)**

Thursday, September 29 • pages 590-601 (Right to Die; Right to Physician-Assisted Suicide)

- *Cruzan v. Director, Missouri Dept. of Health* (1990); ***Washington v. Glucksberg* (1997)**, *Vacco v. Quill* (1997)

Tuesday, October 4 • **Second in-class essay: remember your bluebook**

3. **EQUAL PROTECTION**

Thursday, October 6 • **pages 658-665** (Suspect Classifications: Race)

- *Strauder v. West Virginia* (1880), *Plessy v. Ferguson* (1896), ***Brown v. Board of Education* (1954)**

Friday, October 7 • **Thomas Bell sections**, 2-3 and 3-4 pm, Feldman Seminar, Room, Harry Ransom Center

Tuesday, October 11 • pages 674-682 (Suspect Classifications: Race, cont.)

- ***Loving v. Virginia* (1967)**, *Palmore v. Sidoti* (1984), *Johnson v. California* (2005), *Korematsu v. United States* (1944)

Thursday, October 13 • pages 760-766 and 778-783 (Suspect Classifications: Sex)

- *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), ***Craig v. Boren* (1976)**; *Geduldig v. Aiello* (1974), *Michael M. v. Superior Court* (1981), *Rostker v. Goldberg* (1981)

Friday, October 14 • **Robert Shaffer sections**, 2-3 and 3-4 pm, Feldman Seminar, Room, Harry Ransom Center

Tuesday, October 18 • pages 766-777 (Suspect Classifications: Sex, cont.)

- *Mississippi University for Women v. Hogan* (1982), *J.E.B. v. Alabama* (1994), ***United States v. Virginia* (1996)**

Thursday, October 20 • pages 693-700 and 712-724 (Affirmative Action in Higher Education)

- ***Regents of University of California v. Bakke* (1978)**, ***Grutter v. Bollinger* (2003)**, ***Gratz v. Bollinger* (2003)**

Tuesday, October 25 • **Third in-class essay: remember your bluebook**

4. **EXPRESSION**

Thursday, October 27 • pages 957-970 (Incitement)

- ***Masses Publishing Co. v. Patten (1917), Gitlow v. New York (1925), Whitney v. California (1927)***

Tuesday, November 1 • pages 971-981 (Incitement, cont.)

- ***Dennis v. United States (1951), Brandenburg v. Ohio (1969)***

Thursday, November 3 • pages 1039-1056; and 1058-1066 (Hate Speech; Sexually Explicit Expression)

- ***R.A.V. v. City of St. Paul (1992), Wisconsin v. Mitchell (1993), Virginia v. Black (2003)***
- ***Roth v. U.S. (1957), Kingsly International Pictures Corp. v. Regents (1959), Stanley v. Georgia (1969), Miller v. California (1973)***

Tuesday, November 8 • pages 1180-1196, 1208-1211 (Content-Based and Content-Neutral)

- ***U.S. v. O'Brien (1968), Arcara v. Cloud Books (1986), Texas v. Johnson (1989), U.S. v. Eichman (1990), Barnes v. Glen Theatre (1991)***

Thursday, November 10 • **Fourth in-class essay: remember your bluebook**

5. **RELIGION**

Tuesday, November 15 • pages 1565-1578 (Free Exercise)

- ***Church of the Lukumi Babalu Aye v. City of Hialeah (1993)***, *Reynolds v. United States (1878)*, ***Sherbert v. Verner (1963)***, *Wisconsin v. Yoder (1972)*

Thursday, November 17 • pages 1578-1593 (Free Exercise, cont.)

- *United States v. Lee (1982)*, *Bob Jones University v. United States (1983)*, *Goldman v. Weinberger (1986)*, *Bowen v. Roy (1986)*, *Lyng v. NW Indian Cemetery Protective Ass'n (1988)*, ***Employment Division v. Smith (1990)***, *City of Boerne v. Flores (1997)*

Tuesday, November 22 • pages 1611-1614 and 1636-1646 (Establishment)

- *Lemon v. Kurtzman (1971)*, *McCollum v. Board of Education (1948)*, ***Zorach v. Clauson (1952)***, *Engel v. Vitale (1962)*, *Abington School District v. Schempp (1963)*, *Wallace v. Jaffree (1985)*, ***Lee v. Weisman (1992)***

Thursday, November 24 • no lecture; Thanksgiving Break

Tuesday, November 29 • pages 1663-1673 (Establishment, cont.)

- ***Lynch v. Donnelly (1984)***, *Allegheny County v. American Civil Liberties Union (1989)*, *Capitol Square Review Board v. Pinette (1995)*

Thursday, December 1 • **Fifth essay: remember your bluebook**



HOW TO BRIEF A CASE FOR THIS COURSE

First of all, be brief – write notes, not an essay! Second, include these five points:

1. Factual background
2. “Constitutional question”: formulate in terms of a specific provision of the Constitution
3. The holding (a) of the majority and (b) of dissenters
4. The **reasoning** in 3 (a) and 3 (b) (*this course emphasizes this aspect of the cases*)
5. “Constitutional upshot”: the significance of this case for understanding and applying the Constitution in future cases

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HOW TO WRITE AN IN-CLASS ESSAY FOR THIS COURSE

To improve your essay writing, first consider the organization and coherence of your essay as a whole. By providing an introductory thesis that clearly presents your overall argument and directly addresses each aspect of the topic, you establish a framework for the remainder of your essay. This thesis need not be one sentence but can be a few interrelated sentences that **(a)** make sense of the topic as a whole and **(b)** explicitly declare your overall argument, responding to each part of the topic while treating them as parts of a larger whole.

Always address every part of the topic. Think of your introductory thesis as a skeleton of sorts, which you then systematically flesh out in the body of your essay. By reading the introductory thesis (which is like a preview), the reader should know the defining features of the essay that will follow -- specifically, how you will respond to each part of the topic and how your argument will attempt to fit these parts together. Toward that goal, construct a brief outline of your main ideas before you begin writing.

In writing the rest of your essay, do three things.

First, make an argument that analyzes a limited amount of important material in depth. Engage these ideas and wrestle with them. This shows that you recognize key issues and are thinking critically about them.

Second, utilize the opinions and reasoning from the cases as evidence to support your claims. This is what separates an essay that makes clear, strong, and convincing points in defense of a main argument, from an essay that offers only speculation and personal commentary. But remember to use the court cases as evidence; don't rely on them to make your points for you.

Third, explain the significance of the examples that you cite and make especially clear how they help promote or defend your main thesis. This illustrates that you have a good grasp of course materials and that you can make sense of cases in relation to other cases or in terms of a larger context or issue that encompasses a number of cases.

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MANDATORY EVENTS BEYOND THE CLASSROOM

1. UNIVERSITY GEM: UT LIBRARY SYSTEM (at PCL)

Discussion sections: meetings with and presentations by UT librarians Michele Ostrow (micheleo@austin.utexas.edu) and Sarah Brandt (s.brandt@austin.utexas.edu)

Presentation on *September 16* for Bell's 12-1 and 1-2 pm sections together and Altamirano's 2-3 and 3-4 pm sections together; meet at PCL, Learning Lab 3 at time to be arranged. Topics: (a) tertiary sources for context/background information; (b) scholarly sources: what they are, who writes them, and how to search for and select them from the library's holdings; and (c) how to evaluate sources.

2. UNIVERSITY GEM: HARRY RANSOM CENTER (at HRC)

Bell: Feldman Seminar Room, HRC, Friday, October 7 • 2-3 and 3-4 pm

Shaffer: Feldman Seminar Room, HRC, Friday, October 14 • 2-3 and 3-4 pm

Original books and manuscripts on *overpopulation* by Jonathan Swift (1667-1745); *national identity* by Henry Bolingbroke (1678-1751); *treatment of women in modern West* by Jean-Jacques Rousseau (1712-1778); *slavery* by Edmund Burke (1729-1797); *subjugation of foreign peoples* by George Staunton (1737-1801); *child marriage* by James Forbes (1749-1819); *racism* by Mathew Gregory Lewis (1775-1818); *slavery in 1836 agreement for sale of one female slave, written in New Orleans, in French*; *19th century cosmopolitanism contra nationalism* by Karl Marx (1818-1883); *nationalism, patriotism* by Mahatma Gandhi (1869-1948); *20th century cosmopolitanism contra patriotism* by Gustave Hervé (1871-1944); *racism, anti-semitism, facism and its social exaltation* by Adolf Hitler (1889-1945); *patriotism, cosmopolitanism, and human rights abuses* by Ernest Hemingway (1899-1961); *first-hand witness account of liberation of Buchenwald: genocide* by Churchill Brazelton of Waco, Texas (1945). **Photos** of *child labor* by Lewis Hine; of *family poverty* by Walker Evans; of *national identity in WWII* by Helmut Gernsheim.

3. UNIVERSITY LECTURE SERIES (at Bass Concert Hall)

19 September, 7-8 pm • Mark Updegrave, LBJ Library; Bethany Albertson, Government; Michael Stoff, History • *Election 2016*

20 September, 7-8 pm • George Georgiou, Chemical Engineering; Noël Busch-Armendariz, Social Work; Charles O. Anderson, Theatre and Dance • *Research that Changes the World*