

Law 221.1
Constitutional Law II: The First Amendment
(Fall 2005)

Units: 4
CCN (2Ls/3Ls): 49552

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Course Description:

About seventy percent of this course is devoted to the speech and press clauses of the First Amendment. The remainder of the course covers the free exercise and establishment clauses. We will read only a fraction of the Court's three hundred decisions in the area. Unlike most areas of constitutional law, the First Amendment has become the subject of *very* detailed Supreme Court doctrine, rather like common law areas such as contracts and torts. The casebook is heavily doctrinal, but we will use it as a springboard for discussing more theoretical issues as well.

Grading:

There will be a take-home exam. With my prior permission and approval of your topic, you can substitute a 25-page paper for the exam. Papers are due on the last day finals, December 22. Class participation may also be taken into account.

Texts:

Donald E. Lively et al., *First Amendment Law: Cases, Comparative Perspectives, and Dialogues* (Anderson Publishing Co. 2003).

Additional reading:

All of the leading constitutional law treatises (Chemerinsky, Nowak & Rotunda, and Tribe) contain extensive discussions of First Amendment doctrine. The more theoretically minded should consult Post, *Constitutional Domains: Democracy, Community, Management* (1995). An overview of the field is presented in Daniel Farber, *The First Amendment* (Foundation Press Second Edition 2003).

The following books also contain interesting perspectives on the field:

1. Lee C. Bollinger and Geoffrey R. Stone (eds.), *Eternally Vigilant: Free Speech in the Modern Era* (2002).
2. Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* (2000).
3. Stanley E. Fish, *There's No Such Things as Free Speech, And It's a Good Thing, Too* (1994).
4. Owen M. Fiss, *The Irony of Free Speech* (1996).
5. Leonard W. Levy, *Emergence of a Free Press* (1985).
6. David M. Rabban, *Free Speech in Its Forgotten Years* (1997).
7. Martin H. Redish, *Freedom of Expression: A Critical Analysis* (1984).
8. Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (1999).
9. Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993).

In addition, you are required to read four review articles from the list at the end of this syllabus. You will be expected to refer to these articles in your exam or paper.

Syllabus

Overview and Perspectives

Class 1 – August 22	Pages 3-19
Class 2 – August 23	Pages 19-39

Freedom of Speech

Class 3 – August 24	Pages: 39-57
Class 4 – August 29	Pages: 59-79
Class 5 – August 30	Pages 80-100
Class 6 – August 31	Pages 101-120
No Class – September 5	Labor Day
Class 7 – September 6	Pages 120-130
	Virginia v. Black (course website)
Class 8 – September 7	Pages: 131-151
Class 9 – September 12	Pages: 153-168
Class 10 – September 13	Pages: 168-184
Class 11 – September 14	Pages: 184-201
Class 12 – September 19	Pages: 201-226 (two long cases)
Class 13 – September 20	Pages: 227-248
Class 14 – September 21	Pages: 249-263
Class 15 – September 26	McConnell v. FEC (course website)
Class 16 – September 27	Pages: 2963-279
Class 17 – September 28	Pages: 279-297
Class 18 – October 3	Pages: 298-312
Class 19 – October 4	Pages: 312-328
Class 20 – October 5	Pages: 328-343
Class 21 – October 10	Pages: 343-360
Class 22 – October 11	Pages: 360-375
Class 23 – October 12	Pages: 375-376
	American Library Assignment (course website)
No Class – October 17-19	Fall Break
Class 24 – October 24	Pages: 386-404
Class 25 – October 25	Pages: 404-422

Freedom of the Press

Class 26 - October 26	Pages: 431-451
Class 27 – October 31	Pages: 451-471
Class 28 – November 1	Pages: 471-485

Ancillary Rights

Class 29 – November 2	Pages: 491-510
Class 30 – November 7	Pages: 511-528
Class 31 – November 8	Pages: 528-544

Freedom of Religion

Class 32 – November 9	Pages: 649-664
Class 33 – November 14	Pages: 663-680, 685-688
Class 34 – November 15	Pages: 553-598
	Locke v. Davies (course website)
Class 35 – November 16	Pages: 568-586
Class 36 – November 21	Pages: 586-602
Class 37 – November 22	Pages: 603-611
	Ten Commandments cases (course website)
No Class – November 23	--
Class 38 – December 5	Pages: 611-639

Law Review Articles (You are responsible for reading at least 4):

General Background

- Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991).
- Daniel Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554 (1991).
- Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996).
- Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).
- Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 Stan. L. Rev. 737 (2002).
- Jed Rubinfeld, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767 (2001).
- Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983).

Unprotected Speech

- Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 Cal. L. Rev. 1499 (1996).
- J.M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. 2295 (1999).
- Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 Wm. & Mary L. Rev. 653 (1988).
- David Bryden, *Between Two Constitutions: Feminism and Pornography*, 2 Const. Comm. 147 (1985).
- William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. Rev. 1595 (1987).
- Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 Harv. L. Rev. 778 (2000) (reviewing Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America* (1999)).
- Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782 (1986).
- Paul Gewirtz, *Privacy and Speech*, 2001 Sup. Ct. Rev. 139 (2002).
- Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771 (1999).
- Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1993).
- Charles Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.
- Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 Sup. Ct. Rev. 191 (a classic)
- Catharine MacKinnon, *Only Words* (1993) (a short, article-length book).
- Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).
- Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267 (1991).
- L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. Colo. L. Rev. 55 (1990).
- Frederick Shauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 Sup. Ct. Rev. 197.
- Jeffrey O. Sherman, *Love Speech: The Social Utility of Pornography*, 47 Stan. L. Rev. 661 (1995).
- Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993).
- Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123.
- Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589.
- Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992).

Particular Media and Forums

- Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1 (2004).
- Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 Minn. L. Rev. 1415 (1996).
- Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219 (1984).
- Daniel Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 U. Minn. L. Rev. 1318 (2005).
- Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1.
- Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. Pa. L. Rev. 119 (2001).
- Ronald J. Krotoszynski Jr. & Richard M. Blaiklock, *Enhancing the Spectrum: Media Power, Democracy, and the Marketplace of Ideas*, 2000 U. Ill. L. Rev. 813.
- Neil Netanyel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1 (2001).
- Jed Rubinfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1 (2002).
- Cass R. Sunstein, Republic.com (2001) (a short, article-length book).

The Political Process And Association

- Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258 (1994).
- Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994).
- Richard Briffault, *Campaign Finance, The Parties, and the Court: A Comment on Colorado Republican Federal Campaign Committee v. Federal Elections Commission*, 14 Const. Comm. 91 (1997).
- Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793 (2001).
- Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515 (2001).
- Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274 (2001).
- Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm. & Mary L. Rev. 415 (2004).
- Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741 (1993).
- David McGowan, *Making Sense of Dale*, 18 Const. Comm. 121 (2001).

Religion

- Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations* 33 Loyola Chi. L. J. 121 (2001). Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 Cornell L. Rev. 783 (2002).
- Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346 (2002).
- Frederick Gedicks, *Public Life and Hostility to Religion*, 78 Va. L. Rev. 671 (1992).
- John C. Jeffries, Jr. and James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001).
- Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986).
- Douglas Laycock, *Comment: Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155 (2004).
- Ira Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. Pa. L. Rev. 555 (1991).
- William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308

(1991).
Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992).
Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819 (1998).
Michael Paulsen, *Lemon is Dead*, 43 Case W. L. Rev. 795 (1993).
Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 Sup. Ct. Rev. 123.
Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465 (1999).