

## **Law A592, Constitutional Law II**

**Autumn Quarter 2018**

Class Meets 10:30 a.m. to 12:20 p.m. on Mondays, Wednesdays, and Fridays

**Professor Peter Nicolas**

*e-mail [pnicolas@uw.edu](mailto:pnicolas@uw.edu)*

*Office hours on a drop-in basis or by appointment*

### **Course Description**

This course examines individual constitutional rights, primarily those involving the guarantees of due process and equal protection found in the Fifth and Fourteenth Amendments, as well as the rights guaranteed by the Thirteenth and Fifteenth Amendments. The course focuses on the constitutionality of laws that classify people on the basis of race, sex, sexual orientation, gender identity, and other bases, as well as laws that restrict voting, abortion, contraception, sexual activity, marriage, and other individual freedoms.

In this course, we will be examining the development of constitutional law over time. Accordingly, rather than devoting a single class session to a given doctrinal principle, we will return to certain principles multiple times in concert with doctrinal developments over time. This historical approach provides insight into how changes in the Court's composition and philosophy over time have impacted all aspects of constitutional law.

### **Learning Objectives**

Upon completion of this course, you should:

- Be familiar with the text, structure, and history of the Reconstruction Amendments;
- Understand the formal, established levels of equal protection scrutiny and be able to apply each of those levels of scrutiny;
- Understand the concept of “substantive due process” and the formal, established levels of due process scrutiny, and be able to apply each of those levels of scrutiny;
- Recognize and be able to explain and apply informal levels of equal protection and due process scrutiny;
- Understand the ways in which the equal protection and due process guarantees sometimes work in tandem with one another;
- Have a working knowledge of the Thirteenth and Fifteenth Amendments, and in particular, the ways in which they are similar to and different from the Fourteenth Amendment;
- Understand the concept of “state action,” and when proof of it is required;
- Understand the scope of congressional power to enforce the Reconstruction Amendments;
- Have a thorough understanding of the major cases that have shaped our nation's rights-based constitutional history;

- Be familiar with the development of the constitutional doctrines we have studied in this course over time; and
- Be able to apply any of the constitutional doctrines we have studied in a scenario for which you lack specific binding precedent, such as a novel statute restricting abortion, or a law that classifies people on a basis that the Court has not yet identified as one subject to heightened equal protection scrutiny.

## **Texts**

Peter Nicolas, The Reconstruction Amendments (available at RAMS Copy Center, 4144 University Way NE (206-632-6630)).

## **Course Grading**

All students enrolled in this course are expected to attend class on a regular basis, to come to class prepared, to participate in class discussion of the assigned readings, and to take a final examination. The final grade for this course will be determined primarily by your performance on the final examination, subject to a possible upward or downward adjustment based on class participation.

**Final Examination:** The final examination will be a standard in-class examination that might contain some or all of the following: short answer questions, issue spotter questions, and big picture theoretical questions. The final examination will be limited open-book: you will be permitted to use the required text, any assigned supplemental reading materials, my PowerPoint slides, your class notes, and any outlines that you have materially participated in creating (meaning that you prepared at least 25 percent of the outline). The use of all other materials is strictly prohibited. You will be permitted to use a computer to write out your answers to the final examination, but only if you use *ExamSoft*—the software provided by the law school that blocks access to the Internet and other programs—in secure mode. Because access to your computer’s hard drive and the Internet will be restricted during the exam, you should print out copies of any of these documents in advance of the exam date.

**Class Participation:** Throughout the quarter, students are expected to engage in class participation in three different ways. First, I may sometimes ask you to break into small groups during class and discuss cases and problems. Second, students are welcome and strongly encouraged to voluntarily participate in class discussion. Third, I may call on students at random to answer questions about the assigned reading.

A student whose class participation consistently demonstrates extraordinary preparation and mastery may receive an upward adjustment in her final grade if her final examination grade straddles the line between two letter grades. A student who is repeatedly absent for the small group breakout exercises, or, when called upon to answer a question, is repeatedly absent, passes, or answers the question in a way that does not demonstrate that she prepared for class may receive a downward adjustment in her final grade for class participation, even if her grade does not straddle the line between two letter grades. Although frequency of class participation plays some role in assessing it, infrequent quality participation is valued much more highly than frequent participation of limited quality.

Although class participation plays only a minor role in determining your final grade in the course, it is considered a requirement for successful completion of this course. Thus, a failure to participate in good faith—such as by passing every time called upon or failing to be in class during the small group breakout exercises or when called upon—may result in a grade of incomplete in the course that can only

be rectified by sitting through the entire course in a future quarter and satisfactorily participating in class discussion.

I recognize that some students caring for young children may choose to use the Remote Learning Center in lieu of attending class in person. If you plan to do so, please let me know so that we can arrange a way for you to satisfy the class participation requirement of this course while still allowing you to make full use of the Remote Learning Center.

### **Cancelled Classes**

Please note that although this is a five-credit course, it meets six hours per week. This allows for several of our scheduled class sessions to be cancelled. The dates when we will not meet are noted below.

### **Attendance**

Pursuant to the law school's attendance policy, you are expected to attend at least 80 percent of the class sessions for any course that you are enrolled in. In addition, the policy permits instructors to impose stricter attendance standards. **Any student who fails to attend at least 80 percent of the class sessions will be dropped from the course.** If you plan to miss a class session, you must notify me prior to the class you will be missing and should provide me with a generalized reason for your absence (e.g., illness, care for a sick friend/family member, religious observance). **Please note that I do actively enforce the attendance requirement and will not hesitate to drop a student from the course who fails to satisfy the requirement.**

A failure to attend class can impact you in at least two additional ways. First, the final examination will test materials discussed in class, even if those materials are not included in the reading assignment. Second, if you do not attend class, you cannot engage in class participation, which may result in a downward adjustment to your final grade or a grade of incomplete.

### **Use of Computers and Other Electronic Devices in Class**

You are permitted to have in your possession during class cellular telephones, computers, or other electronic devices, provided that they do not make any sound during class (such as ringing or beeping) that is distracting to me or to other students. This means that you should mute the sound on your computer, cellular telephone, or other electronic device before class begins.

Moreover, if you bring a computer to class, it should be used to take notes, not to send and read e-mail messages, surf the internet, or the like. In some instances, it may be appropriate to use the internet for purposes germane to learning (such as looking up a term used in class that you do not understand in an online dictionary or pulling up a relevant case, statute, or rule). I do not police computer use (unless it distracts me or other students), but instead ask that you exercise sound judgment and courtesy in this regard.

### **Podcasting or Recording of Lectures**

Lectures are provided for instructional purposes only and remain the intellectual property of the instructor. All other uses are prohibited. Lecture material is covered by copyright (Title 17, United States Code), and lectures may not be audio- or video-recorded.

Class sessions in this course are taught live, and you are expected to attend in person. As a courtesy to those who are unable to attend a class session in person due to illness or for other reasons—or for those who want to review something that was said in class—an audio podcast of class sessions will be made available to all students. In addition, copies of my PowerPoint slides are available for all students to download.

### **Access and Accommodation**

Your experience in this class is important to me. If you have already established accommodations with Disability Resources for Students (DRS), please communicate your approved accommodations to me at your earliest convenience so we can discuss your needs.

If you have not yet established services through DRS, but have a temporary health condition or permanent disability that requires accommodations (conditions include but not limited to: mental health, attention-related, learning, vision, hearing, physical or health impacts), you are welcome to contact DRS at 011 Mary Gates Hall or 206-543- 8924 or [uwdrs@uw.edu](mailto:uwdrs@uw.edu) or [disability@uw.edu](mailto:disability@uw.edu). DRS offers resources and coordinates reasonable accommodations for students with disabilities and/or temporary health conditions. Reasonable accommodations are established through an interactive process between you, your instructor(s) and DRS. It is the policy and practice of the University of Washington to create inclusive and accessible learning environments consistent with federal and state law.

**Syllabus/Reading List** (subject to modification; dates are approximate)

- Mon., Sept. 24: Chapter 1: Pre-Reconstruction (1789-1865) (Text pp. 1-19); Chapter 2: Reconstruction and the Gilded Age (1865-1896) (Text pp. 20-35).
- Wed., Sept. 26: Chapter 2: Reconstruction and the Gilded Age (cont'd) (Text pp. 35-68).
- Fri., Sept. 28: Chapter 3: The Rise and (Partial) Fall of Substantive Due Process (Text pp. 69-102).
- Mon., Oct. 1: Chapter 4: Traditional Equal Protection Review (Text pp. 103-114); Chapter 5: Race and the Rise of Equal Protection Review (Text pp. 115-141).
- Wed., Oct. 3: Chapter 6: The Fifteenth Amendment (Text pp. 142-149); Chapter 7: Expanding the Concept of State Action (Text pp. 150-177).
- Fri., Oct. 5: Chapter 8: “Fundamental Rights” and the Rise of Equal Protection Review (Text pp. 178-200); Chapter 9: The Rise of Congressional Power to “Enforce” the Reconstruction Amendments (Text pp. 201-218).
- Mon., Oct. 8: Chapter 10: Equal Protection and the Reordering of the Political Process (Text pp. 219-230); Chapter 11: The Rebirth of Substantive Due Process (Text pp. 231-251).
- Wed., Oct. 10: Chapter 11: The Rebirth of Substantive Due Process (cont'd) (Text pp. 252-267); Chapter 12: Sex Discrimination and the Rise of Equal Protection Review (Text pp. 268-290).
- Fri., Oct. 12: **Reserved Make-Up Session** – This class session is reserved in case I need to cancel a scheduled class session. If no scheduled class sessions are canceled, we will not meet on this day.
- Mon., Oct. 15: Chapter 12: Sex Discrimination and the Rise of Equal Protection Review (cont'd) (Text pp. 290-327).
- Wed., Oct. 17: Chapter 13: Other Classifications and the Equal Protection Clause (Text pp. 328-369).
- Fri., Oct. 19: Chapter 14: Refining the Concept of “State Action” (Text pp. 370-379); Chapter 15: The Rise of the Discriminatory Purpose Requirement (Text pp. 380-404).
- Mon., Oct. 22: Chapter 15: The Rise of the Discriminatory Purpose Requirement (cont'd) (Text pp. 404-419); Chapter 16: Refining “Fundamental Rights” Under the Equal Protection and Due Process Clauses (Text pp. 420-437).
- Wed., Oct. 24: Chapter 16: Refining “Fundamental Rights” Under the Equal Protection and Due Process Clauses (cont'd) (Text pp. 437-477).

- Fri., Oct. 26: Chapter 16: Refining “Fundamental Rights” Under the Equal Protection and Due Process Clauses (cont’d) (Text pp. 477-486); The “Reverse Discrimination” Cases (Text pp. 487-508).
- Mon. Oct. 29: Chapter 17: The “Reverse Discrimination” Cases (cont’d) (Text pp. 509-542).
- Wed., Oct. 31: Chapter 18: Sexual Orientation and the Equal Protection Clause (Text pp. 543-562); Chapter 19: The Ebb and Flow of Fundamental Rights under the Equal Protection, Due Process, and Privileges or Immunities Clauses (Text pp. 563-571).
- Fri., Nov. 2: **Reserved Make-Up Session** – This class session is reserved in case I need to cancel a scheduled class session. If no scheduled class sessions are canceled, we will not meet on this day.
- Mon., Nov. 5: Chapter 19: The Ebb and Flow of Fundamental Rights under the Equal Protection, Due Process, and Privileges or Immunities Clauses (cont’d) (Text pp. 571-607).
- Wed., Nov. 7: Chapter 19: The Ebb and Flow of Fundamental Rights under the Equal Protection, Due Process, and Privileges or Immunities Clauses (cont’d) (Text pp. 607-640).
- Fri., Nov. 9: Chapter 20: The “Reverse Discrimination” Cases Revisited (Text pp. 641-662); Chapter 21: Refining the Scope of Congressional Power to Enforce the Reconstruction Amendments (Text pp. 663-670).
- Wed., Nov. 14: Chapter 21: Refining the Scope of Congressional Power to Enforce the Reconstruction Amendments (cont’d) (Text pp. 670-693).
- Fri., Nov. 16: **Reserved Make-Up Session** – This class session is reserved in case I need to cancel a scheduled class session. If no scheduled class sessions are canceled, we will not meet on this day.
- Mon., Nov. 19: **Class Cancelled.**
- Wed., Nov. 21: **Class Cancelled.**
- Mon., Nov. 26: **Class Cancelled.**
- Wed., Nov. 28: **Reserved Make-Up Session** – This class session is reserved in case I need to cancel a scheduled class session. If no scheduled class sessions are canceled, we will not meet on this day.
- Fri., Nov. 30: **Special Topic: TBD** — Reading Materials TBD
- Mon., Dec. 3: **Special Topic: TBD** — Reading Materials TBD
- Wed., Dec. 5: **Review Class**