

21H.181

Libertarianism in History

Prof. M. Ghachem
mghachem@mit.edu
617-324-7284
E51-296G
Office hours: Tu 10:30-11:30, Th 4-5

Tu/Th 1:00-2:30
Rm. 4-253

The will to live free of the control of the state (or of organized groups who have coopted state authority) is one of the most powerful and controversial motors of western history. This course explores the history of the ideal of personal freedom with an eye towards contemporary debates over the pros and cons of the regulatory state. The first part of the course explores the sociological and theological sources of the concept of freedom and introduces liberty's leading relatives or competitors: property, equality, community, and republicanism. Part Two consists of a series of case studies in the rise of modern liberty and libertarianism: the abolition of slavery, the struggle for religious freedom, and the twentieth-century American civil liberties movement. In the last part of the course, we take up debates over the role of libertarianism vs. the regulatory state in a variety of contexts: counter-terrorism, health care, the financial markets, and the Internet. Throughout, students are asked to consider two problems: (1) the tension between liberty or libertarianism as a general philosophy of life and the need for context-specific judgments about that philosophy; and (2) what points those opposing or favoring broadly libertarian visions are not hearing or fully comprehending. Readings are drawn from political philosophy, sociology, history, and law.

The basic objectives of the course are twofold: to familiarize students with the varieties of libertarianism and their histories, and to enable students to argue effectively about libertarianism on several different levels. Libertarianism has historical, political-theoretical, and policy dimensions (among others), and by the end of the course students should be able to assess and critique the claims made both for and against libertarianism on all three of these levels. The claims in question are often controversial, and they are a constant presence in political, legal, and social argument. The course should help students to engage in oral debate over these issues, and then also to write about them reflectively and with the benefit of historical perspective.

Required Texts:

There is one text required for purchase in this course:

- Michael Sandel, ed., *Justice: A Reader* (New York: Oxford University Press, 2007) [hereafter “*Justice*”].

All other readings will be made available via hyperlinks provided below in the schedule of topics and readings, or via the Stellar course site.

Course Format, Assignments, and Evaluation:

The class meets twice a week. The first twenty or so minutes of each meeting will consist of lecture-style introductions to the day’s topic. The remainder of each class will be devoted to group discussion of the assigned texts for that day. You may bring laptops or tablets to our class meetings solely for the purpose of taking notes and viewing digital versions of the assigned readings. In order to take full advantage of the opportunities this course offers for group learning and interaction, no other use of computers or digital devices (including web surfing, email, and social media) is permitted in the class.

Regular attendance and participation in class discussions are expected. Students will be asked to demonstrate their engagement with the texts primarily by way of participation in our group discussions, but also by means of two kinds of supplementary exercises. First, students will be asked on a few occasions to post brief responses to the readings on the Stellar web-site forum during the course of the semester (roughly one for each part of the course, for a total of three). These responses should consist of 200-300 words on a topic/question that will be posted on the Stellar Forum two weeks before the responses are due. Your responses should be thoughtful and thought-provoking. You are not expected to do any extra preparation for these posts. You will receive a composite grade for all three of your forum posts and that grade will form a portion of your overall final grade.

Second, we will hold two in-class debates during the course of the semester. The class will be divided into two teams and each side will be asked to prepare a “pro” or “con” position as represented by the readings for that day. The first debate will be held on March 11 (Rawls v. Nozick) and the second on April 29 (“Obamacare”). You will be evaluated on your debate performances as part of your overall class participation portion of the final grade.

Finally, the course assignments include two papers. The first is a paper of 8-10 pages on a topic relating to the history and political theory of liberty as an ideal (Part One of the course). That paper is due online by 8pm on March 16; I will post an essay prompt two weeks before the

due date. The second is a 10-12 page paper that more deeply explores one of the case studies or controversies we will study in Parts Two and Three of the course. The second paper is due by 4pm on Thursday, May 15; you are welcome and encouraged to show me a detailed outline with source notes or a rough draft by April 24.

Grades will be determined as follows:

- Paper #1 = 20%
- Paper #2 = 40%
- Stellar forum posts = 10%
- Class participation = 30%

Schedule of Topics and Reading Assignments:

Please note: the following list of topics and reading assignments can be considered stable for the most part but is likely to change in small ways as we progress throughout the semester. I will periodically post updated versions of the syllabus to our Stellar course site, with accompanying email announcements to the class participants.

Introduction

Feb. 4: Nuts and bolts (what this course is about).

Feb. 6: Some Contemporary Libertarian Controversies.

Readings:

- a) Sam Tanenhaus and Jim Rutenberg, "Rand Paul's Mixed Inheritance," *The New York Times* (Jan. 25, 2014), at <http://www.nytimes.com/2014/01/26/us/politics/rand-pauls-mixed-inheritance.html>.
- b) Jeffrey Rosen, "Madison's Privacy Blind Spot," *The New York Times* (Jan. 18, 2014), at <http://www.nytimes.com/2014/01/19/opinion/sunday/madisons-privacy-blind-spot.html>.
- c) Debate between Alan Krueger and Dave Henderson over income inequality, at <http://www.hereandnow.wbur.org/2014/01/29/income-inequality-debate>.

Recommended:

- a) Richard Epstein, "My Rand Paul Problem," *Defining Ideas* (Feb. 3, 2014), at <http://www.hoover.org/publications/defining-ideas/article/167496>.

Part One: Ideals of Freedom, Autonomy, and Civil Society

Feb. 11: Roots of modern freedom (I): the ancient and medieval periods.

Readings:

- a) Orlando Patterson, "The Ancient and Medieval Origins of Modern Freedom," in *The Problem of Evil: Slavery, Freedom, and the Ambiguities of American Reform*, ed. J. Stouffer and S. Mintz (Amherst, MA: University of Massachusetts Press, 2006), 31-66, at <http://scholar.harvard.edu/patterson/publications/ancient-and-medieval-origins-modern-freedom>.

Recommended:

- a) Orlando Patterson, *Freedom*, vol. 1, *Freedom in the Making of Western Culture* (New York: Basic Books, 1991).
- b) Hannah Arendt, "The Meaning of Freedom," in *The Portable Hannah Arendt*, ed. Peter Baehr (New York: Penguin, 2000), 438-461).
- c) Amartya Sen, "Human rights and Asian values: what Lee Kuan Yew and Li Peng don't understand about Asia," *The New Republic* (July 14 and 21, 1997).
- d) Amartya Sen, "East and West: The Reach of Reason," *The New York Review of Books* (July 20, 2000).

Feb. 13: Roots of modern freedom (II): the early modern period.

Readings:

- a) Quentin Skinner, "A Third Concept of Liberty," *Proceedings of the British Academy* 117 (2002): 237-268, at http://www.law.uvic.ca/demcon/victoria_colloquium/documents/SkinnerAThirdConceptofLiberty.pdf.

Recommended:

- b) Quentin Skinner, *Liberty before Liberalism* (New York: Cambridge University Press, 1999).
- c) Quentin Skinner, *Hobbes and Republican Liberty* (New York: Cambridge University Press, 2008). A preliminary overview of this book is also available in lecture form at http://www.anu.edu.au/discoveranu/content/podcasts/hobbes_leviathan/.
- d) Phillip Pettit, "Keeping Republican Freedom Simple: On a Difference with Quentin Skinner," *Political Theory* 30, no. 3 (June 2002): 339-356.

Feb. 20: Revolutionary liberty (I).

Readings:

- a) The American Declaration of Independence (July 1776), at http://www.archives.gov/exhibits/charters/declaration_transcript.html.
- b) Bernard Bailyn, *The Ideological Origins of the American Revolution*, enl. ed. (Cambridge, MA: Harvard University Press, 1992), ch. 3 ("Power and Liberty: A Theory of Politics," pp. 55-93).

Recommended:

- a) John Philip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago, IL: University of Chicago Press, 1987).
- b) Hannah Arendt, *On Revolution* (New York: Penguin, 2006).

Feb. 25: Revolutionary liberty (II).

Readings:

- a) The French Declaration of the Rights of Man and of the Citizen (Aug. 1789), at <http://chnm.gmu.edu/revolution/d/295/>.
- b) Benjamin Constant, "The Liberty of the Ancients Compared with the Moderns" (1819), at http://oll.libertyfund.org/index.php?option=com_content&task=view&id=1467&Itemid=262.

Recommended:

- a) Mona Ozouf, "Liberty," in François Furet and Mona Ozouf, eds., *A Critical Dictionary of the French Revolution*, trans. Arthur Goldhammer (Cambridge, MA: Harvard University Press, 1989), 716-727.
- b) Alexis de Tocqueville, *The Ancien Régime and the Revolution*, trans. Arthur Goldhammer (New York: Cambridge University Press, 2012).

Feb. 27: Modern valuations of liberty as the ultimate political and economic good (I).

Readings:

- a) Excerpts from John Stuart Mill, *On Liberty* (London, 1859), at <http://personal.ashland.edu/~jmoser1/mill.htm> (or read the full chapters 1-2 at <http://www.bartleby.com/130/>).
- b) Friedrich A. Hayek, selections from *The Constitution of Liberty* (1960), in *Justice*, 73-82.

Recommended:

- a) Sunil Khilnani, "The development of civil society," in *Civil Society: History and Possibilities*, ed. Sudipta Kaviraj and Sunil Khilnani (New York: Cambridge University Press, 2001), 11-32.
- b) Ernst Gellner, *Conditions of Liberty: Civil Society and its Rivals* (New York: Penguin, 1994).
- c) John Ehrenberg, *Civil Society: The Critical History of an Idea* (New York: New York University Press, 1999).

March 4: Modern valuations of liberty as the ultimate political and social good (II).

Readings:

- a) Martin Luther King, Jr., "I Have a Dream," (Aug 28, 1963), at http://www.youtube.com/watch?v=HRIF4_WzU1w.
- b) Milton and Rose Friedman, selections from *Free to Choose* (1980), in *Justice*, 49-60.
- c) Robert Nozick, selections from *Anarchy, State, and Utopia* (1974), in *Justice*, 60-73.

Recommended:

- a) Isaiah Berlin, "Two Concepts of Liberty," in *Liberty*, ed. Henry Hardy (New York: Oxford University Press, 2002).
- b) Milton Friedman, *Capitalism and Freedom* (Chicago, IL: University of Chicago Press, 1982).
- c) Cass Sunstein and Richard Thaler, "Libertarian Paternalism," *The American Economic Review* 93, no. 2 (May, 2003): 175-179.
- d) Charles Fried, *Modern Liberty and the Limits of Government* (New York: W.W. Norton, 2007).

March 6: Complementary or contradictory ideals (I)? Property.

Reminder: First Forum Posts Due Today by 8pm.

Readings:

- a) John Locke, selections from *Second Treatise of Government* (1690), in *Justice*, 83-127.
- b) Gregory S. Alexander, Eduardo M. Penalver, Joseph William Singer, and Laura S. Underkuffler, "A Statement of Progressive Property," *Cornell Law Review* 94 (2009): 743-744, at <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/A-Statement-of-Progressive-Property.pdf>.

Recommended:

- a) Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge, MA: Harvard University Press, 2011).

- b) Margaret Radin, *Reinterpreting Property* (Chicago, IL: University of Chicago Press, 1993).
- c) Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge, MA: Harvard University Press, 2011).

March 11: Complementary or contradictory ideals (II)? Equality and distributive justice.

Note: Our first in-class debate will be held today.

Readings:

- a) John Rawls, selections from *A Theory of Justice* (1971), in *Justice*, 203-226.
- b) Robert Nozick, excerpt from *Anarchy, State, and Utopia* (1974), in *Justice*, 226-235.

Recommended:

- a) Alexis de Tocqueville, *Democracy in America*, vol. 2, ed. Olivier Zunz, trans. Arthur Goldhammer (New York: Library of America, 2012), 105-133.
- b) T. H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge, UK: Cambridge University Press, 1950).
- c) Ralf Dahrendorf, *The Modern Social Conflict: The Politics of Liberty*, 2nd ed. (New Brunswick, NJ: Transaction, 2007).

March 13: Complementary or contradictory ideals (III)? Communitarianism and civic republicanism.

Readings:

- a) Alasdair MacIntyre, selections from *After Virtue* (1981), in *Justice*, 315-328,
- b) Michael Sandel, selections from *Democracy's Discontent* (1996), in *Justice*, 328-334.
- c) Michael Walzer, selections from *Spheres of Justice* (1983), in *Justice*, 335-342.

Recommended Reading:

- d) Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1999).
- e) Ferdinand Tönnies, *Community and Civil Society* (New York: Cambridge University Press, 2001).
- f) Richard H. Fallon, Jr., "What Is Republicanism, and Is It Worth Reviving?" *Harvard Law Review* 102, no. 7 (1989): 1695-1735.
- a) Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (New York: Oxford University Press, 2001).

First paper due online by March 16 at 8pm.

Part Two: Case Studies in the Rise of Modern Liberty/Libertarianism

Slavery and Abolition (Paradoxes of Property and Personal Freedom)

March 18: Chattel Slavery and the “Freedom Principle”

Readings:

- a) Edmund S. Morgan, “Slavery and Freedom: The American Paradox,” *The Journal of American History* 59, no. 1 (1972): 5-29.
- b) The *Somerset Case* (1772), at http://www.nationalarchives.gov.uk/pathways/blackhistory/rights/transcripts/somerset_case.htm.

Recommended readings:

- a) The 1705 Virginia Slave Code.
- b) The 1685 Code Noir (“Black Code”).
- c) Sue Peabody and Keila Grinberg, *Slavery, Freedom, and the Law in the Atlantic World: A Brief History with Documents* (Boston, MA: Bedford/St. Martin’s, 2007).

March 20: Antislavery and Liberty (I)

Readings:

- a) Review the John Carter Brown Library’s online exhibition “The Other Revolution: Haiti, 1789-1804,” at http://www.brown.edu/Facilities/John_Carter_Brown_Library/haitian/index.html.
- b) Christopher Brown, “The Problems of Slavery,” in *The Oxford Handbook of the American Revolution*, ed. Edward G. Gray and Jane Kamensky (New York: Oxford University Press, 2013), 427-446.

April 1: Antislavery and Liberty (II)

Readings:

- a) The Emancipation Proclamation (1863).
- b) The Thirteenth and Fourteenth Amendments (1865, 1868).
- c) James M. McPherson, “‘For a Vast Future Also’: Lincoln and the Millennium,” NEH Jefferson Lecture, March 27, 2000, at <http://www.neh.gov/about/awards/jefferson-lecture/james-mcpherson-lecture>.

Recommended:

- a) Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (New York: W.W. Norton, 2010).
- b) James S. Oakes, *Freedom National: The Destruction of Slavery in the United States, 1861-1865* (New York: Norton, 2012).

Second Forum Posts Due April 2 at 8pm.

Freedom of the Spirit: Belief, Conduct, and the First Amendment

April 3: The First Amendment Religion Clauses and “Freedom of Conscience” (Guest Discussant: Jack Rakove, Stanford University)

Readings:

- a) Jack Rakove, “Jefferson, Rights, and the Priority of Freedom of Conscience,” in *The Future of Liberal Democracy: Thomas Jefferson and the Contemporary World*, ed. Robert Fatton and R. K. Ramzani (New York: Macmillan Palgrave, 2004), 49-64.
- b) Selections (tba) from Michael McConnell, John Garvey, and Thomas C. Berg, *Religion and the Constitution*, 3rd ed. (New York: Wolters Kluwer, 2011).

April 8: The Rise of Free Exercise in Modern America

Readings:

- a) Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge, MA: Harvard University Press, 2010), 1-14.
- b) Reynolds v. United States (1878).
- c) Sherbert v. Verner (1963).

Recommended:

- a) Douglas Laycock, *Religious Liberty*, 2 vols. (Grand Rapids, MI: Wm. B. Eerdmans, 2010).

April 10: Religious Accommodation and Civil Rights Today

Readings:

- a) Employment Division v. Smith (1990).
- b) Douglas Laycock, “Sex, Atheism, and the Free Exercise of Religion,” 88 *U. Det. Mercy L. Rev* 407 (2011), at <http://bit.ly/1i9kBcA>.
- c) Hobby Lobby v. Sebelius (10th Cir., June 27, 2013).

From Civil Liberties to Civil Libertarianism

April 15: The Creation of the Modern American Civil Liberties Movement

Readings:

- 1) The Bill of Rights (1791).
- 2) *Abrams v. United States* (1919).
- 3) John F. Witt, "Crystal Eastman and the Internationalist Beginnings of American Civil Liberties," 54 *Duke Law Journal* 705-763 (2004), at <http://scholarship.law.duke.edu/dlj/vol54/iss3/2>.

Recommended:

- 1) Christopher Cappozola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (Oxford University Press, 2008).

April 17: The First Amendment (Guest Discussant: Harvey Silverglate, www.harveysilverglate.com)

Readings:

- 1) *West Virginia Board of Education v. Barnette* (1943).
- 2) Selections (tba) from Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on America's Campuses* (New York: Harper, 1999).
- 3) Jeremy Waldron, "Free Speech and the Menace of Hysteria," *The New York Review of Books*, May 29, 2008, at <http://www.nybooks.com/articles/archives/2008/may/29/free-speech-the-menace-of-hysteria/?page=1>.

Recommended:

- a) Geoffrey Stone, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004).

Part Three: Liberty and the Contemporary Administrative-Regulatory State

Counter-Terrorism and Health Care

April 24: The National Security Agency's Phone Surveillance Program

Reminder: If you want to show me an outline or draft of your final paper, please do so by today.

Readings:

- 1) Judge Richard Leon opinion in *Klayman v. Obama* (D. D.C., Dec. 16, 2013), at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0851-48.
- 2) Judge William Pauley III opinion in *ACLU v. Clapper* (S.D. N.Y., Dec. 27, 2013), at <http://legaltimes.typepad.com/files/nsa-sdny-opinion.pdf>.

Recommended:

- 1) David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2005).
- 2) Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2007).

April 29: “Obamacare”

Note: Our second in-class debate will be held today.

Readings:

- 1) *National Federation of Independent Business v. Sebelius*, No. 11-393 (June 28, 2012), at <http://www.washingtonpost.com/wp-srv/politics/documents/supreme-court-health-care-decision-text.html>.

The Financial Markets

May 1: The Origins of the 2008 Financial Crisis

Readings:

- 1) *Conclusions of the Financial Crisis Inquiry Commission* (2011), at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_conclusions.pdf
- 2) Selections (tba) from the *Dissenting Views of Keith Hennessey, Douglas Holtz-Eakin, and Bill Thomas*, at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_hennessey_holtz-eakin_thomas_dissent.pdf, and the *Dissenting Views of Peter J. Wallison*, at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_wallison_dissent.pdf.

Recommended Reading:

- a) *The Squam Lake Report: Fixing the Financial System* (Princeton, NJ: Princeton University Press, 2010).
- b) Gillian Tett, *Fool's Gold: The Inside Story of J.P. Morgan and How Wall Street Corrupted Its Bold Dream and Created a Financial Catastrophe* (New York: Free Press, 2010).

- c) John B. Taylor, *Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis* (Stanford, CA: Hoover Press, 2009). A version of this argument is also available at <http://www.stanford.edu/~johntayl/FCPR.pdf>.

May 6: Efficient Markets and the Derivatives Debate

Readings:

- a) Selections (tba) from Justin Fox, *The Myth of the Rational Market: A History of Risk, Reward, and Delusion on Wall Street* (New York: Harper Collins, 2009).
- b) Lynn A. Stout, "The Legal Origin of the 2008 Credit Crisis," (February 25, 2011), UCLA School of Law, Law-Econ Research Paper No. 11-05, at <http://ssrn.com/abstract=1770082>.

Internet Freedom

May 8: The Power of Private Regulation

Readings:

- a) Selections (tba) from Lawrence Lessig, *Code version 2.0* (New York: Basic Books, 2006), at <http://www.codev2.cc/>.

May 13: Boundaries of the Internet

Note: the first 10-15 minutes of today's class will be devoted to completing the online course evaluations for this subject. Please remember to bring your laptops for this purpose.

Readings:

- a) Selections (tba) from Jack Goldsmith and Timothy Wu, *Who Controls the Net? Illusions of a Borderless World* (New York: Oxford University Press, 2008).
- b) Selections (tba) from Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006), at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf.

May 15 (to be rescheduled): The Case of Aaron Swartz

Readings:

- a) Selections (tba) from Harold Abelson et al., "Report to the President: MIT and the Prosecution of Aaron Swartz" (July 26, 2013), at <http://swartz-report.mit.edu/docs/report-to-the-president.pdf>.

Recommended:

- a) Aaron Swartz, "Guerilla Open Access Manifesto" (July 2008), at http://archive.org/stream/GuerillaOpenAccessManifesto/Goamjuly2008_djvu.txt.
- b) Superseding indictment, United States v. Aaron Swartz, No. 1:11-cr-10260-NMG (D. M.A., Sept. 12, 2012).

*** Final papers due at 4pm May 15 on the Stellar course site. ***