First Amendment Law  
Professor Teachout  
Fall Term, 2016

Syllabus

     (2) Chemerinsky, Constitutional Law 2015 Supplement [N.B.: we will be using the 2015,  
         not the 2016, supplement]
Office Hours: Wednesday, 3:30-5:00 p.m. or by appointment.
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Course Overview:

This course is designed to introduce students to the basic doctrines and leading cases in  
American First Amendment law with particular emphasis on Supreme Court jurisprudence  
relating to freedom of speech, free exercise of religion, and the prohibition against establishment  
of religion. One large goal of the course is to provide students with appreciation of the basic  
modes of analysis and tests that the Court employs in addressing different types of First  
Amendment problems. In addition, the course is designed to introduce students to the actual  
practice of First Amendment law. Toward that end, students will be organized into teams of  
three or four students and each team will be assigned seven practice-related exercises over the  
course of the term (for example, preparing a motion to dismiss a criminal complaint; drafting an  
aggressive panhandling ordinance; or writing a letter to school authorities providing guidance on  
the adoption and enforcement of school dress code regulations). While individual team members  
can take the lead in preparing the first draft of a particular assigned task, all members of the team  
will be expected to review and comment on the draft before it is turned in and will be held  
accountable for the quality of the final product. These exercises will not be graded but will be  
taken into account as an element of class participation. The final grade will be based 80% on the  
final exam and 20% on class participation.

Resources

In addition to the text and supplement, and other sources cited in the syllabus below, students  
should regularly consult and be prepared to discuss news media stories relating to the First  
Amendment and the discussions of First Amendment issues in the leading Supreme Court blog:  
http://www.scotusblog.com/
Part One: Introduction


Read: Amendment I, U.S. Constitution
http://www.fjc.gov/history/docs/seditionacts.pdf

Part Two: Freedom of Speech

A. Categories of “Unprotected Speech”

1. Advocacy of Unlawful Action


Schenck v. U.S. (1919)
Abrams v. U.S. (1919)
Gitlow v. N.Y. (1925)
Whitney v. California (1927)

Read: Text, pp. 1304-1319

Narrowing of the Clear and Present Danger Test in the Cold War Period

Dennis v. U.S. (1951)

Read: Text, pp. 1320-25(bottom)

Session #3: (1) Advocacy of Unlawful Action: The Modern “Brandenburg Test” (2) Speech Materially Assisting a Terrorist Organization: the “Holder Test”

1. Advocacy of Unlawful Action (cont.)
Brandenburg v. Ohio (1969)

Read: Text, pp. 1325-1328 (bottom)
Prepare: Problem #1: Motion to Dismiss Criminal Complaint

2. Speech “Materially Assisting a Terrorist Organization”


Read: Text, pp 1328 (bottom)-1337 (mid)

Note on Vagueness and Overbreadth Challenges

Read: Text, pp. 1235-43

Session #4: “Fighting Words,” “Group Libel,” “Hate Speech,” and the “Hostile Audience” Problem

3. “Fighting Words:” The “Chaplinsky” Test

Chaplinsky v. New Hampshire (1942)
Gooding v. Wilson (1972)
RAV v. City of St. Paul (1992)

Read: Text, pp. 1337-50

4. “Group Libel” and “Hate Speech”: Is “Beauharnais” Still Good Law?

Beauharnais v. Illinois (1952)

Read: Text, pp. 1353(bottom)-57

Note on the “Hostile Audience” Doctrine

Feiner v. NY (1951) [N.B.: Black’s dissent has subsequently been adopted by the majority and represents the current majority view]
Session #5: “True Threats”

5. “True Threats”


Read: Text, pp. 1358-1365 (bottom)
Discussion of *Elonis v. U.S.* in scotusblog.com:


Session #6: Obscenity and Child Pornography

6. Obscenity and Child Pornography

a. “Obscenity”: The *Miller* Test

*Roth v. U.S.* (1957)
*Paris Adult Theatre* (1973)
*Miller v. California* (1973)

b. Child Pornography: The *Ferber* Test


Read: Text, pp. 1365 (bottom)-1380

Session #7: Libel and Defamation

7. Libel:


a. Private Figures: The Gertz Test

Gertz v. Welch (1974)
Dunn & Bradstreet (1985)

Read: Text, pp. 1461-1477 (bottom)
Prepare: Problem #2: Provide Legal Advice on Proposed News Story

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B. Unsuccessful Candidates for Certification as “Unprotected Speech”

Session #8: (1) Intentional Infliction of Emotional Distress? (2) False Statements and False Politicking?

a. Intentional Infliction of Emotional Distress?

Hustler Magazine v. Falwell (1988)
Snyder v. Phelps (2011)

Read: Text, pp. 1477-1484 (bottom)

b. False Speech (“Lies”) and False Politicking?


Read: Note on U.S. v. Alvarez, pp. 1209(bottom)-1210(mid)
Discussion of Susan B. Anthony, List v. Dreihaus (2015) in scotusblog.com at:

Session #9: (1) Violent Speech? (2) Depictions of Animal Cruelty?
a. Depictions of Animal Cruelty?


b. Violent Speech and Violent Video Games?

*Brown v. EMA* (2011)

Read: Text, pp. 1412-1427 (bottom)

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C. “Less Protected” or “Marginal” Speech

Session #10: Commercial Speech: The *Central Hudson* Test

*Virginia Bd. Of Pharmacy* (1976)
*Central Hudson Gas & Electric* (1980)
*Lorrillard Tobacco v. Reilly* (2001)

Please read: Text, pp. 1427-1441, 1447-1457

Session #11: Compelled Commercial Speech

Compelled Speech generally

*West Virginia State Bd of Ed v. Barnette* (1943)

Compelled Commercial Speech


Read: (1) Text, pp. 1277-1279, 1459-60 (discussion of *Zauderer* case).
(2) Discussion of *National Association of Mfgs* case in scotusblog at:
Session #12: Sexually- Explicit and Indecent Speech Falling Short of Technical Obscenity: “Marginal Speech”?  

**General Rule**

*Cohen v. California* (1971)

**Exceptions?**

(a) **Zoning Regulation of Adult Bookstores and Theatres:** *American Mini Theatres, City of Renton;* Judicial Acceptance of “Secondary Effects” Justification

*Young v. American Mini Theatres* (1976)  

(b) **Nude Dancing and Nudity Regulations**


(c) **FCC Regulation of the Public Airways**

*FCC v. Pacifica* (1978)

Please read: Text, pp. 1387-1405, 1223-26(mid)

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**D. “Protected Speech”**

(1) **Generally Applicable Regulations**

Session #13: Content-Neutral v. Content-Based Regulations of Speech (Part One)

*Turner Broadcasting* (1994)  
Session #14: Content-Neutral v. Content-Based Regulations of Speech (Part Two)

*Reed v. Town of Gilbert* (2015)

Read: Supplement pp. 163-172

Session #15: Expressive Conduct: The *O’Brien* Test

*U.S. v. O’Brien* (1968)

Read: Text, pp.1489-1500

(2) Time, Place, and Manner Regulations: The *Perry* Taxonomy

Session #16: Time, Place and Manner Regulations: “Public Forum” Analysis (Part One)

The Starting Point for Analysis: The *Perry* Taxonomy

See note pp. 1549-50, see also Supplement p. 220, first full paragraph, for standard to be applied to “content neutral” time, place, and manner regulations in a traditional public forum (omitted from excerpt from *Perry* in note on pp. 1549-50 of the text).

Traditional and Designated Public Forums

*Chicago v. Mosley* (1972)

Read: Text, pp. 1545-64; Supplement, pp. 217-30

Section #17: Time, Place and Manner Regulations: Public Forum Analysis (Part Two)

Non-Public Forums

*Krishna v. Lee* (1992)
Read: Tex, pp. 1576(bottom)-1582
Prepare: Problem #4: Draft Aggressive Panhandling Ordinance

Session #18: “Government Speech”: Monuments in Public Parks? Specialty License Plates?

Pleasant Grove v. Summum (2009)

Read: Text, pp. 1230-35; Supplement, pp. 185-93
Prepare: Problem #5: Draft Specialty License Plate Statute

Section #19: Campaign Finance Reform and the First Amendment (Part One)

Buckley v. Valeo (1976)

Read: Text, pp. 1500 (bottom)-1515; 1519-36

Section #20: Campaign Finance Reform and the First Amendment (Part Two)

Arizona PAC v. Bennett (2011)
McCutcheon v. FEC (2014)

Read: Text, pp. 1537-1544; Supplement, pp. 200-17.
Note on McDonnell (2016) at:
http://www.economist.com/blogs/democracyinamerica/2016/07/wink-wink

Section #21: “School Speech”

Bethel School District v. Fraser (1986)
Morse v. Frederick (2007)

Read: Text, pp. 1590(top)-1609
Prepare: Problem #6: Draft Advice on School Dress Code
**Part Four: Freedom of the Press**

Session #22: Freedom of the Press: Keeping Reporters’ Sources Confidential

*Branzburg v. Hayes* (1972)

Read: Text, pp. 1646-53

Background reading on NY Times reporter James Risen:

Seven Days article on press protection in Vermont (July, 2016):


Prepare: Problem #7: Draft op-ed piece on Vt. Supreme Court’s decision in *Spooner* not to consider Vermont state constitutional law (see footnote 4)

**Part Five: The Religion Clauses: Free Exercise**

Session #23: Free Exercise (Part One)

*U.S. v. Seeger* (1965)
*U.S. v. Ballard* (1944)
*Sherbert v. Verner* (1963)
*Wisconsin v. Yoder* (1972)
*Employment Division of Oregon v. Smith* (1990)

Read: Text, pp. 1673-1701; note on *Yoder*, bottom p. 1697; note on *Babalu Aye* on p. 1699.

Session #24: Free Exercise: Post-*Smith* Statutory Enactments: RFRA and RLUIPA (Part Two)

*Burwell v. Hobby Lobby* (2014)

Read: Text, pp. 1697(top)-1704(mid)

2015 Supplement, pp. 233-54(*Hobby Lobby* case)
Part Six: The Religion Clauses: Establishment

Section #25: Establishment: Three Analytical Approaches

Lemon v. Kurtzman (1971) (the three-part Lemon test)
Allegheny v. ACLU (1989) (O’Connor’s “endorsement test”)

Read: Text, pp. 1708-1723, 1765-72, 1730-35

Session #26: Aid to Private Religious Schools


Read: Text, pp. 1774-1804

Session #27: (1) Religious Invocations at Start of Government Sessions; (2) Religious Speech a Form of Protected Speech

Religious Invocations at Start of Government Sessions

Marsh v. Chambers (1983)
Town of Greece v. Galloway (2014)

Religious Speech a Form of Protected Speech

Lamb’s Chapel (1993) and Good News Club (2001) (note cases)

Read: Text, pp. 1773-1774
Supplement, pp. 255-70 (Town of Greece case)
Text, pp. 1723 (bottom)-1730 (mid)

Session #28: The Ten Commandment Cases

McCreary County v. ACLU (2003)
Van Orden v. Perry (2005)

Read: Text, pp. 1735-60