First Amendment Law

Professor Teachout

Fall Term, 2020

Syllabus

Texts:  Chemerinsky, Constitutional Law (5th ed.) and 2019 Supplement\*

Student Hours: Tuesday and Thursday 4:00-5:00 pm or by appointment.

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Course Overview

 This course is designed to provide students with a solid grounding in First Amendment law. It covers the full range of First Amendment issues: free speech, free press, right of association, free exercise of religion, and the prohibition against establishment. The primary goal of the course is to provide students with a helpful analytical framework for identifying and analyzing different types of First Amendment problems. A secondary goal is to provide students with hands-on experience in dealing with First Amendment issues as they are likely to be encountered in practice.  A third important goal is to prepare students for dealing with First Amendment questions on the bar exam.

Over the course of the semester, I will be assigning four practice-related exercises aimed at giving students introductory exposure to the actual practice of First Amendment Law. These exercises will be assigned not on an individual basis but to teams of four to five students. I will not be grading these exercises but will be taking them into account as a component of class participation. In the past, exercises have included the following: drafting and critiquing a motion to dismiss a criminal complaint, drafting an aggressive panhandling ordinance, preparing a memo to a school board regarding school dress code policy, and evaluating possible constitutional challenges to a mandatory labeling requirement.  The exercises are noted on the syllabus will be posted in advance on the TWEN site.

By the end of the course students should be able to:

 (1) identify the particular challenge or challenges raised by a First Amendment problem;

 (2) know the mode of analysis, test, or standard of review the Court will employ in analyzing and deciding the challenge or challenges raised;

 (3) bring to bear on the analysis of the problem key relevant cases, comparing and contrasting those cases with the facts in the problem; and

 (4) demonstrate a basic understanding of the practice-related strategies available to the practitioner of First Amendment law.

This year I have scheduled three short in-class quizzes aimed at testing your understanding of material covered in previous sessions. The dates of the quizzes are indicated on the syllabus. Your grade in the course will be determined in part by your performance on an in-class open-book three-hour final exam (80%), in part on your performance in the quizzes (10%), and in part on your performance on the team-based practice-related exercises (10%).

In addition to the assigned readings, students are encouraged to stay abreast of recent developments in First Amendment law and to consult the discussions of important pending First Amendment cases in the leading Supreme Court blog: <http://www.scotusblog.com/>

I will be posting separately on TWEN the protocol we will be using for on-line classes and the instructions for organizing the class into teams to work on the practice-related exercises.

\*We will be using the 5th (not the 6th) edition and the 2019 Supplement. I will post citations to and/or edited versions of important First Amendment cases decided last term on the TWEN site.

Syllabus

**Part One – Introduction: Historical Context**

Session #1 (Tuesday, August 25th):  Freedom of Speech and Press in Eighteenth Century America: The Sedition Act Trials

We will spend the first class session discussing the historical background of protection of free speech and press in America: at common law; under the new state constitutions (1777-1781); and under the First Amendment to the U.S. Constitution (1781).

In preparation for class, please read pp. 1-26 of Ragsdale, “The Sedition Act Trials.” The Sedition Act Trials are important, for among other reasons, because they illuminate what “freedom of the press” meant, and what it did not mean, to Americans in the period immediately following adoption of the First Amendment. They also illustrate some historical peculiarities of federal court practice during that period.

 In class, we will focus on the trial of Mathew Lyon, a Republican member of the U.S. House of Representatives from Vermont, in part since it has local relevance.  Be prepared to discuss:

* what the Alien and Sedition Act of 1798 prohibited,
* the statements made by Mathew Lyon that were subject to prosecution under the Act,
* where Lyon’s trial was held,
* who presided,
* who represented Mathew Lyon,
* what Lyon’s arguments were,
* the role of judge and jury,
* and the ultimate disposition in the Lyon’s case.

Read:  (1) 1rst Amendment

 (2) Ragsdale, “The Sedition Act Trials” (2005) pp. 1-26 at: <https://www.fjc.gov/sites/default/files/trials/seditionacts.pdf>

 (3) Outline of introductory lecture (to be posted on TWEN)

**Part Two:  Freedom of Speech**

Session #2: Foundations of a Libertarian Conception of Freedom of Speech: Prosecutions Under the Federal Espionage Act of 1917 and Sedition Act of 1918 and State Criminal Syndicalism Laws in the 1920’s – Significance of the Holmes’ and Brandeis’ Dissenting Opinions

*Schenck v. U.S.* (1919)

*Abrams v. U.S.* (1919)

*Gitlow v. N.Y.* (1925)

*Whitney v. California* (1927)

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

*Dennis v. U.S.* (1951)

*Yates v. U.S.* (1957) (note case)

Read: Text, pp. 1351-1373

Pay particular attention to Justice Holmes’s and Justice Brandeis’s dissents in the *Abrams* and *Gitlow* cases (pp. 1359-20, 1363)) and Justice Brandeis’s concurrence in *Whitney* (pp.1365-66). What standard would Holmes and Brandeis establish for determining when “dangerous” speech can be subject to criminal prosecution and what are the grounds for establishing such a restrictive standard? Notice that Holmes’s rationale is different from Justice Brandeis’s. The positions adopted in these opinions eventually become incorporated into the prevailing jurisprudence of the Supreme Court and establish the uniquely libertarian approach to the protection of free speech reflected in American constitutional jurisprudence..

**A.  Categories of “Unprotected Speech”**

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

**1.  Advocacy of Unlawful Action**

*Brandenburg v. Ohio* (1969)

**2.  Speech “Materially Assisting a Terrorist Organization”**

*Holder v. Humanitarian Law Project* (2010)

 Read:  Text, pp. 1373-1385(top)

**Note on Vagueness and Overbreadth Challenges**

Read:  Text, pp. 1283-1290(mid)

                                    Posted note on *Packingham v. N. Carolina* (2018) (overbreadth case) on TWEN

 **Read and be prepared to discuss Problem #1 (posted on TWEN): Response to Criminal Complaint in Santavida case?**

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

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

*Chaplinksy v. New Hampshire* (1942)

*Gooding v. Wilson* (1972)

Read:  Text, pp. 1385(mid)-1390(mid)

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

*Beauharnais v. Illinois* (1952)

Read:  Text, pp. 1399(bottom)-1404(top)

**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]

Read: Text, pp. 1397 (mid)-99(mid)

 Draft Motion to Strike (posted on TWEN)

 **Team Assignment #1: Turn in one-paragraph memo identifying key problems with draft Motion to Strike in Problem #1 (due no later than 5:00 p.m., Monday, Aug. 31)**

Session #5:  “True Threats”

**5.  “True Threats”**

*Virginia v. Black* (2003)

 Read:  Text, pp. 1404(top)-1411(bottom); *State v. Shenk*,\* 2018 VT 45: <https://www.vermontjudiciary.org/sites/default/files/documents/op16-166.pdf>

\*[Note:  Since the majority and dissenting opinions in *Shenk* occupy some 45 pages, you might want to get a head start on it.  When you come to class, be prepared to state succinctly what you see to be the key differences between the majority and dissenting opinions. Does the difference turn on differences over the appropriate constitutional standard or over differences in interpretation of the applicable criminal statute?]

 **In-Class Quiz #1: covering material in Sessions ##2-5**

Session #6: Obscenity and Child Pornography

  **6.  Obscenity and Child Pornography**

1. **Obscenity: “The *Miller* Test”**

*Roth v. U.S.* (1957)

*Paris Adult Theatre* (1973)

*Miller v. California* (1973)

1. **Child Pornography:  “The *Ferber* Test”**

  *New York v. Ferber* (1982)

 Read:  Text, pp. 1411(bottom)-1419(mid); 1422(bottom)-             1425(bottom)

Session #7:  Libel and Defamation and State Anti-SLAPP Laws

**7.  Libel:**

**a.  Public Officials and Figures: “The *New York Times v. Sullivan* Test”**

*New York Times v. Sullivan* (1964)

 **b. Private Figures: “The *Gertz* Test”**

*Gertz v. Welch* (1974)

*Dunn & Bradstreet* (1985)

Read:  Text, pp. 1509(mid)-1526(top)

**Read and prepare Problem #2 (posted on TWEN)**

**Note on Anti-SLAPP laws: prepare Problem #2A (posted on TWEN)**

**Team Assignment #2: Turn in memo (max. one page) describing motion you would file and relief you would request if state has an anti-SLAPP law on the books (due no later than 5:00 p.m., Monday before class)**

 **c. “Limited Purpose” Public Figures**

Note on “limited purpose” public figure (posted on TWEN)

**B.  Rejected Candidates for Certification as “Protected Speech”**

Session #8: Rejected Candidates for “Protected Speech” Certification?

            **a. Intentional Infliction of Emotional Distress?**

*Hustler Magazine v. Falwell* (1988)

*Snyder v. Phelps* (2011)

Read:  Text, pp. 1526(top)-1533(top)

**b. False Speech (“Lies”)**

*U.S. v. Alvarez [the “Stolen Valor” case]* (2012)

 Read:  Note on *U.S. v. Alvarez,* pp. 1251(mid)-1252(mid)

**c. Depictions of Animal Cruelty?**

 *U.S. v. Stevens* (2010)

          **d. Violent Speech and Violent Video Games?**

 *Brown v. EMA* (2011)

Read:  Text, pp. 1457(mid)-1472(mid)

 Constitutionality of amended federal “animal snuff video” statute (posted on TWEN)

**C.  “Less Protected” or “Marginal” Speech**

Session #9: Commercial Speech: The *Central Hudson* Test

*Virginia Bd. Of Pharmacy* (1976)

*Bolger v. Youngs Drug Products* (1983)

*Central Hudson Gas & Electric* (1980)

*44 Liquormart v. R.I.* (1996)

*Lorrillard Tobacco v. Reilly* (2001)

Read:  Text, pp. 1472(mid)-1480(top); 1487-1489(bottom); 1498-        1506(bottom)

Session #10: Compelled Commercial Speech: Compelled Speech Generally

Compelled Speech

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

*National Federation of Family and Life Advocates v. Becerra* (2018)

Compelled Commercial Speech

*Zauderer v. Disciplinary Counsel of the Sp. Ct. of Ohio* (1985)

Read:  (1) Text, pp. 1324-1326; suppl. pp. 186-200; text p. 1508 (note on  *Zauderer* case);

(2)  Discussion of *National Association of Mfgs* case in scotusblog at: http://www.scotusblog.com/2014/11/after-three-decades-does-zauderer-need-updating/

Session #11:  Sexually-Explicit and Vulgar Speech Falling Short of Technical Obscenity: “Marginal Speech”?

General Rule

*Cohen v. California* (1971)

Special 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)

*Renton v. Playtime Theatres* (1986)

(b) FCC  Regulation of the Public Airways

*FCC v. Pacifica* (1978)

  Read:  Text, pp. 1444-50, 1432-41(mid)

**D. “Protected Speech”**

 **(1)  Generally Applicable Standards**

Session #12: Content-Neutral v. Content-Based Regulations of Speech

 A. Protected Speech

*Turner Broadcasting* (1994) (note case)

*Reed v. Town of Gilbert* (2015)

*Boos v. Barry* (1988)

*National Endowment for the Arts v. Finley* (1998)

Read:  pp. 1244-51, 1252(mid)-54(top), 1269-72

 B. Content-Based Regulation of Unprotected Speech? Anomoly?

 *RAV v. City of St. Paul* (1992)

 Read: pp. 1391-96

Session #13: Expressive Conduct: The *O’Brien* Test

  *U.S. v. O’Brien* (1968)

 *Texas v. Johnson* (1989)

 *U.S. v. Eichman* (1990) (note case)

 *City of Erie v. Pap’s A.M.* (2000)

Read:  Text, pp. 1540-49; 1437-40

 **In-Class Quiz #2: Covering material in sessions ##2-12**

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

Session #14:  Time, Place and Manner Regulations: “Public Forum” Analysis (Part One)

The Starting Point for Analysis: The *Perry* Taxonomy

See note pp. 1593-94

Traditional and Designated Public Forums

*Chicago v. Mosley* (1972)

*Hill v. Colorado* (2000)

*McCullen v. Coakley* (2014)

Read:  Text, pp. 1594(bottom)-1612

Section #15:  Time, Place and Manner Regulations: Public Forum Analysis (Part Two)

Non-Public Forums

*U.S. v. Kokinda* (1990) (note case bottom 1629)

*Krishna v. Lee* (1992)

Read: pp. 1629-34

**Team Assignment #3 (posted on TWEN): Draft Aggressive Panhandling Ordinance**

Session #16:  “Government Speech”:

 A. Monuments in Public Parks?  Specialty License Plates?

*Pleasant Grove v. Summum* (2009)

*Walker v. Thompson* (2015)

 Read:  pp. 1273-83

B. Trademarks?

 *Matal v. Tam* (2017)

 *Iancu v. Brunetti* (2019) (posted on TWEN)

 Read: suppl. pp. 161-177

Session #17: “School Speech”

*Tinker v. Des Moines School District* (1969)

*Bethel School District v. Fraser* (1986)

*Hazelwood School District v. Kuhlmeier* (1988)

 Read Text: pp. 1642-1653; article on background of *Tinker* at:

 <https://www.gwlr.org/eckhardt-v-des-moines-the-apex-of-student-rights/>

Session #18: “School Speech” (cont)

*Morse v. Frederick* (2007)

Read: Text, pp. 1653-60

Listen to entire oral argument in *Morse* case on Oyez.org at:

https://www.oyez.org/cases/2006/06-278

  **In-Class Quiz #3: Material covered in Free Speech sessions**

**Part Four:  Freedom of the Press**

Session #19:  Freedom of the Press

Prior Restraint and the *Pentagon Papers* Case

*New York Times v. United States* (1971)

Read:  pp. 1296-1303 (top)

“Shield Laws:” Keeping Reporters Sources Confidential

*Branzburg v. Hayes* (1972)

Read:  pp. 1699 (bottom)-1706 (top): Vermont’s Reporter’s Shield Law (posted on TWEN)

**Team Assignment #4 (posted on TWEN)**

**Part Five: The Religion Clauses: Establishment**

 Section #20:  Establishment: Three Analytical Approaches

  *Lemon v. Kurtzman* (1971) (the three-part *Lemon* test)

*Allegheny v. ACLU* (1989) (O’Connor’s “endorsement test”)

*Lee v. Weisman* (1992) and *Santa Fe School District v. Doe* (2000) (Kennedy’s “coercion test”)

  Read:  Text, pp. 1770-72 (top), 1763-68 (bottom), 1810-17 (mid), 1778-         82(top)

Session #21: Aid to Private Religious Schools

*Mitchell v. Helms* (2000)

*Zelman v. Simmons-Harris* (2002)

Read:  Text, pp. 1828 (mid)-56 (top)

Session #22: (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: “Establishment” as a Defense

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

*Rosenberger v. University of Virginia* (1995)

Read:  Text, pp. 1818 (mid)-27 (bottom), 1774 (mid)-77

Session #23: Religious Symbols on Government Property

*McCreary County v. ACLU* (2003)

*Van Orden v. Perry* (2005)

*American Legion v. American Humanist Association* (2019)

Read:  Text, pp. 1782(mid)-1805(mid); supp. pp. 251-62

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

 Session #24: Free Exercise: The *Smith*  Standard of Review and Exceptions

*U.S. v. Seeger* (1965)

*U.S. v. Ballard* (1944)

*Sherbert v. Verner* (1963)

*Wisconsin v. Yoder* (1972)

*Church of Lukumi Babalu Aye v. Hialiah* (1993)

*Employment Division of Oregon v. Smith* (1990)

Read:  pp. 1721-32 (mid); 1740 (bottom)-48 (mid); 1732(mid)- 40(bottom)

Session #25:  Free Exercise (Part Two)

  A. Post-*Smith* Statutory Enactments: RFRA and RLUIPA

*Cutter v. Wilkinson* (2005)

*Burwell v. Hobby Lobby* (2014)

Read: pp. 1748 (mid)-56

 Note on RFRA and RLUIPA (posted on TWEN)

B. Denial of Government Benefits for Preparation for Ministry: “Play in the Joints”?

  *Locke v. Davey* (2004)

 Read: Text pp. 1756-60

Session #26: Free Exercise: Exemption from Compliance with Anti-Discrimination Laws

A.: Hostility to Religion?

*Masterpiece Cake Shop v. Colorado Civil Rights Commission* (2018)

 B.: The “Ministerial Exception”

 *Our Lady of Guadalupe School v. Morrissey-Berru* (2020)

Read: Supp. pp. 223-36: ed version of *Our Lady of Guadalupe* (posted on TWEN); [https://religionnews.com/2020/07/08/supreme-court-broadens- scope-of-](https://religionnews.com/2020/07/08/supreme-court-broadens-%09%09%09%09scope-of-)ministerial-exception/

Session #27: Free Exercise: Denial of Government Benefits Based on Religious Status of Recipient

*Trinity Lutheran Church v. Pauley* (2017)

*Espinoza v. Montana* (2020)

  Read:  suppl. pp. 237-51; ed. version of *Espinoza* (posted on TWEN)